Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces

Court-Martial Adjudication Data Report

November 2019

Defense Advisory Committee

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THE DEFENSE ADVISORY COMMITTEE ON
INVESTIGATION, PROSECUTION, AND DEFENSE OF
SEXUAL ASSAULT IN THE ARMED FORCES

November 25, 2019

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

The Honorable Jack Reed
Ranking Member
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 Mac Thornberry
Ranking Member
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Mark T. Esper
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Dear Chairmen, Ranking Members, and Mr. Secretary:

We are pleased to submit the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces ("DAC-IPAD" or "Committee") report on military sexual assault case adjudication for fiscal years 2015 through 2018. This report continues to build upon the military sexual assault case disposition data collection and reporting project begun by the DAC-IPAD's predecessor, the Judicial Proceedings Panel (JPP) and continued by the DAC-IPAD as requested by the Department of Defense General Counsel in a June 2018 letter to the Committee Chair.

In this stand-alone data report, the DAC-IPAD provides the most comprehensive military sexual assault case adjudication data ever compiled, as well as a detailed statistical analysis conducted by a professional criminologist retained by the DAC-IPAD. The Committee makes no findings or recommendations at this time; our intent with this report is to provide policymakers with the most up-to-date, accurate, and reliable information available on the outcomes of adult sexual assault allegations in which charges were preferred against a military subject under the Uniform Code of Military Justice.

The Committee is continuing to examine the conviction and acquittal rates for sexual assault prosecutions that are presented in this report as well as the process for preferring and referring charges for sexual assault offenses to court-martial.

The members of the DAC-IPAD would like to express our sincere gratitude and appreciation to the many members of the Military Services, including the Coast Guard, who have diligently assisted the Committee in its collection of case documents for this project and to the JPP for its initiation of this important endeavor.

Respectfully submitted,

Martha S. Bashford, Chair

Marcia M. Anderson

Leo I. Brisbois

Kathleen B. Cannon

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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).[1] Its authorizing legislation charges the Committee to execute three tasks over its five-year term:[2]

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 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.[3] The Committee has collected and recorded case documents including charge sheets, Article 32 reports, and Results of Trial forms for a total of 574 cases completed in fiscal year 2018, 691 cases completed in fiscal year 2017, 769 cases completed in fiscal year 2016, and 780 cases completed in fiscal year 2015. This report 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 report also includes a multivariate statistical analysis prepared by a professional criminologist that identifies patterns in the data.

1 National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [hereinafter FY15 NDAA], § 546, 128 Stat. 3374 (2014).

2 *Id.*

3 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 to commit these offenses (Article 80).

SEXUAL ASSAULT COURT-MARTIAL CASE ADJUDICATION TRENDS AND ANALYSIS

I. INTRODUCTION

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.[4] 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.[5] In order to provide that advice, the Committee is directed to review, on an ongoing basis, cases involving allegations of sexual misconduct.[6]

Before the DAC-IPAD was established, Congress tasked the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (Judicial Proceedings Panel, or JPP) with reviewing and evaluating the judicial response to sexual assault cases in the military. To conduct its analysis, the JPP sought information from court records, case documents, and other publicly available resources for courts-martial resolved in fiscal years 2012 through 2015. Information from the cases was entered into a JPP-developed database, and the JPP coordinated with a criminologist to analyze the data and provide descriptive statistics concerning court-martial case characteristics, case dispositions, and case outcomes.

To continue the collection and analysis of data on sexual assault courts-martial, the DAC-IPAD formed the Data Working Group (DWG). The DWG is composed of three Committee members: Dr. Cassia Spohn, who serves as the working group's chair; Chief Master Sergeant of the Air Force (retired) Rod McKinley; and Mr. James Markey. The DWG has continued to develop, refine, and expand the DAC-IPAD database and, in the past calendar year, added cases completed in fiscal year 2018.

II. METHODOLOGY OF THE DATA WORKING GROUP

In September 2018, the DAC-IPAD staff, at the direction of Chair Martha S. Bashford, requested that the Military Services provide documents, utilizing their individual case tracking databases, for cases involving a preferred charge of sexual assault completed in fiscal year 2018.[7] The staff screened the case records provided by the Services to identify duplicate cases, cases with incomplete documentation, cases of sexual assault that did not involve an adult victim, cases that did not involve a sex offense, and cases whose

4 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).

5 FY15 NDAA, *supra* note 1, § 546(c)(1).

6 *Id.* at § 546(c)(2).

7 A "completed" case is any case tried to verdict, dismissed without further action, or dismissed and then resolved by non-judicial or administrative proceedings.

reported year of case completion was not correct. The resulting 574 cases from fiscal year 2018 were then added to the electronic database.

The DAC-IPAD database includes cases encompassing fiscal years 2012 through 2018, all of which involve at least one charge of a penetrative sexual offense (i.e., rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit these offenses) or a contact sexual offense (i.e., aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit these offenses). The Department of Defense (DoD) does not collect information on the legal outcome of cases in which the victim is the spouse or an intimate partner; therefore the statistical data for fiscal years 2012 through 2014, collected by the JPP, do not include the legal outcomes of those classes of cases and will not be included in the historical discussion to follow.

III. MILITARY JUSTICE INFORMATION FOR SEXUAL ASSAULT CASES COLLECTED BY THE DAC-IPAD

The DAC-IPAD relies on the Military Services to report cases meeting the criteria specified. The Committee therefore does not assert that it has the complete universe of cases throughout the Armed Forces in which a sexual assault charge was filed. The data were also limited to cases in which a complete set of disposition records could be identified and retrieved for analysis. In the following tables and charts, percentages may not total 100, owing to rounding errors or missing data. Also, cadets/midshipmen and warrant officers are included with "officers." Data tables for fiscal years 2015 through 2018, provided in Appendix A, inform the presentation of data that follows.

Court-Martial Case Characteristics

The DAC-IPAD received 574 court-martial records from the Services that involved the preferral of an adult-victim sexual assault offense and were completed in fiscal year 2018. Among the Services, the Army generated the most cases. Courts-martial records indicated that the accused was usually male and the victims were most often female. In addition, the vast majority of courts-martial involved one military victim; however, there were several that involved multiple victims. In 75% of cases, the most serious charge that was preferred was a penetrative offense.

As in the past, the DAC-IPAD notes that a number of characteristics are similar across the cases from fiscal year 2015 through fiscal year 2018:

- The characteristics of the accused and the victim
- The proportion of cases involving a penetrative offense
- The proportion of cases tried by court-martial
- The proportion of penetrative offenses referred to general courts-martial

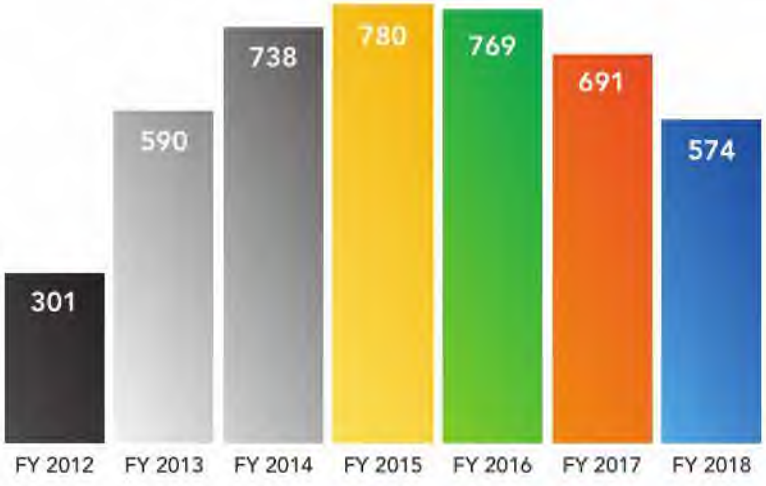
Overview of Total Cases Received

Table 1. Military Service Response to Request for Information (FY 2018)

	Cases Reported	Cases Entered	% Valid
Army	386	232	60.1%
Marine Corps	94	82	87.2%
Navy	109	94	86.2%
Air Force	170	151	88.8%
Coast Guard	15	15	100.0%
Total	774	574	74.2%

The Military Services provided 774 cases in response to the request for information. After the DAC-IPAD staff reviewed the cases to verify their alignment with established criteria for inclusion, 574 cases (74% of submitted cases) for FY18 were added to the database. Reasons for a case being classified as "non-responsive" and therefore not added to the database include being a non-qualifying non-sex offense, being a child-victim sex offense, being an instance of duplicate reporting, and falling into another fiscal year.

Figure 1. Cases Documented by the DAC-IPAD



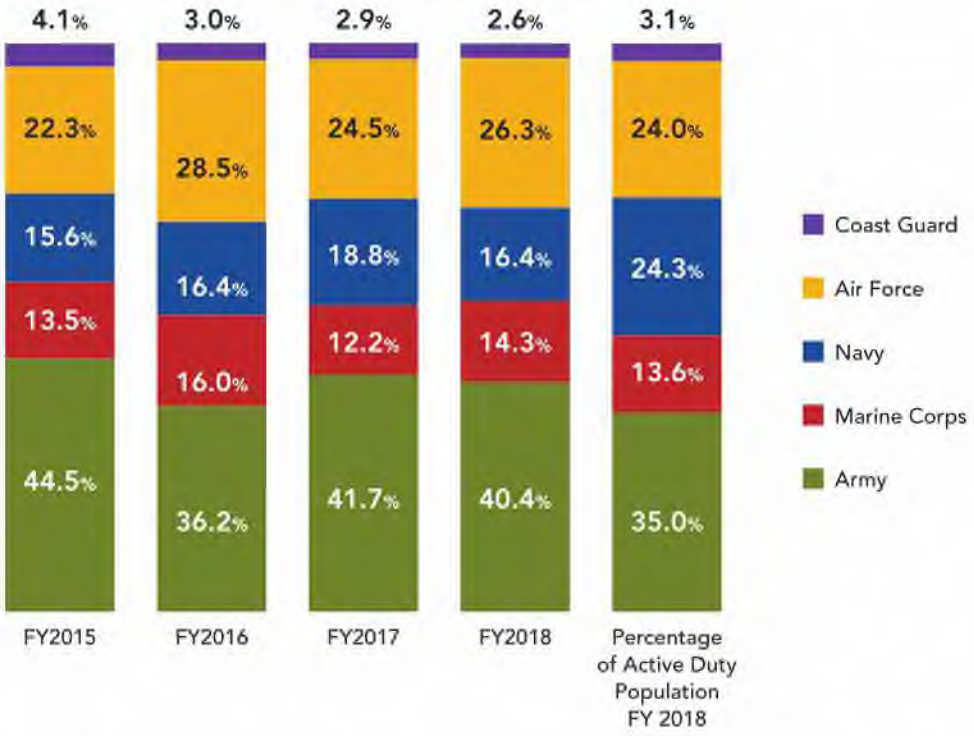
The DAC-IPAD case adjudication database includes cases encompassing fiscal years 2012 through 2018, as illustrated above. However, it should be noted that the total for fiscal year 2016 has increased by 1 case and fiscal year 2017 by 33 cases since the last report of the DAC-IPAD,[8] because the Committee staff is

8 For comparison, during the fiscal year 2017 collection and analysis cycle, the DAC-IPAD added an additional 30 FY16 cases to the case adjudication database, including 1 FY15 case reclassified as FY16.

continuously identifying and recording cases that were not previously reported to the Committee by the Military Services. Such cases are typically identified by the DAC-IPAD staff by tracking appellate decisions and by reclassifying cases that were provided to the Committee for the incorrect fiscal year.

The 574 cases recorded in FY18 represents an almost 17% decline in cases from FY17, a sharper drop than the nearly 11% decline between FY17 and FY16. When compared to the 780 cases recorded in FY15, the FY18 figure represents a 26% decrease in the cases documented. The reason for the continuing decline cannot be determined from the data; the question will continue to be examined in future fiscal years.

Figure 2. Military Service of the Accused



Of the 574 cases received by the DAC-IPAD for FY18, the Army generated the most cases (40%), followed by the Air Force (26%), Navy (16%), Marine Corps (14%), and Coast Guard (3%). To provide additional context for the number of cases included in the DAC-IPAD database from each Military Service, the tables below show the active duty population in each Military Service in fiscal years 2015 through 2018 and the proportion that each Military Service constitutes of the overall active duty population.[9]

9 Fiscal year 2018 data obtained from https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp. Fiscal years 2015 through 2017 obtained from the DoD demographic reports, available at https://www.militaryonesource.mil/reports-and-surveys/demographic-profiles. The figures do not include the number of Guard and Reserve Component members who were on active duty and subject to the Uniform Code of Military Justice (UCMJ).

Table 2. Active Duty Population by Military Service with Number of Sexual Assault Cases in the DAC-IPAD Database (FY 2018)

	Size of Active Duty Population	Percentage of Total Active Duty Population	Number of Cases in DAC-IPAD Database	Percentage of Cases in DAC-IPAD Database
Army	476,179	35.0%	232	40.4%
Marine Corps	185,415	13.6%	82	14.3%
Navy	329,851	24.3%	94	16.4%
Air Force	325,880	24.0%	151	26.3%
Coast Guard	42,114	3.1%	15	2.6%
Total	1,359,439	100.0%	574	100.0%

Table 3. Active Duty Population by Military Service with Number of Sexual Assault Cases in the DAC-IPAD Database (FY 2017)

	Size of Active Duty Population	Percentage of Total Active Duty Population	Number of Cases in DAC-IPAD Database	Percentage of Cases in DAC-IPAD Database
Army	472,047	35.3%	288	41.7%
Marine Corps	184,401	13.8%	84	12.2%
Navy	319,492	23.9%	130	18.8%
Air Force	318,580	23.8%	169	24.5%
Coast Guard	41,581	3.1%	20	2.9%
Total	1,336,101	100.0%	691	100.0%

Table 4. Active Duty Population by Military Service with Number of Sexual Assault Cases in the DAC-IPAD Database (FY 2016)

	Size of Active Duty Population	Percentage of Total Active Duty Population	Number of Cases in DAC-IPAD Database	Percentage of Cases in DAC-IPAD Database
Army	475,400	35.4%	278	36.2%
Marine Corps	183,501	13.7%	123	16.0%
Navy	324,524	24.2%	126	16.4%
Air Force	317,883	23.7%	219	28.5%
Coast Guard	40,473	3.0%	23	3.0%
Total	1,341,781	100.0%	769	100.0%

Table 5. Active Duty Population by Military Service with Number of Sexual Assault Cases in the DAC-IPAD Database (FY 2015)

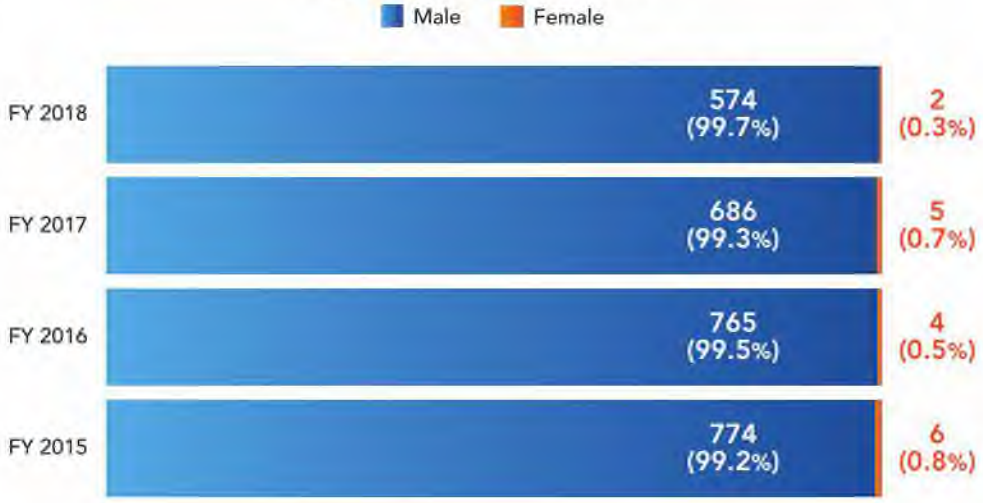
	Size of Active Duty Population	Percentage of Total Active Duty Population	Number of Cases in DAC-IPAD Database	Percentage of Cases in DAC-IPAD Database
Army	491,365	36.3%	347	44.5%
Marine Corps	183,417	13.5%	105	13.5%
Navy	327,801	24.2%	122	15.6%
Air Force	311,357	23.0%	174	22.3%
Coast Guard	39,970	3.0%	32	4.1%
Total	1,353,910	100.0%	780	100.0%

As noted earlier, the total number of cases reported declined in 2018, as each Military Service recorded fewer cases than in the previous fiscal year. The rate at which cases were recorded as responsive to the case criteria was similar for the Air Force (89%), Navy (86%), and Marine Corps (87%). For the Coast Guard, 100% of the cases reported were responsive to the criteria and thus were added to the case adjudication database. The Army had the lowest percentage (60%) of cases reported as responsive (232 of 386). However, as a percentage, the Navy had the largest decline at 28%, followed by the Coast Guard (25%) and the Army
(19%).

Accused Characteristics

For fiscal years 2015 through 2018, the accused in nearly all cases is male (99%).

Figure 3. Sex of the Accused



In addition, the accused is most often enlisted.

Figure 4. Pay Grade of the Accused (FY 2018)

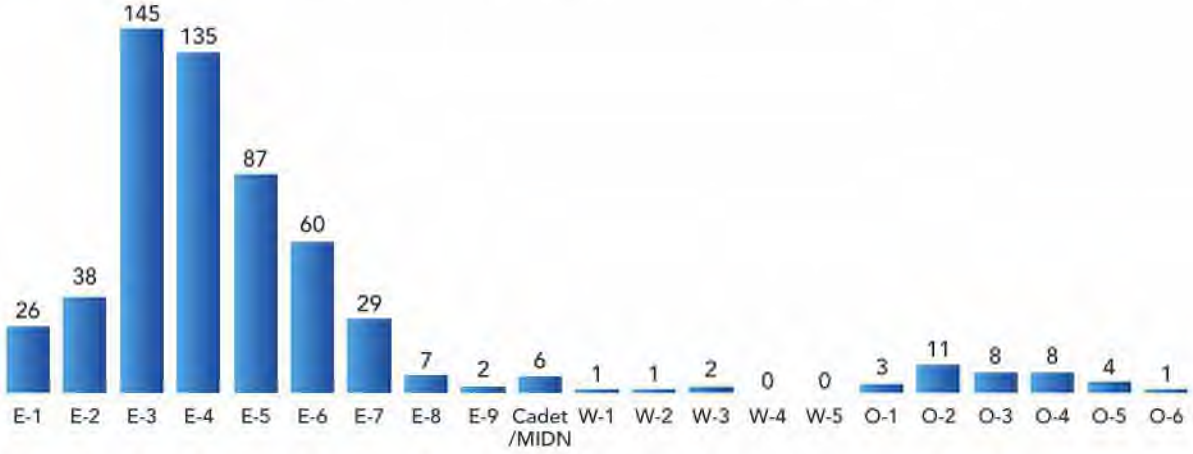


Figure 5. Pay Grade of the Accused (FY 2017)

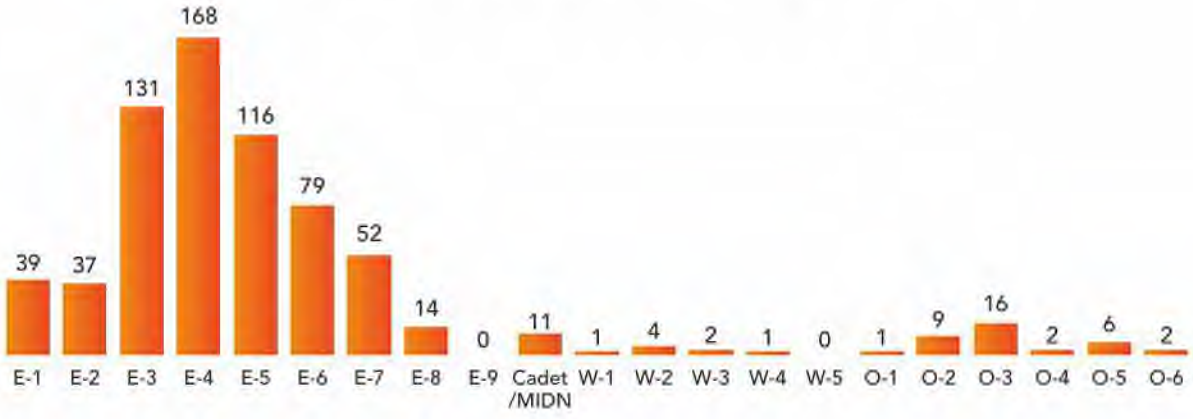


Figure 6. Pay Grade of the Accused (FY 2016)

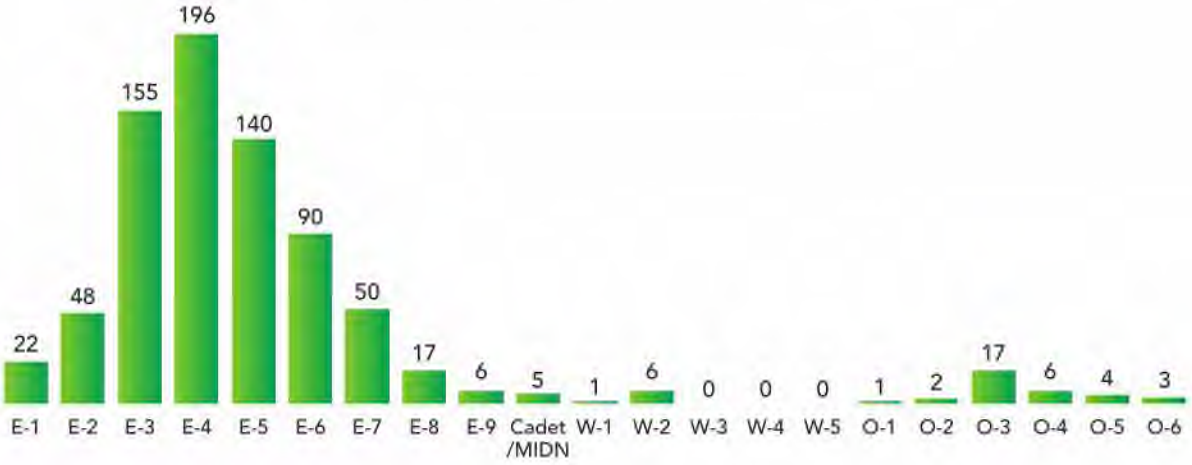
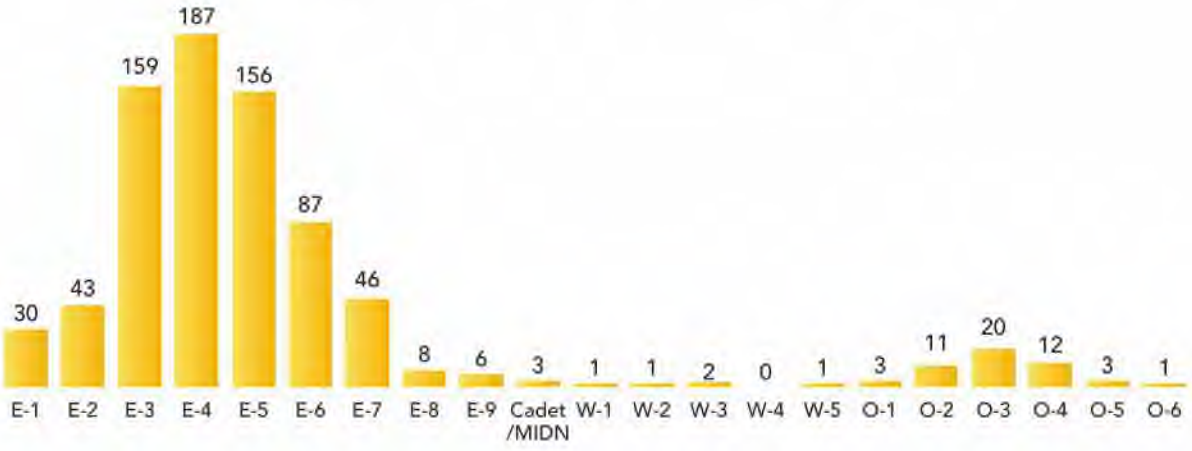


Figure 7. Pay Grade of the Accused (FY 2015)

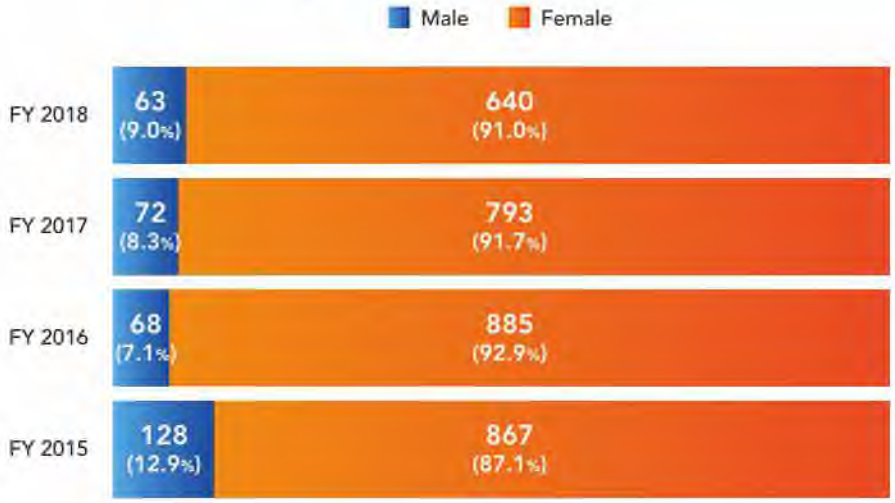


In FY18, enlisted personnel were roughly 80% of the total active duty population but were a higher percentage of the cases (92%) in the database. While officers were nearly 20% of the active duty population, they were a smaller percentage of the cases (8%). In FY18, personnel in the pay grades E3 to E5 were approximately 61% of the active duty population and accounted for most (69%) of the enlisted accused.[10] Fiscal year 2018 saw a change in the distribution of accused among pay grades when compared to that in fiscal years 2015 through 2017. For both enlisted and officers, in FY18 the accused shifted to a more junior pay grade (E-2 and O-2) as than was recorded in previous years (E-3 and O-3). In addition, the number of accused cadets/midshipmen declined nearly 50% in FY18, returning to the level observed in FY16. The basis for these changes is unclear from the data, and it is unknown whether the same observations will be recorded in the future.

Victim Characteristics

In FY18 nearly 91% of the victims were female and 9% were male. Of the 574 cases in FY18, there were 539 cases with exclusively female victims (93.9%), 32 cases with exclusively male victims (5.6%) and 3 cases with both male and female victims (0.5%)

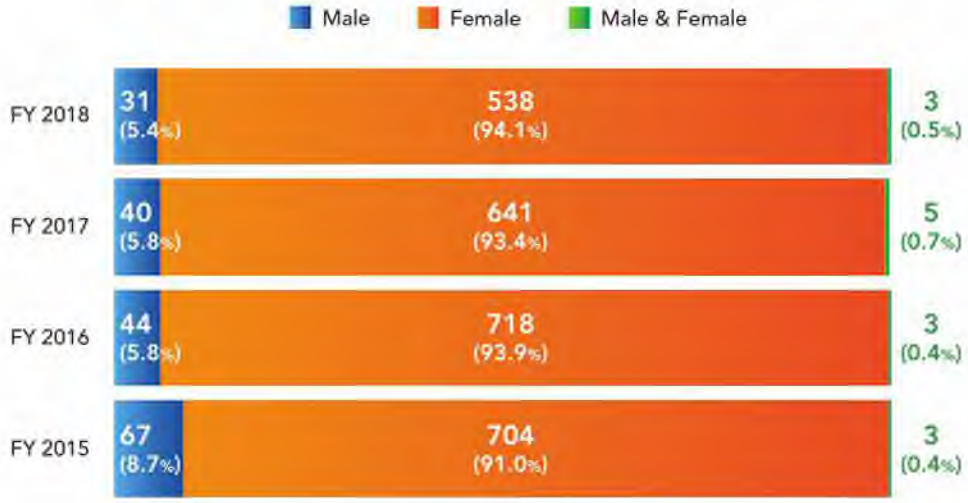
Figure 8. Sex of the Victim(s)



10 *Id.*

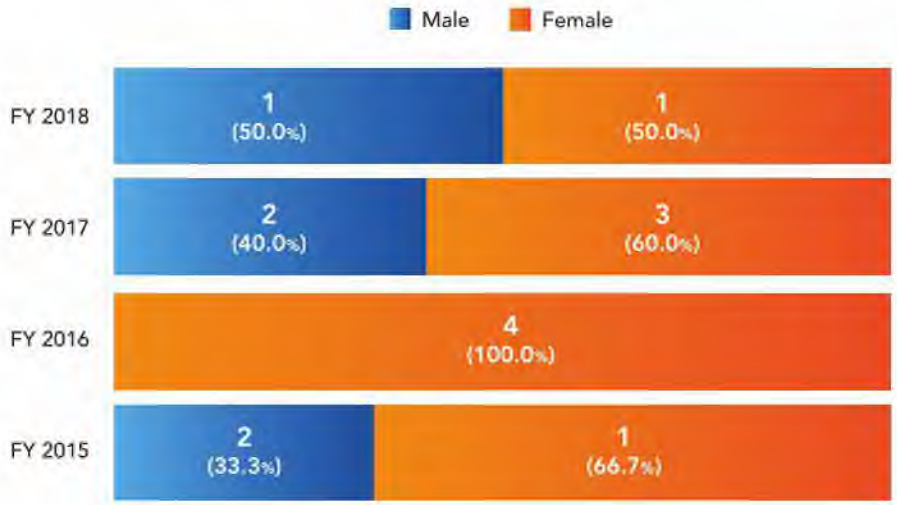
In FY18 when the accused was male, the victim was exclusively female in 94% of the cases, and exclusively male in 5% of the cases; in less than 1% of the cases, victims were of both sexes.

Figure 9. Male Accused/Sex of the Victim(s)



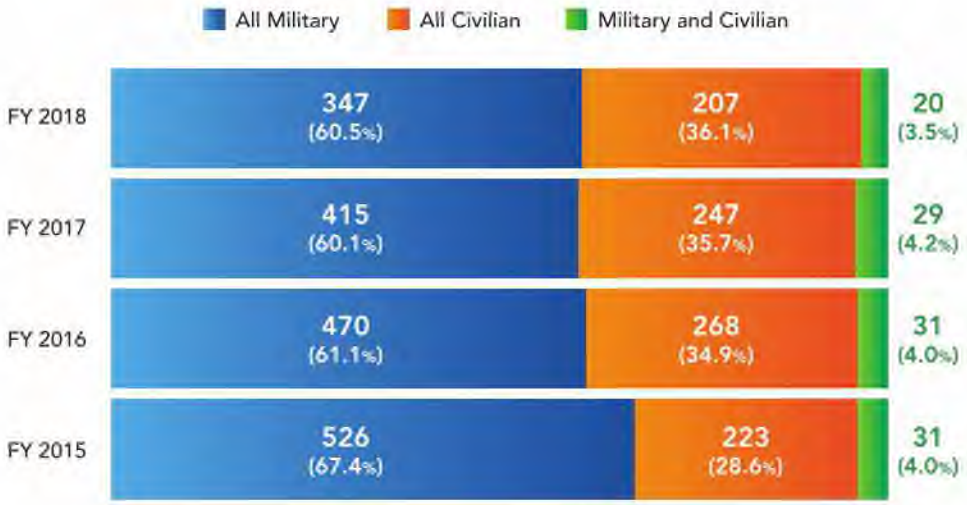
In FY18 there were two cases when the accused was female and the victim was female in one case and male in the other.

Figure 10. Female Accused/Sex of the Victim(s)



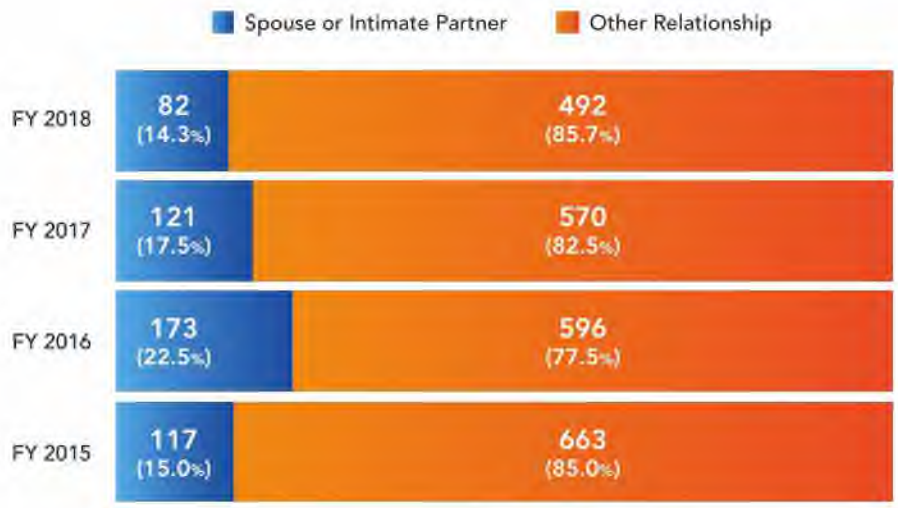
Of the 574 cases in FY18, there were 347 cases with exclusively military victims (60.5%), 207 cases with exclusively civilian victims (36.1%) and 20 cases with both military and civilian victims (3.5%)

Figure 11. Status of the Victim(s)



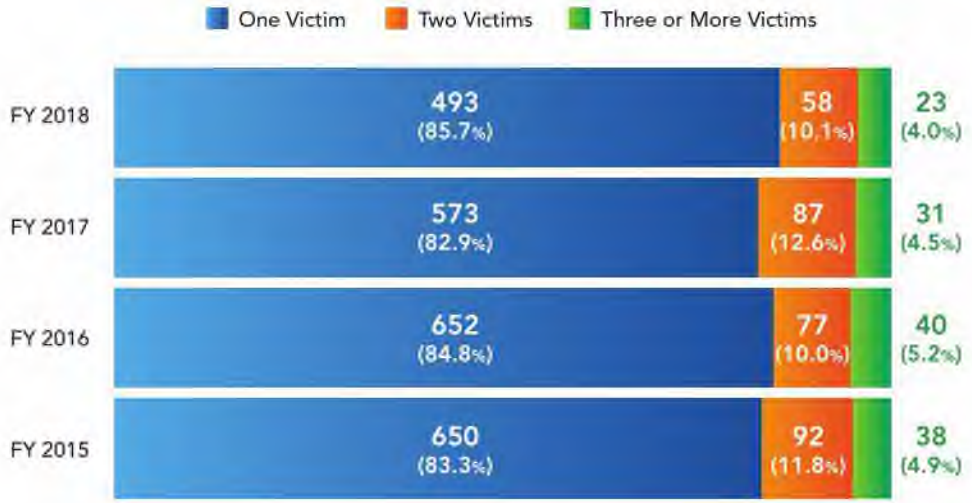
In FY18 the accused's spouse or intimate partner was the victim in 14% of the cases, a decrease from FY17 (18%), FY16 (23%) and FY15 (15%).

Figure 12. Victim Relationship to Accused



Most cases in FY18, as well as historically, involved one (86%) or two (10%) victims. The percentage of cases involving a single victim is the highest recorded; conversely, the percentage of cases with three or more victims is the lowest recorded (4.0%).

Figure 13. Number of Victim(s) per Case



Characteristics of the Nature of the Charges

A penetrative offense, as opposed to a contact offense, was the type of offense preferred most often, appearing in 431 (75.1%) of 574 cases in FY18. This preferral rate is similar to those observed in fiscal years 2017 (74.7%) and 2106 (75.4%), and slightly higher than in 2015 (71.5%).

Figure 14. Type of Most Serious Sex Offense(s) Charged

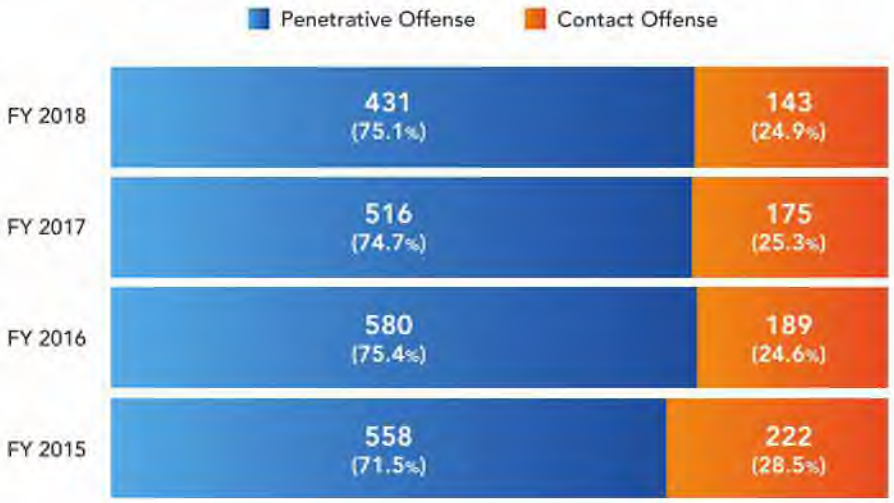
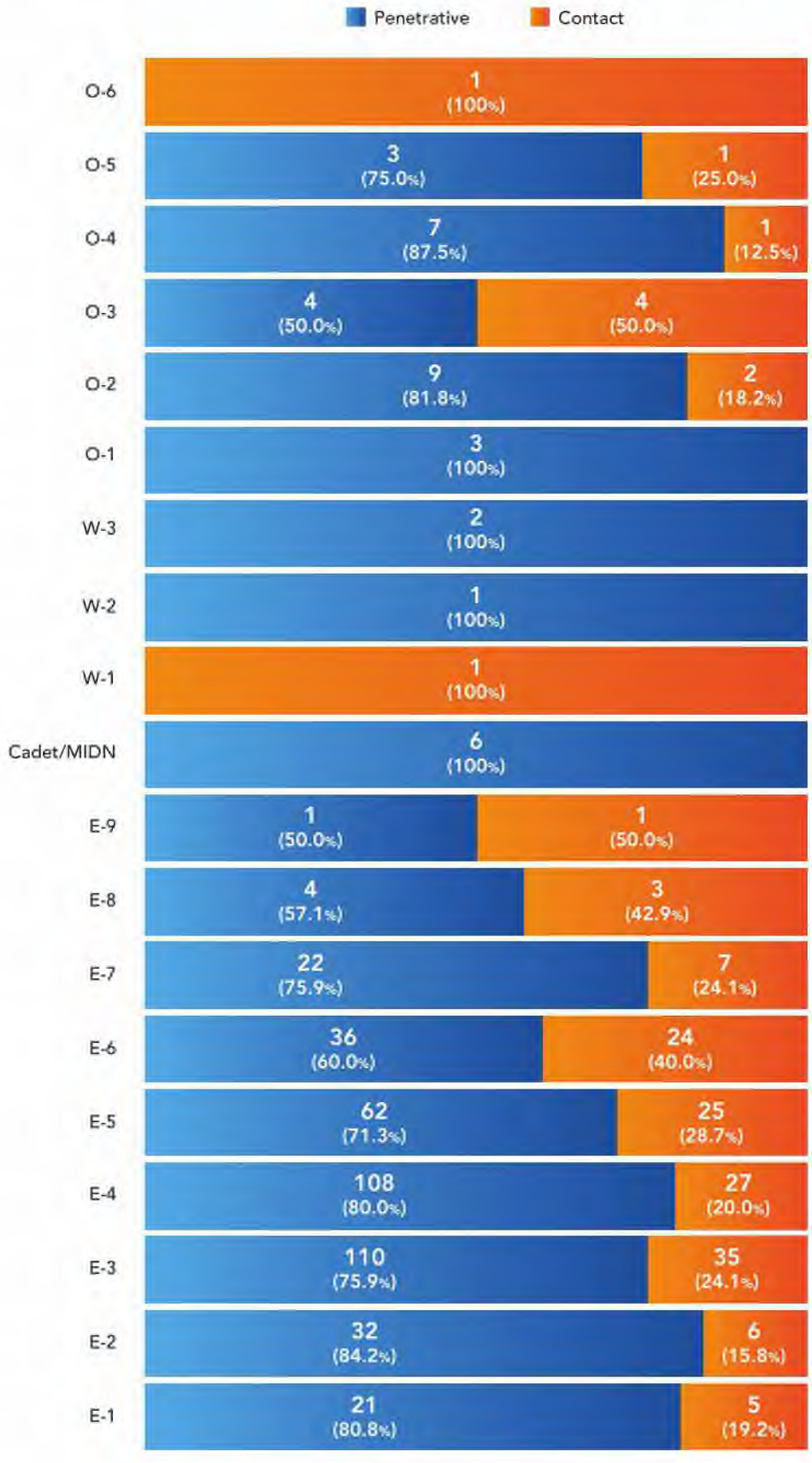


Figure 15. Type of Most Serious Sex Offense(s) Charged by Pay Grade (FY 2018)



Article 32 Hearings

In 2014 the Article 32 hearing, required prior to charges being referred to a general court-martial, was changed from a pretrial investigation into a less robust preliminary hearing. Under the old process, victims were frequently required to appear, testify, and undergo cross-examination from defense counsel; this requirement has been removed from the process.

In FY18, Article 32 hearings were held in 373 cases and waived in an additional 104 cases. The number of hearings waived more than doubled from FY15 to FY16; but while there were fewer hearings waived in FY17 and FY18, the proportion of hearings waived in FY17 (22%) and FY18 (22%) was unchanged from FY16 (21%).

Figure 16. Article 32 Hearings

In FY18, Article 32 hearings were waived in 63 cases without a pretrial agreement, a decrease from 66 cases in FY17. Of the 104 cases in FY18 for which the Article 32 hearing was waived, 85 (82%) involved a penetrative offense and 19 (18%) involved a contact offense. The conviction rate, for any offense, when the Article 32 hearing was waived increased in FY18 (67%) from a low in FY16 (53%). The conviction rate for a sex offense (penetrative or contact), when the Article 32 hearing was waived, was 34% in FY18, an increase from 27% in FY17.

Figure 17. Article 32 Waiver

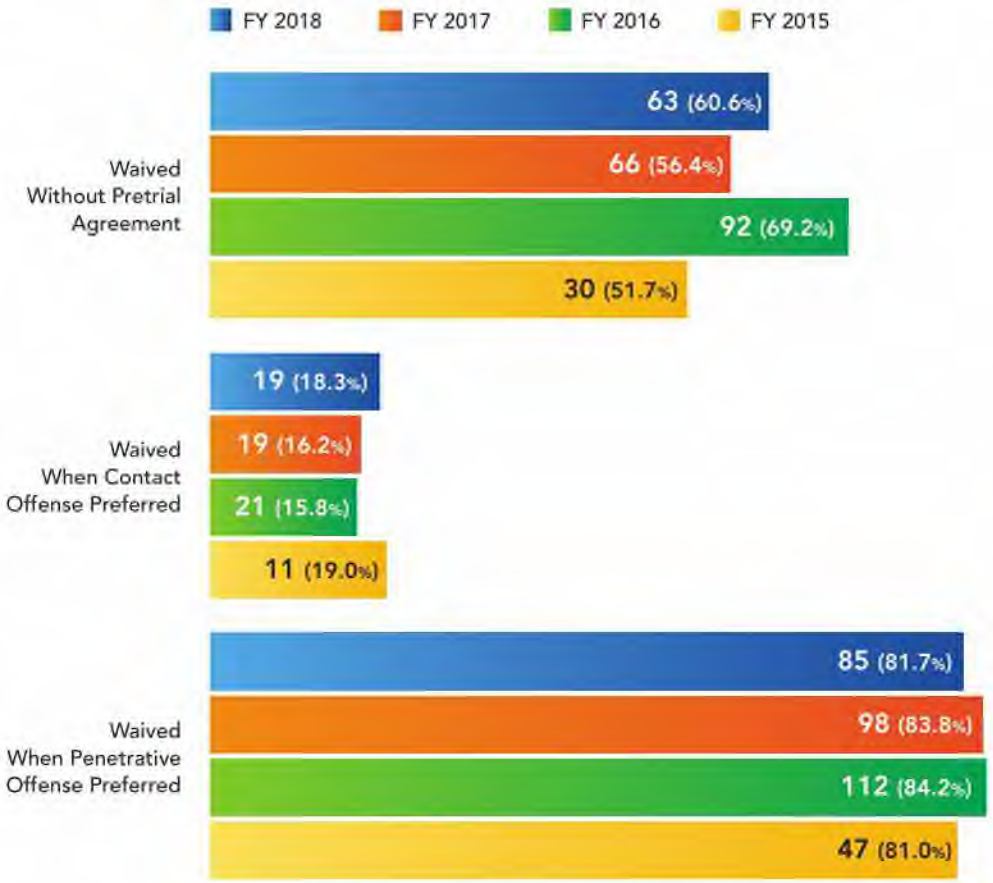
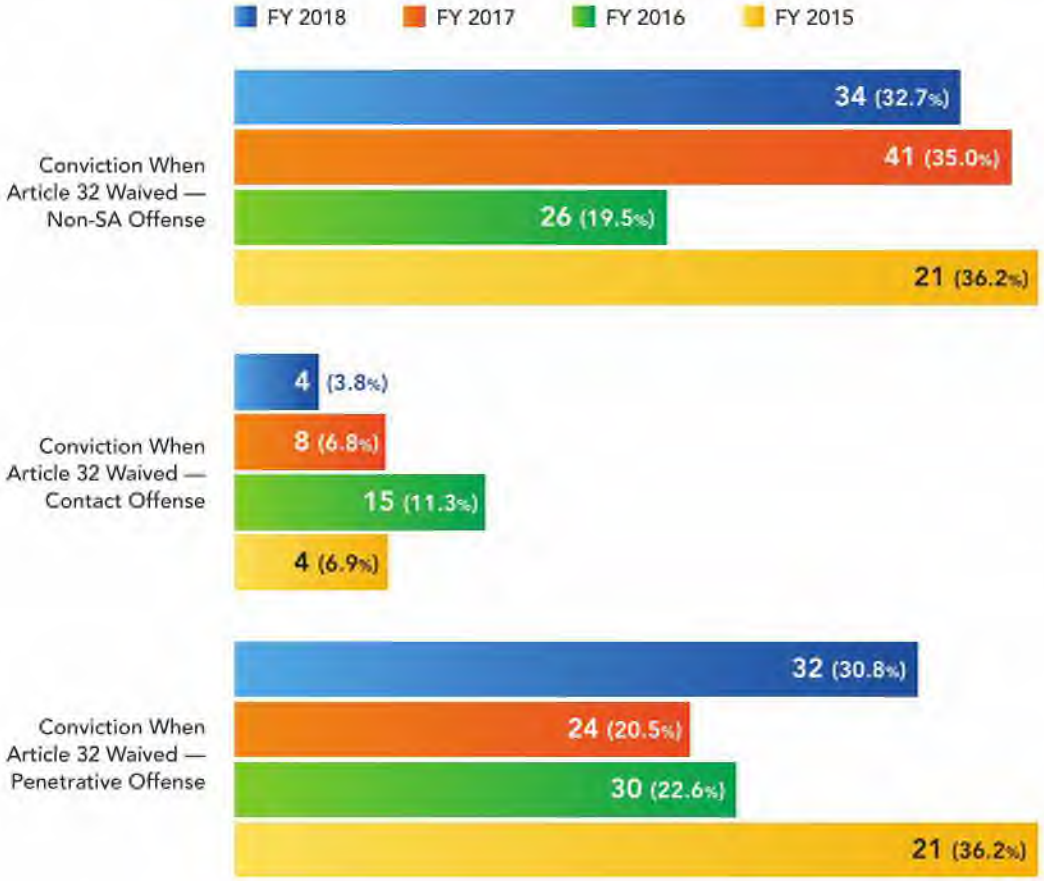


Figure 18. Article 32 Waiver: Conviction Rate



Disposition Decisions

In FY18, convening authorities referred a total of 378 cases to trial by general, special, and summary court-martial; thus, 66% of all preferred cases were referred to trial, a slight increase from 64% in FY17. Conversely, in FY18 convening authorities dismissed or resolved through alternate administrative means 196, or 34%, of preferred cases. Overall, 82% of referred cases in FY18 were referred to trial by general court-martial, representing an increase from FY17 (when the figure was 77%) and a return to the level observed in FY16 (81%).

The following tables set out case dispositions by Military Service of the accused for fiscal years 2015 through 2018.

Table 6. Case Disposition by Military Service of the Accused (FY 2018)

	General Court-Martial				Special Court-Martial				Summary Court-Martial			
	Penetrative		Contact		Penetrative		Contact		Penetrative		Contact	
Army	131	78.4%	21	12.6%	0	0.0%	11	6.6%	0	0.0%	4	2.4%
Marine Corps	32	55.2%	6	10.3%	8	13.8%	9	15.5%	0	0.0%	3	5.2%
Navy	40	60.6%	3	4.5%	5	7.6%	11	16.7%	2	3.0%	5	7.6%
Air Force	68	81.9%	9	10.8%	0	0.0%	6	7.2%	0	0.0%	0	0.0%
Coast Guard	1	25.0%	0	0.0%	0	0.0%	1	25.0%	0	0.0%	2	50.0%

Table 7. Case Disposition by Military Service of the Accused (FY 2017)

	General Court-Martial				Special Court-Martial				Summary Court-Martial			
	Penetrative		Contact		Penetrative		Contact		Penetrative		Contact	
Army	143	76.5%	25	13.4%	1	0.5%	10	5.3%	4	2.1%	4	2.1%
Marine Corps	31	49.2%	3	4.8%	10	15.9%	13	20.6%	4	6.3%	2	3.2%
Navy	50	56.2%	5	5.6%	2	2.2%	28	31.5%	2	2.2%	2	2.2%
Air Force	70	81.4%	6	7.0%	0	0.0%	10	11.6%	0	0.0%	0	0.0%
Coast Guard	6	37.5%	1	6.3%	2	12.5%	3	18.8%	0	0.0%	4	25.0%

Table 8. Case Disposition by Military Service of the Accused (FY 2016)

	General Court-Martial				Special Court-Martial				Summary Court-Martial			
	Penetrative		Contact		Penetrative		Contact		Penetrative		Contact	
Army	164	80.8%	24	11.8%	1	0.5%	10	4.9%	2	1.0%	2	1.0%
Marine Corps	40	48.2%	10	12.0%	7	8.4%	16	19.3%	7	8.4%	3	3.6%
Navy	45	54.2%	7	8.4%	6	7.2%	16	19.3%	2	2.4%	7	8.4%
Air Force	90	84.1%	10	9.3%	1	0.9%	5	4.7%	0	0.0%	1	0.9%
Coast Guard	11	61.1%	0	0.0%	1	5.6%	2	11.1%	0	0.0%	4	22.2%

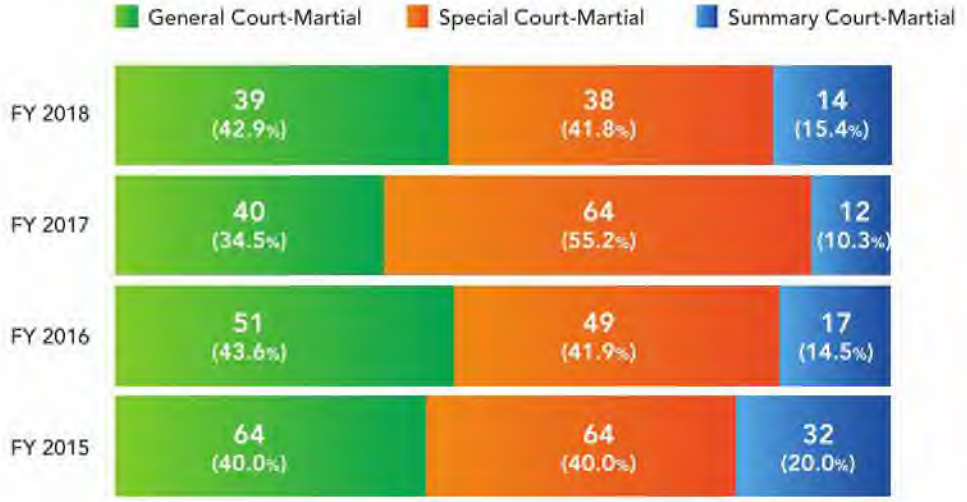
Table 9. Case Disposition by Military Service of the Accused (FY 2015)

	General Court-Martial				Special Court-Martial				Summary Court-Martial			
	Penetrative		Contact		Penetrative		Contact		Penetrative		Contact	
Army	192	77.1%	29	11.6%	3	1.2%	14	5.6%	1	0.4%	10	4.0%
Marine Corps	41	54.7%	8	10.7%	4	5.3%	9	12.0%	6	8.0%	7	9.3%
Navy	49	52.1%	10	10.6%	2	2.1%	25	26.6%	0	0.0%	8	8.5%
Air Force	85	73.9%	15	13.0%	1	0.9%	12	10.4%	0	0.0%	2	1.7%
Coast Guard	9	34.6%	2	7.7%	3	11.5%	4	15.4%	3	11.5%	5	19.2%

The severity of the offense charged influences the type of court-martial to which a charge is referred. Among cases completed in FY18, 95% of penetrative offenses were referred to trial by general court-martial, while contact offenses were referred at about equal frequency to general (43%) and special court-martial (42%) and less often to summary court-martial (15%). In contrast, in FY17 contact offenses were referred to general (35%) and summary court-martial (10%) less often than to special court-martial (55%).

Figure 19. Case Disposition: Penetrative Offense(s) Preferred and Case Ultimately Resolved at Court-Martial

Figure 20. Case Disposition: Contact Offense(s) Preferred and Case Ultimately Resolved at Court-Martial



In FY18 there were 13 cases (4.5%) with a penetrative offense preferred and ultimately resolved at special court-martial and 2 cases (0.7%) at summary court-martial. While it is accurate to state that in some instances a special or summary court-martial was convened after a penetrative sexual assault offense was initially charged, those courts-martial were the result of plea agreements that dismissed the penetrative sexual assault charge in exchange for guilty pleas to other offenses, which were then referred to special or summary courts-martial. The DAC-IPAD did not document any instances in FY18 of the penetrative offense being contested at special or summary court-martial.

To provide additional information on the charges and specifications for each of the cases in question, the tables in Appendix B detail the charges preferred; the advice of the staff judge advocate, if available; the terms of any pretrial agreements; the charges referred to special or summary court-martial; the accused's pleas; and the findings at trial.

Figure 21. Outcomes for Penetrative Offense(s) Preferred by Pay Grade (FY 2018)

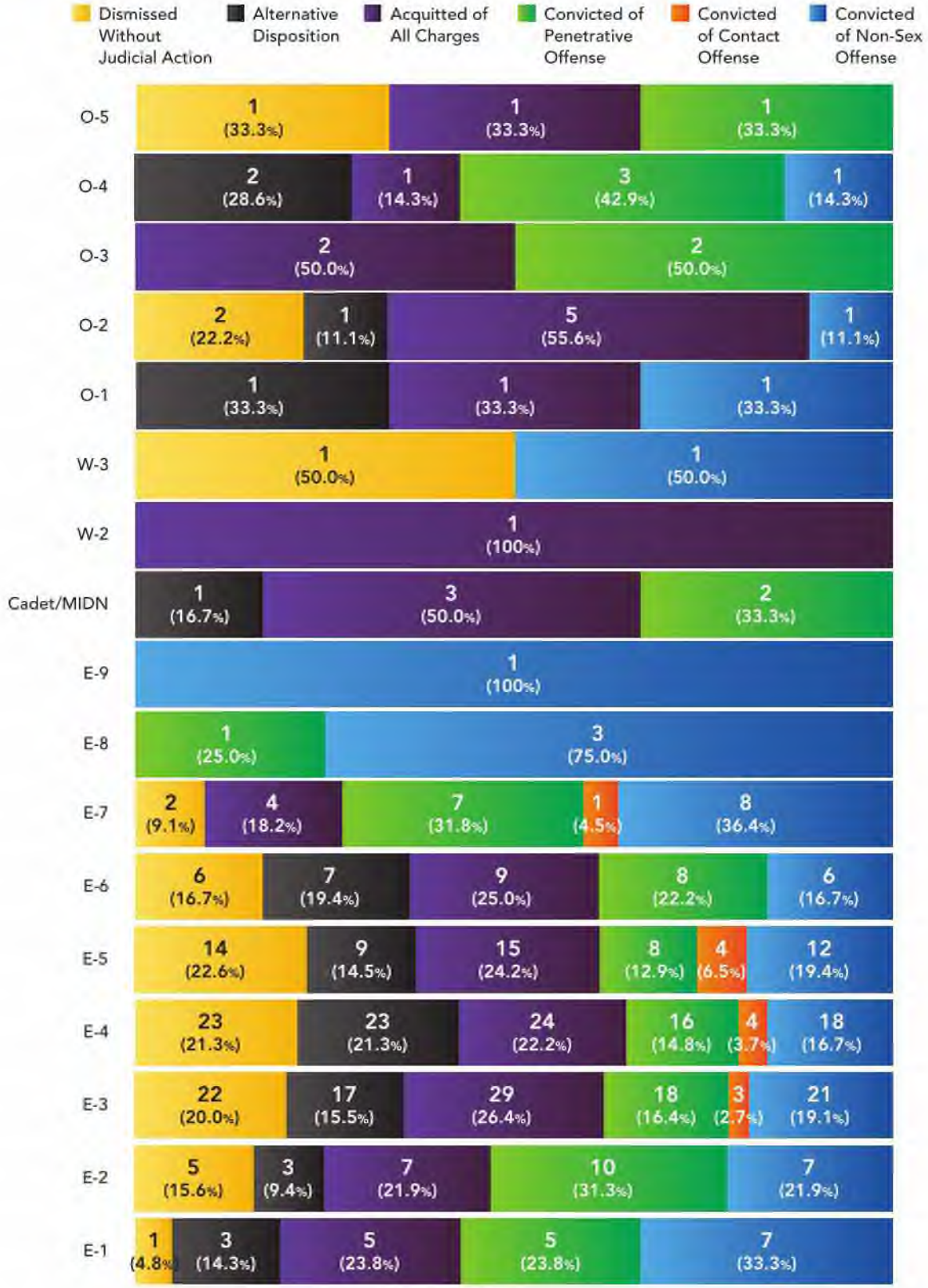
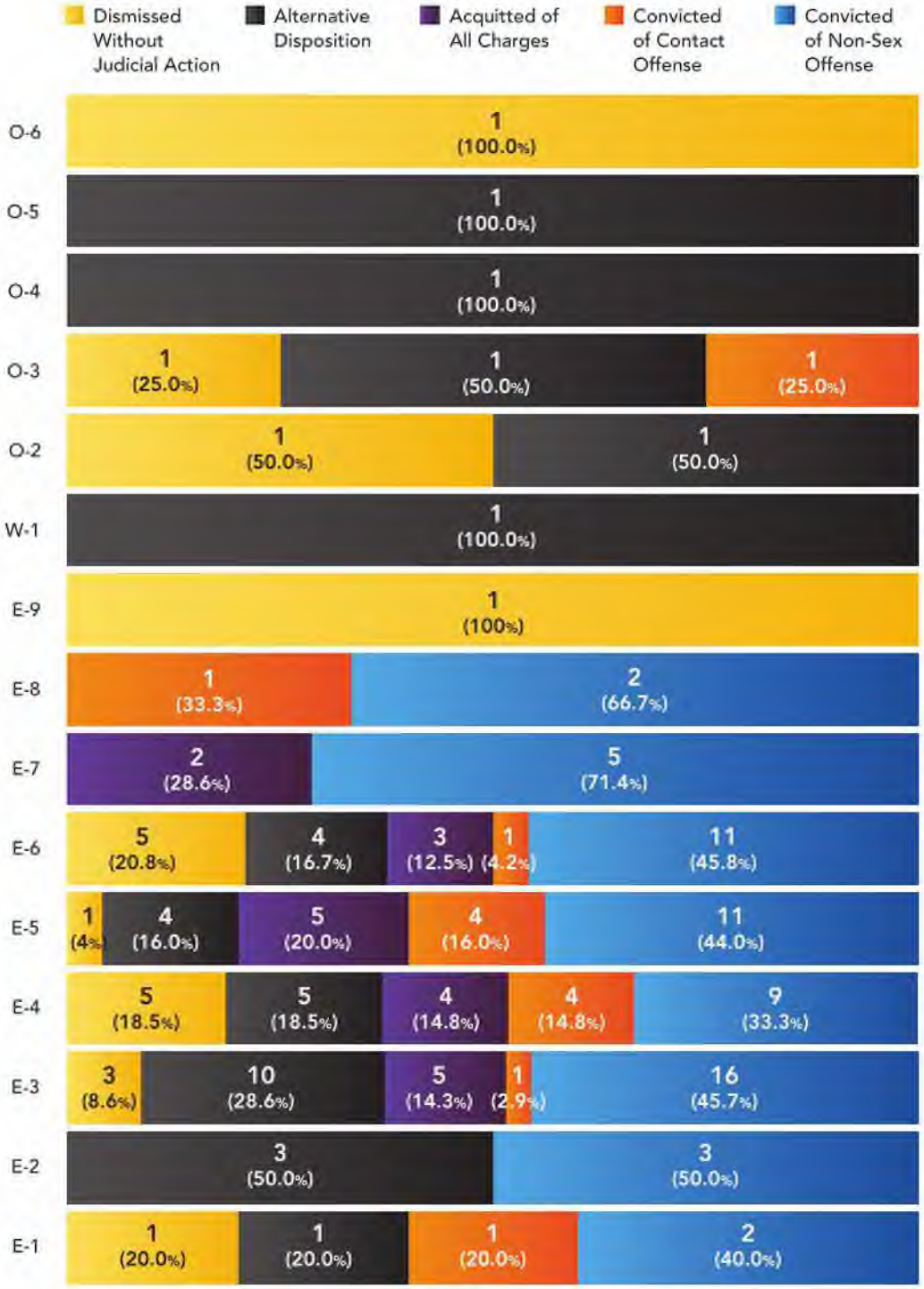


Figure 22. Outcomes for Contact Offense(s) Preferred by Pay Grade (FY 2018)



Adjudication Outcomes

Conviction, acquittal, and dismissal rates summarize how sexual assault prosecutions are ultimately resolved in the military justice system. Figures 23–28 illustrate outcomes for cases according to the type of offense charged (penetrative or contact) and how the case was adjudicated (by a military judge or by a panel of military members).

Figure 23. Outcomes for Penetrative Offense(s): Referred to Court-Martial

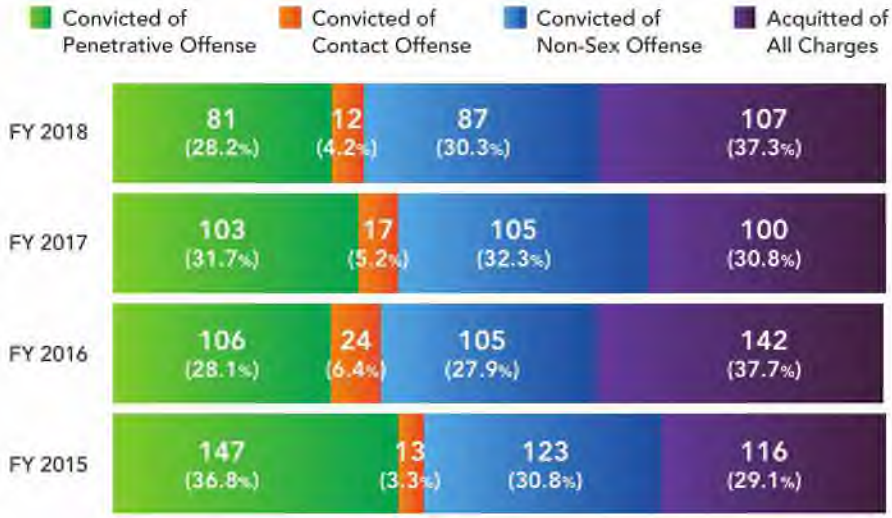


Figure 24. Outcomes for Penetrative Offense(s): Adjudicated by Military Judge

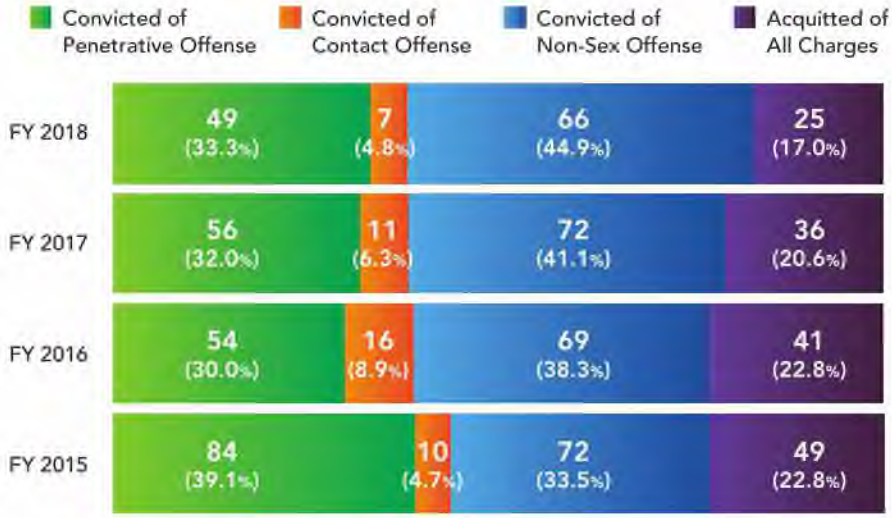


Figure 25. Outcomes for Penetrative Offense(s): Adjudicated by Panel of Military Members

Figure 26. Outcomes for Contact Offense(s): Referred to Court-Martial

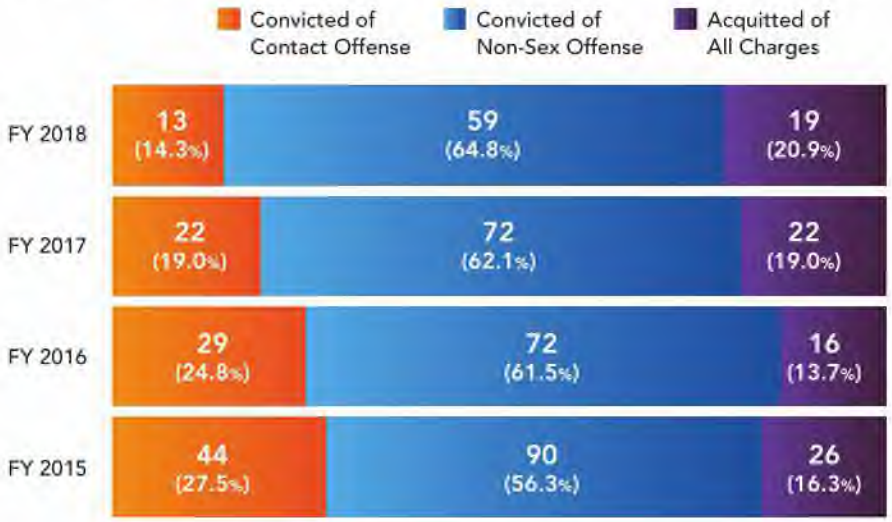


Figure 27. Outcomes for Contact Offense(s): Adjudicated by Military Judge

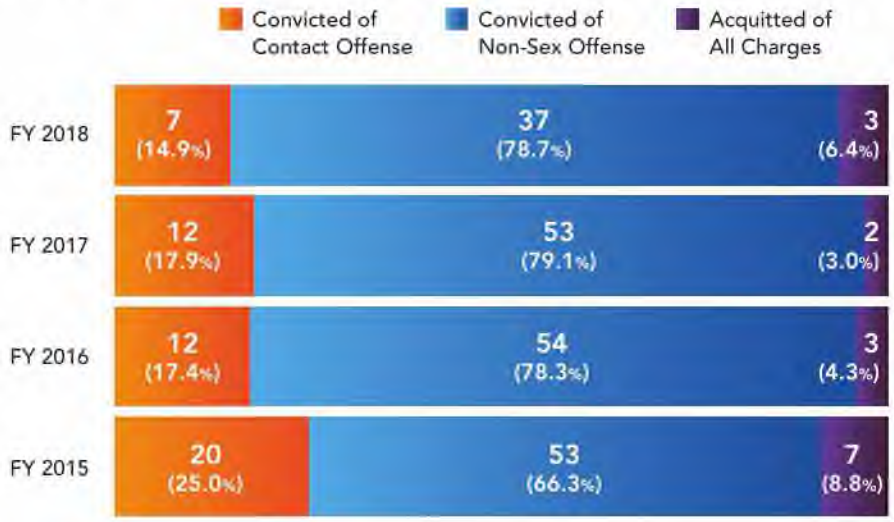
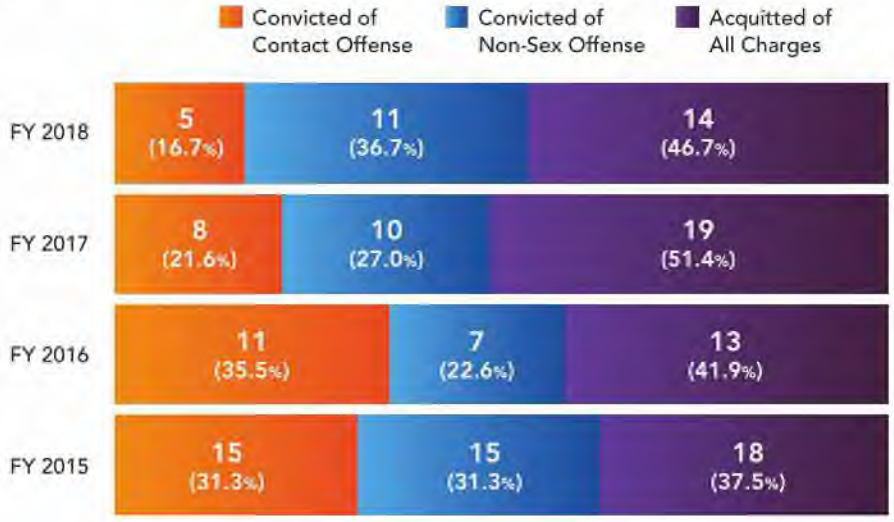


Figure 28. Outcomes for Contact Offense(s): Adjudicated by Panel of Military Members



Figures 29–34 illustrate outcomes for cases where the sexual assault offense was contested, according to the type of offense charged (penetrative or contact), and how the case was adjudicated (by a military judge or by a panel of military members).

Figure 29. Outcomes for Contested Penetrative Offense(s)

Figure 30. Outcomes for Contested Penetrative Offense(s): Adjudicated by Military Judge

Figure 31. Outcomes for Contested Penetrative Offense(s): Adjudicated by Panel of Military Members

Figure 32. Outcomes for Contested Contact Offense(s)

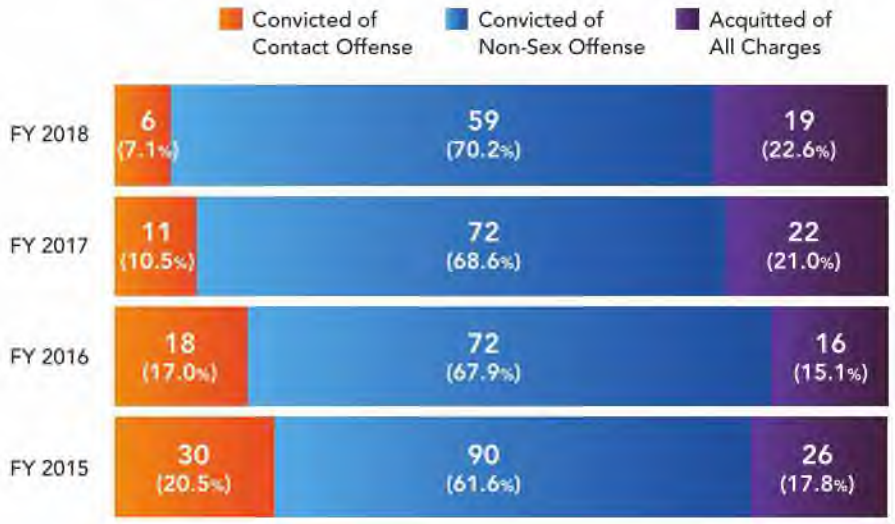


Figure 33. Outcomes for Contested Contact Offense(s): Adjudicated by Military Judge

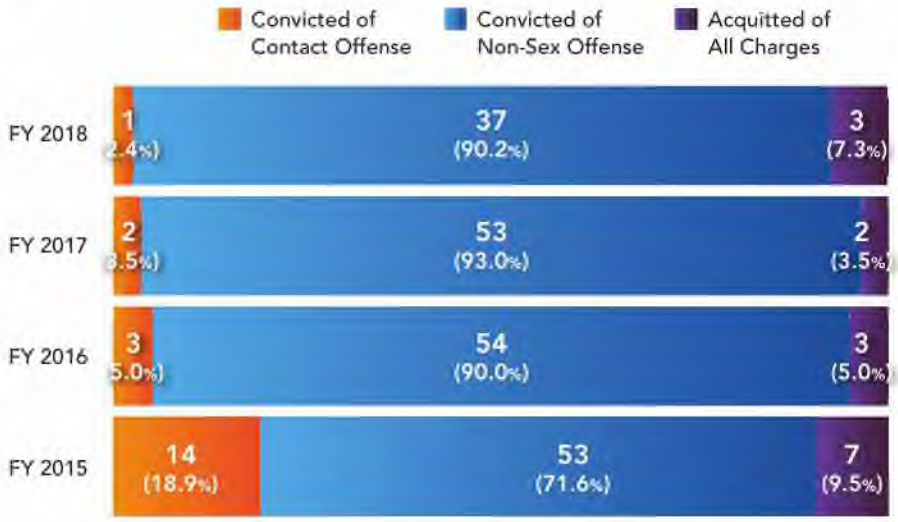
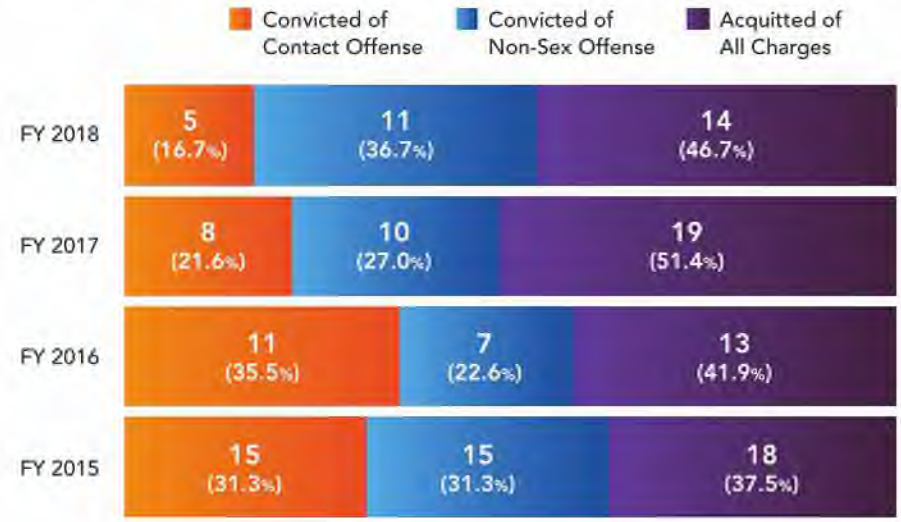


Figure 34. Outcomes for Contested Contact Offense(s): Adjudicated by Panel of Military Members



In FY18, among cases charged with a penetrative offense, non–intimate partner victim cases were more likely to end in acquittal (27%) than intimate partner victim cases (17%), and intimate partner victim cases were more likely to end in a conviction for a non–sexual assault offense (31% compared to 18%).

Figure 35. Accused Charged with Penetrative Offense(s) – Victim: Spouse or Intimate Partner

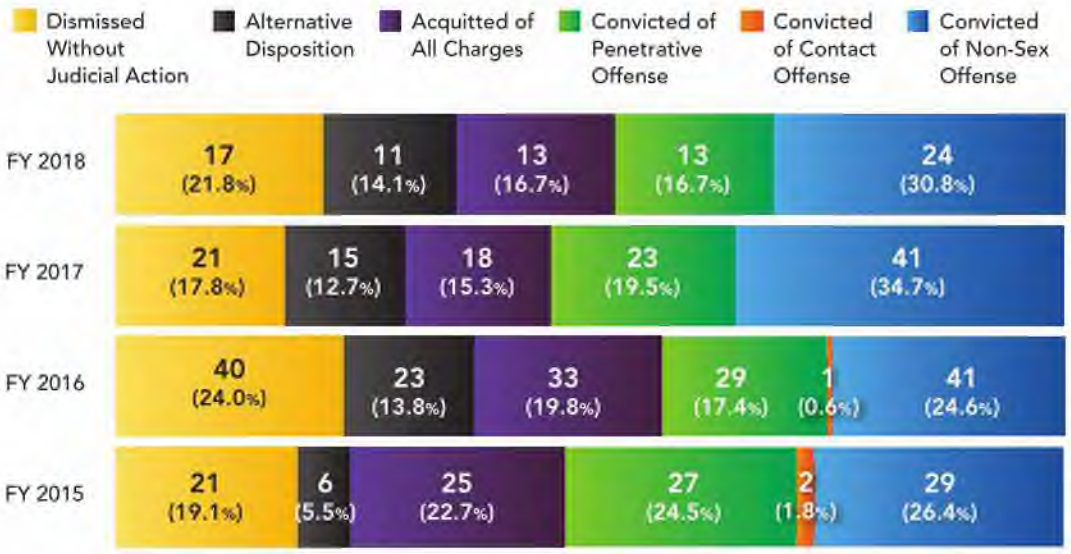
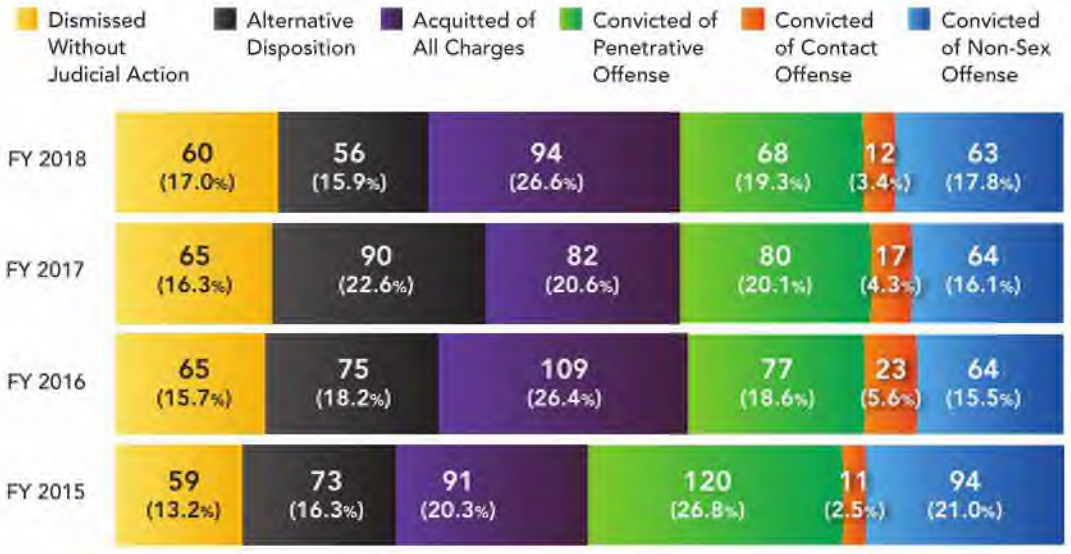


Figure 36. Accused Charged with Penetrative Offense(s) – Victim: Other Relationship



The small numbers of intimate partner victim cases with a contact offense charge make it difficult to draw any statistical conclusions. In FY18 there were 4 cases involving a charged contact offense and an intimate partner, an increase from 3 cases in FY17 and a decline from 6 cases in FY16 and 7 cases in FY15. When cases are combined across the charged offense (penetrative and contact), conviction rates are similar for intimate partner cases (46%) and non–intimate partner cases (43%), but dismissal rates were higher for intimate partner victim cases (24%) than for non–intimate partner cases (15%).

Figure 37. Accused Charged with Contact Offense(s) – Victim: Spouse or Intimate Partner

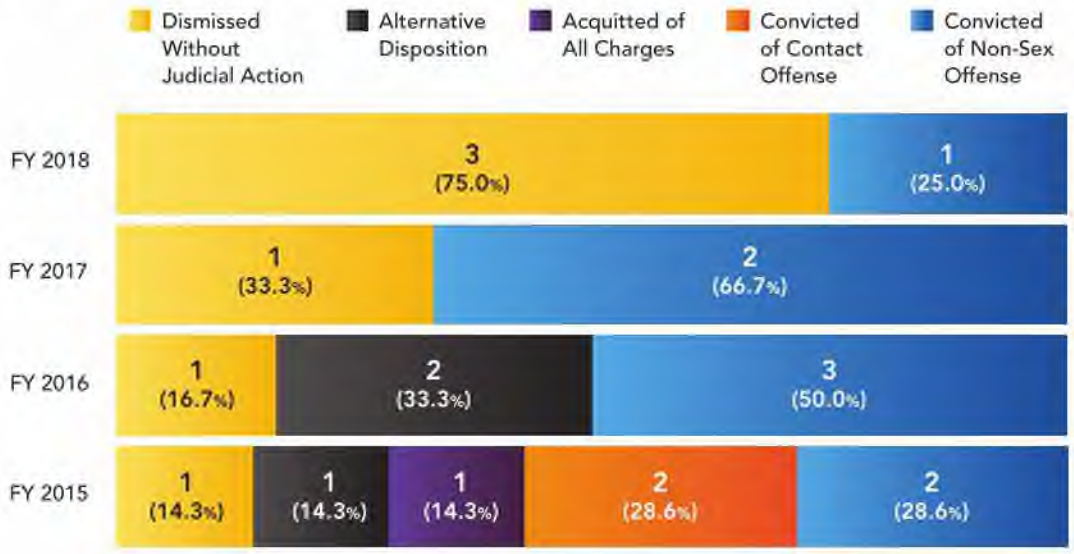
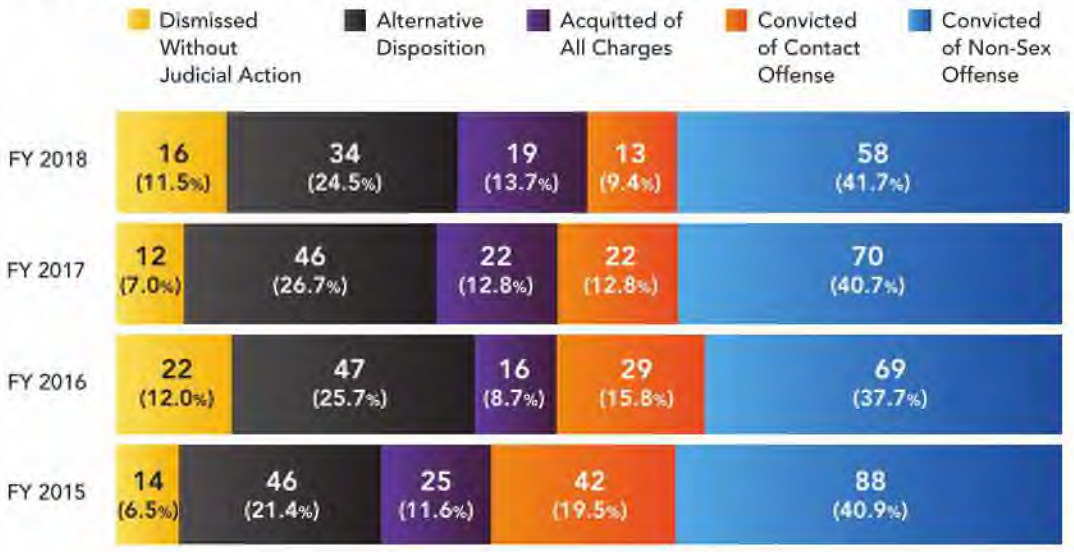


Figure 38. Accused Charged with Penetrative Offense(s) – Victim: Other Relationship



IV. MULTIVARIATE ANALYSIS

Summary of the Multivariate Analyses – Fiscal Year 2018

Consistent patterns emerge from the multivariate analyses. The following variables have relatively consistent effects on the conviction and sentencing outcomes: Military Service branch, number of charges, and charged/conviction offense.

Service Branch

- The likelihood of being convicted of any charge was greater in the Army, Marine Corps, and Navy than in the Air Force or the Coast Guard.
- The likelihood of being convicted of a penetrative offense was greater in the Army and the Marine Corps than in the Air Force.
- There were no statistically significant differences between the Military Services in the chances of acquittal.
- The likelihood of case dismissal was greater in the Coast Guard than in all other Service branches.
- The chances of a punitive separation outcome were greater in the Army and in the Air Force than in the Navy.

Number of Charges

- There was a positive association between the number of charges and the chances of both a conviction and a conviction for a penetrative offense: the likelihood of both outcomes increased when the number of charges increased.
- The chances of acquittal and case dismissal declined as the number of charges increased.
- The chances of punitive separation and of confinement increased as the number of charges increased. The sentence severity scale score increased as the number of charges increased.

Charged Offense / Conviction Offense

- Convictions for penetrative offenses were linked to the highest chance of a confinement sentence; there was no difference in the chances of a confinement sentence between contact offense convictions and non-sexual assault convictions.
- The chances of punitive separation were greater for penetrative and contact offense convictions than for non-sexual assault convictions.
- Sentence severity is greater for penetrative offense convictions than for contact offense convictions and non-sexual assault convictions; sentences are more severe for contact offense convictions than non-sexual assault convictions.

Victim Variables

- The likelihood of case dismissal was higher when the involved parties were current or former intimate partners than when the victim and the accused had other types of relationships.
- The chances of punitive separation were lower in cases that involved only victims who were Military Service members, than in cases that involved only civilians or a combination of civilians and Military Service members.

Summary of the Multivariate Analyses – Fiscal Year 2017

Consistent patterns emerge from the multivariate analyses. The following variables have relatively consistent effects on the conviction and sentencing outcomes: service rank of the accused, number of charges, and charged/conviction offense.

Service Branch

- The chances of a conviction for a penetrative offense were greater in the Army than in the Air Force.
- The chances of a conviction for any offense were lower in the Air Force than in all other Service branches.
- The chances of an acquittal were greater in the Air Force than in the Army; the chances of a dismissal were greater in the Air Force than in the Army and Navy.
- Convicted members of the Marine Corps face a greater chance of punitive separation than their counterparts in the Coast Guard.
- Convicted members of the Air Force and Marine Corps faced more severe sentences, on average, than convicted members of the Army and Coast Guard. Convicted members of the Marine Corps faced more severe sentences, on average, than members of the Navy.

Number of Charges

- The chances of a conviction for any offense, of punitive separation, and of a more severe sentence increased when the number of charges was higher.
- The chances of acquittal and the chances of dismissal both decreased when the number of charges was higher.

Charged Offense / Conviction Offense

- The chance of a confinement sentence was greatest when the conviction was for a penetrative offense, but the difference between penetrative offense convictions and contact offense convictions was not statistically significant. Convictions for a contact offense or for a penetrative offense were more likely than convictions for non–sexual assault offenses to result in a confinement sentence.

- The likelihood that charges would be dismissed was greater when the accused was charged with a penetrative offense than when the accused was charged with a contact offense.
- The likelihood of a punitive separation sentence was greater when the conviction was for a sexual assault offense rather than a non-sexual assault offense.
- Sentence severity was greatest, on average, for penetrative offense convictions and the difference when compared to other offense convictions is statistically significant. Sentence severity, on average, was greater for contact-offense convictions than for non-sexual assault convictions.

Victim Variables

- A greater number of victims in a case was associated with an increased chance of a conviction for a penetrative offense.
- Military-only victim cases were linked to reduced chances that the case would result in a confinement sentence, as compared to civilian-only victim cases and those with military and civilian victims.
- Female-only victim cases were linked to increased chances that the case would result in a punitive separation sentence, as compared to male-only victim cases and those with female and male victims.

Summary of the Multivariate Analyses – Fiscal Year 2016

Consistent patterns emerge from the multivariate analyses. The following variables have relatively consistent effects on the conviction and sentencing outcomes: Military Service branch, number of charges, and charged/conviction offense.

Service Branch

- The chances of a conviction were lower in Air Force cases than in the other Service branches.
- Cases were more likely to end in acquittal in the Air Force than in the Marine Corps.
- Cases were more likely to be dismissed in the Air Force, Marine Corps, and Navy than in the Army.
- Members of the Marine Corps who are convicted face more severe sanctions than convicted members of the Air Force and Navy; members of the Army who are convicted face more severe sanctions than convicted members of the Navy.

Number of Charges

- The chances of a conviction increase as the number of charges increases.
- The chances of acquittal and dismissal decline as the number of charges increases.
- The chances of a punitive separation sanction become greater as the number of charges increases.
- The severity of sentences increases as the number of charges increases.

Charged Offense / Conviction Offense

- Those charged with a penetrative offense are less likely to be convicted of any offense.
- Those charged with a penetrative offense are more likely to be acquitted.
- Those convicted of a penetrative offense face more severe sanctions (confinement, punitive separation, and sentence severity) than those convicted of a non-sexual assault offense; those convicted of a penetrative offense face more severe sanctions (confinement and sentence severity) than those convicted of a contact offense.
- Those convicted of a contact offense face more severe sanctions than those convicted of a non-sexual assault offense.

Victim – Accused Relationship

- The chances of case dismissal are greater for intimate-partner cases than for cases with other relationships between the victim and the accused.

Summary of the Multivariate Analyses – Fiscal Year 2015[11]

In most analyses, the strongest predictor of outcome was whether the accused was charged with or convicted of at least one count of a penetrative offense. Those who were charged with penetrative offenses were less likely than those charged with contact offenses to be convicted of at least one charge, were more likely to be acquitted of all charges, and were more likely to have the case dismissed without further judicial action. On the other hand, if the accused was convicted of a penetrative offense, he or she was more likely to be sentenced to confinement, was more likely to receive a punitive separation, and faced a substantially longer sentence than those convicted of non-sex offenses. By contrast, neither the rank of the accused nor the gender of the victim affected any of the outcomes examined.

Service Branch

- The chances of a conviction for a penetrative offense were more likely if the accused was in the Army than if the accused was in the Air Force or the Marine Corps.
- The chances of conviction for at least one charge were more likely if the accused was in the Coast Guard than if the accused was in any of the other Services.
- Cases were less likely to result in an acquittal at trial if the accused was serving in the Army or Coast Guard than if the accused was serving in the Air Force or Navy.
- Cases were less likely to be dismissed without further judicial action if the accused was in the Air Force rather than in the Marine Corps or the Navy.
- Members of the Army were more likely than those in the Coast Guard to receive a punitive separation.

11 The fiscal year 2015 multivariate analysis was completed by Dr. Cassia Spohn under the authority of the Judicial Proceedings Panel and published in the *Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses* (April 2016).

Number of Charges

- The chances of a conviction increased as the number of charges increased.
- The chances of acquittal and dismissal declined as the number of charges increased.
- The severity of sentences increased as the number of charges increased.

Number of Victims

- The chances of conviction increased as the number of victims increased.
- The chances of a confinement sentence increased as the number of victims increased.

Status of Victims

- The chances of conviction were lower for cases in which the victim was a member of the military rather than a civilian.
- The chances of acquittal were higher for cases in which the victim was a member of the military rather than a civilian.
- The chances that the accused would receive either a sentence of confinement or a punitive separation were lower if the victim was a member of the military rather than a civilian.

Victim – Accused Relationship

- The chances of conviction were lower if the victim was a spouse or intimate partner of the accused.
- The chances of case dismissal were greater for intimate partner cases than for cases with other relationships between the victim and the accused.
- The confinement sentence was almost three years longer if the victim was the spouse or intimate partner.

V. DATA PROJECT WAY FORWARD

The DWG will continue the data collection and analysis project in the coming months. Future analyses will include descriptive statistics concerning court-martial case characteristics, case dispositions, and case outcomes.

APPENDIX A. DAC-IPAD CASE ADJUDICATION DATABASE: SEXUAL OFFENSE(S) DEMOGRAPHIC AND ADJUDICATION DATA

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 for Fiscal Year 2015, as amended. The Committee is tasked by its authorizing statute 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, drawing on its review of such cases on an ongoing basis.

The following tables provide a general overview of data contained in the DAC-IPAD database for fiscal years 2015–18, as of June 13, 2019, and are the source material for the data charts and discussion in this report. The organization follows that in the previous DAC-IPAD reports (March, 2018 and March, 2019) and Appendix A in the 2017 Judicial Proceedings Panel Report (September, 2017). Utilizing similar organizational schemes aids an understanding of changes over time. In addition, the analyses in the two previous reports provide a logical roadmap for understanding the dispositional outcomes of sexual assault cases in the military. The purpose of estimating bivariate relationships and multivariate relationships is to gain an understanding about why certain patterns of results are observed.

It should be noted that the DAC-IPAD relies on the Services to report all cases meeting the specified criteria. The DAC-IPAD therefore cannot assert that it has the complete universe of cases throughout the Armed Forces in which a sexual assault charge was filed. The data were also limited to cases in which a complete set of disposition records could be identified and retrieved for analysis. In interpreting the data, readers should keep in mind that

- Percentages may not total 100, owing to rounding errors or missing data;
- Cadets/Midshipmen and warrant officers are included with "officers" in tables.

DESCRIPTIVE STATISTICS

Tables 1 and 2 provide general description and demographic overview of the data contained in the database.

BIVARIATE ANALYSES

Tables 3 through 14 present the results of analyses that estimate relationships between case characteristics and case-processing outcomes. These analyses provide the opportunity to better understand why patterns of case outcomes are observed. The tables present patterns of relationships between two variables. These are known as bivariate relationships because the focus is on two variables; one is an outcome variable and the other is a predictor variable that can help explain the outcome.

Analyses of bivariate relationships provide an initial examination of relationships between key variables, such as, for example, type of offense charge and conviction result. These examinations are limited because our outcomes of interested are complex and are affected by many variables.

MULTIVARIATE ANALYSES

Tables 15 to 21 present patterns of relationships between multiple variables. These are known as multivariate relationships because the focus is on multiple variables; one is the outcome variable and several predictor variables help explain the outcome. Outcome variables are also known as dependent variables and predictor variables are also called independent variables.

Multivariate models represent a second step, after bivariate relationships are estimated. Multivariate models allow for the inclusion of multiple variables in the model so that we can examine relationships between one outcome, such as conviction, and several predictor variables, such as Military Service branch, the relationship between the accused and the victim, and the offense charged. Predictor variables may be related to our outcome of interest (i.e., conviction or not) and to the other predictor variable of interest; thus multivariate models are useful because they employ mathematical formulas to isolate the part of each predicator that is truly related to the outcome variable and not to the other predictor variables. When a predictor variable is uniquely and strongly related to an outcome variable, after being separated from its relationship with the other predictor variables in the model, we conclude the relationship is "statistically significant." This means that the relationship observed between a predictor and an outcome would likely be observed over different samples of cases; the relationship is not due to random chance. In other words, we conclude that the relationship truly exists and is not an artifact of the sample of data we examined.

Two types of multivariate regression models are used because the key outcome (dependent) variables of interest are either dichotomous, with only two categories, or continuous, with numerical values rather than categories. When dependent variables are dichotomous, logistic regression models are appropriate. Ordinary least squares (OLS) models are used when dependent variables are continuous.

Several predictor variables of interest are categorical; that is, their attributes are categories rather than numbers. An example is Service of the accused. This variable has five categories: Army, Marine Corps, Navy, Air Force, and Coast Guard. Entering categorical variables into regression models requires that one category serves as the reference category against which all other categories are compared. It is necessary to change the reference category to make all relevant comparisons. In the model results presented below, the Army serves as the reference category for the accused's Service branch. This is changed and models are reestimated so that the other branches have the opportunity to serve as the reference category and are compared to the others.

TABLES:

Fiscal Year 2018

Fiscal Year 2017

Fiscal Year 2016

Fiscal Year 2015

TABLE 1
CASE CHARACTERISTICS (FY 2018)

	n	%
FY 2018 Total Cases	574	
Military Service of the Accused		
Army	232	40.4
Marine Corps	82	14.3
Navy	94	16.4
Air Force	151	26.3
Coast Guard	15	2.6
Rank of Accused		
Enlisted	529	92.2
Officer	45	7.8
Pay Grade of Accused		
Enlisted (N = 529)		
E-1	26	4.9
E-2	38	7.2
E-3	145	27.4
E-4	135	25.5
E-5	87	16.4
E-6	60	11.3
E-7	29	5.5
E-8	7	1.3
E-9	2	0.4
Officer (N = 45)[a]		
Cadet/MIDN	6	13.3
W-1	1	2.2
W-2	1	2.2
W-3	2	4.4
W-4	0	0.0
W-5	0	0.0
O-1	3	6.7
O-2	11	24.4
O-3	8	17.8
O-4	8	17.8
O-5	4	8.9
O-6	1	2.2
Sex of Accused		
Male	572	99.7
Female	2	0.3

Location of Unit to Which Accused Assigned When Charges Preferred		
CONUS	437	76.1
OCONUS	97	16.9
Vessel	40	7.0
Sex of Victim(s)		
All Female	539	93.9
All Male	32	5.6
Female and Male	3	0.5
Status of Victim(s)		
All Military	347	60.5
All Civilian	207	36.1
Military and Civilian	20	3.5
Accused Charged with Penetrative Offense(s)		
Yes	431	75.1
No	143	24.9
Accused Convicted of Penetrative Offense(s) (N = 431)		
Yes	81	18.8
No	350	81.2
Accused Charged with Contact Offense(s)		
Yes	143	24.9
No	431	75.1
Accused Convicted of Contact Offense(s) (N = 143)		
Yes	13	9.1
No	130	90.9

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 2
CASE DISPOSITIONS AND CASE OUTCOMES (FY 2018)

	n	%
FY 2018 Total Cases	574	

Type of Court-Martial (N = 378)		
General Court-Martial	311	82.3
Special Court-Martial	51	13.5
Summary Court-Martial	16	4.2
Type of Trial Forum (N = 378)		
Military Judge	194	51.3
Panel of Military Members	168	44.4
Summary Court-Martial Officer	16	4.2

Article 32 Hearing Held		
Yes	373	65.0
Waived	104	18.1
Not Applicable	97	16.9
Accused Charged with Penetrative Offense(s) (N = 431)		
Convicted of Penetrative Offense	81	18.8
Convicted of Sexual Contact Offense	12	2.8
Convicted of Non-Sex Offense	87	20.2
Acquitted of All Charges	107	24.8
Alternative Disposition	67	15.5
Dismissed Without Judicial Action	77	17.9
(After Article 32 Hearing)	*63*	*81.8*
Accused Charged with Sexual Contact Offense(s) (N = 143)		
Convicted of Sexual Contact Offense	13	9.1
Convicted of Non-Sex Offense	59	41.3
Acquitted of All Charges	19	13.3
Alternative Disposition	33	23.1
Dismissed Without Judicial Action	19	13.3
(After Article 32 Hearing)	*12*	*63.2*
Outcomes for Cases Referred to Trial		
Accused Charged with Penetrative Offense(s) (N = 287)		
Convicted of Penetrative Offense	81	28.2
Convicted of Sexual Contact Offense	12	4.2
Convicted of Non-Sex Offense	87	30.3
Acquitted of All Charges	107	37.3
Accused Charged with Sexual Contact Offense(s) (N = 91)		
Convicted of Sexual Contact Offense	13	14.3
Convicted of Non-Sex Offense	59	64.8
Acquitted of All Charges	19	20.9
Outcomes for Contested Trials		
Accused Charged with Penetrative Offense(s) (N = 256)		
Convicted of Penetrative Offense	56	21.9
Convicted of Sexual Contact Offense	*7*	2.7
Convicted of Non-Sex Offense	86	33.6
Acquitted of All Charges	107	41.8
Accused Charged with Sexual Contact Offense(s) (N = 84)		
Convicted of Sexual Contact Offense	6	7.1
Convicted of Non-Sex Offense	59	70.2
Acquitted of All Charges	19	22.6

TABLE 3
ARTICLE 32 WAIVER (FY 2018)

	n	%
Cases in Which Art. 32 Applicable		
Art. 32 Held	373	78.2
Art. 32 Waived	104	21.8
Waived Without Pretrial Agreement	63	60.6
Waived When Involving Penetrative Offense	85	81.7
Waived When Involving Contact Offense	19	18.3
Conviction Rate When Art. 32 Waived – Non-Sex Offense	34	32.7
Conviction Rate When Art. 32 Waived – Contact Offense	4	3.8
Conviction Rate When Art. 32 Waived – Penetrative Offense	32	30.8

TABLE 4
TYPE OF TRIAL BY OFFENSE(S), MILITARY SERVICE, AND RANK OF ACCUSED (FY 2018)

	General Court-Martial		Special Court-Martial		Summary Court-Martial	
	n	%	n	%	n	%
Most Serious Type of Offense(s) Charged						
Penetrative Offense	272	94.8	13	4.5	2	0.7
Contact Offense	39	42.9	38	41.8	14	15.4
Military Service						
Army	152	91.0	11	6.6	4	2.4
Marine Corps	38	65.5	17	29.3	3	5.2
Navy	43	65.2	16	24.2	7	10.6
Air Force	77	92.8	6	7.2	0	0.0
Coast Guard	1	25.0	1	25.0	2	50.0
Rank of Accused						
Officer	26	96.3	1	3.7	0	0.0
Enlisted	285	81.2	50	14.2	16	4.6

TABLE 5
TYPE OF MOST SERIOUS SEX OFFENSE(S) CHARGED BY PAY GRADE (FY 2018)

	Penetrative		Contact	
	n	%	n	%
Enlisted				
E-1	21	80.8	5	19.2
E-2	32	84.2	6	15.8
E-3	110	75.9	35	24.1
E-4	108	80.0	27	20.0
E-5	62	71.3	25	28.7
E-6	36	60.0	24	40.0
E-7	22	75.9	7	24.1
E-8	4	57.1	3	42.9
E-9	1	50.0	1	50.0
Officer				
Cadet/MIDN	6	100.0	0	0.0
W-1	0	0.0	1	100.0
W-2	1	100.0	0	0.0
W-3	2	100.0	0	0.0
W-4	0	0.0	0	0.0
W-5	0	0.0	0	0.0
O-1	3	100.0	0	0.0
O-2	9	81.8	2	18.2
O-3	4	50.0	4	50.0
O-4	7	87.5	1	12.5
O-5	3	75.0	1	25.0
O-6	0	0.0	1	100.0

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 6
OUTCOMES OF SEXUAL OFFENSE(S) BY MILITARY SERVICE OF ACCUSED (FY 2018)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 431)												
Army N = 181	43	23.8	7	3.9	43	23.8	38	21.0	28	15.5	22	12.2
Marine Corps N = 50	13	26.0	2	4.0	17	34.0	8	16.0	4	8.0	6	12.0
Navy N = 67	9	13.4	2	3.0	20	29.9	16	23.9	7	10.4	13	19.4
Air Force N = 128	16	12.5	1	0.8	6	4.7	45	35.2	27	21.1	33	25.8
Coast Guard N = 5	0	0.0	0	0.0	1	20.0	0	0.0	1	20.0	3	60.0
Accused Charged with Contact Offense(s) (N = 143)												
Army N = 51			6	11.8	22	43.1	8	15.7	9	17.6	6	11.8
Marine Corps N = 32			3	9.4	13	40.6	2	6.3	11	34.4	3	9.4
Navy N = 27			1	3.7	16	59.3	2	7.4	6	22.2	2	7.4
Air Force N = 23			3	13.0	6	26.1	6	26.1	4	17.4	4	17.4
Coast Guard N = 10			0	0.0	2	20.0	1	10.0	3	30.0	4	40.0

TABLE 7
OUTCOMES OF SEXUAL OFFENSE(S) BY RANK OF ACCUSED (FY 2018)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 431)												
Officer N = 35	8	22.9	0	0.0	4	11.4	14	40.0	5	14.3	4	11.4
Enlisted N = 396	73	18.4	12	3.0	83	21.0	93	23.5	62	15.7	73	18.4
Accused Charged with Contact Offense(s) (N = 143)												
Officer N = 10			1	10.0	0	0.0	0	0.0	6	60.0	3	30.0
Enlisted N = 133			12	9.0	59	44.4	19	14.3	27	20.3	16	12.0

TABLE 8
OUTCOMES OF CHARGED PENETRATIVE OFFENSE(S) BY PAY GRADE OF ACCUSED (FY 2018)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Enlisted (N = 396)												
E-1 N = 21	5	23.8	0	0.0	7	33.3	5	23.8	3	14.3	1	4.8
E-2 N = 32	10	31.3	0	0.0	7	21.9	7	21.9	3	9.4	5	15.6
E-3 N = 110	18	16.4	3	2.7	21	19.1	29	26.4	17	15.5	22	20.0
E-4 N = 108	16	14.8	4	3.7	18	16.7	24	22.2	23	21.3	23	21.3
E-5 N = 62	8	12.9	4	6.5	12	19.4	15	24.2	9	14.5	14	22.6
E-6 N = 36	8	22.2	0	0.0	6	16.7	9	25.0	7	19.4	6	16.7
E-7 N = 22	7	31.8	1	4.5	8	36.4	4	18.2	0	0.0	2	9.1
E-8 N = 4	1	25.0	0	0.0	3	75.0	0	0.0	0	0.0	0	0.0
E-9 N = 1	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0
Officer (N = 35)[a]												
Cadet/MIDN N = 6	2	33.3	0	0.0	0	0.0	3	50.0	1	16.7	0	0.0
W-1 N = 0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-2 N = 1	0	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
W-3 N = 2	0	0.0	0	0.0	1	50.0	0	0.0	0	0.0	1	50.0
W-4 N = 0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-5 N = 0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-1 N = 3	0	0.0	0	0.0	1	33.3	1	33.3	1	33.3	0	0.0
O-2 N = 9	0	0.0	0	0.0	1	11.1	5	55.6	1	11.1	2	22.2
O-3 N = 4	2	50.0	0	0.0	0	0.0	2	50.0	0	0.0	0	0.0
O-4 N = 7	3	42.9	0	0.0	1	14.3	1	14.3	2	28.6	0	0.0
O-5 N = 3	1	33.3	0	0.0	0	0.0	1	33.3	0	0.0	1	33.3
O-6 N = 0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 9
OUTCOMES OF CHARGED CONTACT OFFENSE(S) BY PAY GRADE OF ACCUSED (FY 2018)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Enlisted (N = 133)												
E-1 N = 5			1	20.0	2	40.0	0	0.0	1	20.0	1	20.0
E-2 N = 6			0	0.0	3	50.0	0	0.0	3	50.0	0	0.0
E-3 N = 35			1	2.9	16	45.7	5	14.3	10	28.6	3	8.6
E-4 N = 27			4	14.8	9	33.3	4	14.8	5	18.5	5	18.5
E-5 N = 25			4	16.0	11	44.0	5	20.0	4	16.0	1	4.0
E-6 N = 24			1	4.2	11	45.8	3	12.5	4	16.7	5	20.8
E-7 N = 7			0	0.0	5	71.4	2	28.6	0	0.0	0	0.0
E-8 N = 35			1	33.3	2	66.7	0	0.0	0	0.0	0	0.0
E-9 N = 1			0	0.0	0	0.0	0	0.0	0	0.0	1	100.0
Officer (N = 10)[a]												
Cadet/MIDN N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-1 N = 1			0	0.0	0	0.0	0	0.0	1	100.0	0	0.0
W-2 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-3 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-4 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-5 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-1 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-2 N = 2			0	0.0	0	0.0	0	0.0	1	50.0	1	50.0
O-3 N = 4			1	25.0	0	0.0	0	0	2	50.0	1	25.0
O-4 N = 1			0	0.0	0	0.0	0	0.0	1	100.0	0	0.0
O-5 N = 1			0	0.0	0	0.0	0	0.0	1	100.0	0	0.0
O-6 N = 1			0	0.0	0	0.0	0	0.0	0	0.0	1	100.0

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 10
OUTCOMES OF SEXUAL OFFENSE(S) BY SEX AND STATUS OF VICTIM (FY 2018)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 431)												
Victim Sex												
All Females N = 417	77	18.5	10	2.4	86	20.6	105	25.2	63	15.1	76	18.2
All Males N = 13	4	30.8	2	15.4	0	0.0	2	15.4	4	30.8	1	7.7
Females & Males N = 1	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0
Victim Status												
All Military N = 242	46	19.0	9	3.7	38	15.7	66	27.3	38	15.7	45	18.6
All Civilian N = 173	29	16.8	1	0.6	47	27.2	38	22.0	27	15.6	31	17.9
Military & Civilian N = 16	6	37.5	2	12.5	2	12.5	3	18.8	2	12.5	1	6.3
Accused Charged with Contact Offense(s) (N = 143)												
Victim Sex												
All Females N = 122			11	9.0	53	43.4	18	14.8	24	19.7	16	13.1
All Males N = 19			2	10.5	5	26.3	0	0.0	9	47.4	3	15.8
Females & Males N = 2			0	0.0	1	50.0	1	50.0	0	0.0	0	0.0
Victim Status												
All Military N = 105			7	6.7	46	43.8	12	11.4	29	27.6	11	10.5
All Civilian N = 34			5	14.7	12	35.3	5	14.7	4	11.8	8	23.5
Military & Civilian N = 4			1	25.0	1	25.0	2	50.0	0	0.0	0	0.0

TABLE 11
OUTCOMES OF SEXUAL OFFENSE(S) BY RELATIONSHIP BETWEEN ACCUSED AND VICTIM (FY 2018)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 431)												
Spouse or Intimate Partner N = 78	13	16.7	0	0.0	24	30.8	13	16.7	11	14.1	17	21.8
Other Relationship N = 353	68	19.3	12	3.4	63	17.8	94	26.6	56	15.9	60	17.0
Accused Charged with Contact Offense(s) (N = 143)												
Spouse or Intimate Partner N = 4			0	0.0	1	25.0	0	0.0	0	0.0	3	75.0
Other Relationship N = 139			13	9.4	58	41.7	19	13.7	33	23.7	16	11.5

TABLE 12
OUTCOMES OF SEXUAL OFFENSE(S) BY ACCUSED'S LOCATION (FY 2018)

	Convicted of Penetrative Offense		Convicted of Sexual Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 431)												
CONUS N = 332	67	20.2	9	2.7	63	19.0	86	25.9	54	16.3	53	16.0
OCONUS N = 76	13	17.1	2	2.6	17	22.4	15	19.7	13	17.1	16	21.1
Vessel N = 23	1	4.3	1	4.3	7	30.4	6	26.1	0	0.0	8	34.8
Accused Charged with Contact Offense(s) (N = 143)												
CONUS N = 105			12	11.4	46	43.8	10	9.5	23	21.9	14	13.3
OCONUS N = 21			1	4.8	7	33.3	6	28.6	5	23.8	2	9.5
Vessel N = 17			0	0.0	6	35.3	3	17.6	5	29.4	3	17.6

TABLE 13
OUTCOMES OF SEXUAL OFFENSE(S) BY TYPE OF TRIAL FORUM (FY 2018)

	Convicted of Penetrative Offense		Convicted of Sexual Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges	
	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) and Case Referred to General or Special Court-Martial (N = 285)								
Adjudicated by Military Judge N = 147	49	33.3	7	4.8	66	44.9	25	17.0
Adjudicated by Panel of Members N = 138	32	23.2	5	3.6	19	13.8	82	59.4
Accused Charged with Contact Offense(s) and Case Referred to General or Special Court-Martial (N = 77)								
Adjudicated by Military Judge N = 47			7	14.9	37	78.7	3	6.4
Adjudicated by Panel of Members N = 30			5	16.7	11	36.7	14	46.7

TABLE 14
OUTCOMES OF SEXUAL OFFENSE(S) BY TYPE OF TRIAL FORUM FOR CASES IN WHICH THE ACCUSED PLED NOT GUILTY (FY 2018)

	Convicted of Penetrative Offense		Convicted of Sexual Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges	
	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s), Referred to General or Special Court-Martial and Pled Not Guilty to SA Offense (N = 254)								
Adjudicated by Military Judge N = 116	24	20.7	2	1.7	65	56.0	25	21.6
Adjudicated by Panel of Members N = 138	32	23.2	5	3.6	19	13.8	82	59.4
Accused Charged with Contact Offense(s), Referred to General or Special Court-Martial and Pled Not Guilty to SA Offense(N = 71)								
Adjudicated by Military Judge N = 41			1	2.4	37	90.2	3	7.3
Adjudicated by Panel of Members N = 30			5	16.7	11	36.7	14	46.7

TABLE 15
VARIABLES ASSOCIATED WITH ADJUDGED SENTENCE OF CONFINEMENT (FY 2018)

	No Confinement		Confinement	
	n	%	n	%
Military Service of Accused (NS)				
Army	19	15.7	102	84.3
Marine Corps	10	20.8	38	79.2
Navy	13	27.1	35	72.9
Air Force	5	15.6	27	84.4
Coast Guard	2	66.7	1	33.3
Rank of Accused (NS)				
Officer	3	23.1	10	76.9
Enlisted	46	19.2	193	80.8
Sex of Victim (NS)[a]				
All Females	46	19.4	191	80.6
All Males	2	15.4	11	84.6
Females and Males	1	50.0	1	50.0
Status of Victim (NS)[b]				
All Military	34	23.3	112	76.7
All Civilian	13	13.8	81	86.2
Military and Civilian	2	16.7	10	83.3
Relationship Between Accused and Victim (NS)				
Spouse or Intimate Partner	5	13.2	33	86.8
Other Relationship	44	20.6	170	79.4
Conviction Offense ($p < .05$)[c]				
Penetrative Offense	1	1.2	80	98.8
Contact Offense	4	16.0	21	84.0
Non-Sex Offense	44	30.1	102	69.9
Number of Counts Preferred ($p < .05$)	5.63 (sd = 3.60)		7.76 (sd = 7.34)	
Number of Victims (NS)	1.24 (sd = .56)		1.34 (sd = 1.08)	
Type of Court-Martial ($p < .05$)				
General Court-Martial	24	12.3	171	87.7
Special Court-Martial	16	37.2	27	62.8
Summary Court-Martial	9	64.3	5	35.7
Type of Trial Forum ($p < .05$)				
Military Judge	22	13.3	144	86.7
Panel of Military Members	18	25.0	54	75.0
Summary Court-Martial Officer	9	64.3	5	35.7

a The relationship is not statistically significant when the "male and female" category is excluded from the analysis.

b The relationship is not statistically significant when the "military and civilian" category is excluded from the analysis.

c The relationship is not statistically significant when the "penetrative offense" category is excluded from the analysis.

TABLE 16
VARIABLES ASSOCIATED WITH ADJUDGED SENTENCE OF PUNITIVE SEPARATION (FY 2018)

	No Separation		Separation	
	n	%	n	%
Military Service of Accused ($p < .05$)				
Army	31	25.6	90	74.4
Marine Corps	19	39.6	29	60.4
Navy	27	56.3	21	43.8
Air Force	3	9.4	29	90.6
Coast Guard	3	100.0	0	0.0
Rank of Accused (NS)				
Officer	2	15.4	11	84.6
Enlisted	81	33.9	158	66.1
Sex of Victim (NS)[a]				
All Females	77	32.5	160	67.5
All Males	4	30.8	9	69.2
Females and Males	2	100	0	0
Status of Victim ($p < .05$)[b]				
All Military	60	41.1	86	58.9
All Civilian	23	24.5	71	75.5
Military and Civilian	0	0	12	100
Relationship Between Accused and Victim (NS)				
Spouse or Intimate Partner	9	23.7	29	76.3
Other Relationship	74	34.6	140	65.4
Conviction Offense ($p < .05$)				
Penetrative Offense	0	0	81	100
Contact Offense	5	20	20	80
Non-Sex Offense	78	53.4	68	46.6
Number of Counts Preferred ($p < .05$)	6.12 (sd = 4.14)		7.95 (sd = 7.75)	
Number of Victims ($p < .05$)	1.19 (sd = .51)		1.39 (sd = 1.17)	
Type of Court-Martial ($p < .05$)[c]				
General Court-Martial	40	20.5	155	79.5
Special Court-Martial	29	67.4	14	32.6
Summary Court-Martial	14	100.0	0	0.0
Type of Trial Forum ($p < .05$)[d]				
Military Judge	47	28.3	119	71.7
Panel of Military Members	22	30.6	50	69.4
Summary Court-Martial Officer	14	100.0	0	0.0

[a] *The relationship is not statistically significant when the "male and female" category is excluded from the analysis.*

[b] *The relationship is statistically significant when the "military and civilian" category is excluded from the analysis.*

[c] *This relationship is statistically significant when Summary Courts-Martial are excluded from the analysis.*

[d] *This relationship is not statistically significant when Summary Court-Martial officers are excluded from the analysis.*

TABLE 17
VARIABLES ASSOCIATED WITH SENTENCE SEVERITY (FY 2018)

	Average Sentence Severity[a]
Military Service of Accused ($p < .05$)	
Army	8.19
Marine Corps	7.87
Navy	6.23
Air Force	9.07
Coast Guard (1 case ended in confinement)[b]	0.00
Rank of Accused (NS)	
Officer	9.82
Enlisted	7.78
Sex of Victim (NS)	
All Females	7.95
All Males	7.55
Males and Females (1 case ended in confinement)	0.00
Status of Victim (NS)	
All Military	7.50
All Civilian	8.04
Military and Civilian	10.50
Relationship Between Accused and Victim (NS)	
Spouse or Intimate Partner	8.56
Other Relationship	7.76
Type of Conviction Offense ($p < .05$)	
Penetrative Offense	11.30
Contact Offense	7.95
Non-Sex Offense	5.22
Type of Court-Martial ($p < .05$)[c]	
General Court-Martial	8.78
Special Court-Martial	3.56
Type of Trial Forum (NS)[d]	
Military Judge	7.79
Panel of Military Members	8.84

[a] *See Table 22 – Adjudged Sentencing Severity Scale (FY 2018) for a description of the scale.*

[b] *The relationship is statistically significant when the Coast Guard case is excluded from the analysis.*

[c] *Summary courts-martial are excluded from this analysis because 9 of 14 summary courts-martial did not end in confinement or a punitive separation.*

[d] *Summary court-martial officer cases are excluded from this analysis because 9 of the 14 summary courts-martial officer cases did not end in confinement or a punitive separation.*

TABLE 18
LOGISTIC REGRESSION: VARIABLES RELATED TO CONVICTIONS (FY 2018)

	B	SE	Exp(B)
Accused Convicted of a Penetrative Offense[a]			
Military Service of Accused			
Army (reference)			
Marine Corps	.18	.38	1.20
Navy	−.61	.41	.54
Air Force	−.69*	.34	.50
Coast Guard	-	-	-
Accused Rank (Enlisted)	.37	.44	1.45
Victim Was Spouse or Intimate Partner	−.25	.39	.78
Female Victim(s)	−.15	.69	.86
Military Victim(s)	.12	.29	1.13
Number of Victims	.71*	.23	2.03
Number of Charges	.03	.03	1.03
Accused Convicted of At Least One Charge[b]			
Military Service of Accused			
Army (reference)			
Marine Corps	.04	.28	1.04
Navy	.14	.27	1.15
Air Force	−1.06*	.26	.35
Coast Guard	−1.15*	.69	.32
Accused Rank (Enlisted)	−.61	.39	.54
Victim Was Spouse or Intimate Partner	−.24	.33	.79
Female Victim(s)	.43	.44	1.53
Military Victim(s)	−.14	.21	.87
Number of Victims	−.02	.18	.98
Number of Charges	.22*	.03	1.25
Accused Charged with Penetrative Offense	−.25	.23	.78

[a] *Analysis includes cases with a penetrative offense charge. Analysis excludes the Coast Guard because no Coast Guard cases resulted in a conviction for a penetrative offense.*

[b] *Analysis includes cases with a penetrative offense charge or a contact offense charge.*

TABLE 19
LOGISTIC REGRESSION: VARIABLES RELATED TO ACQUITTALS AND DISMISSALS (FY 2018)

	B	SE	Exp(B)
Accused Acquitted of All Charges			
Military Service of Accused			
Army (reference)			
Marine Corps	−.30	.40	.74
Navy	−.27	.33	.77
Air Force	.20	.26	1.23
Coast Guard	−1.63	1.07	.20
Accused Rank (Enlisted)	.44	.37	1.56
Victim Was Spouse or Intimate Partner	−.30	.38	.74
Female Victim(s)	1.22	.65	3.38
Military Victim(s)	.03	.24	1.03
Number of Victims	.40	.26	1.50
Number of Charges	−.32*	.06	.73
Accused Charged with a Penetrative Offense	.46	.30	1.58
Dismissed without Judicial Action			
Military Service of Accused			
Army (reference)			
Marine Corps	.09	.42	1.10
Navy	.31	.36	1.36
Air Force	.52	.29	1.68
Coast Guard	1.73*	.59	5.67
Accused Rank (Enlisted)	−.26	.45	.77
Victim Was Spouse or Intimate Partner	.78*	.35	2.19
Female Victim(s)	.14	.58	1.15
Military Victim(s)	.01	.26	1.01
Number of Victims	.02	.28	1.02
Number of Charges	−.15*	.05	.86
Accused Charged with a Penetrative Offense	.26	.31	1.29

TABLE 20
LOGISITIC REGRESSION: VARIABLES RELATED TO SENTENCE OF CONFINEMENT AND PUNITIVE SEPARATION (FY 2018)

	B	SE	Exp(B)
Adjudged Sentence Included Confinement			
Military Service of Accused			
Army (reference)			
Marine Corps	−.36	.48	.70
Navy	−.11	.46	.90
Air Force	−.71	.65	.49
Coast Guard	−1.51	1.27	.22
Accused Rank (Enlisted)	−1.75	1.00	.17
Victim Was Spouse or Intimate Partner	−.23	.66	.80
Female Victim(s)	−.29	.76	.75
Military Victim(s)	−.76	.45	.47
Number of Victims	−.27	.28	.76
Number of Charges	.11*	.05	1.12
Accused Convicted of a Penetrative Offense	4.15*	1.10	63.11
Accused Convicted of a Contact Offense	1.07	.64	2.92
Adjudged Sentence Included Punitive Separation			
Military Service of Accused[a]			
Army (reference)			
Marine Corps	−.78	.45	.46
Navy	−1.04*	.45	.35
Air Force	.66	.72	1.93
Coast Guard	-	-	-
Accused Rank (Enlisted)	.17	1.04	1.18
Victim Was Spouse or Intimate Partner	−.29	.55	.75
Female Victim(s)	.63	.80	1.88
Military Victim(s)	−1.02*	.42	.36
Number of Victims	−.02	.31	.98
Number of Charges	.07*	.04	1.08
Accused Convicted of a Non-Sex Offense[b]	−3.32*	.53	.04

[a] *Coast Guard cases are excluded from this analysis because no Coast Guard cases with a conviction resulted in punitive separation.*

[b] *The reference category is accused convicted of penetrative offense or a contact offense. These two conviction offense categories (penetrative and contact) were combined because all penetrative conviction cases ended in punitive separation (see Table 16 – Variables Associated with Adjudged Sentence of Punitive Separation (FY 2018) above).*

TABLE 21
OLS REGRESSION: VARIABLES RELATED TO SENTENCE SEVERITY (FY 2018)

	B	Beta	T-value
Military Service of Accused			
Army (reference)			
Marine Corps	.21	.02	.34
Navy	−.51	−.04	−.79
Air Force	.23	.02	.34
Coast Guard	−4.35	−.07	−1.35
Accused Rank (Enlisted)	−.55	−.03	−.53
Victim Was Spouse or Intimate Partner	−.01	.00	−.01
Female Victim(s)	.40	.02	.40
Military Victim(s)	−.67	−.08	−1.32
Number of Victims	−.01	−.00	−.05
Number of Charges	.15*	.24	3.94
Accused Convicted of a Penetrative Offense	6.36*	.71	12.62
Accused Convicted of a Contact Offense	2.75*	.19	3.44

TABLE 22
ADJUDGED SENTENCING SEVERITY SCALE (FY 2018)

Sentence	n	%
Confinement up to and including 2 months	22	10.6
Confinement greater than 2 months and up to 5 months	14	6.8
Confinement greater than 5 months and up to 8 months	1	.5
Confinement 9 months to 12 months	1	.5
Confinement 13 months to 18 months OR punitive separation	4	1.9
Punitive separation and confinement up to and including 2 months	17	8.2
Punitive separation and confinement greater than 2 months and up to 5 months	13	6.3
Punitive separation and confinement greater than 5 months and up to 8 months	16	7.7
Punitive separation and confinement 9 months to 12 months	14	6.8
Punitive separation and confinement 13 months to 18 months	12	5.8
Punitive separation and confinement 19 months to 24 months	14	6.8
Punitive separation and confinement 25 months to 36 months	29	14.0
Punitive separation and confinement 37 months to 60 months	17	8.2
Punitive separation and confinement 60 months to 120 months	22	10.6
Punitive separation and confinement greater than 120 months	11	5.3

The adjudged sentencing severity scale was developed by Patricia D. Breen and Brian D. Johnson ("Military Justice: Case Processing and Sentencing Decisions in America's 'Other' Criminal Courts," *Justice Quarterly* 35.4 [2018]: 639–69) and combines the confinement sentence with punitive separations. The scale was developed through consultation with judge advocates. For the purposes of the current analysis, only cases that ended in a conviction were analyzed

and cases that did not result in a sanction of confinement or punitive separation are not included. The scale is used in place of a variable that simply measures the number of confinement months because the distribution of confinement months is not normal. The distribution of values is concentrated at the lower end of the scale. In other words, a large number of cases ended in shorter confinement sentences than longer sentences. Non-normal distributions may present problems when OLS regression models are estimated.

TABLE 23
CASE CHARACTERISTICS (FY 2017)

	n	%
FY 2017 Total Cases	691	
Military Service of the Accused		
Army	288	41.7
Marine Corps	84	12.2
Navy	130	18.8
Air Force	169	24.5
Coast Guard	20	2.9
Rank of Accused		
Enlisted	636	92.0
Officer	55	8.0
Pay Grade of Accused		
Enlisted (N = 636)		
E-1	39	6.1
E-2	37	5.8
E-3	131	20.6
E-4	168	26.4
E-5	116	18.2
E-6	79	12.4
E-7	52	8.2
E-8	14	2.2
E-9	0	0.0
Officer (N = 55)[a]		
Cadet/MIDN	11	20.0
W-1	1	1.8
W-2	4	7.3
W-3	2	3.6
W-4	1	1.8
W-5	0	0.0
O-1	1	1.8
O-2	9	16.4
O-3	16	29.1

O-4	2	3.6
O-5	6	10.9
O-6	2	3.6
Sex of Accused		
Male	686	99.3
Female	5	0.7
Location of Unit to Which Accused Assigned When Charges Preferred		
CONUS	503	72.8
OCONUS	130	18.8
Vessel	58	8.4
Sex of Victim(s)		
All Female	644	93.2
All Male	42	6.1
Female and Male	5	0.7
Status of Victim(s)		
All Military	415	60.1
All Civilian	247	35.7
Military and Civilian	29	4.2
Accused Charged with Penetrative Offense(s)		
Yes	516	74.7
No	175	25.3
Accused Convicted of Penetrative Offense(s) (N = 516)		
Yes	103	20.0
No	413	80.0
Accused Charged with Contact Offense(s)		
Yes	175	25.3
No	516	74.7
Accused Convicted of Contact Offense(s) (N = 175)		
Yes	23	13.1
No	152	86.9

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 24
CASE DISPOSITIONS AND CASE OUTCOMES (FY 2017)

	n	%
FY 2017 Total Cases	691	
Type of Court-Martial (N = 441)		
General Court-Martial	340	77.1
Special Court-Martial	79	17.9
Summary Court-Martial	22	5.0
Type of Trial Forum (N = 441)		
Military Judge	242	54.9
Panel of Military Members	177	40.1
Summary Court-Martial Officer	22	5.0
Article 32 Hearing Held		
Yes	422	61.1
Waived	117	16.9
Not Applicable	152	22.0
Accused Charged with Penetrative Offense(s) (N = 516)		
Convicted of Penetrative Offense	103	20.0
Convicted of Sexual Contact Offense	17	3.3
Convicted of Non-Sex Offense	105	20.3
Acquitted of All Charges	100	19.4
Alternative Disposition	105	20.3
Dismissed Without Judicial Action	86	16.7
(After Article 32 Hearing)	68	79.1
Accused Charged with Sexual Contact Offense(s) (N = 175)		
Convicted of Sexual Contact Offense	22	12.6
Convicted of Non-Sex Offense	72	41.1
Acquitted of All Charges	22	12.6
Alternative Disposition	46	26.3
Dismissed Without Judicial Action	13	7.4
(After Article 32 Hearing)	7	53.8
Outcomes for Cases Referred to Trial		
Accused Charged with Penetrative Offense(s) (N = 325)		
Convicted of Penetrative Offense	103	31.7
Convicted of Sexual Contact Offense	17	5.2
Convicted of Non-Sex Offense	105	32.3
Acquitted of All Charges	100	30.8
Accused Charged with Sexual Contact Offense(s) (N = 116)		
Convicted of Sexual Contact Offense	22	19.0
Convicted of Non-Sex Offense	72	62.1
Acquitted of All Charges	22	19.0

Outcomes for Contested Trials		
Accused Charged with Penetrative Offense(s) (N = 284)		
Convicted of Penetrative Offense	72	25.4
Convicted of Sexual Contact Offense	7	2.5
Convicted of Non-Sex Offense	105	37.0
Acquitted of All Charges	100	35.2
Accused Charged with Sexual Contact Offense(s) (N = 105)		
Convicted of Sexual Contact Offense	11	10.5
Convicted of Non-Sex Offense	72	68.6
Acquitted of All Charges	22	21.0

TABLE 25
ARTICLE 32 WAIVER (FY 2017)

	n	%
Cases in Which Art. 32 Applicable		
Art. 32 Held	422	78.3
Art. 32 Waived	117	21.7
Waived Without Pretrial Agreement	66	56.4
Waived When Involving Penetrative Offense	98	83.8
Waived When Involving Contact Offense	19	16.2
Conviction Rate When Art. 32 Waived – Non SA-Offense	41	35.0
Conviction Rate When Art. 32 Waived – Contact Offense	8	6.8
Conviction Rate When Art. 32 Waived – Penetrative Offense	24	20.5

TABLE 26
TYPE OF TRIAL BY OFFENSE(S), MILITARY SERVICE, AND RANK OF ACCUSED (FY 2017)

	General Court-Martial		Special Court-Martial		Summary Court-Martial	
	n	%	n	%	n	%
Most Serious Type of Offense(s) Charged						
Penetrative Offense	300	92.3	15	4.6	10	3.1
Contact Offense	40	34.5	64	55.2	12	10.3
Military Service						
Army	168	89.8	11	5.9	8	4.3
Marine Corps	34	54.0	23	36.5	6	9.5
Navy	55	61.8	30	33.7	4	4.5
Air Force	76	88.4	10	11.6	0	0.0
Coast Guard	7	43.8	5	31.3	4	25.0
Rank of Accused						
Officer	36	100.0	0	0.0	0	0.0
Enlisted	304	75.1	79	19.5	22	5.4

TABLE 27
TYPE OF MOST SERIOUS SEX OFFENSE(S) CHARGED BY PAY GRADE (FY 2017)

	Penetrative		Contact	
	n	%	n	%
Enlisted				
E-1	27	69.2	12	30.8
E-2	26	70.3	11	29.7
E-3	99	75.6	32	24.4
E-4	139	82.7	29	17.3
E-5	89	76.7	27	23.3
E-6	49	62.0	30	38.0
E-7	29	55.8	23	44.2
E-8	13	92.9	1	7.1
E-9	0	0.0	0	0.0
Officer				
Cadet/MIDN	9	81.8	2	18.2
W-1	1	100.0	0	0.0
W-2	4	100.0	0	0.0
W-3	2	100.0	0	0.0
W-4	1	100.0	0	0.0
W-5	0	0.0	0	0.0
O-1	1	100.0	0	0.0
O-2	7	77.8	2	22.2
O-3	12	75.0	4	25.0
O-4	1	50.0	1	50.0
O-5	5	83.3	1	16.7
O-6	2	100.0	0	0.0

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 28
OUTCOMES OF SEXUAL OFFENSE(S) BY MILITARY SERVICE OF ACCUSED (FY 2017)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 516)												
Army N = 232	57	24.6	10	4.3	47	20.3	34	14.7	59	25.4	25	10.8
Marine Corps N = 55	11	20.0	2	3.6	23	41.8	9	16.4	4	7.3	6	10.9
Navy N = 77	12	15.6	5	6.5	18	23.4	19	24.7	10	13.0	13	16.9
Air Force N = 141	21	14.9	0	0.0	12	8.5	37	26.2	30	21.3	41	29.1
Coast Guard N = 11	2	18.2	0	0.0	5	45.5	1	9.1	2	18.2	1	9.1
Accused Charged with Contact Offense(s) (N = 175)												
Army N = 56			8	14.3	26	46.4	5	8.9	13	23.2	4	7.1
Marine Corps N = 29			5	17.2	8	27.6	5	17.2	6	20.7	5	17.2
Navy N = 53			4	7.5	27	50.9	4	7.5	17	32.1	1	1.9
Air Force N = 28			3	10.7	7	25.0	6	21.4	9	32.1	3	10.7
Coast Guard N = 9			2	22.2	4	44.4	2	22.2	1	11.1	0	0.0

TABLE 29
OUTCOMES OF SEXUAL OFFENSE(S) BY RANK OF ACCUSED (FY 2017)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 516)												
Officer N = 45	10	22.2	2	4.4	8	17.8	10	22.2	5	11.1	10	22.2
Enlisted N = 471	93	19.7	15	3.2	97	20.6	90	19.1	100	21.2	76	16.1
Accused Charged with Contact Offense(s) (N = 175)												
Officer N = 10			0	0.0	5	50.0	1	10.0	4	40.0	0	0.0
Enlisted N = 165			22	13.3	67	40.6	21	12.7	42	25.5	13	7.9

TABLE 30
OUTCOMES OF CHARGED PENETRATIVE OFFENSE(S) BY PAY GRADE OF ACCUSED (FY 2017)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Enlisted (N = 471)												
E-1 N = 27	1	3.7	0	0.0	7	25.9	4	14.8	13	48.1	2	7.4
E-2 N = 26	8	30.8	2	7.7	7	26.9	4	15.4	3	11.5	2	7.7
E-3 N = 99	19	19.2	4	4.0	16	16.2	16	16.2	26	26.3	18	18.2
E-4 N = 139	32	23.0	0	0.0	26	18.7	23	16.5	39	28.1	19	13.7
E-5 N = 89	11	12.4	6	6.7	18	20.2	24	27.0	13	14.6	17	19.1
E-6 N = 49	12	24.5	1	2.0	8	16.3	11	22.4	6	12.2	11	22.4
E-7 N = 29	7	24.1	1	3.4	11	37.9	5	17.2	0	0.0	5	17.2
E-8 N = 13	3	23.1	1	7.7	4	30.8	3	23.1	0	0.0	2	15.4
E-9 N = 0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Officer (N = 45)[a]												
Cadet/MIDN N = 9	3	33.3	0	0.0	0	0.0	2	22.2	0	0.0	4	44.4
W-1 N = 1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	100.0
W-2 N = 4	0	0.0	0	0.0	3	75.0	0	0.0	1	25.0	0	0.0
W-3 N = 2	0	0.0	0	0.0	1	50.0	1	50.0	0	0.0	0	0.0
W-4 N = 1	0	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
W-5 N = 0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-1 N = 1	0	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
O-2 N = 7	3	42.9	0	0.0	1	14.3	1	14.3	0	0.0	2	28.6
O-3 N = 12	2	16.7	2	16.7	2	16.7	3	25.0	2	16.7	1	8.3
O-4 N = 1	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-5 N = 5	1	20.0	0	0.0	0	0.0	1	20.0	2	40.0	1	20.0
O-6 N = 2	0	0.0	0	0.0	1	50.0	0	0.0	0	0.0	1	50.0

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 31
OUTCOMES OF CHARGED CONTACT OFFENSE(S) BY PAY GRADE OF ACCUSED (FY 2017)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Enlisted (N = 165)												
E-1 N = 12			4	33.3	3	25.0	0	0.0	5	41.7	0	0.0
E-2 N = 11			0	0.0	3	27.3	1	9.1	6	54.5	1	9.1
E-3 N = 32			6	18.8	10	31.3	5	15.6	8	25.0	3	9.4
E-4 N = 29			5	17.2	12	41.4	4	13.8	8	27.6	0	0.0
E-5 N = 27			2	7.4	10	37.0	3	11.1	8	29.6	4	14.8
E-6 N = 30			3	10.0	18	60.0	4	13.3	3	10.0	2	6.7
E-7 N = 23			2	8.7	10	43.5	4	17.4	4	17.4	3	13.0
E-8 N = 1			0	0.0	1	100.0	0	0.0	0	0.0	0	0.0
E-9 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Officer (N = 10)[a]												
Cadet/MIDN N = 2			0	0.0	1	50.0	0	0.0	1	50.0	0	0.0
W-1 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-2 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-3 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-4 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-5 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-1 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-2 N = 2			0	0.0	0	0.0	0	0.0	2	100.0	0	0.0
O-3 N = 4			0	0.0	2	50.0	1	25.0	1	25.0	0	0.0
O-4 N = 1			0	0.0	1	100.0	0	0.0	0	0.0	0	0.0
O-5 N = 1			0	0.0	1	100.0	0	0.0	0	0.0	0	0.0
O-6 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 32
OUTCOMES OF SEXUAL OFFENSE(S) BY SEX AND STATUS OF VICTIM (FY 2017)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 516)												
Victim Sex												
All Females N = 490	96	19.6	16	3.3	100	20.4	96	19.6	99	20.2	83	16.9
All Males N = 22	4	18.2	1	4.5	4	18.2	4	18.2	6	27.3	3	13.6
Females & Males N = 4	3	75.0	0	0.0	1	25.0	0	0.0	0	0.0	0	0.0
Victim Status												
All Military N = 283	49	17.3	13	4.6	50	17.7	59	20.8	62	21.9	50	17.7
All Civilian N = 209	45	21.5	1	0.5	54	25.8	38	18.2	38	18.2	33	15.8
Military & Civilian N = 24	9	37.5	3	12.5	1	4.2	3	12.5	5	20.8	3	12.5
Accused Charged with Contact Offense(s) (N = 175)												
Victim Sex												
All Females N = 154			20	13.0	66	42.9	21	13.6	36	23.4	11	7.1
All Males N = 20			2	10.0	6	30.0	1	5.0	9	45.0	2	10.0
Females & Males N = 1			0	0.0	0	0.0	0	0.0	1	100.0	0	0.0
Victim Status												
All Military N = 132			19	14.4	53	40.2	16	12.1	35	26.5	9	6.8
All Civilian N = 38			2	5.3	17	44.7	6	15.8	9	23.7	4	10.5
Military & Civilian N = 5			1	20.0	2	40.0	0	0.0	2	40.0	0	0.0

TABLE 33
OUTCOMES OF SEXUAL OFFENSE(S) BY RELATIONSHIP BETWEEN ACCUSED AND VICTIM (FY 2017)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 516)												
Spouse or Intimate Partner N = 118	23	19.5	0	0.0	41	34.7	18	15.3	15	12.7	21	17.8
Other Relationship N = 398	80	20.1	17	4.3	64	16.1	82	20.6	90	22.6	65	16.3
Accused Charged with Contact Offense(s) (N = 175)												
Spouse or Intimate Partner N = 3			0	0.0	2	66.7	0	0.0	0	0.0	1	33.3
Other Relationship N = 172			22	12.8	70	40.7	22	12.8	46	26.7	12	7.0

TABLE 34
OUTCOMES OF SEXUAL OFFENSE(S) BY ACCUSED'S LOCATION (FY 2017)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 516)												
CONUS N = 376	79	21.0	12	3.2	70	18.6	64	17.0	81	21.5	70	18.6
OCONUS N = 107	20	18.7	3	2.8	26	24.3	27	25.2	20	18.7	11	10.3
Vessel N = 33	4	12.1	2	6.1	9	27.3	9	27.3	4	12.1	5	15.2
Accused Charged with Contact Offense(s) (N = 175)												
CONUS N = 127			14	11.0	47	37.0	18	14.2	38	29.9	10	7.9
OCONUS N = 23			6	26.1	8	34.8	3	13.0	4	17.4	2	8.7
Vessel N = 25			2	8.0	17	68.0	1	4.0	4	16.0	1	4.0

TABLE 35
OUTCOMES OF SEXUAL OFFENSE(S) BY TYPE OF TRIAL FORUM (FY 2017)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges	
	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) and Case Referred to General or Special Court-Martial (N = 315)								
Adjudicated by Military Judge N = 175	56	32.0	11	6.3	72	41.1	36	20.6
Adjudicated by Panel of Members N = 140	47	33.6	4	2.9	25	17.9	64	45.7
Accused Charged with Contact Offense(s) and Case Referred to General or Special Court-Martial (N = 104)								
Adjudicated by Military Judge N = 67			12	17.9	53	79.1	2	3.0
Adjudicated by Panel of Members N = 37			8	21.6	10	27.0	19	51.4

TABLE 36
OUTCOMES OF SEXUAL OFFENSE(S) BY TYPE OF TRIAL FORUM FOR CASES IN WHICH THE ACCUSED PLED NOT GUILTY (FY 2017)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges	
	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s), Referred to General or Special Court-Martial and Pled Not Guilty to SA Offense (N = 276)								
Adjudicated by Military Judge N = 137	26	19.0	3	2.2	72	52.6	36	26.3
Adjudicated by Panel of Members N = 139	46	33.1	4	2.9	25	18.0	64	46.0
Accused Charged with Contact Offense(s), Referred to General or Special Court-Martial and Pled Not Guilty to SA Offense (N = 94)								
Adjudicated by Military Judge N = 57			2	3.5	53	93.0	2	3.5
Adjudicated by Panel of Members N = 37			8	21.6	10	27.0	19	51.4

TABLE 37
VARIABLES ASSOCIATED WITH ADJUDGED SENTENCE OF CONFINEMENT (FY 2017)

	No Confinement		Confinement	
	n	%	n	%
Military Service of Accused (NS)				
Army	32	21.6	116	78.4
Marine Corps	7	14.3	42	85.7
Navy	12	18.2	54	81.8
Air Force	9	20.9	34	79.1
Coast Guard	3	23.1	10	76.9
Rank of Accused (NS)				
Officer	7	28.0	18	72.0
Enlisted	56	19.0	238	81.0
Sex of Victim ($p < .05$)[a]				
All Females	56	18.8	242	81.2
All Males	7	41.2	10	58.8
Females and Males	0	0.0	4	100
Status of Victim ($p < .05$)[b]				
All Military	47	25.5	137	74.5
All Civilian	16	13.4	103	86.6
Military and Civilian	0	0.0	16	100
Relationship Between Accused and Victim ($p < .05$)				
Spouse or Intimate Partner	7	10.6	59	89.4
Other Relationship	56	22.1	197	77.9
Conviction Offense ($p < .05$)				
Penetrative Offense	5	4.9	98	95.1
Contact Offense	4	10.3	35	89.7
Non-Sex Offense	54	30.5	123	69.5
Number of Counts Preferred ($p < .05$)	6.06 (sd = 3.78)		7.66 (sd = 6.12)	
Number of Victims (NS)	1.11 (sd = .36)		1.36 (sd = .87)	
Type of Court-Martial ($p < .05$)				
General Court-Martial	37	15.8	197	84.2
Special Court-Martial	9	14.1	55	85.9
Summary Court-Martial	17	81.0	4	19.0
Type of Trial Forum ($p < .05$)				
Military Judge	16	7.8	188	92.2
Panel of Military Members	30	31.9	64	68.1
Summary Court-Martial Officer	17	81.0	4	19.0

[a] *The relationship remains statistically significant when the "male and female" category is excluded from the analysis.*

[b] *The relationship remains statistically significant when the "military and civilian" category is excluded from the analysis.*

TABLE 38
VARIABLES ASSOCIATED WITH ADJUDGED SENTENCE OF PUNITIVE SEPARATION (FY 2017)

	No Separation		Separation	
	n	%	n	%
Military Service of Accused ($p < .05$)				
Army	45	30.4	103	69.6
Marine Corps	14	28.6	35	71.4
Navy	29	43.9	37	56.1
Air Force	10	23.3	33	76.7
Coast Guard	9	69.2	4	30.8
Rank of Accused (NS)				
Officer	5	20.0	20	80.0
Enlisted	102	34.7	192	65.3
Sex of Victim ($p < .05$)[a]				
All Females	95	31.9	203	68.1
All Males	11	64.7	6	35.3
Females and Males	1	25.0	3	75.0
Status of Victim ($p < .05$)[b]				
All Military	72	39.1	112	60.9
All Civilian	34	28.6	85	71.4
Military and Civilian	1	6.3	15	93.8
Relationship Between Accused and Victim (NS)				
Spouse or Intimate Partner	17	25.8	49	74.2
Other Relationship	90	35.6	163	64.4
Conviction Offense ($p < .05$)				
Penetrative Offense	0	0.0	103	100.0
Contact Offense	8	20.5	31	79.5
Non-Sex Offense	99	55.9	78	44.1
Number of Counts Preferred ($p < .05$)	6.45 (sd =5.08)		7.80 (sd = 6.04)	
Number of Victims ($p < .05$)	1.13 (sd = .46)		1.40 (sd = .92)	
Type of Court-Martial ($p < .05$)[c]				
General Court-Martial	55	23.5	179	76.5
Special Court-Martial	31	48.4	33	51.6
Summary Court-Martial	21	100.0	0	0.0
Type of Trial Forum ($p < .05$)[d]				
Military Judge	57	27.9	147	72.1
Panel of Military Members	29	30.9	65	69.1
Summary Court-Martial Officer	21	100.0	0	0.0

[a] *The relationship remains statistically significant when the "females and males" category is excluded from the analysis.*

[b] *The relationship is not statistically significant when the "military and civilian" category is excluded from the analysis.*

[c] *This relationship remains statistically significant when summary courts-martial are excluded from the analysis.*

[d] *This relationship is not statistically significant when summary court-martial officers are excluded from the analysis.*

TABLE 39
VARIABLES ASSOCIATED WITH SENTENCE SEVERITY (FY 2017)

	Average Sentence Severity [a]
Military Service of Accused ($p < .05$)	
Army	7.85
Marine Corps	8.38
Navy	6.31
Air Force	9.42
Coast Guard	3.90
Rank of Accused (NS)	
Officer	7.78
Enlisted	7.65
Sex of Victim (NS)	
All Females	7.68
All Males	6.70
Females and Males (all 4 cases ended in confinement)	9.00
Status of Victim ($p < .05$)	
All Military	6.98
All Civilian	8.10
Military and Civilian	10.88
Relationship Between Accused and Victim (NS)	
Spouse or Intimate Partner	8.61
Other Relationship	7.38
Type of Conviction Offense ($p < .05$)	
Penetrative Offense	10.91
Contact Offense	7.44
Non-Sex Offense	5.15
Type of Court-Martial ($p < .05$)[b]	
General Court-Martial	8.56
Special Court-Martial	4.30
Summary Court-Martial	0.0
Type of Trial Forum ($p < .05$)[c]	
Military Judge	7.39
Panel of Military Members	8.38
Summary Court-Martial Officer	0.0

a See Table 44 – Adjudged Sentencing Severity Scale (FY 2017) for a description of the scale.

b The relationship remains statistically significant when the summary courts-martial cases are excluded from the analysis.

c The relationship is not statistically significant when the summary court-martial officer cases are excluded from the analysis.

TABLE 40
LOGISTIC REGRESSION: VARIABLES RELATED TO CONVICTIONS (FY 2017)

	B	SE	Exp(B)
Accused Convicted of a Penetrative Offense[a]			
Military Service of Accused			
Army (reference)			
Marine Corps	−.24	.38	.79
Navy	−.64	.37	.53
Air Force	−.73*	.30	.48
Coast Guard	−.80	.86	.45
Accused Rank (Enlisted)	.20	.40	1.22
Victim Was Spouse or Intimate Partner	−.30	.33	.74
Female Victim(s)	.04	.52	1.04
Military Victim(s)	−.37	.25	.70
Number of Victims	.76*	.20	2.14
Number of Charges	.01	.03	1.01
Accused Convicted of At Least One Charge[b]			
Military Service of Accused			
Army (reference)			
Marine Corps	.12	.27	1.13
Navy	−.03	.23	.97
Air Force	−.93*	.23	.39
Coast Guard	.60	.50	1.81
Accused Rank (Enlisted)	−.15	.31	.87
Victim Was Spouse or Intimate Partner	.24	.26	1.27
Female Victim(s)	.16	.34	1.17
Military Victim(s)	−.06	.19	.94
Number of Victims	−.11	.15	.90
Number of Charges	.16*	.03	1.17
Accused Charged with Penetrative Offense	−.38	.20	.68

a Analysis includes cases with a penetrative offense charge.

b Analysis includes cases with a penetrative offense charge or a contact offense charge.

TABLE 41
LOGISTIC REGRESSION: VARIABLES RELATED TO ACQUITTALS AND DISMISSALS (FY 2017)

	B	SE	Exp(B)
Accused Acquitted of All Charges			
Military Service of Accused			
Army (reference)			
Marine Corps	.43	.35	1.54
Navy	.39	.30	1.48
Air Force	.63*	.26	1.87
Coast Guard	.27	.66	1.31
Accused Rank (Enlisted)	.20	.37	1.22
Victim Was Spouse or Intimate Partner	−.15	.32	.86
Female Victim(s)	.40	.50	1.50
Military Victim(s)	.01	.23	1.01
Number of Victims	−.26	.26	.77
Number of Charges	−.11*	.04	.90
Accused Charged with a Penetrative Offense	.51	.27	1.67
Dismissed without Judicial Action			
Military Service of Accused			
Army (reference)			
Marine Corps	.61	.39	1.84
Navy	.17	.35	1.18
Air Force	.91*	.28	2.49
Coast Guard	−.59	1.06	.56
Accused Rank (Enlisted)	.51	.39	1.66
Victim Was Spouse or Intimate Partner	.41	.32	1.50
Female Victim(s)	.16	.52	1.17
Military Victim(s)	.14	.25	1.16
Number of Victims	.22	.21	1.24
Number of Charges	−.12*	.04	.89
Accused Charged with a Penetrative Offense	.70*	.33	2.21

TABLE 42
LOGISITIC REGRESSION: VARIABLES RELATED TO SENTENCE OF CONFINEMENT AND PUNITIVE SEPARATION (FY 2017)

	B	SE	Exp(B)
Adjudged Sentence Included Confinement[a]			
Military Service of Accused			
Army (reference)			
Marine Corps	.87	.51	2.39
Navy	.79	.43	2.20
Air Force	−.06	.50	.94
Coast Guard	1.16	.79	3.19
Accused Rank (Enlisted)	−.87	.56	.42
Victim Was Spouse or Intimate Partner	.68	.52	1.97
Female Victim(s)	1.01	.63	2.73
Military Victim(s)	−.73*	.38	.48
Number of Victims	.44	.37	1.55
Number of Charges	.07	.04	1.07
Accused Convicted of a Penetrative Offense	2.55*	.52	12.85
Accused Convicted of a Contact Offense	1.87*	.59	6.45
Adjudged Sentence Included Punitive Separation[a]			
Military Service of Accused			
Army (reference)			
Marine Corps	.74	.45	2.09
Navy	−.02	.40	.98
Air Force	.43	.50	1.53
Coast Guard	−1.50	.92	.22
Accused Rank (Enlisted)	1.03	.66	2.79
Victim Was Spouse or Intimate Partner	.31	.43	1.37
Female Victim(s)	2.24*	.84	9.39
Military Victim(s)	−.47	.34	.63
Number of Victims	.59	.35	1.80
Number of Charges	.08*	.03	1.08
Accused Convicted of a Non-Sex Offense[b]	−3.54*	.46	.03

a This model includes only cases that resulted in a conviction for a contact offense, penetrative offense, or a non–sexual assault offense.

b The reference category is accused convicted of penetrative offense or a contact offense. These two conviction offense categories (penetrative and contact) were combined because all penetrative conviction cases ended in punitive separation (see Table 38 – Variables Associated with Adjudged Sentence of Punitive Separation (FY 2017)).

TABLE 43
OLS REGRESSION: VARIABLES RELATED TO SENTENCE SEVERITY (FY 2017)

	B	Beta	T-value
Military Service of Accused			
Army (reference)			
Marine Corps	1.71*	.64	2.67
Navy	.32	.03	.55
Air Force	1.21	.09	1.81
Coast Guard	−1.71	−.07	−1.45
Accused Rank (Enlisted)	.15	.01	.19
Victim Was Spouse or Intimate Partner	.67	.06	1.11
Female Victim(s)	1.15	.06	1.13
Military Victim(s)	−.75	−.08	−1.60
Number of Victims	.15	.03	.50
Number of Charges	.15*	.20	3.48
Accused Convicted of a Penetrative Offense	6.16*	.66	12.30
Accused Convicted of a Contact Offense	3.31*	.25	4.75

TABLE 44
ADJUDGED SENTENCING SEVERITY SCALE (FY 2017)

Sentence	n	%
Confinement up to and including 2 months	28	10.4
Confinement greater than 2 months and up to 5 months	20	7.4
Confinement greater than 5 months and up to 8 months	9	3.3
Confinement 9 months to 12 months	0	0.0
Confinement 13 months to 18 months OR punitive separation	13	4.8
Punitive separation and confinement up to and including 2 months	12	4.5
Punitive separation and confinement greater than 2 months and up to 5 months	16	5.9
Punitive separation and confinement greater than 5 months and up to 8 months	26	9.7
Punitive separation and confinement 9 months to 12 months	17	6.3
Punitive separation and confinement 13 months to 18 months	21	7.8
Punitive separation and confinement 19 months to 24 months	15	5.6
Punitive separation and confinement 25 months to 36 months	19	7.1
Punitive separation and confinement 37 months to 60 months	19	7.1
Punitive separation and confinement 60 months to 120 months	35	13
Punitive separation and confinement greater than 120 months	19	7.1

The adjudged sentencing severity scale was developed by Breen and Johnson, "Military Justice" (see Table 22), and combines the confinement sentence with punitive separations. The scale was developed through consultation with judge advocates. For the purposes of the current analysis, only cases that ended in a conviction were analyzed and cases that did not result in a sanction of confinement or punitive separation are not included. The scale is used in place of a variable that simply measures the number of confinement months because the distribution of confinement months is not normal. The distribution of values is concentrated at the lower end of the scale. In other words, a large number of cases ended in shorter confinement sentences than longer sentences. Non-normal distributions may present problems when OLS regression models are estimated.

TABLE 45
CASE CHARACTERISTICS (FY 2016)

	n	%
FY 2016 Total Cases	769	
Military Service of the Accused		
Army	278	36.2
Marine Corps	123	16.0
Navy	126	16.4
Air Force	219	28.5
Coast Guard	23	3.0
Rank of Accused		
Enlisted	724	94.1
Officer	45	5.9
Pay Grade of Accused		
Enlisted (N = 724)		
E-1	22	3.0
E-2	48	6.6
E-3	155	21.4
E-4	196	27.1
E-5	140	19.3
E-6	90	12.4
E-7	50	6.9
E-8	17	2.3
E-9	6	0.8
Officer (N = 45)[a]		
Cadet/MIDN	5	11.1
W-1	1	2.2
W-2	6	13.3
W-3	0	0.0
W-4	0	0.0
W-5	0	0.0
O-1	1	2.2
O-2	2	4.4
O-3	17	37.8
O-4	6	13.3
O-5	4	8.9
O-6	3	6.7

Sex of Accused		
Male	765	99.5
Female	4	0.5
Location of Unit to Which Accused Assigned When Charges Preferred		
CONUS	543	70.6
OCONUS	174	22.6
Vessel	52	6.8
Sex of Victim(s)		
All Female	722	93.9
All Male	44	5.7
Female and Male	3	0.4
Status of Victim(s)		
All Military	470	61.1
All Civilian	268	34.9
Military and Civilian	31	4.0
Accused Charged with Penetrative Offense(s)		
Yes	580	75.4
No	189	24.6
Accused Convicted of Penetrative Offense(s) (N = 580)		
Yes	106	18.3
No	474	81.7
Accused Charged with Contact Offense(s)		
Yes	189	24.6
No	580	75.4
Accused Convicted of Contact Offense(s) (N = 189)		
Yes	29	15.3
No	160	84.7

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 46
CASE DISPOSITIONS AND CASE OUTCOMES (FY 2016)

	n	%
FY 2016 Total Cases	769	
Type of Court-Martial (N = 494)		
General Court-Martial	401	81.2
Special Court-Martial	65	13.2
Summary Court-Martial	28	5.7
Type of Trial Forum (N = 494)		
Military Judge	249	50.4
Panel of Military Members	217	43.9
Summary Court-Martial Officer	28	5.7
Article 32 Hearing Held		
Yes	497	64.6
Waived	133	17.3
Not Applicable	139	18.1
Accused Charged with Penetrative Offense(s) (N = 580)		
Convicted of Penetrative Offense	106	18.3
Convicted of Sexual Contact Offense	24	4.1
Convicted of Non-Sex Offense	105	18.1
Acquitted of All Charges	142	24.5
Alternative Disposition	98	16.9
Dismissed Without Judicial Action	105	18.1
(After Article 32 Hearing)	76	72.4
Accused Charged with Sexual Contact Offense(s) (N = 189)		
Convicted of Sexual Contact Offense	29	15.3
Convicted of Non-Sex Offense	72	38.1
Acquitted of All Charges	16	8.5
Alternative Disposition	49	25.9
Dismissed Without Judicial Action	23	12.2
(After Article 32 Hearing)	7	30.4
Outcomes for Cases Referred to Trial		
Accused Charged with Penetrative Offense(s) (N = 377)		
Convicted of Penetrative Offense	106	28.1
Convicted of Sexual Contact Offense	24	6.4
Convicted of Non-Sex Offense	105	27.9
Acquitted of All Charges	142	37.7

Accused Charged with Sexual Contact Offense(s) (N = 117)		
Convicted of Sexual Contact Offense	29	24.8
Convicted of Non-Sex Offense	72	61.5
Acquitted of All Charges	16	13.7
Outcomes for Contested Trials		
Accused Charged with Penetrative Offense(s) (N = 336)		
Convicted of Penetrative Offense	80	23.8
Convicted of Sexual Contact Offense	9	2.7
Convicted of Non-Sex Offense	105	31.3
Acquitted of All Charges	142	42.3
Accused Charged with Sexual Contact Offense(s) (N = 106)		
Convicted of Sexual Contact Offense	18	17.0
Convicted of Non-Sex Offense	72	67.9
Acquitted of All Charges	16	15.1

TABLE 47
ARTICLE 32 WAIVER (FY 2016)

	n	%
Cases In Which Art. 32 Applicable		
Art. 32 Held	497	78.9
Art. 32 Waived	133	21.1
Waived Without Pretrial Agreement	92	69.2
Waived When Involving Penetrative Offense	112	84.2
Waived When Involving Contact Offense	21	15.8
Conviction Rate When Art. 32 Waived – Non SA-Offense	26	19.5
Conviction Rate When Art. 32 Waived – Contact Offense	15	11.3
Conviction Rate When Art. 32 Waived – Penetrative Offense	30	22.6

TABLE 48
TYPE OF TRIAL BY OFFENSE(S), MILITARY SERVICE, AND RANK OF ACCUSED (FY 2016)

	General Court-Martial		Special Court-Martial		Summary Court-Martial	
	n	%	n	%	n	%
Most Serious Type of Offense(s) Charged						
Penetrative Offense	350	92.8	16	4.2	11	2.9
Contact Offense	51	43.6	49	41.9	17	14.5
Military Service						
Army	188	92.6	11	5.4	4	2.0
Marine Corps	50	60.2	23	27.7	10	12.0
Navy	52	62.7	22	26.5	9	10.8
Air Force	100	93.5	6	5.6	1	0.9
Coast Guard	11	61.1	3	16.7	4	22.2
Rank of Accused						
Officer	33	97.1	1	2.9	0	0.0
Enlisted	368	80.0	64	13.9	28	6.1

TABLE 49
TYPE OF MOST SERIOUS SEX OFFENSE(S) CHARGED BY PAY GRADE (FY 2016)

	Penetrative		Contact	
	n	%	n	%
Enlisted				
E-1	19	86.4	3	13.6
E-2	40	83.3	8	16.7
E-3	125	80.6	30	19.4
E-4	156	79.6	40	20.4
E-5	102	72.9	38	27.1
E-6	58	64.4	32	35.6
E-7	33	66.0	17	34.0
E-8	9	52.9	8	47.1
E-9	4	66.7	2	33.3
Officer				
Cadet/MIDN	5	100.0	0	0.0
W-1	1	100.0	0	0.0
W-2	6	100.0	0	0.0
W-3	0	0.0	0	0.0
W-4	0	0.0	0	0.0
W-5	0	0.0	0	0.0
O-1	1	100.0	0	0.0
O-2	2	100.0	0	0.0
O-3	11	64.7	6	35.3
O-4	4	66.7	2	33.3
O-5	3	75.0	1	25.0
O-6	1	33.3	2	66.7

[a] Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.

TABLE 50
OUTCOMES OF SEXUAL OFFENSE(S) BY MILITARY SERVICE OF ACCUSED (FY 2016)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 580)												
Army N = 222	58	26.1	15	6.8	44	19.8	50	22.5	30	13.5	25	11.3
Marine Corps N = 85	13	15.3	4	4.7	23	27.1	14	16.5	13	15.3	18	21.2
Navy N = 78	15	19.2	2	2.6	18	23.1	18	23.1	11	14.1	14	17.9
Air Force N = 181	17	9.4	3	1.7	13	7.2	58	32.0	43	23.8	47	26.0
Coast Guard N = 14	3	21.4	0	0.0	7	50.0	2	14.3	1	7.1	1	7.1
Accused Charged with Contact Offense(s) (N = 189)												
Army N = 56			12	21.4	18	32.1	6	10.7	16	28.6	4	7.1
Marine Corps N = 38			3	7.9	24	63.2	2	5.3	4	10.5	5	13.2
Navy N = 48			9	18.8	17	35.4	4	8.3	8	16.7	10	20.8
Air Force N = 38			3	7.9	9	23.7	4	10.5	18	47.4	4	10.5
Coast Guard N = 9			2	22.2	4	44.4	0	0.0	3	33.3	0	0.0

TABLE 51
OUTCOMES OF SEXUAL OFFENSE(S) BY RANK OF ACCUSED (FY 2016)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 580)												
Officer N = 34	5	14.7	1	2.9	11	32.4	11	32.4	2	5.9	4	11.8
Enlisted N = 546	101	18.5	23	4.2	94	17.2	131	24.0	96	17.6	101	18.5
Accused Charged with Contact Offense(s) (N = 189)												
Officer N = 11			2	18.2	3	27.3	1	9.1	3	27.3	2	18.2
Enlisted N = 178			27	15.2	69	38.8	15	8.4	46	25.8	21	11.8

TABLE 52
OUTCOMES OF CHARGED PENETRATIVE OFFENSE(S) BY PAY GRADE OF ACCUSED (FY 2016)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Enlisted (N = 546)												
E-1 N = 19	5	26.3	2	10.5	3	15.8	5	26.3	2	10.5	2	10.5
E-2 N = 40	12	30.0	3	7.5	8	20.0	10	25.0	5	12.5	2	5.0
E-3 N = 125	19	15.2	3	2.4	23	18.4	28	22.4	34	27.2	18	14.4
E-4 N = 156	30	19.2	7	4.5	23	14.7	37	23.7	28	17.9	31	19.9
E-5 N = 102	15	14.7	6	5.9	20	19.6	26	25.5	20	19.6	15	14.7
E-6 N = 58	11	19.0	2	3.4	10	17.2	12	20.7	3	5.2	20	34.5
E-7 N = 33	6	18.2	0	0.0	7	21.2	9	27.3	4	12.1	7	21.2
E-8 N = 9	2	22.2	0	0.0	0	0.0	4	44.4	0	0.0	3	33.3
E-9 N = 4	1	25.0	0	0.0	0	0.0	0	0.0	0	0.0	3	75.0
Officer (N = 34)[a]												
Cadet/MIDN N = 5	1	20.0	0	0.0	1	20.0	2	40.0	0	0.0	1	20.0
W-1 N = 1	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0
W-2 N = 6	0	0.0	1	16.7	2	33.3	3	50.0	0	0.0	0	0.0
W-3 N = 0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-4 N = 0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-5 N = 0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-1 N = 1	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-2 N = 2	1	50.0	0	0.0	0	0.0	1	50.0	0	0.0	0	0.0
O-3 N = 11	2	18.2	0	0.0	4	36.4	4	36.4	0	0.0	1	9.1
O-4 N = 4	0	0.0	0	0.0	1	25.0	1	25.0	0	0.0	2	50.0
O-5 N = 3	0	0.0	0	0.0	1	33.3	0	0.0	2	66.7	0	0.0
O-6 N = 1	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 53
OUTCOMES OF CHARGED CONTACT OFFENSE(S) BY PAY GRADE OF ACCUSED (FY 2016)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Enlisted (N = 178)												
E-1 N = 35			1	33.3	2	66.7	0	0.0	0	0.0	0	0.0
E-2 N = 8			1	12.5	3	37.5	0	0.0	1	12.5	3	37.5
E-3 N = 30			8	26.7	10	33.3	3	10.0	7	23.3	2	6.7
E-4 N = 40			4	10.0	18	45.0	3	7.5	9	22.5	6	15.0
E-5 N = 38			4	10.5	15	39.5	3	7.9	14	36.8	2	5.3
E-6 N = 32			4	12.5	8	25.0	4	12.5	11	34.4	5	15.6
E-7 N = 17			4	23.5	7	41.2	2	11.8	3	17.6	1	5.9
E-8 N = 8			0	0.0	5	62.5	0	0.0	1	12.5	2	25.0
E-9 N = 2			1	50.0	1	50.0	0	0.0	0	0.0	0	0.0
Officer (N = 11)[a]												
Cadet/MIDN N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-1 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-2 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-3 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-4 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-5 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-1 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-2 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-3 N = 6			2	33.3	2	33.3	1	16.7	1	16.7	0	0.0
O-4 N = 2			0	0.0	0	0.0	0	0.0	1	50.0	1	50.0
O-5 N = 1			0	0.0	0	0.0	0	0.0	1	100.0	0	0.0
O-6 N = 2			0	0.0	1	50.0	0	0.0	0	0.0	1	50.0

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 54
OUTCOMES OF SEXUAL OFFENSE(S) BY SEX AND STATUS OF VICTIM (FY 2016)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 580)												
Victim Sex												
All Females N = 560	99	17.7	19	3.4	103	18.4	139	24.8	97	17.3	103	18.4
All Males N = 20	7	35.0	5	25.0	2	10.0	3	15.0	1	5.0	2	10.0
Females & Males N = 0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Victim Status												
All Military N = 328	57	17.4	16	4.9	49	14.9	83	25.3	64	19.5	59	18.0
All Civilian N = 227	44	19.4	6	2.6	51	22.5	52	22.9	31	13.7	43	18.9
Military & Civilian N = 25	5	20.0	2	8.0	5	20.0	7	28.0	3	12.0	3	12.0
Accused Charged with Contact Offense(s) (N = 189)												
Victim Sex												
All Females N = 162			24	14.8	66	40.7	11	6.8	39	24.1	22	13.6
All Males N = 24			4	16.7	6	25.0	5	20.8	8	33.3	1	4.2
Females & Males N = 3			1	33.3	0	0.0	0	0.0	2	66.7	0	0.0
Victim Status												
All Military N = 142			23	16.2	53	37.3	12	8.5	36	25.4	18	12.7
All Civilian N = 41			5	12.2	17	41.5	4	9.8	10	24.4	5	12.2
Military & Civilian N = 6			1	16.7	2	33.3	0	0.0	3	50.0	0	0.0

TABLE 55
OUTCOMES OF SEXUAL OFFENSE(S) BY RELATIONSHIP BETWEEN ACCUSED AND VICTIM (FY 2016)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 580)												
Spouse or Intimate Partner N = 167	29	17.4	1	0.6	41	24.6	33	19.8	23	13.8	40	24.0
Other Relationship N = 413	77	18.6	23	5.6	64	15.5	109	26.4	75	18.2	65	15.7
Accused Charged with Contact Offense(s) (N = 189)												
Spouse or Intimate Partner N = 6			0	0.0	3	50.0	0	0.0	2	33.3	1	16.7
Other Relationship N = 183			29	15.8	69	37.7	16	8.7	47	25.7	22	12.0

TABLE 56
OUTCOMES OF SEXUAL OFFENSE(S) BY ACCUSED'S LOCATION (FY 2016)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 580)												
CONUS N = 422	77	18.2	18	4.3	71	16.8	104	24.6	71	16.8	81	19.2
OCONUS N = 127	25	19.7	4	3.1	26	20.5	31	24.4	22	17.3	19	15.0
Vessel N = 31	4	12.9	2	6.5	8	25.8	7	22.6	5	16.1	5	16.1
Accused Charged with Contact Offense(s) (N = 189)												
CONUS N = 121			21	17.4	47	38.8	9	7.4	31	25.6	13	10.7
OCONUS N = 47			3	6.4	16	34.0	5	10.6	16	34.0	7	14.9
Vessel N = 21			5	23.8	9	42.9	2	9.5	2	9.5	3	14.3

TABLE 57
OUTCOMES OF SEXUAL OFFENSE(S) BY TYPE OF TRIAL FORUM (FY 2016)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges	
	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) and Case Referred to General or Special Court-Martial (N = 366)								
Adjudicated by Military Judge N = 180	54	30.0	16	8.9	69	38.3	41	22.8
Adjudicated by Panel of Members N = 186	52	28.3	6	3.3	27	14.7	101	54.9
Accused Charged with Contact Offense(s) and Case Referred to General or Special Court-Martial (N = 100)								
Adjudicated by Military Judge N = 69			12	17.4	54	78.3	3	4.3
Adjudicated by Panel of Members N = 31			11	35.5	7	22.6	13	41.9

TABLE 58
OUTCOMES OF SEXUAL OFFENSE(S) BY TYPE OF TRIAL FORUM FOR CASES IN WHICH THE ACCUSED PLED NOT GUILTY (FY 2016)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges	
	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s), Referred to General or Special Court-Martial and Pled Not Guilty to SA Offense (N = 327)								
Adjudicated by Military Judge N = 141	28	19.9	3	2.1	69	48.9	41	29.1
Adjudicated by Panel of Members N = 186	52	28.0	6	3.2	27	14.5	101	54.3
Accused Charged with Contact Offense(s), Referred to General or Special Court-Martial and Pled Not Guilty to SA Offense (N = 91)								
Adjudicated by Military Judge N = 60			3	5.0	54	90.0	3	5.0
Adjudicated by Panel of Members N = 31			11	35.5	7	22.6	13	41.9

TABLE 59
VARIABLES ASSOCIATED WITH ADJUDGED SENTENCE OF CONFINEMENT (FY 2016)

	No Confinement		Confinement	
	n	%	n	%
Military Service of Accused (NS)				
Army	28	19.0	119	81.0
Marine Corps	15	22.4	52	77.6
Navy	15	24.6	46	75.4
Air Force	6	13.3	39	86.7
Coast Guard	5	31.3	11	68.8
Rank of Accused (NS)				
Officer	5	22.7	17	77.3
Enlisted	64	20.4	250	79.6
Sex of Victim (NS)[a]				
All Females	66	21.2	245	78.8
All Males	3	12.5	21	87.5
Females and Males	0	0.0	1	100.0
Status of Victim ($p < .05$)[b]				
All Military	49	24.7	149	75.3
All Civilian	18	14.6	105	85.4
Military and Civilian	2	13.3	13	86.7
Relationship Between Accused and Victim ($p < .05$)				
Spouse or Intimate Partner	7	9.5	67	90.5
Other Relationship	62	23.7	200	76.3
Conviction Offense ($p < .05$)[c]				
Penetrative Offense	4	3.8	102	96.2
Contact Offense	14	26.4	39	73.6
Non-Sex Offense	51	28.8	126	71.2
Number of Counts Preferred (NS)	6.59 (sd = 4.96)		7.87 (sd = 5.91)	
Number of Victims (NS)	1.19 (sd = .58)		1.33 (sd = .80)	
Type of Court-Martial ($p < .05$)				
General Court-Martial	36	14.6	210	85.4
Special Court-Martial	15	24.2	47	75.8
Summary Court-Martial	18	64.3	10	35.7
Type of Trial Forum ($p < .05$)				
Military Judge	22	10.7	183	89.3
Panel of Military Members	29	28.2	74	71.8
Summary Court-Martial Officer	18	64.3	10	35.7

[a] *The relationship is not statistically significant when the "male and female" category is excluded from the analysis.*

[b] *The relationship remains statistically significant when the "military and civilian" category is excluded from the analysis.*

[c] *The relationship is not statistically significant when the "penetrative offense" category is excluded from the analysis.*

TABLE 60
VARIABLES ASSOCIATED WITH ADJUDGED SENTENCE OF PUNITIVE SEPARATION (FY 2016)

	No Separation		Separation	
	n	%	n	%
Military Service of Accused (NS)				
Army	43	29.3	104	70.7
Marine Corps	26	38.8	41	61.2
Navy	28	45.9	33	54.1
Air Force	15	33.3	30	66.7
Coast Guard	8	50.0	8	50.0
Rank of Accused (NS)				
Officer	7	31.8	15	68.2
Enlisted	113	36.0	201	64.0
Sex of Victim (NS)a				
All Females	114	36.7	197	63.3
All Males	6	25.0	18	75.0
Females and Males	0	0.0	1	100.0
Status of Victim (p = .05)b				
All Military	79	39.9	119	60.1
All Civilian	39	31.7	84	68.3
Military and Civilian	2	13.3	13	86.7
Relationship Between Accused and Victim (NS)				
Spouse or Intimate Partner	21	28.4	53	71.6
Other Relationship	99	37.8	163	62.2
Conviction Offense (p < .05)				
Penetrative Offense	3	2.8	103	97.2
Contact Offense	22	41.5	31	58.5
Non-Sex Offense	95	53.7	82	46.3
Number of Counts Preferred (NS)	6.97 (sd = 5.39)		7.96 (sd = 5.91)	
Number of Victims (NS)	1.26 (sd = .82)		1.33 (sd = .73)	
Type of Court-Martial (p < .05)c				
General Court-Martial	59	24.0	187	76.0
Special Court-Martial	33	53.2	29	46.8
Summary Court-Martial	28	100.0	0	0.0
Type of Trial Forum (p < .05)d				
Military Judge	61	29.8	144	70.2
Panel of Military Members	31	30.1	72	69.9
Summary Court-Martial Officer	28	100.0	0	0.0

a The relationship is not statistically significant when the "females and males" category is excluded from the analysis.

b The relationship is not statistically significant when the "military and civilian" category is excluded from the analysis.

c This relationship is statistically significant when summary courts-martial are excluded from the analysis.

d This relationship is not statistically significant when summary court-martial officers are excluded from the analysis.

TABLE 61
VARIABLES ASSOCIATED WITH SENTENCE SEVERITY (FY 2016)

	Average Sentence Severity [a]
Military Service of Accused ($p < .05$)	
Army	8.15
Marine Corps	7.48
Navy	5.74
Air Force	6.55
Coast Guard	6.27
Rank of Accused (NS)	
Officer	6.83
Enlisted	7.32
Sex of Victim (NS)	
All Females	7.29
All Males	7.32
Females and Males (1 case ended in confinement)	7.00
Status of Victim (NS)	
All Military	6.83
All Civilian	7.75
Military and Civilian	8.87
Relationship Between Accused and Victim ($p < .05$)	
Spouse or Intimate Partner	8.30
Other Relationship	6.97
Conviction Offense ($p < .05$)	
Penetrative Offense	10.53
Contact Offense	6.19
Non-Sex Offense	5.1
Type of Court-Martial ($p < .05$)[b]	
General Court-Martial	8.38
Special Court-Martial	3.96
Type of Trial Forum ($p < .05$)[c]	
Military Judge	7.25
Panel of Military Members	8.27

[a] *See Table 66 – Adjudged Sentencing Severity Scale (FY 2016) for a description of the scale.*

[b] *Summary courts-martial are excluded from this analysis because 18 of 28 summary courts-martial convictions did not end in confinement or a punitive separation sanction.*

[c] *Summary court-martial officer cases are excluded from this analysis because 18 of the 28 summary court-martial officer cases did not end in confinement or a punitive separation sanction.*

TABLE 62
LOGISTIC REGRESSION: VARIABLES RELATED TO CONVICTIONS (FY 2016)

	B	SE	Exp(B)
Accused Convicted of a Penetrative Offense[a]			
Military Service of Accused			
Army (reference)			
Marine Corps	−.71*	.35	.49
Navy	−.33	.33	.72
Air Force	−1.20*	.32	.30
Coast Guard	−.37	.70	.69
Accused Rank (Enlisted)	−.28	.51	.76
Victim Was Spouse or Intimate Partner	−.02	.29	.98
Female Victim(s)	−.95	.51	.39
Military Victim(s)	−.17	.25	.85
Number of Victims	.33	.18	1.40
Number of Charges	.02	.02	1.02
Accused Convicted of At Least One Charge[b]			
Military Service of Accused			
Army (reference)			
Marine Corps	.02	.23	1.02
Navy	−.04	.23	.96
Air Force	−1.13*	.23	.32
Coast Guard	.54	.50	1.71
Accused Rank (Enlisted)	−.12	.36	.89
Victim Was Spouse or Intimate Partner	−.28	.24	.76
Female Victim(s)	−.37	.34	.69
Military Victim(s)	−.19	.18	.82
Number of Victims	−.11	.14	.90
Number of Charges	.17*	.02	1.18
Accused Charged with Penetrative Offense	−.40*	.20	.67

[a] *Analysis includes cases with a penetrative offense charge.*

[b] *Analysis includes cases with a penetrative offense charge or a contact offense charge.*

TABLE 63
LOGISTIC REGRESSION: VARIABLES RELATED TO ACQUITTALS AND DISMISSALS (FY 2016)

	B	SE	Exp(B)
Accused Acquitted of All Charges			
Military Service of Accused			
Army (reference)			
Marine Corps	−.45	.32	.64
Navy	−.16	.29	.86
Air Force	.24	.23	1.27
Coast Guard	−.68	.78	.51
Accused Rank (Enlisted)	.58	.38	1.79
Victim Was Spouse or Intimate Partner	−.33	.25	.72
Female Victim(s)	−.24	.43	.79
Military Victim(s)	−.13	.21	.88
Number of Victims	−.07	.20	.93
Number of Charges	−.11*	.03	.90
Accused Charged with a Penetrative Offense	1.24*	.29	3.47

Dismissed without Judicial Action			
Military Service of Accused			
Army (reference)			
Marine Corps	.77*	.31	2.16
Navy	.67*	.31	1.95
Air Force	.55*	.27	1.73
Coast Guard	−.88	1.06	.42
Accused Rank (Enlisted)	−.08	.48	.93
Victim Was Spouse or Intimate Partner	.85*	.26	2.34
Female Victim(s)	.97	.63	2.64
Military Victim(s)	.13	.22	1.14
Number of Victims	−.00	.23	1.00
Number of Charges	−.14*	.04	.87
Accused Charged with a Penetrative Offense	.22	.27	1.25

TABLE 64
LOGISITIC REGRESSION: VARIABLES RELATED TO SENTENCE OF CONFINEMENT AND PUNITIVE SEPARATION (FY 2016)

	B	SE	Exp(B)
Adjudged Sentence Included Confinement[a]			
Military Service of Accused			
Army (reference)			
Marine Corps	.22	.40	1.25
Navy	.18	.40	1.19
Air Force	.52	.53	1.68
Coast Guard	−.33	.63	.72
Accused Rank (Enlisted)	−.37	.58	.69
Victim Was Spouse or Intimate Partner	.72	.52	2.06
Female Victim(s)	−.90	.68	.41
Military Victim(s)	−.42	.35	.66
Number of Victims	.15	.25	1.16
Number of Charges	.05	.03	1.05
Accused Convicted of a Penetrative Offense	2.44*	.55	11.42
Accused Convicted of a Contact Offense	.34	.39	1.40
Adjudged Sentence Included Punitive Separation[a]			
Military Service of Accused			
Army (reference)			
Marine Corps	.08	.36	1.09
Navy	−.33	.38	.72
Air Force	−.15	.44	.86
Coast Guard	−.65	.62	.52
Accused Rank (Enlisted)	.26	.55	1.30
Victim Was Spouse or Intimate Partner	−.30	.42	.75
Female Victim(s)	−.85	.56	.43
Military Victim(s)	−.50	.32	.61
Number of Victims	−.15	.20	.86
Number of Charges	.08*	.03	1.08
Accused Convicted of a Penetrative Offense	3.92*	.62	50.60
Accused Convicted of a Contact Offense	.68	.36	1.98

a Analysis includes cases with a conviction for any offense.

TABLE 65
OLS REGRESSION: VARIABLES RELATED TO SENTENCE SEVERITY (FY 2016)[a]

	B	Beta	T-value
Military Service of Accused			
Army (reference)			
Marine Corps	.66	.06	1.14
Navy	−1.13*	−.10	−1.94
Air Force	−.97	−.08	1.50
Coast Guard	−.53	−.02	−.50
Accused Rank (Enlisted)	−.26	−.01	−.30
Victim Was Spouse or Intimate Partner	−.11	−.01	−.19
Female Victim(s)	−.26	−.01	−.33
Military Victim(s)	−.47	−.05	−1.00
Number of Victims	−.38	−.07	−1.34
Number of Charges	.22*	.29	5.30
Accused Convicted of a Penetrative Offense	5.98*	.66	12.74
Accused Convicted of a Contact Offense	1.89*	.16	2.96

[a] *Analysis includes cases with a conviction for any offense with a sentence of confinement and/or punitive separation.*

TABLE 66
ADJUDGED SENTENCING SEVERITY SCALE (FY 2016)

Sentence	n	%
Confinement up to and including 2 months	33	11.8
Confinement greater than 2 months and up to 5 months	18	6.5
Confinement greater than 5 months and up to 8 months	7	2.5
Confinement 9 months to 12 months	5	1.8
Confinement 13 months to 18 months OR punitive separation	12	4.3
Punitive separation and confinement up to and including 2 months	11	3.9
Punitive separation and confinement greater than 2 months and up to 5 months	17	6.1
Punitive separation and confinement greater than 5 months and up to 8 months	37	13.3
Punitive separation and confinement 9 months to 12 months	28	10
Punitive separation and confinement 13 months to 18 months	15	5.4
Punitive separation and confinement 19 months to 24 months	12	4.3
Punitive separation and confinement 25 months to 36 months	22	7.9
Punitive separation and confinement 37 months to 60 months	23	8.2
Punitive separation and confinement 60 months to 120 months	20	7.2
Punitive separation and confinement greater than 120 months	19	6.8

The adjudged sentencing severity scale was developed by Breen and Johnson, "Military Justice" (see Table 22), and combines the confinement sentence with punitive separations. The scale was developed through consultation with

judge advocates. For the purposes of the current analysis, only cases that ended in a conviction were analyzed and cases that did not result in a sanction of confinement or punitive separation are not included. The scale is used in place of a variable that simply measures the number of confinement months because the distribution of confinement months is not normal. The distribution of values is concentrated at the lower end of the scale. In other words, a large number of cases ended in shorter confinement sentences than longer sentences. Non-normal distributions may present problems when OLS regression models are estimated.

TABLE 67
CASE CHARACTERISTICS (FY 2015)

	n	%
FY 2015 Total Cases	780	
Military Service of the Accused		
Army	347	44.5
Marine Corps	105	13.5
Navy	122	15.6
Air Force	174	22.3
Coast Guard	32	4.1
Rank of Accused		
Enlisted	722	92.6
Officer	58	7.4
Pay Grade of Accused		
Enlisted (N = 722)		
E-1	30	4.2
E-2	43	6.0
E-3	159	22.0
E-4	187	25.9
E-5	156	21.6
E-6	87	12.0
E-7	46	6.4
E-8	8	1.1
E-9	6	0.8
Officer (N = 58)[a]		
Cadet/MIDN	3	5.2
W-1	1	1.7
W-2	1	1.7
W-3	2	3.4
W-4	0	0.0
W-5	1	1.7
O-1	3	5.2
O-2	11	19.0

O-3	20	34.5
O-4	12	20.7
O-5	3	5.2
O-6	1	1.7
Sex of Accused		
Male	774	99.2
Female	6	0.8
Location of Unit to Which Accused Assigned When Charges Preferred		
CONUS	532	68.2
OCONUS	195	25.0
Vessel	53	6.8
Sex of Victim(s)		
All Female	708	90.8
All Male	69	8.8
Female and Male	3	0.4
Status of Victim(s)		
All Military	526	67.4
All Civilian	223	28.6
Military and Civilian	31	4.0
Accused Charged with Penetrative Offense(s)		
Yes	558	71.5
No	222	28.5
Accused Convicted of Penetrative Offense(s) (N = 558)		
Yes	147	26.3
No	411	73.7
Accused Charged with Contact Offense(s)		
Yes	222	28.5
No	558	71.5
Accused Convicted of Contact Offense(s) (N = 222)		
Yes	44	19.8
No	178	80.2

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 68
CASE DISPOSITIONS AND CASE OUTCOMES (FY 2015)

	n	%
FY 2015 Total Cases	780	
Type of Court-Martial (N = 559)		
General Court-Martial	440	78.7
Special Court-Martial	77	13.8
Summary Court-Martial	42	7.5
Type of Trial Forum (N = 559)		
Military Judge	295	52.8
Panel of Military Members	221	39.5
Summary Court-Martial Officer	42	7.5
Unknown	1	0.2
Article 32 Hearing Held		
Yes	540	69.2
Waived	58	7.4
Not Applicable	182	23.3
Accused Charged with Penetrative Offense(s) (N = 558)		
Convicted of Penetrative Offense	147	26.3
Convicted of Sexual Contact Offense	13	2.3
Convicted of Non-Sex Offense	123	22.0
Acquitted of All Charges	116	20.8
Alternative Disposition	79	14.2
Dismissed Without Judicial Action	80	14.3
(After Article 32 Hearing)	63	78.8
Accused Charged with Sexual Contact Offense(s) (N = 222)		
Convicted of Sexual Contact Offense	44	19.8
Convicted of Non-Sex Offense	90	40.5
Acquitted of All Charges	26	11.7
Alternative Disposition	47	21.2
Dismissed Without Judicial Action	15	6.8
(After Article 32 Hearing)	9	60.0
Outcomes for Cases Referred to Trial		
Accused Charged with Penetrative Offense(s) (N = 399)		
Convicted of Penetrative Offense	147	36.8
Convicted of Sexual Contact Offense	13	3.3
Convicted of Non-Sex Offense	123	30.8
Acquitted of All Charges	116	29.1

Accused Charged with Sexual Contact Offense(s) (N = 160)		
Convicted of Sexual Contact Offense	44	27.5
Convicted of Non-Sex Offense	90	56.3
Acquitted of All Charges	26	16.3
Outcomes for Contested Trials		
Accused Charged with Penetrative Offense(s) (N = 347)		
Convicted of Penetrative Offense	102	29.4
Convicted of Sexual Contact Offense	6	1.7
Convicted of Non-Sex Offense	123	35.4
Acquitted of All Charges	116	33.4
Accused Charged with Sexual Contact Offense(s) (N = 146)		
Convicted of Sexual Contact Offense	30	20.5
Convicted of Non-Sex Offense	90	61.6
Acquitted of All Charges	26	17.8

TABLE 69
ARTICLE 32 WAIVER (FY 2015)

	n	%
Cases In Which Art. 32 Applicable		
Art. 32 Held	540	90.3
Art. 32 Waived	58	9.7
Waived Without Pretrial Agreement	30	51.7
Waived When Involving Penetrative Offense	47	81.0
Waived When Involving Contact Offense	11	19.0
Conviction Rate When Art. 32 Waived – Non SA-Offense	21	36.2
Conviction Rate When Art. 32 Waived – Contact Offense	4	6.9
Conviction Rate When Art. 32 Waived – Penetrative Offense	21	36.2

TABLE 70
TYPE OF TRIAL BY OFFENSE(S), MILITARY SERVICE, AND RANK OF ACCUSED (FY 2015)

	General Court-Martial		Special Court-Martial		Summary Court-Martial	
	n	%	n	%	n	%
Most Serious Type of Offense(s) Charged						
Penetrative Offense	376	94.2	13	3.3	10	2.5
Contact Offense	64	40.0	64	40.0	32	20.0
Military Service						
Army	221	88.8	17	6.8	11	4.4
Marine Corps	49	65.3	13	17.3	13	17.3
Navy	59	62.8	27	28.7	8	8.5
Air Force	100	87.0	13	11.3	2	1.7
Coast Guard	11	42.3	7	26.9	8	30.8
Rank of Accused						
Officer	45	100.0	0	0.0	0	0.0
Enlisted	395	76.8	77	15.0	42	8.2

TABLE 71
TYPE OF MOST SERIOUS SEX OFFENSE(S) CHARGED BY PAY GRADE (FY 2015)

	Penetrative		Contact	
	n	%	n	%
Enlisted				
E-1	21	70.0	9	30.0
E-2	37	86.0	6	14.0
E-3	117	73.6	42	26.4
E-4	152	81.3	35	18.7
E-5	108	69.2	48	30.8
E-6	52	59.8	35	40.2
E-7	25	54.3	21	45.7
E-8	3	37.5	5	62.5
E-9	1	16.7	5	83.3
Officer[a]				
Cadet/MIDN	2	66.7	1	33.3
W-1	1	100.0	0	0.0
W-2	1	100.0	0	0.0
W-3	2	100.0	0	0.0
W-4	0	0.0	0	0.0
W-5	0	0.0	1	100.0
O-1	3	100.0	0	0.0
O-2	6	54.5	5	45.5
O-3	14	70.0	6	30.0
O-4	11	91.7	1	8.3
O-5	1	33.3	2	66.7
O-6	1	100.0	0	0.0

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 72
OUTCOMES OF SEXUAL OFFENSE(S) BY MILITARY SERVICE OF ACCUSED (FY 2015)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 558)												
Army N = 264	88	33.3	4	1.5	60	22.7	44	16.7	50	18.9	18	6.8
Marine Corps N = 72	11	15.3	5	6.9	21	29.2	14	19.4	4	5.6	17	23.6
Navy N = 67	18	26.9	1	1.5	14	20.9	18	26.9	3	4.5	13	19.4
Air Force N = 136	26	19.1	3	2.2	18	13.2	39	28.7	20	14.7	30	22.1
Coast Guard N = 19	4	21.1	0	0.0	10	52.6	1	5.3	2	10.5	2	10.5
Accused Charged with Contact Offense(s) (N = 222)												
Army N = 83			20	24.1	25	30.1	8	9.6	27	32.5	3	3.6
Marine Corps N = 33			2	6.1	22	66.7	0	0.0	3	9.1	6	18.2
Navy N = 55			12	21.8	21	38.2	10	18.2	8	14.5	4	7.3
Air Force N = 38			9	23.7	12	31.6	8	21.1	8	21.1	1	2.6
Coast Guard N = 13			1	7.7	10	76.9	0	0.0	1	7.7	1	7.7

TABLE 73
OUTCOMES OF SEXUAL OFFENSE(S) BY RANK OF ACCUSED (FY 2015)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 558)												
Officer N = 42	13	31.0	2	4.8	13	31.0	6	14.3	1	2.4	7	16.7
Enlisted N = 516	134	26.0	11	2.1	110	21.3	110	21.3	78	15.1	73	14.1
Accused Charged with Contact Offense(s) (N = 222)												
Officer N = 16			5	31.3	5	31.3	1	6.3	4	25.0	1	6.3
Enlisted N = 206			39	18.9	85	41.3	25	12.1	43	20.9	14	6.8

TABLE 74
OUTCOMES OF CHARGED PENETRATIVE OFFENSE(S) BY PAY GRADE OF ACCUSED (FY 2015)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Enlisted (N = 516)												
E-1 N = 21	7	33.3	1	4.8	8	38.1	3	14.3	1	4.8	1	4.8
E-2 N = 37	11	29.7	2	5.4	8	21.6	4	10.8	8	21.6	4	10.8
E-3 N = 117	27	23.1	3	2.6	22	18.8	24	20.5	24	20.5	17	14.5
E-4 N = 152	40	26.3	0	0.0	23	15.1	37	24.3	23	15.1	29	19.1
E-5 N = 108	26	24.1	4	3.7	25	23.1	25	23.1	16	14.8	12	11.1
E-6 N = 52	15	28.8	1	1.9	13	25.0	13	25.0	4	7.7	6	11.5
E-7 N = 25	7	28.0	0	0.0	10	40.0	4	16.0	1	4.0	3	12.0
E-8 N = 3	1	33.3	0	0.0	0	0.0	0	0.0	1	33.3	1	33.3
E-9 N = 1	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0

Officer (N = 42)a												
Cadet/MIDN N = 2	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2	100.0
W-1 N = 1	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-2 N = 1	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-3 N = 2	1	50.0	0	0.0	1	50.0	0	0.0	0	0.0	0	0.0
W-4 N = 0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-5 N = 0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-1 N = 3	1	33.3	0	0.0	1	33.3	1	33.3	0	0.0	0	0.0
O-2 N = 6	0	0.0	0	0.0	4	66.7	1	16.7	0	0.0	1	16.7
O-3 N = 14	4	28.6	2	14.3	4	28.6	2	14.3	1	7.1	1	7.1
O-4 N = 11	5	45.5	0	0.0	3	27.3	1	9.1	0	0.0	2	18.2
O-5 N = 1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	100.0
O-6 N = 1	0	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 75
OUTCOMES OF CHARGED CONTACT OFFENSE(S) BY PAY GRADE OF ACCUSED (FY 2015)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Enlisted (N = 206)												
E-1 N = 9			3	33.3	3	33.3	0	0.0	3	33.3	0	0.0
E-2 N = 6			1	16.7	2	33.3	1	16.7	2	33.3	0	0.0
E-3 N = 42			11	26.2	20	47.6	3	7.1	7	16.7	1	2.4
E-4 N = 35			5	14.3	11	31.4	5	14.3	11	31.4	3	8.6
E-5 N = 48			10	20.8	18	37.5	7	14.6	9	18.8	4	8.3
E-6 N = 35			5	14.3	12	34.3	5	14.3	8	22.9	5	14.3
E-7 N = 21			4	19.0	13	61.9	3	14.3	1	4.8	0	0.0
E-8 N = 5			0	0.0	3	60.0	1	20.0	1	20.0	0	0.0
E-9 N = 5			0	0.0	3	60.0	0	0.0	1	20.0	1	20.0
Officer (N = 16)[a]												
Cadet/MIDN N = 1			0	0.0	0	0.0	0	0.0	1	100.0	0	0.0
W-1 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-2 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-3 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-4 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
W-5 N = 1			0	0.0	0	0.0	0	0.0	1	100.0	0	0.0
O-1 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
O-2 N = 5			2	40.0	1	20.0	1	20.0	0	0.0	1	20.0
O-3 N = 6			2	33.3	3	50.0	0	0.0	1	16.7	0	0.0
O-4 N = 1			1	100.0	0	0.0	0	0.0	0	0.0	0	0.0
O-5 N = 2			0	0.0	1	50.0	0	0.0	1	50.0	0	0.0
O-6 N = 0			0	0.0	0	0.0	0	0.0	0	0.0	0	0.0

[a] *Because the pay grades of O-7, O-8, O-9, and O-10 had no accused documented by the DAC-IPAD, they are omitted from this table.*

TABLE 76
OUTCOMES OF SEXUAL OFFENSE(S) BY SEX AND STATUS OF VICTIM (FY 2015)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 558)												
Victim Sex												
All Females N = 521	133	25.5	11	2.1	117	22.5	108	20.7	74	14.2	78	15.0
All Males N = 36	14	38.9	2	5.6	5	13.9	8	22.2	5	13.9	2	5.6
Females & Males N = 1	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0
Victim Status												
All Military N = 351	81	23.1	5	1.4	73	20.8	81	23.1	57	16.2	54	15.4
All Civilian N = 184	56	30.4	7	3.8	43	23.4	33	17.9	20	10.9	25	13.6
Military & Civilian N = 23	10	43.5	1	4.3	7	30.4	2	8.7	2	8.7	1	4.3
Accused Charged with Contact Offense(s) (N = 222)												
Victim Sex												
All Females N = 187			36	19.3	74	39.6	22	11.8	41	21.9	14	7.5
All Males N = 33			8	24.2	15	45.5	3	9.1	6	18.2	1	3.0
Females & Males N = 2			0	0.0	1	50.0	1	50.0	0	0.0	0	0.0
Victim Status												
All Military N = 175			33	18.9	70	40.0	24	13.7	39	22.3	9	5.1
All Civilian N = 39			8	20.5	15	38.5	2	5.1	8	20.5	6	15.4
Military & Civilian N = 8			3	37.5	5	62.5	0	0.0	0	0.0	0	0.0

TABLE 77
OUTCOMES OF SEXUAL OFFENSE(S) BY RELATIONSHIP BETWEEN ACCUSED AND VICTIM (FY 2015)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 558)												
Spouse or Intimate Partner N = 110	27	24.5	2	1.8	29	26.4	25	22.7	6	5.5	21	19.1
Other Relationship N = 448	120	26.8	11	2.5	94	21.0	91	20.3	73	16.3	59	13.2
Accused Charged with Contact Offense(s) (N = 222)												
Spouse or Intimate Partner N = 7			2	28.6	2	28.6	1	14.3	1	14.3	1	14.3
Other Relationship N = 215			42	19.5	88	40.9	25	11.6	46	21.4	14	6.5

TABLE 78
OUTCOMES OF SEXUAL OFFENSE(S) BY ACCUSED'S LOCATION (FY 2015)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges		Alternative Disposition		Dismissed Without Judicial Action	
	n	%	n	%	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) (N = 558)												
CONUS N = 386	102	26.4	8	2.1	76	19.7	90	23.3	52	13.5	58	15.0
OCONUS N = 142	38	26.8	5	3.5	35	24.6	20	14.1	27	19.0	17	12.0
Vessel N = 30	7	23.3	0	0.0	12	40.0	6	20.0	0	0.0	5	16.7
Accused Charged with Contact Offense(s) (N = 222)												
CONUS N = 146			29	19.9	56	38.4	22	15.1	28	19.2	11	7.5
OCONUS N = 53			11	20.8	19	35.8	2	3.8	17	32.1	4	7.5
Vessel N = 23			4	17.4	15	65.2	2	8.7	2	8.7	0	0.0

TABLE 79
OUTCOMES OF SEXUAL OFFENSE(S) BY TYPE OF TRIAL FORUM (FY 2015)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges	
	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s) and Case Referred to General or Special Court-Martial (N = 389)[a]								
Adjudicated by Military Judge N = 215	84	39.1	10	4.7	72	33.5	49	22.8
Adjudicated by Panel of Members N = 173	62	36.3	3	1.8	42	24.6	66	38.6
Accused Charged with Contact Offense(s) and Case Referred to General or Special Court-Martial (N = 128)								
Adjudicated by Military Judge N = 80			20	25.0	53	66.3	7	8.8
Adjudicated by Panel of Members N = 48			15	31.3	15	31.3	18	37.5

[a] *In one case, the DAC-IPAD could not determine whether adjudication was by a military judge or by a panel of members*

TABLE 80
OUTCOMES OF SEXUAL OFFENSE(S) BY TYPE OF TRIAL FORUM FOR CASES IN WHICH THE ACCUSED PLED NOT GUILTY (FY 2015)

	Convicted of Penetrative Offense		Convicted of Contact Offense		Convicted of Non-Sex Offense		Acquitted of All Charges	
	n	%	n	%	n	%	n	%
Accused Charged with Penetrative Offense(s), Referred to General or Special Court-Martial and Pled Not Guilty to SA Offense (N = 338)[a]								
Adjudicated by Military Judge N = 166	42	25.3	3	1.8	72	43.4	49	29.5
Adjudicated by Panel of Members N = 171	60	35.1	3	1.8	42	24.6	66	38.6
Accused Charged with Contact Offense(s), Referred to General or Special Court-Martial and Pled Not Guilty to SA Offense (N = 122)								
Adjudicated by Military Judge N = 74			14	18.9	53	71.6	7	9.5
Adjudicated by Panel of Members N = 48			15	31.3	15	31.3	18	37.5

[a] *In one case, the DAC-IPAD could not determine whether adjudication was by a military judge or by a panel of members*

TABLE 81
LOGISTIC REGRESSION: VARIABLES RELATED TO CONVICTIONS (FY 2015)

	B	SE	Exp(B)
Accused Convicted of a Penetrative Offense			
Military Service of Accused			
Army (reference)			
Marine Corps	−1.15	.39	.32*
Navy	−.48	.33	.62
Air Force	−.77	.28	.46*
Coast Guard	−.86	.64	.42
Accused Rank (Enlisted)	−.14	.39	.87
Victim Was Spouse or Intimate Partner	−.13	.31	.88
Female Victim(s)	−.54	.41	.58
Military Victim(s)	−.34	.25	.71
Number of Victims	.60	.18	1.82*
Number of Charges	.06	.02	1.06*
Accused Convicted of At Least One Charge			
Military Service of Accused			
Army (reference)			
Marine Corps	−.12	.23	.89
Navy	.003	.23	1.00
Air Force	−.48	.23	.61*
Coast Guard	1.20	.50	3.32*
Accused Rank (Enlisted)	−.56	.36	.57
Victim Was Spouse or Intimate Partner	−.61	.24	.55*
Female Victim(s)	−.39	.34	.68
Military Victim(s)	−.44	.18	.64*
Number of Victims	.04	.14	1.04
Number of Charges	.25	.02	1.28*
Accused Charged with Penetrative Offense	.38	.20	.68*

TABLE 82
LOGISTIC REGRESSION: VARIABLES RELATED TO ACQUITTALS AND DISMISSALS (FY 2015)

	B	SE	Exp(B)
Accused Acquitted of All Charges			
Military Service of Accused			
Army (reference)			
Marine Corps	.30	.38	1.36
Navy	.71	.32	2.04*
Air Force	.94	.29	2.57*
Coast Guard	−1.81	1.07	.16
Accused Rank (Enlisted)	.71	.49	2.03
Victim Was Spouse or Intimate Partner	.62	.35	1.85
Female Victim(s)	.24	.42	1.28
Military Victim(s)	.45	.27	1.56
Number of Victims	−.36	.28	.70
Number of Charges	−.27	.04	.76*
Accused Charged with a Penetrative Offense	.94	.28	2.56*
Dismissed without Judicial Action			
Military Service of Accused			
Army (reference)			
Marine Corps	1.41	.37	4.10*
Navy	.96	.36	2.62*
Air Force	.56	.33	1.74
Coast Guard	.34	.72	1.41
Accused Rank (Enlisted)	−.80	.46	.45
Victim Was Spouse or Intimate Partner	.74	.32	2.10*
Female Victim(s)	1.00	.63	2.73
Military Victim(s)	.13	.28	1.14
Number of Victims	−1.28	.70	.28
Number of Charges	−.26	.06	.77*
Accused Charged with a Penetrative Offense	.94	.34	2.56*

APPENDIX B. DAC-IPAD CASE ADJUDICATION DATABASE: FISCAL YEAR 2018 PENETRATIVE OFFENSE(S) PREFERRED AND RESOLVED AT SPECIAL OR SUMMARY COURTS-MARTIAL

In Figure 19, in the body of this report, the DAC-IPAD documented 15 instances in which charges were preferred for a penetrative sexual assault offense and the case was resolved at a special (13 cases) or summary court-martial (2 cases). While it is correct that there are instances in which a special or summary court-martial was convened after a penetrative sexual assault offense was initially charged, the courts-martial were the result of plea agreements that dismissed the penetrative sexual assault charge in exchange for guilty pleas to other offenses which were then referred to special or summary courts-martial.

To provide additional information on the charges and specifications for each of the cases in question, the following tables detail the charges preferred; the advice of the staff judge advocate, if available; the terms of any pretrial agreements; the charges referred to special or summary court-martial; the accused's pleas; and the findings at trial.

DAC-IPAD Adjudication Database:
Fiscal Year 2018 – Penetrative Offense(s) Preferred and Case Ultimately Resolved at Special Court-Martial

	Preferral				
Case	*Offense*	*Spec*	*Articles*	*SJA Advice*	*Terms of PTA*
1	I	1	Article 80 – Attempted Penetrative		In exchange for guilty plea to Article 128 offense, the CA withdrew the Article 80 – Attempted Rape and Article 120 – contact offenses. After announcement of sentence, the Government dismissed the withdrawn charges without prejudice to ripen into prejudice upon completion of appellate review.
	II	1	Article 120 – Contact		
	Add'l I	1	Article 128 – Assault & Battery		
2	I	1	Article 80 – Attempted Rape		In exchange for guilty plea to Article 128 and Article 134 offenses, the CA withdrew the charges with a not guilty plea. After announcement of sentence, the Government dismissed the withdrawn charges without prejudice to ripen into prejudice upon completion of appellate review.
	II	1	Article 80 – Attempted Penetrative		
	III	1	Article 120c – Indecent Exposure		
	Add'l I	1	Article 128 – Assault & Battery		
	Add'l II	1	Article 134 – Disorderly Conduct		
3	I	1	Article 120 – Penetrative	Dismiss	In exchange for guilty plea to Article 128 and Article 134 offenses, the CA withdrew the charges with a not guilty plea. After announcement of sentence, the Government dismissed the withdrawn charges without prejudice to ripen into prejudice upon completion of appellate review. The Article 120 – Penetrative and Article 128 (two specifications) offenses were withdrawn and dismissed prior to referral.
	II	1	Article 128 – Aggravated assault	GCM	
		2	Article 128 – Aggravated assault	Dismiss	
		3	Article 128 – Aggravated assault	GCM	
		4–6	Article 128 – Assault & Battery	Dismiss	
	Add'l I	1–2	Article 128 – Assault & Battery	GCM	
	Add'l II	1	Article 112a – Wrongful Use	GCM	
		2	Article 112a – Wrongful Possession	GCM	
4	I	1–2	Article 128 – Assault & Battery		In exchange for guilty plea to Article 128 and Article 90 offenses, the Article 120 – Rape and Article 120 – Penetrative offenses were not referred to SPCM and dismissed without prejudice to ripen into prejudice upon completion of appellate review.
	II	1	Article 90 – Disobeying Superior		
	III	1	Article 120 – Rape		
		2	Article 120 – Penetrative		
5	I	1	Article 120 – Penetrative	GCM	In exchange for guilty plea to a new charge of Article 128 – Assault & Battery, the Article 120 – Rape and Article 120 – Contact offenses previously referred to GCM were dismissed without prejudice to ripen into prejudice upon completion of appellate review.
		2	Article 120 – Contact	GCM	
6	I	1–5	Article 92 – Failure to Obey		In exchange for guilty plea to multiple offenses, the CA withdrew charges with a not guilty plea, including the Article 120 – Penetrative offenses. After announcement of sentence, the Government dismissed the withdrawn charges without prejudice to ripen into prejudice upon completion of appellate review.
	II	1	Article 107 – False Official Statement		
	III	1–2	Article 120 – Penetrative		
	IV	1	Article 128 – Simple Assault		
	V	1–4	Article 134 – Adultery		
		5–6	Article 134 – Obstructing Justice		

Referral				
Offense	*Spec*	*Articles*	*Plea*	*Finding*
I	1	Article 80 – Attempted Rape	Not Guilty	W/D
II	1	Article 120 – Contact	Not Guilty	W/D
Add'l I	1	Article 128 – Assault & Battery	Guilty	Guilty
I	1	Article 80 – Attempted Rape	Not Guilty	W/D
II	1	Article 80 – Attempted Sexual	Not Guilty	W/D
III	1	Assault 120c – Indecent Exposure	Not Guilty	W/D
Add'l I	1	Article 128 – Assault & Battery	Guilty	Guilty
Add'l II	1	Article 134 – Disorderly Conduct	Guilty	Guilty
I	1	Article 120 – Penetrative	Not Referred	W/D
II	1	Article 128 – Aggravated assault	Not Guilty	W/D
	2	Article 128 – Aggravated assault	Not Referred	W/D
	3	Article 128 – Aggravated assault	Not Guilty	W/D
	4–6	Article 128 – Assault & Battery	Not Referred	W/D
Add'l I	1–2	Article 128 – Assault & Battery	Guilty	Guilty
Add'l II	1	Article 112a – Wrongful Use	Guilty	Guilty
	2	Article 112a – Wrongful Possession	Not Guilty	W/D
I	1–2	Article 128 – Assault & Battery	Guilty	Guilty
II	1	Article 90 – Disobeying Superior	Guilty	Guilty
III	1	Article 120 – Rape	Not Referred	W/D
	2	Article 120 – Penetrative	Not Referred	W/D
I	1	Article 120 – Penetrative	Not Referred	W/D
	2	Article 120 – Contact	Not Referred	W/D
Add'l I	1	Article 128 – Assault & Battery	Guilty	Guilty
I	1	Article 92 – Failure to Obey	Not Guilty	W/D
	2–3	Article 92 – Failure to Obey	Guilty	Guilty
	4–5	Article 92 – Failure to Obey	Not Guilty	W/D
II	1	Article 107 – False Official	Guilty	Guilty
III	1–2	Statement	Not Guilty	W/D
IV	1	Article 120 – Penetrative	Not Guilty	W/D
V	1	Article 128 – Simple Assault	Guilty	Guilty
	2–3	Article 134 – Adultery	Not Guilty	W/D
	4	Article 134 – Adultery	Guilty	Guilty
	5	Article 134 – Adultery	Not Guilty	W/D
	6	Article 134 – Obstructing Justice	Guilty	Guilty

DAC-IPAD Adjudication Database:
Fiscal Year 2018 – Penetrative Offense s) Preferred and Case Ultimately Resolved at Special Court-Martial

	Preferral				
Case	*Offense*	*Spec*	*Articles*	*SJA Advice*	*Terms of PTA*
7	I	1	Article 120 – Penetrative		In exchange for guilty plea to Article 134 – Indecent Conduct, the CA withdrew Article 120 – Penetrative and Article 120 – Contact offenses after referral but prior to entry of pleas. The dismissal to ripen into prejudice upon completion of appellate review.
		2	Article 120 – Contact		
	II	1	Article 134 – Indecent Conduct		
8	I	1	Article 92 – Failure to Obey	GCM	In exchange for guilty plea to Article 92 and Article 134, the CA withdrew Article 120 – Penetrative and Article 120 – Contact offenses. After announcement of sentence, the Government dismissed the withdrawn charges without prejudice to ripen into prejudice upon completion of appellate review.
	II	1–3	Article 120 – Penetrative	GCM	
		4–6	Article 120 – Contact	GCM	
	III	1	Article 134 – Adultery	GCM	
9	I	1	Article 120 – Penetrative		In exchange for guilty plea to Article 128, the CA withdrew without prejudice the Article 120 – Penetrative offense prior to referral to SPCM. The dismissal to ripen into prejudice upon completion of appellate review.
	II	1	Article 128 – Assault & Battery		
10	I	1–3	Article 120 – Rape	Dismiss	No PTA.
	II	1 & 3	Article 128 – Assault & Battery	Dismiss	
		2	Article 128 – Assault & Battery	SPCM	
	III	1	Article 134 – Adultery	SPCM	
11	I	1	Article 86 – Absence Place of Duty		In exchange for guilty plea to Article 86, Article 92, and Article 112a, the CA withdrew offenses with a plea of not guilty. The dismissal by the CA to ripen into prejudice upon completion of appellate review. The Article 120 – Penetrative and Article 134 offenses were withdrawn and dismissed prior to referral.
	II	1–2	Article 92 – Failure to Obey		
	III	1	Article 107 – False Official Statement		
	IV	1–8	Article 112a – Wrongful Use		
	V	1	Article 121 – Larceny		
	Add'l I	1–2	Article 120 – Penetrative		
	Add'l II	1	Article 134 – Crimes Not Capital		
12	I	1	Article 83 – Fraudulent Enlistment		In exchange for guilty plea to Article 83, Article 112a, Article 128, and Article 134 offenses, the CA withdrew offenses with a plea of not guilty. The dismissal by the CA to ripen into prejudice upon completion of appellate review. The Article 120 – Penetrative offense was withdrawn and dismissed prior to referral.
	II	1	Article 92 – Failure to Obey		
	III	1–2	Article 107 – False Official Statement		
	IV	1–5	Article 112a – Wrongful Use		
		6–9	Article 112a – Wrongful Possession		
		10–1	Article 112a – Wrongful Use		
	V	1	Article 120 – Penetrative		
	VI	1	Article 134 – Obstructing Justice		
	VI	1	Article 134 – Soliciting Another		
	Add'l I	2	Article 128 – Assault & Battery		
		1			
13	I	1	Article 120 – Penetrative		In exchange for guilty plea to Article 107 and Article 134 offenses, the CA will not refer Article 120 – Penetrative offense to GCM. The dismissal by the CA to ripen into prejudice upon completion of appellate review.
	Add'l I	1	Article 107 – False Official Statement		
	Add'l II	1–2	Article 134 – Adultery		

Referral				
Offense	*Spec*	*Articles*	*Plea*	*Finding*
I	1	Article 120 – Penetrative	W/D	W/D
	2	Article 120 – Contact	W/D	W/D
II	1	Article 134 – Indecent Conduct	Guilty	Guilty
I	1	Article 92 – Failure to Obey	Guilty	Guilty
II	1–3	Article 120 – Penetrative	Not Guilty	Withdrawn
	4–6	Article 120 – Contact	Not Guilty	Withdrawn
III	1	Article 134 – Adultery	Guilty	Guilty
I	1	Article 120 – Penetrative	Not Referred	W/D
II	1	Article 128 – Assault & Battery	Guilty	Guilty
I	1–3	Article 120 – Rape	Not Referred	W/D
II	1 & 3	Article 128 – Assault & Battery	Not Referred	W/D
II	2	Article 128 – Assault & Battery	Not Guilty	Not Guilty
III	1	Article 134 – Adultery	Not Guilty	Not Guilty
I	1	Article 86 – Absence Place of Duty	Guilty	Guilty
II	1–2	Article 92 – Failure to Obey	Guilty	Guilty
III	1	Article 107 – False Official	Not Guilty	W/D
IV	1–8	Statement	Guilty	Guilty
V	1	Article 112a – Wrongful Use	Not Guilty	W/D
Add'l I	1–2	Article 121 – Larceny	Not Referred	W/D
Add'l II	1	Article 120 – Penetrative	Not Referred	W/D
I	1	Article 83 – Fraudulent Enlistment	Guilty	Guilty
II	1	Article 92 – Failure to Obey	W/D	W/D
III	1–2	Article 107 – False Official	Not Guilty	W/D
IV	1–4	Statement	Not Guilty	W/D
	5	Article 112a – Wrongful Use	W/D	W/D
	6	Article 112a – Wrongful Use	Guilty	Guilty
	7–9	Article 112a – Wrongful Possession	Not Guilty	W/D
	10	Article 112a – Wrongful Possession	W/D	W/D
	11	Article 112a – Wrongful Use	Guilty	Guilty
V	1	Article 112a – Wrongful Use	Not Referred	W/D
VI	1	Article 120 – Penetrative	Guilty	Guilty
VI	2	Article 134 – Obstructing Justice	W/D	W/D
Add'l I	1	Article 134 – Soliciting Another Article 128 – Assault & Battery	Guilty	Guilty
I	1	Article 120 – Penetrative	Not Referred	W/D
Add'l I	1	Article 107 – False Official	Guilty	Guilty
Add'l II	1–2	Statement Article 134 – Adultery	Guilty	Guilty

DAC-IPAD Adjudication Database:
Fiscal Year 2018 – Penetrative Offense(s) Preferred and Case Ultimately Resolved at Summary Court-Martial

	Preferral				
Case	*Offense*	*Spec*	*Articles*	*SJA Advice*	*Terms of PTA*
1	I	1	Article 80 – Attempted Rape	GCM	In exchange for guilty plea to new Article 128 – Assault & Battery offense at SCM, the Article 80 – Attempted Rape and Article 120 – Contact offenses previously referred to GCM were withdrawn without prejudice. After findings and sentence at SCM and separation from the Service, the dismissal to ripen into with prejudice.
	II	1	Article 120 – Contact	GCM	
	III	1	Article 128 – Assault & Battery	Dismiss	
2	I	1–3	Article 80 – Attempted Penetrative	GCM	In exchange for guilty plea to Article 120c – Indecent Exposure at SCM, the Article 80 – Attempted Penetrative, Article 120 – Contact and Article 134 offenses previously referred to GCM were withdrawn without prejudice. After findings and sentence at SCM and separation from the Service, the dismissal to ripen into with prejudice.
	II	1–3	Article 120 – Contact	GCM	
	III	1	Article 120c – Indecent exposure	GCM	
	Add'l I	1	Article 134 – Prejudice to Good Order	GCM	

Referral				
Offense	*Spec*	*Articles*	*Plea*	*Findings*
I	1	Article 80 – Attempted Rape	Not Referred	W/D
II	1	Article 120 – Contact	Not Referred	W/D
III	1	Article 128 – Assault & Battery	Not Referred	W/D
Add'l I	1	Article 128 – Assault & Battery	Guilty	Guilty
I	1–3	Article 80 – Attempted Penetrative	Not Referred	W/D
II	1–3	Article 120 – Contact	Not Referred	W/D
III	1	Article 120c – Indecent exposure	Guilty	Guilty
Add'l I	1	Article 134 – Prejudice to Good Order	Not Referred	W/D

APPENDIX C. ACRONYMS AND ABBREVIATIONS

CA	convening authority
CONUS	continental United States
DAC-IPAD	Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces
DoD	Department of Defense
DWG	Data Working Group
FY	fiscal year
GCM	general court-martial
JPP	Judicial Proceedings Since Fiscal Year 2012 Amendments Panel
MIDN	midshipman
NDAA	National Defense Authorization Act
NS	not (statistically) significant
OCONUS	outside the continental United States
OLS	ordinary least squares
PTA	pretrial agreement
SA	sexual assault
SCM	summary court-martial
SJA	staff judge advocate
SPCM	special court-martial
UCMJ	Uniform Code of Military Justice
W/D	withdrawn

JUDICIAL PROCEEDINGS PANEL

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

April 2017

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Report of the Judicial Proceedings
Since Fiscal Year 2012 Amendments Panel

Military Defense Counsel Resources and Experience in Sexual Assault Cases

April 2017

JUDICIAL PROCEEDINGS PANEL

April 24, 2017

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Chair, Committee
on Armed Services
United States Senate
Washington, DC 20510

The Honorable Jack Reed
Ranking Member, Committee
on Armed Services
United States Senate
Washington, DC 20510

The Honorable Mac Thornberry
Chair, Committee
on Armed Services
United States House of
Representatives
Washington, DC 20515

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

The Honorable James Mattis
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to submit this report of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP) on military defense counsel resources and experience. This report includes four recommendations on the topics of defense investigators, defense office resources and staffing, defense requests for and funding of expert witnesses and consultants, and defense counsel experience.

To assess the effects of numerous changes in law and policy on sexual assault offenses in the military, the JPP tasked the JPP Subcommittee with conducting site visits to military installations throughout the United States and Asia. From July through September 2016, JPP Subcommittee members spoke to more than 280 individuals from all of the military Services involved in the investigation, prosecution, and defense of sexual assault offenses. The JPP Subcommittee heard from defense counsel and prosecutors from all of the Services about the perceived disparity in resources and experience between defense counsel and prosecutors. The JPP Subcommittee reviewed the information gathered from these site visits, as well as information on this topic received by the JPP in public meetings, and submitted their findings and recommendations on this issue to the JPP. After deliberating on the Subcommittee's report and recommendations, the JPP adopted all of the Subcommittee's recommendations, with modifications. The JPP expresses sincere appreciation to the members of the JPP Subcommittee and everyone who contributed to this report.

The JPP looks forward to continuing its review of military judicial proceedings for sexual assault crimes and addressing other topics in future reports.

Respectfully submitted,

Elizabeth Holtzman, Chair

Barbara S. Jones

Victor Stone

Thomas W. Taylor

Patricia A. Tracey

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APPENDICES:

Executive Summary

In order to assess the effects of numerous changes in law and policy on the investigation, prosecution, and defense of sexual assault offenses in the military, the Judicial Proceedings Panel (JPP) tasked the JPP Subcommittee with conducting site visits to military installations to talk to the men and women who work in the military justice system. The JPP had previously heard information on many of these law and policy changes and wanted to determine how these changes were being carried out at the installation level by investigators, prosecutors, defense counsel, and others involved in sexual assault investigation, litigation, or victim support.

From July through September 2016, members of the JPP Subcommittee visited military installations throughout the United States and Asia. They spoke to more than 280 individuals representing 25 military installations and all of the Services, including prosecutors, defense counsel, special victims' counsel/victims' legal counsel, paralegals, commanders, investigators, and sexual assault response coordinators and other victim support personnel. These individuals spoke without attribution so that the Subcommittee could gain an unfiltered, candid assessment of how changes in sexual assault laws and policies have affected the military justice system. On the basis of information from these site visits, the Subcommittee elected to issue reports on several topics. The Subcommittee issued its first report to the JPP—the Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases—on December 9, 2016.

In its report on defense resources and experience, the JPP Subcommittee detailed information gathered from military installation site visits and other sources in four areas: (1) defense investigators, (2) defense office resources and staffing, (3) defense requests for and funding of experts, and (4) defense counsel experience. The Subcommittee made recommendations in each of these areas.

The JPP deliberated on the Subcommittee's report and had the opportunity to question the JPP Subcommittee members who attended the installation site visits. As a result of this deliberation, the JPP's report summarizes and adopts the information presented by the Subcommittee, provides additional information from Service responses to a JPP request for information, and adopts the Subcommittee's recommendations, with modifications.

The JPP makes four recommendations in the area of defense counsel resources and experience, several of which had—in some form—been recommended by its predecessor panel, the Response Systems to Adult Sexual Assault Crimes Panel (RSP) in its June 2014 report to Congress. The JPP recommends that the Services provide independent defense investigators, ensure sufficient staffing and resourcing of Service defense offices, place expert witness approval and funding authority in the Service defense organizations, and ensure that lead defense counsel in sexual assault cases have sufficient litigation experience, setting a minimum tour length for defense counsel of two years.

Summary of JPP Recommendations on Military Defense Counsel Resources and Experience in Sexual Assault Cases*

Recommendation 39: In order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as reasonably needed.

- In its June 2014 report, the RSP recommended that the Secretary of Defense direct the Services to provide independent, deployable defense investigators. The RSP noted that civilian public defender offices routinely employ investigators and consider them indispensable.
    - To date, only the Navy has complied with this recommendation, hiring eight civilian defense investigators. Site visit feedback from Navy defense counsel regarding the employment of defense investigators was overwhelmingly positive.
    - The Army and Air Force are monitoring the feasibility of the Navy's defense investigator program, but the Marine Corps feels that current procedures for requesting defense investigative assistance are sufficient.
- Since the RSP made this recommendation, statutory changes have been made to the Article 32 process. Under the new Article 32 pretrial hearing process, witnesses, including the victim, testify at the Article 32 hearing far less frequently and less evidence is presented, making it more difficult for defense counsel to gain access to important information regarding the government's case.

Recommendation 40: The military Services immediately review Service defense organizations' staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an independent audit of defense staffing across all military Services to determine the optimal level of staffing for the Service defense organizations in the long term and authorize temporary details from one Service to another to ensure expeditious disposition of allegations. Organizations that have conducted similar kinds of assessments of public defender resources in various civilian jurisdictions may be of assistance in conducting this audit.

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* JPP Recommendations 1–11 are included in the Judicial Proceedings Panel Initial Report 11 (Feb. 2015), *available at* http://jpp.whs.mil/public/docs/08-Panel_Reports/JPP_InitialReport_Final_20150204.pdf. JPP Recommendations 12–17 are included in the Judicial Proceedings Panel Report on Restitution and Compensation for Military Adult Sexual Assault Crimes 5 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Rest_Comp_Report_Final_20160201_Web.pdf. JPP Recommendations 18–23 are included in the Judicial Proceedings Panel Report on Article 120 of the Uniform Code of Military Justice 5–7 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Art120_Report_Final_20160204_Web.pdf. JPP Recommendations 24–36 are included in the Judicial Proceedings Panel Report on Retaliation Related to Sexual Assault Offenses 5–10 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/04_JPP_Retaliation_Report_Final_20160211.pdf. JPP Recommendations 37–38 are included in the Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses 5–6 (Apr. 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/05_JPP_StatData_MilAdjud_SexAsslt_Report_Final_20160419.pdf.

- In its June 2014 report, the RSP recommended that the Service Secretaries ensure that defense organizations are adequately funded and resourced.

- The Secretary of Defense approved this recommendation and referred it to the Service Secretaries for implementation. In their responses to the JPP's recent request for information, all of the Services stated that their senior-level defense counsel have training and experience comparable to or exceeding that of the prosecutors. They also stated that resourcing of defense offices is comparable to that of the prosecution.

- According to site visit feedback provided to the JPP Subcommittee, not all defense offices are adequately staffed or resourced; one defense counsel noted that his office had only one paralegal assigned to assist ten defense counsel. Testimony to the JPP from Army and Marine Corps defense leadership supports site visit feedback that these organizations are understaffed and under-resourced.

Recommendation 41: **The Secretary of Defense direct the Joint Service Committee on Military Justice to draft appropriate rules and measures, as necessary, to vest defense expert approval authority and expenditure funding in the Service defense organizations.**

- According to site visit feedback provided to the JPP Subcommittee by defense counsel and prosecutors, defense requests for expert witnesses and consultants in sexual assault cases are often denied or, if the requests are granted, defense counsel are provided a less qualified expert than that provided to the prosecution.

- Current procedures in the Manual for Courts-Martial require defense counsel to request experts from the convening authority and require them to submit a statement of reasons why the expert is necessary. Given that these requests are typically processed through the trial counsel, such statements often force defense counsel to prematurely reveal trial strategy.

- Even when defense requests for experts are granted, the expert often arrives so late in the trial process that his or her ability to assist with defense strategy is curtailed.

- Civilian public defender offices routinely maintain their own funding for experts.

Recommendation 42: **The military Services permit only defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in sexual assault cases. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set assignment policies that provide defense counsel two or more consecutive years of experience in the role, to the maximum extent feasible at the same location. Exceptions to this policy should be personally approved, on a case-by-case basis, by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.**

- There is a disparity among the Services regarding defense counsel experience requirements; the Air Force and Navy require defense counsel to have prior litigation experience, while the Army and Marine Corps have no such requirement.

- Several defense counsel on site visits told JPP Subcommittee members of their experiences defending sexual assault cases when they had very little litigation experience. All defense counsel recommended against assigning brand-new attorneys to defense counsel positions.

- In its June 2014 report, the RSP recommended that the Services permit only defense counsel with litigation experience to serve as lead defense counsel in sexual assault cases, and that defense counsel be assigned to that role for at least two years. The Secretary of Defense amended this recommendation to state that only counsel with prior litigation experience could serve as trial counsel and defense counsel in penetrative-type sexual offenses, and the minimum tour length was set at two years, to the extent practicable.

    - In response to the JPP's request for information, the Army stated that it considers litigation experience and the complexity of the case when assigning counsel, with inexperienced defense counsel typically being assigned to handle less complex cases and to assist more experienced counsel. According to the Army, its regional and senior defense counsel have the experience necessary to litigate complex cases and to help train more junior counsel. The Marine Corps also reported that it takes many factors into account when assigning defense counsel, such as the complexity of the case and the counsel's experience level. For complex cases, the senior defense counsel must consult with the regional defense counsel to ensure that the right counsel is detailed to the case. The Navy and Air Force stated that typically only experienced counsel are assigned to defense counsel billets, with more senior counsel serving as lead defense counsel in penetrative sexual assault cases.

    - With the exception of the Marine Corps, the other Services reported that defense counsel assignments are usually two years or more. The Marine Corps stated that defense counsel tour lengths are at least 18 months, which it considers adequate.

- A provision in the National Defense Authorization Act for Fiscal Year 2017 requires the Services to ensure that counsel assigned to a case have sufficient experience to successfully prosecute or defend the case. This provision also requires the Services to use a system of skill identifiers to identify experienced judge advocates so that they can provide oversight to less experienced counsel. This provision calls for a five-year pilot program to assess the feasibility of establishing a professional development program for judge advocates to ensure sufficient experience among counsel to prosecute and defend complex cases.

I. Introduction

During the first two years of its tenure, the Judicial Proceedings Panel (JPP) has had the opportunity to hear from numerous officials and experts in the military Services about legislation, policies, and practices relating to sexual assault litigation.[1] This information has been extremely valuable and has informed the JPP's findings and recommendations on a number of topics. However, in order to assess how these laws and policies are working in practice, the JPP determined that there would be value in conducting site visits to military installations to hear the opinions of those responsible for carrying them out.

The JPP tasked the JPP Subcommittee[2] with conducting these installation site visits. From July through September 2016, members of the Subcommittee visited military installations throughout the United States and Asia. They spoke to more than 280 individuals representing 25 military installations from all of the Services who are involved in investigating, litigating, and supporting sexual assault cases in the military.[3] These individuals spoke without attribution so that the Subcommittee could gain an unfiltered, candid assessment of how changes in sexual assault laws and policies have affected the military justice system. On the basis of information from these site visits, the Subcommittee elected to issue several reports on different topics. The Subcommittee issued its first report to the JPP—the Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases—on December 9, 2016.[4]

In its report on defense resources and experience, the JPP Subcommittee detailed information gathered from site visits and other sources in four areas: (1) defense investigators, (2) defense office resources and staffing, (3) defense requests for and funding of experts, and (4) defense counsel experience. The Subcommittee made recommendations in each of these areas. In this report, the JPP adopts the information presented by the Subcommittee, which is summarized here; provides additional information gathered from Service responses to a JPP request for information; and adopts the Subcommittee's recommendations, with modifications. In deliberating on and adopting the Subcommittee's report, the JPP notes the vast experience of the Subcommittee members in litigation of sexual assault cases, both in the military and civilian communities.

1 *See* Appendix A: Judicial Proceedings Panel Authorizing Statutes and Charter.

2 *See* Appendix B: Judicial Proceedings Panel Committee and Subcommittee Member Biographies.

3 *See* Appendix C: List of Installation Site Visits and Subcommittee Members in Attendance.

4 Subcommittee Report to the Judicial Proceedings Panel on Military Defense Counsel Resources and Experience in Sexual Assault Cases (December 2016) [hereinafter Subcommittee Report], Appendix D, *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_DefResources _Final_ 20161208.pdf.

II. Defense Investigators

A. Site Visit Information. As noted in the JPP Subcommittee's report on this subject, defense counsel and trial counsel interviewed by the JPP Subcommittee on military installation site visits universally stated that defense requests for investigative support are routinely denied by convening authorities and military judges. Defense counsel also told the Subcommittee that junior paralegals, who are not trained investigators, do perform some investigative functions, but those activities reduce their availability to help prepare for trial.[5] Defense counsel noted further that their ability to conduct these investigations is limited by their demanding trial schedules and the need to avoid a conflict of interest caused by becoming a potential witness in the case.[6]

While military defense counsel are able to obtain the investigative report produced by military criminal investigative organizations (MCIOs), current practices and policies regarding sexual assault investigations limit a defense counsel's ability to develop the facts of the case. MCIO investigators told Subcommittee members during site visits that internal policies that discourage thorough questioning and follow-up interviews of victims, as well as the presence of special victims' counsel/victims' legal counsel (SVC/VLC) at every interview, have hampered their ability to interview the victim as thoroughly as they feel necessary. They noted that MCIO requests to the SVC/VLC for a follow-up interview with the victim are frequently denied, making it difficult for them to clarify potential inconsistencies in the victim's initial statement.[7]

The Subcommittee report notes that counsel informed them on site visits that the MCIOs will not investigate leads at the defense counsel's request. Defense and trial counsel told Subcommittee members of a factor compounding the problem: recent statutory changes have altered the Article 32 process from a pretrial investigation into a less robust preliminary hearing.[8] Under the old process, victims were frequently required to appear and testify at the Article 32 hearing and undergo cross-examination from defense counsel. Under the new process, victims are no longer required to—and frequently do not—appear and testify at the Article 32 hearing.[9] Trial and defense counsel interviewed by the Subcommittee during installation site visits referred to the new Article 32 process as a "paper drill," because victims and other witnesses often do not testify, and the prosecution frequently submits only written statements or other documentary evidence for review.[10] Under the new process, discovery for the defense is no longer one of the stated purposes for the Article 32 hearing.

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5 Subcommittee Report, Appendix D at 2.

6 Subcommittee Report, Appendix D at 2.

7 Subcommittee Report to the Judicial Proceedings Panel on Sexual Assault Investigations in the Military (February 2017), *available at* http://jpp.whs.mil/Public/docs/08Panel_Reports/JPP_SubcommReport_Investigations_Final_20170224.pdf.

8 National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1702(a), 127 Stat. 672 (2013); National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, § 531(g), 128 Stat. 3292 (2014), makes this change effective for all preliminary hearings conducted on or after December 26, 2014.

9 *Id.*

10 Subcommittee Report, Appendix D at 2.

B. Additional Information. At the JPP's public hearing in May 2016, the Services' chiefs of defense services stated that defense requests for investigative support are rarely granted by the convening authority or military judge in sexual assault cases.[11] In fact, the Marine Corps defense representative informed the JPP that she had never seen an investigator request granted in a sexual assault case, adding that it must be "very infrequent if it happens."[12] Similarly, the Army's Chief of Trial Defense Services stated that only one in twelve requests for appointment of a defense investigator in sexual assault cases was granted.[13] The Marine Corps presenter also noted that having defense counsel conduct all of their own investigative work means that counsel are taken away from working on their case.[14] She pointed out—highlighting the disparity of resources between the prosecution and defense—that in the Marine Corps, the prosecution's complex trial team has dedicated investigators.[15] In addition, in the January 2017 JPP public meeting, a Marine Corps defense counsel told the JPP that not having defense investigators has led to trial delays.[16]

The Navy's defense presenter at the JPP's May 2016 public meeting reported that the Navy had hired eight defense investigators. As noted in the JPP Subcommittee's report, the addition of these investigators has enabled defense counsel to focus on preparing their cases for trial and obtaining needed training.[17] At the JPP's January 2017 public meeting (which had a different subject), a Navy senior defense counsel provided an update on the Navy's addition of defense investigators, stating that a defense investigator working with her had a "monumental" impact "in making up some of the differences that have been lost in the investigative process from the Article 32."[18] She told the JPP that the addition of defense investigators has resulted in cases going to trial more quickly and that the Navy could use more defense investigators than it currently employs. She also noted that the defense investigator's work had resulted in acquittals at trial.[19]

In its June 2014 report, the Response Systems to Adult Sexual Assault Crimes Panel (RSP)—the predecessor panel to the JPP—issued a recommendation that the Secretary of Defense direct the Services to provide independent, deployable defense investigators. In a December 15, 2014,

11 *Transcript of JPP Public Meeting* 241–42 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Officer-in-Charge (Reserve), Defense Services Agency; COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Service; Col Daniel Higgins, U.S. Air Force, Chief, Trial Defense Division; and CDR Stephen Reyes, U.S. Navy, Defense Counsel Assistance Program).

12 *Transcript of JPP Public Meeting* 241 (May 13, 2016) (testimony of Col Terri Zimmerman).

13 *Transcript of JPP Public Meeting* 241–42 (May 13, 2016) (testimony of COL Daniel Brookhart).

14 *Transcript of JPP Public Meeting* 198 (May 13, 2016) (testimony of Col Terri Zimmerman).

15 *Id.*

16 *Transcript of JPP Public Meeting* 190 (Jan. 6, 2017) (testimony of Major James Argentina, U.S. Marine Corps, Senior Defense Counsel) ("Despite the [Response] Systems Panel recommendation that we have independent investigators, it is not currently an asset that we have at this time, which has effected, I think, some delay in the trial when we look at trying to invest[igate] the issues of 412 and 513 . . .").

17 Subcommittee Report, Appendix D at 3.

18 *Transcript of JPP Public Meeting* 214 (Jan. 6, 2017) (testimony of LCDR Rachel Trest, U.S. Navy, Senior Defense Counsel).

19 *Id.*

memorandum regarding implementation of the RSP recommendations,[20] the Secretary of Defense referred this recommendation to the Joint Service Committee on Military Justice (JSC).[21]

The JPP sent a request for information (RFI) to the Services in December 2016 to determine the status of this RSP recommendation. To date only the Navy has implemented it, though the Army and Air Force indicate that they are monitoring the Navy's program to assess its feasibility and success. The Marine Corps believes that its current mechanisms for the defense to obtain investigative support are adequate. The following table summarizes the Services' responses.[22]

Navy	• The Navy implemented the RSP's recommendation by hiring eight defense investigators. • The program is in its second year and has resulted in uncovering exculpatory evidence, contributing to acquittals and better dispositions for defense clients. • The Navy JAG Corps is assessing the program to ensure that it has the appropriate number of investigators and they are assigned appropriately.
Army	• Paralegals are trained to perform some defense investigative functions. • Counsel can request defense investigation support from the convening authority and the military judge. • The Army is tracking the Navy's defense investigator program to assess its feasibility.
Air Force	• The Air Force is tracking implementation of the Navy's defense investigator program to assess the best course of action.
Marine Corps	• Current mechanisms for the defense to obtain investigative support are adequate. • The Manual for Courts-Martial provides procedures for the defense to request investigative support from the convening authority and the military judge. • Defense offices are provided legal clerks who can coordinate and interview witnesses, take notes during meetings, and perform other similar functions. • The accused may personally hire a defense investigator.
Coast Guard	• The Coast Guard uses defense services provided by the Navy.

The Army and Marine Corps responses correctly note that the Manual for Courts-Martial provides procedures for the defense to request investigative assistance from the convening authority and military judge.[23] But in practice, according to presentations made to the JPP by the heads of the Services' defense organizations, as well as information received from numerous trial and defense counsel interviewed during installation site visits, such requests are rarely granted.

Also, while the Army and Marine Corps RFI responses state that defense paralegals and legal clerks can perform some of these investigative functions, defense counsel assert that doing so takes these individuals away from performing their primary duty of preparing to defend Service members accused of serious offenses at courts-martial. Moreover, low staffing levels at defense offices often make

20 U.S. Dep't of Def., Memorandum from the Secretary of Defense on Implementation of the Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (Dec. 15, 2014) [hereinafter SecDef RSP Implementation Memorandum].

21 The JSC is "an inter-agency, joint body of judge advocates and advisors, dedicated to ensuring the Manual for Courts-Martial (MCM) and Uniform Code of Military Justice (UCMJ) constitute a comprehensive body of criminal law and procedure," Joint Service Committee on Military Justice, http://jsc.defense.gov/.

22 *See* Navy's response to JPP Request for Information 160 [hereinafter JPP RFI 160] (Dec. 29, 2016); Army's response to JPP RFI 160 (Jan. 4, 2017); Air Force's response to JPP RFI 160 (Dec. 30, 2016); Marine Corps' response to JPP RFI 160 (Jan. 3, 2017); Coast Guard's response to JPP RFI 160 (Jan. 3, 2017).

23 *See* Army's response to JPP RFI 160 (Jan. 4, 2017); Marine Corps' response to JPP RFI 160 (Jan. 3, 2017).

it impossible for paralegals and legal clerks to provide such assistance. A defense counsel at one installation informed the Subcommittee that an office at a large military installation with ten defense counsel had only one paralegal.[24]

C. JPP Assessment and Recommendation. It has been two and a half years since the RSP recommended that Service defense organizations be provided with independent, deployable defense investigators. This recommendation was based on information presented to the RSP from civilian defense counsel, who observed that many civilian public defender offices have defense investigators and consider them critical. The RSP also found that defense investigators are necessary to "correct an obvious imbalance of resources."[25]

Since the RSP issued that report, statutory changes have been made to the Article 32 process. Under the new Article 32 pre-trial hearing process, witnesses, including the victim, testify at the Article 32 hearing far less frequently and less evidence is presented, making it more difficult for defense counsel to gain access to important information regarding the government's case.

These changes to the Article 32 process, as well as the limitations of MCIO victim interviews, suggest that the need for defense investigators is even greater now than it was when the RSP made its recommendation. Members of the JPP Subcommittee reported in the December 9, 2016, JPP public meeting that their sense from the site visits was that a lack of defense investigators and other resources, especially in light of changes to the Article 32 process, has negatively affected the quality of military justice in sexual assault cases.[26]

***Recommendation 39*: In order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as reasonably needed.**

24 Subcommittee Report, Appendix D at 1.

25 Report of the Response Systems to Adult Sexual Assault Crimes Panel 38, 153 (June 2014) [hereinafter RSP Report], *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf.

26 *Transcript of JPP Public Meeting* 68 (Dec. 9, 2016) (comments of Ms. Elizabeth Holtzman, JPP Chair and JPP Subcommittee member).

III. Defense Office Staffing and Resources

A. Site Visit Information. The JPP Subcommittee reported that it repeatedly heard from prosecutors and defense counsel at installation site visits that defense offices are understaffed and under-resourced. Many defense counsel stated that these deficiencies have made it difficult to manage their caseload, more than half of which is composed of sexual assault cases. As noted above, a defense counsel at a large installation reported having only one paralegal to assist ten defense counsel with case preparation.[27]

B. Additional Information. The Services' defense leadership provided information on this and other topics to the JPP at its May 2016 public meeting. The Army's chief of trial defense services told the Panel that in 2014, he had 154 authorized defense counsel billets and that number had since gone down to 144. Yet he was unable to fill even those billets, with only 135 counsel on hand at that time.[28] Similarly, the Marine Corps defense representative at the May 2016 JPP public meeting stated that there was a disparity in resources between the defense and prosecution.[29]

In its June 2014 report, the RSP recommended that the Service Secretaries "ensure military defense counsel organizations are adequately resourced in funding resources and personnel, including defense supervisory personnel with training and experience comparable to their prosecution counterparts, and direct the Services assess whether that is the case."[30] In the Secretary of Defense's December 15, 2014, memorandum regarding implementation of the RSP recommendations, this recommendation's status was listed as "Approve" and it was referred to the Service Secretaries for implementation.[31] The JPP's December 2016 RFI to the Services inquired about the status of this recommendation.

All of the Services stated that their senior-level defense counsel have training and experience comparable to or exceeding that of prosecutors. They also stated that resourcing of defense offices is comparable to that of the prosecution.[32]

C. JPP Assessment and Recommendation. The Secretary of Defense approved the RSP's recommendation that defense offices be adequately resourced and staffed and forwarded it to the Service Secretaries for action. According to the recent Service responses to the RFI, all defense offices are adequately staffed and resourced. However, reports of defense counsel from the installation site visits and information presented to the JPP at its May 2016 public meeting suggest that understaffing and under-resourcing of defense offices continue to be a problem—especially for the Army and Marine Corps.

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27 SUBCOMMITTEE REPORT, Appendix D at 1.

28 *Transcript of JPP Public Meeting* 215 (May 13, 2016) (testimony of COL Daniel Brookhart).

29 *Transcript of JPP Public Meeting* 196 (May 13, 2016) (testimony of Col Terri Zimmerman).

30 RSP REPORT at 38, 163–64.

31 SecDef RSP Implementation Memorandum.

32 *See* Army's response to JPP RFI 160 (Jan. 4, 2017); Navy's response to JPP RFI 160 (Dec. 29, 2016); Marine Corps' response to JPP RFI 160 (Jan. 3, 2017); Air Force's response to JPP RFI 160 (Dec. 30, 2016); Coast Guard's response to JPP RFI 160 (Jan. 3, 2017).

The military has a great deal of experience in "doing more with less." However, as defense counsel informed Subcommittee members, sexual assault cases have grown increasingly complex, require a lot of resources to defend, and make up a much larger percentage of their caseload than in previous years. As noted by one Subcommittee member—a retired Marine Corps general officer—for many years military defense counsel have complained about a lack of resources and staffing; but as resources have diminished over the years, the defense organizations have gotten used to doing without them. On the basis both of his own experience and of information gathered from prosecutors and defense counsel during site visits, he strongly recommended additional resources and staffing for defense organizations in order to continue providing military members with world-class defense services.[33]

***Recommendation 40*: The military Services immediately review Service defense organizations' staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an independent audit of defense staffing across all military Services to determine the optimal level of staffing for the Service defense organizations in the long term and authorize temporary details from one Service to another to ensure expeditious disposition of allegations. Organizations that have conducted similar kinds of assessments of public defender resources in various civilian jurisdictions may be of assistance in conducting this audit.**

The JPP's recommendation on this topic was informed by the Subcommittee's presentation to the JPP discussing the reliance in the civilian sector on organizations that conduct audits of public defender offices to determine appropriate levels of staffing and resources.[34]

33 *Transcript of JPP Public Meeting* 40–44 (Dec. 9, 2016) (testimony of BGen (Ret.) James Schwenk, JPP Subcommittee member).

34 *Transcript of JPP Public Meeting* 115–16 (Dec. 9, 2016) (testimony of BGen (Ret.) James Schwenk, and Ms. Lisa Friel, JPP Subcommittee members).

IV. Defense Expert Requests and Funding

A. Site Visit Information. During the installation site visits, JPP Subcommittee members heard numerous complaints from defense counsel from all Services about their inability to get approval and funding for defense expert witnesses and consultants in sexual assault cases. In the military, defense counsel must request approval and funding for expert witnesses and consultants, prior to referral of charges, from the convening authority.[35] These requests must be accompanied by a statement providing reasons why the expert is necessary and estimating the cost of the expert.[36] If the convening authority denies the request, the defense counsel can make it again to the military judge following referral of charges. The military judge will determine whether the expert's testimony is "relevant and necessary," and whether the government has or will provide a "suitable substitute."[37]

Defense counsel told Subcommittee members that their requests for experts are frequently denied or, after approval, they are provided with a substitute that is inadequate to the task.[38] This assertion was corroborated by a number of prosecutors interviewed on site visits. Counsel pointed out that when experts are granted, they are often made available shortly before the trial date, too late to help develop a defense theory of the case or prepare the case.[39] In addition, the process of asking the convening authority to approve and fund a defense expert often forces the defense to reveal their trial strategy to the government.[40] In contrast, trial counsel are not similarly disadvantaged: they can consult with and hire experts early in the trial process, without being forced to reveal their theory of the case to the defense.

B. Additional Information. In its June 2014 report, the RSP found that public defender offices often maintain their own budgets to cover expert witnesses and consultants or can request experts through a trial judge who manages the budget.[41] They also pointed out that federal public defenders have their own funding to pay for experts.[42] In addition, the JPP Subcommittee noted that defense counsel in civilian judicial systems are able to hire confidential consulting experts and can keep this information

35 Manual for Courts-Martial, United States (2016 ed.), Rule for Court-Martial [hereinafter R.C.M.] 703(d); Article 46 of the Uniform Code of Military Justice (UCMJ) states that "trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence[.]" 10 U.S.C. § 846 (UCMJ, art. 46).

36 *Id.*

37 *Id.* The Court of Appeals for the Armed Forces has held that an "adequate substitute" must have qualifications "reasonably similar" to those of the government's expert. *United States v. Warner*, 62 M.J. 114, 119 (C.A.A.F. 2005). The court stated: "The absence of such parity opens the military justice system to abuse, because the Government in general, and—as this case demonstrates—the trial counsel in particular, may play key roles in securing defense experts." The appellant's brief in this case analogizes this arrangement to "permitting a Major League baseball manager to choose the opposing pitcher in the final game of the World Series." *Id.* at 120.

38 Subcommittee Report, Appendix D at 6.

39 *Id.*

40 R.C.M. 703(d); Subcommittee Report, Appendix D at 6.

41 RSP Report at 163.

42 *Id.*

from the prosecution unless they elect to use the expert at trial, enabling the defense to get a candid assessment from the expert without it being used against their client.[43]

C. JPP Assessment and Recommendation. Both trial and defense counsel informed the Subcommittee of the difficulties and disparities involved with defense requests for experts. These requests are reportedly often denied by the convening authority, and when they are granted the defense is often given an expert not of their choosing who may not be qualified to speak to the issues at hand. Because military judges can't rule on such requests until after referral of charges—at the point when trial dates are being agreed on—the defense will not have the benefit of a needed expert consultant prior to and during the Article 32 preliminary hearing, when the consultant's expertise may be of critical value to developing a defense and to helping the defense counsel understand the complexities of the issues that tend to arise in sexual assault cases. Furthermore, military defense counsel, like their civilian counterparts, should not be required to reveal their theory of defense or defense strategies to the government so early in the process before trial, unless otherwise required by law. Providing the Service defense organizations their own source of expert funding would alleviate this problem and put the burden on defense leadership to determine how and where this budget will be spent.

***Recommendation 41*: The Secretary of Defense direct the Joint Service Committee on Military Justice to draft appropriate rules and measures, as necessary, to vest defense expert approval authority and expenditure funding in the Service defense organizations.**

43 Subcommittee Report, Appendix D at 7.

V. Defense Counsel Staffing and Experience Levels

A. Site Visit Information. Defense counsel told the Subcommittee on site visits that they generally receive adequate training. However, their comments did suggest problems in the experience level of defense counsel and the lack of uniformity among the Services. The Navy and Air Force require attorneys to have some litigation and military justice experience prior to being placed in a defense counsel billet, but the Army and Marine Corps do not have this prerequisite and allow first-tour judge advocates to serve as defense counsel in sexual assault cases.[44] Several defense counsel told Subcommittee members that in the first or second contested trial of their career, they served as second chair on a rape case; one defense counsel reported having served as lead counsel in a sexual assault case in his third trial.[45] Though these experiences were not common, they were overwhelming and uncomfortable for those counsel who had them. All defense counsel recommended against assigning brand-new attorneys to defense counsel positions.[46]

B. Additional Information. In its June 2014 report, the RSP reviewed this issue and recommended that only defense counsel with prior litigation experience serve as lead defense counsel in a sexual assault case. It also recommended a minimum tour length for defense counsel of two years.[47] In the Secretary of Defense's December 15, 2014 memorandum regarding implementation of the RSP recommendations, this recommendation was approved in part, and referred to the Services for further study.[48] The recommendation was amended by the Department of Defense so that only counsel with prior litigation experience could serve as trial counsel and defense counsel in cases involving penetrative sexual offenses, and the minimum tour length was set at two years, to the extent practicable.[49]

In response to the JPP's RFIs, the Army stated that it considers litigation experience and the complexity of the case when assigning counsel, with inexperienced defense counsel typically being assigned to handle less complex cases and to assist more experienced counsel. According to the Army, its regional and senior defense counsel have the experience necessary to litigate complex cases and to help train more junior counsel.[50] The Marine Corps also reported that it takes many factors into account when assigning defense counsel, such as the complexity of the case and the counsel's experience level. For complex cases, the senior defense counsel must consult with the regional defense counsel to ensure that the right counsel is detailed to the case.[51] The Navy and Air Force stated that typically only

44 Per a memorandum of agreement, the U.S. Coast Guard utilizes Navy defense counsel to defend their members; RSP Report at 159–60.

45 Subcommittee Report, Appendix D at 8.

46 *Id.*

47 RSP Report at 39, 160–61.

48 SecDef RSP Implementation Memorandum.

49 *Id.*

50 Army's response to JPP RFI 160 (Jan. 4, 2017).

51 Marine Corps' response to JPP RFI 160 (Jan. 3, 2017).

experienced counsel are assigned to defense counsel billets, with more senior counsel serving as lead defense counsel in penetrative sexual assault cases.[52]

With the exception of the Marine Corps, the other Services reported that defense counsel assignments are usually two years or more.[53] The Marine Corps stated that defense counsel tour lengths are at least 18 months, which it considers adequate.[54]

In the May 2016 JPP public meeting, the Army's chief of trial defense services told the Panel that 20% of attorneys assigned to a defense counsel position have no prior experience.[55] He stated that while they try to avoid assigning a new defense counsel to a sexual assault case, the realities of their staffing sometimes force these assignments, though the counsel is able to consult with more senior defense counsel.[56] He also noted that the accused's counsel in a sexual assault case may have less experience than the victim's counsel.[57] Similarly, a leader in the Marine Corps' defense organization told the JPP that the vast majority of defense counsel are serving in their first tour and are right out of law school.[58] She explained that they try to make up for this lack of experience through training and through supervision by more experienced counsel.[59] She added that defense counsel typically serve in the position for only 12 to 14 months before being reassigned.[60]

A provision in the National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA) requires the Services to ensure that trial and defense counsel detailed to a court-martial have sufficient experience and knowledge to try the case and requires the Services to have a professional development process to ensure successful prosecution and defense of courts-martial.[61] As part of that process, the Services must use skill identifiers or experience designators for identifying judge advocates with military justice experience and skill so that they can oversee less experienced counsel.[62] The provision also requires the Services to carry out a five-year pilot program to assess the feasibility of establishing a professional development program that will lead to judge advocates with military justice expertise prosecuting and defending complex courts-martial cases.[63]

C. JPP Assessment and Recommendation. While it appears that the Services generally assign more experienced defense counsel to complex cases, such as penetrative sexual assault cases, site visit feedback indicates that in at least some instances, inexperienced, first-tour judge advocates serve as

52 Navy's response to JPP RFI 160 (Dec. 29, 2016); Air Force's response to JPP RFI 160 (Dec. 30, 2016).

53 Army's response to JPP RFI 160 (Jan. 4, 2017); Navy's response to JPP RFI 160 (Dec. 29, 2016); Air Force's response to JPP RFI 160 (Dec. 30, 2016); Coast Guard's response to JPP RFI 160 (Jan. 3, 2017).

54 Marine Corps' response to JPP RFI 160 (Jan. 3, 2017).

55 *Transcript of JPP Public Meeting* 165 (May 13, 2016) (testimony of COL Daniel Brookhart).

56 *Id.*

57 *Id.*

58 *Transcript of JPP Public Meeting* 185 (May 13, 2016) (testimony of Col Terri Zimmerman).

59 *Id.*

60 *Transcript of JPP Public Meeting* 189 (May 13, 2016) (testimony of Col Terri Zimmerman).

61 National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 542, 130 Stat. 2000 (2016), Effective prosecution and defense in courts-martial and pilot programs on professional military justice development for judge advocates.

62 *Id.*

63 *Id.*

defense counsel in these types of cases. First-tour judge advocates with just two prior litigated courts-martial as their only litigation or military justice experience should not serve as lead defense counsel in a sexual assault case. Counsel should have the opportunity to develop their litigation skills in less complex cases and under the supervision of more experienced counsel. The provision in the FY17 NDAA pertaining to trial and defense counsel experience, though lacking in details, apparently seeks to achieve the goal of having the most experienced military trial and defense counsel litigating the most serious sexual assault cases. It should not be left to chance and circumstance whether an accused in a sexual assault case—facing the possibility of a punitive discharge and years in confinement—gets the benefit of experienced counsel.

In order for defense counsel to build core skills and necessary experience, it is important that they have the opportunity to serve in the position for at least two years. The Panel notes that while the Marine Corps' RFI response states that 18 months in the position is sufficient, a leader in the Marine Corps defense community told the JPP in its May 2016 public meeting that defense counsel typically serve in the position for only 12 to 14 months. This is simply not sufficient time to enable defense counsel to gain the necessary experience, as defense counsel on site visits attested.

Recommendation 42: **The military Services permit only defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in sexual assault cases. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set assignment policies that provide defense counsel two or more consecutive years of experience in the role, to the maximum extent feasible at the same location. Exceptions to this policy should be personally approved, on a case-by-case basis, by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.**

APPENDIX A: Judicial Proceedings Panel Authorizing Statutes and Charter

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013

SECTION 576. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) INDEPENDENT REVIEWS AND ASSESSMENTS REQUIRED.—

(2) JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS.— The Secretary of Defense shall establish a panel to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the amendments made to the Uniform Code of Military Justice by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1404) for the purpose of developing recommendations for improvements to such proceedings.

(b) ESTABLISHMENT OF INDEPENDENT REVIEW PANELS.

(1) COMPOSITION.

(B) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall be appointed by the Secretary of Defense and consist of five members, two of whom must have also served on the panel established under subsection (a)(1).

(2) QUALIFICATIONS.—The members of each panel shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes.

(3) CHAIR.—The chair of each panel shall be appointed by the Secretary of Defense from among the members of the panel.

(4) PERIOD OF APPOINTMENT; VACANCIES.—Members shall be appointed for the life of the panel. Any vacancy in a panel shall be filled in the same manner as the original appointment.

(5) DEADLINE FOR APPOINTMENTS.—

(B) JUDICIAL PROCEEDINGS PANEL.—All original appointments to the panel required by subsection (a)(2) shall be made before the termination date of the panel established under subsection (a)(1), but no later than 30 days before the termination date.

(6) MEETINGS.—A panel shall meet at the call of the chair.

(7) FIRST MEETING.—The chair shall call the first meeting of a panel not later than 60 days after the date of the appointment of all the members of the panel.

(c) REPORTS AND DURATION.—

(2) JUDICIAL PROCEEDINGS PANEL.—

(A) FIRST REPORT.—The panel established under subsection (a)(2) shall submit a first report, including any proposals for legislative or administrative changes the panel considers appropriate, to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives not later than 180 days after the first meeting of the panel.

(B) SUBSEQUENT REPORTS.—The panel established under subsection (a)(2) shall submit subsequent reports during fiscal years 2014 through 2017.

(C) TERMINATION.—The panel established under subsection (a)(2) shall terminate on September 30, 2017.

(d) DUTIES OF PANELS.—

(2) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall perform the following duties:

(A) Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice that were enacted by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112– 81; 125 Stat. 1404).

(B) Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.

(C) Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.

(D) Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report required by subsection (c)(2) and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.

(E) Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), and any instances in which prior sexual conduct was determined to be inadmissible.

(F) Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.

(G) Building on the data compiled as a result of paragraph (1)(D), assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.

(H) Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by section 573 of this Act.

(I) Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases.

(J) Consider such other matters and materials as the panel considers appropriate for purposes of the reports.

(3) UTILIZATION OF OTHER STUDIES.—In conducting reviews and assessments and preparing reports, a panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies.

(e) AUTHORITY OF PANELS.—

(1) HEARINGS.—A panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the panel considers appropriate to carry out its duties under this section.

(2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of a panel, a department or agency of the Federal Government shall provide information that the panel considers necessary to carry out its duties under this section.

(f) PERSONNEL MATTERS.—

(1) PAY OF MEMBERS.—Members of a panel shall serve without pay by reason of their work on the panel.

(2) TRAVEL EXPENSES.—The members of a panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance or services for the panel.

(3) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the panels, except that the Secretary may not assign primary responsibility for such staffing and resources to the Sexual Assault Prevention and Response Office.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

SEC. 1731. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(b) ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.—

(1) ADDITIONAL ASSESSMENTS SPECIFIED.—The independent panel established by the Secretary of Defense under subsection (a)(2) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the "judicial proceedings panel", shall conduct the following:

(A) An assessment of the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), to expressly cover a situation in which a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.

(B) An assessment of the implementation and effect of section 1044e of title 10, United States Code, as added by section 1716, and make such recommendations for modification of such section 1044e as the judicial proceedings panel considers appropriate.

(C) An assessment of the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (article 56(b) of the Uniform Code of Military Justice), as added by section 1705, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

(D) An assessment of the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows:

(i) Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation.

(ii) Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (article 139 of the Uniform Code of Military Justice).

(iii) Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.

(2) SUBMISSION OF RESULTS.—The judicial proceedings panel shall include the results of the assessments required by paragraph (1) in one of the reports required by subsection (c)(2)(B) of section 576 of the National Defense Authorization Act for Fiscal Year 2013.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015

SEC. 545. ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.

(a) ADDITIONAL DUTIES IMPOSED.—The independent panel established by the Secretary of Defense under section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the "judicial proceedings panel", shall perform the following additional duties:

(1) Conduct a review and assessment regarding the impact of the use of any mental health records of the victim of an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), by the accused during the preliminary hearing conducted under section 832 of such title (article 32 of the Uniform Code of Military Justice), and during court-martial proceedings, as compared to the use of similar records in civilian criminal legal proceedings.

(2) Conduct a review and assessment regarding the establishment of a privilege under the Military Rules of Evidence against the disclosure of communications between—

(A) users of and personnel staffing the Department of Defense Safe Helpline; and

(B) users of and personnel staffing of the 26 Department of Defense Safe Help Room.

(b) SUBMISSION OF RESULTS.—The judicial proceedings panel shall include the results of the reviews and assessments conducted under subsection (a) in one of the reports required by section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1760).

SEC. 546. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

(f) DUE DATE FOR ANNUAL REPORT OF JUDICIAL PROCEEDINGS PANEL – Section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1760) is amended by inserting "annually thereafter" after "reports".

CHARTER
Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

1. Committee's Official Designation: The committee shall be known as the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel ("the Judicial Proceedings Panel").

2. Authority: The Secretary of Defense, as required by section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 ("the FY 2013 NDAA") (Public Law 112-239), as modified by section 1731(b) of the National Defense Authorization Act for Fiscal Year 2014 ("the FY 2014 NDAA") (Public Law 113-66), and in accordance with the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended) and 41 C.F.R. § 102-3.50(a), established the Judicial Proceedings Panel.

3. Objectives and Scope of Activities: The Judicial Proceedings Panel will conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice (UCMJ) involving adult sexual assault and related offenses since the amendments made to the UCMJ by section 541 of the National Defense Authorization Act for Fiscal Year 2012 ("the FY 2012 NDAA") (Public Law 112-81) for the purpose of developing recommendations for improvements to such proceedings.

4. Description of Duties: Section 576(d)(2) directs the Judicial Proceedings Panel to perform the following duties, with additional duties as added by section 1731(b)(1) of the FY 2014 NDAA:
   a. Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the UCMJ that were enacted by section 541 of the FY 2012 NDAA.
   b. Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.
   c. Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.
   d. Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report of the Judicial Proceedings Panel and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.
   e. Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the UCMJ), and any instances in which prior sexual conduct was determined to be inadmissible.

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Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

f. Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.
g. Building on the data compiled as a result of the assessment conducted by the Response Systems to Adult Sexual Assault Crimes Panel ("the Response Systems Panel"), a Federal advisory committee established pursuant to section 576(a)(1) of the FY 2013 NDAA and in accordance with FACA, of the training level of military defense and trial counsel, assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.
h. Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by Section 573 of the FY 2013 NDAA.
i. Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the UCMJ in certain sexual assault cases.
j. Assess the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the UCMJ), to expressly cover a situation in which a person subject to the UCMJ commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.
k. Assess the implementation and effect of the Special Victim's Counsel for victims of sex-related offenses established by the Secretary of Defense on August 14, 2013 and codified in Section 1044e of title 10, United States Code, by the enactment of Section 1716 of the FY 2014 NDAA on December 26, 2013. The panel shall make such recommendations for modifications of section 1044e as the Judicial Proceedings Panel considers appropriate.
l. Assess the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (article 56(b) of the UCMJ), as added by section 1705 of the FY 2014 NDAA, which requires at a minimum, that upon a finding of guilt for the offenses of rape, sexual assault, rape and sexual assault of a child, forcible sodomy, and attempts to commit such acts, the punishment include dismissal or dishonorable discharge, except as provided for by Article 60 of the UCMJ, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the UCMJ).
m. Assess the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the UCMJ), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows:
    i. Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation.
    ii. Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (article 139 of the UCMJ).

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Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

iii. Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.

n. Consider such other matters and materials as the Judicial Proceedings Panel considers appropriate for purposes of the reports.

In conducting reviews and assessments and preparing reports, the Judicial Proceedings Panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies. The Judicial Proceedings Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as it considers appropriate to carry out its duties. Upon request by the Chair of the Judicial Proceedings Panel, a department or agency of the Federal Government shall provide information that the Judicial Proceedings Panel considers necessary to carry out its duties.

5. Agency or Official to Whom the Committee Reports: The Judicial Proceedings Panel shall provide its first report, including any proposals for legislative or administrative changes it considers appropriate, to the Secretary of Defense through the Department of Defense (DoD) General Counsel (GC), and the Committees on Armed Services of the Senate and the House of Representatives, not later than 180 days after its first meeting. The Judicial Proceedings Panel shall submit subsequent reports during fiscal years 2014 through 2017.

6. Support: The DoD, through the DoD Office of General Counsel (DoD OGC), the Washington Headquarters Services, and the Office of the Under Secretary of Defense for Personnel and Readiness, shall provide staffing and resources as deemed necessary for the performance of the Judicial Proceedings Panel's functions, and shall ensure compliance with the requirements of the FACA, the Government in the Sunshine Act of 1976 ("the Sunshine Act") (5 U.S.C. § 552b, as amended), governing federal statutes and regulations, and established DoD policies and procedures. Primary responsibility for such staffing and resourcing may not be assigned to the Sexual Assault Prevention and Response Office.

7. Estimated Annual Operating Costs and Staff Years: The estimated annual operating cost, to include travel, meetings, and contract support, is approximately $4,000,000 and 15 full-time equivalents.

8. Designated Federal Officer: The Designated Federal Officer (DFO), pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with governing DoD policies and procedures.

In addition, the Judicial Proceedings Panel's DFO is required to be in attendance at all meetings of the Panel and its subcommittees for the entire duration of each and every meeting. However, in the absence of the DFO, the Alternate DFO, duly appointed to the Judicial Proceedings Panel according to DoD policies and procedures, shall attend the entire duration of the Judicial Proceedings Panel and any subcommittee meetings.

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Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

The DFO, or the Alternate DFO, shall approve all of the meetings of the Judicial Proceedings Panel as called by the Chair; shall call all meetings of its subcommittees, in coordination with the Chair; prepare and approve all meeting agendas for the Judicial Proceedings Panel and any subcommittees; and adjourn any meeting when the DFO or the Alternate DFO determines adjournment to be in the public's interest or required by governing regulations or DoD policies and procedures.

9. Estimated Number and Frequency of Meetings: Consistent with sections 576(b)(6) and (7) of the FY 2013 NDAA, the Judicial Proceedings Panel shall meet at the call of the Chair, and the Chair shall call the first meeting of the Judicial Proceedings Panel not later than 60 days after the date of the appointment of all the members of the Judicial Proceedings Panel. The Judicial Proceedings Panel shall meet at a minimum once per year.

10. Duration: The Judicial Proceedings Panel shall remain in effect until terminated, as provided for and as required by section 576(c)(2)(C) of the FY 2013 NDAA; however, the charter is subject to renewal every two years.

11. Termination: According to section 576(c)(2)(C) of the FY 2013 NDAA, the Judicial Proceedings Panel shall terminate on September 30, 2017.

12. Membership and Designation: Pursuant to sections 576(b)(1)(B) and (b)(2), the Judicial Proceedings Panel shall be appointed by the Secretary of Defense and consist of five members, two of whom must have served on the Response Systems Panel.

    The members shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Force, and offenses relating to rape, sexual assault, and other adult sexual assault crimes. The Chair shall be appointed by the Secretary of Defense from among the members of the Judicial Proceedings Panel.

    Members shall be appointed for the life of the Judicial Proceedings Panel, subject to annual renewals. Any vacancy on the Judicial Proceedings Panel shall be filled in the same manner as the original appointment. Panel members shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as special government employee (SGE) members. With the exception of reimbursement of official travel and per diem, Judicial Proceedings Panel members shall serve without compensation.

    The DoD GC, according to DoD policies and procedures, may select experts and consultants as subject matter experts under the authority of 5 U.S.C. § 3109 to advise the Judicial Proceedings Panel or its subcommittees; these individuals do not count toward the Judicial Proceedings Panel's total membership nor do they have voting privileges. In addition, these subject matter experts shall not participate in any deliberations dealing with

CHARTER
Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

the substantive matters before the Judicial Proceedings Panel or its subcommittees nor shall they participate in any voting.

13. Subcommittees: The Department, when necessary and consistent with the Judicial Proceedings Panel's mission and DoD policies and procedures, may establish subcommittees, task groups, or working groups to support the Judicial Proceedings Panel. Establishment of subcommittees will be based upon a written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC.

    These subcommittees shall not work independently of the Judicial Proceedings Panel and shall report all of their recommendations and advice to the Judicial Proceedings Panel for full deliberation and discussion. Subcommittees have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Judicial Proceedings Panel. No subcommittee or any of its members may update or report directly to the DoD or any Federal officers or employees.

    The Secretary of Defense shall appoint subcommittee members even if the member in question is already a member of the Judicial Proceedings Panel. All subcommittee appointments shall be subject to annual renewal. Such individuals, if not full-time or part-time government personnel, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Those individuals who are full-time or permanent part-time Federal employees shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) as RGE members. Subcommittee members shall serve for the life of the subcommittee. With the exception of reimbursement of official travel and per diem, subcommittee members shall serve without compensation.

    All subcommittees operate pursuant to the provisions of FACA, the Sunshine Act, governing Federal statutes and regulations, and established DoD policies and procedures.

14. Recordkeeping: The records of the Judicial Proceedings Panel and its subcommittees shall be handled according to section 2, General Records Schedule 26, and appropriate Department of Defense policies and procedures. These records shall be available for public inspection and copying, subject to the Freedom of Information Act of 1966 (5 U.S.C. § 552, as amended).

15. Filing Date: June 24, 2014

APPENDIX B: Judicial Proceedings Panel Committee and Subcommittee Member Biographies

JUDICIAL PROCEEDINGS PANEL MEMBERS

THE HONORABLE ELIZABETH HOLTZMAN – CHAIR OF THE JPP

Elizabeth Holtzman is counsel with the law firm Herrick, Feinstein LLP. Ms. Holtzman served for eight years as a U.S. representative (D-NY, 1973–81). While in office, she authored the Rape Privacy Act. She then served for eight years as District Attorney of Kings County, New York (Brooklyn), the fourth-largest DA's office in the country, where she helped change rape laws, improve standards and methods for prosecution, and develop programs to train police and medical personnel. In 1989 Ms. Holtzman became the only woman ever elected Comptroller of New York City. Ms. Holtzman graduated from Radcliffe College, *magna cum laude*, and received her law degree from Harvard Law School.

THE HONORABLE BARBARA S. JONES

Barbara Jones is a partner at the law firm Bracewell LLP. 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. Before being nominated to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County (Manhattan). In that role she supervised community affairs, handled public information, and oversaw the work of the Homicide Investigation Unit. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division, and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an Assistant U.S. Attorney, as chief of the General Crimes Unit, and as chief of the Organized Crime Unit in the Southern District of New York.

MR. VICTOR STONE

Victor Stone represents crime victims at the Maryland Crime Victims Resource Center, Inc. Previously, Mr. Stone served as Special Counsel at the United States Department of Justice. He spent 40 years with the Department of Justice in numerous positions, including as Chief Counsel, FBI Foreign Terrorist Task Force, and as Assistant U.S. Attorney in Oregon and the District of Columbia. He has experience working on victims' and prisoners' rights, serving on committees that resulted in the enactment of the Crime Victims' Rights Act and updates to the ABA Standards for Prisoner Rights. After graduating from Harvard Law School, he clerked on the United States Court of Appeals for the Ninth Circuit.

PROFESSOR THOMAS W. TAYLOR

Tom Taylor teaches graduate courses at Duke University's Sanford School of Public Policy. Previously, he served as a decorated and distinguished Army officer, civil servant, and member of the Senior Executive Service. During a 27-year career in the Pentagon, he advised seven secretaries and seven Chiefs of Staff of the Army, and as the senior leader of the Army legal community he worked on a wide variety of operational, personnel, and intelligence issues. He graduated with high honors from Guilford College, Greensboro, N.C., and with honors from the University of North Carolina at Chapel Hill law school, where he was a Morehead Fellow, a member of the law review, and a member of the Order of the Coif.

VICE ADMIRAL PATRICIA A. TRACEY, U.S. NAVY (RETIRED)

Pat Tracey was most recently the Vice President of Homeland Security and Defense for Hewlett Packard Enterprise Services, U.S. Public Sector, developing dynamic strategies and providing support to various agencies including the U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, and U.S. Department of Defense. She completed a distinguished 34-year naval career in 2004, retiring as a vice admiral and the most senior woman officer in the history of the U.S. Navy. As chief of the Navy's $5 billion global education and training enterprise, Admiral Tracey led a successful revolution in training technology to improve the quality, access, effectiveness, and cost of Navy training. She graduated from the College of New Rochelle and the Naval Postgraduate School, with distinction, and completed a Fellowship with the Chief of Naval Operations' Strategic Studies Group.

JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE MEMBERS

THE HONORABLE BARBARA S. JONES – CHAIR OF THE JPP SUBCOMMITTEE

Barbara Jones is a partner at the law firm Bracewell, LLP. She served as a judge in the U.S. District Court for the Southern District of New York for 16 years, where she handled a wide range of cases relating to accounting and securities fraud, antitrust, fraud and corruption involving city contracts and federal loan programs, labor racketeering, and terrorism. Prior to her nomination to the bench in 1995, Judge Jones spent more than two decades as a prosecutor. She was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County (Manhattan), where she supervised community affairs, handled public information, and oversaw the work of the Homicide Investigation Unit. Previously, Judge Jones served as an Assistant U.S. Attorney in the Southern District of New York, where she tried numerous organized crime cases and was Chief of the Organized Crime Strike Force in Manhattan.

THE HONORABLE ELIZABETH HOLTZMAN – CHAIR OF THE JPP

Elizabeth Holtzman, who took office as the youngest woman ever elected to Congress, served in the House of Representatives from 1973 to 1981, representing New York's 16th Congressional District. While in Congress, she served on the House Judiciary and Budget Committees and chaired the Immigration and Refugees Subcommittee. She co-founded the Congressional Women's Caucus and was elected its first Democratic chair. She subsequently was elected Brooklyn District Attorney (where she pioneered new strategies for the prosecution of rape cases)—the only woman ever elected DA in New York City. She was then elected New York City Comptroller, the only woman ever to hold that position. Ms. Holtzman was appointed by President Bill Clinton to the Interagency Working Group (on declassifying secret Nazi war crimes files), and by Secretary Hagel to the Response Systems to Adult Sexual Assault Crimes Panel. She has also been appointed to the Department of Homeland Security Advisory Committee. Ms. Holtzman is a graduate of Harvard Law School and Harvard University's Radcliffe College, *magna cum laude*. She practices law in New York City with the firm Herrick, Feinstein, LLP.

MS. LISA FRIEL

Lisa Friel is an internationally recognized expert on sexual assault. Ms. Friel has investigated and supervised complex cases involving sexual assault and harassment, human trafficking, workplace violence, child pornography, Internet predators, unlawful surveillance, theft, and fraud. Ms. Friel began her professional career at the New York County District Attorney's Office, specializing in sexual assault cases. She was the Chief of the Sex Crimes Prosecution Unit for nearly a decade and the Deputy Chief for 11 years. Supervising more than 40 assistant district attorneys, support staff, and investigators, she typically managed 300 cases and investigations at any one time.

Ms. Friel has directed thousands of investigations into allegations of sexual assault and other misconduct and has trained hundreds of law enforcement personnel throughout the world. In October 2011, following a distinguished 28-year career as a Manhattan prosecutor, Ms. Friel joined T&M Protection Resources as Vice President of the Sexual Misconduct Consulting & Investigations division. Ms. Friel and her staff developed policies and procedures, provided training workshops, and conducted sensitive investigations into a myriad of issues, including sexual misconduct (both sexual assault and sexual harassment) and domestic violence. In September 2014, Ms. Friel was appointed as T&M's Special Advisor to the NFL Commissioner, consulting on domestic violence, child abuse, and sexual assault within the National Football League. In April 2015, Ms. Friel accepted a permanent position with the NFL: an appointment by Commissioner Goodell as the NFL's Special Counsel for Investigations, where she is responsible for all investigations related to possible violations of the NFL's Personal Conduct Policy.

MS. LAURIE ROSE KEPROS

Laurie Rose Kepros is the Director of Sexual Litigation for the Colorado Office of the State Public Defender, where she trains and advises more than 700 lawyers and other staff statewide in their representation of adults and juveniles accused or convicted of sexual crimes. Ms. Kepros has personally represented thousands of criminal defendants, including many victims of sexual assault. She has tried and consulted on thousands of sexual offense cases across the state of Colorado. She has served on dozens of subcommittees of the Colorado Sex Offender Management Board and as a member of both the Sex Offense Task Force and the Sex Offense Working Group of the Sentencing Task Force of the Colorado Commission on Criminal and Juvenile Justice. Ms. Kepros was on the Board of Directors of the Colorado Criminal Defense Bar (CCDB) for 10 years and currently serves on the board of the CCDB's sister policy organization, the Colorado Criminal Defense Institute. She is a member of the Association for the Treatment of Sexual Abusers and an adjunct professor at the University of Denver School of Law. She has repeatedly testified before the Colorado legislature as a subject matter expert in sexual crime law and as an expert witness in Colorado sex offense law in federal district court. In 2012, the CCDB awarded her the Gideon Award for upholding and preserving the principles captured by *Gideon v. Wainwright*.

DEAN LISA SCHENCK (COLONEL, U.S. ARMY, RETIRED)

Dean Lisa Schenck became Associate Dean for Academic Affairs at the George Washington University Law School in 2009 after serving in the Army's Judge Advocate General's Corps for more than 25 years. She also has served as a judge, lawyer, and educator. While in the military, she was an appellate military judge on the U.S. Army Court of Criminal Appeals in 2002 and received the 2003 Judge Advocates Association Outstanding Career Armed Services Attorney Award (Army). In 2005, Dean Schenck was the first woman appointed as a Senior Judge on that court, where she served until she retired. In 2007, the Secretary of Defense also appointed her to serve concurrently as Associate Judge on the U.S. Court of Military Commission Review. After retiring from the military as a colonel in 2008, Dean Schenck served as Senior Advisor to the Defense Task Force on Sexual Assault in Military Services.

PROFESSOR LEE SCHINASI (COLONEL, U.S. ARMY, RETIRED)

Professor Lee Schinasi began his legal career as a trial attorney for the Office of Economic Opportunity before starting a 23-year career in the Army's Judge Advocate General's Corps. His final assignment was as Dean of Academics and Vice Dean of the Army's JAGC School. Professor Schinasi attended the resident Command and General Staff College and the resident Army War College. He has served as military legal advisor to the Army's Chief of Staff for Intelligence and as Staff Judge Advocate of the 3rd Infantry Division (in Germany) and United States Army South (in Panama). Professor Schinasi is co-author of several books on evidence and litigation, including *The Military Rules of Evidence Manual, Military Evidentiary Foundations, The Florida Evidence Code Trial Book, Florida Evidentiary Foundations, Evidence in Florida, Emerging Problems under the Federal Rules of Evidence,* and *Lawyers Cooperative Practice Guide: Florida Evidence*. He received a bachelor's degree in economics and a J.D. degree from the University of Toledo. Before joining the Barry Law faculty, Professor Schinasi taught at the University of Miami School of Law. He currently teaches evidence, torts, civil procedure, and national security law.

BRIGADIER GENERAL JAMES SCHWENK, U.S. MARINE CORPS (RETIRED)

Brigadier General James Schwenk retired from the Marine Corps in 2000 and from civil service in 2014, after 49 years of federal service. As a Marine Corps judge advocate, he served as a trial counsel, defense counsel, Deputy Staff Judge Advocate, Staff Judge Advocate, Special Assistant to the General Counsel of the Navy, Head of Operational Law Branch at Headquarters Marine Corps, Deputy Director of Legal and Legislative Policy for the Office of the Assistant Secretary of Defense for Force Management and Policy, Assistant Judge Advocate General of the Navy for Military Law, and Military Assistant to the DoD General Counsel. Upon retiring from active duty, BGen Schwenk served for 14 years in the Office of the General Counsel of the Department of Defense as Senior Associate Deputy General Counsel, specializing in personnel policy, military justice, and civil support. He was the principal legal advisor for the repeal of "don't ask, don't tell" and the provision of benefits to same-sex spouses of military personnel. In addition, he was the principal legal advisor to numerous DoD working groups in the area of military personnel policy, working extensively with the White House and Congress. BGen Schwenk attended the Washington College of Law, American University, earning his J.D. in 1977.

MS. JILL WINE-BANKS

Jill Wine-Banks has a background as a corporate executive in manufacturing and telecommunications and as an attorney and not-for-profit and government leader. Ms. Wine-Banks started her career at the Department of Justice prosecuting organized crime and labor racketeering cases and then played a crucial role as an assistant special prosecutor investigating and trying the Watergate obstruction of justice case. Ms. Wine-Banks also served as the General Counsel of the United States Army. In that position, Ms. Wine-Banks dealt with environmental, procurement, Panama Canal, intelligence, military justice, and political issues, including the integration of women into basic training and West Point. After leaving the Pentagon, she was a litigation partner at Jenner and Block, the Solicitor General and Deputy Attorney General of Illinois, and later the Executive Vice President and Chief Operating Officer of the American Bar Association, the world's largest legal publisher and professional association with almost 400,000 members. That experience led to her becoming a senior corporate executive at Motorola and then Maytag, handling international business development, global operations, alliance creation and management, and government relations in Pakistan, China, Ukraine, Russia, France, Germany, Japan, and Singapore. Recently, Ms. Wine-Banks was head of career and technical education for the Chicago Public Schools and a business consultant. Ms. Wine-Banks is currently writing a book about her life and career, with a special focus on her experiences during Watergate.

APPENDIX C: List of Installation Site Visits and Subcommittee Members in Attendance

DATES	INSTALLATIONS REPRESENTED	SUBCOMMITTEE MEMBERS
July 11–12, 2016	**Naval Station Norfolk, VA***	Hon. Elizabeth Holtzman
	Joint Base Langley-Eustis, VA	Dean Lisa Schenck
		BGen (R) James Schwenk
July 27–28, 2016	**Fort Carson, CO**	Ms. Lisa Friel
	Peterson Air Force Base, CO	Ms. Laurie Kepros
	Schriever Air Force Base, CO	Professor Lee Schinasi
	U.S. Air Force Academy, CO	Ms. Jill Wine-Banks
August 1–2, 2016	**Fort Bragg, NC**	Ms. Laurie Kepros
	Camp Lejeune, NC	Professor Lee Schinasi
		BGen (R) James Schwenk
August 8–9, 2016	**Naval Station San Diego, CA**	Hon. Barbara Jones
	Marine Corps Recruiting Depot San Diego, CA	Ms. Laurie Kepros
	Marine Corps Air Station Miramar, CA	Ms. Jill Wine-Banks
	Camp Pendleton, CA	
August 22–23, 2016	Marine Corps Base Quantico, VA	Dean Lisa Schenck
	Joint Base Andrews, MD	BGen (R) James Schwenk
	U.S. Naval Academy, MD	Ms. Jill Wine-Banks
	Washington Navy Yard, Washington, DC	
September 12–14, 2016	Osan Air Base, South Korea	Hon. Elizabeth Holtzman
	Camp Humphreys, South Korea	Ms. Jill Wine-Banks
	Camp Red Cloud, South Korea	
	Camp Casey, South Korea	
	U.S. Army Garrison Yongsan, South Korea	
	Camp Butler, Japan	
	Camp Zama, Japan	
	Kadena Air Base, Japan	
	Yokota Air Base, Japan	

**Installations in bold type are the actual meeting locations for the site visits.*

APPENDIX D: Subcommittee Report to the Judicial Proceedings Panel on Military Defense Counsel Resources and Experience in Sexual Assault Cases

SUBCOMMITTEE OF
THE JUDICIAL PROCEEDINGS PANEL

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

December 2016

SUBCOMMITTEE TO THE JUDICIAL PROCEEDINGS PANEL

CHAIR
The Honorable Barbara S. Jones

MEMBERS
Ms. Lisa Friel
The Honorable Elizabeth Holtzman
Ms. Laurie Kepros
Dean Lisa Schenck, Colonel (Retired), U.S. Army
Professor Lee Schinasi, Colonel (Retired), U.S. Army
Brigadier General James Schwenk, U.S. Marine Corps, Retired
Ms. Jill Wine-Banks

STAFF DIRECTOR
Captain Tammy P. Tideswell, JAGC, U.S. Navy

DEPUTY STAFF DIRECTOR
Lieutenant Colonel Patricia H. Lewis, Deputy Staff Director, JAGC, U.S. Army

CHIEF OF STAFF
Mr. Dale L. Trexler

DESIGNATED FEDERAL OFFICIAL
Ms. Maria Fried

JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE
875 N. RANDOLPH STREET
ARLINGTON, VA 22203-1995

December 8, 2016

MEMORANDUM FOR MEMBERS OF THE JUDICIAL PROCEEDINGS PANEL

SUBJECT: Report of the Subcommittee

On April 9, 2015, the Secretary of Defense established this Subcommittee to support the Judicial Proceedings Panel in its duties under Section 576(d) of the National Defense Authorization Act for Fiscal Year 2013. Following the Secretary's objectives and at the request of the Judicial Proceedings Panel, the Subcommittee conducted military installation site visits throughout the United States and Asia. Based upon information received during these site visits, the Subcommittee undertook additional research of several topics. The Subcommittee has completed its review on the topic of military defense counsel resources and experience in sexual assault cases and submits to the Judicial Proceedings Panel its report with our assessment, conclusions, and recommendations.

Barbara S. Jones
Subcommittee Chair

Executive Summary

SUBCOMMITTEE REPORT TO THE JUDICIAL PROCEEDINGS PANEL ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals—representing 25 military installations throughout the United States and Asia, all involved in the military justice process—about the investigation, prosecution, and defense of sexual assault offenses.

This report summarizes site visit information and the Subcommittee's subsequent research, and makes findings regarding defense investigators, the experience levels of defense counsel, and the resources available to them in the military.

On the basis of the information gathered, the Subcommittee makes the following recommendations:

Recommendation 1: The Subcommittee recommends that in order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as needed.

Recommendation 2: The Subcommittee recommends that the military Services immediately review Service defense organizations' staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an audit conducted by an independent, outside entity of defense staffing across all military Services to determine the optimum level of staffing for the Service defense organizations in the long term.

Recommendation 3: The Subcommittee recommends that the Secretary of Defense direct the military Services to vest defense expert funding and approval authority in the Service defense organizations.

Recommendation 4: The Subcommittee recommends that the military Services permit only a defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in a sexual assault case. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set the minimum tour length for defense counsel at two years or more, except when a lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.

Military Defense Counsel Resources and Experience in Sexual Assault Cases

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals—representing 25 military installations throughout the United States and Asia, all involved in the military justice process—about the investigation, prosecution, and defense of sexual assault offenses. Discussions were held without attribution so that Subcommittee members could hear candid perceptions of the military's handling of sexual assault litigation from the men and women who are investigating, litigating, and supporting those cases. The Subcommittee spoke to groups of military prosecutors, defense counsel, special victims' counsel/victims' legal counsel (SVC/VLC), paralegals, and investigators, as well as commanders, sexual assault response coordinators, victim advocates, and victim-witness liaisons from all military Services.

On the basis of the information received during these site visits, the Subcommittee determined that on several issues, it would have to undertake further research before reporting to the JPP. This report summarizes site visit information and subsequent research regarding defense investigators, the experience levels of defense counsel, and the resources available to them in the military. In producing this report, the JPP Subcommittee used information gathered from site visits, information previously presented to the JPP at a public hearing, information derived from the Report of the Response Systems to Adult Sexual Assault Crimes Panel of June 2014, and existing statutory resources.

I. INADEQUATE STAFFING AND RESOURCES FOR MILITARY DEFENSE COUNSEL

A. **Site Visit Information.** Most of the defense counsel who participated in the Subcommittee's site visits reported that they are seriously understaffed and under resourced. These accounts were corroborated by comments from prosecutors interviewed during these site visits. At many installations, counsel stressed that a lack of attorneys, paralegals, investigators, experts, and basic resources hinders their ability to handle their caseload, more than half of which, they stated, is composed of sexual assault cases. At one installation, for example, an office at a large military installation with ten defense counsel had only one paralegal.

The most urgent and frequently raised issue regarding defense resources was a persistent lack of defense investigators. Defense counsel explained that in the current system, the Military Criminal Investigative Organizations (MCIOs) will not investigate leads at their request. Even if they were to do so, the information obtained would not be protected by attorney-client or work product privileges (as it would be for independent investigators assigned to work on a traditional criminal defense team). Some defense and trial counsel also expressed concern that MCIO investigators are often unwilling to follow up on investigative leads, thereby affecting the thoroughness of the investigation. And because, as MCIO investigators told the Subcommittee, they are required to be "non-confrontational" in their interactions with victims, potential problems in a victim's statement (e.g., inconsistencies with other evidence) may not be thoroughly explored.

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

Defense counsel also noted that as a result of recent statutory changes to the Article 32 pretrial hearing process, fewer witnesses, including the victim, testify at the Article 32 hearing and less evidence is presented, making it more difficult for defense counsel to ascertain pertinent information about the government's case. The combination of this recent change in Article 32 practice and the lack of defense investigators has left defense counsel unable to investigate their cases in what they see as an appropriately effective manner.

The Navy is currently the only Service that employs defense investigators—eight of them worldwide. The other Services lack any independent budget to fund defense investigators, and defense counsel stated that they have to request funding for an investigator from the convening authority or military judge in each case in which they deem an investigator necessary.[1] Defense counsel and prosecutors agreed that these requests are routinely denied. Defense counsel consistently told Subcommittee members during the site visits that they rely on junior paralegals, who are not trained investigators, to help investigate these cases by finding and interviewing potential witnesses. As a result, these paralegals are also less available to carry out those job functions for which they have in fact been trained. Defense counsel mentioned that they do, on occasion, ask their clients to personally hire investigators and experts if the government denies their requests.

Defense counsel noted that their ability to investigate their clients' cases is limited by their demanding trial schedules and by the ethical need to avoid a conflict of interest caused by becoming a potential witness in the case—a problem that may arise if the lawyer is the only person present to conduct a witness interview. If, for example, a witness makes a statement during an interview but then testifies inconsistently at trial, the lawyer would be the only possible witness available to impeach the discrepant testimony. The practical consequence of this situation is that the lawyer becomes a witness in his or her own case, and therefore a substitute, conflict-free counsel would have to be appointed, leading to greater expense, added complication, and likely delay in the trial process, in addition to the possible negative effect on the case of replacing the original defense counsel with a new lawyer unfamiliar with the case. At the same time, if such exculpatory, impeaching testimony is unavailable to the accused, he or she may be denied the constitutional protections of confrontation, the right to present a defense, the right to receive a fair trial, and the right to due process of law. In civilian practice, this problem is largely avoided through the use of professional defense investigators who can conduct the interviews and then testify about them in court as necessary. Feedback from Navy defense counsel about the recent addition of defense investigators was very positive, and they felt it alleviated the problems noted above.

B. **Other Sources of Information Regarding Defense Investigators.** The Response Systems to Adult Sexual Assault Crimes Panel (RSP) reviewed the issue of defense investigators in its June 2014 report. The RSP found that defense requests for independent investigators made to the convening authority or military judge are routinely denied, noting that "military defense counsel need independent, deployable defense investigators to zealously represent their clients and correct an obvious imbalance of resources."[2] The RSP received information from a number of civilian public defenders and found that "many public defender offices have investigators on their staffs and consider them critical."[3] In fact, the former president of the National Association of Criminal Defense Lawyers told a subcommittee of the RSP, "I don't know a lawyer in the country that does sex offenses without an investigator, except in

1 *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter MCM], Rules for Courts-Martial [hereinafter R.C.M.] 703(d).

2 Report of the Response Systems to Adult Sexual Assault Crimes Panel 153 (June 2014) [hereinafter RSP Report], *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf.

3 *Id.* at 153.

the military. Really, there is no such thing."[4] The RSP noted that these investigators aid defense counsel in locating and interviewing potential witnesses, finding experts, and identifying services to assist the defense in complying with court-ordered treatment. Their work enables defense counsel to prepare for trial and gives attorneys "a fighting chance to develop facts and other evidence that is rarely provided to them by the government and is crucial for the proper representation of their clients."[5] The RSP concluded their review of this topic by making the following recommendation:

> **RSP Recommendation 81:** The Secretary of Defense direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission and the fair administration of justice.[6]

As reported during the site visits, only the Navy has implemented this RSP recommendation: it has hired eight "defense litigation support specialists," more commonly known as defense investigators.[7] These defense investigators are civilians with prior law enforcement or defense experience. The Navy's Director of the Defense Counsel Assistance Program (DCAP) told the JPP that they have made it possible for defense counsel to focus on preparing for trial and getting needed training.[8] He added, however, that the Navy could use more than eight defense investigators.[9]

Also of significance regarding this issue are recent congressional changes that have dramatically altered the Article 32 process, changing it in practice from a pretrial investigation into a preliminary hearing and removing the requirement that a victim appear and testify at the hearing.[10] Prior to this statutory change, the Article 32 allowed for a "thorough and impartial investigation" of the case in which an investigating officer investigated the "truth and form of the charges."[11] Sexual assault victims were

4 *Transcript of RSP Comparative Systems Subcommittee Meeting* 230 (Jan. 7, 2014) (Ms. Lisa Wayne, former President, National Association of Criminal Defense Lawyers).

5 *Supra note 2* at 153, quoting Charles D. Stimson, "Sexual Assault in the Military: Understanding the Problem and How to Fix It" 18–19 (Nov. 6, 2013); *Transcript of RSP Public Meeting* 380–81 (Dec. 12, 2013) (testimony of Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia) ("But as far as investigators are concerned, some lawyers share an investigator with just one other lawyer or some have their own specific investigator. And I was lucky enough to have my own specific investigator for a while. I share one now. But it makes it much easier in terms of being able to defend our clients finding out that you could throw away all your kind of subjective beliefs about your client's guilt or innocence and then you do investigation and you investigate no matter how much bad evidence there seemingly is. You find out that there are some things—sometimes complainants do not tell the truth. So, you know, one word I kind of bristle at when I hear it all the time from I guess panels that are supposedly objective is the word 'victim.' When we talk about pre-trial matters that have not resulted in conviction or that have not resulted in the guilty plea, we deal with complainants, because a lot of times we understand that alleged victims aren't victims at all when we investigate and even the government finds out before we do that things have been made up. So I think that just reemphasizes the importance of having investigators and having all the different aspects of the case, whether or not it's legal or on the field, done in order to have a decent—not only a decent, but a zealous defense.").

6 *Supra note 2* at 153.

7 *Transcript of JPP Public Meeting* 208 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

8 *Transcript of JPP Public Meeting* 208–09 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

9 *Transcript of JPP Public Meeting* 213 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

10 National Defense Authorization Act for Fiscal Year 2014 [hereinafter FY 14 NDAA], Pub. L. 113-66, 127 Stat. 672 (2013) § 1702(a); National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, 128 Stat. 3292 (2014) § 531(g) makes this change effective for all preliminary hearings conducted on or after December 26, 2014.

11 10 U.S.C. § 832 (UCMJ, art. 32); MCM, *supra* note 1, R.C.M. 405(a) and (e).

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

frequently required to appear and testify at the Article 32 investigation and were subject to cross-examination by the defense counsel.[12] One of the stated purposes of this Article 32 investigation was to "serve as a means of discovery."[13] Under the new process, the Article 32 preliminary hearing is limited to determining primarily whether there is probable cause to believe that an offense has been committed and that the accused committed the offense.[14] Victims are no longer required to testify at the Article 32 hearing,[15] and frequently do not, and it is no longer one of the stated purposes of the hearing that it serve as a means of discovery. Both trial and defense counsel interviewed during installation site visits referred to the new Article 32 process as a "paper drill," often with no witnesses being called to testify and only documentary evidence submitted. Counsel expressed the view that because of these changes to the Article 32 process, it is more vital than ever to provide additional investigative resources for defense counsel.

All of the military Services' chief defense counsel discussed the necessity of having defense investigators to relieve defense counsel and paralegals from the burden of having to conduct their own investigations. The Army Chief of Trial Defense Services noted that an informal survey of defense counsel making requests for defense investigators found that only one in twelve requests was approved in sexual assault cases.[16] One witness told the JPP that the law requires defense counsel to adequately investigate the facts of the case; otherwise, he or she could be found to be ineffective.[17] Several witnesses expressed their view that the refusal to provide defense investigators amounts to depriving the defendants of due process.[18] The Court of Appeals for the Armed Forces has not yet ruled on this specific issue[19] but has discussed an analogous resource, a mitigation specialist for a defendant in a capital case, stating that "[c]ompulsory process, equal access to evidence and witnesses, and the right to necessary expert assistance in presenting a defense are guaranteed to military accuseds through the Sixth Amendment, Article 46, UCMJ, 10 U.S.C. § 846 (2000), and Rule for Courts-Martial (R.C.M.) 703(d)."[20]

Some counsel noted during site visits that there is a high acquittal rate in military courts-martial for sexual assault cases—a statistic that may, on its surface, seem to undercut the need for additional resources for defense counsel. However, the ultimate result of a trial, whether conviction or acquittal,

12 10 U.S.C. § 832 (UCMJ, art. 32); MCM, *supra* note 1, R.C.M. 405(g)(2)(A) and (h)(1)(A).

13 MCM, *supra* note 1, discussion to R.C.M. 405(a).

14 FY 14 NDAA § 1702(a).

15 *Id.*

16 *Transcript of JPP Public Meeting* 241–42 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services).

17 *Transcript of JPP Public Meeting* 197 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch). The Supreme Court of the United States held that ineffective assistance of counsel requires the defendant to show that (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). *See Also* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION STANDARD 4-4.1 (Am. Bar Ass'n, 3d ed. 1993) on Duty to Investigate.

18 *Transcript of JPP Public Meeting* 242–43 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services; Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch; Col Daniel Higgins, U.S. Air Force, Chief, Trial Defense Division).

19 *Transcript of JPP Public Meeting* 246–47 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

20 *See United States v. Kreutzer*, 61 M.J. 293, 305-06 (C.A.A.F. 2005).

is not the sole measure of whether a process was fair and indeed complied with the due process protections of the Constitution.

C. **Other Sources of Information Regarding Additional Office Staffing and Resources.** In its June 2014 report to Congress, the RSP recommended that military defense organizations be provided adequate funding resources and personnel.[21] In doing so, the RSP found that "maintaining adequate resources for the defense of military personnel accused of crimes, including sexual assault, is essential to the legitimacy and fairness of the military justice system."[22]

At the May 13, 2016, public meeting of the JPP, the Army Chief of Trial Defense Services identified his biggest challenge as not having enough defense counsel, explaining that the number of defense counsel billets has gone down since the RSP met and he can't fill the ones he has.[23] A Marine Corps witness told the JPP that "there's a perception of a disparity in resources. And, with all due respect, I'd like to say it's more than a perception, it's a reality." She explained that in the Marine Corps, the prosecution has four highly qualified experts (HQEs), while the defense has only two.[24]

D. **Subcommittee Assessment and Recommendations.** Civilian public defense organizations and private defense counsel routinely rely on defense investigators to locate and interview witnesses, as well as to take other investigative steps. Their assistance enables defense counsel to properly prepare their cases and represent their clients to the best of their ability. According to information from Navy defense counsel, the addition of the eight defense investigators has been tremendously beneficial.

Given the introduction of the SVC/VLC into the MCIO victim interview process, as well as the unwillingness of MCIOs to follow up on leads from defense or trial counsel, the addition of independent defense investigators is more crucial now than it has ever been. The Subcommittee notes that the approval and funding authority for defense investigator requests is the convening authority who referred the charges to court-martial and who may have a vested interest in the outcome of the case. These requests, it should be noted, are denied more than 90% of the time.

Furthermore, as they are no longer able to cross-examine the victim at the current Article 32 hearing and have lost access to the witness testimony and other evidence formerly received at the Article 32 hearing, defense counsel are at significantly greater disadvantage than they were prior to the changes to the Article 32 process. This alteration in procedure makes adding independent defense investigators essential to the fair administration of justice.

The Subcommittee makes the following recommendations:

Recommendation 1: **The Subcommittee recommends that in order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense**

21 *Supra note 2* at 38 (RSP Recommendation 82 reads: "The Service Secretaries ensure military defense counsel organizations are adequately resourced in funding resources and personnel, including defense supervisory personnel with training and experience comparable to their prosecution counterparts, and direct the Services assess whether that is the case.").

22 *Supra note 2* at 38.

23 *Transcript of JPP Public Meeting* 215 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services)

24 *Transcript of JPP Public Meeting* 196 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch). HQEs are highly qualified civilian attorneys employed by all Services, except the Air Force, to support litigation and the training of counsel. They serve in limited term appointments.

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investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as needed.

Recommendation 2: The Subcommittee recommends that the military Services immediately review Service defense organizations' staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an audit conducted by an independent, outside entity of defense staffing across all military Services to determine the optimum level of staffing for the Service defense organizations in the long term.

II. DEFENSE REQUESTS FOR EXPERTS

A. **Site Visit Information.** Defense counsel and others also complained about lack of access to and funding for expert consultants, which puts the defense at an extreme disadvantage. Defense counsel noted that they have trouble getting qualified experts. In the military, defense counsel do not have their own source of funding for witnesses and experts, but must instead request funding from the convening authority. The response to these requests is frequently outright denial or provision of an inadequate substitute for the expert requested. Defense counsel described situations in which they requested a particular expert and were instead provided someone who was deemed to be an "adequate substitute." The "adequate substitute" often lacked the specific knowledge required (for example, an expert in suggestibility in children might be replaced by a child psychologist who was a generalist). Moreover, if approval for an expert is given, it is often granted not at the outset of the case but rather on the eve of trial, when the expert is much less helpful to developing a theory of defense or assisting with preparation of the defense case. Even if defense counsel are successful in getting a qualified expert, the process of requesting the expert forces them to reveal their case or trial strategy to the government. Defense counsel do not see trial counsel receiving comparable treatment from the convening authority; instead, trial counsel can identify and recruit experts to join the prosecution at will, and readily consult with their experts before the defense receives expert assistance. Several prosecutors on the Subcommittee's site visits concurred that this is a systemic problem.

B. **Other Sources of Information.** Article 46 of the Uniform Code of Military Justice (UCMJ) states that "trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence[.]"[25] Under the Rules for Courts-Martial, in every branch of Service and in every case, defense counsel must request funding from the convening authority, prior to referral of charges, for each specific expert witness or consultant needed. This request must include a complete statement of reasons why the expert is necessary and the estimated cost of employing the expert.[26] If the request is denied by the convening authority, after referral of charges, the request may be renewed before a military judge, who determines whether the expert's testimony is "relevant and necessary" and whether the government has provided or will provide an "adequate substitute."[27] This request before the military judge happens much later in the process, often close to trial, leaving inadequate time for the expert to fully assist the defense counsel in the preparation of the case.

25 10 U.S.C. § 846 (UCMJ, art. 46).

26 R.C.M. 703(d).

27 *Id.*

In applying Article 46 of the UCMJ to the issue of designation of expert consultants, the Court of Appeals for the Armed Forces has held that an "adequate substitute" must have qualifications "reasonably similar" to those of the government's expert.[28]

In comparing military defense organizations and civilian public defenders, the RSP found that some public defender offices maintain their own budgets or request experts through a trial judge who manages the budget.[29] The RSP also found that federal public defenders have specific funding to pay for defense experts.[30] The RSP noted that federal discovery rules generally require civilian defense counsel to disclose experts and other witnesses to the government before trial, but not as early as military defense counsel, who must request their witnesses from the convening authority, through trial counsel.[31] Civilian defense counsel also employ confidential consulting experts whose identities usually remain wholly unknown to the prosecution unless the defense elects to endorse the expert as a trial witness or otherwise injects their expertise into the litigation. This type of consulting expert is essential for defense counsel to receive a candid assessment of the evidence without fear that their investigation will develop inculpatory evidence that will be shared with and used by the government in prosecuting their client.

The Supreme Court of the United States has recognized a constitutional right to expert assistance for defendants with regard to both trial defense and sentencing defense, using the example of a mental health expert: "Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor."[32]

C. **Subcommittee Assessment and Recommendation.** Defense counsel in military organizations, like their civilian counterparts, should have separate sources of funding to employ defense experts, without having to request approval and thereby prematurely divulge their defense strategy to the government.

There is also a tension between what the defense attorney must be able to articulate to the convening authority about the expert's likely assistance and the lawyer's need to actually learn from the expert. In this regard, the relative inexperience of military defense counsel can be a particular problem: if they do not already have deep knowledge of the field, they cannot fully explain or clearly articulate why they need the expert or persuasively explain the potential prejudice to their client. Moreover, they should not have to disclose their thinking.

Recommendation 3: **The Subcommittee recommends that the Secretary of Defense direct the military Services to vest defense expert funding and approval authority in the Service defense organizations.**

28 *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005). The court went on to state, "The absence of such parity opens the military justice system to abuse, because the Government in general, and—as this case demonstrates—the trial counsel in particular, may play key roles in securing defense experts." The appellant's brief in this case analogizes this arrangement to "permitting a Major League baseball manager to choose the opposing pitcher in the final game of the World Series."

29 *Supra note 2* at 163.

30 *Id.*

31 *Id.*

32 *Ake v. Oklahoma*, 470 U.S. 68, 84 (1985).

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III. DEFENSE COUNSEL STAFFING AND EXPERIENCE LEVELS

A. **Site Visit Information.** The Subcommittee received information from defense counsel that the training they receive is generally adequate. However, there is disparity not only in the experience levels required among the Services but also between Service-level requirements and the actual experience of defense counsel in the field. While the Navy and Air Force require prior litigation experience of attorneys being assigned to defense counsel positions, in the Army and Marine Corps first-tour judge advocates with no experience in military justice or in the civilian criminal justice system are allowed to serve as defense counsel. Though participants acknowledged that such placements are not common, the few who had them found the experience overwhelming and discomforting. Several junior counsel recounted that in the first or second contested trial of their careers, they served as second chair in a rape case; one counsel then served as lead counsel in his third trial, also involving sexual assault charges. All of these counsel recommended against assigning brand-new attorneys to defense counsel positions. The likelihood that junior counsel will represent clients in serious and complex cases early in their careers is high, because—as participants uniformly reported—sexual assault cases make up most of their caseload. Defense counsel at multiple installations related that the recent addition of HQEs to trial defense services organizations has been very helpful in mitigating the experience gap, but noted that it is unclear whether the funding for these civilian career litigators will continue. In addition, HQEs hold term positions, not permanent ones.

B. **Other Sources of Information.** The RSP reviewed experience levels of defense counsel as part of its June 2014 report to Congress. The following table from that report[33] summarizes experience and training requirements for defense counsel in each of the Services.

RSP Report Chart on Service Standards for Defense Counsel Experience and Training

Organization	Experience	Training
U.S. Army Defense Counsel	• Majority of defense counsel have prior courtroom experience. No specific minimum experience required. • Experience sitting "second chair" until supervisor deems fit to try cases as first chair.	• Graduate of the Judge Advocate Officer Basic Course. • Defense Counsel "101." • Advanced Trial Advocacy Courses.
U.S. Air Force Defense Counsel	• The Air Force is unique in that defense counsel are selected in a very competitive, best-qualified standard by the Air Force Judge Advocate General. • Most defense counsel arrive with 2 to 5 years of experience working in a base legal office, which includes time as a trial counsel in courts-martial. • New defense counsel normally have between 8 and 10 courts-martial trials before starting as a defense counsel.	• Specialized courses provided by the Air Force Judge Advocate General's School. • On-the-job training. • Group training remains a challenge because of geographic diversity of counsel and length of tours. • Out of the 19 Senior Defense Counsel regions, only 3 (San Antonio, Colorado Springs and the National Capitol Region) have the majority of their bases in close enough proximity to drive to group training.

33 *Supra note 2* at 159–60 (slightly modified).

Organization	Experience	Training
U.S. Navy Defense Counsel	• Following their first 24-month tour handling administrative separations and other non-judicial issues, Navy Judge Advocates become eligible to be assigned to a Defense Service Office (DSO) as a defense counsel.[34] • Military Justice Litigation Career Track officers are stationed in all DSO headquarters offices and some detachments, which are smaller regional offices.	• Once selected, counsel receive additional training, including a basic trial advocacy course focusing on courtroom advocacy. • Within the first year at a DSO, defense counsel also attend the defending sexual assault cases class, an intense one-week course involving experts on forensics and psychology and very experienced civilian defense counsel.
U.S. Marine Corps Defense Counsel	• The vast majority of the Marine Corps' 72 defense counsel are first-tour judge advocates with less than 3 years of experience as an attorney. • They typically serve 18 months as defense counsel before moving to another assignment. • The average litigation experience of both senior defense counsel and defense counsel is 14 months, which includes both prosecution and defense time.	• Defense counsel training requirements are set forth in Marine Corps policy. Defense counsel have a basic certification under Article 27(b), the basic lawyer course at the Naval Justice School. And then, at some point, maybe not before they start their official job, but at some point early in their tour, we try to send them to our new defense counsel orientation class which is sponsored by the Naval Justice School.[35]
U.S. Coast Guard Defense Counsel	• By memorandum of agreement between the Coast Guard and the Navy JAG Corps, the Navy is principally responsible for defending Coast Guard members accused of Uniform Code of Military Justice (UCMJ) crimes. • In return, four Coast Guard judge advocates are detailed to work at various Navy DSOs on 2-year rotations, which provides another significant source of trial experience to Coast Guard judge advocates.	• Coast Guard Defense Counsel attend Navy defense training.

Noting the disparities between the Services regarding defense counsel experience and tour lengths, the RSP made the following recommendation:

> **RSP Recommendation 86:** The Service Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps permit only counsel with litigation experience to serve as lead defense counsel in a sexual assault case as well as set the minimum tour length of defense counsel at two years or more, except when a

34 *Transcript of JPP Public Meeting* 205–06 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program, that all senior defense counsel and many other defense counsel in the Navy are qualified in military justice litigation).

35 *See also Transcript of JPP Public Meeting* 186–87 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

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> lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps, or designee, because of exigent circumstances or to specifically enable training of defense counsel under supervision of experienced defense counsel.[36]

According to presentations by the Service trial defense chiefs during the JPP's May 2016 public meeting, little has changed in defense counsel experience levels since the RSP Report was issued in June 2014.[37]

In the Army, about 20% of attorneys assigned to a defense counsel position have no prior experience.[38] While every attempt is made to avoid assigning a brand-new defense counsel to a sexual assault case, the realities of Trial Defense Services (TDS) staffing sometimes force the assignment of inexperienced attorneys to these cases, though they are able to consult with more senior defense counsel.[39] Underscoring the point, a witness testifying before the JPP in May noted that the accused's counsel in a given sexual assault case may have less trial experience than the victim's counsel.[40]

In the Marine Corps, the "vast majority" of defense counsel are serving in their first tour and are often brand-new attorneys right out of law school.[41] Compounding the problem, Marine Corps attorneys serve as defense counsel for only 12 to 14 months before moving to another position.[42] Marine Corps Defense Services attempts to make up for this lack of experience through training (having new defense counsel sit as second chair in several courts-martial before serving as lead defense counsel) and through supervision by more experienced defense counsel.[43]

C. **National Defense Authorization Act for Fiscal Year 2017.** There is currently a provision in the National Defense Authorization Act for Fiscal Year 2017 (FY 17 NDAA), pending presidential signature, which would require the Services to ensure that trial and defense counsel detailed to a court-martial "have sufficient experience and knowledge to effectively prosecute or defend the case" and

36 RSP Report 39, 160–61.

37 *Transcript of JPP Public Meeting* 163–248 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services; Col Daniel Higgins, U.S. Air Force, Chief, Trial Defense Division; Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch; and CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

38 *Transcript of JPP Public Meeting* 165 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services).

39 *Transcript of JPP Public Meeting* 165–66 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services) ("[I]deally, you would not want to assign counsel to a sexual assault or any complex case until they've completed at least our DC 101 training . . . and served as a lead counsel on one or more less complex cases or at least a second chair on a more complex case. However, the realities of TDS manning and caseload often weigh against such a deliberative developmental process. In those instances where, out of necessity, defense counsel with less than ideal training and experience are assigned to defend sexual assault cases [they receive] guidance and input of their supervisor, the senior defense counsel.").

40 *Transcript of JPP Public Meeting* 216 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services).

41 *Transcript of JPP Public Meeting* 185 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

42 *Transcript of JPP Public Meeting* 189 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

43 *Transcript of JPP Public Meeting* 186–88 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

require the Services to have a professional development process to ensure effective prosecution and defense in all courts-martial.[44] Under this provision, the Services must use a system of skill identifiers or experience designators for "identifying judge advocates with skill and experience in military justice proceedings" to provide oversight of less experienced counsel.[45] The Services would also be required to carry out a five-year pilot program to "assess the feasibility and advisability of establishing a deliberate professional developmental process for judge advocates . . . that leads to judge advocates with military justice expertise serving as military justice practitioners capable of prosecuting and defending complex cases in military courts-martial."[46]

D. **Subcommittee Assessment and Recommendation.** Most sexual assault cases that go to trial are fully litigated, complicated, difficult cases, and they often involve Military Rule of Evidence (MRE) 412 or MRE 513 motions.[47] Since these cases are less likely than others to be plea-bargained, lawyers have a critical need to draw on trial court advocacy skills; and junior lawyers often have not yet had an opportunity to develop these skills in less serious cases. As reported by several defense counsel during Subcommittee site visits, sometimes defense counsel with little trial experience are called on to defend a Service member accused of serious sexual assault crimes.

If convicted of a sexual assault offense, the accused faces a sentence that could include a punitive discharge and months or years of confinement as well as lifetime collateral sanctions related to the sex offense registry and evolving state, local, and international policies.[48] The consequences for the accused of having inexperienced defense counsel could be catastrophic and life changing.

44 S. 2943, National Defense Authorization Act for Fiscal Year 2017, Report 114-840 (Conf. Rep.) §542, Effective prosecution and defense in courts-martial and pilot programs on professional military justice development for judge advocates.

45 *Id.*

46 *Id.*

47 MCM, Military Rules of Evidence [hereinafter MRE] 412 (updated June 2016) is titled "Sex offense cases: The victim's sexual behavior or predisposition" and is the military's so-called rape shield law. MRE 513 is the psychotherapist-patient privilege rule.

48 *See generally,* ABA National Inventory of Collateral Consequences of Conviction, *available at* http://www.abacollateralconsequences.org/agreement/?from=/map/; in February 2016, President Obama signed "International Megan's Law" mandating a new passport mark and control process for individuals convicted of sex crimes. Numerous foreign countries, including Mexico and the Philippines, have already begun denying entry to U.S. citizens who have been convicted of sex crimes. The maximum punishments for sexual assault offenses specified in UCMJ, Appendix 12, are as follows:

Rape	Dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances
Sexual Assault	Dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances
Forcible Sodomy (Article 125, MCM)	Dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances
Aggravated Sexual Contact	Dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances
Abusive Sexual Contact	Dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances

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Recommendation 4: The Subcommittee recommends that the military Services permit only a defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in a sexual assault case. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set the minimum tour length for defense counsel at two years or more, except when a lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.

IV. CONCLUSION

There have been numerous changes to law and policy in the arena of military sexual assault litigation in recent years that have serious implications for the quality of defense afforded to those accused of sexual assault. These include the introduction of special victims' counsel/victims' legal counsel for sexual assault victims, development of a Special Victim Investigation and Prosecution capability, and introduction of a less robust Article 32, UCMJ, process that no longer serves as a discovery vehicle for defense counsel. Many of these changes were instituted with the worthy goal of benefiting victims of sexual assault, but it is important that the military justice system continue to respect the rights of the accused. In order to maintain balance in the military justice system, (1) Service defense organizations must be adequately funded and staffed, as is reportedly not the case in all of the Services; (2) defense counsel must have access to an independent funding source for expert witnesses and consultants; and (3) those serving as defense counsel in sexual assault cases must be experienced attorneys.

ENCLOSURE Installation Site Visits Attended by Members of the JPP Subcommittee

Dates	Installations Represented	Subcommittee Members
July 11–12, 2016	**Naval Station Norfolk, VA**[49] **Joint Base Langley-Eustis, VA**	Hon. Elizabeth Holtzman Dean Lisa Schenck BGen (R) James Schwenk
July 27–28, 2016	**Fort Carson, CO** Peterson Air Force Base, CO Schriever Air Force Base, CO **U.S. Air Force Academy, CO**	Ms. Lisa Friel Ms. Laurie Kepros Professor Lee Schinasi Ms. Jill Wine-Banks
August 1–2, 2016	**Fort Bragg, NC** **Camp Lejeune, NC**	Ms. Laurie Kepros Professor Lee Schinasi BGen (R) James Schwenk
August 8–9, 2016	**Naval Station San Diego, CA** Marine Corps Recruiting Depot San Diego, CA Marine Corps Air Station Miramar, CA **Camp Pendleton, CA**	Hon. Barbara Jones Ms. Laurie Kepros Ms. Jill Wine-Banks
August 22–23, 2016	Marine Corps Base Quantico, VA **Joint Base Andrews, MD** **U.S. Naval Academy, MD** Navy Yard, Washington, DC	Dean Lisa Schenck BGen (R) James Schwenk Ms. Jill Wine-Banks
September 12–14, 2016	Osan Air Base, South Korea **Camp Humphreys, South Korea** Camp Red Cloud, South Korea Camp Casey, South Korea U.S. Army Garrison Yongsan, South Korea **Camp Butler, Japan** Camp Zama, Japan Kadena Air Base, Japan Yokota Air Base, Japan	Hon. Elizabeth Holtzman Ms. Jill Wine-Banks

49 Installations in bold type are the actual meeting locations for the site visits.

APPENDIX E: Judicial Proceedings Panel Staff Members and Designated Federal Officials

JUDICIAL PROCEEDINGS PANEL STAFF

Captain Tammy P. Tideswell,
Judge Advocate General's Corps,
U.S. Navy, Staff Director

Lieutenant Colonel Patricia H. Lewis,
U.S. Army, Deputy Staff Director

Mr. Dale Trexler, Chief of Staff

Ms. Julie Carson, Attorney

Dr. Janice Chayt, Investigator

Dr. Alice Falk, Editor

Ms. Theresa Gallagher, Attorney

Ms. Nalini Gupta, Attorney

Ms. Amanda Hagy, Senior Paralegal

Ms. Laurel Prucha Moran,
Graphic Designer

Ms. Meghan Peters, Attorney

Ms. Stayce Rozell, Senior Paralegal

Ms. Terri A. Saunders,
Attorney and Lead Report Writer

Ms. Tiffany M. Williams,
Supervising Paralegal

DESIGNATED FEDERAL OFFICIALS

Ms. Maria Fried,
Associate Deputy General Counsel
(Personnel and Health Policy),
U.S. Department of Defense,
Designated Federal Official

Mr. William Sprance,
Associate Deputy General Counsel
(Personnel and Health Policy),
U.S. Department of Defense,
Alternate Designated Federal Official

Lieutenant Colonel Jacqueline M. Stingl,
Judge Advocate General's Corps,
U.S. Air Force, Associate Deputy General
Counsel (Personnel and Health Policy),
U.S. Department of Defense,
Alternate Designated Federal Official

Mr. Dwight Sullivan,
Senior Associate Deputy General Counsel
(Military Justice and Personnel Policy),
U.S. Department of Defense,
Alternate Designated Federal Official

APPENDIX F: Acronyms and Abbreviations

FY	fiscal year
JPP	Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (Judicial Proceedings Panel)
JSC	Joint Service Committee on Military Justice
MCIO	military criminal investigative organization
MCM	Manual for Courts-Martial
NDAA	National Defense Authorization Act
R.C.M.	Rules for Courts-Martial
RFI	request for information
RSP	Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel)
SecDef	Secretary of Defense
SVC	special victims' counsel
UCMJ	Uniform Code of Military Justice
U.S.C.	United States Code
VLC	victims' legal counsel

APPENDIX G: Sources Consulted

1. LEGISLATIVE SOURCES

Enacted Statutes

10 U.S.C. §§ 801-946 (Uniform Code of Military Justice)

National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013)

National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014)

National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015)

National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)

2. JUDICIAL DECISIONS

U.S. Court of Appeals for the Armed Forces

United States v. Warner, 62 M.J. 114 (2005)

3. RULES AND REGULATIONS

Executive Orders

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016), *available at* http://jsc.defense.gov/Portals/99/Documents/MCM2016.pdf?ver=2016-12-08-181411-957

4. MEETINGS

Public Meetings of the Judicial Proceedings Panel

Transcript of JPP Public Meeting (May 13, 2016), *available at* http://jpp.whs.mil/Public/docs/05-Transcripts/20160513_Transcript_Final.pdf

Transcript of JPP Public Meeting (December 9, 2016), *available at* http://jpp.whs.mil/Public/docs/05-Transcripts/20161209_Transcript_Final.pdf

Transcript of JPP Public Meeting (January 6, 2017), *available at* http://jpp.whs.mil/Public/docs/05-Transcripts/20170106_Transcript_Final.pdf

Transcript of JPP Public Meeting (February 24, 2017), *available at* http://jpp.whs.mil/Public/docs/05-Transcripts/20170224_Transcript_Final.pdf

5. OFFICIAL REPORTS

a. Report of the Response Systems to Adult Sexual Assault Crimes Panel

REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (June 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf

b. Reports of the Subcommittee of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

SUBCOMMITTEE OF THE JUDICIAL PROCEEDINGS PANEL REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES (December 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_DefResources_Final_20161208.pdf

SUBCOMMITTEE OF THE JUDICIAL PROCEEDINGS PANEL REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY (February 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Investigations_Final_20170224.pdf

6. RESPONSES TO JUDICIAL PROCEEDINGS PANEL REQUESTS FOR INFORMATION

Army's Response to Request for Information 160 (January 4, 2017)

Navy's Response to Request for Information 160 (December 29, 2016)

Marine Corps' Response to Request for Information 160 (January 3, 2017)

Air Force's Response to Request for Information 160 (December 30, 2016)

Coast Guard's Response to Request for Information 160 (January 3, 2017)

7. MEMORANDA

U.S. Dep't of Def., Memorandum from the Secretary of Defense on Implementation of the Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (December 15, 2014)

JUDICIAL PROCEEDINGS PANEL

REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY

September 2017

JUDICIAL PROCEEDINGS PANEL

Report of the Judicial Proceedings
Since Fiscal Year 2012 Amendments Panel

Sexual Assault Investigations in the Military

September 2017

JUDICIAL PROCEEDINGS PANEL

September 7, 2017

The Honorable John McCain
Chair, Committee
on Armed Services
United States Senate
Washington, DC 20510

The Honorable Jack Reed
Ranking Member, Committee
on Armed Services
United States Senate
Washington, DC 20510

The Honorable Mac Thornberry
Chair, Committee
on Armed Services
United States House of
Representatives
Washington, DC 20515

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

The Honorable James Mattis
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to submit this report of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP) on sexual assault investigations in the military. This report includes five recommendations on the topics of investigative resources, initial interviews of sexual assault victims, the thoroughness of investigative interviews of sexual assault victims, the collection of cell phone and other digital evidence, and forensic laboratory resources and procedures.

To assess the effects of numerous changes in law and policy on sexual assault offenses in the military, the JPP tasked the JPP Subcommittee with conducting site visits to military installations in the United States and Asia. From June through September 2016, members of the JPP Subcommittee heard from panels of more than 280 individuals from all of the military Services involved in the investigation, prosecution, and defense of sexual assault offenses. The JPP Subcommittee reviewed the information gathered from these site visits, as well as information on this topic received by the JPP in public meetings, and submitted its findings and recommendations to the JPP. After hearing testimony from the JPP Subcommittee members who attended the installation site visits, and deliberating on the Subcommittee's report and recommendations, the JPP makes five

recommendations concerning the issues identified by the JPP Subcommittee. The JPP expresses its sincere appreciation to the members of the JPP Subcommittee and everyone who contributed to this report.

Respectfully submitted,

Elizabeth Holtzman, Chair

Barbara S. Jones

Victor Stone

Thomas W. Taylor

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Executive Summary

In order to assess the effects of numerous changes in law and policy on the investigation, prosecution, and defense of sexual assault offenses in the military, the Judicial Proceedings Panel (JPP) tasked the Subcommittee of the JPP with conducting site visits to military installations to talk to the men and women who work in the military justice system. The JPP had previously received information on many of the changes to law and policy, and wanted to determine how these changes were being carried out and perceived at military installations by investigators, prosecutors, defense counsel, and others involved in sexual assault investigation, litigation, or victim support.

From July through September 2016, members of the JPP Subcommittee visited military installations in the United States and Asia. They met with panels of more than 280 individuals from 25 military installations and all of the military Services, including prosecutors, defense counsel, special victims' counsel/victims' legal counsel, paralegals, commanders, investigators, sexual assault response coordinators and other victim support personnel. These individuals spoke without attribution so that the Subcommittee could gain an unfiltered, candid assessment of how changes in sexual assault laws and policies have, in their view, affected the military justice system.

On the basis of information from these site visits, the Subcommittee elected to issue reports on several topics. The Subcommittee issued its first report to the JPP—the Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases—on December 9, 2016. The JPP subsequently made recommendations based on the issues identified by the JPP Subcommittee and issued its Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases in April 2017. The JPP received the Subcommittee's second report to the JPP—the Report on Sexual Assault Investigations in the Military—on February 17, 2017. The JPP deliberated on the information presented by the Subcommittee and had the opportunity to question the JPP Subcommittee members who attended the installation site visits. As a result of this deliberation and review of the Subcommittee report, included as Appendix A, the JPP issues five recommendations.[1]

In its report, the JPP Subcommittee identified a number of issues in military sexual assault investigations that it discovered during its site visits: (1) the strain on resources experienced by military criminal investigative organizations (MCIOs) that are responsible for investigating all allegations of sexual assault, (2) delays in the initial interview of sexual assault victims by MCIO investigators, (3) impediments to thorough interviews of sexual assault victims by MCIO investigators, (4) difficulties experienced by MCIO investigators in obtaining evidence from sexual assault victims, and (5) delays in the receipt of forensic laboratory test results in sexual assault cases. The Subcommittee made recommendations in each of these areas. The JPP recognizes that its report and recommendations are based on specific anecdotes from individuals who participated in the site visits, and that these individuals' views are not necessarily universally shared. Individual experiences may depend in some measure on the military Service, location, and level of experience of the participants; however, the

1 Both this JPP report and the JPP's Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases address the adequacy of investigative resources. However, given that the Services' criminal investigative branches are stovepiped organizations with responsibilities that differ in many respects from those of the Service defense organizations that represent Service members in the military justice system, the JPP chose to address issues related to investigations in two separate reports.

views addressed in this report were brought to the Subcommittee's attention during every installation site visit, were supported by specific examples, and were also informed by the Subcommittee's subsequent research into related policies and statutes, as well as by testimony before the JPP and the Response Systems to Adult Sexual Assault Crimes Panel. Taken together, these considerations suggest that the issues could be systemic and should be addressed.

The JPP makes five recommendations to deal with the issues affecting the proper investigation of sexual assault cases. One of these issues is the inadequacy of investigative resources available for the most serious sexual assault cases. This concern is addressed in a new Department of Defense (DoD) policy that allows the MCIOs to use non-MCIO resources to investigate some sexual assault cases.[2] The JPP concurs with DoD's implementation of this policy as a way to alleviate the immense strain on investigative resources for sexual assault cases, with one important caveat: the JPP recommends that the advisory committee that follows the JPP, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, monitor the effects of this DoD policy to see if it improves the MCIOs' ability to focus on the most serious sexual assault cases, and make findings and recommendations to the Secretary of Defense as it deems appropriate. The JPP also recommends that the Secretary of Defense identify and remove barriers to prompt initial victim interviews in sexual assault cases, identify and remove barriers to thorough questioning of sexual assault victims by MCIO investigators or other law enforcement agencies, examine and remove impediments to MCIO access to tangible evidence in the possession of sexual assault victims, and review the resources, staffing, procedures, and policies at forensic laboratories within the Department of Defense to ensure expeditious testing of evidence by forensic laboratories.

2 Dep't. of Def. Instruction 5505.18, Investigation of Adult Sexual Assault in the Department of Defense, ¶ 1.2 (March 22, 2017) ("Other DoD law enforcement activity (LEA) resources, as defined in the Glossary, may assist MCIOs while MCIOs investigate offenses of adult sexual assault provided they meet the training requirements established in Paragraph 3.3."). Previous versions of this regulation did not expressly permit other military law enforcement agencies to assist MCIOs in sexual assault investigations.

JPP Recommendations on Sexual Assault Investigations in the Military*

Recommendation 47: **In order to ensure that MCIOs can focus investigative resources on the most serious sexual assault cases, the advisory committee that follows the JPP, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, monitor the effects of the DoD policy that allows Service law enforcement agencies to assist the MCIOs with sexual assault investigations, and make findings and recommendations to the Secretary of Defense as it deems appropriate.**

- MCIOs have substantial and sophisticated expertise in the investigation of sexual assault cases.
- According to site visit feedback provided to the JPP Subcommittee, the MCIOs are spread too thin, and their ability to investigate the penetrative and other cases requiring more investigative expertise is seriously hampered—largely because of policies that required them to investigate every case of sexual contact, as well as sexual assault.
- Because of the MCIOs' lack of time and resources, MCIO investigators are not always able to conduct the additional investigative steps needed to prepare a case for prosecution.
- Under new policy guidance for the MCIOs issued by the Department of Defense Office of Inspector General on March 22, 2017, Service law enforcement agencies are allowed to assist the MCIOs with sexual assault investigations, under the supervision of the MCIOs.
- One year after its implementation, the Department of Defense Office of Inspector General should assess whether this new policy has been effective in ensuring that the MCIOs focus on the most serious sexual assault cases. As part of its assessment, the DoD Office of Inspector General should conduct site visits at several installations and seek information, preferably on a non-attribution basis, directly from special agents in the field.

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* JPP Recommendations 1–11 are included in the Judicial Proceedings Panel Initial Report 11 (Feb. 2015), *available at* http://jpp.whs.mil/public/docs/08-Panel_Reports/JPP_InitialReport_Final_20150204.pdf. JPP Recommendations 12–17 are included in the Judicial Proceedings Panel Report on Restitution and Compensation for Military Adult Sexual Assault Crimes 5 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Rest_Comp_Report_Final_20160201_Web.pdf. JPP Recommendations 18–23 are included in the Judicial Proceedings Panel Report on Article 120 of the Uniform Code of Military Justice 5–7 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Art120_Report_Final_20160204_Web.pdf. JPP Recommendations 24–36 are included in the Judicial Proceedings Panel Report on Retaliation Related to Sexual Assault Offenses 5–10 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/04_JPP_Retaliation_Report_Final_20160211.pdf. JPP Recommendations 37–38 are included in the Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses 5–6 (Apr. 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/05_JPP_StatData_MilAdjud_SexAsslt_Report_Final_20160419.pdf. JPP Recommendations 39–42 are included in the Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases 5–6 (Apr. 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/06_JPP_Defense_Resources_Experience_Report_Final_20170424.pdf. JPP Recommendations 43–46 are included in the Judicial Proceedings Panel Report on Victims' Appellate Rights 5–6 (June 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/07_JPP_VictimsAppRights_Report_Final_20170602.pdf.

Recommendation 48: **The Secretary of Defense take the necessary steps to ensure that special victims' counsel and victims' legal counsel (1) have the resources to schedule and attend the initial victim interview promptly after a report of sexual assault, and (2) receive the training necessary to recognize the importance of a prompt initial victim interview by the MCIO to an effective and just prosecution.**

- It is helpful to MCIO investigators to have the initial interview of the victim be conducted promptly after MCIOs receive a report of sexual assault.
- According to site visit feedback provided to the JPP Subcommittee, the MCIOs' initial victim interviews are substantially delayed, often because special victims' counsel (SVCs) or victims' legal counsel (VLCs) are unavailable to attend the interview.
- A delay in the initial victim interview could cause MCIO investigators to lose valuable physical or digital evidence, as well as impair a victim's ability to clearly remember important details. Moreover, other avenues of investigation cannot, for practical reasons, be identified and pursued until this initial interview is conducted.

Recommendation 49: **The Secretary of Defense identify and remove barriers to thorough questioning of a sexual assault victim by the MCIOs or other law enforcement agencies.**

- Current MCIO policies and practices discourage or prohibit investigators from asking any question that could be perceived as "confrontational" during either the initial or the follow-up interview of a sexual assault victim, even when, in their professional judgment, such questions are vital to address conflicting statements given by the victim or other evidence contradicting the victim's account.
- MCIO policies and/or practices require a supervisor's approval before an investigator can conduct a subsequent interview of a sexual assault victim, which is perceived by investigators as a barrier to questioning a victim after the initial interview.
- Some SVCs/VLCs who attend investigative interviews limit the scope of questioning, and sometimes object to investigators' requests for any follow-up interviews with the victim.
- As a result of the barriers to thorough questioning by MCIOs, investigators lose rapport-building opportunities, as well as important details about the reported offense, since details about an incident are commonly gathered over time after a traumatic event such as sexual assault.

Recommendation 50: **The Secretary of Defense remove impediments to MCIOs' obtaining tangible evidence from a sexual assault victim, particularly information contained on a cell phone or other digital devices, and develop appropriate remedies that address victims' legitimate concerns about turning over this evidence to ensure that sexual assault investigations are complete and thorough.**

- MCIO investigators have reported difficulties voluntarily obtaining a cell phone or other digital device from sexual assault victims. While the opportunity exists to obtain a military search authorization, there are practical and timing difficulties that impede both the ability to obtain a search authorization and the investigation as a whole. Furthermore, obtaining access to cell phones or other digital devices involuntarily may create an adversarial relationship between the

victim and the investigator, and between the victim and the prosecutor, which would ultimately inhibit the effective prosecution of a case.

- Victims' cell phones may contain a wealth of evidence in sexual assault cases. When a victim refuses to turn over relevant evidence—such as photographs, text messages, or social media information contained on his or her cell phone—investigators and prosecutors make decisions about investigating and charging without possessing all available evidence.

- Many victims' concerns about providing their cell phone to investigators center on the financial loss to the victim when investigators retain the phone for forensic analysis, as well as the loss of the use of the phone. In addition, victims have concerns related to the disclosure of the vast amount of personal, confidential, privileged, or potentially self-incriminating information that may be contained on a smartphone.

- Some SVCs/VLCs reported that they advise victims that they should not voluntarily turn over their cell phone to investigators. This advice is intended to preserve victims' legitimate and well-established privacy rights and privileges in the information on their cell phone, regardless of whether the cell phone or other device is likely to contain potential evidence that could be used against the accused or help prepare victim testimony at trial.

- Modern forensic techniques for imaging and searching cell phones, coupled with the use of well-crafted consent forms, may minimize, if not eliminate, victims' legitimate concerns about cell phone searches, and they therefore should be fully explored.

Recommendation 51: **The Secretary of Defense review the resources, staffing, procedures, and policies at forensic laboratories within the Department of Defense to ensure expeditious testing of evidence by forensic laboratories.**

- Forensic evidence such as that obtained from DNA testing and digital device examination can yield critical information, particularly in sexual assault cases, and can further guide MCIOs' or other law enforcement agencies' investigations as well as a prosecutor's charging decisions.

- The length of time it takes to obtain results from forensic laboratories' testing of evidence impedes the timely completion of sexual assault investigations.

- DoD laboratories generally prioritize cases that are pending court-martial, but notifying the laboratory that a court-martial is pending does not, in the view of some interviewees, necessarily result in expeditious testing.

APPENDIX A: Subcommittee of the Judicial Proceedings Panel Report on Sexual Assault Investigations in the Military

SUBCOMMITTEE OF
THE JUDICIAL PROCEEDINGS PANEL

REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY

February 2017

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February 17, 2017

MEMORANDUM FOR MEMBERS OF THE JUDICIAL PROCEEDINGS PANEL

SUBJECT: Report of the Subcommittee

On April 9, 2015, the Secretary of Defense established this Subcommittee to support the Judicial Proceedings Panel in its duties under Section 576(d) of the National Defense Authorization Act for Fiscal Year 2013. Following the Secretary's objectives and at the request of the Judicial Proceedings Panel, the Subcommittee conducted military installation site visits throughout the United States and Asia. Based upon information received during these site visits, the Subcommittee undertook additional research of several topics. The Subcommittee has completed its review on the topic of sexual assault investigations and submits to the Judicial Proceedings Panel its report with our assessment, conclusions, and recommendations.

Barbara S. Jones
Subcommittee Chair

Executive Summary

SUBCOMMITTEE OF THE JUDICIAL PROCEEDINGS PANEL REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals—all involved in the military justice process, from 25 military installations in the United States and Asia—about the investigation, prosecution, and defense of sexual assault offenses.

On the basis of information received at the site visits, the Subcommittee identified several topics to present to the JPP and a need to conduct additional research on some of those topics. Therefore, the Subcommittee decided to issue separate reports on each of the identified subjects. The Subcommittee issued its first report in December 2016 on the subject of military defense counsel resources and experience in sexual assault cases.

This second report focuses on military sexual assault investigations and on Department of Defense (DoD) policies that place responsibility for all sexual assault investigations with the military criminal investigative organizations (MCIOs).[1] It reflects both comments made to Subcommittee members during site visits and the Subcommittee's independent research. The Subcommittee reviewed relevant statutes, DoD policies, the Report of the Response Systems to Adult Sexual Assault Crimes Panel (the RSP), and witness testimony provided to the JPP. The Subcommittee also collected information from DoD and the military Services through formal requests for information and received testimony from a Supervisory Criminal Investigator within the DoD Office of Inspector General in order to fully inform its recommendations to the JPP. The Subcommittee met in September, October, and December of 2016 and in January 2017 to review and deliberate on the information that it had received on the topic of investigations. The Subcommittee will continue to meet in 2017 and will publish additional reports based on information received at the site visits.

While the Subcommittee was formulating this report and its recommendations, the DoD Office of Inspector General provided the Subcommittee with an excerpt of a proposed policy change to DoD investigative policies that directly affects one of the recommendations we were reviewing. If implemented as expected in early 2017, the change would allow the MCIOs to obtain the assistance of other military law enforcement agencies in conducting sexual assault investigations, something not currently permitted but identified as an issue during the Subcommittee's site visits. The Subcommittee therefore considered the DoD proposal in making its recommendation below, with the understanding that the revised policy provided to the Subcommittee in draft will be adopted and published in the very near future.

The Subcommittee makes five recommendations about military sexual assault investigations.

1 MCIOs are the U.S. Army Criminal Investigation Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigations. These organizations, which are typically responsible for investigating more serious crimes, also perform other force protection or intelligence-gathering missions.

Recommendation 1: Allow MCIOs to use non-MCIO resources for some sexual contact and sexual assault cases. MCIOs have substantial and sophisticated expertise in the investigation of sexual assault cases. The Subcommittee heard, however, that the MCIOs are spread too thin and their ability to investigate the penetrative and other cases requiring more investigative expertise is seriously hampered—largely because of policies that require them to investigate every case of sexual contact as well as sexual assault.

The Subcommittee believes this policy should be changed in order to ensure that MCIOs can focus on the most serious sexual assault cases. Under new policy guidance for the MCIOs developed by the Department of Defense Office of Inspector General, Service law enforcement agencies would be allowed to assist the MCIOs with sexual assault investigations, under the supervision of the MCIOs.

Therefore, the Subcommittee recommends that the policy guidance be implemented as soon as possible and that one year after its implementation, the Department of Defense Office of Inspector General assess whether this policy has been effective in ensuring that the MCIOs focus on the most serious sexual assault cases. As part of its assessment, the DoD Office of Inspector General should conduct site visits at several installations and seek information, preferably on a non-attribution basis, directly from special agents in the field.

The Subcommittee also recommends that the advisory committee that follows the JPP, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, monitor the effects of this DoD policy and make findings and recommendations to the Secretary of Defense as it deems appropriate.

Recommendation 2: Ensure prompt initial victim interviews. It is critical that the initial interview of the victim by MCIOs or other law enforcement agencies be conducted promptly after MCIOs receive a report of sexual assault. Yet the Subcommittee heard frequent complaints that the MCIOs' initial interviews were being substantially delayed, often because special victims' counsel or victims' legal counsel were unavailable to attend the interview.

The Subcommittee recommends that the Secretary of Defense take the necessary steps to ensure that special victims' counsel and victims' legal counsel (1) have the resources to schedule and attend the initial victim interview promptly after a report of sexual assault and (2) receive the training necessary to recognize the importance of a prompt victim interview by the MCIO to an effective and just prosecution.

Recommendation 3: Remove impediments to thorough victim interviews. The Subcommittee heard complaints from all MCIO special agents interviewed that various impediments prevented or discouraged them from conducting victim interviews that were as thorough as they consider necessary. Specifically, they felt procedures and policies discouraged or prohibited investigators from asking any question that could be perceived as "confrontational" during either the initial or the follow-up interview even when, in their professional judgment, such questions were vital to address conflicting statements given by the victim or other evidence contradicting the victim's account. They also felt investigations were impeded by policies and procedures that discouraged them from conducting follow-up interviews. The Subcommittee accordingly recommends that the Secretary of Defense identify and remove these and any other identified barriers to thorough questioning of the victim by MCIOs or other law enforcement agencies.

Recommendation 4: Examine and remove impediments to MCIO access to tangible evidence. The Subcommittee heard numerous complaints that investigators have difficulties obtaining evidence from the victim, particularly information on cellular phones or other digital devices. Investigators said the reasons that victims and/or their attorneys gave for not turning over cellular and digital devices included the financial loss to the victim when investigators retain the phone for forensic analysis and privacy concerns over the vast amount of personal information typically contained on a smartphone. These concerns, while legitimate, can be minimized or eliminated by modern forensic techniques for imaging and searching digital devices. Therefore, the Subcommittee recommends that the Secretary of Defense examine these problems and develop appropriate remedies that address victims' legitimate concerns and ensure that sexual assault investigations are complete and thorough.

Recommendation 5: Reduce delays at forensic laboratories. The Subcommittee heard complaints from MCIOs and prosecutors that the length of time it takes to obtain results from forensic laboratories' testing of evidence impedes the timely completion of sexual assault investigations. Therefore, the Subcommittee recommends that the Secretary of Defense review the resources, staffing, procedures, and policies at forensic laboratories within the Department of Defense to ensure more expeditious testing of evidence by forensic laboratories.

Sexual Assault Investigations in the Military

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals from 25 military installations in the United States and Asia involved in the military justice process; these conversations focused on the investigation, prosecution, and defense of sexual assault offenses.[2] Discussions were held without attribution so that Subcommittee members could hear candid perceptions of the military's handling of sexual assault cases from the men and women who are investigating and litigating those cases. The Subcommittee spoke to groups of military prosecutors, defense counsel, special victims' counsel/victims' legal counsel, paralegals, and investigators, as well as commanders, sexual assault response coordinators, victim advocates, and victim-witness liaisons from all military Services.

On the basis of the information received during these site visits, the Subcommittee determined that it would have to conduct further research into several topic areas so that its recommendations to the JPP would be fully informed. The Subcommittee held meetings in September, October, and December of 2016, and in January 2017 in order to develop the information and research needed to report on issues identified at the site visits. In December 2016, the Subcommittee completed its research on the subject of military defense counsel resources and experience in sexual assault cases and issued its first report. The Subcommittee will continue to meet in 2017 to examine other issues and publish additional reports. This report summarizes site visit comments and the Subcommittee's research into military sexual assault investigations and Department of Defense (DoD) policies affecting sexual assault allegations, including policies that place responsibility for all sexual assault investigations with the military criminal investigative organizations (MCIOs).[3]

I. MCIO INVESTIGATORS LACK NECESSARY DISCRETION AND RESOURCES IN HANDLING SEXUAL ASSAULT ALLEGATIONS

A. Site Visit Information

Investigators in every military Service explained that a number of factors have stretched their resources and eliminated their discretion in investigating alleged cases of sexual assault. Perhaps the most often cited problem is that MCIOs are no longer able to refer the less serious cases to other military law enforcement agencies, even when the MCIO investigators say those other agencies have adequate training for doing so. Prior to January 2013, sexual contact offense cases, as opposed to penetrative offense cases, were generally handled by military police investigators, with some variation among the Services. With the DoD policy change in 2013, MCIOs have been required to investigate every sexual assault allegation, regardless of the severity of the alleged offense.[4] The pre-2013 approach allowed

2 A list of the installations visited and Subcommittee members participating in each site visit is enclosed with this report.

3 MCIOs include the U.S. Army Criminal Investigation Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigations. These organizations, which are typically responsible for investigating more serious crimes, also perform other force protection or intelligence-gathering missions.

4 *See* Glossary, Dep't. of Def. Instruction 5505.18, Investigation of Adult Sexual Assault in the Department of Defense [*hereinafter* DoDI 5505.18], January 25, 2013 (incorporating Change 2, June 18, 2015) ("It is DoD policy that . . .

REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY

MCIO special agents discretion to determine which offenses were more appropriately handled by military police investigators or by the accused's unit, depending on the severity of the allegation and on the victim's desire to participate in an investigation. MCIO investigators almost universally felt that the 2013 policy change has severely strained MCIO resources and undermined their ability to investigate more serious sex offenses effectively and thoroughly. At several installations, special agents reported that these difficulties have lowered morale within their organizations.

A majority of agents emphasized that investigations involving sexual contact offenses, though often less complex than a rape case, must be given the same emphasis, time, and resources as the most serious sexual assault offenses. Sexual contact cases include such cases as a touching of the shoulder or the buttocks, or an attempted kiss on the mouth.[5] Investigators within the MCIOs also noted that even when the reported facts of what allegedly took place make prosecution of these sexual contact offenses unlikely, they are still required to devote significant time and resources to investigate them. Further, as sexual offenses make up an increasing share of MCIOs' caseloads—investigators at one installation stated that 60%–80% of their cases involve sexual assault allegations—the bulk of their work involves intensive, lengthy investigations.

The investigators from each Service also identified other situations in which they felt that their specialized training and experience in sexual assault investigations were diverted from the most serious sex offenses. As one example, they pointed to some cases referred to MCIOs by a sexual assault response coordinator (SARC).[6] They said that if a SARC reports an allegation to an MCIO, the MCIO must treat the allegation as a sexual assault even if the alleged facts do not meet all of the elements of the crime (e.g., what occurred was actually a simple assault or no crime at all). Once reported by a SARC, investigators stated, it is very difficult for investigators to reclassify these incidents as non-sex offenses or noncriminal behavior, and these incidents must be fully investigated.

Another example of their lack of discretion involved sexual assaults reported by a third-party witness rather than the putative victim. In some instances, the MCIO investigators told the Subcommittee members, a third party reports an incident as a possible sexual assault and the apparent victim disagrees with this assessment, disputing either the facts alleged or the need for a criminal investigation. Special agents from the MCIOs told the Subcommittee that they are required to vigorously pursue all of these third-party reports, even if the victim does not want to cooperate or disagrees with the alleged facts. One agent highlighted a case in which he had to interview the victim's friends and family despite her express desire that the complaint not be investigated at all and that neither her friends nor family be contacted.

Military Criminal Investigative Organizations (MCIOs) will initiate investigations of all offenses of adult sexual assault of which they become aware, as listed in the Glossary, that occur within their jurisdiction regardless of the severity of the allegation." "Sexual assault" is defined in the Glossary as "An intentional sexual contact characterized by the use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent." The term "sexual assault" includes aggravated sexual contact and abusive sexual contact in violation of Article 120 of the Uniform Code of Military Justice [UCMJ].).

5 10 U.S.C. § 920 (UCMJ, art. 120). *See infra* note 10. Sexual contact cases represent a wide range of criminal behavior and may be disposed of in a variety of ways, from a general court-martial—typically reserved for more serious offenses—to non-judicial punishment or a written admonition.

6 *See* U.S. Dep't of Def. Directive 6495.01, Sexual Assault Prevention and Response (SAPR) program, ¶ 4e(1) (Jan. 23, 2012) (Incorporating Change 2, Effective January 20, 2015) ("The SARC shall serve as the single point of contact for coordinating appropriate and responsive care for sexual assault victims. SARCs shall coordinate sexual assault victim care and sexual assault response when a sexual assault is reported.").

In addition, investigators noted an ever-growing number of administrative requirements for sexual assault investigations, which contribute to the strain of having to investigate every reported sexual contact offense. The burdensome administrative tasks described by investigators included additional requirements for documenting investigative activity, retaining evidence, and generating duplicative internal reports within the MCIO.

B. Other Sources of Information

1. Revisions to the definition of sexual contact in Article 120, Uniform Code of Military Justice (UCMJ).

As noted by participants on the site visits, changes made to the definition of sexual contact under Article 120 of the UCMJ in 2012 expanded the number and type of potential offenses that now fall under the purview of the MCIOs.[7] The 2012 version of Article 120 made the touching of *any* body part for sexual gratification a sexual offense. All offenses under this statute are punishable with up to seven years' confinement and a dishonorable discharge.[8] Previous versions of the statute limited sexual contact crimes to the touching of certain areas of the body—the genitalia, anus, groin, breast, inner thigh, or buttocks of any person; an unwanted touching of other areas of the body was treated as a simple assault, which is a less serious, non-sex offense.[9] In 2016, just four years after expanding the definition of sexual contact offenses, Congress passed legislation that will once again narrow the range of conduct considered a sexual offense.[10] While this law may reduce the number of sexual contact cases that the MCIOs investigate, the reduction will take place very gradually, and all offenses occurring prior to the new legislation's effective date (June 2017, at the earliest) would be governed by the broad definition now in effect. In addition, the new legislation will not solve the primary problem identified by the MCIOs: the diversion of their specialized expertise and experience from more serious sexual assault cases.

2. Report of the Response Systems to Adult Sexual Assault Crimes Panel.

The Response Systems Panel (RSP), an advisory panel succeeded by the JPP, also commented in its June 2014 report on the impact of the January 2013 DOD policy change, explaining how it significantly increased MCIOs' caseloads:

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

7 Appendix 23, Analysis of Punitive Articles, Paragraph 45, Article 120—Rape and Sexual Assault Generally, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012). This change was effective for all offenses committed on or after June 28, 2012.

8 Exec. Order No. 13740, 81 Fed. Reg. 65,175 (Sept. 22, 2016).

9 10 U.S.C. § 920(t) (Act of Jan. 6, 2007, effective Oct. 1, 2007–June 27, 2012).

10 Section 5430 of the National Defense Authorization Act for Fiscal Year 2017 defines sexual contact as "touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object." This legislative provision incorporates proposed statutory language authored by the JPP Subcommittee and adopted by the JPP in its REPORT ON ARTICLE 120 OF THE UNIFORM CODE OF MILITARY JUSTICE (February 2016). The effective date for this change will be designated by the President, and shall occur no later than two years after enactment of the legislation. National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 5430, 130 Stat. 2000 (2016).

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> Investigation Division (Marine Corps CID) agents and Air Force Security Forces investigators, respectively. Since the January 2013 policy change requiring that all adult sexual assault cases be investigated by the MCIOs, cases previously investigated by Marine Corps CID and Air Force Security Forces investigators have shifted to NCIS and AFOSI, significantly increasing their case loads.[11]

After finding that the various military law enforcement agencies other than the MCIOs are also qualified to investigate sexual assault offenses, and particularly "touching offenses," the RSP recommended (in RSP Recommendation 89) that

> The Secretary of Defense direct the commanders and directors of the military criminal investigative organizations to authorize the utilization of Marine Corps Investigation Division, military police investigators, and/or security forces investigators to assist in the investigation of some non-penetrative sexual assault cases under the direct supervision of a special victim unit investigator to retain oversight.[12]

On December 15, 2014, DoD approved this recommendation in part, referring the matter for further examination to the DoD Office of Inspector General (DoD IG), which is responsible for establishing law enforcement policies. Meanwhile, as reported above, MCIOs currently have to investigate both penetrative and contact cases, and they continue to feel that the addition of these non-penetrative (contact) cases to their already large caseloads overburdens them and reduces their ability to investigate the most serious sexual assault cases.

3. *Information presented to the JPP in April 2016.*

At its public meeting on April 8, 2016, the JPP heard testimony on the implementation of a Special Victim Capability within each of the military Services.[13] The chiefs in charge of the MCIOs testified before the JPP that they continue to investigate all reports of sexual assault, referring none of their cases to the military police or security forces.[14] The witnesses also described how the MCIOs have ensured that an increasing number of special agents have the training and expertise to investigate sexual assault cases.[15] According to a senior official in the Air Force Office of Special Investigations

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11 Report of the Response Systems to Adult Sexual Assault Crimes Panel [*hereinafter* RSP Report] 117–18 (June 2014), available at http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf. Note that Army CID's policy, in existence prior to DoD's 2013 directive, still allowed them to refer less serious offenses to the military police investigators, at their discretion.

12 *Id.* at 40. In a footnote, the RSP Report explains that "special victim unit" is a "generic term for any unit designated to handle sexual assault and other crimes with a more vulnerable victim; police agencies use a variety of terms for these specialized units." *Id.* at 118, n.495.

13 In the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 573, 126 Stat. 1632 (2013), Congress required DoD and the Services to implement a "Special Victim Capability"; it called for the Services to provide specially trained prosecutors, MCIO investigators, victim witness assistance personnel, paralegals, and administrative legal support personnel to collaborate in the handling of sexual assault reports. In response, DoD mandated that all sexual assault crimes (i.e., both penetrative and contact offenses) be investigated by the MCIOs, not by any other law enforcement agencies.

14 See *Transcript of JPP Public Meeting* 210, 216 (April 8, 2016) (testimony of Mr. Guy Surian, U.S. Army, Deputy Chief of Investigative Operations, Investigative Policy and Criminal Intelligence, Headquarters, U.S. Army Criminal Investigation Command (CID)) (testimony of Mr. Kevin Poorman, U.S. Air Force, Associate Director, Criminal Headquarters, Air Force Office of Special Investigations.) ("We open [an investigation] on all sexual assaults falling within our jurisdiction.").

15 *Id.* at 209–10, 217 (testimony of Mr. Guy Surian, U.S. Army, Deputy Chief of Investigative Operations, Investigative Policy and Criminal Intelligence, U.S. Army Criminal Investigation Command (CID), and Mr. Jeremy Gauthier, U.S. Navy,

(AFOSI), the quality of sexual assault investigations has improved in recent years, and AFOSI is completing investigations faster than in previous years.[16] This assessment may be inconsistent with the reports of strained investigative resources repeated at every site visit; however, because the testimony relies in part on the DoD Inspector General's review of MCIO investigations conducted from 2012 to 2013, it may not reflect current trends.[17]

4. Forthcoming changes in DoD investigative policies.

On December 28, 2016, the Subcommittee received a letter from the DoD Acting Inspector General explaining that the Office of Inspector General has proposed revisions to DoD's policies concerning sexual assault investigations, and that DoD is in the final stages of reviewing and updating existing policies.[18] The Acting Inspector General did not list all of the policy changes under consideration by DoD. However, he provided a relevant excerpt from the proposed modifications: the new policy would allow law enforcement agencies to "assist MCIOs while MCIOs investigate offenses of adult sexual assault." This policy, in draft form, states:

a. Only the MCIOs will conduct the formal victim interview.

b. The investigation will be considered an MCIO investigation and the responsible MCIO will provide direct supervision of all investigative work conducted by the DoD LEA [law enforcement agency] resources.

c. Under no circumstances may an MCIO refer an adult sexual assault investigation to an installation LEA regardless of the severity of the offense.

d. When LEA resources assist MCIOs with sexual assault investigations, the MCIO investigator will maintain full responsibility for the investigation and assign tasks. Before assisting the MCIOs, the LEA resources will receive training on the topics required in Paragraph 3.3 [of this instruction] by a certified MCIO sexual assault investigator. Ideally the LEA resources will receive the same training and certification as outlined in DoDI 5505.19 [Establishment of Special Victim Investigation and Prosecution (SVIP) Capability within the Military

Deputy Assistant Director, Criminal Investigations and Operations Directorate, Naval Criminal Investigation Service Headquarters).

16 *Transcript of JPP Public Meeting* 228–29 (April 8, 2016) (testimony of Mr. Kevin Poorman, U.S. Air Force, Associate Director, Criminal Headquarters, Air Force Office of Special Investigations.) ("As verified in the DoD IG 2015 assessment of the MCIO investigations in which 99 percent of our investigations collectively were found to be—that the investigations were sufficient. In the last two years we've also improved the median timeliness of our investigations from about 130 days on median to75 days on median. And we've sustained that median 75-day turnaround time for over a year now.") (Referring to the Dep't of Def. Inspector Gen., Report No. DODIG-2015-094, Evaluation of Military Criminal Investigative Organizations' Adult Sexual Assault Investigations (March 24, 2015) [Final], *infra* note 17.).

17 *See* Dep't of Def. Inspector Gen., Report No. DODIG-2015-094, Evaluation of Military Criminal Investigative Organizations' Adult Sexual Assault Investigations 1 (March 24, 2015) [Final], *available at* http://www.dodig.mil/pubs/report_summary.cfm?id=6310. ("We evaluated 536 Military Criminal Investigative Organization (MCIO) investigations of sexual assaults with adult victims opened on or after January1, 2012, and completed in 2013....").

18 *See* Letter to the Chair of the Judicial Proceedings Panel from Mr. Glenn A. Fine, Acting Inspector General, Department of Defense Office of Inspector General to the Honorable Elizabeth Holtzman, Chair, JPP (Dec. 28, 2016) (providing the JPP with DoD's response to RSP recommendation 89 that alternate military law enforcement agencies should be allowed to assist with the investigation of non-penetrative sexual assault cases. DoD explained that it would implement RSP recommendation 89 by changing its existing policy on sexual assault investigations, DoDI 5505.18, *supra* note 4).

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Criminal Investigative Organizations (MCIOs)], which is required for MCIO sexual assault investigators.[19]

This policy proposal implements RSP Recommendation 89 (quoted above), and includes two requirements that were not specified in the RSP recommendation: that only the MCIOs will conduct the formal victim interview and that the assisting law enforcement agencies must receive the requisite training on sexual assault investigations before they can assist the MCIOs.

C. SUBCOMMITTEE ASSESSMENT AND RECOMMENDATIONS

The changes in 2012 to Article 120 of the UCMJ and the changes in 2013 to DoD's policies concerning sexual assault investigations have significantly increased the volume of investigations for which the MCIOs are solely responsible. Collectively, these changes and other administrative policies have generated a flood of investigative activity for strong and weak, serious and less serious cases alike. Special agents at the site visits stressed that the increase in their caseload has severely strained their investigative resources and harmed their ability to pursue the most serious sex crimes in the manner they feel is appropriate. These individuals all concurred that the increase in their workload is primarily due to DoD's mandate that MCIOs investigate all reports of sexual contact—cases that may involve a relatively simple, onetime touching of the leg or buttocks rather than more serious and violent conduct.

The Subcommittee recommends implementing the December 2016 draft changes to DoD's sexual assault investigations policy. The proposal, if implemented, will provide the MCIOs with access to needed additional resources. Although MCIOs will remain responsible for all sexual assault investigations, permitting other law enforcement agencies to assist with those investigations should ease the current strain on MCIO resources and allow the MCIOs to focus on the most serious cases.

The Subcommittee further recommends that the new policy be closely monitored and thoroughly reviewed one year after it takes effect, and that the DoD Inspector General assess the effects of the new policy on the MCIOs' ability to focus their time and effort on the most serious cases of sexual assault. Because the Subcommittee found that its field interviews of investigators were essential to understanding the effects of statutory and policy changes, it also recommends that DoD's review should similarly incorporate site visits at several installations and interviews with special agents as well as military justice practitioners. During its field interviews, DoD should allow interview participants to speak without attribution in order to fully inform DoD's evaluation of the policy's effects.

Should the DoD review find that MCIOs continue to experience strains on their resources and the diversion of their expertise from the most serious sexual assault cases, then the DoD IG might consider allowing MCIOs to transfer full responsibility for some less serious sexual assault offenses, with the approval of a supervisor, to alternative military law enforcement agencies to address the problem. The Subcommittee does not make this recommendation now, in recognition that there are inherent difficulties in such transfers, including but not limited to accurately determining the seriousness of some offenses in the early stages of an investigation. The Subcommittee believes that it is prudent to give the IG's proposed policy changes a chance to be implemented before suggesting that more extensive policy changes are needed.

The JPP, together with its Subcommittee, will reach the end of its statutory term in September 2017. Therefore, it will not be able to monitor the effects of this policy or make additional recommendations

19 *Id.*

about it to the Secretary of Defense. Congress has created a successor panel—the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces[20]—which, the Subcommittee respectfully recommends, should continue to monitor this issue.

Recommendation 1: Allow MCIOs to use non-MCIO resources for some sexual contact and sexual assault cases. MCIOs have substantial and sophisticated expertise in the investigation of sexual assault cases. The Subcommittee heard, however, that the MCIOs are spread too thin and their ability to investigate the penetrative and other cases requiring more investigative expertise is seriously hampered—largely because of policies that require them to investigate every case of sexual contact as well as sexual assault.

The Subcommittee believes this policy should be changed in order to ensure that MCIOs can focus on the most serious sexual assault cases. Under new policy guidance for the MCIOs developed by the Department of Defense Office of Inspector General, Service law enforcement agencies would be allowed to assist the MCIOs with sexual assault investigations, under the supervision of the MCIOs.

Therefore, the Subcommittee recommends that the policy guidance be implemented as soon as possible and that one year after its implementation, the Department of Defense Office of Inspector General assess whether this policy has been effective in ensuring that the MCIOs focus on the most serious sexual assault cases. As part of its assessment, the DoD Office of Inspector General should conduct site visits at several installations and seek information, preferably on a non-attribution basis, directly from special agents in the field.

The Subcommittee also recommends that the advisory committee that follows the JPP, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, monitor the effects of this DoD policy and make findings and recommendations to the Secretary of Defense as it deems appropriate.

II. CURRENT POLICIES AND PRACTICE RENDER INVESTIGATIONS LESS THOROUGH AND LESS EXPEDITIOUS THAN THEY SHOULD BE

A. Site Visit Information

Participants in the Subcommittee's site visits raised a number of other issues that they felt collectively hamper an investigator's ability to conduct thorough investigations. The Subcommittee recognizes that the comments it heard depend in some measure on the military Service, location, and level of experience of the participants, and that a single anecdote does not necessarily indicate a broader trend or a widespread problem. However, the general themes identified below were raised at every site visited by the Subcommittee and were often supported by specific examples, suggesting that some systemic problems may exist that can and should be addressed.

20 The Secretary of Defense, pursuant to Section 546 of the National Defense Authorization Act for Fiscal Year 2015, as modified by section 537 of the National Defense Authorization Act for Fiscal Year 2016, established this nondiscretionary advisory committee. Section 546 of the FY15 NDAA provides that it shall review, on an ongoing basis, cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.

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1. ***The initial investigatory interview of a sexual assault victim is often delayed, to the detriment of the case.***

It is important to note that since the establishment of SARCs, military investigators and military police are no longer the first people to receive sexual assault reports. MCIO investigators in all Services told the Subcommittee that today the vast majority of sexual assault reports from Service members are made to the SARC office, which then informs the MCIO of the allegation. They said that this is a relatively recent development. Most site visit participants noted that in the past, victims contacted their command, the military police (or other Service equivalent), or the MCIO to report an alleged sexual assault. While the option of reporting to MCIOs remains, the agents said that they typically do not hear from victims directly.

Investigators uniformly reported that the first interview of a victim must be scheduled through the special victims' counsel or victims' legal counsel (SVC/VLC), if the victim has already obtained counsel. If the complaining witness has not yet retained counsel and reports a sexual assault directly to the MCIO, MCIOs must notify victims of their right to SVC/VLC representation before beginning the interview.[21] MCIO investigators at site visits reported that victims almost always elect to meet with counsel before agreeing to be interviewed; as a result, the initial investigatory interview is delayed until an SVC/VLC can be assigned and the initial interview can be scheduled.[22] Several special agents indicated that finding a time when the SVC/VLC can attend the initial interview can delay the interview by weeks, or in some cases months, depending on the attorney's availability.[23] A majority of the agents expressed concern that this passage of time could cause them to lose valuable physical or digital evidence, as well as impair a victim's ability to clearly remember details. Moreover, other avenues of investigation cannot, for practical reasons, be identified and pursued until this initial interview is conducted.[24]

2. ***Investigators feel discouraged from asking sexual assault victims questions that might be seen as "confrontational."***

Many senior investigators expressed a concern that they are no longer interviewing the victim in a manner that is best suited to eliciting all the facts and circumstances necessary to discover what occurred. The Subcommittee was told that investigators are now taught not to probe too deeply into

21 *See* DoDI 5505.18, *supra* note 4, encl. 2.11 (requiring an MCIO investigator assigned to conduct an adult sexual assault investigation to inform a sexual assault victim of availability of legal assistance); *see also* Dep't of Def. Instruction 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures, encl. 2, para. 6(m) (Feb. 12, 2014) (requiring Service Secretaries to "[e]stablish procedures that require, upon seeking assistance from a SARC, SAPR VA, MCIO, the Victim Witness Assistance Program (VWAP), or trial counsel, that each Service member who reports that he or she has been a victim of a sexual assault be informed of and given the opportunity to . . . [c]onsult with legal assistance counsel . . .").

22 *See also Transcript of JPP Public Meeting* 215 (April 8, 2016) (testimony of Mr. Guy Surian, U.S. Army, Deputy Chief of Investigative Operations, Investigative Policy and Criminal Intelligence, U.S. Army Criminal Investigation Command (CID)) ("The requirement to notify the SVC prior to interviewing the victim along with the SVC's primary duty to best represent their client's interests have on occasion been problematic. We have an example recently in which two soldiers both arrived at a CID office and both claimed to have been sexually assaulted. So we had to notify two SVCs. After the victims had talked to their SVCs they declined to make any statements to the CID which was problematic.").

23 Prosecutors who spoke to the Subcommittee expressed the same frustration with their attempts to schedule interviews with victims. This topic will be addressed in subsequent reports issued by the JPP Subcommittee.

24 A few investigators at the site visits noted that the vast majority of sexual assault cases they deal with involve "delayed" reports (witnesses did not specify the length of the delay), and that in such cases the loss of access to potential evidence could be attributed to delayed reporting rather than to the schedule of the SVC/VLC.

the details of a sexual assault victim's account. In addition, they are discouraged from "confronting" a complaining witness with aspects of his or her account that do not make logical sense or that conflict with other evidence, including the victim's own inconsistent statements. The investigators stated that, when done appropriately, such questioning is not insensitive and indeed is a crucial investigative practice. As one senior agent explained, in investigative circles "confrontation" is a term of art and does not entail the hostility connoted by the common use of the word. A confrontational, or clarifying, interview involves questions that invite a witness to explain new or inconsistent evidence and statements. While it is clear from the site visits that the Services differ in their approach to this technique, MCIO training, internal practices, or both give many agents the impression that they have to accept the complainant's account at face value, without thoroughly exploring discrepancies or seeking more detail in the complainant's account. One MCIO investigator described being trained to investigate the sexual assault "that did happen" and not the possibility that it did not happen. This approach was problematic, the special agent implied, because it could lead them to overlook important facts and evidence, obscuring the reality of what had occurred.

Internal MCIO policies may likewise discourage thorough questioning of sexual assault victims. Many agents explained that they are required to obtain a supervisor's approval before conducting any interview subsequent to the initial victim interview. The imposition of bureaucratic obstacles to interviewing a victim was widely viewed as a deterrent, and field agents felt dismayed that their MCIO leadership would question their determination that a subsequent interview was a critical investigative step.

3. SVCs/VLCs limit contact with the victim and the scope of victim interviews.

In addition, a number of agents told Subcommittee members that SVCs/VLCs who attend the investigative interviews sometimes object to certain necessary and relevant questions or advise the victim not to answer them. Other investigators reported that the mere presence of the SVC/VLC dissuades them from asking probing questions out of fear that they will be accused of being inappropriate or being too hard on the victim. The Subcommittee heard at one site visit that an SVC/VLC objected every time an agent asked a victim what sort of resolution of the case he or she wanted, even though his training courses had taught the agent that this was an important and routine question to ask. The SVC/VLC's position was that the client's answer could later be exploited by a defense attorney on cross-examination.[25]

The Subcommittee was told that some SVCs/VLCs request that investigators who want to do follow-up interviews with a victim provide the questions in writing in advance of the interview, while others object to any follow-up interviews at all. Some investigators indicated that if inconsistencies in the victim's statement arise during the course of the investigation, they must ask the SVC/VLC to speak with the client to clarify the points because the SVC/VLC do not permit investigators to speak directly with the victim. The SVCs/VLCs then relay back the responses. The Subcommittee heard from SVCs/VLCs that they wanted their clients to be interviewed only one time so that defense counsel cannot claim at trial that the victim made inconsistent statements.[26] Investigators almost universally lamented the resulting loss of rapport-building opportunities, as well as the potential loss of information, since details about an incident are commonly gathered over time after a traumatic event such as sexual

25 The Subcommittee notes that while a defense attorney might portray a victim's statement to investigators in a light most favorable to the defense for various reasons, this is not a reason to curtail appropriate questioning of a victim.

26 This is a summary of the most common explanation provided at site visits by SVCs/VLCs for advising clients to agree to only one interview. The Subcommittee recognizes that other concerns, such as a victim's potential liability for collateral misconduct, may also influence the SVC's/VLC's advice to clients, if applicable to the case.

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assault. Indeed, they also pointed out that follow-up interviews are the norm in the private sector during sexual assault investigations.[27]

4. ***Investigators experience difficulties in obtaining needed and relevant evidence from victims who file unrestricted reports of sexual assault.***

At several site visit locations, trial counsel and investigators recounted cases in which victims, on the advice of their SVC/VLC, declined to turn over potential evidence to investigators. Some SVCs/VLCs openly acknowledged that they advise clients not to turn over their cell phones to investigators even when it is likely to contain potential evidence.[28] Among the reasons offered for this advice were the financial loss to the victim when investigators retain the phone for forensic analysis and privacy concerns over the vast amount of personal information typically contained on a smartphone. Both of these problems can be minimized if not eliminated by modern forensic techniques for imaging and searching cell phones. None of the SVCs/VLCs interviewed expressed a concern that their advice or advocacy could hamper the investigation or prosecution of the case. Some SVCs/VLCs explained that their paramount concern is the victims' privacy, and they view the possibility that their advice might lower the chances for a successful prosecution as of little consequence.

Investigators stressed that the issue of searching a victim's cell phone or other digital devices for evidence frequently arises, because the victim and accused are often acquaintances who may have communicated by phone or social media around the time of the alleged offense. A victim may also have contacted a friend shortly after the incident, and those communications with an outcry witness—the person who first hears an allegation of abuse—can be critical to corroborating a complaint. In the instance of a delayed report, a witness's digital footprint often assumes greater importance because other physical evidence, such as DNA, may degrade or disappear over time. Photographs and online activity can assist agents in establishing a timeline of relevant events and provide the only corroboration of a victim's allegation. Still, investigators acknowledged that the amount and value of the evidence contained on a cell phone will vary greatly from one case to the next, depending on the facts.

Investigators explained that they continue the investigation without access to evidence on cell phones, at times with negative consequences. One agent described a case in which an SVC informed a victim that she did not have to disclose text messages she exchanged with the accused. The victim took this advice and refused to give the investigator or the prosecutor the text messages. The accused predictably gave these texts to his attorney, who confronted the victim with them while she was on the witness stand at trial. The prosecutor, having never seen these texts, had not prepared the victim for this line of cross-examination and, as a result, the victim's testimony was seriously undermined.

27 A number of MCIO special agents were familiar with civilian criminal investigative practice through their prior experience working for civilian law enforcement agencies, and through the training they routinely receive at federal law enforcement training centers.

28 Investigators generally need to have credible information establishing probable cause to believe that an item such as a cell phone contains evidence that corroborates a victim's statement or bears on the guilt or innocence of the accused. Investigators may obtain the item with the victim's consent or by obtaining a warrant, known in the military as a "search authorization," to seize and search the item. Military Rule of Evidence (M.R.E.) 315, Probable Cause Searches, provides that a commander, military magistrate, or military judge may issue a search authorization of persons or property under military control. M.R.E. 315(c) specifically states "a search authorization may be valid under this rule for a search of (1) the physical person of anyone subject to military law or the law of war wherever found; (2) military property of the United States or of nonappropriated fund activities of an Armed Force of the United States wherever located; (3) persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located; or (4) nonmilitary property within a foreign country." MANUAL FOR COURT-MARTIAL, UNITED STATES (2016 ed.), MIL. R. EVID. 315.

5. Despite recent improvements in prosecutor-MCIO relationships, tensions persist and impair the thoroughness of investigations.

Prosecutors and investigators repeatedly described tensions in their working relationships with one another. Trial counsel generally agreed that coordination on sexual assault investigations has improved, but many complained that investigators all too often decline to follow up on important leads. For their part, investigators expressed the view that many requests for additional investigative activity from trial counsel are unnecessary or are difficult for an investigative unit that is already overburdened and understaffed to execute. Some prosecutors ventured that these difficulties may be the result of internal MCIO protocols that stress timely completion of investigative tasks and pressure agents to close a case quickly. In the same vein, prosecutors noted, investigators are reluctant to reopen a closed case except to document newly received lab results or a similarly significant event.

Internal MCIO policies were not clearly defined in site visit discussions, but some agents mentioned internal deadlines of six months to close a case in one Service, and 90 days in another Service. Anecdotally, the investigators clarified that despite these guidelines, they have seen instances in which sexual contact offense investigations take one year to complete. Both investigators and trial counsel stated that before agents close a case, they have to consult with a prosecutor and a commander to make a probable cause determination and document the final decision on case disposition; thus prosecutors do have input before a case is closed. However, should subsequent developments in a case reveal the need for additional investigative steps, prosecutors described real difficulties in getting this additional investigative work completed.

6. Cases are delayed by the length of time taken by forensic labs to test potential evidence.

Several prosecutors and investigators raised the issue of delays caused by the time it takes for forensic lab analysis of evidence. At one installation, prosecutors reported that they typically wait six months for DNA test results. The Subcommittee members were told that DoD labs generally prioritize cases that are pending court-martial, but notifying the lab that a court-martial is pending does not necessarily result in expeditious testing. Trial counsel at one installation said that they will sometimes charge an accused just to hasten the receipt of digital or DNA evidence from the lab, even when the sum total of existing evidence may not support a successful prosecution.

Experiences at other installations varied: one location reported that a Service-specific lab could test evidence in less than 60 days, while at another, agents stated that they wait more than 90 days for lab results, and for that reason they are unable to close their cases expeditiously. By comparison, a civilian detective who participated in one site visit said that he has to wait 12–16 months for forensic testing in his civilian jurisdiction, and afterward collects a DNA swab from the defendant to confirm the results; in his observation, civilian sexual assault investigations take longer than comparable military criminal investigations.

B. Other Sources of Information

1. MCIO structure.

The MCIOs are generally responsible for investigating the most serious offenses committed by members of the military Services. Each Service maintains a stovepiped organization that does not answer to a military commander or to a commander's staff judge advocate (SJA). These independent law enforcement organizations receive investigative policy and guidance from the Department of

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Defense Office of the Inspector General, and the MCIO in each Service establishes its own policies and protocols consistent with DoD IG directives.

2. *Information presented to the JPP in April 2016.*

The JPP examined how MCIOs and other stakeholders in the military justice process interact with SVCs/VLCs and addressed some of the issues identified above. The JPP heard testimony in its April 2016 public meeting from senior officials within each MCIO regarding the impact of SVC/VLC representation and corresponding policies on sexual assault investigations. The witnesses echoed the concerns heard by the Subcommittee members at the site visits regarding investigative delays caused by SVCs/VLCs and noted that policies continue to evolve to accommodate SVC/VLC representation.[29] As one senior MCIO official testified:

> In regards to special victim counsel, we consider the introduction of the special victim counsel to still be a work in progress in some respects. The agents have been provided extensive guidance on how to work with the SVC. The agent has the responsibility of notifying the victim of their right to an SVC representation. The victim's SVC is allowed to be present during the interviews. The requirement to notify the SVC prior to interviewing the victim along with the SVC's primary duty to best represent their client's interests have on occasion been problematic.[30]

Another senior MCIO official suggested that trends in his organization are similar, explaining:

> The special victim counsel program has come a long way since its inception. . . . The advent of this service has had an impact on our investigations. The coordination required to ensure all victim service personnel can attend interviews oftentimes delays the interview process. Collateral misconduct in service can impact victim disclosure and evidence collection. In some instances the victim has elected not to meet with NCIS at all which negates our ability to explain the investigative process and ensure the victim is making a fully informed decision as to their level of participation. We have maintained positive relationships, engaged early and often, and in most instances can quickly address the issues.[31]

JPP presenters also acknowledged that it is difficult to assess the impact of these delays on the overall quality of the investigation, and that these issues have become less pronounced over time.[32]

29 Transcript of JPP Public Meeting 220–21 (April 8, 2016) (testimony of Mr. Jeremy Gauthier, U.S. Navy, Deputy Assistant Director, Criminal Investigations and Operations Directorate, NCIS Headquarters). Id. at 225–27 (testimony of Mr. Kevin Poorman, U.S. Air Force, Associate Director, Criminal Headquarters, Air Force Office of Special Investigations).

30 Id. at 215 (testimony of Mr. Guy Surian, U.S. Army, Deputy Chief of Investigative Operations, Investigative Policy and Criminal Intelligence, U.S. Army Criminal Investigation Command (CID)).

31 Id. at 220–21 (testimony of Mr. Jeremy Gauthier, U.S. Navy, Deputy Assistant Director, Criminal Investigations and Operations Directorate, NCIS Headquarters).

32 Id. at 257–58.

3. RSP Findings and Recommendations in 2014.

In its June 2014 report the RSP made the following recommendation, which Congress enacted in part in the National Defense Authorization Act for Fiscal Year 2016 (FY16 NDAA):[33]

> **RSP Recommendation 62:** The Secretary of Defense develop and implement policy that, when information comes to military police about an instance of sexual assault by whatever means, the first step in an investigation is to advise the victim that she or he has the right to speak with a special victim counsel before determining whether to file a restricted or unrestricted report, or no report at all.[34]

The FY16 NDAA specifically requires that MCIO agents advise victims of their right to an SVC or VLC before the initial interview. Congress did not adopt the portion of RSP Recommendation 62 regarding victims' being advised of the right to a SVC/VLC prior to their electing to file an unrestricted or restricted report. MCIOs ensure that investigators speak to a victim only with his or her attorney present, subject to exceptions for exigent circumstances.[35]

In addition to reviewing how MCIOs safeguard victims' rights and interests in the investigative process, the RSP examined the thoroughness of sexual assault investigations. On this subject, the RSP heard testimony in 2013 and 2014 from prosecutors who voiced concerns similar to those raised during the JPP Subcommittee's site visits in 2016 about the premature closing of sexual assault investigations. The RSP noted the disagreements between trial counsel and MCIOs, stating:

> According to MCIO agents, investigators complete thorough investigations, following all logical leads prior to reaching any conclusions. Military prosecutors, however, provided mixed reviews of the quality of MCIO investigations and often felt additional investigation was necessary. Military prosecutors also conveyed that investigations are considered closed when they are passed to the commander for review and that it is difficult to "reopen" cases for further investigation.[36]

On the basis of this information, the RSP recommended the following:

> **Recommendation 94-A.** The Secretary of Defense should direct MCIOs to standardize their procedures to require that MCIO investigators coordinate with the trial counsel to review all of the evidence, and to annotate in the case file that the trial counsel agrees all appropriate investigation has taken place before providing a report to the appropriate commander for a disposition decision. Neither the trial counsel, nor the investigator, should be permitted to make a dispositive opinion whether probable cause exists.[37]

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33 National Defense Authorization Act for Fiscal Year 2016 [hereinafter FY16 NDAA], Pub. L. No. 114-92, § 534, 129 Stat. 726 (2015).

34 RSP Report at 32.

35 *See Transcript of JPP Public Meeting* 215–25 (April 8, 2016) (testimony of Mr. Jeremy Gauthier, U.S. Navy, Deputy Assistant Director, Criminal Investigations and Operations Directorate, NCIS Headquarters).

36 RSP Report at 123.

37 RSP Report at 42.

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> Recommendation 94-B. To ensure investigators continue to remain responsive to investigative requests after the commander receives the case file, the MCIO commanders and directors should continue to ensure investigators are trained that all sexual assault cases remain open for further investigation until final disposition of the case.[38]

DoD did not adopt these recommendations, but they have been referred to various working groups within the military Services. At present, MCIOs have to include in each investigative report the commander's decision whether probable cause exists to believe an offense was committed, as well as the appropriate disposition for the case—and to include this information, they must either leave open or reopen cases.

Finally, the RSP's Comparative Systems Subcommittee (CSS) examined processing times at military and civilian crime lab facilities. The military's primary laboratory, the Defense Forensic Science Center (formerly the U.S. Army Criminal Investigation Laboratory), located in Forest Park, Georgia, informed the CSS that in 2014, the turnaround time for a laboratory request—the time from when the lab receives the evidence until the lab completes its analysis and sends a report to the requesting agent—was 77 days.[39] Witnesses noted that this time frame is dependent on several factors, such as lab resources, current caseload, and the amount of evidence to be examined in response to a request.[40] The JPP Subcommittee did not seek specific, updated information from military lab facilities to supplement the RSP and site visit information.

C. Subcommittee Assessment and Recommendations

In the wake of Congress's emphasis on sexual assault cases, DoD and the MCIOs have written numerous policies designed to enhance the quality of sexual assault investigations. Unfortunately, most MCIO-specific policies are not publicly available, owing to the sensitive nature of investigative methods. However, the Subcommittee repeatedly received comments during site visits to the effect that investigators today have reduced access to evidence and to victims but are responsible for investigating a broader spectrum of misconduct than ever before. Their investigations also carry more administrative burdens, such as duplicative reports and forms, but contain less evidence, owing in part to their own internal policies and practices regarding victim interviews. Because of the strain on investigative resources, and for all of the reasons stated above, some investigators resist undertaking or are simply unable to do the additional investigative work needed to fully prepare a case for prosecution.

Further complicating the completion of a thorough investigation is a method of SVC/VLC advocacy that restricts the information that investigators and prosecutors can gather from victims. Investigators are likely to be the second or third person victims speak with about the offense, and they can talk only in the presence of the victim's attorney, who may limit the breadth of the inquiry or advise victims not to speak with investigators more than once. A victim's decision to act on the advice of his or her counsel is not inherently problematic. Rather, the problems occur when, on the advice of counsel or on their own, victims limit their participation and fail to provide investigators with evidence relevant to the investigation. Even when the SVC/VLC provides the investigator's question to the victim and communicates the response back to the investigator, the investigator loses valuable information because

38 *Id.*

39 RSP Report, Annex A, Report of the Comparative Systems Subcommittee 101 (May 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Annex_Final_20140627.pdf.

40 *Id.*

he or she is unable to personally observe a victim's demeanor or reaction to an investigator's question. Moreover, investigators may not fully comprehend, or may have additional questions based on the written or verbal responses of an SVC/VLC who does not allow the victim to be questioned directly after the initial interview. Denying follow-up interviews therefore prevents investigators from fully exploring and understanding what could potentially become very important issues in a case.

When a victim either declines subsequent investigative interviews, or refuses to turn over relevant evidence—such as photographs, text messages, or social media information contained on the victim's cell phone—investigators and prosecutors make decisions about investigating and charging without possessing all available evidence. There is a general sense among the investigators and prosecutors interviewed at the site visits that they must press forward without a victim's full cooperation, an approach that raises concerns about not just the fairness of an investigation, but also the overall fairness of a prosecution.

The Subcommittee heard a number of reasons why victims might not cooperate with requests for evidence from the victim's cell phone, from concerns they would not have access to their phones for extended periods of time to concerns about the privacy of information in their phones not related to their case. However, the Subcommittee heard from the investigators and others that these kinds of concerns are somewhat misguided as the technology for imaging and searching cell phones has advanced to the point that both the time it takes to image a phone and the intrusion into irrelevant information have been minimized or altogether eliminated.[41]

Case delays take many forms, and waiting on forensic laboratory analysis was one raised by investigators and prosecutors alike during the site visits. Forensic evidence such as DNA testing and digital device examination can yield critical information, particularly in sexual assault cases, and can further guide MCIOs' investigation as well as a prosecutor's charging decisions. The Subcommittee cautions that while labs may prioritize cases pending court-martial, prosecutors should not prefer charges in order to prioritize a case for laboratory testing if the evidence already available does not support such a decision.

Recommendation 2: **Ensure prompt initial victim interviews. It is critical that the initial interview of the victim by MCIOs or other law enforcement agencies be conducted promptly after MCIOs receive a report of sexual assault. Yet the Subcommittee heard frequent complaints that the MCIOs' initial interviews were being substantially delayed, often because special victims' counsel or victims' legal counsel were unavailable to attend the interview.**

The Subcommittee recommends that the Secretary of Defense take the necessary steps to ensure that special victims' counsel and victims' legal counsel (1) have the resources to schedule and attend the initial victim interview promptly after a report of sexual assault and (2) receive the training necessary to recognize the importance of a prompt victim interview by the MCIO to an effective and just prosecution.

41 *See* Service Responses to JPP Request for Information Set 9, Question 162 (Dec. 30, 2016). Options include requesting that the victim provide only limited consent for specific items of evidence such as photos, text messages, call logs, or app data. MCIOs can photograph text messages or make a forensic copy of select information before returning the phone to the victim. RFI responses also indicated that the MCIOs possess the expertise and technology to perform data extraction on-site using Cellebrite technology. Only if further data extraction is needed will the MCIO send the cell phone to the Defense Computer Forensic Laboratory for examination.

REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY

Recommendation 3: Remove impediments to thorough victim interviews. The Subcommittee heard complaints from all MCIO special agents interviewed that various impediments prevented or discouraged them from conducting victim interviews that were as thorough as they consider necessary. Specifically, they felt procedures and policies discouraged or prohibited investigators from asking any question that could be perceived as "confrontational" during either the initial or the follow-up interview even when, in their professional judgment, such questions were vital to address conflicting statements given by the victim or other evidence contradicting the victim's account. They also felt investigations were impeded by policies and procedures that discouraged them from conducting follow-up interviews. The Subcommittee accordingly recommends that the Secretary of Defense identify and remove these and any other identified barriers to thorough questioning of the victim by MCIOs or other law enforcement agencies.

Recommendation 4: Examine and remove impediments to MCIO access to tangible evidence. The Subcommittee heard numerous complaints that investigators have difficulties obtaining evidence from the victim, particularly information on cellular phones or other digital devices. Investigators said the reasons that victims and/or their attorneys gave for not turning over cellular and digital devices included the financial loss to the victim when investigators retain the phone for forensic analysis and privacy concerns over the vast amount of personal information typically contained on a smartphone. These concerns, while legitimate, can be minimized or eliminated by modern forensic techniques for imaging and searching digital devices. Therefore, the Subcommittee recommends that the Secretary of Defense examine these problems and develop appropriate remedies that address victims' legitimate concerns and ensure that sexual assault investigations are complete and thorough.

Recommendation 5: Reduce delays at forensic laboratories. The Subcommittee heard complaints from MCIOs and prosecutors that the length of time it takes to obtain results from forensic laboratories' testing of evidence impedes the timely completion of sexual assault investigations. Therefore, the Subcommittee recommends that the Secretary of Defense review the resources, staffing, procedures, and policies at forensic laboratories within the Department of Defense to ensure more expeditious testing of evidence by forensic laboratories.

ENCLOSURE Installation Site Visits Attended by Members of the JPP Subcommittee

Dates	Installations Represented	Subcommittee Members
July 11–12, 2016	**Naval Station Norfolk, VA**[42] **Joint Base Langley-Eustis, VA**	Hon. Elizabeth Holtzman Dean Lisa Schenck BGen (R) James Schwenk
July 27–28, 2016	**Fort Carson, CO** Peterson Air Force Base, CO Schriever Air Force Base, CO **U.S. Air Force Academy, CO**	Ms. Lisa Friel Ms. Laurie Kepros Professor Lee Schinasi Ms. Jill Wine-Banks
August 1–2, 2016	**Fort Bragg, NC** **Camp Lejeune, NC**	Ms. Laurie Kepros Professor Lee Schinasi BGen (R) James Schwenk
August 8–9, 2016	**Naval Station San Diego, CA** Marine Corps Recruiting Depot San Diego, CA Marine Corps Air Station Miramar, CA **Camp Pendleton, CA**	Hon. Barbara Jones Ms. Laurie Kepros Ms. Jill Wine-Banks
August 22–23, 2016	Marine Corps Base Quantico, VA **Joint Base Andrews, MD** **U.S. Naval Academy, MD** Navy Yard, Washington, DC	Dean Lisa Schenck BGen (R) James Schwenk Ms. Jill Wine-Banks
September 12–14, 2016	Osan Air Base, South Korea **Camp Humphreys, South Korea** Camp Red Cloud, South Korea Camp Casey, South Korea U.S. Army Garrison Yongsan, South Korea **Camp Butler, Japan** Camp Zama, Japan Kadena Air Base, Japan Yokota Air Base, Japan	Hon. Elizabeth Holtzman Ms. Jill Wine-Banks

42 Installations in bold type are the actual meeting locations for the site visits.

APPENDIX B: Judicial Proceedings Panel Authorizing Statutes and Charter

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013

SECTION 576. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) INDEPENDENT REVIEWS AND ASSESSMENTS REQUIRED.—

(2) JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS.—The Secretary of Defense shall establish a panel to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the amendments made to the Uniform Code of Military Justice by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1404) for the purpose of developing recommendations for improvements to such proceedings.

(b) ESTABLISHMENT OF INDEPENDENT REVIEW PANELS.

(1) COMPOSITION.

(B) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall be appointed by the Secretary of Defense and consist of five members, two of whom must have also served on the panel established under subsection (a)(1).

(2) QUALIFICATIONS.—The members of each panel shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes.

(3) CHAIR.—The chair of each panel shall be appointed by the Secretary of Defense from among the members of the panel.

(4) PERIOD OF APPOINTMENT; VACANCIES.—Members shall be appointed for the life of the panel. Any vacancy in a panel shall be filled in the same manner as the original appointment.

(5) DEADLINE FOR APPOINTMENTS.—

(B) JUDICIAL PROCEEDINGS PANEL.—All original appointments to the panel required by subsection (a)(2) shall be made before the termination date of the panel established under subsection (a)(1), but no later than 30 days before the termination date.

(6) MEETINGS.—A panel shall meet at the call of the chair.

(7) FIRST MEETING.—The chair shall call the first meeting of a panel not later than 60 days after the date of the appointment of all the members of the panel.

(c) REPORTS AND DURATION.—

(2) JUDICIAL PROCEEDINGS PANEL.—

(A) FIRST REPORT.—The panel established under subsection (a)(2) shall submit a first report, including any proposals for legislative or administrative changes the panel considers appropriate, to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives not later than 180 days after the first meeting of the panel.

(B) SUBSEQUENT REPORTS.—The panel established under subsection (a)(2) shall submit subsequent reports during fiscal years 2014 through 2017.

(C) TERMINATION.—The panel established under subsection (a)(2) shall terminate on September 30, 2017.

(d) DUTIES OF PANELS.—

(2) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall perform the following duties:

(A) Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice that were enacted by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112– 81; 125 Stat. 1404).

(B) Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.

(C) Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.

(D) Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report required by subsection (c)(2) and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.

(E) Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), and any instances in which prior sexual conduct was determined to be inadmissible.

(F) Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.

(G) Building on the data compiled as a result of paragraph (1)(D), assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.

(H) Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by section 573 of this Act.

(I) Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases.

(J) Consider such other matters and materials as the panel considers appropriate for purposes of the reports.

(3) UTILIZATION OF OTHER STUDIES.—In conducting reviews and assessments and preparing reports, a panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies.

(e) AUTHORITY OF PANELS.—

(1) HEARINGS.—A panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the panel considers appropriate to carry out its duties under this section.

(2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of a panel, a department or agency of the Federal Government shall provide information that the panel considers necessary to carry out its duties under this section.

(f) PERSONNEL MATTERS.—

(1) PAY OF MEMBERS.—Members of a panel shall serve without pay by reason of their work on the panel.

(2) TRAVEL EXPENSES.—The members of a panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance or services for the panel.

(3) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the panels, except that the Secretary may not assign primary responsibility for such staffing and resources to the Sexual Assault Prevention and Response Office.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

SEC. 1731. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(b) ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.—

(1) ADDITIONAL ASSESSMENTS SPECIFIED.—The independent panel established by the Secretary of Defense under subsection (a)(2) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the "judicial proceedings panel", shall conduct the following:

(A) An assessment of the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), to expressly cover a situation in which a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.

(B) An assessment of the implementation and effect of section 1044e of title 10, United States Code, as added by section 1716, and make such recommendations for modification of such section 1044e as the judicial proceedings panel considers appropriate.

(C) An assessment of the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (article 56(b) of the Uniform Code of Military Justice), as added by section 1705, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

(D) An assessment of the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows:

(i) Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation.

(ii) Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (article 139 of the Uniform Code of Military Justice).

(iii) Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.

(2) SUBMISSION OF RESULTS.—The judicial proceedings panel shall include the results of the assessments required by paragraph (1) in one of the reports required by subsection (c)(2)(B) of section 576 of the National Defense Authorization Act for Fiscal Year 2013.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015

SEC. 545. ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.

(a) ADDITIONAL DUTIES IMPOSED.—The independent panel established by the Secretary of Defense under section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the "judicial proceedings panel", shall perform the following additional duties:

(1) Conduct a review and assessment regarding the impact of the use of any mental health records of the victim of an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), by the accused during the preliminary hearing conducted under section 832 of such title (article 32 of the Uniform Code of Military Justice), and during court-martial proceedings, as compared to the use of similar records in civilian criminal legal proceedings.

(2) Conduct a review and assessment regarding the establishment of a privilege under the Military Rules of Evidence against the disclosure of communications between—

(A) users of and personnel staffing the Department of Defense Safe Helpline; and

(B) users of and personnel staffing of the 26 Department of Defense Safe Help Room.

(b) SUBMISSION OF RESULTS.—The judicial proceedings panel shall include the results of the reviews and assessments conducted under subsection (a) in one of the reports required by section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1760).

SEC. 546. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

(f) DUE DATE FOR ANNUAL REPORT OF JUDICIAL PROCEEDINGS PANEL – Section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1760) is amended by inserting "annually thereafter" after "reports".

CHARTER
Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

1. Committee's Official Designation: The committee shall be known as the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel ("the Judicial Proceedings Panel").

2. Authority: The Secretary of Defense, as required by section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 ("the FY 2013 NDAA") (Public Law 112-239), as modified by section 1731(b) of the National Defense Authorization Act for Fiscal Year 2014 ("the FY 2014 NDAA") (Public Law 113-66), and in accordance with the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended) and 41 C.F.R. § 102-3.50(a), established the Judicial Proceedings Panel.

3. Objectives and Scope of Activities: The Judicial Proceedings Panel will conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice (UCMJ) involving adult sexual assault and related offenses since the amendments made to the UCMJ by section 541 of the National Defense Authorization Act for Fiscal Year 2012 ("the FY 2012 NDAA") (Public Law 112-81) for the purpose of developing recommendations for improvements to such proceedings.

4. Description of Duties: Section 576(d)(2) directs the Judicial Proceedings Panel to perform the following duties, with additional duties as added by section 1731(b)(1) of the FY 2014 NDAA:
   a. Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the UCMJ that were enacted by section 541 of the FY 2012 NDAA.
   b. Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.
   c. Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.
   d. Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report of the Judicial Proceedings Panel and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.
   e. Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the UCMJ), and any instances in which prior sexual conduct was determined to be inadmissible.

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f. Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.
g. Building on the data compiled as a result of the assessment conducted by the Response Systems to Adult Sexual Assault Crimes Panel ("the Response Systems Panel"), a Federal advisory committee established pursuant to section 576(a)(1) of the FY 2013 NDAA and in accordance with FACA, of the training level of military defense and trial counsel, assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.
h. Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by Section 573 of the FY 2013 NDAA.
i. Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the UCMJ in certain sexual assault cases.
j. Assess the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the UCMJ), to expressly cover a situation in which a person subject to the UCMJ commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.
k. Assess the implementation and effect of the Special Victim's Counsel for victims of sex-related offenses established by the Secretary of Defense on August 14, 2013 and codified in Section 1044e of title 10, United States Code, by the enactment of Section 1716 of the FY 2014 NDAA on December 26, 2013. The panel shall make such recommendations for modifications of section 1044e as the Judicial Proceedings Panel considers appropriate.
l. Assess the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (article 56(b) of the UCMJ), as added by section 1705 of the FY 2014 NDAA, which requires at a minimum, that upon a finding of guilt for the offenses of rape, sexual assault, rape and sexual assault of a child, forcible sodomy, and attempts to commit such acts, the punishment include dismissal or dishonorable discharge, except as provided for by Article 60 of the UCMJ, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the UCMJ).
m. Assess the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the UCMJ), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows:
    i. Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation.
    ii. Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (article 139 of the UCMJ).

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Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

iii. Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.

n. Consider such other matters and materials as the Judicial Proceedings Panel considers appropriate for purposes of the reports.

In conducting reviews and assessments and preparing reports, the Judicial Proceedings Panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies. The Judicial Proceedings Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as it considers appropriate to carry out its duties. Upon request by the Chair of the Judicial Proceedings Panel, a department or agency of the Federal Government shall provide information that the Judicial Proceedings Panel considers necessary to carry out its duties.

5. Agency or Official to Whom the Committee Reports: The Judicial Proceedings Panel shall provide its first report, including any proposals for legislative or administrative changes it considers appropriate, to the Secretary of Defense through the Department of Defense (DoD) General Counsel (GC), and the Committees on Armed Services of the Senate and the House of Representatives, not later than 180 days after its first meeting. The Judicial Proceedings Panel shall submit subsequent reports during fiscal years 2014 through 2017.

6. Support: The DoD, through the DoD Office of General Counsel (DoD OGC), the Washington Headquarters Services, and the Office of the Under Secretary of Defense for Personnel and Readiness, shall provide staffing and resources as deemed necessary for the performance of the Judicial Proceedings Panel's functions, and shall ensure compliance with the requirements of the FACA, the Government in the Sunshine Act of 1976 ("the Sunshine Act") (5 U.S.C. § 552b, as amended), governing federal statutes and regulations, and established DoD policies and procedures. Primary responsibility for such staffing and resourcing may not be assigned to the Sexual Assault Prevention and Response Office.

7. Estimated Annual Operating Costs and Staff Years: The estimated annual operating cost, to include travel, meetings, and contract support, is approximately $4,000,000 and 15 full-time equivalents.

8. Designated Federal Officer: The Designated Federal Officer (DFO), pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with governing DoD policies and procedures.

   In addition, the Judicial Proceedings Panel's DFO is required to be in attendance at all meetings of the Panel and its subcommittees for the entire duration of each and every meeting. However, in the absence of the DFO, the Alternate DFO, duly appointed to the Judicial Proceedings Panel according to DoD policies and procedures, shall attend the entire duration of the Judicial Proceedings Panel and any subcommittee meetings.

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Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

The DFO, or the Alternate DFO, shall approve all of the meetings of the Judicial Proceedings Panel as called by the Chair; shall call all meetings of its subcommittees, in coordination with the Chair; prepare and approve all meeting agendas for the Judicial Proceedings Panel and any subcommittees; and adjourn any meeting when the DFO or the Alternate DFO determines adjournment to be in the public's interest or required by governing regulations or DoD policies and procedures.

9. Estimated Number and Frequency of Meetings: Consistent with sections 576(b)(6) and (7) of the FY 2013 NDAA, the Judicial Proceedings Panel shall meet at the call of the Chair, and the Chair shall call the first meeting of the Judicial Proceedings Panel not later than 60 days after the date of the appointment of all the members of the Judicial Proceedings Panel. The Judicial Proceedings Panel shall meet at a minimum once per year.

10. Duration: The Judicial Proceedings Panel shall remain in effect until terminated, as provided for and as required by section 576(c)(2)(C) of the FY 2013 NDAA; however, the charter is subject to renewal every two years.

11. Termination: According to section 576(c)(2)(C) of the FY 2013 NDAA, the Judicial Proceedings Panel shall terminate on September 30, 2017.

12. Membership and Designation: Pursuant to sections 576(b)(1)(B) and (b)(2), the Judicial Proceedings Panel shall be appointed by the Secretary of Defense and consist of five members, two of whom must have served on the Response Systems Panel.

    The members shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Force, and offenses relating to rape, sexual assault, and other adult sexual assault crimes. The Chair shall be appointed by the Secretary of Defense from among the members of the Judicial Proceedings Panel.

    Members shall be appointed for the life of the Judicial Proceedings Panel, subject to annual renewals. Any vacancy on the Judicial Proceedings Panel shall be filled in the same manner as the original appointment. Panel members shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as special government employee (SGE) members. With the exception of reimbursement of official travel and per diem, Judicial Proceedings Panel members shall serve without compensation.

    The DoD GC, according to DoD policies and procedures, may select experts and consultants as subject matter experts under the authority of 5 U.S.C. § 3109 to advise the Judicial Proceedings Panel or its subcommittees; these individuals do not count toward the Judicial Proceedings Panel's total membership nor do they have voting privileges. In addition, these subject matter experts shall not participate in any deliberations dealing with

CHARTER
Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

the substantive matters before the Judicial Proceedings Panel or its subcommittees nor shall they participate in any voting.

13. Subcommittees: The Department, when necessary and consistent with the Judicial Proceedings Panel's mission and DoD policies and procedures, may establish subcommittees, task groups, or working groups to support the Judicial Proceedings Panel. Establishment of subcommittees will be based upon a written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC.

    These subcommittees shall not work independently of the Judicial Proceedings Panel and shall report all of their recommendations and advice to the Judicial Proceedings Panel for full deliberation and discussion. Subcommittees have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Judicial Proceedings Panel. No subcommittee or any of its members may update or report directly to the DoD or any Federal officers or employees.

    The Secretary of Defense shall appoint subcommittee members even if the member in question is already a member of the Judicial Proceedings Panel. All subcommittee appointments shall be subject to annual renewal. Such individuals, if not full-time or part-time government personnel, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Those individuals who are full-time or permanent part-time Federal employees shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) as RGE members. Subcommittee members shall serve for the life of the subcommittee. With the exception of reimbursement of official travel and per diem, subcommittee members shall serve without compensation.

    All subcommittees operate pursuant to the provisions of FACA, the Sunshine Act, governing Federal statutes and regulations, and established DoD policies and procedures.

14. Recordkeeping: The records of the Judicial Proceedings Panel and its subcommittees shall be handled according to section 2, General Records Schedule 26, and appropriate Department of Defense policies and procedures. These records shall be available for public inspection and copying, subject to the Freedom of Information Act of 1966 (5 U.S.C. § 552, as amended).

15. Filing Date: June 24, 2014

APPENDIX C: Judicial Proceedings Panel Committee and Subcommittee Member Biographies

JUDICIAL PROCEEDINGS PANEL MEMBERS

THE HONORABLE ELIZABETH HOLTZMAN — CHAIR OF THE JPP

Elizabeth Holtzman is counsel with the law firm Herrick, Feinstein LLP. Ms. Holtzman served for eight years as a U.S. representative (D-NY, 1973–81). While in office, she authored the Rape Privacy Act. She then served for eight years as District Attorney of Kings County, New York (Brooklyn), the fourth-largest DA's office in the country, where she helped change rape laws, improve standards and methods for prosecution, and develop programs to train police and medical personnel. In 1989 Ms. Holtzman became the only woman ever elected Comptroller of New York City. Ms. Holtzman graduated from Radcliffe College, *magna cum laude*, and received her law degree from Harvard Law School.

THE HONORABLE BARBARA S. JONES

Barbara Jones is a partner at the law firm Bracewell, LLP. 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. Before being nominated to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County (Manhattan). In that role she supervised community affairs, handled public information, and oversaw the work of the Homicide Investigation Unit. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division, and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an Assistant U.S. Attorney, as chief of the General Crimes Unit, and as chief of the Organized Crime Unit in the Southern District of New York.

MR. VICTOR STONE

Victor Stone represents crime victims at the Maryland Crime Victims Resource Center, Inc. Previously, Mr. Stone served as Special Counsel at the United States Department of Justice. He spent 40 years with the Department of Justice in numerous positions, including as Chief Counsel, FBI Foreign Terrorist Task Force, and as Assistant U.S. Attorney in Oregon and the District of Columbia. He has experience working on victims' and prisoners' rights, serving on committees that resulted in the enactment of the Crime Victims' Rights Act and updates to the ABA Standards for Prisoner Rights. After graduating from Harvard Law School, he clerked on the United States Court of Appeals for the Ninth Circuit.

PROFESSOR THOMAS W. TAYLOR

Tom Taylor teaches graduate courses at Duke University's Sanford School of Public Policy. Previously, he served as a decorated and distinguished Army officer, civil servant, and member of the Senior Executive Service. During a 27-year career in the Pentagon, he advised seven secretaries and seven Chiefs of Staff of the Army, and as the senior leader of the Army legal community he worked on a wide variety of operational, personnel, and intelligence issues. He graduated with high honors from Guilford College, Greensboro, N.C., and with honors from the University of North Carolina at Chapel Hill law school, where he was a Morehead Fellow, a member of the law review, and a member of the Order of the Coif.

VICE ADMIRAL PATRICIA A. TRACEY, U.S. NAVY (RETIRED)

Pat Tracey was most recently the Vice President of Homeland Security and Defense for Hewlett Packard Enterprise Services, U.S. Public Sector, developing dynamic strategies and providing support to various agencies including the U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, and U.S. Department of Defense. She completed a distinguished 34-year naval career in 2004, retiring as a vice admiral and the most senior woman officer in the history of the U.S. Navy. As chief of the Navy's $5 billion global education and training enterprise, Admiral Tracey led a successful revolution in training technology to improve the quality, access, effectiveness, and cost of Navy training. She graduated from the College of New Rochelle and the Naval Postgraduate School, with distinction, and completed a Fellowship with the Chief of Naval Operations' Strategic Studies Group.

JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE MEMBERS

THE HONORABLE BARBARA S. JONES — CHAIR OF THE JPP SUBCOMMITTEE

Barbara Jones is a partner at the law firm Bracewell, LLP. 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. Before being nominated to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County (Manhattan). In that role she supervised community affairs, handled public information, and oversaw the work of the Homicide Investigation Unit. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division, and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an Assistant U.S. Attorney, as chief of the General Crimes Unit, and as chief of the Organized Crime Unit in the Southern District of New York.

THE HONORABLE ELIZABETH HOLTZMAN — CHAIR OF THE JPP

Elizabeth Holtzman, who took office as the youngest woman ever elected to Congress, served in the House of Representatives from 1973 to 1981, representing New York's 16th Congressional District. While in Congress, she served on the House Judiciary and Budget Committees and chaired the Immigration and Refugees Subcommittee. She co-founded the Congressional Women's Caucus and was elected its first Democratic chair. She subsequently was elected Brooklyn District Attorney (where she pioneered new strategies for the prosecution of rape cases)—the only woman ever elected DA in New York City. She was then elected New York City Comptroller, the only woman ever to hold that position. Ms. Holtzman was appointed by President Bill Clinton to the Interagency Working Group (on declassifying secret Nazi war crimes files), and by Secretary Hagel to the Response Systems to Adult Sexual Assault Crimes Panel. She has also been appointed to the Department of Homeland Security Advisory Committee. Ms. Holtzman is a graduate of Harvard Law School and Harvard University's Radcliffe College, *magna cum laude*. She practices law in New York City with the firm Herrick, Feinstein, LLP.

MS. LISA FRIEL

Lisa Friel is an internationally recognized expert on sexual assault. Ms. Friel has investigated and supervised complex cases involving sexual assault and harassment, human trafficking, workplace violence, child pornography, Internet predators, unlawful surveillance, theft, and fraud. Ms. Friel began her professional career at the New York County District Attorney's Office, specializing in sexual assault cases. She was the Chief of the Sex Crimes Prosecution Unit for nearly a decade and the Deputy Chief for 11 years. Supervising more than 40 assistant district attorneys, support staff, and investigators, she typically managed 300 cases and investigations at any one time.

Ms. Friel has directed thousands of investigations into allegations of sexual assault and other misconduct and has trained hundreds of law enforcement personnel throughout the world. In October 2011, following a distinguished 28-year career as a Manhattan prosecutor, Ms. Friel joined T&M Protection Resources as Vice President of the Sexual Misconduct Consulting & Investigations division. Ms. Friel and her staff developed policies and procedures, provided training workshops, and conducted sensitive investigations into a myriad of issues, including sexual misconduct (both sexual assault and sexual harassment) and domestic violence. In September 2014, Ms. Friel was appointed as T&M's Special Advisor to the NFL Commissioner, consulting on domestic violence, child abuse, and sexual assault within the National Football League. In April 2015, Ms. Friel accepted a permanent position with the NFL: an appointment by Commissioner Goodell as the NFL's Special Counsel for Investigations, where she is responsible for all investigations related to possible violations of the NFL's Personal Conduct Policy.

MS. LAURIE ROSE KEPROS

Laurie Rose Kepros is the Director of Sexual Litigation for the Colorado Office of the State Public Defender, where she trains and advises more than 700 lawyers and other staff statewide in their representation of adults and juveniles accused or convicted of sexual crimes. Ms. Kepros has personally represented thousands of criminal defendants, including many victims of sexual assault. She has tried and consulted on thousands of sexual offense cases across the state of Colorado. She has served on dozens of subcommittees of the Colorado Sex Offender Management Board and as a member of both the Sex Offense Task Force and the Sex Offense Working Group of the Sentencing Task Force of the Colorado Commission on Criminal and Juvenile Justice. Ms. Kepros was on the Board of Directors of the Colorado Criminal Defense Bar for 10 years and currently serves on the board of the CCDB's sister policy organization, the Colorado Criminal Defense Institute. She is a member of the Association for the Treatment of Sexual Abusers and an adjunct professor at the University of Denver School of Law. She has repeatedly testified before the Colorado legislature as a subject matter expert in sexual crime law and as an expert witness in Colorado sex offense law in federal district court. In 2012, the CCDB awarded her the Gideon Award for upholding and preserving the principles captured by *Gideon v. Wainwright*.

DEAN LISA SCHENCK (COLONEL, U.S. ARMY, RETIRED)

Lisa Schenck became Associate Dean for Academic Affairs at the George Washington University Law School in 2009 after serving in the Army's Judge Advocate General's Corps for more than 25 years. She also has served as a judge, lawyer, and educator. While in the military, she was an appellate military judge on the U.S. Army Court of Criminal Appeals in 2002 and received the 2003 Judge Advocates Association Outstanding Career Armed Services Attorney Award (Army). In 2005, Dean Schenck was the first woman appointed as a Senior Judge on that court, where she served until she retired. In 2007, the Secretary of Defense also appointed her to serve concurrently as Associate Judge on the U.S. Court of Military Commission Review. After retiring from the military as a colonel in 2008, Dean Schenck served as Senior Advisor to the Defense Task Force on Sexual Assault in Military Services.

PROFESSOR LEE SCHINASI (COLONEL, U.S. ARMY, RETIRED)

Lee Schinasi began his legal career as a trial attorney for the Office of Economic Opportunity before starting a 23-year career in the Army's Judge Advocate General's Corps. His final assignment was as Dean of Academics and Vice Dean of the Army's JAGC School. Professor Schinasi attended the resident Command and General Staff College and the resident Army War College. He has served as military legal advisor to the Army's Chief of Staff for Intelligence and as Staff Judge Advocate of the 3rd Infantry Division (in Germany) and United States Army South (in Panama). Professor Schinasi is co-author of several books on evidence and litigation, including *The Military Rules of Evidence Manual, Military Evidentiary Foundations, The Florida Evidence Code Trial Book, Florida Evidentiary Foundations, Evidence in Florida, Emerging Problems under the Federal Rules of Evidence,* and *Lawyers Cooperative Practice Guide: Florida Evidence*. He received a bachelor's degree in economics and a J.D. degree from the University of Toledo. Before joining the Barry Law faculty, Professor Schinasi taught at the University of Miami School of Law. He currently teaches evidence, torts, civil procedure, and national security law.

BRIGADIER GENERAL JAMES SCHWENK, U.S. MARINE CORPS (RETIRED)

James Schwenk retired from the Marine Corps in 2000 and from civil service in 2014, after 49 years of federal service. As a Marine Corps judge advocate, he served as a trial counsel, defense counsel, Deputy Staff Judge Advocate, Staff Judge Advocate, Special Assistant to the General Counsel of the Navy, Head of Operational Law Branch at Headquarters Marine Corps, Deputy Director of Legal and Legislative Policy for the Office of the Assistant Secretary of Defense for Force Management and Policy, Assistant Judge Advocate General of the Navy for Military Law, and Military Assistant to the DoD General Counsel. Upon retiring from active duty, BGen Schwenk served for 14 years in the Office of the General Counsel of the Department of Defense as Senior Associate Deputy General Counsel, specializing in personnel policy, military justice, and civil support. He was the principal legal advisor for the repeal of "don't ask, don't tell" and the provision of benefits to same-sex spouses of military personnel. In addition, he was the principal legal advisor to numerous DoD working groups in the area of military personnel policy, working extensively with the White House and Congress. BGen Schwenk attended the Washington College of Law, American University, earning his J.D. in 1977.

MS. JILL WINE-BANKS

Jill Wine-Banks has a background as a corporate executive in manufacturing and telecommunications and as an attorney and not-for-profit and government leader. Ms. Wine-Banks started her career at the Department of Justice prosecuting organized crime and labor racketeering cases and then played a crucial role as an assistant special prosecutor investigating and trying the Watergate obstruction of justice case. Ms. Wine-Banks also served as the General Counsel of the United States Army. In that position, Ms. Wine-Banks dealt with environmental, procurement, Panama Canal, intelligence, military justice, and political issues, including the integration of women into basic training and West Point. After leaving the Pentagon, she was a litigation partner at Jenner and Block, the Solicitor General and Deputy Attorney General of Illinois, and later the Executive Vice President and Chief Operating Officer of the American Bar Association, the world's largest legal publisher and professional association with almost 400,000 members. That experience led to her becoming a senior corporate executive at Motorola and then Maytag, handling international business development, global operations, alliance creation and management, and government relations in Pakistan, China, Ukraine, Russia, France, Germany, Japan, and Singapore. Recently, Ms. Wine-Banks was head of career and technical education for the Chicago Public Schools and a business consultant. Ms. Wine-Banks is currently writing a book about her life and career, with a special focus on her experiences during Watergate.

APPENDIX D: Judicial Proceedings Panel Staff Members and Designated Federal Officials

JUDICIAL PROCEEDINGS PANEL STAFF

Captain Tammy P. Tideswell,
Judge Advocate General's Corps,
U.S. Navy, Staff Director

Lieutenant Colonel Patricia H. Lewis,
Judge Advocate General's Corps,
U.S. Army, Deputy Staff Director

Mr. Dale Trexler, Chief of Staff

Ms. Julie Carson, Attorney

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Ms. Theresa Gallagher, Attorney

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Ms. Terri A. Saunders, Attorney

Ms. Tiffany M. Williams,
Supervising Paralegal

DESIGNATED FEDERAL OFFICIALS

Ms. Maria Fried,
Associate Deputy General Counsel (Personnel and Health Policy),
U.S. Department of Defense,
Designated Federal Official

Mr. William Sprance,
Associate Deputy General Counsel (Personnel and Health Policy),
U.S. Department of Defense,
Alternate Designated Federal Official

Lieutenant Colonel Jacqueline M. Stingl,
Judge Advocate General's Corps,
U.S. Air Force, Associate Deputy General Counsel (Personnel and Health Policy),
U.S. Department of Defense,
Alternate Designated Federal Official

Mr. Dwight Sullivan,
Senior Associate Deputy General Counsel (Military Justice and Personnel Policy),
U.S. Department of Defense,
Alternate Designated Federal Official

APPENDIX E: Presenters on Sexual Assault Investigations in the Military at Judicial Proceedings Panel Public and Subcommittee Meetings

JUDICIAL PROCEEDINGS PANEL PUBLIC MEETINGS	PRESENTERS
April 8, 2016 Public Meeting of the JPP Holiday Inn Arlington at Ballston Arlington, VA	• Mr. Guy Surian, U.S. Army, Deputy Chief of Investigative Operations, Investigative Policy and Criminal Intelligence • Special Agent Jeremy Gauthier, U.S. Navy, Deputy Assistant Director, Criminal Investigations & Operations Directorate, Naval Criminal Investigative Service Headquarters • Mr. Kevin Poorman, U.S. Air Force, Associate Director, Criminal Headquarters, Air Force Office of Special Investigations • Ms. Beverly Vogel, Sex Crimes Program Manager, U.S. Coast Guard Investigative Service
February 24, 2017 Public Meeting of the JPP Holiday Inn Arlington at Ballston Arlington, VA	• Ms. Lisa Friel, JPP Subcommittee Member • Ms. Laurie Kepros, JPP Subcommittee Member • Ms. Jill Wine-Banks, JPP Subcommittee Member • Dean Lisa Schenck, Colonel, U.S. Army, Retired, JPP Subcommittee Member
May 19, 2017 Public Meeting of the JPP Holiday Inn Arlington at Ballston Arlington, VA	• Panel deliberations

JUDICIAL PROCEEDINGS PANEL PUBLIC MEETINGS	PRESENTERS
June 16, 2017 Public Meeting of the JPP One Liberty Center Arlington, VA	• Panel deliberations
July 26-27, 2017 Public Meeting of the JPP One Liberty Center Arlington, VA	• Panel deliberations and approval of the JPP report and recommendations

JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE MEETINGS	PRESENTERS
October 14, 2016 JPP Subcommittee Meeting One Liberty Center Arlington, VA	• JPP Subcommittee deliberations and review of draft report
December 8, 2016 JPP Subcommittee Meeting Telephonic	• JPP Subcommittee deliberations and review of draft report

JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE MEETINGS	PRESENTERS
December 21, 2016 JPP Subcommittee Meeting Telephonic	• JPP Subcommittee deliberations and review of draft report
December 23, 2016 JPP Subcommittee Meeting Telephonic	• JPP Subcommittee deliberations and review of draft report
January 5, 2017 JPP Subcommittee Meeting One Liberty Center Arlington, VA	• Mr. Steven Knight, Department of Defense Office of Inspector General • JPP Subcommittee deliberations and review of draft report
January 24, 2017 JPP Subcommittee Meeting Telephonic	• JPP Subcommittee deliberations and review of draft report
February 23, 2017 JPP Subcommittee Meeting One Liberty Center Arlington, VA	• JPP Subcommittee discussion on presentation of Subcommittee report to JPP

APPENDIX F: Acronyms and Abbreviations

AFOSI	U.S. Air Force Office of Special Investigations
CID	U.S. Army Criminal Investigation Command (Division)
CSS	Comparative Systems Subcommittee of the Response Systems Panel
DoD	Department of Defense
DODIG	Department of Defense Office of Inspector General
FY	Fiscal Year
JPP	Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (Judicial Proceedings Panel)
LEA	law enforcement agency
MCIO	military criminal investigative organization
MCM	Manual for Courts-Martial
NCIS	Naval Criminal Investigative Service
NDAA	National Defense Authorization Act
RFI	request for information
RSP	Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel)
SARC	sexual assault response coordinator
SJA	staff judge advocate
SVC	special victims' counsel
SVIP	special victim investigation and prosecution capability
UCMJ	Uniform Code of Military Justice
U.S.C.	United States Code
VLC	victims' legal counsel

APPENDIX G: Sources Consulted

1. LEGISLATIVE SOURCES

a. Enacted Statutes

10 U.S.C. §§ 801-946 (Uniform Code of Military Justice)

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

National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014)

National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015)

National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)

2. RULES AND REGULATIONS

a. Executive Orders

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016), *available at* http://jsc.defense.gov/Portals/99/Documents/MCM2016.pdf?ver=2016-12-08-181411-957

b. Department of Defense Directives

U.S. DEP'T OF DEF. DIRECTIVE 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM (Jan. 23, 2012) (Incorporating Change 2, Effective January 20, 2015)

c. Department of Defense Instructions

DEP'T. OF DEF. INSTRUCTION 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE (March 22, 2017)

DEP'T OF DEF. INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES (March 28, 2013) (Incorporating Change 2, Effective July 7, 2015)

3. MEETINGS

a. Public Meetings of the Judicial Proceedings Panel

Transcript of JPP Public Meeting (April 8, 2016), *available at* http://jpp.whs.mil/Public/docs/05-Transcripts/20160408_Transcript_Final.pdf

Transcript of JPP Public Meeting (February 24, 2017), *available at* http://jpp.whs.mil/Public/docs/05-Transcripts/20170224_Transcript_Final.pdf

4. OFFICIAL REPORTS

a. Report of the Response Systems to Adult Sexual Assault Crimes Panel

REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (June 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf

b. Reports of the Subcommittee of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

SUBCOMMITTEE OF THE JUDICIAL PROCEEDINGS PANEL REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY (February 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Investigations_Final_20170224.pdf

c. Department of Defense Reports

DEP'T OF DEF. INSPECTOR GEN., REPORT NO. DODIG-2015-094, EVALUATION OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS' ADULT SEXUAL ASSAULT INVESTIGATIONS (March 24, 2015), *available at* http://www.dodig.mil/pubs/documents/DODIG-2015-094.pdf

5. RESPONSES TO JUDICIAL PROCEEDINGS PANEL REQUESTS FOR INFORMATION

Department of Defense Office of Inspector General's Response to JPP Request for Information 161 (December 28, 2016)

Army's Response to JPP Request for Information 162 (December 29, 2016)

Navy and Marine Corps' Combined Response to JPP Request for Information 162 (January 4, 2017)

Air Force's Response to JPP Request for Information 162 (December 30, 2016)

Coast Guard's Response to JPP Request for Information 162 (January 3, 2017)

6. MEMORANDA

U.S. Dep't of Def., Memorandum from the Secretary of Defense on Implementation of the Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (December 15, 2014)

JUDICIAL PROCEEDINGS PANEL

REPORT ON PANEL CONCERNS REGARDING THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES

September 2017

JUDICIAL PROCEEDINGS PANEL

Report of the Judicial Proceedings
Since Fiscal Year 2012 Amendments Panel

Panel Concerns Regarding the Fair Administration Of Military Justice In Sexual Assault Cases

September 2017

JUDICIAL PROCEEDINGS PANEL

September 15, 2017

The Honorable John McCain
Chair, Committee
on Armed Services
United States Senate
Washington, DC 20510

The Honorable Jack Reed
Ranking Member, Committee
on Armed Services
United States Senate
Washington, DC 20510

The Honorable Mac Thornberry
Chair, Committee
on Armed Services
United States House of
Representatives
Washington, DC 20515

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

The Honorable James Mattis
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to submit this report of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP) on panel concerns regarding the fair administration of military justice in sexual assault cases. This report includes nine recommendations on the topics of the Article 32 process, case disposition guidance for convening authorities and staff judge advocates, the staff judge advocate's pretrial advice to the convening authority, access by prosecutors to sexual assault victims prior to trial, sexual assault prevention and response training, and expedited transfers of sexual assault victims.

To assess the effects of numerous changes in law and policy on sexual assault offenses in the military, the JPP tasked the JPP Subcommittee with conducting site visits to military installations in the United States and Asia. From June through September 2016, members of the JPP Subcommittee heard from panels of more than 280 individuals from all of the military Services involved in the investigation, prosecution, and defense of sexual assault offenses. The JPP Subcommittee reviewed the information gathered from these site visits, as well as information on this topic received by it in Subcommittee meetings and received by the JPP in public meetings, and submitted its findings and recommendations to the JPP. After hearing testimony from JPP Subcommittee members who attended installation site visits, and deliberating on the Subcommittee's report and recommendations, the JPP makes nine recommendations concerning the issues identified by the JPP Subcommittee.

The JPP expresses its sincere appreciation to the members of the JPP Subcommittee and everyone who contributed to this report.

Respectfully submitted,

Elizabeth Holtzman, Chair

Barbara S. Jones

Victor Stone

Thomas W. Taylor

Patricia A. Tracey

Contents

Executive Summary

INTRODUCTION

This report of the Judicial Proceedings Panel (JPP) focuses on some large-scale issues in the military's handling of sexual assault cases that have come to light during the Panel's ongoing assessment of sexual assault in the military.

In the past several years, media reports and the work of a number of members of Congress have fostered a public perception that the military has failed in sexual assault cases to effectively prosecute the accused and treat sexual assault victims with dignity and compassion. To address these concerns, Congress, the Department of Defense, and the White House have all worked to change the military system so that victims of sexual assault will be treated with respect and not further victimized by the criminal justice process. Other changes have been put in place to counter the perception that sexual assault predators were being protected from prosecution by military commanders.

Many of these changes have been valuable. One possible sign that they are having an effect is the increase in the past few years of the number of sexual assault cases being reported and the decrease in the number of reports of unwanted sexual contact in biannual surveys.[1] While the causes for those trends cannot be identified with certainty, many believe they indicate greater confidence that the criminal justice system will help the victim and will vigorously prosecute the accused.

As constructive and important as these changes have been, they appear to have also produced an unintended negative consequence: as the JPP Subcommittee was repeatedly told on its site visits, they appear to have raised questions about the fundamental fairness of the military justice process when it comes to the treatment of the accused.

It is vital for the military justice system to strike the right balance between the needs of the victim and the needs of the defendant. Both must be properly addressed if the system is to be fair and just, and perceived as such. The failure to maintain both the reality and perception among the military and the public of a just system can undermine morale, affect recruiting, and create a corrosive cynicism among military personnel. For that reason, the JPP believes it is important to share the criticisms it received with Congress, the Department of Defense, and the public.

METHODOLOGY

In order to assess the effects of numerous changes in law and policy on the investigation, prosecution, and defense of sexual assault offenses in the military, the Judicial Proceedings Panel tasked the Subcommittee of the JPP with conducting site visits to military installations to talk to the men and women who work in the military justice system. The JPP had previously received information on many

1 According to sexual assault prevalence surveys conducted of active duty military members, about 14,900 Service members experienced some kind of sexual assault in 2016, compared with 20,300 in 2014. *See* U.S. Dep't of Def., SAPRO, Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2016 at 14 (May 1, 2017), *available at* http://sapr.mil/public/docs/reports/FY16_Annual/FY16_SAPRO_Annual_Report.pdf.

of the changes to law and policy, and wanted to determine how these changes were being carried out and perceived at military installations by investigators, prosecutors, defense counsel, and others involved in sexual assault investigation, litigation, or victim support.

From July through September 2016, members of the JPP Subcommittee visited military installations in the United States and Asia. They met with panels of more than 280 individuals from 25 military installations and all of the military Services, including prosecutors, defense counsel, special victims' counsel/victims' legal counsel, paralegals, commanders, investigators, and sexual assault response coordinators and other victim support personnel. These individuals spoke without attribution so that the Subcommittee could gain an unfiltered, candid assessment of how changes in sexual assault laws and policies have, in their view, affected the military justice system.

On the basis of information from these site visits, the Subcommittee elected to issue reports on several topics. The Subcommittee issued its first report to the JPP in December 2016 on the subject of military defense counsel resources and experience in sexual assault cases and its second report in February 2017 on sexual assault investigations in the military. After receiving testimony from the Subcommittee members and deliberating on the information presented, the JPP issued two reports with recommendations on the topics identified by the Subcommittee. The JPP Subcommittee also issued three short reports—without recommendations—in March 2017 on the topics of the Department of Defense (DoD) initial disposition withholding policy, Military Rules of Evidence 412 and 513, and the training and experience of trial counsel and special victims' counsel/victims' legal counsel.

The JPP Subcommittee issued its final report to the JPP in May 2017, relating concerns regarding the fair administration of military justice in sexual assault cases. The JPP deliberated on the information presented by the Subcommittee and had the opportunity to question the JPP Subcommittee members who attended the installation site visits. As a result of this deliberation and review of the Subcommittee report, included as Appendix A, the JPP issues nine recommendations.

REPORT OF THE JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE

In its report, the JPP Subcommittee identified a number of issues with how the military justice system treats sexual assault offenses:

(1) The revised Article 32 process provides less information to convening authorities and no longer serves as a discovery mechanism for the defense.

(2) Convening authorities currently lack meaningful written guidelines to help them decide whether a case warrants referral to court-martial.

(3) Because the staff judge advocate's pretrial advice to the convening authority must be provided to the defense if the charges are referred to court, the staff judge advocate may be unwilling to provide a complete and candid written assessment of the evidence in the case.

(4) Counsel perceive that convening authorities feel pressured to refer sexual assault cases, even when based on weak evidence, to trial.

(5) Trial counsel sometimes lack the access that they believe sufficient to best prepare the victims for trial.

(6) Military members who potentially may sit on court-martial panels receive sexual assault prevention and response training that may confuse them regarding the legal standard for consent when alcohol is involved in sexual assault cases. The frequency of this training is also causing "training fatigue" among some military members.

(7) The current policy on the expedited transfer of sexual assault victims can make it difficult for investigators and prosecutors when victims have been transferred to faraway locations.

FINDINGS AND RECOMMENDATIONS OF THE JUDICIAL PROCEEDINGS PANEL

The JPP recognizes that the views of the individuals who participated in the site visits may depend in some measure on the military Service, location, and level of experience of the participants, and that the information provided was anecdotal. However, the views addressed in this report were brought to the Subcommittee's attention during every installation site visit, were supported by specific examples, and were also contextualized by the Subcommittee's subsequent research into related policies and statutes, as well as testimony before the JPP and the Subcommittee. Taken together, these considerations suggest that the issues could be systemic and should be addressed.

After receiving the presentation of the Subcommittee report, engaging in robust discussion with Subcommittee members at a public meeting on these issues, and deliberating as a panel, the JPP makes nine recommendations regarding the issues affecting the fair administration of military justice in sexual assault cases, addressing the Article 32 process, case disposition guidance for convening authorities and staff judge advocates, the staff judge advocate's pretrial advice to the convening authority, access by prosecutors to sexual assault victims prior to trial, sexual assault prevention and response training, and expedited transfers of sexual assault victims.

JPP Recommendations on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases*

Recommendation 55: The Secretary of Defense and the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which, in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP, no longer serves a useful discovery purpose. This review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of such a preliminary hearing officer against referral, based on lack of probable cause, should be given more weight by the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further analysis of, or changes to, the process are required.

In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP reiterates its recommendation—presented in its report on military defense counsel resources and experience in sexual assault cases—that the military Services provide the defense with independent investigators.

- The Fiscal Year 2014 National Defense Authorization Act (NDAA) made substantial changes to Article 32 of the Uniform Code of Military Justice (UCMJ), narrowing the scope of the pretrial hearing to a determination of whether probable cause exists to believe an offense was committed and the accused committed the offense. These changes also removed the ability of the Article 32 hearing officer to compel a victim to appear and testify at the hearing. The Article 32 hearing is no longer a discovery mechanism for the defense.
- According to site visit information from trial and defense counsel provided to the JPP Subcommittee, the new Article 32 preliminary hearing is not a meaningful process for evaluating the strength of the case.

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* JPP Recommendations 1–11 are included in the Judicial Proceedings Panel Initial Report 11 (Feb. 2015), *available at* http://jpp.whs.mil/public/docs/08-Panel_Reports/JPP_InitialReport_Final_20150204.pdf. JPP Recommendations 12–17 are included in the Judicial Proceedings Panel Report on Restitution and Compensation for Military Adult Sexual Assault Crimes 5 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Rest_Comp_Report_Final_20160201_Web.pdf. JPP Recommendations 18–23 are included in the Judicial Proceedings Panel Report on Article 120 of the Uniform Code of Military Justice 5–7 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Art120_Report_Final_20160204_Web.pdf. JPP Recommendations 24–36 are included in the Judicial Proceedings Panel Report on Retaliation Related to Sexual Assault Offenses 5–10 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/04_JPP_Retaliation_Report_Final_20160211.pdf. JPP Recommendations 37–38 are included in the Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses 5–6 (Apr. 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/05_JPP_StatData_MilAdjud_SexAsslt_Report_Final_20160419.pdf. JPP Recommendations 39–42 are included in the Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases 5–6 (Feb. 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/06_JPP_Defense_Resources_Experience_Report_Final_20170424.pdf. JPP Recommendations 43–46 are included in the Judicial Proceedings Panel Report on Victims' Appellate Rights 3–4 (June 2017), *available at* http://jpp.whs.mil. JPP Recommendations 47–51 are included in the Judicial Proceedings Panel Report On Sexual Assault Investigations in the Military 3–4 (Sep. 2017), *available at* http://jpp.whs.mil. JPP Recommendations 52–54 are included in the Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015 3–4 (Sep. 2017), *available at* http://jpp.whs.mil.

- According to information presented to the JPP by former military judges, trial counsel, and defense counsel, Article 32 hearings are now "paper drills," often with no witnesses testifying and only documentary evidence submitted.

- Counsel who spoke to the Subcommittee during site visits, as well as counsel who provided information to the JPP, stated that convening authorities sometimes refer charges in sexual assault cases even when the Article 32 preliminary hearing officers recommend charges not be referred.

- The JPP believes that Article 32 data should be examined to determine whether the seniority or experience level of the Article 32 preliminary hearing officer is a factor in the frequency with which convening authorities follow his or her advice.

- Because the statutory changes to Article 32, UCMJ, have only recently been included in the court-martial case data reviewed by the JPP, the Secretary of Defense and the DAC-IPAD should continue monitoring court-martial data to evaluate the effect of the statutory changes.

Recommendation 56: **Article 33, UCMJ, nonbinding case disposition guidance for convening authorities and staff judge advocates should require that the following standard be considered for referral to court-martial: the charges are supported by probable cause and there is a reasonable likelihood of proving the elements of each offense beyond a reasonable doubt using only evidence likely to be found admissible at trial.**

The nonbinding disposition guidance should require the staff judge advocate and convening authority to consider all the prescribed guideline factors in making a disposition determination, though they should retain discretion regarding the weight they assign each factor.

- The Fiscal Year 2017 NDAA created a new Article 33 of the UCMJ that directed the Secretary of Defense to issue nonbinding guidance regarding factors that convening authorities and staff judge advocates should consider when exercising their duties with respect to the disposition of charges. The new Article 33 states that this guidance should take into account the "principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases."[2]

- On July 11, 2017, the Joint Service Committee on Military Justice published for public comment proposed disposition guidance under Article 33, UCMJ. The JPP reviewed Sections 2.1 and 2.3 of the proposed guidance and notes that Section 2.1(h) is generally consistent with the JPP proposed standard.

- The "official guidance of the Attorney General" mentioned in Article 33 refers to the U.S. Attorneys' Manual. This manual specifies that probable cause is a threshold consideration that, if met, does not automatically warrant prosecution. The manual provides that an attorney should commence prosecution if "the admissible evidence will probably be sufficient to obtain and sustain a conviction."

- The American Bar Association's Criminal Justice Standards for the Prosecution Function state that a prosecutor should file and maintain criminal charges only when the charges are supported by probable cause, when "admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and [when] the decision to charge is in the interests of justice."

2 National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 5204.

- Counsel interviewed by the JPP Subcommittee on site visits believe that the standard in the military for referral of charges, which is probable cause, is too low and that convening authorities should take into account other factors in making disposition decisions, such as the likelihood of obtaining a conviction at trial.

Recommendation 57: **After case disposition guidance under Article 33, UCMJ, is promulgated, the Secretary of Defense and DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.**

- Counsel who spoke to the Subcommittee during site visits, as well as counsel who provided information to the JPP, perceived considerable pressure on convening authorities to refer sexual assault allegations to court-martial, even when based on weak evidence. The result, they believe, is a high acquittal rate in sexual assault cases.

- Case documents provided by the Services for sexual assault cases tried by court-martial in fiscal year 2015 show that for cases in which the most serious offense tried was a penetrative offense, 39% resulted in convictions for a sexual assault offense, 31% resulted in convictions for a non-sex offense only, and 30% resulted in acquittal of all charges. For cases in which the most serious sex offense tried was a sexual contact offense, 25% resulted in convictions for a sexual contact offense, 57% resulted in convictions for a non-sex offense only, and 18% resulted in acquittal of all charges.[3]

Recommendation 58: **The Secretary of Defense and the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. This review should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should also consider whether such a change would encourage the staff judge advocate to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.**

- Rule for Court-Martial 404 states that the staff judge advocate must provide written pretrial advice to the convening authority prior to referral of charges to a general court-martial, including a conclusion as to whether each specification states an offense under the UCMJ, whether the allegations are warranted by the evidence in the Article 32 preliminary hearing report, and whether a court-martial would have jurisdiction over the accused and offense, as well as a recommendation for action by the convening authority. A copy of the pretrial advice must be provided to the defense if the convening authority refers the case to court-martial.

- Counsel in some Services provide a prosecution merits memo with the trial counsel's opinion on the evidence and the likelihood of conviction at trial. Counsel from other Services say they have

3 Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015 (Sep. 2017), Appendix A: Adjudication of Sexual Offenses Reported to the Military Services in 2015, Cassia Spohn, PhD, School of Criminology and Criminal Justice, Arizona State University.

similar processes. Under Rule for Court-Martial 404, if appended to the staff judge advocate's pretrial advice, this memo would also have to be provided to the defense if charges are referred to court-martial.

Recommendation 59: **Congress review and consider revising provisions in the National Defense Authorization Act for Fiscal Year 2014 and Fiscal Year 2015, sections 1744 and 541 respectively, that require non-referral decisions in certain sexual assault cases to be forwarded for review and decision to a higher general court-martial convening authority or to the Service Secretary, because these provisions appear to have created a perception of undue pressure on convening authorities to refer such cases. The Secretary of Defense should develop procedures to mitigate this perception.**

- The Fiscal Year 2014 and Fiscal Year 2015 NDAAs contain provisions requiring that a convening authority's decision not to refer certain sexual assault cases be forwarded for review and decision either to a higher general court-martial convening authority or to the Service Secretary. While well-intentioned, these NDAA provisions appear to have created the perception of undue pressure on convening authorities to refer sexual assault cases to courts-martial, which negatively affects the military justice system.

- Data provided by the Services on review of disposition decisions since these NDAA provisions were enacted reflect no instances in which secretarial review of a convening authority's decision has been required. In some instances in each Service, a convening authority's decision not to refer a sexual assault case has been reviewed by a higher-level convening authority. In all but one of those instances, the higher-level convening authority also declined to refer the case to court-martial.

- Trial and defense counsel on site visits perceived there to be pressure on convening authorities to refer sexual assault cases to trial, even when based on weak evidence. They perceive that commanders would rather refer cases to trial than deal with the potential adverse effects of not referring the cases, such as career setbacks, media scrutiny, and elevated review of non-referral decisions.

- The JPP notes media coverage of two sexual assault court-martial appellate cases, both of which came to light following the Subcommittee's issuance of its report, that underscores the JPP's concerns related to perceived pressure on convening authorities.

    - In the first case, *United States v. Barry*,[4] a declaration of the convening authority was submitted to the court that states: "I perceived that if I were to disapprove the findings in the [sexual assault] case, it would adversely affect the Navy." The convening authority further stated: "Even though I was convinced then, and am convinced now, that I should have disapproved the findings, my consideration of the Navy's interest in avoiding the perception that military leaders were sweeping sexual assaults under the rug outweighed that conviction at the time."[5]

4 *United States v. Barry*, 76 M.J. 269 (Apr. 27, 2017); *remanded, United States v. Barry*, No. 2017 CAAF LEXIS 703 (C.A.A.F., June 19, 2017).

5 *Declaration of RADM Patrick J. Lorge, USN (Ret.)*, May 5, 2017.

- In the second case, *United States v. Boyce*,[6] the Court of Appeals for the Armed Forces overturned a sexual assault case on the basis of an appearance of unlawful command influence.[7] This was primarily due to senior civilian and military leaders reportedly giving the convening authority an ultimatum to retire or be removed from his position for his failure to refer a prior sexual assault case to court-martial.

Recommendation 60: The Secretary of Defense and the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system.

- Counsel on site visits reported high acquittal rates in sexual assault cases due to a less robust Article 32 process, the standard of probable cause for referral of charges, and pressure on convening authorities to refer cases to trial even when based on weak evidence.

- Case documents provided by the Services for sexual assault cases tried by court-martial in fiscal year 2015 show that for cases in which the most serious offense tried was a penetrative offense, 39% resulted in convictions of a sexual assault offense, 31% resulted in convictions of a non-sex offense only, and 30% resulted in acquittal of all charges. For cases in which the most serious sex offense tried was a sexual contact offense, 25% resulted in convictions of a sexual contact offense, 57% resulted in convictions of a non-sex offense only, and 18% resulted in acquittal of all charges.[8]

Recommendation 61: The Secretary of Defense ensure that special victims' counsel/victims' legal counsel (SVCs/VLCs) receive the necessary training on the importance of allowing reasonable access by prosecutors to sexual assault victims prior to courts-martial. Such training will ensure that SVCs/VLCs are considering the value of an effective relationship between the prosecutor and the victim in the advice they provide their victim-clients, with the goal of assisting the prosecutor in fully preparing for trial.

- A number of trial counsel on site visits told the Subcommittee that while SVCs/VLCs are a valuable asset, they sometimes restrict the ability of trial counsel to conduct subsequent interviews with victims.

Recommendation 62: The Department of Defense Sexual Assault Prevention and Response Office ensure that sexual assault training conducted by the military Services provide accurate information to military members regarding a person's ability to consent to sexual contact after consuming alcohol and regarding the legal definition of "impairment" in this context and that training be timed and conducted so as to avoid "training fatigue."

The Secretary of Defense and the DAC-IPAD monitor whether misperceptions regarding alcohol consumption and consent affect court-martial panel members.

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6 The case was returned to the convening authority allowing for a retrial. *United States v. Boyce*, 76 M.J. 242 (May 22, 2017), *available at* http://www.armfor.uscourts.gov/newcaaf/opinions/2016OctTerm/160546.pdf.

7 The court found in fact that there was no actual unlawful command influence. *Id.*

8 Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015 (Sep. 2017), Appendix A, *supra* note 3.

- Commanders who spoke to the Subcommittee expressed concerns about the frequency of mandatory sexual assault prevention and response (SAPR) training, describing it as time-consuming and potentially counterproductive because of perceived "training fatigue."

- Counsel on site visits indicated that they still hear misperceptions about alcohol use and impairment from court-martial panel members, even though sexual assault response coordinators and others who conduct SAPR training told Subcommittee members they do not train military members that "one beer means no consent," or use variations of that slogan.

- A September 2016 Navy-Marine Corps Court of Criminal Appeals decision—*United States v. Newlan*[9]—involved an erroneous jury instruction on the definition of "impairment" in a sexual assault case. The court noted that many members of the jury pool received training from SAPR personnel that led them to believe that "if someone ingested any alcohol, that individual was no longer able to legally consent. [footnote omitted]"[10]

Recommendation 63: **The Secretary of Defense review the policy on expedited transfer of sexual assault victims and consider whether it should be modified to require commanders to determine, in each case, whether a sexual assault victim could be transferred to another unit on the same installation or to a nearby installation without sacrificing the vital interests of the victim. The intent of this change would be to strike a balance between ensuring that prosecutors have access to victims in preparing for courts-martial and satisfying the need to separate the victim from the accused, while maintaining the victim's access to support systems. Commanders and SVCs/VLCs should receive training in how relocating victims from less desirable to more desirable locations can be used by defense counsel to suggest victims' abuse of this system and to cast doubt on their credibility, possibly leading to more acquittals at courts-martial. The Secretary of Defense should develop procedures to minimize this problem.**

The Secretary of Defense and the DAC-IPAD collect data on expedited transfers to determine the locations from which and to which victims are requesting expedited transfers and to review their stated reasons.

- Some counsel on site visits reported that once victims receive expedited transfers to faraway locations, they are less likely to cooperate with the prosecution. Some counsel and commanders felt that expedited transfers are abused by victims and perceive that commanders are afraid to say no to victims for fear that doing so will be seen as retaliation.

- Counsel perceive that transfers are rarely requested by victims in desirable locations, but they are frequently requested by victims in less desirable locations. Defense counsel may use this perception to challenge the victim's motives during a court-martial, causing panel members to question the victim's credibility.

- According to statistics from the Department of Defense Sexual Assault Prevention and Response Office, the number of expedited transfer requests has risen steadily from 218 requests in fiscal

9 *United States v. Newlan*, 2016 CCA LEXIS 540 (N-M.C.C.A. Sep. 13, 2016), *available at* http://www.jag.navy.mil/courts/documents/archive/2016/NEWLAN-201400409-UNPUB.pdf.

10 *Id.* at 7.

year 2012—when the policy was implemented—to 746 requests in fiscal year 2016. The percentage of requests approved each year has been more than 97%.[11]

11 *See* U.S. Dep't of Def., SAPRO, Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2016, Appendix B: Statistical Data on Sexual Assault at 36 (May 1, 2017), *available at* http://sapr.mil/public/docs/reports/FY16_Annual/Appendix_B_Statistical_Section.pdf.

APPENDIX A: Subcommittee of the Judicial Proceedings Panel Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases

SUBCOMMITTEE OF
THE JUDICIAL PROCEEDINGS PANEL

REPORT ON BARRIERS TO THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES

May 2017

SUBCOMMITTEE TO THE JUDICIAL PROCEEDINGS PANEL

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May 12, 2017

MEMORANDUM FOR MEMBERS OF THE JUDICIAL PROCEEDINGS PANEL

SUBJECT: Report of the Subcommittee

On April 9, 2015, the Secretary of Defense established this Subcommittee to support the Judicial Proceedings Panel in its duties under Section 576(d) of the National Defense Authorization Act for Fiscal Year 2013. Following the Secretary's objectives and at the request of the Judicial Proceedings Panel, the Subcommittee conducted military installation site visits throughout the United States and Asia. Based upon information received during these site visits, the Subcommittee undertook additional research of several topics. The Subcommittee has completed its review on the topic of barriers to the fair administration of military justice in sexual assault cases and submits to the Judicial Proceedings Panel its report with our assessment, conclusions, and recommendations.

Barbara S. Jones
Subcommittee Chair

Executive Summary

SUBCOMMITTEE REPORT TO THE JUDICIAL PROCEEDINGS PANEL ON BARRIERS TO THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals—all involved in the military justice process, from 25 military installations in the United States and Asia—about the investigation, prosecution, and defense of sexual assault offenses.

On the basis of information received at the site visits, the Subcommittee identified several topics to present to the JPP, some of which required additional research. Therefore, the Subcommittee decided to issue separate reports on each of the identified subjects. The Subcommittee issued its first report in December 2016 on the subject of military defense counsel resources and experience in sexual assault cases, its second report in February 2017 on sexual assault investigations in the military, and three short reports in March 2017 on the topics of the Department of Defense (DoD) initial disposition withholding policy, Military Rules of Evidence 412 and 513, and the training and experience of trial counsel and special victims' counsel/victims' legal counsel.

This final Subcommittee report focuses on some large-scale issues in the military's handling of sexual assault cases that came to light during the site visits and subsequent research. In the past several years, there has been a huge public outcry about the problem of sexual assault in the military. Media reports, the documentary film *Invisible War*, and the work of a number of women members of the U.S. House and Senate have fostered a public perception that sexual assault is rampant in the military and that the military has swept the problem under the rug both by failing to effectively prosecute the accused and by failing to treat the victims with dignity and compassion. To address these concerns, Congress, the Department of Defense, and the White House have all worked to change the military system so that victims of sexual assault are treated with respect and are not further victimized by the criminal justice process. Other changes have been put in place to counter the perception that sexual assault predators were being protected from prosecution by military commanders.

Many of these changes have been valuable. One possible sign that they are having an effect is the increase in the past few years of the number of sexual assault cases being reported. While its cause cannot be identified with certainty, many believe that it indicates greater confidence that the criminal justice system will help the victim and vigorously prosecute the accused.

As constructive and important as these changes have been, they have also produced an unintended negative consequence: they have, as the Subcommittee was repeatedly told on its site visits, raised serious questions about the fundamental fairness of the military justice process when it comes to the treatment of the accused.

It is vital for the military justice system to strike the right balance between the needs of the victim and the needs of the defendant. Both must be properly addressed if the system is to be seen as fair and just. The failure to create the perception and the reality of a just system can undermine morale,

affect recruiting, and create a corrosive cynicism among military personnel. For that reason, the Subcommittee believed it was important to share the information it received with the JPP.

The Subcommittee identified a number of problems with how the military justice system treats sexual assault offenses:

1. The revised Article 32 process provides less information to convening authorities and no longer serves as a discovery mechanism for the defense;

2. Because convening authorities currently lack meaningful written guidelines to help them decide whether a case warrants referral to court-martial, such as the likelihood of securing a conviction at trial, they may be referring sexual assault charges to trial on the basis of weak evidence;

3. Because the staff judge advocate's pretrial advice to the convening authority must be provided to the defense, the staff judge advocate may be unwilling to provide a complete and candid written assessment of the evidence in the case;

4. Counsel perceive that convening authorities feel public pressure to refer sexual assault cases to trial;

5. Some trial counsel complained they no longer have the access to sexual assault victims that they need in order to properly prepare those victims for trial;

6. Military members who potentially may sit on court-martial panels receive sexual assault prevention and response training that may confuse them regarding the legal standard for consent in sexual assault cases. The frequency of this training is also causing "training fatigue" among military members; and

7. The current policy on expedited transfer of sexual assault victims can make it difficult for investigators and prosecutors to adequately consult with victims prior to trial when victims have been transferred to faraway locations.

In this report, the Subcommittee makes nine recommendations:

Recommendation 1: The JPP Subcommittee recommends that the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP no longer serves a useful purpose. Such a review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of the preliminary hearing officer against referral, based on lack of probable cause, should be binding on the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further changes to the process are required.

In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP Subcommittee reiterates its recommendation— presented in its report on military defense counsel resources and experience in sexual assault cases, and adopted by the JPP—that the defense be provided with independent investigators.

Recommendation 2: The JPP Subcommittee recommends that Article 33, UCMJ, case disposition guidance for convening authorities and staff judge advocates require the following standard for referral to court-martial: the charges are supported by probable cause and there is a reasonable likelihood of proving the elements of each offense beyond a reasonable doubt using only evidence likely to be found admissible at trial.

The JPP Subcommittee further recommends that the disposition guidance require the staff judge advocate and convening authority to consider all the prescribed guideline factors in making a disposition determination, though they should retain discretion regarding the weight they assign each factor. These factors should be considered in their totality, with no single factor determining the outcome.

Recommendation 3: The JPP Subcommittee recommends that after case disposition guidance under Article 33, UCMJ, is promulgated, the DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

Recommendation 4: The JPP Subcommittee recommends that the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. The DAC-IPAD should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should consider whether such a change would allow the staff judge advocate to provide more fully developed, candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

Recommendation 5: The JPP Subcommittee recommends that Congress repeal provisions from the National Defense Authorization Act for Fiscal Year 2014 and Fiscal Year 2015, sections 1744 and 541 respectively, that require non-referral decisions in certain sexual assault cases to be forwarded to a higher general court-martial convening authority or to the Service Secretary. The perception of pressure on convening authorities to refer sexual assault cases to courts-martial created by these provisions and the consequent negative effects on the military justice system are more harmful than the problems that such provisions were originally intended to address.

Recommendation 6: The JPP Subcommittee recommends that the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system.

Recommendation 7: The JPP Subcommittee recommends that the Secretary of Defense ensure that SVCs/VLCs receive the necessary training on the importance of allowing full access by prosecutors to sexual assault victims prior to courts-martial. Such training will ensure that SVCs/VLCs are considering the value of a meaningful victim-prosecutor relationship in the advice they provide their victim-clients and assist prosecutors in sufficiently developing the rapport with the victim needed to fully prepare for trial.

Recommendation 8: The JPP Subcommittee recommends that the Department of Defense Sexual Assault Prevention and Response Office ensure that sexual assault training conducted by the military Services provide accurate information to military members regarding a person's ability to consent to sexual contact after consuming alcohol and the legal definition of "impairment" in this context and that training be timed and conducted so as to avoid "training fatigue."

The JPP Subcommittee further recommends that the DAC-IPAD monitor whether misperceptions regarding alcohol consumption and consent continue to affect court-martial panel members.

Recommendation 9: The JPP Subcommittee recommends that the Secretary of Defense review the policy on expedited transfer of sexual assault victims and consider whether it should be changed to state that when possible, sexual assault victims should be transferred to another unit on the same installation or to a nearby installation. This change will help ensure that prosecutors have access to victims in preparing for courts-martial, will satisfy the need to separate the victim from the accused, and will maintain the victim's access to support systems while combating the perception that the ability to ask for these transfers has encouraged fraudulent claims of sexual assault. Commanders and SVCs/VLCs should all receive training in how relocating victims from less desirable to more desirable locations can foster the perception among military members that the expedited transfer system is being abused and in how such transfers can be used by defense counsel to cast doubt on the victim's credibility, possibly leading to more acquittals at courts-martial.

The JPP Subcommittee further recommends that the DAC-IPAD review data on expedited transfers to determine the locations from which and to which victims are requesting expedited transfers and to review their stated reasons.

Barriers to the Fair Administration of Military Justice in Sexual Assault Cases

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals from 25 military installations in the United States and Asia involved in the military justice process; these conversations focused on the investigation, prosecution, and defense of sexual assault offenses.[1] Discussions were held without attribution so that Subcommittee members could hear candid perceptions of the military's handling of sexual assault cases from the men and women who are investigating and litigating those cases. The Subcommittee spoke to groups of military prosecutors, defense counsel, special victims' counsel/victims' legal counsel, paralegals, and investigators, as well as commanders, sexual assault response coordinators, victim advocates, and victim-witness liaisons from all military Services.

During the site visits, the Subcommittee identified a number of possible barriers to the fair administration of military justice in sexual assault cases. The Subcommittee determined that it would have to analyze, discuss, and develop the information gathered and conduct further research into some of the issues identified. Therefore, the Subcommittee held 13 meetings or teleconferences from September 2016 through May 2017. Drawing on the site visit data and the Subcommittee's additional discussion and research—including information regarding ethics rules and prosecutorial discretion, provided by representatives of the Services at a Subcommittee meeting held in January 2017—the Subcommittee made recommendations on several of these points in two previous reports to the JPP: one on military defense counsel resources and experience in sexual assault cases, issued in December 2016, and one on sexual assault investigations in the military, issued in February 2017.[2] In addition, the Subcommittee provided brief reports to the JPP in March 2017 on the topics of the Department of Defense (DoD) initial disposition withholding policy, Military Rules of Evidence 412 and 513, and training and experience of trial counsel and special victims' counsel/victims' legal counsel.[3] This final report summarizes site visit comments and the Subcommittee's research into additional barriers to the fair administration of military justice in sexual assault cases.

I. BACKGROUND

Historically, sexual assault in the military has at times garnered the public's attention. In recent years, however, public demands for accountability and justice have grown louder and more persistent, following complaints by sexual assault victims about the military's handling of their allegations and how they are treated. As a result, the procedures for dealing with such cases have been changed.

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1 A list of the installations visited and Subcommittee members participating in each site visit is enclosed with this report.

2 *See* Subcommittee of the Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases (Dec. 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_DefResources_Final_20161208.pdf; Subcommittee of the Judicial Proceedings Panel Report on Sexual Assault Investigations in the Military (Feb. 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Investigations_Final_20170224.pdf.

3 *See* Subcommittee Papers on Initial Disposition Withholding Authority; Military Rules of Evidence 412 and 513; and Training and experience of trial counsel and special victims' counsel/victims' legal counsel (Mar. 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Subcomm_ShortReports_20170302_Final.pdf.

Many victims complained that commanders dismissed their sexual assault allegations without further investigation or action. In response, several DoD or congressionally appointed panels reviewed the state of sexual assault prevention, victim care, investigation, and prosecution in the military and issued reports and recommendations on those topics.[4] Congress and DoD responded to these recommendations and to military sexual assault victims' complaints by adopting more than 100 statutory reforms and numerous policy changes in the area of military sexual assault. The majority of these statutory reforms and policy changes have been instituted since 2012, and many have sought to address the treatment of sexual assault victims.

Statutes creating the Special Victims' Counsel Program and expanding victims' rights have profoundly changed the treatment of sexual assault victims. The statute creating the Special Victims' Counsel Program provides that every military member who reports being sexually assaulted is entitled to have a military attorney appointed to advise him or her of legal issues surrounding the case and other matters. This attorney is authorized to represent the victim, including at the Article 32 hearing and court-martial, at all pretrial stages of the case, and at trial. Since its inception as an Air Force pilot program in 2013, the Special Victims' Counsel/Victims' Legal Counsel[5] (SVC/VLC) Program has evolved to the point that an SVC/VLC right to argue victim privacy issues in court is now recognized.[6] The ability to have an SVC/VLC present during investigative interviews has also helped increase victims' comfort level with the investigative and military justice processes.

The recent passage of legislation allowing victims to decline to testify at Article 32 preliminary hearings has also been perceived positively by sexual assault victims.

These military justice reforms were prompted by past failures to properly address sexual assault allegations. They have empowered sexual assault victims and provided them a voice in how their sexual assault allegations are handled. Yet these reforms have also had unintended and, at times, negative consequences. In the view of trial counsel, defense counsel, investigators, and other military personnel involved in the military criminal justice system who were interviewed by the Subcommittee members during installation site visits, the military justice system is placing the rights and preferences of sexual assault victims over the due process rights of those accused of these offenses. Many of those interviewed sense that in an effort to respond to public criticism and right past wrongs, commanders now feel pressure to resolve greater numbers of sexual assault allegations at courts-martial, regardless of the relative merits of the case or the likelihood of conviction. The result, counsel asserted, has been a dramatic increase in acquittals in these cases. Several counsel went so far as to state that these changes in the military justice system have placed justice and the perception of a fair system at risk.

4 Among these reports are the Defense Task Force Report on Care for Victims of Sexual Assault (Apr. 2004), *available at* http://www.sapr.mil/public/docs/reports/task-force-report-for-care-of-victims-of-sa-2004.pdf; Report of the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies (Jun. 2005), *available at* http://www.dtic.mil/dtfs/doc_recd/High_GPO_RRC_tx.pdf; Report of the Defense Task Force on Sexual Assault in the Military Services (Dec. 2009), *available at* http://www.sapr.mil/public/docs/research/DTFSAMS-Rept_Dec09.pdf; Report of the Response Systems to Adult Sexual Assault Crimes Panel (Jun. 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf; and numerous reports of the Judicial Proceedings Panel, *available at* http://jpp.whs.mil/.

5 The Navy and Marine Corps refers to victims' lawyers as victims' legal counsel, while the other Services refer to them as special victims' counsel.

6 *See* Judicial Proceedings Panel Initial Report (Feb. 2015) [hereinafter JPP Initial Report], Section III, for a full discussion of the SVC/VLC programs. This report is *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/01_JPP_InitialReport_Final_20150204.pdf.

This report discusses some of the changes made to the military justice process in recent years, as well as the perceived pressure on convening authorities and judge advocates to refer sexual assault cases to trial, regardless of the likelihood of conviction. Further, this report highlights some of the long-term negative consequences identified as resulting from the recent reforms. It builds on the observations and conclusions found in two earlier and related Subcommittee reports written following the installation site visits: the *Subcommittee Report to the Judicial Proceedings Panel on Military Defense Counsel Resources and Experience in Sexual Assault Cases*, the *Subcommittee Report to the Judicial Proceedings Panel on Sexual Assault Investigations in the Military*, and the Subcommittee papers on *Initial Disposition Withholding Authority, Military Rules of Evidence 412 and 513*, and *Training and Experience of Trial Counsel and Special Victims' Counsel/Victims' Legal Counsel*.[7]

II. REFERRING SEXUAL ASSAULT CASES TO COURT-MARTIAL

A. Early Stages of Case Processing

Before the convening authority can refer charges to a court-martial, several events must take place. While there are some important differences in the treatment of sexual assault offenses, many of the steps in the military justice process are the same regardless of the offense.

If a victim reports a sexual assault to certain identified personnel, he or she has the ability to file either a restricted or unrestricted report.[8] If the victim chooses to file an unrestricted report of a sexual assault offense, the Services' military criminal investigative organizations (MCIOs) investigate the offense.[9] When the investigation is completed or near completion, military prosecutors discuss the case with the appropriate commander, who determines whether to prefer charges or take some other disciplinary action against the alleged perpetrator.[10]

Rule for Court-Martial (R.C.M.) 306(b) provides guidance for judge advocates and convening authorities on this decision, stating that "[a]llegations of offenses should be disposed of in a timely manner at the lowest appropriate level."[11] Further guidance is contained in nonbinding discussion accompanying R.C.M. 306(b):

> The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including,

7 The JPP adopted the Subcommittee's report on defense counsel resources and experience and its recommendations, with some modifications. The Subcommittee's report on sexual assault investigations is still pending before the JPP. The three Subcommittee papers were presented to the JPP for informational purposes.

8 Restricted reports of adult sexual assault may be only made to sexual assault response coordinators, SAPR victim advocates, and healthcare personnel. U.S. Dep't of Def. Instr. [hereinafter DoDI] 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures, Encl. 4 (Mar. 28, 2013, incorporating Change 2, effective Jul. 7, 2015).

9 The Subcommittee discussed problems associated with MCIO investigations of sexual assault offenses more fully in the Subcommittee of the Judicial Proceedings Panel Report on Sexual Assault Investigations in the Military, *supra* note 2.

10 Only commanders who hold at least special court-martial convening authority and who are in the grade of O-6 (*i.e.*, colonel or Navy captain) or higher can hold initial disposition authority in sexual assault cases. *See* U.S. Dep't of Defense, 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).

11 Manual for Courts-Martial, United States (2016 ed.) [hereinafter 2016 MCM], Rule for Court-Martial [hereinafter R.C.M.] 306(b). R.C.M. 306(c) discusses potential dispositions of allegations: no punishment, administrative action, nonjudicial punishment, or disposition through courts-martial.

> to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, 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. The goal should be a disposition that is warranted, appropriate, and fair.
>
> In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:
>
> (A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
>
> (B) when applicable, the views of the victim as to disposition;
>
> (C) existence of jurisdiction over the accused and the offense;
>
> (D) availability and admissibility of evidence;
>
> (E) the willingness of the victim or others to testify;
>
> (F) cooperation of the accused in the apprehension or prosecution of another accused;
>
> (G) possible improper motives or biases of the person(s) making the allegation(s);
>
> (H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction; and
>
> (I) appropriateness of the authorized punishment to the particular accused or offense.[12]

For sex-related offenses committed in the United States, R.C.M. 306 provides for the victim to express his or her views as to whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense. The convening authority must consider the victim's views as to disposition, if available, before making a decision to prefer charges or take some other disciplinary action.[13]

If charges are preferred and the special court-martial convening authority (SPCMCA) deems a general court-martial appropriate, he or she must direct the case to a preliminary hearing under Article 32 of the UCMJ.[14]

12 2016 MCM, *supra* note 11, R.C.M. 306(b) discussion.

13 2016 MCM, *supra* note 11, R.C.M. 306(e)(2). R.C.M. 306(e)(1) defines "sex-related" offense as any alleged violation of Article 120—Rape and sexual assault generally, 120a—Stalking, 120b—Rape and sexual assault of a child, 120c—Other sexual misconduct, 125—Forcible sodomy; bestiality, or any attempt thereof under Article 80, Uniform Code of Military Justice.

14 2016 MCM, *supra* note 11, R.C.M. 404(b)(5).

B. The Evolution of the Article 32 Process

1. Statutory Changes. Before charges may be referred to a general court-martial, Article 32 of the UCMJ requires a preliminary hearing, unless the accused waives the hearing.[15] In the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA), Congress made substantial changes to Article 32. The impetus for these changes was a widely reported Article 32 investigation at the U.S. Naval Academy in which counsel questioned a Naval Academy midshipman who had reported being sexually assaulted for "more than 30 hours" and subjected her to "humiliating and abusive questions."[16] The legislative changes to Article 32 were also intended to align the procedures with civilian preliminary hearing proceedings, which are used to determine if there is probable cause and if a case should go to trial; during them, victims are often not called to testify.[17]

Prior to these statutory changes, the Article 32 hearing was intended to be a "thorough and impartial investigation" by an investigating officer into the truth and form of the charges.[18] The Article 32 hearing also served as a mechanism for pretrial discovery for the defense.[19] Military witnesses, including sexual assault victims, could be compelled to appear and testify at the Article 32 hearing.[20]

The FY14 NDAA changes to Article 32 applied to Article 32 hearings conducted on or after December 26, 2014.[21] These changes, which restyled the Article 32 from a pretrial investigation into a preliminary hearing, limited the purpose of the hearing to determining whether probable cause exists to believe an offense was committed and whether the accused in the case committed the offense.[22] Under the December 2014 Article 32 format, preliminary hearing officers (PHOs) are still required to determine whether the convening authority has court-martial jurisdiction over the accused and the offense, to consider the form of the charges, and to make recommendations to the convening authority as to disposition.[23] In an effort to limit the scope of Article 32, these statutory changes also removed the ability of a PHO to compel a military victim to appear and testify at the hearing if the victim was found "reasonably available," but allowed the PHO to consider alternatives to testimony for the victim and any other witnesses, regardless of their availability.[24]

15 10 U.S.C. § 832 (UCMJ, Art. 32).

16 *See* 159 Cong. Rec. H7059 (Congresswoman Speier (D-CA) introduced the reforms to Article 32), *available at* https://www.gpo.gov/fdsys/pkg/CREC-2013-11-14/pdf/CREC-2013-11-14-pt1-PgH7059.pdf.

17 *Id. But see infra* notes 26-28 and accompanying text.

18 10 U.S.C. § 832 (UCMJ, Art. 32); 2016 MCM, *supra* note 11, R.C.M. 405.

19 Manual for Courts-Martial, United States (2012 ed.) [hereinafter 2012 MCM], R.C.M. 405 discussion.

20 *Id.*

21 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [hereinafter FY14 NDAA], § 1702(a), 127 Stat. 672 (2013); National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [hereinafter FY15 NDAA], § 531(g), 128 Stat. 3292 (2014).

22 Another change to the Article 32 process requires that judge advocates be used as preliminary hearing officers "whenever practicable." 2016 MCM, *supra* note 11, R.C.M. 405(d)(1). While this had previously been the practice in the Navy, Marine Corps, and Air Force, the Army traditionally used line officers in this role, with a judge advocate appointed to advise the Article 32 investigating officer on legal matters. In addition, the updated R.C.M. 405 requires the preliminary hearing officer to be equal to or senior in grade to the military prosecutor and military defense counsel representing the accused, "when practicable." 2016 MCM, *supra* note 11, R.C.M. 405(d)(1). Navy and Air Force counsel stated that they often use active duty and reserve military judges as Article 32 preliminary hearing officers in sexual assault cases.

23 2016 MCM, *supra* note 11, R.C.M. 405(a).

24 *Id.*; *see also* Major Christopher J. Goewert and Captain Nichole M. Torres, *Old Wine into New Bottles: The Article 32 Process after the National Defense Authorization Act of 2014*, 232 A.F. L. Rev. Vol. 72 (2015).

As observed above, while the Article 32 hearing had previously served as a means of discovery for the defense, the new R.C.M. 405, reflecting the statutory changes to Article 32, specifically states that the Article 32 hearing is "not intended to serve as a means of discovery."[25] This change is significant, as the U.S. Court of Military Appeals (now the U.S. Court of Appeals for the Armed Forces, or CAAF) previously emphasized the value of the Article 32 investigation as a discovery tool. In the case of *Hutson v. United States*, CAAF even relied on the Article 32 hearing to uphold a judge's refusal to grant the defense's request for appointment of an investigator.[26] While acknowledging that investigative assistance is provided for indigent defendants in federal courts, CAAF held that the federal statute used to grant such assistance in federal court was not available to military defendants, stating: "[I]t should be noted that the pretrial investigation to which these charges have been referred is the accused's only practicable means of discovering the case against him."[27] In light of the changes to the Article 32 process, this CAAF decision provides further support for the Subcommittee's recent recommendation, which the JPP adopted, that independent investigators be provided to the defense.[28]

A provision in the National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA) removes the provision in Article 32 permitting the accused to present additional evidence at the Article 32 hearing "in defense and mitigation, relevant to the limited purposes of the hearing," and replaces it with language stating that the accused may present additional evidence "that is relevant to the issues [of whether there is probable cause to believe the accused committed the offense and the PHO's recommendation as to disposition of the case]."[29] It is too early to determine how PHOs will interpret this change and what effect, if any, it will have on the defense's ability to present additional evidence in defense and mitigation at the Article 32 hearing.

2. Site Visit Information. During installation site visits the Subcommittee spoke with trial counsel, defense counsel, and SVCs/VLCs, most of whom were familiar with both the pre-December 2014 and the new Article 32 proceedings. The consensus among them was that unlike the pre-December 2014 Article 32 investigation, the new Article 32 preliminary hearing is not a meaningful process for evaluating the strength of the case or for any other purpose. Sexual assault victims are no longer required to testify at Article 32 hearings, and frequently do not. Trial counsel stated that often the first time a victim provides testimony and is subject to cross-examination by defense counsel is at the court-martial. Beyond Article 32 issues, several trial counsel told Subcommittee members that some SVCs/VLCs limit trial counsel access to the victim, thereby preventing trial counsel from building sufficient rapport with the victim and having the repeated interviews that they feel are necessary to prepare for trial. Several counsel stated that this combination of factors has led to victims being unprepared for trial and testifying poorly on the stand.

Frequently, no witnesses appear at the Article 32 preliminary hearing, which simply involves trial counsel submitting documentary evidence for consideration. Many trial and defense counsel with whom the Subcommittee spoke referred to the Article 32 preliminary hearing as a "paper drill" or "rubber stamp." While many defense counsel noted that they have begun waiving the hearing, some stated that they have continued to assert the accused's right to an Article 32 hearing even if they no longer get a chance to question the victim or receive additional information about the government's case.

25 *Id.*

26 *Hutson v. United States*, 42 C.M.R. 39, 40 (1970).

27 *Id.*

28 *See* Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases 3 (Mar. 2017).

29 National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328 [hereinafter FY17 NDAA], § 5203(b).

Counsel universally observed that pre-December 2014 Article 32 investigations were used to identify weak cases and prevent them from going to court-martial, but the new Article 32 hearing no longer serves this function. The pre-December 2014 Article 32 investigation and investigating officer's recommendation as to whether the evidence supported the charges and whether the charges should be sent forward to court-martial (and to what type of court-martial) helped test the strength of the prosecution's case. According to many trial and defense counsel who spoke with the Subcommittee, the limited scope of the present preliminary hearing and the removal of the requirement for victim testimony are the primary reasons why counsel do not believe the current Article 32 format is a useful tool for vetting cases. Several trial counsel acknowledged that prosecutors should be confident that probable cause exists and that they have sufficient evidence to prevail at trial before charges are even preferred.

Article 32 PHOs' recommendations on whether the case should proceed to trial remain nonbinding, and some trial and defense counsel noted that often staff judge advocates and convening authorities do not abide by the recommendations.[30] Such disregard occurs even when the PHO finds no probable cause to support a charge or an extremely low likelihood of conviction, recommending that the case should be dismissed outright or resolved through disciplinary action at some lower level. Counsel complained that because of the changes to the Article 32 process and because the PHO's recommendations are nonbinding, too many cases are referred to court-martial in which there is little chance of securing a conviction.

3. JPP Public Meeting Commentary on the Effects of the Changes to the Article 32 Hearing. Senior trial and defense counsel and former military judges, speaking to the JPP at a public meeting in January 2017, reinforced the comments of counsel on site visits that Article 32 hearings in sexual assault cases have become "paper drills" at which neither the victim nor other witnesses testify.[31] A senior trial counsel told the JPP that since Article 32 and R.C.M. 405 were modified, the trial counsel has "a lot more control over the presentation of evidence" at the Article 32 preliminary hearing, and can often establish probable cause with only a copy of the victim's statement and portions of the investigation report.[32]

Some counsel and former judges noted that they are seeing more Article 32 waivers from defense counsel since the new Article 32 preliminary hearing took effect, though some defense counsel said that they continue to go forward with these hearings to obtain what information they can.[33] A former judge told the JPP that in pre-December 2014 Article 32 proceedings, it was rare for the defense to submit an Article 32 waiver in a sexual assault case.[34] According to a senior trial counsel, the pre-December 2014 Article 32 investigation was used as a "litmus test" to determine the strength of the case and to see how the victim comes across while testifying. He further stated that given the limited scope of the new Article 32 preliminary hearing, he believes more cases are now being referred to court-martial than would have been under the more robust pre-December 2014 Article 32 investigation.[35] Another senior trial counsel elaborated that some convening authorities who still want to use the Article 32

30 Article 32 investigating officers' recommendations under the pre-December Article 32 process were also nonbinding.

31 *Transcript of JPP Public Meeting* 22 (Jan. 6, 2017) (testimony of Lt Col (ret.) Wendy Sherman, U.S. Air Force, former military trial judge); 104 (testimony of Maj Adam Workman, U.S. Marine Corps, Legal Services Support Team); 233 (testimony of Maj James Argentina, Jr., U.S. Marine Corps, Senior Defense Counsel); 278 (testimony of Maj Aran Walsh, Regional Victims' Legal Counsel).

32 *Transcript of JPP Public Meeting* 104 (Jan. 6, 2017) (testimony of Maj Workman).

33 *Transcript of JPP Public Meeting* 31 (Jan. 6, 2017) (testimony of LTC (ret.) Wade Faulkner, U.S. Army, former military trial judge); 114 (testimony of CPT Brad Dixon, U.S. Army, Trial Counsel Assistance Program Training Officer).

34 *Transcript of JPP Public Meeting* 31 (Jan. 6, 2017) (testimony of LTC (ret.) Faulkner).

35 *Transcript of JPP Public Meeting* 150 (Jan. 6, 2017) (testimony of CPT Dixon).

preliminary hearing to "test the evidence" in a sexual assault case are frustrated that they can no longer do that effectively under the new Article 32 process.[36] A senior defense counsel also questioned whether the new Article 32 preliminary hearing serves any meaningful purpose.[37]

A number of counsel expressed the concern that the more superficial process mandated by the current Article 32 is leading convening authorities to make court-martial referral decisions with less information than was available to them in the past. These counsel corroborated the perception of counsel interviewed by the Subcommittee during site visits that the reforms to Article 32 have made the hearings less meaningful, and as a result more sexual assault cases are referred despite weak evidence and little chance of conviction at trial.[38] One senior trial counsel expressed the opinion that an experienced trial counsel should be able to distill the evidence, research case law, and provide a well-supported recommendation to the convening authority. In his view, the Article 32 should become more like the civilian grand jury system.[39] A Marine Corps VLC concurred, stating that the Marine Corps has implemented a prosecution merits memo in which the trial counsel "writes a complete and informed opinion" of the evidence in the case and the likelihood of achieving a conviction at trial.[40] Prosecutors from the other Services indicated that they draft similar memos or have similar procedures for informing staff judge advocates and convening authorities about the evidence in such cases. Conversely, the Marine Corps VLC stated his view that it is not necessary for victims to testify in the Article 32 hearing. He added that it is traumatic for them and slows the process down.[41]

Several counsel pointed out that the recommendation of the Article 32 PHO is nonbinding on the convening authority, and the Article 32 hearing is now less effective at identifying cases that are likely to result in a conviction at court-martial. Practitioners who testified before the JPP in January 2017 stated they were aware of cases in which Article 32 PHOs either found no probable cause for a charge or recommended against sending the charge to trial, but their advice was not followed by the staff judge advocate and convening authority.[42] In addition, a senior defense counsel told the JPP that as a prosecutor, he has seen situations in which there was almost no probability of winning at trial, and when this information was presented to the convening authority, the convening authority still elected to refer the charges to court-martial.[43] He added that sending fatally weak cases on to court-martial was very demoralizing to the trial counsel.[44]

4. Data on Article 32 Recommendations and Convening Authority Referral Decisions. The Services provided case information and documents showing that out of 416 sexual assault cases that went to general court-martial in fiscal year 2015, 54 cases involved an Article 32 investigating officer or PHO

36 *Transcript of JPP Public Meeting* 151 (Jan. 6, 2017) (testimony of Maj Workman).

37 *Transcript of JPP Public Meeting* 186 (Jan. 6, 2017) (testimony of Maj Marcia Reyes-Steward, U.S. Army, Senior Defense Counsel).

38 *Transcript of JPP Public Meeting* 174 (Jan. 6, 2017) (testimony of Maj Benjamin Henley, U.S. Air Force, Senior Defense Counsel); 210 (testimony of LCDR Rachel Trest, U.S. Navy, Senior Defense Counsel); 239 (testimony of Maj Argentina).

39 *Transcript of JPP Public Meeting* 153 (Jan. 6, 2017) (testimony of LCDR Ben Robertson, U.S. Navy, Senior Trial Counsel).

40 *Transcript of JPP Public Meeting* 290 (Jan. 6, 2017) (testimony of Maj Walsh).

41 *Id.* at 291.

42 *Transcript of JPP Public Meeting* 155 (Jan. 6, 2017) (testimony of LCDR Geralyn Van De Krol, U.S. Coast Guard, Branch Chief, Trial Services); 222 (testimony of LCDR Trest); 224 (testimony of Maj Argentina).

43 *Transcript of JPP Public Meeting* (Jan. 6, 2017) 224 (testimony of Maj Argentina).

44 *Id.*

recommending against referring one or more sexual offense charges to court-martial and the convening authority electing to refer the charge(s) to a general court-martial despite that recommendation.[45] In all these cases, the staff judge advocate's pretrial advice to the convening authority was to refer these charges to general court-martial.[46]

In 45 of the 54 cases in which the Article 32 investigating officer or PHO recommended against referring one or more sexual offenses to trial, the accused was ultimately acquitted of those offenses, though the accused may have been convicted of other offenses.[47]

C. Referral and Prosecutorial Discretion

Following the Article 32 preliminary hearing, the PHO's report, along with the case file and SPCMCA disposition recommendation, is forwarded to the general court-martial convening authority (GCMCA) for disposition.[48] The staff judge advocate then provides written pretrial advice to the convening authority, including a conclusion as to whether each specification states an offense under the UCMJ, whether the allegations are warranted by the evidence in the Article 32 preliminary hearing report, and whether a court-martial would have jurisdiction over the accused and offense, as well as a recommendation of what action should be taken by the convening authority.[49] A copy of the pretrial advice must be provided to the defense if the convening authority refers the case to court-martial; this is not a document covered by attorney-client privilege.[50] The GCMCA must then decide whether to refer some or all of the charges to a general court-martial.[51]

1. Rules Governing Referral of Charges. R.C.M. 601 sets forth the basis for the referral of charges to court-martial:

> If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source[.][52]

45 While all of the cases went to trial in fiscal year 2015, some went to Article 32 hearings prior to the Dec. 26, 2014, change to the Article 32 preliminary hearing and some took place after. These numbers do not reflect the total number of sexual assault cases from all of the Services that went to general court-martial in fiscal year 2015: those cases for which the JPP staff did not receive all case file documents were not included in the total.

46 The pretrial advice in 5 of the 54 case files was not available.

47 The reasons the Article 32 investigating officer or PHO stated they recommended against referral of a sexual offense specification to trial were because he or she determined there were no reasonable grounds to believe the accused committed the offenses/there was no probable cause, or because the prosecution was unlikely to prevail at trial. Under the pre-December 2014 Article 32, the investigating officer's conclusion regarding whether reasonable grounds exist to believe that the accused committed the offenses alleged must be included in his or her report. 2012 MCM, *supra* note 19, R.C.M 405(j)(2)(H). The new Article 32 process requires the PHO to determine whether there is probable cause to believe that the accused committed the offenses alleged. 10 U.S.C. § 832 (UCMJ, Art. 32).

48 2016 MCM, *supra* note 11, R.C.M. 404(e).

49 2016 MCM, *supra* note 11, R.C.M. 406(a)–(b).

50 2016 MCM, *supra* note 11, R.C.M. 406(c).

51 2016 MCM, *supra* note 11, R.C.M. 407.

52 2016 MCM, *supra* note 11, R.C.M. 601(d)(1).

"Information from any source" may include hearsay and information not previously presented at the Article 32 hearing or to the SPCMCA. This rule states that the convening authority or judge advocate is not required to resolve legal issues, "including objections to evidence," prior to referral.[53] The written discussion for R.C.M. 601(d)(1) refers back to disposition factors from R.C.M. 306, previously discussed in the "Early Stages of Case Processing" section of this report, that the convening authority should consider in deciding whether to refer the case to court-martial.[54]

2. Legislation and U.S. Attorneys' Manual. The FY17 NDAA created a new Article 33 under the UCMJ, which directs the Secretary of Defense to issue nonbinding guidance to be considered by convening authorities and judge advocates when exercising their duties with respect to the disposition of charges.[55] The new Article 33 states that this guidance should take into account the "principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases."[56]

The official guidance of the Attorney General mentioned in the new Article 33 refers to the U.S. Attorneys' Manual, which specifies a probable cause standard for prosecutors in determining whether to commence or recommend prosecution or some other disposition.[57] Within this section, however, probable cause is only a threshold consideration that, if met, does not automatically warrant prosecution.[58] The manual further provides that the attorney should commence prosecution if he or she believes that the conduct constitutes a federal offense and "that the admissible evidence will probably be sufficient to obtain and sustain a conviction"; nevertheless, prosecution should be declined when there is no substantial federal interest in prosecution, the person is subject to prosecution in another state, or there is an adequate non-criminal alternative.[59] The discussion to this section states that "both as a matter of fundamental fairness and in the interest of efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact."[60]

3. The American Bar Association's Criminal Justice Standards. Similarly, according to the American Bar Association's (ABA) Criminal Justice Standards for the Prosecution Function, a prosecutor should file and maintain criminal charges only when the charges are supported by probable cause, when "admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and [when] the decision to charge is in the interests of justice."[61] These standards also state that a prosecutor may file and maintain charges "even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question."[62]

53 2016 MCM, *supra* note 11, R.C.M. 601(d)(1).

54 2016 MCM, *supra* note 11, R.C.M. 601(d)(1) discussion.

55 FY17 NDAA, *supra* note 29, § 5204.

56 *Id.*

57 U.S. Dep't of Justice, United States Attorneys' Manual, Section 9-27.200 (1997, updated Jan. 2017).

58 *Id.*

59 U.S. Dep't of Justice, United States Attorneys' Manual, Section 9-27.220 (1997, updated Jan. 2017).

60 *Id.*

61 Criminal Justice Standards for the Prosecution Function, Standard 3-4.3 (Am. Bar Ass'n, Fourth Ed.).

62 *Id.*

The Air Force has implemented, in modified form, the ABA Criminal Justice Standards. In its standard for charging decisions, the Air Force rule states that charges must be supported by probable cause and that a "trial counsel should not institute or permit the continued pendency of criminal charges in the absence of admissible evidence to support a conviction."[63] The other Services have not implemented the ABA standard, though representatives from the Coast Guard and Navy noted they informally use a version of it.[64]

4. Review of Disposition Decisions. The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) contained a provision requiring that a convening authority's decision not to refer certain sexual assault cases be reviewed, either by a higher general court-martial convening authority or by the Service Secretary, depending on the circumstances.[65] This provision, which applies only to cases in which charges have been preferred and for which the staff judge advocate has provided the convening authority with pretrial advice under Article 34 of the UCMJ, was further modified in the FY15 NDAA to require that a convening authority's decision not to refer certain sexual assault cases be reviewed by the Service Secretary when the chief prosecutor of the Service requests such review.[66]

Figure. Elevated Review of Convening Authority Decisions at Referral

63 U.S. Dep't of the Air Force, Air Force Guidance Memo. to Air Force Instruction 51-110, Professional Responsibility Program (Jul. 7, 2016), Standard for Criminal Justice 3-3.9. Discretion in the Charging Decision.

64 *Transcript of JPP Public Meeting* 263 (Jan. 6, 2017) (testimony of CDR Cassie Kitchen, U.S. Coast Guard, former military trial judge); 212, 264 (testimony of CDR Mike Luken, U.S. Navy, former military trial judge).

65 FY14 NDAA, *supra* note 21, § 1744 requires review of decisions not to refer cases involving charges of rape, sexual assault, forcible sodomy, or attempts to commit such acts.

66 FY15 NDAA, *supra* note 21, § 541.

Responding to the JPP Subcommittee's request for information on the number of times that these elevated review provisions have been invoked, the Services provided the following:[67]

- All of the Services reported that since December 26, 2013,[68] there have been zero instances in which a Service Secretary reviewed a convening authority's decision not to refer a qualifying sex-related offense to court-martial.
- All of the Services reported that since December 19, 2014,[69] there have been zero instances in which their chief prosecutor requested that the Service Secretary review a convening authority's decision not to refer a qualifying sex-related offense to court-martial.
- Since December 26, 2013, the Services reported the following instances in which a case involving a qualifying sex-related offense was forwarded for review to the next superior commander after the general court-martial convening authority decided not to refer the case to court-martial.
  - Army: 8 cases. Of these 8 cases, there was one instance in which the next superior commander decided to refer the charge(s) to court-martial.
  - Air Force: 21 cases.[70] Of these 21 cases, there were zero instances in which the next superior commander decided to refer the charge(s) to court-martial.
  - Navy: 11 cases. Of these 11 cases, there were zero instances in which the next superior commander decided to refer the charge(s) to court-martial.
  - Marine Corps: 11 cases. Of these 11 cases, there were zero instances in which the next superior commander decided to refer the charge(s) to court-martial.
  - Coast Guard: 8 cases. Of these 8 cases, there were zero instances in which the next superior commander decided to refer the charge(s) to court-martial.

5. Possible Pressure on Convening Authorities to Refer Sexual Assault Cases to Courts-Martial. As noted, many trial and defense counsel interviewed by the Subcommittee during site visits mentioned their perception that convening authorities feel pressure to refer sexual assault cases to courts-martial, in part owing to public and congressional interest in this issue. Several examples illustrate this pressure.

In late 2013, in a well-publicized case involving sexual assault allegations, a U.S. Air Force convening authority, Lieutenant General Craig Franklin, following a pretrial hearing, agreed with legal advisors that the evidence was not sufficient to proceed to court-martial and dismissed the charges.[71] The acting Secretary of the Air Force then transferred the case for action to a different convening authority,

67 *See* Services' Responses to JPP Subcommittee Request for Information 166 (Apr. 5, 2017).

68 This was the effective date of § 1744 of the FY14 NDAA, *supra* note 21.

69 This was the effective date of § 541 of the FY15 NDAA, *supra* note 21.

70 The Secretary of the Air Force served as the superior GCMCA in one of the 21 cases. The Secretary reviewed the case not because it met criteria for secretarial review under the provisions of FY14 NDAA § 1744 or FY15 NDAA § 541, but because she was the next superior GCMCA.

71 David Alexander, *Rape case removed from U.S. Air Force general who made controversial ruling*, Chic. Trib., Dec. 19, 2013, *available at* http://articles.chicagotribune.com/2013-12-19/news/sns-rt-usa-militarysexassault-20131219_1_general-craig-franklin-u-s-air-force-wright-case. The convening authority, Lieutenant General Craig Franklin, had earlier that year overturned an officer's sexual assault conviction, an act that angered many and led to legislation severely limiting a convening authority's ability to grant post-trial clemency relief in sexual assault cases.

who referred the case to a general court-martial.[72] Senator Claire McCaskill (D-MO) then called for Lieutenant General Franklin's removal from command, declaring: "Lieutenant General Franklin should not be allowed to fulfill the responsibilities of military command because he has repeatedly shown he lacks sound judgment."[73] The case eventually went to trial, and the accused was acquitted of all charges.[74] During the trial, the defense raised an unlawful command influence motion and introduced evidence that following Lieutenant General Franklin's dismissal of charges, the Air Force Judge Advocate General told Lieutenant General Franklin's staff judge advocate that failure to refer the case to trial would "place the Air Force in a difficult position with Congress" and that "absent a 'smoking gun,' victims are to be believed and their cases referred to trial."[75] Shortly thereafter, Lieutenant General Franklin announced that he would retire from the Air Force.

Also in 2013, Senator McCaskill blocked the confirmation of an Air Force convening authority, Lieutenant General Susan Helms, to the position of Air Force Space Command vice commander because she had overturned the sexual assault conviction of a member of her command.[76] Senator McCaskill expressed concerns about Lieutenant General Helms' decision, noting that it was against the advice of the staff judge advocate, who recommended that Lieutenant General Helms affirm the conviction. Senator McCaskill stated, "At a time when the military is facing a crisis of sexual assault, making a decision that sends a message which dissuades reporting of sexual assaults, supplants the finding of a jury, contradicts the advice of counsel, and further victimizes a survivor of sexual assault is unacceptable."[77]

Another source of perceived pressure came from the military's commander in chief, President Barack Obama. In May 2013, during a press conference, President Obama told reporters that those who commit sexual assault in the military should be "prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged."[78] These remarks led to defense counsel filing unlawful command influence motions in numerous courts-martial, on the grounds that the President's remarks could be interpreted by panel members as an attempt to influence the outcomes of courts-martial in sexual assault cases.[79] Lawyers argued that the President's comments could be considered unlawful command influence because they directed specific outcomes in sexual assault cases and were in conflict with the expectation that commanders exercise discretion in making disposition decisions. In an effort to blunt the negative effects of the President's remarks, the Secretary of Defense issued a memorandum reiterating his and the President's expectations that those involved in the military justice process base their decisions on their independent judgment of the facts of each case, and not consider "personal

72 Jeff Schogol, *Airman acquitted of sexual assault charge*, USA Today, Oct. 29, 2015, *available at* https://www.usatoday.com/story/military/2015/10/29/airman-acquitted-sexual-assault-charges/74792760/.

73 Press release, *McCaskill Calls for Removal of Lt. Gen. Craig Franklin from Command* (Dec. 18, 2013), *available at* https://www.mccaskill.senate.gov/media-center/news-releases/mccaskill-calls-for-removal-of-lt-gen-craig-franklin-from-command.

74 Jeff Schogol, *Airman acquitted of sexual assault charge*, USA Today, *supra* note 79.

75 *See Wright v. United States*, __M.J. ___ (A.F.C.C.A. Jan. 13, 2015) (The language in quotations is quoted from the appellate opinion and is not intended to reflect the verbatim words used by the Air Force Judge Advocate General.).

76 *See* 159 Cong. Rec. S4020 (Jun. 7, 2013) *available at* https://www.gpo.gov/fdsys/pkg/CREC-2013-06-07/pdf/CREC-2013-06-07-pt1-PgS4020-3.pdf#page=1.

77 *Id.*

78 Jennifer Steinhauer, *Remark by Obama Complicates Military Sexual Assault Trials*, N.Y. Times, Jul. 13, 2013, *available at* http://www.nytimes.com/2013/07/14/us/obama-remark-is-complicating-military-trials.html.

79 *Id.*

interests, career advancement, or an effort to produce what is thought to be the outcome desired by senior officials, military or civilian."[80]

6. Site Visit Information. Counsel discussed the standard to refer a case to court-martial, which is probable cause—lower than the standard typically applied in state and federal prosecutions. Trial and defense counsel alike believe that the probable cause standard is too low and that convening authorities should be allowed to take into account other factors, such as the credibility of the victim and the likelihood of obtaining a conviction at trial. Judge advocates must hold a license with a state bar to practice law. Because the codes of ethics required by many state bars include standards for prosecution comparable to the United States Attorney's Manual and ABA Standards discussed above, several counsel expressed concern that they may be violating their state bar ethical rules by prosecuting cases in which they feel the charges are not supported by probable cause or in which there is no reasonable likelihood of proving the charges at trial.

Judge advocates overwhelmingly reported a perception of pressure on convening authorities to refer sexual assault cases to court-martial, regardless of merit. According to many of the judge advocates interviewed on site visits, this pressure extends to weak cases that civilian jurisdictions would not prosecute and, in some cases, have already declined to prosecute. The vast majority of prosecutors and defense counsel who spoke with the Subcommittee have the impression that this pressure causes convening authorities to favor referral to court-martial rather than deal with the potential adverse ramifications of not referring a sexual assault case, such as career setbacks, media scrutiny, the possibility of their non-referral decisions being subjected to elevated review, or questions about why the case was not referred. These lawyers suspect that commanders may feel that the act of sending a case to trial, regardless of merit, is perceived as "safe" and harmless with respect to the parties involved and the justice system as a whole.

A commander (O-6) interviewed on a site visit told the Subcommittee that he forwards every sexual assault case to the next general officer in the chain of command for disposition decision, "because I would not want to get it wrong and have someone get away, so I send it forward to let the system sort it out." When asked what, if any, pressure is on commanders to handle sexual assault cases a certain way, one commander replied that he felt the need to "do something immediately" or face harm to his career. Another commander felt that there was pressure to be transparent throughout the process, rather than pressure to send every case to court-martial.

The discussion to R.C.M. 306(b) states that one of the factors a commander should consider when disposing of a case is the views of the victim regarding disposition.[81] Many counsel conveyed their perception that the merits of the case have become less important than the victim's preference regarding disposition. The rationale for referring some cases to court-martial provided by some prosecutors and commanders is that the court-martial process allows the victim to have his or her "day in court," which was described as a laudable end in itself, regardless of outcome. One commander acknowledged that there is pressure to go to trial if the victim wants to go to trial, regardless of the case's merits.

In addition, trial and defense counsel explained that in their experience guilty plea agreements, in which the defendant agrees to plead guilty to some or all charges in exchange for a lesser sentence, will not be approved by commanders if the victim does not support it. Likewise, the common perception among judge advocates is that a victim has veto power over whether the commander prefers to dispose

80 U.S. Dep't of Defense, Memorandum from the Secretary of Defense on Integrity of the Military Justice Process (Aug. 6, 2013).

81 2016 MCM, *supra* note 11, R.C.M. 306(b) discussion.

of a case in an alternate forum, such as through administrative separation proceedings or nonjudicial punishment.

7. Information Presented to the JPP and Subcommittee. Reflecting the same view that the Subcommittee members heard during site visits, counsel speaking at a JPP public hearing also expressed concern about the low threshold of probable cause required to refer a case to court-martial. In the view of a senior defense counsel, the changes to the Article 32, combined with this low threshold to refer cases, result in sexual assault cases being referred when there is no chance for conviction, an outcome that causes both the accused and victim to suffer needlessly.[82] He further compared the military justice system to the civilian justice system, in which experienced prosecutors have the discretion to bring a case to trial, or not, based on the state of the evidence.[83] Another senior defense counsel similarly suggested that prosecutors and convening authorities in the military should exercise more discretion in referring cases to trial, much as state and federal prosecutors do, and refer cases to trial only when the evidence is sufficient to secure a conviction.[84]

A senior defense counsel told the JPP that the pressure on convening authorities to refer sexual assault cases to courts-martial is very high. No convening authority wants to fail to refer a sexual assault case to court only to have it determined later that there was additional evidence and the case should have been tried by court-martial.[85]

In January 2017, the JPP Subcommittee held a hearing on the standards currently applied by military prosecutors and heard from ethics officials and senior prosecutors from the Services. Participants highlighted the differences between the military and civilian justice systems, noting that the goal of the military system is not only to promote justice but also to maintain good order and discipline. In the military justice system, prosecutorial discretion is vested in convening authorities, rather than prosecutors.[86] However, all the Services have adopted some version of ABA Model Rule of Professional Conduct 3.8, which states that prosecutors have an ethical obligation to ensure that all charges are supported by probable cause.[87] If the situation arises in which a prosecutor believes a charge is not supported by probable cause, but his or her supervising attorney disagrees, ethical rules allow the junior attorney to rely on the supervising attorney's "reasonable resolution of an arguable question of professional duty."[88] One presenter noted that in the previous seven years, his Service's ethics office had yet to have a trial counsel call with concerns about prosecuting a case without probable cause—an indication, he believes, that the counsel are working this out with their supervisors.[89]

One counsel described a dilemma in which prosecutors can find themselves when dealing with some sexual assault cases, giving the example of a sexual assault that occurs when the victim is too intoxicated to consent to sexual activity. If the offense is charged under the theory that the victim is

82 *Transcript of JPP Public Meeting* 235 (Jan. 6, 2017) (testimony of Maj Argentina).

83 *Id.* at 237.

84 *Transcript of JPP Public Meeting* 262 (Jan. 6, 2017) (testimony of LCDR Trest).

85 *Transcript of JPP Public Meeting* 225 (Jan. 6, 2017) (testimony of Maj Argentina).

86 *Transcript of JPP Subcommittee Meeting* 183 (Jan. 5, 2017) (testimony of Col Kate Oler, U.S. Air Force, Chief, Government Trial and Appellate Counsel Division).

87 Model Rules of Professional Conduct, r. 3.8 (Am. Bar Ass'n 2016).

88 Model Rules of Professional Conduct, r. 5.2 (Am. Bar Ass'n 2016).

89 *Transcript of JPP Subcommittee Meeting* 259 (Jan. 5, 2017) (testimony of COL William Kern, U.S. Army, Professional Responsibility Branch).

incapable of consenting due to intoxication, guilt may be difficult to prove when there is evidence that the victim was walking, talking, texting, and performing other activities close in time to when the alleged assault occurred. On the other hand, if the offense is charged under the "bodily harm" theory of sexual assault, prosecutors will have problems when the victim does not recall what happened because of his or her intoxication, making it difficult to prove that the touching was offensive. In this situation, it can be difficult to establish probable cause.[90] In such cases, he explained, sometimes the prosecutor cannot establish probable cause, but the victim believes she was sexually assaulted and tells the convening authority that she wants the case to go to trial.[91] In these situations, they rely on the prosecution merit review of the case, using the R.C.M. 306 factors listed above, to persuade the convening authority that the evidence is not supported by probable cause.[92] In addition, Article 34, UCMJ, states that the convening authority cannot refer a charge to a general court-martial if advised in writing by the staff judge advocate that the specification is not warranted by the evidence.[93] According to the counsel, Navy prosecutors look not only at whether there is probable cause but at whether there is a reasonable probability of success at trial.[94] He told the Subcommittee that they have been successful in convincing convening authorities to use this higher standard in deciding whether to refer cases.[95]

Another counsel told the Subcommittee that once probable cause is established, counsel are compelled to go forward with a case even when they do not believe there is reasonable likelihood of success at trial.[96] Several counsel emphasized that there are cases in which conviction at trial seems unlikely, but they go forward to trial because "it is the right thing to do."[97]

8. Data on Referral Decisions. The JPP staff collected sexual assault courts-martial information and case documents from fiscal year 2015 from the Services and entered this information into an electronic database. The data from fiscal year 2015 encompassed 738 cases, all of which involved at least one preferred charge of a sexual offense. Dr. Cassia Spohn, Foundation Professor and Director, School of Criminology and Criminal Justice, Arizona State University, then analyzed these data, producing the following statistical information.[98]

According to the FY 2015 data, for sexual assault cases that went to courts-martial, 79% were referred to a general court-martial, 13% were referred to a special court-martial, and 7% were referred to a summary court-martial. In 52% of the cases referred to courts-martial, a military judge was the factfinder; 40% went to a panel of members; and 7% went to a summary court-martial officer.[99]

90 *Transcript of JPP Subcommittee Meeting* 206 (Jan. 5, 2017) (testimony of CDR Mike Luken).

91 *Id.* at 207.

92 *Id.* at 207.

93 10 U.S.C. § 834 (UCMJ, Art. 34).

94 *Id.* at 212.

95 *Id.* at 244.

96 *Transcript of JPP Subcommittee Meeting* 217 (Jan. 5, 2017) (testimony of LtCol Nicholas Martz, U.S. Marine Corps, Military Justice Branch Head).

97 *Transcript of JPP Subcommittee Meeting* 250 (Jan. 5, 2017) (testimony of CDR Luken); 253 (testimony of Col Oler).

98 Adjudication of Sexual Assault Offenses Reported to the Military Services in 2015, Cassia Spohn, PhD, School of Criminology and Criminal Justice, Arizona State University (Apr. 2017), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/07-CM_Trends_Analysis/20170407/20170407_Spohn_NarrativeReport_FY15Cases.pdf.

99 This data was rounded to the nearest whole number and does not add up to 100 percent.

For cases in which the accused was charged with at least one penetrative offense (rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit these offenses), 28% were convicted of a sexual assault offense,[100] 22% were convicted of a non-sex offense only, and 21% were acquitted of all charges. Another 14% of cases received an alternate disposition,[101] and 15% had all charges dismissed prior to trial.[102]

For cases in which the accused was charged with at least one sexual contact offense (aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit these offenses), 18% were convicted of a sexual contact offense, 41% were convicted of a non-sex offense only, and 13% were acquitted of all charges. Another 22% of cases received an alternate disposition, and 6% had all charges dismissed prior to trial.

FY15 – Case Outcomes by Most Serious Sexual Assault Offense Preferred

Penetrative offense (530 cases)	Number	Percent (%)
Convicted of a sexual offense	150	28%
Convicted of a non-sex offense	114	22%
Acquitted of all charges	113	21%
Alternate disposition/dismissal	153	29%
Contact offense (208 cases)		
Convicted of a contact offense	37	18%
Convicted of a non-sex offense	85	41%
Acquitted of all charges	27	13%
Alternate disposition/dismissal	59	28%

Dr. Spohn also calculated conviction and acquittal rates for sexual assault cases that were tried at court-martial (excluding cases that went to alternate disposition or had charges dismissed prior to trial). For cases in which the most serious offense tried was a penetrative offense, 40% resulted in convictions of a sexual assault offense, 30% resulted in convictions of a non-sex offense only, and 30% resulted in acquittal of all charges.

For cases in which the most serious sex offense tried at court-martial was a sexual contact offense, 25% resulted in convictions of a sexual contact offense, 57% resulted in convictions of a non-sex offense only, and 18% resulted in acquittal of all charges.

100 The vast majority of these cases were convicted of a penetrative offense.

101 Alternate dispositions primarily consist of resignation or administrative discharge in lieu of trial by court-martial. These resignations or discharges usually include an adverse service characterization.

102 For this "all charges dismissed prior to trial" category, the JPP staff does not have information on whether these cases resulted in the accused receiving nonjudicial punishment, administrative action, or no punishment.

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FY15 – Case Outcomes of Trial by Court-Martial

Penetrative offense (377 cases)	Number	Percent (%)
Convicted of a sexual offense	150	40%
Convicted of a non-sex offense	114	30%
Acquitted of all charges	113	30%
Contact offense (149 cases)		
Convicted of a contact offense	37	25%
Convicted of a non-sex offense	85	57%
Acquitted of all charges	27	18%

Annual reports from the Service Judge Advocates General to the Code Committee provide some courts-martial data, though they do not provide specific information on sexual assault courts-martial. In the Fiscal Year 2015 Annual Report, the Army and Navy indicated that while their courts-martial caseload had declined from previous years, the percentage of contested cases remained constant or increased.[103] In that report, the Marine Corps stated that between 2012 and 2014, the number of contested sexual assault cases more than tripled. Their number of contested sexual assault cases in fiscal year 2015 was below that of fiscal year 2013 and 2014, but it was more than twice that of fiscal year 2012.[104]

III. ADDITIONAL ISSUES

A. Prosecutors' Lack of Access to the Victim. Victims with appointed SVCs/VLCs are likely to permit fewer interviews with prosecutors (and investigators) than victims without counsel.[105] Furthermore, when victims do agree to meet with prosecutors, the interviews are often in the presence of a SVC/VLC, who sometimes object to various questions and prevent those interviews from being as probing as they might otherwise be. Investigators also pointed out that few victims grant investigators access to their personal cell phones, which typically contain a wealth of evidence. SVCs/VLCs consistently reported that they do advise victims against sharing information from their phones or social media accounts with investigators. No prosecutors who acknowledged being denied access to the victim's cell phone during interviews indicated that they had considered not prosecuting the case. Prosecutors frequently lamented the loss of rapport-building opportunities because victims now are represented by SVCs/VLCs, even though they appreciated that victims' counsel provide valuable advice and guidance and relieve trial counsel of some of the time burden of helping victims navigate the legal system.

103 Annual Report for Fiscal Year 2015, Report of the Judge Advocate General of the Army, Section 3, 38; Report of the Judge Advocate General of the Navy and the Annual Military Justice Report of the Marine Corps, Section 4, 67, *available at* http://www.armfor.uscourts.gov/newcaat/annual/FY15AnnualReport.pdf.

104 Annual Report for Fiscal Year 2015, Report of the Judge Advocate General of the Navy and the Annual Military Justice Report of the Marine Corps, Section 4, 95-6.

105 Lack of access to victims by investigators is discussed in greater depth in the Subcommittee of the Judicial Proceedings Panel Report on Sexual Assault Investigations in the Military, *supra* note 2. Defense counsel access to victims is discussed in the Subcommittee of the Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases, *supra* note 2.

B. Sexual Assault Prevention and Response (SAPR) Training. Most sexual assault response coordinators and victim advocates who spoke with Subcommittee members acknowledged that misperceptions persist throughout the military regarding the consumption of alcohol and lack of consent, specifically that the consumption of any amount of alcohol makes a person incapable of consenting to sexual activity. Sexual assault response coordinators (SARCs) and victim advocates (VAs) stated they do not currently instruct Service members that "one beer means a person cannot consent." Instead, they emphasize to their audiences that having sex with an intoxicated person has risks and that determining intoxication can be difficult. At some installations, judge advocates stated they review the training materials or assist with the SAPR training to ensure information on this topic is relayed correctly. The Subcommittee viewed this as a positive development.

Commanders who spoke to the Subcommittee consistently expressed concerns about the frequency of mandatory SAPR training, describing it as time-consuming and potentially counterproductive because of perceived "training fatigue." One worried that the Sexual Harassment and Assault Response and Prevention (SHARP) classes and safety briefings are so repetitive that Service members may "tune out" the message.

In the view of some practitioners, SAPR training has become so pervasive that it affects the judgment and selection of potential panel members.[106] Counsel in the Army pointed out that every battalion-sized unit designates a noncommissioned officer (NCO) as the unit's VA, a collateral responsibility that requires specialized training on the topic of sexual assault from a victim-centric perspective. These senior NCOs, along with the other officer or enlisted members on a court-martial panel, have been instructed about the behavior that constitutes sexual assault so many times in SHARP briefings that they have strong opinions about the law. Consequently, counsel find it difficult to correct misperceptions and educate members on the nuances of the law and the burden of proof required at courts-martial.

A defense counsel providing information to the JPP at the January 2017 public meeting stated that in her experience, court-martial panel members, after years of SAPRO training, are "predisposed to believe the victims and misinterpret the legal definition of consent and mistake of fact as to consent."[107] The perception persists, in her view, that if a person is drinking, he or she cannot consent to sexual contact. She further noted that the voir dire process at trial does not completely expose the biases of potential panel members.[108]

Bolstering this point, in a September 2016 Navy-Marine Corps Court of Criminal Appeals decision involving an erroneous jury instruction on the definition of "impairment" in a sexual assault case,[109]

106 *See* Report of the Response Systems to Adult Sexual Assault Crimes Panel 37, *supra* note 4 ("Response System Panel Recommendation 80: The Secretary of Defense and Service Secretaries ensure prevention programs address concerns about unlawful command influence. In particular, commanders and leaders must ensure sexual assault prevention and response training programs and other initiatives do not create perceptions among those who may serve as panel members at courts-martial that commanders expect particular findings and/or sentences at trials or compromise an accused Service member's presumption of innocence, right to fair investigation and disposition, and access to witnesses or evidence. Judge advocates with knowledge and expertise in criminal law should review sexual assault prevention training materials to ensure the materials neither taint potential panel members (military jurors) nor present inaccurate legal information.").

107 *Transcript of JPP Public Meeting* 210–11 (Jan. 6, 2017) (testimony of LCDR Trest).

108 *Id.* at 251.

109 *United States v. Newlan*, No. 201400409 at 23 (N.M. Ct. Crim. App. Sep. 13, 2016). The Court set forth a definition for "impairment" in such cases: "'Impairment' is the state of being damaged, weakened or diminished. Impairment rendering someone 'incapable of consenting' is that level of impairment which is sufficient to deprive him or her of the cognitive ability to appreciate the nature of the conduct in question or the physical or mental ability to make or to communicate a

the court found that many members of the panel received training from SAPR personnel that "if someone ingested any alcohol, that individual was no longer able to legally consent."[110] The court stated:

> We first note that the erroneous definition of "impairment" may have compounded the legally-inaccurate proposition—that "one drink means you can't consent"—that some members received while attending mandatory SAPR training. While likely well-intentioned, these statements made during training generated a significant risk of skewing the panel's understanding of legal consent. Though these members were generally instructed to "not use [or discuss] anything you learned during SAPR training . . . in evaluating the evidence or the credibility of the witnesses in this case," a more tightly tailored and prompt statement of the law would have ameliorated any prejudicial impact generated by the legally-erroneous SAPR training. Since such a statement was not provided, we are not convinced that any confusion created by the SAPR training was wholly eradicated and that it did not contribute to the subsequent prejudice resulting from the incorrect definition of "impairment."[111]

C. Expedited Transfers. A Department of Defense policy familiar to all site visit participants provides sexual assault victims who file an unrestricted report of sexual assault the opportunity to receive an expedited transfer to another installation or to another unit within the same installation, on request.[112] One goal of this policy is to move the victim to a new location where no one knows of the sexual assault and where the victim need not confront the perpetrator on a regular basis and will have adequate support of family, friends, or counseling.[113] SVCs/VLCs draft the requests on behalf of victims, and send them to commanders. The victims often are able to select the location to which they will transfer. DoD policy also allows a commander to transfer the alleged offender, rather than the victim.[114] No participants discussed whether this option amounted to unlawful pretrial punishment in the context of a pending court-martial, but a Subcommittee member raised the issue. Commanders and a few victims' counsel indicated that commanders approve even questionable transfer requests to avoid accusations of reprisal against or mistreatment of a victim.

Some commanders, victims' counsel, and defense counsel believe that the expedited transfer policy is being abused by some individuals who make sexual assault allegations to obtain favorable transfers. Some participants have observed victims on very large installations of more than 50,000 Service members refuse to transfer to other units on the installation, preferring instead to request transfer to what are considered more favorable locations, such as Hawaii or San Diego. At another installation

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decision regarding that conduct to another person."

110 *Id.* at 7. The Court noted that some of the comments from the venire included the following: "If you did have any form of impairment, that [sic] you can't have consent. You may—the person would not be in the proper frame of mind to provide that consent."; "When a person is impaired, they are unable to give consent, regardless of what they say at the time."; I viewed that as part of the training . . . that for someone to consent] they just should not be impaired."; "A person impaired by alcohol use is incapable of giving sexual consent."; "You need sober consent, per the brief."; "If there is alcohol involved, then there is no consent."; "if a person was under the influence of alcohol, even one drink, that person is not able to give consent to any sexual act."; "If a person has one drink of alcohol, they may be considered impaired, therefore, they may not be able to give consent."; "once the victim has had one drink, there is no longer a legal consent."

111 *Id.* at 33–34.

112 *See* DoDI 6495.02, *supra* note 8, encl. 5 (a sexual assault victim may request a temporary or permanent expedited transfer to a different location within their assigned command or installation).

113 *Id.*

114 *Id.*

considered to be a "good" location, with an appealing climate and with metropolitan areas nearby, counsel noted that they see relatively few requests for expedited transfers. Expedited transfers by victims to more favorable locations may lead to defense counsel challenging the victim's motives during a court-martial, arguing to the panel that the victim made a false allegation of sexual assault to receive a transfer to a more desirable location. Such cross-examination, in turn, may cause panel members to question the victim's credibility and possibly acquit the accused.

IV. CONSEQUENCES

A. Site Visit Information. At all the site visits, most trial and defense counsel questioned whether justice is being served by the panoply of reforms in place. Many of them believe that fundamental rights of due process have been undermined. In their view, convening authorities feel pressure to refer sexual assault cases to court-martial, regardless of the likelihood of securing a conviction. Many also feel that the military's emphasis on prosecuting sexual assault has led to criminalizing behavior that may be offensive and inappropriate, but would not be considered criminal in a civilian context. They also expressed concern that minor offenses are now being referred to court-martial that could be more appropriately resolved through nonjudicial punishment or administrative action. There is widespread consensus among prosecutors and defense counsel that the victim's wish regarding disposition of a case is the primary factor determining whether the case will go to court, and that evidentiary concerns, including the credibility of the victim, are given less consideration. Defense counsel perceive that false accusations are now more likely to make it through the system and, as a result, innocent people face allegations that could ruin their lives. To illustrate this point, one defense counsel described how several of his clients, under the immense psychological pressure of facing court-martial for sexual assault, submitted a request for discharge in lieu of trial, even though they claimed they were innocent—and even though a request for discharge in lieu of trial requires an acknowledgment of guilt and stigmatizing notations in their discharge paperwork.

Site visit participants identified a number of negative consequences of what they perceive as too many sexual assault allegations being referred to trial:

1. Practitioners universally described the acquittal rate in their jurisdiction as "high," in part due to the referral to court-martial of cases that lack merit. The acquittal percentages offered at one installation ranged from about 50% to 100%, significantly higher than the sexual offense acquittal rates seen in civilian jurisdictions.

2. Prosecutors and investigators must devote significant time to prosecuting less meritorious cases, which divert resources away from more serious and well-supported allegations.

3. Some prosecutors feel that they face a potential ethical quandary in trying cases in which they see no reasonable likelihood of conviction.

4. The low conviction rate tends to discredit the entire military justice system in the eyes of Service members and the general public.

5. As more cases flood the system, the time needed to take each case to trial increases.

6. When weak cases linger in the system pending trial, the accused's and the victim's careers and lives remain on hold until the case is resolved.

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B. Information Presented to the JPP. One senior defense counsel told the JPP, "The lack of a thorough pre-trial investigation and prosecutorial discretion combined with the nature of acquaintance sexual assaults and the new incentives to fabricate [allegations] are a recipe for wrongful convictions."[115] She stated that despite changes to the system that favor victims and the prosecution, defense counsel are achieving more acquittals than ever before in sexual assault cases. She further observed, however, that the high acquittal rate demonstrates that many of the cases being "pushed through the system" should not be at court-martial and that, although the accused in these cases is often found not guilty, the trial process incurs "a real cost to the accused's life, reputation, family and career."[116] In her view, "the sands have shifted in favor of the victim at the expense of the accused."[117] Another defense counsel expressed his opinion that because of the changes in the military justice system, the rights of the accused to due process and a speedy trial are being eroded.[118] He noted that cases are lingering for as long as two years from report until the case goes to trial, putting the accused's and victim's life on hold for a significant period of time.[119]

V. CONCLUSIONS AND RECOMMENDATIONS

It appears that recent sexual assault legislation and policy changes that have benefited sexual assault victims and made the military justice system less intimidating to them have also had some negative consequences that must be addressed. These changes have affected the perceived legitimacy of the justice system. While legislative changes have substantially reduced the number of victims who testify at Article 32 hearings and have clarified that this hearing is not intended to be a discovery mechanism for the defense, there has been no corresponding new legislation or policy to provide defense counsel access to important case information.[120] In addition, changes in the military justice system, such as the addition of SVCs/VLCs, have greatly benefitted sexual assault victims and given them a much-needed voice in the system. Some defense counsel, however, feel this unfairly tips the scales of justice against the defendant. Also, when SVC/VLC limit a prosecutor's access to the victim, it may adversely affect case outcomes. SVC/VLC must understand that in spite of their laudable intentions, they may inadvertently harm a victim's goals or interests by weakening the criminal case, thereby increasing the chances of an acquittal at trial.

The consensus among counsel interviewed during the installation site visits was that the combination of a less robust Article 32 process, pressure on convening authorities to refer sexual assault cases to courts-martial, and the low standard of probable cause for referring cases to courts-martial has led to cases being referred to courts-martial in which there is little chance for a conviction. Many counsel felt that the result has been a high acquittal rate in sexual assault cases, which, in turn, has caused military

115 *Transcript of JPP Public Meeting* 211 (Jan. 6, 2017) (testimony of LCDR Trest).

116 *Id.* at 212–13.

117 *Id.* at 252.

118 *Transcript of JPP Public Meeting* 250 (Jan. 6, 2017) (testimony of Maj Argentina).

119 *Id.* at 249.

120 The Subcommittee of the Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases, *supra* note 2, highlights significant due process issues regarding defense counsel and makes four recommendations, including that defense counsel be provided with independent investigators, that defense offices be appropriately staffed and resourced, and that expert witness approval and funding be vested in Service defense organizations. The Subcommittee's report and recommendations were approved, with modifications, by the JPP. The Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases is *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/06_JPP_Defense_Resources_Experience_Report_Final_20170424.pdf.

members to question the fairness of the military justice system. In addition, some counsel worried that when the word gets around that sexual assault cases are going to courts-martial supported only by weak evidence, military juries may be much more skeptical of the charges and the prosecution and thus may be more likely to acquit. Perhaps inevitably, as Service members become aware of weak cases and high acquittal rates, victims may become more reluctant to make unrestricted reports.

Even when Article 32 officers have recommended against the referral of charges, those recommendations are not always followed by convening authorities. A substantial sampling of sexual assault cases tried in fiscal year 2015 reveal 54 cases in which the convening authority referred charges despite Article 32 investigating officers or PHOs finding that there was no probable cause or advising against the referral of sexual assault charges. In 45 of those cases, the accused was acquitted of the charges at trial, a number suggesting that perhaps the staff judge advocates and convening authorities should have paid more attention to the Article 32 officers' recommendations.

While most counsel now view the Article 32 process as having little value for scrutinizing the evidence in a sexual assault case, there has yet to emerge a formal written process for ensuring that the convening authority is made fully aware of the strengths and weaknesses of a case and has guidance for deciding an appropriate disposition. There are often good reasons, such as maintaining good order and discipline and respecting a belief that the assault took place, to refer a case to court-martial even when the likelihood of acquittal is high. But a convening authority should not be forced to make the critical decision about referral, with its life-changing impact on both the victim and the defendant, without clear guidelines and a better sense of the evidence's strength. Convening authorities must be corrected if they erroneously believe that a decision to refer a case to court-martial will have few consequences for the accused, the victim, or the public's perception of the military justice system. An accused facing court-martial is exposed to numerous adverse career and personal consequences, such as loss of promotion and career advancement opportunities, ostracism by peers, and the ongoing stress of knowing that a federal conviction, confinement, and sex offender registration are possible. Even if ultimately acquitted, the accused often suffers the enduring social and professional stigma of simply having been accused of these reprehensible offenses.

Recent legislation directing the Secretary of Defense to issue nonbinding guidance to be considered by convening authorities and staff judge advocates in determining an appropriate case disposition may help meet this need. Such formal case disposition guidance, in written form, should provide convening authorities with additional considerations, beyond whether the charges are supported by probable cause, as they decide whether to refer a case to court-martial or to resolve it through disposition at some lower level.

Several prosecutors discussed their practice in sexual assault cases of producing a prosecution merits memo to lay out the strengths and weaknesses of the evidence and the likelihood of a conviction at trial, thereby aiding the staff judge advocate and convening authority in making an appropriate decision on disposition. While this seems like a useful tool to fill the void left when a more robust Article 32 process was replaced, it is worth noting that under Article 34 of the UCMJ and under R.C.M. 406, the staff judge advocate's pretrial advice to the convening authority and accompanying documents must be provided to the defense if charges are referred to trial. A prosecution merits memo detailing evidentiary problems can go to the staff judge advocate without also being given to the defense, but any information provided in writing to the convening authority with the pretrial advice presumably must then be provided to the defense if charges are referred. This legal requirement may make staff judge advocates and prosecutors reluctant to write such candid memos to the convening authority for fear of disclosing a case's evidentiary problems to the defense. There is no such parallel in civilian jurisdictions, where information provided by a prosecutor to his or her superiors would not

have to be provided to the defense counsel unless it revealed potentially exculpatory evidence (as also must be done by military prosecutors). More research and thought should be devoted to enabling the convening authority in the military justice system to be given enough information to make a proper decision, since the convening authority, like prosecutors in civilian jurisdictions, are responsible for determining which cases are prosecuted and which are not.

On site visits, counsel also discussed their perception that convening authorities feel pressure to refer sexual assault cases to courts-martial regardless of their merits. Counsel are concerned that cases are being sent to courts-martial even when the evidence is weak or the allegations involve less serious conduct, such as an attempted kiss or slap on the buttocks, that could be resolved through nonjudicial punishment or administrative action. The Subcommittee notes, however, that in the fiscal year 2015 case data collected from the Services, convening authorities either dismissed charges prior to trial or disposed of cases by alternative means in almost 30% of all cases in which charges were preferred. Without knowing the facts of these cases, we cannot draw conclusions about why they were not referred to trial. But these data do reveal that while convening authorities may be experiencing pressure to refer sexual assault cases to court-martial, they are declining to do so almost 30% of the time. In addition, it may be that convening authorities are referring more sexual assault cases to courts-martial not because of outside pressure but because they now take sexual assault cases more seriously than they had done in the past and feel that disposition by courts-martial is the most appropriate way to resolve these grave allegations. So long as statutory language requires elevated review of a convening authority's decision not to refer a sexual assault case to court-martial, however, convening authorities will always feel some pressure to refer cases to trial against their better judgment.

Counsels' perceptions of a high acquittal rate for sexual assault offenses are borne out by the data. Among cases referred to courts-martial in fiscal year 2015, only 40% of the cases involving a penetrative sexual assault offense resulted in a conviction of any type of sexual assault offense. Just 25% of sexual contact cases resulted in conviction for any sexual offense. While the conviction rate is higher when convictions for non-sex offenses are included, the acquittal rate for sexual assault offenses is significant.

Although the JPP Subcommittee does not have the time to continue investigating the potential causes of this high acquittal rate, this issue must be explored further. The Subcommittee notes that the authorizing legislation for the JPP's successor panel, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, requires the panel to conduct an ongoing review of cases involving sexual misconduct allegations.[121]

The inherent difficulties in evaluating sexual assault case evidence, combined with the widespread perception that convening authorities are referring weak cases, have led to the belief by many of the Subcommittee's interviewees that the military justice system is weighted against the accused in sexual assault cases. Such one-sidedness is particularly serious in light of the potentially catastrophic effects of being accused of a sexual crime. The high rate of acquittal in military sexual assault cases can feed into this perception and lead to a general mistrust of the military justice system, which may lead Service members to acquit when they serve on panels in sexual assault courts-martial.

The public may view the high acquittal rate as a result not of the more aggressive approach to sexual offense prosecution described in the site visits but of the military's indifference to sexual assault. Public loss of confidence in the military and the military justice system has the potential to harm military enlistment and officer accession rates, as well as retention rates. In short, there must be a balance—a

121 FY15 NDAA, *supra* note 21, § 546.

system that treats sexual assault victims fairly and compassionately and that also provides defendants with procedures that are perceived to be, and are, fair. It is not the accused alone who suffers when a sexual assault case for which there is little chance of winning a conviction is referred to court-martial—the victim is also forced to endure a lengthy, difficult process at whose end the accused is very likely to be found not guilty.

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RECOMMENDATIONS:

Recommendation 1: The JPP Subcommittee recommends that the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP no longer serves a useful purpose. Such a review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of the preliminary hearing officer against referral, based on lack of probable cause, should be binding on the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further changes to the process are required.

In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP Subcommittee reiterates its recommendation— presented in its report on military defense counsel resources and experience in sexual assault cases, and adopted by the JPP—that the defense be provided with independent investigators.

Recommendation 2: The JPP Subcommittee recommends that Article 33, UCMJ, case disposition guidance for convening authorities and staff judge advocates require the following standard for referral to court-martial: the charges are supported by probable cause and there is a reasonable likelihood of proving the elements of each offense beyond a reasonable doubt using only evidence likely to be found admissible at trial.

The JPP Subcommittee further recommends that the disposition guidance require the staff judge advocate and convening authority to consider all the prescribed guideline factors in making a disposition determination, though they should retain discretion regarding the weight they assign each factor. These factors should be considered in their totality, with no single factor determining the outcome.

Recommendation 3: The JPP Subcommittee recommends that after case disposition guidance under Article 33, UCMJ, is promulgated, the DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

Recommendation 4: The JPP Subcommittee recommends that the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. The DAC-IPAD should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should consider whether such a change would allow the staff judge advocate to provide more fully developed, candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

Recommendation 5: The JPP Subcommittee recommends that Congress repeal provisions from the National Defense Authorization Act for Fiscal Year 2014 and Fiscal Year 2015, sections 1744 and 541 respectively, that require non-referral decisions in certain sexual assault cases to be forwarded to a higher general court-martial convening authority or to the Service Secretary. The perception of pressure on convening authorities to refer sexual assault cases to courts-martial created by these provisions and the consequent negative effects on the military justice system are more harmful than the problems that such provisions were originally intended to address.

Recommendation 6: The JPP Subcommittee recommends that the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system.

Recommendation 7: The JPP Subcommittee recommends that the Secretary of Defense ensure that SVCs/VLCs receive the necessary training on the importance of allowing full access by prosecutors to sexual assault victims prior to courts-martial. Such training will ensure that SVCs/VLCs are considering the value of a meaningful victim-prosecutor relationship in the advice they provide their victim-clients and assist prosecutors in sufficiently developing the rapport with the victim needed to fully prepare for trial.

Recommendation 8: The JPP Subcommittee recommends that the Department of Defense Sexual Assault Prevention and Response Office ensure that sexual assault training conducted by the military Services provide accurate information to military members regarding a person's ability to consent to sexual contact after consuming alcohol and the legal definition of "impairment" in this context and that training be timed and conducted so as to avoid "training fatigue."

The JPP Subcommittee further recommends that the DAC-IPAD monitor whether misperceptions regarding alcohol consumption and consent continue to affect court-martial panel members.

Recommendation 9: The JPP Subcommittee recommends that the Secretary of Defense review the policy on expedited transfer of sexual assault victims and consider whether it should be changed to state that when possible, sexual assault victims should be transferred to another unit on the same installation or to a nearby installation. This change will help ensure that prosecutors have access to victims in preparing for courts-martial, will satisfy the need to separate the victim from the accused, and will maintain the victim's access to support systems while combating the perception that the ability to ask for these transfers has encouraged fraudulent claims of sexual assault. Commanders and SVCs/VLCs should all receive training in how relocating victims from less desirable to more desirable locations can foster the perception among military members that the expedited transfer system is being abused and in how such transfers can be used by defense counsel to cast doubt on the victim's credibility, possibly leading to more acquittals at courts-martial.

The JPP Subcommittee further recommends that the DAC-IPAD review data on expedited transfers to determine the locations from which and to which victims are requesting expedited transfers and to review their stated reasons.

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ENCLOSURE Installation Site Visits Attended by Members of the JPP Subcommittee

Dates	Installations Represented	Subcommittee Members
July 11–12, 2016	**Naval Station Norfolk, VA**[122] **Joint Base Langley-Eustis, VA**	Hon. Elizabeth Holtzman Dean Lisa Schenck BGen (R) James Schwenk
July 27–28, 2016	**Fort Carson, CO** Peterson Air Force Base, CO Schriever Air Force Base, CO **U.S. Air Force Academy, CO**	Ms. Lisa Friel Ms. Laurie Kepros Professor Lee Schinasi Ms. Jill Wine-Banks
August 1–2, 2016	**Fort Bragg, NC** **Camp Lejeune, NC**	Ms. Laurie Kepros Professor Lee Schinasi BGen (R) James Schwenk
August 8–9, 2016	**Naval Station San Diego, CA** **Marine Corps Recruiting Depot San Diego, CA** Marine Corps Air Station Miramar, CA Camp Pendleton, CA	Hon. Barbara Jones Ms. Laurie Kepros Ms. Jill Wine-Banks
August 22–23, 2016	Marine Corps Base Quantico, VA **Joint Base Andrews, MD** **U.S. Naval Academy, MD** Navy Yard, Washington, DC	Dean Lisa Schenck BGen (R) James Schwenk Ms. Jill Wine-Banks
September 12–14, 2016	Osan Air Base, South Korea **Camp Humphreys, South Korea** Camp Red Cloud, South Korea Camp Casey, South Korea U.S. Army Garrison Yongsan, South Korea **Camp Butler, Japan** Camp Zama, Japan Kadena Air Base, Japan Yokota Air Base, Japan	Hon. Elizabeth Holtzman Ms. Jill Wine-Banks

122 Installations in bold type are the actual meeting locations for the site visits.

APPENDIX B: Judicial Proceedings Panel Authorizing Statutes and Charter

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013

SECTION 576. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) INDEPENDENT REVIEWS AND ASSESSMENTS REQUIRED.—

(2) JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS.—The Secretary of Defense shall establish a panel to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the amendments made to the Uniform Code of Military Justice by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1404) for the purpose of developing recommendations for improvements to such proceedings.

(b) ESTABLISHMENT OF INDEPENDENT REVIEW PANELS.

(1) COMPOSITION.

(B) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall be appointed by the Secretary of Defense and consist of five members, two of whom must have also served on the panel established under subsection (a)(1).

(2) QUALIFICATIONS.—The members of each panel shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes.

(3) CHAIR.—The chair of each panel shall be appointed by the Secretary of Defense from among the members of the panel.

(4) PERIOD OF APPOINTMENT; VACANCIES.—Members shall be appointed for the life of the panel. Any vacancy in a panel shall be filled in the same manner as the original appointment.

(5) DEADLINE FOR APPOINTMENTS.—

(B) JUDICIAL PROCEEDINGS PANEL.—All original appointments to the panel required by subsection (a)(2) shall be made before the termination date of the panel established under subsection (a)(1), but no later than 30 days before the termination date.

(6) MEETINGS.—A panel shall meet at the call of the chair.

(7) FIRST MEETING.—The chair shall call the first meeting of a panel not later than 60 days after the date of the appointment of all the members of the panel.

(c) REPORTS AND DURATION.—

(2) JUDICIAL PROCEEDINGS PANEL.—

(A) FIRST REPORT.—The panel established under subsection (a)(2) shall submit a first report, including any proposals for legislative or administrative changes the panel considers appropriate, to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives not later than 180 days after the first meeting of the panel.

(B) SUBSEQUENT REPORTS.—The panel established under subsection (a)(2) shall submit subsequent reports during fiscal years 2014 through 2017.

(C) TERMINATION.—The panel established under subsection (a)(2) shall terminate on September 30, 2017.

(d) DUTIES OF PANELS.—

(2) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall perform the following duties:

(A) Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice that were enacted by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112– 81; 125 Stat. 1404).

(B) Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.

(C) Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.

(D) Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report required by subsection (c)(2) and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.

(E) Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), and any instances in which prior sexual conduct was determined to be inadmissible.

(F) Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.

(G) Building on the data compiled as a result of paragraph (1)(D), assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.

(H) Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by section 573 of this Act.

(I) Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases.

(J) Consider such other matters and materials as the panel considers appropriate for purposes of the reports.

(3) UTILIZATION OF OTHER STUDIES.—In conducting reviews and assessments and preparing reports, a panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies.

(e) AUTHORITY OF PANELS.—

(1) HEARINGS.—A panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the panel considers appropriate to carry out its duties under this section.

(2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of a panel, a department or agency of the Federal Government shall provide information that the panel considers necessary to carry out its duties under this section.

(f) PERSONNEL MATTERS.—

(1) PAY OF MEMBERS.—Members of a panel shall serve without pay by reason of their work on the panel.

(2) TRAVEL EXPENSES.—The members of a panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance or services for the panel.

(3) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the panels, except that the Secretary may not assign primary responsibility for such staffing and resources to the Sexual Assault Prevention and Response Office.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

SEC. 1731. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(b) ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.—

(1) ADDITIONAL ASSESSMENTS SPECIFIED.—The independent panel established by the Secretary of Defense under subsection (a)(2) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the "judicial proceedings panel", shall conduct the following:

(A) An assessment of the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), to expressly cover a situation in which a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.

(B) An assessment of the implementation and effect of section 1044e of title 10, United States Code, as added by section 1716, and make such recommendations for modification of such section 1044e as the judicial proceedings panel considers appropriate.

(C) An assessment of the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (article 56(b) of the Uniform Code of Military Justice), as added by section 1705, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

(D) An assessment of the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows:

(i) Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation.

(ii) Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (article 139 of the Uniform Code of Military Justice).

(iii) Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.

(2) SUBMISSION OF RESULTS.—The judicial proceedings panel shall include the results of the assessments required by paragraph (1) in one of the reports required by subsection (c)(2)(B) of section 576 of the National Defense Authorization Act for Fiscal Year 2013.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015

SEC. 545. ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.

(a) ADDITIONAL DUTIES IMPOSED.—The independent panel established by the Secretary of Defense under section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the "judicial proceedings panel", shall perform the following additional duties:

(1) Conduct a review and assessment regarding the impact of the use of any mental health records of the victim of an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), by the accused during the preliminary hearing conducted under section 832 of such title (article 32 of the Uniform Code of Military Justice), and during court-martial proceedings, as compared to the use of similar records in civilian criminal legal proceedings.

(2) Conduct a review and assessment regarding the establishment of a privilege under the Military Rules of Evidence against the disclosure of communications between—

(A) users of and personnel staffing the Department of Defense Safe Helpline; and

(B) users of and personnel staffing of the 26 Department of Defense Safe Help Room.

(b) SUBMISSION OF RESULTS.—The judicial proceedings panel shall include the results of the reviews and assessments conducted under subsection (a) in one of the reports required by section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1760).

SEC. 546. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

(f) DUE DATE FOR ANNUAL REPORT OF JUDICIAL PROCEEDINGS PANEL – Section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1760) is amended by inserting "annually thereafter" after "reports".

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1. Committee's Official Designation: The committee shall be known as the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel ("the Judicial Proceedings Panel").

2. Authority: The Secretary of Defense, as required by section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 ("the FY 2013 NDAA") (Public Law 112-239), as modified by section 1731(b) of the National Defense Authorization Act for Fiscal Year 2014 ("the FY 2014 NDAA") (Public Law 113-66), and in accordance with the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended) and 41 C.F.R. § 102-3.50(a), established the Judicial Proceedings Panel.

3. Objectives and Scope of Activities: The Judicial Proceedings Panel will conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice (UCMJ) involving adult sexual assault and related offenses since the amendments made to the UCMJ by section 541 of the National Defense Authorization Act for Fiscal Year 2012 ("the FY 2012 NDAA") (Public Law 112-81) for the purpose of developing recommendations for improvements to such proceedings.

4. Description of Duties: Section 576(d)(2) directs the Judicial Proceedings Panel to perform the following duties, with additional duties as added by section 1731(b)(1) of the FY 2014 NDAA:
   a. Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the UCMJ that were enacted by section 541 of the FY 2012 NDAA.
   b. Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.
   c. Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.
   d. Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report of the Judicial Proceedings Panel and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.
   e. Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the UCMJ), and any instances in which prior sexual conduct was determined to be inadmissible.

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f. Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.
g. Building on the data compiled as a result of the assessment conducted by the Response Systems to Adult Sexual Assault Crimes Panel ("the Response Systems Panel"), a Federal advisory committee established pursuant to section 576(a)(1) of the FY 2013 NDAA and in accordance with FACA, of the training level of military defense and trial counsel, assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.
h. Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by Section 573 of the FY 2013 NDAA.
i. Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the UCMJ in certain sexual assault cases.
j. Assess the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the UCMJ), to expressly cover a situation in which a person subject to the UCMJ commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.
k. Assess the implementation and effect of the Special Victim's Counsel for victims of sex-related offenses established by the Secretary of Defense on August 14, 2013 and codified in Section 1044e of title 10, United States Code, by the enactment of Section 1716 of the FY 2014 NDAA on December 26, 2013. The panel shall make such recommendations for modifications of section 1044e as the Judicial Proceedings Panel considers appropriate.
l. Assess the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (article 56(b) of the UCMJ), as added by section 1705 of the FY 2014 NDAA, which requires at a minimum, that upon a finding of guilt for the offenses of rape, sexual assault, rape and sexual assault of a child, forcible sodomy, and attempts to commit such acts, the punishment include dismissal or dishonorable discharge, except as provided for by Article 60 of the UCMJ, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the UCMJ).
m. Assess the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the UCMJ), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows:
    i. Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation.
    ii. Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (article 139 of the UCMJ).

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iii. Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.

n. Consider such other matters and materials as the Judicial Proceedings Panel considers appropriate for purposes of the reports.

In conducting reviews and assessments and preparing reports, the Judicial Proceedings Panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies. The Judicial Proceedings Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as it considers appropriate to carry out its duties. Upon request by the Chair of the Judicial Proceedings Panel, a department or agency of the Federal Government shall provide information that the Judicial Proceedings Panel considers necessary to carry out its duties.

5. Agency or Official to Whom the Committee Reports: The Judicial Proceedings Panel shall provide its first report, including any proposals for legislative or administrative changes it considers appropriate, to the Secretary of Defense through the Department of Defense (DoD) General Counsel (GC), and the Committees on Armed Services of the Senate and the House of Representatives, not later than 180 days after its first meeting. The Judicial Proceedings Panel shall submit subsequent reports during fiscal years 2014 through 2017.

6. Support: The DoD, through the DoD Office of General Counsel (DoD OGC), the Washington Headquarters Services, and the Office of the Under Secretary of Defense for Personnel and Readiness, shall provide staffing and resources as deemed necessary for the performance of the Judicial Proceedings Panel's functions, and shall ensure compliance with the requirements of the FACA, the Government in the Sunshine Act of 1976 ("the Sunshine Act") (5 U.S.C. § 552b, as amended), governing federal statutes and regulations, and established DoD policies and procedures. Primary responsibility for such staffing and resourcing may not be assigned to the Sexual Assault Prevention and Response Office.

7. Estimated Annual Operating Costs and Staff Years: The estimated annual operating cost, to include travel, meetings, and contract support, is approximately $4,000,000 and 15 full-time equivalents.

8. Designated Federal Officer: The Designated Federal Officer (DFO), pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with governing DoD policies and procedures.

In addition, the Judicial Proceedings Panel's DFO is required to be in attendance at all meetings of the Panel and its subcommittees for the entire duration of each and every meeting. However, in the absence of the DFO, the Alternate DFO, duly appointed to the Judicial Proceedings Panel according to DoD policies and procedures, shall attend the entire duration of the Judicial Proceedings Panel and any subcommittee meetings.

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The DFO, or the Alternate DFO, shall approve all of the meetings of the Judicial Proceedings Panel as called by the Chair; shall call all meetings of its subcommittees, in coordination with the Chair; prepare and approve all meeting agendas for the Judicial Proceedings Panel and any subcommittees; and adjourn any meeting when the DFO or the Alternate DFO determines adjournment to be in the public's interest or required by governing regulations or DoD policies and procedures.

9. Estimated Number and Frequency of Meetings: Consistent with sections 576(b)(6) and (7) of the FY 2013 NDAA, the Judicial Proceedings Panel shall meet at the call of the Chair, and the Chair shall call the first meeting of the Judicial Proceedings Panel not later than 60 days after the date of the appointment of all the members of the Judicial Proceedings Panel. The Judicial Proceedings Panel shall meet at a minimum once per year.

10. Duration: The Judicial Proceedings Panel shall remain in effect until terminated, as provided for and as required by section 576(c)(2)(C) of the FY 2013 NDAA; however, the charter is subject to renewal every two years.

11. Termination: According to section 576(c)(2)(C) of the FY 2013 NDAA, the Judicial Proceedings Panel shall terminate on September 30, 2017.

12. Membership and Designation: Pursuant to sections 576(b)(1)(B) and (b)(2), the Judicial Proceedings Panel shall be appointed by the Secretary of Defense and consist of five members, two of whom must have served on the Response Systems Panel.

    The members shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Force, and offenses relating to rape, sexual assault, and other adult sexual assault crimes. The Chair shall be appointed by the Secretary of Defense from among the members of the Judicial Proceedings Panel.

    Members shall be appointed for the life of the Judicial Proceedings Panel, subject to annual renewals. Any vacancy on the Judicial Proceedings Panel shall be filled in the same manner as the original appointment. Panel members shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as special government employee (SGE) members. With the exception of reimbursement of official travel and per diem, Judicial Proceedings Panel members shall serve without compensation.

    The DoD GC, according to DoD policies and procedures, may select experts and consultants as subject matter experts under the authority of 5 U.S.C. § 3109 to advise the Judicial Proceedings Panel or its subcommittees; these individuals do not count toward the Judicial Proceedings Panel's total membership nor do they have voting privileges. In addition, these subject matter experts shall not participate in any deliberations dealing with

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the substantive matters before the Judicial Proceedings Panel or its subcommittees nor shall they participate in any voting.

13. Subcommittees: The Department, when necessary and consistent with the Judicial Proceedings Panel's mission and DoD policies and procedures, may establish subcommittees, task groups, or working groups to support the Judicial Proceedings Panel. Establishment of subcommittees will be based upon a written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC.

    These subcommittees shall not work independently of the Judicial Proceedings Panel and shall report all of their recommendations and advice to the Judicial Proceedings Panel for full deliberation and discussion. Subcommittees have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Judicial Proceedings Panel. No subcommittee or any of its members may update or report directly to the DoD or any Federal officers or employees.

    The Secretary of Defense shall appoint subcommittee members even if the member in question is already a member of the Judicial Proceedings Panel. All subcommittee appointments shall be subject to annual renewal. Such individuals, if not full-time or part-time government personnel, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Those individuals who are full-time or permanent part-time Federal employees shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) as RGE members. Subcommittee members shall serve for the life of the subcommittee. With the exception of reimbursement of official travel and per diem, subcommittee members shall serve without compensation.

    All subcommittees operate pursuant to the provisions of FACA, the Sunshine Act, governing Federal statutes and regulations, and established DoD policies and procedures.

14. Recordkeeping: The records of the Judicial Proceedings Panel and its subcommittees shall be handled according to section 2, General Records Schedule 26, and appropriate Department of Defense policies and procedures. These records shall be available for public inspection and copying, subject to the Freedom of Information Act of 1966 (5 U.S.C. § 552, as amended).

15. Filing Date: June 24, 2014

APPENDIX C: Judicial Proceedings Panel Committee and Subcommittee Member Biographies

JUDICIAL PROCEEDINGS PANEL MEMBERS

THE HONORABLE ELIZABETH HOLTZMAN — CHAIR OF THE JPP

Elizabeth Holtzman is counsel with the law firm Herrick, Feinstein LLP. Ms. Holtzman served for eight years as a U.S. representative (D-NY, 1973–81). While in office, she authored the Rape Privacy Act. She then served for eight years as District Attorney of Kings County, New York (Brooklyn), the fourth-largest DA's office in the country, where she helped change rape laws, improve standards and methods for prosecution, and develop programs to train police and medical personnel. In 1989 Ms. Holtzman became the only woman ever elected Comptroller of New York City. Ms. Holtzman graduated from Radcliffe College, *magna cum laude*, and received her law degree from Harvard Law School.

THE HONORABLE BARBARA S. JONES

Barbara Jones is a partner at the law firm Bracewell, LLP. 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. Before being nominated to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County (Manhattan). In that role she supervised community affairs, handled public information, and oversaw the work of the Homicide Investigation Unit. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division, and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an Assistant U.S. Attorney, as chief of the General Crimes Unit, and as chief of the Organized Crime Unit in the Southern District of New York.

MR. VICTOR STONE

Victor Stone represents crime victims at the Maryland Crime Victims Resource Center, Inc. Previously, Mr. Stone served as Special Counsel at the United States Department of Justice. He spent 40 years with the Department of Justice in numerous positions, including as Chief Counsel, FBI Foreign Terrorist Task Force, and as Assistant U.S. Attorney in Oregon and the District of Columbia. He has experience working on victims' and prisoners' rights, serving on committees that resulted in the enactment of the Crime Victims' Rights Act and updates to the ABA Standards for Prisoner Rights. After graduating from Harvard Law School, he clerked on the United States Court of Appeals for the Ninth Circuit.

PROFESSOR THOMAS W. TAYLOR

Tom Taylor teaches graduate courses at Duke University's Sanford School of Public Policy. Previously, he served as a decorated and distinguished Army officer, civil servant, and member of the Senior Executive Service. During a 27-year career in the Pentagon, he advised seven secretaries and seven Chiefs of Staff of the Army, and as the senior leader of the Army legal community he worked on a wide variety of operational, personnel, and intelligence issues. He graduated with high honors from Guilford College, Greensboro, N.C., and with honors from the University of North Carolina at Chapel Hill law school, where he was a Morehead Fellow, a member of the law review, and a member of the Order of the Coif.

VICE ADMIRAL PATRICIA A. TRACEY, U.S. NAVY (RETIRED)

Pat Tracey was most recently the Vice President of Homeland Security and Defense for Hewlett Packard Enterprise Services, U.S. Public Sector, developing dynamic strategies and providing support to various agencies including the U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, and U.S. Department of Defense. She completed a distinguished 34-year naval career in 2004, retiring as a vice admiral and the most senior woman officer in the history of the U.S. Navy. As chief of the Navy's $5 billion global education and training enterprise, Admiral Tracey led a successful revolution in training technology to improve the quality, access, effectiveness, and cost of Navy training. She graduated from the College of New Rochelle and the Naval Postgraduate School, with distinction, and completed a Fellowship with the Chief of Naval Operations' Strategic Studies Group.

JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE MEMBERS

THE HONORABLE BARBARA S. JONES — CHAIR OF THE JPP SUBCOMMITTEE

Barbara Jones is a partner at the law firm Bracewell, LLP. 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. Before being nominated to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County (Manhattan). In that role she supervised community affairs, handled public information, and oversaw the work of the Homicide Investigation Unit. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division, and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an Assistant U.S. Attorney, as chief of the General Crimes Unit, and as chief of the Organized Crime Unit in the Southern District of New York.

THE HONORABLE ELIZABETH HOLTZMAN — CHAIR OF THE JPP

Elizabeth Holtzman, who took office as the youngest woman ever elected to Congress, served in the House of Representatives from 1973 to 1981, representing New York's 16th Congressional District. While in Congress, she served on the House Judiciary and Budget Committees and chaired the Immigration and Refugees Subcommittee. She co-founded the Congressional Women's Caucus and was elected its first Democratic chair. She subsequently was elected Brooklyn District Attorney (where she pioneered new strategies for the prosecution of rape cases)—the only woman ever elected DA in New York City. She was then elected New York City Comptroller, the only woman ever to hold that position. Ms. Holtzman was appointed by President Bill Clinton to the Interagency Working Group (on declassifying secret Nazi war crimes files), and by Secretary Hagel to the Response Systems to Adult Sexual Assault Crimes Panel. She has also been appointed to the Department of Homeland Security Advisory Committee. Ms. Holtzman is a graduate of Harvard Law School and Harvard University's Radcliffe College, *magna cum laude*. She practices law in New York City with the firm Herrick, Feinstein, LLP.

MS. LISA FRIEL

Lisa Friel is an internationally recognized expert on sexual assault. Ms. Friel has investigated and supervised complex cases involving sexual assault and harassment, human trafficking, workplace violence, child pornography, Internet predators, unlawful surveillance, theft, and fraud. Ms. Friel began her professional career at the New York County District Attorney's Office, specializing in sexual assault cases. She was the Chief of the Sex Crimes Prosecution Unit for nearly a decade and the Deputy Chief for 11 years. Supervising more than 40 assistant district attorneys, support staff, and investigators, she typically managed 300 cases and investigations at any one time.

Ms. Friel has directed thousands of investigations into allegations of sexual assault and other misconduct and has trained hundreds of law enforcement personnel throughout the world. In October 2011, following a distinguished 28-year career as a Manhattan prosecutor, Ms. Friel joined T&M Protection Resources as Vice President of the Sexual Misconduct Consulting & Investigations division. Ms. Friel and her staff developed policies and procedures, provided training workshops, and conducted sensitive investigations into a myriad of issues, including sexual misconduct (both sexual assault and sexual harassment) and domestic violence. In September 2014, Ms. Friel was appointed as T&M's Special Advisor to the NFL Commissioner, consulting on domestic violence, child abuse, and sexual assault within the National Football League. In April 2015, Ms. Friel accepted a permanent position with the NFL: an appointment by Commissioner Goodell as the NFL's Special Counsel for Investigations, where she is responsible for all investigations related to possible violations of the NFL's Personal Conduct Policy.

MS. LAURIE ROSE KEPROS

Laurie Rose Kepros is the Director of Sexual Litigation for the Colorado Office of the State Public Defender, where she trains and advises more than 700 lawyers and other staff statewide in their representation of adults and juveniles accused or convicted of sexual crimes. Ms. Kepros has personally represented thousands of criminal defendants, including many victims of sexual assault. She has tried and consulted on thousands of sexual offense cases across the state of Colorado. She has served on dozens of subcommittees of the Colorado Sex Offender Management Board and as a member of both the Sex Offense Task Force and the Sex Offense Working Group of the Sentencing Task Force of the Colorado Commission on Criminal and Juvenile Justice. Ms. Kepros was on the Board of Directors of the Colorado Criminal Defense Bar for 10 years and currently serves on the board of the CCDB's sister policy organization, the Colorado Criminal Defense Institute. She is a member of the Association for the Treatment of Sexual Abusers and an adjunct professor at the University of Denver School of Law. She has repeatedly testified before the Colorado legislature as a subject matter expert in sexual crime law and as an expert witness in Colorado sex offense law in federal district court. In 2012, the CCDB awarded her the Gideon Award for upholding and preserving the principles captured by *Gideon v. Wainwright*.

DEAN LISA SCHENCK (COLONEL, U.S. ARMY, RETIRED)

Lisa Schenck became Associate Dean for Academic Affairs at the George Washington University Law School in 2009 after serving in the Army's Judge Advocate General's Corps for more than 25 years. She also has served as a judge, lawyer, and educator. While in the military, she was an appellate military judge on the U.S. Army Court of Criminal Appeals in 2002 and received the 2003 Judge Advocates Association Outstanding Career Armed Services Attorney Award (Army). In 2005, Dean Schenck was the first woman appointed as a Senior Judge on that court, where she served until she retired. In 2007, the Secretary of Defense also appointed her to serve concurrently as Associate Judge on the U.S. Court of Military Commission Review. After retiring from the military as a colonel in 2008, Dean Schenck served as Senior Advisor to the Defense Task Force on Sexual Assault in Military Services.

PROFESSOR LEE SCHINASI (COLONEL, U.S. ARMY, RETIRED)

Lee Schinasi began his legal career as a trial attorney for the Office of Economic Opportunity before starting a 23-year career in the Army's Judge Advocate General's Corps. His final assignment was as Dean of Academics and Vice Dean of the Army's JAGC School. Professor Schinasi attended the resident Command and General Staff College and the resident Army War College. He has served as military legal advisor to the Army's Chief of Staff for Intelligence and as Staff Judge Advocate of the 3rd Infantry Division (in Germany) and United States Army South (in Panama). Professor Schinasi is co-author of several books on evidence and litigation, including *The Military Rules of Evidence Manual*, *Military Evidentiary Foundations*, *The Florida Evidence Code Trial Book*, *Florida Evidentiary Foundations*, *Evidence in Florida*, *Emerging Problems under the Federal Rules of Evidence*, and *Lawyers Cooperative Practice Guide: Florida Evidence*. He received a bachelor's degree in economics and a J.D. degree from the University of Toledo. Before joining the Barry Law faculty, Professor Schinasi taught at the University of Miami School of Law. He currently teaches evidence, torts, civil procedure, and national security law.

BRIGADIER GENERAL JAMES SCHWENK, U.S. MARINE CORPS (RETIRED)

James Schwenk retired from the Marine Corps in 2000 and from civil service in 2014, after 49 years of federal service. As a Marine Corps judge advocate, he served as a trial counsel, defense counsel, Deputy Staff Judge Advocate, Staff Judge Advocate, Special Assistant to the General Counsel of the Navy, Head of Operational Law Branch at Headquarters Marine Corps, Deputy Director of Legal and Legislative Policy for the Office of the Assistant Secretary of Defense for Force Management and Policy, Assistant Judge Advocate General of the Navy for Military Law, and Military Assistant to the DoD General Counsel. Upon retiring from active duty, BGen Schwenk served for 14 years in the Office of the General Counsel of the Department of Defense as Senior Associate Deputy General Counsel, specializing in personnel policy, military justice, and civil support. He was the principal legal advisor for the repeal of "don't ask, don't tell" and the provision of benefits to same-sex spouses of military personnel. In addition, he was the principal legal advisor to numerous DoD working groups in the area of military personnel policy, working extensively with the White House and Congress. BGen Schwenk attended the Washington College of Law, American University, earning his J.D. in 1977.

MS. JILL WINE-BANKS

Jill Wine-Banks has a background as a corporate executive in manufacturing and telecommunications and as an attorney and not-for-profit and government leader. Ms. Wine-Banks started her career at the Department of Justice prosecuting organized crime and labor racketeering cases and then played a crucial role as an assistant special prosecutor investigating and trying the Watergate obstruction of justice case. Ms. Wine-Banks also served as the General Counsel of the United States Army. In that position, Ms. Wine-Banks dealt with environmental, procurement, Panama Canal, intelligence, military justice, and political issues, including the integration of women into basic training and West Point. After leaving the Pentagon, she was a litigation partner at Jenner and Block, the Solicitor General and Deputy Attorney General of Illinois, and later the Executive Vice President and Chief Operating Officer of the American Bar Association, the world's largest legal publisher and professional association with almost 400,000 members. That experience led to her becoming a senior corporate executive at Motorola and then Maytag, handling international business development, global operations, alliance creation and management, and government relations in Pakistan, China, Ukraine, Russia, France, Germany, Japan, and Singapore. Recently, Ms. Wine-Banks was head of career and technical education for the Chicago Public Schools and a business consultant. Ms. Wine-Banks is currently writing a book about her life and career, with a special focus on her experiences during Watergate.

APPENDIX D: Judicial Proceedings Panel Staff Members and Designated Federal Officials

JUDICIAL PROCEEDINGS PANEL STAFF

Captain Tammy P. Tideswell,
Judge Advocate General's Corps,
U.S. Navy, Staff Director

Lieutenant Colonel Patricia H. Lewis,
Judge Advocate General's Corps,
U.S. Army, Deputy Staff Director

Mr. Dale Trexler, Chief of Staff

Ms. Julie Carson, Attorney

Dr. Janice Chayt, Investigator

Dr. Alice Falk, Editor

Ms. Theresa Gallagher, Attorney

Ms. Nalini Gupta, Attorney

Ms. Amanda Hagy, Senior Paralegal

Ms. Laurel Prucha Moran, Graphic Designer

Ms. Meghan Peters, Attorney

Ms. Stayce Rozell, Senior Paralegal

Ms. Terri A. Saunders,
Attorney and Lead Report Writer

Ms. Tiffany M. Williams,
Supervising Paralegal

DESIGNATED FEDERAL OFFICIALS

Ms. Maria Fried,
Associate Deputy General Counsel (Personnel and Health Policy),
U.S. Department of Defense,
Designated Federal Official

Mr. William Sprance,
Associate Deputy General Counsel (Personnel and Health Policy),
U.S. Department of Defense,
Alternate Designated Federal Official

Lieutenant Colonel Jacqueline M. Stingl,
Judge Advocate General's Corps,
U.S. Air Force, Associate Deputy General Counsel (Personnel and Health Policy),
U.S. Department of Defense,
Alternate Designated Federal Official

Mr. Dwight Sullivan,
Senior Associate Deputy General Counsel (Military Justice and Personnel Policy),
U.S. Department of Defense,
Alternate Designated Federal Official

APPENDIX E: Presenters on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases at Judicial Proceedings Panel Public and Subcommittee Meetings

JUDICIAL PROCEEDINGS PANEL PUBLIC MEETINGS	PRESENTERS
May 19, 2017 Public Meeting of the JPP Holiday Inn Arlington at Ballston Arlington, VA	• Ms. Laurie Kepros, JPP Subcommittee Member • Dean Lisa Schenck, Colonel, U.S. Army, Retired, JPP Subcommittee Member • Ms. Jill Wine-Banks, JPP Subcommittee Member
June 16, 2017 Public Meeting of the JPP One Liberty Center Arlington, VA	• Panel deliberations
July 26–27, 2017 Public Meeting of the JPP One Liberty Center Arlington, VA	• Panel deliberations and approval of the report and recommendations

JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE MEETINGS	PRESENTERS
October 14, 2016 **JPP Subcommittee Meeting** **One Liberty Center Arlington, VA**	• Subcommittee deliberations
December 8, 2016 **JPP Subcommittee Meeting** **One Liberty Center Arlington, VA**	• Subcommittee deliberations
January 5, 2017 **JPP Subcommittee Meeting** **One Liberty Center Arlington, VA**	• Colonel Katherine Oler, U.S. Air Force, Chief, Government Trial and Appellate Counsel Division • Colonel William R. Kern, U.S. Army, Professional Responsibility Branch, Office of the Judge Advocate General • Colonel Kathryn Stone, U.S. Army, Retired, Attorney Advisor, Professional Responsibility Branch Head, Office of the Judge Advocate General • Major Emilee Elbert, U.S. Army, Deputy Chief, Trial Counsel Assistance Program • Commander Cassie Kitchen, U.S. Coast Guard, Chief, Military Justice and Command Advice • Commander Michael Luken, U.S. Navy, Director, Trial Counsel Assistance Program • Lieutenant Colonel Nicholas Martz, U.S. Marine Corps, Military Justice Branch Head, Judge Advocate Division
February 23, 2017 **JPP Subcommittee Meeting** **One Liberty Center Arlington, VA**	• Subcommittee deliberations and review of draft report

JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE MEETINGS	PRESENTERS
April 4, 2017 JPP Subcommittee Meeting Bracewell LLP New York, NY	• Subcommittee deliberations and review of draft report
April 26, 2017 JPP Subcommittee Meeting Telephonic	• Subcommittee deliberations and review of draft report
May 3, 2017 JPP Subcommittee Meeting Telephonic	• Subcommittee deliberations and review of draft report
May 18, 2017 JPP Subcommittee Meeting One Liberty Center Arlington, VA	• Subcommittee discussion on presentation of Subcommittee report to JPP

APPENDIX F: Acronyms and Abbreviations

ABA	American Bar Association
CAAF	Court of Appeals for the Armed Forces
DAC-IPAD	Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces
DoD	Department of Defense
DoDI	Department of Defense Instruction
FY	fiscal year
GCMCA	general court-martial convening authority
JPP	Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (Judicial Proceedings Panel)
MCIO	military criminal investigative organization
MCM	Manual for Courts-Martial
NCO	noncommissioned officer
NDAA	National Defense Authorization Act
PHO	preliminary hearing officer
R.C.M.	Rule for Court-Martial
SAPR	sexual assault prevention and response
SARC	sexual assault response coordinator
SHARP	sexual harassment and assault response and prevention
SJA	staff judge advocate
SPCMCA	special court-martial convening authority
SVC	special victims' counsel
UCMJ	Uniform Code of Military Justice
U.S.C.	United States Code
VA	victim advocate
VLC	victims' legal counsel

APPENDIX G: Sources Consulted

1. LEGISLATIVE SOURCES

a. Enacted Statutes

10 U.S.C. §§ 801-946 (Uniform Code of Military Justice)

National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013)

National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014)

National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)

b. Congressional Record

159 Cong. Rec. H7059, *available at* https://www.gpo.gov/fdsys/pkg/CREC-2013-11-14/pdf/CREC-2013-11-14-pt1-PgH7059.pdf

159 Cong. Rec. S4020, *available at* https://www.gpo.gov/fdsys/pkg/CREC-2013-06-07/pdf/CREC-2013-06-07-pt1-PgS4020-3.pdf#page=1

2. JUDICIAL DECISIONS

a. U.S. Court of Appeals for the Armed Forces

Hutson v. United States, 42 C.M.R. 39 (1970)

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JUDICIAL PROCEEDINGS PANEL

FINAL REPORT

October 2017

JUDICIAL PROCEEDINGS PANEL

Report of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

Final Report

October 2017

JUDICIAL PROCEEDINGS PANEL

October 16, 2017

The Honorable John McCain
Chair, Committee
on Armed Services
United States Senate
Washington, DC 20510

The Honorable Jack Reed
Ranking Member, Committee
on Armed Services
United States Senate
Washington, DC 20510

The Honorable Mac Thornberry
Chair, Committee
on Armed Services
United States House of
Representatives
Washington, DC 20515

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

The Honorable James Mattis
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to submit the final report of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP). This report is the culmination of three years of the Panel's review and assessment of issues involving judicial proceedings related to sexual assault in the Armed Forces. To conduct its assessments, the JPP held 32 public meetings between August 2014 and July 2017 during which the members heard testimony from hundreds of witnesses, including sexual assault survivors and victim advocacy organizations, military leaders, military and civilian prosecutors, defense counsel and victims' counsel, former judges, victim services personnel, and numerous others. The Panel also received thousands of pages of documents from the Department of Defense, the military Services, and other interested parties.

Since February 2015, the JPP has issued 11 reports containing a total of 63 recommendations to Congress, the Secretary of Defense, the military Services, and the Defense Advisory Committee on Investigations, Prosecution, and Defense of Sexual Assault in the Armed Forces, presenting its research and findings on the topics assigned to it by Congress, those recommended by its predecessor sexual assault advisory committee—the Response Systems Panel—as well as on two related issues.

The JPP has observed and assessed many constructive and important changes addressing sexual assault in the military and support for victims over the past three years. The Panel applauds the efforts of Congress, the Department of Defense, the military Services, and advocacy organizations as they continue to focus attention on this important matter.

The JPP conveys its gratitude to Congress for the opportunity to examine the issue of sexual assault in the military. The Panel would have not been able to complete its work without the support and assistance of the JPP Subcommittee, the military Services, the Department of Defense, and the hundreds of experts and witnesses who shared their experiences and perspectives with the Panel. The JPP expresses its appreciation to everyone who helped it fulfill its mission.

Respectfully submitted,

Elizabeth Holtzman, Chair

Barbara S. Jones

Victor Stone

Thomas W. Taylor

Patricia A. Tracey

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APPENDICES:

I. Introduction and Tasks Accomplished

In section 576 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, enacted on January 2, 2013, Congress directed the Secretary of Defense to establish the fifth congressionally mandated task force on sexual assault in the military created since 2003: the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (Judicial Proceedings Panel, or JPP).[1] Its immediate predecessor was the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel, or RSP), which completed its work in June 2014.[2]

Congress instructed the JPP "to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice (UCMJ) involving adult sexual assault and related offenses . . . for the purpose of developing recommendations for improvements to such proceedings."[3] In June 2014 the Secretary of Defense appointed five members to the JPP, including two members who had previously served on the RSP.[4]

A. RESPONSIBILITIES AND METHODOLOGY OF THE JUDICIAL PROCEEDINGS PANEL

In the National Defense Authorization Acts for Fiscal Years 2013, 2014, and 2015, Congress assigned to the JPP a total of 16 specific duties covering a wide array of topics related to sexual assault in the military.[5] The Response Systems Panel recommended four issues for review by the JPP.[6] In accordance with its charter, the JPP examined two additional topics that came to the attention of the Panel as

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1 National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239 [hereinafter FY13 NDAA], § 576, 126 Stat. 1632 (2013).

2 The three task forces preceding the RSP were (1) the Panel to Review Sexual Misconduct Allegations at the United States Air Force Academy, (2) the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies, and (3) the Defense Task Force on Sexual Assault in the Military Services (DTF-SAMS).

3 FY13 NDAA, *supra* note 1, § 576. The Judicial Proceedings Panel authorizing statutes and charter are included as Appendix A.

4 The biographies of the Judicial Proceedings Panel and Subcommittee members are included as Appendix B. The Honorable Barbara S. Jones served as the Chair of the RSP, and the Honorable Elizabeth Holtzman served as a member.

5 FY13 NDAA, *supra* note 1, § 576; National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [hereinafter FY14 NDAA], § 1731, 127 Stat. 672 (2014); National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [hereinafter FY15 NDAA], § 545, 128 Stat. 3292 (2014). A list of the JPP's statutory tasks is included as Appendix C.

6 Report of the Response Systems to Adult Sexual Assault Crimes Panel (June 2014) [hereinafter RSP Report], *available at* http://responsesystemspanel.whs.mil/public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf. The RSP recommended the following tasks to the JPP:
   1. RSP Recommendation 45—The Judicial Proceedings Panel and the Joint Services Committee should review and clarify the extent of a victim's right to access information that is relevant to the assertion of a particular right.
   2. RSP Recommendation 113—The Judicial Proceedings Panel and Joint Service Committee consider whether to recommend legislation that would either split sexual assault offenses under Article 120 of the UCMJ into different articles that separate penetrative and contact offenses from other offenses or narrow the breadth of conduct currently criminalized under Article 120.
   3. RSP Recommendation 115—The Judicial Proceedings Panel assess the use of depositions in light of changes to the Article 32 proceeding, and determine whether to recommend changes to the deposition process, including whether military judges should serve as deposition officers.
   4. RSP Recommendation 117—The Judicial Proceedings Panel study whether the military plea bargaining process should be modified.

it conducted its statutory assessments: retaliation against victims of sexual assault and the appellate rights of victims in the military justice process.

To explore and assess these topics, the JPP held 32 public meetings between August 2014 and July 2017.[7] Over the course of those meetings, the Panel heard from hundreds of witnesses, including military leaders, sexual assault victims, sexual assault advocacy groups, Department of Defense (DoD) and civilian victim services personnel, military and civilian prosecutors, defense counsel and victims' counsel, academics and subject matter experts, members of the public, and members of Congress. The JPP also received and reviewed thousands of pages of documents provided by DoD, the military Services, victim advocacy organizations, and other interested parties.

The JPP also tasked a subcommittee appointed by DoD to conduct its own review of certain issues.[8] The JPP Subcommittee held multiple meetings between April 2015 and May 2017. In addition, between July and September 2016 members of the JPP Subcommittee conducted site visits to military installations in the United States and Asia, during which members spoke with panels of more than 280 individuals from all of the Services involved in the investigation, prosecution, and defense of sexual assault offenses.

Congress required the JPP to submit its initial report to the Secretary of Defense and the Committees on Armed Services of the Senate and House of Representatives within 180 days of its first meeting and to issue subsequent reports annually thereafter through fiscal year 2017. The JPP issued its first report in 2015, followed by four reports in 2016 and six reports in 2017. These reports contain a total of 63 recommendations, many of which have been implemented by Congress, DoD, and the Services.[9] The JPP's reports and recommendations, along with ensuing legislative and regulatory changes made by Congress, DoD, and the Services, are discussed below.

B. REPORTS AND RECOMMENDATIONS OF THE JUDICIAL PROCEEDINGS PANEL

1. Initial Report[10]

The JPP issued its initial report in February 2015. It summarized the JPP's assessments from the first six months of its review, with a focus on the effects and implementation of the 2012 amendments to Article 120 of the UCMJ, the effects and implementation of special victims' counsel programs instituted by DoD and the military Services, victim privacy issues in military sexual assault cases, and the rights and needs of sexual assault victims to receive case information and participate in the military judicial process. The JPP made 11 recommendations relating to these topics.

The JPP referred 17 issues for additional consideration to the JPP Subcommittee. The first 11 of these issues related to definitions of terms and elements of offenses, defenses, and enumerated offenses under Article 120 of the UCMJ, the military's sexual assault statute. The remaining six issues

7 A list of the JPP's public meetings and the JPP Subcommittee meetings is included as Appendix D.

8 The biographies of the Subcommittee members are included as Appendix B.

9 A list of the JPP's recommendations is included as Appendix E. The status of these recommendations is included as Appendix F.

10 Judicial Proceedings Panel Initial Report (Feb. 2015) [hereinafter JPP Initial Report], *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/01_JPP_InitialReport_Final_20150204.pdf.

related to how the military prosecutes crimes that involve coercive sexual relationships and abuse of authority, including relationships between trainers and trainees, recruiters and recruits, and senior and subordinate military members in the same chain of command.

A number of JPP recommendations contained in its initial report have been implemented by Congress and DoD.[11] Following the JPP's recommendation relating to the DoD and interagency review process, Congress enacted section 543 of the FY16 NDAA. This provision required the Secretary of Defense to examine the DoD process for implementing statutory changes to the UCMJ for the purpose of developing options to streamline that process and adopting procedures to ensure that legal guidance is published as soon as practicable whenever statutory changes to the UCMJ are implemented.[12] The Deputy Secretary of Defense also approved this JPP recommendation in a September 2, 2016, memorandum to the Service Secretaries.[13]

Following the JPP's recommendations relating to the special victims' counsel/victims' legal counsel (SVC/VLC) program, Congress enacted section 535 of the FY16 NDAA. This provision required the Secretary of Defense to establish guiding principles and standardize training for the SVC/VLC program, as well as ensure that SVCs/VLCs are assigned to locations that maximize their face-to-face contact with clients.[14] DoD also approved, in whole or in part, the JPP's recommendations to establish uniform policies concerning SVC/VLC participation in military justice proceedings, to impose more stringent criteria for selecting SVCs/VLCs, and to extend the eligibility for SVC/VLC representation to last as long as a victim's rights are at issue.[15]

Following the release of the JPP's initial report, Congress addressed the rights of victims through the judicial process in two pieces of legislation. First, Congress enacted section 531 of the FY16 NDAA, expanding a victim's ability to petition an appellate court for a writ of mandamus if the victim believes that his or her rights have been violated.[16] Second, consistent with the JPP's recommendation on victims' access to information, Congress enacted section 5504 of the FY17 NDAA, creating a new Article 140a, UCMJ (*Case management; data collection and accessibility*).[17] This article requires the Secretary of Defense to prescribe uniform standards and criteria for improved access to docket information, filings, and records in the military justice system, using, so far as practicable, the best practices of federal and state courts. DoD also acted on the JPP recommendation, directing the Service Secretaries to develop guidance for their respective Departments to ensure that victims and their counsel have appropriate access to docketing information and case filings.[18]

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11 A chart with the implementation status of JPP recommendations is included as Appendix F.

12 National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 [hereinafter FY16 NDAA], § 543, 129 Stat. 726 (2015).

13 U.S. Dep't of Def., Memorandum from the Deputy Secretary of Defense on Recommendations of the Judicial Proceedings since Fiscal Year 2012 Amendments Panel (Sept. 2, 2016) [hereinafter DSD Memo on Recommendations], *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/01-General_Information/24_DoD_Response_JPP_Initial_Report_Recs_20160902.pdf.

14 FY16 NDAA, *supra* note 12, § 535. SVCs are victim attorneys in the Army, Air Force and Coast Guard. The Navy and Marine Corps victim attorneys are referred to as VLCs.

15 DSD Memo on Recommendations, *supra* note 13.

16 FY16 NDAA, *supra* note 12, § 531.

17 National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 [hereinafter FY17 NDAA], § 5504, 130 Stat. 2000 (2016).

18 DSD Memo on Recommendations, *supra* note 13.

In addition, consistent with the JPP's recommendation on Military Rule of Evidence (M.R.E.) 412, the military's rape shield law, the President signed Executive Order 13696 on June 17, 2015, eliminating the "constitutionally required" exception within M.R.E. 412 at Article 32 hearings.[19]

Finally, DoD approved in part the JPP's recommendation on M.R.E. 513, directing the Joint Service Committee on Military Justice to recommend uniform guidance regarding release of mental health records to ensure an appropriate balance between the interests of law enforcement and the privacy interests of victims of an alleged sex-related offense.[20]

2. Report on Restitution and Compensation for Military Adult Sexual Assault Crimes[21]

After issuing its initial report, the Panel turned its attention to the specific task of examining restitution and compensation for victims of sexual assault in the military. In the FY14 NDAA, Congress instructed the Panel to analyze and assess the adequacy of the provision of compensation and restitution for victims of sexual assault crimes committed by military Service personnel, and specifically to evaluate three proposals for expanding such relief. In February 2016, the JPP released a report containing six recommendations to Congress and the Secretary of Defense to simplify and accelerate how restitution and compensation are provided to victims.

The JPP concluded that to best meet the financial needs of sexual assault victims, a new uniform DoD compensation program should be established that would provide benefits to victims without regard to the physical location of the offense or the victim's state of residence. At present, state victim compensation programs vary as to who and what is covered, in the length of coverage, and in the amounts provided.

The JPP also encouraged the President to issue an executive order that would modify the Rules for Courts-Martial (R.C.M.) to provide victims with the right to be heard before a convening authority enters into a pretrial agreement, noting that the inclusion of restitution in a pretrial agreement is within the discretion of convening authorities. The Panel further recommended that the Services provide regular training to attorneys and victim assistance personnel on the availability and use of restitution in pretrial agreements.

The JPP evaluated three proposals to amend the UCMJ that would allow victims to be compensated from the forfeited wages of incarcerated Service members, would include bodily harm among the injuries meriting compensation in a claim filed against the alleged offender under Article 139 of the UCMJ, and would add restitution as an authorized punishment that could be adjudged at courts-martial. Ultimately, the Panel determined that the negative effects of these proposals would outweigh the benefits each sought to achieve and instead recommended that a new, uniform DoD compensation program be established for victims.

Consistent with one of the JPP's recommendations, the President signed Executive Order 13730 on May 20, 2016, amending R.C.M. 705(d)(3) to require consultation with the victim, whenever practicable, before the convening authority accepts a pretrial agreement.[22]

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19 Exec. Order No. 13696, 80 Fed. Reg. 35,781 (June 17, 2015).

20 DSD Memo on Recommendations, *supra* note 13.

21 Judicial Proceedings Panel Report on Restitution and Compensation for Military Adult Sexual Assault Crimes (Feb. 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/02_JPP_Rest_Comp_Report_Final_20160201.pdf.

22 Exec. Order No. 13730, 81 Fed. Reg. 33,331 (May 20, 2016).

3. Report on Article 120 of the Uniform Code of Military Justice[23]

In February 2016 the JPP released its report on Article 120 of the UCMJ, the military's statute for prosecuting sexual assault cases. The JPP's report followed an in-depth review and analysis of Article 120 by the JPP Subcommittee. Over the course of nine meetings, the JPP Subcommittee heard perspectives and recommendations from more than 40 military justice practitioners and debated the issues directed to it by the JPP, including definitions of terms and elements of offenses, defenses, and enumerated offenses under Article 120. The Subcommittee also compared Article 120 to similar federal criminal law provisions under Title 18 of the United States Code and reviewed how the military currently prosecutes abuse of authority and coercive relationships.

On the basis of the Subcommittee's findings and recommendations and of the JPP's own deliberations, the JPP determined that the most recent version of Article 120, enacted by Congress in 2012, provides a reasonably effective statutory framework for the prosecution of sexual assault offenses in the military. However, the JPP found that some definitions and terms used in the statute are confusing or vague and could possibly obscure standards of conduct among Service members or hinder court-martial prosecution of sexual assault offenses. To address these concerns, the JPP recommended that Congress amend five definitions in Article 120 and adopt a new theory of liability for coercive sexual acts or contacts in which a perpetrator used position, rank, or authority to secure compliance by the other person.

The JPP also recommended that the President amend the Manual for Courts-Martial to specifically state that consent and mistake of fact as to consent may be raised in any case in which they are relevant.

Following these JPP recommendations, in the FY17 NDAA Congress amended the definition of "consent," removed the definition and element of "bodily harm," and amended the definitions of "sexual act" and "sexual contact" in Article 120.[24] Congress also added a definition for "incapable of consenting," as recommended by the JPP; however, Congress chose to use the definition contained in federal law rather than the one proposed by the JPP, which the JPP Subcommittee developed after determining that the federal definition was itself problematic.[25]

Congress did not enact the JPP's recommendation to adopt a new theory of liability for coercive sex acts based on a perpetrator's position, rank, or authority. Though it appeared in the Senate version of the FY17 NDAA, it was not included in the final conference report. The conferees noted that this conduct is prohibited under Article 93a, UCMJ (*Maltreatment*), as added by another provision in the FY17 NDAA.[26]

23 Judicial Proceedings Panel Report on Article 120 of the Uniform Code of Military Justice (Feb. 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/03_JPP_Art120_Report_Final_20160204.pdf.

24 FY17 NDAA, *supra* note 17, § 5430.

25 *See* Subcommittee Report to the Judicial Proceedings Panel on Article 120 of the Uniform Code of Military Justice 15 (Dec. 2015) [hereinafter Subcommittee Report to the JPP on Article 120 of the UCMJ], *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Final_20151210.pdf.

26 H.R. Rep. No. 114-840, at 1535 (2016) (Conf. Rep.).

4. Report on Retaliation Related to Sexual Assault Offenses[27]

The JPP next examined the issue of retaliation related to sexual assault offenses, in a report released in February 2016. The issue of retaliation was brought to the JPP's attention by a 2014 survey published by the RAND Corporation, which indicated that 62% of active duty women who reported unwanted sexual contact to a military authority in 2014 perceived some form of retaliation. This percentage was unchanged from a 2012 survey.[28]

The JPP made 13 recommendations to improve DoD's response to retaliation against Service members who report sexual misconduct. At the heart of the JPP's report was a concern over the fundamental lack of data about the prevalence and nature of reported incidents of retaliation and the steps taken to deal with it. The Panel stressed the critical importance of such data to understand and mitigate the effects of retaliation on individual Service members, unit cohesion, and military readiness.

The JPP found little information on the prevalence of retaliation in the military, because workplace surveys are the only source of existing data about it. The JPP concluded that effective collection and tracking of actual incident data are necessary to understand the extent and nature of the problem of retaliation; such understanding, in turn, is necessary for Congress and DoD to craft more effective solutions and ensure the security and well-being of affected Service members.

To meet this need, the Panel's report recommended that DoD and the Services use a standardized reporting form for incidents of retaliation, similar to the form employed when a sexual assault is reported. The form should be linked to the underlying report of sexual assault. The JPP recommended that incident information should be collected and tracked uniformly for every victim and across each of the Services.

The JPP further noted that there was no single person charged with monitoring what happens to a victim of retaliation. The JPP report recommended that the installation sexual assault response coordinators be tasked to consolidate retaliation reports, track and record retaliation data, and provide information to installation case management groups to monitor progress in resolving complaints.

Congress enacted a number of the JPP's recommendations on retaliation. For example, section 543 of the FY17 NDAA requires DoD to include in the annual Sexual Assault Prevention and Response Office (SAPRO) report to Congress detailed information on each claim of retaliation in connection with a report of sexual assault made by or against a Service member.[29]

Following another JPP recommendation in part, Congress enacted section 545 of the FY17 NDAA, which requires DoD SAPRO to establish metrics for evaluating the efforts of the Armed Forces to prevent and respond to retaliation in connection with sexual assault and to identify best practices to be used by the Military Departments as they seek to prevent and respond to retaliation.[30]

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27 Judicial Proceedings Panel Report on Retaliation Related to Sexual Assault Offenses (Feb. 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/04_JPP_Retaliation_Report_Final_20160211.pdf.

28 Department of Defense Report to the President of the United States on Sexual Assault Prevention and Response 116–17 (Nov. 25, 2014), *available at* http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_SAPRO_Report.pdf.

29 FY17 NDAA, *supra* note 17, § 543.

30 *Id.* § 545.

Adopting another JPP recommendation, Congress also enacted section 546 of the FY17 NDAA, which requires DoD personnel who investigate claims of retaliation to "receive training on the nature and consequences of retaliation, and, in cases involving reports of sexual assault, the nature and consequences of sexual assault trauma."[31]

In addition, following a JPP recommendation, Congress enacted section 547 of the FY17 NDAA, which directs the Secretary of Defense to develop regulations requiring a Service member who reports retaliation to "be informed in writing of the results of the investigation, including whether the complaint was substantiated, unsubstantiated, or dismissed."[32]

Finally, citing the recommendations of the JPP, on July 28, 2016, the Department of Defense Office of Inspector General (DoD IG) announced that a newly created team of seven DoD IG investigators and a supervisor would directly handle all sexual assault reprisal cases across the Services rather than serving in an oversight capacity for investigations conducted at the branch level.[33]

5. Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses[34]

In April 2016, the JPP released a report reviewing trends in the adjudication of adult sexual assault crimes in the military from fiscal years 2012 through 2014.

In conducting its analysis, the JPP extracted data from court records, case documents, and other publicly available resources, reviewing court-martial documents from 1,761 sexual assault cases resolved in fiscal years 2012 through 2014. The JPP retained an expert consultant, the distinguished criminologist Dr. Cassia Spohn, to analyze the data and provide statistics on case characteristics and outcomes. These were used in developing the report and recommendations.

The JPP's report made two specific recommendations. First, the JPP recommended that Congress and the Secretary of Defense collect and analyze case adjudication data using a standardized, document-based collection model similar to systems used by the U.S. Sentencing Commission and developed by the JPP.[35]

Second, the JPP recommended that DoD change its policy that excludes from the annual SAPRO reports to Congress those adult-victim sexual assault cases handled by the DoD Family Advocacy Program (FAP). The JPP recommended that DoD include legal disposition information related to all reported adult sexual assault incidents in one annual DoD report.

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31 *Id.* § 546.

32 *Id.* § 547.

33 U.S. Department of Defense, Office of the Inspector General, "DoDIG Monthly Update–August 2016," *available at* http://www.dodig.mil/Eletter/eletter_view.cfm?id=7048; *see also* Dianna Cahn, *New DOD Investigative Unit to Focus on Sexual Assault-Related Reprisals*, Stars & Stripes, July 28, 2016, *available at* https://www.stripes.com/news/us/new-dod-investigative-unit-to-focus-on-sexual-assault-related-reprisals-1.421464#.WZWGS6Iv-aw.

34 Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses (Apr. 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/05_JPP_StatData_MilAdjud_SexAsslt_Report_Final_20160419.pdf.

35 Document-based case adjudication data collection is a best practice used and recommended by the U.S. Sentencing Commission. The JPP's document-based approach to data collection involves obtaining relevant case documents from the military Services (e.g., charge sheet, report of results of trial) and recording the relevant case history data into a centralized database for analysis.

Consistent with the first recommendation, Congress enacted section 5504 of the Military Justice Act of 2016, which created a new Article 140a, UCMJ, on case management, data collection, and accessibility.[36]

Congress also enacted section 574 of the FY17 NDAA, requiring the FAP to produce an annual report that includes the number of intimate partner, spousal, and child physical and sexual abuse incidents reported and substantiated each year, along with analyses of types of abuse reported and characteristics of the victims and perpetrators.[37] Another provision, section 544 of the FY17 NDAA, requires that the FAP and SAPRO annual reports be submitted together to Congress.[38] However, the statute does not require intimate partner and spousal sexual assault case judicial and disciplinary data to be included in either the FAP or SAPRO annual reports, as the JPP recommended.

6. Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases[39]

In April 2017, the JPP released a report identifying serious issues that affect the ability of defense counsel in military sexual assault cases to provide a robust defense and offering four recommendations to correct the problems. The report grew out of the site visits conducted from July to September 2016 by members of the JPP Subcommittee, who visited military installations in the United States and Asia. The JPP Subcommittee met with panels of more than 280 individuals from 25 military installations and all of the military Services, including prosecutors, defense counsel, SVCs/VLCs, paralegals, commanders, investigators, and sexual assault response coordinators and other victim support personnel. These individuals spoke without attribution so that the JPP Subcommittee could gain an unfiltered, candid assessment of how changes in sexual assault laws and policies have, in their view, affected the military justice system.

On the basis of information received from the Subcommittee and its own deliberations, the JPP made four recommendations relating to defense counsel resources and experience in sexual assault cases. Several of the recommendations were—in some form—previously recommended by the RSP.

First, the JPP found that recent changes to the military justice system, such as substantial changes to the Article 32 pretrial hearing process, have reduced or eliminated the already limited ability of defense counsel to gain important information regarding the prosecution's case. To help address this loss of information, the JPP recommended that military defense counsel, like their civilian counterparts, have access to independent defense investigators—access that now exists only in the Navy.

Second, the JPP found that military defense offices, when compared to prosecution offices, are often understaffed and underfunded. The JPP therefore recommended that the military Services ensure that defense organizations are sufficiently staffed and have appropriate funding.

Third, the JPP found that military defense counsel, unlike civilian public defenders, are required to request approval and funding of defense experts from convening authorities, who often deny these requests. Moreover, because defense counsel must send their requests through the prosecutor, they are

36 FY17 NDAA, *supra* note 17, § 5504.

37 *Id.* § 574.

38 *Id.* § 544.

39 Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases (Apr. 2017) [hereinafter JPP Report on Defense Resources and Experience], *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/06_JPP_Defense_Resources_Experience_Report_Final_20170424.pdf.

forced to prematurely reveal their defense strategies. To correct this problem, the JPP recommended that defense offices be given approval and funding authority for their own expert witnesses.

Fourth, the JPP found that defense counsel in sexual assault cases do not always have the experience required to defend clients in complex cases. Therefore, the JPP recommended that the military Services ensure that lead defense counsel in sexual assault cases have sufficient litigation experience and set a minimum tour length for defense counsel of two years.

7. Report on Victims' Appellate Rights[40]

In June 2017, the JPP released a report that called for enhancing the rights of victims of sexual assault in the military justice system's appellate process. The Panel made four recommendations to Congress, the Department of Defense, and the Services: (1) to provide victims, through legislation, with the ability to protect their rights in post-conviction appellate proceedings; (2) to grant, by legislation, the Court of Appeals for the Armed Forces (CAAF) specific jurisdiction to review victims' appeals under Article 6b of the Uniform Code of Military Justice, the military victims' rights statute; (3) to provide victims with an opportunity to be heard prior to appellate counsel review of certain sealed materials; and (4) to require that victims be provided with notice of significant appellate matters.

The Panel began its assessment of the protection of victims' rights in the appellate process after hearing concerns expressed by the military Services' SVC/VLC program managers at its public meeting in April 2016. In response, the JPP Chair solicited from the program managers a legislative proposal addressing their concerns. The Panel held two public meetings to hear the perspectives of judges, practitioners, and experts—including a former chief judge of CAAF, former military appellate judges, military appellate defense and government counsel, civilian appellate defense counsel, an official from the Department of Justice Office of Victims of Crime, and attorneys from victims' rights organizations—about the proposed changes to the appellate process. The JPP also received written submissions from the DoD, current and former Service judge advocates, and victims' rights organizations.

In May 2017, Congressman Mike Turner and Congresswoman Niki Tsongas introduced the BE HEARD (Building an Environment for Helpful, Effective, and Accessible Representation and Decision-making) Act. This bill, if enacted, would codify the JPP's recommendation to grant CAAF jurisdiction to hear victims' interlocutory appeals under Article 6b, UCMJ.[41]

8. Report on Sexual Assault Investigations in the Military

In September 2017, the JPP issued the Judicial Proceedings Panel Report on Sexual Assault Investigations in the Military. The report is available at http://jpp.whs.mil/Public/docs/08-Panel_Reports/08_JPP_Report_Investigations_Final_20170907.pdf.

40 Judicial Proceedings Panel Report on Victims' Appellate Rights (Jun. 2017) [hereinafter JPP Report on Appellate Rights], *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/07_JPP_VictimsAppRights_Report_Final_20170602.pdf.

41 BE HEARD Act, H.R. 2739, 115th Cong. § 3 (2017).

9. Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015

In September 2017, the JPP issued the Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015. The report is available at http://jpp.whs.mil/Public/docs/08-Panel_Reports/09_JPP_CourtMartial_Data_Report_Final_20170915.pdf.

10. Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases

In September 2017, the JPP issued the Judicial Proceedings Panel Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases. The report is available at http://jpp.whs.mil/Public/docs/08-Panel_Reports/10_JPP_Concerns_Fair_MJ_Report_Final_20170915.pdf.

C. REPORTS OF THE JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE

In its February 2015 assessment of the 2012 version of Article 120 of the Uniform Code of Military Justice, the JPP recommended that 17 issues related to Article 120 be referred to a subcommittee for further evaluation. Following the JPP recommendation, the Secretary of Defense empaneled the JPP Subcommittee in April 2015.[42] The JPP Subcommittee presented the following 4 reports and 3 short reports to the JPP.

1. Subcommittee Report on Article 120 of the Uniform Code of Military Justice

In December 2015, the JPP Subcommittee presented the Subcommittee Report to the Judicial Proceedings Panel on Article 120 of the Uniform Code of Military Justice. The report is available at http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Final_20151210.pdf.

2. Subcommittee Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases

In December 2016, the Subcommittee presented its Subcommittee of the Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases. The report is available at http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_DefResources_Final_20161208.pdf.

3. Subcommittee Report on Sexual Assault Investigations in the Military

In February 2017, the Subcommittee issued its Subcommittee of the Judicial Proceedings Panel Report on Sexual Assault Investigations in the Military. The report is available at http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Investigations_Final_20170224.pdf.

42 The biographies of the Subcommittee members are included as Appendix B.

4. Subcommittee Short Reports on Department of Defense Initial Disposition Withholding Policy,[43] Military Rules of Evidence 412 and 513,[44] and the Training and Experience of Trial Counsel and Victims' Counsel[45]

The JPP Subcommittee presented three short reports to the JPP in March 2017 on the topics of the DoD initial disposition withholding policy, Military Rules of Evidence 412 and 513, and the training and experience of trial counsel and SVCs/VLCs. The reports are available at http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Subcomm_ShortReports_20170302_Final.pdf.

5. Subcommittee Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases

In May 2017, the Subcommittee presented its final report to the JPP. The Subcommittee of the Judicial Proceedings Panel Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases is available at http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Barriers_Final_20170512.pdf.

43 Short Report from the Judicial Proceedings Panel Subcommittee on Initial Disposition Withholding Policy (Mar. 2, 2017) [hereinafter Subcommittee Short Report on Withholding], *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Subcomm_ShortReports_20170302_Final.pdf. The JPP Subcommittee Site Visit Reports are available at http://jpp.whs.mil/under Reports/Subcommittee Site Visits.

44 Short Report from the Judicial Proceedings Panel Subcommittee on Military Rules of Evidence 412 and 513 (Mar. 2, 2017) [hereinafter Subcommittee Short Report on M.R.E.s 412 and 513], *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Subcomm_ShortReports_20170302_Final.pdf.

45 Short Report from the Judicial Proceedings Panel Subcommittee on Training and Experience of Trial Counsel and Special Victims' Counsel/Victims' Legal Counsel (Mar. 2, 2017) [hereinafter Subcommittee Short Report on Trial Counsel Training], *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Subcomm_ShortReports_20170302_Final.pdf.

II. Additional Issues Reviewed and Assessed by the Judicial Proceedings Panel

The JPP was directed by Congress to review and assess five issues that have not been fully addressed in previous JPP reports:

(1) Department of Defense initial disposition withholding policy;

(2) Trial counsel training and experience;

(3) Special Victim Investigation and Prosecution (SVIP) Capability Program;

(4) Military Rule of Evidence 412—admission of evidence of a victim's sexual behavior or predisposition; and

(5) Disclosure and admission of mental health records under Military Rule of Evidence 513.

The findings and assessments of the JPP regarding these issues are detailed below.

A. DEPARTMENT OF DEFENSE INITIAL DISPOSITION WITHHOLDING POLICY

1. Statutory Task

In the FY13 NDAA, Congress directed the JPP to "[m]onitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases."[46]

In that memorandum, setting forth a policy effective June 28, 2012, the Secretary of Defense directed that "commanders within the Department of Defense who do not possess at least special court-martial convening authority and who are not in the grade of O-6 (i.e., colonel or Navy captain) or higher" may not determine the initial disposition of alleged offenses involving the following:

(i) rape, in violation of Article 120 of the UCMJ;

(ii) sexual assault, in violation of Article 120 of the UCMJ;

(iii) forcible sodomy, in violation of Article 125 of the UCMJ; and

(iv) all attempts to commit such offenses, in violation of Article 80 of the UCMJ.[47]

2. Assessment

The JPP monitored the implementation of the withholding policy in two ways. First, on February 3, 2016, the JPP issued a request for information (RFI) to the Services and the DoD, asking whether they had problems with or concerns about the withholding policy. Second, the JPP Subcommittee asked

46 FY13 NDAA, *supra* note 1, § 576(d)(2)(I).

47 U.S. Dep't of Def., Memorandum from the Secretary of Defense on Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012) [hereinafter SecDef Withholding Memo], *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/09-Withholding_Authority/20160408/01_SecDef_Memo_WithholdingAuthority_20120420.pdf.

Service members questions about the implementation of the withholding policy during the site visits conducted between July and September 2016.

In response to the RFI, no entity other than the Marine Corps noted any reservations about the withholding policy.[48] The Marine Corps expressed concern that in certain cases, minor misconduct, such as underage drinking or a barracks order violation, must be disposed of by a higher-level commander than would have previously handled the misconduct; this elevation occurs because the withholding policy applies to "all other alleged offenses arising from or relating to the same incident(s)."[49]

During the JPP Subcommittee's site visits, counsel stated that the withholding policy had little, if any, negative impact on sexual assault case processing other than minor administrative delays attributed to scheduling difficulties inherent in meeting with a senior officer.[50]

On the other hand, site visit participants observed positive effects of the policy: an officer of an O-6 rank typically has more military justice experience than a lower-level commander and the policy has improved the public perception of the military's handling of sexual assault cases. In addition, lower-level commanders themselves "generally supported elevating the decision to a higher-level commander."[51]

On the basis of the foregoing, the JPP does not recommend any changes to the current DoD withholding policy.

B. TRIAL COUNSEL TRAINING AND EXPERIENCE

1. Statutory Task

The FY13 NDAA directed the JPP to assess trends in the training and experience levels of military trial counsel in adult sexual assault cases and the impact of those trends on the prosecution and adjudication of such cases.[52]

2. Assessment

In order to assess the training and experience of adult sexual assault prosecutors, the JPP issued RFIs to the Services in February and December 2016. The JPP also heard testimony on the training and experience of prosecutors at a public meeting on May 13, 2016, during which the Panel heard from leaders of the Service Judge Advocate General's (JAG) schools and members of the JAG Corps who litigate adult sexual assault crimes.[53] In addition, the JPP Subcommittee spoke with prosecutors about

48 Service Responses to JPP Request for Information 106 (Mar. 31, 2016).

49 Service Responses to JPP Request for Information 106 (Mar. 31, 2016); *see also* SecDef Withholding Memo, *supra* note 47. The JPP Requests for Information are available at http://jpp.whs.mil/ under "Requests for Information."

50 Subcommittee Short Report on Withholding, *supra* note 43.

51 *Id.*

52 FY13 NDAA, *supra* note 1, § 576(d)(2)(G). The training and experience of military defense counsel were assessed in the JPP Report on Defense Resources and Experience, *supra* note 39.

53 *See generally Transcript of JPP Public Meeting* (May 13, 2016).

their training and experience during site visits conducted during the summer of 2016 and reported this information to the JPP at a public meeting on March 10, 2017.[54]

The Services collaborate extensively on training.[55] In recent years, the number of specialized courses on sexual assault prosecutions has increased;[56] moreover, information about trying sexual assault cases has been incorporated in the Services' general advocacy courses.[57] Each Service also provides attorneys with liberal access to the specialized training on sexual assault prosecutions available to federal and state prosecutors.[58]

During the site visits, the Subcommittee observed that training programs for trial counsel seemed to be operating well.[59] However, the Subcommittee noted that while trial counsel are generally satisfied that they are receiving adequate and appropriate training, many remarked that the extensive training does not make up for their lack of in-court experience.[60]

Ms. Julia Hejazi, a highly qualified expert (HQE) and experienced civilian prosecutor for the Marine Corps, presented a different perspective regarding counsel training and experience at the May 2016 JPP public meeting. She testified that on the basis of her 16 years of prosecution experience and her 17 months as an HQE for the Marines, she believes that the military is successfully using training—including the experience gained from practical training exercises—to bridge the experience gap between military and civilian sexual assault prosecutors.[61]

In addition to training, each Service has developed units dedicated to the prosecution of sexual assault, led by prosecutors with specialized training and experience.[62] The organizational structures

54 *Transcript of JPP Public Meeting* 177 (Mar. 10, 2017) (testimony of Brigadier General James Schwenk, JPP Subcommittee Member); *see also* Subcommittee Short Report on Trial Counsel Training, *supra* note 45.

55 *See* Service Responses to JPP Request for Information 111, 112, 118, 121 (Mar. 31, 2016).

56 *See* Service Responses to JPP Request for Information 112, 120 (Mar. 31, 2016). *See generally Transcript of JPP Public Meeting* 11–131 (May 13, 2016); *see also* Policy Memorandum 16-01, The Office of the Judge Advocate General, U.S. Army, subject: Special Victim Prosecution Program (Aug 8, 2016) [hereinafter TJAG Policy Memorandum 16-01].

57 *See, e.g., Transcript of JPP Public Meeting* 34 (May 13, 2016) (testimony of Lieutenant Colonel Hanorah Tyer-Witek, U.S. Marine Corps, Executive Officer, Naval Justice School); *id.* at 22–23 (testimony of Colonel Kirk Davies, U.S. Air Force, former Commandant, The Judge Advocate General's School); *id.* at 113 (testimony of Lieutenant Colonel Bret Batdorff, U.S. Army, Chief, Trial Counsel Assistance Program). *See also* Service Responses to JPP Request for Information 111 (Mar. 31, 2016).

58 *See* Service Responses to JPP Request for Information 111, 112 (Mar. 31, 2016); *see also* Navy Response to JPP Request for Information 160 (Dec. 29, 2016); *see also Transcript of JPP Public Meeting* 122, 126–28 (May 13, 2016) (testimony of Major Jesse Schweig, U.S. Marine Corps, Officer in Charge, Trial Counsel Assistance Program); *id.*at 96 (testimony of Colonel Katherine Oler, U.S. Air Force, Chief, Government Trial and Appellate Counsel Division); *see also* Army SVP, Information Paper (Feb. 24, 2016), *available at* http://jpp.whs.mil/Public/docs/07-RFI/Set_6/Responses/RFI_Attachment_Q119_USA.pdf.

59 *Transcript of JPP Public Meeting* 185 (Mar. 10, 2017) (testimony of Brigadier General James Schwenk, JPP Subcommittee Member).

60 Subcommittee Short Report on Trial Counsel Training, *supra* note 45.

61 *Transcript of JPP Public Meeting* 128, 135–36 (May 13, 2016) (testimony of Ms. Julia Hejazi, U.S. Marine Corps, HQE, Trial Counsel Assistance Program).

62 *See* Service Responses to JPP Requests for Information 107-109, 111-112, 118-119 (Mar. 31, 2016); *see also* TJAG Policy Memorandum 16-01, *supra* note 56; *see also* Service Responses to JPP Request for Information 160(c) (Jan. 3, 2017); *see also* Service Responses to Response Systems Panel Request for Information 50 (Nov. 21, 2013); *see also Transcript of JPP Public Meeting* 99–106 (May 13, 2016) (testimony of Commander Michael Luken, U.S. Navy, Chief, Trial Counsel Assistance Program); *id.* at 111, 117-119, 147 (testimony of Lieutenant Colonel Bret Batdorff, U.S. Army, Chief Trial

have, in part, been designed and revised to help experienced prosecutors provide oversight and guidance to more junior prosecutors undertaking sexual assault cases, starting at the investigation stage.[63] However, according to some site visit participants speaking to the Subcommittee, in practice senior counsel sometimes get involved in a case just a few days before trial, leaving much of the trial preparation to be performed by junior counsel.[64]

The Army, Navy, and Marine Corps also have HQEs who assist in sexual assault prosecutions, as well as Trial Counsel Assistance Programs (TCAPs) that provide specialized training, case consultation, and prosecutor augmentation.[65] Lieutenant Colonel Bret Batdorff, former Chief of the Army's TCAP, testified about the type of assistance provided by HQEs, noting that the Army's civilian special victim litigation experts "are on the road, sitting behind the bar . . . helping [the military prosecutors] prep witnesses, interview witnesses, practice opening statements, and things like that."[66]

A recently enacted NDAA provision specifically addresses counsel training and experience. Section 542 of the FY17 NDAA requires the Service Secretaries to establish a system of military justice skill and experience identifiers to ensure that judge advocates with sufficient skills and experience in military justice are assigned to prosecute and defend cases and are assigned to develop less-experienced judge advocates.[67] The provision also requires the Service Secretaries to carry out a five-year pilot program to assess the feasibility and advisability of establishing a deliberate process of professional development in military justice for judge advocates.[68] The Army, Navy, and Marine Corps have implemented military

Counsel Assistance Program); *id.* at 87-99 (testimony of Colonel Katherine Oler, U.S. Air Force, Government Trial and Appellate Counsel Division); *see also* Marine Corps Bulletin 5800, Military Justice Requirements and Implementation Guidance (May 25, 2017) [hereinafter Marine Corps Bulletin 5800], *available at* http://www.marines.mil/Portals/59/Publications/MCBUL%205800%20(Justice).pdf?ver=2017-05-30-131345-063; *see also* email from Stephen McCleary (Jun. 21, 2017, 09:49 EST) (on file with the JPP).

63 *See* TJAG Policy Memorandum 16-01, *supra* note 56; *see also* Air Force Response to JPP Request for Information 109, 111, 113 (Mar. 31, 2016); *see also* Air Force and Navy Response to JPP Request for Information 160 (Dec. 29, 2016); *see also* Navy Response to Response Systems Panel Request for Information 50 (Nov. 21, 2013); *see also Transcript of JPP Public Meeting* 86–99 (May 13, 2016) (testimony of Colonel Katherine Oler, U.S. Air Force, Chief, Government Trial and Appellate Counsel Division); *see also Transcript of JPP Public Meeting* 275–83 (Apr. 8, 2016) (testimony of Lieutenant Commander Ryan Stormer, U.S. Navy, Deputy Chief, Trial Counsel Assistance Program); *see also* Marine Corps Bulletin 5800, *supra* note 62; *see also* email from Stephen McCleary (Jun. 21, 2017, 09:49 EST) (on file with the JPP).

64 Subcommittee Short Report on Trial Counsel Training, *supra* note 45.

65 Marine Corps Bulletin 5800, *supra* note 62; *see also* Services Responses to JPP Request for Information 109, 121 (Mar. 31, 2016); *see also Transcript of JPP Public Meeting* 305 (Apr. 8, 2016) (testimony of Lieutenant Commander Ryan Stormer, U.S. Navy, Deputy Chief, Trial Counsel Assistance Program); *id.* at 305 (testimony of Major Jesse Schweig, U.S. Marine Corps, Officer in Charge, Trial Counsel Assistance Program); *id.* at 305–06 (testimony of Lieutenant Colonel Bret Batdorff, U.S. Army, Chief, Trial Counsel Assistance Program); *see also Transcript of JPP Public Meeting* 128–34 (May 13, 2016) (testimony of Ms. Julia Hejazi, U.S. Marine Corps, HQE, Trial Counsel Assistance Program); *id.* at 142 (testimony of Commander Michael Luken, U.S. Navy, Chief, Trial Counsel Assistance Program); *id.* at 147 (testimony of Lieutenant Colonel Bret Batdorff, U.S. Army, Chief, Trial Counsel Assistance Program). The Air Force does not have TCAP or HQE capabilities similar to the other Services for the prosecution of special victim cases. *See* Air Force Response to Requests for Information 119–21 (Mar. 31, 2016). Instead, the Air Force provides Senior Trial Counsel with reach-back capabilities to consult with the U.S. Air Force Government Trial and Appellate Counsel Division, consisting of experienced military and civilian litigators. *Transcript of JPP Public Meeting* 143–46 (May 13, 2016) (testimony of Colonel Katherine Oler, U.S. Air Force, Chief, Government Trial and Appellate Counsel Division).

66 *Transcript of JPP Public Meeting* 109 (May 13, 2016) (testimony of Lieutenant Colonel Bret Batdorff, U.S. Army, Chief, Trial Counsel Assistance Program).

67 FY17 NDAA, *supra* note 17, § 542.

68 *Id.* § 542(c).

justice skill and experience identifier systems,[69] and in all Services the selection of prosecutors to lead sexual assault prosecutions is based on demonstrated military justice skill and experience.[70]

In light of Congress's actions, the JPP makes no further recommendations at this time.

C. SPECIAL VICTIM INVESTIGATION AND PROSECUTION (SVIP) CAPABILITY PROGRAM

1. Statutory Task

In the FY13 NDAA, Congress tasked the JPP to "[m]onitor trends in the development, utilization and effectiveness of the special victim capability."[71] The term "special victim capability" is defined by Congress as a "distinct, recognizable group of appropriately skilled professionals who work collaboratively" to achieve the stated purposes of "(1) investigating and prosecuting allegations of child abuse, serious domestic violence, or sexual offenses; and (2) providing support for the victims of such offenses."[72] Congress required that this capability include specially trained and selected military investigators, judge advocates, victim witness assistance personnel, and administrative paralegal support personnel.[73]

In compliance with section 573, DoD published special victim investigation and prosecution (SVIP) capability guidance in 2014.[74]

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69 Service Responses to Response Systems Panel Request for Information 76 (Nov. 21, 2013); *see also* Navy Response to RSP Request for Information 50 (Nov. 21, 2013); *see also Transcript of JPP Public Meeting* 17 (May 13, 2016) (testimony of Brigadier General Charles Pede, U.S. Army, Commander/Commandant, Judge Advocate General's Legal Center and School); *id.* at 103 (testimony of Commander Michael Luken, U.S. Navy, Director, Trial Counsel Assistance Program); *id.* at 122 (testimony of Major Jesse Schweig, U.S. Marine Corps, Officer in Charge, Trial Counsel Assistance Program). While the Air Force does not have a military justice skill and experience identifier system, select litigators specialize in military justice litigation and acquire extensive experience. *Transcript of JPP Public Meeting* 53–54 (May 13, 2016) (testimony of Colonel Kirk Davies, U.S. Air Force, Commandant, The Judge Advocate General's School).

70 *See* Service Responses to JPP Requests for Information 107-109, 111-112, 118-119 (Mar. 31, 2016); *see also* TJAG Policy Memorandum 16-01, *supra* note 56; *see also* Service Responses to JPP Request for Information 160(c) (Jan. 3, 2017); *see also* Service Responses to Response Systems Panel Request for Information 50 (Nov. 21, 2013); *see also Transcript of JPP Public Meeting* 99–106 (May 13, 2016) (testimony of Commander Michael Luken, U.S. Navy, Chief, Trial Counsel Assistance Program); *id.* at 111, 117-119, 147 (testimony of Lieutenant Colonel Bret Batdorff, U.S. Army, Chief, Trial Counsel Assistance Program); *id.* at 87-99 (testimony of Colonel Katherine Oler, U.S. Air Force, Government Trial and Appellate Counsel Division); *see also* MARINE CORPS BULLETIN 5800, *supra* note 62; *see also* email from Stephen McCleary (Jun. 21, 2017, 09:49 EST) (on file with the JPP).

71 FY13 NDAA, *supra* note 1, § 576.

72 *Id.* § 573.

73 *Id.*

74 U.S. DEP'T OF DEF. DIRECTIVE-TYPE MEMORANDUM (DTM) 14-002, THE ESTABLISHMENT OF SPECIAL VICTIM CAPABILITY (SVC) WITHIN THE MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS (Feb. 11, 2014); U.S. DEP'T OF DEF. DIRECTIVE-TYPE MEMORANDUM (DTM) 14-003, DOD IMPLEMENTATION OF SPECIAL VICTIM CAPABILITY (SVC) PROSECUTION AND LEGAL SUPPORT (Feb. 12, 2014) (Change 4, April 3, 2017). DTM 14-002 was superseded by U.S. DEP'T OF DEF. INSTR. 5505.19, ESTABLISHMENT OF SPECIAL VICTIM INVESTIGATION AND PROSECUTION (SVIP) CAPABILITY WITHIN THE MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS (MCIOS) (Feb. 3, 2015) (Change 2, Mar. 23, 2017), and U.S. DEP'T OF DEF. INSTR. 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE (Mar. 22, 2017).

2. Assessment

In order to monitor trends in the development, utilization, and effectiveness of the SVIP capability, the JPP sent an RFI to the military Services in February 2016.[75] The JPP also received testimony on the Services' SVIP capability at a public meeting on April 8, 2016, during which the Panel heard from MCIO representatives, military prosecutors, and victim witness liaison (VWL) personnel from each Service.[76] At another public meeting, on May 13, 2016, the JPP received additional testimony on the Services' SVIP capability, specifically relating to the prosecution of sexual assault offenses.[77]

In addition, the JPP Subcommittee, at the direction of the JPP, spoke with investigators, prosecutors, and VWL personnel about SVIP capability during the site visits.[78] Drawing on information received at the site visits, the JPP Subcommittee reported its findings to the JPP on trial counsel training and experience on March 10, 2017,[79] and on sexual assault investigations in the military on February 24, 2017.[80]

All Services have developed a capability that uses investigators specially trained in sexual assault offense investigations to investigate allegations of sexual assault and to collaborate with assigned SVIP personnel from other disciplines.[81] As discussed above, all Services also have prosecutors who are trained and experienced in sexual assault prosecutions to assess and, if appropriate, prosecute allegations of sexual assault.[82] In addition, the Services have specially selected and trained paralegals

75 JPP Requests for Information 107–117 (Mar. 31, 2016).

76 *See generally Transcript of JPP Public Meeting* 209–362 (Apr. 8, 2016).

77 *See generally Transcript of JPP Public Meeting* 85–163 (May 13, 2016).

78 The JPP Subcommittee Site Visit Reports are available at http://jpp.whs.mil/ under "Reports/Subcommittee Site Visits."

79 *Transcript of JPP Public Meeting* 11–84 (March 10, 2017). *See also* Subcommittee Short Report on Trial Counsel Training, *supra* note 45.

80 *Transcript of JPP Public Meeting* 7–61 (Feb. 24, 2017) (testimony of Ms. Lisa Friel, JPP Subcommittee Member). *See also* Subcommittee of the Judicial Proceedings Panel Report on Sexual Assault Investigations in the Military (Feb. 2017), [hereinafter JPP Subcommittee Report on Investigations], *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Investigations_Final_20170224.pdf.

81 U.S. Dep't of Def. Instr. 5505.19, Establishment of Special Victim Investigation and Prosecution (SVIP) Capability Within the Military Criminal Investigative Organizations (MCIOs) (Feb. 3, 2015) (Change 2, Mar. 23, 2017); *see also* Service Responses to JPP Request for Information 104, 107-109, 111 (Mar. 31, 2016); *see also* U.S. Coast Guard Response to JPP Request for Information 109 (Mar. 31, 2016) (noting that the Coast Guard is building proficiency and capability in the prosecution and investigation of sexual assault cases even though section 573 of the FY13 NDAA does not expressly apply to the Coast Guard or the Department of Homeland Security).

82 *See* Service Responses to JPP Requests for Information 107-109, 111-112, 118-119 (Mar. 31, 2016); *see also* TJAG Policy Memorandum 16-01, *supra* note 56; *see also* Service Responses to JPP Request for Information 160(c) (Jan. 3, 2017); *see also* Service Responses to Response Systems Panel Request for Information 50 (Nov. 21, 2013); *see also Transcript of JPP Public Meeting* 99–106 (May 13, 2016) (testimony of Commander Michael Luken, U.S. Navy, Chief, Trial Counsel Assistance Program); *id.* at 111, 117-119, 147 (testimony of Lieutenant Colonel Bret Batdorff, U.S. Army, Chief, Trial Counsel Assistance Program); *id.* at 87-99 (testimony of Colonel Katherine Oler, U.S. Air Force, Government Trial and Appellate Counsel Division); *see also* Marine Corps Bulletin 5800, *supra* note 62; *see also* email from Stephen McCleary (Jun. 21, 2017, 09:49 EST) (on file with the JPP).

who provide support both to special victim prosecutors and to victims.[83] To varying degrees, the Services also have specially trained victim witness liaisons to assist sexual assault victims.[84]

Lieutenant Colonel Batdorff spoke positively about the development of the SVIP capability, commending in particular the quality of the investigations. He noted that "[h]aving investigators dedicated solely to sexual assault cases has allowed the agents to hone their skills and do more complete quality work."[85]

Several presenters at the JPP's April 2016 meeting observed that the SVIP capability has improved communication and coordination between the investigators and the prosecution teams.[86] During site visits, prosecutors and investigators similarly described improved working relationships and agreed that the prosecutors are involved in investigations earlier now than they had been in the past.[87] However, both prosecutors and investigators expressed concern about issues that arise once a case has been closed by investigators but before the prosecutor has completed preparation for trial.[88] Prosecutors asserted that the investigators often decline to follow up on important leads, while investigators asserted that the requested additional investigation is unnecessary or is difficult for an already overburdened and understaffed investigative unit to execute.[89] The Marine Corps is the only Service that has added investigators to its Complex Trial Team to complete any additional investigation needed for the prosecution effort.[90]

Finally, the Services have developed specialized, collaborative training as part of the SVIP capability.[91] The joint training of investigators, prosecutors, victim witness liaisons, and paralegals has played a critical role in building relationships among the SVIP capability team members.

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83 Service Responses to JPP Request for Information 107, 111(c) (Mar. 31, 2016); *see also* MARINE CORPS BULLETIN 5800, *supra* note 62; *see also* email from Stephen McCleary (Jun. 21, 2017, 09:49 EST) (on file with the JPP); see also U.S. Army Information Paper, Trial Counsel Assistance Program, subject: Army Special Victim Non-Commissioned Officer Paralegals (Mar. 15, 2016).

84 Service Responses to JPP Request for Information 107, 111 (Mar. 31, 2016); *see also* MARINE CORPS BULLETIN 5800, *supra* note 62; *see also* MARINE CORPS ORDER 5800.14, VICTIM-WITNESS ASSISTANCE PROGRAM (Mar. 15, 2013); *see also Transcript of JPP Public Meeting* 346 (April 8, 2016) (testimony of Ms. Christa Thompson, U.S. Army Special Victim Witness Liaison Program Manager); *id.* at 322–25; id. at 352; *id.* at 346, 355 (testimony of Mr. William Yables, U.S. Marine Corps Paralegal Specialist, Installation Victim Witness Liaison Officer); *id.* at 331-335 (testimony of Mr. John Hartsell, U.S. Air Force, Associate Chief, Military Justice Division).

85 *Transcript of JPP Public Meeting* 273 (Apr. 8, 2016) (testimony of Lieutenant Colonel Bret Batdorff, U.S. Army, Chief, Trial Counsel Assistance Program).

86 *See generally Transcript of JPP Public Meeting* 214 (Apr. 8, 2016) (testimony of Mr. Guy Surian, U.S. Army, Deputy Chief of Investigative Operations, Investigative Policy and Criminal Intelligence); *id.* at 216–17 (testimony of Mr. Jeremy Gauthier, U.S. Navy, Deputy Assistant Director, Criminal Investigations and Operations Directorate); *id.* at 271–75 (testimony of Lieutenant Colonel Bret Batdorff, U.S. Army, Chief, Trial Counsel Assistance Program); *see also* Service Responses to JPP Requests for Information 108, 109, and 113 (Mar. 31, 2016).

87 JPP Subcommittee Site Visit Reports, *supra* note 78.

88 *Id.*

89 JPP SUBCOMMITTEE REPORT ON INVESTIGATIONS, *supra* note 80.

90 *Transcript of JPP Public Meeting* 285 (Apr. 8, 2016) (testimony of Major Jesse Schweig, U.S. Marine Corps, Officer in Charge, Trial Counsel Assistance Program). The Complex Trial Team consists of the special victim prosecutor (SVP), the regional trial investigator, the civilian HQEs, and specially trained legal administrative support specialists.

91 *Transcript of JPP Public Meeting* 279–80 (Apr. 8, 2016) (testimony of Lieutenant Commander Ryan Stormer, U.S. Navy, Deputy Chief, Trial Counsel Assistance Program); *id.* at 113–19 (testimony of Lieutenant Colonel Bret Batdorff, U.S. Army, Chief, Trial Counsel Assistance Program); *id.* at 101–06 (testimony of Commander Michael Luken, U.S. Navy, Director, Trial Counsel Assistance Program); *id.* at 124 (testimony of Major Jesse Schweig, U.S. Marine Corps, Officer

D. MILITARY RULE OF EVIDENCE 412—ADMISSION OF EVIDENCE OF A VICTIM'S SEXUAL BEHAVIOR OR PREDISPOSITION

1. Statutory Tasks

The FY13 NDAA directed the JPP to carry out two tasks relating to M.R.E. 412. First, the Panel was asked to review and assess those instances in which prior sexual conduct of the alleged victim was considered in an Article 32 hearing, and any instances in which prior sexual conduct was determined to be inadmissible.[92] Second, it was to review those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in courts-martial and assess what impact that evidence had on the case.[93]

M.R.E. 412, which was promulgated in March 1980 with an effective date of September 1, 1980,[94] establishes a rape shield provision that generally bars a victim's sexual behavior or predisposition from being admitted as evidence. The rule contains three exceptions, including one that would allow evidence to be admitted if the exclusion of such evidence would violate the constitutional rights of the accused.[95]

In Executive Order 13696, effective June 17, 2015, the President amended R.C.M. 405, which governs Article 32 preliminary hearings, to prohibit application of the M.R.E. 412 "constitutionally required" evidence exception at preliminary hearings.[96] However, the executive order did not amend the text of M.R.E. 412 itself, and the "constitutionally required" evidence exception continues to apply at courts-martial.

In its *Initial Report*, released in February 2015, the JPP reviewed and assessed M.R.E. 412, but noted that the pending change to Article 32 practice, along with the application of M.R.E. 412 by military judges at courts-martial, should be monitored.[97]

2. Assessment

In order to assess the application of M.R.E. 412 by preliminary hearing officers (PHOs) at Article 32 preliminary hearings and by military judges at courts-martial, the JPP received testimony from former trial judges, trial counsel, defense counsel, and SVCs/VLCs from each Service at a public meeting on

in Charge, Trial Counsel Assistance Program); *see also* Service Responses to JPP Request for Information 111, 112, 113 (Mar. 31, 2016).

92 FY13 NDAA, *supra* note 1, § 576(d)(2)(E).

93 *Id.* § 576(d)(2)(F).

94 Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation* 11 n.20 (1990), *available at* http://scholarship.law.wm.edu/facpubs/638/.

95 The other two exceptions to M.R.E. 412 state that the following evidence is admissible: "evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; [and] evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.) [hereinafter 2016 MCM], M.R E. 412(b)(1)(A) and (B).

96 Exec. Order No. 13696, 80 Fed. Reg. 35,781 (June 17, 2015).

97 JPP INITIAL REPORT, *supra* note 10, at 106–07.

January 6, 2017.[98] In addition, the JPP Subcommittee assessed litigation practice under M.R.E. 412 during site visits and reported its findings to the JPP on March 10, 2017.[99]

These presenters provided insight into the status of preliminary hearing practice approximately 18 months after the "constitutionally required" evidence exception to M.R.E. 412 at such hearings had been eliminated. They testified that the PHOs are well-trained and do not consider evidence that does not fit within the remaining two exceptions.[100] While SVCs/VLCs praised the elimination of the "constitutionally required" exception as benefiting sexual assault victims, defense counsel expressed fear that the convening authority is no longer informed of valuable evidence regarding credibility that may be admitted at courts-martial and cannot be factored into a referral decision.[101]

The presenters were generally in agreement that military judges are well-trained in applying M.R.E. 412 to the facts and narrowly tailor admissible evidence to the relevant purpose at courts-martial.[102] The Subcommittee similarly observed that most counsel are satisfied with both the rule and the procedures used by the military judges.[103]

E. DISCLOSURE AND ADMISSION OF MENTAL HEALTH RECORDS UNDER MILITARY RULE OF EVIDENCE 513

1. Statutory Task

The FY15 NDAA directed the JPP to review and assess the use by the accused of any mental health records of the victim of an offense under the UCMJ, both during the Article 32 preliminary hearing and during court-martial proceedings, as compared to the use of similar records in civilian criminal legal proceedings.[104]

The FY15 NDAA also significantly revised M.R.E. 513—the psychotherapist-patient privilege—in two major ways. First, the NDAA increased the burden on the party seeking the production or admission

98 *See generally Transcript of JPP Public Meeting* (Jan. 6, 2017).

99 *Transcript of JPP Public Meeting* 181 (Mar. 10, 2017) (testimony of Brigadier General James Schwenk, JPP Subcommittee Member). *See also* SUBCOMMITTEE SHORT REPORT ON M.R.E.S 412 AND 513, *supra* note 44. *See also* JPP Subcommittee Site Visit Reports, *supra* note 78.

100 *Transcript of JPP Public Meeting* 294–95 (Jan. 6, 2017) (testimony of Lieutenant Commander Elizabeth Hutton, U.S. Coast Guard, Special Victims' Counsel); *id.* at 159–60 (testimony of Major Ryan Reed, U.S. Air Force, Senior Trial Counsel, Special Victims' Unit); *id.* at 202–03 (testimony of Major James Argentina Jr., U.S. Marine Corps, Senior Defense Counsel); *id.* at 106–08 (testimony of Major Adam Workman, U.S. Marine Corps, Legal Services Support Team).

101 *Transcript of JPP Public Meeting* 173–77 (Jan. 6, 2017) (testimony of Major Benjamin Henley, U.S. Air Force, Senior Defense Counsel); *id.* at 184–85 (testimony of Major Marcia Reyes-Steward, U.S. Army, Senior Defense Counsel); *id.* at 202–03, 238 (testimony of Major James Argentina Jr., U.S. Marine Corps, Senior Defense Counsel); *see also* SUBCOMMITTEE SHORT REPORT ON M.R.E.S 412 AND 513, *supra* note 44.

102 *Transcript of JPP Public Meeting* 283 (Jan. 6, 2017) (testimony of Major Aran Walsh, U.S. Marine Corps, Regional Victims' Legal Counsel); *id.* at 307 (testimony of Lieutenant Commander James Toohey, U.S. Navy, Victims' Legal Counsel); *id.* at 94 (testimony of Lieutenant Commander Geralyn van de Krol, U.S. Coast Guard, Branch Chief, Trial Services, Coast Guard Legal Services Command); *id.* at 102–03 (testimony of Lieutenant Commander Ben Robertson, U.S. Navy, Senior Trial Counsel); *id.* at 109–10 (testimony of Major Adam Workman, U.S. Marine Corps, Legal Support Team).

103 *Transcript of JPP Public Meeting* 181 (Mar. 10, 2017) (testimony of Brigadier General James Schwenk, JPP Subcommittee Member).

104 FY15 NDAA, *supra* note 5, § 545.

of records protected by M.R.E. 513. Under the new test, a military judge may conduct an *in camera* review of records or communications only if he or she finds by a preponderance of the evidence that the moving party has shown that (1) there exists "a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege," (2) "the requested information meets one of the enumerated exceptions to the privilege," (3) "the information sought is not merely cumulative of other information available," and (4) "the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources."[105] This change went into effect on June 17, 2015.[106]

Second, the FY15 NDAA eliminated the enumerated "constitutionally required" exception to M.R.E. 513 at both the Article 32 hearing and at courts-martial.[107]

The JPP's *Initial Report*, dated February 2015, reviewed the origins of the military psychotherapist-patient privilege and reviewed application of the rule then in effect. The JPP noted the extensive changes to M.R.E. 513 made in the FY15 NDAA and determined to monitor practice in light of those changes.[108]

2. Assessment

In order to assess the effect of the revised rules on mental health evidence, the JPP received testimony from former trial judges, trial counsel, defense counsel, and SVCs/VLCs from each Service at a public meeting in January 2017.[109] These presenters provided insight into preliminary hearing and court-martial practice approximately 18 months after the June 2015 changes to M.R.E. 513 were implemented. In addition, during its site visits the JPP Subcommittee asked trial counsel, defense counsel, and SVCs/VLCs about Article 32 and courts-martial practice in light of the changes to M.R.E. 513. The JPP Subcommittee reported its findings to the JPP on March 10, 2017.[110]

a. Admissibility of M.R.E. 513 Evidence

The presenters at the January 2017 JPP meeting generally agreed that under current practice, M.R.E. 513 evidence is rarely admitted at either Article 32 hearings or courts-martial. First, the presenters observed that M.R.E. 513 evidence is infrequently sought at Article 32 hearings, because the PHO does not have the authority to order that mental health records be produced.[111] Second, they agreed that while M.R.E. 513 evidence is frequently sought at courts-martial, mental health records are rarely produced for even an *in camera* review, because the requisite factual basis—a demonstration that the records are likely to contain admissible evidence—is difficult to meet.[112] The Subcommittee heard

105 *Id.* § 537.

106 Exec. Order No. 13696, 80 Fed. Reg. 35,781 (June 17, 2015).

107 FY15 NDAA, *supra* note 5, § 537.

108 JPP Initial Report, *supra* note 10, at 108–23.

109 *See generally Transcript of JPP Public Meeting* (Jan. 6, 2017).

110 *Transcript of JPP Public Meeting* 181 (Mar. 10, 2017) (testimony of Brigadier General James Schwenk, JPP Subcommittee Member). *See also* Subcommittee Short Report on M.R.E.s 412 and 513, *supra* note 44.

111 *Transcript of JPP Public Meeting* 308–09 (Jan. 6, 2017) (testimony of Lieutenant Commander James Toohey, U.S. Navy, Victims' Legal Counsel); *id.* at 177 (testimony of Major Benjamin Henley, U.S. Air Force, Senior Defense Counsel); *id.* at 318–19 (testimony of Captain September Foy, U.S. Air Force, Special Victims' Counsel).

112 *Transcript of JPP Public Meeting* 287–88 (Jan. 6, 2017) (testimony of Major Aran Walsh, U.S. Marine Corps, Regional

similar comments from defense counsel about the difficulty of obtaining an *in camera* review of mental health records at courts-martial.[113]

However, the Subcommittee heard from many trial counsel and SVCs/VLCs who view the changes to M.R.E. 513 positively.[114] They stated that "the rule now works as was intended—to keep mental health records out of the courtroom."[115] Previously, trial counsel would typically obtain mental health records prior to the military judge's production order to facilitate the military judge's anticipated, and almost routine, *in camera* review of the records.[116]

b. Elimination of the "Constitutionally Required" Exception

Several presenters at the January 2017 meeting also noted the lack of uniformity in how military judges are interpreting the elimination of the "constitutionally required" exception to M.R.E. 513. Since this change, judges have ruled inconsistently on whether the Constitution requires the admission of evidence bearing on credibility, perception, ability to recall, or motive.[117] Counsel had previously used this enumerated exception to admit such evidence. Several former military judges asserted that some judges are ordering that evidence be produced but not identifying the particular enumerated exception on which such an order is based; some judges are citing constitutional due process or confrontation as a basis for production; and some are excluding any evidence that does not fit within an enumerated exception, without addressing constitutional implications.[118]

Trial counsel, defense counsel, and SVCs/VLCs on the site visits confirmed this observation, noting that following the removal of the "constitutionally required" exception, "trial judges have taken different positions on whether M.R.E. 513 must be read in light of the Constitution." Faced with inconsistent judicial interpretations, counsel are waiting for appellate guidance on this issue.[119] Though two Service

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Victims' Legal Counsel); *id.* at 119–20 (testimony of Captain Brad Dixon, U.S. Army, Trial Counsel Assistance Program Training Officer); *id.* at 309–10 (testimony of Lieutenant Commander James Toohey, U.S. Navy, Victims' Legal Counsel); *id.* at 20 (testimony of Lieutenant Colonel (Retired) Wendy Sherman, U.S. Air Force, former military judge); *id.* at 36–37 (testimony of Lieutenant Colonel (Retired) Wade Faulkner, U.S. Army, former military trial judge).

113 Subcommittee Short Report on M.R.E.s 412 and 513, *supra* note 44.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Transcript of JPP Public Meeting* 271 (Jan. 6, 2017) (testimony of Lieutenant Commander Rachel Trest, U.S. Navy, Senior Defense Counsel, explaining that the ambiguity stems from removing the "constitutionally required" exception without explaining the intent behind the removal); *id.* at 119 (testimony of Captain Brad Dixon, U.S. Army, Trial Counsel Assistance Program Training Officer); *id.* at 161 (testimony of Major Ryan Reed, U.S. Air Force, Senior Trial Counsel, Special Victims' Unit); *id.* at 228–29 (testimony of Major James Argentina Jr., U.S. Marine Corps, Senior Defense Counsel).

118 *Transcript of JPP Public Meeting* 36–38 (Jan. 6, 2017) (testimony of Lieutenant Colonel (Retired) Wade Faulkner) (stating "many of the judges have taken the newly written 513 and they are applying it in the same way as other well-established privileges like attorney-client and priest-penitent . . . there are some judges that are reluctant to treat the 513 privilege the same way . . . ."); *id.* at 64–65 (testimony of Commander Mike Luken, U.S. Navy, former military trial judge); *id.* at 55 (testimony of Commander Cassie Kitchen, U.S. Coast Guard, former military trial judge); *id.* at 26–28 (testimony of Lieutenant Colonel (Retired) Wendy Sherman, U.S. Air Force, former military judge).

119 Subcommittee Short Report on M.R.E.s 412 and 513, *supra* note 44; *see also Transcript of JPP Public Meeting* 184 (Mar. 10, 2017) (testimony of Brigadier General James Schwenk, JPP Subcommittee Member).

Courts of Criminal Appeals have recently reviewed the effect of the removal of the "constitutionally required" exception from M.R.E. 513,[120] CAAF has yet to rule on this issue.

c. Scope of M.R.E. 513 Privilege

Another issue raised by several presenters at the January public meeting concerned the scope of the M.R.E. 513 privilege. M.R.E. 513 protects "confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." However, the text of the rule does not address whether "confidential communication" includes the psychiatric diagnosis, the medications prescribed and the duration of those prescriptions, the type of therapies used, and the resolution of the diagnosed psychiatric condition.[121] Several presenters noted inconsistencies in the interpretation of what falls under the umbrella of "confidential communication;" they recommended that the rule be clarified by Congress or the President.[122]

A recent Coast Guard case illustrates the uncertainty surrounding the scope of the M.R.E. 513 privilege. In *H.V. v. Kitchen*, the Coast Guard Court of Criminal Appeals (CGCCA) reversed a military judge's order to disclose mental health information that the military judge determined was not privileged under M.R.E. 513, including dates treated, the identity of the provider, the psychiatric diagnosis, medications prescribed and the duration of those prescriptions, the types of therapies used, and the resolution of the diagnosed psychiatric condition. In a 2–1 decision, the CGCCA held that all the above mental health information was privileged under M.R.E. 513, except for the dates of treatment, the duration of the appointments, and the identity of the provider.[123] Although the CGCCA opinion provides guidance to the other military Services, it is not binding precedent on them.

120 *J.M. v. Payton-O'Brien*, 2017 CCA LEXIS 424 (N-M. Ct. Crim. App. June 28, 2017) (holding military judges cannot order production or release of M.R.E. 513 privileged communications unless an enumerated exception applies; however, military judges can protect the constitutional rights of an accused by ordering remedial measures necessary to "guarantee a meaningful opportunity to present a complete defense."); *L.K. v. Acosta*, 76 M.J. 611 (A. Ct. Crim. App. May 24, 2017) (noting in dicta that regardless of the language of M.R.E. 513, "the reach of the constitutional exception is the same today as it was prior to the deletion of the constitutional exception pursuant to NDAA 2015. Under our constitutional hierarchy, a federal statute cannot bar the 'admission or disclosure' of a communication that is 'constitutionally required.'").

121 2016 MCM, *supra* note 95, M.R.E. 513(a).

122 *Transcript of JPP Public Meeting* 48–49 (Jan. 6, 2017) (testimony of Lieutenant Colonel (Retired) Elizabeth Harvey, U.S. Marine Corps, former military trial judge); *id.* at 63 (testimony of Commander Mike Luken, U.S. Navy, former military trial judge); *id.* at 302–03 (testimony of Lieutenant Commander Elizabeth Hutton, U.S. Coast Guard, Special Victims' Counsel); *id.* at 309, 312–14 (testimony of Lieutenant Commander James Toohey, U.S. Navy, Victims' Legal Counsel); *id.* at 195, 255 (testimony of Major James Argentina Jr., U.S. Marine Corps, Senior Defense Counsel).

123 *H.V. v. Kitchen*, 75 M.J. 717 (C.G. Ct. Crim. App. July 8, 2016) (Bruce, J., dissenting). The CAAF granted review, inter alia, of the issue concerning the scope of M.R.E. 513 but determined it lacked jurisdiction over the case; therefore, it did not rule on the scope of confidential communications. *Randolph v. HV*, 76 M.J. 27 (C.A.A.F. 2017). The JPP recommended that specific jurisdiction be granted to CAAF to hear a victim's appeal if a Service Court of Criminal Appeals denies the victim's petition for a writ of mandamus under Article 6b. Recommendation 46, JPP Report on Appellate Rights, *supra* note 40.

III. Issues Not Assessed by the Judicial Proceedings Panel Owing to Subsequent Regulatory and Legislative Changes

The JPP was assigned four issues—two by Congress, and two by its predecessor panel, the RSP—that it did not assess because of changes in regulations and legislation. Those four issues are discussed in this section.

A. MANDATORY MINIMUM SENTENCES

In Section 1731(b)(1)(C) of the FY14 NDAA, Congress directed the JPP to assess the implementation and effects of the mandatory minimum sentences established by Article 56(b) of the UCMJ, which requires that persons found guilty of certain sex offenses receive, at a minimum, dismissal or dishonorable discharge.[124] Congress also tasked the JPP to assess the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under the UCMJ.[125]

In its 2015 report, the Military Justice Review Group (MJRG)—a working group established by the Secretary of Defense to conduct a comprehensive review of the UCMJ—recommended a revision to Article 56, UCMJ (*Sentencing*). The proposal would have replaced the current sentencing process with a system based on published standards developed by a new Military Sentencing Parameters and Criteria Board. That board would collect and analyze sentencing data, use those data to determine appropriate sentencing parameters and criteria for specific offenses, propose them for approval by the President, and issue other sentencing policy guidance.[126]

Under the MJRG proposal, once sentencing parameters and criteria took effect, they would replace the mandatory punitive discharge provisions in Article 56(b), eliminating "a current incongruity in the system" whereby designated sex offenses result in mandatory discharge, but other serious crimes such as murder do not.[127]

Congress amended Article 56, UCMJ (*Sentencing*). However, it did not adopt the MJRG's proposal for determining sentencing parameters and criteria for all offenses, nor did it alter the current mandatory punitive discharge provisions for certain sexual assault offenses.[128]

In light of the MJRG's recommendations and the subsequent action taken by Congress in the Military Justice Act of 2016, the JPP did not conduct an assessment of mandatory minimum sentences.

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124 FY14 NDAA, *supra* note 5, §§ 1731(b)(1)(C), 1705.

125 *Id.* § 1731(b)(1)(C).

126 Report of the Military Justice Review Group, Part 1: UCMJ Recommendations 527 (Dec. 2015), *available at* http://ogc.osd.mil/images/report_part1.pdf.

127 *Id.* at 514.

128 *See* FY17 NDAA, *supra* note 17, § 5301.

B. DEPARTMENT OF DEFENSE SAFE HELPLINE PRIVILEGE

Section 545(a)(2) of the FY15 NDAA tasked the JPP with reviewing and assessing the establishment of a privilege under the M.R.E.s against the disclosure of communications between (1) users of the DoD Safe Helpline and personnel staffing it and (2) users of the DoD Safe HelpRoom and personnel staffing it.[129]

On June 17, 2015, the President issued Executive Order 13696, which established a privilege for confidential communications with DoD Safe Helpline staff. The executive order amended M.R.E. 514(a) to state: "A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between . . . the alleged victim and Department of Defense Safe Helpline staff, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating advice or assistance to the alleged victim."[130]

In light of the executive order, the JPP did not conduct a review and assessment or make recommendations on the Safe Helpline privilege.

C. DEPOSITIONS

In its report issued in June 2014, the RSP recommended that the JPP assess the use of depositions in light of changes to the Article 32 proceeding, and determine what, if any, changes to the deposition process should be recommended, including whether military judges should serve as deposition officers.[131]

Congress subsequently enacted section 532 of the FY15 NDAA, requiring that a party requesting a deposition demonstrate that "due to exceptional circumstances, it is in the interest of justice" to take a deposition. Section 532 also provided that the convening authority may designate commissioned officers as counsel.[132]

In 2016, as part of the Military Justice Act of 2016, Congress amended Article 49, UCMJ (*Depositions*), to codify and expand the FY15 NDAA provision. The amendments included a requirement that deposition officers be judge advocates "whenever practicable."[133]

In light of the provisions in the FY15 NDAA and the Military Justice Act of 2016, the JPP did not conduct further assessment nor make recommendations on the issue of depositions.

129 FY15 NDAA, *supra* note 5, § 545(a)(2).

130 Exec. Order No. 13696, 80 Fed. Reg. 35,781 (June 17, 2015).

131 RSP Report, *supra* note 6, at 48.

132 FY15 NDAA, *supra* note 5, § 532.

133 *Id.* § 5231.

D. PLEA BARGAINING

The RSP also recommended that the JPP study whether the military plea bargaining process should be modified.[134]

In the Military Justice Act of 2016, Congress enacted section 5237, creating a new Article 53a, UCMJ (*Plea agreements*). This article provided basic rules for (1) the construction and negotiation of plea agreements concerning the charges, the sentence, or both; (2) the military judge's determination of whether to accept a proposed plea agreement; and (3) the entrance of the convening authority and the accused into binding agreements regarding the sentence that may be adjudged.[135]

In light of the provisions in the Military Justice Act of 2016, the JPP did not conduct a further assessment or make recommendations on the issue of plea bargaining.

134 RSP Report, *supra* note 6, at 49.

135 FY17 NDAA, *supra* note 17, § 5237.

IV. Recommendations to the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)

The JPP made the following eight recommendations to the DAC-IPAD:

- *Judicial Proceedings Panel Report on Sexual Assault Investigations in the Military* (September 2017)

  Recommendation 47: "In order to ensure that MCIOs can focus investigative resources on the most serious sexual assault cases, the advisory committee that follows the JPP, the DAC-IPAD, monitor the effects of the DoD policy that allows Service law enforcement agencies to assist the MCIOs with sexual assault investigations, and make findings and recommendations to the Secretary of Defense as it deems appropriate."[136]

- *Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015* (September 2017)

  Recommendation 54: "The successor federal advisory committee to the JPP, the DAC-IPAD, should consider continuing to analyze adult-victim sexual assault court-martial data on an annual basis as the JPP has done, and should consider analyzing the following patterns that the JPP discovered in its analysis of fiscal year 2015 court-martial data:

  a. Cases involving military victims tend to have fewer punitive outcomes than cases involving civilian victims; and

  b. The conviction and acquittal rates for sexual assault offenses vary significantly among the military Services.

  c. If a Service member is charged with a sexual assault offense, and pleads not guilty, the probability that he or she will be convicted of a sexual assault offense is 36%, and the probability that he or she will be convicted of any offense (i.e., either a sex or a non-sex offense) is 59%."[137]

- *Judicial Proceedings Panel Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases* (September 2017)

  Recommendation 55: "The Secretary of Defense and the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)

136 Judicial Proceedings Panel Report on Sexual Assault Investigations in the Military 5 (Sep. 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/08_JPP_Report_Investigations_Final_20170907.pdf.

137 Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015 6 (Sep. 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/09_JPP_CourtMartial_Data_Report_Final_20170915.pdf.

continue the review of the new Article 32 preliminary hearing process, which, in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP, no longer serves a useful discovery purpose. This review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of such a preliminary hearing officer against referral, based on lack of probable cause, should be given more weight by the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further analysis of, or changes to, the process are required."[138]

Recommendation 57: "After case disposition guidance under Article 33, UCMJ, is promulgated, the Secretary of Defense and DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases."[139]

Recommendation 58: "The Secretary of Defense and the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. This review should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should also consider whether such a change would encourage the staff judge advocate to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision."[140]

Recommendation 60: "The Secretary of Defense and the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system."[141]

Recommendation 62: "The Secretary of Defense and the DAC-IPAD monitor whether misperceptions regarding alcohol consumption and consent affect court-martial panel members."[142]

Recommendation 63: "The Secretary of Defense and the DAC-IPAD collect data on expedited transfers to determine the locations from which and to which victims are requesting expedited transfers and to review their stated reasons."[143]

138 Judicial Proceedings Panel Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases 7 (Sep. 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/10_JPP_Concerns_Fair_MJ_Report_Final_20170915.pdf.

139 *Id.* at 9 (Recommendation 57).

140 *Id.* at 9 (Recommendation 58).

141 *Id.* at 11 (Recommendation 60).

142 *Id.* at 11 (Recommendation 62).

143 *Id.* at 12 (Recommendation 63).

V. Conclusion

The JPP is grateful to Congress for the opportunity to provide an independent review and assessment of judicial proceedings conducted under the UCMJ involving adult sexual assault and related offenses for the purpose of developing recommendations for improvements to such proceedings. We hope our work has made positive contributions to the military justice system. The JPP would have not been able to complete its work without the support and assistance of the JPP Subcommittee, the military Services, the Department of Defense, and the hundreds of experts and witnesses who shared their experiences and perspectives with the Panel. The JPP expresses its deep appreciation to its hardworking and dedicated staff and to all others who helped fulfill this important mission.

APPENDIX A: Judicial Proceedings Panel Authorizing Statutes and Charter

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013

SECTION 576. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) INDEPENDENT REVIEWS AND ASSESSMENTS REQUIRED.—

(2) JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS.—The Secretary of Defense shall establish a panel to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the amendments made to the Uniform Code of Military Justice by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1404) for the purpose of developing recommendations for improvements to such proceedings.

(b) ESTABLISHMENT OF INDEPENDENT REVIEW PANELS.

(1) COMPOSITION.

(B) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall be appointed by the Secretary of Defense and consist of five members, two of whom must have also served on the panel established under subsection (a)(1).

(2) QUALIFICATIONS.—The members of each panel shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes.

(3) CHAIR.—The chair of each panel shall be appointed by the Secretary of Defense from among the members of the panel.

(4) PERIOD OF APPOINTMENT; VACANCIES.—Members shall be appointed for the life of the panel. Any vacancy in a panel shall be filled in the same manner as the original appointment.

(5) DEADLINE FOR APPOINTMENTS.—

(B) JUDICIAL PROCEEDINGS PANEL.—All original appointments to the panel required by subsection (a)(2) shall be made before the termination date of the panel established under subsection (a)(1), but no later than 30 days before the termination date.

(6) MEETINGS.—A panel shall meet at the call of the chair.

(7) FIRST MEETING.—The chair shall call the first meeting of a panel not later than 60 days after the date of the appointment of all the members of the panel.

(c) REPORTS AND DURATION.—

(2) JUDICIAL PROCEEDINGS PANEL.—

(A) FIRST REPORT.—The panel established under subsection (a)(2) shall submit a first report, including any proposals for legislative or administrative changes the panel considers appropriate, to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives not later than 180 days after the first meeting of the panel.

(B) SUBSEQUENT REPORTS.—The panel established under subsection (a)(2) shall submit subsequent reports during fiscal years 2014 through 2017.

(C) TERMINATION.—The panel established under subsection (a)(2) shall terminate on September 30, 2017.

(d) DUTIES OF PANELS.—

(2) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall perform the following duties:

(A) Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice that were enacted by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112– 81; 125 Stat. 1404).

(B) Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.

(C) Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.

(D) Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report required by subsection (c)(2) and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.

(E) Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice),and any instances in which prior sexual conduct was determined to be inadmissible.

(F) Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.

(G) Building on the data compiled as a result of paragraph (1)(D), assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.

(H) Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by section 573 of this Act.

(I) Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases.

(J) Consider such other matters and materials as the panel considers appropriate for purposes of the reports.

(3) UTILIZATION OF OTHER STUDIES.—In conducting reviews and assessments and preparing reports, a panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies.

(e) AUTHORITY OF PANELS.—

(1) HEARINGS.—A panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the panel considers appropriate to carry out its duties under this section.

(2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of a panel, a department or agency of the Federal Government shall provide information that the panel considers necessary to carry out its duties under this section.

(f) PERSONNEL MATTERS.—

(1) PAY OF MEMBERS.—Members of a panel shall serve without pay by reason of their work on the panel.

(2) TRAVEL EXPENSES.—The members of a panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance or services for the panel.

(3) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the panels, except that the Secretary may not assign primary responsibility for such staffing and resources to the Sexual Assault Prevention and Response Office.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

SEC. 1731. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(b) ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.—

(1) ADDITIONAL ASSESSMENTS SPECIFIED.—The independent panel established by the Secretary of Defense under subsection (a)(2) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the "judicial proceedings panel", shall conduct the following:

(A) An assessment of the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), to expressly cover a situation in which a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.

(B) An assessment of the implementation and effect of section 1044e of title 10, United States Code, as added by section 1716, and make such recommendations for modification of such section 1044e as the judicial proceedings panel considers appropriate.

(C) An assessment of the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (article 56(b) of the Uniform Code of Military Justice), as added by section 1705, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

(D) An assessment of the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows:

(i) Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation.

(ii) Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (article 139 of the Uniform Code of Military Justice).

(iii) Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.

(2) SUBMISSION OF RESULTS.—The judicial proceedings panel shall include the results of the assessments required by paragraph (1) in one of the reports required by subsection (c)(2)(B) of section 576 of the National Defense Authorization Act for Fiscal Year 2013.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015

SEC. 545. ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.

(a) ADDITIONAL DUTIES IMPOSED.—The independent panel established by the Secretary of Defense under section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the "judicial proceedings panel", shall perform the following additional duties:

(1) Conduct a review and assessment regarding the impact of the use of any mental health records of the victim of an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), by the accused during the preliminary hearing conducted under section 832 of such title (article 32 of the Uniform Code of Military Justice), and during court-martial proceedings, as compared to the use of similar records in civilian criminal legal proceedings.

(2) Conduct a review and assessment regarding the establishment of a privilege under the Military Rules of Evidence against the disclosure of communications between—

(A) users of and personnel staffing the Department of Defense Safe Helpline; and

(B) users of and personnel staffing of the 26 Department of Defense Safe Help Room.

(b) SUBMISSION OF RESULTS.—The judicial proceedings panel shall include the results of the reviews and assessments conducted under subsection (a) in one of the reports required by section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1760).

SEC. 546. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

(f) DUE DATE FOR ANNUAL REPORT OF JUDICIAL PROCEEDINGS PANEL.—Section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1760) is amended by inserting "annually thereafter" after "reports".

CHARTER
Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

1. Committee's Official Designation: The committee shall be known as the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel ("the Judicial Proceedings Panel").

2. Authority: The Secretary of Defense, as required by section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 ("the FY 2013 NDAA") (Public Law 112-239), as modified by section 1731(b) of the National Defense Authorization Act for Fiscal Year 2014 ("the FY 2014 NDAA") (Public Law 113-66), and in accordance with the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended) and 41 C.F.R. § 102-3.50(a), established the Judicial Proceedings Panel.

3. Objectives and Scope of Activities: The Judicial Proceedings Panel will conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice (UCMJ) involving adult sexual assault and related offenses since the amendments made to the UCMJ by section 541 of the National Defense Authorization Act for Fiscal Year 2012 ("the FY 2012 NDAA") (Public Law 112-81) for the purpose of developing recommendations for improvements to such proceedings.

4. Description of Duties: Section 576(d)(2) directs the Judicial Proceedings Panel to perform the following duties, with additional duties as added by section 1731(b)(1) of the FY 2014 NDAA:
   a. Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the UCMJ that were enacted by section 541 of the FY 2012 NDAA.
   b. Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.
   c. Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.
   d. Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report of the Judicial Proceedings Panel and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.
   e. Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the UCMJ), and any instances in which prior sexual conduct was determined to be inadmissible.

CHARTER
Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

f. Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.
g. Building on the data compiled as a result of the assessment conducted by the Response Systems to Adult Sexual Assault Crimes Panel ("the Response Systems Panel"), a Federal advisory committee established pursuant to section 576(a)(1) of the FY 2013 NDAA and in accordance with FACA, of the training level of military defense and trial counsel, assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.
h. Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by Section 573 of the FY 2013 NDAA.
i. Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the UCMJ in certain sexual assault cases.
j. Assess the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the UCMJ), to expressly cover a situation in which a person subject to the UCMJ commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.
k. Assess the implementation and effect of the Special Victim's Counsel for victims of sex-related offenses established by the Secretary of Defense on August 14, 2013 and codified in Section 1044e of title 10, United States Code, by the enactment of Section 1716 of the FY 2014 NDAA on December 26, 2013. The panel shall make such recommendations for modifications of section 1044e as the Judicial Proceedings Panel considers appropriate.
l. Assess the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (article 56(b) of the UCMJ), as added by section 1705 of the FY 2014 NDAA, which requires at a minimum, that upon a finding of guilt for the offenses of rape, sexual assault, rape and sexual assault of a child, forcible sodomy, and attempts to commit such acts, the punishment include dismissal or dishonorable discharge, except as provided for by Article 60 of the UCMJ, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the UCMJ).
m. Assess the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the UCMJ), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows:
    i. Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation.
    ii. Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (article 139 of the UCMJ).

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Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

iii. Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.

n. Consider such other matters and materials as the Judicial Proceedings Panel considers appropriate for purposes of the reports.

In conducting reviews and assessments and preparing reports, the Judicial Proceedings Panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies. The Judicial Proceedings Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as it considers appropriate to carry out its duties. Upon request by the Chair of the Judicial Proceedings Panel, a department or agency of the Federal Government shall provide information that the Judicial Proceedings Panel considers necessary to carry out its duties.

5. Agency or Official to Whom the Committee Reports: The Judicial Proceedings Panel shall provide its first report, including any proposals for legislative or administrative changes it considers appropriate, to the Secretary of Defense through the Department of Defense (DoD) General Counsel (GC), and the Committees on Armed Services of the Senate and the House of Representatives, not later than 180 days after its first meeting. The Judicial Proceedings Panel shall submit subsequent reports during fiscal years 2014 through 2017.

6. Support: The DoD, through the DoD Office of General Counsel (DoD OGC), the Washington Headquarters Services, and the Office of the Under Secretary of Defense for Personnel and Readiness, shall provide staffing and resources as deemed necessary for the performance of the Judicial Proceedings Panel's functions, and shall ensure compliance with the requirements of the FACA, the Government in the Sunshine Act of 1976 ("the Sunshine Act") (5 U.S.C. § 552b, as amended), governing federal statutes and regulations, and established DoD policies and procedures. Primary responsibility for such staffing and resourcing may not be assigned to the Sexual Assault Prevention and Response Office.

7. Estimated Annual Operating Costs and Staff Years: The estimated annual operating cost, to include travel, meetings, and contract support, is approximately $4,000,000 and 15 full-time equivalents.

8. Designated Federal Officer: The Designated Federal Officer (DFO), pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with governing DoD policies and procedures.

   In addition, the Judicial Proceedings Panel's DFO is required to be in attendance at all meetings of the Panel and its subcommittees for the entire duration of each and every meeting. However, in the absence of the DFO, the Alternate DFO, duly appointed to the Judicial Proceedings Panel according to DoD policies and procedures, shall attend the entire duration of the Judicial Proceedings Panel and any subcommittee meetings.

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Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

The DFO, or the Alternate DFO, shall approve all of the meetings of the Judicial Proceedings Panel as called by the Chair; shall call all meetings of its subcommittees, in coordination with the Chair; prepare and approve all meeting agendas for the Judicial Proceedings Panel and any subcommittees; and adjourn any meeting when the DFO or the Alternate DFO determines adjournment to be in the public's interest or required by governing regulations or DoD policies and procedures.

9. Estimated Number and Frequency of Meetings: Consistent with sections 576(b)(6) and (7) of the FY 2013 NDAA, the Judicial Proceedings Panel shall meet at the call of the Chair, and the Chair shall call the first meeting of the Judicial Proceedings Panel not later than 60 days after the date of the appointment of all the members of the Judicial Proceedings Panel. The Judicial Proceedings Panel shall meet at a minimum once per year.

10. Duration: The Judicial Proceedings Panel shall remain in effect until terminated, as provided for and as required by section 576(c)(2)(C) of the FY 2013 NDAA; however, the charter is subject to renewal every two years.

11. Termination: According to section 576(c)(2)(C) of the FY 2013 NDAA, the Judicial Proceedings Panel shall terminate on September 30, 2017.

12. Membership and Designation: Pursuant to sections 576(b)(1)(B) and (b)(2), the Judicial Proceedings Panel shall be appointed by the Secretary of Defense and consist of five members, two of whom must have served on the Response Systems Panel.

    The members shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Force, and offenses relating to rape, sexual assault, and other adult sexual assault crimes. The Chair shall be appointed by the Secretary of Defense from among the members of the Judicial Proceedings Panel.

    Members shall be appointed for the life of the Judicial Proceedings Panel, subject to annual renewals. Any vacancy on the Judicial Proceedings Panel shall be filled in the same manner as the original appointment. Panel members shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as special government employee (SGE) members. With the exception of reimbursement of official travel and per diem, Judicial Proceedings Panel members shall serve without compensation.

    The DoD GC, according to DoD policies and procedures, may select experts and consultants as subject matter experts under the authority of 5 U.S.C. § 3109 to advise the Judicial Proceedings Panel or its subcommittees; these individuals do not count toward the Judicial Proceedings Panel's total membership nor do they have voting privileges. In addition, these subject matter experts shall not participate in any deliberations dealing with

CHARTER
Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

the substantive matters before the Judicial Proceedings Panel or its subcommittees nor shall they participate in any voting.

13. Subcommittees: The Department, when necessary and consistent with the Judicial Proceedings Panel's mission and DoD policies and procedures, may establish subcommittees, task groups, or working groups to support the Judicial Proceedings Panel. Establishment of subcommittees will be based upon a written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC.

    These subcommittees shall not work independently of the Judicial Proceedings Panel and shall report all of their recommendations and advice to the Judicial Proceedings Panel for full deliberation and discussion. Subcommittees have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Judicial Proceedings Panel. No subcommittee or any of its members may update or report directly to the DoD or any Federal officers or employees.

    The Secretary of Defense shall appoint subcommittee members even if the member in question is already a member of the Judicial Proceedings Panel. All subcommittee appointments shall be subject to annual renewal. Such individuals, if not full-time or part-time government personnel, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Those individuals who are full-time or permanent part-time Federal employees shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) as RGE members. Subcommittee members shall serve for the life of the subcommittee. With the exception of reimbursement of official travel and per diem, subcommittee members shall serve without compensation.

    All subcommittees operate pursuant to the provisions of FACA, the Sunshine Act, governing Federal statutes and regulations, and established DoD policies and procedures.

14. Recordkeeping: The records of the Judicial Proceedings Panel and its subcommittees shall be handled according to section 2, General Records Schedule 26, and appropriate Department of Defense policies and procedures. These records shall be available for public inspection and copying, subject to the Freedom of Information Act of 1966 (5 U.S.C. § 552, as amended).

15. Filing Date: June 24, 2014

APPENDIX B: Judicial Proceedings Panel Committee and Subcommittee Member Biographies

JUDICIAL PROCEEDINGS PANEL MEMBERS

THE HONORABLE ELIZABETH HOLTZMAN — CHAIR OF THE JPP

Elizabeth Holtzman is counsel with the law firm Herrick, Feinstein LLP. Ms. Holtzman served for eight years as a U.S. representative (D-NY, 1973–81). While in office, she authored the Rape Privacy Act. She then served for eight years as District Attorney of Kings County, New York (Brooklyn), the fourth-largest DA's office in the country, where she helped change rape laws, improve standards and methods for prosecution, and develop programs to train police and medical personnel. In 1989 Ms. Holtzman became the only woman ever elected Comptroller of New York City. Ms. Holtzman graduated from Radcliffe College, *magna cum laude*, and received her law degree from Harvard Law School.

THE HONORABLE BARBARA S. JONES

Barbara Jones is a partner at the law firm Bracewell, LLP. 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. Before being nominated to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County (Manhattan). In that role she supervised community affairs, handled public information, and oversaw the work of the Homicide Investigation Unit. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division, and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an Assistant U.S. Attorney, as chief of the General Crimes Unit, and as chief of the Organized Crime Unit in the Southern District of New York.

MR. VICTOR STONE

Victor Stone represents crime victims at the Maryland Crime Victims Resource Center, Inc. Previously, he served as Special Counsel at the United States Department of Justice, including in the Appellate and General Litigation and Legal Advice Sections of the Criminal Division, U.S. Department of Justice; as Chief Counsel, FBI Foreign Terrorist Task Force; as an Assistant United States Attorney in Oregon and in the District of Columbia; as General Counsel to the D.C. Corrections Trustee; as a U.S. Immigration Judge; as a Special U.S. Parole Commissioner; as an expert at Council of Europe, United Nations, and Prison Rape Elimination Commission subcommittees, and as a DOJ member on the ABA Task Force updating Standards for Prisoner Rights. He also served as the Criminal Division's legal advisor to the Federal Witness Security Program, and regarding federal victims' rights compliance.

PROFESSOR THOMAS W. TAYLOR

Tom Taylor teaches graduate courses at Duke University's Sanford School of Public Policy. Previously, he served as a decorated and distinguished Army officer, civil servant, and member of the Senior Executive Service. During a 27-year career in the Pentagon, he advised seven secretaries and seven Chiefs of Staff of the Army, and as the senior leader of the Army legal community he worked on a wide variety of operational, personnel, and intelligence issues. He graduated with high honors from Guilford College, Greensboro, N.C., and with honors from the University of North Carolina at Chapel Hill law school, where he was a Morehead Fellow, a member of the law review, and a member of the Order of the Coif.

VICE ADMIRAL PATRICIA A. TRACEY, U.S. NAVY (RETIRED)

Pat Tracey was most recently the Vice President of Homeland Security and Defense for Hewlett Packard Enterprise Services, U.S. Public Sector, developing dynamic strategies and providing support to various agencies including the U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, and U.S. Department of Defense. She completed a distinguished 34-year naval career in 2004, retiring as a vice admiral and the most senior woman officer in the history of the U.S. Navy. As chief of the Navy's $5 billion global education and training enterprise, Admiral Tracey led a successful revolution in training technology to improve the quality, access, effectiveness, and cost of Navy training. She graduated from the College of New Rochelle and the Naval Postgraduate School, with distinction, and completed a Fellowship with the Chief of Naval Operations' Strategic Studies Group.

JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE MEMBERS

THE HONORABLE BARBARA S. JONES — CHAIR OF THE JPP SUBCOMMITTEE

Barbara Jones is a partner at the law firm Bracewell, LLP. 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. Before being nominated to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County (Manhattan). In that role she supervised community affairs, handled public information, and oversaw the work of the Homicide Investigation Unit. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division, and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an Assistant U.S. Attorney, as chief of the General Crimes Unit, and as chief of the Organized Crime Unit in the Southern District of New York.

THE HONORABLE ELIZABETH HOLTZMAN — CHAIR OF THE JPP

Elizabeth Holtzman, who took office as the youngest woman ever elected to Congress, served in the House of Representatives from 1973 to 1981, representing New York's 16th Congressional District. While in Congress, she served on the House Judiciary and Budget Committees and chaired the Immigration and Refugees Subcommittee. She co-founded the Congressional Women's Caucus and was elected its first Democratic chair. She subsequently was elected Brooklyn District Attorney (where she pioneered new strategies for the prosecution of rape cases)—the only woman ever elected DA in New York City. She was then elected New York City Comptroller, the only woman ever to hold that position. Ms. Holtzman was appointed by President Bill Clinton to the Interagency Working Group (on declassifying secret Nazi war crimes files), and by Secretary Hagel to the Response Systems to Adult Sexual Assault Crimes Panel. She has also been appointed to the Department of Homeland Security Advisory Committee. Ms. Holtzman is a graduate of Harvard Law School and Harvard University's Radcliffe College, *magna cum laude*. She practices law in New York City with the firm Herrick, Feinstein, LLP.

MS. LISA FRIEL

Lisa Friel is an internationally recognized expert on sexual assault. Ms. Friel has investigated and supervised complex cases involving sexual assault and harassment, human trafficking, workplace violence, child pornography, Internet predators, unlawful surveillance, theft, and fraud. Ms. Friel began her professional career at the New York County District Attorney's Office, specializing in sexual assault cases. She was the Chief of the Sex Crimes Prosecution Unit for nearly a decade and the Deputy Chief for 11 years. Supervising more than 40 assistant district attorneys, support staff, and investigators, she typically managed 300 cases and investigations at any one time.

Ms. Friel has directed thousands of investigations into allegations of sexual assault and other misconduct and has trained hundreds of law enforcement personnel throughout the world. In October 2011, following a distinguished 28-year career as a Manhattan prosecutor, Ms. Friel joined T&M Protection Resources as Vice President of the Sexual Misconduct Consulting & Investigations division. Ms. Friel and her staff developed policies and procedures, provided training workshops, and conducted sensitive investigations into a myriad of issues, including sexual misconduct (both sexual assault and sexual harassment) and domestic violence. In September 2014, Ms. Friel was appointed as T&M's Special Advisor to the NFL Commissioner, consulting on domestic violence, child abuse, and sexual assault within the National Football League. In April 2015, Ms. Friel accepted a permanent position with the NFL: an appointment by Commissioner Goodell as the NFL's Special Counsel for Investigations, where she is responsible for all investigations related to possible violations of the NFL's Personal Conduct Policy.

MS. LAURIE ROSE KEPROS

Laurie Rose Kepros is the Director of Sexual Litigation for the Colorado Office of the State Public Defender, where she trains and advises more than 700 lawyers and other staff statewide in their representation of adults and juveniles accused or convicted of sexual crimes. Ms. Kepros has personally represented thousands of criminal defendants, including many victims of sexual assault. She has tried and consulted on thousands of sexual offense cases across the state of Colorado. She has served on dozens of subcommittees of the Colorado Sex Offender Management Board and as a member of both the Sex Offense Task Force and the Sex Offense Working Group of the Sentencing Task Force of the Colorado Commission on Criminal and Juvenile Justice. Ms. Kepros was on the Board of Directors of the Colorado Criminal Defense Bar for 10 years and currently serves on the board of the CCDB's sister policy organization, the Colorado Criminal Defense Institute. She is a member of the Association for the Treatment of Sexual Abusers and an adjunct professor at the University of Denver School of Law. She has repeatedly testified before the Colorado legislature as a subject matter expert in sexual crime law and as an expert witness in Colorado sex offense law in federal district court. In 2012, the CCDB awarded her the Gideon Award for upholding and preserving the principles captured by *Gideon v. Wainwright*.

DEAN LISA SCHENCK (COLONEL, U.S. ARMY, RETIRED)

Lisa Schenck became Associate Dean for Academic Affairs at the George Washington University Law School in 2009 after serving in the Army's Judge Advocate General's Corps for more than 25 years. She also has served as a judge, lawyer, and educator. While in the military, she was an appellate military judge on the U.S. Army Court of Criminal Appeals in 2002 and received the 2003 Judge Advocates Association Outstanding Career Armed Services Attorney Award (Army). In 2005, Dean Schenck was the first woman appointed as a Senior Judge on that court, where she served until she retired. In 2007, the Secretary of Defense also appointed her to serve concurrently as Associate Judge on the U.S. Court of Military Commission Review. After retiring from the military as a colonel in 2008, Dean Schenck served as Senior Advisor to the Defense Task Force on Sexual Assault in Military Services.

PROFESSOR LEE SCHINASI (COLONEL, U.S. ARMY, RETIRED)

Lee Schinasi began his legal career as a trial attorney for the Office of Economic Opportunity before starting a 23-year career in the Army's Judge Advocate General's Corps. His final assignment was as Dean of Academics and Vice Dean of the Army's JAGC School. Professor Schinasi attended the resident Command and General Staff College and the resident Army War College. He has served as military legal advisor to the Army's Chief of Staff for Intelligence and as Staff Judge Advocate of the 3rd Infantry Division (in Germany) and United States Army South (in Panama). Professor Schinasi is co-author of several books on evidence and litigation, including *The Military Rules of Evidence Manual*, *Military Evidentiary Foundations*, *The Florida Evidence Code Trial Book*, *Florida Evidentiary Foundations*, *Evidence in Florida*, *Emerging Problems under the Federal Rules of Evidence*, and *Lawyers Cooperative Practice Guide: Florida Evidence*. He received a bachelor's degree in economics and a J.D. degree from the University of Toledo. Before joining the Barry Law faculty, Professor Schinasi taught at the University of Miami School of Law. He currently teaches evidence, torts, civil procedure, and national security law.

BRIGADIER GENERAL JAMES SCHWENK, U.S. MARINE CORPS (RETIRED)

James Schwenk retired from the Marine Corps in 2000 and from civil service in 2014, after 49 years of federal service. As a Marine Corps judge advocate, he served as a trial counsel, defense counsel, Deputy Staff Judge Advocate, Staff Judge Advocate, Special Assistant to the General Counsel of the Navy, Head of Operational Law Branch at Headquarters Marine Corps, Deputy Director of Legal and Legislative Policy for the Office of the Assistant Secretary of Defense for Force Management and Policy, Assistant Judge Advocate General of the Navy for Military Law, and Military Assistant to the DoD General Counsel. Upon retiring from active duty, BGen Schwenk served for 14 years in the Office of the General Counsel of the Department of Defense as Senior Associate Deputy General Counsel, specializing in personnel policy, military justice, and civil support. He was the principal legal advisor for the repeal of "don't ask, don't tell" and the provision of benefits to same-sex spouses of military personnel. In addition, he was the principal legal advisor to numerous DoD working groups in the area of military personnel policy, working extensively with the White House and Congress. BGen Schwenk attended the Washington College of Law, American University, earning his J.D. in 1977.

MS. JILL WINE-BANKS

Jill Wine-Banks has a background as a corporate executive in manufacturing and telecommunications and as an attorney and not-for-profit and government leader. Ms. Wine-Banks started her career at the Department of Justice prosecuting organized crime and labor racketeering cases and then played a crucial role as an assistant special prosecutor investigating and trying the Watergate obstruction of justice case. Ms. Wine-Banks also served as the General Counsel of the United States Army. In that position, Ms. Wine-Banks dealt with environmental, procurement, Panama Canal, intelligence, military justice, and political issues, including the integration of women into basic training and West Point. After leaving the Pentagon, she was a litigation partner at Jenner and Block, the Solicitor General and Deputy Attorney General of Illinois, and later the Executive Vice President and Chief Operating Officer of the American Bar Association, the world's largest legal publisher and professional association with almost 400,000 members. That experience led to her becoming a senior corporate executive at Motorola and then Maytag, handling international business development, global operations, alliance creation and management, and government relations in Pakistan, China, Ukraine, Russia, France, Germany, Japan, and Singapore. Recently, Ms. Wine-Banks was head of career and technical education for the Chicago Public Schools and a business consultant. Ms. Wine-Banks is currently writing a book about her life and career, with a special focus on her experiences during Watergate.

APPENDIX C: Judicial Proceedings Panel Tasks

A. STATUTORY TASKS

1. Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice that were enacted by section 541 (Article 120 revision) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 (Public Law 112-81; 125 Stat. 1404). (FY13 NDAA, § 576(d)(2)(A))

2. Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases. (FY13 NDAA, § 576(d)(2)(B))

3. Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts. (FY13 NDAA, § 576(d)(2)(C))

4. Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report required of the JPP and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available. (FY13 NDAA, § 576(d)(2)(D))

5. Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), and any instances in which prior sexual conduct was determined to be inadmissible. (FY13 NDAA, § 576(d)(2)(E))

6. Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case. (FY13 NDAA, § 576(d)(2)(F))

7. Building on the data compiled as a result of paragraph (1)(D), assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases. (FY13 NDAA, § 576(d)(2)(G))

8. Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by section 573 of this Act. (FY13 NDAA, § 576(d)(2)(H))

9. Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases. (FY13 NDAA, § 576(d)(2)(I))

10. Consider such other matters and materials as the panel considers appropriate for purposes of the reports. (FY13 NDAA, § 576(d)(2)(J))

11. An assessment of the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), to expressly cover a situation in which a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person. (FY14 NDAA, § 1731(b)(1)(A))

12. An assessment of the implementation and effect of section 1044e of title 10, United States Code, as added by section 1716, and make such recommendations for modification of such section as the Judicial Proceedings Panel considers appropriate. (FY14 NDAA, § 1731(b)(1)(B))

13. An assessment of the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (article 56(b) of the Uniform Code of Military Justice), as added by section 1705, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice). (FY14 NDAA, § 1731(b)(1)(C))

14. An assessment of the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows:

    (i) Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation.

    (ii) Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (article 139 of the Uniform Code of Military Justice).

    (iii) Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial. (FY14 NDAA, 1731(b)(1)(D))

15. Conduct a review and assessment regarding the impact of the use of any mental health records of the victim of an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), by the accused during the preliminary hearing conducted under section 832 of such title (article 32 of the Uniform Code of Military Justice), and during court-martial proceedings, as compared to the use of similar records in civilian criminal legal proceedings. (FY15 NDAA, § 545(a)(1))

16. Conduct a review and assessment regarding the establishment of a privilege under the M.R.E. against the disclosure of communications between—

    (A) users of and personnel staffing the Department of Defense Safe Helpline; and

    (B) users of and personnel staffing the Department of Defense Safe HelpRoom. (FY15 NDAA, § 545(a)(2))

B. TASKS ASSIGNED TO THE JUDICIAL PROCEEDINGS PANEL BY THE RESPONSE SYSTEMS PANEL (RSP)

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

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

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

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

C. TASKS UNDERTAKEN INDEPENDENTLY BY THE JUDICIAL PROCEEDINGS PANEL

1. Assess the occurrence of retaliation related to sexual assault offenses. This task was undertaken by the JPP in response to the May 2015 release of a DoD Sexual Assault Prevention and Response Office report indicating that 62% of the victims who report being sexually assaulted experience retaliation as a result of making the report.

2. Assess the protection of sexual assault victims' appellate rights. This task was undertaken by the JPP in response to concerns raised by the Service special victims' counsel program managers at the April 8, 2016, JPP public meeting.

APPENDIX D: Judicial Proceedings Panel and Subcommittee Meetings

MEETINGS	PRESENTERS
August 7, 2014 **Public Meeting of the JPP** **The George Washington University Law School** **Washington, DC**	• Mr. William Cassara, Attorney-at-Law, Augusta, Georgia • Colonel (Retired) Timothy Grammel, U.S. Army, former Trial Judiciary Circuit Judge • Colonel Gary Jackson, U.S. Air Force, Staff Judge Advocate, Headquarters Air Force Global Strike Command • Captain Christian Reismeier, U.S. Navy, Chief Judge of the Navy • Professor Stephen Schulhofer, New York University School of Law, American Law Institute (by telephone) • Mr. Dwight Sullivan, Department of Defense, Office of the General Counsel • Ms. Carol Tracy, Women's Law Project • Ms. Charlene Whitman, Æquitas • Mr. John Wilkinson, Æquitas

MEETINGS	PRESENTERS
September 19, 2014 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston Arlington, VA**	• Captain Steven Andersen, U.S. Coast Guard, Commanding Officer, Legal Services Command • Colonel John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice & Community Development • Captain Robert Crow, U.S. Navy, Director, Criminal Law Division • Congresswoman Lois Frankel (D-22nd FL) • Professor Victor Hansen, New England School of Law (by telephone) • Commander Jason Jones, U.S. Navy, Defense Service Office West • Colonel Polly Kenny, U.S. Air Force, Staff Judge Advocate, Air Education and Training Command • Lieutenant Colonel John Kiel, U.S. Army, Criminal Law Division, Office of the Judge Advocate General • Major Frank Kostik, U.S. Army, Senior Defense Counsel • Colonel Michael Lewis, U.S. Air Force, Chief, Military Justice Division • Major Melanie Mann, U.S. Marine Corps, Military Justice Officer • Captain (Retired) Stephen McCleary, U.S. Coast Guard, former Chief of Military Justice • Ms. Elisha Morrow, former U.S. Coast Guard • Mr. E. J. O'Brien, U.S. Army, Highly Qualified Expert, Trial Defense Services • Lieutenant Colonel Alex Pickands, U.S. Army, Trial Counsel Assistance Program • Lieutenant Colonel Julie Pitvorec, U.S. Air Force, Chief Senior Defense Counsel • Major Mark Rosenow, U.S. Air Force, Special Victims Unit, Chief of Policy and Coordination • Lieutenant Colonel Michael Sayegh, U.S. Marine Corps, Staff Judge Advocate, Training Command • Ms. Teresa Scalzo, U.S. Navy, Highly Qualified Expert, Trial Counsel Assistance Program • Congresswoman Jackie Speier (D-14th CA) • Lieutenant Commander Ryan Stormer, U.S. Navy, Trial Counsel Assistance Program • Lieutenant Colonel Chris Thielemann, U.S. Marine Corps, Regional Trial Counsel • Professor Rachel VanLandingham, Southwestern Law School • Lieutenant Colonel James Varley, U.S. Army, Government Appellate Division • Mr. Ronald White, former Highly Qualified Expert for the U.S. Army Trial Defense Services • Colonel Terri Zimmermann, U.S. Marine Corps, Officer-in-Charge (Reserve), Defense Services Organization

MEETINGS	PRESENTERS
October 10, 2014 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston Arlington, VA**	• Colonel John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice & Community Development • Mr. William Barto, U.S. Army, Director, Advocacy Training and Programs, Criminal Law Division, Office of the Judge Advocate General • Major Rebecca DiMuro, U.S. Army, Special Victim Prosecutor • Professor Clifford Fishman, Catholic University School of Law • Mr. Ryan Guilds, Counsel, Arnold & Porter LLP • Major Andrea Hall, U.S. Air Force, Senior Defense Counsel • Major Pete Houtz, U.S. Marine Corps, Regional Trial Counsel • Mr. Greg Jacob, Policy Director, Service Women's Action Network • Ms. Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender • Ms. Viktoria Kristiansson, Attorney Advisor, Æquitas • Ms. Jennifer Long, Director, Æquitas • Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders • Major Matthew Powers, U.S. Marine Corps, Senior Defense Counsel • Ms. Patricia Powers, Senior Deputy Prosecuting Attorney, Yakima County, Washington, Prosecuting Attorney's Office • Commander Stephen Reyes, U.S. Navy, Director, Defense Counsel Assistance Program • Major Shari Shugart, U.S. Army, Senior Defense Counsel • Commander Jonathan Stephens, U.S. Navy, Senior Trial Counsel, Region Legal Service Office Mid-Atlantic • Lieutenant Colonel Brian Thompson, U.S. Air Force, Chief Senior Trial Counsel, Government Trial and Appellate Counsel Division

MEETINGS	PRESENTERS
November 14, 2014 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston Arlington, VA**	• Mr. Michael Andrews, Project Director and Managing Attorney, District of Columbia Crime Victims' Resource Center • Major William Babor, U.S. Air Force, Senior Defense Counsel • Lieutenant Jeffrey Barnum, U.S. Coast Guard, Trial Counsel • Mr. James Boerner, Special Agent, Army Criminal Investigative Command • Lieutenant Colonel Andrea deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division • Mr. Mike DeFamio, Supervisory Special Agent, U.S. Naval Criminal Investigative Service • Captain Karen Fischer-Anderson, U.S. Navy, Chief of Staff, Victims' Legal Counsel • Commander Ted Fowles, U.S. Coast Guard, Chief, Office of Special Victims' Counsel • Ms. Meg Garvin, Executive Director, National Crime Victims' Law Institute • Lieutenant Commander Philip Hamon, U.S. Navy, Senior Trial Counsel, Region Legal Service Office, Naval District Washington • Major Douglas Hatch, U.S. Marine Corps, Senior Complex Trial Counsel, Legal Support Section West • Lieutenant Colonel Scott Hutmacher, U.S. Army, Special Victim Prosecutor • Captain Brent Jones, U.S. Air Force, Senior Trial Counsel, Air Force Legal Operations Agency • Colonel Carol Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization • Major Kyle Kilian, U.S. Marine Corps, Senior Defense Counsel • Captain Aaron Kirk, U.S. Air Force, Special Victims' Counsel • Colonel James Robert McKee, U.S. Army, Program Manager, Special Victims' Counsel Program • Lieutenant Colonel Ryan Oakley, Deputy Director, Legal Policy, Office of the Under Secretary of Defense for Personnel and Readiness • Captain Sarah Robbins, U.S. Army, Trial Defense Counsel • Commander Colleen Shook, U.S. Navy, Officer in Charge, Victims' Legal Program Mid-Atlantic • Captain Jessie Sommer, U.S. Army, Chief, 82nd Airborne Division Legal Assistance Office and Special Victims' Counsel • Mr. Victor Stone, JPP Member *Continued*

MEETINGS	PRESENTERS
November 14, 2014 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston Arlington, VA**	*Continued* • Major Marc Tilney, U.S. Marine Corps, Regional Victims' Legal Counsel • Mr. Mark Walker, Sexual Assault Investigations and Operations Consultant to the Sexual Assault Prevention and Response Office, Air Force Office of Special Investigations • Lieutenant Commander Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel
December 12, 2014 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston Arlington, VA**	• Ms. Gloria Arteaga, U.S. Navy, Sexual Assault Response Coordinator • Colonel John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice and Community Development • Ms. Marie Brodie, U.S. Marine Corps Installation Sexual Assault Response Coordinator • Lieutenant General Christopher Burne, U.S. Air Force, The Judge Advocate General • Colonel (Retired) Don Christensen, U.S. Air Force, President, Protect Our Defenders • Lieutenant General Flora Darpino, U.S. Army, The Judge Advocate General • Lieutenant Kathryn DeAngelo, U.S. Navy, Victims' Legal Counsel and Airman V.T. • Vice Admiral Nannette DeRenzi, U.S. Navy, Judge Advocate General • Ms. Phylista Dudzinski, U.S. Air Force, Sexual Assault Response Coordinator • Ms. Simone Hall, U.S. Coast Guard, Sexual Assault Response Coordinator • Major William Ivins III, U.S. Marine Corps, Regional Victims' Legal Counsel-West, and Ms. J.B. • Sergeant First Class Bridgett Joseph, U.S. Army, Sexual Assault Response Coordinator • Captain Christopher Mangels, U.S. Air Force, Special Victims' Counsel, and Ms. R.S. • Rear Admiral Steven Poulin, U.S. Coast Guard, Judge Advocate General and Chief Counsel • Lieutenant Commander Kelley Stevens, U.S. Coast Guard, Special Victims' Counsel and Petty Officer N.S. • Captain Brian Stransky, U.S. Army, Operational Law Attorney and Specialist A.S.

MEETINGS	PRESENTERS
January 16, 2015 **Public Meeting of the JPP** **U.S. District Court for the District of Columbia Washington, DC**	• Panel Deliberations (no speakers)
January 30, 2015 **Public Meeting of the JPP** **One Liberty Center Arlington, VA**	• Panel Deliberations (no speakers)

MEETINGS	PRESENTERS
March 13, 2015 **Public Meeting of the JPP** **U.S. District Court for the District of Columbia Washington, DC**	• Captain Joseph Ahlers, U.S. Air Force, Special Victims' Counsel • Colonel John Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice • Ms. Nikki Charles, Co-Executive Director, Network for Victim Recovery of DC, and former Administrator of Victim Services, Maryland Criminal Injuries Compensation Board • Major Richard Cloninger, U.S. Marine Corps, Regional Victims' Legal Counsel • Mr. Charles Cosgrove, U.S. Army, Chief, Programs Branch, Criminal Law Division, Office of the Judge Advocate General • Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards • Professor Julie Goldscheid, the City University of New York School of Law • Ms. Bridgette Marie Harwood, Director of Legal Services, Network for Victim Recovery of DC • Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime • Lieutenant Commander Patrick Korody, U.S. Navy, Supervising Attorney, Victims' Legal Counsel Program • Professor Cortney Lollar, University of Kentucky College of Law • Colonel Michael Mulligan, U.S. Army, Chief, Criminal Law Division, Office of the Judge Advocate General • Professor Njeri Mathis Rutledge, South Texas College of Law • Mr. Gene McCleskey, Director, Texas Crime Victims' Compensation Program • Ms. Kathy Nelson, U.S. Air Force, Victim Witness Assistance Program (by telephone) • Major Mary Ellen Payne, U.S. Air Force, Government Trial and Appellate Counsel Division, Air Force Legal Operations Agency • Ms. Laura Banks Reed, Director, DC Superior Court Crime Victims Compensation Program • Major Mark Sameit, U.S. Marine Corps, Officer in Charge, Trial Counsel Assistance Program • Ms. Teresa Scalzo, Deputy Director, U.S. Navy, Trial Counsel Assistance Program • Ms. Lindsey Silverberg, Advocacy and Outreach Supervisor, Network for Victim Recovery of DC

MEETINGS	PRESENTERS
April 9, 2015 **Meeting of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Colonel (Retired) Tim Grammel, U.S. Army, former Military Judge • Commander (Retired) John Maksym, U.S. Navy, former Military Judge • Colonel (Retired) William Orr, U.S. Air Force, former Military Judge • Professor Stephen Schulhofer, New York University School of Law • Mr. Dwight Sullivan, Department of Defense, Office of General Counsel • Lieutenant Colonel (Retired) Quincy Ward, U.S. Marine Corps, former Military Judge

MEETINGS	PRESENTERS
April 10, 2015 **Public Meeting of the JPP** **U.S. District Court for the District of Columbia Washington, DC**	• Mr. Jay Aanrud, U.S. Air Force, Deputy Director, Headquarters, Sexual Assault Prevention and Response • Ms. Julia Andrews, U.S. Coast Guard, Chair, Board for Correction of Military Records • Dr. Lilia Cortina, Professor, University of Michigan • Ms. Monique Ferrell, Director, U.S. Army, Sexual Harassment/ Assault Response and Prevention • Dr. Nathan Galbreath, Department of Defense, Senior Executive Advisor, Sexual Assault Prevention and Response Office • Mr. Patrick Gookin, Director, Department of Defense Inspector General Hotline & Whistleblower Protection Ombudsman • Dr. Patricia Harned, Chief Executive Officer, Ethics & Compliance Initiative • Mr. Douglas Huff, U.S. Army, Legal Advisor, Review Boards Agency • Colonel Scott Jensen, U.S. Marine Corps, Branch Head, Headquarters, Sexual Assault Prevention and Response • Dr. Vicki Magley, Professor, University of Connecticut • Mr. Michael Noone, Professor, Columbus Law School, Catholic University • Mr. Jon Ruskin, Counsel, Board for Correction of Naval Records • Major General Jeffrey Snow, Director, DoD Headquarters, Sexual Assault Prevention and Response Office • Rear Admiral Richard Snyder, Director, Twenty-First Century Sailor Office • Dr. Matthew Soulier, Professor, University of California, Davis • Ms. Nilgun Tolek, Director, DoD Inspector General Whistleblower Reprisal Investigations • Mr. John Vallario, U.S. Air Force, Deputy Executive Director, Board for Correction of Military Records • Dr. Veronique Valliere, Valliere & Counseling Associates, Inc.

MEETINGS	PRESENTERS
May 7, 2015 **Meeting of the JPP Subcommittee** **Thurgood Marshall U.S. Courthouse New York, NY**	• Major Aimee Bateman, U.S. Army, The Judge Advocate General's Legal Center and School • Colonel (Retired) Don Christensen, U.S. Air Force, President, Protect Our Defenders • Lieutenant Commander Richard Federico, U.S. Navy, Senior Defense Counsel • Colonel Mark Jamison, U.S. Marine Corps, Director, Navy-Marine Corps Appellate Government Division • Lieutenant Commander Stuart Kirkby, U.S. Navy, Staff Attorney, Navy-Marine Corps Appellate Review Activity • Major Frank Kostik, U.S. Army, Senior Defense Counsel • Major Mary Ellen Payne, U.S. Air Force, Government Appellate Division • Lieutenant Colonel Alex Pickands, U.S. Army, Trial Counsel Assistance Program • Lieutenant Colonel Julie Pitvorec, U.S. Air Force, Chief Senior Defense Counsel • Major Mark Rosenow, U.S. Air Force, Special Victims Unit, Chief of Policy and Coordination • Major Thomas Smith, U.S. Air Force, Defense Appellate Division • Mr. Zachary Spilman, Attorney at Law • Major John Stephens, U.S. Marine Corps, Navy-Marine Corps Appellate Defense Division • Lieutenant Colonel Christopher Thielemann, U.S. Marine Corps, Regional Trial Counsel • Captain Jihan Walker, U.S. Army, Government Appellate Division • Mr. John Wilkinson, Attorney Advisor, Æquitas • Colonel Terri Zimmermann, U.S. Marine Corps, Chief Reserve Defense Counsel of the Marine Corps

MEETINGS	PRESENTERS
May 19, 2015 **Public Meeting of the JPP** **U.S. District Court for the District of Columbia Washington, DC**	• Ms. Kim Agnew, U.S. Navy, Sexual Assault Response Coordinator • Staff Sergeant E.A., U.S. Army • Ms. Marie Brodie, U.S. Marine Corps, Sexual Assault Response Coordinator • Colonel Allen Broughton, U.S. Marine Corps, Chief of Staff, Marine Corps Installations National Capital Region • Ms. Susan Burke, Victim Counsel, Law Offices of Susan L. Burke • Ms. C.B., former U.S. Air Force Enlisted Member • 1st Lieutenant C.B., U.S. Army • Ms. Sara Darehshori, Senior Counsel, Human Rights Watch, U.S. Program • Captain Heidi Fleming, U.S. Navy, Commanding Officer • Colonel Brian Foley, U.S. Army, Garrison Commander • Petty Officer First Class S.F., U.S. Coast Guard • Command Master Chief Kevin Goodrich, U.S. Navy • Mr. Magnus Graham, U.S. Coast Guard, Sexual Assault Response Coordinator • Command Master Chief Jason Griffin, U.S. Coast Guard • Brigadier General David Harris, U.S. Air Force, Commander • Ms. A.H., Spouse of U.S. Air Force Staff Sergeant • Master Sergeant Michelle Johnson, U.S. Army • Sergeant First Class Bridgett Joseph, U.S. Army, Sexual Assault Response Coordinator • Lance Corporal J.J., U.S. Marine Corps • Staff Sergeant N.L., U.S. Air Force • Retaliation video featuring First Sergeant Katrina Moerk, U.S. Army • Petty Officer Third Class D.M., U.S. Coast Guard • Staff Sergeant LeeAnn Nelson, U.S. Marine Corps, Uniformed Victim Advocate • Command Chief Master Sergeant Craig Neri, U.S. Air Force • Ms. A.N., former U.S. Navy Petty Officer Second Class • Ms. Nancy Pike, U.S. Air Force, Sexual Assault Response Coordinator • Captain V.P. (Retired), U.S. Army • Ms. Meghan Rhoad, Researcher, Human Rights Watch, Women's Rights Division *Continued*

MEETINGS	PRESENTERS
May 19, 2015 **Public Meeting of the JPP** **U.S. District Court for the District of Columbia Washington, DC**	*Continued* • Mr. Michael Starkey, U.S. Air Force, Sexual Assault Prevention and Response Victim Advocate • Technical Sergeant J.S. (Retired), U.S. Air Force • Master Sergeant T.S., U.S. Air Force • Major K.V., U.S. Air Force • Captain Jeffrey Westling, U.S. Coast Guard, Commander
June 18, 2015 **Public Meeting of the JPP** **George Washington University Washington, DC**	• Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards • Mr. Kenneth Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP (by telephone) • Major Chantell Higgins, U.S. Marine Corps, Victims' Legal Counsel • Ms. Mary Kaye Justis, Director, TRICARE Health Plan • Dr. Cara J. Krulewitch, Certified Nurse-Midwife, Fellow of the American College of Nurse Midwives, Director, Women's Health, Medical Ethics and Patient Advocacy • Captain George "Rob" Lavine III, Senior Special Victims' Counsel • Ms. Stephanie Li, Chief, Regulations and Policy Staff, Compensation Service, Veterans Benefits Administration • Mr. R. Peter Masterton, U.S. Army, Chief, European Tort Claims Division, U.S. Army Claims Service Europe • Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration • Ms. Jennifer Riley, Assistant General Counsel for Military and Civilian Pay, Defense Finance and Accounting Services • Captain Micah Smith, U.S. Air Force, Special Victims' Counsel • Lieutenant Commander James Toohey, U.S. Navy, Victims' Legal Counsel • Ms. Diana M. Williard, Quality Assurance Officer, Compensation Service, Veterans Benefits Administration • Lieutenant Commander Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel • Ms. Donna Adams (public comment)

MEETINGS	PRESENTERS
June 25, 2015 **Meeting of the JPP Subcommittee** **Moynihan Courthouse New York, NY**	• Lieutenant Colonel Christopher Kennebeck, U.S. Army, Deputy Staff Judge Advocate • Brigadier General Charles Pede, U.S. Army, Commander/ Commandant, The Judge Advocate General's Legal Center and School • Mr. Dwight Sullivan, Department of Defense, Office of the General Counsel
July 22, 2015 **Meeting of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Major General Peggy Combs, U.S. Army, Commanding General, U.S. Army Cadet Command and Fort Knox • Major General Gina Grosso, U.S. Air Force, Director, Sexual Assault Prevention and Response • Brigadier General Austin Renforth, U.S. Marine Corps, Commanding General, Training Command • Major General (Retired) Robert Shadley, U.S. Army • Rear Admiral Cari Thomas, U.S. Coast Guard, Assistant Commandant for Human Resources • Major General (Retired) Margaret Woodward, U.S. Air Force
August 6, 2015 **Public Meeting of the JPP** **George Washington University Washington, DC**	• Panel Deliberations (no speakers)

MEETINGS	PRESENTERS
August 27, 2015 **Meeting of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Mr. John Awtrey, Department of Defense, Director, Law Enforcement Policy and Support • Lieutenant Commander Paul Casey, U.S. Coast Guard, Staff Judge Advocate • Lieutenant Commander Benedict Gullo, U.S. Coast Guard, Deputy Staff Judge Advocate • Major Tyler Heimann, U.S. Army, former Special Victim Prosecutor • Lieutenant Paul Hochmuth, U.S. Navy, Officer in Charge, Defense Service Office Southeast • Major Adam King, U.S. Marine Corps, Senior Trial Counsel • Colonel David Mendelson, U.S. Army, Staff Judge Advocate • Colonel Brynn Morgan, U.S. Air Force, Staff Judge Advocate • Captain Charles Olson, U.S. Marine Corps, Defense Counsel • Major Mary Ellen Payne, U.S. Air Force, Appellate Counsel, Government Trial and Appellate Division • Lieutenant Commander Ben Robertson, U.S. Navy, Senior Trial Counsel • Captain Lauren Shure, U.S. Air Force, Appellate Defense Counsel • Major Ryan Wardle, U.S. Army, Senior Defense Counsel • Lieutenant Colonel Brett Wilson, U.S. Marine Corps Reserves
September 17, 2015 **Meeting of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Congresswoman Lois Frankel (D-22nd FL) • Ms. Elisha Morrow, former U.S. Coast Guard

MEETINGS	PRESENTERS
September 18, 2015 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston Arlington, VA**	• Dr. Nathan Galbreath, Department of Defense, Senior Executive Advisor, Sexual Assault Prevention and Response Office • Dr. James Lynch, Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland • Major General Camille Nichols, U.S. Army, Director, DoD Sexual Assault Prevention and Response Office • Mr. Glenn Schmitt, Director, Office of Research and Data at the U.S. Sentencing Commission • Dr. Howard Snyder, Deputy Director, Bureau of Justice Statistics, U.S. Department of Justice • Dr. Cassia Spohn, Foundation Professor and Director, Arizona State University School of Criminology and Criminal Justice
October 9, 2015 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston Arlington, VA**	• Mr. Thomas F. Fichter, Assistant Prosecutor, Monmouth County Prosecutor's Office and Director, Special Victim's Unit • Mr. Steven J. Grocki, Deputy Chief for Litigation, Child Exploitation and Obscenity Section, Criminal Division, U.S. Department of Justice • Colonel Walter M. Hudson, U.S. Army, Chief, Criminal Law Division, Office of the Judge Advocate General • Lieutenant Commander Stuart Kirkby, U.S. Navy, Navy-Marine Corps Appellate Review Activity • Mr. Stephen P. McCleary, U.S. Coast Guard, Senior Military Justice Counsel and Chief Prosecutor, Office of Military Justice, Office of the Judge Advocate General • Ms. Katherine E. Robertson, Family Advocacy Program Manager, DoD Office of Family Readiness Policy • Lieutenant Colonel Julie L. Rutherford, U.S. Air Force, Air Staff Counsel, Air Force Sexual Assault Prevention and Response Office • Ms. Darlene Sullivan, Defense Sexual Assault Incident Database Program Manager, DoD Sexual Assault Prevention and Response Office • The Honorable Frank D. Whitney, United States Chief District Judge, Western District of North Carolina (by telephone) • Lieutenant Colonel Angela B. Wissman, U.S. Marine Corps, Branch Head, Judge Advocate Division, Military Justice Branch • Mr. Christopher Perry, Center for Prosecutor Integrity (public comment)

MEETINGS	PRESENTERS
October 22, 2015 **Meeting of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• The Honorable Andrew Effron, former Chief Judge, U.S. Court of Appeals for the Armed Forces, current Director, Military Justice Review Group
November 6, 2015 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston Arlington, VA**	• Dr. Nathan Galbreath, Department of Defense, Senior Executive Advisor, Sexual Assault Prevention and Response Office • Dr. Cassia Spohn, Foundation Professor and Director, Arizona State University School of Criminology and Justice • Mr. Howard Cooley, Jordan, Patrick & Cooley LLP, Attorneys at Law (public comment) • Mr. Christopher Perry, Program Director, Center for Prosecutor Integrity (public comment)
November 19, 2015 **Meeting (telephonic) of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Subcommittee Deliberations (no speakers)
December 2, 2015 **Meeting (telephonic) of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Subcommittee Deliberations and Review of Draft Report (no speakers)

MEETINGS	PRESENTERS
December 11, 2015 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston** **Arlington, VA**	• Dean Michelle Anderson, JPP Subcommittee Member • Ms. Laurie Rose Kepros, JPP Subcommittee Member • Dean Lisa Schenck, JPP Subcommittee Member • Professor Stephen Schulhofer, JPP Subcommittee Member • Brigadier General (Retired) James Schwenk, U.S. Marine Corps, JPP Subcommittee Member • Ms. Jill Wine-Banks, JPP Subcommittee Member • Dr. E. Edward Bartlett, President, Center for Prosecutor Integrity (public comment)
January 15, 2016 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston** **Arlington, VA**	• Panel Deliberations (no speakers)
January 22, 2016 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston** **Arlington, VA**	• Ms. Meghan Peters, JPP Staff Attorney • Dr. Cassia Spohn, Foundation Professor and Director, Arizona State University School of Criminology and Justice
March 11, 2016 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston** **Arlington, VA**	• Panel Deliberations (no speakers)

MEETINGS	PRESENTERS
April 8, 2016 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston** **Arlington, VA**	• Lieutenant Colonel Bret Batdorff, U.S. Army, Chief, Trial Counsel Assistance Program • Ms. Julie Carson, JPP Staff Attorney and Legislative Liaison • Ms. Christa Cothrel, U.S. Coast Guard Special Victims' Counsel Program Manager • Colonel Andrea deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division • Captain Karen Fischer-Anderson, U.S. Navy, Chief of Staff, Navy Victims' Legal Counsel Program • Special Agent Jeremy Gauthier, Deputy Assistant Director, Criminal Investigations & Operations Directorate, Naval Criminal Investigative Service Headquarters • Mr. John Hartsell, U.S. Air Force, Associate Chief, Military Justice Division • Colonel Elizabeth Marotta, U.S. Army, Special Victims' Counsel Program Manager • Colonel Katherine McDonald, U.S. Marine Corps, Officer in Charge, Victim's Legal Counsel Organization • Captain Bradley Palmer, U.S. Air Force, Special Victims Unit, Senior Trial Counsel • Mr. Kevin Poorman, U.S. Air Force, Associate Director, Criminal Headquarters, Air Force Office of Special Investigations • Major Jesse Schweig, U.S. Marine Corps, Officer in Charge, Trial Counsel Assistance Program • Lieutenant Commander Ryan Stormer, U.S. Navy, Deputy Chief, Trial Counsel Assistance Program • Mr. Guy Surian, U.S. Army, Deputy Chief of Investigative Operations, Investigative Policy and Criminal Intelligence • Ms. Christa Thompson, U.S. Army, Special Victim Witness Liaison Program Manager • Ms. Beverly Vogel, Sex Crimes Program Manager, U.S. Coast Guard Investigative Service • Mr. William Yables, Jr., U.S. Marine Corps, Paralegal Specialist, Installation Victim Witness Liaison Officer

MEETINGS	PRESENTERS
May 13, 2016 **Public Meeting of the JPP** **The Judge Advocate General's Legal Center and School** **Charlottesville, VA**	• Lieutenant Colonel Bret Batdorff, U.S. Army, Chief, Trial Counsel Assistance Program • Colonel Daniel Brookhart, U.S. Army, Chief, Trial Defense Service • Ms. Charlotte Cluverius, U.S. Navy, Deputy Chief of Staff, Victims' Legal Counsel Program • Colonel Kirk Davies, U.S. Air Force, Commandant, The Judge Advocate General's School • Colonel Andrea deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division • Ms. Julia Hejazi, U.S. Marine Corps, Highly Qualified Expert, Trial Counsel Assistance Program • Colonel Daniel Higgins, U.S. Air Force, Chief, Trial Defense Division • Lieutenant Colonel Christopher Kennebeck, U.S. Army, Chair and Professor, Criminal Law Department • Captain John Luce, U.S. Coast Guard, Chief, Legal Policy and Program Development • Commander Michael Luken, U.S. Navy, Chief, Trial Counsel Assistance Program • Colonel Katherine McDonald, U.S. Marine Corps, Officer in Charge, Victim Legal Counsel Organization • Colonel Katherine Oler, U.S. Air Force, Chief, Government Trial and Appellate Counsel Division • Brigadier General Charles Pede, U.S. Army, Commander/ Commandant, The Judge Advocate General's Legal Center and School • Commander Stephen Reyes, U.S. Navy, Director, Defense Counsel Assistance Program • Major Jesse Schweig, U.S. Marine Corps, Officer-In-Charge, Trial Counsel Assistance Program • Lieutenant Colonel Hanorah Tyer-Witek, U.S. Marine Corps, Executive Officer, Naval Justice School • Colonel Terri Zimmermann, U.S. Marine Corps, Officer in Charge (Reserve), Defense Services Agency

MEETINGS	PRESENTERS
September 23, 2016 **Public Meeting of the JPP** **One Liberty Center** **Arlington, VA**	• Judge James Baker, former Chief Judge, United States Court of Appeals for the Armed Forces • Mr. Roger Bruce, U.S. Air Force, Senior Appellate Government Counsel (by phone) • Lieutenant Colonel Christopher Carrier, U.S. Army, Chief, Capital and Complex Litigation Branch • Captain Andrew House, U.S. Navy-Marine Corps, Director, Appellate Defense Division • Major Anne Hsieh, U.S. Army, Senior Appellate Government Attorney and Branch Chief • Mr. Brian Keller, U.S. Navy-Marine Corps, Supervisory Appellate Counsel • Colonel (Retired) Denise Lind, former Senior Judge, Army Court of Criminal Appeals • Lieutenant Commander Michael Meyer, U.S. Coast Guard, Chief, Defense Services Division • Lieutenant Robert Miller, U.S. Navy, Appellate Government Counsel • Mr. Brian Mizer, U.S. Air Force, Senior Appellate Defense Counsel • Lieutenant Tereza Ohley, U.S. Coast Guard, Appellate Government Counsel • Colonel (Retired) William Orr, former Chief Judge, Air Force Court of Criminal Appeals • Rear Admiral (Retired) Christian Reismeier, former Chief Judge, Navy-Marine Corps Court of Criminal Appeals • Major Lauren Shure, U.S Air Force, Appellate Defense Counsel • Major Meredith Steer, U.S. Air Force, Appellate Government Counsel

MEETINGS	PRESENTERS
October 14, 2016 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston** **Arlington, VA**	• Colonel (Retired) Don Christensen, U.S. Air Force, President, Protect Our Defenders • Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute • Mr. Ryan Guilds, Counsel, Arnold & Porter LLP • Mr. Chris Johnson, Chief Appellate Defender for the State of New Hampshire (by telephone) • Mr. Jason Middleton, Supervising Deputy State Public Defender, Appellate Division, Colorado State Public Defender • Ms. Ann Vallandingham, Senior Policy Advisor to the Director, Office for Victims of Crime, U.S. Department of Justice
November 18, 2016 **Public Meeting of the JPP** **One Liberty Center** **Arlington, VA**	• Major Harlye Carlton, U.S. Marine Corps, Executive Secretary, Joint Service Committee on Military Justice • Captain Andrew House, U.S. Navy, Director, Navy-Marine Corps Appellate Defense Division • Mr. Stephen McCleary, Senior Military Justice Counsel, U.S. Coast Guard • Colonel (Retired) William Orr, Jr., U.S. Air Force, former Chief Judge, U.S. Air Force Court of Criminal Appeals • Colonel William Pigott, Jr., U.S. Marine Corps, Chair, Joint Service Committee on Military Justice • Lieutenant Colonel Mary Catherine Vergona, U.S. Army, Chief, Policy Branch, Office of the Judge Advocate General • Lieutenant Colonel Angela Wissman, U.S. Marine Corps Reserve, Deputy Officer in Charge, Victims' Legal Counsel Organization
December 9, 2016 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston** **Arlington, VA**	• The Honorable Andrew Effron, Director, Military Justice Review Group, Department of Defense • Ms. Lisa Friel, JPP Subcommittee Member • Ms. Laurie Kepros, JPP Subcommittee Member • Dean Lisa Schenck, JPP Subcommittee Member • Brigadier General (Retired) James Schwenk, U.S. Marine Corps, JPP Subcommittee Member • Mr. Dwight Sullivan, Department of Defense, Office of General Counsel • Ms. Jill Wine-Banks, JPP Subcommittee Member

MEETINGS	PRESENTERS
December 21, 2016 **Meeting (telephonic) of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Subcommittee Deliberations and Review of Draft Report (no speakers)
January 5, 2017 **Meeting of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Major Emilee Elbert, U.S. Army, Deputy Chief, Trial Counsel Assistance Program • Special Agent Diane Kelley, Department of Defense, Office of Inspector General • Colonel William R. Kern, U.S. Army, Professional Responsibility Branch • Commander Cassie Kitchen, U.S. Coast Guard, Chief, Military Justice and Command Advice • Mr. Steven Knight, Department of Defense, Office of Inspector General • Commander Michael Luken, U.S. Navy, Director, Trial Counsel Assistance Program • Lieutenant Colonel Nicholas Martz, U.S. Marine Corps, Military Justice Branch Head • Colonel Katherine Oler, U.S. Air Force, Chief, Government Trial and Appellate Counsel Division • Colonel (Retired) Kathryn Stone, U.S. Army, Attorney Advisor, Professional Responsibility Branch Head

MEETINGS	PRESENTERS
January 6, 2017 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston** **Arlington, VA**	• Major James Argentina, Jr., U.S. Marine Corps, Senior Defense Counsel • Captain Brad Dixon, U.S. Army, Trial Counsel Assistance Program Training Officer • Captain Christopher Donlin, U.S. Army, Special Victims' Counsel • Lieutenant Colonel (Retired) Wade Faulkner, U.S. Army, former Military Trial Judge • Captain September Foy, U.S. Air Force, Special Victims' Counsel • Lieutenant Colonel (Retired) Elizabeth Harvey, U.S. Marine Corps, former Military Trial Judge • Major Benjamin Henley, U.S. Air Force, Senior Defense Counsel • Lieutenant Commander Elizabeth Hutton, U.S. Coast Guard, Special Victims' Counsel • Commander Cassie Kitchen, U.S. Coast Guard, former Military Trial Judge • Commander Mike Luken, U.S. Navy, former Military Trial Judge • Major Ryan Reed, U.S. Air Force, Senior Trial Counsel, Special Victims' Unit • Major Marcia Reyes-Steward, U.S. Army, Senior Defense Counsel • Lieutenant Commander Ben Robertson, U.S. Navy, Senior Trial Counsel • Lieutenant Colonel (Retired) Wendy Sherman, U.S. Air Force, former Military Trial Judge • Lieutenant Commander James Toohey, U.S. Navy, Victims' Legal Counsel • Lieutenant Commander Rachel Trest, U.S. Navy, Senior Defense Counsel • Lieutenant Commander Geralyn van de Krol, U.S. Coast Guard, Branch Chief, Trial Services, Coast Guard Legal Service Command • Major Aran Walsh, U.S. Marine Corps, Regional Victims' Legal Counsel – West • Major Adam Workman, U.S. Marine Corps, Legal Services Support Team
January 24, 2017 **Meeting (telephonic) of the JPP Subcommittee** **One Liberty Center** **Arlington, VA**	• Subcommittee Deliberations and Review of Draft Report (no speakers)

MEETINGS	PRESENTERS
February 8, 2017 **Meeting (telephonic) of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Subcommittee Deliberations and Review of Draft Report (no speakers)
February 23, 2017 **Meeting of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Subcommittee Deliberations (no speakers)
February 24, 2017 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston Arlington, VA**	• Lieutenant Colonel Deanna Daly, U.S. Air Force, Senior Special Victims' Counsel for Appellate and Outreach at the Special Victims' Counsel Division • Ms. Lisa Friel, JPP Subcommittee Member • Captain Andrew House, U.S. Navy, Director, Navy-Marine Corps Appellate Division • Ms. Laurie Kepros, JPP Subcommittee Member • Mr. Stephen McCleary, U.S. Coast Guard, Deputy Chief of Staff and Deputy Managing Counsel, Department of Homeland Security • Colonel Katherine Oler, U.S. Air Force, Chief Government Trial and Appellate Counsel Division • Colonel (Retired) William Orr, Jr., U.S. Air Force, Chief, Strategic Military Justice Legislation and Policy • Colonel Jeffrey G. "Jeff" Palomino, U.S. Air Force, Chief, Appellate Defense Division, Air Force Legal Operations Agency • Dean Lisa Schenck, JPP Subcommittee Member • Lieutenant Colonel Mary Catherine Vergona, U.S. Army, Chief, Policy Branch, Criminal Law Division • Ms. Jill Wine-Banks, JPP Subcommittee Member

MEETINGS	PRESENTERS
February 28, 2017 **Meeting (telephonic) of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Subcommittee Deliberations and Review of Draft Report (no speakers)
March 10, 2017 **Public Meeting of the JPP** **One Liberty Center Arlington, VA**	• Ms. Laurie Kepros, JPP Subcommittee Member • Mr. James Martinson, U.S. Navy, Highly Qualified Expert • Mr. Stephen McCleary, U.S. Coast Guard, Deputy Chief of Staff and Deputy Managing Counsel, Department of Homeland Security • Colonel (Retired) William Orr, Jr., U.S. Air Force, Chief Strategic Military Justice Legislation and Policy • Brigadier General (Retired) James Schwenk, U.S. Marine Corps, JPP Subcommittee Member • Lieutenant Colonel Mary Catherine Vergona, U.S. Army, Chief, Policy Branch, Criminal Law Division • Ms. Jill Wine-Banks, JPP Subcommittee Member
April 4, 2017 **Meeting of the JPP Subcommittee** **Bracewell LLP New York, NY**	• Subcommittee Deliberations (no speakers)
April 7, 2017 **Public Meeting of the JPP** **One Liberty Center Arlington, VA**	• Dr. Nathan Galbreath, Senior Executive Advisor, Department of Defense Sexual Assault Prevention and Response Office • Ms. Kathy Robertson, Family Advocacy Program Manager, Office of the Deputy Assistant Secretary, Military Community and Family Policy, Department of Defense • Dr. Cassia Spohn, Foundation Professor and Director, School of Criminology and Criminal Justice, Arizona State University

MEETINGS	PRESENTERS
April 26, 2017 **Meeting (telephonic) of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Subcommittee Deliberations and Review of Draft Report (no speakers)
May 3, 2017 **Meeting (telephonic) of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Subcommittee Deliberations and Review of Draft Report (no speakers)
May 18, 2017 **Meeting of the JPP Subcommittee** **One Liberty Center Arlington, VA**	• Subcommittee Deliberations (no speakers)
May 19, 2017 **Public Meeting of the JPP** **Holiday Inn Arlington at Ballston Arlington, VA**	• Ms. Laurie Kepros, JPP Subcommittee Member • Dean Lisa Schenck, JPP Subcommittee Member • Ms. Jill Wine-Banks, JPP Subcommittee Member
June 16, 2017 **Public Meeting of the JPP** **One Liberty Center Arlington, VA**	• Panel Deliberations (no speakers)

MEETINGS	PRESENTERS
July 26–27, 2017 **Public Meeting of the JPP** **One Liberty Center** **Arlington, VA**	• Panel Deliberations (no speakers)

APPENDIX E: Reports and Recommendations of the Judicial Proceedings Panel

A. JUDICIAL PROCEEDINGS PANEL INITIAL REPORT (FEBRUARY 2015)

1. Implementation Process for Amendments to the Uniform Code of Military Justice

Recommendation 1: The Secretary of Defense examine the DoD and interagency review process for establishing guidance for implementing statutory provisions of the UCMJ and explore options to streamline the procedures.

2. Special Victims' Counsel Program

Recommendation 2: The Secretary of Defense direct the Services to implement additional selection criteria requiring that judge advocates have adequate criminal justice experience before they are assigned as special victims' counsel.

Recommendation 3: The Department of Defense develop a policy to standardize both the time frame within which to receive SVC training and the substantive requirements of SVC training.

Recommendation 4: The Secretary of Defense direct the Services to perform regular evaluations to ensure SVCs' assignment to locations that maximize the opportunity for face-to-face interactions between SVCs and clients, and to develop effective means for SVCs to communicate with clients when face-to-face communication is not possible.

Recommendation 5: The Secretary of Defense establish appropriate SVC program performance measures and standards, including evaluating, monitoring, and reporting on the SVC programs; establishing guiding principles for the Services; and ensuring centralized, standardized assessment of SVC program effectiveness and client satisfaction.

Recommendation 6: The Secretary of Defense direct the Services to ensure SVCs and victims have appropriate access to docketing information and case filings. In part, this could be accomplished by adopting an electronic system akin to the civilian PACER (Public Access to Court Electronic Records) service.

Recommendation 7: The Secretary of Defense direct the Services to establish uniform practices and procedures concerning SVCs' participation for all military judicial proceedings.

3. Victims' Rights

Recommendation 8: The Secretary of Defense consider establishing expedited procedures for victims to seek mandatory interlocutory review in the Service Courts of Criminal Appeals of any alleged violation of victims' rights.

Recommendation 9: The Secretary of Defense propose timely revisions to statutes, the Manual for Courts-Martial (MCM), and/or regulations to extend eligibility for SVC representation so long as a right of the victim exists and is at issue.

4. Military Rules of Evidence 412 (Past sexual behavior) and 513 (Psychotherapist-patient privilege)

Recommendation 10: The President sign an executive order eliminating the "constitutionally required" exception within M.R.E. 412 at Article 32 hearings.

Recommendation 11: The Secretary of Defense issue specific, uniform guidance to ensure that mental health records are neither sought from a medical treatment facility by investigators or military justice practitioners nor acknowledged or released by medical treatment facility personnel until a military judge or Article 32 hearing officer has ordered their production.

5. Article 120 of the Uniform Code of Military Justice

Non-Enumerated Recommendations: The JPP believes that bifurcating different types of sex offenses under the UCMJ is not necessary at this time and would create further confusion. The JPP recommends against this action and does not believe that further evaluation of this issue is warranted.

The JPP recommends that a subcommittee conduct further evaluation and provide recommendations [on 17 specific questions related to Article 120, UCMJ, and coercive sexual relationships and situations involving abuse of authority].

B. JUDICIAL PROCEEDINGS PANEL REPORT ON RESTITUTION AND COMPENSATION FOR MILITARY ADULT SEXUAL ASSAULT CRIMES (FEBRUARY 2016)

Recommendation 12: The Department of Defense establish a new, uniform program that provides compensation for unreimbursed out-of-pocket expenses of victims of sexual assault crimes committed by Service members.

Recommendation 13: Congress not amend the Uniform Code of Military Justice to add restitution as an authorized punishment that may be adjudged at courts-martial.

Recommendation 14: The military Services provide recurring training to trial practitioners and victim assistance personnel on the availability and use of restitution in pretrial agreements between the government and the accused.

Recommendation 15: The President enact the Department of Defense's recently proposed executive order to modify Rule for Courts-Martial 705(d)(3) to provide victims the right to be heard before a convening authority enters into a pretrial agreement.

Recommendation 16: Congress not amend the Uniform Code of Military Justice to direct that the forfeited wages of incarcerated members of the Armed Forces be used to pay compensation to victims of sexual assault crimes committed by Service members.

Recommendation 17: Congress not amend Article 139 of the Uniform Code of Military Justice to include bodily harm among the injuries meriting compensation for redress.

C. JUDICIAL PROCEEDINGS PANEL REPORT ON ARTICLE 120 OF THE UNIFORM CODE OF MILITARY JUSTICE (FEBRUARY 2016)

Recommendation 18: Congress should amend the definition of "consent" in Article 120(g)(8) of the Uniform Code of Military Justice.

Recommendation 19: The President should amend the Manual for Courts-Martial to specifically state that consent (as an attack on proof) and mistake of fact as to consent (as a clearly delineated defense) may be raised in any case in which they are relevant.

Recommendation 20: Congress should amend Article 120 of the Uniform Code of Military Justice to provide a definition of the term "incapable of consenting" for cases under Article 120(b) and (d), and the President should provide further executive guidance about the circumstances to consider when considering whether a victim was incapable of consenting.

Recommendation 21: Congress should amend and replace the reference in Article 120(b)(1)(B) of the Uniform Code of Military Justice to "causing bodily harm" and should remove the definition of "bodily harm" from Article 120(g)(3).

Recommendation 22: Congress should amend the definitions of "sexual act" and "sexual contact" in Article 120(g)(1)–(2) of the Uniform Code of Military Justice.

Recommendation 23: Congress should adopt a new theory of liability in Article 120(b)(1)(E) of the Uniform Code of Military Justice for coercive sexual acts or contact in which a perpetrator has used position, rank, or authority to obtain compliance by the other person.

D. JUDICIAL PROCEEDINGS PANEL REPORT ON RETALIATION RELATED TO SEXUAL ASSAULT OFFENSES (FEBRUARY 2016)

Recommendation 24: In the Department of Defense's strategy addressing retaliation related to sexual assault, the Secretary of Defense specify (1) processes for reporting and investigating retaliation, (2) responsibility for the collection and monitoring of reports, and (3) mechanisms for tracking retaliation complaints and outcomes.

Recommendation 25: The Secretary of Defense and Service Secretaries develop a standardized form for reporting retaliation. The standardized form should be linked to DD Form 2910 in the Defense Sexual Assault Incident Database to properly track retaliation allegations related to sexual assault offenses, should provide victims of retaliation with the option to file an informal or formal retaliation report, and should be updated throughout the investigative and judicial process to ensure that the retaliation allegation is monitored and resolved.

Recommendation 26: The Secretary of Defense and Service Secretaries continue to provide multiple channels for Service members to report retaliation. In addition, the Secretary of Defense and Service Secretaries formally task installation sexual assault response coordinators (SARCs) with consolidating information from reports on retaliation, recording information on retaliation reports in the Defense Sexual Assault Incident Database, and ensuring that information about the investigation and resolution of retaliation claims is properly and fully monitored.

Recommendation 27: Congress require the Secretary of Defense and Service Secretaries to track retaliation allegations related to sexual assault offenses and publish information regarding retaliation complaints, investigations, and final dispositions in the Department's annual report to Congress on sexual assault prevention and response.

Recommendation 28: The Secretary of Defense establish a policy that requires the DoD Office of Inspector General to investigate all complaints of professional retaliation related to sexual assault. The Secretary of Defense ensure that these investigations are prioritized and conducted by personnel with specialized training. The Secretary of Defense require the inspectors general to report the status of the investigations to the installation sexual assault response coordinators (SARCs) prior to each monthly case management group meeting.

Recommendation 29: The Service Secretaries establish policies to ensure that personnel assigned by commanders to investigate retaliation complaints are properly trained on issues regarding retaliation relating to sexual assault.

Recommendation 30: The Secretary of Defense and Service Secretaries expand the expedited transfer program to include job retraining for Service members who belong to small specialty branches and to be made available, on a case-by-case basis, to bystanders and witnesses of sexual assault who experience retaliation.

Recommendation 31: The Secretary of Defense establish specific guidelines clarifying what information can be released to a person who files a retaliation complaint related to a sexual assault.

Recommendation 32: The Secretary of Defense begin tracking the Services' implementation of the statutory requirement that general or flag officers review proposed involuntary separations of Service members who made unrestricted reports of sexual assault within the preceding year.

Recommendation 33: The Service Secretaries revise their regulatory definitions of maltreatment, which currently contain an overly narrow intent requirement.

Recommendation 34: Congress refrain from creating an enumerated offense prohibiting social retaliation in the Uniform Code of Military Justice.

Recommendation 35: The Secretary of Defense and Service Secretaries develop innovative and effective training on retaliation for commanders and all other Service members, including targeted training that may be used in response to problems of retaliation within an organization.

Recommendation 36: The Secretary of Defense revise the elements and burdens of proof for reprisal claims made under the Military Whistleblower Protection Act so that they parallel the elements and burdens of proof outlined in the Whistleblower Protection Act for DoD civilians.

E. JUDICIAL PROCEEDINGS PANEL REPORT ON STATISTICAL DATA REGARDING MILITARY ADJUDICATION OF SEXUAL ASSAULT OFFENSES (APRIL 2016)

Recommendation 37: The Department of Defense collect and analyze case adjudication data using a standardized, document-based collection model, similar to systems used by the Judicial Proceedings Panel or U.S. Sentencing Commission, that incorporates uniform definitions and categories across all of the military Services.

Recommendation 38: The Department of Defense include legal disposition information related to all adult sexual assault complaints in one annual DoD report, changing its policy that excludes adult-victim cases that are handled by the Family Advocacy Program from Sexual Assault Prevention and Response Office reports.

F. JUDICIAL PROCEEDINGS PANEL REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES (APRIL 2017)

Recommendation 39: In order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as reasonably needed.

Recommendation 40: The military Services immediately review Service defense organizations' staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an independent audit of defense staffing across all military Services to determine the optimal level of staffing for the Service defense organizations in the long term and authorize temporary details from one Service to another to ensure expeditious disposition of allegations. Organizations that have conducted similar kinds of assessments of public defender resources in various civilian jurisdictions may be of assistance in conducting this audit.

Recommendation 41: The Secretary of Defense direct the Joint Service Committee on Military Justice to draft appropriate rules and measures, as necessary, to vest defense expert approval authority and expenditure funding in the Service defense organizations.

Recommendation 42: The military Services permit only defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in sexual assault cases. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set assignment policies that provide defense counsel two or more consecutive years of experience in the role, to the maximum extent feasible at the same location. Exceptions to this policy should be personally approved, on a case-by-case basis, by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.

G. JUDICIAL PROCEEDINGS PANEL REPORT ON VICTIMS' APPELLATE RIGHTS (JUNE 2017)

Recommendation 43: The Joint Service Committee on Military Justice revise its proposed amendment to Rule for Courts-Martial (R.C.M.) 1103A(b)(4)(B)(ii) to include the following language: "Prior to a decision to permit examination of material described in this subparagraph, notice and an opportunity to be heard shall be given to any person whose records are about to be examined and to appellate counsel."

Recommendation 44: The Services formalize procedures to provide victims in sexual assault cases (1) with timely notice, unless declined, of significant appellate matters, including but not limited to the date and time of the filing of appellate pleadings and briefs, of any appellate courtroom proceedings, of the date when the case is taken under submission, and of the final decision and any opinion of

any appellate court, and (2) with convenient access to any unsealed documents filed in the case, if requested.

Recommendation 45: Congress revise Section 547(a) of S. 2943, the Senate version of the Fiscal Year 2017 National Defense Authorization Act, to state:

SEC. 547. APPELLATE STANDING OF VICTIMS UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

(a) APPELLATE REVIEW.—Section 806b of title 10, United States Code (article 6b of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(f) APPELLATE REVIEW.—(1) If counsel for the accused or the Government files appellate pleadings under section 866 or 867 of this title (article 66 or 67) calling into question a prior judicial ruling in the case on an issue as to which a victim previously had standing and was heard, during appellate review that same victim may respond in the same manner as a party regarding that same issue, including through a Special Victims' Counsel under section 1044e of this title."

Recommendation 46: Congress amend Article 6b of the Uniform Code of Military Justice to grant the Court of Appeals for the Armed Forces (CAAF) jurisdiction to hear a victim's appeal if a Service Court of Criminal Appeals denies the victim's petition for a writ of mandamus under Article 6b.

H. JUDICIAL PROCEEDINGS PANEL REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY (SEPTEMBER 2017)

Recommendation 47: In order to ensure that military criminal investigative organizations can focus investigative resources on the most serious sexual assault cases, the advisory committee that follows the JPP, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, monitor the effects of the DoD policy that allows Service law enforcement agencies to assist the MCIOs with sexual assault investigations, and make findings and recommendations to the Secretary of Defense as it deems appropriate.

Recommendation 48: The Secretary of Defense take the necessary steps to ensure that special victims' counsel and victims' legal counsel (1) have the resources to schedule and attend the initial victim interview promptly after a report of sexual assault and (2) receive the training necessary to recognize the importance of a prompt initial victim interview by the MCIO to an effective and just prosecution.

Recommendation 49: The Secretary of Defense identify and remove barriers to thorough questioning of a sexual assault victim by the MCIOs or other law enforcement agencies.

Recommendation 50: The Secretary of Defense remove impediments to MCIOs' obtaining tangible evidence from a sexual assault victim, particularly information contained on a cell phone or other digital devices, and develop appropriate remedies that address victims' legitimate concerns about turning over this evidence to ensure that sexual assault investigations are complete and thorough.

Recommendation 51: The Secretary of Defense review the resources, staffing, procedures, and policies at forensic laboratories within the Department of Defense to ensure expeditious testing of evidence by forensic laboratories.

I. JUDICIAL PROCEEDINGS PANEL REPORT ON STATISTICAL DATA REGARDING MILITARY ADJUDICATION OF SEXUAL ASSAULT OFFENSES FOR FISCAL YEAR 2015 (SEPTEMBER 2017)

Recommendation 52: The Secretary of Defense and the military Services use a standardized, document-based collection model for collecting and analyzing case adjudication data in order to implement Article 140a, Uniform Code of Military Justice (*Case Management; Data Collection and Accessibility*).

Recommendation 53: The new military justice data collection system required to be developed pursuant to Article 140a, Uniform Code of Military Justice (*Case Management; Data Collection and Accessibility*), should be designed so as to become the exclusive source of sexual assault case adjudication data for DoD's annual report to Congress on DoD's sexual assault prevention and response initiatives.

Recommendation 54: The successor federal advisory committee to the JPP, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, should consider continuing to analyze adult-victim sexual assault court-martial data on an annual basis as the JPP has done, and should consider analyzing the following patterns that the JPP discovered in its analysis of fiscal year 2015 court-martial data:

a. Cases involving military victims tend to have less punitive outcomes than cases involving civilian victims; and

b. The conviction and acquittal rates for sexual assault offenses vary significantly among the military Services.

c. If a Service member is charged with a sexual assault offense, and pleads not guilty, the probability that he or she will be convicted of a sexual assault offense is 36%, and the probability that he or she will be convicted of any offense (i.e., either a sex or a non-sex offense) is 59%.

J. JUDICIAL PROCEEDINGS PANEL REPORT ON PANEL CONCERNS REGARDING THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES (SEPTEMBER 2017)

Recommendation 55: The Secretary of Defense and the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which, in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP, no longer serves a useful discovery purpose. This review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of such a preliminary hearing officer against referral, based on lack of probable cause, should be given more weight by the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further analysis of, or changes to, the process are required.

In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP reiterates its recommendation—presented in its report on military defense counsel resources

and experience in sexual assault cases—that the military Services provide the defense with independent investigators.

Recommendation 56: Article 33, UCMJ, nonbinding case disposition guidance for convening authorities and staff judge advocates should require that the following standard be considered for referral to court-martial: the charges are supported by probable cause and there is a reasonable likelihood of proving the elements of each offense beyond a reasonable doubt using only evidence likely to be found admissible at trial.

The nonbinding disposition guidance should require the staff judge advocate and convening authority to consider all the prescribed guideline factors in making a disposition determination, though they should retain discretion regarding the weight they assign each factor.

Recommendation 57: After case disposition guidance under Article 33, UCMJ, is promulgated, the Secretary of Defense and DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

Recommendation 58: The Secretary of Defense and the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. This review should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should also consider whether such a change would encourage the staff judge advocate to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

Recommendation 59: Congress review and consider revising provisions in the National Defense Authorization Act for Fiscal Year 2014 and Fiscal Year 2015, sections 1744 and 541 respectively, that require non-referral decisions in certain sexual assault cases to be forwarded for review and decision to a higher general court-martial convening authority or to the Service Secretary, because these provisions appear to have created a perception of undue pressure on convening authorities to refer such cases. The Secretary of Defense should develop procedures to mitigate this perception.

Recommendation 60: The Secretary of Defense and the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system.

Recommendation 61: The Secretary of Defense ensure that special victims' counsel/victims' legal counsel (SVCs/VLCs) receive the necessary training on the importance of allowing reasonable access by prosecutors to sexual assault victims prior to courts-martial. Such training will ensure that SVCs/VLCs are considering the value of an effective relationship between the prosecutor and the victim in the advice they provide their victim-clients, with the goal of assisting the prosecutor in fully preparing for trial.

Recommendation 62: The Department of Defense Sexual Assault Prevention and Response Office ensure that sexual assault training conducted by the military Services provide accurate information to military members regarding a person's ability to consent to sexual contact after consuming alcohol and regarding the legal definition of "impairment" in this context and that training be timed and conducted so as to avoid "training fatigue."

The Secretary of Defense and the DAC-IPAD monitor whether misperceptions regarding alcohol consumption and consent affect court-martial panel members.

Recommendation 63: The Secretary of Defense review the policy on expedited transfer of sexual assault victims and consider whether it should be modified to require commanders to determine, in each case, whether a sexual assault victim could be transferred to another unit on the same installation or to a nearby installation without sacrificing the vital interests of the victim. The intent of this change would be to strike a balance between ensuring that prosecutors have access to victims in preparing for courts-martial and satisfying the need to separate the victim from the accused, while maintaining the victim's access to support systems. Commanders and SVCs/VLCs should receive training in how relocating victims from less desirable to more desirable locations can be used by defense counsel to suggest victims' abuse of this system and to cast doubt on their credibility, possibly leading to more acquittals at courts-martial. The Secretary of Defense should develop procedures to minimize this problem.

The Secretary of Defense and the DAC-IPAD collect data on expedited transfers to determine the locations from which and to which victims are requesting expedited transfers and to review their stated reasons.

APPENDIX F: Judicial Proceedings Panel Tasks, Recommendations, and Implementation Status

ARTICLE 120, UCMJ (RAPE AND SEXUAL ASSAULT GENERALLY)	
Article 120 **Tasks**	1. Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice (UCMJ) that were enacted by section 541 (Article 120 revision) of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1404). (FY13 NDAA, § 576(d)(2)(A)) 2. An assessment of the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), to expressly cover a situation in which a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person. (FY14 NDAA, § 1731(b)(1)(A)) 3. Consider whether to recommend legislation that would either split sexual assault offenses under Article 120 of the UCMJ into different articles that separate penetrative and contact offenses from other offenses or narrow the breadth of conduct currently criminalized under Article 120. (RSP Recommendation 113 (June 2014))

ARTICLE 120, UCMJ (RAPE AND SEXUAL ASSAULT GENERALLY)	
Article 120 JPP Reports and Recommendations	**9 Recommendations (including 2 non-enumerated recommendations)** **JPP Initial Report (February 2015)** **R-1:** The Secretary of Defense examine the DoD and interagency review process for establishing implementation guidance for UCMJ provisions and explore options to streamline the process. **Non-Enumerated Recommendations:** (1) Article 120, UCMJ, not be bifurcated into separate penetrative and contact (non-penetrative) offenses; and (2) a subcommittee be formed to evaluate 17 specific issues related to Article 120, UCMJ, and coercive sexual relationships and situations involving abuse of authority. **JPP Report on Article 120 of the Uniform Code of Military Justice (February 2016)** **R-18:** Congress should amend the definition of "consent" in Article 120(g)(8), UCMJ. **R-19:** The President should amend the Manual for Courts-Martial to specifically state that consent (as an attack on proof) and mistake of fact as to consent (as a clearly delineated defense) may be raised in any case in which they are relevant. **R-20:** Congress should amend Article 120, UCMJ, to provide a definition of the term "incapable of consenting" for cases under Article 120(b) and (d), and the President should provide further executive guidance about the circumstances to consider when considering whether a victim was incapable of consenting. **R-21:** Congress should amend and replace the reference in Article 120(b)(1)(B), UCMJ, to "causing bodily harm" and should remove the definition of "bodily harm" from Article 120(g)(3), UCMJ. **R-22:** Congress should amend the definitions of "sexual act" and "sexual contact" in Article 120(g)(1)–(2), UCMJ. **R-23:** Congress should adopt a new theory of liability in Article 120(b)(1)(E), UCMJ, for coercive sexual acts or contact in which a perpetrator has used position, rank, or authority to obtain compliance by another person.

ARTICLE 120, UCMJ (RAPE AND SEXUAL ASSAULT GENERALLY)	
Article 120 **Congressional and DoD Implementation**	Subsequent to the JPP recommendations, Congress enacted FY16 NDAA, § 543, requiring the Secretary of Defense to examine the DoD process for implementing statutory changes to the UCMJ for the purpose of developing options to streamline such a process. The Secretary is required to adopt procedures to ensure that legal guidance is published as soon as practicable whenever statutory changes to the UCMJ are implemented. In the FY17 NDAA, § 5430, Congress amended the definition of "consent," removed the definition and element of "bodily harm," and amended the definitions of "sexual act" and "sexual contact" in Article 120, UCMJ. Congress also added a definition for "incapable of consent"; however, Congress chose to use the definition from the federal statute. Congress did not enact a new provision in Article 120, UCMJ, to add a theory of liability for coercive sex acts based on a perpetrator's position, rank, or authority, but did enact Article 93a, UCMJ, in the FY 17 NDAA that prohibited activities with a military recruit or trainee by a person in a position of special trust.

SPECIAL VICTIMS' COUNSEL/VICTIMS' LEGAL COUNSEL (SVC/VLC) PROGRAM	
SVC Program Task	An assessment of the implementation and effect of section 1044e of title 10, United States Code, as added by section 1716, and make such recommendations for modification of such section as the Judicial Proceedings Panel considers appropriate. (FY14 NDAA, § 1731(b)(1)(B))
SVC Program JPP Reports and Recommendations	**7 Recommendations** **JPP Initial Report (February 2015)** **R-2:** The Secretary of Defense direct the Services to implement additional selection criteria for SVCs/VLCs. **R-3:** DoD develop a policy to standardize requirements for both content and timing of SVC/VLC training. **R-4:** The Secretary of Defense direct the Services to optimize SVC/VLC assignments to maximize face-to-face contact with clients. **R-5:** The Secretary of Defense establish SVC/VLC guiding principles and performance measures. **R-7:** The Secretary of Defense direct the Services to establish uniform SVC/VLC participation policies for judicial proceedings. **R-9:** The Secretary of Defense propose revisions to statutes, the Manual for Courts-Martial (MCM), and/or regulations to extend eligibility for SVC/VLC representation as long as a right of the victim is at issue. **JPP Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases (September 2017)** **R-61:** The Secretary of Defense ensure that SVCs/VLCs receive the necessary training on the importance of allowing reasonable access by prosecutors to sexual assault victims prior to courts-martial. Such training will ensure that SVCs/VLCs are considering the value of an effective relationship between the prosecutor and the victim in the advice they provide their victim-clients, with the goal of assisting the prosecutor in fully preparing for trial.

SPECIAL VICTIMS' COUNSEL/VICTIMS' LEGAL COUNSEL (SVC/VLC) PROGRAM	
SVC Program **Congressional and DoD Implementation**	Subsequent to the JPP recommendations, Congress enacted FY16 NDAA, §§ 531 and 535 standardizing training, maximizing face-to-face contact between SVCs/VLCs and clients, and establishing guiding principles. DoD directed the Services to establish uniform participation policies, implement additional selection criteria for SVCs, and extend the eligibility for SVC/VLC representation for as long as a victim's right is at issue. (Sept. 2, 2016, DSD Memo)

VICTIMS' ACCESS TO INFORMATION	
Access to Information **Task**	The Judicial Proceedings Panel and the Joint Service Committee should review and clarify the extent of a victim's right to access information that is relevant to the assertion of a particular right. (RSP Recommendation 45)
Access to Information **JPP Reports and Recommendations**	1 Recommendation **JPP Initial Report (February 2015)** **R-6:** The Secretary of Defense direct the Services to ensure SVCs and victims have appropriate access to docketing information and case filings. In part, this could be accomplished by adopting an electronic system akin to the civilian Public Access to Court Electronic Records (PACER) service.
Access to Information **Congressional and DoD Implementation**	Subsequent to the JPP recommendations, Congress enacted FY 17 NDAA, § 5504, creating a new Article 140a, UCMJ (Case management; data collection and accessibility), which requires the Secretary of Defense to prescribe uniform standards and criteria for facilitating access to docket information, filings, and records in the military justice system, using, so far as practicable, the best practices of federal and state courts. DoD directed the Service Secretaries to develop guidance for their respective Departments to ensure that victims and their counsel have appropriate access to docketing information and case filings. (Sept. 2, 2016, DSD Memo)

VICTIM PRIVACY – MILITARY RULE OF EVIDENCE (M.R.E.) 412 (SEX OFFENSE CASES: THE VICTIM'S SEXUAL BEHAVIOR OR PREDISPOSITION)	
M.R.E. 412 **Tasks**	1. Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (Article 32 of the Uniform Code of Military Justice), and any instances in which prior sexual conduct was determined to be inadmissible. (FY13 NDAA, § 576(d)(2)(E)) 2. Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case. (FY13 NDAA, § 576(d)(2)(F))
M.R.E. 412 **JPP Reports and Recommendations**	**1 Recommendation** **JPP Initial Report (February 2015)** **R-10:** The President sign an executive order eliminating the "constitutionally required" exception within M.R.E. 412 at Article 32 hearings. **JPP Final Report (October 2017)** The JPP received additional testimony on this topic from 19 practitioners and former military judges at its January 6, 2017, public meeting devoted to military stakeholder perspectives on the application of M.R.E. 412 and 513 at Article 32 hearings and courts-martial.
M.R.E. 412 **Congressional and DoD Implementation**	Subsequent to the JPP recommendations, Executive Order 13696, signed on June 17, 2015, eliminated the "constitutionally required" exception within M.R.E. 412 at Article 32 hearings.

VICTIM PRIVACY – M.R.E. 513 (PSYCHOTHERAPIST-PATIENT PRIVILEGE)	
M.R.E. 513 **Task**	Conduct a review and assessment regarding the impact of the use of any mental health records of the victim of an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), by the accused during the preliminary hearing conducted under section 832 of such title (Article 32 of the Uniform Code of Military Justice), and during court-martial proceedings, as compared to the use of similar records in civilian criminal legal proceedings. (FY15NDAA, § 545(a)(1))
M.R.E. 513 **JPP Reports and Recommendations**	1 Recommendation **JPP Initial Report (February 2015)** **R-11:** The Secretary of Defense issue specific, uniform guidance to ensure that mental health records are not sought from or released by medical treatment facility personnel until a military judge or Article 32 hearing officer has ordered their production. **JPP Final Report (October 2017)** The JPP received additional testimony on this topic from 19 practitioners and former military judges at its January 6, 2017, public meeting devoted to military stakeholder perspectives on the application of M.R.E. 412 and 513 at Article 32 hearings and courts-martial.
M.R.E. 513 **Congressional and DoD Implementation**	In the FY15 NDAA, § 537, Congress set a much higher standard for in camera review and disclosure of mental health records. DoD directed the Joint Service Committee on Military Justice to recommend uniform guidance regarding release of mental health records to ensure an appropriate balance between the interests of law enforcement and the privacy interests of victims of an alleged sex-related offense. (Sept. 2, 2016, DSD Memo) Executive Order 13696, signed June 17, 2016, implemented sweeping legislative reforms to Article 32 hearings and prohibited Article 32 preliminary hearing officers from ordering production of communications covered by M.R.E. 513 and 514.

VICTIM RESTITUTION AND COMPENSATION	
Restitution and Compensation **Tasks**	An assessment of the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows: (i) Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation. (ii) Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (Article 139 of the Uniform Code of Military Justice). (iii) Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial. (FY14 NDAA, § 1731(b)(1)(D))
Restitution and Compensation **JPP Reports and Recommendations**	6 Recommendations JPP Report on Restitution and Compensation for Military Adult Sexual Assault Crimes (February 2016) **R-12:** DoD establish a program to provide sexual assault victims with compensation for unreimbursed out-of-pocket expenses. **R-13:** Congress not amend the UCMJ to add restitution as an authorized punishment that may be adjudged at courts-martial. **R-14:** The Services provide practitioners recurring training on the availability and use of restitution in pretrial agreements. **R-15:** The President enact an executive order to provide victims the right to be heard before a convening authority enters into a pretrial agreement. **R-16:** Congress not amend the UCMJ to allow the forfeited wages of incarcerated Service members to be used to pay compensation to victims of sexual assault crimes. **R-17:** Congress not amend Article 139, UCMJ, to include bodily harm among the injuries meriting compensation for redress.

VICTIM RESTITUTION AND COMPENSATION	
Restitution and Compensation **Congressional and DoD Implementation**	Subsequent to the JPP recommendations, Executive Order 13730 was signed on May 20, 2016, amending R.C.M. 705(d)(3) to require consultation with the victim, whenever practicable, before the convening authority accepts a pretrial agreement.

RETALIATION	
Retaliation Task	The issue of retaliation related to the reporting of sexual assault offenses came to the JPP's attention when a 2014 survey published by the RAND Corporation indicated that 62% of active duty women who reported unwanted sexual contact to a military authority in 2014 perceived some form of retaliation. This statistic was unchanged from the 2012 survey. The Panel reviewed the issue pursuant to FY13 NDAA, § 576(d)(2)(J), which provides that the JPP may assess other issues it considers appropriate.

RETALIATION	
Retaliation **JPP Reports and Recommendations**	**13 Recommendations** **JPP Report on Retaliation Related to Sexual Assault Offenses (February 2016)** **R-24:** The Secretary of Defense specify processes for reporting, investigating, monitoring, and recording retaliation complaints and outcomes. **R-25:** The Secretary of Defense and Service Secretaries develop a standardized form to report retaliation, link it to a sexual assault report in the Defense Sexual Assault Incident Database (DSAID), and provide victims with an option to file an informal or formal complaint. **R-26:** The Secretary of Defense and Service Secretaries continue to provide multiple reporting channels and task sexual assault response coordinators (SARCs) to enter and track retaliation complaints in DSAID. **R-27:** Congress require the Secretary of Defense and Service Secretaries to track retaliation incidents and publish statistics in the annual Sexual Assault Prevention and Response Office (SAPRO) reports to Congress. **R-28:** The Secretary of Defense establish a policy to require the DoD Inspector General to investigate all complaints of professional retaliation related to sexual assault reports, to receive specialized training, and to update SARCs on investigations at monthly case review meetings. **R-29:** Service Secretaries establish policies to ensure specialized training of command personnel assigned to investigate retaliation related to sexual assault. **R-30:** The Secretary of Defense and Service Secretaries expand the expedited transfer program to include job retraining for those in small specialty fields and to be available for bystanders and witnesses experiencing retaliation (on a case-by-case basis). **R-31:** The Secretary of Defense establish specific guidelines on the release of retaliation complaint disposition information to complainants. **R-32:** The Secretary of Defense begin tracking the Services' implementation of the statutorily required general or flag officer review of involuntary separations of sexual assault victims who made unrestricted reports in the previous year. **R-33:** Service Secretaries revise Service regulatory definitions of maltreatment, which currently contain an overly narrow intent requirement. **R-34:** Congress not create a UCMJ offense prohibiting social retaliation. **R-35:** The Secretary of Defense and Service Secretaries develop targeted and innovative training on retaliation for commanders and all other Service members. **R-36:** The Secretary of Defense revise the Military Whistleblower Protection Act elements and burdens of proof for reprisal claims to align with those in the federal Whistleblower Protection Act.

RETALIATION	
Retaliation **Congressional and DoD Implementation**	Subsequent to the JPP recommendations, Congress enacted FY17 NDAA, § 545, which requires DoD SAPRO to establish metrics to evaluate the efforts of the Armed Forces to prevent and respond to retaliation in connection with sexual assault and to identify best practices to be used by the Military Departments in the prevention of and response to retaliation. Congress enacted FY17 NDAA, § 543, which requires DoD to include in the annual SAPRO report to Congress detailed information on each claim of retaliation in connection with a report of sexual assault made by or against a Service member. On July 28, 2016, the DoD Office of Inspector General (DoD IG) announced that a newly created team of seven DoD IG investigators and a supervisor would directly handle sexual assault reprisal cases from across the Services rather than overseeing investigations at the branch level. Congress enacted FY17 NDAA, § 546, which requires DoD personnel who investigate claims of retaliation to receive training on the nature and consequences of retaliation and, in cases involving reports of sexual assault, on the nature and consequences of sexual assault trauma. Congress enacted FY17 NDAA, § 547, which requires the Secretary of Defense to develop regulations requiring a Service member who reports retaliation to be informed in writing of the results of the investigation, including whether the complaint was substantiated, unsubstantiated, or dismissed.

SEXUAL ASSAULT ADJUDICATION TRENDS	
Adjudication Trends **Tasks**	Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases. (FY13 NDAA, § 576(d)(2)(B)) Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts. (FY13 NDAA, § 576(d)(2)(C)) Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report required of the JPP and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available. (FY13 NDAA, § 576(d)(2)(D))

SEXUAL ASSAULT ADJUDICATION TRENDS	
Adjudication Trends JPP Reports and Recommendations	6 Recommendations JPP Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses (April 2016) R-37: DoD collect and analyze case adjudication data using a standardized, document-based collection model, similar to those used by the JPP or U.S. Sentencing Commission, that incorporates uniform definitions and categories across all of the military Services. R-38: DoD include legal disposition information related to all adult sexual assault complaints in one annual DoD report, changing its policy that excludes adult-victim cases that are handled by the Family Advocacy Program (FAP) from the annual SAPRO reports to Congress. JPP Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015 (September 2017) R-52: DoD and the military Services use a standardized, document-based collection model for collecting and analyzing case adjudication data in order to implement Article 140a, UCMJ, regarding case management and data collection and accessibility. R-53: The new military justice data collection system required to be developed under Article 140a, UCMJ, should be designed so as to become the exclusive source of sexual assault case adjudication data for DoD's annual report to Congress on DoD's sexual assault prevention and response initiatives. R-54: The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) should consider continuing to analyze adult-victim sexual assault court-martial data on an annual basis as the JPP has done, including patterns that the JPP discovered in its analysis of fiscal year 2015 court-martial data. JPP Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases (September 2017) R-60: The Secretary of Defense and the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system.

SEXUAL ASSAULT ADJUDICATION TRENDS	
Adjudication Trends **Congressional and DoD Implementation**	Congress enacted FY 17 NDAA, § 5504, which created a new Article 140a, UCMJ (Case management; data collection and accessibility), requiring the Secretary of Defense to prescribe uniform standards and criteria using, insofar as practicable, the best practices of federal and state courts for collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision making within the military justice system. Congress enacted FY17 NDAA, § 574, requiring FAP to produce an annual report that includes the number of intimate partner, spousal, and child physical and sexual abuse incidents reported and substantiated each year, including analyses of types of abuse reported and characteristics of the victims and perpetrators. Another provision (§ 544) requires that the FAP and SAPRO annual reports be submitted together to Congress. However, the statute does not require intimate partner and spousal sexual assault case adjudication data to be included in either the FAP or SAPRO annual reports.

TRAINING AND EXPERIENCE OF MILITARY DEFENSE AND TRIAL COUNSEL	
Counsel Training and Experience **Task**	Building on the adjudication data compiled by the JPP, assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases. (FY13 NDAA, § 576(d)(2)(G))
Counsel Training and Experience **JPP Reports and Recommendations**	**4 Recommendations** **JPP Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases (April 2017)** **R-39:** The military Services provide defense counsel with access to independent and deployable defense investigators. **R-40:** The military Services immediately review Service defense organizations' staffing and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an independent audit of defense staffing across all military Services to determine the optimal level of staffing for the Service defense organizations. **R-41:** The Secretary of Defense direct that defense organizations be given approval and funding authority for their own expert witnesses. **R-42:** The military Services permit only defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in sexual assault cases, and defense counsel should have two or more consecutive years of experience in the role. **JPP Final Report (October 2017)** The JPP submitted questions on this topic to DoD and the Services in its Request for Information Sets 6 and 9. The JPP also received testimony at its May 13, 2016, public meeting session titled "Overview of Judge Advocate Training Programs." The JPP Subcommittee gathered information about trial and defense counsel training and experience in practice during site visits from July to September 2016.

TRAINING AND EXPERIENCE OF MILITARY DEFENSE AND TRIAL COUNSEL	
Counsel Training and Experience **Congressional and DoD Implementation**	In the FY17 NDAA, § 542, Congress enacted a provision requiring the Service Secretaries to establish a system of military justice skill and experience identifiers to ensure that judge advocates with sufficient skills and experience in military justice are assigned to prosecute and defend cases and are assigned to develop less experienced judge advocates. The provision also requires the Service Secretaries to carry out a five-year pilot program to assess the feasibility and advisability of establishing a deliberate process of professional development in military justice for judge advocates.

VICTIMS' APPELLATE RIGHTS	
Victims' Appellate Rights **Task**	Issues related to victims' appellate rights came to the attention of the JPP during the testimony of the Services' special victims' counsel/victims' legal counsel program managers at the April 8, 2016, JPP public meeting. The Panel reviewed this issue pursuant to FY13 NDAA, § 576(d)(2)(J), which provides that the JPP may review other issues it considers appropriate.
Victims' Appellate Rights **JPP Reports and Recommendations**	**5 Recommendations** **JPP Initial Report (February 2015)** **R-8:** The Secretary of Defense consider establishing expedited procedures for mandatory interlocutory review to Courts of Criminal Appeals for Article 6b issues. **JPP Report on Victims' Appellate Rights (June 2017)** **R-43:** The Joint Service Committee on Military Justice revise R.C.M. 1103A to provide victims with notice and an opportunity to be heard prior to appellate counsel review of certain sealed materials. **R-44:** The Services formalize procedures to provide victims in sexual assault cases with timely notice of significant appellate matters and with convenient access to any unsealed documents filed in the case, if requested. **R-45:** Congress revise Section 547(a) of S. 2943, the Senate version of the FY17 NDAA, to provide victims with standing to protect their Article 6b rights in post-conviction appellate proceedings for issues as to which a victim previously had standing and was heard. **R-46:** Congress amend Article 6b, UCMJ, to grant the Court of Appeals for the Armed Forces (CAAF) jurisdiction to hear a victim's appeal if a Service Court of Criminal Appeals denies the victim's petition for a writ of mandamus under Article 6b.

VICTIMS' APPELLATE RIGHTS	
Victims' Appellate Rights **Congressional and DoD Implementation**	Congress enacted FY15 NDAA, § 535, granting victims the right to petition the Courts of Criminal Appeals for a writ of mandamus for violations of victims' rights afforded by Military Rules of Evidence 412 (Sex offense cases: The victim's sexual behavior or predisposition) and 513 (Psychotherapist–patient privilege), providing for expedited, but not mandatory, review. Congress expanded this right in the FY16 NDAA, § 531, to include additional protections under Article 6b, UCMJ; however, such interlocutory review remains discretionary. The Senate version of the FY17 NDAA, S.2943, § 547, would have amended Article 6b, UCMJ, to provide for victim standing in post-conviction appellate proceedings and victim notice of appellate matters; however, this section was not passed in the final version of the FY17 NDAA. The conference committee report noted that the conferees would reconsider the issue after receipt of the JPP's recommendations. The BE HEARD (Building an Environment for Helpful, Effective, and Accessible Representation and Decision-making) Act, introduced in the House of Representatives by Congressman Mike Turner (OH-10) and Congresswoman Niki Tsongas (MA-3) in May 2017, would grant CAAF jurisdiction to hear victims' Article 6b appeals.

SPECIAL VICTIM INVESTIGATION AND PROSECUTION (SVIP) CAPABILITIES	
SVIP Capabilities Task	Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by section 573 of this Act. (FY13 NDAA, § 576(d)(2)(H))
SVIP Capabilities JPP Reports and Recommendations	**5 Recommendations** **JPP Report on Sexual Assault Investigations in the Military (September 2017)** **R-47:** DAC-IPAD monitor the effects of the DoD policy that allows Service law enforcement agencies to assist the military criminal investigative organizations (MCIOs) with sexual assault investigations. **R-48:** The Secretary of Defense take the necessary steps to ensure that special victims' counsel and victims' legal counsel (1) have the resources to schedule and attend the initial victim interview promptly after a report of sexual assault and (2) receive the training necessary to recognize the importance of a prompt initial victim interview by the MCIO to an effective and just prosecution. **R-49:** The Secretary of Defense identify and remove barriers to thorough questioning of a sexual assault victim by the MCIOs or other law enforcement agencies. **R-50:** The Secretary of Defense remove impediments to MCIOs' obtaining tangible evidence from a sexual assault victim, particularly information contained on a cell phone or other digital devices, and develop appropriate remedies that address victims' legitimate concerns about turning over this evidence to ensure that sexual assault investigations are complete and thorough. **R-51:** The Secretary of Defense review the resources, staffing, procedures, and policies at forensic laboratories within the Department of Defense to ensure expeditious testing of evidence by forensic laboratories. **JPP Final Report (October 2017)** The JPP submitted questions on this topic to DoD and the Services in its Request for Information Sets 2 and 6. The JPP also received testimony on SVIP at its April 8, 2016, public meeting session titled "MCIO Overview and Perspective of the SVIP Policies, Practices, and Procedures" and at its May 13, 2016, public meeting session titled "Overview of Training and Experience of Attorneys Prosecuting Sexual Assault Cases." The JPP Subcommittee gathered information about SVIP in practice during site visits from July to September 2016.

SPECIAL VICTIM INVESTIGATION AND PROSECUTION (SVIP) CAPABILITIES	
SVIP Capabilities **Congressional and DoD Implementation**	DoD issued a directive-type memorandum in February 2014 (DTM 14-003) establishing special victim capability prosecution and legal support; the memorandum was most recently updated in April 2017. In February 2015 DoD issued an instruction establishing the SVIP capability within the MCIOs (DoDI 5505.19), which was most recently updated in March 2017. Also in March 2017, DoD reissued its instruction on the investigation of adult sexual assault (DoDI 5505.18) to incorporate SVIP requirements. These policies require MCIO lead investigators to notify each SVIP member (judge advocates and victim assistance personnel) within 24 hours of receiving an allegation, collaborate with the SVIP members within 48 hours, and consult with respective SVIP members at least monthly to assess progress in the investigation or prosecution of a covered offense and to help ensure that all aspects of the victim's needs are being met. They also require specialized training for all SVIP members and ensure integrated capability during all stages of the process.

SEXUAL ASSAULT DISPOSITION WITHHOLDING POLICY	
Withholding Task	Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases. (FY13 NDAA, § 576(d)(2)(I))
Withholding JPP Reports and Recommendations	**JPP Final Report (October 2017)** The JPP submitted questions on this topic to DoD and the Services in its Request for Information Set 6. In addition, the JPP Subcommittee gathered information about how the withholding policy is working in practice during site visits from July to September 2016.
Withholding Congressional and DoD Implementation	No further legislative action has been taken on this topic by Congress, and the JPP is not aware of any additional action taken by DoD.

MANDATORY MINIMUM SENTENCING	
Mandatory Minimum Sentencing **Task**	An assessment of the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (Article 56(b) of the Uniform Code of Military Justice), as added by section 1705, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice). (FY14 NDAA, § 1731(b)(1)(C))
Mandatory Minimum Sentencing **JPP Reports and Recommendations**	**JPP Final Report (October 2017)** The JPP did not conduct further assessment or make recommendations on this issue in light of the Military Justice Review Group's (MJRG) recommended revision to Article 56, UCMJ (Sentencing), which would have replaced broad sentencing authority with sentencing guided by predetermined parameters and criteria. Under the MJRG proposal, once sentencing parameters and criteria took effect, they would replace the mandatory punitive discharge provisions in Article 56(b), eliminating an incongruity in the system whereby designated sex offenses result in mandatory discharge, but other serious crimes such as murder do not.
Mandatory Minimum Sentencing **Congressional and DoD Implementation**	In the Military Justice Act of 2016, Congress enacted § 5301, which amended Article 56, UCMJ (Sentencing), but did not adopt the MJRG's proposed sentencing parameters and criteria for all offenses, or alter the current mandatory punitive discharge provisions for certain sexual assault offenses.

ESTABLISHING PRIVILEGE FOR COMMUNICATIONS WITH DOD SAFE HELPLINE AND SAFE HELPROOM PERSONNEL	
Safe Helpline **Task**	Conduct a review and assessment regarding the establishment of a privilege under the M.R.E. against the disclosure of communications between— (A) users of and personnel staffing the Department of Defense Safe Helpline; and (B) users of and personnel staffing the Department of Defense Safe HelpRoom. (FY15 NDAA, § 545(a)(2))
Safe Helpline **JPP Reports and Recommendations**	**JPP Final Report (October 2017)** The JPP did not conduct further assessment or make recommendations on this issue in light of Executive Order 13696, which established such a privilege.
Safe Helpline **Congressional and DoD Implementation**	Executive Order 13696, signed June 17, 2015, amended M.R.E. 514(a)–(c) to establish a privilege for confidential communications with DoD Safe Helpline staff.

DEPOSITIONS	
Dispositions **Task**	The Judicial Proceedings Panel assess the use of depositions in light of changes to the Article 32 proceeding, and determine whether to recommend changes to the deposition process, including whether military judges should serve as deposition officers. (RSP Recommendation 115)
Dispositions **JPP Reports and Recommendations**	**JPP Final Report (October 2017)** The JPP did not make further assessment or recommendations on this issue in light of the legislative provisions enacted in the FY15 NDAA and the Military Justice Act of 2016.
Dispositions **Congressional and DoD Implementation**	Congress enacted FY15 NDAA, § 532, which requires a party requesting a deposition to demonstrate that there are "exceptional circumstances" and that it is "in the interest of justice" to take a deposition. It also provided that the convening authority may designate commissioned officers as counsel. In the Military Justice Act of 2016, Congress enacted § 5231, which amended Article 49, UCMJ (Depositions), to codify and expand on the FY15 NDAA provision, including a requirement that deposition officers be judge advocates "whenever practicable."

PLEA BARGAINING	
Plea Bargaining **Task**	The Judicial Proceedings Panel study whether the military plea bargaining process should be modified. (RSP Recommendation 117)
Plea Bargaining **JPP Reports and Recommendations**	**JPP Final Report (October 2017)** The JPP did not make further assessment or recommendations on this issue in light of the legislative provisions enacted in the Military Justice Act of 2016.
Plea Bargaining **Congressional and DoD Implementation**	In the Military Justice Act of 2016, Congress enacted § 5237, creating a new Article 53a, UCMJ (Plea agreements), that provides basic rules for (1) the construction and negotiation of plea agreements concerning the charges, the sentence, or both; (2) the military judge's determination of whether to accept a proposed plea agreement; and (3) the operation of plea agreements containing sentence limitations with respect to the military judge's sentencing authority.

Note 1: A list of all JPP recommendations in their entirety is provided in Appendix E to this report.

Note 2: A list of all JPP tasks in their entirety is provided in Appendix C to this report.

Note 3: This chart does not include recommendations 55–59, 62–63 from the JPP Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases (September 2017), because these recommendations are based on information received by the JPP Subcommittee during site visits and were not directly related to a task assigned to the JPP. Since they were issued only weeks before this report, no report on the status of their implementation can yet be made.

APPENDIX G: Judicial Proceedings Panel Staff Members and Designated Federal Officials

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APPENDIX H: Acronyms and Abbreviations

BE HEARD	Building an Environment for Helpful, Effective, and Accessible Representation and Decision-making
CAAF	United States Court of Appeals for the Armed Forces
CCA	Court of Criminal Appeals
CGCCA	Coast Guard Court of Criminal Appeals
DoD	Department of Defense
DoD IG	Department of Defense Office of Inspector General
DTF-SAMS	Defense Task Force on Sexual Assault in the Military Services
DTM	directive-type memorandum
FAP	Family Advocacy Program
FY	fiscal year
HQE	highly qualified expert
JAG	Judge Advocate General
JPP	Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (Judicial Proceedings Panel)
MCIO	military criminal investigative organization
MCM	Manual for Courts-Martial
MJRG	Military Justice Review Group
M.R.E.	Military Rule of Evidence
NDAA	National Defense Authorization Act
PHO	preliminary hearing officer
R.C.M.	Rules for Courts-Martial
RFI	request for information
RSP	Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel)

SAPRO	Sexual Assault Prevention and Response Office
SVC	special victims' counsel
SVIP	special victim investigation and prosecution capability
SVP	special victim prosecutor
TCAP	Trial Counsel Assistance Program
UCMJ	Uniform Code of Military Justice
VLC	victims' legal counsel
VWL	victim witness liaison

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REPORT ON BARRIERS TO THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES

May 2017

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May 12, 2017

MEMORANDUM FOR MEMBERS OF THE JUDICIAL PROCEEDINGS PANEL

SUBJECT: Report of the Subcommittee

On April 9, 2015, the Secretary of Defense established this Subcommittee to support the Judicial Proceedings Panel in its duties under Section 576(d) of the National Defense Authorization Act for Fiscal Year 2013. Following the Secretary's objectives and at the request of the Judicial Proceedings Panel, the Subcommittee conducted military installation site visits throughout the United States and Asia. Based upon information received during these site visits, the Subcommittee undertook additional research of several topics. The Subcommittee has completed its review on the topic of barriers to the fair administration of military justice in sexual assault cases and submits to the Judicial Proceedings Panel its report with our assessment, conclusions, and recommendations.

Barbara S. Jones
Subcommittee Chair

Executive Summary

SUBCOMMITTEE REPORT TO THE JUDICIAL PROCEEDINGS PANEL ON BARRIERS TO THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals—all involved in the military justice process, from 25 military installations in the United States and Asia—about the investigation, prosecution, and defense of sexual assault offenses.

On the basis of information received at the site visits, the Subcommittee identified several topics to present to the JPP, some of which required additional research. Therefore, the Subcommittee decided to issue separate reports on each of the identified subjects. The Subcommittee issued its first report in December 2016 on the subject of military defense counsel resources and experience in sexual assault cases, its second report in February 2017 on sexual assault investigations in the military, and three short reports in March 2017 on the topics of the Department of Defense (DoD) initial disposition withholding policy, Military Rules of Evidence 412 and 513, and the training and experience of trial counsel and special victims' counsel/victims' legal counsel.

This final Subcommittee report focuses on some large-scale issues in the military's handling of sexual assault cases that came to light during the site visits and subsequent research. In the past several years, there has been a huge public outcry about the problem of sexual assault in the military. Media reports, the documentary film *Invisible War*, and the work of a number of women members of the U.S. House and Senate have fostered a public perception that sexual assault is rampant in the military and that the military has swept the problem under the rug both by failing to effectively prosecute the accused and by failing to treat the victims with dignity and compassion. To address these concerns, Congress, the Department of Defense, and the White House have all worked to change the military system so that victims of sexual assault are treated with respect and are not further victimized by the criminal justice process. Other changes have been put in place to counter the perception that sexual assault predators were being protected from prosecution by military commanders.

Many of these changes have been valuable. One possible sign that they are having an effect is the increase in the past few years of the number of sexual assault cases being reported. While its cause cannot be identified with certainty, many believe that it indicates greater confidence that the criminal justice system will help the victim and vigorously prosecute the accused.

As constructive and important as these changes have been, they have also produced an unintended negative consequence: they have, as the Subcommittee was repeatedly told on its site visits, raised serious questions about the fundamental fairness of the military justice process when it comes to the treatment of the accused.

It is vital for the military justice system to strike the right balance between the needs of the victim and the needs of the defendant. Both must be properly addressed if the system is to be seen as fair and just. The failure to create the perception and the reality of a just system can undermine morale,

affect recruiting, and create a corrosive cynicism among military personnel. For that reason, the Subcommittee believed it was important to share the information it received with the JPP.

The Subcommittee identified a number of problems with how the military justice system treats sexual assault offenses:

1. The revised Article 32 process provides less information to convening authorities and no longer serves as a discovery mechanism for the defense;

2. Because convening authorities currently lack meaningful written guidelines to help them decide whether a case warrants referral to court-martial, such as the likelihood of securing a conviction at trial, they may be referring sexual assault charges to trial on the basis of weak evidence;

3. Because the staff judge advocate's pretrial advice to the convening authority must be provided to the defense, the staff judge advocate may be unwilling to provide a complete and candid written assessment of the evidence in the case;

4. Counsel perceive that convening authorities feel public pressure to refer sexual assault cases to trial;

5. Some trial counsel complained they no longer have the access to sexual assault victims that they need in order to properly prepare those victims for trial;

6. Military members who potentially may sit on court-martial panels receive sexual assault prevention and response training that may confuse them regarding the legal standard for consent in sexual assault cases. The frequency of this training is also causing "training fatigue" among military members; and

7. The current policy on expedited transfer of sexual assault victims can make it difficult for investigators and prosecutors to adequately consult with victims prior to trial when victims have been transferred to faraway locations.

In this report, the Subcommittee makes nine recommendations:

Recommendation 1: The JPP Subcommittee recommends that the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP no longer serves a useful purpose. Such a review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of the preliminary hearing officer against referral, based on lack of probable cause, should be binding on the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further changes to the process are required.

In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP Subcommittee reiterates its recommendation— presented in its report on military defense counsel resources and experience in sexual assault cases, and adopted by the JPP—that the defense be provided with independent investigators.

Recommendation 2: The JPP Subcommittee recommends that Article 33, UCMJ, case disposition guidance for convening authorities and staff judge advocates require the following standard for referral to court-martial: the charges are supported by probable cause and there is a reasonable likelihood of proving the elements of each offense beyond a reasonable doubt using only evidence likely to be found admissible at trial.

The JPP Subcommittee further recommends that the disposition guidance require the staff judge advocate and convening authority to consider all the prescribed guideline factors in making a disposition determination, though they should retain discretion regarding the weight they assign each factor. These factors should be considered in their totality, with no single factor determining the outcome.

Recommendation 3: The JPP Subcommittee recommends that after case disposition guidance under Article 33, UCMJ, is promulgated, the DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

Recommendation 4: The JPP Subcommittee recommends that the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. The DAC-IPAD should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should consider whether such a change would allow the staff judge advocate to provide more fully developed, candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

Recommendation 5: The JPP Subcommittee recommends that Congress repeal provisions from the National Defense Authorization Act for Fiscal Year 2014 and Fiscal Year 2015, sections 1744 and 541 respectively, that require non-referral decisions in certain sexual assault cases to be forwarded to a higher general court-martial convening authority or to the Service Secretary. The perception of pressure on convening authorities to refer sexual assault cases to courts-martial created by these provisions and the consequent negative effects on the military justice system are more harmful than the problems that such provisions were originally intended to address.

Recommendation 6: The JPP Subcommittee recommends that the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system.

Recommendation 7: The JPP Subcommittee recommends that the Secretary of Defense ensure that SVCs/VLCs receive the necessary training on the importance of allowing full access by prosecutors to sexual assault victims prior to courts-martial. Such training will ensure that SVCs/VLCs are considering the value of a meaningful victim-prosecutor relationship in the advice they provide their victim-clients and assist prosecutors in sufficiently developing the rapport with the victim needed to fully prepare for trial.

Recommendation 8: The JPP Subcommittee recommends that the Department of Defense Sexual Assault Prevention and Response Office ensure that sexual assault training conducted by the military Services provide accurate information to military members regarding a person's ability to consent to sexual contact after consuming alcohol and the legal definition of "impairment" in this context and that training be timed and conducted so as to avoid "training fatigue."

The JPP Subcommittee further recommends that the DAC-IPAD monitor whether misperceptions regarding alcohol consumption and consent continue to affect court-martial panel members.

Recommendation 9: The JPP Subcommittee recommends that the Secretary of Defense review the policy on expedited transfer of sexual assault victims and consider whether it should be changed to state that when possible, sexual assault victims should be transferred to another unit on the same installation or to a nearby installation. This change will help ensure that prosecutors have access to victims in preparing for courts-martial, will satisfy the need to separate the victim from the accused, and will maintain the victim's access to support systems while combating the perception that the ability to ask for these transfers has encouraged fraudulent claims of sexual assault. Commanders and SVCs/VLCs should all receive training in how relocating victims from less desirable to more desirable locations can foster the perception among military members that the expedited transfer system is being abused and in how such transfers can be used by defense counsel to cast doubt on the victim's credibility, possibly leading to more acquittals at courts-martial.

The JPP Subcommittee further recommends that the DAC-IPAD review data on expedited transfers to determine the locations from which and to which victims are requesting expedited transfers and to review their stated reasons.

Barriers to the Fair Administration of Military Justice in Sexual Assault Cases

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals from 25 military installations in the United States and Asia involved in the military justice process; these conversations focused on the investigation, prosecution, and defense of sexual assault offenses.[1] Discussions were held without attribution so that Subcommittee members could hear candid perceptions of the military's handling of sexual assault cases from the men and women who are investigating and litigating those cases. The Subcommittee spoke to groups of military prosecutors, defense counsel, special victims' counsel/victims' legal counsel, paralegals, and investigators, as well as commanders, sexual assault response coordinators, victim advocates, and victim-witness liaisons from all military Services.

During the site visits, the Subcommittee identified a number of possible barriers to the fair administration of military justice in sexual assault cases. The Subcommittee determined that it would have to analyze, discuss, and develop the information gathered and conduct further research into some of the issues identified. Therefore, the Subcommittee held 13 meetings or teleconferences from September 2016 through May 2017. Drawing on the site visit data and the Subcommittee's additional discussion and research—including information regarding ethics rules and prosecutorial discretion, provided by representatives of the Services at a Subcommittee meeting held in January 2017—the Subcommittee made recommendations on several of these points in two previous reports to the JPP: one on military defense counsel resources and experience in sexual assault cases, issued in December 2016, and one on sexual assault investigations in the military, issued in February 2017.[2] In addition, the Subcommittee provided brief reports to the JPP in March 2017 on the topics of the Department of Defense (DoD) initial disposition withholding policy, Military Rules of Evidence 412 and 513, and training and experience of trial counsel and special victims' counsel/victims' legal counsel.[3] This final report summarizes site visit comments and the Subcommittee's research into additional barriers to the fair administration of military justice in sexual assault cases.

I. BACKGROUND

Historically, sexual assault in the military has at times garnered the public's attention. In recent years, however, public demands for accountability and justice have grown louder and more persistent, following complaints by sexual assault victims about the military's handling of their allegations and how they are treated. As a result, the procedures for dealing with such cases have been changed.

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1 A list of the installations visited and Subcommittee members participating in each site visit is enclosed with this report.

2 *See* Subcommittee of the Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases (Dec. 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_DefResources_Final_20161208.pdf; Subcommittee of the Judicial Proceedings Panel Report on Sexual Assault Investigations in the Military (Feb. 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Investigations_Final_20170224.pdf.

3 *See* Subcommittee Papers on Initial Disposition Withholding Authority; Military Rules of Evidence 412 and 513; and Training and experience of trial counsel and special victims' counsel/victims' legal counsel (Mar. 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Subcomm_ShortReports_20170302_Final.pdf.

Many victims complained that commanders dismissed their sexual assault allegations without further investigation or action. In response, several DoD or congressionally appointed panels reviewed the state of sexual assault prevention, victim care, investigation, and prosecution in the military and issued reports and recommendations on those topics.[4] Congress and DoD responded to these recommendations and to military sexual assault victims' complaints by adopting more than 100 statutory reforms and numerous policy changes in the area of military sexual assault. The majority of these statutory reforms and policy changes have been instituted since 2012, and many have sought to address the treatment of sexual assault victims.

Statutes creating the Special Victims' Counsel Program and expanding victims' rights have profoundly changed the treatment of sexual assault victims. The statute creating the Special Victims' Counsel Program provides that every military member who reports being sexually assaulted is entitled to have a military attorney appointed to advise him or her of legal issues surrounding the case and other matters. This attorney is authorized to represent the victim, including at the Article 32 hearing and court-martial, at all pretrial stages of the case, and at trial. Since its inception as an Air Force pilot program in 2013, the Special Victims' Counsel/Victims' Legal Counsel[5] (SVC/VLC) Program has evolved to the point that an SVC/VLC right to argue victim privacy issues in court is now recognized.[6] The ability to have an SVC/VLC present during investigative interviews has also helped increase victims' comfort level with the investigative and military justice processes.

The recent passage of legislation allowing victims to decline to testify at Article 32 preliminary hearings has also been perceived positively by sexual assault victims.

These military justice reforms were prompted by past failures to properly address sexual assault allegations. They have empowered sexual assault victims and provided them a voice in how their sexual assault allegations are handled. Yet these reforms have also had unintended and, at times, negative consequences. In the view of trial counsel, defense counsel, investigators, and other military personnel involved in the military criminal justice system who were interviewed by the Subcommittee members during installation site visits, the military justice system is placing the rights and preferences of sexual assault victims over the due process rights of those accused of these offenses. Many of those interviewed sense that in an effort to respond to public criticism and right past wrongs, commanders now feel pressure to resolve greater numbers of sexual assault allegations at courts-martial, regardless of the relative merits of the case or the likelihood of conviction. The result, counsel asserted, has been a dramatic increase in acquittals in these cases. Several counsel went so far as to state that these changes in the military justice system have placed justice and the perception of a fair system at risk.

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4 Among these reports are the Defense Task Force Report on Care for Victims of Sexual Assault (Apr. 2004), *available at* http://www.sapr.mil/public/docs/reports/task-force-report-for-care-of-victims-of-sa-2004.pdf; Report of the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies (Jun. 2005), *available at* http://www.dtic.mil/dtfs/doc_recd/High_GPO_RRC_tx.pdf; Report of the Defense Task Force on Sexual Assault in the Military Services (Dec. 2009), *available at* http://www.sapr.mil/public/docs/research/DTFSAMS-Rept_Dec09.pdf; Report of the Response Systems to Adult Sexual Assault Crimes Panel (Jun. 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf; and numerous reports of the Judicial Proceedings Panel, *available at* http://jpp.whs.mil/.

5 The Navy and Marine Corps refers to victims' lawyers as victims' legal counsel, while the other Services refer to them as special victims' counsel.

6 *See* Judicial Proceedings Panel Initial Report (Feb. 2015) [hereinafter JPP Initial Report], Section III, for a full discussion of the SVC/VLC programs. This report is *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/01_JPP_InitialReport_Final_20150204.pdf.

This report discusses some of the changes made to the military justice process in recent years, as well as the perceived pressure on convening authorities and judge advocates to refer sexual assault cases to trial, regardless of the likelihood of conviction. Further, this report highlights some of the long-term negative consequences identified as resulting from the recent reforms. It builds on the observations and conclusions found in two earlier and related Subcommittee reports written following the installation site visits: the *Subcommittee Report to the Judicial Proceedings Panel on Military Defense Counsel Resources and Experience in Sexual Assault Cases, the Subcommittee Report to the Judicial Proceedings Panel on Sexual Assault Investigations in the Military,* and the Subcommittee papers on *Initial Disposition Withholding Authority, Military Rules of Evidence 412 and 513,* and *Training and Experience of Trial Counsel and Special Victims' Counsel/Victims' Legal Counsel.*[7]

II. REFERRING SEXUAL ASSAULT CASES TO COURT-MARTIAL

A. Early Stages of Case Processing

Before the convening authority can refer charges to a court-martial, several events must take place. While there are some important differences in the treatment of sexual assault offenses, many of the steps in the military justice process are the same regardless of the offense.

If a victim reports a sexual assault to certain identified personnel, he or she has the ability to file either a restricted or unrestricted report.[8] If the victim chooses to file an unrestricted report of a sexual assault offense, the Services' military criminal investigative organizations (MCIOs) investigate the offense.[9] When the investigation is completed or near completion, military prosecutors discuss the case with the appropriate commander, who determines whether to prefer charges or take some other disciplinary action against the alleged perpetrator.[10]

Rule for Court-Martial (R.C.M.) 306(b) provides guidance for judge advocates and convening authorities on this decision, stating that "[a]llegations of offenses should be disposed of in a timely manner at the lowest appropriate level."[11] Further guidance is contained in nonbinding discussion accompanying R.C.M. 306(b):

> The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including,

7 The JPP adopted the Subcommittee's report on defense counsel resources and experience and its recommendations, with some modifications. The Subcommittee's report on sexual assault investigations is still pending before the JPP. The three Subcommittee papers were presented to the JPP for informational purposes.

8 Restricted reports of adult sexual assault may be only made to sexual assault response coordinators, SAPR victim advocates, and healthcare personnel. U.S. DEP'T OF DEF. INSTR. [hereinafter DoDI] 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, Encl. 4 (Mar. 28, 2013, incorporating Change 2, effective Jul. 7, 2015).

9 The Subcommittee discussed problems associated with MCIO investigations of sexual assault offenses more fully in the SUBCOMMITTEE OF THE JUDICIAL PROCEEDINGS PANEL REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY, *supra* note 2.

10 Only commanders who hold at least special court-martial convening authority and who are in the grade of O-6 (*i.e.*, colonel or Navy captain) or higher can hold initial disposition authority in sexual assault cases. *See* U.S. DEP'T OF DEFENSE, 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).

11 MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.) [hereinafter 2016 MCM], Rule for Court-Martial [hereinafter R.C.M.] 306(b). R.C.M. 306(c) discusses potential dispositions of allegations: no punishment, administrative action, nonjudicial punishment, or disposition through courts-martial.

> to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, 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. The goal should be a disposition that is warranted, appropriate, and fair.
>
> In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:
>
> (A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
>
> (B) when applicable, the views of the victim as to disposition;
>
> (C) existence of jurisdiction over the accused and the offense;
>
> (D) availability and admissibility of evidence;
>
> (E) the willingness of the victim or others to testify;
>
> (F) cooperation of the accused in the apprehension or prosecution of another accused;
>
> (G) possible improper motives or biases of the person(s) making the allegation(s);
>
> (H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction; and
>
> (I) appropriateness of the authorized punishment to the particular accused or offense.[12]

For sex-related offenses committed in the United States, R.C.M. 306 provides for the victim to express his or her views as to whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense. The convening authority must consider the victim's views as to disposition, if available, before making a decision to prefer charges or take some other disciplinary action.[13]

If charges are preferred and the special court-martial convening authority (SPCMCA) deems a general court-martial appropriate, he or she must direct the case to a preliminary hearing under Article 32 of the UCMJ.[14]

12 2016 MCM, *supra* note 11, R.C.M. 306(b) discussion.

13 2016 MCM, *supra* note 11, R.C.M. 306(e)(2). R.C.M. 306(e)(1) defines "sex-related" offense as any alleged violation of Article 120—Rape and sexual assault generally, 120a—Stalking, 120b—Rape and sexual assault of a child, 120c—Other sexual misconduct, 125—Forcible sodomy; bestiality, or any attempt thereof under Article 80, Uniform Code of Military Justice.

14 2016 MCM, *supra* note 11, R.C.M. 404(b)(5).

B. The Evolution of the Article 32 Process

1. Statutory Changes. Before charges may be referred to a general court-martial, Article 32 of the UCMJ requires a preliminary hearing, unless the accused waives the hearing.[15] In the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA), Congress made substantial changes to Article 32. The impetus for these changes was a widely reported Article 32 investigation at the U.S. Naval Academy in which counsel questioned a Naval Academy midshipman who had reported being sexually assaulted for "more than 30 hours" and subjected her to "humiliating and abusive questions."[16] The legislative changes to Article 32 were also intended to align the procedures with civilian preliminary hearing proceedings, which are used to determine if there is probable cause and if a case should go to trial; during them, victims are often not called to testify.[17]

Prior to these statutory changes, the Article 32 hearing was intended to be a "thorough and impartial investigation" by an investigating officer into the truth and form of the charges.[18] The Article 32 hearing also served as a mechanism for pretrial discovery for the defense.[19] Military witnesses, including sexual assault victims, could be compelled to appear and testify at the Article 32 hearing.[20]

The FY14 NDAA changes to Article 32 applied to Article 32 hearings conducted on or after December 26, 2014.[21] These changes, which restyled the Article 32 from a pretrial investigation into a preliminary hearing, limited the purpose of the hearing to determining whether probable cause exists to believe an offense was committed and whether the accused in the case committed the offense.[22] Under the December 2014 Article 32 format, preliminary hearing officers (PHOs) are still required to determine whether the convening authority has court-martial jurisdiction over the accused and the offense, to consider the form of the charges, and to make recommendations to the convening authority as to disposition.[23] In an effort to limit the scope of Article 32, these statutory changes also removed the ability of a PHO to compel a military victim to appear and testify at the hearing if the victim was found "reasonably available," but allowed the PHO to consider alternatives to testimony for the victim and any other witnesses, regardless of their availability.[24]

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15 10 U.S.C. § 832 (UCMJ, Art. 32).

16 *See* 159 Cong. Rec. H7059 (Congresswoman Speier (D-CA) introduced the reforms to Article 32), *available at* https://www.gpo.gov/fdsys/pkg/CREC-2013-11-14/pdf/CREC-2013-11-14-pt1-PgH7059.pdf.

17 *Id. But see infra* notes 26-28 and accompanying text.

18 10 U.S.C. § 832 (UCMJ, Art. 32); 2016 MCM, *supra* note 11, R.C.M. 405.

19 Manual for Courts-Martial, United States (2012 ed.) [hereinafter 2012 MCM], R.C.M. 405 discussion.

20 *Id.*

21 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [hereinafter FY14 NDAA], § 1702(a), 127 Stat. 672 (2013); National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [hereinafter FY15 NDAA], § 531(g), 128 Stat. 3292 (2014).

22 Another change to the Article 32 process requires that judge advocates be used as preliminary hearing officers "whenever practicable." 2016 MCM, *supra* note 11, R.C.M. 405(d)(1). While this had previously been the practice in the Navy, Marine Corps, and Air Force, the Army traditionally used line officers in this role, with a judge advocate appointed to advise the Article 32 investigating officer on legal matters. In addition, the updated R.C.M. 405 requires the preliminary hearing officer to be equal to or senior in grade to the military prosecutor and military defense counsel representing the accused, "when practicable." 2016 MCM, *supra* note 11, R.C.M. 405(d)(1). Navy and Air Force counsel stated that they often use active duty and reserve military judges as Article 32 preliminary hearing officers in sexual assault cases.

23 2016 MCM, *supra* note 11, R.C.M. 405(a).

24 *Id.*; *see also* Major Christopher J. Goewert and Captain Nichole M. Torres, *Old Wine into New Bottles: The Article 32 Process after the National Defense Authorization Act of 2014*, 232 A.F. L. Rev. Vol. 72 (2015).

As observed above, while the Article 32 hearing had previously served as a means of discovery for the defense, the new R.C.M. 405, reflecting the statutory changes to Article 32, specifically states that the Article 32 hearing is "not intended to serve as a means of discovery."[25] This change is significant, as the U.S. Court of Military Appeals (now the U.S. Court of Appeals for the Armed Forces, or CAAF) previously emphasized the value of the Article 32 investigation as a discovery tool. In the case of *Hutson v. United States*, CAAF even relied on the Article 32 hearing to uphold a judge's refusal to grant the defense's request for appointment of an investigator.[26] While acknowledging that investigative assistance is provided for indigent defendants in federal courts, CAAF held that the federal statute used to grant such assistance in federal court was not available to military defendants, stating: "[I]t should be noted that the pretrial investigation to which these charges have been referred is the accused's only practicable means of discovering the case against him."[27] In light of the changes to the Article 32 process, this CAAF decision provides further support for the Subcommittee's recent recommendation, which the JPP adopted, that independent investigators be provided to the defense.[28]

A provision in the National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA) removes the provision in Article 32 permitting the accused to present additional evidence at the Article 32 hearing "in defense and mitigation, relevant to the limited purposes of the hearing," and replaces it with language stating that the accused may present additional evidence "that is relevant to the issues [of whether there is probable cause to believe the accused committed the offense and the PHO's recommendation as to disposition of the case]."[29] It is too early to determine how PHOs will interpret this change and what effect, if any, it will have on the defense's ability to present additional evidence in defense and mitigation at the Article 32 hearing.

2. Site Visit Information. During installation site visits the Subcommittee spoke with trial counsel, defense counsel, and SVCs/VLCs, most of whom were familiar with both the pre-December 2014 and the new Article 32 proceedings. The consensus among them was that unlike the pre-December 2014 Article 32 investigation, the new Article 32 preliminary hearing is not a meaningful process for evaluating the strength of the case or for any other purpose. Sexual assault victims are no longer required to testify at Article 32 hearings, and frequently do not. Trial counsel stated that often the first time a victim provides testimony and is subject to cross-examination by defense counsel is at the court-martial. Beyond Article 32 issues, several trial counsel told Subcommittee members that some SVCs/VLCs limit trial counsel access to the victim, thereby preventing trial counsel from building sufficient rapport with the victim and having the repeated interviews that they feel are necessary to prepare for trial. Several counsel stated that this combination of factors has led to victims being unprepared for trial and testifying poorly on the stand.

Frequently, no witnesses appear at the Article 32 preliminary hearing, which simply involves trial counsel submitting documentary evidence for consideration. Many trial and defense counsel with whom the Subcommittee spoke referred to the Article 32 preliminary hearing as a "paper drill" or "rubber stamp." While many defense counsel noted that they have begun waiving the hearing, some stated that they have continued to assert the accused's right to an Article 32 hearing even if they no longer get a chance to question the victim or receive additional information about the government's case.

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25 *Id.*

26 *Hutson v. United States*, 42 C.M.R. 39, 40 (1970).

27 *Id.*

28 *See* Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases 3 (Mar. 2017).

29 National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328 [hereinafter FY17 NDAA], § 5203(b).

Counsel universally observed that pre-December 2014 Article 32 investigations were used to identify weak cases and prevent them from going to court-martial, but the new Article 32 hearing no longer serves this function. The pre-December 2014 Article 32 investigation and investigating officer's recommendation as to whether the evidence supported the charges and whether the charges should be sent forward to court-martial (and to what type of court-martial) helped test the strength of the prosecution's case. According to many trial and defense counsel who spoke with the Subcommittee, the limited scope of the present preliminary hearing and the removal of the requirement for victim testimony are the primary reasons why counsel do not believe the current Article 32 format is a useful tool for vetting cases. Several trial counsel acknowledged that prosecutors should be confident that probable cause exists and that they have sufficient evidence to prevail at trial before charges are even preferred.

Article 32 PHOs' recommendations on whether the case should proceed to trial remain nonbinding, and some trial and defense counsel noted that often staff judge advocates and convening authorities do not abide by the recommendations.[30] Such disregard occurs even when the PHO finds no probable cause to support a charge or an extremely low likelihood of conviction, recommending that the case should be dismissed outright or resolved through disciplinary action at some lower level. Counsel complained that because of the changes to the Article 32 process and because the PHO's recommendations are nonbinding, too many cases are referred to court-martial in which there is little chance of securing a conviction.

3. JPP Public Meeting Commentary on the Effects of the Changes to the Article 32 Hearing. Senior trial and defense counsel and former military judges, speaking to the JPP at a public meeting in January 2017, reinforced the comments of counsel on site visits that Article 32 hearings in sexual assault cases have become "paper drills" at which neither the victim nor other witnesses testify.[31] A senior trial counsel told the JPP that since Article 32 and R.C.M. 405 were modified, the trial counsel has "a lot more control over the presentation of evidence" at the Article 32 preliminary hearing, and can often establish probable cause with only a copy of the victim's statement and portions of the investigation report.[32]

Some counsel and former judges noted that they are seeing more Article 32 waivers from defense counsel since the new Article 32 preliminary hearing took effect, though some defense counsel said that they continue to go forward with these hearings to obtain what information they can.[33] A former judge told the JPP that in pre-December 2014 Article 32 proceedings, it was rare for the defense to submit an Article 32 waiver in a sexual assault case.[34] According to a senior trial counsel, the pre-December 2014 Article 32 investigation was used as a "litmus test" to determine the strength of the case and to see how the victim comes across while testifying. He further stated that given the limited scope of the new Article 32 preliminary hearing, he believes more cases are now being referred to court-martial than would have been under the more robust pre-December 2014 Article 32 investigation.[35] Another senior trial counsel elaborated that some convening authorities who still want to use the Article 32

30 Article 32 investigating officers' recommendations under the pre-December Article 32 process were also nonbinding.

31 *Transcript of JPP Public Meeting* 22 (Jan. 6, 2017) (testimony of Lt Col (ret.) Wendy Sherman, U.S. Air Force, former military trial judge); 104 (testimony of Maj Adam Workman, U.S. Marine Corps, Legal Services Support Team); 233 (testimony of Maj James Argentina, Jr., U.S. Marine Corps, Senior Defense Counsel); 278 (testimony of Maj Aran Walsh, Regional Victims' Legal Counsel).

32 *Transcript of JPP Public Meeting* 104 (Jan. 6, 2017) (testimony of Maj Workman).

33 *Transcript of JPP Public Meeting* 31 (Jan. 6, 2017) (testimony of LTC (ret.) Wade Faulkner, U.S. Army, former military trial judge); 114 (testimony of CPT Brad Dixon, U.S. Army, Trial Counsel Assistance Program Training Officer).

34 *Transcript of JPP Public Meeting* 31 (Jan. 6, 2017) (testimony of LTC (ret.) Faulkner).

35 *Transcript of JPP Public Meeting* 150 (Jan. 6, 2017) (testimony of CPT Dixon).

preliminary hearing to "test the evidence" in a sexual assault case are frustrated that they can no longer do that effectively under the new Article 32 process.[36] A senior defense counsel also questioned whether the new Article 32 preliminary hearing serves any meaningful purpose.[37]

A number of counsel expressed the concern that the more superficial process mandated by the current Article 32 is leading convening authorities to make court-martial referral decisions with less information than was available to them in the past. These counsel corroborated the perception of counsel interviewed by the Subcommittee during site visits that the reforms to Article 32 have made the hearings less meaningful, and as a result more sexual assault cases are referred despite weak evidence and little chance of conviction at trial.[38] One senior trial counsel expressed the opinion that an experienced trial counsel should be able to distill the evidence, research case law, and provide a well-supported recommendation to the convening authority. In his view, the Article 32 should become more like the civilian grand jury system.[39] A Marine Corps VLC concurred, stating that the Marine Corps has implemented a prosecution merits memo in which the trial counsel "writes a complete and informed opinion" of the evidence in the case and the likelihood of achieving a conviction at trial.[40] Prosecutors from the other Services indicated that they draft similar memos or have similar procedures for informing staff judge advocates and convening authorities about the evidence in such cases. Conversely, the Marine Corps VLC stated his view that it is not necessary for victims to testify in the Article 32 hearing. He added that it is traumatic for them and slows the process down.[41]

Several counsel pointed out that the recommendation of the Article 32 PHO is nonbinding on the convening authority, and the Article 32 hearing is now less effective at identifying cases that are likely to result in a conviction at court-martial. Practitioners who testified before the JPP in January 2017 stated they were aware of cases in which Article 32 PHOs either found no probable cause for a charge or recommended against sending the charge to trial, but their advice was not followed by the staff judge advocate and convening authority.[42] In addition, a senior defense counsel told the JPP that as a prosecutor, he has seen situations in which there was almost no probability of winning at trial, and when this information was presented to the convening authority, the convening authority still elected to refer the charges to court-martial.[43] He added that sending fatally weak cases on to court-martial was very demoralizing to the trial counsel.[44]

4. Data on Article 32 Recommendations and Convening Authority Referral Decisions. The Services provided case information and documents showing that out of 416 sexual assault cases that went to general court-martial in fiscal year 2015, 54 cases involved an Article 32 investigating officer or PHO

36 *Transcript of JPP Public Meeting* 151 (Jan. 6, 2017) (testimony of Maj Workman).

37 *Transcript of JPP Public Meeting* 186 (Jan. 6, 2017) (testimony of Maj Marcia Reyes-Steward, U.S. Army, Senior Defense Counsel).

38 *Transcript of JPP Public Meeting* 174 (Jan. 6, 2017) (testimony of Maj Benjamin Henley, U.S. Air Force, Senior Defense Counsel); 210 (testimony of LCDR Rachel Trest, U.S. Navy, Senior Defense Counsel); 239 (testimony of Maj Argentina).

39 *Transcript of JPP Public Meeting* 153 (Jan. 6, 2017) (testimony of LCDR Ben Robertson, U.S. Navy, Senior Trial Counsel).

40 *Transcript of JPP Public Meeting* 290 (Jan. 6, 2017) (testimony of Maj Walsh).

41 *Id.* at 291.

42 *Transcript of JPP Public Meeting* 155 (Jan. 6, 2017) (testimony of LCDR Geralyn Van De Krol, U.S. Coast Guard, Branch Chief, Trial Services); 222 (testimony of LCDR Trest); 224 (testimony of Maj Argentina).

43 *Transcript of JPP Public Meeting* (Jan. 6, 2017) 224 (testimony of Maj Argentina).

44 *Id.*

recommending against referring one or more sexual offense charges to court-martial and the convening authority electing to refer the charge(s) to a general court-martial despite that recommendation.[45] In all these cases, the staff judge advocate's pretrial advice to the convening authority was to refer these charges to general court-martial.[46]

In 45 of the 54 cases in which the Article 32 investigating officer or PHO recommended against referring one or more sexual offenses to trial, the accused was ultimately acquitted of those offenses, though the accused may have been convicted of other offenses.[47]

C. Referral and Prosecutorial Discretion

Following the Article 32 preliminary hearing, the PHO's report, along with the case file and SPCMCA disposition recommendation, is forwarded to the general court-martial convening authority (GCMCA) for disposition.[48] The staff judge advocate then provides written pretrial advice to the convening authority, including a conclusion as to whether each specification states an offense under the UCMJ, whether the allegations are warranted by the evidence in the Article 32 preliminary hearing report, and whether a court-martial would have jurisdiction over the accused and offense, as well as a recommendation of what action should be taken by the convening authority.[49] A copy of the pretrial advice must be provided to the defense if the convening authority refers the case to court-martial; this is not a document covered by attorney-client privilege.[50] The GCMCA must then decide whether to refer some or all of the charges to a general court-martial.[51]

1. Rules Governing Referral of Charges. R.C.M. 601 sets forth the basis for the referral of charges to court-martial:

> If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source[.][52]

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45 While all of the cases went to trial in fiscal year 2015, some went to Article 32 hearings prior to the Dec. 26, 2014, change to the Article 32 preliminary hearing and some took place after. These numbers do not reflect the total number of sexual assault cases from all of the Services that went to general court-martial in fiscal year 2015: those cases for which the JPP staff did not receive all case file documents were not included in the total.

46 The pretrial advice in 5 of the 54 case files was not available.

47 The reasons the Article 32 investigating officer or PHO stated they recommended against referral of a sexual offense specification to trial were because he or she determined there were no reasonable grounds to believe the accused committed the offenses/there was no probable cause, or because the prosecution was unlikely to prevail at trial. Under the pre-December 2014 Article 32, the investigating officer's conclusion regarding whether reasonable grounds exist to believe that the accused committed the offenses alleged must be included in his or her report. 2012 MCM, *supra* note 19, R.C.M 405(j)(2)(H). The new Article 32 process requires the PHO to determine whether there is probable cause to believe that the accused committed the offenses alleged. 10 U.S.C. § 832 (UCMJ, Art. 32).

48 2016 MCM, *supra* note 11, R.C.M. 404(e).

49 2016 MCM, *supra* note 11, R.C.M. 406(a)–(b).

50 2016 MCM, *supra* note 11, R.C.M. 406(c).

51 2016 MCM, *supra* note 11, R.C.M. 407.

52 2016 MCM, *supra* note 11, R.C.M. 601(d)(1).

"Information from any source" may include hearsay and information not previously presented at the Article 32 hearing or to the SPCMCA. This rule states that the convening authority or judge advocate is not required to resolve legal issues, "including objections to evidence," prior to referral.[53] The written discussion for R.C.M. 601(d)(1) refers back to disposition factors from R.C.M. 306, previously discussed in the "Early Stages of Case Processing" section of this report, that the convening authority should consider in deciding whether to refer the case to court-martial.[54]

2. Legislation and U.S. Attorneys' Manual. The FY17 NDAA created a new Article 33 under the UCMJ, which directs the Secretary of Defense to issue nonbinding guidance to be considered by convening authorities and judge advocates when exercising their duties with respect to the disposition of charges.[55] The new Article 33 states that this guidance should take into account the "principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases."[56]

The official guidance of the Attorney General mentioned in the new Article 33 refers to the U.S. Attorneys' Manual, which specifies a probable cause standard for prosecutors in determining whether to commence or recommend prosecution or some other disposition.[57] Within this section, however, probable cause is only a threshold consideration that, if met, does not automatically warrant prosecution.[58] The manual further provides that the attorney should commence prosecution if he or she believes that the conduct constitutes a federal offense and "that the admissible evidence will probably be sufficient to obtain and sustain a conviction"; nevertheless, prosecution should be declined when there is no substantial federal interest in prosecution, the person is subject to prosecution in another state, or there is an adequate non-criminal alternative.[59] The discussion to this section states that "both as a matter of fundamental fairness and in the interest of efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact."[60]

3. The American Bar Association's Criminal Justice Standards. Similarly, according to the American Bar Association's (ABA) Criminal Justice Standards for the Prosecution Function, a prosecutor should file and maintain criminal charges only when the charges are supported by probable cause, when "admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and [when] the decision to charge is in the interests of justice."[61] These standards also state that a prosecutor may file and maintain charges "even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question."[62]

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53 2016 MCM, *supra* note 11, R.C.M. 601(d)(1).

54 2016 MCM, *supra* note 11, R.C.M. 601(d)(1) discussion.

55 FY17 NDAA, *supra* note 29, § 5204.

56 *Id.*

57 U.S. Dep't of Justice, United States Attorneys' Manual, Section 9-27.200 (1997, updated Jan. 2017).

58 *Id.*

59 U.S. Dep't of Justice, United States Attorneys' Manual, Section 9-27.220 (1997, updated Jan. 2017).

60 *Id.*

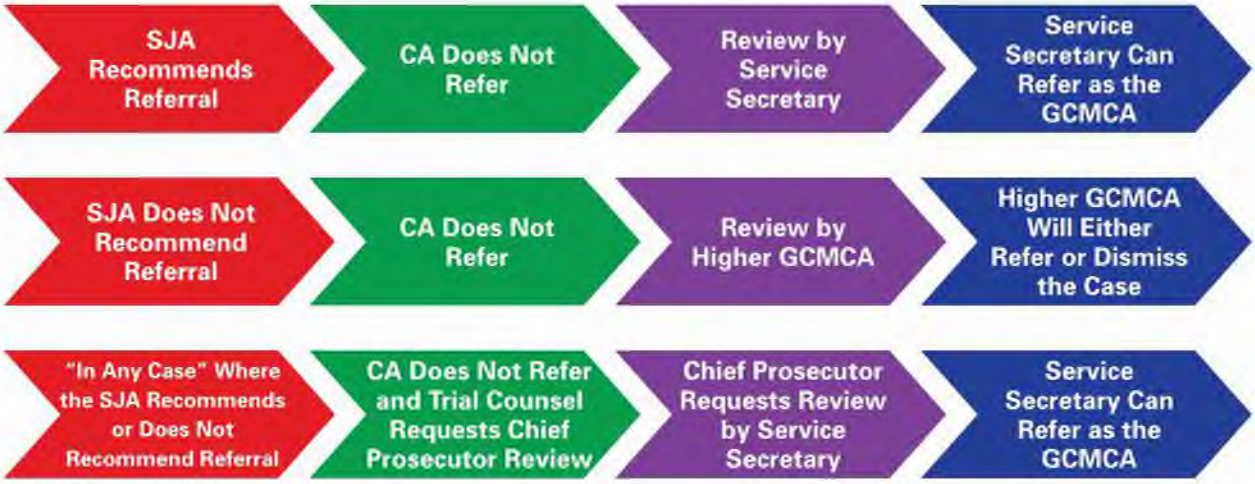
61 Criminal Justice Standards for the Prosecution Function, Standard 3-4.3 (Am. Bar Ass'n, Fourth Ed.).

62 *Id.*

The Air Force has implemented, in modified form, the ABA Criminal Justice Standards. In its standard for charging decisions, the Air Force rule states that charges must be supported by probable cause and that a "trial counsel should not institute or permit the continued pendency of criminal charges in the absence of admissible evidence to support a conviction."[63] The other Services have not implemented the ABA standard, though representatives from the Coast Guard and Navy noted they informally use a version of it.[64]

4. Review of Disposition Decisions. The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) contained a provision requiring that a convening authority's decision not to refer certain sexual assault cases be reviewed, either by a higher general court-martial convening authority or by the Service Secretary, depending on the circumstances.[65] This provision, which applies only to cases in which charges have been preferred and for which the staff judge advocate has provided the convening authority with pretrial advice under Article 34 of the UCMJ, was further modified in the FY15 NDAA to require that a convening authority's decision not to refer certain sexual assault cases be reviewed by the Service Secretary when the chief prosecutor of the Service requests such review.[66]

Figure. Elevated Review of Convening Authority Decisions at Referral



63 U.S. Dep't of the Air Force, Air Force Guidance Memo. to Air Force Instruction 51-110, Professional Responsibility Program (Jul. 7, 2016), Standard for Criminal Justice 3-3.9. Discretion in the Charging Decision.

64 *Transcript of JPP Public Meeting* 263 (Jan. 6, 2017) (testimony of CDR Cassie Kitchen, U.S. Coast Guard, former military trial judge); 212, 264 (testimony of CDR Mike Luken, U.S. Navy, former military trial judge).

65 FY14 NDAA, *supra* note 21, § 1744 requires review of decisions not to refer cases involving charges of rape, sexual assault, forcible sodomy, or attempts to commit such acts.

66 FY15 NDAA, *supra* note 21, § 541.

Responding to the JPP Subcommittee's request for information on the number of times that these elevated review provisions have been invoked, the Services provided the following:[67]

- All of the Services reported that since December 26, 2013,[68] there have been zero instances in which a Service Secretary reviewed a convening authority's decision not to refer a qualifying sex-related offense to court-martial.
- All of the Services reported that since December 19, 2014,[69] there have been zero instances in which their chief prosecutor requested that the Service Secretary review a convening authority's decision not to refer a qualifying sex-related offense to court-martial.
- Since December 26, 2013, the Services reported the following instances in which a case involving a qualifying sex-related offense was forwarded for review to the next superior commander after the general court-martial convening authority decided not to refer the case to court-martial.
  - » Army: 8 cases. Of these 8 cases, there was one instance in which the next superior commander decided to refer the charge(s) to court-martial.
  - » Air Force: 21 cases.[70] Of these 21 cases, there were zero instances in which the next superior commander decided to refer the charge(s) to court-martial.
  - » Navy: 11 cases. Of these 11 cases, there were zero instances in which the next superior commander decided to refer the charge(s) to court-martial.
  - » Marine Corps: 11 cases. Of these 11 cases, there were zero instances in which the next superior commander decided to refer the charge(s) to court-martial.
  - » Coast Guard: 8 cases. Of these 8 cases, there were zero instances in which the next superior commander decided to refer the charge(s) to court-martial.

5. Possible Pressure on Convening Authorities to Refer Sexual Assault Cases to Courts-Martial. As noted, many trial and defense counsel interviewed by the Subcommittee during site visits mentioned their perception that convening authorities feel pressure to refer sexual assault cases to courts-martial, in part owing to public and congressional interest in this issue. Several examples illustrate this pressure.

In late 2013, in a well-publicized case involving sexual assault allegations, a U.S. Air Force convening authority, Lieutenant General Craig Franklin, following a pretrial hearing, agreed with legal advisors that the evidence was not sufficient to proceed to court-martial and dismissed the charges.[71] The acting Secretary of the Air Force then transferred the case for action to a different convening authority,

67 *See* Services' Responses to JPP Subcommittee Request for Information 166 (Apr. 5, 2017).

68 This was the effective date of § 1744 of the FY14 NDAA, *supra* note 21.

69 This was the effective date of § 541 of the FY15 NDAA, *supra* note 21.

70 The Secretary of the Air Force served as the superior GCMCA in one of the 21 cases. The Secretary reviewed the case not because it met criteria for secretarial review under the provisions of FY14 NDAA § 1744 or FY15 NDAA § 541, but because she was the next superior GCMCA.

71 David Alexander, *Rape case removed from U.S. Air Force general who made controversial ruling*, Chic. Trib., Dec. 19, 2013, *available at* http://articles.chicagotribune.com/2013-12-19/news/sns-rt-usa-militarysexassault-20131219_1_general-craig-franklin-u-s-air-force-wright-case. The convening authority, Lieutenant General Craig Franklin, had earlier that year overturned an officer's sexual assault conviction, an act that angered many and led to legislation severely limiting a convening authority's ability to grant post-trial clemency relief in sexual assault cases.

who referred the case to a general court-martial.[72] Senator Claire McCaskill (D-MO) then called for Lieutenant General Franklin's removal from command, declaring: "Lieutenant General Franklin should not be allowed to fulfill the responsibilities of military command because he has repeatedly shown he lacks sound judgment."[73] The case eventually went to trial, and the accused was acquitted of all charges.[74] During the trial, the defense raised an unlawful command influence motion and introduced evidence that following Lieutenant General Franklin's dismissal of charges, the Air Force Judge Advocate General told Lieutenant General Franklin's staff judge advocate that failure to refer the case to trial would "place the Air Force in a difficult position with Congress" and that "absent a 'smoking gun,' victims are to be believed and their cases referred to trial."[75] Shortly thereafter, Lieutenant General Franklin announced that he would retire from the Air Force.

Also in 2013, Senator McCaskill blocked the confirmation of an Air Force convening authority, Lieutenant General Susan Helms, to the position of Air Force Space Command vice commander because she had overturned the sexual assault conviction of a member of her command.[76] Senator McCaskill expressed concerns about Lieutenant General Helms' decision, noting that it was against the advice of the staff judge advocate, who recommended that Lieutenant General Helms affirm the conviction. Senator McCaskill stated, "At a time when the military is facing a crisis of sexual assault, making a decision that sends a message which dissuades reporting of sexual assaults, supplants the finding of a jury, contradicts the advice of counsel, and further victimizes a survivor of sexual assault is unacceptable."[77]

Another source of perceived pressure came from the military's commander in chief, President Barack Obama. In May 2013, during a press conference, President Obama told reporters that those who commit sexual assault in the military should be "prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged."[78] These remarks led to defense counsel filing unlawful command influence motions in numerous courts-martial, on the grounds that the President's remarks could be interpreted by panel members as an attempt to influence the outcomes of courts-martial in sexual assault cases.[79] Lawyers argued that the President's comments could be considered unlawful command influence because they directed specific outcomes in sexual assault cases and were in conflict with the expectation that commanders exercise discretion in making disposition decisions. In an effort to blunt the negative effects of the President's remarks, the Secretary of Defense issued a memorandum reiterating his and the President's expectations that those involved in the military justice process base their decisions on their independent judgment of the facts of each case, and not consider "personal

72 Jeff Schogol, *Airman acquitted of sexual assault charge,* USA Today, Oct. 29, 2015, *available at* https://www.usatoday.com/story/military/2015/10/29/airman-acquitted-sexual-assault-charges/74792760/.

73 Press release, *McCaskill Calls for Removal of Lt. Gen. Craig Franklin from Command* (Dec. 18, 2013), *available at* https://www.mccaskill.senate.gov/media-center/news-releases/mccaskill-calls-for-removal-of-lt-gen-craig-franklin-from-command.

74 Jeff Schogol, *Airman acquitted of sexual assault charge,* USA Today, *supra* note 79.

75 *See Wright v. United States*, __M.J. ___ (A.F.C.C.A. Jan. 13, 2015) (The language in quotations is quoted from the appellate opinion and is not intended to reflect the verbatim words used by the Air Force Judge Advocate General.).

76 *See* 159 Cong. Rec. S4020 (Jun. 7, 2013) *available at* https://www.gpo.gov/fdsys/pkg/CREC-2013-06-07/pdf/CREC-2013-06-07-pt1-PgS4020-3.pdf#page=1.

77 *Id.*

78 Jennifer Steinhauer, *Remark by Obama Complicates Military Sexual Assault Trials*, N.Y. Times, Jul. 13, 2013, *available at* http://www.nytimes.com/2013/07/14/us/obama-remark-is-complicating-military-trials.html.

79 *Id.*

interests, career advancement, or an effort to produce what is thought to be the outcome desired by senior officials, military or civilian."[80]

6. Site Visit Information. Counsel discussed the standard to refer a case to court-martial, which is probable cause—lower than the standard typically applied in state and federal prosecutions. Trial and defense counsel alike believe that the probable cause standard is too low and that convening authorities should be allowed to take into account other factors, such as the credibility of the victim and the likelihood of obtaining a conviction at trial. Judge advocates must hold a license with a state bar to practice law. Because the codes of ethics required by many state bars include standards for prosecution comparable to the United States Attorney's Manual and ABA Standards discussed above, several counsel expressed concern that they may be violating their state bar ethical rules by prosecuting cases in which they feel the charges are not supported by probable cause or in which there is no reasonable likelihood of proving the charges at trial.

Judge advocates overwhelmingly reported a perception of pressure on convening authorities to refer sexual assault cases to court-martial, regardless of merit. According to many of the judge advocates interviewed on site visits, this pressure extends to weak cases that civilian jurisdictions would not prosecute and, in some cases, have already declined to prosecute. The vast majority of prosecutors and defense counsel who spoke with the Subcommittee have the impression that this pressure causes convening authorities to favor referral to court-martial rather than deal with the potential adverse ramifications of not referring a sexual assault case, such as career setbacks, media scrutiny, the possibility of their non-referral decisions being subjected to elevated review, or questions about why the case was not referred. These lawyers suspect that commanders may feel that the act of sending a case to trial, regardless of merit, is perceived as "safe" and harmless with respect to the parties involved and the justice system as a whole.

A commander (O-6) interviewed on a site visit told the Subcommittee that he forwards every sexual assault case to the next general officer in the chain of command for disposition decision, "because I would not want to get it wrong and have someone get away, so I send it forward to let the system sort it out." When asked what, if any, pressure is on commanders to handle sexual assault cases a certain way, one commander replied that he felt the need to "do something immediately" or face harm to his career. Another commander felt that there was pressure to be transparent throughout the process, rather than pressure to send every case to court-martial.

The discussion to R.C.M. 306(b) states that one of the factors a commander should consider when disposing of a case is the views of the victim regarding disposition.[81] Many counsel conveyed their perception that the merits of the case have become less important than the victim's preference regarding disposition. The rationale for referring some cases to court-martial provided by some prosecutors and commanders is that the court-martial process allows the victim to have his or her "day in court," which was described as a laudable end in itself, regardless of outcome. One commander acknowledged that there is pressure to go to trial if the victim wants to go to trial, regardless of the case's merits.

In addition, trial and defense counsel explained that in their experience guilty plea agreements, in which the defendant agrees to plead guilty to some or all charges in exchange for a lesser sentence, will not be approved by commanders if the victim does not support it. Likewise, the common perception among judge advocates is that a victim has veto power over whether the commander prefers to dispose

80 U.S. Dep't of Defense, Memorandum from the Secretary of Defense on Integrity of the Military Justice Process (Aug. 6, 2013).

81 2016 MCM, *supra* note 11, R.C.M. 306(b) discussion.

of a case in an alternate forum, such as through administrative separation proceedings or nonjudicial punishment.

7. Information Presented to the JPP and Subcommittee. Reflecting the same view that the Subcommittee members heard during site visits, counsel speaking at a JPP public hearing also expressed concern about the low threshold of probable cause required to refer a case to court-martial. In the view of a senior defense counsel, the changes to the Article 32, combined with this low threshold to refer cases, result in sexual assault cases being referred when there is no chance for conviction, an outcome that causes both the accused and victim to suffer needlessly.[82] He further compared the military justice system to the civilian justice system, in which experienced prosecutors have the discretion to bring a case to trial, or not, based on the state of the evidence.[83] Another senior defense counsel similarly suggested that prosecutors and convening authorities in the military should exercise more discretion in referring cases to trial, much as state and federal prosecutors do, and refer cases to trial only when the evidence is sufficient to secure a conviction.[84]

A senior defense counsel told the JPP that the pressure on convening authorities to refer sexual assault cases to courts-martial is very high. No convening authority wants to fail to refer a sexual assault case to court only to have it determined later that there was additional evidence and the case should have been tried by court-martial.[85]

In January 2017, the JPP Subcommittee held a hearing on the standards currently applied by military prosecutors and heard from ethics officials and senior prosecutors from the Services. Participants highlighted the differences between the military and civilian justice systems, noting that the goal of the military system is not only to promote justice but also to maintain good order and discipline. In the military justice system, prosecutorial discretion is vested in convening authorities, rather than prosecutors.[86] However, all the Services have adopted some version of ABA Model Rule of Professional Conduct 3.8, which states that prosecutors have an ethical obligation to ensure that all charges are supported by probable cause.[87] If the situation arises in which a prosecutor believes a charge is not supported by probable cause, but his or her supervising attorney disagrees, ethical rules allow the junior attorney to rely on the supervising attorney's "reasonable resolution of an arguable question of professional duty."[88] One presenter noted that in the previous seven years, his Service's ethics office had yet to have a trial counsel call with concerns about prosecuting a case without probable cause—an indication, he believes, that the counsel are working this out with their supervisors.[89]

One counsel described a dilemma in which prosecutors can find themselves when dealing with some sexual assault cases, giving the example of a sexual assault that occurs when the victim is too intoxicated to consent to sexual activity. If the offense is charged under the theory that the victim is

82 *Transcript of JPP Public Meeting* 235 (Jan. 6, 2017) (testimony of Maj Argentina).

83 *Id.* at 237.

84 *Transcript of JPP Public Meeting* 262 (Jan. 6, 2017) (testimony of LCDR Trest).

85 *Transcript of JPP Public Meeting* 225 (Jan. 6, 2017) (testimony of Maj Argentina).

86 *Transcript of JPP Subcommittee Meeting* 183 (Jan. 5, 2017) (testimony of Col Kate Oler, U.S. Air Force, Chief, Government Trial and Appellate Counsel Division).

87 Model Rules of Professional Conduct, r. 3.8 (Am. Bar Ass'n 2016).

88 Model Rules of Professional Conduct, r. 5.2 (Am. Bar Ass'n 2016).

89 *Transcript of JPP Subcommittee Meeting* 259 (Jan. 5, 2017) (testimony of COL William Kern, U.S. Army, Professional Responsibility Branch).

incapable of consenting due to intoxication, guilt may be difficult to prove when there is evidence that the victim was walking, talking, texting, and performing other activities close in time to when the alleged assault occurred. On the other hand, if the offense is charged under the "bodily harm" theory of sexual assault, prosecutors will have problems when the victim does not recall what happened because of his or her intoxication, making it difficult to prove that the touching was offensive. In this situation, it can be difficult to establish probable cause.[90] In such cases, he explained, sometimes the prosecutor cannot establish probable cause, but the victim believes she was sexually assaulted and tells the convening authority that she wants the case to go to trial.[91] In these situations, they rely on the prosecution merit review of the case, using the R.C.M. 306 factors listed above, to persuade the convening authority that the evidence is not supported by probable cause.[92] In addition, Article 34, UCMJ, states that the convening authority cannot refer a charge to a general court-martial if advised in writing by the staff judge advocate that the specification is not warranted by the evidence.[93] According to the counsel, Navy prosecutors look not only at whether there is probable cause but at whether there is a reasonable probability of success at trial.[94] He told the Subcommittee that they have been successful in convincing convening authorities to use this higher standard in deciding whether to refer cases.[95]

Another counsel told the Subcommittee that once probable cause is established, counsel are compelled to go forward with a case even when they do not believe there is reasonable likelihood of success at trial.[96] Several counsel emphasized that there are cases in which conviction at trial seems unlikely, but they go forward to trial because "it is the right thing to do."[97]

8. Data on Referral Decisions. The JPP staff collected sexual assault courts-martial information and case documents from fiscal year 2015 from the Services and entered this information into an electronic database. The data from fiscal year 2015 encompassed 738 cases, all of which involved at least one preferred charge of a sexual offense. Dr. Cassia Spohn, Foundation Professor and Director, School of Criminology and Criminal Justice, Arizona State University, then analyzed these data, producing the following statistical information.[98]

According to the FY 2015 data, for sexual assault cases that went to courts-martial, 79% were referred to a general court-martial, 13% were referred to a special court-martial, and 7% were referred to a summary court-martial. In 52% of the cases referred to courts-martial, a military judge was the factfinder; 40% went to a panel of members; and 7% went to a summary court-martial officer.[99]

90 *Transcript of JPP Subcommittee Meeting* 206 (Jan. 5, 2017) (testimony of CDR Mike Luken).

91 *Id.* at 207.

92 *Id.* at 207.

93 10 U.S.C. § 834 (UCMJ, Art. 34).

94 *Id.* at 212.

95 *Id.* at 244.

96 *Transcript of JPP Subcommittee Meeting* 217 (Jan. 5, 2017) (testimony of LtCol Nicholas Martz, U.S. Marine Corps, Military Justice Branch Head).

97 *Transcript of JPP Subcommittee Meeting* 250 (Jan. 5, 2017) (testimony of CDR Luken); 253 (testimony of Col Oler).

98 Adjudication of Sexual Assault Offenses Reported to the Military Services in 2015, Cassia Spohn, PhD, School of Criminology and Criminal Justice, Arizona State University (Apr. 2017), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/07-CM_Trends_Analysis/20170407/20170407_Spohn_NarrativeReport_FY15Cases.pdf.

99 This data was rounded to the nearest whole number and does not add up to 100 percent.

For cases in which the accused was charged with at least one penetrative offense (rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit these offenses), 28% were convicted of a sexual assault offense,[100] 22% were convicted of a non-sex offense only, and 21% were acquitted of all charges. Another 14% of cases received an alternate disposition,[101] and 15% had all charges dismissed prior to trial.[102]

For cases in which the accused was charged with at least one sexual contact offense (aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit these offenses), 18% were convicted of a sexual contact offense, 41% were convicted of a non-sex offense only, and 13% were acquitted of all charges. Another 22% of cases received an alternate disposition, and 6% had all charges dismissed prior to trial.

FY15 – Case Outcomes by Most Serious Sexual Assault Offense Preferred

Penetrative offense (530 cases)	Number	Percent (%)
Convicted of a sexual offense	150	28%
Convicted of a non-sex offense	114	22%
Acquitted of all charges	113	21%
Alternate disposition/dismissal	153	29%
Contact offense (208 cases)		
Convicted of a contact offense	37	18%
Convicted of a non-sex offense	85	41%
Acquitted of all charges	27	13%
Alternate disposition/dismissal	59	28%

Dr. Spohn also calculated conviction and acquittal rates for sexual assault cases that were tried at court-martial (excluding cases that went to alternate disposition or had charges dismissed prior to trial). For cases in which the most serious offense tried was a penetrative offense, 40% resulted in convictions of a sexual assault offense, 30% resulted in convictions of a non-sex offense only, and 30% resulted in acquittal of all charges.

For cases in which the most serious sex offense tried at court-martial was a sexual contact offense, 25% resulted in convictions of a sexual contact offense, 57% resulted in convictions of a non-sex offense only, and 18% resulted in acquittal of all charges.

100 The vast majority of these cases were convicted of a penetrative offense.

101 Alternate dispositions primarily consist of resignation or administrative discharge in lieu of trial by court-martial. These resignations or discharges usually include an adverse service characterization.

102 For this "all charges dismissed prior to trial" category, the JPP staff does not have information on whether these cases resulted in the accused receiving nonjudicial punishment, administrative action, or no punishment.

FY15 – Case Outcomes of Trial by Court-Martial

Penetrative offense (377 cases)	Number	Percent (%)
Convicted of a sexual offense	150	40%
Convicted of a non-sex offense	114	30%
Acquitted of all charges	113	30%
Contact offense (149 cases)		
Convicted of a contact offense	37	25%
Convicted of a non-sex offense	85	57%
Acquitted of all charges	27	18%

Annual reports from the Service Judge Advocates General to the Code Committee provide some courts-martial data, though they do not provide specific information on sexual assault courts-martial. In the Fiscal Year 2015 Annual Report, the Army and Navy indicated that while their courts-martial caseload had declined from previous years, the percentage of contested cases remained constant or increased.[103] In that report, the Marine Corps stated that between 2012 and 2014, the number of contested sexual assault cases more than tripled. Their number of contested sexual assault cases in fiscal year 2015 was below that of fiscal year 2013 and 2014, but it was more than twice that of fiscal year 2012.[104]

III. ADDITIONAL ISSUES

A. Prosecutors' Lack of Access to the Victim. Victims with appointed SVCs/VLCs are likely to permit fewer interviews with prosecutors (and investigators) than victims without counsel.[105] Furthermore, when victims do agree to meet with prosecutors, the interviews are often in the presence of a SVC/VLC, who sometimes object to various questions and prevent those interviews from being as probing as they might otherwise be. Investigators also pointed out that few victims grant investigators access to their personal cell phones, which typically contain a wealth of evidence. SVCs/VLCs consistently reported that they do advise victims against sharing information from their phones or social media accounts with investigators. No prosecutors who acknowledged being denied access to the victim's cell phone during interviews indicated that they had considered not prosecuting the case. Prosecutors frequently lamented the loss of rapport-building opportunities because victims now are represented by SVCs/VLCs, even though they appreciated that victims' counsel provide valuable advice and guidance and relieve trial counsel of some of the time burden of helping victims navigate the legal system.

103 Annual Report for Fiscal Year 2015, Report of the Judge Advocate General of the Army, Section 3, 38; Report of the Judge Advocate General of the Navy and the Annual Military Justice Report of the Marine Corps, Section 4, 67, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY15AnnualReport.pdf.

104 Annual Report for Fiscal Year 2015, Report of the Judge Advocate General of the Navy and the Annual Military Justice Report of the Marine Corps, Section 4, 95-6.

105 Lack of access to victims by investigators is discussed in greater depth in the Subcommittee of the Judicial Proceedings Panel Report on Sexual Assault Investigations in the Military, *supra* note 2. Defense counsel access to victims is discussed in the Subcommittee of the Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases, *supra* note 2.

B. Sexual Assault Prevention and Response (SAPR) Training. Most sexual assault response coordinators and victim advocates who spoke with Subcommittee members acknowledged that misperceptions persist throughout the military regarding the consumption of alcohol and lack of consent, specifically that the consumption of any amount of alcohol makes a person incapable of consenting to sexual activity. Sexual assault response coordinators (SARCs) and victim advocates (VAs) stated they do not currently instruct Service members that "one beer means a person cannot consent." Instead, they emphasize to their audiences that having sex with an intoxicated person has risks and that determining intoxication can be difficult. At some installations, judge advocates stated they review the training materials or assist with the SAPR training to ensure information on this topic is relayed correctly. The Subcommittee viewed this as a positive development.

Commanders who spoke to the Subcommittee consistently expressed concerns about the frequency of mandatory SAPR training, describing it as time-consuming and potentially counterproductive because of perceived "training fatigue." One worried that the Sexual Harassment and Assault Response and Prevention (SHARP) classes and safety briefings are so repetitive that Service members may "tune out" the message.

In the view of some practitioners, SAPR training has become so pervasive that it affects the judgment and selection of potential panel members.[106] Counsel in the Army pointed out that every battalion-sized unit designates a noncommissioned officer (NCO) as the unit's VA, a collateral responsibility that requires specialized training on the topic of sexual assault from a victim-centric perspective. These senior NCOs, along with the other officer or enlisted members on a court-martial panel, have been instructed about the behavior that constitutes sexual assault so many times in SHARP briefings that they have strong opinions about the law. Consequently, counsel find it difficult to correct misperceptions and educate members on the nuances of the law and the burden of proof required at courts-martial.

A defense counsel providing information to the JPP at the January 2017 public meeting stated that in her experience, court-martial panel members, after years of SAPRO training, are "predisposed to believe the victims and misinterpret the legal definition of consent and mistake of fact as to consent."[107] The perception persists, in her view, that if a person is drinking, he or she cannot consent to sexual contact. She further noted that the voir dire process at trial does not completely expose the biases of potential panel members.[108]

Bolstering this point, in a September 2016 Navy-Marine Corps Court of Criminal Appeals decision involving an erroneous jury instruction on the definition of "impairment" in a sexual assault case,[109]

106 *See* Report of the Response Systems to Adult Sexual assault Crimes Panel 37, *supra* note 4 ("Response System Panel Recommendation 80: The Secretary of Defense and Service Secretaries ensure prevention programs address concerns about unlawful command influence. In particular, commanders and leaders must ensure sexual assault prevention and response training programs and other initiatives do not create perceptions among those who may serve as panel members at courts-martial that commanders expect particular findings and/or sentences at trials or compromise an accused Service member's presumption of innocence, right to fair investigation and disposition, and access to witnesses or evidence. Judge advocates with knowledge and expertise in criminal law should review sexual assault prevention training materials to ensure the materials neither taint potential panel members (military jurors) nor present inaccurate legal information.").

107 *Transcript of JPP Public Meeting* 210–11 (Jan. 6, 2017) (testimony of LCDR Trest).

108 *Id.* at 251.

109 *United States v. Newlan*, No. 201400409 at 23 (N.M. Ct. Crim. App. Sep. 13, 2016). The Court set forth a definition for "impairment" in such cases: "'Impairment' is the state of being damaged, weakened or diminished. Impairment rendering someone 'incapable of consenting' is that level of impairment which is sufficient to deprive him or her of the cognitive ability to appreciate the nature of the conduct in question or the physical or mental ability to make or to communicate a

the court found that many members of the panel received training from SAPR personnel that "if someone ingested any alcohol, that individual was no longer able to legally consent."[110] The court stated:

> We first note that the erroneous definition of "impairment" may have compounded the legally-inaccurate proposition—that "one drink means you can't consent"—that some members received while attending mandatory SAPR training. While likely well-intentioned, these statements made during training generated a significant risk of skewing the panel's understanding of legal consent. Though these members were generally instructed to "not use [or discuss] anything you learned during SAPR training . . . in evaluating the evidence or the credibility of the witnesses in this case," a more tightly tailored and prompt statement of the law would have ameliorated any prejudicial impact generated by the legally-erroneous SAPR training. Since such a statement was not provided, we are not convinced that any confusion created by the SAPR training was wholly eradicated and that it did not contribute to the subsequent prejudice resulting from the incorrect definition of "impairment."[111]

C. Expedited Transfers. A Department of Defense policy familiar to all site visit participants provides sexual assault victims who file an unrestricted report of sexual assault the opportunity to receive an expedited transfer to another installation or to another unit within the same installation, on request.[112] One goal of this policy is to move the victim to a new location where no one knows of the sexual assault and where the victim need not confront the perpetrator on a regular basis and will have adequate support of family, friends, or counseling.[113] SVCs/VLCs draft the requests on behalf of victims, and send them to commanders. The victims often are able to select the location to which they will transfer. DoD policy also allows a commander to transfer the alleged offender, rather than the victim.[114] No participants discussed whether this option amounted to unlawful pretrial punishment in the context of a pending court-martial, but a Subcommittee member raised the issue. Commanders and a few victims' counsel indicated that commanders approve even questionable transfer requests to avoid accusations of reprisal against or mistreatment of a victim.

Some commanders, victims' counsel, and defense counsel believe that the expedited transfer policy is being abused by some individuals who make sexual assault allegations to obtain favorable transfers. Some participants have observed victims on very large installations of more than 50,000 Service members refuse to transfer to other units on the installation, preferring instead to request transfer to what are considered more favorable locations, such as Hawaii or San Diego. At another installation

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decision regarding that conduct to another person."

110 *Id.* at 7. The Court noted that some of the comments from the venire included the following: "If you did have any form of impairment, that [sic] you can't have consent. You may—the person would not be in the proper frame of mind to provide that consent."; "When a person is impaired, they are unable to give consent, regardless of what they say at the time."; I viewed that as part of the training . . . that for someone to consent] they just should not be impaired."; "A person impaired by alcohol use is incapable of giving sexual consent."; "You need sober consent, per the brief."; "If there is alcohol involved, then there is no consent."; "if a person was under the influence of alcohol, even one drink, that person is not able to give consent to any sexual act."; "If a person has one drink of alcohol, they may be considered impaired, therefore, they may not be able to give consent."; "once the victim has had one drink, there is no longer a legal consent."

111 *Id.* at 33–34.

112 *See* DoDI 6495.02, *supra* note 8, encl. 5 (a sexual assault victim may request a temporary or permanent expedited transfer to a different location within their assigned command or installation).

113 *Id.*

114 *Id.*

considered to be a "good" location, with an appealing climate and with metropolitan areas nearby, counsel noted that they see relatively few requests for expedited transfers. Expedited transfers by victims to more favorable locations may lead to defense counsel challenging the victim's motives during a court-martial, arguing to the panel that the victim made a false allegation of sexual assault to receive a transfer to a more desirable location. Such cross-examination, in turn, may cause panel members to question the victim's credibility and possibly acquit the accused.

IV. CONSEQUENCES

A. Site Visit Information. At all the site visits, most trial and defense counsel questioned whether justice is being served by the panoply of reforms in place. Many of them believe that fundamental rights of due process have been undermined. In their view, convening authorities feel pressure to refer sexual assault cases to court-martial, regardless of the likelihood of securing a conviction. Many also feel that the military's emphasis on prosecuting sexual assault has led to criminalizing behavior that may be offensive and inappropriate, but would not be considered criminal in a civilian context. They also expressed concern that minor offenses are now being referred to court-martial that could be more appropriately resolved through nonjudicial punishment or administrative action. There is widespread consensus among prosecutors and defense counsel that the victim's wish regarding disposition of a case is the primary factor determining whether the case will go to court, and that evidentiary concerns, including the credibility of the victim, are given less consideration. Defense counsel perceive that false accusations are now more likely to make it through the system and, as a result, innocent people face allegations that could ruin their lives. To illustrate this point, one defense counsel described how several of his clients, under the immense psychological pressure of facing court-martial for sexual assault, submitted a request for discharge in lieu of trial, even though they claimed they were innocent—and even though a request for discharge in lieu of trial requires an acknowledgment of guilt and stigmatizing notations in their discharge paperwork.

Site visit participants identified a number of negative consequences of what they perceive as too many sexual assault allegations being referred to trial:

1. Practitioners universally described the acquittal rate in their jurisdiction as "high," in part due to the referral to court-martial of cases that lack merit. The acquittal percentages offered at one installation ranged from about 50% to 100%, significantly higher than the sexual offense acquittal rates seen in civilian jurisdictions.

2. Prosecutors and investigators must devote significant time to prosecuting less meritorious cases, which divert resources away from more serious and well-supported allegations.

3. Some prosecutors feel that they face a potential ethical quandary in trying cases in which they see no reasonable likelihood of conviction.

4. The low conviction rate tends to discredit the entire military justice system in the eyes of Service members and the general public.

5. As more cases flood the system, the time needed to take each case to trial increases.

6. When weak cases linger in the system pending trial, the accused's and the victim's careers and lives remain on hold until the case is resolved.

B. Information Presented to the JPP. One senior defense counsel told the JPP, "The lack of a thorough pre-trial investigation and prosecutorial discretion combined with the nature of acquaintance sexual assaults and the new incentives to fabricate [allegations] are a recipe for wrongful convictions."[115] She stated that despite changes to the system that favor victims and the prosecution, defense counsel are achieving more acquittals than ever before in sexual assault cases. She further observed, however, that the high acquittal rate demonstrates that many of the cases being "pushed through the system" should not be at court-martial and that, although the accused in these cases is often found not guilty, the trial process incurs "a real cost to the accused's life, reputation, family and career."[116] In her view, "the sands have shifted in favor of the victim at the expense of the accused."[117] Another defense counsel expressed his opinion that because of the changes in the military justice system, the rights of the accused to due process and a speedy trial are being eroded.[118] He noted that cases are lingering for as long as two years from report until the case goes to trial, putting the accused's and victim's life on hold for a significant period of time.[119]

V. CONCLUSIONS AND RECOMMENDATIONS

It appears that recent sexual assault legislation and policy changes that have benefited sexual assault victims and made the military justice system less intimidating to them have also had some negative consequences that must be addressed. These changes have affected the perceived legitimacy of the justice system. While legislative changes have substantially reduced the number of victims who testify at Article 32 hearings and have clarified that this hearing is not intended to be a discovery mechanism for the defense, there has been no corresponding new legislation or policy to provide defense counsel access to important case information.[120] In addition, changes in the military justice system, such as the addition of SVCs/VLCs, have greatly benefitted sexual assault victims and given them a much-needed voice in the system. Some defense counsel, however, feel this unfairly tips the scales of justice against the defendant. Also, when SVC/VLC limit a prosecutor's access to the victim, it may adversely affect case outcomes. SVC/VLC must understand that in spite of their laudable intentions, they may inadvertently harm a victim's goals or interests by weakening the criminal case, thereby increasing the chances of an acquittal at trial.

The consensus among counsel interviewed during the installation site visits was that the combination of a less robust Article 32 process, pressure on convening authorities to refer sexual assault cases to courts-martial, and the low standard of probable cause for referring cases to courts-martial has led to cases being referred to courts-martial in which there is little chance for a conviction. Many counsel felt that the result has been a high acquittal rate in sexual assault cases, which, in turn, has caused military

115 *Transcript of JPP Public Meeting* 211 (Jan. 6, 2017) (testimony of LCDR Trest).

116 *Id.* at 212–13.

117 *Id.* at 252.

118 *Transcript of JPP Public Meeting* 250 (Jan. 6, 2017) (testimony of Maj Argentina).

119 *Id.* at 249.

120 The Subcommittee of the Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases, *supra* note 2, highlights significant due process issues regarding defense counsel and makes four recommendations, including that defense counsel be provided with independent investigators, that defense offices be appropriately staffed and resourced, and that expert witness approval and funding be vested in Service defense organizations. The Subcommittee's report and recommendations were approved, with modifications, by the JPP. The Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases is *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/06_JPP_Defense_Resources_Experience_Report_Final_20170424.pdf.

members to question the fairness of the military justice system. In addition, some counsel worried that when the word gets around that sexual assault cases are going to courts-martial supported only by weak evidence, military juries may be much more skeptical of the charges and the prosecution and thus may be more likely to acquit. Perhaps inevitably, as Service members become aware of weak cases and high acquittal rates, victims may become more reluctant to make unrestricted reports.

Even when Article 32 officers have recommended against the referral of charges, those recommendations are not always followed by convening authorities. A substantial sampling of sexual assault cases tried in fiscal year 2015 reveal 54 cases in which the convening authority referred charges despite Article 32 investigating officers or PHOs finding that there was no probable cause or advising against the referral of sexual assault charges. In 45 of those cases, the accused was acquitted of the charges at trial, a number suggesting that perhaps the staff judge advocates and convening authorities should have paid more attention to the Article 32 officers' recommendations.

While most counsel now view the Article 32 process as having little value for scrutinizing the evidence in a sexual assault case, there has yet to emerge a formal written process for ensuring that the convening authority is made fully aware of the strengths and weaknesses of a case and has guidance for deciding an appropriate disposition. There are often good reasons, such as maintaining good order and discipline and respecting a belief that the assault took place, to refer a case to court-martial even when the likelihood of acquittal is high. But a convening authority should not be forced to make the critical decision about referral, with its life-changing impact on both the victim and the defendant, without clear guidelines and a better sense of the evidence's strength. Convening authorities must be corrected if they erroneously believe that a decision to refer a case to court-martial will have few consequences for the accused, the victim, or the public's perception of the military justice system. An accused facing court-martial is exposed to numerous adverse career and personal consequences, such as loss of promotion and career advancement opportunities, ostracism by peers, and the ongoing stress of knowing that a federal conviction, confinement, and sex offender registration are possible. Even if ultimately acquitted, the accused often suffers the enduring social and professional stigma of simply having been accused of these reprehensible offenses.

Recent legislation directing the Secretary of Defense to issue nonbinding guidance to be considered by convening authorities and staff judge advocates in determining an appropriate case disposition may help meet this need. Such formal case disposition guidance, in written form, should provide convening authorities with additional considerations, beyond whether the charges are supported by probable cause, as they decide whether to refer a case to court-martial or to resolve it through disposition at some lower level.

Several prosecutors discussed their practice in sexual assault cases of producing a prosecution merits memo to lay out the strengths and weaknesses of the evidence and the likelihood of a conviction at trial, thereby aiding the staff judge advocate and convening authority in making an appropriate decision on disposition. While this seems like a useful tool to fill the void left when a more robust Article 32 process was replaced, it is worth noting that under Article 34 of the UCMJ and under R.C.M. 406, the staff judge advocate's pretrial advice to the convening authority and accompanying documents must be provided to the defense if charges are referred to trial. A prosecution merits memo detailing evidentiary problems can go to the staff judge advocate without also being given to the defense, but any information provided in writing to the convening authority with the pretrial advice presumably must then be provided to the defense if charges are referred. This legal requirement may make staff judge advocates and prosecutors reluctant to write such candid memos to the convening authority for fear of disclosing a case's evidentiary problems to the defense. There is no such parallel in civilian jurisdictions, where information provided by a prosecutor to his or her superiors would not

have to be provided to the defense counsel unless it revealed potentially exculpatory evidence (as also must be done by military prosecutors). More research and thought should be devoted to enabling the convening authority in the military justice system to be given enough information to make a proper decision, since the convening authority, like prosecutors in civilian jurisdictions, are responsible for determining which cases are prosecuted and which are not.

On site visits, counsel also discussed their perception that convening authorities feel pressure to refer sexual assault cases to courts-martial regardless of their merits. Counsel are concerned that cases are being sent to courts-martial even when the evidence is weak or the allegations involve less serious conduct, such as an attempted kiss or slap on the buttocks, that could be resolved through nonjudicial punishment or administrative action. The Subcommittee notes, however, that in the fiscal year 2015 case data collected from the Services, convening authorities either dismissed charges prior to trial or disposed of cases by alternative means in almost 30% of all cases in which charges were preferred. Without knowing the facts of these cases, we cannot draw conclusions about why they were not referred to trial. But these data do reveal that while convening authorities may be experiencing pressure to refer sexual assault cases to court-martial, they are declining to do so almost 30% of the time. In addition, it may be that convening authorities are referring more sexual assault cases to courts-martial not because of outside pressure but because they now take sexual assault cases more seriously than they had done in the past and feel that disposition by courts-martial is the most appropriate way to resolve these grave allegations. So long as statutory language requires elevated review of a convening authority's decision not to refer a sexual assault case to court-martial, however, convening authorities will always feel some pressure to refer cases to trial against their better judgment.

Counsels' perceptions of a high acquittal rate for sexual assault offenses are borne out by the data. Among cases referred to courts-martial in fiscal year 2015, only 40% of the cases involving a penetrative sexual assault offense resulted in a conviction of any type of sexual assault offense. Just 25% of sexual contact cases resulted in conviction for any sexual offense. While the conviction rate is higher when convictions for non-sex offenses are included, the acquittal rate for sexual assault offenses is significant.

Although the JPP Subcommittee does not have the time to continue investigating the potential causes of this high acquittal rate, this issue must be explored further. The Subcommittee notes that the authorizing legislation for the JPP's successor panel, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, requires the panel to conduct an ongoing review of cases involving sexual misconduct allegations.[121]

The inherent difficulties in evaluating sexual assault case evidence, combined with the widespread perception that convening authorities are referring weak cases, have led to the belief by many of the Subcommittee's interviewees that the military justice system is weighted against the accused in sexual assault cases. Such one-sidedness is particularly serious in light of the potentially catastrophic effects of being accused of a sexual crime. The high rate of acquittal in military sexual assault cases can feed into this perception and lead to a general mistrust of the military justice system, which may lead Service members to acquit when they serve on panels in sexual assault courts-martial.

The public may view the high acquittal rate as a result not of the more aggressive approach to sexual offense prosecution described in the site visits but of the military's indifference to sexual assault. Public loss of confidence in the military and the military justice system has the potential to harm military enlistment and officer accession rates, as well as retention rates. In short, there must be a balance—a

121 FY15 NDAA, *supra* note 21, § 546.

system that treats sexual assault victims fairly and compassionately and that also provides defendants with procedures that are perceived to be, and are, fair. It is not the accused alone who suffers when a sexual assault case for which there is little chance of winning a conviction is referred to court-martial—the victim is also forced to endure a lengthy, difficult process at whose end the accused is very likely to be found not guilty.

RECOMMENDATIONS:

Recommendation 1: The JPP Subcommittee recommends that the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP no longer serves a useful purpose. Such a review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of the preliminary hearing officer against referral, based on lack of probable cause, should be binding on the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further changes to the process are required.

In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP Subcommittee reiterates its recommendation— presented in its report on military defense counsel resources and experience in sexual assault cases, and adopted by the JPP—that the defense be provided with independent investigators.

Recommendation 2: The JPP Subcommittee recommends that Article 33, UCMJ, case disposition guidance for convening authorities and staff judge advocates require the following standard for referral to court-martial: the charges are supported by probable cause and there is a reasonable likelihood of proving the elements of each offense beyond a reasonable doubt using only evidence likely to be found admissible at trial.

The JPP Subcommittee further recommends that the disposition guidance require the staff judge advocate and convening authority to consider all the prescribed guideline factors in making a disposition determination, though they should retain discretion regarding the weight they assign each factor. These factors should be considered in their totality, with no single factor determining the outcome.

Recommendation 3: The JPP Subcommittee recommends that after case disposition guidance under Article 33, UCMJ, is promulgated, the DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

Recommendation 4: The JPP Subcommittee recommends that the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. The DAC-IPAD should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should consider whether such a change would allow the staff judge advocate to provide more fully developed, candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

Recommendation 5: The JPP Subcommittee recommends that Congress repeal provisions from the National Defense Authorization Act for Fiscal Year 2014 and Fiscal Year 2015, sections 1744 and 541 respectively, that require non-referral decisions in certain sexual assault cases to be forwarded to a higher general court-martial convening authority or to the Service Secretary. The perception of pressure on convening authorities to refer sexual assault cases to courts-martial created by these provisions and the consequent negative effects on the military justice system are more harmful than the problems that such provisions were originally intended to address.

Recommendation 6: The JPP Subcommittee recommends that the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system.

Recommendation 7: The JPP Subcommittee recommends that the Secretary of Defense ensure that SVCs/VLCs receive the necessary training on the importance of allowing full access by prosecutors to sexual assault victims prior to courts-martial. Such training will ensure that SVCs/VLCs are considering the value of a meaningful victim-prosecutor relationship in the advice they provide their victim-clients and assist prosecutors in sufficiently developing the rapport with the victim needed to fully prepare for trial.

Recommendation 8: The JPP Subcommittee recommends that the Department of Defense Sexual Assault Prevention and Response Office ensure that sexual assault training conducted by the military Services provide accurate information to military members regarding a person's ability to consent to sexual contact after consuming alcohol and the legal definition of "impairment" in this context and that training be timed and conducted so as to avoid "training fatigue."

The JPP Subcommittee further recommends that the DAC-IPAD monitor whether misperceptions regarding alcohol consumption and consent continue to affect court-martial panel members.

Recommendation 9: The JPP Subcommittee recommends that the Secretary of Defense review the policy on expedited transfer of sexual assault victims and consider whether it should be changed to state that when possible, sexual assault victims should be transferred to another unit on the same installation or to a nearby installation. This change will help ensure that prosecutors have access to victims in preparing for courts-martial, will satisfy the need to separate the victim from the accused, and will maintain the victim's access to support systems while combating the perception that the ability to ask for these transfers has encouraged fraudulent claims of sexual assault. Commanders and SVCs/VLCs should all receive training in how relocating victims from less desirable to more desirable locations can foster the perception among military members that the expedited transfer system is being abused and in how such transfers can be used by defense counsel to cast doubt on the victim's credibility, possibly leading to more acquittals at courts-martial.

The JPP Subcommittee further recommends that the DAC-IPAD review data on expedited transfers to determine the locations from which and to which victims are requesting expedited transfers and to review their stated reasons.

ENCLOSURE Installation Site Visits Attended by Members of the JPP Subcommittee

Dates	Installations Represented	Subcommittee Members
July 11–12, 2016	**Naval Station Norfolk, VA**[122] **Joint Base Langley-Eustis, VA**	Hon. Elizabeth Holtzman Dean Lisa Schenck BGen (R) James Schwenk
July 27–28, 2016	**Fort Carson, CO** Peterson Air Force Base, CO Schriever Air Force Base, CO **U.S. Air Force Academy, CO**	Ms. Lisa Friel Ms. Laurie Kepros Professor Lee Schinasi Ms. Jill Wine-Banks
August 1–2, 2016	**Fort Bragg, NC** **Camp Lejeune, NC**	Ms. Laurie Kepros Professor Lee Schinasi BGen (R) James Schwenk
August 8–9, 2016	**Naval Station San Diego, CA** **Marine Corps Recruiting Depot San Diego, CA** Marine Corps Air Station Miramar, CA Camp Pendleton, CA	Hon. Barbara Jones Ms. Laurie Kepros Ms. Jill Wine-Banks
August 22–23, 2016	Marine Corps Base Quantico, VA **Joint Base Andrews, MD** **U.S. Naval Academy, MD** Navy Yard, Washington, DC	Dean Lisa Schenck BGen (R) James Schwenk Ms. Jill Wine-Banks
September 12–14, 2016	Osan Air Base, South Korea **Camp Humphreys, South Korea** Camp Red Cloud, South Korea Camp Casey, South Korea U.S. Army Garrison Yongsan, South Korea **Camp Butler, Japan** Camp Zama, Japan Kadena Air Base, Japan Yokota Air Base, Japan	Hon. Elizabeth Holtzman Ms. Jill Wine-Banks

122 Installations in bold type are the actual meeting locations for the site visits.

SUBCOMMITTEE OF
THE JUDICIAL PROCEEDINGS PANEL

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

December 2016

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December 8, 2016

MEMORANDUM FOR MEMBERS OF THE JUDICIAL PROCEEDINGS PANEL

SUBJECT: Report of the Subcommittee

On April 9, 2015, the Secretary of Defense established this Subcommittee to support the Judicial Proceedings Panel in its duties under Section 576(d) of the National Defense Authorization Act for Fiscal Year 2013. Following the Secretary's objectives and at the request of the Judicial Proceedings Panel, the Subcommittee conducted military installation site visits throughout the United States and Asia. Based upon information received during these site visits, the Subcommittee undertook additional research of several topics. The Subcommittee has completed its review on the topic of military defense counsel resources and experience in sexual assault cases and submits to the Judicial Proceedings Panel its report with our assessment, conclusions, and recommendations.

Barbara S. Jones
Subcommittee Chair

Executive Summary

SUBCOMMITTEE REPORT TO THE JUDICIAL PROCEEDINGS PANEL ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals—representing 25 military installations throughout the United States and Asia, all involved in the military justice process—about the investigation, prosecution, and defense of sexual assault offenses.

This report summarizes site visit information and the Subcommittee's subsequent research, and makes findings regarding defense investigators, the experience levels of defense counsel, and the resources available to them in the military.

On the basis of the information gathered, the Subcommittee makes the following recommendations:

Recommendation 1: The Subcommittee recommends that in order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as needed.

Recommendation 2: The Subcommittee recommends that the military Services immediately review Service defense organizations' staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an audit conducted by an independent, outside entity of defense staffing across all military Services to determine the optimum level of staffing for the Service defense organizations in the long term.

Recommendation 3: The Subcommittee recommends that the Secretary of Defense direct the military Services to vest defense expert funding and approval authority in the Service defense organizations.

Recommendation 4: The Subcommittee recommends that the military Services permit only a defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in a sexual assault case. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set the minimum tour length for defense counsel at two years or more, except when a lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.

Military Defense Counsel Resources and Experience in Sexual Assault Cases

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals—representing 25 military installations throughout the United States and Asia, all involved in the military justice process—about the investigation, prosecution, and defense of sexual assault offenses. Discussions were held without attribution so that Subcommittee members could hear candid perceptions of the military's handling of sexual assault litigation from the men and women who are investigating, litigating, and supporting those cases. The Subcommittee spoke to groups of military prosecutors, defense counsel, special victims' counsel/victims' legal counsel (SVC/VLC), paralegals, and investigators, as well as commanders, sexual assault response coordinators, victim advocates, and victim-witness liaisons from all military Services.

On the basis of the information received during these site visits, the Subcommittee determined that on several issues, it would have to undertake further research before reporting to the JPP. This report summarizes site visit information and subsequent research regarding defense investigators, the experience levels of defense counsel, and the resources available to them in the military. In producing this report, the JPP Subcommittee used information gathered from site visits, information previously presented to the JPP at a public hearing, information derived from the Report of the Response Systems to Adult Sexual Assault Crimes Panel of June 2014, and existing statutory resources.

I. INADEQUATE STAFFING AND RESOURCES FOR MILITARY DEFENSE COUNSEL

A. **Site Visit Information.** Most of the defense counsel who participated in the Subcommittee's site visits reported that they are seriously understaffed and under resourced. These accounts were corroborated by comments from prosecutors interviewed during these site visits. At many installations, counsel stressed that a lack of attorneys, paralegals, investigators, experts, and basic resources hinders their ability to handle their caseload, more than half of which, they stated, is composed of sexual assault cases. At one installation, for example, an office at a large military installation with ten defense counsel had only one paralegal.

The most urgent and frequently raised issue regarding defense resources was a persistent lack of defense investigators. Defense counsel explained that in the current system, the Military Criminal Investigative Organizations (MCIOs) will not investigate leads at their request. Even if they were to do so, the information obtained would not be protected by attorney-client or work product privileges (as it would be for independent investigators assigned to work on a traditional criminal defense team). Some defense and trial counsel also expressed concern that MCIO investigators are often unwilling to follow up on investigative leads, thereby affecting the thoroughness of the investigation. And because, as MCIO investigators told the Subcommittee, they are required to be "non-confrontational" in their interactions with victims, potential problems in a victim's statement (e.g., inconsistencies with other evidence) may not be thoroughly explored.

Defense counsel also noted that as a result of recent statutory changes to the Article 32 pretrial hearing process, fewer witnesses, including the victim, testify at the Article 32 hearing and less evidence is presented, making it more difficult for defense counsel to ascertain pertinent information about the government's case. The combination of this recent change in Article 32 practice and the lack of defense investigators has left defense counsel unable to investigate their cases in what they see as an appropriately effective manner.

The Navy is currently the only Service that employs defense investigators—eight of them worldwide. The other Services lack any independent budget to fund defense investigators, and defense counsel stated that they have to request funding for an investigator from the convening authority or military judge in each case in which they deem an investigator necessary.[1] Defense counsel and prosecutors agreed that these requests are routinely denied. Defense counsel consistently told Subcommittee members during the site visits that they rely on junior paralegals, who are not trained investigators, to help investigate these cases by finding and interviewing potential witnesses. As a result, these paralegals are also less available to carry out those job functions for which they have in fact been trained. Defense counsel mentioned that they do, on occasion, ask their clients to personally hire investigators and experts if the government denies their requests.

Defense counsel noted that their ability to investigate their clients' cases is limited by their demanding trial schedules and by the ethical need to avoid a conflict of interest caused by becoming a potential witness in the case—a problem that may arise if the lawyer is the only person present to conduct a witness interview. If, for example, a witness makes a statement during an interview but then testifies inconsistently at trial, the lawyer would be the only possible witness available to impeach the discrepant testimony. The practical consequence of this situation is that the lawyer becomes a witness in his or her own case, and therefore a substitute, conflict-free counsel would have to be appointed, leading to greater expense, added complication, and likely delay in the trial process, in addition to the possible negative effect on the case of replacing the original defense counsel with a new lawyer unfamiliar with the case. At the same time, if such exculpatory, impeaching testimony is unavailable to the accused, he or she may be denied the constitutional protections of confrontation, the right to present a defense, the right to receive a fair trial, and the right to due process of law. In civilian practice, this problem is largely avoided through the use of professional defense investigators who can conduct the interviews and then testify about them in court as necessary. Feedback from Navy defense counsel about the recent addition of defense investigators was very positive, and they felt it alleviated the problems noted above.

B. **Other Sources of Information Regarding Defense Investigators.** The Response Systems to Adult Sexual Assault Crimes Panel (RSP) reviewed the issue of defense investigators in its June 2014 report. The RSP found that defense requests for independent investigators made to the convening authority or military judge are routinely denied, noting that "military defense counsel need independent, deployable defense investigators to zealously represent their clients and correct an obvious imbalance of resources."[2] The RSP received information from a number of civilian public defenders and found that "many public defender offices have investigators on their staffs and consider them critical."[3] In fact, the former president of the National Association of Criminal Defense Lawyers told a subcommittee of the RSP, "I don't know a lawyer in the country that does sex offenses without an investigator, except in

1 *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter MCM], Rules for Courts-Martial [hereinafter R.C.M.] 703(d).

2 Report of the Response Systems to Adult Sexual Assault Crimes Panel 153 (June 2014) [hereinafter RSP Report], *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf.

3 *Id.* at 153.

the military. Really, there is no such thing."[4] The RSP noted that these investigators aid defense counsel in locating and interviewing potential witnesses, finding experts, and identifying services to assist the defense in complying with court-ordered treatment. Their work enables defense counsel to prepare for trial and gives attorneys "a fighting chance to develop facts and other evidence that is rarely provided to them by the government and is crucial for the proper representation of their clients."[5] The RSP concluded their review of this topic by making the following recommendation:

> **RSP Recommendation 81:** The Secretary of Defense direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission and the fair administration of justice.[6]

As reported during the site visits, only the Navy has implemented this RSP recommendation: it has hired eight "defense litigation support specialists," more commonly known as defense investigators.[7] These defense investigators are civilians with prior law enforcement or defense experience. The Navy's Director of the Defense Counsel Assistance Program (DCAP) told the JPP that they have made it possible for defense counsel to focus on preparing for trial and getting needed training.[8] He added, however, that the Navy could use more than eight defense investigators.[9]

Also of significance regarding this issue are recent congressional changes that have dramatically altered the Article 32 process, changing it in practice from a pretrial investigation into a preliminary hearing and removing the requirement that a victim appear and testify at the hearing.[10] Prior to this statutory change, the Article 32 allowed for a "thorough and impartial investigation" of the case in which an investigating officer investigated the "truth and form of the charges."[11] Sexual assault victims were

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4 *Transcript of RSP Comparative Systems Subcommittee Meeting* 230 (Jan. 7, 2014) (Ms. Lisa Wayne, former President, National Association of Criminal Defense Lawyers).

5 *Supra note 2* at 153, quoting Charles D. Stimson, "Sexual Assault in the Military: Understanding the Problem and How to Fix It" 18–19 (Nov. 6, 2013); *Transcript of RSP Public Meeting* 380–81 (Dec. 12, 2013) (testimony of Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia) ("But as far as investigators are concerned, some lawyers share an investigator with just one other lawyer or some have their own specific investigator. And I was lucky enough to have my own specific investigator for a while. I share one now. But it makes it much easier in terms of being able to defend our clients finding out that you could throw away all your kind of subjective beliefs about your client's guilt or innocence and then you do investigation and you investigate no matter how much bad evidence there seemingly is. You find out that there are some things—sometimes complainants do not tell the truth. So, you know, one word I kind of bristle at when I hear it all the time from I guess panels that are supposedly objective is the word 'victim.' When we talk about pre-trial matters that have not resulted in conviction or that have not resulted in the guilty plea, we deal with complainants, because a lot of times we understand that alleged victims aren't victims at all when we investigate and even the government finds out before we do that things have been made up. So I think that just reemphasizes the importance of having investigators and having all the different aspects of the case, whether or not it's legal or on the field, done in order to have a decent—not only a decent, but a zealous defense.").

6 *Supra note 2* at 153.

7 *Transcript of JPP Public Meeting* 208 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

8 *Transcript of JPP Public Meeting* 208–09 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

9 *Transcript of JPP Public Meeting* 213 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

10 National Defense Authorization Act for Fiscal Year 2014 [hereinafter FY 14 NDAA], Pub. L. 113-66, 127 Stat. 672 (2013) § 1702(a); National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, 128 Stat. 3292 (2014) § 531(g) makes this change effective for all preliminary hearings conducted on or after December 26, 2014.

11 10 U.S.C. § 832 (UCMJ, art. 32); MCM, *supra* note 1, R.C.M. 405(a) and (e).

frequently required to appear and testify at the Article 32 investigation and were subject to cross-examination by the defense counsel.[12] One of the stated purposes of this Article 32 investigation was to "serve as a means of discovery."[13] Under the new process, the Article 32 preliminary hearing is limited to determining primarily whether there is probable cause to believe that an offense has been committed and that the accused committed the offense.[14] Victims are no longer required to testify at the Article 32 hearing,[15] and frequently do not, and it is no longer one of the stated purposes of the hearing that it serve as a means of discovery. Both trial and defense counsel interviewed during installation site visits referred to the new Article 32 process as a "paper drill," often with no witnesses being called to testify and only documentary evidence submitted. Counsel expressed the view that because of these changes to the Article 32 process, it is more vital than ever to provide additional investigative resources for defense counsel.

All of the military Services' chief defense counsel discussed the necessity of having defense investigators to relieve defense counsel and paralegals from the burden of having to conduct their own investigations. The Army Chief of Trial Defense Services noted that an informal survey of defense counsel making requests for defense investigators found that only one in twelve requests was approved in sexual assault cases.[16] One witness told the JPP that the law requires defense counsel to adequately investigate the facts of the case; otherwise, he or she could be found to be ineffective.[17] Several witnesses expressed their view that the refusal to provide defense investigators amounts to depriving the defendants of due process.[18] The Court of Appeals for the Armed Forces has not yet ruled on this specific issue[19] but has discussed an analogous resource, a mitigation specialist for a defendant in a capital case, stating that "[c]ompulsory process, equal access to evidence and witnesses, and the right to necessary expert assistance in presenting a defense are guaranteed to military accuseds through the Sixth Amendment, Article 46, UCMJ, 10 U.S.C. § 846 (2000), and Rule for Courts-Martial (R.C.M.) 703(d)."[20]

Some counsel noted during site visits that there is a high acquittal rate in military courts-martial for sexual assault cases—a statistic that may, on its surface, seem to undercut the need for additional resources for defense counsel. However, the ultimate result of a trial, whether conviction or acquittal,

12 10 U.S.C. § 832 (UCMJ, art. 32); MCM, *supra* note 1, R.C.M. 405(g)(2)(A) and (h)(1)(A).

13 MCM, *supra* note 1, discussion to R.C.M. 405(a).

14 FY 14 NDAA § 1702(a).

15 *Id.*

16 *Transcript of JPP Public Meeting* 241–42 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services).

17 *Transcript of JPP Public Meeting* 197 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch). The Supreme Court of the United States held that ineffective assistance of counsel requires the defendant to show that (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). *See Also* ABA Standards for Criminal Justice: Defense Function Standard 4-4.1 (Am. Bar Ass'n, 3d ed. 1993) on Duty to Investigate.

18 *Transcript of JPP Public Meeting* 242–43 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services; Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch; Col Daniel Higgins, U.S. Air Force, Chief, Trial Defense Division).

19 *Transcript of JPP Public Meeting* 246–47 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

20 *See United States v. Kreutzer*, 61 M.J. 293, 305-06 (C.A.A.F. 2005).

is not the sole measure of whether a process was fair and indeed complied with the due process protections of the Constitution.

C. **Other Sources of Information Regarding Additional Office Staffing and Resources.** In its June 2014 report to Congress, the RSP recommended that military defense organizations be provided adequate funding resources and personnel.[21] In doing so, the RSP found that "maintaining adequate resources for the defense of military personnel accused of crimes, including sexual assault, is essential to the legitimacy and fairness of the military justice system."[22]

At the May 13, 2016, public meeting of the JPP, the Army Chief of Trial Defense Services identified his biggest challenge as not having enough defense counsel, explaining that the number of defense counsel billets has gone down since the RSP met and he can't fill the ones he has.[23] A Marine Corps witness told the JPP that "there's a perception of a disparity in resources. And, with all due respect, I'd like to say it's more than a perception, it's a reality." She explained that in the Marine Corps, the prosecution has four highly qualified experts (HQEs), while the defense has only two.[24]

D. **Subcommittee Assessment and Recommendations.** Civilian public defense organizations and private defense counsel routinely rely on defense investigators to locate and interview witnesses, as well as to take other investigative steps. Their assistance enables defense counsel to properly prepare their cases and represent their clients to the best of their ability. According to information from Navy defense counsel, the addition of the eight defense investigators has been tremendously beneficial.

Given the introduction of the SVC/VLC into the MCIO victim interview process, as well as the unwillingness of MCIOs to follow up on leads from defense or trial counsel, the addition of independent defense investigators is more crucial now than it has ever been. The Subcommittee notes that the approval and funding authority for defense investigator requests is the convening authority who referred the charges to court-martial and who may have a vested interest in the outcome of the case. These requests, it should be noted, are denied more than 90% of the time.

Furthermore, as they are no longer able to cross-examine the victim at the current Article 32 hearing and have lost access to the witness testimony and other evidence formerly received at the Article 32 hearing, defense counsel are at significantly greater disadvantage than they were prior to the changes to the Article 32 process. This alteration in procedure makes adding independent defense investigators essential to the fair administration of justice.

The Subcommittee makes the following recommendations:

Recommendation 1: **The Subcommittee recommends that in order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense**

21 *Supra note 2* at 38 (RSP Recommendation 82 reads: "The Service Secretaries ensure military defense counsel organizations are adequately resourced in funding resources and personnel, including defense supervisory personnel with training and experience comparable to their prosecution counterparts, and direct the Services assess whether that is the case.").

22 *Supra note 2* at 38.

23 *Transcript of JPP Public Meeting* 215 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services)

24 *Transcript of JPP Public Meeting* 196 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch). HQEs are highly qualified civilian attorneys employed by all Services, except the Air Force, to support litigation and the training of counsel. They serve in limited term appointments.

investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as needed.

Recommendation 2: The Subcommittee recommends that the military Services immediately review Service defense organizations' staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an audit conducted by an independent, outside entity of defense staffing across all military Services to determine the optimum level of staffing for the Service defense organizations in the long term.

II. DEFENSE REQUESTS FOR EXPERTS

A. **Site Visit Information.** Defense counsel and others also complained about lack of access to and funding for expert consultants, which puts the defense at an extreme disadvantage. Defense counsel noted that they have trouble getting qualified experts. In the military, defense counsel do not have their own source of funding for witnesses and experts, but must instead request funding from the convening authority. The response to these requests is frequently outright denial or provision of an inadequate substitute for the expert requested. Defense counsel described situations in which they requested a particular expert and were instead provided someone who was deemed to be an "adequate substitute." The "adequate substitute" often lacked the specific knowledge required (for example, an expert in suggestibility in children might be replaced by a child psychologist who was a generalist). Moreover, if approval for an expert is given, it is often granted not at the outset of the case but rather on the eve of trial, when the expert is much less helpful to developing a theory of defense or assisting with preparation of the defense case. Even if defense counsel are successful in getting a qualified expert, the process of requesting the expert forces them to reveal their case or trial strategy to the government. Defense counsel do not see trial counsel receiving comparable treatment from the convening authority; instead, trial counsel can identify and recruit experts to join the prosecution at will, and readily consult with their experts before the defense receives expert assistance. Several prosecutors on the Subcommittee's site visits concurred that this is a systemic problem.

B. **Other Sources of Information.** Article 46 of the Uniform Code of Military Justice (UCMJ) states that "trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence[.]"[25] Under the Rules for Courts-Martial, in every branch of Service and in every case, defense counsel must request funding from the convening authority, prior to referral of charges, for each specific expert witness or consultant needed. This request must include a complete statement of reasons why the expert is necessary and the estimated cost of employing the expert.[26] If the request is denied by the convening authority, after referral of charges, the request may be renewed before a military judge, who determines whether the expert's testimony is "relevant and necessary" and whether the government has provided or will provide an "adequate substitute."[27] This request before the military judge happens much later in the process, often close to trial, leaving inadequate time for the expert to fully assist the defense counsel in the preparation of the case.

25 10 U.S.C. § 846 (UCMJ, art. 46).

26 R.C.M. 703(d).

27 *Id.*

In applying Article 46 of the UCMJ to the issue of designation of expert consultants, the Court of Appeals for the Armed Forces has held that an "adequate substitute" must have qualifications "reasonably similar" to those of the government's expert.[28]

In comparing military defense organizations and civilian public defenders, the RSP found that some public defender offices maintain their own budgets or request experts through a trial judge who manages the budget.[29] The RSP also found that federal public defenders have specific funding to pay for defense experts.[30] The RSP noted that federal discovery rules generally require civilian defense counsel to disclose experts and other witnesses to the government before trial, but not as early as military defense counsel, who must request their witnesses from the convening authority, through trial counsel.[31] Civilian defense counsel also employ confidential consulting experts whose identities usually remain wholly unknown to the prosecution unless the defense elects to endorse the expert as a trial witness or otherwise injects their expertise into the litigation. This type of consulting expert is essential for defense counsel to receive a candid assessment of the evidence without fear that their investigation will develop inculpatory evidence that will be shared with and used by the government in prosecuting their client.

The Supreme Court of the United States has recognized a constitutional right to expert assistance for defendants with regard to both trial defense and sentencing defense, using the example of a mental health expert: "Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor."[32]

C. **Subcommittee Assessment and Recommendation.** Defense counsel in military organizations, like their civilian counterparts, should have separate sources of funding to employ defense experts, without having to request approval and thereby prematurely divulge their defense strategy to the government.

There is also a tension between what the defense attorney must be able to articulate to the convening authority about the expert's likely assistance and the lawyer's need to actually learn from the expert. In this regard, the relative inexperience of military defense counsel can be a particular problem: if they do not already have deep knowledge of the field, they cannot fully explain or clearly articulate why they need the expert or persuasively explain the potential prejudice to their client. Moreover, they should not have to disclose their thinking.

Recommendation 3: **The Subcommittee recommends that the Secretary of Defense direct the military Services to vest defense expert funding and approval authority in the Service defense organizations.**

28 *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005). The court went on to state, "The absence of such parity opens the military justice system to abuse, because the Government in general, and—as this case demonstrates—the trial counsel in particular, may play key roles in securing defense experts." The appellant's brief in this case analogizes this arrangement to "permitting a Major League baseball manager to choose the opposing pitcher in the final game of the World Series."

29 *Supra note 2* at 163.

30 *Id.*

31 *Id.*

32 *Ake v. Oklahoma*, 470 U.S. 68, 84 (1985).

III. DEFENSE COUNSEL STAFFING AND EXPERIENCE LEVELS

A. **Site Visit Information.** The Subcommittee received information from defense counsel that the training they receive is generally adequate. However, there is disparity not only in the experience levels required among the Services but also between Service-level requirements and the actual experience of defense counsel in the field. While the Navy and Air Force require prior litigation experience of attorneys being assigned to defense counsel positions, in the Army and Marine Corps first-tour judge advocates with no experience in military justice or in the civilian criminal justice system are allowed to serve as defense counsel. Though participants acknowledged that such placements are not common, the few who had them found the experience overwhelming and discomforting. Several junior counsel recounted that in the first or second contested trial of their careers, they served as second chair in a rape case; one counsel then served as lead counsel in his third trial, also involving sexual assault charges. All of these counsel recommended against assigning brand-new attorneys to defense counsel positions. The likelihood that junior counsel will represent clients in serious and complex cases early in their careers is high, because—as participants uniformly reported—sexual assault cases make up most of their caseload. Defense counsel at multiple installations related that the recent addition of HQEs to trial defense services organizations has been very helpful in mitigating the experience gap, but noted that it is unclear whether the funding for these civilian career litigators will continue. In addition, HQEs hold term positions, not permanent ones.

B. **Other Sources of Information.** The RSP reviewed experience levels of defense counsel as part of its June 2014 report to Congress. The following table from that report[33] summarizes experience and training requirements for defense counsel in each of the Services.

RSP Report Chart on Service Standards for Defense Counsel Experience and Training

Organization	Experience	Training
U.S. Army Defense Counsel	• Majority of defense counsel have prior courtroom experience. No specific minimum experience required. • Experience sitting "second chair" until supervisor deems fit to try cases as first chair.	• Graduate of the Judge Advocate Officer Basic Course. • Defense Counsel "101." • Advanced Trial Advocacy Courses.
U.S. Air Force Defense Counsel	• The Air Force is unique in that defense counsel are selected in a very competitive, best-qualified standard by the Air Force Judge Advocate General. • Most defense counsel arrive with 2 to 5 years of experience working in a base legal office, which includes time as a trial counsel in courts-martial. • New defense counsel normally have between 8 and 10 courts-martial trials before starting as a defense counsel.	• Specialized courses provided by the Air Force Judge Advocate General's School. • On-the-job training. • Group training remains a challenge because of geographic diversity of counsel and length of tours. • Out of the 19 Senior Defense Counsel regions, only 3 (San Antonio, Colorado Springs and the National Capitol Region) have the majority of their bases in close enough proximity to drive to group training.

33 *Supra note 2* at 159–60 (slightly modified).

Organization	Experience	Training
U.S. Navy Defense Counsel	• Following their first 24-month tour handling administrative separations and other non-judicial issues, Navy Judge Advocates become eligible to be assigned to a Defense Service Office (DSO) as a defense counsel.[34] • Military Justice Litigation Career Track officers are stationed in all DSO headquarters offices and some detachments, which are smaller regional offices.	• Once selected, counsel receive additional training, including a basic trial advocacy course focusing on courtroom advocacy. • Within the first year at a DSO, defense counsel also attend the defending sexual assault cases class, an intense one-week course involving experts on forensics and psychology and very experienced civilian defense counsel.
U.S. Marine Corps Defense Counsel	• The vast majority of the Marine Corps' 72 defense counsel are first-tour judge advocates with less than 3 years of experience as an attorney. • They typically serve 18 months as defense counsel before moving to another assignment. • The average litigation experience of both senior defense counsel and defense counsel is 14 months, which includes both prosecution and defense time.	• Defense counsel training requirements are set forth in Marine Corps policy. Defense counsel have a basic certification under Article 27(b), the basic lawyer course at the Naval Justice School. And then, at some point, maybe not before they start their official job, but at some point early in their tour, we try to send them to our new defense counsel orientation class which is sponsored by the Naval Justice School.[35]
U.S. Coast Guard Defense Counsel	• By memorandum of agreement between the Coast Guard and the Navy JAG Corps, the Navy is principally responsible for defending Coast Guard members accused of Uniform Code of Military Justice (UCMJ) crimes. • In return, four Coast Guard judge advocates are detailed to work at various Navy DSOs on 2-year rotations, which provides another significant source of trial experience to Coast Guard judge advocates.	• Coast Guard Defense Counsel attend Navy defense training.

Noting the disparities between the Services regarding defense counsel experience and tour lengths, the RSP made the following recommendation:

> **RSP Recommendation 86:** The Service Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps permit only counsel with litigation experience to serve as lead defense counsel in a sexual assault case as well as set the minimum tour length of defense counsel at two years or more, except when a

34 *Transcript of JPP Public Meeting* 205–06 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program, that all senior defense counsel and many other defense counsel in the Navy are qualified in military justice litigation).

35 *See also Transcript of JPP Public Meeting* 186–87 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

> lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps, or designee, because of exigent circumstances or to specifically enable training of defense counsel under supervision of experienced defense counsel.[36]

According to presentations by the Service trial defense chiefs during the JPP's May 2016 public meeting, little has changed in defense counsel experience levels since the RSP Report was issued in June 2014.[37]

In the Army, about 20% of attorneys assigned to a defense counsel position have no prior experience.[38] While every attempt is made to avoid assigning a brand-new defense counsel to a sexual assault case, the realities of Trial Defense Services (TDS) staffing sometimes force the assignment of inexperienced attorneys to these cases, though they are able to consult with more senior defense counsel.[39] Underscoring the point, a witness testifying before the JPP in May noted that the accused's counsel in a given sexual assault case may have less trial experience than the victim's counsel.[40]

In the Marine Corps, the "vast majority" of defense counsel are serving in their first tour and are often brand-new attorneys right out of law school.[41] Compounding the problem, Marine Corps attorneys serve as defense counsel for only 12 to 14 months before moving to another position.[42] Marine Corps Defense Services attempts to make up for this lack of experience through training (having new defense counsel sit as second chair in several courts-martial before serving as lead defense counsel) and through supervision by more experienced defense counsel.[43]

C. **National Defense Authorization Act for Fiscal Year 2017.** There is currently a provision in the National Defense Authorization Act for Fiscal Year 2017 (FY 17 NDAA), pending presidential signature, which would require the Services to ensure that trial and defense counsel detailed to a court-martial "have sufficient experience and knowledge to effectively prosecute or defend the case" and

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36 RSP Report 39, 160–61.

37 *Transcript of JPP Public Meeting* 163–248 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services; Col Daniel Higgins, U.S. Air Force, Chief, Trial Defense Division; Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch; and CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

38 *Transcript of JPP Public Meeting* 165 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services).

39 *Transcript of JPP Public Meeting* 165–66 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services) ("[I]deally, you would not want to assign counsel to a sexual assault or any complex case until they've completed at least our DC 101 training . . . and served as a lead counsel on one or more less complex cases or at least a second chair on a more complex case. However, the realities of TDS manning and caseload often weigh against such a deliberative developmental process. In those instances where, out of necessity, defense counsel with less than ideal training and experience are assigned to defend sexual assault cases [they receive] guidance and input of their supervisor, the senior defense counsel.").

40 *Transcript of JPP Public Meeting* 216 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services).

41 *Transcript of JPP Public Meeting* 185 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

42 *Transcript of JPP Public Meeting* 189 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

43 *Transcript of JPP Public Meeting* 186–88 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

require the Services to have a professional development process to ensure effective prosecution and defense in all courts-martial.[44] Under this provision, the Services must use a system of skill identifiers or experience designators for "identifying judge advocates with skill and experience in military justice proceedings" to provide oversight of less experienced counsel.[45] The Services would also be required to carry out a five-year pilot program to "assess the feasibility and advisability of establishing a deliberate professional developmental process for judge advocates . . . that leads to judge advocates with military justice expertise serving as military justice practitioners capable of prosecuting and defending complex cases in military courts-martial."[46]

D. **Subcommittee Assessment and Recommendation.** Most sexual assault cases that go to trial are fully litigated, complicated, difficult cases, and they often involve Military Rule of Evidence (MRE) 412 or MRE 513 motions.[47] Since these cases are less likely than others to be plea-bargained, lawyers have a critical need to draw on trial court advocacy skills; and junior lawyers often have not yet had an opportunity to develop these skills in less serious cases. As reported by several defense counsel during Subcommittee site visits, sometimes defense counsel with little trial experience are called on to defend a Service member accused of serious sexual assault crimes.

If convicted of a sexual assault offense, the accused faces a sentence that could include a punitive discharge and months or years of confinement as well as lifetime collateral sanctions related to the sex offense registry and evolving state, local, and international policies.[48] The consequences for the accused of having inexperienced defense counsel could be catastrophic and life changing.

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44 S. 2943, National Defense Authorization Act for Fiscal Year 2017, Report 114-840 (Conf. Rep.) §542, Effective prosecution and defense in courts-martial and pilot programs on professional military justice development for judge advocates.

45 *Id.*

46 *Id.*

47 MCM, Military Rules of Evidence [hereinafter MRE] 412 (updated June 2016) is titled "Sex offense cases: The victim's sexual behavior or predisposition" and is the military's so-called rape shield law. MRE 513 is the psychotherapist-patient privilege rule.

48 *See generally,* ABA National Inventory of Collateral Consequences of Conviction, *available at* http://www.abacollateralconsequences.org/agreement/?from=/map/; in February 2016, President Obama signed "International Megan's Law" mandating a new passport mark and control process for individuals convicted of sex crimes. Numerous foreign countries, including Mexico and the Philippines, have already begun denying entry to U.S. citizens who have been convicted of sex crimes. The maximum punishments for sexual assault offenses specified in UCMJ, Appendix 12, are as follows:

Rape	Dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances
Sexual Assault	Dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances
Forcible Sodomy (Article 125, MCM)	Dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances
Aggravated Sexual Contact	Dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances
Abusive Sexual Contact	Dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances

Recommendation 4: The Subcommittee recommends that the military Services permit only a defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in a sexual assault case. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set the minimum tour length for defense counsel at two years or more, except when a lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.

IV. CONCLUSION

There have been numerous changes to law and policy in the arena of military sexual assault litigation in recent years that have serious implications for the quality of defense afforded to those accused of sexual assault. These include the introduction of special victims' counsel/victims' legal counsel for sexual assault victims, development of a Special Victim Investigation and Prosecution capability, and introduction of a less robust Article 32, UCMJ, process that no longer serves as a discovery vehicle for defense counsel. Many of these changes were instituted with the worthy goal of benefiting victims of sexual assault, but it is important that the military justice system continue to respect the rights of the accused. In order to maintain balance in the military justice system, (1) Service defense organizations must be adequately funded and staffed, as is reportedly not the case in all of the Services; (2) defense counsel must have access to an independent funding source for expert witnesses and consultants; and (3) those serving as defense counsel in sexual assault cases must be experienced attorneys.

ENCLOSURE Installation Site Visits Attended by Members of the JPP Subcommittee

Dates	Installations Represented	Subcommittee Members
July 11–12, 2016	**Naval Station Norfolk, VA**[49] **Joint Base Langley-Eustis, VA**	Hon. Elizabeth Holtzman Dean Lisa Schenck BGen (R) James Schwenk
July 27–28, 2016	**Fort Carson, CO** Peterson Air Force Base, CO Schriever Air Force Base, CO **U.S. Air Force Academy, CO**	Ms. Lisa Friel Ms. Laurie Kepros Professor Lee Schinasi Ms. Jill Wine-Banks
August 1–2, 2016	**Fort Bragg, NC** **Camp Lejeune, NC**	Ms. Laurie Kepros Professor Lee Schinasi BGen (R) James Schwenk
August 8–9, 2016	**Naval Station San Diego, CA** Marine Corps Recruiting Depot San Diego, CA Marine Corps Air Station Miramar, CA **Camp Pendleton, CA**	Hon. Barbara Jones Ms. Laurie Kepros Ms. Jill Wine-Banks
August 22–23, 2016	Marine Corps Base Quantico, VA **Joint Base Andrews, MD** **U.S. Naval Academy, MD** Navy Yard, Washington, DC	Dean Lisa Schenck BGen (R) James Schwenk Ms. Jill Wine-Banks
September 12–14, 2016	Osan Air Base, South Korea **Camp Humphreys, South Korea** Camp Red Cloud, South Korea Camp Casey, South Korea U.S. Army Garrison Yongsan, South Korea **Camp Butler, Japan** Camp Zama, Japan Kadena Air Base, Japan Yokota Air Base, Japan	Hon. Elizabeth Holtzman Ms. Jill Wine-Banks

49 Installations in bold type are the actual meeting locations for the site visits.

SUBCOMMITEE REPORT TO THE JUDICIAL PROCEEDINGS PANEL

ON

ARTICLE 120 OF THE UNIFORM CODE OF MILITARY JUSTICE

December 2015

Subcommittee
to the
Judicial Proceedings since Fiscal Year 2012 Amendments Panel

JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE
875 N. RANDOLPH STREET
ARLINGTON, VA 22203-1995

December 10, 2015

MEMORANDUM FOR MEMBERS OF THE JUDICIAL PROCEEDINGS PANEL

SUBJECT: Report of the Subcommittee

On April 9, 2015, the Secretary of Defense established this Subcommittee to support the Judicial Proceedings Panel in its duties under Section 576(d) of the National Defense Authorization Act for Fiscal Year 2013. The Secretary established four objectives for the Subcommittee to assess and make recommendations for improvements in the construction, interpretation, and implementation of current adult sexual assault provisions contained in the Uniform Code of Military Justice (UCMJ), to include Article 120 of the UCMJ. The Subcommittee has completed its review and submits to the Judicial Proceedings Panel its report with our assessment, conclusions, and recommendations.

Barbara S. Jones
Subcommittee Chair

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Executive Summary

In its February 2015 assessment of the 2012 version of Article 120 of the Uniform Code of Military Justice (UCMJ), the Judicial Proceedings Panel (JPP) recommended that seventeen issues should be referred to a subcommittee for further evaluation. Eleven of these issues related to the definitions of terms, elements of offenses, defenses, and enumerated offenses under the statute. Some presenters testified to the JPP that a lack of clarity or specificity in certain definitions in Article 120 could create difficulty or uncertainty in prosecuting cases under the statute. Conversely, others told the JPP that further revisions to Article 120—a statute significantly revised twice in recent years—would make prosecutions more complex.

The JPP also recommended that a subcommittee further assess how the military prosecutes crimes under the UCMJ involving abuse of position, rank, or authority, including relationships between trainers and trainees, recruits and recruiters, and senior and subordinate military members in the same chain of command. The JPP heard testimony about whether the 2012 version of Article 120 and other articles of the UCMJ provide sufficient means for the prosecution of coercive sexual offenses, inappropriate relationships, and maltreatment, and the JPP heard proposals to amend Article 120 to more specifically address offenses committed by training instructors against trainees. The JPP recommended that a subcommittee examine these issues and provide recommendations for possible amendments.

To review the issues referred to it by the JPP, the JPP Subcommittee (hereinafter "the Subcommittee") held seven meetings from April 2015 to October 2015. Members of the Subcommittee heard from more than forty witnesses, considered more than one-hundred sources of written material, and deliberated extensively on each issue. In accord with the JPP's directives, the Subcommittee discussed and deliberated on each issue regarding whether amendments to Article 120 of the UCMJ should be recommended, and, if so, what form such amendments should take. This analysis included detailed discussion and debate over specific statutory language and various proposals prepared by the Subcommittee members.

Overall, the Subcommittee determined that Article 120 of the UCMJ provides a reasonably effective statutory framework for prosecution of sexual assault offenses in the military, but that some definitions and terms used in Article 120 are sufficiently confusing or vague as to create uncertainty or concern regarding the effects of these terms on standards of conduct among Service members or on court-martial prosecution of sexual assault offenses. Accordingly, the Subcommittee determined that amendments to Article 120 of the UCMJ and the Manual for Courts-Martial are warranted to address seven issues it reviewed. For ten of the issues it reviewed, the Subcommittee determined that change or amendment is not warranted.

Overview of the Subcommittee's Assessment

In its initial report of February 4, 2015, the Judicial Proceedings Panel (JPP) determined that seventeen issues regarding Article 120 of the UCMJ should be directed to a subcommittee for further evaluation. The first eleven of these issues were related to definitions of terms, elements of offenses, defenses, and enumerated offenses under the statute, and the other six issues were related to coercive sexual relationships and abuse of authority.

To complete these tasks, the Subcommittee considered the JPP's February 2015 report, together with the testimony and written materials regarding these issues previously provided to the JPP during its public meetings in August through December 2014. The Subcommittee held seven meetings, from April through October 2015, and received testimony from forty-four witnesses. These witnesses included retired military judges, senior prosecutors and defense counsel, appellate counsel, civilian practitioners, staff judge advocate legal advisers to training commanders, general and flag officers in command at the Services' entry-level training commands, the Chief of the Joint Service Committee at the time the current version of Article 120 was drafted and submitted to Congress, the Director of Law Enforcement Policy for the Department of Defense (DoD), and one member of Congress along with one of her constituents who was a victim of sexual misconduct during her entry-level military training. In addition to this testimony, the Subcommittee considered the written materials and recommendations provided by the witnesses. The Subcommittee deliberated during five of its meetings. The issues, the material considered, and the Subcommittee's conclusions and recommendations are set forth below.

Summary of Subcommittee Recommendations

The Subcommittee recommends that amendments be made to Article 120 of the UCMJ and the Manual for Courts-Martial to address the following issues referred to it by the JPP:

JPP Issue 1: ***Is the current definition of "consent" unclear or ambiguous?***

Subcommittee Recommendation: The Subcommittee determined that the definition of consent is confusing in some areas and still retains vestiges of outdated rape laws that could be interpreted to require a victim to physically resist an attacker before a fact-finder can conclude there was a lack of consent. The Subcommittee's recommended changes would retain most of the current definition, but remove repetitive and contradictory language about resistance. A lack of resistance would still be relevant for the fact-finder to consider along with all the surrounding circumstances, but the proposed change clarifies that a lack of resistance alone does not constitute consent.

JPP Issue 2: ***Should the statute define defenses relying on the victim's consent or the accused's mistake of fact as to consent in sexual assault cases?***

Subcommittee Recommendation: The Subcommittee determined that there should be clarification in the *Manual for Courts-Martial* so that consent (as an attack on the government's proof) and mistake of fact as to consent (as a clearly delineated defense) may be raised in any case in which it is relevant.

JPP Issue 3: ***Should the statute define "incapable of consenting?"***

Subcommittee Recommendation: The Subcommittee determined that practitioners, including military judges, prosecutors, defense counsel, appellate courts, panel members at courts-martial, and Service members as part of their sexual assault training, need a definition for this important term that is an issue in many sexual assault and abusive sexual contact prosecutions under Articles 120(b) and 120(d). Practitioners testified that a majority of the cases that go to trial have an alleged victim who was incapable of consenting due to impairment by alcohol or other intoxicating substances, and the absence of any explanation of this term leaves a "gap" in the statute that makes it difficult for counsel to argue their cases and for judges to instruct panel members on this issue. The Subcommittee's recommended definition of "incapable of consenting" would appear in the Subcommittee's recommended redraft at Article 120(g)(8), and further explanatory guidance for practitioners would be set forth in a subsequent executive order explaining in more depth that a totality of the circumstances test applies when determining the ultimate question of whether a victim was incapable of consenting.

JPP Issue 5: ***Does the definition of "bodily harm" require clarification?***

Subcommittee Recommendation: The Subcommittee determined that the concept of "bodily harm" is useful for cases in which a sexual act or sexual contact has been committed without a victim's consent, especially in cases in which the alleged victim has little or no recollection of the incident owing to impairment, but that the term and its present definition are confusing and should be amended. The present language of 120(b)(1)(B) should be amended and replaced with the words "without the consent of the other person." This would remove any confusion over the term "bodily harm" and would create a baseline theory of liability for any sexual act or sexual contact committed without a victim's consent. The Subcommittee's recommended changes would clarify what the presenters told the Subcommittee: that "bodily harm" in Article 120(g)(3), as applied under Article120 (b)(1)(B) and Article 120(d), means a sexual act or sexual contact done without the consent of the victim, but no further "bodily harm" or physical injury must be shown. This change would further require removing the present definition of "bodily harm" set forth in Article 120(g)(3). Accordingly, the successive definitions set forth in Article 120(g) will also require renumbering. This renumbering is set out in the Subcommittee's proposed redraft in Enclosure 1 to this report.

JPP Issue 9: ***Are the definitions of "sexual act" and "sexual contact" too narrow, or are they overly broad?***

Subcommittee Recommendation: The Subcommittee determined that the definitions of "sexual act" and "sexual contact" require clarification. The definition of "sexual act" should be modified so that penetration and contact are addressed in separate subsections, and the definition of "sexual contact" should include the use of an object.

JPP Issue 13: ***Does the 2012 version of the UCMJ afford prosecutors the ability to effectively charge coercive sexual relationships or those involving abuse of authority under Article 120?***

Subcommittee Recommendation: The Subcommittee determined that the 2012 version of the UCMJ does afford prosecutors the ability to effectively charge some types of coercive sexual misconduct or sexual misconduct involving the abuse of authority. But the Subcommittee also concluded that some offenses in the entry-level training environment involve subtle forms of

coercion not easily captured under the current statutory framework. The Subcommittee therefore recommends a new subsection, Article 120(b)(1)(E), that would create an additional theory of liability for sexual assault or abusive sexual contact in which an accused has abused his or her position, rank, or authority to secure compliance by the other person.

JPP Issue 15: ***Should a new provision be added under Article 120 to specifically address coercive sexual relationships or those involving abuse of authority?***

Subcommittee Recommendation: The Subcommittee determined that although Article 120(b)(1)(A) is used by practitioners to charge coercive sexual misconduct offenses involving the abuse of authority, numerous fact patterns—especially those arising in the entry-level training environment between instructors and recruits—are not easily captured by this theory of liability. Accordingly, the Subcommittee recommends a new subsection, Article 120(b)(1)(E), to address sexual assaults and abusive sexual contact when an accused has abused his or her position, rank, or authority to secure compliance by the other person.

The Subcommittee does not recommend amendments to Article 120 of the UCMJ regarding the following issues referred to it by the JPP:

JPP Issue 4: ***Is the definition concerning the accused's "administration of a drug or intoxicant" overbroad?***

Subcommittee Recommendation: The Subcommittee determined that the definition concerning the accused's "administration of a drug or intoxicant" under Article 120(a)(5) is not overbroad. The Subcommittee therefore recommends no changes on this issue.

JPP Issue 6: ***Is the definition of "threatening wrongful action" ambiguous or too narrow?***

Subcommittee Recommendation: The Subcommittee determined that the definition of "threatening wrongful action" is not so ambiguous or narrow as to require a change to the definition. However, the Subcommittee believes that the concerns expressed by practitioners that this definition is too narrow to capture offenses arising in the entry-level training environment can and should be addressed. The Subcommittee believes that the best approach to the practitioners' concerns is through its responses to issues 13 and 15 recommending a new subsection under Article 120(b)(1) for sexual assaults and abusive sexual contact when an accused has abused his or her position, rank, or authority to secure compliance by the other person.

JPP Issue 7: ***How should "fear" be defined to acknowledge both subjective and objective factors?***

Subcommittee Recommendation: The Subcommittee determined that no change was necessary to the current requirements that the fear of the victim be both a personal, subjective fear and that it be an objectively reasonable fear, as currently specified by Article 120(g)(7).

JPP Issue 8: ***Is the definition of "force" too narrow?***

Subcommittee Recommendation: The Subcommittee determined that in light of the recommended amendments to the statutory definition of consent in issue 1, no modification to the Article 120(g)(5) definition of force should be recommended.

JPP Issue 10: ***Should the accused's knowledge of a victim's capacity to consent be a required element of sexual assault?***

Subcommittee Recommendation: At present, the government must prove both the victim's incapacity to consent and that the accused knew or reasonably should have known of that incapacity. The Subcommittee determined that the government should continue to be required to prove that the victim was incapable of consenting and that the accused knew or reasonably should have known of that incapacity. Title 18 U.S.C. Section 2242 (Sexual abuse) and Section 2244 (Abusive sexual contact) require the government to prove not only the charged sexual act or sexual contact but also the accused's knowledge of the victim's incapacity to consent. The elements in Article 120(b)(2) and 120(b)(3) similarly require the government to prove the act and the accused's knowledge of the incapacity, but also permit a conviction when an accused "reasonably should have known" of the victim's incapacity to consent. The Subcommittee considered the specific issue referred by the JPP, as well as whether Article 120's scienter requirement was overly broad in permitting a conviction for an accused who "reasonably should have known" of the victim's incapacity to consent, and determined that it would not recommend any changes on this issue.

JPP Issue 11: ***Should the offense of "indecent act" be added to the UCMJ as an enumerated offense?***

Subcommittee Recommendation: For the great majority of the UCMJ's history, "indecent acts" were punishable as a specified offense under Article 134, requiring a showing that the conduct was either prejudicial to good order and discipline or of a nature to bring discredit upon the Armed Forces. An enumerated offense under Article 120 would require no such showing, which could result in overbroad application of the offense. The Subcommittee is aware that the Department of Defense has proposed an Article 134 offense in a recent draft executive order that addresses "Indecent Conduct," pursuant to the President's authority under Article 56 of the UCMJ. The Subcommittee takes no position on the contents of that proposal. The Subcommittee does not recommend adding the offense of "indecent act" to the UCMJ as an enumerated offense under Article 120. The Subcommittee's recommendation does not extend to offenses specified by the President under Article 134 of the UCMJ.

JPP Issue 12: ***Is the current practice of charging inappropriate relationships or maltreatment under articles of the UCMJ other than Article 120 appropriate and effective when sexual conduct is involved?***

Subcommittee Recommendation: The Subcommittee determined that the current practice of charging inappropriate sexual relationships or maltreatment under articles of the UCMJ other than Article 120 (Articles 92 and 93) can be appropriate and effective when sexual conduct is involved.

JPP Issue 14: ***Should the definition of "threatening or placing that other person in fear" be amended to ensure that coercive sexual relationships or those involving abuse of authority are covered under an existing Article 120 provision?***

Subcommittee Recommendation: The Subcommittee determined that if the proposed Article 120(b)(1)(E) is adopted (see issue 15), the definition of threatening or placing another person in fear does not need to be amended with respect to coercive sexual relationships.

JPP Issue 16: ***Should sexual relationships between basic training instructors and trainees be treated as per se illegal or strict liability offenses under Article 120?***

Subcommittee Recommendation: The Subcommittee determined that consensual sexual relationships between basic training instructors and trainees should not be treated as per se illegal or strict liability offenses under Article 120.

JPP Issue 17: ***As an alternative to further amending Article 120, should coercive sexual relationships currently charged under other articles of the UCMJ be added to DoD's list of offenses that trigger sex offender registration?***

Subcommittee Recommendation: The Subcommittee determined that sexual relationships currently charged under other articles of the UCMJ, including Articles 92 and 93, should not be added to DoD's list of offenses that trigger sex offender registration.

Subcommittee Review of Issues

1. Is the current definition of "consent" unclear or ambiguous?

Current definition of "consent" in Article 120(g)(8) of the UCMJ:

(8) *Consent.*

(A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (C) or (D) of subsection (b)(1).

(C) Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

A. JPP Rationale for Referring This Issue to the Subcommittee. Some witnesses who appeared before the JPP in late 2014 testified that the current UCMJ definition of consent[1] is inconsistent and confusing. According to JPP witness and Subcommittee member Professor Stephen J. Schulhofer of the New York University School of Law, this definition of consent mixes three of the four definitions of consent used throughout many American jurisdictions. He observed that the current version of Article 120 is awkwardly constructed and the consent language is vague and contradictory. He suggested that the JPP propose a fresh start to the sexual assault statute rather than attempt to amend it piecemeal. In contrast, other witnesses, including trial practitioners, said that the definition is clear, unambiguous, and should not be altered. Given these opposing viewpoints, the JPP referred this issue to the Subcommittee for further analysis.[2]

B. Testimony and Information Received by the Subcommittee. A majority of the presenters before the Subcommittee recommended some change to the definition of consent. A retired Army military judge stated that some parts of the consent definition are contradictory. He suggested replacing the term "freely given" with "voluntary." He also suggested removing terminology regarding a victim needing to resist the attack.[3] A senior Marine Corps prosecutor and

[1] *See* 10 U.S.C. § 920(g)(8).

[2] JUDICIAL PROCEEDINGS PANEL, INITIAL REPORT 26–27 (Feb. 2015) [hereinafter JPP INITIAL REPORT], *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_InitialReport_Final_20150204.pdf.

[3] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

former military judge agreed.[4] A senior Army prosecutor recommended that consent should be "outwardly expressed in words or conduct."[5] He suggested removing subparagraph (g)(8)(c) as being redundant given the other subparagraphs.[6]

The reserve Chief of the Marine Corps Defense Services Organization testified that the term "competent person" is confusing and unclear and needs to be defined.[7] A senior Air Force defense counsel stated that the definition of consent is internally inconsistent in some places, that any terminology requiring "affirmative consent" is not realistic, and that affirmative expressions of consent are not how people interact socially.[8]

An Army appellate government counsel who litigates sexual assault convictions on appeal testified that there needs to be clarification regarding what a competent person is; the definition provides that "a sleeping, unconscious or incompetent person cannot consent," but she suggested that there is a gap in the definition when applied to a victim who is not sleeping or unconscious.[9] A civilian practitioner who formerly served on active duty as a Marine Corps prosecutor and defense counsel stated that the present definition of consent is too narrow and needs to be broader.[10]

A smaller number of presenters recommended no changes to the definition of consent. For instance, a senior Air Force prosecutor stated that while the various concepts in the definition could be organized in a simpler manner, the statute nevertheless provides Service members, practitioners, and finders of fact with a relatively concise statement of this fundamental legal term.[11] And a civilian attorney and former prosecutor testified that he does not see a problem with the definition of consent in Article 120. He noted that over his career, he never prosecuted a sexual assault case where he didn't have to prove that there was no consent, even when lack of consent was not included as a specific element of an offense; in his opinion attempting to avoid the consent issue does not accomplish much. He does not think the law is the problem; rather, the problem is in the implementation of the law, which he describes as how cases are investigated, charged, and prosecuted, and how victims are treated.[12]

C. Conclusion: Some Subcommittee members noted a concern with the definition's "residual reference to resistance."[13] The definition and the bench instructions given to the court-martial panel members can be interpreted as requiring a victim to physically resist an attacker before

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[4] *Transcript of JPP Subcommittee Meeting* 104–14 (May 7, 2015) (testimony of Lieutenant Colonel Chris Thielemann, U.S. Marine Corps).

[5] *Transcript of JPP Subcommittee Meeting* 114–24 (May 7, 2015) (testimony of Lieutenant Colonel Alex Pickands, U.S. Army).

[6] *Transcript of JPP Subcommittee Meeting* 114–24 (May 7, 2015) (testimony of Lieutenant Colonel Alex Pickands, U.S. Army).

[7] *Transcript of JPP Subcommittee Meeting* 218–33 (May 7, 2015) (testimony of Colonel Terri Zimmermann, U.S. Marine Corps Reserve).

[8] *Transcript of JPP Subcommittee Meeting* 233–45 (May 7, 2015) (testimony of Lieutenant Colonel Julie Pitvorec, U.S. Air Force).

[9] *Transcript of JPP Subcommittee Meeting* 351–64 (May 7, 2015) (testimony of Captain Jihan Walker, U.S. Army).

[10] *Transcript of JPP Subcommittee Meeting* 386–97 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

[11] *Transcript of JPP Subcommittee* Meeting 124–35 (May 7, 2015) (testimony of Major Mark Rosenow, U.S. Air Force); *see also Written Statement of Major Mark Rosenow* (May 20, 2015).

[12] *Transcript of JPP Subcommittee Meeting* 378–86 (May 7, 2015) (testimony of Mr. John Wilkinson, Æquitas—The Prosecutors' Resource on Violence Against Women).

[13] *See generally Transcript of JPP Subcommittee Meeting* 229 (June 25, 2015).

a judge or panel can find that the victim did not consent to the sexual act or sexual contact alleged. For instance, the Subcommittee noted that the language in 120(g)(8)(A), which in part states that a "lack of verbal or physical resistance" "resulting from the use of force" does not constitute consent, could actually imply that a lack of verbal or physical resistance not resulting from the use of force could constitute consent.

Moreover, the Subcommittee also noted that 120(g)(8)(C) on one hand advises the fact-finder to consider "all the surrounding circumstances" of the offense, yet on the other hand advises the fact-finder to consider whether and why the victim did or did not resist the attack. Grouping the question of resistance with all the other circumstances surrounding the offense places too much weight—perhaps inadvertently—on the issue of resistance.[14] Although the Subcommittee believes evidence of resistance or the lack thereof to be relevant and admissible evidence for a fact-finder to consider, it is just one of the circumstances surrounding the offense and should be given no greater or lesser emphasis than any other circumstance in the text of the statute or elsewhere.

Regarding the definition of "consent," the Subcommittee decided to recommend that the statutory definition of "consent" be modified in order to address concerns that the definition is unclear, is confusing, and contains language seeming to require resistance by a victim in order for a fact-finder to find that a victim did not consent.

To avoid placing too much emphasis on evidence of resistance or the lack thereof, the Subcommittee's proposal would break out in one subsection of the definition the concept of resistance and the other issues currently listed in the statute for determining whether there was consent, and would place the general concept of the circumstances surrounding the offense in a separate subsection of the definition.

D. Recommendation: The Subcommittee recommends that the text of Article 120(g)(8)(A) be amended by deleting the words "or submission resulting from the use of force, threat of force, or placing another in fear" and by adding the words "Submission resulting from the use of force, threat of force, or placing another in fear also does not constitute consent." The Subcommittee recommends that the text of Article 120(g)(8)(C) be amended by deleting the words "Lack of consent may be inferred based on the circumstances of the offense" and by deleting the words "or whether a person did not resist or ceased to resist only because of another person's actions." *See* Enclosure 1, Proposed Modified Article 120 of the UCMJ.

The new definition of consent in the Subcommittee's proposed redraft would appear at Article 120(g)(7) and would read as follows:

(7) *Consent.*

(A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual

[14] *See generally Transcript of JPP Subcommittee Meeting* 233–34, 242–43 (June 25, 2015).

relationship by itself or the manner of dress of the person involved in the conduct at issue does not constitute consent.

(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (C) or (D) of subsection (b)(1).

(C) All the surrounding circumstances are to be considered in determining whether a person gave consent.[15]

[15] *See* Enclosure 1.

2. Should the statute define defenses relying on the victim's consent or the accused's mistake of fact as to consent in sexual assault cases?

A. JPP Rationale for Referring This Issue to the Subcommittee. Several witnesses before the JPP testified that the availability of the defenses of consent and mistake of fact as to consent under the current statute is unclear, because such defenses were explicitly included in the 2007 version of Article 120 but are not specifically included in the 2012 version. Other witnesses said that the mistake of fact defense still clearly applied, but contended that it should be reintroduced into the statute to expressly limit its applicability and make clear any limitations on its scope.

During deliberations, members of the JPP agreed that the statute's lack of clarity in its definition of consent contributes to confusion about the role of consent in determining knowledge or intent in Article 120 offenses. The JPP also agreed that consent and mistake of fact as to consent are important defenses and that the statute should clearly indicate what constitutes a mistake of fact and whether the defense applies to rape and sexual assault offenses. Given the opposing views of presenters before the JPP and the JPP's own concerns regarding this issue, the JPP referred this issue to the Subcommittee for further analysis.[16]

B. Testimony and Information Received by the Subcommittee. A majority of presenters recommended clarification that these two defenses are available and may be raised by an accused. A retired Army trial judge opined that the statute should clearly state that, if raised, consent to the sexual conduct at issue is a defense to all of the offenses in Article 120.[17] He also stated that mistake of fact as to consent in any Article 120 case where it is relevant should be clearly listed as a defense in the statute or in Rule for Courts-Martial (R.C.M.) 916.[18] A retired Marine Corps trial judge agreed that mistake of fact as to consent should be clearly stated to be an available defense.[19] A retired Air Force trial judge also recommended that it be clearly stated that consent and mistake of fact as to consent are available defenses to an accused in sexual assault cases.[20]

A senior Army supervisory prosecutor testified that listing the defenses available to an accused in a prosecution under Article 120 would be helpful to practitioners.[21] The reserve Chief of the Marine Corps Defense Services Organization testified that both consent and mistake of fact as to consent should be clearly stated in both the statute and R.C.M. 916.[22] A senior Army Defense Counsel recommended that both consent and mistake of fact as to consent be put back into the statute to remove any confusion as to their availability to an accused.[23] A civilian military court-martial practitioner and current reservist who formerly served on active duty as both a military prosecutor

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[16] JPP INITIAL REPORT 27–29.

[17] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

[18] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

[19] *Transcript of JPP Subcommittee Meeting* 249 (Apr. 9, 2015) (testimony of Lieutenant Colonel Quincy Ward, U.S. Marine Corps (Ret)).

[20] *Transcript of JPP Subcommittee Meeting* 190–91 (Apr. 9, 2015) (testimony of Colonel William Orr, U.S. Air Force (Ret.))

[21] *Written Statement of Lieutenant Colonel Alexander Pickands, U.S. Army* (May 8, 2015).

[22] *Transcript of JPP Subcommittee Meeting* 230 (May 7, 2015) (testimony of Colonel Terri Zimmermann, U.S. Marine Corps Reserve).

[23] *Transcript of JPP Subcommittee Meeting* 245–53 (May 7, 2015) (testimony of Major Frank Kostik, U.S. Army); *see also Written Statement of Major Kostik* (May 26, 2015).

and a defense counsel opined that both consent and mistake of fact as to consent are always available to an accused as a matter of constitutional due process.[24]

A smaller number of military prosecutors opined that regardless of whether it is expressly stated in the statute or elsewhere, an accused may always raise consent and mistake of fact as to consent because Article 120(f) states "an accused may raise any applicable defenses available under this chapter or the Rules for Courts-Martial." In light of this, they testified that amendment to Article 120 is unnecessary.[25]

C. Conclusion: With respect to the defenses of "consent" and "mistake of fact as to consent," at its June meeting the Subcommittee decided to recommend that "consent" be left the way it is now treated, as a defense attack on the government's proof regarding which the judge instructs the court-martial panel members, and that "mistake of fact as to consent" be clearly listed as a defense and added back into the statute or in the Rules for Courts-Martial.

D. Recommendation: Owing to some question by practitioners regarding the availability of these defenses, the Subcommittee recommends clarification, in the *Manual for Courts-Martial*, that an accused may raise both "consent" and "mistake of fact as to consent" in appropriate cases. Presenters told the Subcommittee that these defenses have always been available to an accused, in statute, in the *Manual for Courts-Martial*, or as a matter of the common law as developed by the appellate courts. Presenters told the Subcommittee that mistake of fact has traditionally been listed as a defense in the *Manual for Courts-Martial* and "consent" has been viewed as an attack on the government's proof which an accused may make during trial and on which, if raised by the evidence, requires a judicial instruction by the military judge. Accordingly, the availability of "consent" as an attack on proof and "mistake of fact as to consent" as a defense should be clearly stated in the *Manual for Courts-Martial.* The Subcommittee does not recommend that these defenses be listed in the text of the statute.

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[24] *Transcript of JPP Subcommittee Meeting* 392 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

[25] *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015); *see also Transcript of JPP Subcommittee Meeting* 358 (May 7, 2015) (testimony of Captain Jihan Walker, U.S. Army).

3. Should the statute define "incapable of consenting?"

A. JPP Rationale for Referring This Issue to the Subcommittee. Numerous witnesses told the JPP that the interpretation of "incapable of consenting" and of "impairment" under the 2012 version of Article 120 raised just as many problems as had language in the 2007 version of the statute. Noting that the statute includes no definitions or further guidance regarding the term "incapable of consenting," witnesses provided anecdotes of military judges using their "common sense and the knowledge of human nature to the ways of the world" to determine the meaning of "incapable of consent." These witnesses recommended amending the statute to provide either a definition or a statutory test to determine when an individual is incapable of consenting.

During deliberations, the JPP determined that additional review was required. In particular, it noted the interrelationship between incapacity and consent and the importance of providing clear definitions of these terms to judges, practitioners, and court-martial panel members. And because sexual assault prevention training for all Service members uses language from Article 120, vague terms may leave them confused about standards of behavior and expectations, raising an important policy interest. Given the views of presenters before the JPP and the JPP's own concerns regarding this issue, the JPP referred this issue to the Subcommittee for further analysis.[26]

B. Testimony and Information Received by the Subcommittee. A majority of the presenters before the Subcommittee recommended that a definition be adopted of this important term that is often relevant in sexual assault cases. This term appears in the statute at Article 120(b)(3), but unlike most other terms or definitions referred to the Subcommittee, there is no explanation or definition of the term under Article 120(g). Perhaps as a result, this issue generated the greatest number of recommendations for change from the presenters before the Subcommittee.

One retired Navy military judge testified that the lack of a definition for "incapable of consenting" is "a big anemia in the statute, and we have to go in and fill it."[27] A retired Army military judge recommended adoption of a definition that would state, "The term 'incapable of consenting' means unable to appraise the nature of the sexual conduct at issue, physically decline participation in the sexual conduct at issue, or physically communicate unwillingness to engage in the sexual conduct at issue."[28] A senior Army prosecutor stated that the current Article 120 is devoid of any definition for "incapable of consenting," and this lack of definition renders an already challenging theory of culpability almost useless.[29] By removing the 2007 definition of "substantially incapacitated," in his view, Congress left practitioners adrift without a standard by which to teach Service members how to behave, provide notice of criminal behavior, make appropriate charging decisions, and effectively prosecute those who exploit impaired or intoxicated individuals.[30] A senior Air Force prosecutor testified that a definition is needed, and he suggested the following: "The term 'incapable of consenting' means unable to appraise the nature of the sexual conduct at issue, decline participation in the sexual conduct at issue, or communicate unwillingness to engage in the sexual conduct at issue."[31]

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[26] JPP INITIAL REPORT 29–30.

[27] *Transcript of JPP Subcommittee Meeting* 200 (Apr. 9, 2015) (testimony of Commander John Maksym, U.S. Navy (Ret.)).

[28] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

[29] *Written Statement of Lieutenant Colonel Alexander Pickands, U.S. Army* (May 8, 2015).

[30] *Written Statement of Lieutenant Colonel Alexander Pickands, U.S. Army* (May 8, 2015).

[31] *Transcript of JPP Subcommittee Meeting* 121 (May 7, 2015) (testimony of Major Mark Rosenow, U.S. Air Force).

An Air Force appellate government counsel stated that the lack of a definition leads to defense counsel's arguing that any condition short of a victim being asleep or unconscious amounts to the victim being capable of consenting to sexual activity.[32] She suggested that a definition contain the following language: "A person does not need to be unconscious or asleep in order to be incapable of consenting to a sexual act due to impairment by a drug, intoxicant or other similar substance," or "a person's level of impairment does not need to rise to the level of unconsciousness or sleep in order for that person to be incapable of consenting to a sexual act due to impairment by a drug, intoxicant or other similar substance."[33] An Army appellate government counsel agreed that this term needs to be clarified.[34]

Defense counsel also agreed that there should be a definition of "incapable of consenting." The reserve Chief of the Marine Corps Defense Services Organization testified that the statute should define "incapable of consenting."[35] A senior Air Force defense counsel testified that a definition is needed, and she agreed with the definition recommended by the retired Army military judge quoted above: "The term 'incapable of consenting' means unable to appraise the nature of the sexual conduct at issue, physically decline participation in the sexual conduct at issue, or physically communicate unwillingness to engage in the sexual conduct at issue."[36] A senior Army defense counsel agreed that a definition is needed, and likewise agreed with the one recommended by the retired Army military judge.[37] A senior Navy defense counsel also testified that practitioners absolutely need the statute to define this term; consent becomes an issue as early as the investigative stage, and without an adequate definition cases end up devolving into a battle of experts giving opinions on the level of intoxication.[38] He told the Subcommittee that the concept of "incapable of consenting" also comes into conflict with the training received by court-martial panels on alcohol intoxication as it relates to the ability to consent, and without a legal definition military judges cannot assist the panel members on this often pivotal issue.[39]

One civilian attorney and former prosecutor testified that a victim's capacity to consent is always a fact question, but it helps to give examples in a definition, such as "less than 16 years old, mentally defective, mentally incapacitated, too intoxicated to appreciate the nature of the act, physically helpless, or unconscious."[40]

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[32] *Transcript of JPP Subcommittee Meeting* 336–47 (May 7, 2015) (testimony of Major Mary Ellen Payne, U.S. Air Force).

[33] *Transcript of JPP Subcommittee Meeting* 336–47 (May 7, 2015) (testimony of Major Mary Ellen Payne, U.S. Air Force)

[34] *Transcript of JPP Subcommittee Meeting* 351–64 (May 7, 2015) (testimony of Captain Jihan Walker, U.S. Army).

[35] *Transcript of JPP Subcommittee Meeting* 231 (May 7, 2015) (testimony of Colonel Terri Zimmermann, U.S. Marine Corps Reserve).

[36] *Transcript of JPP Subcommittee Meeting* 242–44 (May 7, 2015) (testimony of Lieutenant Colonel Julie Pitvorec, U.S. Air Force).

[37] *Written Statement of Major Frank Kostik* (May 26, 2015).

[38] *Transcript of JPP Subcommittee Meeting* 253–68 (May 7, 2015) (testimony of Lieutenant Commander Richard Federico, U.S. Navy).

[39] *Transcript of JPP Subcommittee Meeting* 253–68 (May 7, 2015) (testimony of Lieutenant Commander Richard Federico, U.S. Navy).

[40] *Transcript of JPP Subcommittee Meeting* 382–84 (May 7, 2015) (testimony of Mr. John Wilkinson, Æquitas - The Prosecutors' Resource on Violence Against Women).

One Subcommittee member, in presenting before the Judicial Proceedings Panel, noted that the phrase "incapable of consenting" is "conclusory and meaningless." For instance, when is a person incapable? What is the test? Civilian courts have worked with similar language and managed convictions from time to time, he pointed out, but the ambiguity impedes the law's ability to communicate a normative message and may inhibit prosecution of deserving cases. He stated that the criteria of incapacity must be defined.[41]

C. Conclusion: The vast majority of presenters before the Subcommittee who practice under the UCMJ requested a definition of "incapable of consenting," as this issue is present in most cases prosecuted at trial. The Subcommittee concluded that a definition is necessary and should be initiated through statutory amendment, an executive order, or in the *Military Judges' Benchbook* instructions.

The Subcommittee first looked to 18 U.S.C. § 2242 (Sexual abuse) for possible guidance regarding what factors should be considered when adopting a definition of "incapable of consenting."[42] That code section criminalizes knowingly engaging in a sexual act with another person if that other person is—

> (A) incapable of appraising the nature of the conduct; or
>
> (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.[43]

However, the Subcommittee believed that this language, although helpful, could be seen as too narrow. The Subcommittee found the Navy-Marine Court of Criminal Appeals opinion in *United States v. Pease*[44] to be more useful. The *Pease* court stated:

> An "incompetent" person is a person who lacks either the mental or physical ability to consent due to a cause enumerated in the statute. To be able to freely give an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question, then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person.[45]

The court further stated that to be incapable of consenting means a person "lacked the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make and to communicate a decision about whether they agreed to the conduct."[46]

Accordingly the Subcommittee recommends a new definition of "incapable of consenting," based in part on the *Pease* case.

The Subcommittee also believes that additional guidance should be provided regarding the factors that should be considered by a fact-finder when resolving the question of whether the alleged

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[41] *Written Comments of Professor Stephen Schulhofer* (Aug. 8, 2014).

[42] *See generally Transcript of JPP Subcommittee Meeting* 114–15 (Oct. 22, 2015).

[43] 18 U.S.C. § 2242 (Sexual Abuse).

[44] *United States v. Pease*, 74 M.J. 763 (N-M. Ct. Crim. App. 2015).

[45] *Pease*, 74 M.J. at 770.

[46] *Id.*

victim was incapable of consenting, including a totality of the circumstances analysis that sets forth a non-exhaustive list of example factors.[47] This proposed definition is set forth in the Subcommittee's recommendation.

D. Recommendation: The Subcommittee recommends that the following definition of "incapable of consenting" be adopted as part of the Subcommittee's redraft of Article 120, which would appear at Article 120(g)(8):

> Incapable of consenting. A person is 'incapable of consenting' if that person does not possess the mental ability to appreciate the nature of the conduct or does not possess the physical or mental ability to make or communicate a decision regarding such conduct.

The Subcommittee further recommends that the following language be promulgated in an executive order to be published in the *Manual for Courts-Martial* and the *Military Judges' Benchbook* instructions:

> A totality of circumstances standard applies when assessing whether a person was incapable of consenting. In deciding whether a person was incapable of consenting, many factors should be considered and weighed, to the extent they are known, including, but not limited to, that person's:
>
> - Decision-making ability;
> - Ability to foresee and understand consequences;
> - Awareness of the identity of the person with whom they are engaging in the conduct;
> - Level of consciousness;
> - Amount of alcohol or other intoxicants ingested;
> - Tolerance to the ingestion of alcohol or other intoxicants; and/or
> - Ability to walk, talk, and engage in other purposeful physical movements.

[47] *See generally Transcript of JPP Subcommittee Meeting* 117–19 (Oct. 22, 2015).

4. Is the definition concerning the accused's "administration of a drug or intoxicant" overbroad?

> Current text of Article 120(a)(5) of the UCMJ:
>
> Any person subject to this chapter who commits a sexual act upon another person by—
>
> (5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct,
>
> is guilty of rape and shall be punished as a court-martial may direct.

A. JPP Rationale for Referring This Issue to the Subcommittee. According to JPP witness and Subcommittee member Professor Schulhofer, the statute should be narrowly tailored to criminalize only the intentional administration of an intoxicant for the purpose of committing a sexual act, not actions that are accidental or negligent. No military practitioners raised concerns regarding this issue with the JPP or related any criticisms arising from problems with this definition that have occurred at the trial level.

During deliberations, JPP members noted that only one presenter highlighted the issue of intent with regard to the administration of a drug or intoxicant. It was not clear to the JPP if a conviction would be possible in cases in which the substance was administered by accident or without proof of intent. Given these questions, the JPP referred this issue to the Subcommittee for further analysis.[48]

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended no changes to the definition of an accused's administering a drug or intoxicant to a victim under Article 120(a)(5). For instance, according to a senior Army prosecutor there is no indication from the field that, as worded, this provision is capturing conduct that is not exploitative or assaultive.[49] He urged the Subcommittee not to add a specific intent requirement to this offense. He offered the hypothetical that if a person spiked a punch bowl at a party and then performed a sexual act on someone who had consumed that intoxicant and become impaired, that behavior should be criminal. Adding a specific intent that the intoxicant be administered with the purpose of rendering people impaired and vulnerable to sexual acts would render this theory unprovable. Doing so would also require the offender to have specifically chosen the victim at the time of administering the substance, when it is just as likely that he or she is targeting a pool of individuals (e.g., anyone who partakes in the punch). Similarly, a senior Air Force prosecutor stated that recommendations to include a specific intent requirement (e.g., that administration of the drug or intoxicant be for the purpose of impairing a victim's capacity to consent) are misplaced.[50] The discretion of commanders throughout the processing of a case and the consistent safety check provided by judge advocates, including their Article 34, UCMJ, pretrial advice, make it unlikely this subsection will be applied to situations where the administration is disconnected from the sexual act or sexual contact. Adding a specific intent requirement would,

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[48] JPP INITIAL REPORT 30.

[49] *Written Statement of Lieutenant Colonel Alexander Pickands, U.S. Army* (May 8, 2015).

[50] *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

however, undermine prosecutions through this subsection in two obvious circumstances: (1) where the accused formed the intent to commit the offense only after recognizing how intoxicated the victim became and (2) where the accused ingests drugs or intoxicants at the same time and thereby raises the issue of voluntary intoxication. See R.C.M. 916(l)(2). And one civilian practitioner who formerly served as a Marine Corps prosecutor and defense counsel observed that this issue appears to be concerned with an incredibly narrow set of hypothetical facts that do not require preemptive congressional action.[51]

A contrary view was offered by a retired Army military judge, who suggested amending the definition by adding the requirement that the administration of a drug or intoxicant be done for the purpose of impairing the victim's capacity to express a lack of consent to the sexual act.[52]

C. Conclusion: With respect to the definition concerning the accused's "administration of a drug or intoxicant," as stated in Article 120(a)(5), the Subcommittee determined that no change should be made to this definition.[53] The Subcommittee concluded that adding an element to this provision would unnecessarily complicate charging certain offenses under the statute.

D. Recommendation: No change.

[51] *Transcript of JPP Subcommittee Meeting* 387–88 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

[52] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

[53] *See generally Transcript of JPP Subcommittee Meeting* 227–28 (Oct. 22, 2015).

5. Does the definition of "bodily harm" require clarification?

> Current definition of "bodily harm" in Article 120(g)(3) of the UCMJ:
>
> (3) *Bodily harm.* The term "bodily harm" means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

A. JPP Rationale for Referring This Issue to the Subcommittee. The 2012 version of Article 120 expanded the offense of sexual assault to include sexual acts by causing bodily harm. Under the current statute, bodily harm is defined as "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." Thus, in cases in which the bodily harm alleged is the sexual act (or contact) itself, lack of consent can effectively become an element of the offense.

The issue raised to the JPP is whether sexual assault based on bodily harm under Article 120(b)(1)(B) includes only offenses that involved bodily harm in addition to the sexual act or if the statute also includes offenses that involved only a nonconsensual sexual act. According to several current practitioners, the definition of bodily harm, as well as the statutory scheme surrounding the bodily harm offense, is ambiguous and creates confusion at trial. One solution recommended to the JPP was to amend the definition of bodily harm to include "physical pain, illness, or any impairment" while establishing a separate and distinct offense under Article 120 for sexual intercourse without consent. However, another witness before the JPP argued that the bodily harm definition should not be altered and that Congress's intention to include sex without consent as an offense was clear.

During deliberations, the JPP members found the definition of bodily harm confusing. Given the opposing views of presenters and the JPP's own concerns over the term "bodily harm," the JPP referred this issue to the Subcommittee for further analysis.[54]

B. Testimony and Information Received by the Subcommittee. A majority of the presenters before the Subcommittee recommended that no changes be made to the concept of bodily harm in Article 120(b)(1)(B) or the definition of bodily harm in Article 120(g)(3). Several experienced prosecutors stated that they would charge Article 120(b)(1)(B) in cases in which the victim has little or no recollection of the incident but can affirmatively state that a perpetrator engaged in a sexual act or sexual contact with the victim without consent. For instance, one senior Army prosecutor stated that he has had cases in which the victim was positioned, unclothed, in such a manner that the offender penetrated her without having to adjust clothing, bedding, or her body, and without having to use force.[55] If the sexual act could not be used as the bodily harm, this would not be prosecutable as a sexual assault. He testified that this definition also helps in cases of poor or old memory, and he has prosecuted numerous cases in which the victim remembered being penetrated, but not the details of any physical contact before the penetration.[56] A senior Marine prosecutor recommended leaving this definition unchanged because it allows the government to capture acts that are nonconsensual and also addresses the scenario where consent is withdrawn.[57] A senior Air Force

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[54] JPP INITIAL REPORT 30–31.

[55] *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

[56] *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

[57] *Transcript of JPP Subcommittee Meeting* 111–13 (May 7, 2015) (testimony of Lieutenant Colonel Chris Thielemann, U.S. Marine Corps).

prosecutor recommended that no changes be made because the definition accurately captures the legal term and allows prosecutors to criminalize nonconsensual sexual acts and sexual contacts even in situations where the act or contact constitutes the offensive touching.[58]

An Army appellate government counsel asked that no changes be made because this subsection allows the government to charge the bodily harm as the act, and this tactic is useful in cases in which the victim does not have a clear memory of what happened owing to impairment by drugs or alcohol.[59] One civilian practitioner testified that the statute is clear that Congress intended to define nonconsensual sexual activity as bodily harm, and this definition is uncontroversial.[60]

On the other hand, a retired Army trial judge opined that the definition was confusing and in need of change, and he suggested creating a new offense under Article 120 of "wrongful sexual contact," which would criminalize any sexual contact on another person without that other person's permission.[61] And a senior Air Force defense counsel stated that there is "just no real definition" of "bodily harm" that actually lends itself to be easily defended when it is used in the context of incapacitation or alcohol. It is used in various different ways. And for that reason, it is hard to articulate what exactly "bodily harm" means. She suggested that the term "bodily harm" needs to have a definition that is actually workable.[62]

Testifying before the JPP in August 2014, Subcommittee member Professor Stephen Schulhofer opined that the concept of "bodily harm" is confusing as used in several places in Article 120 and should be more clearly defined. He stated that it should serve to differentiate more serious cases from those in which there is no injury or threat of injury beyond the harm of unwanted penetration itself. Bodily harm as currently defined in the UCMJ ("any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact") conflicts with the Model Penal Code's definition, which specifies "physical pain, illness or any impairment of physical condition."[63]

C. Conclusion: According to military practitioners who testified before the Subcommittee, the concept of "bodily harm" is useful for cases in which a sexual act or contact has been committed without the victim's consent and a victim has little or no recollection of the event beyond the nonconsensual act or contact. But despite many practitioners' testimony that the concept of bodily harm as used under Article 120(b)(1)(B), Article 120(d), and the definition in Article 120(g)(3) is workable, the Subcommittee nevertheless finds the term and its present definition confusing for two reasons.

First, the statute currently defines bodily harm as "any offensive touching of another, however slight," meaning a nonconsensual touching and nothing more. Although that concept of bodily harm has a well-developed history in military law under Article 128, UCMJ (Assault)—a history that judges and legal practitioners are well-versed in—non-lawyers who sit on military

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[58] Written *Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

[59] *Transcript of JPP Subcommittee Meeting* 359 (May 7, 2015) (testimony of Captain Jihan Walker, U.S. Army).

[60] *Transcript of JPP Subcommittee Meeting* 388 (May 7, 2015) (testimony of Mr. Zachary Spilman).

[61] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (April 10, 2015).

[62] *Transcript of JPP Subcommittee Meeting* 121–23 (May 7, 2015) (testimony of Lieutenant Colonel Julie Pitvorec, U.S. Air Force)

[63] *Written Comments of Professor Stephen Schulhofer* (Aug. 8, 2014).

courts-martial panels are not typically familiar with this legal concept. "Bodily harm" in lay terms often means the presence of physical injuries, and the Subcommittee is concerned that a panel could interpret "bodily harm" to require some physical injury in addition to the unwanted sexual penetration or contact. Because rape and sexual assault may not result in physical injuries, these differing concepts could be confusing to a panel and result in inappropriate acquittals.[64] Second, the current text regarding this theory of liability in Article 120(b)(1)(B) is tautological. For these reasons, the Subcommittee recommends it be amended.

The Subcommittee's recommended changes would clarify what the presenters told the Subcommittee: that "bodily harm" in Article 120(g)(3), as applied under Article120 (b)(1)(B) and Article 120(d), is defined as a sexual act or sexual contact done without the consent of the victim, but no further "bodily harm" must be shown.

D. Recommendation: Change the language of 120(b)(1)(B) and replace it with "without the consent of the other person."[65] This would remove any confusion over the term "bodily harm" and would create a baseline offense for any sexual act or sexual contact committed without a victim's consent. The removal of the definition of bodily harm set forth in Article 120(g)(3) will require that each successive subparagraph be renumbered. This renumbering is set forth in the Subcommittee's proposed redraft in Enclosure 1 to this report.

The new Article 120(b)(1)(B) would read as follows:

(b) Sexual assault. Any person subject to this chapter who—

(1) commits a sexual act upon another person

(B) without the consent of the other person;

is guilty of sexual assault and shall be punished as a court-martial may direct.[66]

[64] *See generally Transcript of JPP Subcommittee Meeting* 332–39 (June 25, 2015).

[65] *See* Enclosure 1.

[66] *See* Enclosure 1.

6. Is the definition of "threatening wrongful action" ambiguous or too narrow?

> Current definition of "threatening or placing that other person in fear" in Article 120(g)(7) of the UCMJ:
>
> (7) *Threatening or placing that other person in fear.* The term "threatening or placing that other person in fear" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.

A. JPP Rationale for Referring This Issue to the Subcommittee. The *Manual for Courts-Martial* does not define the term "wrongful action" and provides no guidance on whether Congress intended this provision to cover the inherently coercive senior–subordinate relationships unique to the military. Significantly, the 2007 version of Article 120 specifically articulated and provided a theory of liability for placing a victim in fear "through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of another." However, this language was removed from the current version of Article 120.

Some witnesses contended that the current provision is too narrow and ambiguous, because it does not encompass sexual acts or contacts that are induced through promises of career advancement or undeserved favorable treatment. Others testified to the contrary that the current language is adequate to charge sexual assaults resulting from inherently coercive relationships and that the "threat of . . . wrongful action" language is appropriately broad and can encompass senior–subordinate relationships.

During deliberations, the JPP agreed that additional review was necessary to determine whether the current statutory language is intended to cover relationships unique to the military and, if so, whether the statute is sufficiently broad. Given the opposing views offered by practitioners, the JPP referred this issue to the Subcommittee for further analysis.[67]

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended some change in the definition of "threatening wrongful action." This group testified that the term is unclear and ambiguous in cases in which an accused is charged with violating Article 120(b)(1)(A) or 120(d) by using his or her position of authority or rank to coerce a victim into a sexual act or sexual contact. For instance, a senior Air Force appellate government counsel stated that the definition should be made more explicit.[68] To her, it is not obvious at first glance that the definition is meant to encompass situations where a superior is using his or her rank or authority to coerce sexual acts or contacts.[69] Military court-martial panels are used to following orders, she noted, and thus it is important for those selected to sit as panel members to receive explicit instructions. Otherwise, defense counsel could certainly successfully argue that since neither "use of rank" or "abuse of authority" is expressly included in the definition of "threatening or placing in fear," the court members cannot find the accused guilty. She suggested incorporating the language of the 2007 version of Article 120 into the definition of "threatening or placing in fear"—

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[67] JPP INITIAL REPORT 31–32.

[68] *Written Statement of Major Mary Ellen Payne, U.S. Air Force* (September 1, 2015).

[69] *Written Statement of Major Mary Ellen Payne, U.S. Air Force* (September 1, 2015).

with the caveat that offering to affect a subordinate's career positively should not be a criminal act. A senior Marine Corps prosecutor at an entry-level training command testified that the bench book instructions for this definition are inadequate.[70] He suggested "reaching back" to the previous version of Article 120 for guidance. The prior version of Article 120 provided some specific examples of what could constitute the threatened harm targeted, one of which was threatening or placing the victim in fear "through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person."[71] He suggested also explaining that threats may be either express or implied.[72] A senior Coast Guard prosecutor and former military judge testified that the definition "falls short."[73] He stated that a military judge needs to be able to provide court-martial panels with specific instructions, and he suggested a modification to the bench instructions in accord with his fellow prosecutors' suggestions based on the prior version of Article 120.[74]

A senior Air Force appellate defense counsel agreed that the definition needs modification. Like some of the prosecutors, she suggested looking back to the 2007 version of Article 120 and modifying the bench instructions to address this issue.[75] A senior Air Force staff judge advocate and legal adviser to a training commanding general testified that this definition is too narrow and should include any offers of favorable action by the accused.[76] A Marine Corps staff judge advocate and legal adviser to the commanding general of an entry-level training facility testified that he believes the definition should be modified in accord with the 2007 version of article to include the specific example of abusing military position, rank, or authority.[77]

A minority of presenters suggested that the definition does not need change. A retired Army military judge believes that the current definition is sufficient because it addresses "wrongful" conduct.[78] And a senior Air Force prosecutor noted that the current definition is sufficiently broad to cover the types of sexual assaults and abusive sexual contacts falling outside of the other theories contained in Article 120(b)(1).[79] That said, he recommended consideration of a new sexual offense specifically targeting the inherently coercive senior–subordinate relationships unique to the military.[80]

One Subcommittee member, in presenting before the Judicial Proceedings Panel, noted that the definition is either too ambiguous or too narrow in its application to an officer or NCO who seeks

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[70] *Transcript of JPP Subcommittee Meeting* 14 (Aug. 27, 2015) (testimony of Major Adam King, U.S. Marine Corps).

[71] 10 U.S.C. § 920(t)(7)(B) (This version of Article 120 was in effect for offenses committed during the period from Oct. 1, 2007 through June 27, 2012).

[72] *Transcript of JPP Subcommittee Meeting* 16 (Aug. 27, 2015) (testimony of Major Adam King, U.S. Marine Corps).

[73] *Transcript of JPP Subcommittee Meeting* 31 (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Gullo, U.S. Coast Guard).

[74] *Transcript of JPP Subcommittee Meeting* 32 (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Gullo, U.S. Coast Guard).

[75] *Transcript of JPP Subcommittee Meeting* 123 (Aug. 27, 2015) (testimony Captain Lauren Shure, U.S. Air Force).

[76] *Transcript of JPP Subcommittee Meeting* 190 (Aug. 27, 2015) (testimony of Colonel Brynn Morgan, U.S. Air Force).

[77] *Transcript of JPP Subcommittee Meeting* 194–95 (Aug. 27, 2015) (testimony of Lieutenant Colonel Brett Wilson, U.S. Marine Corps).

[78] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

[79] *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

[80] *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

sexual favors in return for undeserved favorable treatment, or sexual favors absent which he will report an enlistee's infractions or mention factually accurate shortcomings in the enlistee's personnel report.[81] He recommends that the definition be clarified and that these types of scenarios be treated as a coercive sexual crime.[82]

Two other presenters held that the definition is actually too broad and encompasses conduct that should not be criminal. For instance, a senior Army prosecutor suggested the words "physical or violent" be inserted to qualify "action contemplated by the communication or action."[83] The effect would be to strip nonviolent threats out of the sexual assault arena, reserving the most severe offenses and punishments for those who (a) violate a person's physical integrity (their body) and (b) render ineffective a person's personal autonomy (their ability to decide what happens to their body).[84] Force, violence, threatening coercion, and incompetence—all of these have violence at their core; the victim is compelled to participate, actively or passively, in the sexual conduct. They cannot, or reasonably do not, have the opportunity to escape or avoid the conduct. He suggested that economic harms should be addressed outside of Article 120, if at all.[85] And a civilian practitioner and former Marine Corps prosecutor and defense counsel declared that "the definition is incredibly broad and presents a uniquely factual question: Was the contemplated action wrongful?"[86] In his view, this is a question of fact to be determined according to the evidence, and he believes that the current definition of wrongful action is adequate to address the issues of coercive sexual relationships and abuses of military rank or authority.[87]

C. Conclusion: Although concerns were expressed to the Subcommittee regarding the definition being unclear and perhaps too narrow, the Subcommittee nevertheless concluded that adding a new subsection (E) to Article 120(b)(1) addressing abuse of position, rank, or authority would satisfy those worried about potential narrowness in the definition of threatening wrongful action in Article 120(g)(7).[88] Accordingly, the Subcommittee recommended no change to the definition of "threatening or placing that other person in fear" under Article 120(g)(7).

D. Recommendation: No change.

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[81] *Written Comments of Professor Stephen Schulhofer* (Aug. 8, 2014).

[82] *Written Comments of Professor Stephen Schulhofer* (Aug. 8, 2014).

[83] *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

[84] *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

[85] *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

[86] *Transcript of JPP Subcommittee Meeting* 389 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

[87] *Transcript of JPP Subcommittee Meeting* 389 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

[88] *See generally Transcript of JPP Subcommittee Meeting* 382–86 (Oct. 22, 2015).

7. How should "fear" be defined to acknowledge both subjective and objective factors?

A. JPP Rationale for Referring This Issue to the Subcommittee. Because the definition of "threatening or placing that other person in fear" hinges on "caus[ing] a reasonable fear,"[89] it is clear that for offenses under Article 120 involving threats or placing a victim in fear, an objective "reasonable person" standard must be met rather than a subjective standard that takes into account the victim's actual and individual mind-set. The JPP received some testimony that the "reasonable" test should be amended to recognize a victim's subjective, actual fears.

During deliberations, the JPP agreed that additional review was necessary to determine whether a different test should replace the current objective test and to evaluate the most effective and efficient means of implementing such a change. In addition, the definition of "threatening or placing that other person in fear" in the 2012 version of the statute was substantially narrowed from the definition used in the 2007 version. This change raises questions as to whether the current version of Article 120 sufficiently criminalizes certain types of sexual misconduct, particularly those that involve abuse of authority. Given the opposing views among presenters and the JPP's own concerns about this issue, the JPP referred it to the Subcommittee for further analysis.[90]

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended no changes to Article 120(g)(7), at least in the context of prosecutions under Article 120(a)(3), 120(b)(1)(A), 120(c), or 120(d), when the accused has been charged with placing the victim in "fear" of the threatened act alleged. The majority of presenters stated the government is—and should be—required to prove both (1) the victim's subjective, personal fear, and (2) that the victim's subjective fear was also objectively reasonable under the circumstances.

A senior Army prosecutor stated that fear is defined adequately as written: a victim's actual, subjective fear could indicate that the victim's fear is also objectively reasonable in response to a particular threat.[91] He believes these forms of proof to be sufficient; there is no need for further adjustment.[92] Likewise, a senior Air Force prosecutor found the requirement that a victim's fear be "objectively reasonable under the circumstances" to be proper: a subjective but objectively unreasonable fear in a victim would, in cases in which the defense was raised, make it impossible for the prosecution to prove beyond a reasonable doubt that the accused did not have an honest and reasonable mistake of fact as to consent.[93] He noted that in the marginal case in which the accused has knowledge of the victim's objectively unreasonable but subjective fear, the prosecution is free to allege sexual assault or abusive sexual contact by bodily harm, as the sexual act or sexual contact would be nonconsensual.[94]

A retired Army military judge stated that "fear" does not need to be defined to acknowledge subjective fear, because subjective fear is already relevant and admissible and would also be relevant

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[89] 10 U.S.C. § 920(g)(7).

[90] JPP INITIAL REPORT 32 (Feb. 2015).

[91] *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

[92] *Id.*

[93] *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

[94] *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

to show objective fear.[95] He believes that removing the requirement that the fear be objectively reasonable would result in confusion and cause practical problems in litigating sexual assault trials.[96] And a civilian practitioner who was formerly a Marine Corps prosecutor and defense counsel stated that requiring an objectively reasonable fear is "appropriate because it incorporates the defense of mistake of fact regarding whether the other person was actually in fear" and also "avoids prosecuting someone for instilling a fear that is objectively unreasonable."[97]

One retired Air Force military judge offered a different view, testifying that if the focus is on protecting the victim, the court-martial panel members "should not be permitted to superimpose their own judgment upon the victim, as long as they believe the victim believed he or she was in fear."[98] He suggested that in such cases, the accused should be responsible for the victim as he or she "finds" the victim.[99]

One Subcommittee member who submitted written material to the Judicial Proceedings Panel recommended modifying the definition from a narrower reasonable person standard to a more subjective one that allows a more vulnerable victim's fear to be sufficient to satisfy the fear element.[100]

C. Conclusion: The Subcommittee concluded that no change was needed to the requirements that a victim's subjective and personal fear be also objectively reasonable under the circumstances, as currently specified by Article 120(g)(7).[101]

D. Recommendation: No change.

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[95] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

[96] *Id.*

[97] *Transcript of JPP Subcommittee Meeting* 390 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

[98] *Transcript of JPP Subcommittee Meeting* 192 (April 9, 2015) (testimony of Colonel William Orr, U.S. Air Force (Ret.)).

[99] *Transcript of JPP Subcommittee Meeting* 192 (April 9, 2015) (testimony of Colonel William Orr, U.S. Air Force (Ret.)).

[100] Dean Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, 452–53 (2014).

[101] *See generally Transcript of JPP Subcommittee Meeting* 284 (Oct. 22, 2015).

8. Is the definition of "force" too narrow?

> Current definition of force in Article 120(g)(5) of the UCMJ:
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> (5) *Force.* The term "force" means—
>
> (A) the use of a weapon;
>
> (B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or
>
> (C) inflicting physical harm sufficient to coerce or compel submission by the victim.

A. JPP Rationale for Referring This Issue to the Subcommittee. Under the 2007 version of Article 120, force was defined as an "action to compel submission of another or to overcome or prevent another's resistance" by use or suggestion of a dangerous weapon, or by "physical violence, strength, power, or restraint . . . sufficient that the other person could not avoid or escape the sexual conduct." According to one expert, this phrasing required the victim to resist the assault.[102] The 2012 revision to Article 120 amended the definition of force to focus objectively on the offender's conduct rather than subjectively on the victim's behavior. Force is now defined as "(A) the use of a weapon; (B) the use of such physical strength or violence sufficient to overcome, restrain, or injure a person; or (C) inflicting physical harm sufficient to coerce or compel submission by the victim." Subsection (B) measures the offender's use of physical strength or violence by an objective reasonable person standard rather than by the actions of the particular victim in a case. While subsection (C) does look at the particular victim, it does not place the burden of resistance on that person.

Two witnesses before the JPP advocated for a broader definition of force. JPP Subcommittee member Dean Lisa Schenck noted that the 2012 version of Article 120 restricts "force" to a situation in which a weapon is used, rather than simply displayed or suggested. The degree of force to compel the victim's submission is more subjective than in the 2007 version and places less emphasis on whether the victim could escape the assault. One other JPP witness recommended that Article 120(g)(5) should include "the use, the display, or the suggestion of the use of a weapon." Professor Schulhofer argued that there should be two categories of forcible rape—one encompassing unlawful force applied against a person; the other, escalated use of force that could cause death or grievous bodily harm. During deliberations, the JPP decided that additional review was warranted to determine if the definition of force should be broadened and referred this issue to the Subcommittee for further analysis.[103]

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended no change to the definition of force under Article 120(g)(5). A senior Air Force prosecutor stated that in his experience, offenses falling under the statute's definitions of rape and aggravated sexual contact are much less common than those qualifying as sexual assault and abusive sexual contact.[104] He noted that in cases in which "force" is used, it is

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[102] Jim Clark, *Analysis of Crimes and Defenses 2012 UCMJ Article 120, Effective 28 June 2012*, Emerging Issues 7 (2012), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/07_Art120_UCMJ_Crimes Defenses_Analysis_Clark_2012.pdf., at 2

[103] JPP INITIAL REPORT 32–33 (Feb. 2015).

[104] *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

normally apparent, and the language included within Article 120(g)(5) is adequate.[105] Similarly, a senior Army prosecutor opined that the definition is sufficient, and he suggested adding the words "using or brandishing a weapon" to the first prong under Article 120(g)(5)(A).[106] He provided the example of an accused brandishing a Taser, a weapon that would not be likely to cause grievous bodily harm or death, but would serve to compel submission even without completing the act of using it.[107] A retired Army military judge opined that the definition of "force" is not too narrow.[108] In his view, some of the concerns about situations that are arguably not covered could be addressed by other theories of liability, such as "threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping."[109] And a civilian practitioner and former Marine Corps prosecutor and defense counsel testified that the statutory definition of force is narrow, which in his opinion is sensible when considered in the context of the broader statutory definitions of bodily harm and of threatening or placing in fear.[110]

One senior Air Force appellate government counsel offered an opposing view, suggesting that the current definition of force should clarify that a victim is not required to exert any particular level of resistance in order for the accused to be found to have used unlawful force.[111] She relied on an appellate case in which the Service court overturned a rape conviction because the government did not admit sufficient evidence to prove force: specifically, "trial counsel did not elicit sufficient evidence to indicate that the Appellant used force to overcome the pushing."[112] The court appears to have focused on what it perceived was a lack of resistance by the victim, and although the case was prosecuted under the 2007 version of Article 120, she believes that the same result could occur under the present version of the statute.[113]

One Subcommittee member, in written material presented to the Judicial Proceedings Panel, recommended modifying the definition of force to include situations in which the accused suggests that he or she has possession of a weapon; at this time the definition covers only situations in which a weapon is actually used.[114]

C. Conclusion: The Subcommittee concluded that in light of the amendments to the statutory definition of consent recommended in the discussion of issue 1, no modification to the Article 120(g)(5) definition of force should be recommended.[115]

D. Recommendation: No change.

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[105] *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

[106] *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

[107] *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

[108] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

[109] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

[110] *Transcript of JPP Subcommittee Meeting* 390 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

[111] *Written Statement of Major Mary Ellen Payne, U.S. Air Force* (May 15, 2015).

[112] *Id*, citing *U.S. v. Soto*, ACM 38422 (A.F. Ct. Crim. App., Sept. 16, 2014)(unpub. op.).

[113] *Id.*

[114] Dean Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, 451–52 (2014).

[115] *See generally Transcript of JPP Subcommittee Meeting* 285 (Oct. 22, 2015).

9. Are the definitions of "sexual act" and "sexual contact" too narrow, or are they overly broad?

Current definitions of sexual act and sexual contact in Article 120(g)(1) and (2) of the UCMJ:

(1) *Sexual act.* The term "sexual act" means—

(A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the vulva or anus or mouth, of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) *Sexual contact.* The term "sexual contact" means—

(A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or

(B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.

A. JPP Rationale for Referring This Issue to the Subcommittee. The JPP heard testimony that the statute's definition of sexual act may be overbroad. One JPP witness observed that a military member who put his or her finger in the mouth of another to abuse or harass that person could be charged with committing a sexual act under the current definition. A military defense counsel recommended amending the definition to eliminate the potential of a sexual assault conviction in cases in which objects or "any body part" are inserted into another's mouth for a purpose that is not sexual. The JPP also heard testimony that the statute's definition of sexual contact may be either too narrow or overbroad. Witnesses before the JPP were split on that issue. Those who criticized the definition as too narrow contended that the statute does not include a sexual touching of another person through the use of an object. Conversely, those who viewed the definition as overly broad reasoned that the definition allows for possible inclusion of "hypotheticals [that are] absurd;" one observed that "if the absurdity can be removed from the definition, then I think it adds respect to the law."[116] Another presenter agreed, noting that the definition could be used to impose unnecessary or inappropriate collateral consequences, such as sex offender registration for acts of touching that are not necessarily sexual. During deliberations, members of the JPP agreed that additional review of these definitions was warranted, and referred this issue to the Subcommittee for further analysis.[117]

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended some modification of the definitions of "sexual act" and

[116] *Transcript of JPP Public Meeting* 302–03 (Aug. 7, 2014) (testimony of COL Timothy Grammel, U.S. Army (Retired)).

[117] JPP INITIAL REPORT 33–35 (Feb. 2015).

"sexual contact" under Article 120(g)(1)–(2). A retired Army military judge stated that the definitions of "sexual act" and "sexual contact" are too broad.[118] The term "sexual act," he suggested, could be fixed by deleting two words—"or mouth"—from subparagraph (B). The term "sexual contact," he suggested, should be corrected by deleting most of subparagraph (B), which criminalizes touching any body part with any body part, including through the clothing, if it is accompanied by the intent to arouse or gratify the sexual desire of any person. He suggested that statutory language requiring specific intent should be added to subparagraph (A). In addition, with this change, an ambiguity in the last sentence can be corrected, and "or by any object" can be added after "by any body part." A senior Air Force prosecutor testified that "sexual act" is too broad and "sexual contact" is too narrow.[119] He recommended removing "or mouth" from the definition of "sexual act," and adding "or any object" to the definition of "sexual contact."

A senior Army defense counsel recommended modifying the definition of "sexual contact" to state, "Touching may be accomplished by any part of the body or by any object when the object is used to arouse or gratify the sexual desire of any person."[120] A senior Navy defense counsel agreed with the retired Army trial judge that "or mouth" should be deleted from the definition of sexual act.[121] He also agreed with the suggested change to the definition of sexual contact to include the use of an object. An Army appellate government counsel agreed that the use of an object should be added to the definition of sexual contact.[122] One senior Marine Corps appellate defense counsel testified that the second parts of the definitions of sexual act and sexual contact in Article 120(g)(1)(B) and 120(g)(2)(B) are overly broad and should be removed.[123]

On the other hand, one senior Army prosecutor recommended no changes to the definition of sexual act because in his view it is correctly defined.[124] He stated that the definition of "sexual contact" is adequate, although he agreed that the words "or an object" should be added.[125]

On July 15, 2015, in the midst of the Subcommittee's meetings, the Court of Appeals for the Armed Forces issued its opinion in *United States v. Schloff*,[126] holding that "sexual contact" may include those instances when an accused touches a victim with an object. In a 3–2 decision, the Court ruled that a specification alleging abusive sexual contact by pressing a stethoscope to the breasts of a noncommissioned officer in violation of Article 120 of the UCMJ appropriately stated an offense, because the act of pressing a stethoscope to the victim's breasts (object-to-body contact) constituted sexual contact as defined by Article 120(g)(2).

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[118] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

[119] *Transcript of JPP Subcommittee Meeting* 131 (May 7, 2015) (testimony of Major Mark Rosenow, U.S. Air Force).

[120] *Written Statement of Major Frank Kostik U.S. Army* (May 26, 2015).

[121] *Transcript of JPP Subcommittee Meeting* 264 (May 7, 2015) (testimony of Lieutenant Commander Richard Federico, U.S. Navy).

[122] *Transcript of JPP Subcommittee Meeting* 361 (May 7, 2015) (testimony of Captain Jihan Walker, U.S. Army).

[123] *Transcript of JPP Subcommittee Meeting* 332–36 (May 7, 2015) (testimony of Major John Stephens, U.S. Marine Corps).

[124] *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

[125] *Id.*

[126] *United States v. Schloff* 74 M.J. 312 (2015).

C. Conclusion: The Subcommittee concluded that the definitions for "sexual act" and "sexual contact" should be amended to clarify the bounds of prohibited conduct and address concerns regarding overbreadth in some places and narrowness in other parts of these definitions.[127]

Numerous presenters testified that the definition of sexual act in Article 120(g)(1)(B) may be too broad because it could include placing an object like a toothbrush into someone's mouth with the intent to abuse, humiliate, or degrade any person, regardless of whether there was any specific sexual intent.[128] The Subcommittee believes that this definition could convert into a sex crime acts that might constitute hazing or battery-types of offenses—offensive touchings—but are not sex offenses.[129]

Moreover, to address concerns regarding the narrowness of the definition of sexual contact in Article 120(g)(2), and following the recommendations of several presenters, the Subcommittee believes the statutory definition of sexual contact should clearly state that contact can be accomplished not only with any part of the body but also with an object.

D. Recommendation: The Subcommittee recommends that the Article 120(g)(1) definition for "sexual act" be amended as follows:[130] The words "contact between the" should be deleted, and the words "penetration however slight of the" should be inserted, in Article 120(g)(1)(A). Further, the word "and" preceding the word "vulva" should be deleted and replaced with the word "into" and the words "and for purposes of this subparagraph contact involving the penis occurs upon "penetration, however slight" should be deleted.

A new subsection (B) should be added to subparagraph (g)(1), consisting of the words "contact between the mouth and the penis, vulva, or scrotum or anus." The current subsection (B) should be redesignated subsection (C), and the words "or penis" should be added after the word "vulva," and the words "or mouth" should be deleted.

The Subcommittee recommends that the Article 120(g)(2) definition for "sexual contact" be amended as follows: Article 120(g)(2)(A) and (B) should be merged into one subparagraph. The word "genitalia" should be deleted, and the words "vulva, penis, scrotum" should be added in its place. The words "any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done" should be deleted.[131]

The new definitions of "sexual act" and "sexual contact" in Article 120(g) would read as follows:

(1) *Sexual act.* The term "sexual act" means—

(A) penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

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[127] *See* generally *Transcript of JPP Subcommittee Meeting* 288–313 (Oct. 22, 2015).

[128] *Transcript of JPP Subcommittee Meeting* 20, 50 (May 7, 2015) (testimony of Major Amy Bateman, U.S. Army).

[129] *See generally Transcript of JPP Subcommittee Meeting* 396–97 (June 25, 2015).

[130] *See* Enclosure 1.

[131] *See* Enclosure 1.

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person, or to arouse or gratify the sexual desire of any person.

(2) *Sexual contact*. The term "sexual contact" means—

touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person, or with an intent to arouse or gratify the sexual desire of any person.

Touching may be accomplished by any part of the body or an object.

10. Should the accused's knowledge of a victim's capacity to consent be a required element of sexual assault?

A. JPP Rationale for Referring This Issue to the Subcommittee. The requirement of proving that the accused knew or reasonably should have known of the victim's incapacity to consent is not found in the text of the federal sexual abuse statute, 18 U.S.C. § 2242, upon which Article 120(b)(2) and 120(b)(3) were based. Some testimony before the JPP suggested that this additional requirement in Article 120 is essentially an extra mens rea element that the prosecution must prove, which, in turn, affords unnecessary protections to the accused. Critics opined that this extra mens requirement is unnecessary because the statute is aimed at protecting the victim who is mentally or physically unable to consent owing to one of the specifically enumerated conditions, such as being asleep, unconscious, or otherwise unaware that a sexual act is occurring (120(b)(2)); impaired by drugs, intoxicants, or other substances (120(b)(3)(A)); or suffering from a mental disease or defect or physical disability (120(b)(3)(B)). Given these concerns, the JPP referred this issue to the Subcommittee for further analysis.[132]

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended that no changes be made to Article 120(b)(2) or 120(b)(3), which require the government to prove both (1) the victim's incapacity to consent and (2) that the accused knew or reasonably should have known of that incapacity. A retired Army military judge opined that the requirement that the accused knew or should have known of the victim's incapacity to consent should remain as a required element of sexual assault.[133] A senior Army prosecutor testified that this will be a required item of proof whether it is a stated element or it is raised as a defense. In its current form, the statute simply takes the defense of mistake of fact and incorporates it into Article 120(b)(2)–(3) by making it a required element. In other words, an accused cannot be both reasonably aware of the victim's incapacity and reasonably mistaken that the victim consented. If this requirement were removed, an accused could still raise mistake of fact as a defense.[134] Likewise, a senior Air Force prosecutor stated that the requirement that the accused "knows or reasonably should know" of the victim's incapacity to consent is properly included as part of Article 120(b)(2), (b)(3)(A), and (b)(3)(B), UCMJ. He believes it strikes the proper balance between criminalizing sexual acts (as well as sexual contacts through Art. 120(d), UCMJ) against victims who are in a condition making them incapable of consent and sparing from unfair punishment Service members who were both honestly and reasonably mistaken about that status. In courts-martial involving evidence of such a mistake of fact, the accused will appropriately be held to the standard of a reasonably careful, ordinary, prudent, and sober adult under the circumstances at the time of each offense.[135] A former Marine prosecutor and defense counsel who is now a civilian counsel stated that the government should have to prove the accused had some knowledge that the victim was incapable of consenting.[136]

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[132] JPP INITIAL REPORT 35 (Feb. 2015).

[133] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

[134] *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

[135] *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

[136] *Transcript of JPP Subcommittee Meeting* 391 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

Two federal circuit courts of appeal have held that in prosecutions under 18 U.S.C. § 2242, the government must prove both that the victim was incapacitated and that the accused knew of this incapacity (the scienter requirement).[137]

There were no presenters before the Subcommittee who suggested amending this section of Article 120.

C. Conclusion: Although some testimony was presented to the JPP that these subsections of Article 120 impose an additional mens rea requirement on the government in prosecutions for sexual assault and abusive sexual contact, this scienter element of proof is necessary, and it is also required under the federal criminal code in Title 18, U.S.C. Section 2242 (Sexual abuse). That section of the federal criminal code punishes anyone who knowingly:

> (1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or
>
> (2) engages in a sexual act with another person if that other person is—
>
> > (A) incapable of appraising the nature of the conduct; or
> >
> > (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.

The Subcommittee finds persuasive the federal circuit courts' rationale for requiring that the government prove not just that the accused engaged in a sexual act, but also that the accused knew the victim was incapacitated when doing so.[138] For instance, the Eighth Circuit in *United States v. Bruguier* reasoned that to do otherwise would, among other things, "disregard the bedrock American tradition" of requiring this scienter element to be proven in rape and sexual assault prosecutions involving an incapacitated victim, and it would make the crime one where strict liability is imposed for the act alone.[139]

The Subcommittee additionally considered the difference in the scienter requirements between Article 120(b)(2)–(3) and 18 U.S.C. § 2242. The federal criminal code requires proof that an accused knew of a victim's incapacity to consent, whereas Article 120(b)(2)–(3) permits conviction when an accused either knew or "reasonably should have known" of the victim's incapacity to consent. The Subcommittee determined that the standard established by Congress in Article 120(b)(2)–(3) is neither unclear nor ambiguous; therefore, the Subcommittee does not recommend changes to the standard.

Two members of the Subcommittee concluded that Service members should not face the severe consequences of conviction under Article 120(b)(2) and (3) in the absence of the same culpability required for convicting a civilian under the same circumstances. Therefore they would

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[137] *See, e.g., U.S. v. Bruguier*, 735 F.3d 754, 774 (8th Cir. 2013); *United States v. Peters*, 277 F.3d 963, 967–68 (7th Cir. 2002). *See also United States v. Aksal*, 2013 U.S. Dist. LEXIS 176947 (D. N.J. Dec. 17, 2013).

[138] *Bruguier*, 735 F.3d at 774.

[139] *Id.* at 772–73.

recommend changing Article 120(b)(2) and (3) to require, as under 18 U.S.C. § 2242, that the accused have knowledge of the victim's incapacity to consent. Under federal law, of course, knowledge includes willful blindness, a substantial means for assuring punishment in cases of culpable misconduct.

In sum, the Subcommittee determined that an accused's knowledge of a victim's incapacity to consent should remain a required element of sexual assault under Article 120(b)(2) and 120(b)(3).

D. Recommendation: The Subcommittee does not recommend changing Article 120(b)(2) or Article 120(b)(3).

11. Should the offense of "indecent act" be added to the UCMJ as an enumerated offense?

A. JPP Rationale for Referring This Issue to the Subcommittee. The UCMJ offense of "indecent acts with another" traditionally proscribed a variety of sexual misconduct that was not otherwise prohibited, such as consensual sexual intercourse in the presence of others and sex acts with an animal or a corpse. The 2007 amendment to Article 120 moved "indecent acts with another" from Article 134 to Article 120 and eliminated the element of the conduct as prejudicial to good order and discipline or discrediting the Service. The 2012 amendment to Article 120, however, removed the offense entirely. Currently, "indecent act" is not an enumerated offense under the UCMJ.

The JPP received testimony that the statute should be amended to restore indecent acts as an enumerated offense. The prosecution may still charge an indecent act as a general disorder offense under Article 134, but it must prove as an additional element that the conduct was prejudicial to good order and discipline or discredited the Service. In addition, the maximum punishment for a general disorder Article 134 offense is four months' confinement and forfeiture of two-thirds pay per month for four months, whereas the maximum punishment for an indecent act charged under the 2007 version of Article 120 was up to five years' confinement, forfeiture of all pay and allowances, and a dishonorable discharge.

During deliberations, members of the JPP agreed that additional review was necessary to consider whether indecent acts should be restored as an enumerated offense, and the JPP referred this issue to the Subcommittee for further analysis.[140]

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended that this offense be added back into the Uniform Code of Military Justice. A retired Marine Corps trial and appellate judge testified that this offense should be put back in the UCMJ because, in his experience, "the breadth and amount of [indecent] things that younger generations will do today that are completely incompatible with what the public believes the military culture is needs to be back in there."[141] A senior Army prosecutor stated that this offense should be added back into the code, and suggested that the tougher decision is between putting it into Article 120 versus having the President add it back to Article 134's enumerated offenses.[142] In his view, putting the offense under Article 120 relieves the government of having to prove that the conduct was Service discrediting or prejudicial to good order and discipline, which is an additional element of proof for an Article 134 offense that is not required under Article 120.[143] The importance of this, he believes, is not that it saves the government effort; rather, it is that indecent acts could then be a lesser-included offense of other Article 120 crimes.[144] If it is an Article 134 offense, the additional element of proof prevents its use as a lesser offense.[145] And a senior Air Force prosecutor testified that an offense of indecent acts should be added back into the code, although it could be

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[140] JPP INITIAL REPORT 36 (Feb. 2015).

[141] *Transcript of JPP Subcommittee Meeting* 200–01 (Apr. 9, 2015) (testimony of Lieutenant Colonel Quincy Ward, U.S. Marine Corps (Ret.)).

[142] *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

[143] *Id.*

[144] *Id.*

[145] *Id.*

placed under either Article 120 or Article 134.[146] He believes that nonconsensual sexual encounters regularly include elements of abuse that are not well captured within the present statutory scheme; if this offense is reintroduced into the code, investigators and trial practitioners at all levels could be aware of its availability when faced with fact patterns that appear to fall under the category of sexual assault but do not satisfy the elements of any current offense. In his view, the fair administration of military justice by the consistent charging of these crimes in similar fact patterns would benefit significantly if indecent acts were added back into the UCMJ as an enumerated offense.[147]

One Subcommittee member, in material presented to the Judicial Proceedings Panel, recommended adding this offense back into Article 120 in order to avoid the additional element of proof under Article 134.[148]

Two presenters recommended no change on this issue. A retired Army military judge stated that the offense of "indecent act," which existed in the statute between 2007 and 2012, should not be added as an enumerated offense under Article 120.[149] Most of what was in that offense between 2007 and 2012 has been moved to Article 120c(a). The remainder of indecent acts that should be criminalized and are not covered by Articles 120, 120b, 120c, or 125 can fall within Article 134, as does the offense of indecent language. He suggested that if the President thinks it warrants being specifically enumerated as an offense under Article 134 in part IV of the *Manual for Courts-Martial*, then the President can accomplish that enumeration by executive order, which is how indecent acts were handled in the past. And a civilian practitioner and former Marine Corps prosecutor and defense counsel suggested that indecent conduct can currently be prosecuted as a general offense under Article 134.[150]

C. Conclusion: The Subcommittee concluded that adding indecent acts to the UCMJ as an enumerated offense (i.e., a statutory offense enumerated in Title 10 of the U.S. Code) is unwarranted. For the great majority of the UCMJ's history, "indecent acts" were punishable as a specified offense under Article 134, requiring a showing that the conduct was either prejudicial to good order and discipline or of a nature to discredit the Armed Forces. An enumerated offense under Article 120 would require no such showing, which could result in overbroad application of the offense. The Subcommittee is aware that the Department of Defense has proposed an Article 134 offense in a recent draft executive order that addresses "Indecent Conduct," pursuant to the President's authority under UCMJ Article 56. The Subcommittee takes no position on the contents of that proposal.

D. Recommendation: The Subcommittee does not recommend adding the offense of "indecent act" to the UCMJ as an enumerated offense under Article 120. The Subcommittee's recommendation does not extend to offenses specified by the President under Article 134 of the UCMJ.

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[146] *Transcript of JPP Subcommittee Meeting* 134–35 (May 7, 2015) (testimony of Major Mark Rosenow, U.S. Air Force).

[147] Id.

[148] Dean Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, 448–51 (2014).

[149] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

[150] *Transcript of JPP Subcommittee Meeting* 391–92 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

12. Is the current practice of charging inappropriate relationships or maltreatment under articles of the UCMJ other than Article 120 appropriate and effective when sexual conduct is involved?

A. JPP Rationale for Referring This Issue to the Subcommittee. Inappropriate, consensual sexual relationships between instructors and recruits are currently charged as a violation of Article 92, UCMJ. The maximum punishment that may be imposed at a court-martial for a violation of this provision is a dishonorable discharge (or dismissal for an officer), forfeiture of all pay and allowances, and confinement for two years. Coercive relationships may also be charged, depending on the specific facts of the offense, under Article 93, maltreatment; Article 128, assault; or Article 134, conduct that discredits the Service or is prejudicial to good order and discipline. As further explained with respect to issue 13, sometimes behavior occurring within the context of these prohibited relationships is already chargeable and charged under Article 120 as well.

Those who testified before the JPP against amending Article 120 to cover these types of sexual relationships highlighted the articles and regulations that already prohibit inappropriate sexual relationships. Numerous witnesses, including prosecutors, staff judge advocates, military justice experts, a civilian defense counsel, and the Army's Judge Advocate General, told the JPP that current UCMJ punitive articles and regulations sufficiently criminalize sexual relationships between senior officials and subordinates, trainers and trainees, and recruiters and recruits, contending that the statute does not require further revision.

Several other witnesses, however, told the JPP that prosecuting offenses of senior–subordinate relationships that involve elements of coercion under punitive articles other than Article 120 is not sufficient, because convictions for violating these other punitive articles generally do not require sex offender registration. They contend that such offenses should be charged and viewed as sex offenses, because while a sexual relationship between a senior and a subordinate may appear consensual, the inherently coercive nature of the relationship prevents the subordinate from rendering freely given consent.

Given the opposing views between presenters before the JPP regarding whether the current practice of charging inappropriate relationships or maltreatment under articles of the UCMJ other than Article 120 is appropriate and effective when sexual conduct is involved, the JPP referred this issue to the Subcommittee for further evaluation.[151]

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee stated that the current practice of charging inappropriate sexual relationships or maltreatment under Articles 92 or 93 is appropriate and effective when consensual sexual conduct is involved. A senior Marine Corps prosecutor testified that the current method of charging inappropriate sexual relationships under Articles 92 or 93 is adequate.[152] A senior Army prosecutor testified that the present framework is workable and suggested adding a new Article 92 offense for any training instructor who has a sexual relationship with a recruit.[153] A senior Navy prosecutor and former defense counsel testified that the current version of Article 120 is sufficient to

[151] JPP INITIAL REPORT 38–43 (Feb. 2015).

[152] *Transcript of JPP Subcommittee Meeting* 12–13 (Aug. 27, 2015) (testimony of Major Adam King, U.S. Marine Corps).

[153] *Transcript of JPP Subcommittee Meeting* 19–22 (Aug. 27, 2015) (testimony of Major Tyler Heimann, U.S. Army).

prosecute sexual assault and contact crimes.[154] In cases in which Article 120 is charged and the government is arguing that the accused placed the victim in fear, he believes that Article 120 allows a prosecutor to make a fact-specific prosecution and to make an argument as to why the language used by the accused was sufficient to put that person in fear and give them a reasonable belief that "what they said was going to happen, would happen."[155] And a senior Coast Guard prosecutor who has also served as a staff judge advocate and military judge concurred that the current practice of prosecuting consensual trainer–trainee cases under Article 92 is sufficient.[156]

Numerous defense counsel also expressed their belief that the current practice of charging inappropriate relationships or maltreatment under articles of the UCMJ other than Article 120 is appropriate and effective when consensual sexual conduct is involved. A senior Air Force appellate defense counsel testified that the current structures of the UCMJ, specifically Article 120, are fully capable of handling sexual misconduct within the training environment.[157] A Navy defense counsel reiterated that the current practice of charging under Articles 92, 93, or 120 allows prosecutors the flexibility needed when charging these types of cases.[158] And a Marine defense counsel who has previously served as a prosecutor stated that Article 92 is sufficient when charging sexual relationships between trainers and trainees that do not fit under Article 120.[159]

C. Conclusion: The current practice of charging inappropriate relationships as a violation of a lawful general order or maltreatment under articles 92 or 93 of the UCMJ can be appropriate and effective when consensual sexual conduct is involved.

D. Recommendation: The Subcommittee does not recommend any changes to the current practice of charging inappropriate sexual relationships that cannot be charged under Article 120 as a violation of Articles 92 and/or 93.

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[154] *Transcript of JPP Subcommittee Meeting* 25 (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Robertson, U.S. Navy).

[155] *Transcript of JPP Subcommittee Meeting* 25 (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Robertson, U.S. Navy).

[156] *Transcript of JPP Subcommittee Meeting* 28–30 (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Gullo, U.S. Coast Guard).

[157] *Transcript of JPP Subcommittee Meeting* 123 (Aug. 27, 2015) (testimony of Captain Lauren Shure, U.S. Air Force).

[158] *Transcript of JPP Subcommittee Meeting* 128 (Aug. 27, 2015) (testimony of Lieutenant Paul Hochmuth, U.S. Navy).

[159] *Transcript of JPP Subcommittee Meeting* 121 (Aug. 27, 2015) (testimony of Captain Charles Olson, U.S. Marine Corps).

13. Does the 2012 version of the UCMJ afford prosecutors the ability to effectively charge coercive sexual relationships or those involving abuse of authority under Article 120?

A. JPP Rationale for Referring This Issue to the Subcommittee. Any case involving overt force or threat of force may be charged as an offense under Article 120. But for cases that involve coercive sexual relationships without overt force, the ability to charge conduct as a criminal offense under Article 120 has been diminished by amendments to the statute. Under the pre-2007 version of Article 120, cases without overt force relied on the doctrine of constructive force—an alternative legal theory that recognizes use of threats and intimidation to gain control or prevent resistance as a type of force. Military courts further developed this theory to address instances of clearly nonconsensual sexual acts—especially between military members with rank disparity—when there was no use of overt physical force. The necessary force was found to be constituted by fear, coercion, or abuse of authority. However, the mere existence of a sexual relationship between individuals of a different rank was not alone enough to sustain a conviction under Article 120 of the UCMJ. Under the constructive force doctrine, military appellate courts determined that the victim's lack of consent must be manifest and/or the accused must have explicitly used the difference in rank to create a situation of dominance and control.

The 2012 version of Article 120 does not contain language that specifically addresses the use of military rank to threaten or coerce, without force, an individual into a sexual act or sexual contact. Some witnesses told the JPP that the current statutory language in Article 120 does not clearly criminalize sexual relationships between senior personnel and their subordinates resulting from coercion and/or abuse of authority when force and lack of consent are not overtly present. Two witnesses before the JPP described the difficulty of charging coercive sexual relationships as sexual assault offenses under Article 120(b)(1)(A), a sexual act accomplished through fear of wrongful action, noting that the statutory language was ineffective for such cases. The witnesses recommended amending Article 120 to specifically encompass situations in which senior Service members use their position of authority to coerce a subordinate into a sexual act or contact. Given the opposing views of the presenters before the JPP, the JPP referred this issue to the Subcommittee for further evaluation.[160]

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee stated that the 2012 version of Article 120 provides military prosecutors the ability to effectively charge coercive sexual acts or contacts involving the abuse of rank or authority. A senior Coast Guard prosecutor testified that the current version of Article 120 is sufficient to effectively charge coercive sexual misconduct involving the abuse of authority.[161] A senior Army defense counsel who previously served as a prosecutor at an Army training command testified that in his experience, even consensual sexual acts or contacts between trainers and trainees were prosecuted under an appropriate article and the offenders punished and held publicly accountable.[162] A senior Marine Corps defense counsel and former prosecutor testified that the current version of Article 120 gives prosecutors sufficient ability to charge coercive sexual relationships involving the abuse of authority.[163] A senior Air Force appellate defense counsel testified that the current version of Article

[160] JPP INITIAL REPORT 38–43 (Feb. 2015).

[161] *Transcript of JPP Subcommittee Meeting* 28–31 (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Gullo, U.S. Coast Guard).

[162] *Transcript of JPP Subcommittee Meeting* 112–15 (Aug. 27, 2015) (testimony of Major Ryan Wardle, U.S. Army).

[163] *Transcript of JPP Subcommittee Meeting* 121 (Aug. 27, 2015) (testimony of Captain Charles Olson, U.S. Marine Corps).

120 is fully capable of handling sexual misconduct cases that arise in the training environment, and no changes are necessary.[164] A senior Navy defense counsel also testified that the current version of Article 120 is both effective and appropriate and provides prosecutors the flexibility they need in charging this type of sexual misconduct.[165]

Numerous staff judge advocates who advise commanding officers at entry-level training facilities regarding investigations and prosecution of sexual assault allegations testified in accord with the majority of the presenters before the Subcommittee. For instance, an Air Force staff judge advocate testified that the current versions of Article 92 and Article 120 can be used to effectively prosecute trainer sexual misconduct.[166] She believes that other articles of the UCMJ, such as Article 93 (maltreatment and cruelty), Article 128 (assault, simple assault, and battery), or 134 (general disorders), provide the flexibility to charge appropriately depending on the unique facts of each individual case.[167] A senior Marine Corps staff judge advocate legal advisor for an entry-level training commanding officer testified that the current versions of Articles 92 and 120 are sufficient to hold Marines accountable for sexual misconduct in the entry-level training environment.[168] And a senior Coast Guard staff judge advocate legal adviser to the commanding officer at an entry-level training installation testified that the current practice of charging other articles, primarily Article 92, is sufficient in capturing the criminality of any given fact pattern.[169] He also told the Subcommittee that the current version of Article 120 gives prosecutors the ability to adequately prosecute these types of cases.[170]

C. Conclusion: The Subcommittee concluded that in some cases Article 120, as well as other provisions in the UCMJ, provides prosecutors with an effective means of charging coercive sexual misconduct.[171] However, because such relationships—especially those that occur in the entry-level training environment—can involve subtle forms of coercion not easily captured under the current structure of Article 120, such misconduct could be better addressed via the proposed Article 120(b)(1)(E).

D. Recommendation: The Subcommittee recommends no changes to Article 120(b)(1)(A), but will recommend that a new subsection be added to better address coercive sexual relationships or those involving abuse of authority. See Issue 15.

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[164] *Transcript of JPP Subcommittee Meeting* 123 (Aug. 27, 2015) (testimony of Captain Lauren Shure, U.S. Air Force).

[165] *Transcript of JPP Subcommittee Meeting* 128 (Aug. 27, 2015) (testimony of Lieutenant Paul Hochmuth, U.S. Navy).

[166] *Transcript of JPP Subcommittee Meeting* 189 (Aug. 27, 2015) (testimony of Colonel Brynn Morgan, U.S. Air Force).

[167] *Id.*

[168] *Transcript of JPP Subcommittee Meeting* 194 (Aug. 27, 2015) (testimony of Lieutenant Colonel Brett Wilson, U.S. Marine Corps).

[169] *Transcript of JPP Subcommittee Meeting* 198 (Aug. 27, 2015) (testimony of Lieutenant Commander Paul Casey, U.S. Coast Guard).

[170] *Id.* at 199.

[171] *See generally Transcript of JPP Subcommittee Meeting* 385–88 (Oct. 22, 2015).

14. Should the definition of "threatening or placing that other person in fear" be amended to ensure that coercive sexual relationships or those involving abuse of authority are covered under an existing Article 120 provision?

> Current definition of "threatening or placing that other person in fear" in Article 120(g)(7) of the UCMJ:
>
> (7) *Threatening or placing that other person in fear.* The term "threatening or placing that other person in fear" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.

A. JPP Rationale for Referring This Issue to the Subcommittee. The definition of "threatening or placing that other person in fear" used in the 2012 version of Article 120 is less encompassing than the 2007 definition. The JPP agrees that as a result, the 2012 version of Article 120 does not sufficiently criminalize sexual relationships between senior and subordinates when force or the threat of force is not overt. Given this concern, the JPP referred this issue to the Subcommittee for further evaluation.[172]

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended amending the definition of "threatening or placing that other person in fear" to ensure that coercive sexual relationships or those involving abuse of authority are better covered under an existing Article 120 provision. A senior Air Force appellate government counsel testified that the current definition is not expansive enough, and she recommended going back to the definition of threatening or placing in fear from the 2007 version of Article 120.[173] She offered a single caveat: that the definition should not include promises to positively affect a person's career.[174] A senior Marine Corps prosecutor testified that while it is not necessary to amend the statutory definition of "threatening or placing that other person in fear," the bench instructions on this definition need to be modified to address the fact scenario in which an accused coerces a victim into a sexual act or contact by abusing his or her military rank or authority.[175] A senior Coast Guard prosecutor testified that this definition "falls short," simply because "when we define wrongful action—that gets a little gray."[176] From a prosecutor's standpoint, he believes that the military judge should be equipped to provide instructions that are definitive on the law and that can be followed by the court-martial panel members. Like several other presenters before the Subcommittee, he suggested looking back to the 2007 version of Article 120 and its definition for guidance.[177] A senior Air Force appellate defense counsel testified that the current definition should be modified along the lines of the definition set forth in the 2007 version of Article 120.[178] And a senior Navy defense counsel recommended that the concerns regarding the definition of "threatening or placing that other

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[172] JPP INITIAL REPORT 41–43 (Feb. 2015).

[173] *Transcript of JPP Subcommittee Meeting* 6 (Aug. 27, 2015) (testimony of Major Mary Ellen Payne, U.S. Air Force).

[174] *Id.* at 7–8.

[175] *Transcript of JPP Subcommittee Meeting* 14–15 (Aug. 27, 2015) (testimony of Major Adam King, U.S. Marine Corps)

[176] *Transcript of JPP Subcommittee Meeting* 31 (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Gullo, U.S. Coast Guard).

[177] *Id.* at 31–32.

[178] *Transcript of JPP Subcommittee Meeting* 123 (Aug. 27, 2015) (testimony of Captain Lauren Shure, U.S. Air Force).

person in fear" be addressed by modifying the bench instructions to align more closely with the definition contained in the 2007 version of Article 120.

Staff judge advocate legal advisers to training commanding officers also agreed that the definition needs modification. A senior Air Force staff judge advocate to a training commanding officer testified that the definition is too narrow and should be expanded to include a promise of positive action in return for sexual acts or contact.[179] A Marine Corps staff judge advocate to the commanding officer of entry-level training testified that this definition needs to be improved by referring back to the previous definition in the 2007 version of Article 120, which provided the specific example of an accused who uses or abuses his or her military position, rank, or authority to obtain sexual acts or contact from a victim.[180]

Conversely, one senior Navy prosecutor testified that the definition of "threatening or placing that other person in fear" in Article 120(g)(7) is sufficient and allows the prosecutor to make a fact-specific prosecution and an argument as to why the language used by the accused was sufficient to put that person in fear and give them a reasonable belief that "what they said was going to happen, would happen."[181] He testified that in situations in which the accused has not made any express threats or taken any overt actions that would help to corroborate a threat of wrongful action, he can still prosecute that fact pattern under Article 120(b)(1)(B) or 120(d) by alleging that the act or contact was committed without the consent of the victim.[182]

C. Conclusion: The Subcommittee concluded that if the proposed Article 120(b)(1)(E) is adopted (see issue 15), the definition of threatening or placing another person in fear does not need to be amended with respect to coercive sexual acts or coercive sexual contact.[183]

D. Recommendation: No change.

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[179] *Transcript of JPP Subcommittee Meeting* 190 (Aug. 27, 2015) (testimony of Colonel Brynn Morgan, U.S. Air Force).

[180] *Transcript of JPP Subcommittee Meeting* 194–95 (Aug. 27, 2015) (testimony of Lieutenant Colonel Brett Wilson, U.S. Marine Corps).

[181] *Transcript of JPP Subcommittee Meeting* 25 (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Robertson, U.S. Navy).

[182] *Id.* at 39–40.

[183] *See generally Transcript of JPP Subcommittee Meeting* 385–88 (Oct. 22, 2015).

15. Should a new provision be added under Article 120 to specifically address coercive sexual relationships or those involving abuse of authority?

A. JPP Rationale for Referring This Issue to the Subcommittee. The "Report on Protections for Prospective Members" stated that a new UCMJ article or an additional provision under Article 120 was not required because "statutes and regulations are in place to hold offenders appropriately accountable when prospective and new members of the military are victimized by service members who exercise control over them."[184] Given the JPP's concerns regarding whether the current methods of charging coercive sexual misconduct committed by abuse of rank or authority under Article 92, 93, or 120 are effective, the JPP referred this issue to the Subcommittee for further analysis.[185]

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended against a new provision under Article 120 to specifically address coercive sexual relationships or those involving abuse of authority. Those presenters noted that when cases arise in which an alleged victim states he or she was coerced into engaging in a sexual act or sexual contact with a superior, this fact pattern is currently charged as a violation of Article 120(b)(1)(A) for threatening or placing the victim in fear of wrongful action.

C. Conclusion: Although most presenters before the Subcommittee recommended against adopting a new provision to specifically address coercive sexual relationships or offenses involving abuse of authority, the Subcommittee is concerned that the present statute removed language from the 2007 version of Article 120 that specifically addressed the abuse of position, rank, or authority. This concern is especially acute when it analyzes offenses that have arisen in the entry-level training environment which have been the subject of so much recent public scrutiny and which often lack overt, direct threats of wrongful action, involving instead more subtle elements of coercion. Accordingly, to address this concern and make it abundantly clear that in cases in which an accused has used his or her position, rank, or authority to coerce a victim into engaging in a sexual act or sexual contact, the Subcommittee believes that a new subsection should be added under Article 120(b)(1).[186]

D. Recommendation: Article 120(b)(1) should be amended to include a new subparagraph (E): "by using their position, rank, or authority to secure compliance by the other person."

The new Article 120(b)(1)(E) would read as follows:

(b) Sexual assault. Any person subject to this chapter who—

(1) commits a sexual act upon another person

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[184] U.S. DEPT. OF DEF., REPORT ON PROTECTIONS FOR PROSPECTIVE MEMBERS AND NEW MEMBERS OF THE ARMED FORCES DURING ENTRY-LEVEL PROCESSING AND TRAINING 2 (MAY 2014) [HEREINAFTER U.S. DEPT. OF DEF., REPORT ON PROTECTIONS FOR PROSPECTIVE MEMBERS], available at http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140919/29_ReportOnProtectionsForProspectiveMembers_DoD_2014.pdf.

[185] JPP INITIAL REPORT 38–43 (Feb. 2015).

[186] *See generally Transcript of JPP Subcommittee Meeting* 385–88 (Oct. 22, 2015).

(E) by using position, rank, or authority to secure compliance by the other person

is guilty of sexual assault and shall be punished as a court-martial shall direct.[187]

[187] *See* Enclosure 1.

16. Should sexual relationships between basic training instructors and trainees be treated as strict liability or per se illegal offenses under Article 120?

A. JPP Rationale for Referring This Issue to the Subcommittee. One member of Congress told the JPP that the issue of consent was paramount during recent courts-martial of military training instructors who were accused of sexually assaulting trainees at Lackland Air Force Base, Texas. She noted that many of the instructors acknowledged sexual relationships with the trainees but argued at trial that the relationships were consensual and therefore not criminal. She stated that on the basis of this defense, many of the instructors were found not guilty of sexual offenses but guilty of lesser offenses that did not carry the collateral consequence of having to register as a sex offender. From these outcomes, she concluded that the UCMJ and Article 120 do not properly deal with military training environments, and she declared, "I believe there should be strict liability." She also told the JPP that current military regulations discourage victims from reporting sexual assaults resulting from abuse of authority, because they leave victims subject to possible UCMJ action for engaging in consensual relationships with instructors.[188]

In law, strict liability is liability that does not depend on intent to harm. Instead, it is based on the breach of an absolute duty to make something safe. In this context, strict liability would make the trainer who engages in a sexual act with a trainee guilty of a sexual assault owing solely to his or her position of trust and authority as it relates to the victimized subordinate. The assumption of this legal theory is that trainers of military personnel have an absolute duty to make safe every aspect of the training environment—from equipment integrity to command structure and interpersonal relationships. This point of view holds that any deviation from this standard would be an affront to the authority placed in those leaders and would cause trainees to distrust the immediate chain of command and military leadership as a whole.

The JPP heard from numerous witnesses who recommended against a strict liability or per se illegal standard that would remove any consideration of the trainer's intent or an alleged victim's consent. Witnesses contended that such a standard would be overbroad, criminalize truly consensual relationships, and result in unjust outcomes. Other witnesses reasoned that the UCMJ already criminalizes such conduct, that the current charging mechanisms appropriately cover abuses of power in training environments, and that an additional punitive provision is not necessary. Given these opposing views, the JPP referred this issue to the Subcommittee for further evaluation.[189]

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended against treating sexual relationships between training instructors and trainees as per se illegal or strict liability offenses under Article 120. The consistent theme sounded by those voicing this position was twofold: (1) the present methods for prosecuting these types of offenses under Article 92 are sufficient to hold military training instructors accountable, and (2) it would be unjust to make consensual sexual relationships between trainers and trainees a registrable sex offense, when no such registration results from similar consensual sexual relationships in the civilian community.

One senior Air Force prosecutor and appellate government counsel stated that she is opposed to making these offenses per se illegal or strict liability because (1) it is overly paternalistic to tell

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[188] *Transcript of JPP Public Meeting* 128 (Sept. 19, 2014) (testimony of Rep. Jackie Speier, D-14th CA).

[189] JPP INITIAL REPORT 41–43 (Feb. 2015).

adults they can never consent to sex while simultaneously telling them they must act and be treated like adults in the military; (2) labeling someone a sex offender for having a consensual sexual relationship with an adult is unjust; (3) these relationships are already criminalized under Article 92, and that is an effective deterrent and method of prosecution; and (4) per se/strict liability for what are factually consensual relationships is an overcorrection in sexual assault policy.[190] All other senior prosecutors from the Marine Corps,[191] Army,[192] Navy,[193] and Coast Guard[194] who testified at the same Subcommittee meeting agreed with this assessment.

Similarly, the defense counsel who testified before the Subcommittee during its August meeting recommended against treating sexual relationships between training instructors and trainees as per se illegal or strict liability offenses under Article 120. One senior Army defense counsel who has previously served as a senior prosecutor testified that it would be a mistake to adopt a strict liability or per se illegal standard making any sexual relationship between instructors and trainees a violation of Article 120 when the facts reveal consensual conduct. He testified that there have been cases in which an investigation found consensual sexual conduct between a trainer and trainee who both intended to remain in a relationship after the trainee's graduation.[195] A senior Marine defense counsel who also served previously as a prosecutor echoed these sentiments and stated that Article 92 is sufficient to criminalize and hold accountable trainers who have consensual sexual relationships with recruits.[196] An Air Force appellate defense counsel who represented several Air Force military training instructors in cases arising from the Lackland sexual abuse from 2011 to 2013 stated that the current version of Article 120 is sufficient to address nonconsensual sexual assault or contact cases arising in the training environment, and she recommended against adopting a strict liability or per se illegal standard.[197] And a Navy defense counsel and former prosecutor testified that the current version of Article 120 is sufficient to prosecute nonconsensual sexual offenses in the training environment; adopting a strict liability or per se illegal standard is unnecessary and would be inappropriate because in his experience the majority of sexual misconduct committed by instructors is mutual, consensual conduct.[198]

Numerous staff judge advocate legal advisers to training commanding officers reiterated the comments of the prosecutors and defense counsel. A senior Air Force staff judge advocate stated that she did not believe the adoption of a strict liability or per se illegal standard under Article 120 would improve prosecutions under Article 120.[199] She viewed the present framework of using Article 92, Article 93, or the general article under Article 134 as sufficient to address trainer sexual misconduct that does not rise to the level of nonconsent.[200] A senior Army staff judge advocate legal adviser

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[190] *Written Statement of Major Mary Ellen Payne, U.S. Air Force* (September 1, 2015).

[191] *Transcript of JPP Subcommittee Meeting* 11 (Aug. 27, 2015) (testimony of Major Adam King, U.S. Marine Corps).

[192] *Transcript of JPP Subcommittee Meeting* 20 (Aug. 27, 2015) (testimony of Major Tyler Heimann, U.S. Army).

[193] *Transcript of JPP Subcommittee Meeting* 24–26 (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Robertson, U.S. Navy).

[194] *Transcript of JPP Subcommittee Meeting* 28–30 (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Gullo, U.S. Coast Guard).

[195] *Transcript of JPP Subcommittee Meeting* 112–14 (Aug. 27, 2015) (testimony of Major Ryan Wardle, U.S. Army).

[196] *Transcript of JPP Subcommittee Meeting* 121 (Aug. 27, 2015) (testimony of Captain Charles Olson, U.S. Marine Corps).

[197] *Transcript of JPP Subcommittee Meeting* 122–27 (Aug. 27, 2015) (testimony of Captain Lauren Shure, U.S. Air Force).

[198] *Transcript of JPP Subcommittee Meeting* 127–31 (Aug. 27, 2015) (testimony of Lieutenant Paul Hochmuth, U.S. Navy).

[199] *Transcript of JPP Subcommittee Meeting* 188–89 (Aug. 27, 2015) (testimony of Colonel Brynn Morgan, U.S. Air Force).

[200] *Id.*

recommended against a strict liability or per se illegal standard under Article 120.[201] A Marine Corps staff judge advocate legal adviser to a training commanding officer stated that the typical method of prosecuting trainer sexual misconduct under Article 92 is sufficient to hold trainers accountable.[202] He therefore is not in favor of adopting any strict liability or per se illegal standard under Article 120.[203] And a Coast Guard staff judge advocate testified that the present practice of charging inappropriate sexual relationships between trainers and trainees under Article 92 is sufficient and there is no need to make such relationships a strict liability or per se illegal violation of Article 120.[204]

The legal advisers to the training commands also noted that recruits are given thorough training that even consensual relationships are inappropriate and illegal for both recruits and trainers and that recruits sign acknowledgment forms indicating their understanding of these regulations. They added that instructors already express fears in dealing with trainees and that continued over-criminalization would further erode the important mentoring relationship that must be created between instructors and recruits. [205]

At the July meeting, some former and current training commanders gave views differing from those of the prosecutors and legal advisers. One commanding general for an Army training command opined that making consensual sexual relationships per se illegal under Article 120 or a different article not currently used would provide commanders with an additional tool to deter this misconduct.[206] An Air Force general officer expressed views similar to those of the prosecutors and legal advisers. She was skeptical of making these offenses per se illegal under Article 120, but suggested modifying Article 120 so as to cover situations involving "constructive force" by instructors.[207] A Coast Guard flag officer commander testified that she supported "an expansion of Article 120 to be able to accommodate for this imbalance of power" between instructors and recruits.[208] And a Marine Corps commanding general stated that he is not opposed to strict liability in boot camp (entry-level training) alone, but in other contexts he believes that the present prosecution framework is sufficient.[209]

C. Conclusion: Consensual sexual relationships that occur between instructors and trainees in the environment of basic training should not be treated as either strict liability or per se illegal under Article 120. Service orders and regulations make these types of relationships per se illegal under Article 92, and they can be prosecuted with a maximum punishment of two years' confinement and a dishonorable discharge.

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[201] *Transcript of JPP Subcommittee Meeting* 191 (Aug. 27, 2015) (testimony of Colonel David Mendelson, U.S. Army).

[202] *Transcript of JPP Subcommittee Meeting* 194 (Aug. 27, 2015) (testimony of LtCol Brett Wilson, U.S. Marine Corps).

[203] *Id.* at 194–95.

[204] *Transcript of JPP Subcommittee Meeting* 198–200 (Aug. 27, 2015) (testimony of LCDR Paul Casey, U.S. Coast Guard).

[205] *Transcript of JPP Subcommittee Meeting* 233-34 (Aug. 27, 2015) (testimony of Colonel David Mendelson, U.S. Army).

[206] *Transcript of JPP Subcommittee Meeting* 271–76, 281 (July 22, 2015) (testimony of Major General Peggy Combs, U.S. Army).

[207] *Transcript of JPP Subcommittee Meeting* 291–92 (July 22, 2015) (testimony of Major General Gina Grosso, U.S. Air Force).

[208] *Transcript of JPP Subcommittee Meeting* 295 (July 22, 2015) (testimony of Rear Admiral Cari Thomas, U.S. Coast Guard).

[209] *Transcript of JPP Subcommittee Meeting* 301–03 (July 22, 2015) (testimony of Brigadier General Austin Renforth, U.S. Marine Corps).

D. Recommendation: The Subcommittee does not recommend that consensual sexual relationships between basic training instructors and trainees be treated as either strict liability or illegal per se under Article 120.

17. As an alternative to further amending Article 120, should coercive sexual relationships currently charged under other articles of the UCMJ be added to DoD's list of offenses that trigger sex offender registration?

A. JPP Rationale for Referring This Issue to the Subcommittee. In receiving testimony regarding the question of whether sexual relationships between basic training instructors and trainees should be treated as strict liability or per se illegal offenses under Article 120, presenters told the JPP that coercive sexual relationships charged under articles other than Article 120, such as Articles 92 and 93, do not result in an accused being registered as a sex offender after conviction. Accordingly, the JPP referred this issue to the Subcommittee for further analysis.[210]

B. Testimony and Information Received by the Subcommittee. None of the presenters before the Subcommittee recommended adding any offenses charged under articles other than Article 120 to DoD's list of offenses that trigger sex offender registration.

C. Conclusion: The Subcommittee concluded that cases in which sexual relationships are charged and prosecuted under Articles 92 and/or 93 should not be added to the Department of Defense's list of offenses that trigger sex offender registration. Before being reported as a sex offender, a military accused should be convicted of a qualifying sex offense involving lack of consent. Articles 92 and 93 do not involve sex crimes in which a sexual act or sexual contact has been committed without a victim's consent.

D. Recommendation: Sexual relationships currently charged under other articles of the UCMJ, including Articles 92 and 93, should not be added to DoD's list of offenses that trigger sex offender registration.

[210] JPP INITIAL REPORT 39–43 (Feb. 2015).

ENCLOSURE 1

Subcommittee's Proposed Revisions to Article 120

45. Article 120—Rape and sexual assault generally

a. *Text of statute.*

(a) Rape. Any person subject to this chapter who commits a sexual act upon another person by—

(1) using unlawful force against that other person;
(2) using force causing or likely to cause death or grievous bodily harm to any person;
(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
(4) first rendering that other person unconscious; or
(5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct;

is guilty of rape and shall be punished as a court-martial may direct.

(b) Sexual Assault. Any person subject to this chapter who—

(1) commits a sexual act upon another person ~~by~~

(A) by threatening or placing that other person in fear;
(B) without the consent of the other person;
~~causing bodily harm to that other person;~~
(C) by making a fraudulent representation that the sexual act serves a professional purpose; ~~or~~
(D) by inducing a belief by any artifice, pretense or concealment that the person is another person; or
(E) by using position, rank, or authority to secure compliance by the other person;

(2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious or otherwise unaware that the sexual act is occurring; or

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or
(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person

is guilty of sexual assault and shall be punished as a court-martial may direct.

(c) Aggravated sexual contact.

Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(d) Abusive sexual contact. Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(e) Proof of Threat. In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(f) Defenses. An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

(g) Definitions. In this section:

(1) Sexual act. The term "sexual act" means—

(A) ~~contact between the~~ penetration however slight of the penis ~~and~~ into the vulva or anus or mouth, ~~and for purposes of this subparagraph, contact involving the penis occurs upon penetration, however slight; or~~

(B) contact between the mouth and the penis, vulva, or scrotum or anus; or

(~~B~~C) the penetration, however slight, of the vulva or penis or anus ~~or mouth~~ of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) Sexual contact. The term "sexual contact" means—

~~(A)~~ touching, or causing another person to touch, either directly or through the clothing, the ~~genitalia~~ vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate or degrade any person or

~~(B) any touching, or causing another to touch, either directly or through the clothing, any body part of any person, if done~~ with an intent to arouse or gratify the sexual desire of any person.

Touching may be accomplished by any part of the body or an object.

~~(3) Bodily harm. The term "bodily harm" means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensutal sexual contact.~~

(3~~4~~) Grievous bodily harm. The term "grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.

(4~~5~~) Force. The term "force" means—

(A) the use of a weapon;

(B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or

(C) inflicting physical harm sufficient to coerce or compel submission by the victim.

(5~~6~~) Unlawful Force.—The term "unlawful force" means an act of force done without legal justification or excuse.

(6~~7~~) Threatening or placing that other person in fear. The term "threatening or placing that other person in fear" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.

(7~~8~~) Consent.

(A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance ~~or submission resulting from the use of force, threat of force, or placing another person in fear~~ does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved in the conduct at issue does ~~shall~~ not constitute consent.

(B) A sleeping, unconscious or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while und

er threat or in fear or under the circumstances described in subparagraph (C) or (D) of subsection (b)(1).

(C) ~~Lack of consent may be inferred based on the circumstances of the offense.~~ All the surrounding circumstances are to be considered in determining whether a person gave consent, ~~or whether a person did not resist or ceased to resist only because of another person's actions.~~

(8) Incapable of consenting. A person is "incapable of consenting" if that person does not possess the mental ability to appreciate the nature of the conduct or does not possess the physical or mental ability to make or communicate a decision regarding such conduct.

ENCLOSURE 2

Supplemental and Dissenting Commentary Concerning Subcommittee Recommendations, with Proposed New Article 120 Statute

by Laurie Rose Kepros

SUPPLEMENTAL AND DISSENTING COMMENTARY CONCERNING SUBCOMMITTEE RECOMMENDATIONS

by Laurie Rose Kepros

The JPP Subcommittee has reached consensus on several important improvements to Article 120 of the Uniform Code of Military Justice (UCMJ), the *Manual for Courts-Martial* (MCM), and *Military Judges' Benchbook* (*Benchbook*) which are set forth in its report. I write separately to identify ongoing problems with Article 120 that remain either unaddressed or inadequately addressed by the Subcommittee's recommendations and to urge further modifications. My comments discuss the following issues:

INTRODUCTION

It is undisputed that the just resolution of sexual offense allegations is a matter of utmost importance to those accused, to victims, and to the friends and family who care for them, as well as to the broader military community and society. Perhaps more than ever before, conviction of a sex crime is a wholly life-altering event. A Service member convicted of an offense under Article 120 may face not only the end of his or her military career but also potential terms of imprisonment up to and including a life sentence. Even if he or she is allowed to return to life in a civilian community, a sex offense adjudication will still have lifelong effects. In addition to requirements to comply with varied and complex state sex offender registration laws (or face additional criminal prosecutions and punishments), sex offense convictions trigger an ever-expanding list of punitive consequences in the community that affect both the offender and his or her family (whether or not the restriction is relevant to the facts of the underlying offense). Currently these collateral sanctions include housing and residency restrictions (which even keep people out of homeless shelters); GPS monitoring; employment, educational, and professional licensing prohibitions; bans on access to religious institutions; parental rights consequences (and sometimes a ban from entering a child's school); restrictions on food stamp benefits; anti-loitering provisions to discourage offenders from certain

locations; denial of housing and educational financial aid assistance; restrictions on library and computer/Internet usage (as well as on the use of private websites such as Facebook and dating websites such as Match.com); trick-or-treating prohibitions; special drivers' licenses and license plates; limitations on international travel; and even civil commitment.[1] With so much at stake, the military justice system must take great care to ensure that these internal and external consequences are not arbitrarily or unfairly imposed and that when Service members are accused of such offenses, they are afforded the full array of constitutional protections that they have spent their military careers defending.

A. REMAINING CONFUSION IN ARTICLE 120

At its June 25, 2015, meeting, the Subcommittee commenced a debate that was central to its overall deliberative process. At that time, the positions of the Subcommittee members as to whether to recommend statutory changes to Article 120, and whether to limit any recommendations to the seventeen issues identified by the JPP, ran the gamut. Some members invoked the position of witnesses who voiced objections to further amendments, noting that Article 120 had been revised three times already in recent years history and that the result has sometimes been complex prosecutions under multiple versions of the statute. Often, these witnesses advocated instead for changes in the *Benchbook* or MCM rather than Article 120, or suggested that if any statutory changes were absolutely necessary, they be as narrow as possible. For example, Subcommittee member Brigadier General James Schwenk stated: "I'll be the no-change person, and put the burden on everybody who believes change . . . needs to be made in the near-term to justify what's broken—if it ain't broke, don't fix it."[2] At the other end of the spectrum, I supported a rewrite of the statute. Yet General Schwenk also acknowledged: "I did hear there is a lot of confusion. I did hear that it would be a lot better if things were clarified."[3] As General Schwenk noted, the need for clarity arose repeatedly during testimony before the Subcommittee, with almost all witnesses ultimately recommending at least some minor change and with some witnesses urging larger-scale revisions.[4]

Notably, among the witnesses open to a broader reorganization of the statute was Major Aimee Bateman, an associate professor of criminal law at the Army's Judge Advocate General's (JAG) School.[5] Major Bateman estimated that in the past three years, she has taught a block of instruction on Article 120 about 50 times to almost 3,000 students, including reservists and those receiving her training through recorded classes.[6] Her trainees at the Army's JAG School include "brand-new newly commissioned, minted judge advocates," and her course is "one of the very first classes of instruction they get. They have been in the Army for about six weeks. They have been judge advocates for about six weeks."[7] She also trains judicial candidates from across all the Services, as well as

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[1] Notably, empirical research into many of policies has shown they do nothing to reduce sexual recidivism. In the case of the sex offender registry, some studies have even demonstrated that it *increases* sexual recidivism by socially isolating individuals and thus stripping away some of the most robust factors shown to protect against sexual re-offense. *See, e.g.*, J. J. Prescott & J. E. Rockoff. *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, J. OF LAW & ECONOMICS 54.1 (2011): 161–206, 161.

[2] *Transcript of JPP Subcommittee Meeting* 224 (June 25, 2015).

[3] *Id.* at 226.

[4] For instance, on April 10, 2015, Colonel Timothy Grammel, U.S. Army (Ret.), provided the Subcommittee with his extensive written *Suggested Amendments to Article 120.*

[5] *Transcript of JPP Subcommittee Meeting* 4 (May 7, 2015).

[6] *Id.* at 99.

[7] *Id.* at 6–7.

> a lot of judge advocates who are not in any way, shape, or form going to practice . . . criminal law . . . but they are staff judge advocates, they are leaders, they are managers, and teaching them and familiarizing them with the law, so that they can answer those questions [for] our very junior, inexperienced judge advocates. . . . I'll teach a lieutenant—again, they have been in the Army six weeks. I give them their hour of block instruction on Article 120. They go out to Fort Bragg, Fort Drum . . . and now they are the subject matter expert on Article 120 for anybody who crosses their path out in the field, which is a little . . . scary.[8]

According to Major Bateman, about half of the lawyers she teaches "are in very early stages of their [legal] career[s]" and, at the time of their introduction to Article 120, lack other professional experience navigating complex statutory schemes.[9]

Major Bateman provided numerous examples of sources of confusion to practitioners concerning Article 120. Hopefully, some of these concerns would be mitigated by adoption of the Subcommittee's recommendations. Yet she also pointed to structural problems in Article 120. For instance, she described difficulties that have arisen in understanding the role of consent in Article 120. Even judicial candidates have found the law to be unclear with respect to whether to instruct on consent-related defenses: "[I]f we are having trouble explaining this to 50 very smart prescreened—we want these people to sit on the bench and be trial judges and appellate judges, and they are having trouble kind of conceptualizing and capturing this and feel[ing] comfortable."[10]

It is unnecessary to wade deeply into Article 120 to find other examples, unaddressed by the Subcommittee's recommendations, of how unhelpful this statute can be in describing the parameters of criminal sexual behavior. Among them is the first offense described in Article 120(a)(1): "Any person subject to this chapter who commits a sexual act upon another person by using unlawful force against that other person is guilty of rape and shall be punished as court-martial may direct." "Unlawful force" is further defined in Article 120(g)(6) as "an act of force done without legal justification or excuse." Moreover, "Force" is specified as "(A) the use of a weapon; (B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or (C) inflicting physical harm sufficient to coerce or compel submission by the victim."

In light of these definitions, how is the reader to assess when or whether in the course of a sexual act an act of force may be done *with* legal justification? What is a legal justification or excuse for force in this context? What if the "force" is incidental to the "sexual act" itself? Is consent a legal justification for a forceful sexual act? If so, does it negate the element of "unlawful force" or is it an affirmative defense? In either event, what if there was consent to the sexual act but not the forceful act? Has the crime of rape been committed? It is unsurprising that experienced lawyers like the judicial candidates in Major Bateman's class struggled with these types of questions.

Helpfully, with respect to JPP issue 2, the Subcommittee has recommended that the MCM be amended to clarify the availability of the defenses of "consent" and "mistake of fact as to consent" for offenses under Article 120. Hence, it is reasonable to ask whether adoption of this Subcommittee recommendation alone would be sufficient to fix the problem identified in Major Bateman's testimony—that her class of judicial candidates was confused about the availability of consent

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[8] *Id.* at 7–8.

[9] *Id.* at 80.

[10] *Id.* at 37.

defenses. In fact, for that group of jurists or other military lawyers, an amendment to the MCM is a tangible improvement and will clarify the availability of those defenses. For non-attorney readers of Article 120, however, this clarification may remain invisible.

In contrast, in its recommendation concerning JPP issue 5, the Subcommittee wisely has rewritten the statutory language concerning the counterintuitive term of art "bodily harm" (which, as defined, requires no physical injury to the body). In pertinent part, the Subcommittee's recommendation on JPP issue 5 eliminates the term "bodily harm" and instead describes a new offense that is significantly more understandable on its face. The new Article 120(b)(1)(B) would read as follows:

> (b) Sexual assault. Any person subject to this chapter who—
>
> (1) commits a sexual act upon another person
>
> (B) without the consent of the other person;
>
> is guilty of sexual assault and shall be punished as a court-martial may direct.[11]

The Subcommittee's JPP issue 5 proposal, therefore, makes it clear to any reader that it is criminal to commit a sexual act upon another person without the consent of that person. The reader need not engage in a searching review of the MCM, *Benchbook*, or case law to have a basic understanding of the statutory language and what it forbids.

Fair notice is among the constitutional protections to be guaranteed in all criminal prosecutions. It must be clear what conduct is prohibited, and the forbidden behavior must be described with sufficient clarity that its alleged violation cannot be capriciously enforced. Due process requires that criminal statutes be defined "in a manner that does not encourage arbitrary and discriminatory enforcement."[12] This "more important aspect of vagueness doctrine" requires that the statute "'establish minimal guidelines to govern law enforcement'" rather than "'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"[13] Therefore, every effort should be made to make all of the sexual crimes described in Article 120 as clear and comprehensible as possible—and not just to lawyers, judges, or court-martial panel members but to everyone subject to prosecution under the UCMJ.

1. THE ARTICLE 120 AUDIENCE

Major Bateman's testimony revealed how, ultimately, all Service members look to Article 120 for guidance on how to appropriately conform behavior to the UCMJ. Major Bateman explained how her charge in teaching Article 120 reaches far beyond training lawyers to apply the statute to cases they are litigating. Rather, she must

> try to equip [her students] with kind of a baseline understanding of the law, so that they may be able to practice in a courtroom properly, but also be conversant on the law, because this isn't just talked about within our judge advocate community. As we all know, this is the topic of the day in command huddles . . . at the Chief of Staff of

[11] JPP SUBCOMMITTEE REPORT at 21.

[12] *Kolender v. Lawson,* 461 U.S. 352, 357 (1983).

[13] *Id.* at 358 (quoting *Smith v. Goguen,* 415 U.S. 566, 574–75 (1974)).

> the Army level, and all the way down, preventing sexual assault is the number one priority of the Army. So . . . it is talked about in all sorts of contexts and all sorts of forums outside the courtroom.[14]

Consequently, although the Subcommittee heard testimony from numerous military practitioners with prosecutorial, defense, and judicial experience, these lawyers are not the only Service members who are expected to take direction from Article 120. As noted by the Subcommittee, "because sexual assault prevention training for all Service members uses language from Article 120, vague terms may leave them confused about standards of behavior and expectations, raising an important policy interest."[15] Furthermore, it is unfair to expect Service members to suss out on their own counterintuitive interpretations of terminology that may lurk in the case law, *Benchbook*, MCM, or other legal references. Troublingly, Major Bateman was one of many military witnesses[16] who described a serious problem with how Article 120, unclear on its face, is being taught to Service members in the course of sexual assault prevention trainings:

> [T]he priority for the Chief of Staff of the Army and the Secretary of the Army is [to] prevent sexual assault, not [just to] prosecute it properly. Right? I mean, we want to prevent it on the front end. So the conversations are toward that end of this. So when can I have sex with someone then, or when can I approach somebody else to have sex and not be charged with a crime for it? So how do we explain that? And this is where I have heard people say everything from, well, you know, could you buy a car, or were you with [it] enough to get a tattoo, or, you know, even to the extent of the way they like to teach it in the field, the way commanders like to teach it, if you have one drink, you can't do anything, don't touch anybody. Right? That's clearly not a legal definition in any sense. Even lawyers, though, I have heard teach this as if you're too drunk to drive, you are too drunk to consent. [But] . . . we are not [in Article 120] imparting any sort of definitions from [DUI law].[17]
>
> The problem is when the law is articulated incorrectly in the prevention training, . . . we run into the problem of degrading the legitimacy of the law.[18]

2. ADDITIONAL CHANGES TO ARTICLE 120 REQUIRED DESPITE RECENT AMENDMENTS TO THE STATUTE

Major Bateman explained that currently three versions of Article 120 "are still in some respects active and still on the books . . . in that there is an unlimited statute of limitations."[19] Nevertheless,

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[14] *Transcript of JPP Subcommittee Meeting* 8 (May 7, 2015).

[15] JPP SUBCOMMITTEE REPORT at 13.

[16] *See, e.g., id.* at 212 ("Ma'am, we've seen that a couple of times where they've been told in SAPR training, you know, one drink means you can't consent."), 260 ("During *voir dire*, the members were asked this question, how many of you believe that if a person has one drink of alcohol, they cannot legally consent to any sexual activity? Out of the 12 panel members, nine raised their hand in the affirmative."), 349 ("I've sat through training where I've heard the 'one drink and you can't consent' line. When I was in processing at Joint Base Andrews, . . . one of the things I heard from a representative from the Sexual Assault Prevention Office was someone might not be able to consent after having one drink."), and 415 ("[I] heard 'after one drink you can't consent.'"); *see also Transcript of JPP Subcommittee Meeting* 271–72 (April 9, 2015)("[Y]ou get the takeaway being, stay so far away, one drink equals no consent. And then you get members sitting in the panel box that refuse to yield from that. And unfortunately you get trial judges that . . . try to drag them over . . . to get them rehabilitated. . . . The issue of consent [is big], how it's addressed during the training, and when it's at odds with . . . the definition of consent . . . in the Manual.").

[17] *Transcript of JPP Subcommittee Meeting* 40–41 (May 7, 2015).

[18] *Id.* at 102.

when questioned by JPP Chair and Subcommittee member Elizabeth Holtzman about whether the numerous recent statutory changes meant further substantial change should be avoided, Major Bateman shared her insights into why this was *not* a reason to avoid more statutory changes at this time:

> [A]n evolution of my perspective . . . is from what I have seen—whether it's formally changed by Congress or not—it is still changing and evolving. So we can't avoid the fact that—the way the instructions are changing. . . . [W]hen facts applie[d] to law make it into a courtroom, it is changing. So …I think appropriate measured changes would be good at this point because it is already—there is a level of confusion. There is a level of inconsistency potentially because of the way that people have adjusted to their understanding of the law through . . . pleading decisions and evidentiary instructions. In that regard, I don't think we should be scared of changing it because it is going to cause all sorts of . . . unrest in the force. It is already unrestful. So I think changes are okay and not to be strictly avoided at this point.[20]

Hence, in Major Bateman's view, because the decisions of appellate courts in actual cases will continue to interpret and reinterpret the statutory language, fear of change should not be a reason to refrain from making intentional clarifications to the law.

Similarly, the Subcommittee heard testimony from Colonel Terri Zimmermann on behalf of the Marine Corps Defense Services Organization.[21] Colonel Zimmermann is the reserve counterpart to the active duty Chief Defense Counsel in the Marine Corps and has been a Marine Corps judge advocate since 1993, litigating sexual assault cases as a prosecutor, an appellate military judge, and a defense counsel.[22] She also has a civilian criminal defense practice that is about 75% military, and she does both trial and appellate work.[23] In light of her experience with all versions of Article 120 as well as with civilian criminal statutes, Colonel Zimmermann urged the Subcommittee to consider the following in its deliberations:

> What is the purpose of the military justice system? . . . [O]ne of those purposes is to achieve justice. . . . It's to punish people who intentionally or with some culpable mental state take an action that we, as a society, deem as inappropriate and unlawful. It's not to punish people who do things, for the most part, by accident or mistake. . . . [O]ur criminal justice system is intended to identify people who break the law, punish them and deter other people from committing the same type of conduct. And so, I think it's really important to keep that in mind when we're talking about whether we tweak a statute, whether we rewrite a statute, what is the purpose of the statute? What kind of due process concerns do we have? What kind of notice concerns do we have? All of those factors, in my opinion, militate towards completely rewriting [Article 120].[24]

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[19] *Id.* at 5–6.
[20] *Id.* at 93–94.
[21] *Id.* at 219.
[22] *Id.*
[23] *Id.* at 219–20.
[24] *Id.* at 220–21.

Colonel Zimmermann further explained, consistent with Major Bateman's testimony, that changes to Article 120 are inevitable and thus should take the form of a complete statutory rewrite and not just "tweaks":

> This statute is a mess. It is just unworkable. It's too complicated. It's unwieldy and it's not fair. So, there is going to be some change. . . . And . . . people in the field are going to have to adjust. . . . In my view, it's appropriate for us to rewrite [Article 120] and get it correct, as correct as we can get it. Nothing's ever going to be perfect, I know that. But I think we ought to start from scratch and get it right and then people can adjust to that. I'm not too concerned about people saying, well, there are going to be four statutes in effect. Well, there's going to be four statutes in effect no matter what change is enacted. So, as opposed to tweaking, my recommendation is that we start from scratch.[25]

3. THE KEPROS PROPOSAL IN ATTACHMENT A

In the context of this confusion and need for clarification, I advocate for broader changes to Article 120 than the Subcommittee has endorsed, including a wholesale reorganization of the statute. To that end, in anticipation of the June 25, 2015, Subcommittee meeting, I drafted a new proposed Article 120 statute. My proposal is attached as Attachment A. The Subcommittee, persuaded by the concerns about more dramatic changes to Article 120, elected to approach any revisions more conservatively and not to undertake work on my proposal in its deliberative process. Consequently, Attachment A does not reflect the work of the Subcommittee in its June 25, 2015, or subsequent meetings and remains only a rough draft. I have nonetheless included it because it illustrates some of the current shortcomings within Article 120 that remain unaddressed and provides one suggestion as to how Article 120 may be made more coherent.

Although my proposal recommends numerous modifications to Article 120, the biggest change is conceptual. Notions of "consent" and "force" in Article 120 have become complicated through both military jurisprudence and statutory changes. As Ms. Holtzman commented during the Subcommittee's May 7, 2015, meeting,

> This is one of the worst statutes I have read in terms of drafting. . . . And so we have complicated issues. . . . [T]he fact that this statute tried to take consent out of the picture, and now consent has come back in, has created a kind of a pretzel approach. Everybody is twisting things around to kind of figure out how to get the language of the statute and the concept of consent in and how we do that.[26]

Ms. Holtzman further suggested to Major Bateman that for "some of the bigger issues, like dealing with consent, you can't just make an itty-bitty statutory change," and Major Bateman agreed.[27]

Hence, my proposal seeks to realign the terms "consent" and "force" with their commonly understood meanings; and rather than trying to pretend that consent is not relevant, I aim instead to create a statute in which, as many laypeople would intuitively assume, the baseline criminal behavior is a nonconsensual sexual touching. Then, that notion of "nonconsent" can also encompass a person

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[25] *Id.* at 222.

[26] *Id.* at 84.

[27] *Id.* at 85.

who is incapable of consenting for various reasons. Further, and consistent with most American criminal statutory schemes, this type of organization would permit the level of offense and potential penalties to increase to account for more aggravated conduct, such as the use of extreme violence or the deliberate introduction of intoxicants.

During her testimony, I asked Major Bateman if reorganizing Article 120 to make nonconsensual sexual touching the baseline crime would make sense. She confirmed that notwithstanding the 2007 and 2012 changes to Article 120,

> [W]hat we have ended up discovering over the last three years is consent is always relevant, it's always instructed on, and it always comes up. [N]ow that we have actually seen it play out, . . . I think it would make it cleaner to just affirmatively bring it back in the law explicitly. So I think that is, fundamentally, why I do agree with your proposal.[28]

Colonel Zimmermann concurred, noting that "the issue of consent is really the pivotal issue"[29] and expressing her agreement with the notion of creating a scheme in which a nonconsensual sexual touching was the baseline offense with "aggravating circumstances that can be added onto that" with "a graduated series of penalties for the conduct."[30]

Finally, reorganizing Article 120 so that principles of "consent" are central to criminality could eliminate the need for the continual creation of additional new subsections in the statute to try to describe every conceivable type of coercion, such as the Subcommittee's recommendation in response to JPP issue 15 to create a new Article 120(b)(1)(E) that would read as follows:

> (b) Sexual assault. Any person subject to this chapter who—
>
> (1) commits a sexual act upon another person
>
> (E) by using position, rank, or authority to secure compliance by the other person
>
> is guilty of sexual assault and shall be punished as a court-martial shall direct.[31]

If consent is defined so that it is valid only where it is "freely given" (as in the current definition) or "voluntary" (as suggested in Attachment A, following the recommendation of a witness[32]), consent cannot exist when rank or other authority is deployed to compel the other person into sexual activity. Consequently, such sexual abuse would be prosecutable as a nonconsensual act.

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[28] *Id.* at 83.

[29] *Id.* at 222–23.

[30] *Id.* at 229.

[31] JPP SUBCOMMITTEE REPORT at 44-45.

[32] *Transcript of JPP Subcommittee Meeting* 418 (May 7, 2015) (testimony of Mr. John Wilkinson, Æquitas—The Prosecutors' Resource on Violence Against Women).

B. JPP ISSUE 1: *IS THE CURRENT DEFINITION OF "CONSENT" UNCLEAR OR AMBIGUOUS?*

In responding to its mandate to consider this issue, the Subcommittee, in pertinent part, urges that the following language be used within the definition of "consent": "(A) . . . Lack of verbal or physical resistance does not constitute consent."[33] Simultaneously, the Subcommittee endorses retaining the following language from subsection (C) of the definition of "consent": "All the surrounding circumstances are to be considered in determining whether a person gave consent."[34]

Moreover, in its summary recommendation concerning issue 1, the Subcommittee states, "A lack of resistance would still be relevant for the fact-finder to consider along with all the surrounding circumstances, but the proposed change clarifies that a lack of resistance alone does not constitute consent."[35] In its complete recommendation, the Subcommittee further explains that "Although the Subcommittee believes evidence of resistance or the lack thereof to be relevant and admissible evidence for a fact-finder to consider, it is just one of the circumstances surrounding the offense and should be given no greater or lesser emphasis than any other circumstance in the text of the statute or elsewhere."[36]

Cooperative and voluntary sexual activity usually will involve a *lack* of resistance by the participating parties. Therefore, these sentences from the Subcommittee's Report accurately convey the intentions of the Subcommittee that court-martial panel members incorporate considerations of a "lack of resistance" in their overall consideration of "[a]ll the surrounding circumstances." Problematically, the recommended statutory change itself does not adequately communicate the Subcommittee's intentions and may result in misadvice by courts and misinterpretation by fact-finders. For example, the Subcommittee declined to recommend that the statute read "Lack of verbal or physical resistance *alone* does not constitute consent *but shall be considered among the surrounding circumstances*" (emphasis added).[37]

Imagine a scenario in which a couple is in a long-term relationship and engages in routine patterns of sexual behavior. The partners generally experience cooperation with each other upon initiating the sexual activity and are alerted that one person is not consenting to the sexual behavior only *if* that person objects or otherwise indicates a disinclination to engage in some or all sexual activity at that time. Within "all the surrounding circumstances" of this relationship, the habits and expectations of the partners certainly inform their beliefs about whether there is consent to sexual activity, including whether one of the parties is objecting or otherwise resisting. Although, as the Subcommittee notes, a lack of resistance alone would not constitute consent in this situation, it would certainly be relevant to a fact-finder assessing whether an accused reasonably believed an alleged victim had consented to sexual activity.

Similarly, the Subcommittee recommends that the definition of "consent" retain the current language that "(A) . . . An expression of lack of consent through words or conduct means there is no consent."

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[33] JPP SUBCOMMITTEE REPORT at 9-10.

[34] *Id.*

[35] *Id.* at 2.

[36] *Id.* at 9.

[37] An alternate clarification of the Subcommittee's recommendation for the definition of "consent" could state at subsection (A): "Lack of verbal or physical resistance *alone* does not constitute consent" and at subsection (C): "All the surrounding circumstances *including lack of resistance (if applicable)* are to be considered in determining whether a person gave consent."

Yet a fact-finder attempting to apply the definition's mandate that this "means there is no consent" may be confused in a situation in which there is credible evidence of an alleged victim initially and clearly verbally declining to engage in sexual activity but then later cooperating in, and possibly even initiating, sexual acts. In her testimony, Major Bateman described such a scenario presented to her JAG students:

> [T]he day before [sexual activity occurred,] the accused approached me and said, "Would you like to have sex with me?" I said, "No, I hate you. I will never have sex with you." Is that even relevant? . . . [T]hat caused . . . the most recent time teaching this to a senior audience [of judicial candidates], a huge problem. Of course it's relevant. [Yet they said:] Well, show me to what . . . element of the crime that is relevant to.[38]

Concerningly, this debate ensued among judicial candidates despite the fact that the "all the surrounding circumstances" language is already present in the definition. So, once again, this aspect of the statutory definition of "consent" in subsection (A) suggests inflexibility and potential confusion in how evidence is to be evaluated by the fact-finder. Even as amended, the definition leaves it unclear that "[a]n expression of lack of consent through words or conduct" is *also* among the evidence that is to be evaluated in light of "[a]ll the surrounding circumstances."

Finally, the Subcommittee's recommendation largely retains the following language from current subsection (A): "A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved in the conduct at issue shall not constitute consent," except that the Subcommittee has recommended substituting the word "does" in place of "shall." While the language concerning dating / social / sexual relationships is appropriately contextualized by the phrase "by itself," the statute does not reflect the same nuance concerning "manner of dress." Of course, it is again true that "manner of dress" *by itself* does not constitute consent but it certainly would be relevant to an assessment of "[a]ll the surrounding circumstances." It is easy to imagine a scenario in the context of an ongoing relationship, for example, in which dress is a mechanism used to convey to one's partner an interest in and desire to participate in sexual activity. And, yet again, the definition fails to make it explicit that evidence concerning dress comes within "[a]ll the surrounding circumstances."[39]

An alternate definition of "consent" is set forth in Attachment A's draft iteration of Article 120(g)(6). Among other things, the Attachment A proposal avoids the problem described above with respect to "manner of dress" evidence by simply reordering the sentence to read: "A current or previous dating or social or sexual relationship or the manner of dress of the person involved in the conduct at issue ***by themselves*** shall not constitute consent."[40] The Attachment A[41] definition therefore avoids the confusion present in both the current statute and the Subcommittee's recommendation.

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[38] *Transcript of JPP Subcommittee Meeting* 39 (May 7, 2015).

[39] Building on the alternate proposal set forth in n.27, subsection (C) could be more explicit in including the scenarios which are defined in subsection (A) as "nonconsensual," *e.g.,* "All the surrounding circumstances**, including (if applicable) manner of dress, and any expressions of lack of consent or lack of resistance,** are to be considered in determining whether a person gave consent."

[40] Attachment A at Article 120(g)(6)(D)(emphasis added).

[41] Unlike the current statute, the framework of the Attachment A proposal organizes the Article 120 crimes of rape, sexual assault, aggravated sexual contact, and abusive sexual contact around the principle that these crimes have at their core a victim who does not or cannot given consent to sexual activity. Consequently, the Attachment A definition of "consent" addresses a

C. MENS REA ISSUES

Several of the issues referred to the Subcommittee by the JPP involved the role of mens rea in Article 120. Despite their severe consequences, Article 120 does not articulate specific intent requirements for the crimes it describes. In fact, in some contexts, Article 120 creates criminal liability not only for an actor who commits the actus reus with actual knowledge of the relevant circumstances but also for an actor who, under a mere negligence standard, "reasonably should know" of such a circumstance.

Interestingly, the topic of mens rea has received renewed attention in multiple national forums during the Subcommittee's work on these issues. On November 16, 2015, bipartisan leadership from the House Judiciary Committee and House Crime Subcommittee introduced legislation titled the "Criminal Code Improvement Act of 2015"[42] to address the erosion in the mens rea requirement in federal criminal law. On November 18, 2015, the legislation passed out of the House Judiciary Committee by a unanimous voice vote. That same day, a group of senators introduced even stronger legislation called the "Mens Rea Reform Act of 2015,"[43] aimed at ensuring that only those who are truly culpable of criminal conduct committed with criminal intent are ensnared by federal criminal laws. Sponsored by Senators Orrin Hatch, Ted Cruz, Mike Lee, Rand Paul, and David Perdue, the mens rea reform would generally establish a default criminal intent requirement that the government prove beyond a reasonable doubt that the defendant acted "willfully, with respect to any element for which the text of the covered offense does not specify a state of mind."

Earlier in 2015, the United States Supreme Court decided a case in which it considered the sufficiency of a merely negligent mens rea, similar to the "should have known" language recurring throughout Article 120. In *Elonis v. United States*,[44] the Supreme Court considered the federal law making "it a crime to transmit in interstate commerce 'any communication containing any threat . . . to injure the person of another.'" In Mr. Elonis's case the jury was instructed that to render a verdict of "guilty," they must find that Mr. Elonis communicated *what a reasonable person* would regard as a threat but not that Mr. Elonis *himself* be aware of the threatening nature of the communication.[45] In finding these instructions insufficient to sustain Mr. Elonis's conviction, the Supreme Court reviewed the important role of mens rea in defining criminal conduct and provided several examples of cases in which convictions were vacated as a consequence of inadequate proof of a culpable mental state:

> "[W]rongdoing must be conscious to be criminal." *Id.*, at 252, 72 S.Ct. 240. As Justice Jackson explained, this principle is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id.*, at 250, 72 S.Ct. 240. The "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea,* scienter, malice aforethought, guilty knowledge, and the like. *Id.*, at 252, 72 S.Ct. 240; 1 W. LaFave, Substantive Criminal Law § 5.1, pp. 332–333 (2d ed. 2003). . . .

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broader array of scenarios than either the current statutory definition of "consent" or the definition proposed by the Subcommittee.

[42] *See* http://judiciary.house.gov/_cache/files/75116271-c347-4589-9c47-4fe06859c638/criminal-code-improvement-act-rp-003-xml.pdf.

[43] *See* http://www.hatch.senate.gov/public/_cache/files/56edc2e6-c658-4a2a-bdb5-e259819c48a4/HEN15E40.pdf.

[44] *Elonis v. United States*, 135 S. Ct. 2001, 2004, 192 L. Ed. 2d 1 (2015).

[45] *Id.*

> *Morissette*, for example, involved an individual who had taken spent shell casings from a Government bombing range, believing them to have been abandoned. During his trial for "knowingly convert[ing]" property of the United States, the judge instructed the jury that the only question was whether the defendant had knowingly taken the property without authorization. 342 U.S., at 248–249, 72 S.Ct. 240. This Court reversed the defendant's conviction, ruling that he had to know not only that he was taking the casings, but also that someone else still had property rights in them. He could not be found liable "if he truly believed [the casings] to be abandoned." *Id.*, at 271, 72 S.Ct. 240; see *id.*, at 276, 72 S.Ct. 240.
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> By the same token, in *Liparota v. United States*, we considered a statute making it a crime to knowingly possess or use food stamps in an unauthorized manner. 471 U.S. 419, 420, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985). The Government's argument, similar to its position in this case, was that a defendant's conviction could be upheld if he knowingly possessed or used the food stamps, and in fact his possession or use was unauthorized. *Id.*, at 423, 105 S.Ct. 2084. But this Court rejected that interpretation of the statute, because it would have criminalized "a broad range of apparently innocent conduct" and swept in individuals who had no knowledge of the facts that made their conduct blameworthy. *Id.*, at 426, 105 S.Ct. 2084. . . . [2010] . . .
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> To take another example, in *Posters 'N' Things, Ltd. v. United States*, this Court interpreted a federal statute prohibiting the sale of drug paraphernalia. 511 U.S. 513, 114 S.Ct. 1747, 128 L.Ed.2d 539 (1994). Whether the items in question qualified as drug paraphernalia was an objective question that did not depend on the defendant's state of mind. *Id.*, at 517–522, 114 S.Ct. 1747. But, we held, an individual could not be convicted of selling such paraphernalia unless he "knew that the items at issue [were] likely to be used with illegal drugs." *Id.*, at 524, 114 S.Ct. 1747. Such a showing was necessary to establish the defendant's culpable state of mind.
>
> And again, in *X–Citement Video*, we considered a statute criminalizing the distribution of visual depictions of minors engaged in sexually explicit conduct. 513 U.S., at 68, 115 S.Ct. 464. We rejected a reading of the statute which would have required only that a defendant knowingly send the prohibited materials, regardless of whether he knew the age of the performers. *Id.*, at 68–69, 115 S.Ct. 464. We held instead that a defendant must also know that those depicted were minors, because that was "the crucial element separating legal innocence from wrongful conduct." *Id.*, at 73, 115 S.Ct. 464. . . . [46]

In light of these trends, and for the sake of fundamental fairness, the mens rea issues referred by the JPP should be resolved with recommendations that ensure a sufficient mental culpability element separating "legal innocence from wrongful conduct." Beyond the issues referred by the JPP, and as illustrated in Attachment A, Article 120 should require that an accused act with actual knowledge and not attach the serious criminal liability that flows from a sexual offense conviction to merely negligent conduct.

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[46] *Id.* at 2009–10.

1. JPP ISSUE 4: *IS THE DEFINITION CONCERNING THE ACCUSED'S "ADMINISTRATION OF A DRUG OR INTOXICANT" OVERBROAD?*

In its recommendation concerning Issue 4, the Subcommittee concludes that "the definition concerning the accused's 'administration of a drug or intoxicant' under Article 120(a)(5) is not overbroad. The Subcommittee therefore recommends no changes on this issue."[47] Article 120(a)(5) states that

> Any person subject to this chapter who commits a sexual act upon another person by administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct is guilty of rape and shall be punished as a court-martial may direct.

As suggested by a retired Army military judge, the definition should be amended by adding a requirement that the administration of a drug or intoxicant be done *for the purpose of* impairing the victim's capacity to express a lack of consent to the sexual act.[48] In the Subcommittee's deliberations, a fair argument was made that the word "by" in the statute means that it already requires such intent, since the use of the drug or intoxicant is to be the mechanism for effectuating the rape. But if that is the intent of the statute, there is no harm in making this specific intent requirement more explicit.

Hypothetically, a person may spike the punch or serve marijuana-laced brownies for the purpose of surreptitiously introducing alcohol or drugs into a social setting with no preexisting plan to create a sexual offense victim. The person may even administer such intoxicants because of socially informed expectations that other guests already voluntarily ingest such substances and would not object to them. If that individual commits a sexual offense after *later* discovering that someone has become substantially impaired as a result of the intoxicants, reasonable distinctions can and should be drawn concerning his or her level of culpability compared to that of a person whose prior intent was to use the substances as a vehicle for sexual offending.

A different subsection, Article 120(b)(1)(3)(A) defines as guilty of sexual assault

> Any person subject to this chapter who commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person.

Hence, the opportunist who sexually abuses an impaired victim (regardless of how that victim became intoxicated) is guilty of Article 120(b)(1)(3)(A) and already faces up to thirty years' imprisonment. The sanction of a potential sentence of life imprisonment as provided for in Article 120(a)(5), however, should be reserved for a premeditated actor who administered intoxicants as the means to facilitate sexual abuse. Such distinctions (and sanctions) based on specific intent are routinely and appropriately drawn in law. For example, a homicide committed with premeditation or after deliberation is routinely punished much more severely than a murder committed in the "heat of passion." In addition, requiring a specific intent in Article 120(a)(5) would better distinguish it from

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[47] JPP SUBCOMMITTEE REPORT at 4.

[48] *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

cases more appropriately prosecuted under Article 120(b)(3)(A) and reduce the risk of arbitrariness or otherwise inadequately constrained prosecutorial discretion.

Further, this issue should be considered with reference to Rule for Courts-Martial 916(l)(2) concerning the relevance of voluntary intoxication evidence. Witnesses testified to the frequent scenario in military sexual assault prosecutions of undisputed evidence being present that both the alleged victim and the accused were intoxicated. The rule states:

> Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

Thus, although the rule makes it clear that voluntary intoxication never provides a defense to criminal behavior, it may be considered in evidence whenever "actual knowledge" or "specific intent" are elements. Given the vague drafting of Article 120(a)(5), it is unclear on its face whether it contains a mens rea sufficient to make evidence of the accused's perhaps extreme voluntary intoxication relevant even in a case in which he or she is facing the possibility of lifetime imprisonment. In assessing culpability, the fact-finder should consider the voluntary intoxication of a drunken and unplanned effort to subject another to intoxicants in order to effect the person's submission to sexual activity. Clarifying the mens rea in Article 120(a)(5) would therefore assist in delineating the relevance of such evidence. In addition, as further discussed below, in light of the Supreme Court's antipathy in *Elonis* toward the use of a negligence standard in a criminal statute, the "reasonably should be known" language in Article 120(b)(3)(A) should be removed. Removing the "reasonably should be known" provision would also serve the purpose of clarifying in Article 120(b)(3)(A) that the accused's voluntary intoxication is relevant as well to his or her assessment of the level of impairment in his or her sexual partner.

2. JPP ISSUE 3: *SHOULD THE STATUTE DEFINE "INCAPABLE OF CONSENTING"?*

In crafting a proposed definition of "incapable of consenting," the Subcommittee initially looked to 18 U.S.C. § 2242 (Sexual abuse). Section 2242 criminalizes knowingly engaging in a sexual act with another person if that other person is—

> (A) incapable of appraising the nature of the conduct; or
>
> (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.

Its final proposal differs from the federal statute, however, as the Subcommittee recommends that the following definition be part of its redraft of Article 120(g)(8): "A person is 'incapable of consenting' if that person does not possess the mental ability to appreciate the nature of the conduct or does not possess the physical or mental ability to make or communicate a decision regarding such conduct."[49]

[49] JPP SUBCOMMITTEE REPORT at 16.

Notably, § 2242 requires a defendant to have *actual knowledge*[50] of the alleged victim's incapability before suffering criminal liability. Article 120(b)(3), however, also criminalizes the sexual behavior if an accused only "reasonably should have known" that the other person was incapable of consenting.

The lack of criminal culpability for an actor in the federal criminal justice system who merely "reasonably should have known," unlike the liability flowing under the UCMJ, becomes particularly important in the context of the Subcommittee's proposal. The Subcommittee has done its best to draft a new definition of "incapable of consenting." But its proposed definition—unlike the federal definition—is completely new, novel, and untested by practice or application. Hence, a wiser course would be to adopt the rule that limits criminal culpability to an actor with *actual knowledge*, since doing so would protect both the unjustly accused and the constitutionality of the statutory language from any areas of inadvertently overbroad application in the untested proposed definition of "incapable of consenting."

Severe prison sentencing and other punishing lifetime consequences flow from a conviction under Article 120(b)(3). Yet the Subcommittee heard testimony that these cases frequently involve situations in which both parties are intoxicated.[51] This "reasonably should have known" standard of mere negligence is inadequate to fairly assess and assign culpability under such circumstances. If both parties were so intoxicated as to be "incapable of consenting," how could identical behavior render one party criminally culpable and the other a "victim"? Or is charging to be impermissibly driven by arbitrariness, sexism,[52] or the vagaries of the reporting process?

And, once again, with an intoxicated accused, the relevance of voluntary intoxication evidence under Rule for Courts-Martial 916(l)(2) becomes important. For example, what if two intoxicated people commenced voluntary acts of sexual intimacy but, in the course of that activity, one of them fell asleep or passed while the other continued to engage in the sexual contact with the unconscious party? If these sexual acts were complained of later, fairness would dictate consideration of the actor's level of intoxication in assessing whether he or she had recognized that the situation had changed before continuing with the sexual acts and, thus, whether he or she had the necessary culpable mental state. Removing the "reasonably should be known" provision would clarify that, for purposes of Article 120(b)(3)(A), the accused's voluntary intoxication is also relevant to his or her assessment of the level of impairment in his or her sexual partner.

Moreover, the *Elonis* decision seriously calls into question the continued viability of a criminal statute that attaches culpability based on proof of mere negligence alone:

> Elonis's conviction . . . was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Staples*, 511 U.S., at 606–607, 114 S.Ct. 1793 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S.Ct.

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[50] Like the federal government, numerous states (*e.g.*, Colorado, Texas) limit liability for sexual assault crimes to cases in which the government has proven beyond a reasonable doubt that the accused had actual knowledge of the circumstances giving rise to the sexual contact.

[51] *Transcript of JPP Subcommittee Meeting* 269 (May 7, 2015) (testimony of Colonel Terri Zimmermann, U.S. Marine Corps Reserve).

[52] *See generally id.* at 271–72 (observing that under such circumstances it is usually a male who is prosecuted).

> 134, 88 L.Ed. 48 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries*, 692 F.3d, at 484 (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing *Morissette*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288). See 1 C. Torcia, Wharton's Criminal Law § 27, pp. 171–172 (15th ed. 1993); *Cochran v. United States,* 157 U.S. 286, 294, 15 S.Ct. 628, 39 L.Ed. 704 (1895) (defendant could face "liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind"). Under these principles, "what [Elonis] thinks" does matter[.][53]

Before criminal culpability as a sex offender should attach for sexual activity with a person incapable of consenting, the government, consistent with the federal statute, should be required to establish through direct or circumstantial evidence that an actor actually knew that a victim was incapable of giving consent yet engaged in sexual behavior with that victim anyway.

D. JPP ISSUE 11: *SHOULD THE OFFENSE OF "INDECENT ACT" BE ADDED TO THE UCMJ AS AN ENUMERATED OFFENSE?*

I join the Subcommittee's recommendation that the former offense of indecent acts should not be restored as an enumerated offense. The Subcommittee has been notified that the Department of Defense proposed an Article 134 offense called "Indecent Conduct" in a recent draft executive order. I write separately to identify a few unresolved concerns that prevent me, without further study, from taking a position on whether the current proposal to create this Article 134 offense should go forward.

Past applications of the indecent act law have punished sexual behaviors that are normative and noncriminal within a civilian context: for example, consensual sexual activity occurring in the presence of a consenting third party or known recording device. The breadth (and potential overbreadth) of criminalizing such behavior is concerning on both vagueness and free speech grounds. It also raises questions about whether such a law's reach could be meaningfully narrowed with additional or different elements (including but not limited to requiring proof that the behavior was prejudicial to good order and discipline or Service discrediting).

Furthermore, it appears that satisfactory, alternate mechanisms within military discipline channels to address such behavior may already exist. Although the Subcommittee heard from witnesses who endorsed returning indecent acts provisions to the UCMJ, the justifications were sometimes vague and included that there had been such provisions in the past as well as some witnesses' general disapproval of indecent behavior. A need for this particular tool was not clearly articulated. In addition, although some requested the reenactment of indecent act provisions, others testified that prosecutions addressing such behavior had been brought through alternate mechanisms and upheld on appeal, thereby again raising the question of why advocates feel there would be value in reenacting these provisions. Issue 11 further raises the question of what policy reasons led to the removal of these provisions in the 2012 version of Article 120.

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[53] *Elonis*, 135 S. Ct. at 2011.

Another specific apprehension with respect to the indecent conduct proposal that arises for me as a civilian practitioner concerns the sex offender registry. As I understand it, the current proposal would enumerate indecent conduct provisions within Article 134 with the intention not to trigger sex offender registration requirements. Problematically, however, sex offender registry provisions vary greatly among the states. States routinely use their own criteria for who must register and may decline to defer to the policies of the jurisdiction of conviction.[54] Therefore, it is a matter of genuine concern that state law enforcement agencies or courts may see the word "indecent" on a rap sheet revealing a military adjudication and wrongly and harmfully mandate that that party register as a sex offender.

[54] For example, in Colorado, any person who was ever required to register in another jurisdiction, must register anew upon entering Colorado even if s/he was previously released from the registry in the state of conviction or another state. Colorado also has required individuals without criminal sex offense convictions to register based on civil proceedings in other states and conducts its own analysis of whether another jurisdiction's offense is sufficiently "equivalent" to Colorado sex crimes to require registration without regard for whether registration was ordered in that state.

REDRAFT OF ARTICLE 120 (NONCONSENT PROPOSAL) BY LAURIE ROSE KEPROS

45. Article 120—Rape and sexual assault generally

a. *Text of statute.*

(a) Rape. Any person subject to this chapter who knowingly commits a sexual act upon another person without that person's consent by using—

(1) unlawful force in addition to the force incidental to the sexual act against that other person;

(2) threats or otherwise placing the other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;

(3) means to render the other person unconscious; or

(4) the administration of a drug, intoxicant, or other similar substance by force or threat of force, or without the knowledge or consent of that person, to substantially impair the ability of that other person to appraise or control conduct;

is guilty of rape and shall be punished as a court-martial may direct.

(b) Sexual Assault.

Any person subject to this chapter who knowingly commits a sexual act upon another person without that person's consent is guilty of sexual assault and shall be punished as a court-martial may direct.

(c) Aggravated sexual contact.

Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(d) Abusive sexual contact.

Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(e) Proof of Threat. In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(f) Defenses. An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial including but not limited to consent and mistake of fact. Marriage is not a defense for any conduct in issue in any prosecution under this section.

(g) Definitions. In this section:

(1) Sexual act. The term "sexual act" means—

(A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the vulva or anus of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) Sexual contact. The term "sexual contact" means touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, if done with an intent to abuse, humiliate or degrade any person or to arouse or gratify the sexual desire of any person. The touching may be accomplished by any part of the body or any object.

(3) Force. The term "force" means—

(A) the use of a weapon;

(B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or

(C) inflicting physical harm sufficient to coerce or compel submission by the victim.

(4) Unlawful Force.—The term "unlawful force" means an act of force done without consent or any other legal justification or excuse.

(5) Threatening or placing that other person in fear. The term "threatening or placing that other person in fear" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.

(6) Consent.

(A) The term "consent" means a voluntary agreement to the conduct at issue.

(B) Consent may be conveyed through words or actions. An expression of lack of consent through words or conduct means there is no consent. All the surrounding circumstances are to be considered in determining whether a person gave consent or not, including whether a person did not resist or ceased to resist only because of another person's actions. Lack of verbal or physical resistance alone does not constitute consent.

(C) Submission resulting from the use of force, threat of force, or placing another person in fear is involuntary and does not constitute consent.

(D) A current or previous dating or social or sexual relationship or the manner of dress of the person involved in the conduct at issue by themselves shall not constitute consent.

(E) A sleeping or unconscious person cannot consent. A person cannot consent if s/he is unaware that the sexual act is occurring.

(F) A person does not consent if s/he agrees to the sexual act(s) only because the perpetrator has made a fraudulent representation that the sexual act serves a professional purpose.

(G) A person does not consent if s/he agrees to the sexual act(s) only because the perpetrator has induced a belief by artifice, pretense or concealment of the fact that the person is another person;

(H) Any alleged consent is not valid if the person was incapable of consenting at the time of the sexual act or sexual contact.

(7) Incapable of consenting.— The term "incapable of consenting" means that as a result of impairment by any drug, intoxicant, or other similar substance, physical disability, or mental disease or defect, a person is unable to appraise the nature of the sexual conduct at issue, physically decline participation in the sexual conduct at issue, or physically communicate unwillingness to engage in the sexual conduct at issue.

Military Justice Review Group

Report of the Military Justice Review Group

Part I: UCMJ Recommendations

December 22, 2015

REPORT OF THE MILITARY JUSTICE REVIEW GROUP

PART I: UCMJ RECOMMENDATIONS

DEPARTMENT OF DEFENSE
MILITARY JUSTICE REVIEW GROUP
875 NORTH RANDOLPH STREET SUITE 8000
ARLINGTON, VA 22203-1995

December 22, 2015

Robert S. Taylor
Acting General Counsel of the Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Dear Mr. Taylor,

On behalf of the Military Justice Review Group (MJRG), I enclose Part I of our report: UCMJ Recommendations. Thank you for the superb support provided by you and your staff during this project.

Sincerely,

Andrew S. Effron

Enclosure:
As stated

Overview

The Uniform Code of Military Justice (UCMJ) provides the statutory framework for the military justice system. In this Report, the Military Justice Review Group (MJRG) analyzes each UCMJ article, including its historical background, current practice, and comparison to federal civilian law. The Report proposes substantive additions to the UCMJ through 37 new articles, substantive statutory amendments to 68 articles, and includes consolidated draft legislation incorporating all proposed changes. These proposed changes would enhance the purpose of military law as stated in the Preamble to the Manual for Courts-Martial (MCM): "[T]o 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."

Establishing the Military Justice Review Group

This comprehensive review of the UCMJ and MCM resulted from a request to the Secretary of Defense by DoD's senior uniformed leadership.

- In August 2013, the then-Chairman of the Joint Chiefs of Staff, General Martin Dempsey, and the other members of the Joint Chiefs recommended that then-Secretary of Defense Chuck Hagel order a holistic review of the UCMJ in order to ensure that it effectively and efficiently achieves justice consistent with due process and good order and discipline.

- On October 18, 2013, Secretary Hagel directed the DoD General Counsel to conduct a comprehensive review of the UCMJ and the military justice system with support from military justice experts provided by the military services. Secretary Hagel directed the review to include an analysis of not only the UCMJ, but also its implementation through the Manual for Courts-Martial and service regulations.

- The Secretary also directed the review to consider the report and recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel), a twelve-month independent review and assessment of the systems used to investigate, prosecute, and adjudicate adult sexual assault and related offenses in the military, including the role of the commander in the administration of military justice.

Guiding Principles

The DoD General Counsel established the MJRG with direction to take into account five principles during its review:

- Use the current UCMJ as a point of departure for baseline reassessment.

- Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial

of criminal cases in the United States district courts should be incorporated into military justice practice.

- To the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the military services.
- Consider any recommendations, proposals, or analysis relating to military justice issued by the Response Systems Panel.
- Consider, as appropriate, the recommendations, proposals, and analysis in the report of the Defense Legal Policy Board, including the report of that Board's Subcommittee on Military Justice in Combat Zones.

Major Legislative Proposals

This Report contains the MJRG's completed review of the UCMJ. Proposals for amendments to the UCMJ generally fall into seven categories. This Report's major proposals would:

- ***Strengthen the Structure of the Military Justice System by—***
  - Requiring issuance of guidance on the disposition of criminal cases similar to the U.S. Attorneys Manual, tailored to military needs.
  - Mandating additional training for commanders and convening authorities focused on the proper exercise of UCMJ authority.
  - Establishing a military judge-alone special court-martial as an additional option for disposition, similar to the judge-alone forum in civilian proceedings, with confinement limited to a maximum of six months and no punitive discharge.
  - Establishing selection criteria for military judges, mandating tour lengths, and requiring appointment of a Chief Trial Judge in each armed force.
  - Creating authority for military judges to handle specified legal issues that arise before formal referral of a case to court-martial that would otherwise await a ruling until after referral to court-martial.
  - Establishing a military magistrates program as an option for the services, with magistrates authorized to preside over specified pre-referral matters upon designation by a military judge, and to preside with the consent of the parties in the proposed judge-alone special court-martial.
- ***Enhance Fairness and Efficiency in Pretrial and Trial Procedures by—***
  - Continuing to enhance victims' rights by:
    - Creating the opportunity for victim input on disposition decisions at the preliminary hearing stage.
    - Providing for public access to court documents and pleadings.
    - Treating victims consistently with regard to defense counsel interviews and access to records of trial.
  - Expanding authority to obtain documents during investigations through subpoenas and other process.

- Enhancing the utility of the preliminary hearing for the staff judge advocate and convening authority and providing an opportunity for parties and victims to submit relevant information on the appropriate disposition of offenses.
- Replacing the current variable composition and voting percentages for court-martial panels (military juries) with a requirement for a standardized number of panel members and a consistent voting percentage.
- Requiring, to the greatest extent practicable, at least one defense counsel be learned in the law applicable to capital cases, as in federal civilian courts and military commissions.

- ***Reform Sentencing, Guilty Pleas, and Plea Agreements by—***
  - Ensuring that each offense receives separate consideration for purposes of sentencing to confinement.
  - Replacing the current sentencing standard (which relies on maximum punishments with minimal criteria in adjudging a sentence below the maximum) with a system of judicial discretion guided by parameters and criteria.
  - Improving military plea agreements by allowing negotiated ranges of punishments and adjudged sentences within the range.
  - Continuing to permit appeals of sentences by servicemembers, and establishing government appeals of sentences in circumstances similar to federal civilian practice.
  - Providing for the effective implementation of these reforms by establishing sentencing by military judges in all non-capital trials.

- ***Streamline the Post-Trial Process by—***
  - Eliminating redundant post-trial paperwork and requiring an entry of judgment by the military judge similar to federal civilian practice to mark the completion of a special or general court-martial.
  - Establishing restricted authority to suspend sentences in cases in which the military judge recommends a specific form of suspension and the convening authority approves a suspension within the military judge's recommendation.

- ***Modernize Military Appellate Practice by—***
  - Permitting the government to file interlocutory appeals in general and special courts-martial regardless of whether a punitive discharge could be adjudged.
  - Transforming the automatic appeal of cases to the service Courts of Criminal Appeals into an appeal of right in which the accused, upon advice of appellate defense counsel, would determine whether to file an appeal.
  - Expanding direct review jurisdiction of the Courts of Criminal Appeals primarily with respect to cases in which an accused is sentenced to confinement for more than six months.
  - Providing servicemembers, like their civilian counterparts, with the opportunity to obtain judicial review in all cases.

- Focusing the appeal on issues raised by the parties, with the opportunity for the Courts of Criminal Appeals to review for plain error.
- Establishing harmless error standards of review for guilty pleas similar to those applied by the federal civilian courts of appeal.
- Providing for review of issues identified by the accused regarding factual sufficiency when the appellant makes a sufficient showing to justify relief.
- Permitting the government to appeal a sentence under conditions similar to those applied by the federal civilian courts of appeal.
- Continuing to require automatic review of capital cases and requiring, to the greatest extent practicable, at least one appellate defense counsel be learned in the law applicable to capital cases.

- ***Increase Transparency and Independent Review of the Military Justice System by—***
  - Creating a statute requiring uniform public access to courts-martial documents and pleadings similar to that available in federal civilian courts.
  - Establishing an independent blue ribbon panel of experts to conduct periodic reviews of the UCMJ.

- ***Improve the Functionality of Punitive Articles and Proscribe Additional Acts by—***
  - Restructuring the punitive articles of the UCMJ, which proscribe criminal acts.
  - Establishing specific statutory punitive articles to cover many forms of misconduct now addressed by Executive Order in the General Article.
  - Authorizing the President to designate lesser included offenses under legislative criteria.
  - Aligning the definition of "sexual acts" in Article 120 with federal civilian law.
  - Revising the prohibition against stalking (Article 130) to include cyberstalking and threats to intimate partners.
  - Amending the statute of limitations for child-abuse offenses, fraudulent enlistment, and to extend the period when DNA testing implicates an identified person.
  - Creating new enumerated offenses, including:
    - Article 93a: Prohibited activities with military recruit or trainee by person in position of special trust
    - Article 121a: Fraudulent use of credit and debit cards
    - Article 123: Offenses concerning Government computers
    - Article 132: Retaliation

Table of Contents

Executive Summary

Introduction

The Uniform Code of Military Justice (UCMJ) provides the statutory framework for the military justice system. In this Report, the Military Justice Review Group (MJRG) provides individual analysis of every article of the UCMJ, including summaries of the current statutes, historical background, current practice, and comparisons to applicable rules and procedures in federal civilian practice. The Report proposes substantive additions to the UCMJ through 37 new articles and substantive statutory amendments to 68 articles. The Report includes consolidated draft legislation incorporating all proposed changes.

This summary briefly describes the background of the MJRG and highlights the primary recommendations in the Report.[1]

Establishing the MJRG and its Guiding Principles

This comprehensive review of the military justice system resulted from a request by the Department of Defense's senior uniformed leadership to the Secretary of Defense. In August 2013, the then-Chairman of the Joint Chiefs of Staff, General Martin Dempsey, and the other members of the Joint Chiefs recommended to then-Secretary of Defense Chuck Hagel "a comprehensive and holistic review" of the UCMJ and the military justice system to ensure that the system "most effectively and efficiently does justice consistent with due process and good order and discipline."[2] The Joint Chiefs concluded that a comprehensive review of the UCMJ was appropriate in view of the many social developments and major changes in the armed forces since the last comprehensive review, which occurred in the 1980s.

On October 18, 2013, Secretary Hagel directed the General Counsel of the Department of Defense to conduct a comprehensive review of the UCMJ and the military justice system, including the MCM and service regulations, with support from military justice experts provided by the military Services.[3] The Secretary's direction included a requirement to consider the report and recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel).[4]

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[1] Section B of the Report contains an Article-by-Article Index of UCMJ Recommendations, followed by a detailed analysis of each provision of the UCMJ, including recommended amendments. Section C of the Report contains consolidated draft legislation that includes all proposed amendments to the UCMJ.

[2] U.S. Dep't of Def., Memorandum from the Chairman of the Joint Chiefs of Staff on Recommendation of the Joint Chiefs of Staff with respect to a Holistic Review of the Uniform Code of Military Justice (Aug. 5, 2013). The Chairman's memorandum is attached as Appendix A to this Report.

[3] U.S. Dep't of Def., Memorandum from Secretary of Defense on Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013). Secretary Hagel's memorandum is attached as Appendix B to this Report.

[4] *Id.* The Response Systems Panel was established by the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632 (2013) [hereinafter NDAA FY 2013]. The Response Systems

The DoD General Counsel established the MJRG to carry out the comprehensive review, utilizing military justice experts detailed by the Services.[5] The General Counsel appointed Andrew S. Effron, former Chief Judge of the United States Court of Appeals for the Armed Forces, to serve as the Director of the MJRG.[6]

The General Counsel's Terms of Reference established five guiding principles for the MJRG to apply during its review:

- Use the current UCMJ as a point of departure for baseline reassessment.
- Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice.
- To the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the military services.
- Consider any recommendations, proposals, or analysis relating to military justice issued by the Response Systems Panel.
- Consider, as appropriate, the recommendations, proposals, and analysis in the report of the Defense Legal Policy Board, including the report of that Board's Subcommittee on Military Justice in Combat Zones.[7]

The DoD General Counsel also directed the MJRG to consult with general and flag officers with experience as general court-martial convening authorities—senior commanders with authority to direct that cases be tried by court-martial. The Legal Counsel to the Chairman of the Joint Chiefs of Staff was tasked with assisting in identifying a suitable group of

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Panel conducted a twelve-month independent review and assessment of the systems used to investigate, prosecute, and adjudicate adult sexual assault and related offenses in the military, including the role of the commander in the administration of military justice. *See* REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (June 2014) [hereinafter RESPONSE SYSTEMS PANEL REPORT], *available at* http://responsesystemspanel.whs.mil. The Response Systems Panel ultimately made 132 recommendations, which the Department of Defense is in the process of implementing. *See* U.S. Dep't of Def., Memorandum from the Secretary of Defense on Implementation of the Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (Dec. 15, 2014), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/01-General_Information/05_DoDResponse_RSPRecommendations_20141215.pdf.

[5] In addition to detailed military personnel, the MJRG staff includes civilian personnel with expertise in military and criminal law, as well as experienced legislative counsel. The MJRG also benefits from the assistance of personnel made available on a periodic basis by the DoD General Counsel and the Department of Justice.

[6] *See* Appendix D to this Report for a full list of the members of the MJRG and its Advisors.

[7] Terms of Reference for the Military Justice Review Committee (Jan. 24, 2014) and Addendum (Mar. 12, 2014) [hereinafter Terms of Reference and Addendum, respectively]. Both the Terms of Reference and the Addendum are attached as Appendix C to this Report.

officers for this purpose. Finally, the DoD General Counsel required the Director to coordinate any proposed amendments, at his discretion, on an ongoing basis with the DoD Deputy General Counsel (Personnel & Health Policy), The Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff.[8]

The General Counsel designated two distinguished experts in the law—the Honorable David Sentelle, former Chief Judge for the United States Court of Appeals for the District of Columbia Circuit; and the Honorable Judith Miller, former DoD General Counsel—to serve as Senior Advisors to the MJRG. The DoD General Counsel also requested that the Department of Justice designate an expert criminal litigator to serve as an advisor to the MJRG. Mr. Jonathan Wroblewski, Director of the Office of Policy and Legislation in the Criminal Division of the Department of Justice (DoJ), serves as the DoJ's Advisor to the MJRG. Mr. John Sparks and Mr. Clark Price have served as advisors to the MJRG from the United States Court of Appeals for the Armed Forces.

The DoD Office of General Counsel facilitated the opportunity for public input to the MJRG by establishing a website that included an invitation to submit recommendations.[9] The Office of General Counsel also wrote to over 400 organizations, including bar associations, law schools, victims' advocacy groups, and other public interest organizations, advising them of the opportunity for input. The MJRG received numerous thoughtful public comments which it considered during the review process.

The Secretary of Defense established a very tight time frame for completion of the comprehensive review—one year for a legislative report on the UCMJ, and a report on implementing rules six months later.[10] Based upon this guidance and direction from the DoD General Counsel, the MJRG submitted its initial report on the UCMJ to the General Counsel on March 25, 2015. Following a period of internal review within the Department of Defense, the MJRG submitted a revised UCMJ report on September 2, 2015. The Department approved the legislative proposals in the revised report as an official Department of Defense proposal, and submitted the proposals to the Office of Management and Budget for interagency review. After considering comments provided during the interagency review, the MJRG prepared this final report, which includes the legislation that has been submitted to Congress as an official administration proposal.

Based upon guidance from the DoD General Counsel, the MJRG has prepared a separate report on implementing rules, focusing primarily on the Manual for Courts-Martial

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[8] Terms of Reference, *supra* note 7, at 4.

[9] The MJRG's website is located at http://www.dod.mil/dodgc/mjrg.html.

[10] The MJRG's separate review of implementing rules is described in Section A, Part 2 of this Report. Many potential areas for MCM proposals are identified in this Report's discussions of the UCMJ.

(MCM).[11] The MJRG's report on the MCM, which was submitted to the DoD General Counsel on September 21, 2015, currently is under review within the Department of Defense.

Further information regarding the scope and methodology of the MJRG is found in Part A of this Report.

Purpose of Military Law

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."[12] These three major recurring themes—justice, discipline, and efficiency—are set forth in complementary clauses of the Preamble to the Manual for Courts-Martial and are woven throughout the structure and provisions of the UCMJ and the Manual. Since its inception in 1775, military law in the United States has evolved to recognize that all three components are essential to ensure that our national security is protected and strengthened by an effective, highly disciplined military force.

The current structure and practice of the UCMJ embodies a single overarching principle based on more than 225 years of experience: a system of military law can only achieve and maintain a highly disciplined force if it is fair and just, and is recognized as such both by members of the armed forces and by the American public. "Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. . . . It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline."[13] This Report's proposals are made with full recognition that the necessity for justice and the requirement for discipline are inseparable.[14]

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[11] The President implements the UCMJ and prescribes rules for pretrial, trial, and post-trial procedure by executive order in the MCM. Based upon direction from the DoD General Counsel, the MJRG's report on the MCM includes recommendations for rules that would be used to implement the legislative proposals from the MJRG, subject to enactment. In that context, the recommendations in the MJRG's MCM report take the form of a discussion draft that provides a foundation for further consideration during internal DoD and interagency review.

[12] MCM, Part I, ¶3; *see also* Parker v. Levy, 417 U.S. 733, 763-64 (1974) (Blackmun, J., concurring) ("[C]ommanders who are arbitrary with their charges will not produce the efficient and effective military organization this country needs and demands for its defense.").

[13] AD HOC COMMITTEE TO STUDY THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO THE HON. WILLIAM R. BRUCKER, SECRETARY OF THE ARMY 11 (Jan. 18, 1960) [hereinafter POWELL REPORT], *available at* http://www/loc.gov/rr/frd/Military_Law/pdf/Powell_report/pdf.

[14] *See, e.g.*, POWELL REPORT, *supra* note 11, at 11-12 ("In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable. . . ."); United States v. Littrice, 13 C.M.R. 43, 47 (C.M.A. 1953) ("It was generally recognized [by Congress] that military justice and military discipline were essentially interwoven. . . . [C]onfronted with the necessity of maintaining a delicate balance between justice and

The need to promote discipline through an instrument of justice requires a court-martial system that differs in important respects from civilian criminal justice systems. As the Supreme Court has stated, the military remains a "specialized society separate from civilian society . . . [because] it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[15] This separateness of purpose and mission has shaped the values and traditions that are embodied in the UCMJ, as reflected in the following unique characteristics that distinguish courts-martial from criminal trials in the civilian courts.

Unique Military Offenses. The offenses proscribed by the UCMJ are "military offenses," even when similar offenses also exist at common law. This is because crimes committed by military members, irrespective of substantially similar civilian counterparts, have the potential to seriously damage unit cohesion by destroying the bonds of trust critical to successful mission accomplishment. There are also crimes under the UCMJ that consist of unique military offenses—including desertion, disrespect, disobedience, malingering, misbehavior before the enemy, and others. These offenses are specifically proscribed in the military context because of their deleterious impact on morale and mission accomplishment.

In addition, Article 134, the General Article, proscribes conduct that is prejudicial to good order and discipline or of a nature to bring discredit on the armed forces. Under this article and others, members of the armed forces can face prosecution for acts which are not regarded as criminal in civilian jurisdictions. For example, activity that might be protected under the First Amendment to the Constitution if carried out by a civilian can lead to criminal punishment for a member of the armed forces. This is because the unique needs of military service require constitutional considerations to be applied differently to those who serve in the military.[16] "In civilian life there is no legal sanction—civil or criminal—for failure to behave as an officer and a gentleman; in the military world, [Article] 133 imposes such a sanction on a commissioned officer."[17]

Unique Military Procedures. The court-martial system has unique procedures developed for those circumstances where civilian criminal procedures are impractical or unworkable in a military setting. The procedures often have as their origin the need for a system that is

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discipline, Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws."); Article 30(b), UCMJ ("Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition would be made thereof *in the interest of justice and discipline.*") (emphasis added).

[15] *Parker*, 417 U.S. at 743 (internal quotation and citation omitted).

[16] *See Parker*, 417 U.S. at 758 ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

[17] *Parker*, 417 U.S. at 739.

simultaneously efficient and capable of operating in a wide variety of settings—including forward-deployed areas of armed conflict—while also remaining fair and just given the highly hierarchical structure of the military.

Sometimes these procedures are more favorable to members of the armed forces than analogous procedures in civilian practice. For example, rights advisement warnings under Article 31(b)—similar to those required in the civilian setting by *Miranda v. Arizona*[18]—are required whenever a servicemember is suspected of an offense and questioned, regardless of whether he or she is in custody. This extra protection for military members suspected of crimes is rooted in the recognition of the inherently custodial nature of interrogation within the military setting. Additionally, in the military, the assistance of counsel is provided throughout the court-martial and appellate process, regardless of the member's rank or ability to pay. With respect to court-martial procedure, the military employs a robust and open discovery process designed to minimize gamesmanship, increase efficiency in the pretrial and trial processes, and ensure that a servicemember's rights during these processes are protected.

Sometimes the procedures employed in the court-martial process are less favorable to servicemembers than similar procedures in civilian practice. For example, in the military, confinement before trial is permitted under broader circumstances than in civilian practice, and with no potential for bail. Also, court-martial panels (military juries) can be composed of fewer than twelve members and do not require unanimous verdicts except to proceed to capital sentencing in a case in which the death penalty is an authorized sentence. The Supreme Court traditionally defers to the balance struck by Congress in these matters. "[I]n determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8."[19]

Unique Military Punishments. In addition to confinement and fines, servicemembers found guilty of committing criminal offenses under the UCMJ face possible punitive separation (bad-conduct or dishonorable discharges for enlisted personnel; dismissal for officers) as well as reductions in their rank and loss of pay. These punishments not only remove convicted military members from the armed forces, they may also deprive them of vested retirement pay and veterans benefits otherwise earned during periods of honorable service.

Partnership of Staff Judge Advocates and Convening Authorities. The partnership of convening authorities—senior commanders authorized to convene courts-martial—and their primary legal advisors, staff judge advocates, is a distinct feature of the military justice system. Staff judge advocates provide critical advice to general court-martial convening authorities. A convening authority may not refer charges to trial by general court-martial in the absence of legal analysis and the staff judge advocate's determination that: the charge alleges an offense under the UCMJ; there is jurisdiction over the offense

[18] Miranda v. Arizona, 384 U.S. 436 (1966).

[19] Middendorf v. Henry, 425 U.S. 57, 67 (1976).

and the accused; and the charge is warranted by the evidence contained in the preliminary hearing report.[20]

Due in part to the unique roles of the staff judge advocate and convening authority in the military justice system, as well as the authority and responsibilities of commanders throughout the military organization, the UCMJ includes an express statutory provision addressing unlawful command influence. Under Article 37, interference with court-martial proceedings by convening authorities and all others subject to the Code is strictly prohibited. Such a prohibition has no direct parallel in federal civilian practice, but is essential in ensuring a just system that maintains the confidence of both servicemembers and the public. For example, "by insulating military judges from the effects of command influence, [the UCMJ and corresponding regulations] sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause" requirement for "a fair trial in a fair tribunal."[21] The prohibition against unlawful command influence was a major driving factor behind the enactment of the UCMJ. It remains essential to ensure fairness and justice in the armed forces, which require a hierarchical command structure in order to prevail in the harsh and unforgiving conditions of military combat.

Deployability. In the military, there is a unique need to conduct trials in deployed environments during ongoing combat operations around the world, as well as in other nations where American servicemembers are stationed. Courts-martial are routinely conducted in nations with which the United States has Status of Forces Agreements; these agreements establish priority of criminal jurisdiction over offenses committed by servicemembers between the host nation's law and the UCMJ. In addition, numerous courts-martial have been conducted during combat deployments, including throughout the deployments that have taken place in Iraq and Afghanistan since the September 11, 2001 attacks.

Consideration of Criminal Law Practices in Civilian Courts. Congress enacted the UCMJ in 1950 following widespread dissatisfaction with the operation of courts-martial and their fairness to the accused during World War II. Congress addressed this dissatisfaction in the UCMJ, in part, by prohibiting unlawful command influence and creating an appellate court composed of civilians, the court now designated as the United States Court of Appeals for the Armed Forces. Since then, the UCMJ has continually evolved in an effort to achieve justice, discipline, and efficiency and fine tune the balance between these complementary goals. The result is "a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history . . . ."[22]

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[20] *See* Articles 30 and 34, UCMJ. For additional information and a recent assessment of the role of the commander in the military justice system *see* RESPONSE SYSTEMS PANEL REPORT, *supra* note 4, at 22-25; 73-74; 125-132; 167-171.

[21] Weiss v. United States, 510 U.S. 163, 179 (1994).

[22] *Weiss*, 510 U.S. at 194 (Ginsburg, J., concurring).

Military law has incorporated practices and procedures of federal civilian law where practicable and not contrary to or inconsistent with the requirements of the armed forces. It also has counterbalanced the limitation of rights available to servicemembers with procedures designed to ensure protection of those rights that are provided under military law.[23] Since its enactment in 1950, significant changes to the UCMJ include the establishment of the military judiciary in 1968 with enhanced powers and the requirement for qualified defense counsel in most instances; the adoption of the Military Rules of Evidence in 1980; simplification of the post-trial process and enhancement of appellate review in 1983; adoption of a rule-based MCM in 1984 to replace the uncertainties generated by the prior treatise format; and a variety of clarifying amendments in subsequent years.

As a result of these and other changes, the modes of presentation and the rules of evidence that currently apply during trials by courts-martial are nearly identical to those in federal civilian courts. Other procedures—such as how cases are sent to trial and how panel members are selected; the number of members required on panels; the percentage of votes required for a finding of guilty; sentencing proceedings; and numerous other procedures—continue to retain military-specific components.

This Report examines many of the distinctions that remain between military practice under the UCMJ and federal and state civilian practice. The proposals recommend aligning certain procedures with federal civilian practice in instances where they will enhance fairness and efficiency and where the rationale for military-specific practices has dissipated. For example, robust military judiciary and defense counsel organizations are firmly rooted in a system largely constructed prior to their development. These and other systemic changes reflect the growth and maturation of the military justice system since Congress enacted the UCMJ.

This Report's proposals recommend retaining military-specific practices where the comparable civilian practice would be incompatible with the military's purpose, function, and mission, or would not further the goals of justice, discipline, and efficiency in the military context. Maintaining distinct military practices and procedures—where appropriate—remains vital to ensuring justice within a hierarchical military organization that must operate effectively both at home and abroad, during times of conflict and times of peace.

Contemporary Context

Recent Legislation. Recognizing the inseparable link between justice and discipline, changes made to the UCMJ since 1950 have served to enhance the rights of servicemembers, to provide effective disciplinary tools for military commanders, and to increase the efficiency of court-martial and appellate procedures.[24] In recent years,

[23] *See Weiss*, 510 U.S. at 174 ("By enacting the [UCMJ] in 1950, and through subsequent statutory changes, Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system.").

[24] For a detailed narrative of the evolution of military justice, see Section A of this Report.

legislative changes focused primarily, but not exclusively, on concern over the manner in which the military justice system addresses sexual assault allegations, and the treatment of sexual assault victims within the system. These targeted changes reflect concern that neither servicemembers nor the public will have confidence in a system of military law that does not—or does not appear to—protect the dignity and rights of victims as well as the rights of the accused.

Recent changes represent significant modifications to court-martial practice. In general, the changes enhanced victims' rights and participation throughout the military justice process while limiting the exercise of convening authorities' pretrial and post-trial discretion. These changes also revised a number of practices before, during, and after trial related to the interests of an accused in the context of a military organization.

In the National Defense Authorization Acts for Fiscal Years 2014 and 2015, Congress enacted substantial amendments to 15 articles of the UCMJ, along with additional statutory provisions outside the UCMJ, that have directly impacted military justice practice.[25] A recent executive order contains numerous provisions that implement these statutory provisions throughout the Manual for Courts-Martial.[26]

Major changes in the recent legislation include:

- Codifying victims' rights in Article 6b and incorporating into the statute many of the rights available to victims in federal civilian courts.
- Providing Special Victims' Counsel to alleged victims of sex-related offenses who are authorized to receive legal assistance for legal consultation and representation in connection with the reporting, military investigation, and military prosecution of sex-related offenses.
- Transforming the broad pretrial investigation of offenses under Article 32 into a more focused preliminary hearing, and providing that victims may not be compelled to testify at the hearing.
- Curtailing the convening authority's previously unrestricted post-trial discretion to take action favorable to an accused on the findings or sentence of a court-martial, permitting modification only in narrowly defined circumstances.
- Limiting the availability of depositions to situations in which exceptional circumstances and the interests of justice require the preservation of prospective witness testimony for use at preliminary hearings or trial.

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[25] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013) [hereinafter NDAA FY 2014]; Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014) [hereinafter NDAA FY 2015]. The MJRG's separate review of implementing rules is described in Section A, Part 2, of this Report.

[26] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

- Creating oversight mechanisms in circumstances where the convening authority declines to refer certain alleged sexual assaults to trial, and limiting the forum for trial of those offenses to general court-martial.
- Directing the President to amend the Military Rules of Evidence to enhance witnesses' psychotherapist-patient privilege and limit the accused's right to present evidence of his or her good military character to raise reasonable doubt as to guilt.
- Amending the equal opportunity of the trial counsel, defense counsel, and the court-martial to obtain witnesses and other evidence by limiting the circumstances under which counsel for the accused may interview alleged sexual assault victims.
- Requiring that the sentence for certain sexual assault offenses include, at a minimum, a dishonorable discharge or dismissal.

Further changes were enacted in the National Defense Authorization Act for Fiscal Year 2016.[27]

Federal Advisory Committees. Congress also directed the Secretary of Defense to establish several federal advisory committees to examine military law and practices with regard to sexual assault allegations. All of these efforts reflect significant congressional and public interest in the military justice system.

- The Response Systems Panel was established in 2013 to conduct a twelve-month review of the effectiveness of the systems used to investigate, prosecute, and adjudicate sexual assault offenses, including the role of the commander in the military justice system. The Response Systems Panel issued its report in June 2014,

[27] *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015) [hereinafter NDAA FY 2016]. The statute includes: enforcement of certain crime victim rights by the Court of Criminal Appeals (sec. 531); Department of Defense civilian employee access to Special Victims' Counsel (SVC) (sec. 532); authority for SVCs to provide legal consultation and assistance in connection with various government proceedings (sec. 533); timely notification of victims of sex-related offenses of the availability of SVC assistance (sec. 534); additional improvements to the SVC program (sec. 535); enhancement of confidentiality of restricted reporting in sexual assault cases (sec. 536); modification of the deadline for establishment of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (sec. 537); improved Department of Defense prevention and response to sexual assaults in which the victim is a male member of the armed forces (sec. 538); preventing retaliation against members of the armed forces who report or intervene on behalf of the victim of an alleged sex-related offense (sec. 539); sexual assault prevention and response training for administrators and for Senior ROTC instructors (sec. 540); retention of case notes in investigations of sex-related offenses (sec. 541); report on prevention and response to sexual assault in the Army National Guard and Army Reserve (sec. 542); improved implementation of UCMJ changes (sec. 543); modification of RCM 104 to establish certain prohibitions on evaluations of Special Victims Counsel (sec. 544); modification of MRE 304 relating to the corroboration of a confession or admission (sec. 545). *See* 161 Cong. Rec. H7747-H8123 (daily ed. Nov. 5, 2015) (bill text and joint explanatory statement). *See also* H.R. REP. NO. 114-102 (2015), at 144-47; S. REP. NO. 114-49 (2015), at 120-23.

including 132 recommendations, many of which directly impact practices under the UCMJ.[28]

- The Judicial Proceedings Panel followed the Response Systems Panel.[29] The Judicial Proceedings Panel is reviewing the operation of the court-martial process with respect to sexual assault offenses, and will issue periodic reports through 2017. The Judicial Proceedings Panel issued its Initial Report on February 4, 2015.[30]

- Congress recently directed the creation of an additional advisory committee to conduct an in-depth study of selected court-martial cases involving sexual assault. The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces will begin its work in 2016.[31]

- In addition to these congressionally mandated review groups, the Secretary of Defense independently established the Defense Legal Policy Board, a discretionary federal advisory committee, in 2012. The Board issued its report on the reporting and investigation of cases where servicemembers were alleged to have caused the death, injury, or abuse of non-combatants in Iraq or Afghanistan in June 2013.[32] The report of the Board recommended, among other things, reforms to the military justice system.

Summary of Recommendations – Major Legislative Proposals

The following are the MJRG's major proposals for changes to the UCMJ. Unless otherwise noted, the proposals are predicated on a one-year transition period for implementation—that is, a one-year period between the date of enactment of any legislation and the date on which the new legislation would come into effect. These proposals fall into seven categories:

- Strengthening the Structure of the Military Justice System
- Enhancing Fairness and Efficiency in Pretrial and Trial Procedures
- Reforming Sentencing, Guilty Pleas, and Plea Agreements

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[28] *See* note 4, *supra*, for more information about the Response Systems Panel.

[29] The full name of the Judicial Proceedings Panel is "The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel." NDAA FY 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632 (2013).

[30] *See* INITIAL REPORT OF THE JUDICIAL PROCEEDINGS PANEL (Feb. 2015) [hereinafter JUDICIAL PROCEEDINGS PANEL INITIAL REPORT], *available at* http://jpp.whs.mil/.

[31] The NDAA FY 2016 requires establishment of this additional advisory committee within 90 days after enactment of the statute. *See* note 27, *supra*.

[32] DEFENSE LEGAL POLICY BOARD REPORT ON MILITARY JUSTICE IN COMBAT ZONES (JUNE 2013), *available at* http://www.facadatabase.gov/committee/historyreportdocuments.aspx?flr=14657&cid=2446&fy=2013.

- Streamlining the Post-Trial Process
- Modernizing Military Appellate Practice
- Increasing Transparency and Facilitating Independent, Ongoing Review of the Military Justice System
- Improving the Functionality of the Punitive Articles and Proscribing Additional Criminal Acts

Strengthening the Structure of the Military Justice System

The Convening Authority-Staff Judge Advocate Partnership. This Report proposes strengthening the partnership between the convening authority and the staff judge advocate. The proposals in the Report will enhance the scope and quality of information available to the convening authority and staff judge advocate in their evaluation of the full range of disposition options.

The Exercise of Disposition Discretion by Convening Authorities. Military commanders are responsible for instilling and maintaining the level of discipline necessary to ensure accomplishment of the military mission. The issue of whether that responsibility should continue to include the authority to refer cases to courts-martial, or whether that authority should be vested in judge advocates, has been the subject of considerable debate, as reflected in the report of the Response Systems Panel, a blue-ribbon advisory committee composed of distinguished non-governmental experts in civilian practice as well as military law.[33] Congress expressly directed the Response Systems Panel to assess the impact of removing disposition authority from the chain of command, focusing on sexual assault cases.[34] The Panel's report, which recommended retention of the commander's role in exercising disposition discretion, includes thoughtful views on both sides of the issue.[35] In view of the extensive testimony and evidence so recently gathered and considered by the congressionally-established Response Systems Panel, the MJRG has focused its efforts on measures to improve the current process, rather than on revisiting the underlying fundamental policy so soon after the Response Systems Panel completed its thorough and careful treatment of the issue.

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[33] *See* RESPONSE SYSTEMS PANEL REPORT, *supra* note 4, at 6-7, 22-25 (Recommendations 36-43), and 167-71.

[34] NDAA FY 2014 at § 1731(a)(1)(A) (directing the Response Systems Panel 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."). *See also* NDAA FY 2013 at § 576(d)(1)(F-G) (directing the Response Systems Panel to assess "the roles and effectiveness of commanders at all levels in preventing sexual assaults and responding to reports of sexual assault . . . [and] the strengths and weaknesses of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and in the investigation, prosecution, and adjudication of adult sexual assault crimes.").

[35] RESPONSE SYSTEMS PANEL REPORT, *supra* note 4, at 6-7, 22-23 (Recommendations 36-37), 167-71, and 173-76 (Additional Views of Response Systems Panel Members Dean Elizabeth L. Hillman and Mr. Harvey Bryant).

In that regard, the proposals in this Report endeavor to enhance decision-making in the context of the convening authority-staff judge advocate relationship.

- *Focused commander and convening authority training.* First, this Report proposes to amend Article 137, which currently requires that all enlisted members receive training on the UCMJ, to also extend this requirement to cover officers, and to require periodic training for all those who exercise responsibility for the imposition of nonjudicial punishment or who convene courts-martial. Although the services currently incorporate military justice training into a variety of continuing professional education programs for both officers and non-commissioned officers, this proposal would establish a statutory requirement for focused training on the exercise of authority under the UCMJ. Part II of the Report will address the importance of focusing training and operational guidance that considers both the restrictions on unlawful command influence and the authority of commanders and senior officials to instill discipline through the exercise of lawful command emphasis.

- *Disposition considerations.* Second, this Report proposes to clarify the distinction between the minimum legal requirements for referral of a case to trial by court-martial under Article 34 (Advice of staff judge advocate and reference for trial) and the separate, prudential issues involving the exercise of disposition discretion by military commanders and convening authorities. This includes a proposal to establish Article 33 (Disposition guidance), which would require the President to direct the Secretary of Defense, in consultation with the Secretary of Homeland Security, to issue non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates and judge advocates should take into account when exercising their duties with respect to disposition of charges in the interest of justice and discipline. These considerations would take into account the guidance in the Principles of Federal Prosecution in the United States Attorneys Manual, with appropriate modifications to reflect the unique purposes and aspects of military law. This non-binding guidance, a proposed draft of which will be offered in Part II of this Report, would provide a functional decision-making framework for convening authorities, commanders, staff judge advocates and judge advocates to assess the full range of disposition options for alleged offenses under the Code, recognizing that the disposition decision encompasses many issues beyond the legal and factual sufficiency of a particular case.

- *Staff Judge Advocate/Legal Advisor's Advice.* The staff judge advocate's pretrial advice will still be required prior to referring a case to general court-martial, in accordance with Article 34. To enhance the exercise of referral discretion for special courts-martial, this Report's proposed amendments to Article 34 also would require pre-referral judge advocate consultation in all special courts-martial. Part II of the Report will focus on the rules implementing Article 34, with particular attention to the content of the staff judge advocate's advice and the responsibility to convey any victim's input in the referral decision. Part II also will address the content of the staff judge advocate's advice in cases where the staff judge advocate disagrees with

the findings of the preliminary hearing officer with respect to probable cause, the form of the charges, or jurisdiction.

Court-Martial Options. The military justice system has four primary components: non-judicial punishment, summary courts-martial, special courts-martial, and general courts-martial. This Report proposes including an additional option for special courts-martial, through amendments to Articles 16 (Courts-martial classified) and 19 (Jurisdiction of special courts-martial). Similar to civilian practice, the proposed option would authorize non-jury trials for minor offenses. This option would provide an alternative means of addressing minor offenses that may warrant a degree of punishment greater than authorized for a summary court-martial but would not warrant a punitive discharge or confinement for more than six months (particularly during contingency operations or when a rapid and large build-up of forces is underway). This alternative would consist of a judge-alone proceeding for findings and sentence, with a maximum confinement of six months and no punitive discharge authorized. The judge-alone special court-martial would be an option for consideration by the convening authority, not a matter for election by the accused, similar to civilian practice authorizing non-jury trials for petty offenses when the maximum punishment includes confinement for no more than six months. The accused in such a proceeding, and in all special courts-martial, would have increased access to appellate review under the proposed amendments to Articles 66 and 69 discussed later in this summary.

The Military Judiciary. The military judiciary provides the linchpin to a fair and effective military justice system and guarantees a fair and impartial tribunal. This Report makes several proposals to build on that foundation:

- *Selection criteria and tour lengths*. The Report proposes enhancing the stature, management, and public perception of the military judiciary by establishing in statute the foundational requirements for the qualification and appointment of military judges in Article 26 (Military judge of a general or special court-martial), with flexible criteria in the Manual for Courts-Martial. The primary authority for selection and certification of military judges would remain vested in The Judge Advocates General, including identification of a Chief Trial Judge for each Service, a position formally recognized in proposed changes to Article 26. The Judge Advocates General and the Commandant of the Marine Corps would assign military judges in accordance with minimum tour lengths established by the President in the Manual, subject to exceptions that could be invoked to meet military exigencies, or to grant a request for reassignment or retirement. These proposed changes are designed to promote the experience level of military judges and enhance public confidence in the independence of the military judiciary.

- *Pretrial judicial decisions*. A number of military justice decisions made prior to trial involve substantial legal issues. In order to reduce the number of issues that must be litigated at trial, and thereby increase efficiency in the court-martial process, this Report proposes to create a new statute, Article 30a (Proceedings conducted before referral), to provide statutory authority for judicial rulings on legal issues arising prior to trial. The new statute would authorize the President to identify the types of

issues appropriate for those proceedings, to establish procedures for such proceedings, and to specify available remedies. The statute would create authority for judicial rulings prior to referral on limited issues that currently must await judicial action until after referral. This authority would permit judicial review of, but not replace, command and convening authority decisions on those matters. Part II of the Report will consider rules to set forth particular issues for pretrial rulings, which could include, for example: review of pretrial confinement actions, requests for mental competency evaluations, requests for depositions, requests for individual military counsel, and ensuring that the protections afforded to victims under the Military Rules of Evidence are properly enforced in preliminary hearings.

- *Military magistrates.* The current and proposed role of military judges contains substantial potential for utilizing full and part-time military magistrates, akin to the federal system. The proposed Articles 26a (Military magistrates) and 30a also would provide the services with the option of establishing a military magistrate program, with qualifications and tour-length criteria separate from the criteria used for the certification of military judges. The Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps could appoint full or part-time military magistrates. The services could employ magistrates designated by military judges prior to referral to conduct pretrial hearings, act on designated pretrial matters, and preside with the consent of the parties in the proposed judge-alone special courts-martial discussed above. In these areas, military magistrates would act with full authority of military judges, with their decisions reviewed by military judges. The use of magistrates would permit a more efficient utilization of the military judiciary, and could provide a training and certification pipeline for future military judges.

Enhancing Fairness and Efficiency in Pretrial and Trial Procedures

Victims' Rights.

- *Article 6b.* In the NDAA FY 2014, Congress enacted Article 6b, which codifies victims' rights under the UCMJ and incorporates many provisions of the federal Crime Victims' Rights Act. This Report proposes to conform military law to federal law with respect to the relationship between the rights of victims and the disposition of offenses and with respect to the appointment of individuals to assume the rights of deceased, incompetent, or minor victims. This Report also would extend recently enacted provisions concerning defense counsel interviews of victims of sex-related offenses to cover victims of all UCMJ offenses.

- *Implementing Article 6b.* As noted earlier, the President implements the UCMJ and prescribes rules for pretrial, trial, and post-trial procedure through the Rules for Courts-Martial. Part II of this Report will consider rules to implement the rights set forth in Article 6b and other victim provisions this Report proposes, as well as

enhancements to remedial options for violations of these rights.[36] The matters that will be considered in Part II will include, for example: the ability of the victim to be reasonably heard on the plea agreement, pretrial confinement, release, and sentencing (including through an unsworn statement); the victim's input on the disposition of offenses to the convening authority; the right to notice of proceedings and the release or escape of the accused; the right to not be excluded from proceedings absent a required showing; and the right to submit post-trial matters to the convening authority.[37]

- *Additional proposals.* This Report's proposal regarding Article 32 (Preliminary hearing) also addresses the victim's opportunity to convey views on disposition of offenses to the convening authority. The proposal regarding Article 54 (Record of trial) increases access of victims of all offenses to trial records. The proposal to enact Article 140a (Case management; data collection and accessibility) would provide victims, counsel, and members of the public access to all unsealed court-martial documents. This Report would revise the current prohibition against stalking to address cyberstalking and threats to intimate partners (Article 130). This Report also proposes additional punitive articles that would address retaliation (Article 132) and specifically criminalize improper sexual activities with a recruit or trainee by a person in a position of special trust (Article 93a).

Investigative Subpoena Power. The optimal time for use of subpoena power often occurs during the conduct of an investigation, making it possible to develop and analyze information for use in the decision as to whether to prefer charges, whether a preliminary hearing should be ordered, and for consideration during a preliminary hearing. The Article 32 proceeding, as recently revised, serves primarily as a preliminary hearing rather than as an investigative tool and will operate most efficiently and effectively when based upon information compiled prior to the hearing. This Report proposes, through amendments to Article 46 (Opportunity to obtain witnesses and other evidence) and Article 47 (Refusal to appear or testify) to provide a process for making subpoenas and other process available independent of Article 32 during the earliest stages of an investigation.

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[36] A recent executive order contains numerous provisions to implement Article 6b rights throughout the Manual for Courts-Martial. Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

[37] Article 6b(a)(6) provides that a victim has the "right to receive restitution as provided in law." As a matter of current practice, non-statutory restitution may be included in pretrial agreements in guilty plea cases, *see, e.g.*, R.C.M. 705(c)(2)(C), and a limited form of restitution related to property damage is available outside the sentencing process in the form of deductions from pay under Article 139. The congressionally-chartered Judicial Proceedings Panel is considering whether additional options for restitution should be provided in connection with sexual offense proceedings. *See* NDAA FY14 at § 1731(b)(1)(D). In view of the limited jurisdiction of courts-martial over personal property and assets, development of an effective restitution program may require consideration of options outside the military sentencing process, and beyond the scope of this Report. Because such options would include consideration of administrative and judicial procedures outside the military justice system, this Report recommends that development of any statutory changes regarding restitution take place after the Judicial Proceedings Panel presents its recommendations.

The Article 32 Preliminary Hearing. This Report proposes to retain the core features of the Article 32 preliminary hearing as set forth in current legislation (NDAA FY 2014 and FY 2015). The proposal would focus the preliminary hearing on an initial determination of probable cause prior to referring charges to a general court-martial; require a more comprehensive preliminary hearing report; and provide an additional opportunity for the government, the defense, and victims to present information relevant to an appropriate disposition of the charges and specifications. The proposal would require the preliminary hearing officer to analyze and organize the information presented in a manner designed to enhance the utility of the hearing to the staff judge advocate and the convening authority in fulfilling their respective disposition responsibilities. The requirement for detailed analysis of this information for use in the disposition process would replace the current requirement for a disposition recommendation. Consistent with the recently enacted legislation, the preliminary hearing officer will be a judge advocate, equal to or greater in rank than the most senior counsel. Part II of the Report will address changes in the rules implementing Article 32 that would be required as a result of the proposed statutory amendments.

Discovery. The discovery rules applicable to courts-martial are addressed primarily in the Rules for Courts-Martial, which implement Article 46 and provide for robust and open discovery in military practice. Part II of this Report will consider proposed rule changes to strengthen the military's open discovery practice, which is intended to be timely and comprehensive. The Rules serve the goals of discovery in courts-martial, which include improving efficiency, preventing delays and surprise during trials, limiting gamesmanship, and permitting the accused to prepare adequately for trial and to present a defense, subject to limitations on classified and privileged information. Part II also will consider whether the President should establish a mechanism to address potential wrongful convictions that result from discovery violations or other factors.

Double Jeopardy. This Report proposes amending Article 44 (Former jeopardy), the prohibition against double jeopardy in military law, to conform to federal civilian practice by providing for jeopardy attachment when the members are impaneled following completion of challenges, or, if there are no members, when evidence is introduced on the merits of the charges.

Panel Member Selection, Panel Size, and Votes Needed to Convict.

- *Current Practice*. The composition of courts-martial has changed over time, from the thirteen-member panels required under the original American Articles of War, to the variable panel sizes permitted under current law—a minimum of three members for a special court-martial, a minimum of five members for a non-capital general court-martial, and a minimum of twelve members for a capital general court-martial. The use of a minimum number of members, rather than a standard number, means that the panel size can vary from case to case. The voting percentage also has changed, from a simple majority vote since the beginning of the Revolutionary War through World War I, to the varied system under the UCMJ: two-thirds for the findings in general and special courts-martial; three-fourths for sentences to confinement for ten years or more; unanimity in order to proceed to

capital sentencing in cases in which a death sentence is an authorized punishment; and unanimity for a death sentence. The variation in panel sizes means that the number of votes required for findings may vary substantially from trial to trial, even within the same category of court-martial, with percentages ranging from 67% to 80% depending on the number of members actually seated. Additionally, the variation in panel sizes complicates the member selection process because of the unpredictability in the number of panel members who ultimately will serve on the panel.

- *Providing consistency*. This Report proposes to provide consistency by standardizing the number of members for each type of court-martial through amendments to Article 16 (Courts-martial classified), Article 25a (Number of members in capital cases), and Article 52 (Number of votes required). The Report proposes four members for a special court-martial (with three votes required for a conviction); eight members for a non-capital general court-martial (with six votes required for a conviction); and twelve members for a capital general court-martial (with unanimity on the findings and sentence required for the death penalty). This proposal would establish a standard panel size, which would facilitate the detailing process, and also would establish a standard percentage of votes cast to convict (75 percent, with unanimity required to proceed to capital sentencing in cases in which a death sentence is an authorized punishment). Following voir dire, challenges, and final empanelment, the unseated prospective members left over from the venire would be free to return to their normal duties.

- *Panel selection*. This Report proposes to retain the current criteria in Article 25(Who may serve on courts-martial) for member selection by the convening authority, with two modifications. First, this proposal would eliminate the blanket prohibition against detailing enlisted panel members serving in the same unit as the accused and would permit such members to be detailed under the same conditions applicable to the detailing of officers from the same unit as the accused. Second, the proposal would amend Article 29 (Absent and additional members) to permit the convening authority to authorize alternate panel members, at his or her discretion. Under criteria to be established in the Rules for Courts-Martial in Part II of this Report, the convening authority would have initial discretion in panel composition to include selection of a panel of all enlisted members. The proposed criteria also would provide guidance for fulfilling a request by an accused, as under current law, for a panel composed of at least one-third enlisted members or all officers. The Report recognizes unique features of military practice by providing flexibility for a non-capital general court-martial to proceed with not less than six members when it becomes necessary, due to unforeseen circumstances, to excuse a member for good cause during trial.

Learned Counsel in Capital Trials and Appeals. Consistent with federal law and the law applicable to military commissions, this Report proposes amending Article 27 (Detail of trial and defense counsel) and Article 70 (Appellate counsel) to require that, to the greatest

extent practicable in capital cases, at least one defense counsel be learned in the law applicable to capital cases.

Reforming Sentencing, Guilty Pleas, and Pretrial Agreements

Sentencing Reforms. The Report proposes replacing the current sentencing system—which relies primarily on maximum punishments and which provides only minimal guidance regarding the adjudication of sentences below the maximum—with a system of judicial discretion guided by parameters and criteria.

- *Judicial sentencing.* The Report proposes, through an amendment to Article 53 (Court to announce action), that military judges adjudicate the sentence for each non-capital offense, consistent with the practice in federal proceedings and in the vast majority of states that rely on judges rather than juries to adjudicate non-capital sentences. Judicial sentencing would facilitate the use of parameters and criteria to enhance the potential for greater consistency in military sentencing and provide a better balance between individualized sentences and sentence uniformity. It also would facilitate consideration of a broader range of relevant information in the military sentencing process, and consideration of victim-impact statements, including unsworn statements. The judicial sentencing process also would make it easier to employ segmented sentencing, in which any confinement portion of a sentence would be adjudged for each offense, as discussed more fully below. These changes, along with the elimination of instructional issues, have the potential for a considerable reduction in appellate litigation and rehearings in the area of military sentencing.

- *Sentencing procedures.* The Report proposes to revise court-martial sentencing procedures through amendments to Article 56 (Maximum and minimum limits), by borrowing, with substantial modification, federal civilian practices to enhance the opportunity to achieve consistency, fairness, and justice in the adjudication of military sentences. Although it is not practicable to simply adopt the federal sentencing guidelines due to the many differences in the procedures, offenses, and types of punishments at courts-martial, the proposed sentencing reforms would endeavor to promote greater uniformity and predictability in military sentencing while allowing the military judge to exercise meaningful sentencing discretion in order to ultimately craft an individualized sentence for each offender.

- *Replacing unitary sentencing with segmented sentencing.* Under current practice, the court-martial adjudges a single sentence for all offenses resulting in a conviction, not a separate punishment for each offense. The proposal would adopt the practice in federal civilian courts and most state courts of adjudging a separate sentence for each offense with respect to confinement and fines. Where appropriate, the military judge would determine a sentence to confinement and a fine for each offense, and when the accused is convicted of multiple offenses, would determine whether terms of confinement should run consecutively or concurrently.

- *Replacing broad sentencing authority with sentencing guided by parameters and criteria.* Current law authorizes a court-martial to adjudge any punishment, or no punishment at all, subject only to the maximum punishments established under Article 56(a) or by statute, and by any mandatory minimum punishments established by statute. This proposal would replace the current sentencing process with a system based upon published standards developed by a new Military Sentencing Parameters and Criteria Board. The Military Sentencing Parameters and Criteria Board would collect and analyze sentencing data to inform determinations of appropriate parameters and criteria for specific offenses.
    - In general, a sentencing parameter is a boundary on the punishment that may be imposed for an offense, subject to departure for reasons set forth in the trial record. Sentencing criteria are factors that a judge must consider when sentencing a case, but that do not set a boundary on the punishment. The goal is to limit inappropriate disparity within a system that will largely maintain individualized sentencing and judicial discretion in sentencing.
    - The proposal involves discrete use of the sentencing experience developed in the civilian sector while maintaining the distinct characteristics of military sentencing, particularly with respect to unique military offenses and punishments. The military judge would be able to sentence outside the parameters, as may be warranted, with a written explanation on the record subject to review by the Courts of Criminal Appeals for abuse of discretion.
- The implementation of parameters and criteria would draw upon best practices at the federal and state level, and would replace the current practice of adjudging a sentence with little or no guidance. This proposal differs in important respects from the federal civilian guidelines, which are based upon a set of offenses and an offender population that is markedly different from the majority of individuals accused of criminal offenses in the armed forces. Under the proposal, the Chief Trial Judges of the Services would serve as the voting members of the Military Sentencing Parameters and Criteria Board. The Board will collect and analyze sentencing data, propose confinement parameters and sentencing criteria for approval by the President, and issue other sentencing policy guidance.
- *Implementation in two phases.* The development of comprehensive sentencing parameters and criteria will require detailed analysis of sentencing data involving the relationship between specific offenses and the sentence imposed for those sentences. Because the military justice system, unlike the federal civilian system and most state systems, does not currently utilize segmented sentencing (which provides a separate sentence for each offense), it will be necessary to implement sentencing parameters in two phases.
    - In the first phase, the President, with the advice of the Military Sentencing Parameters and Criteria Board, will issue interim guidance based upon an analysis of past experience in the military and civilian sectors. The interim guidance will be used by military judges as they apply the new sentencing

procedures, included segmented sentencing, in conjunction with the effective date of the legislation (one year after the date of enactment).

- In the second phase, the Military Sentencing Parameters and Criteria Board will conduct a detailed analysis of the data generated by military segmented sentencing. Based upon that analysis, the President will issue comprehensive sentencing parameters and sentencing criteria, which will take effect not later than four years after the enactment of the legislation. Upon implementation, the comprehensive sentencing parameters would replace the mandatory minimum sentences currently set forth in Article 56(b).

Guilty Pleas. This Report makes several proposals regarding military guilty plea practice and procedures.

- *Current procedures.* The military justice system takes particular care to test the validity of guilty pleas because the facts and the law are not tested in the crucible of the adversarial process. Further, there may be subtle pressures inherent to the military environment that may influence the manner in which servicemembers exercise (and waive) their rights. The providence inquiry and a judge's explanation of possible defenses are established procedures which ensure that servicemembers knowingly and voluntarily admit to all elements of a formal charge. This Report proposes that the military justice system retain many of the procedures currently in effect under Article 45 (Pleas of the accused) to ensure that an accused's guilty plea at a court-martial is knowing and voluntary.

- *Proposed changes.* The Report proposes several changes to Article 45, including: an amendment to Article 45(b) to permit an accused to plead guilty in capital cases for offenses where death is not a mandatory sentence; and creation of paragraph 45(c), which would align military law with federal civilian law by applying the doctrine of harmless error to variances from Article 45.

Plea Agreements. This Report's proposals with regard to plea agreements align with those that would create sentencing parameters and criteria.

- *Create Article 53a.* This Report proposes to create a new statute, Article 53a (Plea agreements) that would continue those aspects of current practice in which a plea agreement is viewed as an agreement between the accused and the convening authority but that takes into account proposed sentencing by judge alone and the establishment of sentencing parameters and criteria. The convening authority would be responsible for entering into an agreement that reflects the interests of the government in general and the disciplinary interests of the unit in particular. As noted above with regard to guilty pleas, the military judge would continue to use the providence inquiry in accordance with R.C.M. 910 to ensure that the guilty plea is provident and that all plea agreement terms are lawful. This proposal also would retain present rules governing lawful terms, including the prohibition on requiring waiver of appellate review.

- *Military judge's responsibility*. Under the proposal, the military judge's responsibility would be to: (1) determine the legality of the plea agreement; (2) adjudge a sentence in accordance with the plea agreement; and, (3) take any other action on the sentence (e.g., make a recommendation on suspension) that is authorized under the rules. The military judge would review the entire agreement, including any negotiated sentence agreement, prior to determining whether to accept the agreement and adjudge the sentence. If the agreement contains a negotiated sentencing range, the military judge would enter a sentence within that range unless the judge determines that the negotiated sentencing range is plainly unreasonable or otherwise unlawful.

Streamlining the Post-Trial Process

This Report proposes to simplify post-trial processing of courts-martial in accordance with changes enacted in the NDAA FY 2014. The amendments to Article 60(Action by convening authority) enacted as part of the NDAA FY 2014 significantly restricted the convening authority's discretion to change the findings and sentence of a court-martial. The proposals in this Report reflect those restrictions by eliminating all redundant or unnecessary paperwork in cases where the recent legislation has removed the convening authority's post-trial discretion. In all general and special courts-martial, the military judge would make an "entry of judgment" incorporating the results of the court-martial and any actions taken by the convening authority within the limited scope permitted by the recent legislation. The proposed legislation also would provide a restricted authority to suspend sentences, which would be in addition to the authority under present law to include suspension as a term in a pretrial agreement. The new authority would be limited to cases where the military judge recommends suspension and the convening authority acts within the scope of the military judge's recommendation. The proposed changes in post-trial processing are set forth in Articles 60 through 60c.

Modernizing Military Appellate Practice

The current appellate process involves: (1) automatic review for matters of fact and law, as well as sentence appropriateness, by the service Courts of Criminal Appeals under Article 66 for those cases with a sentence to confinement for one year or more or a punitive discharge; (2) discretionary review of matters of law for good cause by the United States Court of Appeals for the Armed Forces under Article 67; (3) access to the Supreme Court for only those cases the Court of Appeals for the Armed Forces reviews under Article 67a. All other general courts-martial (except those where review is waived or withdrawn) receive a limited review by the Office of The Judge Advocate General under Article 69. All other special and summary courts-martial receive limited review by a judge advocate under Article 64. The government is entitled to interlocutory appeals in limited circumstances under Article 62.

The current appellate review process reflects the historical legacy of routine post-trial examination of cases in which lay officers acted as counsel, judge, and jury. Under the UCMJ, the military justice system has established a formal system of appellate review, involving judicial consideration of trials presided over by qualified judges involving parties

represented by qualified counsel. The development of a trial and appellate system with attorneys and judges has made it possible to adapt selected features of the federal appellate system for use in the military justice system.

This Report's proposals would modernize military appellate practice through amendments to Articles 56 (Sentencing), 62 (Appeal by the United States), 64 (Review by a judge advocate), 65 (Disposition of records), 66 (Review by Court of Criminal Appeals), 67 (Review by the Court of Appeals for the Armed Forces), 69 (Review in the office of the Judge Advocate General), and 73 (Petition for a new trial). In general, the proposals would:

- Permit the government to file interlocutory appeals in general and special courts-martial regardless of whether a punitive discharge may be adjudged (through amendment to Article 62).
- Clarify that the government may file an interlocutory appeal where the military judge enters a finding of not guilty following the return of a finding of guilty by members (through amendment to Article 62).
- Require appellate defense counsel to review the record of trial and provide the accused with advice regarding the filing of an appeal in all cases in which an accused is sentenced to confinement for more than six months, a punitive discharge, or in which the government has previously filed an interlocutory appeal (through amendment to Article 65).
- Revise the jurisdiction of the service Courts of Criminal Appeals to include all cases in which the accused files an appeal and in which an accused is sentenced to confinement for more than six months, a punitive discharge, or in which the government had filed an interlocutory appeal (through amendment to Article 66).
- Enhance the ability for all other appellants to have their cases reviewed by the service Courts of Criminal Appeals (through amendments to Articles 64, 65, 66, and 69).
- Transform the automatic appeal of non-capital cases to the service Courts of Criminal Appeals to an appeal of right and eliminate the requirement for the service Courts of Criminal Appeals to review the record of trial in non-capital cases where the appellant has not filed an appeal raising issues for the court's review (through amendment to Article 66).
- Provide for factual sufficiency review only when appellant raises the issue for the court's review and makes an appropriate showing that the court should dismiss the findings (through amendment to Article 66).
- Hear appeals as to sentence brought by either an appellant or, in appropriate circumstances, the government (through amendment to Articles 56 and 66).

- Require appropriate notification to the other Judge Advocates General prior to certification by a Judge Advocate General of an issue for review by the Court of Appeals for the Armed Forces (through amendment to Article 67).
- Expand the time limit for filing a petition for new trial from two to three years, consistent with practice in federal civilian courts (through amendments to Articles 69 and 73).
- Continue to require automatic review of capital cases and require, to the greatest extent practicable, at least one defense counsel who is learned in the law applicable to capital cases (through an amendment to Article 70).
- Establish harmless error standard of appellate review in guilty plea cases (through an amendment to Article 45).

Increasing Transparency and Independent Review of the Military Justice System

This Report makes two proposals that would increase transparency and require periodic independent review of the military justice system. Both would enhance the confidence of members of the armed forces and the public in military law and the operation of the military justice system.

Public Access. This proposal would establish a new statute, Article 140a (Case management; data collection and accessibility), that would require the Secretary of Defense to develop uniform case management standards and criteria that also would allow public access to court-martial dockets, pleadings, and records in a manner similar to that available in the federal civilian courts. This proposal envisions implementation across the services to ensure ease of access and management of data. In addition to the criticism made by the Response Systems Panel regarding the difficulty in gathering and analyzing military justice data, the Judicial Proceedings Panel recently recommended that DoD adopt an electronic system similar to that utilized by federal courts to ensure Special Victims' Counsel and victims have appropriate access to docketing information and case filings.

The Military Justice Review Panel. This proposal would enhance the efficiency and effectiveness of the UCMJ by amending Article 146 (Code committee) to establish a blue ribbon panel—the Military Justice Review Panel—composed of experts in military law and civilian criminal law, to conduct periodic reviews of the military justice system.

The Panel would issue its first report four years after the effective date of the legislation, focusing on the implementation of the new legislation. Eight years after the effective date of the legislation, the Panel would issue its first comprehensive review of the UCMJ and Manual for Courts-Martial. Thereafter, the Panel would issue comprehensive reports every eight years. Within each eight-year cycle the Panel would issue targeted reports at the mid-point of each cycle, and could issue additional reports on matters referred to the Panel by the Secretary of Defense or Congress.

The proposal is 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. Accordingly, the comprehensive reviews are scheduled to occur every eight years.

The proposal also relies on the expectation that the Joint Service Committee will continue to conduct its vital role within the executive branch addressing the type of targeted adjustments in law and regulation that are required on a more frequent basis to address specific issues in the law.

Improving the Functionality of the Punitive Articles and Proscribing Additional Criminal Acts

Finally, this Report proposes amendments to the punitive articles, those provisions of the UCMJ (Articles 77-134) that describe prohibited criminal acts, as follows:

Restructuring the Punitive Articles. This Report proposes migrating most of the prohibited conduct addressed by the President in the Manual for Courts-Martial under Article 134 (General article) into new statutory articles or existing enumerated statutory articles that proscribe related criminal conduct. In addition, the Report proposes a statutory clarification that would provide extraterritorial jurisdiction over all offenses otherwise covered by clause 3 of Article 134 (i.e., Title 18 offenses that currently must be prosecuted under other clauses of Article 134 when the underlying civilian offense does not have extraterritorial application).

Lesser Included Offenses. This Report proposes to provide notice of lesser included offenses, by establishing statutory authorization in Article 79 (Conviction of lesserincluded offense) for the President to designate a reasonably included offense as a lesser included offense.

Statute of Limitations. This Report proposes amending Article 43 (Statute of limitations) to adopt the federal civilian approach to child-abuse offenses (10 years when the victim is no longer alive); revising the period for fraudulent enlistment to cover the length of the enlistment or 5 years, whichever is longer; and extending the period when DNA testing implicates an identified person. This report also proposes to make the amendments apply to the prosecution of any offense committed before, on, or after the date the statute is enacted if the applicable limitation period has not yet expired.

Article 120 (Rape and sexual assault generally). This Report proposes aligning the definition of "sexual act" in military law with federal civilian law. The congressionally-chartered Judicial Proceedings Panel, which is giving extensive consideration to whether further changes to Article 120 are warranted, has recommended, and the Secretary of Defense has established a subcommittee of distinguished criminal law experts to examine Article 120. Pending the outcome of that review, this Report does not recommend further changes beyond the conforming changes needed to align Article 120 to the parallel provisions in federal civilian criminal proceedings.

Article 128 (Assault). The Report proposes aligning the definition of assault with federal civilian law, which would permit greater flexibility to address assaults involving domestic violence as an aggravating factor.

Article 130 (Stalking). This proposal would expand the current Article 120a to include cyberstalking.[38] The proposal also would update current law to address threats to intimate partners.

New Offenses Proposed:

- *Article 93a (Prohibited activities with military recruit or trainee by person in position of special trust)*. This proposal would create a new statute that identifies persons (such as recruiters and drill sergeants) for whom sexual activity with other identified individuals (such as recruiting prospects or trainees) would be strictly prohibited without requiring additional proof of coercion or abuse. This would not preempt the services' authority to issue regulations under Article 92 (Failure to obey order or regulation) addressing matters such as fraternization that involve non-sexual as well as sexual conduct, nor would it preempt charges for rape or sexual assault under Article 120 that are based upon abuse of one's position in the chain of command to gain access to or coerce another person.[39]

- *Article 121a (Fraudulent use of credit cards, debit cards, and other access devices)*. This proposal would create a new statute that would specifically criminalize unauthorized use of another's credit or debit card.

- *Article 123 (Offenses concerning Government computers)*. This proposed new offense would criminalize accessing a government computer with an unauthorized purpose and is based on an analogous federal statute (18 U.S.C. §1030 (Fraud and related activity in connection with computers)). The proposed article is targeted to meet military needs and it applies only to persons subject to the code and is directed only at United States government computers.

- *Article 132 (Retaliation)*. This proposed new article would prohibit retaliation against victims and witnesses of crime. The offense would define retaliation as when a person, with the intent to retaliate against any person for reporting or planning to report an offense, or with the intent to discourage any person from reporting an offense, wrongfully takes or threatens to take an adverse personnel action against the person, or wrongfully withholds or threatens to withhold a favorable personnel action with respect to the person.

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[38] The current offense within Article 130 (Housebreaking) would be codified within Article 129 (Burglary).

[39] The Judicial Proceedings Panel is examining whether the definitions of rape and sexual assault in Article 120 should be amended to expressly cover a situation in which a person subject to the UCMJ commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person. *See* NDAA FY 2014 at § 1731(b)(1)(A). The proposal to create a new Article 93a addresses a related but different matter.

Conclusion

The current military justice debates provide an opportunity to consider changes that would enhance the vital role of the UCMJ in strengthening our national security. The Military Justice Review Group respectfully submits these recommendations for appropriate consideration.

Legislative Report

Section A. Background

The recommendations in this Report draw upon the history of American military justice and the specific responsibilities assigned to the Military Justice Review Group. Part 1 of this background section summarizes the structural development of the military justice system. Part 2 discusses the establishment and role of the Military Justice Review Group.

Part 1. Historical Perspective: Summary of Structural Changes in the Military Justice System

For purposes of providing background regarding the recommendations in this Report, this section provides a brief historical perspective highlighting major developments in the structure of military justice in terms of three historical phases.[1]

- The first phase (1775-1912), which established the structural foundation, began in the period leading up to the Declaration of Independence, and continued to the pre-World War I years in the 20th Century. In many significant respects, the court-martial process in 1912 closely resembled the structure of courts-martial at the time of the Revolutionary War.

- The second phase (1913-1941) introduced the first significant structural reforms. This phase began on the eve of World War I, and continued through the post-war debates about the administration of justice, the enactment of amendments that emerged from that debate, and the subsequent implementation of those amendments.

- The third phase (1941-present) began with a major national debate about the purposes and practices of military justice growing out of World War II experience. The third phase produced major structural changes, including enactment of the Uniform Code of Military Justice, implementation of the new legislation under the 1951 Manual for Courts-Martial, and subsequent periodic revisions to the Code and the Manual.

I. The First Phase: Foundation (1775 to 1912)

Prior to the Revolutionary War, Americans became familiar with courts-martial over the course of fighting four colonial wars with the British against the French. American colonists

[1] The modern military justice system was derived primarily from the Articles of War used by the Army. The other Services had their own disciplinary systems with many similarities to the Articles of War. The Navy was governed by Articles for the Government of the Navy. The Coast Guard followed Regulations for the U.S. Revenue-Cutter Service, as it was first known. The Marine Corps was subject to the Navy articles, except when detached for service with the Army by order of the President.

fighting with the British Army in those conflicts were subject to trial by courts-martial under the British Articles of War.[2] America's future Commander in Chief—George Washington—presided over at least one British general court-martial while serving as a colonel in the First Virginia Regiment.[3]

In the year leading up to the Declaration of Independence, the Continental Congress focused on the steps necessary to secure liberty and prepare for armed conflict. After the Battles of Lexington and Concord on April 19, 1775, the Continental Congress organized the colonial fighters and militia converging on Boston into a unified military force—the Continental Army—with George Washington as its Commander in Chief. Shortly thereafter, the Continental Congress enacted the American Articles of War to govern the newly created army.[4] The articles required members of the Continental Army to take an oath of allegiance, prescribed the duties of soldiers and officers, listed punishable offenses, and authorized punishments and modes of trial by courts-martial. Over the next few months, General Washington determined that the list of crimes and related punishments in the American Articles of War were insufficient to meet the needs of the Continental Army, and he asked Congress to add more capital offenses and increase the authorized punishment in several articles.[5] Congress made the requested changes.[6]

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[2] British Articles of War of 1765, Section XIX, art. I, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 946 (photo reprint 1920) (2d ed. 1896).

[3] Frederick Bernays Wiener, *American Military Law in Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 5-6 (1989). In a letter of instruction, Washington reminded his junior officers of the importance of discipline: "Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all." George Washington, Letter of Instructions to the Captains of the Virginia Regiments (29 July 1759).

[4] American Articles of War, enacted June 30, 1775, *reprinted in* WINTHROP, *supra* note 2, at 953. The American Articles borrowed heavily from the Massachusetts Articles of War, enacted April 5, 1775. *See id.* at 947. The Provisional Congress of Massachusetts Bay had enacted its own modified version of British Articles of War for the government of its militia. Gerald F. Crump, *Part I: A History of the Structure of Military Justice in the United States, 1775-1920*, 16 A.F. L. REV. 41, 42-44 (1974). The American and the Massachusetts versions differed from the British version in that, except for the three capital offenses, they limited the types of punishment that could be imposed. *Id.* In non-capital cases, the maximum allowable punishments were a dismissal or discharge out of the Army, whipping not exceeding thirty-nine lashes, a fine of up to two months of pay, and imprisonment for one month. *See* AW 51 of 1775.

By taking an active role in revising the articles, the Continental Congress underscored the responsibility of the civilian legislature in establishing the basic rules of military justice, as expressly established in the Constitution. *See* U.S. CONST. art I, § 8, cl. 14 (setting forth the power of Congress "to make rules for the Government and Regulations of the land and naval Forces").

[5] *See* UNITED STATES ARMY JUDGE ADVOCATE GENERAL CORPS, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975 10-13 (1975) [hereinafter THE ARMY LAWYER].

[6] Additional Articles, enacted November 7, 1775, *reprinted in* WINTHROP, *supra* note 2, at 959. On November 28, 1775, Congress also adopted Rules for the Regulation of the Navy of the United Colonies of North America. These rules, according to John Adams, were based on the British Regulations and Instructions Relating to His Majesty's Service at Sea, published in 1772. The Adams Papers Digital Edition: Papers of John Adams, Vol. 3, May 1775–Jan. 1776, *in* UNIVERSITY OF VIRGINIA PRESS, ROTUNDA (C. James Taylor ed., 2008-2015) [hereinafter

In response to Washington's concerns about the state of discipline, a committee led by John Adams recommended a new and enlarged version of the articles, modeled more closely on the original British articles.[7] Acting on the committee's recommendations, Congress enacted a new version of the American articles in 1776.[8]

Through the balance of the 18th and 19th Centuries, as America obtained its independence, adopted the Constitution, and engaged in a variety of military conflicts of varying size, duration, and location, the basic structural components of the 1776 Articles remained in place.[9] The following describes the primary features of military justice during this foundational period.

A. Purpose of Military Justice during the foundational period

The military justice system was designed to instill good order and discipline by punishing neglects, disorders, and other offenses. Most offenses listed in the Articles of War were unique to the military and had no counterpart in civilian criminal codes.

Military-specific offenses punishable by court-martial included desertion,[10] absence without leave,[11] contemptuous or disrespectful words against the President or the

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The Adams Papers]. The Navy court-martial at that time bore many similarities in appearance to the Army court-martial, but in contrast to the Army's Articles of War, the Navy's Articles remained substantially unchanged until the adoption of the Uniform Code of Military Justice in 1950. Robert S. Pasley, Jr. & Felix E. Larkin, *The Navy Court-Martial: Proposals for Its Reform*, 33 CORNELL L. REV. 195, 197-98 (1947).

[7] *See* Wiener, *supra* note 3, at 6 n.34 (quoting DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 409 (L.H. Butterfield ed. 1961)); Crump, *supra* note 4, at 44; *see also* THE ARMY LAWYER, *supra* note 5, at 10-11 (General Washington was sent a letter by Colonel Tudor, Judge Advocate General, complaining about the insufficiency of the Articles of War and requesting their revision).

[8] In non-capital cases, the maximum for whippings was increased to 100 lashes and the limitations on the fine and imprisonment were eliminated. AW, § 18, art. 3 of 1776. In the Navy, the commander could inflict on a seaman twelve lashes on his bare back with a cat of nine-tails. RULES FOR THE REGULATION OF THE NAVY OF THE UNITED COLONIES OF NORTH AMERICA, art. 4 (November 28, 1775) [hereinafter 1775 RULES OF THE NAVY]; An Act for the Government of the Navy of the United States, art. 4 (March 2, 1799).

[9] For much of this era, the United States maintained relatively small land and naval forces, with substantial increases occurring during conflicts such as the War of 1812, the Mexican-American War, the Civil War, and the Spanish American War (followed by the conflict in the Philippine-American War). Crump, *supra* note 4, at 45-54 (noting that court-martial practice was stable and military law had remained almost unchanged for 135 years). Congress revised the Articles of War in 1786, 1806, and 1874. *See* WINTHROP, *supra* note 2, at appendices 11-13; *see also* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 49 (1958). In addition to the three revisions of the Articles, Congress approved a variety of amendments during the foundational period. *See* Crump, *supra* note 4, at 46-54; David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 150-55 (1980).

[10] AW, § 6, art. 1 of 1776; AW 48 of 1874. In the Revolutionary War, the most common offense tried by court-martial was desertion. One survey of available records from this period showed that nearly 44 percent of courts-martial (1,162 of 2,666 cases) were trials for desertion. JAMES C. NEAGLES, SUMMER SOLDIERS: A SURVEY & INDEX OF REVOLUTIONARY WAR COURTS-MARTIAL 34 (1986).

[11] AW, § 6, art. 2 of 1776; AW 21 of 1806; AW 34 of 1874.

Congress,[12] contempt or disrespect towards the commander,[13] mutiny and sedition,[14] striking a superior officer or failing to obey a lawful command,[15] misbehavior before the enemy,[16] being drunk on duty,[17] and sleeping on post.[18] The court-martial also had the power to punish all other non-capital crimes not mentioned in the Articles of War that affected good order and discipline.[19] Except for desertion or some other impediment in which the accused was not amenable to justice, the Articles of War imposed a two-year statute of limitations on all crimes punishable by court-martial.[20]

In peacetime, capital crimes such as murder and rape could only be prosecuted in civilian court.[21] The Articles of War required the commanding officer, upon request of the injured party or parties, "to use his utmost endeavors" to deliver soldiers accused of committing crimes "punishable by the known laws of the land" to the civil magistrate for trial.[22] A commanding officer who failed to deliver the soldier to the civil magistrate was himself liable to be tried by court-martial and cashiered out of the service for this failure.[23] The Articles of War thus expressed a preference in peacetime for trying common law crimes in civilian courts.[24]

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[12] AW 5 of 1806; AW 19 of 1874. The pre-1806 versions did not mention the President, since the office was created by the Constitution. *See* AW, § 2, art. 1 of 1776 (referring only to Congress and the local legislature).

[13] AW, § 2, art. 2; AW 6 of 1806; AW 20 of 1874. The first court-martial in the U.S. Revenue-Cutter Service (the Coast Guard's predecessor) for this type of offense occurred on 7 December 1793 aboard the Revenue Cutter MASSACHUSETTS. The offender, Third Mate Sylvanus Coleman of Nantucket, was summarily dismissed from the service for "speaking disrespectfully of his superior officers in public company. . . insulting Captain John Foster Williams [the commanding officer] on board. . ." and for writing an order in the name of the commanding officer. HORATIO DAVIS SMITH, EARLY HISTORY OF THE UNITED STATES REVENUE MARINE SERVICE 1789-1849 7 (1932), *available at* http://www.uscg.mil/history/articles/USRCS1789-1849.pdf.

[14] AW, § 2, art. 3 of 1776; AW 7 of 1806; AW 22 of 1874.

[15] AW, § 2, art. 5 of 1776; AW 9 of 1806; AW 21 of 1874.

[16] AW, §13, arts. 12-14 of 1776; AW 42 of 1874.

[17] AW 45 of 1806; AW 38 of 1874.

[18] AW 46 of 1806; AW 39 of 1874.

[19] AW, § 18, art. 5 of 1776; AW 99 of 1806; AW 62 of 1874.

[20] AW 88 of 1806; AW 103 of 1874.

[21] In 1874, the Articles of War listed the common-law offenses that could be punished *in time of war* without any showing that the offenses were prejudicial to good order and discipline: larceny, robbery, burglary, arson, mayhem, manslaughter, murder, rape, and assault and battery with intent to kill, wound, murder, or rape. AW 58 of 1874.

[22] AW, § 18, art. 5 of 1776; AW 33 of 1806; AW 59 of 1874.

[23] AW, § 18, art. 5 of 1776; AW 33 of 1806; AW 59 of 1874.

[24] The British Articles of War also imposed a duty on the commanding officer to deliver any officer or soldier accused of a capital crime or of using violence against civilians to the civil magistrate for trial. British AW, §

Because the military justice system was different from the common law system, Congress required that everyone joining the military must have the Articles of War read to them by the person enlisting them, or by their commanding officer, before taking their oath of military service.[25] Thereafter, the articles were to be read and published in every garrison, regiment, troop, or company every two months to remind all officers and soldiers of their duty to observe and follow them.[26]

B. Investigation and charging during the foundational period

Any person, civilian or military, could complain about a soldier to any commissioned officer. The officer then signed formal charges to initiate the court-martial process.[27] This legal act of a commissioned officer signing formal charges against an accused was called a "preferral" of charges. The preferred charges were then forwarded to the accused's commanding officer for his approval, accompanied by a request or recommendation that the charges, if approved, be "referred" to trial by court-martial.[28] If the commanding officer found it more appropriate for a charge to be disposed of without trial, the charges were not preferred at all; or, if charges were preferred, the commanding officer dismissed them.

As soon as a commissioned officer preferred formal charges, the accused was placed under arrest and confined until tried by court-martial.[29] Although the arrest could legally be made by any commissioned officer, it was ordinarily made by the accused's immediate commanding officer.[30] The accused was also relieved of all military duties while under arrest. The Articles of War limited the period of arrest to eight days, or until the trial could be held, whichever came first.[31]

There was no formal requirement for a preliminary investigation under the Articles of War before preferring charges and forwarding them to the appropriate commanding officer.

11, art. 1 of 1765. This provision explains why the British soldiers accused of murder and defended by John Adams for their role in the Boston Massacre were tried in civilian court.

[25] AW, § 3, art. 1 of 1776; AW 10 of 1806; AW 2 of 1874. It was important for a soldier to learn about the Articles of War, because the soldier was now subject to a legal system distinct from the civilian system. The articles contained many offenses unique to the military, and ignorance of the law was not a defense to a violation of the articles.

[26] AW, § 18, art. 1 of 1776; AW 101 of 1806; AW 128 of 1874 (articles were to be read and published every six months). In the Navy, the rules were hung up in a public part of the ship and read once a month to everyone. An Act for the Better Government of the Navy of the United States, art. 25, § 16 (July 17, 1862) [hereinafter 1862 ROCKS AND SHOALS]; 1775 RULES OF THE NAVY, *supra* note 8, at art. 7.

[27] WINTHROP, *supra* note 2, at 153.

[28] *Id.* at 154 ("By *preferring to* is meant officially addressing and forwarding to the commander, through the proper military channels, (or directly where permissible), the formal charges . . . .").

[29] AW, § 14, art. 15 of 1776; AW 77, 78 of 1806; AW 65, 66 of 1874.

[30] WINTHROP, *supra* note 2, at 123.

[31] AW, § 14, art. 16 of 1776; AW 79 of 1806; AW 70 of 1874.

However, prior to preferral, the normal practice was that the charges should be supported by *prima facie* evidence or by a proper preliminary investigation before preferral.[32] Otherwise, an unsupported charge would result in the initial arrest and confinement of an innocent person as well as the needless waste of time at the trial, if the unsupported charge went to trial. It was a neglect of duty to bring frivolous or malicious charges, and such neglect often resulted in censure or severe punishment.[33]

After the charges were preferred and the accused arrested, a judge advocate served the accused with a copy of the formal charges[34] and forwarded them, along with a recommendation as to the disposition of the charges, to the commanding officer.[35]

C. Convening the court-martial during the foundational period

After receiving a copy of the formal charges, the commanding officer had complete discretion regarding whether to try the charges by court-martial and the type of court-martial that should hear the charges.[36] To convene a court-martial, the commanding officer published an order announcing the place and time of trial, the name of the person or persons to be tried, and the appointment of all court-martial personnel, which included the persons to serve as court members (judge and jury) and as the judge advocate (prosecutor). As discussed below, the number of personnel required to serve as members of the panel depended on the type of court-martial selected.

The commanding officer could elect between two types of court-martial: the general court-martial and several inferior courts-martial. The main distinctions between the two types of

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[32] WINTHROP, *supra* note 2, at 150-51.

[33] *Id.* at 151 n.19.

[34] AW 77, 78 of 1806; AW 71 of 1874.

[35] During the Revolutionary War, some officers brought charges against fellow officers to revenge slights and insults. NEAGLES, *supra* note 10, at 29. Others requested trial by a court-martial as a means to vindicate their honor and to clear themselves of wrongdoing. THE ARMY LAWYER, *supra* note 5, at 15. General Charles Lee, for example, demanded a court-martial after General George Washington reprimanded him for disobeying orders and making an unnecessary retreat at the Battle of Monmouth. General Lee was found guilty.

In 1786, Congress created the court of inquiry to prevent the misuse of courts-martial as an outlet for the jealousies and animosities that sometimes permeated the officer corps. The court of inquiry provided the means by which an impartial body could look "into the nature of any transaction of, or accusation or imputation against, any officer or soldier." EDWARD M. COFFMAN , THE OLD ARMY: A PORTRAIT OF THE AMERICAN ARMY IN PEACETIME, 1784-1898 32 (1986). A court of inquiry had three members whose duty it was to examine the allegations and to pronounce a conclusion on the facts. The Navy also had courts of inquiry. 1862 ROCKS AND SHOALS, *supra* note 26, at arts. 23-24. Because courts of inquiry could be also abused—or, according to the 1874 Articles of War, ". . . perverted to dishonorable purposes, and . . . employed, in the hands of weak and envious commandants, as engines for the destruction of military merit"—the Articles prohibited commanding officers from ordering them "except upon demand by the officer or soldier whose conduct is to be inquired of." AW 115 of 1874.

[36] AW 2 of 1786; AW 65 of 1806; AW 72 of 1874. The judge advocate performed the duties described below. The Navy only had the general court-martial from 1774 until 1855. Pasley & Larkin, *supra* note 6, at 198.

courts were the number of commissioned officers appointed as members and the maximum punishment the court-martial could impose.

1. General Court-Martial

The general court-martial was the only court-martial that could adjudge a sentence imposing the maximum punishment authorized under the Articles of War, and it was the only forum empowered to try officers. It was also the only court-martial in which the commanding officer was required to appoint a judge advocate.[37]

The commanding officer appointed between five and thirteen commissioned officers to serve as members of the general court-martial. Although the Articles of War required the commanding officer to appoint thirteen officers "where that number can be convened without manifest injury to the service," after the Revolutionary War, the Articles were amended to require the appointment of at least five members.[38] The actual number appointed was solely within the discretion of the commanding officer.[39] The general court-martial could adjudge a sentence containing any punishment authorized under the Articles of War for the offenses charged, to include the death penalty.[40] Other authorized punishments included imprisonment, fines or forfeiture of pay, and dismissal from the military.[41] The Articles of War typically authorized the general court-martial to sentence

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[37] AW 2 of 1786; AW 65 of 1806; *see also* WINTHROP, *supra* note 2, at 158.

[38] AW 64 of 1806. During the Revolutionary War, the general court-martial had at least 13 commissioned officers as its members. AW, § 14, art. 1 of 1776. After the War, the Army was disbanded, leaving a total of about 80 persons in the entire Army, scattered across the country to guard munition depots, which made it difficult for any commander to convene a court-martial with 13 officers on the panel. In 1786, Congress reduced the minimum number of officers needed to five, while stating a preference for 13, if they could be assembled "without manifest injury to the service." AW 1 of 1786. Since 1786 when the Army almost did not exist, Congress has kept the minimum number at five members, except for the trial of capital offenses, where there must be 12 members before a death sentence can be imposed. AW 5 of 1920 (eliminating the five-to-thirteen officer requirement and simply requiring that the number of officers cannot be "less than five"). *But see* the current version of Article 25(a) (requiring at least 12 members in capital cases if they are "reasonably available"). The Navy general court-martial also consisted of between five and 13 commissioned officers. 1862 ROCKS AND SHOALS, *supra* note 26, at art. 11. The 1775 Navy rules required at least six commissioned officers, three Captains and three lieutenants, and the eldest captain presided. 1775 RULES OF THE NAVY, *supra* note 8, at art. 39. The U.S. Revenue-Cutter Service (the predecessor service to the modern Coast Guard) had two courts. The minor court—convened by the commanding officer—was to consist of not less than three commissioned officers. The general court—convened only at the direction of the President or the Secretary of the Treasury—was also composed of no less than three commissioned officers. REGULATIONS FOR THE U.S. REVENUE-CUTTER SERVICE, arts. 1110, 1134 (1907).

[39] Martin v. Mott, 25 U.S. 19 (1827) (the commander's decision as to the number of court members to be appointed without manifest injury to the service is a matter for his sound discretion and is conclusive).

[40] *See, e.g.*, AW, § 2, art. 3 of 1776 (mutiny), art. 4 (failure to suppress mutiny), art. 5 (striking a superior officer), §6, art. 1 (desertion). In the Navy, the death penalty was also available. *See, e.g.*, 1862 ROCKS AND SHOALS, *supra* note 26, at art. 3, ¶1 (mutiny), ¶2 (disobedience to a superior's lawful orders), ¶3 (sharing intelligence with the enemy), ¶¶ 4, 6 (desertion), ¶7 (hazarding a vessel), ¶9 (cowardice), and art. 5 (murder).

[41] *See, e.g.*, AW, § 12, art. 1 of 1776 (forfeiture of pay and dismissal for misappropriating military property).

the accused "according to the nature of the offense,"[42] or "in the discretion of the court-martial."[43] In addition to the better known punishments, others included flogging, ear cropping, being marked with indelible ink, confinement in dark holes, dunking in water, and forced labor with a ball and chain.[44] The findings and sentence of a court-martial were not complete or final, and could not be executed, until they were approved by the commanding officer who convened the court-martial.[45]

2. Inferior Courts-Martial

During various periods of time in the foundational phase, a number of different types of inferior courts-martial were available to commanding officers—the regimental court-martial, the garrison court-martial, the field-officer court, and the summary court. All inferior courts-martial typically involved the same maximum punishment: a fine of one month's pay, imprisonment for one month, and hard labor for one month.[46]

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[42] *See, e.g.*, AW, § 2, art. 2 of 1776 (contempt, disrespect).

[43] *See, e.g.*, AW, § 6, art. 2 of 1776 (absence without leave).

[44] Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 8 (1987); *see, e.g.*, AW, §7, art. 2 of 1776 (authorizing corporeal punishment for sending a challenge to duel). The 1874 Articles of War finally prohibited these punishments. AW 98 of 1874 ("No person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body.").

[45] *See* Part VI, "Commanding Officer Review," *infra*.

[46] The regimental court-martial (convened by a regimental commander) and the garrison court-martial (convened by a garrison commander) were identical in structure. Both were used solely to try enlisted soldiers for non-capital offenses with the limited punishment described above. AW 83 of 1874. Corporeal punishment was also often part of the sentence. Both courts required the commanding officer to detail at least three court members, but there was no requirement to appoint a judge advocate. AW 82 of 1874. The regimental and garrison courts-martial used the same procedures as the general courts-martial. The adjudged sentence was executed only after being approved by the commanding officer who convened the court-martial. AW 109 of 1874.

The field-officer court was first created in 1862 for use in the Civil War, and was later incorporated into the 1874 Articles of War. The field-officer court, when available, replaced the regimental and garrison courts-martial. AW 83 of 1874. Like the regimental and garrison courts-martial, the field-officer court could only try enlisted soldiers for non-capital offenses. AW 80 of 1874. The field-officer court consisted of a field grade officer (a major, lieutenant colonel, or colonel) who the commanding officer (normally the regimental commander) detailed to sit alone as a single court member. WINTHROP, *supra* note 2, at 491. No judge advocate was detailed. The maximum punishment the field-officer court could impose on a soldier was the same as the maximum permitted for the regimental and garrison courts-martial. The sentence of a field-officer court was executable only after approval by a senior commanding officer, normally the brigade or post commander. AW 110 of 1874.

The summary court was created in 1890 to replace the regimental and garrison courts-martial. The summary court consisted of a single court member, usually the commissioned officer who was second in command. The summary court was held within 24 hours of the accused's arrest, and, unlike the other inferior courts-martial, the accused had a right to object to this proceeding and could demand a general court-martial. The maximum sentence a summary court could adjudge was the same as the other inferior courts-martial. AW 83 of 1874. The sentence was executed after being approved by the commanding officer convening the court.

D. Trial Procedure during the foundational period

1. Selection of Court Members

The commanding officer authorized to convene the court-martial selected its members from the officer corps. The commander had broad authority in the selection of members, subject to the requirement that members not be of a rank inferior to the accused "if it can be avoided."[47] If the accused challenged any court member for cause, the other court members voted to decide whether the challenge had any merit.[48] Court members could be removed, even during trial, as long as the number did not fall below the minimum required. When a member of the militia faced trial by court-martial, militia officers of the same provincial corps as the offender had to compose the entire panel.[49]

2. The Court President

The senior member of the court-martial was its president, or presiding officer.[50] The court president, however, was not a judge nor was he required to have formal training in the law. He was a regular officer like the other detailed members. He presided over the court-martial by opening the court, calling it to order, and announcing its adjournment when the court-martial voted to adjourn.[51] The president was also the channel of communication with the commanding officer responsible for convening the court-martial.[52] The court-

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In 1909, Congress created for the Navy the "deck court," which was similar to the Army's summary court. Pasley & Larkin, *supra* note 6, at 198 n.14 (citing 35 Stat. 621 (1909) and 39 Stat. 586 (1916)). The "deck court" was a single officer appointed to try enlisted men for minor offenses. U.S. Department of the Navy, NAVAL COURTS AND BOARDS B-66 (2d ed. 1945) [hereinafter NAVAL COURTS AND BOARDS] at B-66. The maximum punishment that could be adjudged was confinement and forfeiture of pay for 20 days; the sentence was executed after it was approved by convening authority. The U.S. Revenue Cutter Service had only two courts, the minor court and the general court. REGULATIONS FOR THE U.S. REVENUE-CUTTER SERVICE, art. 1107 (1907). Punishments for officers included dismissal, suspension, forfeitures, imprisonment for two years, reduction in rank and reprimand. *Id.* at art. 1171. Punishment for enlisted members included dishonorable discharge; forfeitures; confinement for one year; confinement in irons, on bread and water, for 30 days; reduction in rank, deprivation of liberty for three months; and extra duties. *Id.* The Revenue Cutter Service and the Lifesaving Service merged to form the Coast Guard in 1915. The newly formed Coast Guard initially maintained the original two courts, but later added the deck court, with similar punishments as the Navy. COAST GUARD COURTS AND BOARDS, arts. 41-49 (1923).

[47] AW 11 of 1786; AW 75 of 1806; AW 79 of 1874.

[48] AW 71 of 1806; AW 88 of 1874. The naval court-martial followed the same procedure of having its members decide challenges for cause. NAVAL COURTS AND BOARDS, *supra* note 46, at § 390.

[49] AW, § 17, art. 1 of 1776; AW 97 of 1806; AW 77 of 1874 ("Officers of the Regular Army shall not be competent to sit on courts-martial to try the officer or soldiers of other forces.").

[50] WINTHROP, *supra* note 2, at 170. Until 1828, the court president was specifically detailed. Thereafter the court president was no longer designated in the convening order but was simply the senior member.

[51] *Id.* at 171.

[52] *Id.* at 173.

martial president acted for and in the name of the court-martial, but was in every other way an equal of the other court members.

3. The Court Members as judge and jury

Some of the members' powers were comparable to those of a judge, and others were comparable to those of a jury.[53] No judge presided over the court to instruct the members on the law, and there were few rules of procedure and evidence.[54] The members were responsible for determining both the law and the facts. The court members took an oath in which they swore "to duly administer justice" according to the Articles of War, but "if any doubt should arise" in which the Articles did not adequately explain the law, then they should decide the case "according to your conscience, the best of your understanding, and the custom of war in like cases."[55]

4. The Judge Advocate

The Articles of War required the commanding officer to detail a judge advocate to every general court-martial. A judge advocate, when detailed, could advise the members of the court. The judge advocate, however, was not necessarily a lawyer, and the court members were not required to follow his advice.[56] The judge advocate did not have to be a commissioned officer or even a member of the military.[57] The American legal profession at

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[53] *Id.* at 54-55.

[54] The first Manual for Courts-Martial to prescribe rules and procedures for use in courts-martial was published in 1895. In federal civilian courts at that time, state law provided the rules of criminal procedure. The Judiciary Act of 1789 directed federal courts to apply the law of the state in which the court was seated. *See, e.g.*, Judiciary Act of 1789, ch. 20, 1 Stat. 73. In 1940, Congress gave the Supreme Court authority to publish rules of criminal procedure. Sumners Courts Act, 76 Pub. L. No. 675, 54 Stat. 688 (1940). The Federal Rules of Criminal Procedure took effect in 1946. Congress enacted the Federal Rules of Evidence in 1975. Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

[55] AW 6 of 1786; AW 69 of 1806; AW 84 of 1874; *see also* AW, § 14, art. 3 of 1776. This oath was received by court members serving on general, regimental, and garrison courts-martial. No oath was prescribed for the field-officer court. WINTHROP, *supra* note 2, at 492. The absence of anyone with legal training at a court-martial was not necessarily that different from civilian practice during that era, depending on the location. Many common law judges of the post-Colonial period were also untrained in the law and there were few legal reports available. THE ARMY LAWYER, *supra* note 5, at 11; G. Edward White, *The Path of American Jurisprudence*, 124 U. PENN. L. REV. 1212, 1214 (1976). High-level judgeships were often held by non-lawyers throughout the eighteenth century. An untrained judge is reported to have told a jury "to do justice between the parties, not by any quirks of the law out of Coke or Blackstone—books that I never read and never will—but by common sense as between man and man." *Id.* at 1213 n.5 (footnote omitted).

[56] In common law courts, even when instructed on the law by judges, the jury decided the law and the facts, sometimes ignoring judicial instructions and "finding the law" themselves. White, *supra* note 55, at 1216; J. R. Pole, *Reflections on American Law and the American Revolution*, 50 WM. & MARY Q. 123 (1993). Juries had wide latitude to decide the law, especially the colonial jury, which had a more active role and was a stronger institution. *Id.* at 129. Naval court members were also free to disregard the advice of the judge advocate. *See* NAVAL COURTS AND BOARDS, *supra* note 46, at § 400.

[57] WINTHROP, *supra* note 2, at 183-84 (citing instances where enlisted and civilians were known to act as judge advocate). The Navy had never placed a high premium on lawyers in uniform. As late as World War I, the

that time was not fully developed, and lacked a formal structure for education, achievement, and specialization.[58] The judge advocate had three legal duties to perform under the Articles of War: to prosecute the case in the name of the United States;[59] to administer the oath of office to the court members;[60] and to protect the interests of the accused in limited ways.[61]

The judge advocate represented the public interest and thus had a duty to do justice, not merely to convict.[62] Accordingly, he was expected to call all witnesses with knowledge of the alleged offense and not solely those witnesses whose testimony was favorable to the prosecution.[63] Moreover, the judge advocate owed two duties to the accused: to object to any leading question posed to any of the witnesses, and to object to any question asked of the accused which might elicit an incriminating answer.[64]

5. Defense Counsel

Navy Judge Advocate General boasted that there was not a single lawyer on his staff. Edmund M. Morgan, *The Background of the Uniform Code of Military Justice,* 28 MIL. L. REV. 21 (1965).

[58] White, *supra* note 55, at 1214.

[59] AW, § 14, art. 3 of 1776; AW 6 of 1786; AW 69 of 1806; AW 90 of 1874. The 1775 Articles of War did not mention the judge advocate. The judge advocate in the Navy had the same duties as the judge advocate in the Army. NAVAL COURTS AND BOARDS, *supra* note 46, at § 400.

[60] AW, § 14, art. 3 of 1776; AW 6 of 1786; AW 69 of 1806; AW 84 of 1874. After the judge advocate administered the oath to each member, the court president then administered an oath to the judge advocate to bind him not to disclose the vote or opinion of any particular member of the court-martial. *Id.* In 1775, the court members received their oath from the court president, who was then sworn by the court member next in rank. AW 33 of 1775.

[61] AW 6 of 1786; AW 69 of 1806; AW 84 of 1874. The Articles of War decreed that the judge advocate was to "consider himself counsel for the prisoner" for the limited purpose of objecting to certain types of questions posed to witnesses or the accused. *Id.* The Navy judge advocate had the same duty to protect the interests of an accused without counsel. NAVAL COURTS AND BOARDS, *supra* note 46, at § 401. While having in mind his duties as prosecutor, he was to advise the accused against advancing anything that would tend to incriminate him or prejudice his case. *Id.* Furthermore, he was to see that no illegal evidence was brought against the accused and was to assist him in presenting to the court a defense, including evidence in extenuation or mitigation as well as evidence of previous good conduct and character. *Id.* The U.S. Revenue Cutter Service rules for courts required that "[a] commissioned officer, cadet (if serving on a cruising vessel), warrant officer, or petty officer may be permitted to appear as counsel for the accused at the request of the latter." REGULATIONS FOR THE U.S. REVENUE-CUTTER SERVICE, art. 1110(3) (1907). Following formation of the Coast Guard in 1915 the right to counsel was retained and expanded. REGULATIONS FOR THE UNITED STATES COAST GUARD, art. 2143 (1916).

[62] WINTHROP, *supra* note 2, at 197 (noting that the judge advocate was also a "minister of justice").

[63] *Id.* at 193-94.

[64] AW 6 of 1786; AW 69 of 1806; AW 90 of 1874. Neither the 1775 nor the 1776 Articles of War prescribed these duties.

Practice under the early Articles of War generally preluded participation by defense counsel at trial.[65] These restrictions were relaxed over time, and by the late 19th Century had become obsolete.[66] As in civilian life at that time, and well into the 20th Century, the right of an accused to representation by counsel was limited to those who could afford an attorney.[67]

6. Presentation of the case

The trial proceedings, which were open to the public, could be held only between the hours of eight in the morning and three in the afternoon.[68] The prescribed hours were intended

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[65] Until the late 19th Century, the accused had no right to counsel, and defense counsel were not allowed to participate in courts-martial. WINTHROP, *supra* note 2, at 166. The proceedings of some courts-martial had been disapproved solely because a defense counsel had participated at trial. THE ARMY LAWYER, *supra* note 5, at 29. General William Hull claimed legal error in his court-martial because he had been denied his Sixth Amendment right to counsel, but the denial was approved by no less an authority than the father of the Bill of Rights himself, President James Madison. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 284 (1958).

Here the court-martial was no different than the English common law where *no* accused felon had counsel. J. M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW AND HIST. REV. NO. 2, 221 (1991). Blackstone wrote in 1765, "It is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated." WILLIAM S. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, vol. IV, at 355 (1765). In Great Britain, it was not until 1836 that Parliament granted accused felons the right to counsel. Beattie, *supra*, at 222 (discussing the Prisoner's Counsel Act of 1836); Wiener, *supra* note 9, at 4 (discussing the same). But the American colonies were ahead of the English common law. By 1791, seven states had guaranteed the right to counsel in their constitutions and two others made them available by statute or practice. *Id.* at 4-5.

The judge advocate serving as prosecutor had a duty to protect the rights of the accused. At common law, the judge looked after the defendant's interests in the absence of counsel. Blackstone declared, "[T]he judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular." BLACKSTONE, *supra*, at 355. Judges often conducted cross-examinations for prisoners and saw no reason to insist on defendants doing this for themselves. Beattie, *supra*, at 233.

[66] In due time, the prohibition against defense counsel was relaxed so as to permit counsel to sit with the accused at trial, but not to speak in open court, such as by questioning witnesses, making objections, arguing motions, or presenting opening statements or closing arguments. Later, the prohibition against counsel's participation was further relaxed by degrees, until it became almost obsolete by 1895. Winthrop characterized the rule prohibiting the participation of defense counsel in courts-martial as "embarrassing, if not indeed humiliating." WINTHROP, *supra* note 2, at 166-67. By 1895, the rule was mostly either ignored or relaxed, as defense counsel were frequently permitted to participate in courts-martial without objection by the court members, except in the rarest of cases.

[67] The Supreme Court did not apply the Sixth Amendment right to counsel to the states through the 14th Amendment until 1932 in capital cases, until 1963 in felony cases, and until 1972 for imprisonable misdemeanors. *See* Powell v. Alabama, 287 U.S. 85 (1932); Gideon v. Wainwright, 372 U.S. 375 (1963); Argesinger v. Hamlin, 407 U.S. 25 (1972).

[68] AW 36 of 1775; AW, § 14, art. 7 of 1776; AW 11 of 1786; AW 75 of 1806; AW 94 of 1874. The Articles of War permitted the trial to go beyond these prescribed hours when the nature of the case, "in the opinion of the officer appointing the court, require[d] immediate example." *Id.* By contrast, a naval court-martial could be held at any hour of the day, but was not supposed to be held at unusual hours or for an unusually

to keep the trial from becoming too protracted or onerous for others to attend, and also afforded the judge advocate an opportunity to compile the daily report of the proceedings.[69]

Ordinarily, neither side made an opening statement, except in complicated cases.[70] Witnesses took an oath to tell "the truth, the whole truth, and nothing but the truth, so help me God."[71] The judge advocate conducted the direct examination, the accused conducted cross-examination, and the court members then asked any questions they had. Witnesses were not permitted to listen to the testimony of other witnesses, except for experts and victims who had already testified.[72] The victim of an offense—also known as the prosecuting witness—was allowed to remain in court after testifying to enable the judge advocate to confer with the prosecuting witness during trial. The prosecuting witness's counsel, if any, was also allowed to sit with the prosecuting witness, but took no active part in the proceedings.[73]

The court members conducted all of their business, to include evidentiary and procedural rulings, by majority vote.[74] Like common law courts, the court members by majority vote were authorized to punish refusals by witnesses to testify, contempt of court, and other disturbances.[75] In non-capital cases, the court members also considered evidence in the form of depositions.[76]

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protracted duration, except when the convening authority informed the court that the case was of extraordinary urgency. NAVAL COURTS AND BOARDS, *supra* note 46, at § 367.

[69] WINTHROP, *supra* note 2, at 281. The judge advocate was responsible for compiling the record of the proceedings of the court-martial referenced in the Articles of War. *See, e.g.*, AW 104, 110-114 of 1874. Every record began with copies of the convening order and a statement regarding the each meeting of the court-martial, and the persons who were present—to include the judge advocate and the accused. WINTHROP, *supra* note 2, at 505. The record set forth fully the testimony of each witness, in the form of separate answers to specific questions, with the answers written down as nearly as practicable in the exact words as they were delivered by the witness. *Id.* at 509. If a considerable amount of testimony was taken down in shorthand, the record had to show that it was read over to the witness to ensure it was correctly transcribed. *Id.* at 510. At the conclusion of the court-martial, the proceedings were *authenticated* as a true and complete record by the signatures of the court president and the judge advocate. *Id.* at 512.

[70] WINTHROP, *supra* note 2, at 283.

[71] AW 54 of 1775; AW §14, art. 6 of 1776; AW 9 of 1786; AW 73 of 1806; AW 92 of 1874.

[72] WINTHROP, *supra* note 2, at 284.

[73] *Id.* at 191. The Articles of War, however, did not recognize the prosecuting witness as having any official role in the prosecution of the charge. There were no private prosecutors in courts-martial.

[74] *Id.* at 171.

[75] AW 54 of 1775; AW, §14, art. 14 of 1776; AW 76 of 1806; AW 86 of 1874.

[76] AW 10 of 1786; AW 74 of 1806; AW 91 of 1874.

Although the court members were supposed to follow the rules of evidence as recognized by the criminal courts of the country, in practice they took a more liberal course in regard to the admission of testimony and the examination of witnesses, and considered whatever evidence they determined was relevant and reliable.[77] The members often asked the judge advocate to produce other witnesses or evidence as needed.[78] Evidence of the accused's good general character was always admissible as a defense as well as in mitigation.[79] When it came time for closing arguments, the accused spoke first, and the judge advocate spoke last.[80] Although the Articles of War were silent as to the burden of proof, the practice was for the prosecution to establish guilt beyond a reasonable doubt.[81]

7. Deliberation and Voting

The judge advocate joined the court members during deliberation as a non-voting member to provide advice, and to call attention to formal errors regarding the preparation of the verdict.[82] Because the judge advocate was with the court members when they deliberated and voted, the judge advocate took an oath not to discover or to disclose the vote or opinion of any court member, unless required to do so in due course of law.[83]

The court members arrived at their findings and sentence by majority vote,[84] except that a death sentence required a two-thirds vote.[85] The court members cast their votes beginning with the most junior in rank.[86] This procedure was meant to prevent the more senior ranking persons from unduly influencing the vote of the junior ranking officers.[87] In

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[77] WINTHROP, *supra* note 2, at 313-14.

[78] *Id.* at 286-87.

[79] *Id.* at 350-51.

[80] *Id.* at 299.

[81] *Id.* at 314-15. Naval courts-martial also employed the beyond a reasonable doubt standard. NAVAL COURTS AND BOARDS, *supra* note 46, at §§ 157-59.

[82] WINTHROP, *supra* note 2, at 195.

[83] AW, § 14, art. 3 of 1776, § 14, art. 3; AW 6 of 1786; AW 69 of 1806; AW 85 of 1874. In 1892, Congress passed an Act requiring the judge advocate to withdraw from the court-martial during deliberations. Since then the judge advocate has delivered his advice in open court. WINTHROP, *supra* note 2, at 195.

[84] WINTHROP, *supra* note 2, at 172. Navy courts-martial arrived at their findings and sentence by a majority vote. 1862 ROCKS AND SHOALS, *supra* note 26, at art. 19.

[85] AW, § 14, art. 5 of 1776; AW 8 of 1786; AW 87 of 1806; AW 96 of 1874. Navy courts-martial imposed a death sentence by a two-thirds vote. 1862 ROCKS AND SHOALS, *supra* note 26, at art. 19.

[86] AW, § 14, art. 4 of 1776; AW 7 of 1786; AW 72 of 1806; AW 95 of 1874; *accord* NAVAL COURTS AND BOARDS, *supra* note 46, at § 371.

[87] WINTHROP, *supra* note 2 at 176.

addition, court members—individually or with other court members—could recommend clemency to the commanding officer who convened the court-martial.[88]

The court-martial arrived at a single sentence covering all charges upon which the accused was found guilty, without regard to any differences among the offenses as to the maximum authorized punishment.[89] The commanding officer who convened the court had to approve the findings and sentence before they could be announced. The court members were required by oath not to divulge the sentence of the court until it was approved and published by the proper authority.[90]

E. Review of Courts-Martial during the foundational period

1. Commanding Officer Review

During the foundational era, the primary responsibility for review rested with the commander who convened the court-martial. The sentence or acquittal by a court-martial was not complete or final without the approval of the commanding officer who convened the court-martial.[91] Without the commanding officer's approval, the result of trial was more in the nature of a recommendation only: it was but the opinion of a body of officers.

The commanding officer who convened the court-martial had a legal duty to personally review and act on the case, exercising personal judgment as if the commanding officer were one of the court-martial members.[92] The action was judicial in nature, involving the exercise of discretion to act according to the commanding officer's own judgment in light of the facts and law as understood by the commander, with no obligation to give a reason for the action. The commanding officer was not at liberty to delegate this duty to another.[93] A commanding officer who disagreed with an acquittal could ask the court members to reconsider their finding.[94] In the event of a disagreement with a conviction, the

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[88] *Id.* at 443.

[89] *Id.* at 404.

[90] AW, § 14, art. 3 of 1776; AW 6 of 1786; AW 69 of 1806; AW 85 of 1874. Keeping the verdict from coming to the knowledge of the accused helped to guard against escapes and facilitated the efficient administration of the punishment. WINTHROP, *supra* note 2, at 234.

[91] AW, § 14, arts. 8, 10 of 1776; AW 2 of 1786; AW 65 of 1806; AW 104 & 109 of 1874. In the Civil War, sentences imposed by a field-officer had to be approved by the brigade commander or higher authority. AW 110 of 1874.

[92] *See* Runkle v. United States, 122 U.S. 543 (1887) (reinstating an officer whose sentence to a dismissal had not been personally approved by the President); WINTHROP, *supra* note 2, at 447.

[93] WINTHROP, *supra* note 2, at 449.

[94] *Id.* at 260 n.65 (reporting cases in which the commander's disapproval of the acquittal rendered the finding inoperative). A British judge advocate in 1847 defended the British military commanders' practice of asking the court-martial to reconsider acquittals or to increase the sentence. MAJOR GENERAL VANS KENNEDY, A TREATISE ON THE PRINCIPLES AND PRACTICE OF MILITARY LAW 214-15 (rev. ed. 1847) ("This revision is obviously founded upon the long established practice of Courts of Law, where it is competent for the judge to direct the jury to reconsider their verdict. For Chitty states 'If the jury through mistake, or evident partiality, deliver an

commanding officer could set it aside. A commanding officer who viewed the sentence as too severe could reduce it, except with respect to a sentence to death or dismissal.[95] If the commanding officer viewed the sentence as not sufficiently severe, the case could be returned to the court-martial for an upward revision.[96] Once approved, the president of the court-martial announced the verdict, and the members of the court spoke with one voice, regardless of the actual vote. If a death sentence was announced, the court-martial stated that two-thirds of the court concurred in the sentence.[97] No dissents were revealed, and no majority or minority vote was disclosed, or even whether the vote was unanimous, because that would violate the members' oath by identifying how members voted.[98]

The judge advocate assigned to the court-martial was required to transmit the original proceedings and approved sentence to the Secretary of War for retention.[99] Upon request, the accused was entitled to a copy of the record of trial and sentence.[100]

2. Further Review

In peacetime, all death sentences and all sentences dismissing a commissioned officer required personal confirmation by the President.[101] In wartime, the commanding general

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improper verdict, the court may before it is recorded, desire them to reconsider it, and recommend an alteration. . . .' Courts-Martial also, are often too favorably inclined towards the Prisoner, and thus the most frequent grounds, upon which a revision is directed, are either an acquittal contrary to evidence, or the inadequacy or illegality of the punishment awarded.") (internal citation omitted). The 1874 Articles of War stated, however, that "[n]o person shall be tried a second time for the same offense." AW 102 of 1874.

[95] AW, § 18, art. 2 of 1776; AW 89 of 1806; AW 112 of 1874.

[96] *See, e.g.*, Swaim v. United States, 165 U.S. 553 (1897) (holding that the action of the President in twice returning the proceedings of a court-martial urging a more severe sentence was authorized by law). Navy convening authorities enjoyed the same power to return any record for a revision of its findings or sentence. NAVAL COURTS AND BOARDS, *supra* note 46, at § 473.

[97] WINTHROP, *supra* note 2, at 404.

[98] *Id.* at 404. The members' oath prohibited them from disclosing or discovering the vote or opinion of any member of the court-martial. AW, § 14, art. 3 of 1776; AW 6 of 1786; AW 69 of 1806; AW 85 of 1874.

[99] AW, § 18, art. 3 of 1776; AW 24 of 1786; AW 90 of 1806. During the Civil War, Congress directed court-martial records be sent to the Judge Advocate General. AW 113 of 1874.

[100] AW, § 18, art. 3 of 1776; AW 24 of 1786; AW 65 of 1806; AW 114 of 1874.

[101] AW, § 14, arts. 8 & 10 of 1776; AW 65 of 1806; AW 105 & 109 of 1874. Before the Constitution was adopted and a President was elected, these reviews were done by Congress or the Commander in Chief. AW, § 14, arts. 8 & 13 of 1776; AW 2 of 1786. The same was true in the Navy where no death sentence or dismissal of a commissioned or warrant officer could be executed until confirmed by the President of the United States. 1862 ROCKS AND SHOALS, *supra* note 26, at art. 19. All other sentences could be confirmed by the commander of the fleet or approved by the officer ordering the court. *Id.*

in the field could confirm these punishments.[102] The President also had to confirm the results of all trials involving general officers in time of war or peace.[103]

Beyond these reviews, there was no further right of appeal. Once the commanding officer approved the results of trial, the case became final. There was no judicial or appellate review;[104] the military justice system did not have appellate courts. The only other avenue for review was by seeking collateral review in federal court, primarily through writs of habeas corpus or back pay claims.[105] Collateral review during the foundational period focused narrowly on jurisdictional issues, which largely precluded review on the merits of non-jurisdictional claims of error.[106]

3. Execution of the Sentence

The sentence was carried out in a manner designed to make an example of a condemned prisoner, often in great ceremony. If a prisoner was to be shot to death, the commanding officer had all available troops assemble in formation on three sides of a square. The prisoner was then paraded in front of them, accompanied by the provost marshal, the regimental band (playing a funeral march), the firing squad, and the prisoner's coffin, carried by four men. On arriving at the open space in front of the formation, the music ceased; the prisoner was placed on the fatal spot marked by his coffin; and the charge, finding and sentence of the court-martial, and the order for his execution, were read aloud. The firing squad formed six or eight paces from the prisoner. After the chaplain said a final prayer and the provost marshal gave the signal, the prisoner was shot to death. The assembled troops were then marched in slow time and in single file by the body of the deceased before returning to their quarters.[107]

Soldiers sentenced to a discharge were literally "drummed out" of the service. The man about to be discharged was brought forward escorted by a guard before the assembled troops where his crimes, misdeeds, and the order for his discharge were read aloud. After stripping the buttons, facings, and any other insignia from his clothing, he was escorted out

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[102] AW 65 of 1806; AW 99, 106-07 of 1874.

[103] AW 2 of 1786; AW 65 of 1806; AW 108 of 1874.

[104] WINTHROP, *supra* note 2, at 51.

[105] *See* Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 20-36 (1985).

[106] Rosen observes that the jurisdictional approach during this period limited review to four categories of issues: (1) whether the court-martial had jurisdiction over the offense; (2) whether the court-martial had jurisdiction over the person; (3) whether the court-martial was lawfully convened and constituted; and (4) whether the adjudged sentence was duly approved and authorized by law. *Id.* at 31-36.

[107] S.V. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 166-67 (4th ed. 1862). Death by hanging was similar in that the troops to witness the execution were assembled in a square formation with the gallows in the center. *Id.* at 167-68.

of the barracks or camp of his corps with drummers and fifes playing the "rogue's march."[108]

In addition, if a commissioned officer was dismissed from the service for cowardice or fraud, the sentence often directed that notices of the crime be published in newspapers to ensure the officer's humiliation before his fellow officers, troops, and associates and family back home.[109] The dismissal action was frequently published in the newspapers circulated near the camp as well as around the officer's residence.[110]

II. The Second Phase: Structural reforms of the World War I era and its aftermath (1913-1941)

The period from the years immediately preceding World War I through the interwar years brought important structural reforms to the military justice system. The World War I era proposals and debates featured the broadest public and congressional attention to military justice since the Revolutionary War era adoption of the Articles of War.

A. The 1913 and 1916 Articles of War

In the years preceding America's entry into World War I, Congress enacted two sets of amendments, which largely reflected the results of a detailed review by Major General Enoch Crowder, the Judge Advocate General of the Army.[111] A set of amendments approved in 1913 included replacement of the garrison and regimental courts-martial with a new forum, the special court-martial, empowered to impose six months confinement.[112] The 1916 amendments retained much of the basic court-martial structure and procedures of the previous articles, while also making a number of changes that have remained part of the military justice system to the present day, including: (1) broad jurisdiction over a wide range of criminal offenses;[113] (2) jurisdiction over certain civilians accompanying the armed forces;[114] (3) appointment of a judge advocate for special as well as general courts-

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[108] *Id.* at 168.

[109] AW 22 of 1786; AW 85 of 1806.

[110] NEAGLES, *supra* note 10, at. 32.

[111] Wiener, *supra* note 3, at 16-17.

[112] Act of March 2, 1913, Ch. 93, 62d Cong, 3d Sess., 37 Stat. 721; *see* Crump, *supra* note 4, at 55-58; Wiener, *supra* note 3, at 17.

[113] AW 92 of 1916. The 1916 amendments included jurisdiction over the full range of criminal conduct with the exception of a restriction on peacetime jurisdiction over two offenses: murder and rape. This restriction against trial for murder or rape in times of peace was carried forward in future revisions, to include the 1948 Elston Act, in which no person could be tried for murder or rape committed within the geographical limits of the United States and the District of Columbia in time of peace. AW 92 of 1948, as amended by the Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 627 [hereinafter Elston Act]. This restriction remained in place until adoption of the UCMJ in 1950, which provided worldwide jurisdiction over all offenses.

[114] AW 2 of 1916. Under the 1916 amendments, all persons accompanying or serving with the armies of the United States outside of U.S. territory in time of peace were subject to military law; in time of war, such

martial;[115] (4) elimination of the prohibition against regular officers serving as panel members when the accused was a member of the militia or a non-regular volunteer;[116] (5) express recognition of the accused's right to be represented by the counsel of his own selection, if such counsel was reasonably available;[117] (6) a statutory prohibition against compelled self-incrimination;[118] and (7) a speedy trial requirement.[119]

Non-judicial discipline

The 1916 Articles of War provided a new means by which commanders could punish soldiers for minor offenses without having to resort to a court-martial.[120] This new tool was initially called non-judicial discipline, and later came to be known as non-judicial punishment. The tool was available only for "minor offenses not denied by the accused."[121] The authorized punishments included admonition, reprimand, withholding of privileges, extra duty, and restriction to certain specified limits. Forfeiture of pay and confinement,

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persons were subject to military law both within and without the territorial jurisdiction of the United States. Similar bases of jurisdiction were incorporated into the UCMJ when it was enacted in 1950, and remain a part of the Code to the present day. *See* Art. 2 (10-12).

[115] AW 11 of 1916. The judge advocate could issue subpoenas to civilian witnesses in special courts-martial, a power he had in general courts-martial. AW 22 of 1916. Witnesses who refused to appear after receiving a subpoena were subject to prosecution in federal district court for the commission of a misdemeanor. AW 23 of 1916.

[116] AW 4 of 1916.

[117] AW 17 of 1916. If the accused was not represented by counsel, the judge advocate was to advise the accused "from time to time throughout the proceedings . . . of his legal right." *Id.* By comparison, civilian defendants in federal and state courts also had the right to counsel, but only if they could afford counsel. If they could not afford counsel, civilian defendants faced trial without any counsel and without anyone present to record what was said at trial. *See* Wiener, *supra* note 3, at 24.

[118] AW 24 of 1916. This provision was the forerunner to Article 31 of the UCMJ, which is more protective than the Fifth Amendment right against self-incrimination in non-custodial interrogations. *See* Miranda v. Arizona, 384 U.S. 436, 489 n.62 (1966) (referring to Article 31, UCMJ, with approval).

[119] AW 70 of 1916.

[120] AW 104 of 1916. The "captain's mast" was the naval term for the non-judicial proceeding. Unlike the soldier, a sailor could not refuse non-judicial punishment and demand trial by court-martial, or appeal the punishment. These differences are explained by the fundamentally different leadership styles of the two Services. In the Navy, the commanding officer who imposed non-judicial punishment was almost always the commander of a ship in whom the Navy reposed special faith and who was also authorized to convene both deck and summary courts-martial. WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 123 (1973). A similar procedure existed in the Coast Guard, but the Coast Guardsman had a right to appeal the punishment. REGULATIONS FOR THE UNITED STATES COAST GUARD, art. 1924 (1916). In the Army, non-judicial punishment was generally exercised by company commanders, who were often junior officers with much less experience and no authority to convene a court. GENEROUS, *supra*, at 123.

[121] AW 104 of 1916. The 1948 Elston Act later granted the accused the right to decline non-judicial punishment and to demand a court-martial. AW 104 of 1948.

however, were not authorized.[122] The accused also had a right to appeal the punishment imposed by his immediate commander to the next superior officer, if he believed it was unjust or disproportionate to the offense.[123]

Non-judicial punishment was not a bar to a trial by court-martial for the same offense. But if the accused was convicted of the same offense for which he received non-judicial punishment, evidence of this punishment was admissible at the court-martial to mitigate the sentence.[124]

B. World War I and the post-war military justice debates

The 1916 Articles of War were soon put to the test. The United States declared war on Germany in April 1917. Over the next three years, over four million would serve on active duty, including many who had been drafted or enlisted under the pressure of the draft. Few had any prior experience with military justice.

During the War, Major General Crowder was appointed to be in charge of the draft, and Brigadier General Samuel T. Ansell was designated as the Acting Judge Advocate General. Ansell took the position the Judge Advocate General had the authority to revise court-martial sentences for injustice. Crowder disagreed, and the Secretary of the Army sided with Crowder.[125]

Soon after resolving the initial Ansell-Crowder disagreement, the War Department learned that thirteen African-Americans had been executed only two days after being convicted in a mass court-martial in Texas.[126] In the aftermath of public and internal criticism of the proceedings,[127] the War Department published a General Order providing that no death sentences could be executed in the United States until the War Department reviewed the

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[122] AW 104 of 1916. Under the 1948 Elston Act, hard labor without confinement was also authorized, but confinement and forfeiture of pay were not authorized, except when a general court-martial convening authority punished an officer below the rank of brigadier general with a forfeiture of not more than one-half of his pay per month for three months. AW 104 of 1948.

[123] AW 104 of 1916.

[124] *Id.*

[125] For a discussion of the dispute between General Crowder and General Ansell, see Major Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell,* 35 MIL. L. REV. 1 (1967); JONATHAN LURIE, ARMING MILITARY JUSTICE 446-126 (1st ed. 1992); Frederick Bernays Wiener, *The Seamy Side of the World War I Court-Martial Controversy,* 123 MIL. L. REV. 109 (1989); Crump, *supra* note 4, at 59-69.

[126] A large racial disturbance involving African-American soldiers resulted in multiple civilian deaths. Sixty-three soldiers were tried in a single court-martial for the disturbance and thirteen were sentenced to death by hanging. The commanding general approved the sentences, and the soldiers were hanged the next day, under the wartime authority of a commanding general to execute sentences in the field without prior approval from high authority. The records of trial were then sent to the Office of the Judge Advocate General for review where four months later they were found to be legally sufficient. Wiener, *supra* note 3, at 17-18.

[127] *Id.* at 17-18; Crump, *supra* note 4, at 5.

case.[128] The end of the war and return of many soldiers to civilian life was accompanied by increased attention to the administration of military justice during the war, including allegations of cases proceeding on the basis of unsupported charges, excessive sentences, improper command interference, and numerous cases returned by the convening authority to the court-martial in an effort to transform acquittals into convictions.[129]

Congress held extensive hearings on the administration of the court-martial system during World War I.[130] It heard reports about a variety of injustices and it invited testimony from many persons of interest, to include Crowder, Ansell, and others. Two main criticisms emerged. The first was that non-lawyers were assigned to defend soldiers.[131] The second was that commanders repeatedly intervened in courts-martial to bring about the results they wanted.[132]

C. The 1920 Articles of War and the interwar implementing rules.

After detailed congressional hearings and public debate,[133] Congress enacted legislation in 1920 that made a number of important changes to the Articles of War.

1. Law Member

The 1920 Articles of War created a new position for the general court-martial. A "law member" was detailed to every general court-martial,[134] even though in practice the court-

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[128] General Order No. 169, Dec. 29, 1917 (cited in Wiener, *supra* note 3, at 18).

[129] After the Armistice was signed in 1918, the bulk of U.S. soldiers were discharged from further military duty, and criticisms about the military justice system began to pour in. Wiener, *supra* note 3, at 19-20; Edmund M. Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L. J. 52-54 (1919-20); GENEROUS, *supra* note 120, at 8; *see also The Thing That Is Called Military Justice!*, NEW YORK WORLD, Jan. 19, 1919.

[130] *Hearings on S. 64 on the Establishment of Military Justice Before a Subcomm. of the Sen. Comm. on Military Affairs*, 66th Cong. (1919); *Courts-Martial: Hearings on Amendments to Articles of War Before a Special Subcomm. of the House Comm. on Military Affairs*, 66th Cong. (1920).

[131] Senate Proceedings and Debates of the 1st Sess. of the 66th Cong., Vol 58, Part 4, 3943 (1919). Senator Chamberlain discussed four death penalty cases from France to illustrate the problem of inexperienced defense counsel. All four soldiers sentenced to death were represented by young second lieutenants with no legal training. Two soldiers were sentenced to death for sleeping on post at the front, but they alleged they had not slept for five days prior to their offense and thus fell asleep from sheer exhaustion. The other two soldiers were sentenced to death for refusing to drill, even though they claimed they were too sick to drill. None of the courts had apparently made any effort to confirm or disprove these extenuating circumstances.

[132] Fully one-third of all acquittals during the war had been changed to guilty verdicts at the request of the convening authority. GENEROUS, *supra* note 120, at 8.

[133] *Hearings on S. 64 on the Establishment of Military Justice Before a Subcomm. of the Sen. Comm. on Military Affairs*, 66th Cong. (1919); *Courts-Martial: Hearings on Amendments to Articles of War Before a Special Subcomm. of the House Comm. on Military Affairs*, 66th Cong. (1920); *see* Brown, *supra* note 125, at 15-36.

[134] AW 8 of 1920.

martial could proceed in the law member's absence.[135] To qualify, the law member had to be an officer in the Judge Advocate General's office;[136] if such an officer was not available, the appointing officer had to appoint someone specially qualified to perform those duties.[137] The presence of the law member at trial meant that the judge advocate no longer served both as the prosecutor and as the advisor to the court on the law.

The law member was not a judge. The law member served as one of the appointed court members and was seated with them to the immediate left of the presiding court president.[138] As a court member, the law member had an equal vote in deciding all questions submitted to a vote or ballot of the court, including challenges, findings, sentence, and any interlocutory questions submitted to a vote of the court.[139]

Some of the law member's evidentiary rules were binding on the court-martial.[140] But the court members were authorized to overrule or disregard many of the law member's rulings, just as they could reject the advice of the prosecuting judge advocate before there was a law member. The law member's rulings were not binding on matters such as the order of the witnesses or other evidence, the recall of a witness for further examination, the qualifications of expert witnesses, whether the court members would visit the premises where the alleged offense took place, the competence of witnesses, the insanity or other mental defect of the accused, whether argument or statement of counsel was improper, and the correctness of any military action, strategy or tactics.[141] If any court member objected to a law member's ruling, the court was cleared and closed to the public, and the court members decided the question by a majority voice vote, beginning with the officer most junior in rank.[142]

In special courts-martial, which had no appointed law member, the court president performed the role of law member by making rulings in open court.[143]

2. Provision of defense counsel

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[135] MCM 1921, ¶ 85a (discussing courses of action when the law member is absent); *see also* Hiatt v. Brown, 339 U.S. 103 (1950) (the availability of an officer of the Judge Advocate General's department to serve as a law officer on a general court-martial was a matter within the sound discretion of the appointing authority).

[136] AW 8 of 1920.

[137] *Id.*

[138] MCM 1921, ¶ 83.

[139] *Id.* at ¶ 89(a).

[140] AW 31 of 1920.

[141] *Id.*; MCM 1921, ¶ 89*a*.

[142] AW 31 of 1920. A secret ballot was used only on the findings. *Id.*

[143] *Id.*

The 1920 Articles of War required the convening authority to appoint a defense counsel at government expense to represent the accused in all general and special courts-martial, but did not require the appointment of a qualified attorney to serve as defense counsel.[144]

3. Charging and Investigation

The 1920 Articles of War permitted any military member—officer or enlisted—to swear charges against a military accused.[145] There was a safeguard against frivolous charges: the person signing the charges had to take an oath to affirm that he either had personal knowledge of the offenses or had the charges investigated, and that the charges were true in fact to the best of his knowledge and belief.[146]

Moreover, before charges could be referred to a general court-martial, the 1920 Articles required a thorough and impartial investigation of the charged offenses.[147] The investigation was conducted by the commanding officer or another officer appointed by him. The investigation examined the form of the charges and the evidence supporting them.[148] The officer investigating the charges heard testimony from witnesses, including those the accused requested.[149] The accused could cross-examine witnesses, and present evidence in defense or mitigation.[150] At the conclusion of the investigation, the officer appointed to investigate the charges forwarded the charges, a summary of the substance of the testimony taken on both sides, and his recommendation as to disposition of the case to the commanding officer.[151]

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[144] AW 11 of 1920. The 1916 Articles of War merely granted the accused the right to be represented by counsel of his own selection, if counsel was reasonably available. Nevertheless, even the new version did not require the appointed defense counsel be a lawyer—and often he did not possess legal training. But the naming of defense counsel in courts-martial was in this limited sense far in advance of anything available in contemporary federal or state courts. The indigent federal defendant in noncapital cases had to wait for a similar benefit another 18 years until the Supreme Court decided *Johnson v. Zerbst*, 304 U.S. 458 (1938), while the indigent defendant in state court was not entitled to court-appointed counsel until the Supreme Court decided *Gideon v. Wainwright*, 373 U.S. 335 (1963).

[145] AW 70 of 1920. The Coast Guard had a similar procedure. When a report of misconduct was received, "the officer receiving the report shall institute a careful investigation into the circumstances on which the complaint is founded. He shall call upon the complainant for a written statement of the case, together with a list of his witnesses, mentioning where they may be found, and a recommendation of any documentary evidence bearing upon the case that may be obtainable." REGULATIONS FOR THE UNITED STATES COAST GUARD, art. 1922 (1916).

[146] AW 70 of 1920.

[147] *Id.*

[148] MCM 1921, ¶ 76a.

[149] AW 70 of 1920.

[150] *Id.* The 1948 Elston Act later extended the right to counsel to the preliminary investigation. AW 46(b) of 1948.

[151] AW 70 of 1920.

4. Voting

The 1920 Articles of War increased the percentage of the vote needed to reach a conviction and determine the sentence. The new Articles also changed the voting procedure used in arriving at the verdict. Before 1920, only a majority vote was needed for a non-capital offense and a two-thirds vote for a capital one. Under the new law, a two-thirds vote was required to convict in all non-capital cases, and a unanimous vote to convict in capital cases.[152] Before 1920, all sentences in non-capital cases required only a majority vote; the new law required that every sentence have a minimum two-thirds concurrence.[153] If the sentence to confinement was for life imprisonment or for more than ten years confinement, the vote had to be by a three-fourths concurrence.[154]

The 1920 Articles of War also changed the procedure for voting on findings and the sentence: the court members voted by secret written ballot.[155] The junior member counted the votes and the court president checked the count.[156] The court members decided all other interlocutory matters by a simple majority on a voice vote.[157]

The same voting procedure used for findings and the sentence was also used in deciding whether to excuse or "challenge" a member for cause at the start of the trial.[158] The 1920 Articles granted the prosecuting judge advocate a right to challenge court members for cause; and, in addition to challenges for cause, the Articles granted both the prosecutor and the defense counsel the right to exercise one peremptory challenge, which allowed both to remove a member for any reason or no reason at all.[159] The law member was also subject to challenge, but only for cause.[160]

5. Acquittal

Before 1920, the commanding officer could return the record of trial to the court-martial with a request for a different verdict or a more severe sentence.[161] In the period between 1917 and 1919, one-third of all acquittals were turned into convictions at the request of the

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[152] AW 43 of 1920.

[153] *Id.*

[154] *Id.*

[155] AW 31 of 1920.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] Wiener, *supra* note 3, at 20-21.

convening authority.[162] The 1920 revision prohibited the convening authority from revisiting an acquittal or from seeking an increase in the sentence originally imposed, unless the sentence was less than the mandatory sentence fixed by law for the offense.[163]

Until 1920, the findings and sentence were not announced until the convening authority finally approved them. Under the new Articles of War, whenever the court acquitted the accused on all charges and specifications, the court-martial was required to immediately announce this result in open court, since the commanding officer could no longer revisit the acquittal.[164]

6. Post-Trial and Appellate Review

The 1920 Articles improved upon the procedures for post-trial review provided by the general orders published in the aftermath of the Houston riot cases. Previously, the War Department reviewed all cases with a death sentence, a dismissal, or a dishonorable discharge. The new procedures also extended War Department review to cases where the sentence included imprisonment for more than one year or a bad-conduct discharge. The new review procedures were both automatic and at public expense.[165]

The review procedures were integrated into the post-trial actions taken by the reviewing authorities. No sentence could be approved, confirmed, or executed until all reviewing authorities had obtained a written legal opinion from their staff judge advocate.[166] The convening authority could approve and execute low level sentences, meaning those where less than a year of confinement and no discharge had been imposed. Higher reviewing authorities in the chain of command had to confirm other sentences, and the adjudged sentence determined the designation of the final confirming authority.

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[162] GENEROUS, *supra* note 120, at 8.

[163] AW 40 of 1920.

[164] AW 29 of 1920.

[165] AW 50 ½ of 1920. To facilitate these reviews, the 1920 law continued a provision in effect since 1776, which conferred on every accused tried by a general court-martial the right to receive a copy of the record of his trial at no cost. AW, § 18, art. 3(3) of 1776; AW 90(2) of 1806; AW 114 of 1874; AW 111 of 1916. The criminal defendant in federal court had no similar right until 1944. Wiener, *supra* note 3, at 25 n.156, (citing Act of Jan. 20, 1944, ch. 3, 58 Stat. 5, art. 3 (1944), enacted after the decision in *Miller v. United States*, 317 U.S. 192 (1942)); *see* H.R. REP. NO. 78-868, (1943). The position of a state criminal defendant was not clarified until 1956. Wiener, *supra* note 3, at 25 n.157, (citing Griffin v. Illinois, 351 U.S. 12 (1956) (defendant may not be denied the right to appeal by inability to pay for a trial transcript); Eskridge v. Washington State Board of Prison, 357 U.S. 214 (1958) (destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts)).

[166] AW 46 of 1920. William F. Fratcher, *Appellate Review in American Military Law,* 14 MO. L. REV. 15, 44 (1949). The trial judge advocate and defense counsel were both precluded from subsequently acting as staff judge advocate to the reviewing or confirming authority in the same case. AW 11 of 1920.

The President of the United States confirmed any sentence that included the death penalty, the dismissal of an officer, or concerned a general officer.[167] There were three war-time exceptions permitting the commanding general in the field to confirm such a sentence: (1) if the dismissal was not for a general officer;[168] (2) if the commanding general had, as part of his review, reduced the sentence so that it no longer needed to be confirmed by the President;[169] or (3) when a death sentence for murder, rape, mutiny, desertion, and spying, and the record of trial had been examined under the provisions of Article 50 ½, discussed next.

Article 50 ½ required the Judge Advocate General to establish a board of review consisting of at least three officers from his department.[170] The board of review was to examine and prepare a written legal opinion for every case needing the President's approval or confirmation.[171] Except in cases based solely on a guilty plea, neither the President nor the commanding general in the field could order the execution of a sentence to death, a dismissal (not suspended), a dishonorable discharge (not suspended), or to confinement in a penitentiary, until the board of review determined that the record of trial was legally sufficient to support the sentence.[172]

The opinion of the board of review and the recommendation of the Judge Advocate General were advisory only. When the Judge Advocate General ruled, with the concurrence of the Secretary of War, that a case was not legally sufficient, it would not be submitted to the President, and would instead be returned to the convening authority for a rehearing or other appropriate action.[173] But, if the Judge Advocate General disagreed with the board's opinion, then the Judge Advocate General had to forward the entire case, along with the

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[167] AW 48 of 1920.

[168] *Id.*

[169] AW 50 of 1920. Fratcher, *supra* note 166, at 46.

[170] AW 50 ½ of 1920.

[171] *Id.*

[172] *Id*; Fratcher, *supra* note 166, at 47. This article contained an exception carried forward from the 1917 code in which a record of trial could bypass post-trial review. When a sentence to a dismissal or a dishonorable discharge was ordered suspended, the board of review did not examine the record of trial under Article of War 50 ½, even if the reviewing authority shortly thereafter revoked the suspension. Wiener, *supra* note 3, at 28. The World War II era Vanderbilt Committee criticized Article of War 50 ½ for being "almost unintelligible," and asserted that there was "no good reason why cases in which dishonorable discharge is suspended should not be reviewed in the same way as are cases in which it is not suspended." REPORT OF THE WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 9 (December 13, 1946) [hereinafter VANDERBILT REPORT].

[173] AW 50 ½ of 1920; Fratcher, *supra* note 166, at 47. If the convening authority ordered a rehearing, he had to appoint new members. AW 50 ½ of 1920. The court members at the rehearing could not be the same members who sat on the original court-martial. The rehearing could not revisit any acquittal or finding of not guilty; and no increase in the sentence would be enforced unless the sentence was based on a finding of guilty for an offense that was not considered on the merits in the original proceeding. This provision was carried forward by Article 52 of the Elston Act (discussed in Part III.B, *infra*).

board's opinion and his own dissent, to the President.[174] The President could then decide whether to confirm the sentence or to remit, mitigate, commute, or disapprove all or part of the sentence.[175]

The Judge Advocate General's office also reviewed all other records of trial from general courts-martial. If the review determined a record of trial was legally insufficient, the case was forwarded to the board of review. If the board agreed that the record was legally insufficient, the Judge Advocate General forwarded the record, along with the board's opinion and his own opinion, to the Secretary of War or the President for action.[176]

III. The Third Phase: The UCMJ: Prelude, Enactment, Implementation, and Revision (1941-present)

A. Military Justice in World War II - volume and controversy

In World War II, the United States expanded its armed forces to a maximum strength of 12,300,000,[177] and more than 16,000,000 individuals served in the Army over the course of the war.[178] The Navy expanded from 250,000 personnel in peacetime to an aggregate of more than 4,750,000 individuals, including the Marine Corps and the Coast Guard.[179] Six hundred thousand courts-martial were held per year at the height of World War II.[180] The military conducted over 1.7 million trials by the end of the war, carried out over 100 capital executions, and held over 45,000 members of the armed forces in prison, even at the end of the war.[181] The Navy conducted over 600,000 courts-martial during the war, and, at the

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[174] AW 50 ½ of 1920.

[175] *Id.*; Fratcher, *supra* note 166, at 49-50.

[176] AW 50 ½ of 1920; Fratcher, *supra* note 166, at 51.

[177] Wiener, *supra* note 9, at 11.

[178] John T. Willis, *The United States Court of Military Appeals: its Origin, Operation, and Future*, 55 MIL. L. REV. 39 (1972).

[179] ROBERT J. WHITE, A STUDY OF FIVE HUNDRED NAVAL PRISONERS AND NAVAL JUSTICE 1 (1947). The Coast Guard itself grew from a pre-war strength of 17,022 to a total of approximately 241,000 members. Robert Scheina, The Coast Guard at War: A History, *available at* http://www.uscg.mil/history/articles/h_CGatwar.asp.

[180] Robert J. White, *The Uniform Code of Military Justice – Its Promise and Performance*, 35 ST. JOHN'S LAW REV. 197, 200 (1961).

[181] *Id.* at 200 n.4 (1961) (citing Austin H. MacCormick, *Statistical Study of 24,000 Military Prisoners*, 10 FED. PROBATION 6 (1946); Delmar Karlen & Louis H. Papper, *The Scope of Military Justice*, 43 J. CRIM. L., C. & P.S. 285 (1952)); WHITE, *supra* note 179, at 2; LURIE, *supra* note 125, at 128 (1992). During the war, the military conducted a total of 80,000 general courts-martial, or an average of nearly 60 convictions by the highest form of military court, somewhere in the world, every day of the war. GENEROUS, *supra* note 120, at 14.

beginning of 1946, held approximately 15,000 naval personnel in confinement.[182] In all, the armed forces handled one third of all criminal cases tried in the nation.[183]

During and immediately after World War II, Congress was flooded with countless complaints about the administration of military justice; in fact, the military justice system attracted the attention of every major bar association in the United States. The chief complaint was that, even under the 1920 Articles of War, courts-martial were wholly lacking in independence and their decisions were dictated in advance of the trial by the commanders who appointed them.[184]

Studies conducted during and after the war by the Army, the Navy, bar associations, and veterans groups identified areas of significant concern, including improper command interference with courts-martial, inadequate representation, inadequate training of court-members in the legal aspects of their duties, and unduly harsh sentences.[185] These concerns were echoed and amplified during post-war military justice hearings.[186]

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[182] WHITE, *supra* note 179, at 2.

[183] Wiener, *supra* note 9, at 11 (citing Karlen & Pepper, *The Scope of Military Justice,* 43 J. CRIM. L., C. & P.S. 285, 297 (1952)). The demographics for crime potential and the prosecution rate matched. According to one study, the military was responsible for about 30 percent of the nation's crime potential, including from the largest crime-producing segment of American society: males between the ages of 17 and 40. GENEROUS, *supra* note 120, at 14. In the Navy, 60 percent of all offenders were between 18 and 21, while sailors coming from homes broken by divorce, drunkenness, death, or desertion accounted for 85 percent of all offenders. WHITE, *supra* note 179, at 2.

[184] *See, e.g., Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 825-26 (1949) (Testimony of Rep. Gerald R. Ford) [hereinafter *Hearings on H.R. 2498*]; White, *supra* note 180, at 209 n.46 (quoting letter from Vermont's post-war Governor Edward W. Gibson to the Committee on the Code, dated Nov. 18, 1948).

[185] Vanderbilt Report, *supra* note 172; Secretary of War, The Complete Doolittle Report: The Report of the Secretary of War's Board on Officer-Enlisted Man Relationships (1946); Press Release, Navy Department, Chaplain Reports on Prisoners' Opinions of Naval Justice (Jan. 5, 1947) (describing White Report, *supra* note 179); Court-Martial Sentence Review Board, Report of General Court -Martial Sentence Review Board to the Sec'y of the Navy (1947).

Secretary of War Robert P. Patterson enlisted the aid of the American Bar Association (ABA) for ideas on how to reform and improve the justice system. In 1946, the ABA appointed a committee of prominent lawyers and judges to hold hearings and make recommendations regarding the military justice system. *Association Aid Enlisted in Improving Army Courts-Martial*, 32 A.B.A. J. NO. 5, 254 (May 1946); *Military Justice: Changes Advised in Courts-Martial*, 33 A.B.A. J. NO. 1, 40 (January 1947). The Secretary of the Navy requested four separate groups to study the Navy court-martial system and make recommendations for its modification. Pasley & Larkin, *supra* note 6, at 195-96.

[186] *Hearings on H.R. 2498, supra* note 184; *Hearings on H.R. 3341 and H.R. 4080 before the House Comm. on Armed Services*, 81st Cong. (1949); *Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong. (1949).

B. The 1948 Elston Act

Congress first addressed the issues arising out of the World War II experience through revisions of the Articles of War in 1948 legislation that came to be known as the Elston Act.[187] The legislation included a number of major changes in military practice which were made part of the UCMJ two years later.[188]

The Elston Act was approved during the same time period in which Congress combined the military departments into a single organization, which became the Department of Defense.[189] The Elston Act applied to the Army, not the Navy, and it was not clear initially if the Act applied to the Air Force until a federal appeals court ruled that it did so apply.[190]

James V. Forrestal, the first Secretary of Defense, decided that a single military code should be enacted to apply to all of the armed forces, and appointed a committee to draft the new Code.[191] Based on the committee's report and draft legislation, the Department forwarded to Congress proposed legislation to create a Uniform Code of Military Justice. After extensive hearings and debate, the legislation, as modified by Congress, was signed into law by President Truman on May 5, 1950.[192] It became effective on May 31, 1951, and applied

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[187] Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 627. The Elston Act was named for its sponsor, Representative Charles Elston of Ohio, and was enacted as part of the Selective Service Act of 1948.

[188] The Elston Act's major provisions are discussed together with the UCMJ's major provisions below.

[189] In 1947 Congress placed the Army, the Air Force, and the Navy in the newly created National Military Establishment under the control of a Secretary of Defense. Act of June 26, 1947, ch. 343, 61 Stat. 495 [National Security Act of 1947]. The National Military Establishment was renamed the "Department of Defense" on August 10, 1949.

[190] Stock v. Department of the Air Force, 186 F.2d 968, 968 (4th Cir. 1950). When the President signed the Air Force Military Justice Act on June 25, 1948, the statute stated that the Air Force was now governed by the "laws now in effect." The laws in effect then were the 1920 Articles of War, not the Elston Act. The Elston Act, which President Truman signed the day before, on June 24, 1948, would not go into effect until February 1, 1949. GENEROUS, *supra* note 120, at 31-32.

[191] Secretary Forrestal appointed a four-man committee to draft the new code. He chose Harvard law professor and long-time advocate of military justice reform, Edmund M. Morgan, to chair the committee. Professor Morgan was the same professor who nearly 30 years earlier had criticized the 1916 Articles of War in congressional hearings. LURIE, *supra* note 125, at 157-70; Felix Larkin, *Professor Edmund M. Morgan and the Drafting of the Uniform Code*, 28 MIL. L. REV. 7, 8-9 (1965). In Professor Morgan's words,

> [T]he committee endeavored to follow the directive of Secretary Forrestal to frame a Code that would be uniform in terms and in operation and that would provide full protection of the rights of person subject to the Code without undue interference with appropriate military discipline and the exercise of appropriate military functions.

Morgan, *supra* note 57, at 22; LURIE, *supra* note 125, at 157-213; GENEROUS, *supra* note 120, at 34-53; Willis, *supra* note 178, at 54-63.

[192] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108. For the Congressional hearings on the UCMJ, see *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. (1949); *Hearings on H.R. 3341 and H.R. 4080 before the House Comm. on Armed Services*, 81st Cong. (1949); *Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*,

to all of the military services—the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard.[193]

C. The Uniform Code of Military Justice

The UCMJ retained the core features of military justice, including unique military offenses and punishments, as well as the disciplinary and disposition authority of the commander.[194] The legislation also made major changes in the structure of the military justice system. These changes have been refined in subsequent legislation, as summarized in the following sections.

81st Cong. (1949); H.R. REP. NO. 81-491 (1949); S. REP. NO. 81-486 (1949); H.R. REP. NO. 81-1946 (1950) (Conf. Rep.); 95 CONG. REC. [Feb. 8; April 26; May 5, 13; July 29 (1949); Feb. 1, 2, 3 (1950)].

[193] The Marine Corps is a branch of the Armed Forces separate from the Navy, but is a component of the Department of the Navy. The Coast Guard is also a branch of the Armed Forces. In peacetime it is under the Department of Homeland Security, but in war or exigency it can be transferred to the Department of the Navy. The Coast Guard began as the Revenue-Cutter Service under the Department of the Treasury in 1790, and merged with the U.S. Lifesaving Service to become the modern Coast Guard in 1915. The Service was transferred to the Department of Transportation with its establishment in 1967, and was again transferred to the Department of Homeland Security in 2002.

[194] The UCMJ provided a standard procedure whereby commanding officers could discipline officers and enlisted persons for minor offenses without a court-martial. Article 15, UCMJ (1950). This procedure was not a court-martial and the receipt of punishment was not a conviction. Receiving non-judicial punishment did not bar a later trial by court-martial for the same offense, but the accused had a right to show at the later trial he had previously been punished for the same offense during sentencing. Art. 15(e), UCMJ (1950).

The Code did not provide the military member a right to refuse non-judicial punishment and demand trial by court-martial, as was previously the case under the Articles of War. Instead, service Secretaries could, by regulation, place limitations on the powers granted under the Code. Art. 15(b), UCMJ (1950). The Army and the Air Force published regulations giving their members the right demand a court-martial when offered non-judicial punishment. MCM 1951, ¶ 132. The Navy and the Coast Guard did not afford their members this right.

In 1962, Congress amended the UCMJ to give military members a statutory right to demand trial by court-martial, "except in the case of a member attached to or embarked on a vessel." Act of September 7, 1962, Pub. L. No. 87-648, 76 Stat. 447, 448. (1962). This amendment had the effect of extending to members of the Navy and Coast Guard the right to demand trial by court-martial in lieu of nonjudicial punishment, subject to the "vessel exception." *See* Dwight H. Sullivan, *Overhauling the Vessel Exception*, 43 NAVAL LAW REV. 71 (1996) (explaining the history of the UCMJ's "vessel exception," and noting instances in which sailors were denied the right to demand a court-martial due to the "vessel exception" when the "vessels" in question were in dry dock being overhauled and, thus, not operational).

In receiving non-judicial punishment, commissioned officers and warrant officers could be required to forfeit their pay, have their privileges withheld, and be restricted to certain specified limits. Article 15(a)(1), UCMJ (1950). Enlisted persons could also have their privileges withheld and be restricted to certain specified limits, be given extra duties, be reduced in rank, and, if attached to or embarked on a vessel, confined on bread and water or diminished rations. Article 15(a)(2), UCMJ (1950). The maximum punishment imposable on enlisted persons depended on the rank of the officer imposing the punishment and on the rank of the enlisted persons involved.

1. Court-Martial Jurisdiction

The Elston Act provided that the military had jurisdiction to punish violations of all offenses, except murder or rape committed within the geographical limits of the United States and the District of Columbia in time of peace.[195] Under the UCMJ, court-martial jurisdiction extended to all offenses over all persons subject to the Code at all times and in all places.[196] The category of persons subject to the Code covered not only servicemembers on active duty, but also family members and civilian employees and contractors accompanying the armed forces overseas; the UCMJ also purported to retain jurisdiction over former servicemembers who had committed serious offenses while on active duty and who could not be tried in federal or state court for those offenses.[197]

In the 1950s, the Supreme Court invalidated the portions of the UCMJ authorizing trial by court-martial of military dependents and civilian employees accompanying the armed forces overseas in time of peace.[198] The Court also held that ex-servicemen were no longer subject to military jurisdiction for offenses they may have committed while on active duty.[199]

In 1969, the Supreme Court also placed a major limitation on the trial of servicemembers for some offenses committed under the UCMJ. In *O'Callahan v. Parker*, the Court ruled that military jurisdiction extended only to offenses with a "service-connection" to the military; in the absence of a "service-connection," civilian courts had to try the offenses so the defendant would receive the full protections of the Bill of Rights, in particular, a grand jury indictment under the Fifth Amendment and a trial by jury under the Sixth Amendment.[200]

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[195] The 1948 Elston Act provided that no person could be tried for murder or rape committed within the geographical limits of the United States and the District of Columbia in time of peace. AW 92 of 1948.

[196] Article 2 (Persons subject to the code) & Article 5 (Territorial applicability of the code), UCMJ (1950).

[197] *See, e.g.*, Article 3(a), UCMJ (1950) (Jurisdiction to try certain personnel) (defining a serious offense committed by a former servicemember as punishable by confinement for 5 years or more).

[198] McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (civilian government employees); Reid v. Covert, 354 U.S. 1 (1957) (civilian dependents); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (civilian dependents). In light of these cases, the U.S. Court of Military Appeals declined to sustain military jurisdiction over civilian employees of Army contractors in Vietnam, because Congress had not declared war in the armed conflict. *See, e.g.*, United States v. Averette, 41 C.M.R. 363 (1970) (no UCMJ jurisdiction over civilian employee of Army contractor in Vietnam, interpreting the jurisdictional provision as applying only in time of a declared war), superseded by statute Article 2(a)(10), UCMJ (1950), as stated in United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012)); *see also* MAJ. GEN. GEORGE S. PRUGH, LAW AT WAR 110 (1991).

[199] *See, e.g.*, Toth v. Quarles, 350 U.S. 11 (1950) (no UCMJ jurisdiction over ex-servicemembers).

[200] O'Callahan v. Parker, 395 U.S. 258 (1969). In *O'Callahan*, the Court determined that an off-duty soldier's attempted rape and assault of a civilian in a Honolulu hotel had no service-connection since the offenses were committed in peacetime, in U.S. territory, and did not involve military authority, security, or property.

By one estimate, the service-connection rule resulted in civilian courts handling roughly two out of every five serious offenses by soldiers.[201] In 1987, the Supreme Court overruled *O'Callahan* and ended the service-connection requirement.[202] Today, court-martial jurisdiction is based solely on the accused's status as a member of the armed forces.

2. Pretrial Investigation/Preliminary Hearing

The UCMJ carried forward the requirement that no charge could be referred to a general court-martial until a thorough and impartial investigation had been made of all matters set forth in the charges.[203] From 1920 to 2014, the purpose of this pretrial investigation was to inquire into the truth of the matters set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case "in the interest of justice and discipline."[204]

The accused had the right to be present at the investigation, to be represented by counsel, and to have a "full opportunity" to cross-examine witnesses against him.[205] The accused also had the right to present anything he desired in his own behalf, either in defense or mitigation, and to have the investigating officer examine available witnesses requested by the accused.[206]

In 2013, Congress changed the pretrial investigation into a preliminary hearing.[207] The hearing's purpose now is to determine whether there is probable cause to believe an offense has been committed and that the accused committed the offense. Victims are not required to appear at the hearing, and cross-examination of witnesses, if any, is limited to

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[201] General William C. Westmoreland & Major General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 1, 86, 87 n.51 (1980). The service-connection rule led to some odd results. *See, e.g.*, United States v. Hedlund, 2 M.J. 11 (C.M.A. 1976) (upholding jurisdiction for a conspiracy offense, since military members had formed an agreement on a military base to go into town to rob someone for beer money; but rejecting jurisdiction over the subsequent robbery and kidnapping offenses committed downtown in furtherance of the conspiracy).

[202] Solorio v. United States, 483 U.S. 1056 (1987) (upholding jurisdiction over numerous sex offenses involving minor female dependents of fellow servicemembers at private residence).

[203] Article 32, UCMJ (1950).

[204] Article 32(a) (1950-2013).

[205] *Id.* Under the Elston Act, Congress expressly granted the accused the right to be represented by counsel at the investigation. AW 46(b) of 1948 ("The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general court-martial jurisdiction over the command . . . ."). The Navy published regulations requiring a pretrial inquiry by the officer recommending court-martial; the officer could order a board of investigation or court of inquiry if needed. *See* Synopsis of Recommendations for the Improvement of Naval Justice, Office of the Judge Advocate General, Navy Department, 1947.

[206] *Id.*

[207] NDAA FY 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 672 (2013).

matters directly relevant to the hearing.[208] The hearing's other objectives remain the same: whether the convening authority has court-martial jurisdiction over the offense and the accused, the form of the charges, and a recommendation as to the disposition that should be made of the case.[209]

3. Types of Courts-Martial (including panel membership)

The UCMJ maintained the same three basic types of court-martial available since 1916: the general court-martial, the special court-martial, and the summary court-martial.[210] The general court-martial required the appointment of at least five court members.[211] The senior member was the court president who presided at the court-martial, and who retained a few important duties, such as setting the time and place of trial, prescribing the uniform required in court, and preserving order in the open sessions of the court to ensure they were conducted in a dignified, military manner.[212] Both the Elston Act and the UCMJ provided that enlisted persons were now competent to sit on all general and special courts-martial when the accused was enlisted.[213]

The general court-martial could impose any authorized punishment, including the death penalty.[214] A unanimous vote of the court members was required to convict on an offense for which the death penalty was mandatory or discretionary.[215] A sentence of life imprisonment or confinement for more than ten years needed a three-fourths concurrence.[216] In both general and special courts-martial, all other findings of guilty and sentences required a two-thirds vote of the members.[217] Questions, such as a challenge for

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[208] Art. 32(d), UCMJ (2014).

[209] *Id.* Congress later clarified that the accused, as under prior law, could waive the new Article 32 preliminary hearing. NDAA FY 2015, Pub. L. No. 113-291, § 531(a)(4), 128 Stat 3292 (2014).

[210] Art. 16, UCMJ (1950).

[211] The Elston Act continued to require the appointment of a law member; the UCMJ replaced the law member with a *law officer*, as discussed in the next section 4, *infra*.

[212] MCM 1951, ¶¶ 41, 57, 73, 74.

[213] AW 4 of 1948; Art. 25(c), UCMJ (1950). The accused could request the appointment of enlisted members in writing, and at least one third of the total membership on the court had to consist of enlisted persons. But the pool of enlisted persons who could serve as court members excluded enlisted person in the same military unit as the accused.

[214] Art. 18, UCMJ (1950).

[215] Art. 52, UCMJ (1950). Only a two-thirds vote was required to convict on an offense where death was discretionary. However, a unanimous vote was required for a sentence of death.

[216] Art. 52(b)(2), UCMJ (1950).

[217] Art. 52(a)(2) UCMJ (1950).

cause, a motion for a finding of not guilty, or a motion relating to the accused's sanity, were decided by a majority vote of the court members.[218]

The special court-martial required at least three members (no law officer was required),[219] and could adjudge a bad-conduct discharge, confinement for six months, hard labor without confinement for three months, and forfeiture of two-thirds pay for six months.[220] In 1999, Congress increased the period of confinement and forfeiture that special courts-martial could impose to one year.[221]

The summary court-martial consisted of one officer who could adjudge confinement for one month, hard labor without confinement for 45 days, restriction for two months, and forfeiture of two-thirds pay for one month.[222] The UCMJ retained the right of a servicemember to object to the forum, unless he had previously refused punishment under Article 15, UCMJ.

4. Military Judge (from law member to law officer to military judge)

The Elston Act increased the qualifications of the law member by requiring the law member to be an officer in the Judge Advocate General's department or an officer who was a member of the bar of a Federal court or of the highest court of a state of the United States *and* certified by the Judge Advocate General for such detail.[223] The legislation also enhanced the role of the law member by providing that the law member's evidentiary rulings were final and binding on the court members.[224] The law member, however, did not occupy the position of a judge. The law member continued to serve as a voting member of the panel. The presiding officer at trial was still the court president, and the law member was still seated next to him.

a. The judicial role of the law officer

The UCMJ replaced the law member with a new position—the law officer. The law officer now sat apart from the court members during trial, usually in the front of the courtroom on a raised dais, where a judge would normally preside over a trial.[225] Unlike the law member, the law officer was not one of the court members, did not deliberate or vote with the

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[218] Art. 52(b)(3) UCMJ (1950).

[219] Art. 16, UCMJ (1950).

[220] Art. 19 UCMJ (1950).

[221] NDAA FY 2000, Pub. L. No. 106-65, § 577 (October 5, 1999).

[222] Art. 20, UCMJ (1950).

[223] AW 8 of 1948.

[224] AW 31 of 1948. The court president's rulings in special courts-martial on those same questions were similarly final. *Id.*

[225] MCM 1951, ¶ 61*b*; *see also* MCM 1951, at 500 (schematic of seating in general court-martial).

members, and could not discuss the case with the members outside of the presence of the accused (with one limited exception that allowed the law officer to help the members put the findings and sentence into proper form).[226]

Although the law officer was not a judge, the law officer was expected to remain scrupulously impartial,[227] to instruct the court members on all elements of the offense or lesser-included offenses fairly raised by the evidence,[228] to avoid unauthorized out-of-court discussions about the case,[229] and to abstain from improperly entering the closed sessions of the court members.[230] In special courts-martial, the court president was expected to perform the same duties the law officer performed at a general court-martial.[231]

As the law officer was meant to be more like a judge, it was also evident that the court president of a general court-martial was meant to occupy a position more like the foreman of a jury. Except for the court president's right as a member to object to certain rulings of the law officer, the president was not to interfere with those rulings.[232]

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[226] The law officer still lacked the authority to rule on challenges, motions for a finding of not guilty, or the accused's sanity. These issues continued to be decided by the court members. Art. 41, UCMJ (1950); *see also* JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 96-97, 396, 402 (1953). The law officer made evidentiary and procedural rulings, and instructed the court members on the elements of the offense, the presumption of innocence, and the burden of proof. Art. 51(c), UCMJ (1950). The duties of the law officer were not entirely spelled out in the UCMJ. These details were left for the President, who was responsible to prescribe the rules of procedure and evidence in the Manual for Court-Martial. Art. 36, UCMJ (1950); *see also* GENEROUS, *supra* note 120, at 43. For example, the law officer's responsibility to instruct on the elements of the offense was provided in paragraph 73 of the 1951 Manual for Courts-Martial.

[227] United States v. Renton, 25 C.M.R. 201 (C.M.A. 1958) (law officer should have disqualified himself after helping the prosecution draft the sample charges and specifications against the accused); *see also* United States v. Kennedy, 24 C.M.R. 61 (C.M.A. 1957) (law officer abandoned his impartial role and became an interested party for the government, when he admitted that subjective influences were working on him, including an appreciation of the fact that he had a career in the Army which must be considered).

[228] United States v. Clark, 2 C.M.R. 107 (C.M.A. 1952) (conviction of lesser included offense could not be affirmed when no instruction had been given on the elements of the offenses); United States v. Phillips, 11 C.M.R. 137 (C.M.A. 1953) (law officer improperly denied a request for an instruction on the accused's good character). Since the law officer was responsible to instruct on the law, court members were no longer permitted to bring a copy of the Manual for Courts-Martial for use in closed session deliberations. Court members could no more refer to the Manual than they could to other legal authorities in their closed-session deliberations. United States v. Boswell, 23 C.M.R. 369 (C.M.A. 1957).

[229] United States v. Kennedy, 24 C.M.R. 61 (C.M.A. 1957).

[230] United States v. Keith, 4 C.M.R. 85 (C.M.A. 1952).

[231] U.S. v. Clay, 1 C.M.R. 74 (C.M.A. 1951) (It was reversible error for the special court-martial president to fail to instruct the other members on the elements of the offense.).

[232] MCM 1951, ¶¶ 41, 57, 73, 74. A natural tension thus arose between the law officer, whose evidentiary rulings and instructions were final, and the court president, who still presided over the court-martial, and was adjusting to a diminished role. The court president was not permitted to make rulings reserved for the law officer. *See* United States v. Berry, 2 C.M.R. 141 (C.M.A. 1952) (reversing the conviction in a pre-UCMJ case, because the court president had made rulings that were for the law member: "The ground for this

Two lingering problems impeded the law officer's independence. In the 1950s, the law officer often performed this duty on a part-time basis. When not engaged in trial work, the law officer's primary job could be any number of tasks performed by military lawyers.[233] More importantly, the law officer was often a judge advocate assigned to work for the staff judge advocate to the commanding officer who convened the court. Because the law officer was a subordinate in the staff judge advocate's office, he knew that the charges at the court-martial had already been approved for trial by the very same officer who wrote his efficiency reports. This arrangement created the potential for unlawful command influence from the office of the staff judge advocate.[234]

In 1957, the Army developed a solution to address the organizational pressures faced by the law officer by creating an independent judiciary—a corps of judge advocates whose only duty would be to sit as law officers on general courts-martial and who would not be under the command of any person who recommended trial, who ordered trial, or who would review the record of trial in any capacity.[235]

Under the program, senior judge advocates were assigned to a normal three-year tour of duty as judicial officers by the Judge Advocate General. Efficiency reports were written by the assistant judge advocate general and endorsed by the Judge Advocate General.

The creation of an independent judiciary had an immediate benefit: in the first year and a half of the new program, reversals for law officer error were cut to less than 50 percent of the previous rate.[236] The actual length of the trial doubled, as a result of the law officer paying more attention to interlocutory rulings and instructions.[237] The law officer would no longer be rushed by pressure from the court president to "get on with it."[238]

b. The judicial role of the military judge

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holding is, not specific prejudice to the accused's rights under the circumstances of this particular case, but rather the general prejudice to his rights arising from a violation of the basic principle of freedom of the court from 'command influence.'").

[233] GENEROUS, *supra* note 120, at 116-17.

[234] Frederick Bernays Wiener, *The Army's Field Judiciary System—A Notable Advance*, 46 A.B.A. J. 1178, 1180 (1960). Both factors—the part-time character of the law officer's work, plus the fact that he was more frequently than not under the shadow of the staff judge advocate—contributed to the high incidence of error ultimately requiring correction. *Id.* at 1180 (citing *Messy Areas in the Administration of Military Justice*, 21 THE JUDGE ADVOCATE JOURNAL 20, 23-24 (Dec, 1955)).

[235] Wiener, *supra* note 234, at 1178.

[236] GENEROUS, *supra* note 120, at 118.

[237] Wiener, *supra* note 234, at 1181.

[238] Many commanders actually welcomed the new plan because reversals for law officer error decreased. Wiener, *supra* note 234, at 1182.

In 1968, Congress replaced the law officer with the military judge, and made the Army's independent field judiciary system mandatory for all five Services.[239] Moreover, for the first time in military history, an accused could elect to be tried and sentenced by a military judge sitting alone—without court members—in both general and special courts-martial.[240] The military judge's new powers also included the power to release an accused from pretrial confinement after referral of the case to court-martial.[241] In addition, before any special court-martial could adjudge a bad-conduct discharge, Congress required the appointment of a military judge and legally trained counsel for both sides.[242] The transformation of law officer into military judge marked the end of a long decisional process by Congress.

5. Counsel

The UCMJ required that any person who was appointed as trial counsel or defense counsel in a general court-martial must be a judge advocate or a graduate of an accredited law school or a member of the bar of a federal court or the highest court of a state, and certified as competent to perform such duties by a judge advocate general.[243] The appointment of counsel with these qualifications was not required in special courts-martial.[244]

In 1968, Congress amended the UCMJ to excuse the appointment of qualified defense counsel on account of physical conditions or military exigencies.[245] In 1983, Congress again

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[239] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335; *see* H.R. REP. 90-1481; S. REP. 90-1601.

[240] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. By 1988, about three-quarters of all trials by special and general courts were before a military judge sitting alone without court members *See Military Justice Statistics,* Dep't of the Army, *Clerk of Court Notes*, THE ARMY LAWYER, 27-50-182, 54 (Feb. 1988). The exact figures for judge alone cases in the Army were: GCM, 71.2%; BCDSPCM, 78.4%; SPCM, 65.8%.

[241] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1338, 1341.

[242] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[243] Art. 27, UCMJ (1950). By contrast, Assistant U.S. Attorneys are only required to be members of the bar of a federal court or of the highest court of a state; they do not need to be a law school graduate of an accredited law school. United States Department of Justice, Experienced Attorney Hiring Process, http://www.justice.gov/legal-careers/hiring-process (last visited Mar. 17, 2015). Public defender qualification requirements are similar, requiring any public defender to be "a member in good standing in the bar of the state." U.S. DEP'T OF JUSTICE, U.S. COURT GUIDE TO JUDICIARY POLICY, Vol. 7A, § 420.10.50. Graduation from an accredited law school is not listed as a requirement.

[244] During the Vietnam War, some commanders opposed relinquishing control over special courts-martial, even after lawyers began serving as defense counsel. These commanders accepted that felony-level general courts-martial required judge advocates, but they did not appreciate the intrusion of lawyers into their special courts. For example, the Army division's aviation group and artillery commanders in Vietnam continued using non-lawyers as prosecutors, believing that a line officer, rather than a judge advocate, would better represent the command's interest. FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 33 (US Army, 2001). However, non-lawyer trial counsel did not perform as well as legally trained defense counsel. The most reluctant convening authorities eventually accepted the presence of judge advocates at special courts-martial. By mid-1970, the Army required a military judge in all special courts-martial, not just those that could adjudge a bad-conduct discharge. *Id.*

[245] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(2), 82 Stat. 1335.

amended the UCMJ to state that qualified defense counsel must be appointed in all special courts-martial, except on account of physical conditions or military exigencies.[246]

Defense counsel faced the same circumstances law officers faced before development of the field judiciary program. Defense counsel were members of the same legal office as prosecutors and were under the supervision and control of the staff judge advocate who advised the commander.

In 1973, the Secretary of Defense directed each of the military departments to submit plans for restructuring its defense counsel services.[247] In 1974, the Air Force and the Navy placed its defense counsel under the direction of the appropriate judge advocate general, with the Army following suit in 1978.[248]

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[246] Military Justice Act of 1983, Pub. L. No. 98–209, § 3(c)(2), 97 Stat. 1393, 1394.

[247] The Vietnam War exposed another problem area in the military: racial tension and unrest. In 1972, Secretary of Defense Melvin R. Laird commissioned a task force "to identify and assess the impact of racially related patterns or practices on the administration of justice" and "to recommend ways to strengthen the military justice system and to enhance the opportunity for equal justice for every serviceman and woman." John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4, 21 (1983) (citing 1 DEP'T OF DEF., REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES at 1-2 (Nov. 30, 1972) [hereinafter ADMINISTRATION OF MILITARY JUSTICE TASK FORCE NOV. 1972 REPORT]; W.M. Burch, II, *From Military Justice Branch to Directorate: USAF Judiciary*, XV, No. 1 JAG L. REV. 45, 48 (1973). The Task Force was co-chaired by Mr. Nathaniel Jones, General Counsel for the National Association for the Advancement of Colored People, and Lieutenant General C.E. Hutchin, Jr., Commander, First Army. Lynn G. Norton, *Air Force Leads Way: Pioneering the Defense Program*, 26 THE REPORTER 106 (1999).

The Task Force found that African-American troops, who rarely saw members of their own race in command positions, had lost confidence in the military as an institution; they saw the command structure as having no regard for whether they would succeed in military careers. ADMINISTRATION OF MILITARY JUSTICE TASK FORCE NOV. 1972 REPORT, *supra*, at 38-48, 59-66. The Task Force also found that many enlisted men lacked confidence in military defense counsel and did not believe that defense counsel truly represented their interests. Instead they believed that defense counsel could not effectively represent the accused because they also served the commander. Howell, *supra*, at 21. To address this concern, the Task Force recommended that all defense counsel be brought under the direction of the Judge Advocate General. Howell, *supra*, at 22; Norton, *supra*, at 26.

[248] In the Air Force, defense counsel were called area defense counsel and were initially assigned to the Trial Judiciary Division. Norton, *supra* note 247, at 26. The Navy already had its defense and trial counsel in law centers as early as 1968. To separate the defense function from the command bringing charges, the Navy placed the centers under the Navy Judge Advocate General in 1974. U.S. COMPTROLLER GENERAL, REPORT TO CONGRESS: FUNDAMENTAL CHANGES NEEDED TO IMPROVE THE INDEPENDENCE AND EFFICIENCY OF THE MILITARY JUSTICE SYSTEM, FPCD 78-16, at 31 (Oct. 31, 1978). The Coast Guard in 1988 entered into an MOU with the Navy to provide Coast Guard attorneys to assist in certain Navy offices; in exchange the Navy provides most Coast Guard defense advocacy services nation-wide. Coast Guard Military Justice Manual, COMDTINST M5819.1E (April 2011), Encl. 24b. The Army created and placed its defense counsel under the Trial Defense Services. Howell, *supra* note 247, at 4.

6. Trial procedure

The UCMJ provided broad authority to the President to prescribe rules for pretrial, trial, and post-trial procedures, including modes of proof.[249] The President prescribes rules which, so far as he considers practicable, apply the principles of law and the rules of evidence generally applicable in United States district court, so long as those rules are not contrary to or inconsistent with other provisions of the UCMJ.[250]

The President publishes the military criminal procedures in the Rules for Courts-Martial, which generally conform to the Federal Rules of Criminal Procedure insofar as practicable.[251] The Rules for Courts-Martial tend to be much more extensive than the Federal Rules of Criminal Procedure as they must provide detailed guidance on matters that are specific to military practice.

In 1950, the admissibility of evidence and the competency and privileges of witnesses in federal courts was governed by common law principles. The rules of evidence in the federal and state criminal system were largely the product of case law. Congress enacted the Federal Rules of Evidence in 1975.[252] The Military Rules of Evidence, adopted in 1980, were identical in many respects to the federal rules.[253] By regulation, any amendment to the federal rules will automatically amend parallel provisions in the Military Rules of Evidence, unless the President takes action to the contrary within eighteen months of the amendment.[254]

With military rules and procedures modeled on federal rules and procedures, courts-martial can look to federal court decisions interpreting those rules and procedures as persuasive authority.[255]

7. Unlawful Command Influence

The Elston Act addressed inappropriate interference in the court-martial trial and review process by identifying and prohibiting acts that could unlawfully influence the actions of court-members and convening authorities.[256]

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[249] Art. 36, UCMJ (1950). This provision was derived from a similar one in the Articles of War. In the Navy, rule-making authority was given to the Secretary of the Navy. *See Hearings on H.R. 2498*, *supra* note 184, at 1014.

[250] *Hearings on H.R. 2498*, *supra* note 184, at 1016-19.

[251] The Federal Rules of Criminal Procedure took effect in 1946, after Congress authorized the Supreme Court to draft them. Sumners Courts Act, 76 Pub. L. No. 675, 54 Stat. 688 (June 29, 1940).

[252] Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

[253] MCM, App. 22, (M.R.E. General Provisions, Analysis) (discussing history of the Military Rules of Evidence).

[254] M.R.E. 1102(a).

[255] *See* MCM, App. 22 (M.R.E. General Provisions, Analysis).

The UCMJ similarly addressed "unlawful command influence" by prohibiting convening authorities and commanders from censuring, reprimanding, or admonishing a court member, law officer, or counsel with respect to the findings or sentence of the court, or the exercise of their functions in the conduct of the proceedings.[257] The UCMJ also made such conduct punishable in a punitive article.[258]

8. Post-trial role of the Convening Authority

Under the Elston Act, the convening and the confirming authority (the authority to confirm a sentence) had the implied power to disapprove both the findings of guilty and the sentence, in whole or in part, and to remand the case for rehearing.[259]

Under the UCMJ, the convening authority continued to exercise an appellate-type review function with responsibility to act on the findings and sentence, and was only to approve them to the extent that he found them correct in law and fact, and to the extent he determined in his discretion that they should be approved.[260]

In 1983, Congress removed the requirement for the convening authority to conduct formal appellate reviews of cases to ensure their legal sufficiency before approving the findings and the sentence.[261] The 1983 Act focused the convening authority's attention on matters of direct interest to the exercise of command prerogative—the matter of clemency. For these purposes, the Act also permitted the accused's defense counsel to submit a rebuttal to the staff judge advocate's recommendation before the convening authority took action on the case.

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[256] AW 88 of 1948.

[257] Art. 37, UCMJ (1950).

[258] Art. 98, UCMJ (1950). Since 1951, however, there have been almost no prosecutions of any kind for unlawful command influence under Article 98. Wiener, *supra* note 3, at 41-42 n.244. For a fuller discussion, *see Hearing on Constitutional Rights of Military Personnel Before Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 87th Cong., 2d Sess., 780-81 (1949) (Testimony by Frederick Bernays Wiener). Despite a lack of prosecutions under Article 98, servicemembers have been awarded relief when their own case has been impacted by unlawful command influence. *See, e.g.*, United States v. Littrice, 13 C.M.R. 43 (C.M.A. 1953) (conviction reversed after the commander's executive officer met with court members before the start of a general court-martial to drive home the commander's expectation that they would vote to convict and impose a severe sentence); United States v. Whitley, 19 C.M.R. 82 (C.M.A. 1955) (conviction reversed after the convening authority during the trial replaced the court president of a special court-martial who had ruled consistently in favor of the defense with a "more qualified" court president).

[259] AW 47(f), 49 of 1948.

[260] The commander's authority to disapprove or approve in whole or in part the findings and sentence was a matter "wholly within [the commander's] discretion[.]" Art. 64, UCMJ (1950). Even before the UCMJ was enacted, the judgment and sentence of a court-martial was "incomplete and inconclusive, being in the nature of a recommendation only" to the commanding officer who convened the court-martial. WINTHROP, *supra* note 2 at 447.

[261] Pub. L. No. 98-209, 97 Stat. 1393 (1983).

In 2014, Congress removed the convening authority's power to modify the findings and sentence, with some exceptions.[262] The convening authority can modify the findings and sentence for light sentences involving minor offenses where the accused was sentenced to less than six months of confinement with no punitive discharge, and where the offense carried a maximum sentence of two years or less of confinement. With respect to all other offenses, the convening authority can reduce the sentence pursuant to a pretrial agreement or upon a recommendation by the trial counsel when the accused provided substantial assistance in the investigation or prosecution of another person.

9. Appellate review

a. Appellate review under the Elston Act

Records of trial not requiring action by a confirming authority under the Elston Act were reviewed by a legal officer in the office of the Judge Advocate General and, if the legal officer was of the opinion that the record was legally deficient in any respect, the record went to the board of review to be examined.[263]

Under the Elston Act, the boards of review examined all cases with sentences to a dishonorable or bad-conduct discharge or to confinement in a penitentiary, except when the discharge was suspended. The boards of review had to determine whether the evidence in each record of trial was legally sufficient to support a conviction by proof beyond a reasonable doubt.[264] In so doing, the boards of review were authorized to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact.[265]

But the board of review was essentially only an advisory board; its opinions were not binding unless the Judge Advocate General concurred in the opinion.[266] If the Judge Advocate General disagreed with it, the case was forwarded to higher authority for resolution.

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[262] NDAA FY 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 672 (2013).

[263] AW 50(f) of 1948.

[264] AW 47(c) of 1948.

[265] AW 50(g) of 1948. The Elston Act also created a judicial council, consisting of three general officers, which acted as an appellate review body above the level of the board of review, and which, in certain cases, could also act as a confirming authority. AW 50(a) of 1948. The judicial council reviewed cases when the opinions of the boards of review and the Judge Advocate General differed. AW 50(d)(4), 50(e)(4) of 1948. The judicial council's authority depended on whether the Judge Advocate General agreed with its opinion. AW 48(c) of 1948. If they, too, differed, the case was forwarded to the Secretary of the Army for confirmation. AW 48(b) of 1948. The President had to confirm any sentence to death or sentence involving a general officer. AW 48(a) of 1948.

[266] If the board of review found record to be legally deficient and the Judge Advocate General agreed with the board's opinion, the Judge Advocate General returned the record of trial to the convening authority for a rehearing or other action. AW 50(d)(3), 50(e)(3) of 1948.

After the post-trial review and confirming action were completed, the findings of guilty and the sentence became final and conclusive. Orders publishing the proceedings and all actions taken were binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial.[267]

b. Transformation of the Boards of Review into Appellate Courts

The UCMJ transformed the boards of review into actual appellate courts with authority to issue judicial rulings binding on the Judge Advocate General and all other convening and confirming authorities and whose decisions were reviewable only by the Court of Military Appeals.[268]

In 1968, Congress recast the boards of review as Courts of Military Review,[269] and, in 1994, they were renamed Courts of Criminal Appeals.[270]

c. U.S. Court of Appeals for the Armed Forces

The UCMJ created a civilian court of last resort within the military justice system—the Court of Military Appeals.[271] Congress established the Court to be "completely removed from all military influence or persuasion."[272] The Court originally had three judges, appointed from civilian life by the President, by and with the advice and consent of the Senate for a term of fifteen years.[273] In 1989, Congress increased the number of judges on

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[267] AW 50(h) of 1948.

[268] LURIE, *supra* note 125, at 169-206; Willis, *supra* note 178, at 57-63. Congress also did away with judicial councils, which had been part of the Elston Act.

[269] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, 1341-42.

[270] Pub. L. No. 103-337, sec. 924, 108 Stat. 2831 (October 5, 1994).

[271] Art. 67, UCMJ (1950). The court's first chief judge described its creation as the most revolutionary step Congress had ever taken to carry out its constitutional responsibility "to make rules for the Government and Regulation of the land and naval Forces." Robert Emmett Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1960-61) (quoting U.S. CONST. art. I, sec. 8, cl. 14). Other common law countries quickly followed the example of the United States in establishing a civilian court of last resort over their military justice system. Direct appeal of military cases to civilian courts was made available in Great Britain in 1951, in Canada in 1952, in New Zealand in 1953, and in Australia in 1955. Wiener, *supra* note 3, at 37 nn.224-28.

[272] Gerald F. Crump, *Part II: A History of the Structure of Military Justice in the United States, 1921-1966*, 17 A.F. LAW REV. 55, 66 n.86 (1975) (citing Sen. Estes Kefauver, in *U.S. Congressional Record*, 81st Cong., 2d Sess., 1950, XCVI, Part 1, 1362.).

For Congress, the Court of Military Appeals was merely an extension of the American concept of civilian control over the military. But this concept was vigorously opposed in congressional hearings by military leaders before the UCMJ was adopted. *See, e.g., Hearings on H.R. 2498*, *supra* note 184, at 772-73 (statement of Maj. Gen Kenneth F. Cramer, Chief, National Guard Bureau); Crump, *supra*, at 66.

[273] Art. 67(a)(1), UCMJ (1951).

the Court to five to enhance the Court's stability and effectiveness.[274] In 1994, Congress changed the name of the Court to its current designation—the U.S. Court of Appeals for the Armed Forces.[275]

The U.S. Court of Appeals for the Armed Forces can review a case on appeal on one of three bases: (1) if the accused is a general or flag officer, or the sentence includes the death penalty; (2) if a judge advocate general certifies an issue to the court; or (3) if the court grants a petition for review. [276] The Court's review is mandatory for cases in the first two categories. For the third category, the Court grants a petition for review for "good cause," a determination within the court's discretion. The Court exercises its discretion to address important legal issues or to resolve conflicts among the Services in their interpretation of the UCMJ.

In addition to the authority for direct review of cases from the Courts of Criminal Appeal, the U.S. Court of Appeals for the Armed Forces may consider petitions for extraordinary relief under the All Writs Act.[277]

d. Direct Appeal to the Supreme Court

In 1983, Congress provided for direct review of the Court's decisions by the Supreme Court.[278] Under the Act, parties may petition the Supreme Court for discretionary writs of certiorari in all cases in which the U.S. Court of Appeals for the Armed Forces had granted the petition for review.[279] Since 1983, the Supreme Court has granted review in a relatively small number of cases.[280]

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[274] With only three judges, the replacement of a single judge could produce major swings in the law and in the court's development of precedent. The same could occur if a single judge were to change his or her viewpoint. Such change undermined doctrinal stability and sapped the court's pronouncements of the legitimacy that comes with predictability. Joel D. Miller, *Three is Not Enough*, 1976 ARMY LAW. 11, 13 (Sept. 1976); *see also* Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1216-17 (1997) (a three-judge court needlessly detracted from the court's standing in the American judicial pantheon).

[275] Pub. L. No. 103-337, § 924, 108 Stat. 2831 (1994).

[276] Art. 67(b), UCMJ (1950). In 1983, Congress eliminated mandatory review for cases involving flag or general officers, limiting review in this category to death sentences. Art. 67(b)(1), UCMJ (1983).

[277] The All Writs Act, 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); *see, e.g.*, Noyd v. Bond, 395 U.S. 683 (1969); Clinton v. Goldsmith, 526 U.S. 529 (1999); United States v. Denedo , 556 U.S. 904 (2009).

[278] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, 1405 (1983).

[279] No direct appeal can be made to the Supreme Court if the U.S. Court of Appeals for the Armed Forces declines to review the case.

[280] *See, e.g.*, Weiss v. United States, 510 U.S. 163 (1994) (military judges who were commissioned officers before their assignment to serve as judges did not need a second appointment before assuming their judicial duties); Davis v. United States, 512 U.S. 452 (1994) (suspect's ambiguous or equivocal reference to attorney

e. Interlocutory appeals by the United States

In the 1983 Act, Congress authorized interlocutory appeals by the prosecution of certain adverse trial rulings.[281] Before then, the government had no ability to appeal a military judge's ruling that terminated the proceedings with respect to a charge or otherwise excluded important evidence. This change allowed government appeals under procedures similar to appeals by the United States in a federal prosecution.

f. Collateral Review

Federal courts outside the military justice system also review court-martial sentences under the standards applicable to collateral review. In addition to jurisdictional issues, a court during collateral review may consider the constitutional claims of servicemembers under the "full and fair" consideration test stated by the Supreme Court in *Burns v. Wilson*.[282]

10. Punitive Articles

The UCMJ added definitions (in Article 1) and offenses on matters pertaining to substantive criminal law, such as principals, accessory after the fact, conviction of a lesser included offense, attempt, conspiracy, solicitation, malingering, and extortion.[283] The UCMJ also carried forward many military-unique offenses, such as desertion, failure to obey an order or regulation, and disrespect towards superior officer.[284] In all, it contained 58 punitive articles. When it came to defining offenses, the UCMJ was a model of clarity, especially when compared to prior versions of the Articles of War or the Articles for the Government of the Navy.

Two punitive articles have been part of military justice system since 1775.[285] They are unique in that, if they had been civilian offenses, the Supreme Court would have struck them down as unconstitutionally vague; but the Court has upheld them when applied to a

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did not require cessation of interrogation); Ryder v. United States, 515 U.S. 177 (1995) (participation of civilian judges without Senate confirmation on the Court of Military Review violated the Appointments Clause); Loving v. United States, 517 U.S. 748 (1996) (Congress delegated to the President the power to promulgate rule restricting death sentence to murders in which aggravating circumstances have been established); Edmond v. United States, 520 U.S. 651 (1997) (Secretary of Transportation could appoint civilian judges to court of criminal appeals); United States v. Scheffer, 523 U.S. 303 (1998) (per se rule against admission of polygraph evidence in court-martial proceedings did not violate the Fifth or Sixth Amendment rights of an accused to present a defense); Clinton v. Goldsmith, 526 U.S. 529 (1999) (invalidating injunction against dropping court-martialed service member from the Air Force rolls); United States v. Denedo, 556 U.S. 904 (2009) (military appellate courts can entertain coram nobis petitions under the All Writs Act).

[281] Pub. L. No. 98-209, 97 Stat. 1393, at 1398 (1983).

[282] 346 U.S. 137 (1953); *see* Rosen, *supra* note 105, at 7-9, 50-65.

[283] Arts. 77-82, 115, and 127, UCMJ (1950).

[284] Arts. 85, 89, and 92, UCMJ (1950).

[285] WINTHROP, *supra* note 2, at 720.

servicemember.[286] The first is "conduct unbecoming an officer and gentleman," and the second is the "General Article."[287]

The General Article prohibits all disorders and neglects prejudicial to good order and discipline, and prohibits all conduct of a nature to bring discredit upon the armed forces.[288] In exercising his authority to designate maximum punishments, the President has defined certain well known offenses under the General Article that are not in enumerated articles.[289] These offenses include kidnapping, negligent homicide, bribery, obstruction of justice, and misprision of a serious offense, among others.[290] Because they are merely Presidentially designated offenses and not enumerated offenses enacted by Congress, the prosecution must allege and prove an extra element in addition to the regular elements of the offenses; this extra element is referred to as the "terminal" element, which consists of showing that the conduct was either prejudicial to good order and discipline or was service discrediting.

IV. Military Justice Reform in Historical Perspective: Managing Change in Challenging Times

In 1950, the military establishment responded in a remarkable manner to the enactment of the UCMJ. The month after President Harry S. Truman signed the new law, the Korean War broke out.[291] Commanders and judge advocates immediately confronted the challenge of implementing an entirely new Code while simultaneously fighting a major war.[292] The military expanded from about 1.5 million in uniform in 1950 to nearly 3 million in 1955. The military's quick expansion brought with it a sharp increase in the number of courts-

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[286] The Supreme Court upheld both punitive articles in Parker v. Levy, 417 U.S. 733 (1974) (stating that the military, whose business it was to fight or be ready to fight wars, had a need to regulate aspects of the conduct of its members which in the civilian sphere are left unregulated).

[287] Art. 133, UCMJ (1950); Art. 134, UCMJ (1950) (Clauses 1 and 2 offenses).

[288] The General Article also permits the convening authority to assimilate federal and state crimes and offenses, when they are not capital offenses. Art. 134, UCMJ (1950) (Clause 3 offenses).

[289] The Presidentially designated offenses are listed in the Manual for Courts-Martial at Part IV, paragraphs 61-113.

[290] MCM, Part IV, ¶¶ 89, 92, 95 & 96.

[291] President Truman signed the UCMJ into law on May 5, 1950. Harry S. Truman, *Statement by the President Upon Signing Bill Establishing a Uniform Code of Military Justice*, May 6, 1950. The Korean War began on June 25, 1950. The UCMJ went into effect on May 31, 1951.

[292] The armed services scrambled to train a cadre of lawyers who could implement the UCMJ. In late 1950, the Air Force inaugurated the Judge Advocate General Staff Officer Course at Maxwell Air Force Base, Alabama. PATRICIA A. KEARNS, FIRST 50 YEARS: U.S. AIR FORCE JUDGE ADVOCATE GENERAL'S DEPARTMENT 27 (2004). Also in 1950, the Army reopened its Judge Advocate General's School, previously located at the University of Michigan in Ann Arbor and deactivated after World War II, in temporary facilities at Fort Myer, Virginia, until a permanent school was established the following year on the campus of the University of Virginia in Charlottesville, where it remains today. THE ARMY LAWYER, *supra* note 5, at 185-86, 217.

martial.[293] Yet the transition into lawyer-conducted general courts-martial was relatively smooth, with no noticeable adverse impact upon military discipline or effectiveness.[294]

[293] The court-martial rate during the Korean War was even higher than during World War II under the Articles of War. Westmoreland & Prugh, *Judges in Command*, *supra* note 201, at 86. For example, the Army's court-martial rate in the Korean War fluctuated between 9.5 and 11.6 courts per thousand soldiers. *Id.* at 90. During World War II, the Army's rate was never more than 6.9 per thousand. *Id.* at 38. Although the Korean War ended in 1953, the Cold War obliged the military to maintain a large force with a global presence. Consequently, judge advocates conducted a total of about two million courts-martial in the first ten years of the UCMJ's existence from 1951 to 1961.

[294] THE ARMY LAWYER, *supra* note 5, at 206. A similar response by commanders and judge advocates to changes in the UCMJ in time of armed conflict was repeated in Vietnam and later conflicts. *See generally* BORCH, *supra* note 244.

Part 2. The Role of the Military Justice Review Group

Establishing the MJRG

The current comprehensive review of the UCMJ had its origins in a memorandum to the Secretary of Defense from General Martin Dempsey, then-Chairman of the Joint Chiefs of Staff. The August 5, 2013 memorandum, written on behalf of the Joint Chiefs, recommended to then-Secretary of Defense Chuck Hagel that he "direct the Department of Defense General Counsel to conduct a comprehensive, holistic review of the UCMJ and the military justice system . . . solely intended to ensure that our system most effectively and efficiently does justice consistent with due process and good order and discipline."[1] The memorandum observed that "much has changed since [the last major review of the UCMJ in 1983], to include the end of the Cold War, the successful integration of the All-Volunteer Force, and the enactment of the Goldwater-Nichols Act of 1986." The Joint Chiefs concluded that a "DOD-led holistic review of the UCMJ and the military justice system would be appropriate."[2]

On October 18, 2013, Secretary Hagel directed the Department of Defense General Counsel to "conduct a comprehensive review of the [UCMJ] and the military justice system with support from military justice experts provided by the Services."[3] Secretary Hagel determined that "[s]uch a review is appropriate given the many amendments to the UCMJ since the Military Justice Act of 1983 and the Manual for Courts-Martial (MCM) since 1984."[4]

Secretary Hagel directed the review to "include an analysis of not only the UCMJ, but also its implementation through the MCM and service regulations."[5] The Secretary also directed the review to consider the June 2014 report and recommendations of the Response Systems Panel.[6] Finally, Secretary Hagel directed the preparation of two reports with

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[1] U.S. Dep't of Def., Memorandum from the Chairman of the Joint Chiefs of Staff on Recommendation of the Joint Chiefs of Staff with respect to a Holistic Review of the Uniform Code of Military Justice (Aug. 5, 2013). The Chairman's memorandum is attached as Appendix A to this Report.

[2] *Id.*

[3] U.S. Dep't of Defense, Memorandum from Secretary of Defense on Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013). Secretary Hagel's memorandum is attached as Appendix B to this Report.

[4] *Id.*

[5] *Id.*

[6] *Id.* Congress directed the Secretary establish the Response Systems Panel to "conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses [under the UCMJ] . . . for the purpose of developing recommendations regarding how to improve the effectiveness of such systems." NDAA FY13, Pub. L. No. 112-239, § 576, 126 Stat. 1632 (2013). *See also* REPORT OF THE RESPONSE SYSTEM TO ADULT SEXUAL ASSAULT CRIMES PANEL (June 2014), *available at* http://responsesystemspanel.whs.mil.

relatively short deadlines: (1) a report due in 12 months providing recommendations for amendments to the UCMJ; and (2) a report due in 18 months providing recommendations for amendments to the MCM. Subsequently, the Secretary of Defense set specific deadlines for the report: March 25, 2015, for Part I of the Report (the UCMJ) and September 21, 2015, for Part II (the MCM and service regulations).

As directed by the Secretary of Defense, the DoD General Counsel established the MJRG with support from military justice experts provided by the Services.[7] The MJRG members detailed by the services included: one judge advocate in the grade of O-6 or O-5 with military justice expertise from each of the military services; two additional judge advocates in the grade of O-4 or O-3 with military justice experience from each of the military services; and a noncommissioned officer serving in the legal field from each of the military services. The Coast Guard nominated one military justice expert in the grade of O-5. The services provided all personnel to the MJRG for extended periods of time.

The military personnel on the MJRG served as team members, rather than as service representatives. As such, they were able to provide advice and assistance based upon their experience with the ability to initiate and comment on proposals without obtaining prior approval from their Services. At the same time, the military members were encouraged to engage experts from within their service and in other services as they explored ideas and shaped proposals.

The MJRG staff included civilian personnel with expertise in military and criminal law, as well as experienced legislative counsel. The MJRG also benefited from the assistance of personnel made available on a periodic basis by the DoD General Counsel and the Department of Justice. The General Counsel appointed Andrew S. Effron, former Chief Judge of the United States Court of Appeals for the Armed Forces, to serve as the Director of the MJRG.

The General Counsel designated two distinguished experts in the law, the Honorable David Sentelle, former Chief Judge for the United States Court of Appeals for the District of Columbia Circuit, and the Honorable Judith Miller, former DoD General Counsel, to serve as Senior Advisors to the MJRG. The DoD General Counsel also requested that the Department of Justice designate an expert criminal litigator as an advisor to the MJRG. Mr. Jonathan Wroblewski, Director of the Office of Policy and Legislation in the Criminal Division of the Department of Justice (DoJ), served as DOJ's Advisor to the MJRG. Mr. John Sparks and Mr.

[7] In requesting nominees from the services, the General Counsel stated his expectation that "the judge advocates on the MJRG will have experience as military judges, prosecutors, defense counsel, and victim's counsel, or access to others in their organizations with those perspectives. They may also draw on their experience as staff judge advocates advising military commanders as convening authorities." Terms of Reference for Military Justice Review Committee (Jan. 24, 2014) and Addendum (Mar. 12, 2014) [hereinafter Terms of Reference and Addendum, respectively]. The Addendum changed the name from "Committee" to "Group." Both the Terms of Reference and Addendum are attached as Appendix C to this Report. The Federal Register also announced the MJRG's comprehensive review of the military justice system. 79 Fed. Reg. 28688-28689 (May 19, 2014).

Clark Price have served as advisors to the MJRG from the United States Court of Appeals for the Armed Forces.

The Director and members of the MJRG provided the advisors with periodic updates on the status of the project, and from time to time consulted with the advisors on various issues. The discussions with each advisor, which took place on an individual basis, provided the MJRG with diverse perspectives from experienced experts. The interchanges with the advisors were conducted on an informal basis, not as a matter of coordination, and without any request for or expectation of approval for the Report or any of its components.

Scope of the MJRG's Review

This Report constitutes the MJRG's proposals for amendments to the UCMJ. The MJRG's proposal for changes to the MCM, which were submitted to the DoD General Counsel on September 21, 2015, currently are under review within the Department of Defense. Many aspects of military life and culture help shape and promote discipline within the armed forces in addition to the military justice system and its guiding documents, the UCMJ and MCM. Other important components of a disciplined force include matters such as recruiting and enlistment standards to determine who may serve; training of personnel in military values and culture; establishing an appropriate command climate; and the many administrative options available to commanders to enforce discipline and maintain good order, high morale, and esprit de corps.

Although the statutes, regulations, and policies governing the non-UCMJ aspects of military discipline have a bearing on the operation of the military justice system, an assessment of the impact and effectiveness of the non-UCMJ components of discipline is beyond the scope of this Report. Accordingly, although the MJRG took into account the non-UCMJ aspects of military discipline, the recommendations in Parts I and II of the Report focus on the statutory provisions of the UCMJ, its implementing executive order (MCM), and service implementation.

Guiding Principles and Operational Considerations of the MJRG

The General Counsel issued Terms of Reference for the MJRG, which established objectives and guidance for the MJRG to apply during its review. The Terms of Reference set forth five guiding principles:

- Use the current UCMJ as a point of departure for baseline reassessment.
- Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice.
- To the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the military services.

- Consider any recommendations, proposals, or analysis relating to military justice issued by the Response Systems Panel.[8]
- Consider, as appropriate, the recommendations, proposals, and analysis in the report of the Defense Legal Policy Board, including the report of that Board's Subcommittee on Military Justice in Combat Zones.[9]

The General Counsel also required the MJRG to "consult with general and flag officers who have had experience as general court-martial convening authorities," and to request the assistance of the Legal Counsel for the Chairman, Joint Chiefs of Staff, to help "conven[e] a meeting or meetings with a suitable group of officers for this purpose."[10] Finally, the General Counsel required the Director to coordinate any proposals, at his discretion, on an ongoing basis with the DoD Deputy General Counsel (Personnel & Health Policy), The Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Chairman of the Joint Chiefs of Staff Legal Counsel.[11]

In the course of the review, the MJRG identified six key considerations to provide operational guidance for the MJRG's analysis and to provide a framework for any MJRG proposals:

- ***Discipline:*** National security requires armed forces that are trained, motivated, and highly disciplined.
- ***Unique Features***: History has demonstrated that military discipline requires a court-martial system that differs in important respects from the trial of criminal cases in the civilian sector, including:
    - unique military offenses (e.g., desertion, disrespect, disobedience);
    - unique military punishments (e.g., punitive discharges, reductions in rank); and
    - trials conducted outside the United States (e.g., in deployed and other overseas environments).

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[8] The DoD General Counsel also specifically requested the MJRG to assess 14 of the Response System Panel's recommendations. U.S. Dep't of Def., Memorandum of the General Counsel on Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (Sep. 29, 2014). The General Counsel's memorandum is attached as Appendix F to this Report.

[9] Terms of Reference, *supra* note 7, at 3.

[10] Addendum, *supra* note 7.

[11] Terms of Reference, *supra* note 7, at 4.

- ***Democratic Values***: History also has demonstrated that in our democratic society, servicemembers, their families, and the public expect the court-martial process to:
    - employ the standards and procedures of the civilian sector as far as practicable; and
    - counterbalance the limitation of rights available to members of the armed forces and the hierarchical nature of military service with procedures to ensure protection of rights provided under military law.
- ***Personnel Policies***:
    - The military justice system must be sufficiently flexible to function effectively across a wide variety of national and international environments, personnel practices, and operational requirements, regardless of whether the forces are composed of highly motivated volunteers, reluctant conscripts, or a combination of the two. In that regard, the military justice system must be designed not only for today's force, but also for the wide array of force structures that may be needed to address the national security challenges of the future.
    - The court-martial system is critical to the establishment of a disciplined force, but it is not the sole component. The establishment and maintenance of a disciplined force requires effective training, sound leadership, and sound personnel policies.
- ***Periodic Evaluations***: The history of military justice has further demonstrated the need for periodic evaluation and recalibration of the court-martial process to maintain an appropriate balance between the interests of justice and discipline.
- ***Working Assumptions:***
    - A primary focus of the MJRG's review is to promote justice through enhanced efficiency at all phases of the process.
    - The MJRG should strive to reduce unnecessary litigation by addressing ambiguities, uncertainties, and inconsistencies in rules, statutes, and case law.
    - With respect to recently enacted revisions to the UCMJ, the MJRG should confine further changes to those areas where there is a compelling reason for change, or to harmonize recent legislation with other recommended reforms. Similar considerations should apply with respect to areas with frequent litigation, but stable case law.
    - The MJRG should take into account, but is not bound by, past or current DoD positions on military justice matters.

- The MJRG should take into account the importance of maintaining "system balance"; that is, the balance among factors such as the constitutional and statutory rights of the accused, the power and resources of the prosecutor, the role of the commander, the statutory rights of the victim, and the importance of striving to achieve justice in order to maintain good order and discipline.

Public Input, DoD Outreach Discussions, and Consultation Sessions

In order to most efficiently and thoroughly complete its comprehensive review of the UCMJ and MCM, the MJRG utilized a variety of methods. The MJRG held outreach discussions with various military justice participants from DoD and the military services; the DoD Deputy General Counsel (Personnel & Health Policy) facilitated specific requests for public input; a website informed those wishing to submit comments and suggestions to the MJRG on how to do so; and the MJRG engaged in consultation on selected issues with the Office of the General Counsel, The Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps, and the Legal Counsel for the Chairman, Joint Chiefs of Staff. Finally, the Director and members of the staff met periodically with the Senior Advisors to the MJRG. Due to the comprehensive nature of the review and the limited time frame within which to conduct it, the MJRG determined it would not be practical to collect or originate military justice data other than that already available from other sources.

Public Input to MJRG. Part I of the Report involves the development of a proposal by an internal DoD group for Department of Defense and executive branch review under standard legislative coordination policies prior to public release. Notwithstanding the internal nature of the MJRG's work, the Department of Defense determined that it would be valuable to provide an opportunity for public input to the MJRG. The Federal Register announced the MJRG's creation and described how the public could submit any desired comments.[12] The DoD Deputy General Counsel (Personnel & Health Policy) sent over 400 letters to various organizations seeking public input to the MJRG.[13] The MJRG also created a website with information on providing comments and suggestions.[14] The MJRG received numerous thoughtful public comments which it considered and incorporated into the review process.

MJRG DoD Outreach Roundtable Discussions. Given the requirement to review every article of the UCMJ within a one year time frame and every provision of the MCM within six months after completing the UCMJ review, it was not practicable for the MJRG to hold hearings, engage in field investigations, or require the services to develop data on the

[12] 79 Fed. Reg. 28688 (May 19, 2014).

[13] Organizations contacted for input included victim advocacy and human rights organizations, veterans' organizations, professional legal organizations, state and local bar associations, and 202 law schools in the United States that grant juris doctorates and are approved by the American Bar Association (ABA).

[14] The MJRG's website is located at http://www.dod.mil/dodgc/mjrg.html.

operation of every component of the UCMJ and MCM. The MJRG's location in Washington, however, enabled the MJRG to benefit from informal meetings with a large number of judge advocates and other military justice experts within the government who not only served in area organizations, but who also had extensive prior experience with military justice activities around the nation and in the deployed environment.

Throughout the spring and summer of 2014, the MJRG engaged in Outreach Roundtable Discussions with various DoD military justice experts, including military criminal investigative organizations, staff judge advocates and convening authorities, trial counsel, defense counsel, appellate counsel for the government and the defense, military trial and appellate judges, special victims' counsel, victim witness/assistance personnel, senior enlisted personnel, commanders, and flag and general officers. The Outreach Discussions provided an opportunity for DoD and Coast Guard military justice experts to engage in informal discussions with the MJRG, and to provide information to the MJRG as it conducted its comprehensive review. In addition, the Outreach Discussions created an opportunity for the DoD Services and the Coast Guard to provide any input they desired for the MJRG's consideration.

In the winter of 2015, the MJRG continued its Outreach Roundtable Discussions, meeting with commanders and senior enlisted personnel at Marine Corp Base Quantico, senior commanders attending the National Defense University at Fort McNair, Washington, District of Columbia, and additional commanders and judge advocates attending The Judge Advocate General's Legal Center and School operated by the Army in Charlottesville, Virginia as well as the school's criminal law faculty.

Consultation Sessions. The General Counsel's Terms of Reference required the MJRG to "consult with general and flag officers who have had experience as general court-martial convening authorities," and to request the assistance of the Legal Counsel for the Chairman, Joint Chiefs of Staff, to help "conven[e] a meeting or meetings with a suitable group of officers for this purpose."[15] With the assistance of the Chairman's Legal Counsel and his staff, the MJRG held two extended sessions with general and flag officers who had served as general court-martial convening authorities. Finally, the DoD General Counsel required the Director to coordinate any proposals, at his discretion, with the DoD Deputy General Counsel (Personnel & Health Policy), The Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Chairman of the Joint Chiefs of Staff Legal Counsel. In addition, the General Counsel provided those officials and the military departments with the opportunity to review the MJRG's March 25 report. As directed by the General Counsel, the MJRG had the opportunity to consider, but was not bound by, the suggestions provided during the consultation and review process in the course of preparing the final version of this Report.

[15] Addendum, *supra*, note 7.

The Review Process Methodology

The MJRG Team Process. The MJRG organized the staff into four teams, representing different components of the military justice system: structure; punitive articles; pretrial and trial process; and sentencing and post-trial process. Military justice experts from the Services served as team leads: a general breakdown of the four teams' primary focus areas and responsibilities is below:

Structure Team	
Focus Area	**UCMJ Subchapters: Articles**
A – *Structure* This focus area included a review of the fundamental structure of the military justice system, to include: nonjudicial punishment, courts of inquiry, and all levels of courts-martial; ways to improve funding the courts-martial system; and the rules and procedures for appointment of trial judges and the practice of the separate service trial judiciaries.	Subchapters I: Articles 1, 6-6A Subchapter III: Article 15 Subchapter IV: Articles 16-21 Subchapter V: Articles 22-29 Subchapter VII: Article 37 Subchapter XI: Articles 135-140
B – *Jurisdiction & Preliminary Issues* This focus area included a review of the rules, practices, and procedures related to military criminal investigation, apprehension, pretrial confinement, preliminary hearings, unlawful influence, and courts-martial jurisdiction (including issues related to the overlapping jurisdiction of military, federal, state, and foreign governments).	Subchapter I: Articles 2-5 Subchapter II: Articles 7-11, 13 Subchapter VI: Article 32
Pretrial and Trial Process Team	
Focus Area	**UCMJ Subchapters: Articles**
C – *Pretrial Process* This focus area included a review of the rules, practices, and procedures from the initial disposition of charges to arraignment, including preferral and referral of charges, the role of special victims' counsel, and victims' rights.	Subchapter I: Articles 6b Subchapter II: Articles 12 & 14 Subchapter VI: Articles 30-31, 33-35 Subchapter VII: Article 36

Pretrial and Trial Process Team cont'd	
Focus Area	**UCMJ Subchapters: Articles**
D – *Trial Process* This focus area included a review of the rules, practices, and procedures from arraignment to the announcement of findings, including, among other things, trial procedure, interlocutory appeals, and the Military Rules of Evidence.	Subchapter VII: Articles 38-42, 44-50, 51-53 Subchapter IX: Article 76b
Sentencing and Post Trial Team	
Focus Area	**UCMJ Subchapters: Articles**
E – *Sentencing* This focus area included the rules, practices, and procedures of sentencing proceedings, to include: consideration of whether to adopt mandatory minimums and sentencing guidelines in courts-martial; and the role of the convening authority and the service courts of criminal appeals in reviewing sentences for appropriateness and clemency.	Subchapter VIII: Articles 55-58b
F – *Post-trial & Appellate Review Process* This focus area included the rules, practices, and procedures of post-trial processing and appellate review, to include government appeals; preparation of the record of trial; consideration of processes for automated access to courts-martial and appellate filings; jurisdictional prerequisites for appellate review; the scope of appellate review; and appellate procedures.	Subchapter VII: Article 54 Subchapters IX: Articles 59-76a Subchapter XII: Articles 141-145
Punitive Articles Team	
Focus Area	**UCMJ Subchapters: Articles**
G – *Punitive Articles* This focus area included a comprehensive review of the punitive articles of the UCMJ, to include comparisons to federal offenses in Title 18 of the U.S. Code and the Model Penal Code, and whether to incorporate federal civilian offenses by reference rather than create separate offenses in the UCMJ.	Subchapter VII: Article 43, 50a Subchapter X: Articles 77-134
H – *Standardization and Ongoing Review of the System* This focus area included an examination of the current structure and role of the Code and Joint Service Committees with the aim of improving and making more robust the processes for keeping the military justice system current. This focus area also covers standardization across the services, including standardization with regard to data collection.	Subchapter XII: Article 146

The MJRG Teams conducted their reviews and analyses in two stages. In the first stage, each team researched and analyzed the portions of the UCMJ within their areas of responsibility. Using the DoD General Counsel's Terms of Reference and the MJRG's operational guidance as a framework, the MJRG teams completed a review of the UCMJ and its implementing rules in the MCM in order to identify issues for potential legislative and manual proposals.

For each UCMJ article or MCM rule (or any proposed new article or rule), the responsible MJRG Team compiled the relevant historical background of the UCMJ or MCM provision, and provided a thorough analysis of the provision, including: (1) current practice; (2) key judicial decisions and scholarly commentary; (3) ongoing legislative and regulatory developments; (4) parallel practices, if any, in federal and state criminal law; (5) other sources of law and policy; and (6) and any external proposals for change, such as from the Response Systems Panel or public input. Based on all of this information, the MJRG Team determined whether to propose changing the current provision, propose a new provision, or recommend no change. Each team, and each member of a team, had a full opportunity to comment on the proposals made by other team members and other teams.

There was vigorous and ongoing debate about many ideas and proposals contained in this Report, as well as those that were not included. This included inter- and intra-team in-depth discussions as well as debate and discussion with the Director and the MJRG as a whole, which continued into the Report drafting phase, in order to reach the ultimate decisions on this Report's proposals.

In the second stage of the team review process, the MJRG Teams combined the analysis of the respective UCMJ articles with specific proposed legislative language to prepare the analysis that appears in the Statutory Review and Recommendations section of this Report.

The MJRG submitted the initial draft of the legislative report to the DoD General Counsel on March 25, 2015. Following a period of internal review within the Department of Defense, the MJRG submitted a revised UCMJ report on September 2, 2015. The Department approved the legislative proposals in the revised report as an official Department of Defense proposal, and submitted the proposals to the Office of Management and Budget for interagency review.[16] After considering comments provided during the interagency review, the MJRG prepared this final report, which includes the legislation that has been submitted to Congress as an official administration proposal.

Based upon guidance from the DoD General Counsel, the MJRG also prepared a separate report on implementing rules, focusing primarily on the Manual for Courts-Martial

[16] *See* U.S. DEP'T OF DEF. DIR. 5500.01, PREPARING, PROCESSING, AND COORDINATING LEGISLATION, EXECUTIVE ORDERS, PROCLAMATIONS, VIEWS LETTERS, AND TESTIMONY (Jun. 15, 2007) and OMB Circular A-19.

(MCM).[17] The MJRG's report on the MCM, which was submitted to the DoD General Counsel on September 21, 2015, currently is under review within the Department of Defense.[18]

[17] The President implements the UCMJ and prescribes rules for pretrial, trial, and post-trial procedure by executive order in the MCM.

[18] Based upon guidance from the DoD General Counsel, the MJRG's September 21, 2015 report on the MCM was designated as a "Discussion Draft." The MCM recommendations were drafted with the understanding that revisions would be necessary to reflect any changes in the legislative proposals during the course of interagency review and consideration by the Congress, as well as during any formal coordination of a draft executive order following enactment of amendments to the UCMJ. As such, the MJRG's Discussion Draft serves as the foundation for subsequent development of a proposed executive order, not as an official proposal.

Section B.
Statutory Review and Recommendations

Article-by-Article Index of UCMJ Recommendations

The implementing rules and guidance in the Manual for Courts-Martial for all UCMJ articles, including those recommended to be retained in their current form, will be examined in Part II of the MJRG Report.

SUBCHAPTER I. GENERAL PROVISIONS

§ 801. Art. 1. Definitions

- *Amend the definition of "judge advocate" to properly reflect the change within the Air Force from the "Judge Advocate General's Department" to the "Judge Advocate General's Corps."*
- *Amend the definition of "military judge" to conform to the proposed changes in Art. 30a allowing military judges to address certain matters prior to referral of charges.*

§ 802. Art. 2. Persons subject to this chapter

- *Amend the article to address UCMJ jurisdiction for reserve component members during time periods incidental to Inactive-Duty Training (IDT).*

§ 803. Art. 3. Jurisdiction to try certain personnel

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 804. Art. 4. Dismissed officer's right to trial by court- martial

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 805. Art. 5. Territorial applicability of this chapter

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 806. Art. 6. Judge Advocates and legal officers

- *Amend the article to conform the language of the statute to current practice and related statutory provisions.*

§ 806a. Art. 6a. Investigation and disposition of matters pertaining to the fitness of military judges

- *Amend the article to conform the language of the statute to current practice and related statutory provisions.*

§ 806b. Art. 6b. Rights of the victim of an offense under this chapter

- *Amend the article to align it with federal law under the Crime Victims' Rights Act, 18 U.S.C. § 3771, regarding the exercise of discretion in the preferral and referral of charges.*
- *Amend the article to align it with federal law under the Crime Victims' Rights Act, 18 U.S.C. § 3771, regarding the procedure for appointment of individuals to assume the rights of a victim who is under 18 years of age, incompetent, incapacitated, or deceased.*
- *Amend the article to incorporate the provisions concerning defense counsel interviews of victims of sex-related offenses, currently located in Article 46(b), extending those provisions to victims of all offenses.*

SUBCHAPTER II. APPREHENSION AND RESTRAINT

§ 807. Art. 7. Apprehension

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 808. Art. 8. Apprehension of deserters

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 809. Art. 9. Imposition of restraint

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 810. Art. 10. Restraint of persons charged with offenses

- *Amend the article to conform the language of the statute to current practice and related statutory provisions.*
- *Amend the article to include all cases when an accused is in pretrial confinement.*
- *This article will be retitled as "Restraint of persons charged."*

§ 811. Art. 11. Reports and receiving of prisoners

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 812. Art. 12. Confinement with enemy prisoners prohibited

- *Amend the article so that the prohibition on confinement of servicemembers with foreign nationals applies only to situations where the foreign nationals are not members of the U.S. Armed Forces and are confined under the law of war.*
- *This article will be retitled as "Prohibition of confinement of armed forces members with enemy prisoners and certain others."*

§ 813. Art. 13. Punishment prohibited before trial

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 814. Art. 14. Delivery of offenders to civil authorities

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

SUBCHAPTER III. NON-JUDICIAL PUNISHMENT

§ 815. Art. 15. Commanding Officer's non-judicial punishment

- *Amend the article to eliminate confinement on bread and water as an authorized punishment.*

SUBCHAPTER IV. COURT-MARTIAL JURISDICTION

§ 816. Art. 16. Courts-martial classified

- *Amend the article to establish fixed-sized panels in all courts-martial: eight members in a general court-martial, twelve members in a capital general court-martial, and four members in a special court-martial.*
- *Amend the article to require that a military judge be detailed to all special courts-martial.*
- *Amend the article to authorize a referred judge alone special court-martial with no option for members on findings or sentencing - where the authorized punishment for confinement is limited to six months or less, and no punitive discharge is authorized, pursuant to amendments proposed in Art. 19.*

§ 817. Art. 17. Jurisdiction of courts-martial in general

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 818. Art. 18. Jurisdiction of general courts-martial

- *Retain the article with conforming amendments.*

§ 819. Art. 19. Jurisdiction of special courts-martial

- *Amend the article to limit confinement for any special court-martial referred to a judge-alone bench trial under proposed Art. 16 to six months or less, forfeitures of no more than six months, and no punitive discharge.*

- *Amend the article to allow military magistrates, with the consent of the parties and upon designation by a military judge, to preside over special courts-martial referred to a judge alone under proposed Art. 16.*

§ 820. Art. 20. Jurisdiction of summary courts-martial

- *Amend the article to clarify that a finding of guilt at a summary court-martial is not a conviction from a criminal court.*

§ 821. Art. 21. Jurisdiction of courts-martial not exclusive

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

SUBCHAPTER V. COMPOSITION OF COURTS-MARTIAL

§ 822. Art. 22. Who may convene general courts-martial

- *Retain the article with technical amendments.*

§ 823. Art. 23. Who may convene special courts-martial

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 824. Art. 24. Who may convene summary courts-martial

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 825. Art. 25. Who may serve on courts-martial

- *Amend the article to permit detailing enlisted personnel to serve on court-martial panels without a specific request from the accused for enlisted representation, and to permit detailing enlisted members from the same unit as the accused under the same conditions applicable to detailing of officers from the same unit as the accused.*

- *Retain the right of an enlisted accused to specifically elect one-third enlisted panel membership or elect an all-officer panel.*

- *Amend the article to require that the convening authority detail a sufficient number of members for impanelment under the proposed amendments to Article 29.*

§ 825a. Art. 25a. Number of members in capital cases

- *Amend the article to require a fixed panel size of twelve members in capital cases.*

- *This article will be retitled as "Number of court-martial members in capital cases."*

§ 826. Art. 26. Military judge of a general or special court-martial

- *Amend the article to require, as is current practice, that a military judge be detailed to every general and special court-martial.*
- *Amend the article to authorize cross-service detailing of military judges, with the approval of the appropriate Judge Advocate General.*
- *Amend the article to require the appointment by the Judge Advocate General of a chief trial judge in each Armed Force.*
- *Amend the article to establish appropriate criteria for the Judge Advocate General to use in certifying a person for service as a military judge.*
- *Amend the article to authorize the President to establish uniform regulations concerning minimum tour lengths for military judges with provisions for early reassignment as necessary.*

Proposed new article to the UCMJ

§ 826a. Art. 26a. Military magistrates

- *Establish a new article providing for Judge Advocates General certification of military magistrates pursuant to broad qualification criteria, similar to the requirements for military judges.*
- *In the new statute, provide that military magistrates may perform duties other than those under Articles 19 and 30a in accordance with regulations prescribed by the Secretary concerned.*

§ 827. Art. 27. Detail of trial counsel and defense counsel

- *Amend the article to require uniform qualifications for defense counsel at all courts-martial, and to require that all trial counsel and assistant trial counsel meet certain minimum requirements and be determined competent by their Judge Advocate General.*
- *Amend the article to require that, to the greatest extent practicable, at least one defense counsel detailed to a capital case be "learned in the law" applicable to capital cases.*

§ 828. Art. 28. Detail or employment of reporters and Interpreters

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 829. Art. 29. Absent and additional members

- *Amend the article to clarify the function of assembly and impanelment in courts-martial with members and the limited situations in which a member may be absent after assembly.*
- *Amend the article to authorize the impanelment of alternate members on courts-martial, similar to the use of alternate jurors in federal practice.*
- *Amend the article to allow non-capital general courts-martial to proceed after impanelment with not less than six members if members are excused.*
- *This article will be retitled as "Assembly and impaneling of members; detail of new members and military judges."*

SUBCHAPTER VI. PRE-TRIAL PROCEDURE

§ 830. Art. 30. Charges and specifications

- *Retain the article with technical amendments.*

Proposed new article to the UCMJ

§ 830a. Art. 30a. Proceedings conducted before referral

- *Establish a new article authorizing the President to issue regulations permitting military judges or magistrates to consider certain pretrial matters and make judicial rulings on those matters before referral of charges to a court-martial.*
- *Authorize the President to issue regulations setting forth the matters that may be ruled upon and limitations on available remedies.*

§ 831. Art. 31. Compulsory self- incrimination prohibited

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 832. Art. 32. Preliminary hearing

- *Retain the primary focus on an initial determination of probable cause before referring charges to a general court-martial.*
- *Amend the article to revise the requirement for a disposition recommendation to focus the preliminary hearing officer more directly on providing an analysis of information that will be useful in informing the staff judge advocate's recommendation and the convening authority's ultimate disposition decision under Articles 30 and 34.*
- *Amend the article to also provide an opportunity for the parties and the victim to submit material to inform the hearing officer's report and ultimately the Staff Judge*

Advocate recommendation and convening authority decision regarding appropriate disposition of the case.

- *This article will be retitled as "Preliminary hearing required before referral to general court-martial."*

§ 833. Art. 33. Forwarding of charges

- *Strike this article, but incorporate it substantively into Art. 10.*

Proposed new title and content for UCMJ article

§ 833. Art. 33. Disposition guidance

- *Establish a new article requiring that the Secretary of Defense issue non-binding guidance regarding factors that convening authorities and judge advocates should take into account when exercising disposition discretion.*
- *The guidance shall take into account, with appropriate consideration of military requirements, the principles contained in the U.S. Attorney's Manual concerning the fair and evenhanded administration of criminal law.*

§ 834. Art. 34. Advice of staff judge advocate and reference for trial

- *Require that a staff judge advocate's recommendation on whether to refer charges to trial uses the standard of whether referral is "in the interest of justice and discipline."*
- *Enhance the article by requiring that convening authorities consult with a judge advocate on relevant legal issues before referring charges for trial at special courts-martial.*
- *This article will be retitled as "Advice to convening authority before referral for trial."*

§ 835. Art. 35. Service of charges

- *Retain the article with technical amendments.*
- *This article will be retitled as "Service of charges; commencement of trial."*

SUBCHAPTER VII. TRIAL PROCEDURE

§ 836. Art. 36. President may prescribe rules

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 837. Art. 37. Unlawfully influencing action of court

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 838. Art. 38. Duties of trial counsel and defense counsel

- *Amend the article to require that assistant defense counsel in general and special courts-martial be qualified in accordance with proposed changes in Art. 27.*

§ 839. Art. 39. Sessions

- *Retain the article with conforming amendments to align it with the proposals in Articles 16 and 53 for fixed-size member panels, the elimination of special courts-martial without a military judge, and judge-alone sentencing in all non-capital general and special courts-martial.*

§ 840. Art. 40. Continuances

- *Retain the article with conforming amendments.*

§ 841. Art. 41. Challenges

- *Retain the article with conforming amendments to align it with the proposal in Art. 16 for fixed-size member panels, and the elimination of special courts-martial without a military judge.*

§ 842. Art. 42. Oaths

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 843. Art. 43. Statute of limitations

- *Amend the article to increase the statute of limitations for child abuse offenses to 10 years or life of the child, whichever is longer.*
- *Technical amendments to the statute of limitations for offenses under Art. 83 "Fraudulent enlistment" (proposed to be recodified as Art. 104).*
- *Amend the article to extend the statute of limitations for offenses in which DNA evidence implicates an identified person.*
- *Other technical amendments to the article.*
- *Application provision.*

§ 844. Art. 44. Former jeopardy

- *Amend the article by placing the attachment of jeopardy to when the panel members are impaneled after challenges are exercised, instead of when evidence is first introduced.*
- *This amendment will align double jeopardy protections under the UCMJ more closely with federal practice.*

§ 845. Art. 45. Pleas of the accused

- *Amend the article to permit an accused to plead guilty in capital cases where the sentence of death is not mandatory.*
- *Amend the article so that review of deviations from the article's requirements are subject to a "harmless error" standard of review; not all deviations would mandate invalidation of the guilty plea.*
- *Amend the article to eliminate the need for separate Service regulations authorizing entry of findings upon acceptance of a guilty plea.*
- *Other technical amendments to the article.*

§ 846. Art. 46. Opportunity to obtain witnesses and other evidence

- *Amend the article to allow the issuance of investigative subpoenas for the production of evidence prior to referral and preferral of charges. This will align UCMJ subpoena authority with that in federal and state jurisdictions, and improve the operation of the military justice system in this area.*
- *Amend the article by moving the provisions concerning defense counsel interviews of victims to Article 6b, extending these protections to all victims as defined under that article.*
- *Amend the article by providing military judges with the ability to issue warrants and court orders for the production of certain electronic communications under the Stored Communications Act, 18 U.S.C. §2701 et seq. This will align the authority to obtain such evidence for use in courts-martial more closely with federal and state practices.*
- *Amend the article to provide authority to military judges to modify, quash, or order compliance with military subpoenas, issued before or after referral of charges, in conjunction with the subpoena and warrant authorities proposed in the article.*

§ 847. Art. 47. Refusal to appear or testify

- *Amend the article to clarify its function with respect to the enforcement of subpoenas for civilian witnesses and evidence custodians.*
- *This article will be retitled as "Refusal of person not subject to chapter to appear, testify, or produce evidence."*

§ 848. Art. 48. Contempts

- *Amend the article to extend the contempt power of military judges to pre-referral sessions and proceedings, consistent with the proposed amendments to Art. 26 and the authorities proposed in new Art. 30a.*

- *Amend the article to provide for appellate review of contempt punishments in a manner consistent with the review of other orders and judgments under the UCMJ. This will align the UCMJ more closely in this area with the review procedures applicable in federal district courts and federal appellate courts regarding the contempt power.*
- *Amend the article to clarify that judges on the U.S. Court of Appeals for the Armed Forces and the Courts of Criminal Appeals do not have to be "detailed" to cases or proceedings in order to exercise contempt power.*
- *This article will be retitled as "Contempt."*

§ 849. Art. 49. Depositions

- *Amend the article to require that depositions are ordered only when either party demonstrates that the testimony of the prospective witness may be lost and should therefore be preserved for later use at trial.*
- *The proposed amendments will align the use of depositions under the UCMJ more closely with federal practice, and improve the operation of the military justice system in this area.*
- *Amend the article to conform to recent changes to Article 32, by requiring that deposition officers be judge advocates certified under Article 27(b) "whenever practicable."*
- *Other technical and conforming amendments to the article.*

§ 850. Art. 50. Admissibility of records of courts of inquiry

- *Amend the article to permit sworn testimony from a court of inquiry to be either played from an audio or visual recording or read into evidence when it is otherwise admissible.*
- *This article will be retitled as "Admissibility of sworn testimony from records of courts of inquiry."*

§ 850a. Art. 50a. Defense of lack of mental responsibility

- *Retain this article with conforming amendments based on the proposal to eliminate special courts-martial without a military judge.*

§ 851. Art. 51. Voting and rulings

- *Retain the article with conforming amendments.*

§ 852. Art. 52. Number of votes required

- *Amend this article to require concurrence of at least three-fourths (75 percent) of the members present to convict for non-capital offenses and unanimity on the findings and*

sentence for capital offenses, and to conform to the proposal in Article 16 for fixed-size panels in general and special courts-martial.

- *This article will be retitled as "Votes required for conviction, sentencing, and other matters."*

§ 853. Art. 53. Court to announce action

- *Amend the article to require sentencing by a military judge in all general and special courts-martial, except in capital cases. For capital offenses, members would determine whether the sentence shall include death, life without eligibility for parole, or such other lesser punishments as may be determined by the military judge.*
- *This article will be retitled as "Findings and sentencing."*

Proposed new article to the UCMJ

§ 853a. Art. 53a. Plea Agreements

- *Establish a new article to more closely align plea agreements under the UCMJ with federal practice and improve the operation of the military justice system in this area.*
- *Provide statutory authority for convening authorities to enter into plea agreements under the system of sentencing by the military judge, guided by sentencing parameters, proposed in Articles 53 and 56, and consistent with the entry of judgment model proposed in Article 60c.*

§ 854. Art. 54. Record of trial

- *Amend the article to facilitate the use of modern court reporting technology in the recording, certification, and distribution of court-martial records; authorize certification of the record of trial by a court reporter, instead of authentication by the military judge.*
- *Amend the article to require a complete record in any general or special courts-martial in which confinement or forfeitures exceed six months.*

SUBCHAPTER VIII. SENTENCES

§ 855. Art. 55. Cruel and unusual punishments prohibited

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 856. Art. 56. Maximum and minimum limits

- *Amend the article to require "segmented" sentencing in general and special courts-martial, where confinement is adjudged for each individual guilty finding; this further aligns sentencing under the UCMJ with federal practice, and will improve the operation of the military justice system in this area.*

- *Amend the article to establish sentencing parameters and criteria for use in general and special courts-martial to provide guidance to military judges in determining an appropriate sentence.*
- *Establish a Board, within the Department of Defense, to develop sentencing parameters and criteria as well as review and recommend changes to sentencing rules and procedures.*
- *Amend the article to authorize appeal by the government, in limited circumstances, of awarded sentences.*
- *This article will be retitled as "Sentencing."*

§ 856a. Art. 56a. Sentence of confinement for life without eligibility for parole

- *Strike this article, but incorporate it substantively into Article 56.*

§ 857. Art. 57. Effective date of sentences

- *Combine Articles 57, 57a, and 71 into one single article that addresses when an accused begins serving a court-martial punishment as well as deferment of punishment.*

§ 857a. Art. 57a. Deferment of sentences

- *Strike this article, but incorporate it substantively into Article 57.*

§ 858. Art. 58. Execution of confinement

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 858a. Art. 58a. Sentences: reduction in enlisted grade upon approval

- *This article will be repealed, and the automatic reductions in grade of enlisted members will sunset when the sentencing parameters and criteria proposed under Art. 56 take effect.*

§ 858b. Art. 58b. Sentences: forfeiture of pay and allowances during confinement

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

SUBCHAPTER IX. POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL

§ 859. Art. 59. Error of law; lesser included offense

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 860. Art. 60. Action by the Convening authority

- *Amend the article to address the requirements for a Statement of Trial Results in general and special courts-martial and to authorize the President to establish regulations addressing post-trial motions.*
- *Amend the article to eliminate redundant or unnecessary paperwork in cases where the recent legislation has removed the convening authority's post-trial discretion.*
- *This article will be retitled as "Post-trial processing in general and special courts-martial."*

Proposed new article to the UCMJ

§ 860a. Art. 60a. Limited authority to act on the sentence in specified post-trial circumstances

- *Retain and clarify limitations on the convening authority's ability to act on the findings and sentence of most general and special courts-martial, with conforming amendments to align the article with other revisions to post-trial processing*
- *Establish restricted authority to suspend sentences of confinement or punitive discharge, limited to cases where the military judge recommends suspension and the convening authority acts within the scope of the military judge's recommendation.*

Proposed new article to the UCMJ

§ 860b. Art. 60b. Post-trial actions in summary courts-martial and certain general and special courts-martial

- *Establish this article to clarify the convening authority's power to modify the findings and sentence in all summary courts-martial and any general or special court-martial not covered by the proposed Article 60a, consistent with current law.*

Proposed new article to the UCMJ

§ 860c. Art. 60c. Entry of judgment

- *Establish this article to more closely align post-trial processing under the UCMJ with federal practice, and enhance the operation of the military justice system in this area.*
- *Amend the article to require, in all general and special courts-martial, that the military judge make an "entry of judgment" incorporating the statement of trial results and any post-trial action of the convening authority. In summary courts-martial, the judgment would consist of the findings and sentence of the court-martial, as modified by any post-trial actions of the convening authority.*

§ 861. Art. 61. Waiver or withdrawal of appeal

- *Retain the article with conforming amendments.*
- *This article will be retitled as "Waiver of right to appeal; withdrawal of appeal."*

§ 862. Art. 62. Appeal by the United States

- *Amend the article to authorize the government to appeal when, upon defense motion, the military judge sets aside a panel's finding of guilty because of legally insufficient evidence; such an appeal would not be authorized when it would violate Article 44's prohibitions on double jeopardy.*
- *Other conforming amendments to the article.*

§ 863. Art. 63. Rehearings

- *Amend the article so that, at a sentencing rehearing, where an accused changes his or her plea to not guilty or otherwise fails to comply with the terms a pretrial agreement, the new sentence that may be awarded is not limited, or capped, by the original sentence.*
- *Remove the prohibition on increased sentences at rehearing after a sentence is set aside based on a government appeal of the sentence.*
- *These amendments will align sentencing rehearings under the UCMJ with federal practice and improve the operation of the military justice system in this area.*

§ 864. Art. 64. Review by a judge advocate

- *Amend the article so that the option for review of a proceeding by a judge advocate applies only to summary courts-martial.*
- *Other conforming amendments to the article.*
- *This article will be retitled as "Judge advocate review of finding of guilty in summary court-martial."*

§ 865. Art. 65. Disposition of records

- *Amend the article to require forwarding for review by an appellate defense counsel a copy of the record of trial for cases eligible for direct access review by the Service Courts of Criminal Appeals under Article 66.*
- *Amend the article to require review in the Office of the Judge Advocate General of all general and special court-martial cases not eligible for direct access review by the Courts of Criminal Appeals under proposed Article 66.*
- *Amend the article to require review in the Office of the Judge Advocate General of all court-martial cases that are eligible for direct access review by Courts of Criminal Appeals under Art. 66, but where appeal has been waived, withdrawn, or not filed.*
- *This article will be retitled as "Transmittal and review of records."*

§ 866. Art. 66. Review by Court of Criminal Appeals

- *Amend the article to replace the automatic review of all non-capital cases with an "appeal of right."*
- *Amend the article to authorize direct access to the Courts of Criminal Appeals for all courts-martial that include a sentence greater than six months confinement or a punitive discharge, instead of the current threshold of greater than one year confinement or a punitive discharge.*
- *Amend the article to authorize direct access to the Courts of Criminal Appeals for all courts-martial in which the government previously appealed under proposed Article 62.*
- *Amend the article to allow an accused to apply for discretionary review by the Court of Criminal Appeals when the accused is not entitled to file an appeal of right.*
- *Amend the article to provide statutory standards for factual sufficiency review, sentencing appropriateness review, and review of excessive post-trial delays.*
- *This article will be retitled as "Courts of Criminal Appeals."*

§ 867. Art. 67. Review by the Court of Appeals for the Armed Forces

- *Amend the article to require notification to other Judge Advocates General in connection with any decision by a Judge Advocate General to certify a case for review by the Court of Appeals for the Armed Forces.*
- *Conforming amendments to align the article to the creation of an "entry of judgment" in Article 60c.*

§ 867a. Art. 67a. Review by the Supreme Court

- *Retain this article with a technical amendment.*

§ 868. Art. 68. Branch offices

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 869. Art. 69. Review in the office of the Judge Advocate General

- *Amend the article to eliminate automatic review of general courts-martial cases by Judge Advocate General not reviewed under Article 66, and to permit the accused to request such a review for a one-year period, extendable to three years for good cause.*
- *Amend the article to provide the accused with an opportunity to request discretionary review by the Court of Criminal Appeals of decisions made by the Office of the Judge Advocate General.*
- *This article will be retitled as "Review by Judge Advocate General."*

§ 870. Art. 70. Appellate counsel

- *Amend the article to require, to the greatest extent practicable, at least one appellate defense counsel be "learned in the law" related to capital cases for any case in which the death penalty was adjudged.*
- *This will align the counsel qualification requirements under the UCMJ more closely with federal practice and enhance the operation of military justice system in this area.*

§ 871. Art. 71. Execution of sentence; suspension of sentence

- *Strike this article, but incorporate it substantively into Art. 57.*

§ 872. Art. 72. Vacation of suspension

- *Amend the article so that a convening authority may authorize a judge advocate to conduct a hearing to make factual determinations about whether a violation occurred that may warrant a decision to vacate a suspension.*
- *This amendment eliminates the requirement that such a hearing be conducted personally by a special court-martial convening authority.*

§ 873. Art. 73. Petition for a new trial

- *Amend the article by expanding the time to file a petition for a new trial to three years after the date of entry of judgment.*

§ 874. Art. 74. Remission and suspension

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 875. Art. 75. Restoration

- *Amend the article to provide the President with explicit authority to establish eligibility criteria for restoration of pay and allowances during the period between the time a court-martial sentence is set aside or disapproved and the time any sentence is imposed upon a new trial or rehearing.*

§ 876. Art. 76. Finality of proceedings, findings, and sentences

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 876a. Art. 76a. Leave required to be taken pending review of certain court-martial convictions

- *Retain the article with conforming amendments.*

§ 876b. Art. 76b. Lack of mental capacity or mental responsibility: commitment of accused for examination and treatment

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

SUBCHAPTER X. PUNITIVE ARTICLES

§ 877. Art. 77. Principals

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 878. Art. 78. Accessory after the fact

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 879. Art. 79. Conviction of lesser included offense

- *Amend this article to authorize the President to issue regulations designating lesser included offenses.*
- *The article will be retitled as "Conviction of offense charged, lesser included offenses, and attempts."*

§ 880. Art. 80. Attempts

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 881. Art. 81. Conspiracy

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 882. Art. 82. Solicitation

- *The offense of "Soliciting another to commit an offense" under Article 134, paragraph 105, will be incorporated into this article.*
- *The article will be retitled as "Soliciting commission of offenses."*

§ 883. Art. 83. Fraudulent enlistment, appointment or separation

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in new Article 104a.*

Proposed new title and content for UCMJ article

§ 883. Art. 83. Malingering

- *The offense of "Malingering" migrated from Article 115.*

§ 884. Art. 84. Unlawful enlistment, appointment or separation

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in new Article 104b.*

Proposed new title and content for UCMJ article

§ 884. Art. 84. Breach of medical quarantine

- *The offense of "Breach of medical quarantine" migrated from Article 134, paragraph 100.*

§ 885. Art. 85. Desertion

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 886. Art. 86. Absence without leave

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 887. Art. 87. Missing movement

- *The offense of "missing movement" will remain in this article.*
- *The offense of "Jumping from vessel into the water," under Article 134, paragraph 91, will be incorporated into this article.*
- *This article will be retitled as "Missing movement; jumping from vessel."*

Proposed new article to the UCMJ

§ 887a. Art. 87a. Resisting apprehension, flight, breach of arrest, escape

- *Article 95 will be recodified as new Article 87a, but will not be otherwise amended.*

Proposed new article to the UCMJ

§ 887b. Art. 87b. Offenses against correctional custody and restriction

- *The offense of "Correctional custody - offenses against," under Article 134, paragraph 70, will be incorporated into this article.*

- *The offense of "Restriction, breaking," under Article 134, paragraph 102, will be incorporated into this article.*

§ 888. Art. 88. Contempt toward officials

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 889. Art. 89. Disrespect toward superior commissioned officer

- *The offense of "Disrespect toward superior commissioned officer" will remain in this article.*
- *The offense of "Assault of superior commissioned officer" from Article 90(1) will be incorporated into this article.*
- *This article will be retitled "Disrespect toward superior commissioned officer; assault of superior commissioned officer."*

§ 890. Art. 90. Assaulting or willfully disobeying superior commissioned officer

- *The offense of "Willfully disobeying superior commissioned officer" will remain in this article.*
- *The offense of "Assaulting superior commissioned officer" from Article 90(1) will be recodified in Art. 89.*
- *This article will be retitled "Willfully disobeying superior commissioned officer."*

§ 891. Art. 91. Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 892. Art. 92. Failure to obey order or regulation

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 893. Art. 93. Cruelty and maltreatment

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

Proposed new article to the UCMJ

§ 893. Art. 93a. Prohibited activities with military recruit or trainee by person in position of special trust

- *New punitive article that would prohibit sexual activity by recruiters and trainers with recruits and trainees.*

§ 894. Art. 94. Mutiny or sedition

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 895. Art. 95. Resistance, flight, breach of arrest, escape

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in new article 87a.*

Proposed new title and content for UCMJ article

§ 895. Art. 95. Offenses by sentinel or lookout

- *The offense of "Misbehavior of sentinel" migrated from Art. 113.*
- *The offense "Loitering or wrongfully sitting on post by sentinel or lookout" from Article 134, paragraph 104(b)(2), will be incorporated into this article.*
- *This article will be titled "Offenses by sentinel or lookout."*

Proposed new article to the UCMJ

§ 895a. Art. 95a. Disrespect toward sentinel or lookout

- *The offense of "Disrespect to a sentinel or lookout" from Article 134, paragraph 104(b)(1), will be incorporated into this article.*

§ 896. Art. 96. Releasing prisoner without proper authority

- *The offense of "Releasing prisoner without proper authority" will remain in this article.*
- *The offense "Drinking liquor with prisoner," under Article 134 paragraph 74, will be incorporated into this article.*
- *This article will be retitled "Release of prisoner without authority; drinking with prisoner."*

§ 897. Art. 97. Unlawful detention

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 898. Art. 98. Noncompliance with procedural rules

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 131f.*

Proposed new title and content for UCMJ article

§ 898. Art. 98. Misconduct as prisoner

- *The offense of "Misconduct as prisoner" migrated from Article 105.*

§ 899. Art. 99. Misbehavior before the enemy

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 900. Art. 100. Subordinate compelling surrender

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 901. Art. 101. Improper use of countersign

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 902. Art. 102. Forcing a safeguard

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 903. Art. 103. Captured or abandoned property

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 108a.*

Proposed new title and content for UCMJ article

§ 903. Art. 103. Spies

- *The offense of "Spies" migrated from Art. 106.*
- *Amend the article to remove mandatory punishment of death for this offense.*

Proposed new article to the UCMJ

§ 903a. Art. 103a. Espionage

- *The offense of "Espionage" migrated from Article 106a.*

Proposed new article to the UCMJ

§ 903b. Art. 103b. Aiding the enemy

- *The offense of "Aiding the enemy" migrated from Article 104.*

§ 904. Art. 104. Aiding the enemy

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 103b.*

Proposed new title and content for UCMJ article

§ 904. Art. 104. Public records offenses

- *The offense of "Public record: altering, concealing, removing, mutilating, obliterating, or destroying" under Article 134, paragraph 99, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 904a. Art. 104a. Fraudulent enlistment, appointment or separation

- *The offense of "Fraudulent enlistment, appointment or separation," under Article 83 will be recodified in this article.*

Proposed new article to the UCMJ

§ 904b. Art. 104b. Unlawful enlistment, appointment, separation

- *The offense of "Unlawful enlistment, appointment, separation," under Article 84 will be recodified in this article.*

§ 905. Art. 105. Misconduct as prisoner

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 98.*

Proposed new title and content for UCMJ article

§ 905. Art. 105. Forgery

- *The offense of "Forgery" migrated from Article 123.*

Proposed new article to the UCMJ

§ 905a. Art. 105a. False or unauthorized pass offenses

- *The offense of "False or unauthorized pass offenses," under Article 134, paragraph 77, will be incorporated into this article.*

§ 906. Art. 106. Spies

- *Recodify in Article 103.*

Proposed new title and content for UCMJ article

§ 906. Art. 106. Impersonating an officer, noncommissioned officer, or petty officer, or an agent or official

- *The offense of "Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official," under Article 134, paragraph 86, will be incorporated into this article.*
- *This article will be retitled as "Impersonation of officer, noncommissioned or petty officer, or agent or official," conforming to the definition of "officer" in 10 U.S.C. 101(b)(1).*

§ 906a. Art. 106a. Espionage

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 103a.*

Proposed new title and content for UCMJ article

§ 906a. Art. 106a. Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

- *The offense of "Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button," under Article 134, paragraph 113, will be incorporated into this article.*
- *This article will be retitled as "Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button."*

§ 907. Art. 107. False official statements

- *The offense of "False official statements" will remain in this article.*
- *The offense of "False swearing," under Article 134, paragraph 79, will be incorporated into this article.*
- *This article will be retitled as "False official statements; false swearing."*

Proposed new article to the UCMJ

§ 907a. Art. 107a. Parole violation

- *The offense of "Parole, violation of," under Article 134, paragraph 97a, will be incorporated into this article.*

§ 908. Art. 108. Military property of United States - loss, damage, destruction, or disposition

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

Proposed new article to the UCMJ

§ 908a. Art. 108a. Captured, abandoned property

- *The offense of "Captured or abandoned property" migrated from Article 103.*

§ 909. Art. 109. Property other than military property of United States—Waste, spoilage, or destruction

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

Proposed new article to the UCMJ

§ 909a. Art. 109a. Mail matter: wrongful taking, opening, etc.

- *The offense of "Mail taking, opening, secreting, destroying, or stealing," under Article 134, paragraph 93, will be incorporated into this article.*
- *This article will be retitled "Mail matter: wrongful taking, opening, etc."*

§ 910. Art. 110. Improper hazarding of vessel

- *Amend this article to include "aircraft," so that it will prohibit the improper hazarding of both a vessel and an aircraft.*
- *This article will be retitled "Improper hazarding of vessel or aircraft."*

§ 911. Art. 111. Drunken or reckless operation of vehicle, aircraft, or vessel

- *Retain the text of the article in current form, but lower the blood alcohol content limit for the offense to .08.*
- *Recodify in Article 113.*

Proposed new title and content for UCMJ article

§ 911. Art. 111. Leaving scene of vehicle accident

- *The offense of "Fleeing scene of accident," under Article 134, paragraph 82, will be incorporated into this article.*
- *This article will be retitled "Leaving scene of vehicle accident."*

§ 912. Art. 112. Drunk on duty

- *The offense of "Drunk on duty" will remain in this article.*
- *The offense of "Drunkenness - incapacitating oneself for performance of duties through prior indulgence in intoxicating liquor or drugs," under Article 134, paragraph 76, will be incorporated into this article.*
- *The offense of "Drunk prisoner," under Article 134, paragraph 75, will be incorporated into this article.*
- *The article will be retitled as "Drunkenness and other incapacitation offenses."*

§ 912a. Art. 112a. Wrongful use, possession, etc., of controlled substances

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 913. Art. 113. Misbehavior of sentinel

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 95.*

Proposed new title and content for UCMJ article

§ 913. Art. 113. Drunken or reckless operation of vehicle, aircraft, or vessel

- *The offense of "Drunken or reckless operation of vehicle, aircraft, or vessel" migrated from Article 111.*

§ 914. Art. 114. Dueling

- *The offense of "Dueling" will remain in this article.*
- *The offense of "Reckless endangerment," under Article 134, paragraph 100a, will be incorporated into this article.*
- *The offense of "Firearm, discharging—willfully, under such circumstances as to endanger human life," under Article 134, paragraph 81, will be incorporated into this article.*
- *The offense of "Weapon: concealed, carrying," under Article 134, paragraph 112, will be incorporated into this article.*
- *The article will be retitled as "Endangerment offenses."*

§ 915. Art. 115. Malingering

- *Recodify as Article 83 with technical amendments.*

Proposed new title and content for UCMJ article

§ 915. Art. 115. Communicating threats

- *The offense of "Threat or hoax designed or intended to cause panic or public fear," under Article 134, paragraph 109, will be incorporated into this article.*
- *The offense of "Threat, communicating," under Article 134, paragraph 110, will be incorporated into this article.*
- *The article will be retitled as "Communicating threats."*

§ 916. Art. 116. Riot or breach of peace

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 917. Art. 117. Provoking speeches or gestures

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 918. Art. 118. Murder

- *Retain this article with technical amendments to conform to the proposal to address the crime of forcible sodomy in Article 120.*

§ 919. Art. 119. Manslaughter

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 919a. Art. 119a. Death or injury of an Unborn Child

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

Proposed new article to the UCMJ

§ 919b. Art. 119b. Child endangerment

- *The offense of "Child Endangerment," under Article 134, paragraph 68a, will be incorporated into this article.*

§ 920. Art. 120. Rape and sexual assault generally

- *The definition of "sexual act" in this article will be amended to match the definition used in federal civilian practice in 18 U.S.C. §2246(2)(A)-(D).*

§ 920a. Art. 120a. Stalking

- *Amend this article by revising the statute to include stalking through use of technology, such as electronic communication services, and to include threats to intimate partners.*

- *Recodify in Article 130.*

Proposed new title and content for UCMJ article

§ 920a. Art. 120a. Mails: deposit of obscene matter

- *The offense of "Mails: depositing or causing to be deposited obscene matters in," under Article 134, paragraph 94, will be incorporated into this article.*

§ 920b. Art. 120b. Rape and sexual assault of a child

- *The definition of "sexual act" in this article will be amended to match the definition used in federal civilian practice in 18 U.S.C. §2246(2)(A)-(D).*

§ 920c. Art. 120c. Other sexual misconduct

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 921. Art. 121. Larceny and wrongful appropriation

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

Proposed new article to the UCMJ

§ 921a. Art. 121a. Unauthorized use of credit cards, debit cards, and other access devices

- *New punitive article that would criminalize larcenies involved with unauthorized use of a credit or debit card, or other access device.*

Proposed new article to the UCMJ

§ 921b. Art. 121b. False pretenses to obtain services

- *The offense of "False pretenses, obtain services under," under Article 134, paragraph 78, will be incorporated into this article.*

- *This article will be titled "False pretenses to obtain services."*

§ 922. Art. 122. Robbery

- *Align this article with federal practice under 18 U.S.C. § 2111 by amending the intent requirement for this offense.*

- *The amended article will require proof of a forcible taking of the property by the accused from the victim, in the presence of the victim; the requirement to prove that the accused intend to permanently deprive victim of their property will be deleted.*

Proposed new article to the UCMJ

§ 921c. Art. 122a. Receiving stolen property

- *Article migrated from Article 134, paragraph 106.*
- *This article will be titled "Receiving stolen property."*

§ 923. Art. 123. Forgery

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 105.*

Proposed new article to the UCMJ

§ 923. Art. 123. Offenses concerning Government computers

- *New punitive article that would criminalize willful unauthorized access of a U.S. government computer or system, based on an analogous federal statute at 18 U.S.C. §1030.*

§ 923a. Art. 123a. Making, drawing, or uttering check, draft, or order without sufficient funds

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 924. Art. 124. Maiming

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in new Article 128a.*

Proposed new article to the UCMJ

§ 924. Art. 124. Frauds against the United States

- *The offense of "Frauds against the United States" migrated from Article 132.*

Proposed new article to the UCMJ

§ 924a. Art. 124a. Bribery

- *The offenses of "Bribery," under Article 134, paragraph 66, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 924b. Art. 124b. Graft

- *The offenses of "Graft," under Article 134, paragraph 66, will be incorporated into this article.*

§ 925. Art. 125. Forcible sodomy; bestiality

- *The crime of forcible sodomy will be addressed in revised Article 120.*
- *Part II of the Report will address the crime of bestiality in Article 134.*

Proposed new title and content for UCMJ article

§ 925. Art. 125. Kidnapping

- *The offense of "Kidnapping," under Art. 134, paragraph 92, will be incorporated into this article.*

§ 926. Art. 126 - Arson

- *The offense of "Arson" will remain in this article.*
- *The offense of "Burning with intent to defraud," under Article 134, paragraph 67, will be incorporated into this article.*
- *The article will be retitled as "Arson; burning property with intent to defraud."*

§ 927. Art. 127. Extortion

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 928. Art. 128. Assault

- *The offense of "Assault" will remain in this article; the offense will be aligned to match the federal offense found at 18 U.S.C. § 113 to improve operation of military justice practice in this area.*
- *The offense of "Assault – with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking," under Article 134, paragraph 64, will be incorporated into this article with technical amendments.*

Proposed new article to the UCMJ

§ 928a. Art. 128a. Maiming

- *The offense of "Maiming" migrated from Article 124.*

§ 929. Art. 129. Burglary

- *The offense of "Burglary" will remain in this article with technical amendments.*
- *The offense of "Housebreaking," under Article 130, will be incorporated into this article.*
- *The offense of "Unlawful entry," under Article 134, paragraph 111, will be incorporated into this article.*
- *The article will be retitled as "Burglary; unlawful entry."*

§ 930. Art. 130. Housebreaking

- *Recodify in Article 129.*

Proposed new title and content for UCMJ article

§ 930. Art. 130. Stalking

- *The offense of "Stalking" will be migrated from Article 120a, and amended by revising the statute to include stalking through use of technology, such as electronic communication services, and to include threats to intimate partners.*

§ 931. Art. 131. Perjury

- *The offense of "Perjury" will remain in this article.*

Proposed new article to the UCMJ

§ 931a. Art. 131a. Subordination of perjury

- *The offense of "Perjury, subordination of," under Article 134, paragraph 98, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 931b. Art. 131b. Obstructing justice

- *The offense of "Obstructing justice," under Article 134, paragraph 96, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 931c. Art. 131c. Misprision of serious offense

- *The offense of "Misprision of serious offense," under Article 134, paragraph 95, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 931d. Art. 131d. Wrongful refusal to testify

- *The offense of "Testify: wrongful refusal," under Article 134, paragraph 108, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 931e. Art. 131e. Prevention of authorized seizure of property

- *The offense of "Seizure: destruction, removal, or disposal of property to prevent," under Article 134, paragraph 103, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 931f. Art. 131f. Noncompliance with procedural rules

- *The offense of "Noncompliance with procedural rules" under Article 98, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 931g. Art. 131g. Wrongful interference with adverse administrative proceeding

- *The offense of "Wrongful interference with an adverse administrative proceeding," under Art. 134, paragraph 96a, will be incorporated into this article.*

§ 932. Art. 132. Frauds against the United States

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Art. 124.*

Proposed new title and content for UCMJ article

§ 932. Art. 132. Retaliation

- *Establish a new article that prohibits retaliation against victims and witnesses of crime.*
- *The offense would define retaliation as when a person, with the intent to retaliate against any person for reporting or planning to report an offense, or with the intent to discourage any person from reporting an offense, wrongfully takes or threatens to take an adverse personnel action against the person, or wrongfully withholds or threatens to withhold a favorable personnel action with respect to the person.*

§ 933. Art. 133. Conduct unbecoming an officer and a gentleman

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 934. Art. 134. General article

- *Amend this article to establish extraterritorial jurisdiction for offenses charged under clause 3 - "all federal crimes not capital," to conform with the UCMJ's intended worldwide jurisdiction.*

§ 934. Art. 134, para 61 - Abusing public animal

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 62 - Adultery

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 64 - Assault – with Intent to Commit Murder, Voluntary Manslaughter, Rape, Robbery, Sodomy, Arson, Burglary, or Housebreaking

- *Codify in Art. 128 as part of a broader assault offense.*

§ 934. Art. 134, para 65 - Bigamy

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 66 – Bribery and graft

- *Codify in Articles 124a and 124b.*

§ 934. Art. 134, para 67 - Burning with intent to defraud

- *Codify in Article 126 as part of a broader arson offense.*

§ 934. Art. 134, para 68 - Check, worthless, making and uttering by dishonorably failing to maintain funds

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 68a - Child Endangerment

- *Codify in Art. 119b.*

§ 934. Art. 134, para 68b - Child Pornography

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 69 - Cohabitation, wrongful

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 70 - Correctional custody - offenses against

- *Codify in Article 87b.*

§ 934. Art. 134, para 71 - Debt, dishonorably failing to pay

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 72 - Disloyal statements

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense.*

Accordingly, this Report does not recommend migrating this offense to an enumerated Article.

- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 73 - Disorderly conduct, drunkenness

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 74 - Drinking liquor with prisoner

- *Codify in Article 96.*

§ 934. Art. 134, para 75 - Drunk prisoner

- *Codify in Article 112.*

§ 934. Art. 134, para 76 - Drunkenness - incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drugs

- *Codify in Article 112.*

§ 934. Art. 134, para 77 - False or unauthorized pass offenses

- *Codify in Article 105a.*

§ 934. Art. 134, para 78 - False pretenses, obtaining services under

- *Codify in new Article 121b.*

§ 934. Art. 134, para 79 - False swearing

- *Codify in Article 107.*

§ 934. Art. 134, para 80 - Firearm, discharging—through negligence

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 81 - Firearm, discharging—willfully, under such circumstances as to endanger human life

- *Codify in Article 114.*

§ 934. Art. 134, para 82 - Fleeing scene of accident

- *Codify in Art. 111.*

§ 934. Art. 134, para 83 - Fraternization

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 84 - Gambling with subordinate

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 85 - Homicide, negligent

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 86 – Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official

- *Codify in Article 106.*

§ 934. Art. 134, para 89 - Indecent language

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 91 - Jumping from vessel into the water

- *Codify in Article 87.*

§ 934. Art. 134, para 92 – Kidnapping

- *Codify in Article 125.*

§ 934. Art. 134, para 93 - Mail: taking, opening, secreting, destroying, or stealing

- *Codify in Article 109a.*

§ 934. Art. 134, para 94 - Mails: depositing or causing to be deposited obscene matters in

- *Codify in Article 120a.*

§ 934. Art. 134, para 95 - Misprision of serious offense

- *Codify in Article 131c.*

§ 934. Art. 134, para 96 - Obstructing justice

- *Codify in Article 131b.*

§ 934. Art. 134, para 96a - Wrongful interference with an adverse administrative proceeding

- *Codify in Article 131g.*

§ 934. Art. 134, para 97 - Pandering and prostitution

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 97a - Parole, violation of

- *Codify in Art. 107a.*

§ 934. Art. 134, para 98 - Perjury; subornation of

- *Codify in Article 131a.*

§ 934. Art. 134, para 99 - Public record: altering, concealing, removing, mutilating, obliterating, or destroying

- *Codify in Article 104.*

§ 934. Art. 134, para 100 - Quarantine: medical, breaking

- *Codify in Article 84.*

§ 934. Art. 134, para 100a - Reckless endangerment

- *Codify in Article 114.*

§ 934. Art. 134, para 102 - Restriction, breaking

- *Codify in Article 87b.*

§ 934. Art. 134, para 103 - Seizure: destruction, removal, or disposal of property to prevent

- *Codify in Article 131e.*

§ 934. Art. 134, para 103a - Self- injury without intent to avoid service

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 104 - Sentinel or lookout: offenses against or by

- *Codify in Articles 95 and 95a.*

§ 934. Art. 134, para 105 - Soliciting another to commit an offense

- *Codify in Article 82.*

§ 934. Art. 134, para 106 – Stolen property: knowingly receiving, buying, concealing

- *Codify in Article 122a.*

§ 934. Art. 134, para 107 – Straggling

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 108 - Testify, wrongful refusal

- *Codify in Article 131d.*

§ 934. Art. 134, para 109 - Threat or hoax designed or intended to cause panic or public fear

- *Codify in Article 115.*

§ 934. Art. 134, para 110 - Threat, communicating

- *Codify in Article 115.*

§ 934. Art. 134, para 111 - Unlawful entry

- *Codify in Article 129.*

§ 934. Art. 134, para 112 - Weapon: concealed, carrying

- *Codify in Article 114.*

§ 934. Art. 134, para 113 - Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

- *Codify in Article 106a.*

SUBCHAPTER XI. MISCELLANEOUS PROVISIONS

§ 935. Art. 135. Courts of inquiry

- *Amend the article to expand its scope by including civilian members of the Department of Homeland Security and the U.S. Coast Guard.*

§ 936. Art. 136. Authority to administer oaths and to act as notary

- *Technical amendments to the title of the article striking the words "and to act as a notary."*

§ 937. Art. 137. Articles to be explained

- *Amend this article to include officers in the group of servicemembers who must have the UCMJ "carefully explained" to them upon entry on active duty.*
- *Amend this article to require that all officers with the authority to convene courts-martial, or impose non-judicial punishment, receive periodic training on the purpose and administration of the UCMJ.*
- *Amend this article to require the Secretary of Defense to maintain and update electronic versions of the UCMJ and MCM readily accessible on the Internet by members of the armed forces and the public.*

§ 938. Art. 138. Complaints of wrongs

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 939. Art. 139. Redress of injuries to property

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 940. Art. 140. Delegation by the President

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

Proposed new article to the UCMJ

§ 940a. Art. 140a - Case management; data collection and accessibility

- *Require the Secretary of Defense to establish and maintain uniform standards for the collection of data useful in assessing the efficiency and effectiveness of the military justice system.*
- *Require the Secretary of Defense to establish a uniform case management system to enhance efficiency and oversight, as well as to increase transparency in the system and foster public access to releasable information.*

SUBCHAPTER XII. UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

§ 941. Art. 141. Status

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 942. Art. 142. Judges

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 943. Art. 143. Organization and employees

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 944. Art. 144. Procedure

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 945. Art. 145. Annuities for judges and survivors

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 946. Art. 146. Code committee

- *Amend the article to establish the "Military Justice Review Panel" which will conduct a comprehensive review of the military justice system every eight years.*

Proposed new article to the UCMJ

§ 946a. Art. 146a. Annual Reports

- *Establish an article requiring annual reports regarding the operation of the UCMJ by the U.S. Court of Appeals for the Armed Forces, compiled from information submitted to the court by the Judge Advocates General, and the SJA to the Commandant of the Marine Corps.*
- *Annual reports will be submitted to the Congressional Armed Services Committees, the Secretary of Defense, the Secretary of Homeland Security, and the Secretaries of the Military Departments.*

Punitive Articles After Recodification

SUBPART I. GENERAL PROVISIONS

Art. 77 – Principals

Art. 78 – Accessory after the fact

Art. 79 – Conviction of offense charged, lesser included offenses, and attempts

SUBPART II. INCHOATE OFFENSES

Art. 80 – Attempts

Art. 81 – Conspiracy

Art. 82 – Soliciting commission of offenses

SUBPART III. PLACE OF DUTY OFFENSES

Art. 83 – Malingering

Art. 84 – Breach of medical quarantine

Art. 85 – Desertion

Art. 86 – Absence without leave

Art. 87 – Missing movement; jumping from vessel

Art. 87a – Resistance, flight, breach of arrest, and escape

Art. 87b – Offenses against correctional custody and restriction

SUBPART IV. AUTHORITY OFFENSES

Art. 88 – Contempt toward officials

Art. 89 – Disrespect toward a superior commissioned officer; assault of superior commissioned officer

Art. 90 – Willfully disobeying superior commissioned officer

Art. 91 – Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

Art. 92 – Failure to obey order or regulation

Art. 93 – Cruelty and maltreatment

Art. 93a – Prohibited activities with military recruit or trainee by person in position of special trust

Art. 94 – Mutiny or sedition

SUBPART V. ENEMY/POST OFFENSES

Art. 95 – Offenses by sentinel or lookout

Art. 95a – Disrespect toward sentinel or lookout

Art. 96 – Release of prisoner without authority; drinking with prisoner

Art. 97 – Unlawful detention

Art. 98 – Misconduct as prisoner

Art. 99 – Misbehavior before the enemy

Art. 100 – Subordinate compelling surrender

Art. 101 – Improper use of countersign

Art. 102 – Forcing a safeguard

Art. 103 – Spies

Art. 103a – Espionage

Art. 103b – Aiding the enemy

SUBPART VI. FALSITY OFFENSES

Art. 104 – Public records offenses

Art. 104a – Fraudulent enlistment, appointment, or separation

Art. 104b – Unlawful enlistment, appointment, or separation

Art. 105 – Forgery

Art. 105a – False or unauthorized pass offenses

Art. 106 – Impersonation of officer, noncommissioned or petty officer, or agent or official

Art. 106a – Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

Art. 107 – False official statements; false swearing

Art. 107a – Parole violation

SUBPART VII. DUTY AND PROPERTY OFFENSES

Art. 108 – Military property of United States–Loss, damage, destruction, or wrongful disposition

Art. 108a. – Captured or abandoned property

Art. 109 – Property other than military property of United States - Waste, spoilage, or destruction

Art. 109a – Mail matter: wrongful taking, opening, etc.

Art. 110 – Improper hazarding of vessel or aircraft

Art. 111 – Leaving scene of vehicle accident

SUBPART VIII. DRUG AND ALCOHOL OFFENSES

Art. 112 – Drunkenness and other incapacitation offenses

Art. 112a – Wrongful use, possession, etc., of controlled substances

Art. 113 – Drunken or reckless operation of vehicle, aircraft or vessel

SUBPART IX. BREACH OF PEACE OFFENSES

Art. 114 – Endangerment offenses

Art. 115 – Communicating threats

Art. 116 – Riot or breach of peace

Art. 117 – Provoking speeches or gestures

SUBPART X. OFFENSES AGAINST PERSONS AND PROPERTY

Art. 118 – Murder

Art. 119 – Manslaughter

Art. 119a – Death or injury of an unborn child

Art. 119b – Child endangerment

Art. 120 – Rape and sexual assault generally

Art. 120a – Mails: deposit of obscene matter

Art. 120b – Rape and sexual assault of a child

Art. 120c – Other sexual misconduct

Art. 121 – Larceny and wrongful appropriation

Art. 121a – Fraudulent use of credit cards, debit cards, and other access devices

Art. 121b – False pretenses to obtain services

Art. 122 – Robbery

Art. 122a – Receiving stolen property

Art. 123 – Offenses concerning Government computers

Art. 123a – Making, drawing or uttering check, draft, or order without sufficient funds

Art. 124 – Frauds against the United States

Art. 124a – Bribery

Art. 124b – Graft

Art. 125 – Kidnapping

Art. 126 – Arson; burning property with intent to defraud

Art. 127 – Extortion

Art. 128 – Assault

Art. 128a – Maiming

Art. 129 – Burglary; unlawful entry

Art. 130 – Stalking

SUBPART XI. OBSTRUCTION OFFENSES

Art. 131 – Perjury

Art. 131a – Subordination of perjury

Art. 131b – Obstructing justice

Art. 131c – Misprision of serious offense

Art. 131d – Wrongful refusal to testify

Art. 131e – Prevention of authorized seizure of property

Art. 131f – Noncompliance with procedural rules

Art. 131g – Wrongful interference with an adverse administrative proceeding

Art. 132 – Retaliation

SUBPART XII. OFFENSES OF GENERAL APPLICATION

Art. 133 – Conduct unbecoming an officer and a gentleman

Art. 134 – General article

Subchapter I. General Provisions

Article 1 – Definitions
10 U.S.C. § 801

1. Summary of Proposal

This proposal would amend the current definition of "judge advocate" in Article 1(13)(A) to reflect that a judge advocate in the Air Force is a member of the Air Force Judge Advocate General's Corps. The proposal also would amend the definition of "military judge" in Article 1(10) to reflect proposed changes in Article 30a, allowing limited detailing of military judges outside the context of a referred general or special court-martial case.

2. Summary of the Current Statute

Article 1 provides statutory definitions for certain words and terms used throughout the UCMJ. Currently, the definition of "judge advocate" in Article 1(13) does not reflect the 2003 name change from the "Air Force Judge Advocate General's Department" to the "Air Force Judge Advocate General's Corps." Also, Article 1(10) defines "military judge" to mean "an official of a general or special court-martial detailed in accordance with [Article 26]."

3. Historical Background

Article 1 was designed to define and explain certain words and terms used within the UCMJ. Although the statute has remained relatively unchanged since the UCMJ was enacted in 1950,[1] Congress has periodically amended Article 1 for clarity and to account for changing circumstances.

4. Contemporary Practice

The President has implemented Article 1 through R.C.M. 103. The rule incorporates by reference all Article 1 definitions into the Manual for Courts-Martial, and adds additional definitions applicable throughout the Manual.

5. Relationship to Federal Civilian Practice

The definitions under Article 1, as well as those prescribed by the President under R.C.M. 103, are in many instances similar to the definitions applicable in federal civilian practice, provided under 1 U.S.C. §§ 1-5 and Fed. R. Crim. P. 1.

6. Recommendation and Justification

Recommendation 1.1: Amend Article 1(13)(A) to reflect the change within the Air Force from the "Judge Advocate General's Department" to the "Judge Advocate General's Corps."

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

- Prior to 2003, the Air Force Judge Advocate General's Corps was known as the Judge Advocate General's Department. This amendment would reflect the 2003 change.

Recommendation 1.2: Amend Article 1(10) to conform the definition of "military judge" to the proposed addition of Article 30a, allowing limited detailing of military judges to address matters prior to referral of charges.

- This is a conforming change.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 101. DEFINITIONS.

(a) DEFINITION OF MILITARY JUDGE.—Paragraph (10) of section 801 of title 10, United States Code (article 1 of the Uniform Code of Military Justice), is amended to read as follows:

"(10) The term 'military judge' means a judge advocate designated under section 826(c) of this title (article 26(c)) who is detailed under section 826(a) or section 830a of this title (article 26(a) or 30a)).".

(b) DEFINITION OF JUDGE ADVOCATE.—Paragraph (13) of such section (article) is amended—

(1) in subparagraph (A), by striking "the Army or the Navy" and inserting "the Army, the Navy, or the Air Force"; and

(2) in subparagraph (B), by striking "the Air Force or".

9. Sectional Analysis

Section 101 contains amendments to Article 1 of the UCMJ concerning the definitions of "military judge" and "judge advocate," as follows:

Section 101(a) would amend the definition of "military judge" in Article 1(10) to reflect the changes in Articles 16, 19, 26, and 30a regarding the detailing of military judges. *See* Sections 401, 403, 504, and 602, *infra.*

Section 101(b) would make a technical amendment to Article 1 to reflect the 2003 name change from the "Air Force Judge Advocate General's Department" to the "Air Force Judge Advocate General's Corps."

Article 2 – Persons Subject to this Chapter
10 U.S.C. § 802

1. Summary of Proposal

This proposal would amend Article 2 to clarify personal jurisdiction over reserve component members performing periods of inactive-duty training. This Report does not recommend any other changes to Article 2.

2. Summary of the Current Statute

Article 2 defines which persons are subject to the jurisdiction of courts-martial under the UCMJ. Article 2(a) specifies thirteen categories of persons who, by their membership in a defined category—for example, members of a regular component of the armed forces, cadets and midshipmen, and persons in the custody of the armed forces serving a court-martial sentence, among others—are subject to UCMJ jurisdiction. Of particular relevance to this proposal, Article 2(a)(3) provides jurisdiction over members of a reserve component while on inactive-duty training, including members of the National Guard performing inactive-duty training while in federal service. Article 2(b) specifies that UCMJ jurisdiction for new enlistees commences upon taking the oath of enlistment. Article 2(c) supplements subsection (a), defining additional criteria by which a person serving with an armed force who is not otherwise subject to the Code may "constructively enlist" and thereby be subject to court-martial jurisdiction.[1] Article 2(d) specifies requirements for recalling a servicemember to active duty involuntarily for purposes of military justice proceedings, and Article 2(e) states that jurisdiction under the statute is subject to the mental capacity standards provided in Article 76b.

3. Historical Background

The first American Articles of War, enacted by the Continental Congress in 1775, began with a personal jurisdiction provision that required all officers and soldiers to subscribe to the Articles of War upon their commissioning or enlistment.[2] From that first version of the Articles of War until 1920, similar provisions regarding jurisdiction appeared in either Article 1 or the Articles of War Preamble. In 1920, Congress amended the Articles of War to provide for statutory definitions in Article 1 and, as under the current UCMJ, Congress provided the various categories of persons subject to military law in Article 2.[3] When the

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[1] *See, e.g.*, United States v. Fry, 70 M.J. 465 (C.A.A.F. 2012).

[2] AW 1 of 1775. The statute provided that those already in the Army who chose not to subscribe to the new Articles could be discharged or retained subject to the rules and regulations of which they entered the service.

[3] AW 2 of 1920.

UCMJ was enacted in 1950, Congress borrowed from Article 2 of the Articles of War, Article 5 of the proposed Articles for Government of the Navy, and a variety of existing federal statutes to create the new Article 2, delineating twelve categories of persons subject to UCMJ jurisdiction.[4] Since it was first enacted, Article 2 has been amended several times, and the issue of personal jurisdiction under the UCMJ has been contested regularly in both military and civilian courts.[5]

The definitions of some terms are necessary for understanding the application of personal jurisdiction under the UCMJ. As used throughout the Manual for Courts-Martial, the term "active duty" means full-time duty in the active military service of the United States.[6] The term includes full-time training duty, annual training duty, and attendance at a school designated as a service school by law while in active service.[7] "Active service" means service on active duty.[8] "Inactive-duty training," means duty performed pursuant to service regulations as a member of a reserve component of the armed forces.[9] This duty often takes place on weekends in four-hour increments commonly referred to as "drill" periods.

Historically, the armed services took different approaches to exercising jurisdiction over members of a reserve component on inactive-duty training.[10] Prior to the UCMJ's

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[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see also Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House. Comm. on Armed Services*, 81st Cong. 853-54 (1949) [hereinafter *Hearings on H.R. 2498*].

[5] *See, e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955) (holding that Congress may not subject ex-servicemembers to trial by court-martial; such former members, like other civilians, are entitled to the benefits and safeguards afforded those tried in federal civilian courts); Reid v. Covert, 354 U.S. 1, 5-6 (1957) (holding that the provisions of Article 2(11), extending court-martial jurisdiction to persons accompanying the armed forces outside the continental limits of the United States, could not be constitutionally applied to trial of civilian dependents of members of the armed forces overseas, in times of peace, for capital offenses); O'Callahan v. Parker, 395 U.S. 258, 273 (1969) (prohibiting trial by court-martial where the member's alleged misconduct was not "service-connected"); Solorio v. United States, 483 U.S. 435 (1987) (overruling Parker and holding that court-martial jurisdiction depends solely on the accused's status as member of armed forces); *see also* United States v. Averette, 19 C.M.A. 363 (1970) (interpreting the prior version of Article 2(10) as providing jurisdiction over civilians only in a time of declared war); REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW JURISDICTION OVER CIVILIANS ACCOMPANYING THE ARMED FORCES IN TIME OF ARMED CONFLICT (April 18, 1997); United States v. Ali, 71 M.J. 256, 264-65 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013) (holding foreign national working with the Army as a civilian contractor in Iraq subject to court-martial jurisdiction under Article 2(a)(10) as amended by NDAA FY 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2217 (2006) (authorizing jurisdiction over civilians accompanying the armed forces during a "contingency operation.")). This Report focuses primarily on the application of the UCMJ to active and reserve members of the armed forces. Jurisdiction over civilians has not been invoked frequently in recent decades. In that context, this Report does not provide a recommendation to amend Article 2 beyond the specific recommendations regarding reservists under Article 2(3).

[6] 10 U.S.C. § 101 (d)(1); *see* R.C.M. 103(21) (Discussion).

[7] *Id.*

[8] 10 U.S.C. § 101 (d)(3).

[9] 10 U.S.C. § 101 (d)(7).

[10] *Hearings on H.R. 2498*, supra note 4, at 859.

enactment in 1950, the Navy, the Marine Corps, and the Coast Guard exercised jurisdiction in all situations involving reserve training.[11] The Navy extended jurisdiction broadly, subjecting reservists to court-martial jurisdiction for any duty or instruction period, and any time they wore their uniforms.[12] In contrast, the Army historically exercised court-martial jurisdiction over reservists more narrowly, finding jurisdiction only in situations where the reservist was using expensive or dangerous equipment.[13]

During the drafting of the UCMJ, the proposed provision for court-martial jurisdiction over reservists in an inactive-duty training status specified that "reserve personnel who are voluntarily on inactive-duty training authorized by written orders" would be subject to UCMJ jurisdiction.[14] The "written orders" requirement was added to apply jurisdiction only to certain types of training and to provide notice of UCMJ jurisdiction to the personnel concerned.[15] The legislation was further refined during congressional consideration to read: "(3) Reserve personnel while they are on inactive-duty training authorized by written orders voluntarily accepted by them, which orders specify that they are subject to the code."[16] The legislative history indicates that it was the drafters' intent to extend court-martial jurisdiction principally to reservists over training weekends who use dangerous and expensive equipment such as aircraft and ships, and that it was not intended to cover other incidental circumstances.[17] Article 2(3) was enacted in this revised form as part of the UCMJ. In 1979, the statute was redesignated as Article 2(a)(3) without change.[18]

In 1986, Congress amended Articles 2 and 3 to make three changes in jurisdiction over reservists.[19] First, Article 2(a)(3) was modified to eliminate the requirement that the reservist must voluntarily accept orders to active duty in order for court-martial jurisdiction to attach.[20] Second, Article 2(d) was added to provide for authority, under regulations established by the President, to involuntarily activate reservists not on active

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[11] *Id.*; *see also* United States v. Abernathy, 48 C.M.R. 205, 206 (C.M.A. 1974).

[12] *Id.*

[13] *Id.*

[14] *Uniform Code of Military Justice, Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong. 859 (1949) [hereinafter *Hearings on S. 857 and H.R. 4080*]; *see also* United States v. Caputo, 18 M.J. 259, 269 (C.M.A. 1984) (compiling a narrative of the applicable Senate legislative history as APPENDIX B).

[15] *Hearings on S. 857 and H.R. 4080*, *supra* note 14, at 155.

[16] *Id.*

[17] *Id.* at 154-55.

[18] Act of Nov. 9, 1979, Pub. L. No. 96-107, Title VIII, § 801(a), 93 Stat. 810. (This redesignation was the result of the addition of subsections (b) and (c) to Article 2).

[19] NDAA FY 1987, Pub. L. No. 99–661, tit. VIII, 100 Stat. 3816 (1986); *see* Lawrence v. Maksym, 58 M.J. 808, 812 (N-M. Ct. Crim. App. 2003) (discussing legislative history to the 1986 amendments to Articles 2 and 3).

[20] *Lawrence*, 58 M.J. at 812.

duty for the purposes of nonjudicial punishment or court-martial proceedings. Third, Article 3(d) was added to provide that a reservist would still be subject to court-martial jurisdiction, even after the termination of a period of active duty or inactive duty for training, for offenses committed during a period of active duty or inactive duty for training.[21]

4. Contemporary Practice

Under Article 2(a)(1), persons subject to UCMJ jurisdiction include "[m]embers of a regular component of the armed forces, including . . . other persons lawfully called or ordered into, or duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it." In addition, Article 2(a)(3) specifies that "[m]embers of a reserve component while on inactive-duty training" are subject to the UCMJ. Misconduct by reservists that takes place outside of inactive-duty drill periods, even if committed on base or in government housing, typically falls outside of UCMJ jurisdiction. Military courts have held to a bright-line rule for personal jurisdiction over reservists, finding no jurisdiction over a reservist who commits an offense when not on active duty or inactive-duty training.[22]

Although Article 2(a)(3) provides a basis for personal jurisdiction over reservists performing inactive-duty training (IDT) in certain circumstances, jurisdictional gaps remain: misconduct by a reserve component member carried out while en route from their home to their IDT drill site, or while berthed in military housing or contract commercial berthing, or during periods in between successive IDTs (i.e. meal breaks and Saturday evenings), or while en route from the IDT site to their home typically all fall outside of UCMJ jurisdiction under current law. Misconduct that occurs during the periods described above, which, for example, could include driving under the influence, damage to government quarters, or a crime of violence, has the potential to negatively affect good order and discipline in the armed forces.

5. Relationship to Federal Civilian Practice

Jurisdictional issues based on military status normally do not arise in federal civilian proceedings except in a narrow class of cases arising under the Military Extraterritorial Jurisdiction Act.[23]

In civil litigation, such as cases involving the Federal Tort Claims Act (FTCA), amenability to military discipline is not sufficient by itself to establish federal liability for the acts of reservists committed outside the scope of their duties.[24]

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[21] *Id.* (citing Willenbring v. Neurater, 48 M.J. 152, 168 (C.A.A.F. 1998)).

[22] *See id.* (citing Major Tyler J. Harder, USA, *Moving Towards the Apex: Recent Developments in Military Jurisdiction*, 2003 ARMY LAW. 3, 15 (April/May 2003)).

[23] 18 U.S.C. § 3261.

6. Recommendation and Justification

Recommendation 2: Amend Article 2 to expand the applicability of UCMJ jurisdiction for reserve component members performing inactive-duty training.

- Under the present interpretation of Article 2(a)(3), UCMJ jurisdiction over reserve component members performing inactive-duty training typically applies only during individual four-hour drill periods. A clarification in the law is needed to ensure that UCMJ jurisdiction applies to misconduct committed by an individual ordered to inactive-duty training throughout the drill period, including after working hours.
- The proposed amendments to Article 2 would enhance good order and discipline in the reserve components of the armed forces by giving commanders better disciplinary options to address misconduct that takes place incident to periods of Inactive-Duty Training.

7. Relationship to Objectives and Related Provisions

- This proposal supports MJRG Operational Guidance by addressing an ambiguity in current law with respect to court-martial jurisdiction over reserve personnel.

8. Legislative Proposal

SEC. 102. CLARIFICATION OF PERSONS SUBJECT TO UCMJ WHILE ON INACTIVE-DUTY TRAINING.

Paragraph (3) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended to read as follows:

"(3)(A) While on inactive-duty training and during any of the periods specified in subparagraph (B)—

"(i) members of a reserve component; and

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[24] *See* Hamm v. United States, 483 F.3d 135, 138 (2d Cir. 2007); *see, e.g.*, Hartzell v. United States, 786 F.2d 964, 968 (9th Cir. 1986) ("[A] soldier traveling between duty stations is not acting within the scope of employment notwithstanding the military's general right to control his activities."); Bissell v. McElligott, 369 F.2d 115, 119 (8th Cir. 1966) ("[T]he unique control which the Government maintains over a soldier has little if any bearing upon determining whether his activity is within the scope of his employment.").

"(ii) members of the Army National Guard of the United States or the Air National Guard of the United States, but only when in Federal service.

"(B) The periods referred to in subparagraph (A) are the following:

"(i) Travel to and from the inactive-duty training site of the member, pursuant to orders or regulations.

"(ii) Intervals between consecutive periods of inactive-duty training on the same day, pursuant to orders or regulations.

"(iii) Intervals between inactive-duty training on consecutive days, pursuant to orders or regulations.".

9. Sectional Analysis

Section 102 would amend Article 2(a)(3) of the UCMJ to clarify jurisdiction over reserve component members performing periods of inactive-duty training. The amendment would provide commanders clearer authority to address misconduct that takes place during periods incident to inactive-duty training, and during intervals between inactive-duty training on consecutive days.

Article 3 – Jurisdiction to Try Certain Personnel
10 U.S.C. § 803

1. Summary of Proposal

This Report recommends no change to Article 3. Part II of the Report will consider whether any changes are needed in the rules implementing Article 3.

2. Summary of the Current Statute

Article 3 provides UCMJ jurisdiction over four special classes of persons. Article 3(a) provides that if a person commits an offense while subject to the Code, and there is a subsequent break in that jurisdiction, the person is not relieved from amenability to trial for that offense once UCMJ jurisdiction is re-established. Article 3(b) provides for continuing court-martial jurisdiction over individuals who are alleged to have fraudulently obtained a discharge from the military on the issue of the fraudulent discharge. It further provides that if the servicemember is convicted of fraudulently obtaining a discharge, the member is then subject to trial by court-martial for all offenses committed before the fraudulent discharge. Article 3(c) addresses the narrow situation that could arise if a deserter subsequently enlists in the service (or receives a commission) and is then discharged from that second term of service. It provides that the deserter is still subject to UCMJ jurisdiction despite the later discharge. Article 3(d) provides that reservists are still subject to court-martial jurisdiction, even after the termination of a period of active duty or inactive duty for training, for offenses committed during a period of active duty or inactive duty for training if they still have time remaining on their military obligation.

3. Historical Background

Under the Articles of War, court-martial jurisdiction was lost over military personnel following their separation from service.[1] When the UCMJ was enacted in 1950, Article 3(a) established continuing court-martial jurisdiction over certain discharged members for acts they committed prior to their discharge.[2] The original version of Article 3(a) sought to balance the interest in terminating court-martial jurisdiction over an individual following a valid discharge against the interest in holding accountable individuals who committed crimes in a place where state and federal jurisdiction was lacking, and who had been subsequently discharged from the service.[3] The drafters of the UCMJ included subsection (c) to address a case in which the court held that a discharge from the Navy barred military

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[1] S. REP. NO. 81-486, at 8 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] S. REP. NO. 81-486, at 8 (1949).

prosecution of a person who had deserted from the Marine Corps, subsequently enlisted in the Navy, and thereafter had been validly discharged from Navy.[4]

In 1955, the Supreme Court held that Congress could not, under its constitutional authority to make rules for the government of the armed forces, subject a servicemember who had been validly discharged to trial by court-martial for a violation of military law committed before the discharge.[5] Subsection (d) was added to the statute in 1986, to provide for continuing UCMJ jurisdiction over reservists despite breaks in their periods of service.[6] In 1987, the President promulgated R.C.M. 204 provisions that reflected and implemented the changes to Article 3(d) as well as other changes made to Article 2, the main statute concerning UCMJ jurisdiction. In 1992, Congress adopted the current form of Article 3(a) to align the statute with controlling case law and contemporary practice.[7]

4. Contemporary Practice

The President has implemented Article 3 through R.C.M. 202 and 204. The Discussion to R.C.M. 202(a) addresses the implementation of the provisions of Article 3(a)-(c). R.C.M. 204 addresses jurisdiction over reserve personnel. Current service regulations specifically provide that members whose enlistments have expired but who are still awaiting formal discharge are subject to UCMJ jurisdiction. Under applicable case law, jurisdiction over active duty military personnel normally continues until: (1) the member receives a valid discharge certificate; (2) there is a final accounting of pay; and (3) the member has completed administrative clearance processes required by his or her Service Secretary.[8]

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 3 in federal civilian practice due to aspects of personal jurisdiction unique to the military.

6. Recommendation and Justification

Recommendation 3: No change to Article 3.

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[4] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 880-81 (1949) (statement of Felix Larkin) (discussing United States *ex rel.* Hirshberg v. Cooke, 336 U.S. 210 (1949)).

[5] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 13-14 (1955).

[6] NDAA FY 1987, Pub. L. No. 99-661, § 808, 100 Stat 3816 (1986).

[7] NDAA FY 1993, Pub. L. No. 102-484, § 1063, 106 Stat 2315 (1992). In 2000, Congress enacted the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261, which extends federal criminal jurisdiction to validly discharged military members for felony-level federal offenses committed outside the U.S. while the member was subject to the UCMJ.

[8] United States v. Hart, 66 M.J. 273, 275 (C.A.A.F. 2008).

- In view of the well-developed case law addressing Article 3's provisions, a statutory change is not necessary.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 3.

7. Relationship to Objectives and Related Provisions

- This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.
- Changes to jurisdiction over reserve personnel recommended in Article 2 would provide more clarity as to when a reservist is subject to UCMJ jurisdiction during periods of training and drilling. The proposed amendments to Article 2 are consistent with the current jurisdictional authority found in Article 3.

Article 4 – Dismissed Officer's Right to Trial by Court-Martial
10 U.S.C. § 804

1. Summary of Proposal

This Report recommends no change to Article 4. Part II of the Report will consider whether any changes are needed in the rules implementing Article 4.

2. Summary of the Current Statute

In time of war, the President may order the dismissal of an officer.[1] Article 4 provides that any officer dismissed by order of the President can make a written application alleging wrongful dismissal. Upon the filing of such an application, the officer must be tried by a general court-martial convened by the President as soon as practicable. If the President fails to convene a court-martial within six months, the Secretary of the service concerned must substitute an administrative discharge for the dismissal ordered by the President. If a court-martial is convened but does not adjudge dismissal or death, the Secretary concerned must substitute an administrative discharge for the dismissal. If an administrative discharge is substituted for a Presidential discharge, only the President can reappoint the officer. If an officer is discharged by administrative action, the officer does not have a right to trial by court-martial under Article 4.

3. Historical Background

Article 4 addresses a difference in procedure that existed between the Army and the Navy prior to the enactment of the UCMJ in 1950.[2] Under the Articles of War, Army officers did not have the right to request a court-martial when dismissed by the President.[3] However, Article 37 of the Articles for the Government of the Navy provided naval officers with such a right.[4] Article 4 provided a uniform rule consistent with the Navy's practice.[5] By

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[1] 10 U.S.C. § 1161(a). The phrase "time of war" is not defined in this section or in case law addressing this statute. Article 36 of the earlier Articles for the Government of the Navy provided the President the same authority to dismiss an officer without a court-martial finding. However, instead of providing the authority in "time of war," it withheld the authority "in time of peace." AGN 36 of 1930. Case law interpreting the "in time of peace" provision of Article 36 held that it "contemplated not a mere cessation of the hostilities, but peace in the complete sense, officially proclaimed." *See* Kahn v. Andersen, 255 U.S. 1, 10 (1921).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 888 (1949) [hereinafter *Hearings on H.R. 2498*].

[3] *See, e.g.*, AW 118 of 1920.

[4] AGN 37 of 1930; *see Hearings on H.R. 2498*, *supra* note 2, at 888.

requesting a trial, such officers could 'ameliorate the infamy' of the dismissal by converting it to an administrative discharge, if the result of the trial did not support the dismissal.[6] Article 4 differed from previously existing law in that it provided—depending on the results of the court-martial (or whether the trial was convened in a timely manner)—for the substitution of an administrative discharge rather than completely voiding the dismissal of the President.[7] This change was based on concern that Congress lacked the constitutional authority to provide a means to outright void the decision of the President concerning the dismissal of an officer.[8] The drafters agreed that the President's decision to remove an officer from the service could not be curtailed, but believed the characterization of the officer's service could be changed based on the findings of a subsequent court-martial.[9] Article 4 has remained relatively unchanged since the UCMJ's enactment in 1950.

4. Contemporary Practice

The President has implemented Article 4 through R.C.M. 107. Both the statute and the rule have limited applicability, as the President may only order the dismissal of an officer during time of war and there are other administrative procedures for removing officers from further service.

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 4 in federal civilian practice.

6. Recommendation and Justification

Recommendation 4: No change to Article 4.

- The right of an officer to demand a trial by court-martial after a dismissal by the President during time of war under Article 4 is not contentious and is a stable provision, albeit with limited applicability.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 4.

7. Relationship to Objectives and Related Provisions

- This recommendation supports MJRG Operational Guidance by maintaining a unique feature of military practice.

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[5] *Hearings on H.R. 2498*, *supra* note 2, at 888.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 888-96.

Article 5 – Territorial Applicability of this Chapter
10 U.S.C. § 805

1. Summary of Proposal

This Report recommends no change to Article 5. Part II of the Report will consider whether any changes are needed in the rules implementing Article 5.

2. Summary of the Current Statute

Article 5 provides that the UCMJ is applicable in all places without limitation.

3. Historical Background

Prior to enactment of the UCMJ, Army courts-martial exercised worldwide jurisdiction for most offenses, but Navy courts-martial were conducted under provisions that generated jurisdictional issues.[1] Article 6 of the Articles for the Government of the United States Navy (1930), only allowed military trials for murder when the accused was alleged to have been a person "belonging to any public vessel of the United States," who committed the offense outside the territorial jurisdiction of the United States. Even when this provision was amended in 1945, removing the requirement for the accused to "belong" to a vessel, the geographical limitation on jurisdiction for murder continued to cause confusion and difficulty in cases, leading to calls for its elimination.[2] The UCMJ, as enacted in 1950, adopted the worldwide jurisdictional approach for all offenses[3]. Other than a technical amendment in 1956, there have been no other amendments to this article.

4. Contemporary Practice

The President has implemented Article 5 through Rule for Courts-Martial 201(a)(2).

5. Relationship to Federal Civilian Practice

Article 5 is unique to the military given its worldwide mission and does not have a counterpart in federal civilian law. Geographically, UCMJ jurisdiction reaches every place where servicemembers and other persons subject to the Code are present. Venue in federal civilian practice is governed by the Federal Rules of Criminal Procedure and by statute.[4]

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[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 897 (1949).

[2] *See* Robert S. Pasley and Felix E. Larkin, *Navy Court Martial Proposals for Its Reform*, 33 CORNELL L. REV 199-201 (1947).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] FED. R. CRIM. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.[5] Jurisdiction is provided by statute, such as 18 U.S.C. § 7 (Special Maritime and Territorial Jurisdiction), by some interstate nexus such as a weapon possessed by a felon,[6] or by some other legislative finding. Although federal civilian criminal jurisdiction is generally limited to offenses committed in the special maritime and territorial jurisdiction of the United States, some federal statutes have been given extraterritorial application.[7]

6. Recommendation and Justification

Recommendation 5: No change to Article 5.

- In view of the well-developed case law addressing Article 5's provisions, a statutory change is not necessary. The current statute reflects the expeditionary nature of our armed forces, and is critical to the administration of military justice around the globe. Part II of the Report will consider whether any changes are needed in the rules implementing Article 5.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.
- This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

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with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice."); 18 U.S.C. § 3237.

[5] 18 U.S.C. § 3237(a).

[6] 18 U.S.C. § 922(g)(1).

[7] *See generally* U.S. Congressional Research Service, Extraterritorial Application of American Criminal Law, Feb. 15, 2012, *available at* http://fas.org/sgp/crs/misc/94-166.pdf.

Article 6 – Judge Advocates and Legal Officers
10 U.S.C. § 806

1. Summary of Proposal

This proposal would amend Article 6 by broadening the disqualification provision under Article 6(c) to include appellate judges, and counsel who have participated in the same case—including victims' counsel—in any proceeding before a military judge, preliminary hearing officer, or appellate court. Part II of the Report will consider whether any changes are needed in the rules implementing Article 6.

2. Summary of the Current Statute

Article 6 concerns the assignment for duty of judge advocates and the role of staff judge advocates and legal officers in military justice matters. The article contains four subsections. Article 6(a) provides that the assignment for duty of judge advocates shall be made upon the recommendation of the Judge Advocate General or, in the case of Marine Corps judge advocates, by direction of the Commandant of the Marine Corps; and that the Judge Advocate General or senior members of his staff shall make frequent field inspections in supervision of the administration of military justice. Subsection (b) requires convening authorities to communicate directly with their staff judge advocates or legal officers in all military justice matters, and empowers staff judge advocates and legal officers to communicate directly with other staff judge advocates and legal officers in the chain of command, or directly with the Judge Advocate General. Subsection (c) disqualifies military judges, trial and defense counsel, investigating officers, and panel members from later acting as a staff judge advocate or legal officer to any reviewing authority in a case in which they previously participated. Subsection (d) authorizes judge advocates assigned or detailed to hold or exercise the functions of civil offices within the government to perform such duties, subject to reimbursement by the agency concerned under regulations to be prescribed by the Secretary of Defense and the Secretary of Homeland Security.

3. Historical Background

Article 6 was designed to fulfill four related purposes: (1) to place judge advocates and legal officers under the independent control of the Judge Advocates General; (2) to enhance the effectiveness and independence of staff judge advocates and legal officers by requiring direct communication between them and their commanding officers in all military justice matters, and by providing for independent communication among judge advocates; (3) to help prevent interference with the due administration of military justice by the command; and (4) to ensure review of court-martial cases by independent staff judge advocates.[1]

[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 898 (1949) [hereinafter *Hearings on H.R. 2498*]; H.R. REP. No. 81-491, at 12-13 (1949); *see also* MCM, App. 21 (R.C.M. 105, Analysis).

Subsections (a)-(c) of the statute were derived from Articles 47a and 11 of the Articles of War and have changed little since the UCMJ's enactment in 1950.[2] There were no similar provisions in the Articles for the Government of the Navy.[3] In 1967, Congress amended Article 6(a) to provide the Commandant of the Marine Corps (as opposed to the senior judge advocate) with the responsibility for the duty assignments of Marine Corps judge advocates.[4] This change reflected the unique structure of the Marine Corps and its position as a distinct military service within the Department of the Navy. Subsection (d) of the statute, concerning the assignment of judge advocates to hold and exercise the functions of civil office within the government, was added in 1987.[5]

4. Contemporary Practice

The President has implemented subsections (b) and (c) of Article 6 through R.C.M. 105 and R.C.M. 1106(b), respectively. Both rules essentially repeat the statutory provisions.[6] R.C.M. 503(b)-(c) provide that the Judge Advocates General may permit the detailing of counsel or military judges from one service to serve as counsel or military judge in a different armed force, a combatant command, or a joint command, consistent with their authority under Article 6(a) with respect to assignments for duty of judge advocates.

5. Relationship to Federal Civilian Practice

There is no direct federal civilian analogue for Article 6. However, Article 6's provisions concerning the independence of staff judge advocates and legal officers reflect the quasi-judicial role of these officers within the military command structure, similar to rules and canons concerning "judicial independence" in the civilian sector.[7] In addition, 28 U.S.C. § 530B explicitly obligates attorneys for the Government, including Assistant U.S. Attorneys, to observe applicable state rules of professional responsibility, which preclude attorneys from assuming roles in cases where they were previously involved in a different capacity.

6. Recommendation and Justification

Recommendation 6: Amend Article 6(c) to expand the disqualification provision concerning later involvement in the same case as the staff judge advocate or legal officer to also include appellate judges and counsel who have acted in the same case or in any proceeding before a military judge, preliminary hearing officer, or appellate court.

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[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Hearings on H.R. 2498, supra* note 1, at 898.

[3] *Id.*

[4] Act of Dec. 8, 1967, Pub. L. No. 90-179, 81 Stat. 545.

[5] NDAA FY 1987, Pub. L. No. 99-661, § 807(a), 100 Stat. 3905.

[6] *See also* R.C.M. 406(b)(4) (Discussion) ("Grounds for disqualification . . . in a case include previous action in that case as investigating officer, military judge, trial counsel, defense counsel, or member.").

[7] *See, e.g.*, ABA MODEL CODE OF JUDICIAL CONDUCT (2011).

- This proposed amendment would account for the role of victims' counsel (including Special Victims' Counsel under 10 U.S.C. § 1044e) and appellate judges in military practice, ensuring no conflicts of interest when an individual who has been assigned for duty in one of these positions is subsequently assigned for duty as a staff judge advocate to the reviewing authority with respect to the same case.
- This proposal also would account for pre-referral proceedings, such as Article 32 preliminary hearings, where the counsel assigned to represent the government or the defense may not have been specifically detailed as "trial counsel" or "defense counsel." In these situations, the assigned counsel should be disqualified from later action as the staff judge advocate.
- This proposal also reflects recent changes to Article 32, redesignating the "investigating officer" as a "preliminary hearing officer."

7. Relationship to Objectives and Related Provisions

- This proposed change supports MJRG Operational Guidance by addressing an ambiguity in Article 6(c)'s disqualification provision with respect to victims' counsel (including Special Victims' Counsel under 10 U.S.C. § 1044e), appellate judges, and counsel who participate in proceedings prior to referral of charges and specifications for trial, thereby reducing the risk of unnecessary litigation.
- This proposal accounts for the establishment of military magistrates who, when designated to act on matters as authorized under the proposed amendments to Articles 19 and 30a, would be disqualified from further participation in a case in a different capacity.

8. Legislative Proposal

SEC. 103. STAFF JUDGE ADVOCATE DISQUALIFICATION DUE TO PRIOR INVOLVEMENT IN CASE.

Subsection (c) of section 806 of title 10, United States Code (article 6 of the Uniform Code of Military Justice), is amended to read as follows:

"(c)(1) No person who, with respect to a case, serves in a capacity specified in paragraph (2) may later serve as a staff judge advocate or legal officer to any reviewing or convening authority upon the same case.

"(2) The capacities referred to in paragraph (1) are, with respect to the case involved, any of the following:

"(A) Preliminary hearing officer, court member, military judge, military magistrate, or appellate judge.

"(B) Counsel who have acted in the same case or appeared in any proceeding before a military judge, military magistrate, preliminary hearing officer, or appellate court.".

9. Sectional Analysis

Section 103 would amend Article 6, which concerns the assignment for duty of judge advocates and the role of staff judge advocates and legal officers in military justice matters. Article 6(c) currently disqualifies military judges, trial and defense counsel, investigating officers, and panel members from later acting as a staff judge advocate or legal officer to any reviewing authority in a case in which they previously participated. The proposed amendments would expressly cover military magistrates when presiding over pre-referral proceedings under Article 30a, or when presiding, with the parties' consent, over cases referred to judge-alone special courts-martial, under Article 19. See Sections 403, 602, infra. The amendments also would revise the disqualification provision under Article 6(c) to include appellate judges and counsel (including victims' counsel) who have participated previously in the same case or in any proceeding before a military judge (to include a military magistrate designated under Articles 19 or 30a), preliminary hearing officer, or appellate court in the same case.

Article 6a – Investigation and Disposition of Matters Pertaining to the Fitness of Military Judges

10 U.S.C. § 806a

1. Summary of Proposal

This proposal would align Article 6a with the proposal to allow the detailing of military magistrates to proceedings under Article 30a, adding "military magistrates" to the list of officials whose fitness to perform duties shall be subject to investigation and disposition under regulations prescribed by the President. Part II of the Report will consider whether any changes are needed in the rules implementing Article 6a.

2. Summary of the Current Statute

Article 6a directs the President to prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of military judges and military appellate judges to perform their judicial duties. The statute requires that such procedures shall be uniform for all armed forces to the extent practicable, and it directs the President to transmit a copy of the procedures prescribed to the Committees on Armed Services of the Senate and the House of Representatives.

3. Historical Background

Enacted in 1989, Article 6a was intended by Congress to establish procedures to investigate and dispose of allegations concerning judges in the military consistent with similar procedures found in the civilian sector.[1] Other than minor technical amendments in 1996 and 1999, the statute has remained unchanged since its enactment.

4. Contemporary Practice

The President has implemented Article 6a through R.C.M. 109(c), which was added to the rule in 1993.[2] R.C.M. 109 generally delegates responsibility for professional supervision of military judges, judge advocates, and other counsel to the service Judge Advocates General. The specific procedures prescribed in subsection (c) for investigation and disposition of matters pertaining to the fitness of military judges are modeled after the American Bar Association's Model Standards Relating to Judicial Discipline and Disability Retirement (1978) (ABA Model Standards) and the procedures relating to the investigation of complaints against federal judges established by the Judicial Conduct and Disability Act of

[1] *See* H.R. REP. NO. 101-331, at 656 (1989) (Conf. Rep.). *See generally* MCM, App. 21 (R.C.M. 109(c), Analysis).

[2] MCM, App. 21 (R.C.M. 109(c), Analysis).

1980, 28 U.S.C. § 372(c).[3] R.C.M. 109(c) recognizes the overall responsibility of the Judge Advocates General for the professional supervision and discipline of military trial and appellate judges and provides the Judge Advocates General with final disposition authority with respect to any findings and recommendations made during the initial inquiry into the matters alleged.

5. Relationship to Federal Civilian Practice

The procedures prescribed by the President under Article 6a and R.C.M. 109(c) for investigation and disposition of matters pertaining to the fitness of military judges are based on similar federal civilian standards and procedures recommended in the ABA Model Standards and established by federal law under title 28. Specifically, 28 U.S.C. § 351(d)(1) includes "magistrate judge" within the definition of "judge" with respect to investigations into fitness for duty complaints against federal civilian judges.

6. Recommendation and Justification

Recommendation 6a: Amend Article 6a to add "military magistrate" to the list of officials whose fitness to perform duties shall be subject to investigation and disposition under regulations prescribed by the President.

- This proposal is a conforming amendment to align Article 6a with the proposal to allow the detailing of military magistrates to proceedings under Article 30a. The purpose of this proposal is to enable the Judge Advocates General to appropriately investigate complaints of misconduct or lack of fitness with respect to any official designated to perform official judicial duties under the UCMJ.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 6a, including any updates needed based on the Judicial Improvements Act of 2002, 28 U.S.C. §§ 351-364.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference and MJRG Operational Guidance by employing, insofar as practicable, the standards and procedures of the civilian sector pertaining to the investigation and disposition of matters relating to the fitness of officials authorized to perform judicial duties, including federal magistrate judges.

[3] *Id.* This Act was later replaced by the Judicial Improvements Act of 2002, 28 U.S.C. §§ 351-364. *See generally* ELIZABETH B. BAZAN, JUDICIAL DISCIPLINE PROCESS: AN OVERVIEW (2005), *available at* http://fas.org/sgp/crs/misc/RS22084.pdf.

8. Legislative Proposal

SEC. 104. CONFORMING AMENDMENT RELATING TO MILITARY MAGISTRATES.

The first sentence of section 806a(a) of title 10, United States Code (article 6a(a) of the Uniform Code of Military Justice), is amended by striking "military judge" and all that follows through the end of the sentence and inserting "military appellate judge, military judge, or military magistrate to perform the duties of the position involved.".

9. Sectional Analysis

Section 104 would amend Article 6a of the UCMJ to align the statute with the changes proposed in Article 19 and the proposed new sections, Articles 26a and 30a, concerning military magistrates. *See* Sections 403, 507, and 602, *infra.* Article 6a directs the President to prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of military judges and military appellate judges to perform their judicial duties. The proposed amendment would add "military magistrate" to the list of officials whose fitness to perform duties shall be subject to investigation and disposition under regulations prescribed by the President, consistent with federal law concerning the investigation and disposition of matters relating to the fitness of federal magistrate judges in the performance of their judicial duties.

Article 6b – Rights of the Victim of an Offense Under this Chapter

10 U.S.C. § 806b

1. Summary of Proposal

This proposal would amend Article 6b in order to better align military practice with federal civilian practice under the Crime Victims' Rights Act with respect to the relationship between the rights of victims and the disposition of offenses, as well as the procedures for judicial appointment of individuals to assume the rights of certain victims. The proposed amendments also would move recently enacted provisions concerning defense counsel interviews of victims of sex-related offenses into Article 6b and would extend those provisions to victims of all offenses, consistent with related victims' rights provisions.

Part II of the Report will address a number of different areas in the rules implementing (or implicating) Article 6b, with particular emphasis on structuring the victim's role in the disposition decision-making process and ensuring the victim's right to participate in the court-martial process is fully realized. Part II of the Report will address pretrial, trial, and post-trial procedures in the context of victim's rights. In addition, Part II of the Report will consider and address recent and proposed changes to the Military Rules of Evidence impacting victims during the pretrial and trial stages of the court-martial process.

2. Summary of the Current Statute

Article 6b provides victims of offenses under the UCMJ with the following rights:

- To be reasonably protected from the accused;
- To reasonable, accurate, and timely notice of any public hearing or proceeding concerning the continuation of confinement prior to trial of the accused, a preliminary hearing under Article 32, a court-martial, or clemency and parole board proceeding involving the crime, or any release or escape of the accused;
- To not be excluded from any such public hearing or proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;
- To be reasonably heard at any public proceeding involving pretrial release, sentencing, or any parole proceeding;
- To reasonably confer with the attorney for the government in the case;
- To restitution as provided by law;

- To proceedings free from unreasonable delay; and
- To be treated with fairness and with respect for the victim's dignity and privacy.

The statute defines a "victim" as an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ. Subsection (c) states that the military judge shall designate a representative for the victim in a case where the victim is under 18 years of age, not in the military, incompetent, incapacitated, or deceased. The definition of "victim of an offense" under Article 6b applies only to natural persons. Article 6b(d) provides that nothing in the statute authorizes a cause of action for damages against the United States or any of its officers or employees. The statute states that victims may file petitions for writs of mandamus with the Courts of Criminal Appeals when the victim asserts the trial judge erred in rulings under M.R.E. 412 (Relevance of alleged victim's sexual behavior or sexual predisposition) and M.R.E. 513 (Psychotherapist-patient privilege). These interlocutory appeal provisions serve to highlight a victim's right to seek relief by mandamus on the two matters, but they do not restrict victims' ability to seek extraordinary relief under applicable law for violations of the other rights that are listed in Article 6b.[1]

3. Historical Background

Congress enacted Article 6b in 2013.[2] The statute codifies victims' rights under the UCMJ and incorporates many provisions of the federal Crime Victims' Rights Act.[3] In 2014, Congress amended Article 6b to clarify the definition of victim and the authority to appoint individuals to assume the rights of certain victims.[4] The 2014 legislation also added subsection (e) to the statute regarding petitions for writs of mandamus in connection with rulings under M.R.E. 412 and 513.[5]

4. Contemporary Practice

In recent years, legislative changes to the UCMJ have addressed concerns about the manner in which the military justice system has handled sexual assault allegations and the treatment of victims of sexual assault and other sex-related offenses. These changes have served to enhance victims' rights and victim participation throughout the military justice

[1] *See* LRM v. Kastenberg, 72 M.J. 364, 368-69 (C.A.A.F. 2013) (citing cases involving issues other than the rights under M.R.E. 412 and 513).

[2] NDAA FY 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013).

[3] 18 U.S.C. § 3771.

[4] NDAA FY 2015, Pub. L. No. 113-291, § 531(f), 128 Stat. 3292 (2014).

[5] *Id.* at § 535. Congress further amended subsection (e) in 2015 to expand victims' opportunity to seek extraordinary relief. NDAA FY 2016, Pub. L. No. 114-92, § 531, 129 Stat. 726 (2015).

process. The Department of Defense has addressed these changes primarily through directives and additional guidance.[6]

In 2011, Congress enacted legislation providing victims of sexual assault in the military with legal assistance services, sexual assault response coordinators, and victim advocates.[7] In 2013, Congress required the establishment of additional services to provide support to adult victims of sex-related offenses.[8] On August 14, 2013, the Secretary of Defense directed each of the services to implement special victim's advocacy programs to provide legal advice and representation to victims of sex-related offenses.[9] Congress built upon this directive by enacting legislation requiring the services to establish Special Victims' Counsel programs and make available legal assistance and representation to victims of sex-related offenses.[10]

In the NDAA FY 2014, Congress also required the Secretary of Defense to designate an authority within each service to receive and investigate complaints against Department of Defense civilian employees and military personnel relating to the provision of, or violation of, victims' rights under Article 6b.[11] The Response Systems to Adult Sexual Assault Crimes Panel recommended that the Secretary of Defense assess the effectiveness of the complaint processes to determine whether a more uniform process is needed.[12] On December 14, 2014, the Secretary approved the recommendation and referred it to the Services for implementation.[13]

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[6] *See, e.g.*, Dep't of Defense Inst. (DODI) 6495.02 - Sexual Assault Prevention and Response (SAPR) Propram Procedures (28 March 2013); DODI 5505.19, Establishment of Special Victim Investigation and Prosecution (SUIP) Capability Within the Military Criminal Investigative Organizations (MCIOs) (3 Feb. 2015).

[7] NDAA FY 2012, Pub. L. No. 112-81, § 581, 125 Stat. 1298 (2011).

[8] NDAA FY 2013, Pub. L. No. 112-239, § 573, 126 Stat. 1632 (2013).

[9] Memorandum from Secretary of Defense Chuck Hagel, "Sexual Assault Prevention and Response" (14 August 2013).

[10] NDAA FY 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 966 (2013), adding a Special Victims' Counsel requirement to 10 U.S.C. § 1044e. The Special Victims' Counsel program provides support to victims of sexual assault, enhances the role of victims within the military justice system, and helps to enforce the rights of victims under Article 6b. Pursuant to the program, eligible victims can receive legal advice and representation by a Special Victims' Counsel on a wide array of matters. Special Victims' Counsel assist victims: (1) in understanding the military justice process; (2) by providing legal guidance to victims to allow full participation in applicable programs, services, and the military justice process; and (3) by representing victims in proceedings in connection with the reporting, investigation, and prosecution of sex-related offenses.

[11] *Id.* at § 1701.

[12] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 31 (June 2014) [hereinafter RESPONSE SYSTEMS PANEL REPORT].

[13] Memorandum from Secretary of Defense Chuck Hagel, "Department of Defense Implementation of the Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel" (15 December 2014).

Article 6b became effective immediately upon enactment.[14] A recent executive order contains numerous provisions to implement Article 6b rights throughout the Manual for Courts-Martial.[15] These provisions include the following:

- R.C.M. 305(i) provides crime victims the right to timely notice of the 7-day pretrial confinement review; the right to attend and be heard at a pretrial confinement hearing; and the right to confer with the government counsel.
- R.C.M. 405(i)(2) provides crime victims the right to notice of a preliminary hearing under Article 32, the right to confer with counsel for the government, and the right to be present at a preliminary hearing.
- R.C.M. 801(a)(6) provides procedures to appoint a representative for victims who are minors.
- R.C.M. 806(b)(2) provides crime victims the right to attend a court-martial proceeding and reflects the standard for exclusion from the courtroom articulated in Article 6b(a)(3).
- R.C.M. 906(b)(8) provides crime victims the right to notice of a motion or hearing to release the accused from pretrial confinement, the right to confer with the trial counsel, and the right to be heard on the motion.
- R.C.M. 1001 and R.C.M. 1001A implement the requirements of Article 6b(a)(4)(B) regarding sentencing hearings and further provide crime victims with the right to make an unsworn statement during the sentencing phase in non-capital courts-martial.

5. Relationship to Federal Civilian Practice

Article 6b incorporates into the military justice system many of the rights set forth in the Crime Victims' Rights Act.[16] A recent executive order contains numerous provisions to implement Article 6b rights throughout the Manual for Courts-Martial.[17]

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[14] In its report, the Response Systems Panel provided an extended analysis and recommendations concerning implementation of Article 6b in various Manual for Courts-Martial provisions and service regulations. *See* RESPONSE SYSTEMS PANEL REPORT, *supra* note 12, at 28-31. Part II of this Report will address these recommendations and provide additional analysis and recommendations concerning implementation of Article 6b in the MCM.

[15] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

[16] 18 U.S.C. § 3771.

[17] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

6. Recommendation and Justification

Recommendation 6b.1: Amend Article 6b to conform military law to federal civilian practice by addressing the relationship between victims' rights under Article 6b and the exercise of disposition discretion under Articles 30 and 34.

- The Crime Victims' Rights Act, which affords numerous rights to crime victims, specifically states that those rights do not impair the prosecutorial discretion of the Attorney General or any officer under his direction. Although Article 6b contains a nearly identical "No cause of action" provision, the statute does not contain a similar provision addressing the relationship of the rights afforded to victims under subsection (a) and the exercise of disposition discretion under the UCMJ.
- This proposal would better align military practice with federal civilian practice, expressly addressing and clarifying the relationship between victims' rights under the UCMJ and the exercise of disposition discretion by convening authorities under Articles 30 and 34.
- The proposed amendment would serve as a foundation for further clarification in the Rules for Courts-Martial and other Manual provisions of the role of victims at various stages in the military justice process.

Recommendation 6b.2: Amend Article 6b to conform military law to federal civilian practice by expanding the options available for assumption of a victim's rights by a proper representative when the victim is under 18 years of age, incompetent, incapacitated, or deceased.

- The Crime Victims' Rights Act provides that, "[i]n the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative." This proposal would align military practice with federal civilian practice by mirroring the language currently contained in the CVRA, with minor changes to adapt the language to military use.
- The proposed amendment would promote efficiency by eliminating the need for the military judge to designate a representative when another court of competent jurisdiction has already appointed a legal guardian who can assume the rights of the victim on their behalf.

Recommendation 6b.3: Amend Article 6b by incorporating the provisions concerning defense counsel interviews of victims currently located in Article 46(b), extending those provisions to victims of all offenses.

- This provision would address the procedure for interviewing victims in the context of the rights of all who are designated as victims under Article 6b.

7. Relationship to Objectives and Related Provisions

- These proposals support the GC Terms of Reference by incorporating into military justice practice, to the extent practicable, the principles of law and the rules of procedure used in the trial of criminal cases in the U.S. district courts, specifically in the area of victims' rights.
- Accompanying proposals related to the enhancement of victims' rights are addressed in Article 32 (providing for a victim's input on disposition of offenses), Article 54 (increasing access to records of trial for victims of any offense), and Article 140a (providing improved public access to military justice matters).
- Proposals for additional substantive offenses related to the matters under Article 6b include the proposal for Article 93a (improper sexual activity with recruits and trainees), Article 130 (expand the current prohibition against stalking to include cyberstalking and threats to intimate partners), and Article 132 (retaliation against victims and witnesses of crime).

8. Legislative Proposal

SEC. 105. RIGHTS OF VICTIM.

(a) DESIGNATION OF REPRESENTATIVE.—Subsection (c) of section 806b of title 10, United States Code (article 6b of the Uniform Code of Military Justice), is amended in the first sentence by striking "the military judge" and all that follows through the end of the sentence and inserting the following: "the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section.".

(b) RULE OF CONSTRUCTION.—Subsection (d) of such section (article) is amended—

(1) by striking "or" at the end of paragraph (1);

(2) by striking the period at the end of paragraph (2) and inserting "; or"; and

(3) by adding at the end the following new paragraph:

"(3) to impair the exercise of discretion under sections 830 and 834 of this title (articles 30 and 34).".

(c) INTERVIEW OF VICTIM.—Such section (article) is amended by adding at the end the following new subsection:

"(f) COUNSEL FOR ACCUSED INTERVIEW OF VICTIM OF ALLEGED OFFENSE.—(1) Upon notice by counsel for the Government to counsel for the accused of the name of an alleged victim of an offense under this chapter who counsel for the Government intends to call as a witness at a proceeding under this chapter, counsel for the accused shall make any request to interview the victim through the Special Victim's Counsel or other counsel for the victim, if applicable.

"(2) If requested by an alleged victim who is subject to a request for interview under paragraph (1), any interview of the victim by counsel for the accused shall take place only in the presence of the counsel for the Government, a counsel for the victim, or, if applicable, a victim advocate.".

9. Sectional Analysis

Section 105 contains amendments related to the rights of victims under Article 6b of the UCMJ, as follows:

Section 105(a) would clarify the procedure for appointment of individuals to assume the rights of a victim who is under 18 years of age, incompetent, incapacitated, or deceased,

consistent with the similar provision in the Crime Victims' Rights Act. This change would conform military law to federal civilian law with respect to the procedure for appointment of individuals to assume the rights of certain victims.

Section 105(b) would clarify the relationship between the rights provided to victims under the UCMJ and the exercise of disposition discretion under Articles 30 and 34, consistent with a similar provision in the Crime Victims' Rights Act concerning the exercise of prosecutorial discretion. This change would conform military law to federal civilian law with respect to the relationship between the rights of victims and the duties of government officials to investigate crimes and properly dispose of criminal offenses.

Section 105(c) would move the recently enacted provisions concerning defense counsel interviews of victims of sex-related offenses from Article 46(b) into Article 6b and would extend those provisions to victims of all offenses, consistent with related victims' rights provisions.

Implementing regulations would address a number of matters concerning the rights of victims under Article 6b, to include: the ability of victims to be heard on the plea, confinement, release, and sentencing (including through an unsworn statement); the victim's input on the disposition of offenses to the convening authority; the right to notice of proceedings and the release or escape of the accused; the right not to be excluded from proceedings absent a required showing; and the right to submit post-trial matters to the convening authority.

Subchapter II. Apprehension and Restraint

Article 7 – Apprehension
10 U.S.C. § 807

1. Summary of Proposal

This Report recommends no change to Article 7. Part II of the Report will consider whether any changes are needed in the rules implementing Article 7.

2. Summary of the Current Statute

Article 7 concerns the apprehension of persons subject to the Code for law enforcement purposes. The article contains three subsections. Article 7(a) defines apprehension as the taking of a person into custody (equivalent to a civilian "arrest"). Article 7(b) provides that any person authorized under regulations governing the armed forces to apprehend persons subject to the Code, or otherwise subject to prosecution under the UCMJ, may do so upon reasonable belief that an offense has been committed and the person to be apprehended committed it. This standard is equivalent to probable cause.[1] In addition, Article 7(c) provides specific authority to commissioned officers, warrant officers, petty officers, and noncommissioned officers to apprehend persons in order to "quell quarrels, frays, and disorders" among persons subject to the Code.

3. Historical Background

Article 7 has not been amended since the enactment of the UCMJ in 1950.[2] The drafters of the UCMJ chose the word "apprehension" to eliminate confusion created by "a certain duality of meaning in the words 'arrest,' 'restraint,' 'confinement,' and words of that character" as those terms were used in the Articles of War and the Articles for the Government of the Navy.[3] Under the Code, "apprehension" refers to the initial taking or seizing of a person into custody. "Arrest" and "confinement" under Article 9, by contrast, refer to subsequent formal actions that may be taken by the accused's commanding officer and that terminate the initial period of custody. The drafters also adopted a standard that embodies the concept of probable cause, while rejecting any requirement for the issuance of a warrant prior to apprehension on the grounds that such a requirement would be inconsistent with the military environment.[4]

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[1] *See* R.C.M. 302(c); *see also* Article 9(d).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 902 (1949) [hereinafter *Hearings on H.R. 2498*]. *See generally* LT Walter E. Hiner, *Apprehension, Arrest, and Confinement*, 1952 JAG JOURNAL 14 (1952).

[4] *See Hearings on H.R. 2498*, supra note 3, at 902.

4. Contemporary Practice

The President has implemented Article 7 through R.C.M. 302. The rule provides that apprehensions under Article 7 may be conducted by military law enforcement officials; commissioned, warrant, petty, and noncommissioned officers; and civilians authorized to apprehend deserters under Article 8. The remainder of the rule provides the standard for apprehension (probable cause) and the procedures applicable to apprehensions.

5. Relationship to Federal Civilian Practice

Federal civilian practice and military practice with respect to apprehensions differ slightly in terminology ("arrest" versus "apprehension") and in the procedures required for a lawful apprehension. In the federal civilian system, arrests are generally made upon warrants issued by the court or a magistrate judge under Fed. R. Crim. P. 4 and 9. In military practice, apprehensions may be made by military law enforcement personnel upon probable cause without a warrant.

6. Recommendation and Justification

Recommendation 7: No change to Article 7.

- Part II of the Report will consider whether any changes are needed in the rules implementing Article 7.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline assessment. Based on the stability in the case law dealing with Article 7's substantive provisions, no change is warranted.

Article 8 – Apprehension of Deserters
10 U.S.C. § 808

1. Summary of Proposal

This Report recommends no change to Article 8. Part II of the Report will consider whether any changes are needed in the rules implementing Article 8.

2. Summary of the Current Statute

Article 8 provides that any civilian law enforcement officer authorized to arrest offenders under federal or state laws may summarily apprehend a deserter from the armed forces and deliver the person into military custody.

3. Historical Background

In 1885, the Supreme Court held that a civilian law enforcement officer did not have the authority to arrest a military deserter unless the authority to do so could be "derived from some rule of the law of England which has become a part of our law, or from the legislation of Congress."[1] The Court concluded that English law had never authorized such arrests and that existing U.S. law failed to establish the authority to do so.[2] In 1920, Congress amended the Articles of War to provide civilian law enforcement officers with statutory authority to arrest deserters.[3] Article 8 was based on that original statutory provision and remains virtually unchanged from its original form.[4]

4. Contemporary Practice

The President has implemented Article 8 through R.C.M. 302(b)(3), which restates the statutory provision. The Discussion to R.C.M. 302(b)(3) clarifies that civilian law enforcement officers do not have the authority to apprehend military members for other violations of the UCMJ.

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 8 in federal civilian practice.

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[1] Kurtz vs. Moffitt, 115 U. S. 487, 498 (1885).

[2] *Id.*

[3] AW 106 of 1920; *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 39 (1951).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

6. Recommendation and Justification

Recommendation 8: No change to Article 8.

- Article 8 remains an important statutory authority in military justice practice and is the basis for cooperation between military and civilian law enforcement personnel in desertion cases.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 8.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique feature of military law that is essential to the law enforcement function in desertion cases.

Article 9 – Imposition of Restraint
10 U.S.C. § 809

1. Summary of Proposal

This Report recommends no change to Article 9. Part II of the Report will consider whether any changes are needed in the rules implementing Article 9.

2. Summary of the Current Statute

Article 9 concerns the imposition of restraint, including arrests and confinement, upon persons subject to the Code before and during disposition of offenses. Generally, such forms of restraint are imposed by the order of an accused's commanding officer and act to terminate an initial period of custody following an apprehension under Article 7; however, apprehension is not a prerequisite for the imposition of restraint.[1] Article 9 is divided into five subsections. Subsection (a) defines "arrest" as the restraint of a person by an order, not imposed as a punishment for an offense, directing the person to remain within certain specified limits. "[C]onfinement" is defined as the physical restraint of a person. Subsection (b) provides that an enlisted member may be ordered into arrest or confinement by any commissioned officer or, if authorized by the member's commanding officer, by a warrant, petty, or noncommissioned officer. Subsection (c) provides that commissioned officers, warrant officers, and civilians subject to the Code may be ordered into arrest or confinement only by their commanding officer. Subsection (d) provides that no person may be ordered into arrest or confinement except for probable cause. Finally, subsection (e) clarifies that Article 9's provisions do not limit the authority of persons authorized to make apprehensions under Article 7, such as military law enforcement personnel.

3. Historical Background

Under the Articles of War, the Army used the term "arrest" to refer both to apprehension and the imposition of restraint.[2] The Navy employed the term "close arrest" to describe a practice that was essentially confinement.[3] The drafters of the UCMJ sought to eliminate the confusion created by the use of the term "arrest" to refer both to law-enforcement type apprehensions (Article 7) and command-directed restraint or confinement pending disposition of charges, so they placed these authorities in different articles.[4] Subsections

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[1] *See generally* LT Walter E. Hiner, *Apprehension, Arrest, and Confinement*, 1952 JAG JOURNAL 14 (1952).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 903-4 (1949).

[3] *Id.*

[4] *Id.* at 901-3; *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 35 (1951).

(b)-(d) of Article 9 reflect the practices in place in the Army and the Navy at the time of the article's enactment.[5] Article 9 has not been amended since the UCMJ's enactment in 1950.[6]

In 1993, in *United States v. Rexroat*, the Court of Military Appeals clarified that Supreme Court case law requiring a review of the probable cause basis for pretrial confinement within 48 hours by a "neutral and detached magistrate" applies to military confinement orders under Article 9.[7] However, the court declined to hold that the 48-hour probable cause review must be conducted by a military magistrate. Citing the authority given to all commissioned officers under Article 9(b) to order enlisted members into arrest or confinement, the court held that the 48-hour review could be conducted by a non-magistrate commissioned officer, so long as the officer is "neutral and detached" and not involved in the command's law enforcement function.[8]

4. Contemporary Practice

The President has implemented Article 9 through R.C.M. 304 and 305, which govern pretrial restraint and pretrial confinement, respectively. R.C.M. 304 defines pretrial restraint as "moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses." The rule then defines the different levels of military restraint —conditions on liberty, restriction in lieu of arrest, arrest, and confinement—and the procedures for ordering restraint of persons subject to the Code. R.C.M. 305 provides the rules and procedures applicable to pretrial confinement pending disposition of charges, including review of the confinement decision by commanding officers and neutral and detached pretrial confinement review officers.[9] These rules and procedures are discussed in greater detail in the section of this Report addressing Article 10 (Restraint of persons charged with offenses).

5. Relationship to Federal Civilian Practice

The authority to impose restraint under Article 9 is somewhat analogous to a U.S. district court's authority to issue arrest warrants under Fed. R. Crim. P. 4. Furthermore, the review function of the "neutral and detached officer" under R.C.M. 305(i)(1) (48-hour review) is similar to the function of the magistrate judge at the initial appearance under Fed. R. Crim. P. 5 and applicable Supreme Court case law concerning the 48-hour review requirement.[10]

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[5] *Id.*

[6] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[7] United States v. Rexroat, 38 M.J. 292, 295-96 (C.M.A. 1993) (discussing Gerstein v. Pugh, 420 U.S. 103 (1975) and County of Riverside v. McLaughlin, 500 U.S. 44 (1991)); *see also* Courtney v. Williams, 1 M.J. 267, 271 (C.M.A. 1976) ("those procedures required by the Fourth Amendment in the civilian community must also be required in the military community" unless military necessity requires a different rule).

[8] *Rexroat*, 38 M.J. at 298-99.

[9] *See* R.C.M. 305(i)(1).

[10] *See* Gerstein v. Pugh, 420 U.S. 103 (1975); County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

The notification aspects of the initial appearance under the federal rule are also similar to the charge notification requirement under Article 30(b) and R.C.M. 305(e); however, whereas the magistrate judge provides notice to the defendant of the charges in federal civilian practice, in military practice this is a command function.

6. Recommendation and Justification

Recommendation 9: No change to Article 9.

- Part II of the Report will consider whether any changes are needed in the rules implementing Article 9.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline assessment. Based on the stability in the case law dealing with Article 9's substantive provisions, no change is warranted.
- This recommendation is related to this Report's proposal in Article 30a to authorize military magistrates and military judges to conduct specific judicial functions prior to referral of charges and specifications for trial, including the review of pretrial confinement decisions.

Article 10 – Restraint of Persons Charged with Offenses

10 U.S.C. § 810

1. Summary of Proposal

This proposal would amend Article 10 to conform the language of the statute to current practice and related statutory provisions. Additionally, it would place into Article 10 the requirement for forwarding of charges and, when applicable, the preliminary hearing report, when an accused is in confinement (currently in Article 33 in the form of an eight-day forwarding requirement whenever a person is being "held for trial by general court-martial"). Part II of the Report will consider whether any changes are needed in the rules implementing Article 10.

2. Summary of the Current Statute

Article 10 concerns restraint of persons charged with offenses and, in conjunction with Article 33, the actions that must be taken by military commanders and convening authorities when persons are held for trial by court-martial. The statute provides that any person subject to the Code who is charged with an offense shall, as the circumstances may require, be ordered into arrest or confinement; but that any person charged only with an offense normally tried by a summary court-martial shall not ordinarily be placed in confinement. The statutory authority for commanding officers and other officials to order persons subject to the Code into arrest or confinement is provided separately in Article 9. Article 10 also provides that, when a person is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform the person of the accusation and to either proceed to trial or dismiss the charges and release the person.

3. Historical Background

Article 10 was derived from Articles 69 and 70 of the Articles of War and was generally consistent with the practice in the Navy at the time of the UCMJ's enactment in 1950.[1] However, the provision requiring notice to the confined person did not exist in prior laws or practice.[2] The statute has not been amended since it was enacted. The requirement in the statute that proper authority take "immediate steps" toward trial when an accused has been ordered into arrest or confinement has been interpreted as creating a speedy trial

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 905 (1949) [hereinafter *Hearings on H.R. 2498*].

[2] S. REP. NO. 81-486, at 10 (1949); *see, e.g.*, AW 70 of 1920 ("When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him.").

right, beyond that provided for in R.C.M. 707 and the Sixth Amendment, for an accused in pretrial confinement.[3]

4. Contemporary Practice

The President has implemented Article 10 through R.C.M. 304 (Pretrial restraint), R.C.M. 305 (Pretrial confinement), and R.C.M. 707 (Speedy trial).

R.C.M. 304(c) and 305(d) address when a person may be ordered into arrest or confinement. R.C.M. 304(e) and 305(e) implement Article 10's notice requirement, and R.C.M. 305(e) provides that an accused who is ordered into confinement must also be promptly informed of his right to remain silent and his right to counsel. R.C.M. 304(c) and R.C.M. 305(d), which address when a person may be ordered into arrest or confinement, combine the probable cause requirement for restraint articulated in Article 9(d) with the "as circumstances may require" standard in Article 10 for continued restraint. With respect to review of pretrial confinement orders, R.C.M. 305 provides for a 48-hour probable cause review by a "neutral and detached officer"; a 72-hour written memorandum by the accused's commander, addressing both probable cause and whether continued confinement is required by the circumstances; and a 7-day review by a "neutral and detached officer"—commonly referred to as the "pretrial confinement hearing officer"—who reviews submissions by the government and the accused and determines whether the accused should remain in confinement or be released.[4] Under current Army practice, a judge advocate specially trained and designated as a military magistrate acts as a pretrial confinement hearing officer in most cases. In the other services, this role is typically performed by line officers.

Under R.C.M. 305(j)-(k), a person ordered into confinement is unable to challenge the appropriateness of the pretrial confinement decision before a military judge with the power to make findings of fact and conclusions of law until the case is referred to a court-martial for trial by a convening authority, which can be several months after the imposition of confinement in many cases.[5] After referral of charges, issues regarding the legality of pretrial confinement may be reviewed by the military judge who has the authority under R.C.M. 305(k) to provide a remedy in the form of day-for-day credit for illegal pretrial confinement.[6]

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[3] *See Hearings on H.R. 2498*, *supra* note 1, at 906-12; United States v. Kossman, 38 M.J. 258, 262 (C.M.A. 1993) (abrogating the presumption of speedy trial violation when pretrial confinement exceeds 90 days, as previously held under United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971), but requiring the government to exercise "reasonable diligence."); *id.* ("Article 10 does not require instantaneous trials, but the mandate that the Government take immediate steps to try arrested or confined accused must ever be borne in mind.").

[4] R.C.M. 305(h)(2)(C), (i)(1)-(2).

[5] R.C.M. 305(j). Under current law, prior to referral and failing a motion for reconsideration with the pretrial confinement review officer, the only possible route for a challenge to the pretrial confinement decision within the military justice system is the unwieldy and narrowly limited opportunity to file an extraordinary writ with a military Court of Criminal Appeals. *See, e.g.*, United States v. Palmiter, 20 M.J. 90, 97 (C.M.A. 1985).

[6] *See* United States v. Adcock, 65 M.J. 18, 23-24 (C.A.A.F. 2007).

R.C.M. 707 assists in enforcement of the requirement under Article 10 for prompt disposition of offenses when the accused is in arrest or confinement, by requiring the government to bring such an accused to trial within 120 days of the imposition of restraint.[7] Under the rule, the remedy for failure to comply with the 120-day requirement is dismissal of the affected charges, possibly with prejudice.[8]

5. Relationship to Federal Civilian Practice

There are some basic similarities between military practice and federal civilian practice in the areas of pretrial confinement review and speedy trial. In both systems, an initial review of the probable cause basis for confinement by a "neutral and detached" official is required within forty-eight hours of the imposition of confinement. And in both systems, speedy trial requirements are amplified when the accused is placed in pretrial confinement. Beyond these basic similarities, however, the systems differ in many ways.

One main difference between military practice and federal civilian practice in the area of pretrial confinement concerns the right to bail, which does not exist in the military.[9] The Bail Reform Act of 1984 prescribes the rules and procedures for pretrial detention of criminal defendants in the federal civilian system, including the rules concerning release of defendants from detention pending trial.[10] Under the law, defendants can be detained even if the charged conduct does not give rise to a rebuttable presumption of detention, and the Government may proceed by proffer at detention hearings.[11] In the military, subject to the confinement review procedures under R.C.M. 305, discretion to impose pretrial confinement on accused military members rests primarily with military commanders.[12] In the federal civilian system, this function is performed by judicial officers, primarily magistrate judges, under 18 U.S.C. § 3142 and Fed. R. Crim. P. 5(d)(3).

A second area of difference between the two systems concerns statutory and regulatory speedy trial provisions. In the federal civilian system, individuals who are arrested are required to be presented to a magistrate judge without unnecessary delay.[13] The Speedy

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[7] R.C.M. 707(a)(2).

[8] R.C.M. 707(d).

[9] *See* Levy v. Resor, 37 C.M.R. 399, 402-03 (C.M.A. 1967) (the right to bail pending trial is not constitutional but statutory only and in the military there is no statutory provision for such bail) (citing United States v. Hangsleben, 24 C.M.R. 130, 133 (C.M.A. 1957) ("[I]n the military bail is not available.")).

[10] 18 U.S.C. § 3141 *et seq.*; *see* United States v. Salerno, 481 U.S. 739, 748 (1987) ("We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.").

[11] United States v. Stone, 608 F.3d 939, 948–49 (6th Cir. 2010).

[12] *See Levy*, 37 C.M.R. at 404.

[13] FED. R. CRIM. P. 5(a)(1)(A). *But see* United States v. Encarnacion, 239 F.3d 395, 400 n.5 (1st Cir. 2001) (where unnecessary delay before the probable cause hearing is not used to subject defendant to unwarranted interrogation, Rule 5(a) does not provide a basis for dismissal of the indictment because defendant cannot be said to have been prejudiced by the delay).

Trial Act provides that such individuals who are charged with crimes must proceed to trial no sooner than thirty days, and no later than seventy days, after their arraignment.[14] Individuals charged by complaint must, as a general rule, be indicted within 30 days of their arrest.[15] The statute also governs the computation of time within which a trial must commence, providing exclusions of time on various grounds, and provides for dismissal of indictments or informations for a failure to commence trial within the statutory time limits.[16] Under the law, individuals subject to pretrial detention are required to be brought to trial within ninety days of their detention.[17] However, due to the law's various exclusion of time provisions, it is not unusual for individuals to be detained for many months, and even years, before their trials begin. For purposes of the Speedy Trial Act, a trial commences at the beginning of *voir dire*.[18] The factors used to determine whether violations of the speedy trial rules should result in dismissal of charges with or without prejudice include the seriousness of the offense, the facts and circumstances of the case which lead to the dismissal, and the impact of re-prosecution on the administration of the Speedy Trial Act and on the administration of justice.[19]

A final area of difference between the two systems concerns review of the pretrial confinement determination. Under R.C.M. 305, judicial review of pretrial confinement decisions currently cannot take place until after charges have been referred for trial. In the federal civilian system, when individuals are arrested for a "probable cause" arrest (in other words, an arrest made before a criminal complaint is filed), the Supreme Court has required that a judicial officer make a probable cause determination regarding that arrest within forty-eight hours.[20] When probable cause arrests occur over the weekend or holidays this can be accomplished by presenting the facts to a judicial officer who then makes a probable cause determination rather than by a formal 'in-person' presentation of the defendant for an initial appearance under Fed. R. Crim. P. 5.[21] If probable cause has already been established as a matter of law, such as with an indictment, then no additional

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[14] 18 U.S.C. § 3161(b).

[15] *Id.*

[16] 18 U.S.C. §§ 3161(h)-3162.

[17] 18 U.S.C. § 3164(b).

[18] United States v. Gonzalez, 671 F.2d 441 (11th Cir. 1982), cert. denied, 456 U.S. 994 (1982); *see also* United States v. Crane, 776 F.2d 600, 603 (6th Cir. 1985) (a trial court may not evade the Act by beginning *voir dire* within the 70-day limit and then entering a long recess before the jury is sworn in and the rest of the trial goes forward).

[19] 18 U.S.C. § 3162(a)(1).

[20] County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

[21] FED. R. CRIM. P. 4.1; *see* United States v. Bueno-Vargas, 383 F.3d 1104 (9th Cir. 2004) (Customs agent's statement of probable cause to detain arrested person pending further proceedings, made under penalty of perjury and sent to a magistrate judge by facsimile, satisfied Fourth Amendment's requirement of an oath or affirmation).

probable cause determination prior to the initial appearance is required.[22] When individuals are arrested upon a criminal complaint, they have a right to a preliminary hearing to determine probable cause within fourteen days of their initial appearance if they remain in custody, or within twenty-one days if they have been released.[23] If an indictment is returned before the preliminary hearing then probable cause has been established and the hearing is automatically waived.[24] At the preliminary hearing, defendants have the right to present evidence and to cross-examine witnesses, but they may not seek to suppress evidence.[25] If the magistrate judge finds that probable cause is lacking, he is required to dismiss the complaint (without prejudice) and discharge the defendant.[26]

6. Recommendation and Justification

Recommendation 10: Amend Article 10 to conform the language of the statute to current practice and related statutory provisions, and to incorporate the forwarding requirement under Article 33. Specifically, divide the article into two subsections. Subsection (a) would provide that any person charged with an offense under the UCMJ "may be ordered into arrest or confinement as the circumstances require," except when they are charged with an offense that is normally tried by summary court-martial. Subsection (b) would require that, when a person is ordered into arrest or confinement before trial, immediate steps shall be taken to inform the person of the specific offense of which the person is accused and to try the person or dismiss the charges and release the person, and would incorporate Article 33's requirement to forward the charges and specifications and, when applicable, the Article 32 preliminary hearing report.

- This proposal would conform Article 10 to current practice, in which persons charged with offenses are ordered into confinement only as the circumstances require.
- The proposed amendments also would align the language of Article 10 more closely with related statutory provisions and other changes proposed in this Report.
- By moving the provision concerning forwarding of charges from Article 33 to Article 10, the proposed changes would facilitate expeditious processing of all cases involving pretrial confinement rather than just those expected to be referred to a general court-martial. This change also would replace the eight-day forwarding requirement under Article 33 with time frames established in the Manual for Courts-Martial that would reflect contemporary considerations regarding current

[22] *See* Kalina v. Fletcher, 522 U.S. 118, 129 (1997) (the Fourth Amendment's probable cause requirement is satisfied by an indictment returned by a grand jury).

[23] FED. R. CRIM. P. 5.1(a)-(c).

[24] FED. R. CRIM. P. 5.1(a)(2).

[25] FED. R. CRIM. P. 5.1(e).

[26] FED. R. CRIM. P. 5.1(f).

processing times in courts-martial cases while preserving the requirement to promptly forward the charges and the preliminary hearing report.

- Part II of the Report will consider whether any changes are needed in the rules implementing Article 10, with particular emphasis on judicial review of pretrial confinement decisions under R.C.M. 305 and the requirements for prompt disposition of offenses under R.C.M. 707 (Speedy trial).

7. Relationship to Objectives and Related Provisions

- This proposal would support the GC Terms of Reference by incorporating, insofar as practicable, practices and procedures used in U.S. district court into military justice practice in the area of pretrial confinement review.
- This proposal is related to this Report's proposal to empower military judges and military magistrates to exercise judicial review functions before referral of charges to courts-martial, including with respect to pretrial confinement decisions.

8. Legislative Proposal

SEC. 201. RESTRAINT OF PERSONS CHARGED.

Section 810 of title 10, United States Code (article 10 of the Uniform Code of Military Justice), is amended to read as follows:

"§810. Art. 10. Restraint of persons charged

"(a) IN GENERAL.—(1) Subject to paragraph (2), any person subject to this chapter who is charged with an offense under this chapter may be ordered into arrest or confinement as the circumstances require.

"(2) When a person subject to this chapter is charged only with an offense that is normally tried by summary court-martial, the person ordinarily shall not be ordered into confinement.

"(b) NOTIFICATION TO ACCUSED AND RELATED PROCEDURES.—(1) When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken—

"(A) to inform the person of the specific offense of which the person is accused; and

"(B) to try the person or to dismiss the charges and release the person.

"(2) To facilitate compliance with paragraph (1), the President shall prescribe regulations setting forth procedures relating to referral for trial, including procedures for prompt forwarding of the charges and specifications and, if applicable, the preliminary hearing report submitted under section 832 of this title (article 32).".

9. Sectional Analysis

Section 201 would amend Article 10 to conform the language of the statute to current practice and related statutory provisions concerning restraint of persons charged with offenses and the actions that must be taken by military commanders and convening authorities when persons subject to the Code are held for trial by court-martial. The amendments would clarify the general provisions concerning restraint under Article 10, and would incorporate into Article 10 the requirement under Article 33 for prompt forwarding of charges in cases involving pretrial confinement. The amendments would expand the requirement for prompt forwarding to cover special courts-martial as well as general courts-martial, and would require the establishment of prompt processing timeframes in the Manual for Courts-Martial. Implementing rules would address pre-referral review of confinement orders by military magistrates and military judges under the proposed Article 30a, as well as the requirements for prompt disposition of offenses by military commanders and convening authorities.

Article 11 – Reports and Receiving of Prisoners
10 U.S.C. § 811

1. Summary of Proposal

This Report recommends no change to Article 11. Part II of the Report will consider whether any changes are needed in the rules implementing Article 11.

2. Summary of the Current Statute

Article 11 provides that a confinement officer may not refuse to accept or keep a prisoner when provided with a signed statement by a commissioned officer detailing the offense alleged against the prisoner. Article 11 further requires that the confinement officer report within twenty-four hours to the prisoner's commanding officer the name of the prisoner, the offense alleged against him, and the name of the person who ordered the confinement.

3. Historical Background

Article 11 was based on a consolidation of two offenses within the Articles of War: Article 71 (Refusal to Receive and Keep Prisoners); and Article 72 (Report of Prisoners Received).[1] Article 11 was designed to be a reiteration of the law in force at the time, and to supplement punitive articles 95, 96, and 97, which address unlawful incarceration and unlawful release of prisoners under the UCMJ.[2] The drafters considered addressing the subject matter covered by Article 11 in regulations only, but ultimately opted to enact Article 11 to avoid the perception that "it [was] dropped [because] it was no longer necessary."[3] Article 11 has not been amended since the UCMJ's enactment in 1950.[4]

Few reported appellate cases have addressed Article 11 since its enactment. The most direct analysis was provided in *United States v. Espinosa*, where the Navy Court of Military Review found that Article 11's requirement of a report within twenty-four hours to the prisoner's commanding officer was consistent with the due process requirements articulated by the Supreme Court in *Gerstein v. Pugh*.[5] The court noted that the chief intent of Article 11's precursors in the Articles of War was evidently "to preclude the unreasonable detention without trial of the prisoners committed daily to the guard-house

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 912-913 (1949).

[2] *Id.* at 913.

[3] *Id.*

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] United States v. Espinosa, 2 M.J. 1198, 1200-01 (N.C.M.R. 1976) (citing Gerstein v. Pugh, 420 U.S. 103 (1975)).

at post, etc., and to secure them a prompt trial by bringing the cases, every twenty-four hours, (or at other brief regular periods,) to the attention of the commanding officer, who, upon examination of the facts reported, may determine then and there, so far as in his power, whether the parties shall be tried or released."[6]

4. Contemporary Practice

The President has implemented Article 11(b) through R.C.M. 305(h)(1). The rule closely follows Article 11(b), except that terms used in Article 11 such as "provost marshal" and "master at arms" are replaced with the more general term "commissioned, warrant, noncommissioned, or petty officer into whose charge the prisoner was committed."

5. Relationship to Federal Civilian Practice

The closest federal civilian corollary to Article 11 is Fed. R. Crim. P. 5(a)(1), which requires that an arresting officer bring the arrestee before a state or federal judicial officer for an initial appearance "without unnecessary delay" (unless a statute provides otherwise).[7]

6. Recommendation and Justification

Recommendation 11: No change to Article 11.

- The language in R.C.M. 305(h)(1) has been updated to accurately reflect terminology used to describe current practice in confinement facilities. Although the language of the statute has not been updated, the current statutory provision fully addresses its intended purpose.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline assessment. Based on the stability in the case law dealing with Article 11's substantive provisions, no change is warranted.

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[6] *Espinosa*, 2 M.J. at 1200 (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 128 (1920 reprint) (2d ed. 1896)).

[7] Federal civilian courts address violations of "unnecessary delay" by applying an exclusionary rule to statements obtained from an accused whose initial appearance before a magistrate judge under FED. R. CRIM. P. 5(a)(1) is "unreasonably delayed." *See* Corley v. United States, 556 U.S. 303, 322-23 (2009) (discussing 18 U.S.C. § 3501(c) (permitting admission of defendant's statements to law enforcement obtained within six hours of arrest, absent unreasonable delay in effecting the FED. R. CRIM. P. 5(a)(1) initial appearance)).

Article 12 – Confinement with Enemy Prisoners Prohibited
10 U.S.C. § 812

1. Summary of Proposal

This proposal would amend Article 12 by limiting the prohibition on confinement of military members with foreign nationals to situations where the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war.

2. Summary of the Current Statute

Article 12 provides that no member of the armed forces may be placed in confinement in "immediate association" with enemy prisoners or other foreign nationals who are not members of the armed forces.

3. Historical Background

Article 12 was derived from Article 16 of the Articles of War.[1] The specific language included in Article 12 reflected Congressional concern over confining American servicemembers with foreign prisoners of war.[2] The inclusion of the phrase "in immediate association with" in the statute was intended to permit confinement of military members with enemy prisoners and foreign nationals within the same confinement facility, including overseas facilities, but to require segregation between such prisoners and military members within the facility.[3]

In recent decades, the services have closed a number of military confinement facilities in the United States, particularly those at smaller bases and in other areas with low concentrations of active duty servicemembers.[4] These closures have resulted in an increasing number of cooperation agreements between the services and federal, state, and local authorities to allow sentenced military members to be held at civilian confinement facilities, in association with civilian prisoners. Although these facilities rarely house "enemy prisoners," they frequently house foreign nationals who are not members of the armed forces. Despite these changes in military confinement practices, however, the

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[1] Article 16 only applied outside the Continental United States. Article 12 of the UCMJ is not subject to geographic limitation. *See* AW 16 of 1948; *see also* MCM 1949, Chapter V, ¶19a.

[2] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 914-15 (1949).

[3] *Id.*

[4] *See generally* DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION REPORT (2005).

prohibition on confinement with enemy prisoners and "other foreign nationals not members of the armed forces" under Article 12 has remained unchanged since the UCMJ was enacted in 1950.[5]

4. Contemporary Practice

The President has implemented Article 12 through R.C.M. 1113(e)(2)(C), which repeats the statutory prohibitions in the context of general rules and procedures concerning confinement of servicemembers.[6] Article 12 and the rules implementing the statute apply to all situations in which a convicted servicemember is housed in "immediate association" with a non-U.S. citizen, regardless of whether the non-citizen is an enemy foreign national.[7] In civilian confinement facilities where there are no readily available methods for identifying which prisoners are foreign nationals, this strict prohibition has resulted in military members being confined in total isolation.[8]

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 12 in federal civilian practice.

6. Recommendation and Justification

Recommendation 12: Amend Article 12 to limit the prohibition on confinement of military members with foreign nationals to situations where the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war.

- This change would address situations where military members are incarcerated in civilian confinement facilities pursuant to an agreement with the armed forces. The proposed amendment would clarify that this is not the type of situation Article 12 was designed to address as it does not involve confinement in close association with enemy prisoners or unlawful combatants/detainees.
- This proposed amendment retains the prohibition on confining military members in immediate association with enemy prisoners.

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[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[6] R.C.M. 1113(e)(2)(C); *see also* R.C.M. 305(a) (Discussion); DEP'T OF DEFENSE DIRECTIVE 1325.04, *Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities*, ¶4.3 (17 August 2001) (Certified Current as of 23 April 2007).

[7] *See, e.g.*, United States v. McPherson, 73 M.J. 393, 396 (C.A.A.F. 2014) (quoting United States v. Bartlett, 66 M.J. 426, 428 (C.A.A.F. 2008)); United States v. Wilson, 73 M.J. 529, 532 (A.F. Ct. Crim. App. 2014).

[8] *See, e.g.*, United States v. Wilson, 73 M.J. 404 (C.A.A.F. 2014) (Article 12 not violated where servicemember was confined alone to avoid association with foreign nationals where confinement facility had no methodology for determining which prisoners were foreign nationals).

7. Relationship to Objectives and Related Provisions

- This proposal is a stand-alone recommendation.

8. Legislative Proposal

SEC. 202. MODIFICATION OF PROHIBITION OF CONFINEMENT OF ARMED FORCES MEMBERS WITH ENEMY PRISONERS AND CERTAIN OTHERS.

Section 812 of title 10, United States Code (article 12 of the Uniform Code of Military Justice), is amended to read as follows:

"§812. Art. 12. Prohibition of confinement of armed forces members with enemy prisoners and certain others

"No member of the armed forces may be placed in confinement in immediate association with—

"(1) enemy prisoners; or

"(2) other individuals—

"(A) who are detained under the law of war and are foreign nationals; and

"(B) who are not members of the armed forces.".

9. Sectional Analysis

Section 202 would amend Article 12 to limit the prohibition on confinement of military members with foreign nationals to situations where the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war. Under current law, it is a violation of Article 12 if a military member is held in "immediate association" with enemy prisoners or foreign nationals who are not members of the armed forces. Under current practice, however, it is not uncommon for non-U.S. citizens to be held in the same civilian

confinement facilities where our military members are held during periods of pretrial or post-trial confinement. This practice was not anticipated by the drafters of the UCMJ in 1949. The proposed amendment to Article 12 would maintain the current strict prohibition against confining military members in immediate association with enemy prisoners of war, while clarifying that the restrictions in Article 12 relating to confinement of military member with "foreign nationals" are limited to situations in which the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war. This change would ease the administrative burden placed on civilian confinement facilities that hold confined military members, and would prevent military members in these facilities from being isolated unnecessarily.

Article 13 – Punishment Prohibited Before Trial
10 U.S.C. § 813

1. Summary of Proposal

This Report recommends no change to Article 13. Part II of the Report will consider whether any changes are needed in the rules implementing Article 13.

2. Summary of the Current Statute

Article 13 provides that no person may be subjected to punishment pending trial. The statute clarifies that this does not prohibit pretrial arrest or confinement provided that the conditions of arrest or confinement may not be any more rigorous than necessary to ensure the person's presence at trial. Article 13 also does not prohibit minor punishment during any period of confinement for disciplinary infractions.

3. Historical Background

Article 13 was based on Article 16 of the Articles of War, and adopted the practices of the Army and Navy concerning the rigor of pretrial confinement or arrest.[1] In Article 13, the drafters of the UCMJ removed the ambiguities that had been present in the Articles of War, and clarified the relationship of Article 13 with the effective date of sentences (Article 57).[2] Prior to this change, the Articles of War had been interpreted to prohibit the enforcement of any sentence until after final approval, even though the accused was placed in confinement immediately after the sentence was adjudged.[3] In 1981, the reference to Article 57 was stricken to "clarify the distinction between the so-called un-sentenced and sentenced prisoner so that after trial, regardless of whether the sentence had been executed upon appellate review, post-trial confinees could be administered under similar programs."[4] The statute has remained unchanged since that time.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 916 (1949) [hereinafter *Hearings on H.R. 2498*]; H.R. REP. No. 81-491, at 14 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 ("Subject to the provisions of article 57, no person, while being held for trial or the results of trial, shall be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him . . .") *amended by* Pub. L. 97-81, § 3, 95 Stat. 1085 (1981); *see Hearings on H.R. 2498*, *supra* note 1, at 818.

[3] *Id.* at 916.

[4] H.R. REP. No. 97-306, at 5 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1769, 1773; *see* Act of Nov. 20, 1981, Pub. L. No. 97-81, 95 Stat. 1087.

4. Contemporary Practice

Article 13 prohibits two types of activities: (1) intentionally imposing punishment on an accused before a finding of guilt has been adjudged at trial (illegal pretrial punishment);[5] and (2) pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial (illegal pretrial confinement).[6] The commingling of pretrial and sentenced prisoners may violate Article 13 if it is intended to punish the prisoner or is unrelated to any legitimate government purpose.[7] An accused subjected to illegal pretrial punishment or confinement under Article 13 is entitled to "meaningful" sentence relief.[8]

5. Relationship to Federal Civilian Practice

There is no statutory equivalent to Article 13 in federal civilian practice. Federal courts have, however, held that punishment prior to trial is a violation of the due process clause of the Fourteenth Amendment.[9]

6. Recommendation and Justification

Recommendation 13: No change to Article 13.

- In view of the well-developed case law addressing Article 13's provisions, a statutory change is not necessary. Part II of the Report will consider whether any changes are needed in the rules implementing Article 13.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.
- This proposal supports MJRG Operational Guidance by preserving a unique feature of the military justice system that helps to counterbalance the limitation of rights available to members of the armed forces.

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[5] *See* United States v. McCarthy, 47 M.J. 162, 165 (C.A.A.F. 1997) ("Article 13 prohibits the imposition of punishment or penalty prior to trial. Such an imposition entails a purpose or intent to punish an accused before guilt or innocence has been adjudicated.") (citation omitted).

[6] *See* United States v. Fischer, 61 M.J. 415 (2005) (termination of accused's pay during pretrial confinement after his period of obligated service expired did not constitute illegal pretrial punishment).

[7] *See* United States v. Palmiter, 20 M.J. 90, 94-95 (C.M.A. 1985) (citations omitted).

[8] *See* United States v. Harris, 66 M.J. 166, 169 (C.A.A.F. 2008) (noting that while Article 13 violations require "meaningful relief" an accused is not entitled to additional sentencing relief *per se* when confinement credit exceeds confinement adjudged and approved at trial; holding that setting aside accused's punitive discharge would be "disproportionate" when confinement credit exceeded approved confinement by 186 days).

[9] *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); Dodds v. Richardson, 614 F.3d 1185, 1192–1193 (10th Cir. 2010).

Article 14 – Delivery of Offenders to Civil Authorities
10 U.S.C. § 814

1. Summary of Proposal

This Report recommends no change to Article 14. Part II of the Report will consider whether any changes are needed in the rules implementing Article 14.

2. Summary of the Current Statute

Article 14 concerns the delivery of military offenders to civil authorities. The article is divided into two subsections. Article 14(a) provides that, in accordance with service regulations, a member of the armed forces accused of an offense against civil authority may, upon request, be delivered to the civil authority for trial, subject to being returned into military custody if the sentence of a court-martial is interrupted. This is a permissive authority only.[1] Article 14(b) provides that when a member of the armed forces who is undergoing sentence of a court-martial is delivered to civil authorities, such delivery interrupts the execution of any court-martial sentence; and that the civil authorities must, upon request of competent military authority, return the member to military control. This provision "encourages cooperation between military and civil authorities when a sentenced servicemember in military custody also is suspected of having committed criminal offenses amenable to civilian prosecution. As a result of Article 14(b) . . . if civil authorities subsequently try, convict, and sentence to confinement the servicemember, the two sentences, in effect, will run consecutively."[2]

3. Historical Background

Under Army practice prior to the enactment of the UCMJ, commanders were required, upon request, to turn a military member accused of a civil crime over to civilian authorities, except in a time of war. This practice was adopted before the Army had authority to try its personnel for civil offenses in time of peace, and was originally enacted in the Articles of War.[3] Under Navy practice, on the other hand, commanders exercised broad discretion with respect to the delivery of enlisted personnel to civilian authorities. Article 14 was based on the Navy practice.[4]

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[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 921 (1949) [hereinafter *Hearings on H.R. 2498*].

[2] United States v. Willenbring, 56 M.J. 671, 681 (A. Ct. Crim. App. 2001).

[3] AW 74 of 1920; *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 39 (1951).

[4] *Hearings on H.R. 2498*, *supra* note 1, at 921.

In 1988, Congress required the Secretary of Defense to ensure that the Service Secretaries issued uniform regulations to provide for the delivery of members of the armed forces to civilian authority when such members have been accused of offenses against civil authority.[5]

4. Contemporary Practice

The President has implemented Article 14(a) through R.C.M. 106 and Article 14(b) through R.C.M. 1113(e)(2)(A)(ii). The rules only apply to delivery of military members to authorities of the United States or its political subdivisions. Delivery of a military member to a foreign government for trial is ordinarily covered by status of forces agreements.[6] Each of the services has regulations outlining the procedures for delivery of a military member to civilian authorities.

There has been very little case law concerning Article 14 since the UCMJ's adoption, and the few cases which have dealt with its provisions have affirmed the statute's continued relevance and authority.[7]

5. Relationship to Federal Civilian Practice

Article 14 has no corresponding rule in federal civilian practice.

6. Recommendation and Justification

Recommendation 14: No change to Article 14.

- In view of the well-developed case law addressing Article 14's provisions, a statutory change is not necessary.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 14.

7. Relationship to Objectives and Related Provisions

- This recommendation supports MJRG Operational Guidance by preserving a unique feature of the military justice system that supports military discipline while ensuring appropriate coordination with civilian authorities.

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[5] NDAA FY 1989, Pub. L. No. 100-456, § 721, 102 Stat. 1918 (1988).

[6] MCM, App. 21 (R.C.M. 106, Analysis).

[7] *See, e.g.*, United States v. Duncan, 34 M.J. 1232 (A.C.M.R. 1992), *aff'd* 38 M.J. 496 (C.M.A. 1993) (under Article 14, authority of Department of Justice does not extend beyond right to request that military surrender soldier for trial in civilian court).

Subchapter III. Non-Judicial Punishment

Article 15 – Commanding Officer's Non-judicial Punishment
10 U.S.C. § 815

1. Summary of Proposal

This proposal would retain the wide range of punishments available to commanders to address misconduct through non-judicial proceedings under Article 15, while precluding punishment in the form of confinement on a diet consisting only of bread and water. Part II of the Report will consider whether any changes are needed in the rules implementing Article 15.

2. Summary of the Current Statute

Article 15 provides commanders with a range of disciplinary measures for minor offenses in order to promote good order and discipline in the armed forces and correct deficiencies in servicemembers without the stigma of a court-martial conviction. Article 15 is implemented through detailed regulations proscribed by the President in Chapter V of the MCM, and through service-specific regulations. Members may request a trial by court-martial in lieu of non-judicial punishment except when attached to or embarked on board a vessel.

Under the current statute, the punishments authorized by Congress include: reduction to the lowest pay grade; confinement on bread and water or diminished rations for three days when attached or embarked on a vessel; correctional custody for 30 days; restriction for 60 days; arrest in quarters for 30 days; extra duties for 45 days; forfeitures of one-half of one month's pay for three months; and detention of one-half of one month's pay for two months. The scope of these punishments may vary depending upon the grade of the member and that of the imposing authority. Rank reduction, confinement on bread and water, correctional custody, extra duties, and restriction may only be imposed against enlisted members. Arrest in quarters is limited to officers.

3. Historical Background

From the earliest days of our nation, commanders have had the authority to impose disciplinary punishments through a variety of formal and informal procedures.[1] Congress

[1] The ability of commanders to summarily punish sailors for minor offenses has origins in the earliest naval regulations, and for troops, in regulations and practices promulgated during the Revolutionary War. While the ability of a ship's captain to impose punishment was well-established by naval tradition, field commanders routinely complained of challenges with disciplining their troops, and would often exercise general orders in order to fill the legislative gaps where discipline was not expressly authorized. *See generally* Captain Harold L. Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37 (1965).

codified the ability of a company commander to impose disciplinary punishment in Article 104 of the 1916 Articles of War.[2] This provision served as the foundation for Article 15 when the UCMJ was enacted in 1950.[3] In 1962, Congress amended Article 15 with a view towards reducing the number of courts-martial for minor offenses.[4]

4. Contemporary Practice

Non-judicial punishment is governed by Article 15, Part V of the Manual for Courts-Martial, and service-specific regulations. Article 15 provides substantial discretion to the services in structuring non-judicial punishment proceedings. Although similar in terms of purpose—efficient and direct disposition of minor offenses—service regulations and cultures have created essentially five different variations of this administrative forum, under a variety of different names: "Captain's Mast" (Navy and Coast Guard); "Office Hours" (Marine Corps); "Article 15" (Air Force and Army); or just "NJP" (a commonly used term). The services apply three different standards of proof during Article 15 proceedings: the Army applies a beyond a reasonable doubt standard, just as in courts-martial; the Navy, Marine Corps, and Coast Guard use a preponderance of the evidence standard, recognizing the non-criminal nature of the proceeding; and the Air Force has no established regulatory standard of evidence for non-judicial punishment.[5] The statutorily authorized "vessel exception," which precludes a member attached or embarked on a vessel from demanding a court-martial in lieu of non-judicial punishment proceedings, is utilized primarily by the Sea Services.[6] The Army's Article 15 regulations provide commanders with options with respect to whether non-judicial punishment records are filed locally or permanently, depending on the rank of the member and the nature of the offense.[7]

5. Relationship to Federal Civilian Practice

Non-judicial punishment does not have a direct civilian equivalent. Although civilian employees are subject to a variety of administrative disciplinary matters, the range of punishments available under Article 15 and the service-specific procedures and rules that implement the statute are unique to military service.

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[2] AW 104 of 1916.

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 923-955 (1949).

[4] Act of Sept. 7, 1962, Pub. L. No. 87-648, § 1, 76 Stat. 447-450; *see Hearings on H.R. 7656 Before Subcommittee No. 1 of the House Committee on Armed Services*, 87th Cong., 1st Sess. 4903 (1962); Miller, *supra*, note 1, at 37.

[5] *See* AIR FORCE INSTR. 51-202 (Air Force regulation governing non-judicial punishment); ARMY REG. 27-10 (Army regulation governing non-judicial punishment); COMMANDANT INSTR. M5810.E (Coast Guard regulation governing non-judicial punishment); and JAGINST. 5800.7F (Navy-USMC regulation governing non-judicial punishment).

[6] *Id.* (confinement on bread and water or diminished rations is not authorized by the Coast Guard). *See generally* Dwight H. Sullivan, *Overhauling the Vessel Exception*, 45 NAVAL L. REV. 57 (1996).

[7] *See* ARMY REG. 27-10 (filing determinations provided under 3-6).

6. Recommendation and Justification

Recommendation 15: Amend Article 15 to remove punishment in the form of confinement on a diet limited to bread and water from the list of authorized punishments.

- This proposal reflects confidence in the ability of commanders in a modern era to administer effective discipline through the utilization of the wide range of punishments otherwise available under Article 15 and other non-punitive measures.
- Part II of this Report will consider: (1) whether a uniform burden of proof can be adopted in Part V of the Manual to promote greater consistency in non-judicial punishment proceedings; (2) whether to enhance options for the services to administer low-level NJP for minor disciplinary infractions without necessarily triggering permanent adverse administrative consequences; and (3) whether to clarify the circumstances qualifying for the "vessel exception."

7. Relationship to Objectives and Related Provisions

- This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.
- The recommendation to retain Article 15 largely in its current form reflects a recognition that NJP effectively promotes good order and discipline at the unit level, and is essential to the effective administration of military justice in the armed forces.

8. Legislative Proposal

SEC. 301. MODIFICATION OF CONFINEMENT AS NON-JUDICIAL PUNISHMENT.

Section 815 of title 10, United States Code (article 15 of the Uniform Code of Military Justice), is amended—

(1) in subsection (b)—

(A) in paragraph (2)(A), by striking "on bread and water or diminished rations"; and

(B) in the undesignated matter after paragraph (2), by striking "on bread and water or diminished rations" in the sentence beginning "No two or more"; and

(2) in subsection (d), by striking "on bread and water or diminished rations" in paragraphs (2) and (3)."

9. Sectional Analysis

Section 301 contains amendments concerning non-judicial punishment under Article 15. Non-judicial punishment under Article 15 provides commanders with a range of disciplinary measures for minor offenses to promote good order and discipline in the armed forces and correct deficiencies in servicemembers without the stigma of a court-martial conviction. Article 15, as amended, would retain the wide range of punishments available to commanders to address misconduct through non-judicial proceedings, while precluding punishment in the form of a diet consisting only of bread and water. Implementing rules would address several issues concerning the administration of non-judicial punishment under Article 15, including the standard of evidence at non-judicial punishment proceedings, the administrative consequences of non-judicial punishment for minor disciplinary offenses, and the circumstances qualifying for the "vessel exception."

Subchapter IV. Court-Martial Jurisdiction

Article 16 – Courts-Martial Classified
10 U.S.C. § 816

1. Summary of Proposal

This proposal would establish standard sized panels in non-capital courts-martial: eight members in a general court-martial, and four members in a special court-martial. As provided in Article 25a, a general court-martial in a capital case would have a panel of twelve members. Reflecting longstanding practice, the proposal would require a military judge at all special courts-martial. The proposed amendments would continue the authority for judge-alone trials in non-capital cases at the request of the accused. Consistent with the constitutional authority to authorize civilian non-jury trials without obtaining a defendant's consent in cases involving confinement for six months or less, the proposal also would provide the military justice system with similar discretionary authority for referral to a judge-alone special court-martial, in which confinement and forfeitures would be limited to six months or less and no punitive discharge would be authorized (as reflected in the proposed changes to Article 19). The authority to refer cases to the new judge-alone forum would be subject to limitations prescribed by the President. This proposal would retain the summary court-martial.

2. Summary of the Current Statute

Currently, Article 16 authorizes the following types of courts-martial: a general court-martial, consisting of a military judge and at least five members; a general court-martial authorized to adjudge the death penalty, subject to the requirements and exceptions of Article 25a, consisting of a military judge and at least 12 members; a special court-martial consisting of a military judge and at least three members; a special court-martial without a military judge, consisting of at least three members; and a summary court-martial consisting of a single commissioned officer. The current statute establishes minimum requirements for the number of members, not a fixed panel size, for general and special courts-martial. The statute also permits judge-alone general and special courts-martial at the election of the accused in non-capital cases.

3. Historical Background

Modeled after the British Articles of War, the earliest American Articles of War called for thirteen-member general courts-martial and specified that regimental courts-martial (analogous to the current special courts-martial) should convene with five members, but never fewer than three.[1] Naval courts-martial at that time impaneled at least six members, a number that was eventually reduced to three (five for capital cases). After the American

[1] AW XXXVIII of 1775. *See generally* Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 114-117 (1992).

Revolution, and in order to account for the limited-size of America's military forces, the Articles of War and Articles for the Government of the Navy adopted the practice of seating five to thirteen officers in general courts-martial, with regimental courts-martial (or "summary" courts-martial in the Navy) fixed at three members.[2] By 1920, the practice under the Articles of War was again amended by having no fewer than five members in general courts-martial and no fewer than three members in special courts-martial, a practice that has remained in place since that time.[3]

The 1920 Articles of War created the position of the law member.[4] The law member was one of the appointed court members and was seated with them.[5] As a court member, the law member had an equal vote in deciding all questions submitted to a vote or ballot of the court, including challenges, findings, sentence, and any interlocutory questions submitted to a vote of the court.[6] Although the law member made evidentiary and procedural rulings, the court members could overrule the law member, just as they could reject the advice of the prosecuting judge advocate.[7] When a court member objected to a law member's ruling, the members decided the question by a majority vote.[8] In special courts-martial, which had no appointed law member, the court president performed the role of law member by making rulings in open court.[9]

When the UCMJ was enacted in 1950, Congress replaced the law member with a "law officer."[10] The law officer was no longer one of the court members and sat apart from them during trial, usually in the front of the courtroom on a raised dais, where one would expect a judge to sit.[11] The law officer did not deliberate or vote with the members, and could not discuss the case with the members outside of the presence of the accused, except to help put the findings and sentence into proper form. Then, in 1968, Congress replaced the law officer with a military judge, aligning the judicial powers of the position roughly with the

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[2] See, e.g., AW 5, 6 of 1916; *see also* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 3-11 (1998).

[3] AW 5, 6 of 1920. Under the Articles of War, only officers could sit on court-martial panels. *See also* AGN 27, 45 of 1930 (requiring a minimum of five members for general courts-martial and three members for summary courts-martial, which were the equivalent of special courts-martial in Navy practice).

[4] AW 8 of 1920.

[5] MCM 1921, ¶83.

[6] MCM 1921, ¶89*a*.

[7] AW 31 of 1920; MCM 1921, ¶89*a*.

[8] *Id.* A secret ballot was used only on the findings.

[9] *Id.*

[10] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[11] MCM 1951, ¶61*b.*; *see also id.* at 500 (schematic of seating in general court-martial).

powers of federal civilian judges.[12] For the first time, the accused could elect trial by a military judge alone—without court members—in both general and special courts-martial.[13] The military judge's new powers included the power to release an accused from pretrial confinement, and to hold sessions outside the presence of the members at the pretrial, trial, and post-trial stages under Article 39(a).[14] In addition, before any special court-martial could adjudge a bad-conduct discharge, Congress required the appointment of a military judge and legally trained counsel for both sides.[15]

The summary court-martial, composed of a single commissioned officer, has been a codified feature of military justice practice since the late nineteenth century, and has been a disposition option for low-level offenses under the UCMJ since its enactment in 1950. Case law and practice have identified it as being distinct from the other courts-martial, as it is an administrative, non-criminal forum without the consequence of criminal liability.[16]

4. Contemporary Practice

The President has implemented Article 16 through R.C.M. 501, 502, and 503, which provide the rules and procedures concerning the composition of courts-martial and the qualifications, duties, and detailing of courts-martial personnel, including panel members. In accordance with the criteria under Article 25 and the procedures under R.C.M. 502-503, court-martial convening authorities develop a list of best-qualified members whom they detail to a particular court-martial. As a general practice, the number detailed to a court-martial will be greater than the minimum required by Article 16 in order to account for the possibility of excusals and successful challenges. Even with excusals and challenges, courts-martial frequently impanel more than the required number of members. Under current practice, the excess members cannot be returned to their units to perform their regular duties, but must continue to sit on the panel through the completion of the court-martial. As a result, the panel size can vary from case to case, even in cases involving similar charges. Because the size of the panel can vary, so can the percentage required for a conviction, anywhere from 67% (e.g., two out of three members, four out of six, six out of nine) to 80% (e.g., four out of five members).

With respect to special courts-martial without a military judge, although current law continues to provide authority for this forum, the services have a longstanding practice of assigning a military judge to every special court-martial. Summary courts-martial remain

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[12] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335-36.

[13] *Id.* By 1988, about three-quarters of all trials by special and general courts were before a military judge sitting alone without court members. *See Military Justice Statistics,* the Army Lawyer, Feb. 1988 at 54. The exact figures for judge-alone cases at that time were: GCM, 71.2%; BCDSPCM, 78.4%; and SPCM, 65.8%.

[14] Military Justice Act of 1968, at 82 Stat. 1338, 1341.

[15] Military Justice Act of 1968, at 82 Stat. 1335-36.

[16] *See* Middendorf v. Henry, 425 U.S. 25 (1976). For a more detailed analysis of the evolution of the summary court-martial, see the Section in this Report analyzing Article 20.

an available forum for the disposition of minor offenses in a court-martial proceeding without a detailed military judge.

5. Relationship to Federal Civilian Practice

In federal civilian practice and state criminal practice, judges preside in all criminal proceedings, including in misdemeanor cases. Furthermore, federal juries are required to have twelve jurors in all cases, except when the defendant is charged with Class B or C misdemeanors or violations, in which case the defendant is not entitled to a jury trial.[17] Among the fifty states, Florida, Connecticut, Utah, and Arizona allow for felony-level convictions in non-capital cases by juries of fewer than twelve—with Florida and Connecticut authorizing six-person juries, and Utah and Arizona requiring an eight-person jury. However, there is no civilian jurisdiction, state or federal, that allows jury panels to fluctuate between cases depending on the size of the initial venire and the number of excusals or challenges granted. Military panels are not subject to the same general constitutional requirements as civilian juries in terms of their size.[18]

6. Recommendation and Justification

Recommendation 16.1: Amend Article 16 to establish standard panel sizes in all courts-martial: eight members in a general court-martial (subject to the requirements of Article 25a in capital cases), and four members in a special court-martial.

- The current system creates an anomaly by varying the percentage required for a conviction based upon the happenstance of the number of members who remain on the panel after challenges and excusals—a variance that can range from 67% to 80% depending on the number of members impaneled to the court-martial.

- The recommendation for a standard four-member special court-martial and a standard eight-member non-capital general court-martial—in conjunction with the change proposed in Article 52 to require a fixed percentage (75%) of votes on the findings in all cases—will eliminate this anomaly. The proposed changes would provide an appropriate number of members for group discussion and deliberation, while ensuring that the operational requirements of convening authorities are appropriately balanced.

- The proposal would address the inefficiencies that result from the current requirement for the court-martial to impanel every member detailed in excess of the required number. Although it is necessary for the convening authority to detail a number of members larger than the minimum in order to take into account the potential for challenges and excusals, the current system creates a burden on

[17] 18 U.S.C. § 3559; FED. R. CRIM. P. 58(b)(2); *see* United States v. Merrick, 459 F.2d 644 (4th Cir. 1972).

[18] *See Ex parte* Quirin, 317 U.S. 1, 17 (1942); Sanford v. United States, 586 F.3d 28, 35 (D.C. Cir. 2009); Mendrano v. Smith, 797 F.2d 1538, 1544 (10th Cir. 1986).

military effectiveness by requiring the excess members to remain on the panel rather than return to their regular duties.

- The proposed standard panel sizes for general and special courts-martial are well within the range of the number of members that currently sit in most courts-martial. The twelve-member general court-martial in capital cases is consistent with the current minimum number of members required in that forum.

- The proposed standard panel size for general courts-martial will be subject to the requirements of the proposed amendments to Article 25a, requiring a standard panel of twelve members in capital cases.

- To address excusals of members that may occur during the course of trial, the proposed amendments to Article 29 will provide the procedure for replacements, options for the use of alternate members, and the opportunity for non-capital general courts-martial to proceed with a reduced panel, but no fewer than six members.

Recommendation 16.2: Amend Article 16 to require a military judge to be detailed to all special courts-martial.

- Although the UCMJ has authorized special courts-martial to proceed without a detailed military judge (subject to restrictions on punishment), the military services have long required the presence of a military judge to preside at all special courts-martial. In the unlikely event that a disciplinary proceeding is needed to address misconduct in a situation where a judge cannot be readily assigned, a commander will continue to have the broad authority to issue non-judicial punishment under Article 15, as well as the authority to refer charges to a summary court-martial, a one-officer court without a military judge or counsel, which is empowered to impose an array of punishments, including up to thirty days of confinement.

Recommendation 16.3: Amend Article 16 to provide the military justice system with an option for a judge-alone trial special court-martial, with confinement limited to six months or less, as reflected in the proposed changes to Article 19.

- The proposed authority for referral of cases to a judge-alone special court-martial draws upon the successful experience of the military justice system with judge-alone trials since 1968. It also draws upon the experience in the federal civilian system, as well as in state courts, in which an accused defendant does not have the right to trial by jury when the confinement does not exceed six months.

- Consistent with federal civilian practice, the confinement that could be adjudged in a case referred to a judge-alone special court-martial would be six months or less; forfeitures would be capped at six months; and a punitive discharge would not be available, in accordance with the proposed changes to Article 19.

- The convening authority would have discretion, subject to such limitations that the President may prescribe by regulation, in deciding whether to refer a case to a

judge-alone special court-martial or to a traditional special court-martial empowered to adjudge up to twelve months confinement and forfeitures, as well as a punitive discharge. At the traditional special court-martial, the accused would have the same opportunity as under current law to elect a judge-alone trial or a trial with a panel of members.

- The judge-alone special court-martial will provide the convening authority with a greater range of disposition options, which may prove particularly useful when addressing cases involving a request for court-martial arising out of a non-judicial punishment or summary court-martial refusal, and in deployed environments where operational demands may make it difficult to assemble a panel to address cases involving minor misconduct.

7. Relationship to Objectives and Related Provisions

- The proposal to create a referred judge-alone special court-martial supports the GC Terms of Reference by incorporating a practice used in U.S. district courts—the judge-alone trial with a punishment cap of six months confinement (and no punitive discharge in the military context). This proposal supports MJRG Operational Guidance by promoting the first of six "key principles": discipline in the armed forces. The judge-alone special court-martial would offer military commanders a new disposition option for low-level criminal misconduct—one that would be more efficient and less burdensome on the command than a special court-martial, but without the option for the member to refuse as in summary courts-martial and non-judicial punishment.

- The proposed amendments that would require standard panel sizes in all general and special court-martial support MJRG Operational Guidance by employing the standards and procedures of the civilian sector with respect to consistency between jury/panel sizes insofar as practicable in military practice.

- In the section of this Report addressing Article 20, clarifying language has been proposed to incorporate the Supreme Court's treatment of the summary court-martial as an administrative, non-criminal forum.

8. Legislative Proposal

SEC. 401. COURTS-MARTIAL CLASSIFIED.

Section 816 of title 10, United States Code (article 16 of the Uniform Code of Military Justice), is amended to read as follows:

"§816. Art. 16. Courts-martial classified

"(a) IN GENERAL.—The three kinds of courts-martial in each of the armed forces are the following:

"(1) General courts-martial, as described in subsection (b).

"(2) Special courts-martial, as described in subsection (c).

"(3) Summary courts-martial, as described in subsection (d).

"(b) GENERAL COURTS-MARTIAL.—General courts-martial are of the following three types:

"(1) A general court-martial consisting of a military judge and eight members, subject to sections 825(d)(3) and 829 of this title (articles 25(d)(3) and 29).

"(2) In a capital case, a general court-martial consisting of a military judge and the number of members determined under section 825a of this title (article 25a), subject to sections 825(d)(3) and 829 of this title (articles 25(d)(3) and 29).

"(3) A general court-martial consisting of a military judge alone, if, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record or in writing, a court composed of a military judge alone and the military judge approves the request.

"(c) SPECIAL COURTS-MARTIAL.—Special courts-martial are of the following two types:

"(1) A special court-martial, consisting of a military judge and four members, subject to sections 825(d)(3) and 829 of this title (articles 25(d)(3) and 29).

"(2) A special court-martial consisting of a military judge alone—

"(A) if the case is so referred by the convening authority, subject to section 819 of this title (article 19) and such limitations as the President may prescribe by regulation; or

"(B) if the case is referred under paragraph (1) and, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record or in writing, a court composed of a military judge alone and the military judge approves the request.

"(d) SUMMARY COURT-MARTIAL.—A summary court-martial consists of one commissioned officer.".

9. Sectional Analysis

Section 401 contains amendments concerning courts-martial classifications under Article 16 of the UCMJ. Under current law, general courts-martial consist of a military judge and not less than five members in non-capital cases, or a military judge alone upon the election of the accused. Special courts-martial consist of not less than three members, a military judge and not less than three members, or a military judge alone upon the election of the accused. Because there is a variable number of members in each case, the number of votes required for a conviction under Article 52 can fluctuate from case to case without any

guiding principle to ensure consistency. *See* Section 715, *infra* (discussing voting by the court-martial panel under Article 52). The proposed amendments seek to enhance military justice and improve the consistency of court-martial panel deliberations by establishing standard panel sizes: twelve members in capital general courts-martial, eight members in non-capital general courts-martial, and four members in special courts-martial. As amended, Article 16 would include references to Article 25a (addressing panel size in capital cases), Article 25(d) (addressing the initial detailing of members by the convening authority), and Article 29 (addressing the impaneling of members and the impact of excusals on panel composition).

Article 16(c), as amended, would require a military judge to be detailed to all special courts-martial, reflecting current military practice and similar federal and state civilian practice. The amendments also would add the option of referral to a non-jury (judge-alone) special court-martial. Such a forum is common among civilian criminal jurisdictions. *See* 18 U.S.C. § 3559; Fed. R. Crim. P. 58(b)(2); *United States v. Merrick*, 459 F.2d 644 (4th Cir. 1972). Providing commanders with this option would generate greater efficiencies in the military justice system for the adjudication of low-level, misdemeanor-equivalent offenses. As provided in the proposed amendments to Article 19, punishments at this forum could include confinement and forfeitures limited to no more than six months and would not include a punitive discharge. In addition, a military magistrate designated by the detailed military judge could preside when authorized under service regulations and with the consent of the parties. *See* Section 403, *infra.* Implementing provisions in the Manual for Courts-Martial would establish limits on the types of offenses that could be referred for trial at this forum.

Article 17 – Jurisdiction of Courts-Martial in General
10 U.S.C. § 817

1. Summary of Proposal

This Report recommends no change to Article 17. Part II of the Report will consider whether any changes are needed in the rules implementing Article 17.

2. Summary of the Current Statute

Article 17 provides that each armed force has court-martial jurisdiction over all persons subject to the UCMJ. Subsection (a) provides each armed force with court-martial jurisdiction over all persons subject to the Code and authorizes the President to prescribe regulations for jurisdiction by one armed force over the personnel of another (i.e., "reciprocal jurisdiction"). Subsection (b) provides for departmental review of cases tried by one armed force by the service of the accused.

3. Historical Background

Article 17 has not been amended since the UCMJ's enactment in 1950.[1] However, the regulatory language for reciprocal jurisdiction contained in R.C.M. 201(e) was amended in 1986 (post-Goldwater-Nichols Act) to conform the statute to the reorganization of the joint service environment.[2]

4. Contemporary Practice

The President has implemented Article 17 through R.C.M. 201(e). Under the rule, unified and specified combatant commanders are authorized to convene courts-martial over members of any service within their respective command, subject to service-specific regulations or agreements. In the event of disagreement among Service Secretaries, military departments, or combatant commanders, the Secretary of Defense or his designee designates the appropriate organization to exercise jurisdiction.[3] The rule and its guidance

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-443, tit. II, § 211(b), 100 Stat. 992.

[3] In its 2013 Final Report, the Defense Legal Policy Board's (DLPB) Subcommittee on Military Justice in Combat Zones found that, throughout the conflicts in Iraq and Afghanistan, the individual Services continued to maintain control over military justice matters related to their own personnel, despite operating in a joint environment. The Subcommittee recommended that military justice jurisdictional responsibilities be determined and prescribed during the joint-planning process. It is possible for the Services to implement the DLPB recommendations under existing statutory and regulatory authority. Part II of this Report will consider whether any regulatory changes are needed to facilitate the exercise of military justice jurisdiction over

are consistent with the original "congressional intent that reciprocal jurisdiction ordinarily not be exercised outside of joint commands or task forces, and is designed to protect the integrity of intraservice lines of authority."[4]

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 17 in federal civilian practice.

6. Recommendation and Justification

Recommendation 17: No change to Article 17.

- Article 17 requires no amendments. As drafted, the statute provides all necessary authority for, and restrictions concerning, reciprocal jurisdiction.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 17.

7. Relationship to Objectives and Related Provisions

- This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

personnel by joint commanders in future conflicts and deployed environments. *See* DEFENSE LEGAL POLICY BOARD, REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES: MILITARY JUSTICE IN CASES OF U.S. SERVICE MEMBERS ALLEGED TO HAVE CAUSED THE DEATH, INJURY OR ABUSE OF NON-COMBATANTS IN IRAQ OR AFGHANISTAN, 4.0 *Subcommittee Findings and Recommendations*, 35 (DEP'T OF DEF. MAY 30, 2013).

[4] MCM, App. 21 (R.C.M. 201(e), Analysis) (citing *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 612-15, 957-58 (1949)).

Article 18 – Jurisdiction of General Courts-Martial
10 U.S.C. § 818

1. Summary of Proposal

This proposal would make a conforming changes to align Article 18 with the revised descriptions of the types of courts-martial under Article 16, and would specify the sexual offenses currently listed under Article 56(b)(2), over which general courts-martial have exclusive jurisdiction.

2. Summary of the Current Statute

Article 18 establishes the jurisdiction of general courts-martial over persons subject to the UCMJ, including those subject to military tribunal under the law of war. The statute authorizes general courts-martial to adjudge all punishments available under the UCMJ, including death, subject to any limitations prescribed by the President; however, it expressly prohibits judge-alone general courts-martial from exercising jurisdiction in cases where the death penalty may be awarded. Article 18(c) limits jurisdiction over the sex-related offenses listed under Article 56(b)(2).

3. Historical Background

Congress has amended Article 18 twice since the UCMJ was enacted in 1950.[1] The statute was first amended in 1968, in order to prohibit judge-alone general courts-martial in capital cases.[2] More recently, in 2013, Congress amended Article 18 by dividing the statute into three subsections and, in subsection (c), limiting jurisdiction over the sex-related offenses specified under Article 56(b)(2) to general courts-martial.[3]

4. Contemporary Practice

The President has implemented Article 18 through R.C.M. 201 (Jurisdiction in general), R.C.M. 202 (Persons subject to the jurisdiction of courts-martial), and R.C.M. 203 (Jurisdiction over the offense), which are consistent with the statutory provisions.

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 18 in federal civilian practice.

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

[3] NDAA FY 2014, Pub. L. No. 113-66, § 1705(b), 127 Stat. 672 (2013).

6. Recommendation and Justification

Recommendation 18: Amend Article to conform the statute to the proposed changes to Article 16 concerning the types of general courts-martial and the proposed changes to Article 56 concerning sex-related offenses.

- This proposal would retain current law with non-substantive conforming changes necessitated by the proposed amendments to Article 56.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.
- This recommendation supports MJRG Operational Guidance by minimizing change to an area recently revised by Congress; taking into account the importance of maintaining system balance; and maintaining a unique and necessary feature of military practice.
- This recommendation would align Article 18 with the proposed changes in Articles 16 and Article 56.

8. Legislative Proposal

SEC. 402. JURISDICTION OF GENERAL COURTS-MARTIAL.

Section 818 of title 10, United States Code (article 18 of the Uniform Code of Military Justice), is amended—

(1) in subsection (b), by striking "section 816(1)(B) of this title (article 16(1)(B))" and inserting "section 816(b)(3) of this title (article 16(b)(3))"; and

(2) by striking subsection (c) and inserting the following:

"(c) Consistent with sections 819 and 820 of this title (articles 19 and 20), only general courts-martial have jurisdiction over the following offenses:

"(1) A violation of subsection (a) or (b) of section 920 of this title (article 120).

"(2) A violation of subsection (a) or (b) of section 920b of this title (article 120b).

"(3) An attempt to commit an offense specified in paragraph (1) or (2) that is punishable under section 880 of this title (article 80).".

9. Sectional Analysis

Section 402 would make conforming changes to Article 18 of the UCMJ to align the statute with the revised descriptions of types of courts-martial under Article 16. The amendments also would modify Article 18 to specify the sexual offenses (currently listed by cross-reference to Article 56(b)(2)) over which general courts-martial have exclusive jurisdiction. This would accommodate the proposal under Section 801, *infra*, to repeal Article 56(b) following the enactment of sentencing parameters under Article 56(d).

Article 19 – Jurisdiction of Special Courts-Martial
10 U.S.C. § 819

1. Summary of Proposal

This proposal would provide conforming changes in Article 19, which sets forth the requirements for a special court-martial, in light of: (1) the proposed changes in Article 16 that provide an option to refer cases to a judge-alone special court-martial; (2) the proposed changes in Article 27 regarding the requirement to detail defense counsel for both general and special courts-martial; and (3) the proposed changes in Article 54 regarding the preparation of records for all courts-martial. The proposed amendments also would amend Article 19 to codify current practice by requiring a military judge to be detailed to every special court-martial, and would allow military judges to designate military magistrates, if available, to preside over special courts-martial referred judge-alone, with the consent of the parties.

2. Summary of the Current Statute

Article 19 concerns the jurisdiction of special courts-martial. Under this section, the maximum punishment for any case tried by special court-martial is confinement for one year, forfeiture of two-thirds pay per month for one year, hard labor without confinement for not more than three months, reduction to the lowest pay grade (E-1), and a bad-conduct discharge. A special court-martial may not adjudge a bad-conduct discharge, more than six months confinement, or forfeiture of two-thirds pay per month for more than six months unless there is a "complete record" of the proceedings, a qualified defense counsel is detailed to represent the accused, and a military judge presides at trial.

3. Historical Background

When Congress enacted the UCMJ in 1950,[1] it based Article 19 on Article 13 of the Articles of War.[2] The statute's legislative history reflects a congressional intent to prohibit trial at a special court-martial of any offense for which a mandatory punishment was prescribed by the UCMJ.[3] The provision in Article 19 allowing capital offenses to be tried at a special court-martial, minus the authority to adjudge the death penalty, was adopted at the urging of the Navy in order to retain the option of trying such cases aboard ship, because prompt

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] S. REP. No. 81-486, at 13 (1949).

[3] *Id.*; *see* AW 19 of 1948.

disciplinary action might be needed in circumstances where it would be impractical to refer such a case to a general court-martial convening authority.[4]

The Military Justice Act of 1968 amended Article 19 to provide that a bad-conduct discharge could not be adjudged at a special court-martial unless legally qualified defense counsel was appointed to represent the accused, a military judge was detailed to the trial, and a complete record of the proceedings was made.[5] In 1999, Congress again amended Article 19 to revise the maximum punishment authorized at special courts-martial by increasing the maximum period of authorized confinement and forfeitures from six months to one year.[6] In 2014, Congress amended Article 56 and Article 18 to require certain rape and sexual assault offenses to be tried only at general courts-martial, precluding convening authorities from referring these charges to special courts-martial.[7]

4. Contemporary Practice

Special courts-martial are typically used to try unique military disciplinary offenses and other minor offenses. The provision in Article 19 for special court-martial cases to be tried without a judge is not a part of contemporary practice. Under established practice in all services, virtually all special courts-martial are conducted with a military judge, and defense counsel qualified under Article 27(b).

5. Relationship to Federal Civilian Practice

The Supreme Court has held that the Sixth Amendment right to a jury does not apply to trials of petty offense crimes (i.e., those punishable by not more than six months confinement).[8] State courts generally do not provide jury trials when adjudicating petty offenses, and federal courts do not provide jury trials for petty offenses.[9] In federal civilian courts, magistrate judges typically preside over the initial appearance, arraignment and trial of all petty offenses.[10] The parties may appeal a ruling of a magistrate judge to a district court judge within fourteen days of its entry.[11]

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[4] *Id.*

[5] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335-36 (allowing an exception to the requirement for a military judge because of physical conditions or military exigencies, if the convening authority makes a detailed written statement, appended to the record, of the reasons a military judge could not be detailed).

[6] NDAA FY 2000, Pub. L. No. 106-65, § 577(a)(1) and (a)(2), 113 Stat. 512 (1999).

[7] NDAA FY 2014, Pub. L. No. 113-66, § 1705, 127 Stat. 672 (2013).

[8] Baldwin v. New York, 399 U.S. 66, 73 (1970) (noting that any disadvantage to an accused facing up to six months imprisonment "may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications").

[9] FED. R. CRIM. P. 58(b)(2)(F).

[10] FED. R. CRIM. P. 58(b)(2) and 58(b)(3).

[11] FED. R. CRIM. P. 58(g)(2)(A) and 58(g)(2)(B).

6. Recommendation and Justification

Recommendation 19.1: Amend Article 19 to conform to the proposal in Article 16 to allow special courts-martial to be referred judge-alone, with authority for a military judge to designate a military magistrate to preside over these cases as well.

- This proposal would conform the requirements and jurisdictional limits of special courts-martial to include the specific option for charges to be referred to a special court-martial consisting of a military judge-alone, as proposed in Article 16, subject to the additional limitation on sentence. A military magistrate would be authorized to preside over the special court-martial referred judge-alone, if designated by the military judge, with the consent of the parties.
- As with other special courts-martial, appellate review would be available for this forum under the proposed amendments to Articles 66 and 69.

Recommendation 19.2: Amend Article 19 to conform to current practice requiring a military judge, qualified defense counsel, and a record at every special court-martial.

- This proposal would clarify the requirement for every special court-martial to have a military judge, qualified defense counsel, and a complete record, consistent with current practice and the statutory requirements in Article 27 and Article 54.

7. Relationship to Objectives and Related Provisions

- This proposal reflects federal civilian practice in allowing a magistrate to preside over cases that adjudicate petty offense level charges.

8. Legislative Proposal

SEC. 403. JURISDICTION OF SPECIAL COURTS-MARTIAL.

Section 819 of title 10, United States Code (article 19 of the Uniform Code of Military Justice), is amended—

(1) by striking "Subject to" in the first sentence and inserting the following:

"(a) IN GENERAL.—Subject to";

(2) by striking "A bad-conduct discharge" and all that follows through the end; and

(3) by adding after subsection (a), as designated by paragraph (1), the following new subsections:

"(b) ADDITIONAL LIMITATION.—Neither a bad-conduct discharge, nor confinement for more than six months, nor forfeiture of pay for more than six months may be adjudged if charges and specifications are referred to a special court-martial consisting of a military judge alone under section 816(c)(2)(A) of this title (article 16(c)(2)(A)).

"(c) MILITARY MAGISTRATE.—If charges and specifications are referred to a special court-martial consisting of a military judge alone under section 816(c)(2)(A) of this title (article 16(c)(2)(A)), the military judge, with the consent of the parties, may designate a military magistrate to preside over the special court-martial.".

9. Sectional Analysis

Section 403 would amend Article 19 to align the statute with proposed changes in Article 16 regarding the composition of special courts-martial. *See* Section 401, *supra.*

Article 20 – Jurisdiction of Summary Courts-Martial

10 U.S.C. § 820

1. Summary of Proposal

This proposal would amend Article 20 to incorporate Supreme Court case law identifying the summary court-martial as a non-criminal forum. Part II of the Report will consider whether any changes are needed in the rules implementing Article 20.

2. Summary of the Current Statute

Article 20 provides the jurisdictional limits of summary courts-martial, including who may be tried by summary courts-martial and the maximum punishments that may be adjudged by summary courts-martial. Under the statute, summary courts-martial have jurisdiction to try all persons subject to the Code except officers, cadets, aviation cadets, and midshipmen. They may not try persons for capital offenses, and they may not adjudge punishments of death, dismissal, dishonorable or bad-conduct discharge, confinement in excess of 30 days, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay. Article 20 further provides that no person may be tried by summary court-martial over his or her objection. Any refusal to submit to trial by summary court-martial permits a convening authority to bring the charges to a special or general court-martial at the convening authority's discretion. The UCMJ does not provide a right to counsel at summary courts-martial.[1]

3. Historical Background

Military commanders have long exercised the authority to summarily punish servicemembers under their command for minor disciplinary infractions. During the Civil War, Congress created "Field Officer Courts," consisting of one field grade officer who summarily adjudicated charges against enlisted troops for non-capital offenses.[2] The maximum punishment authorized at these courts was a fine of one month's pay and one month's confinement or hard labor.[3] In 1890, Congress created a peacetime "summary court," providing military members the right to refuse trial by the summary court and

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[1] *See* Article 27(a)(1); R.C.M. 1301(e) ("The accused at a summary court-martial does not have the right to counsel.").

[2] Act of July 17, 1862, ch. CCI, § 7, 12 Stat. 598; *see* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 490-92 (photo reprint 1920) (2d ed. 1896).

[3] Act of April 10, 1806, ch. XX, art. 67, 2 Stat. 367 (providing the punishment limitations for garrison or regimental courts-martial, which also applied to "Field Officer Courts").

demand trial by court-martial.[4] The statutory authority for this court endured through various iterations of the Articles of War until it, in turn, formed the basis of Article 20 when the UCMJ was enacted in 1950.[5] Under the UCMJ, the purpose of the summary court-martial, which "occupies a position between informal non-judicial disposition under Article 15 and the courtroom-type procedure of the general and special courts-martial . . . 'is to exercise justice promptly for relatively minor offenses under a simple form of procedure.'"[6] In 1976, in *Middendorf v. Henry*, the Supreme Court considered a Sixth Amendment challenge to the summary court-martial based on the lack of right to counsel.[7] The Court denied the challenge, holding that "a summary court-martial is not a 'criminal prosecution' for purposes of the Sixth Amendment."[8]

4. Contemporary Practice

Summary courts-martial typically are convened to provide for prompt disposition of minor offenses. Cases may be referred directly to a summary court-martial for disposition. Summary courts-martial also may be convened pursuant to a pretrial agreement, where the accused agrees to plead guilty at summary court-martial in exchange for the inherent protections offered by this low-level forum (limited confinement; limited reduction; limited forfeitures). In addition, a convening authority may consider referral to a summary court-martial among the options for disposition when an accused has exercised the right under Article 15 to request trial by court-martial in lieu of a non-judicial punishment proceeding. The President has implemented the rules and procedures for summary courts-martial primarily in Chapter XIII of the Rules for Courts-Martial, with additional guidance provided through service regulations.

5. Relationship to Federal Civilian Practice

There is no direct civilian equivalent to the summary court-martial; however, "pretrial diversion" programs are available in the federal system, substituting community supervision or the performance of other services in lieu of criminal prosecution in order to save judicial resources for major cases.[9] Although not directly analogous, there are some

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[4] Act of Oct. 1, 1890, ch. 1259, 26 Stat. 648; *see also* MCM 1898, 65-69.

[5] AW 104 of 1916; AW 14 of 1948; *see* H.R. REP. NO. 81-491 at 17 (1949).

[6] Middendorf v. Henry, 425 U.S. 25, 32 (1976) (citing MCM 1969, ¶79*a*.).

[7] *Id.*

[8] *Id.* at 42. In arriving at its conclusion, the Court explained that the legitimacy of the summary court-martial rested upon the important distinction between civilian and military society, noting that "the court-martial proceeding takes place not in civilian society, as does the parole revocation proceeding, but in the military community with all of its distinctive qualities." *Id.* at 37.

[9] *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-22.000 (describing pretrial diversion, generally); § 9-2.022 (identifying pretrial diversion as an alternative to federal prosecution); § 9-27.250 (discussing factors for recommending non-criminal disposition of federal offenses) (2009). The use of such programs varies widely from district to district.

similarities in function between these diversion programs and the summary court-martial forum.

6. Recommendation and Justification

Recommendation 20: Amend Article 20 by adding a new subsection expressly defining the summary court-martial as "a non-criminal forum" and clarifying that "[a] finding of guilty at a summary court-martial does not constitute a criminal conviction."

- Like a non-judicial punishment proceeding under Article 15, a summary court-martial under Article 20 provides commanders with an option for disposition of minor offenses in a non-criminal forum where the findings do not constitute a criminal conviction. Unlike an Article 15 proceeding, however, the designation of a proceeding under Article 20 as a "court-martial" may lead government and private sector entities to treat the results of a summary court-martial as a criminal conviction. To clarify the status of a summary court-martial, the amendment would expressly set forth the non-criminal nature of this forum.

- In Part II of the Report, further consideration will be given to the development of guidance concerning to the rules and procedures used in summary courts-martial, as well as appropriate use of, and consequences flowing from, the results of summary courts-martial adjudications.

7. Relationship to Objectives and Related Provisions

- The proposal supports MJRG Operational Guidance by adding clarifying language to Article 20 to ensure the records of summary court-martial convictions are not categorized by agencies or organizations, both inside and outside of the Department of Defense, as constituting a criminal conviction from a "judicial" proceeding.

8. Legislative Proposal

SEC. 404. SUMMARY COURT-MARTIAL AS NON-CRIMINAL FORUM.

Section 820 of title 10, United States Code (article 20 of the Uniform Code of Military Justice), is amended—

(1) by inserting "(a) IN GENERAL.—" before "Subject to"; and

(2) by adding at the end the following new subsection:

"(b) NON-CRIMINAL FORUM.—A summary court-martial is a non-criminal forum. A finding of guilty at a summary court-martial does not constitute a criminal conviction.".

9. Sectional Analysis

Section 404 would amend Article 20 to clarify the status of the summary court-martial as a non-criminal forum. In *Middendorf v. Henry*, 425 U.S. 25 (1976), the Supreme Court held that a summary court-martial does not constitute a criminal prosecution. Although a summary court-martial appropriately may result in administrative and personal consequences, it does not have the collateral consequences of a criminal conviction because it does not reflect a determination made by a judicial, criminal forum. The proposed amendment would clarify that, because of its non-judicial nature, a summary court-martial is not a "criminal prosecution," within the traditional due process understanding of a criminal prosecution (i.e., presided over by a judicial officer, and where the accused has a right to counsel) and that a finding of guilty at a summary court-martial does not constitute a "criminal conviction."

Article 21 – Jurisdiction of Courts-Martial Not Exclusive

10 U.S.C. § 821

1. Summary of Proposal

This Report recommends no change to Article 21. Part II of the Report will consider whether any changes are needed in the rules implementing Article 21.

2. Summary of the Current Statute

Article 21 provides that the provisions of the UCMJ that confer jurisdiction upon a court-martial do not deprive other military tribunals of concurrent jurisdiction over the offense or the offender. The statute expressly does not apply to military commissions established under chapter 47A of title 10, United States Code.

3. Historical Background

Article 21 was based on Article 15 of the Articles of War and reflected the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), upholding the President's authority to convene military commissions.[1] The legislative history of Article 21 indicates congressional intent to preserve double jeopardy protections by providing for concurrent jurisdiction between the UCMJ and other military tribunals or commissions, without permitting the government to try an individual in both forums.[2] In 2006, as part of the Military Commissions Act, Congress added a sentence to Article 21 stating the provisions of the statute do not apply to the military commissions provided for under that Act.[3]

4. Contemporary Practice

The President has implemented Article 21 through R.C.M. 201(g), which essentially repeats the statutory provisions.

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 976 (1949).

[3] Pub. L. No. 109-366, § 4, 120 Stat 2600 (2006).

5. Relationship to Federal Civilian Practice

Article 21 is unique to the UCMJ and does not have a federal statutory counterpart. The concept of concurrent jurisdiction, however, is well-established with respect to the concurrent jurisdiction of military, federal civilian, and state courts over many matters.[4]

6. Recommendation and Justification

Recommendation 21: No change to Article 21.

- This report recommends no change to Article 21. The current statutory provision fully addresses the article's intended purpose. The procedures implementing this provision support the statute's intent and function.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 21.

7. Relationship to Objectives and Related Provisions

- This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

[4] *See* 57 CORPUS JURIS SECUNDUM MILITARY JUSTICE § 19 (2015) (Where an offense amounts to a violation of state or federal nonmilitary penal law as well as a violation of the UCMJ, the jurisdiction of courts-martial is concurrent with the jurisdiction of the civil courts); *see also* 53 AMERICAN JURISPRUDENCE 2nd Military and Civil Defense § 239 (2015) (The statutory grant of authority to courts-martial to try specified offenses against the civil law of a state does not operate to deprive the civilian courts of their normal jurisdiction over prosecutions for those offenses).

Subchapter V. Composition of Court-Martial

Article 22 – Who May Convene General Courts-Martial
10 U.S.C. § 822

1. Summary of Proposal

This proposal would make a technical amendment to Article 22 to reflect the current terminology for the title of an officer commanding a naval fleet, with no substantive changes to the statute. Part II of the Report will consider whether any additional changes are needed in the rules implementing Article 22.

2. Summary of the Current Statute

Article 22 provides that the authority to convene general courts-martial may be exercised by the President, designated senior civilian officials and commanding officers, and commanding officers empowered to do so by the President. The statute also addresses the process for consideration of a case when a commanding officer empowered to convene courts-martial is the accuser, and the general power of superior commanding officers to exercise court-martial convening authority.

3. Historical Background

Article 22 was derived from Article 8 of the Articles of War and Article 38 of the Articles for the Government of the Navy.[1] In 1986, Congress amended Article 22 to add the Secretary of Defense and combatant commanders to the list of general court-martial convening authorities;[2] and in 2006, Congress removed the reference to a commanding officer of a "Territorial Department."[3]

4. Contemporary Practice

The President has implemented Article 22 through R.C.M. 504. The statute and the rule reflect current practice.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1131-32 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 4-6 (1951).

[2] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, § 211(b), 100 Stat. 1017.

[3] NDAA FY 2006, Pub. L. No. 109-163, § 1057(a)(2), 119 Stat. 3136.

5. Relationship to Federal Civilian Practice

Federal civilian courts are standing courts with no direct analogy to courts-martial, each of which is a temporary tribunal convened to consider a specific case.[4]

6. Recommendation and Justification

Recommendation 22: Amend Article 22(a)(6) by removing the words "in chief."

- This is a minor technical change to reflect the current terminology for the commander of a naval fleet. No other statutory changes are needed.
- Part II of the Report will consider whether any additional changes are needed in the rules implementing Article 22.

7. Relationship to Objectives and Related Provisions

- This is a minor technical change and is not related to any other provisions of the Code.

8. Legislative Proposal

SEC. 501. TECHNICAL AMENDMENT RELATING TO PERSONS AUTHORIZED TO CONVENE GENERAL COURTS-MARTIAL.

Section 822(a)(6) of title 10, United States Code (article 22(a)(6) of the Uniform Code of Military Justice), is amended by striking "in chief".

9. Sectional Analysis

Section 501 would make a technical amendment to Article 22 to reflect the current terminology for the title of an officer commanding a naval fleet, with no substantive changes.

[4] *See* McClaughry v. Deming, 186 U.S. 49, 63 (1902) ("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved.").

Article 23 – Who May Convene Special Courts-Martial
10 U.S.C. § 823

1. Summary of Proposal

This Report recommends no change to Article 23. Part II of the Report will consider whether any changes are needed in the rules implementing Article 23.

2. Summary of the Current Statute

Article 23 identifies the officials who may convene special courts-martial: all general court-martial convening authorities; commanding officers of various commands and military installations; and commanding officers or officers-in-charge of any other command when empowered by the Secretary concerned. The article also provides that if any such official is an accuser, the court must be convened by superior competent authority.

3. Historical Background

Article 23 was derived from Article 9 of the 1920 Articles of War and Article 26 of the 1930 Articles for the Government of the Navy.[1] It has changed little since the UCMJ was enacted in 1950.[2]

4. Contemporary Practice

The President has implemented Article 23 through R.C.M. 504, which provides additional clarification concerning the definition of "separate and detached" commands and units, and specifies procedures for determining whether particular commands are separate and detached. The statute and the rule reflect current practice.

5. Relationship to Federal Civilian Practice

Because federal civilian courts are courts of standing jurisdiction, there is no civilian equivalent of court-martial "convening authority" as exercised by military commanders and other designated officials under Articles 22, 23, and 24.[3]

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1137 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 6-7 (1951).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] *See* McClaughry v. Deming, 186 U.S. 49, 63 (1902) ("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved.").

6. Recommendation and Justification

Recommendation 23: No change to Article 23.

- In view of the well-developed case law addressing Article 23's provisions, a statutory change is not necessary.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 23.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique aspect of military law that is essential to command authority and the administration of military justice under the Code.

Article 24 – Who May Convene Summary Courts-Martial
10 U.S.C. § 824

1. Summary of Proposal

This Report recommends no change to Article 24. Part II of the Report will consider whether changes are needed in the rules implementing Article 24.

2. Summary of the Current Statute

Article 24 identifies the officials who may convene summary courts-martial: all general and special court-martial convening authorities; commanding officers of detached companies or other Army detachments; commanding officers of detached squadrons or other Air Force detachments; and commanding officers or officers in charge of any other command when empowered by the Secretary concerned. The statute also provides that when only one commissioned officer is present with a command or detachment, that officer shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him.

3. Historical Background

Article 24 was derived from Article 10 of the Articles of War and Article 64 of the Articles for the Government of the Navy.[1] The statute has remained unchanged since the UCMJ was enacted in 1950.[2]

4. Contemporary Practice

The President has implemented Article 24 through R.C.M. 504(d)(2) and R.C.M. 1302, the latter of which provides discretion to the convening authorities to determine whether to forward charges to a superior authority when the summary court-martial or the convening authority is the accuser. R.C.M. 504(b)(2)(A) provides clarification concerning the definition of "separate and detached" commands and units and procedures for determining whether particular commands are separate and detached. The specific rules and procedures for summary courts-martial are laid out in Chapter XIII of the Rules for Courts-Martial. The statute and the rules implementing the statute reflect current practice.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1137-38 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 7 (1951).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

5. Relationship to Federal Civilian Practice

Because federal civilian courts are courts of standing jurisdiction, there is no civilian equivalent of court-martial "convening authority" as exercised by military commanders and other designated officials under Articles 22, 23, and 24.[3]

6. Recommendation and Justification

Recommendation 24: No change to Article 24.

- Consistent with this Report's recommendations to retain the basic authority and purpose of summary court-martial, and in view of the well-developed case law addressing Article 24's provisions, a statutory change is not necessary.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 24.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique feature of the military justice system that allows for efficient disposition of relatively minor offenses in an administrative, non-criminal forum.

[3] *See* McClaughry v. Deming, 186 U.S. 49, 63 (1902) ("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved.").

Article 25 – Who May Serve on Courts-Martial
10 U.S.C. § 825

1. Summary of Proposal

This proposal would amend Article 25 to expand the opportunity for service on a court-martial by enlisted personnel. Under the proposal, the convening authority would have the option of detailing enlisted personnel to a court-martial in the initial convening order. The accused would then have the opportunity to request a different panel composition, reflecting the two alternatives under current law. The accused could request either a panel composed entirely of officers or a panel composed of at least one-third enlisted personnel. The proposal would retain the current prohibition against detailing panel members who are junior in rank and grade to the accused, but would remove the statutory prohibition against detailing enlisted panel members (but not officers) who are from the same unit as the accused. The proposal would instead rely on the well-developed procedures for voir dire and challenges to address any concerns about bias or conflicts—the same process that is used to address any issues involving officers from the same unit as the accused.

2. Summary of the Current Statute

Article 25 defines the eligibility requirements for members serving on courts-martial panels. Currently, the convening authority selects and details members using the following criteria listed in Article 25(d)(2): age, education, training, experience, length of service, and judicial temperament. The convening authority may select any active duty commissioned officer or warrant officer for service on a general or special court-martial panel.[1] The convening authority may also detail enlisted members, but only if requested by an enlisted accused. If such a request is made, Article 25(c)(1) provides that enlisted membership must comprise at least one-third of the total membership of the panel, unless eligible enlisted members cannot be obtained due to physical conditions or military exigencies.[2] When it can be avoided, an accused may not be tried by a member junior in rank or grade;[3] and in all cases, enlisted members may never be detailed from the accused's same unit[4]

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[1] Warrant officers and enlisted members are only eligible to serve as panel members on general and special courts-martial, whereas commissioned officers are eligible to serve on all courts-martial, including as a summary court-martial officer. Article 25(a)-(b).

[2] If enlisted members cannot be obtained following a request by the accused for enlisted membership on the panel, Article 25(c)(1) requires the convening authority to make a detailed written statement, to be appended to the record of trial, stating why they could not be obtained.

[3] Prohibitions against members being tried at courts-martial by persons of inferior rank have been in effect since 1775. *See generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENCE 951-983 (2000 reprint) (2d ed. 1920).

unless the prohibition is waived by the accused.[5] Article 25(e) permits the convening authority to excuse members before the court-martial is assembled—delegable to the staff judge advocate, legal officer, or another principal assistant pursuant to service regulations. After the court-martial is assembled, however, Article 29 provides that members may be added to or removed from the panel only with the approval of the military judge.

3. Historical Background

The right to trial by jury in criminal cases has not been extended to courts-martial.[6] Beginning in the Revolutionary era, the Articles of War and Articles for the Government of the Navy provided for the appointment of officers to serve on courts-martial, but otherwise did not provide statutory criteria for their selection by court-martial convening authorities. In the aftermath of controversies about court-martial practices during World War I,[7] Congress first set forth basic criteria for service on courts-martial in the 1920 Articles of War.[8] When Congress enacted the UCMJ in 1950, it incorporated these selection criteria into Article 25.[9] With respect to enlisted representation on courts-martial, Congress did not authorize enlisted representation in statute until 1948, as part of the Elston Act amendments.[10] This authorization was incorporated into Article 25 as enacted in 1950. From 1950 to 1986, Article 25 required all requests for enlisted members to be in writing. In 1986, Congress amended the statute to allow for oral requests by the accused.[11]

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[4] Article 25(c)(2) currently defines a unit as being: "[A]ny regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them."

[5] *See* United States v. Kimball, 13 M.J. 659, 660 (N.M.C.M.R. 1982) (holding that "where the accused and his defense counsel purported at trial to waive any objection to the enlisted members on the grounds that they were from the same unit as the accused, he will not be permitted to challenge the composition of the court in this regard on appeal.").

[6] *Ex parte* Quirin, 317 U.S. 1 (1942); *Ex parte* Milligan, 71 U.S. 2 (1866); United States v. Guilford, 8 M.J. 598, 601 (1979); *see also* Sanford v. United States, 586 F.3d 28 (D.C. Cir. 2009); Mendrano v. Smith, 797 F.2d 1538 (10th Cir. 1986).

[7] *See* Edward F. Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3, 21 (1970); Gary C. Smallridge, *The Military Jury Selection Reform Movement*, A. F. L. REV. 343, 347-349 (1978). *See generally* United States v. White, 25 C.M.R 357 (1972).

[8] AW 4 of 1920 ("When appointing courts-martial, the appointing authority shall detail as members thereof, those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament. . . ."); *see* WINTHROP, *supra* note 3, at 951-997.

[9] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1138-52 (1949).

[10] AW 16 of 1948. The Ansell-Crowder debates, which preceded the passage of the 1920 Articles of War, first raised the possibility of having enlisted members serve on military panels.

[11] Military Justice Act of 1983, Pub. L. No. 98-209, § 803(a), 97 Stat. 1393.

4. Contemporary Practice

A court-martial is a temporary body, created by a convening order to hear a specific case. Each convening order sets forth the names of the individual members detailed to serve on the specific court-martial. The members are selected by the convening authority, frequently from lists of nominees prepared by the convening authority's staff judge advocate with input from the nominees' superiors. Most services prepare lists of members designated for service over a period of time; in one service, a new list of members is prepared for each case.[12] An allegation of improper manipulation of the member selection process may be reviewed as an issue of unlawful command influence.[13]

The President has implemented Article 25 through R.C.M. 502 (Qualifications and duties of personnel of courts-martial), R.C.M. 503 (Detailing members, military judge, and counsel), R.C.M. 505 (Changes of members, military judge, and counsel), and R.C.M. 903 (Accused's elections on composition of court-martial). R.C.M. 903(a)(1) specifically provides that the military judge shall ascertain, on the record and before the end of the initial Article 39(a) session, whether the accused wishes to exercise his right to elect enlisted membership on the panel. The convening authority's excusal power under Article 25(e) and R.C.M. 505(c) is typically exercised when the member has an approved reason for being absent from court duty.

5. Relationship to Federal Civilian Practice

Under the Sixth Amendment and 28 U.S.C §§ 1861-1869, federal jurors are randomly selected, and the jury venire is required to represent a fair cross-section of the local community in the district or division where the court convenes. Each federal district court is required to devise and implement a written plan for random selection of jurors that does not exclude potential jurors on the basis of race, color, religion, sex, national origin, or economic status. The practices for selecting and impaneling juries vary widely among the federal districts, as the specific processes are managed by judges, administrative staff, and local district rules.[14] The military justice system must be able to operate in deployed and

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[12] In the Army, Navy, Marine Corps, and Coast Guard, the common practice is for an annual standing convening order, with amendments made for specific courts-martial. Commanders update these standing orders annually or upon assuming command. *See* ARMY REG. 27-10; JAGINST 5800.7F; MARINE CORPS ORDER 5800.16A; COMMANDANT INSTR. M5810.1E. In the Air Force, commanders publish new convening orders for each new case referred for trial. *See* AIR FORCE INSTR. 51-201.

[13] *See, e.g.*, United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001) (reversing for improper denial of challenge for cause of senior panel member who was in the chain of command of five other persons on the venire); United States v. Drain, 17 C.M.R. 44 (C.M.A. 1954) (reversing for improper denial of challenge for cause of senior panel member in part because he wrote the efficiency reports of all other court members); United States v. Mitchell, 19 M.J. 905 (A.C.M.R. 1985) (remanding a case where evidence was raised that the commander made remarks capable of influencing court members to disregard favorable character testimony by a convicted solider who was a sentencing witness for the accused).

[14] *See* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, AND ORIN KERR, CRIMINAL PROCEDURE § 22.2(a) (3d ed. 2013) (describing the minimum requirements applicable to all random selection plans issued by federal district courts, and highlighting areas of difference).

operational environments in which large numbers of potential court-members are engaged in vital national security activities. As a consequence, it has not been considered practicable to adopt the civilian random selection model for use in courts-martial on a system-wide basis.[15] Although court-martial panel members are not considered to be jurors under the Sixth amendment,[16] a well-developed body of case law addresses the need for assembled court members to be objective and impartial.[17] In addition, members are subject to challenge and disqualification under criteria similar to—and in some cases more stringent than—the criteria applicable to removal of jurors from civilian panels.

6. Recommendation and Justification

Recommendation 25.1: Amend Article 25 to permit convening authorities to detail enlisted personnel to court-martial panels, subject to the accused's ability to specifically elect an all-officer panel under the same rules and procedures with which an accused may elect one-third enlisted panel membership.

- This proposal would benefit the court-martial panel member selection process by allowing commanders to detail highly qualified enlisted members with greater frequency and in greater numbers. This expanded opportunity for enlisted personnel to serve on panels would enable the court-martial process to benefit from the experience, education, training, and judgment of the high quality personnel who serve in the armed forces.

- The proposed change would increase the efficiency of the military justice system, by providing commanders with a broader pool of potential members to be detailed to courts-martial. Such a broader pool would be particularly important in situations involving small units, or remote or deployed locations.

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[15] Attempts at random panel selection efforts have been made—most notably in experiments occurring at Fort Riley in 1974 and, later, at V Corps in 2005. Both experiments sought to apply random-selection procedures, but produced unforeseen difficulties in meeting the criteria under Article 25(d)(2). *See* James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117, 128-130 (2010). In 1999, Congress directed the Joint Service Committee on Military Justice to study random selection of court-martial members. *See generally* JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURT-MARTIAL (1999). In its study, the Committee examined different methods of panel selection employed by the services, analyzed past random court-martial selection experiments, and analyzed Canadian and United Kingdom member-selection systems. *Id.* at 3. The Committee concluded that random selection is incompatible with Article 25(d)(2), and found that the standard selection method best applies Article 25(d)(2)'s best qualified mandate. *Id.* at 3, 22.

[16] *See* O'Callahan v. Parker, 395 U.S. 258 (1969); *Ex parte* Quirin, 317 U.S. 1 (1942). *See generally* Andrew S. Williams, *Safeguarding the Commander's Authority to Review the Findings of a Court-Martial*, 28 BYU J. PUB. L. 471, 485-500 (2014).

[17] *See, e.g.*, United States v. McQueen, 7 M.J. 281, 281 (C.M.A. 1979) ("The proper test to evaluate the propriety of the judge's denial of a challenge for cause 'is whether he (the prospective court member) is mentally free to render an impartial finding and sentence based on the law and the evidence.'") (quoting United States v. Parker, 19 C.M.R. 400, 410-411 (1955)).

- This recommendation reflects the reality that enlisted members are capable fact-finders, having received extensive technical training during the course of their careers, with many having additional education beyond high school. The ability of a convening authority to draw upon this resource in accordance with the criteria of Article 25 would enhance his or her ability to appoint a "blue ribbon" panel, when compared to a civilian jury randomly drawn from the community at large.[18]

- The proposed amendments would specifically retain the accused's ability to elect one-third enlisted panel membership, and would continue the right to elect an all-officer panel. This would ensure that any additional flexibility provided to convening authorities does not diminish an accused's alternatives under current law—to be trial by a panel composed of either officers, or to be tried by a mixed panel of officers and enlisted members.

Recommendation 25.2: Amend Article 25 by removing the statutory prohibition against detailing enlisted members to courts-martial who are from the same unit as an enlisted accused.

- This proposal would retain the statutory limitation against detailing panel members junior in rank and grade to the accused; however, it would eliminate the blanket prohibition against detailing enlisted members who are of the same unit as an enlisted accused. The current law contains no such limitation on the detailing of officers from the same unit as the accused. As such, current law provides an unnecessary distinction between enlisted members and officers. The proposal would eliminate this outmoded distinction, and rely instead on the well-developed procedures for voir dire and challenges to address any concerns about bias or conflicts—the same process that is used to address any issues involving officers from the same unit as the accused.

Recommendation 25.3: Amend Article 25(d) to conform to the proposed amendments under Article 29 concerning impaneling of members.

- This proposal would conform Article 25 to the proposed amendments in Article 29 requiring the detail of not less than 12 members in a capital case, 8 members in a non-capital general court-martial, and 4 members in a special court-martial.

7. Relationship to Objectives and Related Provisions

- This proposal supports MJRG Operational Guidance by enhancing efficiency during the panel selection phase of the court-martial process, which maintaining a unique and necessary feature of military justice practice.

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[18] *See* Valerie P. Hans, *Judges, Juries, and Scientific Evidence*, 16 J.L. & POL'Y 19, 44 (2007) ("Looking separately at college educated jurors and analyzing their scientific backgrounds and responses to true-false items, this study found that the college educated jurors possessed some fact finding advantages over their juror peers with less education, and even in some instances over judges. The significance of such educational factors leads one to consider the possible advantages of employing blue ribbon juries in extremely complex trials.").

- This proposal is related to the changes proposed in Articles 16, 25a, 29, 41, and 53.

8. Legislative Proposal

SEC. 502. WHO MAY SERVE ON COURTS-MARTIAL; DETAIL OF MEMBERS.

(a) WHO MAY SERVE ON COURTS-MARTIAL.—Subsection (c) of section 825 of title 10, United States Code (article 25 of the Uniform Code of Military Justice), is amended to read as follows:

"(c)(1) Any enlisted member on active duty is eligible to serve on a general or special court-martial for the trial of any other enlisted member.

"(2) Before a court-martial with a military judge and members is assembled for trial, an enlisted member who is an accused may personally request, orally on the record or in writing, that—

"(A) the membership of the court-martial be comprised entirely of officers; or

"(B) enlisted members comprise at least one-third of the membership of the court-martial, regardless of whether enlisted members have been detailed to the court-martial.

"(3) Except as provided in paragraph (4), after such a request, the accused may not be tried by a general or special court-martial if the membership of the court-martial is inconsistent with the request.

"(4) If, because of physical conditions or military exigencies, a sufficient number of eligible officers or enlisted members, as the case may be, are not available to carry out paragraph (2), the trial may nevertheless be held. In that event, the convening authority shall make a detailed written statement of the reasons for nonavailability. The statement shall be appended to the record.".

(b) DETAIL OF MEMBERS.—Subsection (d) of such section (article) is amended by adding at the end the following new paragraph:

"(3) The convening authority shall detail not less than the number of members necessary to impanel the court-martial under section 829 of this title (article 29).".

9. Sectional Analysis

Section 502 concerns the eligibility requirements for service on court-martial panels. The proposed amendments to Article 25 would expand the opportunity for service on a court-martial panel by permitting the detail of enlisted personnel as panel members without requiring a specific request from the accused. As amended, Article 25 would contain the following provisions:

Article 25(c)(1) and (d)(1) would retain the statutory prohibition against detailing panel members junior in rank and grade to the accused, but the statutory prohibition against detailing enlisted panel members who are of the same unit as an enlisted accused would be eliminated. There is no such limitation on the detailing of officers from the same unit as the accused under current law. As such, current law provides an unnecessary distinction between enlisted members and officers. The amendments would eliminate this outmoded distinction, and rely instead on the well-developed procedures for voir dire and challenges to address any concerns about bias or conflicts—the same process that is used to address any issues involving officers from the same unit as the accused. This change would enhance the convening authority's ability to draw from a large pool of highly qualified members, thereby expanding the opportunity for courts-martial to reflect the input of the high caliber enlisted personnel in the modern armed forces.

Article 25(c)(2) would retain the option for the accused to request a panel with at least one-third enlisted members. In addition, it would grant the accused the option to request

an all-officer panel, which is the default panel composition under current practice. The Article 25(d)(2) member-selection criteria (age, education, training, experience, length of service, and judicial temperament) would be retained to ensure that court-martial panels continue to be composed of the most highly qualified, eligible personnel. The statute's implementing rules would include appropriate adjustments to address requests for panels that include all officers or at least one-third enlisted representation.

Article 25(d)(3) would require that the convening authority detail a sufficient number of members for impanelment under the proposed amendments to Article 29. *See* Section 506, *infra.*

Article 25a – Number of Members in Capital Cases
10 U.S.C. § 825a

1. Summary of Proposal

This proposal would conform the number of panel members in a capital case to a fixed number of twelve members, as required in federal civilian criminal trials.

2. Summary of the Current Statute

Article 25a establishes a floor of twelve members for panels in capital cases, but it does not provide a ceiling, thereby permitting the number of members in capital cases to vary from case to case. The statute provides that the convening authority may specify a number of members less than twelve but not "less than five" (the current minimum for a general court-martial) when twelve members are "not reasonably available because of physical conditions or military exigencies."

3. Historical Background

Before 1920, the Articles of War required that all general courts-martial panels be composed of five to thirteen officers, including in capital cases.[1] In 1920, Congress amended the Articles of War to provide that general courts-martial panels could consist of "any number of officers not less than five";[2] in addition, the voting requirement in capital cases was changed to require a unanimous vote in order to adjudge a death sentence.[3] When the UCMJ was enacted in 1950, Congress incorporated these requirements into the Code in Article 52.[4] Article 25a, and its requirement for a twelve-member minimum in capital cases, was added in 2001.[5]

4. Contemporary Practice

The President has implemented Article 25a through R.C.M. 501(a)(1)(B), which mirrors the statutory provisions.

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[1] *See, e.g.*, AW 5 of 1916.

[2] AW 5 of 1920.

[3] AW 43 of 1920. *See generally* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 1-15 (1998) (explaining the historical development in the size and voting requirements for capital case court-martial panels).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] NDAA FY 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1012, 1124 (2001).

5. Relationship to Federal Civilian Practice

In federal civilian capital cases, and in capital cases among the states that authorize the death penalty, a jury panel composed of at least twelve jurors is required.[6] Federal civilian capital cases require a fixed panel of twelve jurors unless the parties stipulate otherwise, or the defendant voluntarily waives his or her right to a trial by jury in writing, with government consent, and court approval.[7] Pursuant to Article 18, the right to waive a trial by members is not permitted in a military capital case.

6. Recommendation and Justification

Recommendation 25a: Amend Article 25a to require a fixed-size panel of twelve members in capital cases.

- By requiring twelve-member panels in all cases in which the accused may be sentenced to death, this proposal would align military practice with prevailing capital litigation practice in the United States.
- In the event the case becomes non-capital as a result of developments after referral, the case would proceed in accordance with the membership requirements under Articles 16, 29, and 53. If the case becomes non-capital after twelve members have been impaneled, the case would proceed with twelve members subject to the excusal provisions in Articles 29 and 53.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference and MJRG Operational Guidance by incorporating the practices and rules used in U.S. district courts applicable to capital cases into military practice insofar as practicable.
- This proposal will impact or be impacted by related proposals in this Report pertaining to Articles 17-20, 25, 29, 41, 45, and 51-53.

8. Legislative Proposal

SEC. 503. NUMBER OF COURT-MARTIAL MEMBERS IN CAPITAL CASES.

Section 825a of title 10, United States Code (article 25a of the Uniform Code of Military Justice), is amended to read as follows:

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[6] *See, e.g.*, Williams v. Florida, 399 U.S. 78, 103 (1970).

[7] FED. R. CRIM. P. 23.

"§825a. Art. 25a. Number of court-martial members in capital cases

"(a) IN GENERAL.—In a case in which the accused may be sentenced to death, the number of members shall be 12.

"(b) CASE NO LONGER CAPITAL.—Subject to section 829 of this title (article 29)—

"(1) if a case is referred for trial as a capital case and, before the members are impaneled, the accused may no longer be sentenced to death, the number of members shall be eight; and

"(2) if a case is referred for trial as a capital case and, after the members are impaneled, the accused may no longer be sentenced to death, the number of members shall remain 12.".

9. Sectional Analysis

Section 503 would amend Article 25a to establish a standard panel size of twelve members in capital cases, consistent with the standard size for juries in federal civilian capital trials. Under current law, panels in capital courts-martial are composed of a variable number of members no fewer than twelve, which means that the number of members can vary from case to case without any guiding principle to ensure consistency. Under the statute, as amended, in the event a case becomes non-capital as a result of developments after referral but prior to impanelment, the case would proceed in accordance with the membership requirements under Articles 16 and 29. If the case becomes non-capital after twelve members have been impaneled, it would proceed with twelve members subject to the excusal provisions in Articles 29.

Article 26 – Military Judge of a General or Special Court-Martial

10 U.S.C. § 826

1. Summary of Proposal

This proposal would amend Article 26 to conform to current practice by requiring that a military judge preside over every general and special court-martial, by providing for the designation of a chief trial judge by each Judge Advocate General, and by providing statutory authority for cross-service detailing of military judges with the approval of the Judge Advocate General of the Armed Force of which the military judge is a member. Further, the proposal would amend Article 26 to provide for uniform selection criteria and regulations concerning minimum tour lengths for military judges with limited exceptions.

2. Summary of the Current Statute

Article 26 requires that a military judge be detailed to preside over every general court-martial, and provides discretionary authority for the detailing of military judges to preside over special courts-martial.[1] Article 26 further provides that a military judge must be a commissioned officer who is a member of the bar and who is certified as qualified for service as a military judge by the Judge Advocate General. In addition, Article 26 prohibits a person who is the accuser or a witness for the prosecution, or who has investigated or acted as counsel in the case, from acting as a military judge in the same case. Under Article 26(e), any consultation between the military judge and members of the court-martial must take place in the presence of the accused, trial counsel, and defense counsel. The military judge serves as the presiding official, not as a voting member of the court.

3. Historical Background

Prior to enactment of the UCMJ, a court-martial consisted of a board of officers without a presiding judge. At the time, courts-martial did not include a military judge. Under the Articles of War, the Army employed a "law member" who, in addition to participating as a member of the panel, could rule on certain legal issues.[2] The UCMJ, as enacted in 1950, required the detailing of a law officer to each general court-martial.[3] The law officer was

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[1] Article 19 currently requires that, in any special court-martial case where a military judge could not be detailed to the trial because of physical conditions or military exigencies, the convening authority shall provide a detailed written explanation stating the reason a military judge could not be detailed. In practice, no special court-martial is held without a military judge, and the accompanying proposal to amend Article 19 conforms to this practice.

[2] MCM 1928, ¶¶39-40; *see also* Henry A. Cretella & Norman B. Lynch, *The Military Judge: Military or Judge?*, 9 CAL. W. L. REV. 57, 73 (1972).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

not a member of the panel and did not deliberate or vote on findings or the sentence.[4] The law officer performed many, but not all, of the duties of a trial court-judge.[5] In special courts-martial, the president of the court-martial served as the presiding official.[6]

In the Military Justice Act of 1968, Congress transformed the law officer position into that of the military judge, with authority to preside over courts-martial under Article 26. Other changes in the 1968 legislation authorized the military judge to conduct motion and related hearings without the presence of the panel members, to preside in judge-alone non-capital cases upon request of the accused, and to perform the duties generally associated with the judicial role in criminal proceedings.[7]

4. Contemporary Practice

Under current law, Article 26 and accompanying service regulations control the duties of military judges in courts-martial as well as the detailing and rating of judges. Military judges must be detailed to every general court-martial; they may also be detailed to special courts-martial, but because the UCMJ currently provides for the possibility of a special court-martial without a military judge, it does not require detailing of a special-court-martial judge in every case. The UCMJ currently provides no authority for a military judge to act as a judge outside the context of a referred case, and Article 26 limits detailing of a judge to a referred court-martial case.

The Judge Advocates General select judge advocates for assignment as military judges using minimal statutory standards supplemented by individual service criteria. Most services have an assigned chief trial judge, established by service regulations. The chief trial judges perform various functions related to their positions, such as supervising and rating other judges, detailing other judges to cases, and coordinating judicial training. All of the services have formal or informal minimum tour lengths for military judge assignments that are not less than three years, with established exceptions for ending these tours early.

The President has implemented Article 26 through R.C.M. 503(b)(3). In 2005, this rule was updated to clarify that a military judge from any service may be detailed to a court-martial convened within another service or a combatant command or joint command, when

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[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM 1951, Part IX, ¶39. The law officer, who was required to be a lawyer, advised the court on questions of law and procedure, provided instructions to the members on findings, assisted in putting findings in proper form, and upon findings of guilt, advised as to the maximum authorized punishment for each offense.

[6] MCM 1951, Part IX, ¶40. The president of the court, generally not a lawyer, was the senior ranking member and "presiding officer of the court." The president was expected to preserve order in the courtroom, set the time and place of trial, administered oaths, and recessed or adjourned the court. In special courts-martial, the president served as the presiding official and addressed legal matters.

[7] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. The revised Article 26 and accompanying MCM provisions required general court-martial convening authorities to detail military judges to all general courts-martial, while special court-martial convening authorities had the option to detail a military judge to special courts-martial. *See* MCM 1969, ¶4*e*.

permitted by the Judge Advocate General of the armed force of the judge. This rule, as well as R.C.M. 201(e)(4), allows for cross-service detailing of military judges.

5. Relationship to Federal Civilian Practice

Federal civilian courts are standing courts with no direct analogy to courts-martial, each of which is a temporary tribunal convened to consider a specific case.[8] In the federal civilian system, judges are presidentially appointed, subject to Senate confirmation, with life tenure in the case of Article III judges,[9] or tenure for a statutory term in the case of Article I judges.[10] Federal district court judges consider issues and make judicial rulings at the request of a party or in response to requirements of the Federal Rules of Criminal Procedure any time after a defendant has made an initial appearance. A judge becomes the chief judge of a U.S. district court or U.S. circuit court of appeals based on seniority among eligible judges. The President appoints the Chief Justice of the United States, subject to confirmation by the Senate. Federal district court judges may preside over cases in other federal districts within their circuit if designated by the Chief Judge of their circuit. The Chief Justice of the United States may designate district court judges to preside outside their own circuit.[11]

6. Recommendation and Justification

Recommendation 26.1: Amend Article 26: (1) to conform the statute to the current practice of detailing a military judge to every general and special court-martial; (2) to provide for cross-service detailing of military judges; (3) to require a chief trial judge in each armed force; and (4) to provide appropriate criteria for service as a military judge.

- This proposal would conform Article 26 to current practice by requiring that a military judge preside over every general and special court-martial, and by requiring a chief trial judge in each service. It also would codify the authority for detailing military judges to a court convened by a joint commander or within another armed force.
- The proposal would establish statutory criteria for selection for service as a military judge, including education, training, experience, and judicial temperament.
- The proposal would remove "or his designee" from Article 26 in the three instances that phrase occurs to conform to current practice under the UCMJ, in which the

[8] *See* United States v. Denning, 186 U.S. 49, 63 (1902) ("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved.").

[9] U.S. CONST. art. III.

[10] *See, e.g.*, 26 U.S.C. § 7443 (providing for fifteen-year terms of appointment for U.S. Tax Court judges); 38 U.S.C. § 7253 (providing for fifteen-year appointments for judges of the Veteran's Court of Appeals).

[11] 28 U.S.C. § 292.

Judge Advocate General has designated other officials to perform duties without express statutory reference to the ability to designate.

Recommendation 26.2: Amend Article 26 to authorize the President to establish uniform regulations concerning minimum tour lengths for military judges with provisions for early reassignment as necessary.

- This proposal would provide a stable tour length for military judges, consistent with the vital importance of developing a significant level of experience within the judiciary.
- The proposed amendments support uniformity of practice among the services with respect to tour lengths for assignment of military judges, with exceptions for early reassignment.
- Part II of the Report will address changes in the rules implementing Article 26, with particular emphasis on the rules concerning minimum tour lengths for military judges. The implementing rules in Part II will reflect the Services' role and discretion in applying exceptions to the minimum tour lengths.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC terms of reference by better aligning the provisions of Article 26 with federal civilian practice and by applying provisions more uniformly across the services.
- The proposal would codify the ability of each Judge Advocate General to detail military judges to cases outside their services and to establish a unified minimum tour length for all military trial judges.

8. Legislative Proposal

SEC. 504. DETAILING, QUALIFICATIONS, ETC. OF MILITARY JUDGES.

(a) SPECIAL COURTS-MARTIAL.—Subsection (a) of section 826 of title 10, United States Code (article 26 of the Uniform Code of Military Justice), is amended—

(1) in the first sentence, by inserting after "each general" the following: "and special"; and

(2) by striking the second sentence.

(b) QUALIFICATIONS.—Subsection (b) of such section (article) is amended by striking "qualified for duty" and inserting "qualified, by reason of education, training, experience, and judicial temperament, for duty".

(c) DETAIL AND ASSIGNMENT.—Subsection (c) of such section (article) is amended to read as follows:

"(c)(1) In accordance with regulations prescribed under subsection (a), a military judge of a general or special court-martial shall be designated for detail by the Judge Advocate General of the armed force of which the military judge is a member.

"(2) Neither the convening authority nor any member of the staff of the convening authority shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to the military judge's performance of duty as a military judge.

"(3) A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial—

"(A) may perform such duties only when the officer is assigned and directly responsible to the Judge Advocate General of the armed force of which the military judge is a member; and

"(B) may perform duties of a judicial or nonjudicial nature other than those relating to the officer's primary duty as a military judge of a general court-martial when such duties are assigned to the officer by or with the approval of that Judge Advocate General.

"(4) In accordance with regulations prescribed by the President, assignments of military judges under this section (article) shall be for appropriate minimum periods, subject to such exceptions as may be authorized in the regulations.".

(d) DETAIL TO A DIFFERENT ARMED FORCE.—Such section (article) is further amended by adding at the end the following new subsection:

"(f) A military judge may be detailed under subsection (a) to a court-martial or a proceeding under section 830a of this title (article 30a) that is convened in a different armed force, when so permitted by the Judge Advocate General of the armed force of which the military judge is a member.".

(e) CHIEF TRIAL JUDGES.—Such section (article), as amended by subsection (d), is further amended by adding at the end the following new subsection:

"(g) In accordance with regulations prescribed by the President, each Judge Advocate General shall designate a chief trial judge from among the members of the applicable trial judiciary.".

9. Sectional Analysis

Section 504 contains amendments to Article 26 pertaining to the detailing and qualifications of military judges, as follows:

Section 504(a) would amend Article 26(a) to conform to the proposed amendments to Article 16 and to reflect current practice in which a military judge is detailed to every general and special court-martial.

Section 504(b) would amend Article 26(b) to provide that the Judge Advocates General certify officers to be military judges who are most qualified to serve by virtue of meeting statutory criteria and through an evaluation of their individual education, training, experience, and judicial temperament.

Section 504(c) would amend Article 26(c) to provide for Manual provisions concerning minimum tour lengths for military judges. Implementing rules would enable the Services to apply appropriate exceptions to the minimum tour lengths.

Section 504(d) would add a new subsection (f) to Article 26 to expressly authorize cross-service detailing of military judges. Although such detailing has been addressed in the Rules for Courts-Martial, these amendments would provide clear statutory authority for this practice.

Section 504(e) would further amend Article 26 by adding a new subsection (g) to codify the position of chief trial judge. Under implementing regulations, the chief judge could detail subordinate military judges to particular cases, and carry out additional duties as directed by the Judge Advocates General or as identified in the UCMJ, MCM, and service regulations.

The proposed amendments to Article 26 also would remove the phrase "or his designee" from Article 26 in the three instances where it occurs. This change would conform the statute to current practice under the UCMJ, in which the Judge Advocate General has designated other officials to perform duties without express statutory reference to the ability to designate.

Article 26a (New Provision) – Military Magistrates
10 U.S.C. § 826a

1. Summary of Proposal

This proposal would create a new section, Article 26a, providing the minimum qualifications for military magistrates and providing that military magistrates may be assigned under service regulations to perform duties other than those described under Articles 19 and 30a.

2. Summary of the Current Statute

This proposal would create a new article of the UCMJ.

3. Historical Background

The Military Justice Act of 1968 established the position of military judge at courts-martial, created independent trial judiciaries within the services, and granted an accused the right to elect a trial by military judge alone, without members.[1] Since 1968, the law and the practice in the military justice system have shifted primary responsibility to military trial judges to preside over all aspects of court-martial procedure.[2]

4. Contemporary Practice

There is no current statutory provision specifically authorizing or describing military magistrates. However, under the executive authority governing military search authorizations, the President has provided military judges and non-statutory magistrates the power to issue search authorizations.[3]

5. Relationship to Federal Civilian Practice

The Federal Magistrates Act of 1968 established the magistrate judge system for the federal civilian courts.[4] A federal magistrate judge's jurisdiction and powers are set forth

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[1] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[2] *See generally* Fansu Ku, *From the Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49 (2009).

[3] M.R.E. 315(d)(2) ("Authorization to search pursuant to this rule may be granted by . . . [a] military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned.").

[4] Pub. L. No. 90-578, Oct. 17, 1968, 82 Stat. 1107. The 1968 Act was preceded by a system of appointed "discreet persons learned in the law" who were authorized by Congress in 1793 to be available to set bail for defendants in federal criminal cases.

by statute.[5] The local rules in each district outline the specific duties magistrate judges are assigned, and they may act on authority expressly granted by federal district court judges or by consent of the parties.[6]

A magistrate judge's duties vary considerably depending on local rules. In criminal cases, magistrate judges have full authority to preside over trials involving petty offenses and in Class A misdemeanor cases by consent of the parties. Magistrate judges assist in felony preliminary proceedings (search and arrest warrants, summonses, initial appearances, preliminary examinations, arraignments, and detention hearings) and in felony pretrial matters (pretrial motions, evidentiary hearings, probation/supervised release hearings, and guilty plea proceedings). When a federal criminal defendant is placed in pretrial confinement, the defendant has the right to a detention hearing during his initial appearance before a magistrate judge.[7] This hearing determines whether continued confinement of the defendant before trial is warranted. Either party may seek an immediate de novo review of a detention order before a federal district court judge.[8] A magistrate judge may administer oaths and issue orders pertaining to the setting of bail or detention without authorization from a district judge.[9]

6. Recommendations and Justification

Recommendation 26a: Enact a new section, Article 26a, providing the minimum qualifications for military magistrates and providing that military magistrates may be assigned under service regulations to perform duties other than those described under Articles 19 and 30a.

- This proposal would align the qualification requirements for military magistrates with the qualification requirements of military judges under Article 26.
- This proposal also would authorize the Secretary concerned to prescribe regulations governing other duties that military magistrates may perform in addition to the duties specified under Articles 19 and 30a. Such duties could include, for example, duty as a preliminary hearing officer under Article 32 or as summary courts-martial officers. Such duties also could include issuing search authorizations and performing pretrial confinement reviews, both before and after referral of charges.

[5] 28 U.S.C. § 636.

[6] 28 U.S.C. § 636(b)-(c).

[7] 18 U.S.C. § 3142

[8] United States v. Leon, 766 F.2d 77, 80 (2nd Cir. 1985)

[9] 28 U.S.C. § 636(a).

7. Relationship to Objectives and Related Provisions

- This proposal to create a new section, Article 26a, supports the Terms of Reference by incorporating positive aspects of the federal civilian judicial system into the current military justice structure.
- The proposal is related to Article 26, which addresses qualification requirements for military judges, and to Articles 19 and 30a, which would allow detailed military judges to designate military magistrates to preside over judge-alone special courts-martial (with consent of the parties) and proceedings before referral of charges and specifications to court-martial for trial.

8. Legislative Proposal

SEC. 507. MILITARY MAGISTRATES.

Subchapter V of chapter 47 of title 10, United States Code, is amended by inserting after section 826 (article 26 of the Uniform Code of Military Justice) the following new section (article):

"§826a. Art. 26a. Military magistrates

"(a) QUALIFICATIONS.—A military magistrate shall be a commissioned officer of the armed forces who—

"(1) is a member of the bar of a Federal court or a member of the bar of the highest court of a State; and

"(2) is certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military magistrate by the Judge Advocate General of the armed force of which the officer is a member.

"(b) DUTIES.—In accordance with regulations prescribed by the Secretary concerned, in addition to duties when designated under section 819 of this title or section 830a of this title (articles 19 or 30a), a military magistrate may be assigned to perform other duties of a nonjudicial nature.".

9. Sectional Analysis

Section 507 would create a new section, Article 26a, which would set forth minimum qualifications under which the Judge Advocates General, in accordance with service regulations, could certify military magistrates who could preside over proceedings under Articles 19 and 30a when designated by the detailed military judge.

Under Article 26a(b), military magistrates also could be assigned to non-judicial duties if so authorized under regulations of the Secretary concerned. This provision recognizes that the services have programs through which qualified officers may be detailed to perform duties of a non-judicial nature—that is, duties that do not have to be performed by a military judge—such as issuing search authorizations or serving as a summary court-martial officer, preliminary hearing officer, or pretrial confinement review officer.

Article 27 – Detail of Trial Counsel and Defense Counsel
10 U.S.C. § 827

1. Summary of Proposal

This proposal would amend Article 27 by requiring the detailing of qualified defense counsel to all special courts-martial, and by requiring, "to the greatest extent practicable," the detailing of defense counsel "learned in the law applicable to capital cases" in all capital cases. This proposal would retain the authority for the services to detail individuals not qualified under Article 27(b)—such as law students preparing to become judge advocates—to serve as trial counsel in special courts-martial and assistant trial counsel in both general and special courts-martial, but would require that they meet minimum requirements prescribed by the President before being detailed. The proposed amendments also would broaden the disqualification provision under Article 27(a)(2) to include appellate judges who have participated in the same case.

2. Summary of the Current Statute

Article 27 concerns the detailing of trial and defense counsel to courts-martial and prescribes minimum qualification requirements for counsel so detailed. The statute contains three subsections. Article 27(a) directs that trial counsel and defense counsel shall be detailed for each general and special court-martial, and provides limits on the ability of counsel, investigating officers, military judges, and members to later participate in a different capacity in the same case. Article 27(b) provides that counsel detailed for general courts-martial must be certified as competent by the Judge Advocate General of the armed force of which the counsel is a member, and must be either: (1) a judge advocate who is a graduate of an accredited law school or a member of the bar of a Federal court or the highest court of a state; or (2) a member of the bar of a Federal court or of the highest court of a state. Article 27(b) also requires that a non-judge advocate detailed as a trial or defense counsel be a member of the bar of a Federal court or the highest court of a state. In the case of special courts-martial, Article 27(c) allows the detailing of defense counsel who do not meet the requirements of Article 27(b) when required by physical conditions or military exigencies, but generally requires the detailed defense counsel to have qualifications equivalent to those of the detailed trial counsel. The statute is silent regarding qualification requirements to act as trial counsel at general courts-martial, and to act as trial counsel or assistant trial counsel at special courts-martial.

3. Historical Background

Article 27 is based on Article 11 of the Articles of War.[1] In most respects, the current statute is not significantly different from the original version that was enacted in 1950.[2] In the Military Justice Act of 1968, Congress removed the term "law officer" from subsection (a) and replaced it with the term "military judge" to reflect the addition of a judicial officer to the military justice system.[3] Congress also added what is now subsection (c)(1) to the statute to make allowance for situations where physical conditions or military exigencies prevent assignment of qualified counsel.[4] This provision had previously been in the Articles of War, but was not included in Article 27 when the UCMJ was enacted in 1950. In the Military Justice Act of 1983, Congress amended the statute to require the service Secretaries to prescribe regulations for detailing of trial and defense counsel to general and special courts-martial.[5]

4. Contemporary Practice

The President has implemented Article 27 through R.C.M. 502 (Qualifications and duties of personnel of courts-martial) and R.C.M. 503 (Detailing members, military judge, and counsel). The specific procedures and regulations for detailing of counsel are provided by service regulations.

5. Relationship to Federal Civilian Practice

Currently, all federal courts require attorneys who practice before them to be admitted to a state bar or eligible to practice before the highest court of a state. However, the rules for admission to practice before federal district courts across the 94 districts of the federal court system are not uniform. Some districts only require membership in good standing with any state bar, while other districts have additional requirements for independent examinations, sponsorship, fees, and availability for pro bono assignment.[6]

Similar to the requirements under article 27(b), Assistant United States Attorneys are required to be members of the bar of a federal court or of the highest court of a state, and must also have at least one year of legal or other relevant experience.[7] There is no

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1154-55 (1949); H.R. REP. 81-491, at 18 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(2), 82 Stat. 1335, 1335 (1968).

[4] *Id.* at § 2(10)(b), 82 Stat. at 1337.

[5] Military Justice Act of 1983, Pub. L. No. 98–209, § 3(c)(2), 97 Stat 1393, 1394 (1983).

[6] *See generally* JOHN OKRAY, U.S. FEDERAL COURTS: ATTORNEY ADMISSION REQUIREMENTS (2011).

[7] United States Department of Justice, Experienced Attorney Hiring Process, http://www.justice.gov/legal-careers/hiring-process (last visited Mar. 17, 2015). These are minimum requirements only; hiring offices within individual districts exercise discretion to require additional qualifications or experience.

requirement that the attorney be a law school graduate (eight states still allow students to "read the law" by apprenticing with a licensed attorney and sit for the bar exam without having graduated from law school),[8] nor is there a requirement that any law school attended be accredited, unless graduation from an accredited law school is a requirement to sit for that attorney's state bar.[9] Public defender qualification requirements are similar, requiring any public defender to be "a member in good standing in the bar of the state."[10] Graduation from an accredited law school is not listed as a requirement. 18 U.S.C. § 3005 imposes additional qualification requirements upon defense counsel assigned in capital cases, requiring they be "learned in the law applicable to capital cases."

With respect to the right to counsel, 18 U.S.C. § 3006A requires representation to be provided for any financially eligible (indigent) person who is charged with a felony or Class A misdemeanor.[11] When a magistrate judge determines it is required by the interests of justice, representation may be required for those charged with a Class B misdemeanor (confinement for 6 months or less, but more than 30 days) or a Class C misdemeanor (confinement for 30 days or less but more than 5 days).[12] The federal civilian system only provides defense counsel upon showing of indigency. The UCMJ provides for the detailing of defense counsel in every general and special court-martial, recognizing the fact that servicemembers are often assigned involuntarily to locations that are far from family, friends and other sources of support.

6. Recommendation and Justification

Recommendation 27.1: Amend Article 27(a)(2) to broaden the disqualification provision to include appellate judges who have participated in the same case.

- This proposed change recognizes that military appellate judges may have previously participated in the same case in a different capacity prior to being assigned as an appellate judge.

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[8] National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements 2015 (2015), *available at* http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf. These states are California, Maine, New York, Vermont, Virginia, Washington, West Virginia and Wyoming. In addition, five jurisdictions allow graduates of online or correspondence law schools to apply for bar admission.

[9] *Id.* Currently, only 17 U.S. jurisdictions require a J.D. or LL.B. degree from an American Bar Association-approved law school as a prerequisite for state bar admission. All remaining jurisdictions permit graduates of non-ABA-approved law schools to sit for the bar, although three jurisdictions require the non-ABA-approved law schools to be located within the jurisdiction (Massachusetts, Tennessee, and Puerto Rico).

[10] U.S. DEP'T OF JUSTICE, U.S. COURT GUIDE TO JUDICIARY POLICY, Vol. 7A, § 420.10.50, http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/GuideToJudiciaryPolicyVolume7.aspx.

[11] 18 U.S.C. § 3006A(a)(1)(A). Note: a Class A misdemeanor in the federal district courts is one in which the maximum punishment is one year or less but more than six months. 18 U.S.C. § 3559(a)(6).

[12] 18 U.S.C. § 3006A(a)(2).

Recommendation 27.2: Amend Article 27 to require that: (1) all defense counsel detailed to general or special courts-martial must be qualified under Article 27(b); and (2) all trial counsel and assistant trial counsel detailed to special courts-martial, and all assistant trial counsel detailed to general courts-martial, must be determined to be competent to perform such duties under regulations prescribed by the President.

- This proposal would remove the authority to detail counsel who are not certified under Article 27(b) to represent the accused in special courts-martial. This proposal is consistent with current practice, as well as with this Report's proposal to require the detailing of a military judge in all special courts-martial. This proposal would not prohibit non-lawyers, such as investigators, defense paralegals or law students, from assisting the defense in a capacity other than as defense counsel or assistant defense counsel.

- This proposal retains the authority for the services to detail certain individuals, such as law students preparing to become judge advocates, as trial counsel or assistant trial counsel in special courts-martial if the Judge Advocate General or a designee of the Judge Advocate General determines the individual is competent to perform such duties. Part II of the Report will address the minimum requirements that would provide a uniform baseline across the services, with the Judge Advocates General retaining the opportunity to prescribe additional rules and procedures for detailing these counsel.

Recommendation 27.3: Amend Article 27 by adding a "learned counsel" requirement for defense counsel in capital cases. Specifically, add a new subsection (d) providing that, "[t]o the greatest extent practicable, at least one defense counsel detailed for a court-martial in a case in which the death penalty may be adjudged shall be learned in the law applicable to capital cases."

- This proposal would align defense counsel qualification requirements in capital cases in military practice with the requirement for learned counsel under 18 U.S.C. § 3005, insofar as practicable given the small number of capital cases that are tried in military practice.

- Part II of the Report will address changes in the rules implementing Article 27, with particular attention to the applicable procedures for assigning qualified defense counsel in capital cases.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment in evaluating minimum qualification requirements for trial and defense counsel.

- This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to defenses counsel in the civilian sector insofar as practicable in military criminal practice.

- The proposed amendments are consistent with the changes proposed to Articles 16 and 26 to require a military judge to preside at all special courts-martial.

8. Legislative Proposal

SEC. 505. QUALIFICATIONS OF TRIAL COUNSEL AND DEFENSE COUNSEL

Section 827 of title 10, United States Code (article 27 of the Uniform Code of Military Justice), is amended—

(1) in the first sentence of paragraph (2) of subsection (a), by striking "No person" and all that follows through "trial counsel," the first place it appears and inserting the following: "No person who, with respect to a case, has served as a preliminary hearing officer, court member, military judge, military magistrate, or appellate judge, may later serve as trial counsel,";

(2) in the first sentence of subsection (b), by striking "Trial counsel or defense counsel" and inserting "Trial counsel, defense counsel, or assistant defense counsel"; and

(3) by striking subsection (c) and inserting the following new subsections:

"(c)(1) Defense counsel and assistant defense counsel detailed for a special court-martial shall have the qualifications set forth in subsection (b).

"(2) Trial counsel and assistant trial counsel detailed for a special court-martial and assistant trial counsel detailed for a general court-martial must be

determined to be competent to perform such duties by the Judge Advocate General, under such rules as the President may prescribe.

"(d) To the greatest extent practicable, in any capital case, at least one defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.".

9. Sectional Analysis

Section 505 would amend Article 27, which concerns the detailing of trial and defense counsel to courts-martial, prescribes minimum qualification requirements for counsel, and disqualifies persons who have acted as the investigating officer, military judge, or a court member from later acting as trial or defense counsel in the same case.

Section 505(1) would broaden the disqualification provision under Article 27(a)(2) to include appellate judges who have participated previously in the same case.

Section 505(2) would amend Article 27(b) to extend the qualification requirement to any assistant defense counsel detailed to a general court-martial.

Section 505(3) would amend Article 27(c)(1) by requiring any defense counsel or assistant defense counsel detailed to a special court-martial to be qualified under Article 27(b). Article 27(c)(2), as amended, would retain the authority for the Services to detail individuals such as law students preparing to become judge advocates to serve as trial counsel in special courts-martial and assistant trial counsel in both general and special courts-martial without a requirement for certification under Article 27(b), so long as such individuals are determined to be competent to perform such duties by the Judge Advocate General. These changes are consistent with current practice, applicable federal civilian practice, and with the proposed changes to Articles 16 and 26, which would require a military judge to preside at all special courts-marital.

Section 505(3) also would add a new subsection (d) to Article 27. The new provision would require, to the greatest extent practicable, in any capital case, at least one defense counsel shall be learned in the law applicable to capital cases, reflecting the standard applicable in capital cases tried in the Article III courts and before military commissions.

Article 28 – Detail or Employment of Reporters and Interpreters

10 U.S.C. § 828

1. Summary of Proposal

This Report recommends no change to Article 28. Part II of the Report will consider whether any changes are needed in the rules implementing Article 28.

2. Summary of the Current Statute

Article 28 requires the convening authority of a court-martial, military commission, or court of inquiry to detail or employ qualified court reporters to record the proceedings and testimony taken before the court or commission. The article also authorizes the convening authority to detail or employ interpreters. The statute does not apply to the military commissions established under Chapter 47A of title 10.

3. Historical Background

Congress derived Article 28 from Article 115 of the 1948 Articles of War, which differed only in that it empowered the President of the court-martial panel, rather than the convening authority, to appoint a court reporter.[1] The only substantive amendment to Article 28 came in 2006, to provide the exception for statutory military commissions.[2]

4. Contemporary Practice

The President has implemented Article 28 through R.C.M. 501(c), which provides that reporters and interpreters may be detailed or employed as appropriate, and R.C.M. 502(e), which provides the duties of reporters and interpreters so detailed and authorizes the Secretary concerned to prescribe regulations for the qualification and compensation of reporters and interpreters. In special courts-martial, the convening authority may determine that a reporter or interpreter is not required.[3]

5. Relationship to Federal Civilian Practice

Similar to general and special court-martial practice, federal court reporters record proceedings at the following stages of trial: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the

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[1] *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1158 (1949).

[2] Military Commissions Act of 2006, Pub. L. No. 109-366, § 4(a)(2), 120 Stat. 2600, 2631 (2006).

[3] R.C.M. 501(c) (Discussion).

approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.[4] Each session of court and every proceeding designated by rule or order of the court or by one of the judges is required be recorded verbatim by shorthand, mechanical means, or electronic sound recording equipment.[5] The district courts are provided discretion to select the method of recording.[6] By comparison, current military law requires a verbatim transcript in most cases, with exceptions for summary courts-martial and general and special courts-martial resulting in a sentence of less than six months confinement, less than six months forfeiture of pay, and which does not include a punitive discharge.[7] The Court Interpreters Act provides that the Director of the Administrative Office of the United States Courts shall prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters in judicial proceedings instituted by the United States.[8]

6. Recommendation and Justification

Recommendation 28: No change to Article 28.

- Part II of the Report will consider whether amendments to the MCM are necessary to ensure appropriate implementation of the proposed amendments to Articles 54 and 65 concerning the production and disposition of trial records. The proposed revision to Article 54(a) designates the court reporter as the individual statutorily empowered to certify the record.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

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[4] 28 U.S.C. § 753.

[5] 28 U.S.C. § 753(b).

[6] *Id.*

[7] *See* Article 54(c)(2) (authorizing the President to prescribe whatever materials he deems appropriate for courts martial resulting in confinement or forfeiture of pay for less than six months, and no punitive discharge); R.C.M. 1103(b)-(c) (providing the rules for verbatim and summarized transcripts for general and special courts-martial). The proposed amendments to Articles 54 and 65 would align military practice more closely with federal civilian practice in this area.

[8] 28 U.S.C. § 1827.

Article 29 – Absent and Additional Members
10 U.S.C. § 829

1. Summary of Proposal

This proposal would amend Article 29 to align the statute with the proposed amendments to Articles 16 and 25a regarding the required number of members at general and special courts-martial. The proposal would clarify the function of assembly and impanelment in courts-martial with members, and the limited situations in which members may be absent after assembly. The amendments would allow the convening authority to detail alternate members to the court-martial, and would further clarify the option under current law for consideration of the record by a new member or military judge, by allowing for the member or judge to consider the record through the use of an electronic or other similar recording.

2. Summary of the Current Statute

Article 29 authorizes the excusal of members from assembled general and special courts-martial as the result of a challenge, physical disability, or for good cause. The current statute requires the convening authority to detail new members in order for a trial to proceed whenever a panel falls below five members in the case of a general court-martial, and below three members in the case of a special court-martial. Article 29 also governs how evidence is presented whenever a new member or new military judge is detailed to a court-martial after the court is assembled.

3. Historical Background

Article 29 reflects longstanding military practice regarding the authority to excuse members and to detail new members to a court-martial panel as necessary.[1] At one time, military custom allowed for the impanelment of additional officers as "'supernumeraries,' whose purpose was to supply the places of such original members as might be excluded on challenge, or whose seats might be vacated by absence."[2] This practice had no statutory basis, and was abandoned in the 1840s. In its current form, Article 29 has remained substantially unchanged since the UCMJ was enacted in 1950.[3]

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1158-59 (1949).

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 79-80 (photo reprint 1920) (2d ed. 1896).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108. In 2001, subsection (b) was amended to reflect the enactment of Article 25a. NDAA FY 2002, Pub. L. No. 107-107, § 582(c), 115 Stat. 1012.

4. Contemporary Practice

Under current law, both Article 29 and R.C.M. 505(c)(2)(A) permit the excusal of members after assembly for good cause. R.C.M. 505(f) defines good cause as including "physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge unable to proceed with the court-martial within a reasonable time."[4] Under R.C.M. 505(f), this does not include temporary inconveniences that are "incident to normal conditions of military life." These requirements are designed to ensure that members are not relieved or excused in an attempt to affect the outcome of a case.[5] However, Article 29 and current practice recognize the unique nature of the military mission and the need for a means to excuse members due to military exigencies.

5. Relationship to Federal Civilian Practice

Federal civilian practice and military practice concerning excusal of members (or jurors) differ in several ways. Although both systems allow for excusals, the UCMJ does not have a statutory mechanism for seating alternate members. In contrast, in the federal civilian system, a district court judge may remove and replace a seated juror with an alternate whenever doubt arises about that juror's ability to perform his or her duties.[6] A federal court may impanel up to six alternates, with each side entitled to additional peremptory challenges based on the number of alternates to be impaneled. District court judges are granted wide latitude in their handling of member selection, and absent a demonstration of bias or prejudice to the defendant, their discretion will typically not be disturbed.

6. Recommendation and Justification

Recommendation 29.1: Amend Article 29 to: (1) clarify the function of assembly and impanelment in general and special courts-martial with members, and the limited situations in which members may be absent from the court-martial after assembly; (2) provide for the impaneling of 12 members in a capital general court-martial, 8 members in a non-capital general court-martial, and 4 members in a special court-martial; (3) authorize (but not require) the convening authority to direct the use of alternate members; and (4) authorize non-capital general courts-martial to proceed with a minimum of six members if one or more members are excused for good cause after the members have been impaneled.

- Under current law, Articles 16, 25, and 29 refer to the court-martial being "assembled," but there is no UCMJ provision that directly addresses assembly. This proposal would clarify the function of assembly and impanelment in members cases, and the situations in which a member may be absent or excused after assembly.

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[4] United States v. Vasquez, 72 M.J. 13, 19 (C.A.A.F. 2013) (articulating that "Article 29(b), UCMJ . . . represents Congress' view of what 'process is due' in the event a panel falls below quorum.").

[5] United States v. Garcia, 15 M.J. 864, 865 (A.C.M.R. 1983).

[6] FED. R. CRIM. P. 24(c). *See* United States v. Godwin, 765 F.3d 1306, 1316 (11th Cir.), *cert. denied*, 135 S. Ct. 491 (2014); *see also* FED. R. CRIM. P. 23(b)(2) ("In addition, at any time before the verdict, the parties may, with the court's approval, stipulate in writing to a jury of less than [twelve] persons.").

- The option for the convening authority to utilize alternate members would enhance efficiency and better align military practice with federal civilian practice.

Recommendation 29.2: Amend Article 29 to clarify that a newly-detailed court-martial member or military judge may consider the record of previously admitted evidence through the use of an electronic or other similar recording.

- This proposal will increase efficiency when court members are replaced mid-trial. The option to use recordings to present the record to new members would enable the court to proceed by utilizing modern technology without having to await the production of a written transcript.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference and MJRG Operational Guidance by incorporating, insofar as practicable, practices and procedures concerning alternate members and replacement of members mid-trial as used in criminal trials in U.S. district court.

8. Legislative Proposal

SEC. 506. ASSEMBLY AND IMPANELING OF MEMBERS; DETAIL OF NEW MEMBERS AND MILITARY JUDGES.

Section 829 of title 10, United States Code (article 29 of the Uniform Code of Military Justice), is amended to read as follows:

"§829. Art. 29. Assembly and impaneling of members; detail of new members and military judges

"(a) ASSEMBLY.—The military judge shall announce the assembly of a general or special court-martial with members. After such a court-martial is assembled, no member may be absent, unless the member is excused—

"(1) as a result of a challenge;

"(2) under subsection (b)(1)(B); or

"(3) by order of the military judge or the convening authority for disability or other good cause.

"(b) IMPANELING.—(1) Under rules prescribed by the President, the military judge of a general or special court-martial with members shall—

"(A) after determination of challenges, impanel the court-martial; and

"(B) excuse the members who, having been assembled, are not impaneled.

"(2) In a general court-martial, the military judge shall impanel—

"(A) 12 members in a capital case; and

"(B) eight members in a noncapital case.

"(3) In a special court-martial, the military judge shall impanel four members.

"(c) ALTERNATE MEMBERS.—In addition to members under subsection (b), the military judge shall impanel alternate members, if the convening authority authorizes alternate members.

"(d) DETAIL OF NEW MEMBERS.—(1) If, after members are impaneled, the membership of the court-martial is reduced to—

"(A) fewer than 12 members with respect to a general court-martial in a capital case;

"(B) fewer than six members with respect to a general court-martial in a noncapital case; or

"(C) fewer than four members with respect to a special court-martial;

the trial may not proceed unless the convening authority details new members and, from among the members so detailed, the military judge impanels new members sufficient in number to provide the membership specified in paragraph (2).

"(2) The membership referred to in paragraph (1) is as follows:

"(A) 12 members with respect to a general court-martial in a capital case.

"(B) At least six but not more than eight members with respect to a general court-martial in a noncapital case.

"(C) Four members with respect to a special court-martial.

"(e) DETAIL OF NEW MILITARY JUDGE.—If the military judge is unable to proceed with the trial because of disability or otherwise, a new military judge shall be detailed to the court-martial.

"(f) EVIDENCE.—(1) In the case of new members under subsection (d), the trial may proceed with the new members present after the evidence previously introduced is read or, in the case of audiotape, videotape, or similar recording, is played, in the presence of the new members, the military judge, the accused, and counsel for both sides.

"(2) In the case of a new military judge under subsection (e), the trial shall proceed as if no evidence had been introduced, unless the evidence previously introduced is read or, in the case of audiotape, videotape, or similar recording, is played, in the presence of the new military judge, the accused, and counsel for both sides.".

9. Sectional Analysis

Section 506 contains amendments to Article 29 pertaining to the assembly, impaneling, and excusal of members, and the detailing of new court members and military judges. As amended, Article 29 would contain the following provisions:

Article 29(a) would clarify the function of assembly in general and special courts-martial with members, and the limited situations in which a member may be absent or excused after assembly of the court-martial.

Article 29(b)-(c) would require the military judge to impanel the number of members required under Articles 16 and 25a: twelve members in a capital case; eight members in a non-capital general court-martial; and four members in a special court-martial. The military judge would impanel any alternate members authorized by the convening authority in a specific case, and would then excuse any member who was detailed but not impaneled.

Article 29(d) would provide for the detail of new members if, as a result of excusals after the members have been impaneled, the membership on the panel is reduced below the following: twelve members in a capital general court-martial; six members in a non-capital general court-martial; and four members in a special court-martial. Because excusal of a member for good cause mid-trial is not a common occurrence, this provision should be used only in unusual situations. As under current law, the prohibition on further trial proceedings when the panel membership falls below the required number of members does not preclude sessions under Article 39.

Article 29(e) would address the detailing of a new military judge when the military judge is unable to proceed as a result of physical disability or otherwise.

Article 29(f) would establish the procedure for presenting the prior trial proceedings to the newly detailed members or judge. In addition to retaining the current procedure for reading a transcript of the prior proceedings, the amendment would permit the previously admitted evidence to be presented to the new members through play-back of a recording.

Subchapter VI. Pretrial Procedure

Article 30 – Charges and Specifications
10 U.S.C. § 830

1. Summary of Proposal

This proposal would clarify the language and organization of Article 30 in the context of current practice and related statutory provisions, with no substantive changes. Part II of the Report will address whether changes are needed in the rules implementing Article 30.

2. Summary of the Current Statute

Article 30 provides basic statutory requirements for the initial signing and swearing of criminal charges against a military accused, and for the disposition of charges and specifications by military commanders and convening authorities exercising various levels of disciplinary authority over persons subject to the Code. The article is divided into subsections to deal with these two distinct aspects of military charging practice. Article 30(a) provides that charges and specifications may be "preferred"—that is, signed and sworn to under oath—by any person subject to the Code. It then provides the knowledge requirements for the person signing the charges, usually known as the "accuser": (1) that the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and (2) that the charges and specifications are "true in fact" to the best of the signer's knowledge and belief.[1] Article 30(b) directs "the proper authority," which ordinarily is the commander who exercises non-judicial punishment authority over of the accused, but can also include any higher commander, to take "immediate steps" to determine what disposition should be made of the charges and specifications "in the interest of justice and discipline."[2] It then requires that the accused be informed of the charges against him "as soon as practicable."

3. Historical Background

Congress derived Article 30, in part, from Article 46 (Charges; Action Upon) of the Articles of War, as amended by the Elston Act of 1948.[3] The title and subject of Article 30 ("Charges and specifications") refers to the particular nomenclature of the military's distinctive two-

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[1] *See* Article 1(9) ("The term 'accuser' means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused."). This definition allows that the "signer" of the charges may be a nominal, but not the actual, accuser.

[2] *See* R.C.M. 306(a), 401(a) (providing that a superior commander may withhold the authority to dispose of offenses in individual cases, with respect to certain types of cases, or generally).

[3] *Compare* Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 *with* Act of June 24, 1948, ch. 625, tit. II, §222, 62 Stat. 627; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 980 (1949) [hereinafter *Hearings on H.R. 2498*].

part charging procedure, which has long been a part of American "military usage and practice."[4] Under this practice, a person initiates a charge against an accused by writing out a short description of the Article violated (the "charge") and a plain, concise statement of the essential facts constituting the offense charged (the "specification").[5] Charges are "preferred," or officially brought against the accused as a criminal matter, when a person subject to the UCMJ signs and swears to them, as required by Article 30(a). Under early versions of the Articles of War, only officers could prefer charges.[6] In 1920, Congress relaxed this requirement, providing that "[c]harges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief."[7] When Congress enacted the UCMJ in 1950, it divided this statutory provision into its component parts and added the requirement that the signer's oath be taken before "an officer of the armed forces authorized to administer oaths."[8] In 1956, Congress amended the article to clarify that this officer must be "commissioned." Other than this change, the current version of Article 30(a) is basically identical to the version that Congress originally enacted in 1950.

The origins of Article 30(b)'s disposition and notification provisions are more recent. Under the Articles of War, military commanders were given little guidance concerning their disposition duties, and military members were not required to be notified when charges were preferred against them. The 1891 Manual, for example, advised commanders simply to ensure "that there are good grounds for sustaining the charges" before acting upon them, including by referring the charges to court-martial for trial.[9] Winthrop advised that "[o]nly such charges as, upon sufficient investigation, are ascertained to be supported by the facts—are found to be sustained by at least *prima facie* evidence—should be preferred for trial," and that "[a]ll charges should be substantial and made in good faith."[10] Neither of these admonitions, however, was ever incorporated into the Articles of War in connection with preferral of charges or the commander's initial disposition authority. The 1920 Articles of War were the first to introduce the phrase "in the interest of justice and discipline" in connection with the commander's duty to dispose of charges and specifications that have been preferred against a military accused. It did so in the

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[4] Carter v. McClaughry, 183 U.S. 365, 386 (1902). *See generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 132-50 (photo reprint 1920) (2d ed. 1896).

[5] R.C.M. 307(c); *accord* MCM 1891, at 17-21; MCM 1917, ¶¶61-74.

[6] *See* WINTHROP, *supra* note 4, at 153; MCM 1905, at 20 ("Charges should be signed by a commissioned officer, but a contract surgeon or a dental surgeon may sign charges against an enlisted man."); MCM 1917, ¶63 ("Any officer may prefer charges.").

[7] AW 70 of 1920 (later moved to AW 46(a) of 1948).

[8] *Hearings on H.R. 2498*, *supra* note 3, at 980.

[9] MCM 1891, at 22.

[10] WINTHROP, *supra* note 4, at 150-51.

paragraph concerning pre-referral "investigations," which would later become the basis for Article 32 pretrial investigations.[11]

When Congress enacted the UCMJ, it sought to provide consistent statutory guidance to commanders and convening authorities in the exercise of their initial disposition and referral responsibilities, so it included the "in the interest of justice and discipline" standard in Article 30(b) as well as Article 32(a).[12] Congress also sought to prevent the situation experienced by many servicemembers under the Articles of War: lengthy stays in jail, or worse, on orders of their commanders without any notice of the charges for which they were being held, and without prompt action on the part of the commanders to dispose of the charges appropriately.[13] It addressed this concern in Article 30(b)—in conjunction with Articles 10 and 33—by requiring the commander "to take immediate steps" to dispose of the charges and specifications, and to inform the accused of the charges and specifications "as soon as practicable."[14] Congress bound together the interests of justice and discipline in Article 34, requiring the convening authority to obtain the advice of his or her staff judge advocate—with respect to both the threshold legal questions of probable cause, proper charging, and jurisdiction, and the disposition decision itself—before referring charges and specifications to general court-martial for trial.

In its current form, Article 30, in conjunction with Article 34, codifies both the commander-judge advocate partnership and the dual-purpose of the American military justice system: to promote justice while maintaining discipline within the ranks.[15] Throughout the history of the Code, legislators, servicemembers, and the public have regarded the dual-purpose

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[11] AW 70, ¶2 of 1920.

[12] *See* Article 32(a) (prior to the NDAA FY 2014 amendments).

[13] *See Hearings on H.R. 2498, supra* note 3, at 981-83; *see also* PHILIP MCFARLAND, SEA DANGERS: THE AFFAIR OF THE SOMERS (1985) (detailing the so-called "Somers Affair," in which the son of the Secretary of War and two other shipmates aboard the U.S.S. Somers were charged and court-martialed for mutiny, with no notice of the charges (or of the court-martial) until moments before their execution).

[14] *See also* Article 10 ("When any person subject to this chapter is placed in arrest or confinement prior to trial, *immediate steps* shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.") (emphasis added).

[15] *See* MCM, Part I, ¶3 ("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."); *see also* United States v. Littrice, 13 C.M.R. 43, 47 (C.M.A. 1953) ("It was generally recognized [by Congress] that military justice and military discipline were essentially interwoven. . . . [C]onfronted with the necessity of maintaining a delicate balance between justice and discipline, Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws."); AD HOC COMMITTEE TO STUDY THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO HON. WILLIAM R. BRUCKER, SECRETARY OF THE ARMY 11-12 (18 Jan. 1960) ("In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable . . . ."); DEPARTMENT OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 14 (1972) ("[N]o need is seen to consider the sacrifice of justice for the sake of discipline. The two are, for American servicemen, inextricable, and the latter cannot exist without the former.").

nature of military law and the commander's role in charging decisions with both admiration and skepticism.[16] Over the years, attention to the disposition discretion of military commanders has tended to focus on Article 30.[17]

4. Contemporary Practice

The President has implemented Article 30 across a number of different rules in the Manual for Courts-Martial. R.C.M. 307 implements Article 30(a), providing the rules and procedures concerning who may prefer charges and specifications, how they are to be preferred, and the manner in which they are to be technically alleged in the charge sheet. R.C.M. 308 implements Article 30(b)'s notice requirement and, in conjunction with R.C.M. 707 (Speedy trial) and R.C.M. 401(b) (Prompt determination), the requirement that notice of the charges be provided to the accused "as soon as practicable."[18] R.C.M. 306(c), 402-405, 407, and 601 provide the actions that commanders and convening authorities of various levels may take to dispose of the charges and specifications against an accused, including: dismissal of the charges; administrative action (such as counseling, reprimands, extra military instruction, or the administrative withholding of privileges); forwarding the charges to a superior or subordinate commander for disposition; directing a pretrial investigation (or preliminary hearing) on the charges; and referral of charges to a summary, special, or general court-martial for trial.[19] And finally, R.C.M. 306(b) (Initial disposition: policy) and 401 (Forwarding and disposition of charges in general) guide commanders and convening authorities with respect to how to determine what disposition to make of the charges and specifications "in the interest of justice and discipline." R.C.M. 401 restates this statutory standard and then directs commanders to, once they have ensured that the accused has been notified of the charges, dispose of the charges "in accordance with the policy in R.C.M. 306(b)."[20]

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[16] *See generally* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1 (2013).

[17] *See, e.g.*, S. 987, 93rd Cong. § 2, the proposed Military Justice Act of 1973 (as introduced in the Senate, February 22, 1973) (recommending amendment of Article 30 to remove military commanders from the disposition process and to transfer disposition discretion to an independent "Courts-martial Commands" that would be established in the Office of the Judge Advocate General of each armed force); *see also* Kenneth Hodson, *Military Justice: Abolish or Change?*, 22 KAN. L. REV. 31 (1973) (expressing disagreement with the 1973 proposals); S. 1752, 113th Cong. § 2, the proposed Military Justice Improvement Act of 2013 (as introduced in the Senate, November 20, 2013); 160 CONG. REC. S1335-49 (daily ed. Mar. 6, 2014).

[18] *See* R.C.M. 707(a) (requiring that the accused be brought to trial within 120 days after preferral of charges, or earlier if the accused is placed under restraint); *see also* United States v. Maresca, 28 M.J. 328, 331-32 (C.M.A. 1989) (discussing the connection between Article 30(b) and speedy trial considerations and stating that "the Article and R.C.M. 308 must be construed to require that the immediate commander notify an accused of the charges as soon after they have been preferred as the accused can reasonably be found and informed thereof.").

[19] *See* R.C.M. 306(c), 402-405, 407.

[20] R.C.M. 401(c); *see also* R.C.M. 401(b) (Discussion) (noting that the commander should ensure that the accused is notified of the charges "[b]efore determining an appropriate disposition").

R.C.M. 306(b) forms the President's core policy guidance with respect to disposition of offenses under the Code "in the interest of justice and discipline." The Discussion to the rule provides a non-exclusive list of factors military commanders should consider when deciding how to dispose of offenses. These "disposition factors" are then incorporated by reference into the rules concerning disposition of preferred charges and specifications and referral of charges and specifications to court-martial for trial.[21] The Discussion notes, "The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced . . . . The goal should be a disposition that is warranted, appropriate, and fair."[22] The rule itself directs commanders to dispose of allegations of offenses "in a timely manner at the lowest appropriate level of disposition . . . ."[23] Under current law, the disposition factors include:

- the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
- when applicable, the views of the victim as to disposition;
- existence of jurisdiction over the accused and the offense;
- availability and admissibility of evidence;
- the willingness of the victim or others to testify;
- cooperation of the accused in the apprehension or prosecution of another accused;
- possible improper motives or biases of the person(s) making the allegation(s);
- availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction; and
- appropriateness of the authorized punishment to the particular accused or offense.[24]

These factors are based, in part, on the 1979 version of the ABA Standards for the Prosecution Function § 3-3.9(b), and are similar—but not identical—to the factors used by

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[21] *See* R.C.M. 401(b)-(c); R.C.M. 407(a)(6) (Discussion); R.C.M. 601(d)(1) (Discussion).

[22] R.C.M. 306(b) (Discussion).

[23] R.C.M. 306(b).

[24] *See* Exec. Order No. 13,669, 79 Fed. Reg. 34,999, 35,013-14 (June 18, 2014).

civilian prosecutors in determining whether or not to charge someone with a criminal offense in federal or state court.[25]

5. Relationship to Federal Civilian Practice

Military charging practice under Article 30(a) and R.C.M. 307 combines aspects of the civilian complaint under Fed. R. Crim. P. 3 and the indictment or information under Fed. R. Crim. P. 7. Like the civilian indictment or information, charges and specifications preferred under Article 30(a) "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and it must be signed by an attorney for the government."[26] And like the indictment in federal civilian practice, preferral of charges under Article 30(a) formally initiates a criminal matter against an accused, putting the accused on notice of potential prosecution, and generally triggering his right to counsel under service regulations. In other ways, however, charges and specifications under Article 30(a) and R.C.M. 307 function more like the complaint under Fed. R. Crim. P. 3. Like the complaint, charges and specifications are "a written statement of the essential facts constituting the offense charged,"[27] and the signer is required to swear before an authorized official that they are true "to the best of [the signer's] knowledge and belief."[28] Also like the complaint, preferred charges and specifications alone are not sufficient to bring an accused to trial. In both systems, a second step is needed: the referral of charges to a court-martial under Article 34, and the filing of the information or indictment with a federal district court under Fed. R. Crim. P. 7.[29] Furthermore, in both systems, formal

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[25] *See generally* MCM, App. 21 (R.C.M. 306(b), Analysis). *See also* REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 48 (June 2014) [hereinafter RESPONSE SYSTEMS PANEL REPORT], at 126; RESPONSE SYSTEMS PANEL REPORT PANEL ANNEX 168-75. However, R.C.M. 306 omits the explicit "quantum of evidence" calculus which guides the charging decision of civilian prosecutors and United States Attorneys. *See* ABA STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.9(a) ("A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL [hereinafter USAM], at § 9-27.220 (Grounds for Commencing or Declining Prosecution) ("The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because: (1) No substantial Federal interest would be served by prosecution; (2) The person is subject to effective prosecution in another jurisdiction; or (3) There exists an adequate non-criminal alternative to prosecution."). Further discussion of this issue is taken up in the proposal to amend Article 33, *infra*.

[26] FED. R. CRIM. P. 7(c)(1); *see, e.g.*, WINTHROP, *supra* note 4, at 132 ("The Charge, in the military practice, like the indictment of the criminal courts, is simply a description in writing of the alleged offence of the accused."); MCM 1905, p. 16 ("A military charge corresponds to a *civil indictment*.").

[27] FED. R. CRIM. P. 7(c)(1).

[28] *See* United States District Court Criminal Complaint Form, *available at* http://www.uscourts.gov/forms/law-enforcement-grand-jury-and-prosecution-forms/criminal-complaint.

[29] In the federal civilian system, a grand jury indictment is required for felony offenses unless the defendant waives the indictment and consents to prosecution by information. FED. R. CRIM. P. 7(b).

discovery rules are generally not triggered until after referral of charges or the indictment/information;[30] preliminary hearing procedures take place, by design, between the preferral/complaint stage and the referral/information stage;[31] and until the charges are formally referred or filed, they can be modified without approval of the court.[32]

The essential differences between the two systems in the area of pretrial process are that in the federal system, the complaint - preliminary hearing - information procedures can be bypassed through the securing of a grand jury indictment under Fed. R. Crim. P. 6. The grand jury indictment is not available in the military justice system,[33] and there is no corresponding mechanism to bypass Articles 30 and 32 and refer charges directly to a court-martial. In addition, in the federal civilian system, complaints are reviewed for probable cause by judges, who then issue an arrest warrant or summons to bring the accused to court for an initial appearance.[34] In the military justice system, the initial appearance function is fulfilled under Article 30(b) and R.C.M. 308 (Notification to accused of charges), and there is no need for an arrest warrant or summons because military members are subject to orders. The formal probable cause screening takes place initially at the preliminary hearing stage in general courts-martial, and before referral of charges and specifications to trial in all courts-martial.[35] Furthermore, in all cases, probable cause is required before the accused may be ordered into arrest or confinement pending trial by court-martial under Articles 9 and 10.

With respect to disposition of charges and notice to the accused under Article 30(b) and R.C.M. 306, 308, 401-404, and 407, military practice varies from federal civilian practice in several key aspects. Under R.C.M. 308, the accused's immediate commander is responsible for causing the accused to be notified of the charges preferred against him; this notice function is provided in the federal civilian system by the judiciary under Fed. R. Crim. P. 4 (Arrest Warrant or Summons on a Complaint) and Fed. R. Crim. P. 5 (Initial Appearance). Additionally, the duty to determine whether the accused should be held in confinement is generally performed by the accused's commander or, when authorized by service regulations, an officer designated as a magistrate.[36] In federal civilian practice, this duty is generally performed by a magistrate judge at the initial appearance under Fed. R. Crim. P.

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[30] *Compare* R.C.M. 701(a) (providing for disclosure by the trial counsel of information in the government's possession to the defense counsel *after* service of charges under Article 35 generally) *with* FED. R. CRIM. P. 16. Although formal discovery is generally not triggered under the rule until service of charges, the military has a long tradition of substantial early disclosure and open file sharing between the government and the defense. *See* Summary and Analysis of Article 46, *infra*.

[31] *Compare* R.C.M. 405 *with* FED. R. CRIM. P. 5.1.

[32] *Compare* R.C.M. 603 *with* FED. R. CRIM. P. 7(e).

[33] U.S. CONST. amend. V.

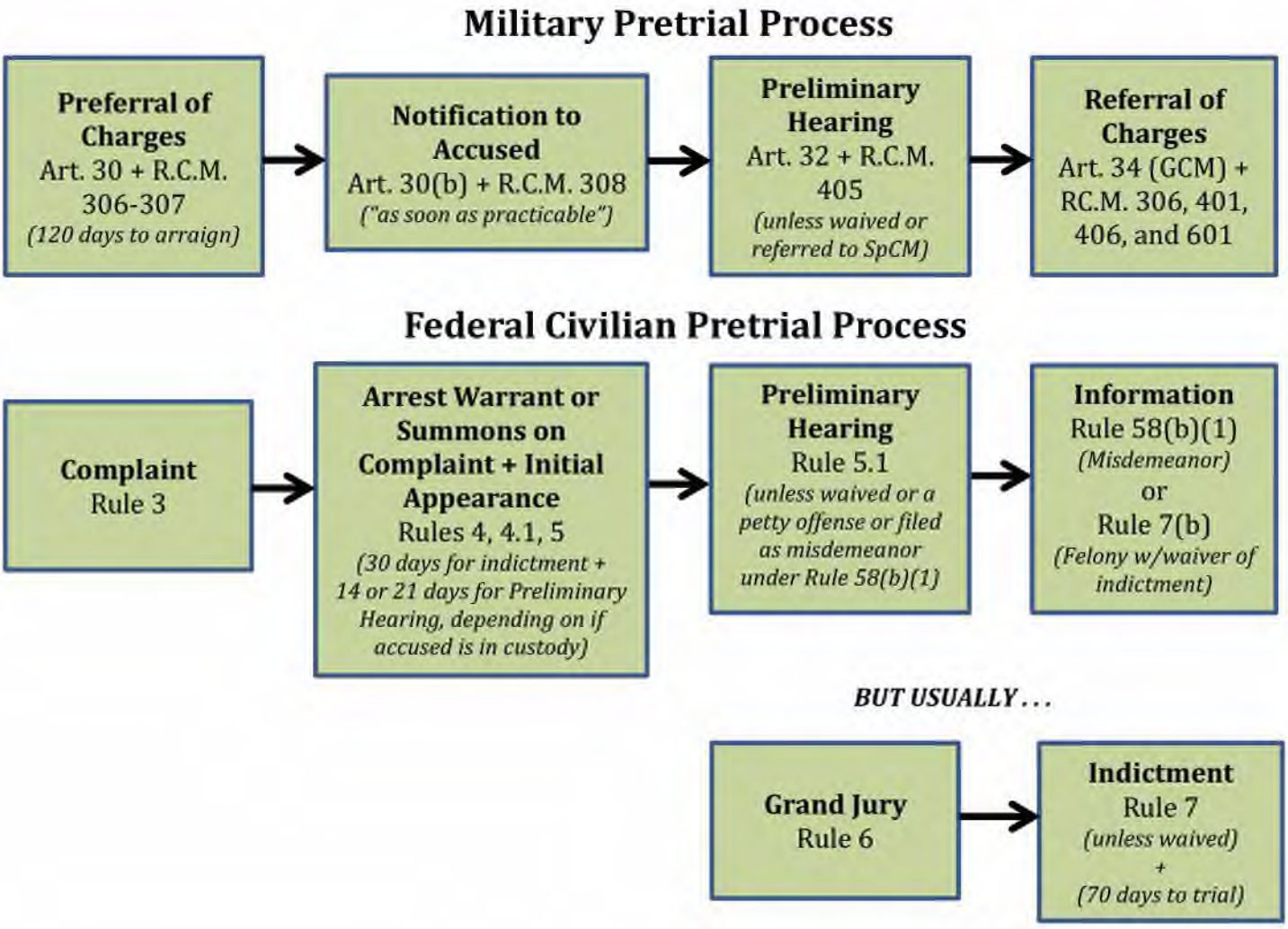
[34] *See* FED. R. CRIM. P. 4 and 5.

[35] R.C.M. 601(d)(1).

[36] *See* R.C.M. 305.

5. Most significantly, whereas federal civilian prosecutors are guided in the exercise of their prosecutorial discretion by robust, uniform disposition guidance—the *Principles of Federal Prosecution*, contained in the United States Attorneys' Manual[37]—military commanders and convening authorities are guided in the exercise of their disposition discretion only by the non-binding "disposition factors" in the Discussion to R.C.M. 306 and by Article 30(b)'s broad admonition to dispose of charges and specifications "in the interest of justice and discipline."[38] This difference is addressed in greater detail in this Report in the proposal to amend Article 33 (Disposition Guidance).

Figure 1. (Simplified Comparison of Military and Federal Civilian Pretrial Processes)



[37] USAM, *supra* note 25, at § 9-27.000.

[38] *See generally* Rachel E. VanLandingham, *Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards*, 11 OHIO ST. J. CRIM. L. 389 (2014).

6. Recommendation and Justification

Recommendation 30.1: Amend Article 30 by reorganizing the statute into three subsections: (a) providing the mode of preferring charges and specifications and the oath requirement; (b) providing the required statement of the person who signs the charges; and (c) providing the duty of proper authority to notify the accused of the charges and to dispose of them in the interest of justice and discipline.

- This reorganization of the statutory provisions under Article 30 would clarify the relationship and sequencing of related requirements for preferral of charges and specifications against a military accused, better aligning the statute's provisions with current practice and the President's implementing rules. This will reduce the potential for unnecessary litigation in this area and make the statute clearer and more functional.

Recommendation 30.2: Amend Article 30 by re-sequencing the notification and disposition requirements and providing that both actions take place "as soon as practicable."

- Currently, Article 30(b) requires that commanders take "immediate steps" to determine what disposition should be made of charges and specifications; it then requires them to inform the accused of the charges "as soon as practicable." In practice (and under the Rules for Courts-Martial), this sequence of events is reversed: the accused is notified of the charges as soon as practicable, and only then does the accused's commander or the cognizant convening authority determine how to dispose of the charges. This proposal would align the sequencing of the notification and disposition requirements with current practice.

- As noted in the Discussion to R.C.M. 306(b), "The disposition decision is one of the most important and difficult decisions facing a commander." Although timeliness is critical in military justice, it is not so critical as to require immediacy over thoughtful and deliberate action. Amending the statute so that notification to the accused and disposition of the charges in the interest of justice and discipline are both required "as soon as practicable" would better align these requirements with current practice and reduce the potential for unnecessary litigation in this area.

- The timeliness requirements in Article 30(b) were originally placed in the statute in order address a situation that occurred frequently under the Articles of War: commanders would delay in notifying the accused and disposing of the charges while the accused was in confinement. This was the origin of the "immediate steps" requirement. Since that time, the practices and procedures used to ensure timely processing of cases have evolved, particularly with the introduction of military judges in 1968 and the adoption of R.C.M. 707 (Speedy trial) in 1984. Articles 10 and 33, along with R.C.M. 305, sufficiently ensure that military members in pretrial confinement will have the charges against them disposed of promptly. The "immediate steps" requirement in Article 30(b) is no longer necessary.

Recommendation 30.3: Retain the current procedures for the exercise of disposition discretion based upon the interlocking responsibilities of military commanders, staff judge advocates, and judge advocates.

- The guidance in Article 30(b) and R.C.M. 306 regarding the exercise of the military commander's disposition function in partnership with his or her staff judge advocate (or judge advocate, as the case may be) reflects the ABA Standards for the Prosecution Function, a core guiding document for federal and state prosecutors. This guidance also performs a similar function to the Principles of Federal Prosecution contained in the United States Attorneys' Manual, which effectively guides federal civilian prosecutors in their exercise of prosecutorial discretion.

- Commanders are responsible for instilling and maintaining the level of discipline necessary to ensure accomplishment of the military mission. The issue of whether that responsibility should continue to include the authority to refer cases to courts-martial, or whether that authority should be vested in judge advocates, has been the subject of considerable debate, as reflected in report of the Response Systems Panel, a blue-ribbon advisory committee composed of distinguished non-governmental experts in civilian practice as well as military law.[39] Congress expressly directed the Response Systems Panel to assess the impact of removing disposition authority from the chain of command, focusing on sexual assault cases.[40] The Panel's report, which recommended retention of the commander's role in exercising disposition discretion, includes thoughtful views on both sides of the issue.[41] In view of the extensive testimony and evidence so recently gathered and considered by the congressionally-established Response Systems Panel, the MJRG has focused its efforts on measures to improve the current process, rather than on revisiting the underlying fundamental policy so soon after the Response Systems Panel completed its thorough and careful treatment of the issue.

7. Relationship to Objectives and Related Provisions

- This proposal supports the MJRG Terms of Reference by using the current UCMJ as a point of departure for the MJRG's baseline reassessment.

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[39] *See* RESPONSE SYSTEMS PANEL REPORT, *supra* note 25, at 6-7, 167-71 and Recommendations 36-43 at 22-25.

[40] NDAA FY 2014 at § 1731(a)(1)(A) (directing the Response Systems Panel 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."); *see also* NDAA FY13 at § 576(d)(1)(F-G) (directing the Response Systems Panel to assess "the roles and effectiveness of commanders at all levels in preventing sexual assaults and responding to reports of sexual assault;" and assess "the strengths and weaknesses of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and in the investigation, prosecution, and adjudication of adult sexual assault crimes.").

[41] RESPONSE SYSTEMS PANEL REPORT, *supra* note 39, at 6-7, 22-23 (Recommendations 36-37), 167-76 (Additional Views of Response Systems Panel Members Dean Elizabeth L. Hillman and Mr. Harvey Bryant).

- This proposal supports MJRG Operational Guidance by re-emphasizing the critical importance of discipline as a key principle of the military justice system. Furthermore, this proposal would address ambiguities between Article 30 and the rules implementing the statute, reducing the potential for unnecessary litigation and improving the functionality of the mechanisms and procedures associated with charging and disposition of offenses.
- This proposal is related to the sections in this Report discussing Article 34 (Advice of staff judge advocate and reference for trial) and the proposed amendments to Article 33 (Disposition Guidance).

8. Legislative Proposal

SEC. 601. CHARGES AND SPECIFICATIONS.

Section 830 of title 10, United States Code (article 30 of the Uniform Code of Military Justice), is amended to read as follows:

"§830. Art. 30. Charges and specifications

"(a) IN GENERAL.—Charges and specifications—

"(1) may be preferred only by a person subject to this chapter; and

"(2) shall be preferred by presentment in writing, signed under oath before a commissioned officer of the armed forces who is authorized to administer oaths.

"(b) REQUIRED CONTENT.—The writing under subsection (a) shall state that—

"(1) the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and

"(2) the charges and specifications are true, to the best of the knowledge and belief of the signer.

"(c) DUTY OF PROPER AUTHORITY.—When charges and specifications are preferred under subsection (a), the proper authority shall, as soon as practicable—

"(1) inform the person accused of the charges and specifications; and

"(2) determine what disposition should be made of the charges and specifications in the interest of justice and discipline.".

9. Sectional Analysis

Section 601 would amend Article 30, which provides basic statutory requirements for the initial signing and swearing of criminal charges against a military accused, and for the disposition of charges and specifications by military commanders and convening authorities exercising various levels of disciplinary authority over persons subject to the Code. By reorganizing Article 30 into three subsections and removing the requirement for commanders to take "immediate steps" to dispose of charges and specifications, the amendments would improve the functionality of the statute and better align the statute's provisions with current practice.

Article 30a (New Provision) – Proceedings Conducted Before Referral

10 U.S.C. § 830a

1. Summary of Proposal

This proposal would create Article 30a to authorize military judges or military magistrates to consider certain pretrial matters and to make judicial rulings on those matters prior to the referral of charges to a court-martial. The proposed statute would authorize the President to designate the specific pretrial matters that may be considered by a military judge or magistrate prior to referral. The President also would prescribe the procedures for conducting such proceedings, and set forth limitations on available remedies. Article 30a would further authorize the services to establish a military magistrates program. Military magistrates in such a program would be available to preside in pretrial proceedings under Article 30a when designated to do so by a military judge. When designated, magistrates would act on these matters with the full authority of a military judge. The proposed article also would provide for the issuance of regulations for procedures in which military judges could formally review any magistrate rulings. Each service would establish procedures for the detailing of military judges and the designation of magistrates under this program.

2. Summary of the Current Statute

This proposal creates a new article of the UCMJ. Although military judges may be assigned to perform duties in addition to presiding over courts-martial, the UCMJ does not provide an express judicial role for military judges prior to referral of charges.[1] There is no current statutory provision specifically authorizing or describing military magistrates.[2]

3. Historical Background

Before enactment of the UCMJ in 1950, the Articles of War provided for a law member to make legal rulings at a court-martial and for a president of the panel to make administrative and procedural decisions.[3] At the time, courts-martial did not include a military judge. The UCMJ created the position of law officer for all general courts-martial. The law officer was not a member of the panel and did not deliberate or vote on findings or

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[1] Article 26(c). Under R.C.M. 707(c)(1), the President has provided military judges with the pre-referral authority to exclude pretrial delays for purposes of determining speedy trial issues, if authorized under service regulations.

[2] Under the executive authority governing military search authorizations, the President has provided military judges and non-statutory magistrates the power to issue search authorizations under M.R.E. 315(d)(2), if authorized under Department of Defense or service regulations.

[3] *See, e.g.*, AW 8, 31 of 1920.

the sentence.[4] A decision by a law officer was usually advisory, and the president of the panel had ultimate control over a number of authoritative and procedural decisions.[5]

The Military Justice Act of 1968 established the position of military judge at courts-martial, created independent trial judiciaries within the services, and granted an accused the right to elect a trial by military judge alone, without members.[6] Since 1968, the law and the practice in the military justice system have shifted primary responsibility to military trial judges to preside over all aspects of court-martial procedure.[7]

4. Contemporary Practice

Although military judges have significant authority in presiding over courts-martial, the UCMJ provides no specific statutory role for military judges prior to the referral of charges to a court-martial. Prior to referral, the convening authority makes decisions in certain matters that are then subject to judicial review after charges are referred to a specific court-martial. Examples of legal issues that, under current practice, may require a legal decision prior to referral of charges, include:

- *Inquiries into Mental Capacity or Responsibility*: Under R.C.M. 706 and current practice, an accused's defense counsel typically makes an initial request for a mental health inquiry to the convening authority. If the convening authority denies the request prior to referral, the defense counsel must wait until referral to request that the court order the inquiry. If the military judge at trial concludes that the convening authority erred in denying the request, the trial is abated until the convening authority ensures the inquiry is complete.

- *Depositions*: Article 49 and R.C.M. 702 control deposition practice. Under current law, a convening authority may order depositions after preferral of charges, but a military judge has no power to order a deposition until after charges are referred to a court-martial for trial. After referral, either the convening authority or the military judge may order a deposition.

- *Search Authorizations*: Under M.R.E. 315(d)(1), military commanders have primary authority to authorize probable cause searches conducted in areas over which they have control. There is no UCMJ provision authorizing probable cause searches by military judges or magistrates. M.R.E. 315(d)(2) provides a very limited authority for a military judge or magistrate to authorize a search based on probable cause, but only if authorized by departmental regulations.

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[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] *See* MCM 1951, ¶¶39-40.

[6] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[7] *See generally* Fansu Ku, *From the Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49 (2009).

- *Pretrial Confinement Reviews*: R.C.M. 305 sets forth the procedural requirements for holding a servicemember in pretrial confinement. The rule includes a review of the probable cause determination and the necessity of continued confinement within seven days of the imposition of confinement by a "neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned." A servicemember is unable to challenge the appropriateness of the pretrial confinement decision or continued confinement before a military judge until a convening authority refers charges, which can occur up to several months after the imposition of pretrial confinement. If the convening authority never refers charges, but instead dismisses the charges after the accused has spent a significant period of time in pretrial confinement, the servicemember has no review of the pretrial confinement decision before a judicial authority. Each service implements R.C.M. 305 in a slightly different manner, based on service regulations.

- *Individual Military Counsel*: Under Article 38(b)(3)(B), an accused has the right to request representation by a specific military counsel if that counsel is reasonably available. The request is submitted through counsel to the convening authority for decision under R.C.M. 506 and service regulations. Prior to referral, the decision is subject to further administrative review, but judicial review is not available until the case is referred for trial. After referral of charges, an accused may file a motion under R.C.M. 905(b)(6) objecting to denial of the request. If the military judge at trial determines that the convening authority erred in denying the request, the trial may be delayed for a lengthy period of time pending the detail of counsel and an opportunity for counsel to prepare for trial. Prior to referral of charges, an accused may not raise such a motion before a military judge.

- *Subpoenas:* The issuance of subpoenas is authorized under Articles 46 and 47 and R.C.M. 703. Under current law, the trial counsel is authorized to issue subpoenas for witnesses and for the production of evidence at any time after charges have been referred to court-martial for trial, and before referral of charges in connection with an Article 32 preliminary hearing. Under R.C.M. 703(e)(2)(F), a military judge only becomes involved in the issuance and enforcement of subpoenas when, after referral of charges to court-martial, "a person subpoenaed requests relief on grounds that compliance is unreasonable or oppressive."[8] At that point, the military judge may direct that the subpoena be modified or withdrawn, as appropriate, or may issue a warrant of attachment to compel the attendance of the witness or the production of documents.[9]

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[8] This Report proposes amendments to Articles 46 and 47 that would allow military judges to exercise this review authority before referral of charges in the case of subpoenas for the production of evidence (subpoenas duces tecum). Further, the proposed amendments would authorize military judges to issue warrants before referral of charges for the production of stored electronic communications under Chapter 121 of Title 18, United States Code.

[9] R.C.M. 703(e)(2)(G)(i). *See generally* United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006).

5. Relationship to Federal Civilian Practice

Federal civilian courts are standing courts, as opposed to courts-martial, which are temporary tribunals convened to consider specific cases.[10] After a federal defendant makes an initial appearance under Fed. R. Crim. P. 5, the defendant may file motions with a district court judge on issues that must be addressed prior to arraignment or trial.[11] Pretrial issues for judicial determination may include various motions brought on specific grounds or under the All Writs Act.[12]

The Federal Magistrates Act of 1968 established the magistrate judge system for the federal civilian courts.[13] A federal magistrate judge's jurisdiction and powers are set forth by statute.[14] The local rules in each district outline the specific duties magistrate judges are assigned, and they may act on authority expressly granted by federal district court judges or by consent of the parties.[15]

A magistrate judge's duties vary considerably depending on local rules. In criminal cases, magistrate judges have full authority to preside over trials involving petty offenses and in Class A misdemeanor cases by consent of the parties. Magistrate judges assist in felony preliminary proceedings (search and arrest warrants, summonses, initial appearances, preliminary examinations, arraignments, and detention hearings) and in felony pretrial matters (pretrial motions, evidentiary hearings, probation/supervised release hearings, and guilty plea proceedings). When a federal criminal defendant is placed in pretrial confinement, the defendant has the right to a detention hearing during his initial appearance before a magistrate judge.[16] This hearing determines whether continued

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[10] *See* McClaughry v. Deming, 186 U.S. 49, 63 (1902) ("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved.").

[11] *See* FED. R. CRIM. P. 12(b) (Pretrial Motions).

[12] 28 U.S.C. § 1651(a). A federal district court may entertain numerous types of pretrial motions, including a motion to quash a grand jury or trial subpoena under FED. R. CRIM. P. 17(c)(2), and a motion for a mental examination of a defendant under 18 U.S.C. §§ 4241, 4142 and FED. R. CRIM. P. 12.2. According to FED. R. CRIM. P. 12(b)(3), some motions must be raised before trial, including a motion alleging a defect in instituting the prosecution, a motion alleging defects in the indictment or information, a motion to suppress evidence, and a motion to sever charges or defendants. Other pretrial motions include a motion for depositions (FED. R. CRIM. P. 15), a motion to quash or modify a subpoena (FED. R. CRIM. P. 17), a motion to dismiss an indictment based on lack of legal qualification of a grand jury or juror (FED. R. CRIM. P. 6(b)(2)), a motion to produce a witness statement (FED. R. CRIM. P. 26.2), and a request to issue a search and seizure warrant (FED. R. CRIM. P. 41).

[13] Pub. L. No. 90-578, Oct. 17, 1968, 82 Stat. 1107. The 1968 Act was preceded by a system of appointed "discreet persons learned in the law" who were authorized by Congress in 1793 to be available to set bail for defendants in federal criminal cases.

[14] 28 U.S.C. § 636.

[15] 28 U.S.C. § 636(b)-(c).

[16] 18 U.S.C. § 3142

confinement of the defendant before trial is warranted. Either party may seek an immediate de novo review of a detention order before a federal district court judge.[17] A magistrate judge may administer oaths and issue orders pertaining to the setting of bail or detention without authorization from a district judge.[18]

6. Recommendations and Justification

Recommendation 30a: Enact a new Article 30a to provide statutory authority for military judges or magistrates to provide timely review, prior to referral of charges, of certain matters currently subject to judicial review only on a delayed basis at trial.

- Under this proposal, the President would designate in the Manual for Courts-Martial the matters subject to pre-referral judicial review. The President also would set forth the procedures for conducting such review, the specific limitations on the remedies available in such cases, and rules regarding further review of such rulings. As a general matter, the remedies available in pre-referral proceedings would be structured in a manner that would preserve the option for the convening authority to defer action until a decision is made to refer the case to trial by court-martial.

- This change would not relieve commanders from the pretrial responsibilities assigned to them under current law, but would provide for earlier rulings on matters currently subject to later review in courts-martial.

- The opportunity for an earlier ruling by a military judge, including the opportunity for timely corrections prior to referral, would enhance the efficiency of the court-martial process by reducing the number of delays that now result from precluding judicial review until referral of charges. Part II of the Report will propose rules governing the types of matters to be considered by military judges and magistrates, such as motions on requests for individual military counsel, mental competency examinations, depositions, the issuance of subpoenas, and ensuring that the protections afforded to victims under the Military Rules of Evidence are properly enforced in preliminary hearings.

- Allowing for judicial determinations of such matters prior to referral would promote efficiency and also would provide relevant information to the convening authority for consideration in the referral and disposition decision-making process.

- Under this proposal and the related proposals under Articles 19 and 26a, military magistrates would function much like military judges but without the entire scope of responsibilities of a military judge due to their lesser experience and rank. These magistrates would augment the military judiciary and serve to relieve the resource burden on military judges to address myriad pretrial matters. In addition, these duties would serve as a training ground to prepare a military magistrate for

[17] United States v. Leon, 766 F.2d 77, 80 (2nd Cir. 1985)

[18] 28 U.S.C. § 636(a).

certification as a military judge and allow for an assessment as to whether such a certification would be appropriate. The services would have discretion as to whether to employ a magistrate program, consistent with general unified standards as supplemented by their own service specific regulations. Certification and detailing of magistrates would rest with the Judge Advocates General or their designees.

7. Relationship to Objectives and Related Provisions

- This proposal to create an Article 30a supports the Terms of Reference by incorporating positive aspects of the federal civilian judicial system into the current military justice structure.
- The proposal is related to Article 26, which addresses detailing military judges to referred court-martial cases, and to the proposal to create Article 26a, which would provide qualification requirements for military magistrates similar to those applicable to military judges.
- The proposal to create an Article 30a also is related to proposed changes to Articles 16 and 19, which would provide for referral to a judge-alone special court-martial, with an option for a military magistrate to preside in such trials with the consent of the parties.
- This proposal is consistent with the proposed amendments to Articles 46 and 47 authorizing military judges to issue and review pre-referral subpoenas and warrants.
- This proposal is consistent with the recommendation contained in the Report of The Response Systems to Adult Sexual Assault Crimes Panel, which stated: "It is the sense of the Panel that military judges should be involved in the military justice process at an earlier stage to better protect the rights of victims and the accused."[19]

8. Legislative Proposal

SEC. 602. PROCEEDINGS CONDUCTED BEFORE REFERRAL.

Subchapter VI of chapter 47 of title 10, United States Code, is amended by inserting after section 830 (article 30 of the Uniform Code of Military Justice) the following new section (article):

[19] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 49-50 (June 2014) (Recommendation 118).

"§830a. Art. 30a. Proceedings conducted before referral

"(a) IN GENERAL.—(1) The President shall prescribe regulations for proceedings conducted before referral of charges and specifications to court-martial for trial.

"(2) The regulations prescribed under paragraph (1) shall—

"(A) set forth the matters that a military judge may rule upon in such proceedings;

"(B) include procedures for the review of such rulings;

"(C) include appropriate limitations to ensure that proceedings under this section extend only to matters that would be subject to consideration by a military judge in a general or special court-martial; and

"(D) provide such limitations on the relief that may be ordered under this section as the President considers appropriate.

"(3) If any matter in a proceeding under paragraph (1) becomes a subject at issue with respect to charges that have been referred to a general or special court-martial, the matter shall be transferred to the military judge detailed to the court-martial.

"(b) DETAIL OF MILITARY JUDGE.—The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed to proceedings under subsection (a)(1).

"(c) DISCRETION TO DESIGNATE MAGISTRATE TO PRESIDE.—In accordance with regulations prescribed by the Secretary concerned, a military judge detailed to a proceeding under subsection (a)(1) may designate a military magistrate to preside over the proceeding.".

9. Sectional Analysis

Section 602 would create a new section, Article 30a, to authorize military judges to preside over certain pretrial issues that arise prior to referral of charges in a case. The authority under this section would extend only to issues: (1) that would be subject to post-referral review by a military judge at a general or special court-martial; and (2) that are designated expressly by the President as eligible for pre-referral review under this section. To the extent identified by the President in implementing regulations, judicial proceedings under this section could include matters currently reviewed in post-referral proceedings, such as search authorizations; requests for mental competency evaluations, individual military counsel, depositions, and subpoenas; review of pretrial confinement determinations; and enforcing victims' rights in pretrial proceedings under Article 6b. The rules prescribed by the President would set forth the procedures military judges should use under this section, and would limit the available remedies to those expressly identified by the President. Any pre-referral judicial consideration of these select issues would occur after an appropriate authority had the opportunity to take action to resolve them.

Article 30a(c) would allow the detailed military judge to designate a military magistrate to preside over the proceeding. The statute would provide for the creation of regulations by which military judges could formally review a military magistrate's rulings on pretrial matters. In addition to acting on pretrial matters, military magistrates also could preside over special court-martial cases referred as judge-alone trials, as proposed in Article 19, with the parties' consent. *See* Section 403, *supra.*

Article 31 – Compulsory Self-Incrimination Prohibited
10 U.S.C. § 831

1. Summary of Proposal

This Report recommends no change to Article 31. Part II of the Report will consider whether changes to the rules implementing Article 31 are needed.

2. Summary of the Current Statute

Article 31 codifies the Fifth Amendment's privilege against self-incrimination and common law rules concerning involuntary confessions, providing additional statutory protections against coercive interrogations and degrading questions in the military setting. The article contains four subsections. Subsection (a) provides the general privilege: that persons subject to the Code may not compel any person to incriminate himself or to answer any question that might tend to incriminate them. Subsection (b) operationalizes the privilege by prohibiting any person subject to the Code from interrogating or requesting any statement from an accused, or from any other person suspected of an offense, without first advising them of the nature of the accusation, of their right not to make any statement regarding the suspected offense, and that any statement they make may be used against them in a trial by court-martial. Subsection (c) provides an added protection for witnesses before military tribunals, by prohibiting persons subject to the Code from compelling witnesses to make non-material statements, or to produce non-material evidence, that may tend to degrade them. Subsection (d) is the enforcement mechanism for this section and provides that statements obtained in violation of Article 31, "or through the use of coercion, unlawful influence, or unlawful inducement," may not be used as evidence against the person so questioned in trials by court-martial.

3. Historical Background

The law of confessions and self-incrimination in the military setting has changed significantly since the Articles of War were originally adopted in 1775.[1] The 1776 Articles of War explicitly authorized compulsory testimony, declaring that "[a]ll persons called to give evidence, in any cause, before a court-martial, who shall refuse to give evidence, shall be punished for such refusal at the discretion of such court-martial."[2] By 1916, the law against self-incrimination had evolved, and the Articles of War provided a statutory protection against self-incrimination in the context of military court proceedings:

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[1] *See generally* CPT Manuel E. F. Supervielle, *Article 31(b): Who Should be Required to Give Warnings?*, 123 MIL. L. REV. 151 (1989).

[2] AW, § XIV, art. 6, of 1776.

> No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him.[3]

The 1917 Manual for Courts-Martial clarified the Fifth Amendment's applicability to servicemembers, stating that the Fifth Amendment privilege against self-incrimination "applies to trials by courts-martial and is not limited to the person on trial, but extends to any person who may be called as a witness."[4] In 1948, Congress added an additional statutory protection, providing for exclusion of coerced statements and a duty to warn all persons accused of offenses of the right not to make a statement and that any statement made could be used as evidence at a court-martial.[5]

When Congress enacted the UCMJ in 1950, it significantly expanded the protections against self-incrimination in Article 31.[6] The newly enacted statute protected all persons in all situations, not just witnesses during official proceedings.[7] In Article 31(b), Congress extended the warning requirement to any "person suspected of an offense" and added a required warning concerning the nature of the accusation. Finally, under Article 31(d), any statement obtained in violation of the article was now excluded as evidence, regardless of whether or not the statements were "coerced."

In addition to the requirements of Article 31, self-incrimination issues in the military justice system are litigated in light of the requirements of the Fifth Amendment.[8] Given the critical role of confessions and admissions in both civilian and military proceedings, a well-developed and evolving body of case law exists in connection with Article 31 and the related constitutional and regulatory provisions.[9]

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[3] AW 24 of 1916. Prior to 1916, aspects of the right against self-incrimination existed in law and practice. For example, in 1878, Congress made it clear that a military accused did not have to take the stand, and no comment could be made about an accused's failure to do so. *See* Captain Fredric I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1, 54 (1976) (citing the Act of March 16, 1878, ch. 37, 20 Stat. 30). By 1901, Congress included the proviso that "no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him." Act of March 2, 1901, ch. 809, § 1, 31 Stat. 951.

[4] MCM 1917, ¶233.

[5] AW 24 of 1948; Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 627.

[6] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[7] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 984-88 (1949).

[8] *See* United States v. Tempia, 37 C.M.R. 249, 260 (C.M.A. 1967) (holding that Miranda v. Arizona, 384 U.S. 436 (1966) applies in military prosecutions).

[9] *See generally* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 5-4(B)(1) (8th ed. 2012).

Article 31 has changed very little since the UCMJ was enacted in 1950. However, the case law concerning the statute's application has evolved over the years—particularly with respect to Article 31(b)'s warning requirements.[10] Some of the key issues addressed by appellate courts include when warnings must be given and who must warn. Not all conversations with a suspect must be preceded by rights warnings.[11] Warnings must be given before any "official" questioning by a person subject to the Code, or questioning by someone acting as an agent for the military, which might include a civilian, a government employee, or a foreign law enforcement officer.[12]

4. Contemporary Practice

The President has implemented Article 31 through Military Rules of Evidence 301 (Privilege concerning compulsory self-incrimination), 303 (Degrading questions), 304 (Confessions and admissions), and 305 (Warnings about rights). These rules create a procedural framework to protect the right of witnesses against self-incrimination, and to provide guidance to courts and practitioners on the application of Article 31's provisions.[13] The rules generally track the case law concerning the Fifth Amendment and Article 31, though some terms used in the rules are left unspecific given the evolving nature of the case law in the area.[14] The rules have not yet been updated to reflect the most recent developments in the case law concerning Article 31(b).

5. Relationship to Federal Civilian Practice

Military practice and federal civilian practice in the areas of self-incrimination, involuntary confessions, and rights warnings share many commonalities, and the Supreme Court's case

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[10] *See generally* Supervielle, *supra* note 1. Consider the evolution in the law from United States v. Duga, 10 M.J. 206, 209 (C.M.A. 1981) (holding that Article 31(b)'s warning requirements applied only if the questioner was acting in an official capacity *and* if the suspect perceived the official nature of the questioning) to United States v. Jones, in which the Court of Appeals for the Armed Forces modified the second prong of the *Duga* test, which had utilized a subjective standard. United States v. Jones, 73 M.J. 357, 361 (C.A.A.F. 2014). Under the *Jones* modified test, Article 31(b) applies to situations in which: (1) the questioner is acting in an official law-enforcement or disciplinary capacity; *or* (2) the questioner "could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity."

[11] SCHLUETER, *supra* note 9, at § 5-4(B)(1).

[12] *Id.*; *see also* United States v. Pinson, 56 M.J. 489 (C.A.A.F. 2002) (holding that Icelandic criminal investigators were not acting under the control or direction of Naval investigators when they interrogated appellant); United States v. Ruiz, 54 M.J. 138, 140 n.2 (C.A.A.F. 2000) (noting that the actions of an undercover agent are "not within the scope of the warning requirement in Article 31(b)"); United States v. Smith, 56 M.J. 653 (A. Ct. Crim. App. 2001) (Article 31 warnings not required when questioning accused during unscheduled classification board because such questioning had legitimate administrative purpose and was not for purpose of obtaining information to be used at trial).

[13] *See generally* STEPHEN A. SALTZBURG, LEE D. SCHINASI, AND DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 3-22 – 3-285 (7th ed. 2011).

[14] MCM, App. 22 (M.R.E. 305(c), Analysis).

law in this area is fully applicable to servicemembers.[15] Civilian practice focuses largely upon case law interpreting the Fifth Amendment, although in *Miranda v. Arizona*, the Supreme Court specifically looked to Article 31(b) to craft an exclusionary rule to protect the Fifth Amendment privilege against self-incrimination during civilian police interrogations.[16] In its decision, the Court held that an individual being questioned by law enforcement "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed," or else any statement made by the person would be inadmissible against him in a criminal proceeding.[17] Military practice applies Article 31, the Military Rules of Evidence, and the Fifth Amendment. Because both privileges—the Fifth Amendment privilege against self-incrimination and the statutory privilege under Article 31—apply to servicemembers, M.R.E. 301 clarifies that "[t]he privilege most beneficial to the individual asserting the privilege shall be applied" when determining whether to admit an accused's prior statements in a military criminal proceeding.[18]

6. Recommendation and Justification

Recommendation 31: No changes to Article 31.

- The subject of self-incrimination lies at the intersection of constitutional law, statutory articles, and regulatory provisions in an area of intense and ongoing litigation. As such, caution is particularly warranted with respect to statutory changes, lest the attempt to codify existing case law either stifles a subject in which the applicable civilian and military case law is evolving, or in which the introduction of new language would trigger extensive interpretative litigation. The military appellate courts have shown flexibility in adapting Article 31's provisions to changing times and to previously unanticipated factual scenarios. In that context, this Report does not recommend amendments to Article 31.

- Part II of the Report will consider whether any of the regulatory provisions need to be update to ensure consistency with the evolving interpretations of Article 31.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by using the current UCMJ as a baseline for departure. This proposal supports the MJRG's Operational Guidance by not recommending statutory changes in an area where the case law is evolving yet stable, and which would likely lead to additional litigation.

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[15] The applicability of the Fifth Amendment to servicemembers was noted in the MCM as early as 1917. *See* MCM 1917, ¶233-36.

[16] Miranda v. Arizona, 384 U.S. 436, 489 (1966).

[17] *Id.* at 444.

[18] M.R.E. 301(a).

Article 32 – Preliminary Hearing
10 U.S.C. § 832

1. Summary of Proposal

This proposal would focus the preliminary hearing on an initial determination of probable cause prior to referring charges to a general court-martial; require a more comprehensive preliminary hearing report; and provide an opportunity for the government, the defense, and victims to submit additional information at the conclusion of the hearing pertinent to an appropriate disposition of the charges and specifications. The proposal would replace the statute's provision for a "recommendation" on disposition with a requirement for the preliminary hearing officer to analyze and organize the information from the proceeding in a manner designed to better assist the staff judge advocate and the convening authority in fulfilling their respective disposition responsibilities under Articles 30 and 34. Part II of the Report will address changes in the rules implementing Article 32 that would be required as a result of the proposed statutory amendments.

2. Summary of the Current Statute

Article 32, as recently amended by NDAA FY 2014 and NDAA FY 2015, requires completion of a preliminary hearing as a precondition to referral of charges to a general court-martial. The statute provides that the purpose of a preliminary hearing is limited to: (1) determining whether there is probable cause to believe the accused committed the offense; (2) determining whether there is jurisdiction over the accused and the offense(s); (3) considering the form of the charge(s); and (4) recommending "the disposition that should be made of the case." An impartial hearing officer, normally a judge advocate senior in rank to the accused, presides at the preliminary hearing and prepares a post-hearing report for the convening authority addressing probable cause, jurisdiction, the form of the charges, and the hearing officer's recommendation as to disposition. At the hearing, the accused, who must be advised of the charges, has the right to be represented by counsel, to cross-examine witnesses who testify, and to present evidence in defense and mitigation that is relevant to the purposes of the hearing. The hearing officer may consider uncharged misconduct, subject to providing notice to the accused and affording the accused the same opportunities for representation, cross-examination, and presentation of evidence as are available regarding the charges.

Article 32(d)(3) provides that a victim (including any military member) who declines to testify at the preliminary hearing cannot be required to do so. Under Article 32(e), the preliminary hearing must be recorded, and a copy of the recording must be provided to a victim upon request. The requirements of Article 32 are binding on all convening authorities; however, failure to follow them does not constitute jurisdictional error.

3. Historical Background

Article 32 traces its history to the 1920 amendments to the Articles of War, which grew out of the post-World War I debates concerning the administration of military justice in the Army during the war.[1] A significant concern raised during the hearings and debates concerned the practice under which "a soldier may be put on trial by a commanding officer's arbitrary discretion, without any preliminary inquiry into the probability of the charge."[2] The 1920 amendments to the Articles of War established a requirement that:

> No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides . . . .[3]

The goal of this statutory pretrial investigation was to ensure adequate preparation of cases; to guard against hasty, ill-considered charges; to save innocent persons from the stigma of unfounded charges; and to prevent trivial cases from going before general courts-martial.[4]

The post-World War II military justice debates resulted in a series of amendments to the Articles of War known as the Elston Act.[5] Among the changes, Congress moved "pretrial investigations" to Article 46 and amended the statute to permit the accused to be

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[1] AW 70 of 1920. Like the rest of the Articles of War, this requirement applied only to the United States Army. Discipline in the Navy was controlled by the Articles for the Government of the Navy, which contained no statutory provision for a pretrial investigation. The Articles for the Government of the Navy were adopted in 1862 and had not been substantially amended since that time. Coast Guard Disciplinary Regulations called for a "careful investigation into the circumstances on which the complaint is founded" and a written report which included available witnesses and evidence.

[2] WAR DEPARTMENT, MILITARY JUSTICE DURING THE WAR 63 (1919). It was also during this time that the Army first developed the criminal investigative division within the Military Police Corps to conduct criminal investigations. However, at this early stage, investigators were selected from military police units within each individual command, and they generally lacked investigative training and experience. The Navy's criminal investigative organization did not develop until 1945, when the Office of Naval Intelligence charter was expanded to include criminal investigations.

[3] AW 70 of 1920.

[4] Humphrey v. Smith, 336 U.S. 695, 698-99 (1949) (citing WAR DEPARTMENT, MILITARY JUSTICE DURING THE WAR 63 (1919)).

[5] Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 627.

represented by counsel at the investigation.[6] Two years later, Congress consolidated the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Rules for the Coast Guard into the UCMJ and incorporated the requirement for a pretrial investigation.[7] The language of Article 32 outlining its purpose, however, remained essentially the same as under the original statute under the 1920 Articles of War: an inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case "in the interest of justice and discipline."[8]

Subsequent to enactment of the UCMJ, the statutory provisions governing the Article 32 investigation remained largely unchanged over the next six decades, with only minor technical and clarifying amendments. The Military Justice Amendments of 1981 clarified the accused's right to individual military counsel at the investigation and aligned the right to counsel in Article 32(b) with the right to counsel under Article 27 and the duties of counsel contained in Article 38.[9] NDAA FY 1996 amended the statute to provide for the investigation of uncharged misconduct,[10] and NDAA FY 2012 expanded the subpoena authority under Article 47 to include a subpoena to compel the production of documents and evidence issued in connection with an Article 32 investigation.[11]

In NDAA FY 2014, Congress revised Article 32 in its entirety, with the new provisions applying to offenses committed on or after December 27, 2014.[12] The Joint Explanatory Statement accompanying the final bill noted that the legislation "changes Article 32, UCMJ, proceedings from an investigation to a preliminary hearing."[13] The statement drew the

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[6] AW 46(b) of 1948 ("The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general court-martial jurisdiction over the command . . . ."). As Congress was enacting the Elston Act, the Navy was conducting a review of the Articles for Government of the Navy. Although these Articles did not require a pretrial investigation, internal Service regulations called for an inquiry by the officer recommending court-martial, who could order a board of investigation or court of inquiry if additional development of the facts was needed. *See* SYNOPSIS OF RECOMMENDATIONS FOR THE IMPROVEMENT OF NAVAL JUSTICE, OFFICE OF THE JUDGE ADVOCATE GENERAL, NAVY DEPARTMENT (1947), *available at* http://www.loc.gov/mwg-internal/de5fs23hu73ds/progress?id=yHs22rx0-_bQk8Zm_NTgo2FGtJbHsUEszdpj8uXPbRo.

[7] Act of May 5, 1950, ch. 169, 64 Stat. 108.

[8] Article 32(a) (1950-2013).

[9] Military Justice Amendments of 1981, Pub. L. No. 97-81, § 4, 95 Stat. 1085.

[10] NDAA FY 1996, Pub. L. No. 105-85, § 1131, 111 Stat. 1759 (1997).

[11] NDAA FY 2012, Pub. L. No. 112-81, § 542, 125 Stat 1298 (2011); *see* R.C.M. 703(e)(2)(c)(1).

[12] NDAA FY 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 672 (2013). NDAA FY 2015 subsequently amended the new Article 32 to apply to all hearings held on or after December 27, 2014, irrespective of the date of the offenses. NDAA FY 2015, Pub. L. No. 113-291, § 531(a)(4), 128 Stat. 3292 (2014).

[13] 159 CONG. REC. H7949 (daily ed. Dec. 12, 2013) (Joint Explanatory Statement on H.R. 3304).

following contrast between an Article 32 "investigation" under then-current law and an Article 32 "preliminary hearing" under the new version of Article 32:

> Under current law and Rule 405 of the Rules for Courts-Martial, an Article 32, UCMJ investigation includes an inquiry into the truth of the matters set forth in the charges, provides a means to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, and serves as a tool of discovery. The agreement establishes that an Article 32, UCMJ, preliminary hearing has a narrower objective: (1) Determine whether there is probable cause to believe an offense has been committed and that the accused committed the offense; (2) Determine whether the convening authority has court-martial jurisdiction over the offense and the accused; (3) Consider the form of the charges; and (4) Recommend the disposition that should be made of the case.[14]

Subsequently, Congress approved a technical amendment to the new Article 32 to clarify that the accused, as under prior law, could waive the Article 32 proceeding.[15]

4. Contemporary Practice

The new Article 32 provisions apply to all preliminary hearings held on or after December 27, 2014. A recent executive order contains the implementing rules and procedures for the new Article 32, including a new R.C.M. 404A addressing disclosure of matters to the defense before the preliminary hearing.[16] The substance of the new statute and the new implementing provisions have not been addressed in reported appellate decisions.[17] Part II of this Report will further consider contemporary practice in light of any developments in the implementing rules or the applicable case law concerning Article 32.

5. Relationship to Federal Civilian Practice

There is not a direct corollary to the Article 32 hearing in federal civilian practice. Both the prior Article 32 investigation and the current Article 32 preliminary hearing have been compared to two distinct types of civilian proceedings—a civilian grand jury and a judicial probable cause hearing.[18] The current Article 32 preliminary hearing has some of the traits of both, and possesses other traits common to neither.

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[14] *Id.*

[15] NDAA FY 2015, Pub. L. No. 113-291, § 531(a)(4), 128 Stat. 3292 (2014).

[16] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

[17] *See* Manual for Courts-Martial; Proposed Amendments, 79 Fed. Reg. 59,938-59,942 (Oct. 3, 2014).

[18] *See, e.g.*, Lawrence J. Sandell, *The Grand Jury and the Article 32: A Comparison*, 1 N. KY. L. REV. 25 (1973); *see also* REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (May 2014) (comparing the prior Article 32 investigation and the new Article 32 preliminary hearing to the civilian preliminary hearing, and identifying two major differences: (1) unlike civilian preliminary hearings, Article 32 hearings have traditionally served as a discovery tool for the defense; and (2) unlike

In federal civilian criminal trials, the right to a grand jury is established through the Fifth Amendment to the Constitution and is implemented in the Federal Rules of Criminal Procedure, which recognize the right to grand jury indictment in all felony cases.[19] The Supreme Court has described the purpose and powers of the grand jury in expansive terms:

> [The grand jury] serves the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions. It has . . . extraordinary powers of investigation and great responsibility for directing its own efforts. . . . Without thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution.[20]

The U.S. Attorney's Manual, however, describes a narrower role for grand jurors:

> While grand juries are sometimes described as performing accusatory and investigatory functions, the grand jury's principal function is to determine whether or not there is probable cause to believe that one or more persons committed a certain Federal offense within the venue of the district court. . . . The grand jury's power, although expansive, is limited by its function toward possible return of an indictment . . . [and] cannot be used solely to obtain additional evidence against a defendant who has already been indicted [or] used solely for pre-trial discovery or trial preparation.[21]

Although the grand jury is often described as an independent body—and grand juries do act with independence in many areas—the Supreme Court has stated that it is "an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses."[22] This specifically includes the ability of the grand jury to issue subpoenas. However, the court's ability to exercise its supervisory power over grand juries is limited.[23]

Regular federal grand juries are standing bodies, impaneled for up to eighteen months, although they may actually sit for as little as once a month. Grand juries have a maximum of 23 members, with 16 needed for a quorum. An indictment may be returned by a vote of 12

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civilian preliminary hearings, the Article 32 hearing officer's determination regarding probable cause is not binding on the convening authority).

[19] FED. R. CRIM. P. 7(a).

[20] United States v. Sells Engineering, Inc., 463 U.S. 418, 423 (1983) (internal quotations and citations omitted).

[21] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-11.101 (1997) [hereinafter USAM].

[22] Brown v. United States, 359 U.S. 41, 49 (1959).

[23] *See* United States. v. Williams, 504 U.S. 36 (1992) ("Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure.").

or more members.[24] The grand jury does not conduct its business in open court, and a federal judge does not preside over its proceedings. It meets behind closed doors, in secret, with only the grand jurors, the attorney for the government, witnesses, a recorder, and possibly an interpreter present. The target of a grand jury investigation or a potential defendant may request to appear and testify before the grand jury, but may actually appear only if invited or subpoenaed and may not be accompanied by counsel while testifying. In addition, a potential defendant has no right to cross-examine witnesses and no right to introduce evidence in rebuttal. Hearsay evidence is generally permissible at the grand jury proceeding, and there is no legal requirement for the prosecutor to present exculpatory evidence.[25]

There are four possible outcomes from a federal grand jury investigation: (1) an indictment, in which the grand jury accuses an individual investigated of a specific crime and the government is authorized to proceed to trial; (2) a vote not to indict, which is binding on the government unless the U.S. Attorney specifically authorizes the case to be re-presented to the same or a different grand jury; (3) the discharge or expiration of the grand jury without any action; or (4) the submission of a presentment or report to the court.[26] In the majority of cases that go before a grand jury, the government will have already conducted a criminal investigation, and is primarily seeking an indictment. In these cases, the attorney for the government will present evidence to the grand jury, including testimony from criminal investigators or law enforcement agents, in order to establish probable cause for the indictment. In other cases, however, the investigation will be incomplete before the grand jury stage, and the grand jury—either on its own initiative or at the suggestion of the attorney for the government—will investigate the matter presented by the government. In its investigative capacity, the grand jury has the power to issue subpoenas to compel the testimony of witnesses and the production of documents

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[24] FED. R. CRIM. P. 6(a) and (f).

[25] *See Williams*, 504 U.S. at 55 ("[W]e conclude that courts have no authority to prescribe such a duty [to disclose exculpatory evidence to the grand jury] pursuant to their inherent supervisory authority over their own proceedings."). Although there is not a legal requirement, Department of Justice policy requires a prosecutor who is personally aware of substantial evidence that directly negates the guilt of a subject to disclose that evidence to the grand jury before seeking an indictment. USAM, *supra* note 21, at § 9-11.241. *Cf.* R.C.M. 601(d)(1) (providing that charges may be referred to court-martial by a convening authority "based on hearsay in whole or in part" and that "[t]he convening authority or judge advocate may consider information from any source . . . ."); R.C.M. 701(a)(6) (requiring the trial counsel to disclose to the defense "as soon as practicable" evidence known to the trial counsel that reasonably tends to negate the guilt of the accused of an offense charged, reduce the degree of guilt, or reduce the punishment).

[26] *See generally* SUSAN W. BRENNER, GREGORY C. LOCKHART & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE, 1 FED. GRAND JURY § 3:4 (2d ed., 2006). At common law, 'indictments' were returned based upon evidence presented to the grand jury, while 'presentments' were "the notice taken by the grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them. . . ." Presentments are no longer a common practice.

and physical evidence.[27] A grand jury uses the court's subpoena power, as provided in Fed. R. Crim. P. 17.

In addition to the grand jury, federal civilian practice also provides for an adversarial preliminary hearing, to be conducted between 14-21 days following a not-yet-indicted accused's initial appearance following arrest.[28] The hearing is presided over by a federal magistrate judge, whose role is to determine whether there is probable cause for the charges. If there is probable cause, the magistrate judge "binds over" the charges for felony trial (pending indictment) in U.S. district court; if there is not probable cause, the magistrate judge dismisses the complaint.[29] The purpose of this proceeding is to provide the accused a procedural protection against baseless charges early in the life of a case in situations where the government has not yet sought or obtained a grand jury indictment.[30]

With respect to state practice, the Constitutional guarantee of prosecution by grand jury indictment is not applicable to the states,[31] and the Supreme Court has held that independent judicial screening of felony-level charges through a preliminary hearing is not a due process requirement.[32] Nevertheless, all American jurisdictions provide at least one procedural avenue for obtaining such a screening, and nearly two-thirds of the states allow for filing of felony-level charges without a prior grand jury indictment.[33] Instead, most of these states allow felony cases to be brought following an adversarial preliminary hearing similar to the one provided for by Fed. R. Crim. P. 5.1. Six of these states permit bypassing the preliminary hearing through direct filing of an information (a charging instrument filed with the court similar in both content and function to charges that are referred to a court-martial).[34] In these direct filing jurisdictions, the trial judge makes an ex parte probable

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[27] *Cf.* R.C.M. 703(e)-(f), as amended by Exec. Order No. 13,669, 79 Fed. Reg. 34,999 (June 18, 2014) (providing trial counsel and the Article 32 investigating officer with the power to issue subpoena duces tecum prior to referral of charges to court-martial in support of the investigation).

[28] FED. R. CRIM. P. 5.1(c). The rule requires the preliminary hearing to take place within 14 days of the initial appearance only when the accused is in custody.

[29] FED. R. CRIM. P. 5.1(e)-(f); *see* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, AND ORIN KERR, CRIMINAL PROCEDURE §14.1(a) (Screening) (3d ed. 2013).

[30] *See* LAFAVE ET AL., *supra* note 29, at § 14.1 (Functions of the preliminary hearing) (3d ed. 2013) ("Preliminary hearing screening is said to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, to save the defendant from the humiliation and anxiety involved in public prosecution, and to ensure that there are substantial grounds upon which a prosecution may be based."). Under FED. R. CRIM. P. 5.1(a)(2), the government can bypass the preliminary hearing requirement by securing a prior grand jury indictment.

[31] Hurtado v. California, 110 U.S. 516 (1884).

[32] Lem Woon v. Oregon, 229 U.S. 586 (1913).

[33] *See* LAFAVE ET AL., *supra* note 29, at § 14.1 (Indictment states) and § 14.2(d) (Information states).

[34] *Id.* The "direct filing" states include Florida, Iowa, Montana, Minnesota, Vermont, and Washington. Of these states, Minnesota and Vermont have eliminated the preliminary hearing entirely. *Id.*

cause determination after the filing of the information by the prosecutor, by reviewing the charges and the prosecutor's sworn affidavit summarizing the available evidence.[35]

Like Article 32 hearings, state-level preliminary hearings are generally adversarial in nature. The accused has a right to counsel and to cross-examine witnesses; though in the majority of jurisdictions the rules of evidence do not apply, except with respect to privileges.[36] Most jurisdictions recognize a general defense right to present defense witnesses at the preliminary hearing.[37] However, "[w]here the magistrate has reason to believe that the defense is calling a witness to obtain further discovery of the prosecution's case, the magistrate may require the defense to make an offer of proof as to what will be obtained from the witness' testimony."[38] Furthermore, in most jurisdictions, magistrate judges will not allow subpoenas of crime victims to testify at the preliminary hearing, or at any pretrial proceeding, unless it can be shown that they are likely to be unavailable to testify at trial.[39]

The primary purposes of preliminary hearings in both federal and state practice—similar to the primary purposes of Article 32 and its statutory predecessors in the Articles of War—are to prevent hasty, malicious, improvident, or oppressive prosecutions; to ensure that there are substantial grounds upon which a prosecution may be based; and to avoid the unnecessary public expense of an unwarranted trial.[40] To ensure these purposes are fulfilled, the magistrate judge's probable cause determination is generally binding on the government.[41] Preliminary hearings also serve several prosecution and public policy goals, including: helping to inform the decision by the government whether to proceed with criminal prosecution at the felony trial court; informing the ultimate decision by the

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[35] *Id.*; *see, e.g.*, MINN. R. CRIM. P. 2.01.

[36] LAFAVE ET AL., *supra* note 29, at § 14.4 (Preliminary hearing procedures). The right to cross-examine witnesses at a preliminary hearing is based on local law only, as the Supreme Court has long held that cross-examination at a preliminary hearing is not required by the confrontation clause of the Sixth Amendment. *See* Goldsby v. United States, 160 U.S. 70 (1895).

[37] LAFAVE ET AL., *supra* note 29, at § 14.4(d).

[38] *Id.*

[39] *Id.*; *see also id.* at § 20.2(e) (Depositions) (explaining that in the vast majority of jurisdictions, so-called "discovery depositions" are not allowed).

[40] *Id.* at § 14.1(a). *Cf.* Humphrey v. Smith, 336 U.S. 695, 698-99 (1949) ("[The pretrial investigation's] original purposes were to insure adequate preparation of cases, to guard against hasty, ill-considered charges, to save innocent persons from the stigma of unfounded charges, and to prevent trivial cases from going before general courts-martial.") (referring to AW 70 of 1920, the predecessor to Article 32 of the UCMJ).

[41] LAFAVE ET AL., *supra* note 29, at § 14.3. In most jurisdictions, the consequence of the magistrate judge not finding probable cause is a dismissal without prejudice, with the ability for the prosecution to seek a new preliminary hearing with new evidence, or even with the same evidence. *Id.* at § 14.3(c). A minority group of states, however, prohibit refiling on the same evidence and provide for prosecution appeal of a dismissal to the trial court. *Id.*

accused with respect to his plea;[42] gaining the defense perspective as to what actually happened; promoting the victim's interest in pursuing the matter by presenting it in a public forum; and promoting public confidence in a sensitive prosecutorial decision by having the evidence presented in a public forum and the decision ratified by a neutral and detached magistrate (or, if the case is likely to be dismissed, by showing that the dismissal stemmed from deficiencies in the evidence rather than any favoritism on the part of the prosecutor).[43] For these reasons, in most states where there is an option to bypass the preliminary hearing with a grand jury indictment, prosecutors generally choose not to exercise this option.[44]

The recently enacted Article 32 preliminary hearing differs from its federal and state civilian counterpart in that the preliminary hearing officer does not exercise judicial powers with respect to the disposition of charges. Instead, the preliminary hearing and the report of the preliminary hearing officer serve primarily as vehicles for developing and analyzing information for consideration by the staff judge advocate and the convening authority. The responsibility for determining probable cause and jurisdiction, as well as the responsibility for making a decision on disposition, only arise after the preliminary hearing officer prepares and forwards the report required by Article 32. At that point, before the charges and specifications may be referred to a general court-martial for trial, the staff judge advocate makes a determination on the legal issues of probable cause, jurisdiction, and whether each specification states an offense under military law which is binding on the convening authority if any of the three are lacking. As a separate matter, the staff judge advocate makes an advisory recommendation on disposition to the convening authority, the officer charged with the responsibility for making the ultimate disposition decision.

6. Recommendation and Justification

Recommendation 32: Amend Article 32(a)-(c) by revising the current requirement for a disposition "recommendation" to focus the preliminary hearing officer more directly on providing an analysis of the information that will be useful in fulfilling the statutory responsibilities of: (1) the staff judge advocate, in providing legal determinations and a disposition recommendation to the convening authority under Article 34; and (2) the convening authority, in disposing of the charges and specifications "in the interest of justice and discipline" under Article 30.

- This proposal would retain the core purposes of the Article 32 preliminary hearing as amended—to determine whether or not each specification alleges an offense, whether or not there is probable cause to believe that the accused committed the

[42] *Id.* at § 14.1(e) ("The hearing may then provide a valuable 'educational process' for the defendant who is not persuaded by his counsel's opinion that the prosecution has such a strong case that a negotiated plea is in the defendant's best interest.").

[43] YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS & QUESTIONS 1015 (13th ed. 2012).

[44] *See id.* at § 14.2(d), noting that the bypass option is utilized in many state jurisdictions in less than ten percent of felony cases. This is different from the federal practice, where federal prosecutors routinely bypass scheduled preliminary hearings by obtaining prior indictments. *See id.* at § 14.2(b).

offense charged, and whether or not the convening authority has jurisdiction over the accused and the offense—while restructuring the current requirement for a disposition recommendation. As amended, the parties and any victim of an offense could submit additional matters relevant to disposition to the hearing officer, which the hearing officer would then organize and analyze in the preliminary hearing report. As such, the proposed amendments would retain the current limitations on the nature of the Article 32 preliminary hearing, while expanding the opportunity for victims and the accused to provide timely and useful input for consideration in the disposition decision-making process.

- The proposed amendments recognize that the preliminary hearing officer is in a unique position to organize and analyze the information developed during the preliminary hearing and—as will be developed more fully in the proposed implementing rules in Part II of this Report—a broader range of additional documentary information that the government, the accused, and the victim would be able to submit following the hearing. Under the proposed amendments, the hearing officer would use all of this information to assist and inform the staff judge advocate's recommendation and the convening authority's ultimate disposition decision.

- Under the proposal, the hearing officer's report would be required to include an analysis of whether each specification alleges an offense; whether there is probable cause to believe the accused committed the offense; whether any modifications to the specifications are needed; the evidence supporting the elements of each offense; a summary of witness testimony and documentary evidence; observations concerning the testimony of witnesses; additional information relevant to the convening authority's disposition decision under Articles 30 and 34; and a discussion of any uncharged offenses.

- The proposed amendments would emphasize that the primary responsibility for a disposition recommendation resides with the staff judge advocate under Article 34. Also, while not requiring the preliminary hearing officer to make a recommendation, the proposed legislation does not preclude the preliminary hearing officer from doing so, either when required by service regulations or by the convening authority in a particular case.

- As in the current statute, the proposal reflects that none of the preliminary hearing officer's conclusions would be binding on the convening authority, who is ultimately responsible for determining the appropriate disposition of the charges and specifications for each case in the interest of justice and discipline.

- This proposal reaffirms that a victim's desire not to testify at the preliminary hearing will not, alone, be grounds for ordering a deposition.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by incorporating, to the extent practicable and appropriate, the principles of law and the rules of procedure used in the trial of criminal cases in the United States district courts into military justice practice.
- This recommendation also supports the GC Terms of Reference by examining and incorporating where appropriate the recommendations, proposals and analysis of the Response Systems Panel—in particular, Recommendation 115 (concerning the ordering of depositions), Recommendation 116 (regarding the treatment of the hearing officer's recommendation), and Recommendation 55 (regarding creation and implementation of mechanisms requiring trial counsel to convey the victim's specific concerns and preferences to the convening authority regarding case disposition) of the Response Systems Panel's final report.
- This recommendation is related to the proposed amendments to Articles 30, 33 and 34 concerning the staff judge advocate's responsibility to provide a recommendation, the convening authority's responsibility to appropriately dispose of the case, and guidance concerning the exercise of disposition authority.

8. Legislative Proposal

SEC. 603. PRELIMINARY HEARING REQUIRED BEFORE REFERRAL TO GENERAL COURT-MARTIAL.

(a) IN GENERAL.—Section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), is amended by striking the section heading and subsections (a), (b), and (c), and inserting the following:

"§832. Art. 32. Preliminary hearing required before referral to general court-martial

"(a) IN GENERAL.—(1)(A) Except as provided in subparagraph (B), a preliminary hearing shall be held before referral of charges and specifications for trial by general court-martial. The preliminary hearing shall be conducted by an

impartial hearing officer, detailed by the convening authority in accordance with subsection (b).

"(B) Under regulations prescribed by the President, a preliminary hearing need not be held if the accused submits a written waiver to the convening authority and the convening authority determines that a hearing is not required.

"(2) The issues for determination at a preliminary hearing are limited to the following:

"(A) Whether or not the specification alleges an offense under this chapter.

"(B) Whether or not there is probable cause to believe that the accused committed the offense charged.

"(C) Whether or not the convening authority has court-martial jurisdiction over the accused and over the offense.

"(b) HEARING OFFICER.—(1) A preliminary hearing under this section shall be conducted by an impartial hearing officer, who—

"(A) whenever practicable, shall be a judge advocate who is certified under section 827(b)(2) of this title (article 27(b)(2)); or

"(B) in exceptional circumstances, shall be an impartial hearing officer, who is not a judge advocate so certified.

"(2) In the case of a hearing officer under paragraph (1)(B), a judge advocate who is certified under section 827(b)(2) of this title (article 27(b)(2)) shall be available to provide legal advice to the hearing officer.

"(3) Whenever practicable, the hearing officer shall be equal in grade or senior in grade to military counsel who are detailed to represent the accused or the Government at the preliminary hearing.

"(c) REPORT TO CONVENING AUTHORITY.—After a preliminary hearing under this section, the hearing officer shall submit to the convening authority a written report (accompanied by a recording of the preliminary hearing under subsection (e)) that includes the following:

"(1) For each specification, a statement of the reasoning and conclusions of the hearing officer with respect to determinations under subsection (a)(2), including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations of the hearing officer concerning the testimony of witnesses and the availability and admissibility of evidence at trial.

"(2) Recommendations for any necessary modifications to the form of the charges or specifications.

"(3) An analysis of any additional information submitted after the hearing by the parties or by a victim of an offense, that, under such rules as

the President may prescribe, is relevant to disposition under sections 830 and 834 of this title (articles 30 and 34).

"(4) A statement of action taken on evidence adduced with respect to uncharged offenses, as described in subsection (f).".

(b) SUNDRY AMENDMENTS.—Subsection (d) of such section (article) is amended—

(1) in paragraph (1), by striking "subsection (a)" in the first sentence and inserting "this section";

(2) in paragraph (2), by striking "in defense" and all that follows through the end and inserting "that is relevant to the issues for determination under subsection (a)(2).";

(3) in paragraph (3), by adding at the end the following new sentence: "A declination under this paragraph shall not serve as the sole basis for ordering a deposition under section 849 of this title (article 49)."; and

(4) in paragraph (4), by striking "the limited purposes of the hearing, as provided in subsection (a)(2)." and inserting the following: "determinations under subsection (a)(2).".

(c) REFERENCE TO MCM.—Subsection (e) of such section (article) is amended by striking "as prescribed by the Manual for Courts-Martial" in the second sentence and inserting "under such rules as the President may prescribe".

(d) EFFECT OF VIOLATION.—Subsection (g) of such section (article) is amended by adding at the end the following new sentence: "A defect in a report under subsection (c) is not a basis for relief if the report is in substantial compliance with that subsection.".

9. Sectional Analysis

Section 603 would amend Article 32 to clarify current law concerning the requirement for and the conduct of preliminary hearings before referral of charges and specifications to general courts-martial for trial. The amendments would focus the preliminary hearing on an initial determination of probable cause, jurisdiction, and the form of the charges, and would provide for the production of evidence and the examination of witnesses to assist the preliminary hearing officer in making these determinations. In addition, the amendments would revise the requirement for a disposition recommendation—currently provided as a fourth, distinct purpose of the preliminary hearing—to focus the preliminary hearing officer more directly on providing a thorough analysis of the information developed at the hearing. The purpose of this analysis would be to inform the staff judge advocate's recommendation and the convening authority's ultimate disposition decision with respect to the charges and specifications in the case, rather than providing a disposition recommendation in summary form without supporting analysis. The report and the analysis contained within it would be advisory in nature and would be designed to assist the staff judge advocate and the convening authority. The analysis contained within the report would not provide a basis for complaint or relief when in substantial compliance with the requirements of the amended Article 32. As amended, Article 32 would contain the following provisions:

Article 32(a) would state the issues for determination at the preliminary hearing: (1) whether or not the specification alleges an offense under the UCMJ; (2) whether or not there is probable cause to believe that the accused committed the offense charged; and (3) whether or not the convening authority has court-martial jurisdiction over the accused and over the offense.

Article 32(b) would retain and clarify current law concerning the qualifications of the preliminary hearing officer.

Article 32(c) would require the preliminary hearing officer's report to include an analysis of whether each specification alleges an offense; whether there is probable cause to believe the accused committed the offense; any necessary modifications to the form of the charges and specifications; the state of the evidence supporting the elements of each offense; a summary of witness testimony and documentary evidence; a statement regarding the availability and admissibility of evidence; additional information relevant to disposition of

charges and specification under Articles 30 and 34; and a discussion of any uncharged offenses. The proposed amendments recognize that the primary responsibility for a disposition recommendation resides with the staff judge advocate under Article 34. Also, while not requiring the preliminary hearing officer to make a recommendation, the proposed legislation does not preclude the preliminary hearing officer from doing so, either when required by service regulations or by the convening authority in a particular case.

Article 32(c)(2) would provide the parties and any victim with the opportunity to submit additional information to the preliminary hearing officer for transmission for consideration by the convening authority with respect to disposition. The procedure for submission of additional information would be separate from the hearing, reflecting the broader range of information that may be pertinent to the exercise of disposition discretion. The implementing regulations would provide procedures for sealing or otherwise protecting sensitive or personal material in the additional information submitted by the parties or the victim.

Article 32(d)(3) would clarify that a victim's declination to participate in the Article 32 hearing "shall not serve as the sole basis for ordering a deposition" under Article 49. This change would ensure that a victim's declination under Article 32(d)(3) is not used to circumvent the limited purpose of depositions under Article 49: to preserve prospective witness testimony for use at trial, generally in cases where the prospective witness will be unavailable to testify in person. *See* Section 711, *infra*.

The proposed changes are based in part on a recognition that the convening authority's ultimate disposition decision depends on a broad range of factors relating to good order and discipline—of which the preliminary hearing officer may not be aware and which may not directly relate to the legal or factual strengths or weaknesses of the limited case as presented at the preliminary hearing—including those factors contained in the disposition guidance under the proposed new Article 33. In addition, consistent with the proposed amendments to Articles 46 and 47 (and as will be more fully developed in the Rules for Courts-Martial), the authority to issue pre-referral investigative subpoenas would be governed by a uniform policy that will apply throughout the process prior to referral, and would not be limited narrowly to Article 32 proceedings.

Article 33 (Current law) – Forwarding of Charges
10 U.S.C. § 833

1. Summary of Proposal

This proposal would move the requirement for prompt forwarding of charges in cases involving pretrial confinement or arrest from Article 33 to Article 10.

2. Summary of the Current Statute

Article 33 requires that the commanding officer forward the charges against "a person who is held for trial by general court-martial," along with the Article 32 preliminary hearing report, to the officer exercising general court-martial jurisdiction within eight days after the accused is ordered into arrest or confinement "if practicable." When such forwarding is not practicable, the article requires the commanding officer to submit a written report to the general court-martial convening authority stating the reasons for delay.

3. Historical Background

Article 33 is based on a similar provision from Article 46c of the 1948 Articles of War:

> When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges.[1]

This provision was derived, in turn, from Articles 70 and 71 of the 1920 Articles of War. Article 70 provided that "no officer or soldier" could be held in pretrial confinement for "more than eight days, or until such time as a court-martial can be assembled."[2] Article 71 required that "an officer" held in pretrial confinement be served with a copy of the charges within eight days of his confinement.[3] Article 71 also required that the officer be brought to trial with 10 days of the service of such charges.[4] Neither of the Article 71 requirements, apparently, applied to enlisted members who were ordered into confinement. Whereas Article 10 requires prompt disposition of offenses in all cases in which the accused is being held for trial, the drafters of the UCMJ specifically intended Article 33 to insure "an

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[1] AW 46c of 1948; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1005 (1949) [hereinafter *Hearings on H.R. 2498*].

[2] AW 70 of 1920.

[3] AW 71 of 1920.

[4] *Id.* The article, however, allowed an additional 30 days to bring an officer to trial based on the "necessities of service."

expeditious processing of charges and specifications in general courts-martial," where there was an additional pretrial requirement of the Article 32 investigation.[5] Unlike its predecessors, Article 33 requires the report of the investigating officer (now the preliminary hearing officer) to be forwarded along with the charges. The drafters acknowledged, however, that the 8-day requirement for forwarding was "just an arbitrary figure."[6] Otherwise, there was very little discussion of Article 33 during the Congressional hearings leading to the enactment of the UCMJ in 1950.

4. Contemporary Practice

The President has not implemented Article 33's 8-day requirement for the forwarding of charges to the general court-martial convening authority when a member is held in pretrial confinement anywhere in the Rules for Courts-Martial. Because it is rare in modern practice for an Article 32 hearing and report to be completed within eight days, it has not served as a realistic time frame for moving cases forward. However, the reporting requirement in Article 33 is typically performed as matter of routine in accordance with service-specific reporting regulations whenever an accused is placed in placed in pretrial confinement. Notwithstanding the statute's unrealistic time frame for forwarding charges, the courts have viewed Article 33 as serving two primary purposes independent of its specific requirements. First, the courts have held that Article 33 is a source of "speedy trial law" in the military justice system.[7] Second, the article has, historically, served to ensure early assignment of defense counsel to military members in pretrial confinement.[8] Within the Manual for Courts-Martial, there are seven provisions which require that an action be taken "as soon as practicable."[9] Among these provisions, only Article 33 also includes a time certain.

5. Relationship to Federal Civilian Practice

There is no direct federal civilian analogue for Article 33. Instead, the interests underlying Fed. R. Crim. P. 5 (Initial Appearance) and the Speedy Trial Act, 18 U.S.C. § 3161, are spread among the requirements contained in Articles 10, 30, 33, and 35, along with the rules implementing these statutes.

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[5] S. REP. NO. 486, at 17 (1949); *see also Hearings on H.R. 2498*, *supra* note 1, at 908 (discussing the relationship between Articles 10, 33, and 98 in the context of the accused's right to a speedy trial).

[6] *Hearings on H.R. 2498*, supra note 1, at 1005.

[7] *See* United States v. Vogan, 35 M.J. 32, 33 (C.M.A. 1992) (noting that Articles 10 and 33 combine to form one of "five sources of the right to a speedy trial in the military"). The other four sources include the Sixth Amendment, the Due Process Clause of the Fifth Amendment, R.C.M. 707, and case law. *Id.*

[8] *See* United States v. Jackson, 5 M.J. 223, 226 (C.M.A. 1978) (stating that the provisions of Articles 10 and 33, "if followed, foresee early assignment of military defense counsel").

[9] *See* Article 4(a); Article 30(b); Article 33; R.C.M. 301(b); 308(a)-(b); 701(a)(6); and 1304(b)(2)(f)(v); *see also* R.C.M. 1009(c)(1)-(2) (requiring clarification of an ambiguous sentence as soon as "practical").

6. Recommendation and Justification

Recommendation 33: Move the requirement for prompt forwarding of charges in cases involving pretrial arrest or confinement from Article 33 to Article 10.

- Article 33 is based upon antiquated ideas concerning how cases are processed and the speed at which they are processed. The rule is derived from a 1948 Article of War that was based on a 1920 Article of War that required service of charges in eight days after the imposition of restraint and the actual trial just ten days after service. While the 10-day requirement from the 1920 Articles of War was later dropped, the 1948 version of the statute still required service of charges within eight days of the imposition of restraint. In addition, Congress added a requirement to Article 33 that was not present in the Articles of War: that the Article 32 report of investigation be forwarded along with the charges. Under current practice, there are few cases where an Article 32 hearing will be held, let alone completed, within 8 days.

- Article 33 only applies to cases where a person is ordered into arrest or confinement pending trial by general court-martial. Moving the language in Article 33 to Article 10 will promote efficient processing of all cases involving pretrial arrest or confinement.

7. Relationship to Objectives and Related Provisions

- This proposal will support MJRG Operational Guidance by enhancing prompt pretrial processing and disposition of offenses.

- Article 33 in its present form would be deleted, and a new provision would be inserted—"Disposition Guidance."

Article 33 (New Provision) – Disposition Guidance
10 U.S.C. § 833

1. Summary of Proposal

This proposal would enact a new Article 33 requiring the establishment of non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under Articles 30 and 34. This Disposition Guidance would draw upon the Principles of Federal Prosecution ("DOJ Guidelines") in the United States Attorneys' Manual, with appropriate modifications to reflect the unique purposes of military law. Part II of this Report will contain a complete draft of the proposed disposition guidance, for inclusion in the Manual for Courts-Martial as an appendix.

2. Summary of the Current Statute

Under current law, convening authorities may not refer a charge to court-martial for trial in the absence of a determination that the charge is supported by probable cause. In general courts-martial, this probable cause determination is made by the staff judge advocate pursuant to Article 34, and is informed by the Article 32 hearing officer's report. In special and summary courts-martial, the probable cause screening can be performed by any judge advocate, or by the convening authority.[1] Article 30 directs commanders and convening authorities to dispose of charges and specifications "in the interest of justice and discipline."

3. Historical Background

Before 1920, convening authorities exercised virtually unfettered discretion to dispose of charges and specifications against an accused, including by referring the charges to court-martial for trial.[2] Article 70 of the 1920 Articles of War contained the first requirement for pre-referral staff judge advocate advice. This was a procedural requirement only and the convening authority was not required to follow the advice, even if the staff judge advocate determined there was insufficient evidence to prosecute the accused.[3] When the UCMJ was enacted in 1950, Congress provided, in Article 34, that convening authorities themselves must determine that a charge is supported by probable cause before referring the charge to

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[1] *See* R.C.M. 601(d)(1).

[2] *See, e.g.*, MCM 1905, at 19 (requiring only that the commanding officer investigate the charges and "state in his indorsement whether or not, in his opinion, the charges can be sustained").

[3] AW 70, ¶3 of 1920 ("Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.").

general court-martial; and, in Article 30, Congress specified that commanders and convening authorities must dispose of charges and specifications "in the interest of justice and discipline."[4] In 1983, Congress amended Article 34 to transfer the probable cause screening function in general courts-martial from the convening authority to the staff judge advocate.[5] In 1984, the President set forth the first Manual provision, R.C.M. 306, to expressly provide a "policy" for the disposition of offenses by military commanders and convening authorities.[6]

4. Contemporary Practice

R.C.M. 601(d)(1) provides that a convening authority generally may refer charges to any court-martial as long as "the convening authority finds or is advised by a judge advocate" that there is probable cause for the specification and that the specification alleges an offense. In general court-martial cases, this function is always performed by the staff judge advocate pursuant to Article 34. The rule further provides that the convening authority may rely on information from any source when making the referral decision, including hearsay and other evidence that may not be admissible at trial.[7]

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[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108. During the Congressional hearings on the proposed UCMJ in 1949, Colonel Melvin Maas suggested that the standard for referral of charges to general court-martial should be raised to "beyond a reasonable doubt," to align the standard with applicable civilian charging standards in felony trials. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 712 (1949). The Committee demurred that the applicable civilian charging standard would be a "prima facie determination," and did not adopt the proposal.

[5] Military Justice Act of 1983, Pub. L. No. 98-209, § 4(a)(2), 97 Stat. 1393.

[6] R.C.M. 306(b) ("Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition . . . ."). The Discussion to R.C.M. 306(b) notes that "[t]he disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced . . . . The goal should be a disposition that is warranted, appropriate, and fair." The Discussion provides a non-exclusive list of "disposition factors" for commanders and convening authorities to consider, including: the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline; when applicable, the views of the victim as to disposition; existence of jurisdiction over the accused and the offense; availability and admissibility of evidence; the willingness of the victim or others to testify; cooperation of the accused in the apprehension or prosecution of another accused; possible improper motives or biases of the person(s) making the allegation(s); availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction; and appropriateness of the authorized punishment to the particular accused or offense. Exec. Order No. 13,669, 79 Fed. Reg. 34,999, 35,013-14 (June 18, 2014).

[7] *See, e.g.*, United States v. Howe, 37 M.J. 1062, 1064 (N.M.C.M.R. 1993) ("The convening authority is not required to screen the evidence to ensure its admissibility. In fact, the decision to prosecute may be premised on evidence which is incompetent, inadmissible, or even tainted by illegality."). The requirement for probable cause is consistent with the first sentence—but not the second—of the ABA Standards concerning the exercise of prosecutorial discretion in the charging decision: "A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction." ABA STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.9(a).

5. Relationship to Federal Civilian Practice

Military charging practice and federal civilian charging practice differ significantly with respect to the decisional principles used to determine when charges should be referred to court-martial or federal criminal court for trial. In federal civilian practice, probable cause is the ethical floor for charging; above that floor, attorneys are guided by robust decision rules and charging standards that help to structure and guide the exercise of prosecutorial discretion. The Principles of Federal Prosecution ("DOJ Guidelines") contained in the United States Attorneys' Manual provide the following decision rule with respect to the charging decision:

> The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:
>
> (1) No substantial Federal interest would be served by prosecution;
>
> (2) The person is subject to effective prosecution in another jurisdiction; or
>
> (3) There exists an adequate non-criminal alternative to prosecution."[8]

In addition to this rule for the charging decision, the DOJ Guidelines provide structured guidance regarding plea agreements, non-criminal alternative dispositions, and wide range of other matters impacting or implicating prosecutorial discretion.[9] In military practice, the broad admonition in Article 30 to dispose of charges and specifications "in the interest of justice and discipline" and the R.C.M. 306 factors are not similarly structured.[10]

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[8] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.220 (Grounds for Commencing or Declining Prosecution) [hereinafter USAM]. Most state jurisdictions employ similar charging standards, with some form of the "sufficient admissible evidence" criterion. *See, e.g.* Denver District Attorney Policies, The Charging Decision ("If a determination is made that the facts do not support a reasonable belief that the charge can be proven beyond a reasonable doubt, there is a legal and ethical duty to decline to file charges."); WASH. REV. CODE ANN. § 9.94A.411 ("Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder.").

[9] *See, e.g.*, USAM, *supra* note 8, at § 9-27.250 (Non-criminal Alternatives to Prosecution) ("In determining whether prosecution should be declined because there exists an adequate, non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including: (1) The sanctions available under the alternative means of disposition; (2) The likelihood that an effective sanction will be imposed; and (3) The effect of non-criminal disposition on Federal law enforcement interests.").

[10] *Compare* R.C.M. 306(b) (Discussion) (instructing commanders and convening authorities to consider and balance the disposition factors "to the extent practicable . . . .") *with* USAM, *supra* note 8, at § 9-27.001 ("These principles of Federal prosecution have been designed to assist in structuring the decision-making process of attorneys for the government. For the most part, they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing necessary flexibility."). *See generally* Rachel E.

6. Recommendation and Justification

Recommendation 33.2: Create a new statutory provision requiring the establishment of non-binding guidance—taking into account the Principles of Federal Prosecution in the U.S. Attorney's Manual with appropriate consideration of military requirements—regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline.

- This proposal would help to "fill the gap" that currently exists in military practice between the probable cause standard for referral of charges to court-martial and the "beyond a reasonable doubt" standard for conviction. In civilian practice, this gap has been filled with structured decisional principles and charging standards to help guide prosecutors in the prudent and effective exercise of prosecutorial discretion. In military practice, the disposition decision-making guidance under Article 30 and R.C.M. 306(b) is relatively unstructured.
- The proposed disposition guidance would provide structured decisional principles to help guide commanders and convening authorities—as well as the staff judge advocates, judge advocates, and legal officers who advise them in all military justice matters—in the effective exercise of disposition discretion "in the interest of justice and discipline" in individual cases.
- Part II of this Report will contain a complete draft of the proposed disposition guidance, for inclusion in the Manual for Courts-Martial as an appendix.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference and MJRG Operational Guidance by incorporating, to the extent practicable, the standards and procedures of the civilian sector with respect to the exercise of prosecutorial discretion.

8. Legislative Proposal

SEC. 604. DISPOSITION GUIDANCE.

Section 833 of title 10, United States Code (article 33 of the Uniform Code of Military Justice), is amended to read as follows:

"§833. Art. 33. Disposition guidance

VanLandingham, *Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards*, 11 OHIO ST. J. CRIM. L. 389 (2014).

"The President shall direct the Secretary of Defense to issue, in consultation with the Secretary of Homeland Security, non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under sections 830 and 834 of this title (articles 30 and 34). Such guidance shall take into account, with appropriate consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in accordance with the principle of fair and evenhanded administration of Federal criminal law.".

9. Sectional Analysis

Section 604 contains a complete revision of Article 33. The current statute concerning forwarding of charges in general courts-martial when the accused is in confinement would be incorporated into the closely related provisions in Article 10. Article 33, as amended, would require the establishment and maintenance of non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under Articles 30 and 34. This disposition guidance would draw upon the Principles of Federal Prosecution in the United States Attorneys' Manual, with appropriate modifications to reflect the unique purposes and requirements of military law. In doing so, the proposed guidance would enhance the disposition decision-making process and better align military charging practice with the standards and principles applicable in most civilian jurisdictions. The proposed disposition guidance would be issued by the Department of Defense, and would be included in the Manual for Courts-Martial as an appendix.

Article 34 – Advice of Staff Judge Advocate and Reference for Trial

10 U.S.C. § 834

1. Summary of Proposal

This proposal would amend Article 34 to clarify ambiguities in the language of the current statute and to expressly tie the staff judge advocate's pre-referral disposition recommendation to the "in the interest of justice and discipline" standard for disposition of charges and specifications under Article 30(b). This proposal would further amend Article 34 to require that convening authorities consult a judge advocate on relevant legal issues before referral of charges and specifications to special courts-martial for trial, consistent with current practice.

2. Summary of the Current Statute

Article 34 concerns the relationship between the staff judge advocate and the convening authority in the disposition decision-making process in general court-martial cases. The article contains three subsections. Article 34(a) requires convening authorities to obtain advice from their staff judge advocates before referring charges and specifications to general court-martial for trial; it also prohibits convening authorities from referring any specification to general court-martial unless the staff judge advocate finds that: (1) the specification alleges an offense; (2) the specification is "warranted by the evidence" contained in the Article 32 preliminary hearing report, if there is such a report; and (3) a court-martial would have jurisdiction over the accused and the offense. Article 34(b) requires the staff judge advocate's advice to include a written and signed statement providing conclusions on the three threshold legal issues as well as a recommendation to the convening authority regarding the disposition of each specification. The staff judge advocate's recommendation must accompany any specification referred for trial. Article 34(c) authorizes formal corrections to the charges and specifications, as well as changes to conform them to the evidence contained in the Article 32 report.

3. Historical Background

Article 34 did not come into its current form until the Military Justice Act of 1983. Before 1920, the convening authority exercised near total discretion to refer charges against a military accused to general court-martial for trial.[1] The first statutory requirement for pre-referral staff judge advocate advice appeared in Article 70 of the 1920 Articles of War, which combined various pretrial requirements that are now spread across Articles 10, 30,

[1] *See, e.g.*, MCM 1905, at 19 (requiring only that the commanding officer investigate charges before referring them to a court-martial, and that he "state in his indorsement whether or not, in his opinion, the charges can be sustained").

32, 33, 34, and 35 of the UCMJ. Paragraph 3 of Article 70 required simply that, "Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice."[2] This was a procedural requirement only; the convening authority was not obliged to follow the staff judge advocate's advice, even if the staff judge advocate determined there was insufficient evidence to prosecute the accused.

In the Elston Act of 1948, Congress moved the requirement for pre-referral staff judge advocate advice from Article 70 to Article 47(b) and placed a statutory prohibition on the convening authority's ability to refer charges to a general court-martial when certain legal thresholds were not met following review of the report of investigation under Article 46(b) (the precursor to Article 32 of the UCMJ):

> Before directing the trial of any charge by general court-martial the convening authority will refer it to his staff judge advocate for consideration and advice; and no charge will be referred to a general court-martial for trial unless *it has been found that* a thorough and impartial investigation thereof has been made as prescribed in the preceding article, that such is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation.[3]

The passive construction of "unless it has been found that . . ." was ambiguous, but seemed to indicate that the staff judge advocate was responsible for determining whether the charge was legally sufficient and sustained by the evidence. When Congress enacted the UCMJ two years later, the drafters clarified this ambiguity by explicitly vesting the convening authority—not the staff judge advocate—with the power to determine the threshold legal issues.[4] Under the new Article 34, the convening authority was prohibited from referring charges to general court-martial unless the convening authority personally determined that the charge alleged an offense under the Code and was warranted by the evidence in the Article 32 report.[5] Congress also added a new subsection (now subsection

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[2] AW 70 of 1920, at ¶3; *see Establishment of Military Justice—Proposed Amendment of the Articles of War: Hearing on S. 64 Before a Subcomm. Of the S. Comm. on Military Affairs*, 66th Cong. 283-84 (1919) (statement of Samuel T. Ansell) ("[A] commanding general can not court-martial a man at will. These two things must have been done; his law officer must have said, 'The investigation that has been made has produced evidence that justifies a trial'; that is, prima facie proof; and, too, the law officer must have said that the charges as drafted are legally sufficient to allege an offense against the Articles of War. Now, then, after that the commanding general may or may not, as he pleases, court-martial the man.").

[3] AW 47(b) of 1948 (emphasis added).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1006-1009 (1949) [hereinafter *Hearings on H.R. 2498*].

[5] *See* Article 34(a) prior to 1983 amendments ("The convening authority shall not refer a charge to a general court martial for trial unless *he has found* that the charge alleges an offense under this code and is warranted by the evidence indicated in the report of the investigation.") (emphasis added). Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (1950) (amended 1983)); *see also* United States v. Greenwalt, 20 C.M.R. 285, 288 (C.M.A. 1955) ("By law, the final responsibility for determining whether charges are to be referred for

(c)) to the statute to clarify that formal corrections and conforming changes to the charges and specifications could be made to make them consistent with the evidence brought out in the Article 32 investigation without requiring a new investigation on the charges.[6]

In 1983, Congress revised Article 34 extensively, bringing the statute into its present form.[7] Language that had previously been in Article 34(a) which allowed the convening authority to obtain the required pre-referral advice from a legal officer instead of the staff judge advocate was removed.[8] Congress then updated the staff judge advocate advice consistent with what appeared to be the original intent of this provision under the Elston Act, by vesting referral "veto" authority with the staff judge advocate rather than the convening authority himself.[9] This change conformed the statute to the practice as it had developed in the decades since the UCMJ was enacted; it also acknowledged that the legality of the charges, the legal sufficiency of the evidence, and court-martial jurisdiction "involve complex legal determinations" best addressed by legally trained staff judge advocates.[10] The 1983 amendments moved subsection (b) to subsection (c) and created a new subsection (b), specifying the required content of the staff judge advocate's advice: (1) a signed, written statement of the staff judge advocate's conclusions with respect to charge sufficiency, probable cause, and jurisdiction; and (2) a recommendation of the action that the convening authority should take regarding each specification.[11] This secondary requirement implicitly tied the staff judge advocate's recommendation under Article 34 to the disposition standard articulated in Article 30(b)—"in the interest of justice and discipline"—mirroring the requirement in Article 32(a) that the Article 32 investigating officer provide "a recommendation as to the disposition which should be made of the case in the interest of justice and discipline."[12] However, this connection was never made explicitly in the statute.

4. Contemporary Practice

The President has implemented Article 34 across several different rules in the Manual for Courts-Martial. R.C.M. 406, 407, and 601 implement Article 34(a)-(b), repeating the

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trial, and the kind of court-martial before which they are to be heard, rests with the convening authority. While he is required to consult with his legal adviser before such reference, he is not required to follow the recommendation which he receives. When as here, there is an actual conflict between the investigating officer's recommendation and the one submitted by his counselor, the convening authority may accept either.").

[6] *Hearings on H.R. 2498*, *supra* note 4, at 1006.

[7] Military Justice Act of 1983, Pub. L. No. 98-209, § 4(a)-(b), 97 Stat. 1393.

[8] *Id.* at § 4(a)(1).

[9] *Id.* at § 4(a)(2).

[10] S. REP. NO. 98-53, at 4, 16-17 (1983).

[11] Pub. L. No. 98-209, at § 4(b).

[12] Article 32(a), prior to NDAA FY 2014 amendments.

statutory provisions concerning the content of the staff judge advocate advice and providing additional rules and procedures applicable to referral of charges and specifications to all courts-martial. R.C.M. 603 expands on Article 34(c), providing additional rules and procedures for making "minor" and "major" changes to the charges and specifications before and after referral in all three types of court-martial. R.C.M. 601(d)(1) provides that a convening authority generally may refer charges to any court-martial as long as "the convening authority finds or is advised by a judge advocate" that there is probable cause for the specification and that the specification alleges an offense. In general court-martial cases, this function is always performed by the staff judge advocate.

With respect to the additional required content of the staff judge advocate advice prior to referral of charges and specifications to general courts-martial, the rules themselves repeat the statutory provisions while providing little additional guidance. The Discussion to R.C.M. 406(b) explains that the "warranted by the evidence" standard under Article 34(a)(2) means probable cause.[13] It also explains:

> The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter, endorsements, and report of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; any recommendations for disposition of the case by commanders or others who have forwarded the charges; and the recommendation of the Article 32 investigating officer. However, there is no legal requirement to include such information, and failure to do so is not error.[14]

Because the staff judge advocate's recommendation concerns referral of charges and specifications by the convening authority, this statutory requirement implicitly implicates R.C.M. 601 (Referral), which directs convening authorities to "consider the options and considerations under R.C.M. 306 in exercising the discretion to refer."[15] As noted earlier in this Report, R.C.M. 306 provides that all allegations of offenses (including preferred charges and specifications) should be disposed of in a timely manner at the lowest appropriate level of disposition.[16] The Discussion to R.C.M. 306(b) then provides a non-exclusive list of factors military commanders should consider when deciding how to dispose of offenses. These "disposition factors" form the President's core policy guidance with respect to the "in

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[13] R.C.M. 406(b) (Discussion); *see* United States v. Engle, 1 M.J. 387, 389 n.4 (C.M.A. 1976) (citing Gerstein v. Pugh, 420 U.S. 103 (1975)).

[14] R.C.M. 406(b) (Discussion). In the 1969 MCM, this guidance (other than the last sentence stating that a discussion and analysis of the evidence by the staff judge advocate is not required) formed a part of the rule that implemented Article 34; however, it was moved to the non-binding discussion section in the 1984 Manual. *Compare* MCM 1969, ¶35*c. with* R.C.M. 406(b) (Discussion), at ¶2; *see also* S. REP. NO. 98-53, at 17.

[15] R.C.M. 601(d)(1) (Discussion).

[16] R.C.M. 306(b).

the interest of justice and discipline" disposition standard articulated in Article 30(b), and help to inform the staff judge advocate's pre-referral advice under Article 34(b). However, under the current rules, the connection between staff judge advocate's advice under R.C.M. 406 and this disposition policy guidance under R.C.M. 306 is not explicitly drawn.

5. Relationship to Federal Civilian Practice

Referral of charges and specifications to court-martial for trial under Article 34 and R.C.M. 601 is similar in many respects to the indictment or information under Fed. R. Crim. P. 7. In both cases, the purpose of the action is to officially direct that an accused be criminally prosecuted on the charges in a court of law; and in both cases, the action generally signals that the government has considered alternative dispositions and has determined that the interest of justice—or, in the case of the military, the interest of justice and discipline—warrants prosecution. In this sense, the exercise of disposition discretion by court-martial convening authorities under Article 30 and 34 is akin to the exercise of prosecutorial discretion by attorneys for the government in federal civilian practice. In military practice, this responsibility is split between two officials: the staff judge advocate, who is responsible for making legal determinations and providing legal advice; and the convening authority, who is responsible for balancing the interests of justice and discipline appropriately in each individual case. The decision rules used to guide the exercise of disposition discretion by the convening authority and the staff judge advocate are addressed in greater detail in this Report in the section concerning proposed Article 33 (Disposition Guidance).

6. Recommendation and Justification

Recommendation 34.1: Amend Article 34 to clarify ambiguities in the language of the current statute and to explicitly tie the staff judge advocate's recommendation to the "in the interest of justice and discipline" standard under Article 30(b).

- Currently, Article 34 contains several ambiguities that hinder its application, including the use of the term "refer" in different contexts in subsection (a), and the requirement for a recommendation from the staff judge advocate under subsection (b) that is not clearly tied to the disposition standard articulated in Article 30(b).

- This proposal would clarify the language of the statute and the relationship between the staff judge advocate's advice under Article 34 and the general standard for disposition of charges and specifications under Article 30. It also would include a new subsection defining the term "referral" as "the order of a convening authority that charges and specifications against an accused be tried by a specified court-martial." This definition would help to provide consistency throughout the Code with respect to usage of the terms "refer" or "referral" in the context of charging.

- Part II of the Report will consider additional changes in the rules implementing Article 34, with particular focus on the content of advice with respect to the staff judge advocate's conclusion regarding probable cause and jurisdiction. Part II of the Report will also address the content of the staff judge advocate's advice on those

matters in which the staff judge advocate disagrees with the conclusions of the preliminary hearing officer. This will take into account the recommendation of the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel) "to evaluate if there are circumstances when a general court-martial convening authority should not have authority to override an Article 32 investigating officer's recommendation against referral of an investigated charge for trial by court-martial."[17]

Recommendation 34.2: Amend Article 34 to require the convening authority to consult with a judge advocate on relevant legal issues before referral of charges to special courts-martial.

- This change would codify current practice, and would amount to a minor change to the rule concerning referral of charges generally under R.C.M. 601(d). It also would enhance the decision-making relationship between convening authorities and judge advocates and ensure greater consistency in the exercise of disposition discretion by convening authorities generally.

- Part II of the Report will propose changes in the rules implementing Article 34 to reflect the requirement for judge advocate consultation on relevant legal issues in special courts-martial. The proposed rules will include baseline requirements and guidance, and will provide flexibility for service-specific regulations and procedures concerning the method and manner of the required judge advocate consultation. This flexibility will ensure that different services will be able to tailor the new requirement to their specific needs and personnel structures.

Recommendation 34.3: Amend Article 34 to clarify that formal corrections to the charges and specifications may be made before referral for trial in special court-martial cases as well as in general courts-martial.

- Under current law, Article 34 applies only in the context of general court-martial cases. This change would clarify that the ability to make formal corrections to the charges and specifications before referral for trial is not exclusive to charges that are being referred to general courts-martial. This change is necessitated by the proposal to require, in the statute, judge advocate advice prior to referral of charges and specifications to special courts-martial.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by considering the recommendations, proposals, and analysis issued by the Response Systems Panel.

- This proposal supports MJRG Operational Guidance by incorporating, to the extent practicable, the standards and procedures of the civilian sector with respect to the

[17] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 49 (Recommendation 116) (June 2014).

charging decision. Specifically, this proposal requires pre-referral legal advice from legally trained judge advocates in all general and special court-martial cases, which would result in greater consistency among convening authorities in the decision to prosecute offenders, and enhancement of the standards used to determine when to exercise referral authority.

- This proposal is closely related to the proposed creation of a new Article 33, which would provide a statutory requirement for the issuance of robust disposition guidance based on the Principles of Federal Prosecution contained in the United States Attorneys' Manual.

8. Legislative Proposal

SEC. 605. ADVICE TO CONVENING AUTHORITY BEFORE REFERRAL FOR TRIAL.

Section 834 of title 10, United States Code (article 34 of the Uniform Code of Military Justice), is amended to read as follows:

"§834. Art. 34. Advice to convening authority before referral for trial

"(a) GENERAL COURT-MARTIAL.—

"(1) STAFF JUDGE ADVOCATE ADVICE REQUIRED BEFORE REFERRAL.—Before referral of charges and specifications to a general court-martial for trial, the convening authority shall submit the matter to the staff judge advocate for advice, which the staff judge advocate shall provide to the convening authority in writing. The convening authority may not refer a specification under a charge to a general court-martial unless the staff judge advocate advises the convening authority in writing that—

"(A) the specification alleges an offense under this chapter;

"(B) there is probable cause to believe that the accused committed the offense charged; and

"(C) a court-martial would have jurisdiction over the accused and the offense.

"(2) STAFF JUDGE ADVOCATE RECOMMENDATION AS TO DISPOSITION.—Together with the written advice provided under paragraph (1), the staff judge advocate shall provide a written recommendation to the convening authority as to the disposition that should be made of the specification in the interest of justice and discipline.

"(3) STAFF JUDGE ADVOCATE ADVICE AND RECOMMENDATION TO ACCOMPANY REFERRAL.—When a convening authority makes a referral for trial by general court-martial, the written advice of the staff judge advocate under paragraph (1) and the written recommendation of the staff judge advocate under paragraph (2) with respect to each specification shall accompany the referral.

"(b) SPECIAL COURT-MARTIAL; CONVENING AUTHORITY CONSULTATION WITH JUDGE ADVOCATE.—Before referral of charges and specifications to a special court-martial for trial, the convening authority shall consult a judge advocate on relevant legal issues.

"(c) GENERAL AND SPECIAL COURTS-MARTIAL; CORRECTION OF CHARGES AND SPECIFICATIONS BEFORE REFERRAL.—Before referral for trial by general court-

martial or special court-martial, changes may be made to charges and specifications—

"(1) to correct errors in form; and

"(2) when applicable, to conform to the substance of the evidence contained in a report under section 832(c) of this title (article 32(c)).

"(d) DEFINITION.—In this section, the term 'referral' means the order of a convening authority that charges and specifications against an accused be tried by a specified court-martial.".

9. Sectional Analysis

Section 605 would amend Article 34, which concerns the relationship between the staff judge advocate and the convening authority in the disposition decision-making process in general court-martial cases. The section would amend Article 34 to clarify ambiguities in the language of the current statute, to require judge advocate consultation before referral of charges to special courts-martial, and to expressly tie the staff judge advocate's pre-referral disposition recommendation in general courts-martial to the "in the interest of justice and discipline" standard for disposition of charges and specifications under Article 30. As amended, Article 34 would contain the following provisions:

Article 34(a) would replace and clarify the provisions concerning staff judge advocate advice before referral to general courts-martial currently contained in Article 34(a)-(b). Article 34(a)(2) would expressly tie the staff judge advocate's disposition recommendation to the "in the interest of justice and discipline" disposition standard under Article 30.

Article 34(b) would require that convening authorities consult a judge advocate on relevant legal issues before referral of charges and specifications to special courts-martial for trial, consistent with current practice.

Article 34(c) would allow formal corrections to the charges and specifications to be made before referral in both general and special courts-martial.

Article 34(d) would define "referral," in the context of Article 34, to mean "the order of the convening authority that charges and specifications against an accused be tried by a specified court-martial," consistent with current implementing regulations.

The changes to Article 34 are intended to solidify and enhance the decision-making partnership between judge advocates and court-martial convening authorities, ensuring that the interests of justice and discipline are well-considered and appropriately balanced in each individual case. Implementing regulations will address additional changes in the rules implementing Article 34, with particular focus on the content of advice with respect to the staff judge advocate's conclusion regarding probable cause and jurisdiction, and with respect to those matters in which the staff judge advocate disagrees with the conclusions of the preliminary hearing officer. Implementing regulations also would address the baseline requirements for pre-referral judge advocate consultation on relevant legal issues in special courts-martial.

Article 35 – Service of Charges
10 U.S.C. § 835

1. Summary of Proposal

This proposal would clarify the current statute with no substantive changes. Part II of the Report will consider whether changes are needed in the rules implementing Article 35.

2. Summary of the Current Statute

Article 35 contains two related procedural requirements. First, it requires the trial counsel to serve a copy of referred court-martial charges upon the accused. Second, in time of peace, it provides for a "waiting period" which must be observed after service of charges before the accused may be brought to trial against his objection: five days for general court-martial; three days for special court-martial.

3. Historical Background

Article 35 is based in part on the second half of Article 46(c) of the 1920 Articles of War and was also "in accordance with present Navy practice" at the time of the UCMJ's enactment in 1950.[1] In contrast with Article 33, which forms a part of the military accused's speedy trial rights, Article 35 was designed to protect the accused against a "too speedy trial."[2] This protection "is closely intertwined with the basic right of an accused and his counsel to have adequate time, before trial, to prepare their case and, once trial has begun, to conduct the defense."[3] The statute has remained unchanged in the decades since.[4]

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1012 (1949) [hereinafter *Hearings on H.R. 2498*]; *see* AGN 43 of 1930.

[2] *Hearings on H.R. 2498*, *supra* note 1, at 1012; *see* United States v. Cherok, 22 M.J. 438, 440 (C.M.A. 1986) ("Article 35 provides a shield with which an accused may prevent too speedy a trial, not a sword with which an accused may attack the Government for failing to bring him to trial sooner.").

[3] Lt Col Robert S. Stubbs II, USMC, *Delays in Trial*, 15 JAG JOURNAL 39, 42 (1961).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108. During the House Subcommittee's hearings on the UCMJ in 1949, the only aspect of Article 35 that sparked any debate was that the statutory three-day and five-day waiting period requirements were only to apply "in time of peace." Chairman Elston pointed out that it seemed odd to limit these accused-friendly protections to peacetime court-martial cases since "most of the complaints [giving rise to the UCMJ] arose during wartime and by reason of wartime prosecutions." *Hearings on H.R. 2498*, *supra* note 1, at 1013. After some discussion of this topic, the Subcommittee determined that the waiting periods were not required by policy or law and merely constituted an "added protection in time of peace." *Id.* at 1014.

4. Contemporary Practice

Article 35's service and waiting period requirements are implemented through R.C.M. 602, which restates these requirements and clarifies that the dates of service and of trial (but not Sundays or holidays) are excluded for purposes of calculating the three-day and five-day waiting periods. If the government violates the required waiting period and the accused objects, the trial may not proceed until the end of the waiting period; however, if the accused does not object the right to delay is deemed waived and the trial may proceed.[5] The Discussion to R.C.M. 901(a) (Call to order) notes Article 35's waiting period requirement and instructs military judges to "secure an affirmative waiver on the record" if it appears from the referred charge sheet that the required waiting period has not elapsed. Neither Article 35 nor its implementing rules have resulted in a significant amount of litigation in the decades since the UCMJ's adoption.[6]

5. Relationship to Federal Civilian Practice

Article 35's "service of charges" requirement functionally corresponds to Fed. R. Crim. P. 9 (Arrest Warrant or Summons on an Indictment or Information). The primary purpose of both rules is to notify the accused that the accused will soon be prosecuted for certain charges, and that the court has these charges for action.[7] Article 35 requires the trial counsel to serve a copy of the charges on the accused. Under the federal rule, the court itself is responsible for issuing the warrant or summons.[8] The federal analogue to Article 35's waiting period requirement resides in Section 3161(c)(2) of the Speedy Trial Act.[9] The statute imposes a mandatory 30-day delay before trial following the defendant's first appearance through counsel (or express waiver of counsel), unless the defendant consents to a shorter time period.[10]

Although the three-day and five-day waiting periods under Article 35 are shorter than the 30-day delay under the federal rule, this difference is less significant in practice in light of

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[5] *See, e.g.*, United States v. Williams, 54 M.J. 757, 759 (C.G.C.C.A. 2001).

[6] *But see, e.g.*, *Cherok*, 22 M.J. at 440 (C.M.A. 1986) (the accused may not use the waiting period under Article 35 to create a speedy trial violation by the government); United States v. Desiderio, 31 M.J. 894, 896 (A.F.C.M.R. 1990) (no prejudice where someone other than the trial counsel signed Block 15 of the charge sheet indicating they "caused the charges to be served" on the accused pursuant to Article 35).

[7] By contrast, FED. R. CRIM. P. 4 and 5 are more analogous to the initial notification to the accused of the charges and specifications under Article 30(b) and R.C.M. 308.

[8] FED. R. CRIM. P. 9(a); *see* MCM, App. 21 (R.C.M. 602, Analysis) ("The warrant system of Fed. R. Crim. P. 9(a), (b)(1), and (c)(2) is unnecessary in military practice.").

[9] 18 U.S.C. §§ 3161-3174.

[10] *Id.* at § 3161(c)(2); *see also* United States v. Reynolds, 781 F.2d 135, 136 (8th Cir. 1986) (noting the Speedy Trial Act's "30-day provision operates to support a criminal defendant's Sixth Amendment right to effective assistance of counsel by assuring 'that a defendant be given a reasonable time to obtain counsel and that counsel be provided a reasonable time to prepare the case.").

other aspects of military practice. First, a military accused is notified of the charges "as soon as practicable" after preferral under Article 30, and is generally provided with a defense counsel and a copy of the charge sheet at this time.[11] Second, it is rare for the accused to be brought to trial within thirty days after preferral, particularly in general courts-martial cases, and Article 40 provides for continuances "as often as may appear to be just." Thus, the three-day and five-day waiting periods following referral of charges do not appreciably impact an accused's ability to fully prepare for trial over the course of at least several weeks (and generally much more time) prior to arraignment.

6. Recommendation and Justification

Recommendation 35: Amend Article 35 by dividing it into two subsections and revising the language of its two substantive provisions—the service of charges and waiting period requirements—to better align the article with current practice and related UCMJ articles.

As currently drafted, the purpose and function of Article 35's two procedural requirements contain several ambiguities. The proposed language for Article 35's service of charges requirement would clarify and simplify this provision while avoiding ambiguous use of the term "refer." The proposed language for Article 35's waiting period requirement (updated with the subheading "Commencement of Trial") would conform this part of the article to current practice by ensuring that the military judge inquires on the record whether the accused objects in a case where the government schedules the first session of trial within the statutory waiting period. It also would address ambiguities in the statute with respect to the starting and ending points of the three-day and five-day waiting periods.

This proposal would revise Article 35's "[i]n time of peace . . ." limitation to read: "This subsection shall not apply in time of war." This change would provide greater consistency between Article 35 and other UCMJ articles that include "time of war" exceptions, including Articles 43, 71, 85, 90, 101, 105, 106, 112a, and 113.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by clarifying ambiguities in the language of Article 35 while retaining and improving its two key provisions, which provide significant procedural safeguards for the accused in military criminal proceedings.

The proposal also would better align Article 35 with its corresponding MCM provisions and current practice, as well as with other statutory exceptions for "in time of war," minimizing the opportunity for misapplication of the statute or renewed appellate activity concerning its language and intent.

[11] *See* R.C.M. 307 and 401.

8. Legislative Proposal

SEC. 606. SERVICE OF CHARGES AND COMMENCEMENT OF TRIAL.

Section 835 of title 10, United States Code (article 35 of the Uniform Code of Military Justice), is amended to read as follows:

"§835. Art. 35. Service of charges; commencement of trial

"(a) IN GENERAL.—Trial counsel detailed for a court-martial under section 827 of this title (article 27) shall cause to be served upon the accused a copy of the charges and specifications referred for trial.

"(b) COMMENCEMENT OF TRIAL.—(1) Subject to paragraphs (2) and (3), no trial or other proceeding of a general court-martial or a special court-martial (including any session under section 839(a) of this title (article 39(a)) may be held over the objection of the accused—

"(A) with respect to a general court-martial, from the time of service through the fifth day after the date of service; or

"(B) with respect to a special court-martial, from the time of service through the third day after the date of service.

"(2) An objection under paragraph (1) may be raised only at the first session of the trial or other proceeding and only if the first session occurs before the end of the applicable period under paragraph (1)(A) or (1)(B). If the first session occurs

before the end of the applicable period, the military judge shall, at that session, inquire as to whether the defense objects under this subsection.

"(3) This subsection shall not apply in time of war.".

9. Sectional Analysis

Section 606 would amend Article 35, which requires the trial counsel to ensure that a copy of the charges and specifications is served upon the accused following referral of charges. Article 35 also provides the accused with the opportunity, in time of peace, to object to the commencement of trial until the completion of a statutory period following service of charges—three days for special courts-martial, and five days for general courts-martial. These requirements, consistent with similar procedural requirements in federal district court, would ensure that military accused receive sufficient notice of the charges upon which they are to be tried by court-martial, and sufficient time to prepare for trial with their defense counsel. The present statute contains ambiguities with respect to each of these statutory requirements. The proposed revision would address these ambiguities and make other clarifying and conforming changes, none of which alter the purposes of Article 35.

Subchapter VII. Trial Procedure

Article 36 – President May Prescribe Rules
10 U.S.C. § 836

1. Summary of Proposal

This Report recommends no change to Article 36.

2. Summary of the Current Statute

Article 36 provides broad authority to the President to prescribe rules for pretrial, trial, and post-trial procedures, including modes of proof for courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry. The statute allows the President to prescribe rules which, so far as the President considers practicable, apply the principles of law and the rules of evidence generally applicable in United States district court, so long as those rules are not contrary to or inconsistent with other statutory provisions of the UCMJ. Article 36 also requires all rules and regulations prescribed by the President to be uniform so far as practicable.

3. Historical Background

As early as 1813, Congress provided statutory authority for the President to prescribe rules and procedures for courts-martial and military justice practice.[1] When the UCMJ was enacted in 1950, Congress derived Article 36 from similar statutory provisions in Article 38 of the Articles of War. The proposed Article 48 of the Articles for the Government of the Navy, by contrast, would have given rule-making authority to the Secretary of the Navy.[2] Article 36 was included in the UCMJ in order to standardize this rule-making authority in the President, and in order to ensure that the rules prescribed by the President would conform to the Federal Rules of Criminal Procedure insofar as practicable.[3] In 1979, Congress clarified the breadth of the President's authority to issue rules governing pretrial, trial, and post-trial procedures.[4] In 2006, Congress amended Article 36 to provide exceptions in the case of military commissions established under chapter 47A of title 10.[5]

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[1] Act of March 3, 1813, ch. 52, § 5. *See generally* MCM, App. 21 (R.C.M. Analysis, Introduction).

[2] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1014 (1949) [hereinafter *Hearings on H.R. 2498*].

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Hearings on H.R. 2498*, *supra* note 2, at 1016-19.

[4] Dep't of Defense Authorization Act, 1980, Pub. L. No. 96-107, tit. VII, § 801(b), 93 Stat. 803, 811 (1979); *see also* NDAA FY 1991, Pub. L. No. 101-510, § 1301(4), 104 Stat. 1668 (1990) (repealing provisions requiring reporting of regulations to Congress).

[5] Military Commissions Act of 2006, Pub. L. No. 109-366, § 4(a)(3), 120 Stat. 2600 (2006).

4. Contemporary Practice

Article 36 is the basis for the Rules for Courts-Martial, the Military Rules of Evidence, and any other executive order pertaining to military justice practice. Typically, rules that are prescribed by the President under the authority of Article 36 are proposed by and reviewed within the Department of Defense and in the Executive Branch under established procedures governing the preparation of executive orders by the Joint Service Committee on Military Justice.[6] The President's rule-making authority is broad, and is generally only limited by the Constitution and the UCMJ itself.[7]

5. Relationship to Federal Civilian Practice

The Supreme Court promulgates most procedural and evidentiary rules in the federal courts under the Rules Enabling Act.[8] These rules have the weight of law, provided that there is "no contrary congressional command."[9] Generally, these rules are based on the recommendations of a standing advisory committee. After the committee adopts a new rule, the rule is forwarded to Congress, which has the authority to reject the rule. Congress may also create its own rules pursuant to statute.[10] Generally, the Rules for Courts-Martial tend to be much more detailed than the Federal Rules of Criminal Procedure, reflecting the relative brevity of the UCMJ and consequent extent of Presidential authority under Art. 36.

6. Recommendation and Justification

Recommendation 36: No change to Article 36.

In view of the well-developed case law addressing the President's authority to prescribe rules under Article 36, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by maintaining the statutory requirement that the rules implementing the UCMJ apply the standards and practices of the civilian sector insofar as practicable.

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[6] *See* MCM, App. 26.

[7] *See* United States v. Smith, 32 C.M.R. 105, 118 (C.M.A. 1962) (holding Article 36 to be a valid delegation to the President of the power, by regulations, to prescribe the procedure, including modes of proof, in cases before courts-martial); *see also* THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 112-9 at 498-99 (2013) (reciting the President's concurrent authority, with Congress, to prescribe the jurisdiction and procedure of courts-martial and military commissions utilizing his "Commander and Chief" powers (U.S. CONST. art II, § 2, cl. 1)).

[8] 28 U.S.C. § 2072.

[9] 28 U.S.C. § 2072 (b). *See* American Exp. Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2308 (2013) (explaining that the intent and scope of Federal Rules of Civil Procedure govern unless they conflict with express congressional intent in countervailing statute).

[10] *See, e.g.*, FED R. EVID. 413 historical note (e) (Application).

Article 37 – Unlawfully Influencing Action of Court
10 U.S.C. § 837

1. Summary of Proposal

This Report recommends no change to Article 37. Part II of the Report will consider whether any changes are needed in the rules implementing Article 37.

2. Summary of the Current Statute

Article 37 contains a series of proscriptions concerning improper influence in court-martial proceedings. Article 37(a) prohibits: (1) censures, reprimands, or admonishments of the military judge, counsel, or any member of a court-martial by the convening authority or any other commanding officer; (2) attempts to coerce or improperly influence the action of a court or any member thereof with respect to the findings or sentence in any case by any person subject to the Code; and (3) attempts to coerce or improperly influence the convening authority or other approving/reviewing authority by any person subject to the Code. Statements and instructions provided to the court in the normal course of a trial are exempted from these prohibitions. Subsection (b) of the statute prohibits use of an individual's performance of duty as a member of a court-martial or an attorney's zealous representation of an accused as the basis for an unfavorable performance evaluation or fitness report of the member.

3. Historical Background

Congress derived Article 37 from Article 88 of the Articles of War.[1] As enacted in 1950 and as set forth today, the statute prohibits the convening authority from improperly influencing the law officer (a predecessor to the military judge, who advised the court-martial members) or the counsel assigned to the case.[2] The statute does not prohibit a reviewing authority from making comment on errors of the court in the course of a proper review or from taking appropriate action when a member of the court acted in such manner that he abandoned his or her judicial responsibilities and duties.[3] In addition, the statute does not prohibit military commanders from providing general instructions as to the state of discipline within their commands.[4] In 1968, Congress replaced the term "law officer" with "military judge" to reflect the introduction of military judges into the military

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1019 (1949) [hereinafter *Hearings on H.R. 2498*].

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] *Hearings on H.R. 2498*, supra note 1, at 1019.

[4] LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 26 (1951).

justice system, and it added the remainder of subsection (a) and all of subsection (b) to the statute.[5]

4. Contemporary Practice

The President has implemented Article 37 through R.C.M. 104, which provides additional clarification concerning the statutory prohibitions. Article 37(b) also has been implemented through M.R.E. 606(b), which recognizes unlawful command influence as a legitimate subject of inquiry when inquiring into the validity of the findings or sentence of a court-martial. The case law addressing the statute is well-developed.[6]

5. Relationship to Federal Civilian Practice

Although there are federal statutes which prohibit influencing or obstructing federal civilian courts and court officers—for example, 18 U.S.C. §§ 1501-21 (Obstruction of Justice)—these are punitive statutes more closely related to UCMJ Article 134 (Obstructing justice) in Part IV of the Manual.[7] Federal civilian courts are standing courts, which makes comparison to courts-martial imprecise. Each court-martial is a temporary tribunal convened to consider a specific case, and is convened by a military commander who has the power to refer charges for trial; to select the members of the court; to approve or disapprove a variety of legal issues related to pretrial confinement and witnesses; and to exercise extensive administrative powers with respect to the duties, assignments, and careers of the accused, the members, witnesses, and others. In these respects, Article 37 addresses issues unique to the military environment.

6. Recommendation and Justification

Recommendation 37: No change to Article 37.

In view of the well-developed case law addressing Article 37 and the rules implementing it, a statutory change is not necessary.

Part II of the Report will consider whether any changes are needed to ensure the rules reflect the current state of the law and adequately reflect the authority to engage in appropriate command activities, including lawful command emphasis with respect to disciplinary matters.

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[5] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(13)(A)-(D), 82 Stat. 1335.

[6] *See, e.g.*, United States v. Biagase, 50 M.J. 143 (C.A.A.F. 1999) (outlining the applicable standard in reviewing cases for unlawful command influence); United States v. Simpson, 58 M.J. 368 (C.A.A.F. 2003) (examining the circumstances under which unlawful command influence and the appearance of unlawful command influence may impermissibly constrain the discretion of the officer involved in the disposition of the charges or the impartiality of the court-martial members); Weiss v. United States, 510 U.S. 163 (1993) (denying a due process challenge concerning the independence of military judges, noting the statutory protections against unlawful command influence in the UCMJ, including those found in Article 37).

[7] MCM, Part IV, ¶96.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique statutory provision that protects against undue command influence and which the Supreme Court has recognized as playing a significant role in protecting the due process interests of accused military members in court-martial proceedings.

Article 38 – Duties of Trial Counsel and Defense Counsel
10 U.S.C. § 838

1. Summary of Proposal

This proposal would conform the provisions of Article 38 addressing assistant defense counsel to the related provisions in Article 27. Part II of the Report will consider whether changes are need needed to the rules with respect to defense counsel's post-trial responsibilities in light of changes to Article 60 and this Report's proposals to modify post-trial procedures.

2. Summary of the Current Statute

Article 38 details the duties and responsibilities of trial and defense counsel and provides the accused with various rights regarding his legal representation. Article 38(a) states that counsel for the government shall be appointed in every general or special courts-martial and that the trial counsel is responsible for preparing a record of the proceedings. The accused's rights to be represented by military counsel, civilian counsel, or specific military counsel upon request are outlined in Article 38(b). Subsection (c) addresses the defense counsel's role in clemency matters under Article 60. Subsections (d) and (e) address the duties and qualification requirements of assistant trial and defense counsel. These provisions expressly authorize assistant trial counsel (in a general court-martial) and assistant defense counsel (in a general or special court-martial) who are not qualified under Article 27(b) to perform the duties of trial and defense counsel under the direction of counsel so qualified.

3. Historical Background

When the UCMJ was enacted in 1950, Congress derived Article 38, in part, from Articles 17, 11 and 116 of the Articles of War, as well as a proposed Article for the Government of the Navy.[1] In 1981, Article 38(b) was amended to: (1) add provisions relating to the right to counsel at an Article 32 hearing; (2) authorize promulgation of regulations relating to the reasonable availability of military counsel; and (3) authorize the detailing of additional military defense counsel under specified circumstances.[2] In 1983, subsection (b)(7) was modified to provide that regulations defining "reasonable availability" could not prescribe

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1021 (1949).

[2] Act of November 20, 1981, Pub. L. No. 97-81, §4(b), 95 Stat. 1085, 1088 (1981).

any limitations based on the fact the individual military counsel requested is from a different branch of service than the accused.[3]

Prior to World War II, an accused was provided military defense counsel at courts-martial; however, the counsel provided often lacked formal legal training, even when charges were referred to general courts-martial. When the UCMJ was enacted, Congress addressed this situation by adding a requirement into Article 27 that lawyers be appointed as defense counsel in all general courts-martial.[4] However, in special courts-martial, the detailed military defense counsel was required to be a lawyer only if the trial counsel was a lawyer.[5] In the Military Justice Act of 1968, Congress amended Article 27 to require that a lawyer be appointed as defense counsel unless such appointment would be impracticable based on physical conditions or military exigencies; and it limited the punishment that could be imposed at court-martial if the detailed defense counsel was not qualified under Article 27(b).[6] Currently, Article 19 (Jurisdiction of special courts-martial) does not permit a bad-conduct discharge to be adjudged unless Article 27(b)-qualified defense counsel is detailed to represent the accused.

4. Contemporary Practice

The President has implemented Article 38 through R.C.M. 502, 506, 808, and 1103(b). The accused's rights to military counsel, civilian counsel, and specific military counsel upon request are outlined in R.C.M. 506(a)-(b). R.C.M. 502(d) requires defense counsel and associate defense counsel in general and special courts-martial, and trial counsel in general courts-martial, to be certified under Article 27(b). The services currently detail judge advocates to serve as assistant defense counsel who are qualified under Article 27(b). Article 38(c), concerning the defense counsel's role in clemency matters, is addressed in R.C.M. 502(d)(6) and 1105(a)-(b), which detail the rules and procedures for submitting post-trial clemency matters to the convening authority. R.C.M. 808 and 1103(b) implement Article 38(a)'s requirement that the trial counsel prepare the record of proceedings following each court-martial.

5. Relationship to Federal Civilian Practice

The duties of trial and defense counsel under Article 38 are largely similar to those of federal prosecutors, who represent the United States in U.S. district court, and civilian defense attorneys, who represent federal defendants. The military trial counsel's duty under Article 38(a) to prosecute "in the name of the United States" is similar to the responsibility of U.S. Attorneys in the federal civilian system to act as the attorney for the

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[3] Military Justice Act of 1983, Pub. L. No. 98-209, §3(e), 97 Stat. 1393, 1394-95 (1983).

[4] Article 27(b)(1).

[5] Article 27(c)(2) (1950-68).

[6] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(10), 82 Stat. 1335, 1337 (1968).

government in all criminal prosecutions.[7] However, in federal civilian practice, the court reporter, not the U.S. Attorney, is responsible for preparing the record of trial.[8] By contrast, under Article 38(a), record preparation is the responsibility of the trial counsel.[9] (In addition, military trial counsel are typically responsible for a whole host of administrative responsibilities—courthouse security, witness travel, reviewing defense witness requests, and other duties—that are primarily performed by other personnel in the federal civilian system.) In the federal civilian system, defendants in criminal cases have the right to representation by an attorney at all stages of prosecution. The defendant may hire an attorney or, if indigent, have counsel appointed at the government's expense.[10] Under Article 38(b), an accused has the right to at least one free military defense counsel in all general and special courts-martial, irrespective of indigence, and has an additional right to hire a civilian defense counsel at no cost to the government.

6. Recommendation and Justification

Recommendation 38: Amend Article 38(e) to delete reference to an assistant defense counsel who is not qualified to be defense counsel as required by Article 27(b).

The proposed change would require all defense counsel, regardless of whether they are acting as lead or assistant defense counsel, to be qualified under Article 27(b). This change is consistent with the actual practice of all of the services, and would align military rules in this area with federal civilian practice.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by employing civilian standards for the qualification of government and defense counsel insofar as practicable.

This proposal also supports MJRG Operational Guidance by removing an inconsistency between Article 38 and current practice with respect to the qualification requirements of detailed defense counsel and assistant defense counsel.

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[7] *See* Judiciary Act of 1789, 1 Stat. 92 (providing for the appointment "in each district of a meet person learned in the law to act as attorney for the United States . . . whose duty it shall be to prosecute in each district all delinquents for crimes and offenses, recognizable under the authority of the United States, and all civil actions in which the United States shall be concerned"); 28 U.S.C. § 547(1) ("[E]ach United States attorney, within his district, shall prosecute for all offenses against the United States . . . .").

[8] 28 U.S.C. § 753(b).

[9] Article 38(a); R.C.M. 1103(b), (c).

[10] FED. R. CRIM. P. 44(a).

8. Legislative Proposal

SEC. 701. DUTIES OF ASSISTANT DEFENSE COUNSEL.

Subsection (e) of section 838 of title 10, United States Code (article 38 of the Uniform Code of Military Justice), is amended by striking ", under the direction" and all that follows through "(article 27),".

9. Sectional Analysis

Section 701 would amend Article 38 to conform it to the proposed amendments in Article 27 concerning the requirement for all defense counsel in general and special courts-martial to be qualified under Article 27(b).

Article 39 – Sessions
10 U.S.C. § 839

1. Summary of Proposal

This proposal would codify current practice under which military judges preside at arraignments. This proposal also would conform Article 39 to the proposed amendments to Articles 16 and 19, which provide for a military judge to preside at all general and special courts-martial.

2. Summary of the Current Statute

Article 39 provides the authority and basic rules for post-referral sessions of court conducted outside the presence of the court-martial members. Article 39(a) authorizes a military judge, after service of referred charges under Article 35, to hold proceedings without the presence of members for the purpose of: (1) hearing and determining pretrial motions; (2) hearing and ruling upon any matter that does not require member involvement; (3) holding the arraignment and receiving the pleas of the accused; and (4) performing any other procedural function that does not require the presence of the members. Article 39(b)-(c) require all proceedings, including those conducted pursuant to Article 39(a), to be made part the record of trial and to be conducted in the presence of the accused, the defense counsel, and the trial counsel. Article 39(d) prohibits the use of findings and holdings of military commissions in any Article 39(a) session.

3. Historical Background

When the UCMJ was enacted in 1950, there were no military judges and Article 39 contained only the provisions that are now set forth in subsection (c), requiring all proceedings of the court to be on the record except for member deliberations.[1] In 1968, when the position of military judge was created, Article 39 was amended to provide for trial sessions conducted by the military judge without the presence of the members.[2] In 2006, Congress separated what is now subsection (b) from subsection (a) and added a video teleconferencing provision.[3] In 2009, Congress added subsection (d) concerning military commissions under chapter 47A.[4]

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(15), 82 Stat. 1335, 1338 (1968).

[3] NDAA FY 2006, Pub. L. No. 109-163, § 2, Div. A, Title V, Subtitle E, (Sec. 556), 119 Stat. 3126, 3266 (2006).

[4] NDAA FY 2010, Pub. L. No. 111-84, Div. A, Title XVIII, § 1803(a)(2), 123 Stat. 2190, 2612 (2009).

4. Contemporary Practice

Currently, military judges are not detailed to cases or proceedings under the UCMJ until charges have been referred for trial by court-martial. Once referred, it is common practice for military judges, pursuant to Article 39(a), to arraign the accused and hold pretrial hearings to consider and determine pretrial motions and other matters related to the court-martial.[5] Article 39(a) sessions are also used to resolve issues raised during the course of trial which should not be discussed within the presence of members, such as arguments concerning the admissibility of evidence. The President has implemented Article 39 through R.C.M. 803, which generally tracks the language of the statute. The Discussion to R.C.M. 803 notes that Article 39(a) sessions should be held:

> to ascertain the accused's understanding of the right to counsel, the right to request trial by military judge-alone, or when applicable, enlisted members, and the accused's choices with respect to these matters; dispose of interlocutory matters; hear objections and motions; rule upon other matters that may legally be ruled upon by the military judge, such as admitting evidence; and perform other procedural functions which do not require the presence of members.

5. Relationship to Federal Civilian Practice

Federal civilian courts are standing courts with no direct analogy to courts-martial, which are temporary tribunals convened to consider a specific case.[6] There is no need in the federal civilian system for an express statutory authority for sessions of court held outside the presence of the jurors.

6. Recommendation and Justification

Recommendation 39.1: Amend Article 39 to establish uniform requirements for arraignment by a military judge and to eliminate references to courts-martial without a military judge.

This is primarily a conforming change to reflect the proposed amendments to Articles 16 and 19, which require a military judge to preside at all general and special courts-martial. The proposal also would codify the longstanding practice of using military judges for arraignments.

This recommendation only relates to post-referral sessions of court in the context of convened general and special courts-martial. This Report's proposal to enact a new Article 30a concerning pre-referral proceedings is discussed in detail in that section of the Report.

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[5] *See* R.C.M. 803 (Discussion).

[6] *See* McClaughry v. Deming, 186 U.S. 49, 63 (1902) ("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved.").

Recommendation 39.2: Amend Article 39 to conform to the proposal under Article 53 for judicial sentencing in all non-capital general courts-martial and all special courts-martial.

This is a conforming change to reflect the proposed amendments to Articles 53. The change would clarify that the military judge may call the court into session without the presence of the members for the purpose of conducting a sentencing proceeding and sentencing the accused.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by preserving a unique feature of the UCMJ that is necessary for the proper administration of justice given the temporary, *ad hoc* nature of courts-martial.

The recommended amendments reflect proposed changes in Articles 16 and 19 to eliminate courts-martial without a military judge.

8. Legislative Proposal

SEC. 702. SESSIONS.

Section 839 of title 10, United States Code (article 39 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a)—

(A) by redesignating paragraph (4) as paragraph (5); and

(B) by striking paragraph (3) and inserting the following new paragraphs:

"(3) holding the arraignment and receiving the pleas of the accused;

"(4) conducting a sentencing proceeding and sentencing the accused; and"; and

(2) in the second sentence of subsection (c), by striking ", in cases in which a military judge has been detailed to the court,".

9. Sectional Analysis

Section 702 would amend Article 39 to codify current practice, in which military judges preside at arraignments. The amendments also would conform the statute to the proposed amendments to Articles 16, 19, and 53 requiring military judges to be detailed to preside

over and to sentence the accused in all non-capital general courts-martial and all special courts-martial.

Article 40 – Continuances
10 U.S.C. § 840

1. Summary of Proposal

This proposal would modify Article 40's reference to "a court-martial without a military judge" to conform to this Report's proposal to require a military judge in all special courts-martial.

2. Summary of the Current Statute

Article 40 provides statutory authority for the military judge of a general or special-court-martial, a special court-martial without a military judge, or a summary court-martial to order continuances at the request of either party "for reasonable cause." The statute also provides that continuances may be granted "for such time, and as often, as may appear to be just."

3. Historical Background

The authority to grant continuances was first codified in the Articles of War of 1898.[1] This first version of the statute included a provision that if the prisoner was in close confinement, the trial could not be delayed for longer than sixty days. This provision was removed in 1916.[2] Article 40, as originally drafted, was derived verbatim from the 1920 version of the statute.[3] Because the position of military judge was not created until 1968, the original version of Article 40 gave the authority to grant continuances exclusively to "[the] court-martial."[4] The article has been amended twice in the decades since inclusion of this provision in the UCMJ as enacted in 1950. In 1956, Congress added "the law officer" as an authority that may grant continuances under the article in addition to a court-martial without a law officer;[5] and in 1968, Congress inserted "military judge" in place of "law officer," bringing Article 40 into its current form.[6]

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[1] AW 93 of 1898.

[2] AW 20 of 1916.

[3] *See* AW 20 of 1920; *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1025 (1949) [hereinafter *Hearings on H.R. 2498*].

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Hearings on H.R. 2498*, *supra* note 3, at 1025.

[5] The Act of August 10, 1956, ch. 1041, 70A Stat. 51.

[6] The Military Justice Act of 1968, Pub. L. No. 90-632, § 2(16), 82 Stat. 1339.

4. Contemporary Practice

The President has implemented Article 40 through R.C.M. 906(b)(1), which states that "[a] continuance may be granted only by the military judge." Previously, convening authorities possessed an overlapping authority to order "postponements."[7] This authority was determined to conflict with the military judge's authority to schedule proceedings and control the docket, and it was therefore removed from the 1984 Manual.[8] Under current law, the decision whether to grant a continuance is a matter within the discretion of the military judge, who evaluates the particular facts and circumstances of each case.[9] "Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of Government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member."[10] In order to obtain a continuance, the moving party must show by a preponderance of the evidence that prejudice to the party's substantial rights will occur absent a continuance.[11] In *United States v. Miller*, the Court of Appeals for the Armed Forces provided a list of factors "used to determine whether a military judge abused his or her discretion by denying a continuance."[12] The list includes "'surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.'"[13] The military Courts of Criminal Appeals continue to apply the *Miller* factors when reviewing military judge denials of continuance requests for abuse of discretion.[14]

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[7] MCM 1969, ¶58*a*.

[8] *See* MCM, App. 21 (R.C.M. 906(b)(1), Analysis).

[9] *See* R.C.M. 906(b)(1) (Discussion); United States v. Maresca, 28 M.J. 328, 333 (C.M.A. 1989); *see generally* Lt Col William W. Brooks, *The Continuance in Courts-Martial*, 15 A.F. L. REV. 173 (1973).

[10] R.C.M. 906(b)(1) (Discussion); *see, e.g., Maresca*, 28 M.J. at 333 (the military judge may grant the government continuances in order to obtain the presence of witnesses at a court-martial).

[11] United States v. Allen, 31 M.J. 572, 620 (N.M.C.M.R. 1990); *see also* United States v. Dunks, 1 M.J. 254 (C.M.A. 1976) (military judges should be liberal in granting continuances where good cause for the delay exists); United States v. Livingston, 7 M.J. 638 (A.C.M.R. 1979) (continuance requests should be granted unless the request appears to be unreasonable, or made on frivolous grounds solely for delay).

[12] United States v. Miller, 47 M.J. 352, 358 (C.A.A.F. 1997).

[13] *Id.* (quoting FRANCIS GILLIGAN AND FREDRIC LEDERER, COURT-MARTIAL PROCEDURE § 18-32.00 at 704 (1991)).

[14] *See, e.g.*, United States v. Weisbeck, 50 M.J. 461, 464-65 (C.A.A.F. 1999) (the military judge abused his discretion by denying defense request nine days before trial for a continuance to arrange for the testimony of an expert witness, where the testimony of the expert was the heart of the intended defense, there was no available substitute for the testimony, the requested continuance was for less than six weeks, the government asserted no prejudice arising from a continuance, and the only justification for denying the continuance was expeditious processing).

5. Relationship to Federal Civilian Practice

Although there is no analogous federal rule specifically covering continuances, Article 40 and the case law interpreting it are generally consistent with longstanding federal common law rules concerning the trial judge's discretionary authority to grant pretrial and trial continuances.[15] As the Supreme Court noted in *Avery v. State of Alabama* in 1940:

> In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.[16]

Similarly, in *Morris v. Slappy*, the Court characterized the discretion that must be granted to trial courts on matters of continuances as "broad," and stated that "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel."[17]

6. Recommendation and Justification

Recommendation 40: Amend Article 40 by deleting the words "a court-martial without a military judge" and replacing them with the words "a summary court-martial."

This proposal is based on this Report's proposal to amend Article 16 to eliminate special courts-martial without a military judge. This change would better align the UCMJ with contemporary military justice practice, in which special courts-martial without a military judge are rarely, if ever, convened. It also would better align military practice with the practice in federal district courts, where there is no procedure for a trial without a judge.

Although Article 40, in its current form, does not expressly reference "a special court-martial without a military judge," the proposed amendment would clarify the article's meaning and would help to distinguish the authority to grant continuances, which extends to summary courts-martial, from other UCMJ provisions that would be eliminated as a result of the proposed amendment to Article 16.

The reference to summary courts-martial in the amendment reflects the fact that a military judge does not preside in that forum.

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[15] *See also* 18 U.S.C. § 3161(h)(7)(A) (excluding delay resulting from a continuance granted by a judge when "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial").

[16] 308 U.S. 444, 446 (1940). *See also* Ungar v. Sarafite, 376 U.S. 575, 589 (1964) ("There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.") (citations omitted).

[17] Morris v. Slappy, 461 U.S. 1, 11-12 (1983) (quoting *Ungar*, 376 U.S. at 589).

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and Article 36 of the UCMJ by incorporating, to the extent practicable, the principles of law and the rules of procedure used in the trial of criminal cases in the United States district courts into military justice practice.

This recommendation is related to the proposed amendment to Article 16 to eliminate special courts-martial without a military judge.

8. Legislative Proposal

SEC. 703. TECHNICAL AMENDMENT RELATING TO CONTINUANCES.

Section 840 of title 10, United States Code (article 40 of the Uniform Code of Military Justice), is amended by striking "court-martial without a military judge" and inserting "summary court-martial".

9. Sectional Analysis

Section 703 would make a technical amendment to Article 40 to clarify that "a summary court-martial" is the narrow exception to the general rule that the authority to grant continuances is vested solely in the military judge, with no substantive change to the law. This change would conform the statute to the proposed amendments to Articles 16 and 19 requiring military judges to be detailed to preside over all general and special courts-martial, and would better align military practice regarding continuances with federal civilian practice.

Article 41 – Challenges
10 U.S.C. § 841

1. Summary of Proposal

This proposal would align Article 41 with the changes proposed in Article 16 concerning fixed panel sizes and elimination of special courts-martial without a military judge. Part II of the Report will consider changes that would be needed in the rules implementing Article 41 based on these proposed statutory amendments. Part II of the Report will also address application of the liberal grant mandate with respect to "for cause" challenges by the parties in general and special courts-martial.

2. Narrative Summary of the Current Statute

Article 41 provides that the military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause; it also provides each party with one peremptory challenge with respect to the members only. The statute vests authority for determining the relevance and validity of all challenges for cause with the military judge—or, in the case of a special court-martial without a military judge, with the court-martial itself. Subsections (a)(2) and (b)(2) of the statute provide the procedures applicable when the exercise of challenges reduces the court-martial below the minimum number of members required under Article 16.

3. Historical Background

Congress derived Article 41 from Article 18 of the Articles of War.[1] The statute adopted the then-existing Army and Navy practice with respect to challenges for cause, and the Army practice with respect to peremptory challenges.[2] In 1991, Congress amended Article 41 to provide procedures applicable in situations where the exercise of challenges reduces the court-martial below the minimum number of members required under Article 16.[3] In 1968, Congress established the position of military judge for all general and most special courts-martial and authorized the military judge to rule on challenges.[4]

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1025-26 (1949).

[2] *Id.*

[3] NDAA FY 1991, Pub. L. No. 101-510, § 541(b), 104 Stat. 1565 (1990).

[4] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(17), 82 Stat. 133.

4. Contemporary Practice

The President has implemented Article 41 through R.C.M. 902 (concerning disqualification of military judges) and R.C.M. 912 (concerning member challenges). R.C.M. 912(f)(1) expands upon Article 41(a)(1) and identifies fourteen specific grounds for challenging and removing members for cause. Until 1984, the Manual provided that challenges for cause should be "liberally granted" to both parties.[5] Under current case law, the liberal grant standard applies only to defense challenges for cause.[6]

5. Relationship to Federal Civilian Practice

Military courts often follow federal case law concerning the grounds for challenge.[7] Military courts and federal district courts differ, however, in the number of peremptory challenges allowed for each party. In military practice, each party is entitled to only one peremptory challenge in all types of cases.[8] In the federal civilian system, the number of peremptory challenges allowed is based on the type of case: in a capital case, each party is entitled to twenty peremptory challenges; in a non-capital felony case, the defense is entitled to ten peremptory challenges while the government is entitled to only six; and in misdemeanor cases, each party is allowed three peremptory challenges.[9] The vast majority of states provide the government and defense with the same number of peremptory challenges regardless of the type of case.[10] In every state, the number of peremptory challenges is greater than one and generally ranges between three and ten.[11]

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[5] *See, e.g.*, MCM 1951, ¶62*h.*(2) ("Courts should be liberal in passing upon challenges, but need not sustain a challenge upon the mere assertion of the challenger."); *see also* MCM 2012, App. 21 (R.C.M. 912(f)(3), Analysis).

[6] *See, e.g.*, United States v. James, 61 M.J. 132, 139 (C.A.A.F. 2005) (citing the convening authority's selection of the court members and the limited peremptory challenges available to the accused in holding the liberal grant policy did not apply to Government challenges for cause).

[7] *See, e.g.*, United States v. Santiago-Davila, 26 M.J. 380, 392-93 (C.M.A. 1988) (applying the Supreme Court's ruling on race based challenges in Batson v. Kentucky, 476 U.S. 79 (1986) to courts-martial practice); United States v. Witham, 47 M.J. 297, 303 (C.A.A.F. 1997) (applying the Supreme Court's ruling on gender based challenges in J.E.B. v. Alabama *ex rel.* T.B ., 511 U.S. 127, 130-31 (1994)).

[8] R.C.M. 912(g)(1).

[9] FED. R. CRIM. P. 24(b)(1).

[10] *See, e.g.*, Pa. R. Crim. P. Rule 634; Mont. Code Ann. § 46-16-116; ILCS S. Ct. Rule 434; Miss. Code Ann. § 99-17-3; T. C. A. § 40-18-118; West's F.S.A. § 913.08; C.G.S.A. § 54-82g; 22 Okl. St. Ann. § 655; N.R.S. 175.051; I.C. § 19-2016; O.R.S. § 136.230; N.C.G.S.A. § 15A-1217.

[11] *See, e.g.*, Mont. Code Ann. § 46-16-116; ILCS S. Ct. Rule 434; West's F.S.A. § 913.08; 22 Okl. St. Ann. § 655; N.R.S. 175.051; I.C. § 19-2016.

6. Recommendation and Justification

Recommendation 41: Amend Article 41 to align the statute with changes proposed in Article 16 concerning fixed panel sizes and elimination of special courts-martial without a military judge. Specifically: (1) amend Article 41(a)(1) to delete reference to courts-martial without a military judge; and (2) amend Article 41(a)(2) and (b)(2) to delete the word "minimum."

These are conforming amendments. The underlying legislative proposals and justifications are provided in the section in this Report addressing proposed amendments to Article 16.

Part II of the Report will consider changes that would be needed in the rules implementing Article 41 based on these proposed statutory amendments. It will also address application of the liberal grant mandate with respect to "for cause" challenges by each party in general and special courts-martial.[12]

7. Relationship to Objectives and Related Provisions

The proposal to eliminate the reference to special courts-martial without a military judge in Article 41(a)(1) is related to proposed changes to Article 16 to eliminate special courts-martial without a military judge.

The proposal to delete the word "minimum" in Article 41(a)(2) and (b)(2) is related to the proposal to amend Article 16 to set fixed panel sizes.

8. Legislative Proposal

SEC. 704. CONFORMING AMENDMENTS RELATING TO CHALLENGES.

Section 841 of title 10, United States Code (article 41 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a)(1), by striking ", or, if none, the court," in the second sentence;

(2) in subsection (a)(2) by striking "minimum" in the first sentence; and

(3) in subsection (b)(2), by striking "minimum".

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[12] *See generally* United States v. Smart, 21 M.J. 15 (C.M.A. 1985) (addressing the importance of ensuring that the court-martial panel is composed of individuals with a fair and open mind).

9. Sectional Analysis

Section 704 would amend Article 41 to conform the statute to the changes proposed in Article 16 concerning standard panel sizes in general and special courts-martial and the elimination of special courts-martial without a military judge. The statute's implementing rules would address application of the "liberal grant mandate" with respect to "for cause" challenges by each party in a general or special court-martial. *See United States v. Smart*, 21 M.J. 15 (C.M.A. 1985) (addressing the importance of ensuring that the court-martial panel is composed of individuals with a fair and open mind).

Article 42 – Oaths
10 U.S.C. § 842

1. Summary of Proposal

This Report recommends no change to Article 42. Part II of the Report will consider whether any changes are needed in the rules implementing Article 42.

2. Summary of the Current Statute

Article 42 requires all participants in a court-martial (including judges, attorneys, members, reporters, and interpreters) to take an oath that they will perform their duties faithfully. The statute allows each Service Secretary to control the manner and form of the oath, and specifically requires that all witness testimony must be given under oath.

3. Historical Background

Taking oaths to perform court duties faithfully or to swear to tell the truth has long been a practice in the military justice system. The first oath requirements appeared in the original Articles of War of 1775.[1] When the UCMJ was enacted in 1950, Article 42 was derived from Article 19 of the 1948 Articles of War.[2] With the exception of minor updates, the statute has changed little since 1950.[3]

4. Contemporary Practice

The President has implemented Article 42 through R.C.M. 807. Under the rule, military judges, attorneys, and court reporters swear to faithfully perform their duties when they assume their position. They are not required to repeat the oath with each new court-martial. Panel members are re-sworn with each new court-martial, regardless of any previous oaths. Witnesses are generally sworn in the first time they testify, but do not need to be re-sworn if they testify again in the same court-martial. R.C.M. 807 provides examples of oaths for various participants. Article 136 lists the persons who are authorized to administer oaths for military justice purposes.

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[1] AW 33 of 1775 (requiring all members of the court-martial to serve under oath; empowering President of the court-martial to place witnesses under oath).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1029 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 95-98 (1951).

[3] Act of Congress, August 10, 1956, ch. 1041, 70A Stat. 51; The Military Justice Act of 1968, Pub. L. No. 90-632, § 2(18), 82 Stat. 1339; Military Justice Act of 1983, Pub. L. No. 98-209, §§ 2(e), 3(f), 97 Stat. 1393, 1395.

5. Relationship to Federal Civilian Practice

Federal civilian practice and military practice concerning the taking of oaths by participants in criminal proceedings are generally similar.[4] In federal civilian practice, jurors take two oaths: a preliminary oath as prospective jurors before voir dire; and an impanelment oath if selected to serve on the jury. In military practice, the substance of the two oaths is combined into a single oath given to members before the court-martial is assembled.

6. Recommendation and Justification

Recommendation 42: No change to Article 42.

The law governing oaths in the military is long-established, noncontroversial, and aligned with similar federal civilian rules. No statutory changes are necessary.

Part II of the Report will consider whether any changes are needed in the rules implementing Article 42.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline assessment. Based on the stability in the case law dealing with Article 42's substantive provisions, no change is warranted.

[4] *See* 28 U.S.C.A. § 453 (oath requirement for federal judges); 28 U.S.C.A. § 544 (oath requirement for attorneys representing the government); FED. R. EVID. 603 (oath requirement for witnesses).

Article 43 – Statute of Limitations
10 U.S.C. § 843

1. Summary of Proposal

This proposal would amend Article 43 to align military practice with federal civilian practice by extending the statute of limitations applicable to child abuse offenses and offenses in which DNA evidence implicates an identified individual. The proposal also would extend the statute of limitations for offenses under Article 83 (Fraudulent enlistment, appointment, or separation).

2. Summary of the Current Statute

Article 43 sets forth the statute of limitations under the UCMJ. Article 43(a) specifies certain offenses that may be tried and punished at any time without limitation, including: murder; rape and sexual assault; rape and sexual assault of a child; and any other offense punishable by death. Article 43(b)(1) sets a default statute of limitations for all other offenses at five years. Article 43(b)(2) creates an exception for child abuse offenses, which may be tried at a court-martial within five years or during the life of the child, whichever provides a longer period. Subsections (d)-(g) of the statute provide additional rules and exceptions applicable in other special situations, including time of war exceptions and periods in which an accused is absent from territory in which the United States has the authority to apprehend him, or is in the custody of civil authorities or enemy forces.

3. Historical Background

Article 88 of the 1806 Articles of War specified a two-year limitations provision, including a tolling provision in cases of unauthorized absence, and courts-martial have been bound by a time limitations provision since that time.[1] Article 39 of the 1920 Articles of War provided a statute of limitations of two years for most offenses; three years for desertion in time of peace, damage to federal property, and certain other federal offenses; and no statute of limitations for desertion during time of war, murder, and mutiny.[2] Articles 61 and 62 of the Articles for the Government of the Navy established a two-year limitation period that began to run on the date the offense was committed, with an exception for desertion in time of peace, in which case the limitation period began to run at the end of the accused's enlistment.[3] These articles further provided for the suspension of the running of

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[1] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 984 (photo reprint 1920) (2d ed. 1896); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-6 (9th ed. 2015).

[2] AW 39 of 1920.

[3] AGN 61 and 62 of 1930. *See* LTJG C. R. Davis, USN, *The Statute of Limitations*, 1950 JAG Journal 7, 7-8 (1950).

the statute under certain circumstances, and for its tolling upon the issuance of an order for trial or punishment.[4]

When the UCMJ was enacted in 1950,[5] Congress included a statute of limitations in Article 43 of three years for most offenses, which was raised to five years in 1986.[6] Under the original version of Article 43, the only offenses subject to punishment without limitation were desertion or absence without leave in time of war, aiding the enemy, mutiny, or murder.[7] In 2003, Congress added a provision based on 18 U.S.C. § 3283 (Offenses against children), providing a statute of limitations in child abuse cases of five years or the life of the child, whichever period is longer.[8] In 2006, Congress added "rape, or rape of a child" to the list of offenses subject to punishment without limitation under Article 43(a),[9] and in 2014 this provision was expanded again to include "sexual assault" and "sexual assault of a child" in addition to "rape" and "rape of a child."[10]

4. Contemporary Practice

The President has implemented Article 43 through R.C.M. 907(b)(2)(B), which provides the accused with waivable grounds for dismissal of charges when the applicable statute of limitations under Article 43 has run.

5. Relationship to Federal Civilian Practice

The statute of limitations provisions under Article 43 are largely consistent with the statutes of limitations applicable to similar offenses in federal civilian practice under Title 18. Article 43, however, provides a shorter statute of limitations for child abuse offenses when the victim is no longer alive. Under Article 43(b)(2)(A), the limitation period is five years or the life of the child, whichever is longer; under 18 U.S.C. § 3283 the statute of limitations is ten years or the life of the child, whichever is longer. In 2006, Congress raised the limitations period in the Title 18 provision from five years to ten years.

In cases where DNA testing implicates an identified person in the commission of a felony, 18 U.S.C. § 3297 provides that "no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following

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[4] *Id.*

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[6] NDAA FY 1987, Pub. L. No. 99-661, § 805, 100 Stat. 3905 (1986).

[7] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1031-33 (1949).

[8] Pub. L. No. 99-661, tit. VIII, § 805(a), 100 Stat. 3905 (1986). This amendment resulted from a decision by the Court of Appeals for the Armed Forces in *United States v. McElhaney*, in which the court held that the statute of limitations contained in 18 U.S.C. § 3283 did not apply to courts-martial. 54 M.J. 120, 124-5 (C.A.A.F. 2000).

[9] NDAA FY 2006, Pub. L. No. 109-163, §§ 552(e)-553(a), 119 Stat. 3136 (2006).

[10] NDAA FY 2014, Pub. L. No. 113-66, § 1703, 127 Stat. 672 (2013).

the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period."

6. Recommendation and Justification

Recommendation 43.1: Amend Article 43 to increase the statute of limitations applicable to child abuse offenses from the current 5 years or the life of the child, whichever is longer, to 10 years or life of the child, whichever is longer.

This change would align Article 43(b)(2)(A) with 18 U.S.C. § 3283, which was amended in 2006 to increase the statute of limitations applicable for child abuse offenses from five to ten years.

Recommendation 43.2: Amend Article 43 by adding a new subsection (h) to extend the statute of limitations for Article 83 fraudulent enlistment cases from five years, as it currently stands, to: (1) the length of the enlistment, in the case of enlisted members; (2) the length of the appointment, in the case of officers; or (3) five years, whichever is longer.

Under current law, a servicemember who commits the offense of fraudulent enlistment would be subject to prosecution for violation of Article 83 until five years from the day he or she began receiving pay. Some enlistments and appointments last six years or more, and servicemembers may be in inactive-duty status for several years while receiving education. Such servicemembers may enter the service fraudulently (for example, by lying about violent crimes committed under another name before enlisting) and only disclose that fact, voluntarily or involuntarily, after the statute of limitations for the offense under Article 83 has already run.[11] When these scenarios arise, courts have strictly applied the 5-year limitations period under Article 43.[12]

This proposal would enhance the ability of the armed services to prosecute fraudulent enlistment offenses and avoid the scenario where an enlistment or appointment has been premised on false information and deception, but the servicemember is permitted to evade prosecution, and even to reenlist, because five years has elapsed since the servicemember first received pay or allowances.

Recommendation 43.3: Amend Article 43 by adding a new subsection (i) to extend the statute of limitations when DNA testing implicates an identified person in the commission

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[11] *See* SCHLUETER, *supra* note 1, at § 5.2[3][c].

[12] *See* United States v. Victorian, 31 M.J. 830, 832 (N.M.C.M.R. 1990) (plea of guilty to fraudulent enlistment improvident where prosecution of the offense was barred by the statute of limitations and the record of trial failed to indicate that the accused was aware of the bar); United States v. Jackson, 18 M.J. 753, 756 (A.C.M.R. 1984) (defense counsel's failure to raise the statute of limitations that barred the accused's conviction for fraudulent enlistment fell below minimum standards of competence); United States v. Farano, 60 M.J. 932, 934 (N-M. Ct. Crim. App. 2005) (accused's fraudulent enlistment not complete until two months after making false statements because of delayed enlistment program, and statute of limitations does not begin until the receipt of pay or allowances).

of an offense by excluding periods prior to the DNA implication in computing the period of limitations.

This change would align Article 43 with 18 U.S.C. § 3297 which extends the limitation period in specified circumstances where DNA testing implicates an identified person.

The amendments made by the proposal would apply to the prosecution of any offense committed before, on, or after the date of the enactment of the statute if the applicable limitation period has not yet expired.

7. Relationship to Objectives and Related Provisions

This proposal would support the GC Terms of Reference and MJRG Operational Guidance by incorporating practices and procedures used in U.S. district courts with respect to the applicable statute of limitations for child abuse offenses and for DNA testing identification.

This proposal also would support MJRG Operational Guidance by addressing an ambiguity in Article 43 with respect to fraudulent enlistment offenses.

8. Legislative Proposal

SEC. 705. STATUTE OF LIMITATIONS.

(a) INCREASE IN PERIOD FOR CHILD ABUSE OFFENSES.—Subsection (b)(2)(A) of section 843 of title 10, United States Code (article 43 of the Uniform Code of Military Justice), is amended by striking "five years" and inserting "ten years".

(b) INCREASE IN PERIOD FOR FRAUDULENT ENLISTMENT OR APPOINTMENT OFFENSES.—Such section (article) is further amended by adding at the end the following new subsection:

"(h) FRAUDULENT ENLISTMENT OR APPOINTMENT.—A person charged with fraudulent enlistment or fraudulent appointment under section 904a(1) of this title (article 104a(1)) may be tried by court-martial if the sworn charges and specifications are received by an officer exercising summary court-martial jurisdiction with respect to that person, as follows:

"(1) In the case of an enlisted member, during the period of the enlistment or five years, whichever provides a longer period.

"(2) In the case of an officer, during the period of the appointment or five years, whichever provides a longer period.".

(c) DNA EVIDENCE.—Such section (article), as amended by subsection (b), is further amended by adding at the end the following new subsection:

"(i) DNA EVIDENCE.—If DNA testing implicates an identified person in the commission of an offense punishable by confinement for more than one year, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period.".

(d) CONFORMING AMENDMENTS.—Such section (article) is further amended in subsection (b)(2)(B) by striking clauses (i) through (v) and inserting the following:

"(i) Any offense in violation of section 920, 920a, 920b, 920c, or 930 of this title (article 120, 120a, 120b, 120c, or 130), unless the offense is covered by subsection (a).

"(ii) Maiming in violation of section 928a of this title (article 128a).

"(iii) Aggravated assault, assault consummated by a battery, or assault with intent to commit specified offenses in violation of section 928 of this title (article 128).

"(iv) Kidnapping in violation of section 925 of this title (article 125).".

(e) APPLICATION.—The amendments made by subsections (a), (b), (c), and (d) shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this subsection if the applicable limitation period has not yet expired.

9. Sectional Analysis

Section 705 contains amendments to Article 43 pertaining to the statute of limitations for certain UCMJ offenses. The statute would be amended as follows:

Section 705(a) would extend the statute of limitations applicable to child abuse offenses under Article 43 from the current five years or the life of the child, whichever is longer, to ten years or the life of the child, whichever is longer, thereby aligning Article 43(b)(2)(A) with 18 U.S.C. § 3283 (Offenses against children).

Section 705(b) would create a new subsection (h), extending the statute of limitations for Article 83 (fraudulent enlistment) cases from five years, as it currently stands, to (1) the length of the enlistment, in the case of enlisted members; (2) the length of the appointment, in the case of officers; or (3) five years, whichever is longer.

Section 705(c) would create a new subsection (i), extending the statute of limitations until a period of time following the implication of an identified person by DNA testing that is equal to the otherwise applicable limitations period.

Section 705(d) contains conforming amendments based on the proposed realignment of the punitive articles.

Section 705(e) establishes the applicability of the amendments made by subsections (a), (b), (c), and (d) to the prosecution of any offense committed before, on, or after the date of the enactment of the statute if the applicable limitations period has not yet expired.

Article 44 – Former Jeopardy
10 U.S.C. § 844

1. Summary of Proposal

This proposal would amend Article 44 to more closely align the attachment of jeopardy standard with the standard applicable in federal civilian criminal proceedings. Part II of the Report will consider whether any changes are needed in the rules implementing Article 44.

2. Summary of the Current Statute

Article 44 contains three related subsections: (a) stating the general principle that "[n]o person may, without his consent, be tried a second time for the same offense"; (b) defining finality with respect to former guilty findings as being "after review of the case has been fully completed"; and (c) stating that, for the purpose of dismissals by the convening authority or "on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused," jeopardy attaches "after the introduction of evidence."

3. Historical Background

When Article 44 was originally proposed, it included the provisions that are currently under subsections (a) (no retrial for the same offense) and (b) (defining finality), but not the provision under subsection (c) (attaching jeopardy after introduction of evidence).[1] During the House Subcommittee hearings on the UCMJ in 1949, concern was raised about a recent double jeopardy case in which charges had been dismissed after evidence had already been entered.[2] Article 44(c) was added in order to protect military members against such actions.

4. Contemporary Practice

Under current rules, a panel is sworn in prior to voir dire.[3] After challenges are made and resolved and all the dismissed members have departed, the military judge will announce that the court is assembled.[4] This is often immediately followed by opening statements, and then the presentation of the evidence by the government.

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1046 (1949) [hereinafter *Hearings on H.R. 2498*].

[2] *Hearings on H.R. 2498*, supra note 1, at 1048-5 (discussing Wade v. Hunter, 69 S. Ct. 834 (1949)).

[3] R.C.M. 912(d) (Discussion).

[4] R.C.M. 911.

5. Relationship to Federal Civilian Practice

In federal civilian practice, prospective jurors swear two oaths: first, they swear to tell the truth during voir dire; then, after they are impaneled, they swear a second oath to faithfully perform their duties as a juror.[5] Jeopardy attaches following the second oath.[6] After jeopardy attaches, a case may not be retried after dismissal unless the dismissal was required due to a manifest necessity.[7] In civilian practice, manifest necessity includes mistrials, unavailable witnesses due to the fault of the accused, and other reasons out of the control of the government. In military practice, manifest necessity also includes military necessities, such as interrupting a court-martial due to military operations.[8] In short, both systems allow for a retrial after jeopardy attaches, provided there is a legitimate need for the dismissal.

The difference between military and federal civilian practice with respect to jeopardy attachment is attributable to the different bases for the rules in each system. In civilian practice, jeopardy attachment is based on case law concerning the Fifth Amendment;[9] in the military, attachment is based on statute. Attachment of jeopardy in civilian practice changed when the Supreme Court held that attachment must occur when the jury is sworn.[10] Military law has not incorporated this change. The military's deviation from the civilian standard is not necessary in order to meet the goals of military justice. Rather, it is the result of an amendment to Article 44, originally intended to bring military practice into compliance with then contemporary civilian practice,[11] which has not been updated to match current civilian law.

6. Recommendation and Justification

Recommendation 44: Amend Article 44 to more closely align double jeopardy protections in the military with those applicable in federal civilian practice.

Given that the doctrine of manifest necessity will allow retrials for cases which were dismissed due to military necessity, there does not appear to be any need for the deviation between civilian and military double jeopardy rules.

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[5] Handbook for Trial Jurors Serving in the United States District Courts, at 4-6 (Administrative Office of the United States Courts, 10 March 2015).

[6] Crist v. Bretz, 437 U.S. 28, 35 (1978).

[7] United States v. Perez, 22 U.S. 579, 580 (1824). *See also* United States v. Dixon, 913 F.2d 1305, 1310 (8th Cir. 1990) ("If manifest necessity required the declaration of a mistrial, then the defendants may be retried without violating their protection against double jeopardy.").

[8] United States v. Easton, 71 M.J. 168, 172-73 (C.A.A.F. 2012).

[9] *Crist*, 437 U.S. at 35.

[10] *Id.*

[11] *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. Of the S. Comm. On Armed Services*, 81st Cong. 168-170 (1949).

Other proposals in this Report, such as eliminating courts-martial without a military judge and using fixed panel sizes, would reduce many differences between civilian juries and military panels. Since military and civilian practice are becoming more similar, the military should follow the same rules regarding double/former jeopardy as the federal civilian courts.

7. Relationship to Objectives and Related Provisions

This proposal support the GC Terms of Reference by incorporating double jeopardy standards used in U.S. district courts.

8. Legislative Proposal

SEC. 706. FORMER JEOPARDY.

Subsection (c) of section 844 of title 10, United States Code (article 44 of the Uniform Code of Military Justice), is amended to read as follows:

"(c)(1) A court-martial with a military judge alone is a trial in the sense of this section (article) if, without fault of the accused—

"(A) after introduction of evidence; and

"(B) before announcement of findings under section 853 of this title (article 53);

the case is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses.

"(2) A court-martial with a military judge and members is a trial in the sense of this section (article) if, without fault of the accused—

"(A) after the members, having taken an oath as members under section 842 of this title (article 42) and after completion of challenges under section 841 of this title (article 41), are impaneled; and

"(B) before announcement of findings under section 853 of this title (article 53);

the case is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses.".

9. Sectional Analysis

Section 706 would amend Article 44 (Former jeopardy) to align the military more closely with federal civilian standards concerning double jeopardy.

Article 45 – Pleas of the Accused
10 U.S.C. § 845

1. Summary of Proposal

This proposal would amend Article 45 to: (1) to permit an accused to enter a guilty plea to a capital offense, subject to the requisite inquiry to ensure that the plea is voluntary and that the accused articulates the facts establishing the elements of the plea; (2) establish a statutory standard for assessing claims of error in the plea inquiry process; and (3) make technical conforming changes in the statute.

2. Summary of the Current Statute

Article 45(a) requires a military judge to enter a plea of not guilty in the record on behalf of an accused when an accused: (1) makes an irregular pleading; (2) fails to enter a plea; (3) enters a plea of guilty but sets forth matters inconsistent with the plea that cannot be resolved; (4) has made an improvident plea; or (5) does not understand the meaning and effect of a guilty plea. Article 45(b) prohibits an accused from pleading guilty to an offense for which the death penalty may be adjudged. Subsection (b) also permits, if authorized by regulations of the Secretary concerned and if the offense is not one for which the death penalty may be adjudged, the entry of findings of guilt upon acceptance of a plea of guilty without the necessity of voting on the findings. Under the statute, such a finding of guilt constitutes the finding of the court unless the plea is withdrawn prior to the announcement of the sentence, in which case the proceedings continue as though the accused had pleaded not guilty.

3. Historical Background

Article 45(a) generally reflected Army and Navy practice at the time of the UCMJ's enactment in 1950.[1] Article 45(b) also reflected Army and Navy practice before the enactment of the UCMJ, although there was previously no statute prohibiting guilty pleas in capital cases.[2] Article 45(b) was amended in the Military Justice Act of 1968 to permit the entry of findings of guilt upon acceptance of a plea of guilty without the necessity of voting on the findings, if authorized by regulations of the Secretary concerned, and if the offense was not one for which the death penalty could be adjudged.[3]

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[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1053 (1949).

[2] *See id. See generally* Major Frank E. Kostik Jr., *If I Have to Fight for My Life—Shouldn't I Get to Choose My Own Strategy? An Argument to Overturn the Uniform Code of Military Justice's Ban on Guilty Pleas in Capital Cases*, 220 MIL. L. REV. 242, 245 (2014).

[3] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(19)(B), 82 Stat. 1335. Before this amendment, military practice required the court to vote on the findings even if an accused pleaded guilty. *See Military Justice: Joint*

4. Contemporary Practice

The President has implemented Article 45 through R.C.M. 910, which provides the rules and procedures applicable to guilty plea proceedings, including plea agreement inquiries by the military judge. Under current military practice, a plea of guilty may not be accepted unless it is made knowingly and voluntarily after the military judge has explained the elements of the offense. Furthermore, before a plea of guilty may be accepted, the accused must admit every act or omission, and element of the offense to which the accused has pled guilty, and must be pleading guilty because the accused agrees that he or she is, in fact, guilty.[4] The military judge is required to engage in a detailed colloquy with the accused in accordance with *United States v. Care*.[5] Unless it is clear from the entire record that an accused knows the elements, admits them freely, and is pleading guilty because he or she is actually guilty, the plea of guilty will not be accepted.

The current approach to appellate review of guilty pleas focuses attention on the military judge's conduct of the plea inquiry. "Rejection of a guilty plea on appellate review requires that the record of trial show a substantial basis in law and fact for questioning the guilty plea."[6]

5. Relationship to Federal Civilian Practice

Fed. R. Crim. P. 11 governs guilty pleas in federal civilian practice. Like Article 45(a), Rule 11 requires a federal court, before accepting a guilty plea, to determine that the defendant's decision to plead is voluntary, knowing, and intelligent.[7] Similar to R.C.M. 910, the federal rules require that a defendant understand the nature of the offense to which he or she is pleading guilty.[8] The federal rules also require a factual basis for a plea.[9] However, Fed. R. Crim. P. 11 does not require any specific on-the-record colloquy.[10]

Hearings before the Subcomm. on Constitutional Rights of the Senate Subcomm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services, 87th Cong. 543 (1966).

[4] R.C.M. 910(c)-(e).

[5] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969); *see* R.C.M. 910(e) (Determining accuracy of plea); LTC Patricia A. Ham, *Crossing the I's and Dotting the T's: The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Arrangements*, 2004 ARMY LAW. 10, 32 (July 2004).

[6] United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002)

[7] FED. R. CRIM. P. 11(b)(2).

[8] FED. R. CRIM. P. 11(b)(1)(G); *see* Boykin v. Alabama, 395 U.S. 238, 240 (1969).

[9] FED. R. CRIM. P. 11(b)(3).

[10] United States v. Adams, 961 F.2d 505, 511 (5th Cir. 1992) (finding that the court must subjectively satisfy itself of "an adequate factual basis.")

District court judges may also accept a guilty plea when an accused claims he is innocent, pursuant to *North Carolina v. Alford*.[11] The *Alford* plea is not permitted under longstanding military law, which requires the accused to agree that he or she is, in fact, guilty of the offense.[12]

In federal civilian practice and in all but three of the states that have the death penalty, defendants may plead guilty in a capital cases. Furthermore, federal defendants have a right to appeal their guilty pleas unless waived, but the appeal is not automatic.[13] In these cases, federal appellate courts will apply either a harmless-error or a plain-error standard of review, depending on whether the defendant made a timely objection at trial.[14] Under Fed. R. Crim. P. 11(h), like Fed. R. Crim. P. 52(a), the courts will grant no relief for errors a defendant raises by timely objection at trial that "do not affect substantial rights."[15]

With respect to appellate review of errors in the plea process not raised at trial, the Supreme Court has held that plain-error will apply when a defendant stays silent and fails to object to an error in the Rule 11 guilty plea proceedings.[16] Federal plain error doctrine

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[11] North Carolina v. Alford, 400 U.S. 25, 37-38 (1970) (holding that the defendant's express admission of guilt in the entrance of a guilty plea was not a constitutional requisite). In *Alford*, the plea was accepted despite protestations of innocence because the court found overwhelming evidence of guilt.

[12] The military's mandate to insure that pleas are voluntary, knowing, and intelligent under Article 45 and R.C.M. 910 reflects the unique challenges of ensuring voluntariness of a plea under the special circumstances of military life, including the "subtle pressures inherent to the military environment that may influence the manner in which service members exercise (and waive) their rights." United States v. Phillippe, 63 M.J. 307, 310 (C.A.A.F. 2006). *See* United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969). Members of the armed forces are subject to involuntary orders and assignments, often in locations far from family, friends and other sources of support. They are subject to prosecution under statutes that would be considered unconstitutionally vague in civilian courts. *See* Parker v. Levy, 417 U.S. 733 (1974). In contrast to civilian proceedings, where unrelated charges typically are not subject to a single trial, military policy provides for trial of all known offenses -- no matter how distinct -- at a single trial under a very narrow standard for severance of charges. *See* R.C.M. 906(b)(10) (severance may be granted only to prevent a manifest injustice). In light of those circumstances, the military justice system has counterbalanced the pressures of military life by ensuring that the record of trial demonstrates a clear acknowledgement of guilt based upon an understanding element and an articulation by the accused of the facts establishing each element. These standards diminish the potential for wrongful convictions, while also providing a well-developed record that can prove highly useful in sustaining convictions based upon a properly conducted proceeding.

[13] *See* United States v. Seay, 620 F.3d 919, 921 (8th Cir. 2010) ("It is a well-established legal principle that a valid plea of guilty is an admission of guilt that waives all non-jurisdictional defects and defenses."); United States v. Moussaoui, 591 F.3d 263, 279 (4th Cir. 2010) ("When a defendant pleads guilty, he waives all non-jurisdictional defects in the proceedings conducted prior to entry of the plea [and] has no non-jurisdictional ground upon which to attack that judgment except the inadequacy of the plea."); *see also* Eric Hawkins, *A Murky Doctrine Gets A Little Pushback: The Fourth Circuit's Rebuff of Guilty Pleas in United States v. Fisher*, 55 B.C. L. REV. E-Supplement 103, 114 (2014).

[14] United States v. Vonn, 535 U.S. 55, 58, (2002).

[15] Rule 11(h) states, "A variance from the requirements of this rule is harmless error if it does not affect substantial rights." Rule 52(a) states "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

[16] *Vonn*, 535 U.S. at 59.

allows an appellate court to correct an error not raised at trial only when the appellant demonstrates that: (1) there is error; (2) the error is clear or obvious; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.[17] In *United States v. Dominguez Benitez*, the Supreme Court further refined the plain error test in a guilty plea case.[18] The Court said that relief for Rule 11 error must be tied to prejudicial effect. In order to demonstrate that an error affected substantial rights, the error must have had a prejudicial effect on the outcome of a judicial proceeding. The Court held that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the . . . court committed plain error under Rule 11 . . . must show a reasonable probability that, but for the error, he would not have entered the guilty plea."[19]

Finally, unlike in the military, a federal defendant may waive the right to appeal as part of a plea agreement, if that waiver is knowing and intelligent,[20] although the waiver may not include ineffective assistance of counsel claims. A district court, before accepting a guilty plea, must "inform the defendant of, and determine that the defendant understands . . . any . . . provision waiving the right to appeal."[21] However, the court accepting the plea is not required to conduct a specific dialogue with the defendant concerning the waiver of his right to appeal, so long as the record contains sufficient evidence to determine that the defendant knowingly and voluntarily waived that right.

6. Recommendation and Justification

Recommendation 45.1: Amend Article 45(b) to permit an accused to plead guilty in capital cases where death is not mandatory.

Permitting an accused to enter a plea of guilty in a capital case where the death sentence is not mandatory is consistent with civilian criminal practice. The reasons for the prohibition on guilty pleas in capital cases are no longer applicable in light of statutory and constitutional requirements for a knowing and voluntary plea, the assistance of counsel, and the detailed inquiry into voluntariness and the circumstances of the offense under Article 45 and R.C.M. 910.

A guilty plea is recognized as a matter in mitigation. A plea in a capital case may allow an accused to avoid imposition of the death penalty by demonstrating that he has taken

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[17] United States v. Marcus, 560 U.S. 258, 262 (2010).

[18] United States v. Dominguez Benitez, 542 U.S. 74, 81 (2004).

[19] *Id.* at 83.

[20] FED. R. CRIM. P. 11(b)(1)(N). *See* United States v. Feichtinger, 105 F.3d 1188, 1190 (7th Cir. 1997), *cert. denied*, 520 U.S. 1281 (1997) ("The right to appeal is a statutory right, and like other rights – even constitutional rights – which a defendant may waive, it can be waived in a plea agreement."); *In re* Sealed Case, 702 F.3d 59, 63 (D.C. Cir. 2012) ("A waiver of the right to appeal a sentence is presumptively valid and is enforceable if the defendant's decision to waive is knowing, intelligent, and voluntary.").

[21] FED. R. CRIM. P. 11(b)(1)(N).

responsibility for his conduct, is remorseful, and is seeking to spare the victim's family and the court system unnecessary time and expense. The Supreme Court has recognized that an individual accused of a capital charge has an interest in pleading guilty and avoiding trial "in order to spare themselves and their families the spectacle and expense of protracted courtroom proceedings."

Recommendation 45.2: Amend Article 45(b) to delete reference to a court-martial without a military judge.

Based on a separate proposal to eliminate special courts-martial without a military judge, reference to such a court-martial in subsection (b) should be deleted.

Recommendation 45.3: Amend Article 45(b) to eliminate the need for separate service regulations authorizing entry of findings upon acceptance of a guilty plea.

Prior to the enactment of the UCMJ, a finding of guilty could not be entered without a vote even if the plea had been accepted. The drafters of the Code permitted the services to authorize entry of a finding of guilty without a vote after acceptance of such a plea. Each of the services authorizes this practice through service regulations. Entry of a finding of guilty after acceptance of a plea is the norm in military justice practice. Requiring the services to separately authorize such a practice is unnecessary.

Recommendation 45.4: Amend Article 45 to include a new subsection (c) that would codify harmless error review in guilty plea cases.

This proposal is modeled after Fed. R. Crim. P. 11(h) with language that conforms to Article 59(a). Subsection (c) would make clear that deviations from Article 45(a) are subject to harmless error review. The proposal is an acknowledgement that not every violation of Article 45 requires invalidation of the guilty plea. The military providence inquiry has developed over the years into a careful, deliberate procedure with comprehensive protections to ensure that every guilty plea is knowing and voluntary. A guilty plea of that character should not be overturned for minor or technical violations of Article 45(a) that amount to harmless error.

7. Relationship to Objectives and Related Provisions

The recommendation to eliminate the reference to a court-martial without a military judge is related to proposed changes to Articles 16, 19, 26, 40, 41, 49, 50a and 51 to delete similar references.

The recommendation to codify a harmless error review in guilty plea cases is related to proposed changes in appellate review under Article 66(c) which are designed to focus appellate review more precisely on claims of prejudicial error at trial. In that regard, Part II of the Report will recommend related changes to the Manual for Courts-Martial to apply plain error review for matters not properly preserved at trial. Specifically, Part II of the Report will consider the potential of applying a rule for plain error, similar to Fed. R. Crim. P. 52(b), as well as a modification to R.C.M. 910(j) to apply plain error review to Article 45(a) matters raised for the first time on appeal. The goal would be to require an accused

to identify errors in the guilty plea process and bring them to the attention of the trial judge to correct, or face plain-error review on appeal.

8. Legislative Proposal

SEC. 707. PLEAS OF THE ACCUSED.

(a) PLEAS OF GUILTY.—Subsection (b) of section 845 of title 10, United States Code (article 45 of the Uniform Code of Military Justice), is amended—

(1) in the first sentence, by striking "may be adjudged" and inserting "is mandatory"; and

(2) in the second sentence—

(A) by striking "or by a court-martial without a military judge"; and

(B) by striking ", if permitted by regulations of the Secretary concerned,".

(b) HARMLESS ERROR.—Such section (article) is further amended by adding at the end the following new subsection:

"(c) HARMLESS ERROR.—A variance from the requirements of this article is harmless error if the variance does not materially prejudice the substantial rights of the accused.".

9. Sectional Analysis

Section 707 contains amendments to Article 45 concerning the pleas of the accused.

Section 707(a) would amend Article 45(b) to permit an accused to plead guilty in a capital case when the death penalty is not a mandatorily prescribed punishment. It would further amend the statute to conform to the proposed changes in Articles 16 and 19 to require a military judge to be detailed to all general and special courts-martial, and to eliminate the unnecessary requirement under current law for members to enter a finding of guilty where the military judge has already accepted the accused's guilty plea.

Section 707(b) would codify a harmless error rule in a new subsection (c) of Article 45. The proposed language is adapted from Fed. R. Crim. P. 11(h), using the language of Article 59(a) by substituting the phrase "materially prejudice the substantial rights of the accused" for the phrase "affects" substantial rights. *See* Article 59(a) ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."); *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (describing Article 59(a) as the military counterpart to Fed. R. Crim. P. 52(a)). These changes would reflect federal practice and procedure with respect to harmless error and plain error review, while recognizing the unique aspects of military practice.

The proposed amendments to Article 45 aim to improve the efficiency and effectiveness of appellate review of unconditional guilty pleas, while also preserving the unique procedural protections in the military system to ensure a guilty plea is voluntary, knowing, and intelligent. The amendments fit within the larger goal of encouraging error correction at the trial stage and would make no change to the responsibilities of the military judge under Article 45(a). The changes seek to eliminate the sanction of reversal for harmless errors, and would conform the statute to the proposed changes in Article 66 (replacing automatic review in non-capital cases with review based upon the accused's right to file an appeal). Subsection (c) addresses only harmless error. Implementing rules will prescribe plain error review for matters not properly preserved at trial. The addition of subsection (c) reflects the specific structure of Article 45, and is not intended to disturb the longstanding application of standards of review, including a harmless error test, to other aspects of the Code that are not accompanied by a statutory standard of review.

Articles 46-47 – Opportunity to Obtain Witnesses and Other Evidence & Refusal to Appear or Testify

10 U.S.C. §§ 846-47

1. Summary of Proposal

This proposal would amend Articles 46 and 47 to clarify the authority to issue and enforce subpoenas for witnesses and other evidence, and to enhance the government's ability to use investigative subpoenas prior to trial, consistent with federal and state practice. In addition, the proposed amendments to Article 46 would provide explicit authority for military judges to modify, quash, or order compliance with subpoenas before and after referral of charges, and to issue warrants and orders for the production of stored electronic communications, consistent with federal and state practice under the Stored Communications Act. This proposal would further amend Article 46 by moving the provisions under subsection (b) concerning defense counsel interviews of victims of sex-related offenses to Article 6b and extending those provisions to victims of all offenses, consistent with related victims' rights provisions.

2. Summary of the Current Statutes

Article 46 addresses the production of witnesses and evidence, including the issuance of subpoenas. Under Article 46(a), the trial counsel, defense counsel, and the court-martial are guaranteed "equal opportunity" to obtain witnesses and other evidence. Article 46(b) places two conditions on the defense counsel's ability to interview "alleged victims of alleged sex-related offenses": (1) when the government notifies the defense of its intent to call such victims as witnesses at a preliminary hearing or a court-martial, the defense must make any requests for interviews of the alleged victims through the Special Victims' Counsel or other victim's counsel, if applicable; and (2) such interviews shall, if requested by the alleged victim, take place only in the presence of counsel for the Government, counsel for the victim, or a Sexual Assault Victim Advocate. Article 46(c) provides statutory authority for the use of subpoenas to obtain witnesses and evidence for courts-martial, stating that "[p]rocess issued in court-martial cases . . . shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States or the Commonwealths and possessions."

Article 47 assists in the enforcement of military subpoenas with respect to civilian witnesses and evidence custodians, by making it a punishable offense—triable in U.S. district court upon certification of facts to the U.S. Attorney—for any person to willfully neglect or refuse to comply with process issued under Article 46, including duly issued subpoenas duces tecum (subpoenas for evidence) to obtain documentary evidence for use at Article 32 preliminary hearings.

3. Historical Background

As early as 1891, the ability to issue enforceable, nationwide process to obtain witnesses and other evidence for court-martial proceedings was recognized as essential to the legitimacy and effective administration of the nation's military justice system.[1] In 1901, Congress passed "an act to prevent the failure of military justice and for other purposes," the central feature of which was to make it a misdemeanor offense for any "person not belonging to the army of the United States" to willfully neglect or refuse to appear as a witness at, or produce documentary evidence for, a general court-martial.[2] When Congress enacted the UCMJ in 1950,[3] it sought to replicate the rules for federal compulsory process in Articles 46 and 47,[4] which it derived in part from Articles 22 and 23 of the Articles of War.[5] With respect to Article 46's subpoena power provision (now codified as subsection (c)), the drafters of the UCMJ "felt [it] appropriate to leave the mechanical details as to the issuance of process to regulation."[6] The drafters added the first sentence of Article 46 concerning "equal opportunity" (now codified as subsection (a)) in order "to insure equality between the parties in securing witnesses."[7] Both articles remained substantially unchanged from their original versions until recently.

In 2011, the Department of Defense proposed several amendments to Article 47 in order to address the lack of investigative subpoena power in military practice.[8] Previously, the

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[1] *See* 1891 MCM 146, n.1 (Op. Act'g Judge Adv. Genl., June 26, 1891) ("I am of the opinion that the courts would hold that [the current military subpoena process] does not, under the law, run beyond the State, Territory or District where the military court sits. It is certain that if you should succeed in getting a witness before the court-martial by virtue of such process, you could not compel him to testify or punish him for contempt. It is a very defective piece of machinery.").

[2] 31 Stat. 950 (March 2, 1901); *see* United States v. Praeger, 149 F. 474 (W.D. Texas 1907). This punishment provision was later codified as Article of War 23, the predecessor of Article 47 of the UCMJ.

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] Maj. Joseph Topinka, *Expanding Subpoena Power in the Military*, 2003 ARMY LAW. 15, 19-20 (citing Brief for the Dept. of the Army at A1, United States v. Bennett, 12 M.J. 463 (C.M.A. 1982)).

[5] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1057-59 (1949) [hereinafter *Hearings on H.R. 2498*]. Unlike the current Article 46(c), which simply requires process issued in court-martial cases to "be similar" to process issued in U.S. district court, the Articles of War expressly provided such authority: "Every trial judge advocate of a general or special court-martial and every summary court-martial *shall have* power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue . . . ." AW 22 of 1920 (emphasis added). Similarly, the Articles for the Government of the Navy provided that "[a] naval court-martial or court of inquiry *shall have* power to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction within the State, Territory, or District where such naval court shall be ordered to sit may lawfully issue." AGN 42 of 1930 (emphasis added).

[6] *Hearings on H.R. 2498*, *supra* note 5, at 1057.

[7] *Id.*

[8] Office of Legislative Counsel, U.S. Dep't of Def., Sixth Package of Legislative Proposals Sent to Congress for Inclusion in the National Defense Authorization Act for Fiscal Year 2012 § 532 (2011) [hereinafter OLC Leg.

power to compel witness testimony and the production of documentary evidence by subpoena under the Code was limited to depositions, courts of inquiry, and courts-martial after referral of charges for trial.[9] This lack of pre-referral subpoena power created a paradox for commanders and convening authorities, in whom the UCMJ vests responsibility for investigating and disposing of alleged offenses and preferred charges and specifications: they could not refer charges for trial until there was probable cause to believe an accused committed the offense; but in order to subpoena the evidence that could help inform this probable cause determination, they first had to refer charges to a court-martial. By contrast, the vast majority of federal subpoenas are issued pre-indictment, pursuant to grand jury investigations and in support of the prosecution's efforts to develop the evidence upon which to charge the accused.[10] For decades, the military's "subpoena paradox" was widely understood to be a weakness of the military justice system and an area in need of reform.[11]

In its 2012 amendments to the UCMJ, Congress responded to the Department of Defense's legislative proposals by extending Article 47's punishment authority to cover persons not subject to the UCMJ who receive subpoenas duces tecum for Article 32 investigations, and by authorizing the convening authority in these cases to certify cases of non-compliance to the U.S. attorney for prosecution in U.S. district court.[12] With these changes, government counsel in courts-martial and Article 32 investigations now had an enforceable, pre-referral subpoena authority somewhat analogous to the authority of federal prosecutors to issue pre-indictment subpoenas pursuant to grand jury investigations.[13] Two years later,

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Proposal]. *See generally* Maj. Chris Pehrson, *The Subpoena Duces Tecum and the Article 32 Investigation: A Military Practitioner's Guide to Navigating the Uncharted Waters of Pre-Referral Compulsory Process*, 2014 ARMY LAW. 8.

[9] Article 46(c) (referring explicitly to "court-martial cases"); R.C.M. 703(e)(2)(C); *see also* Flowers v. First Hawaiian Bank, 295 F.3d. 966 (9th Cir. 2002).

[10] Topinka, *supra* note 4, at 20-21.

[11] *See generally* Topinka, *supra* note 4; *see also* NATIONAL ACADEMY OF PUBLIC ADMINISTRATORS, ADAPTING MILITARY SEX CRIME INVESTIGATIONS TO CHANGING TIMES 20, 23 (June 1999); OFFICE OF THE INSPECTOR GEN. U.S. DEP'T OF DEF., CRIMINAL INVESTIGATIONS POLICY AND OVERSIGHT, EVALUATION OF SUFFICIENCY OF SUBPOENA AUTHORITY WITHIN THE DEPARTMENT OF DEFENSE IN SUPPORT OF GENERAL CRIMES INVESTIGATIONS 2-10 (2001).

[12] NDAA FY 2012, Pub. L. No. 112-81, § 542(a)(1)-(2) (2011).

[13] *Cf.* FED. R. CRIM. P. 17. *See generally* Topinka, *supra* note 4. Under the Department of Defense's original 2011 legislative proposal, the trial counsel's subpoena duces tecum authority would have been tied to "investigations" more generally, not solely investigations under Article 32; however, concern over "how recipients could challenge a pre-referral subpoena led Congress to limit the authority to Article 32 investigations, where the convening authority would have cognizance over the case and the power to quash or modify the subpoena." Pehrson, *supra* note 8, at 10; *see* OLC Leg. Proposal, *supra* note 8 (proposing that Article 47(a)(1) be amended to state, "Any person not subject to this chapter who . . . has been duly issued a subpoena duces tecum *for an investigation, including an investigation* pursuant to section 832(b) of this title (article 32(b)) . . .") (emphasis added); *see also* R.C.M. 703(e)(2)(F) (2012) ("If a person subpoenaed requests relief on the grounds that compliance is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena be modified or withdrawn if appropriate.").

Congress amended Article 47 again, this time in order to align the statute with the NDAA FY 2014 amendments that transformed the Article 32 investigation into a more narrowly focused "preliminary hearing." As amended, the purpose of the Article 32 hearing is no longer to conduct "a thorough and impartial investigation of all the matters set forth" in the charges and specifications, as it was previously. As a consequence of this transformation, the investigative value of subpoenas duces tecum issued under Articles 46 and 47 was indirectly diminished.

As part of the NDAA FY 2014 amendments, Congress also amended Article 46, splitting the statute into subsections and adding a new subsection (b). The new provision placed conditions on a defense counsel's ability to interview alleged victims of sex-related offenses. The contours of this provision have not been interpreted in the Manual or in appellate decisions. Although the legislative history does not expressly address this provision, it appears to reflect two well-settled principles of law and professional ethics: (1) that a lawyer may not communicate directly with a person the lawyer knows to be represented by counsel without the consent of that counsel or a court order;[14] and (2) that "neither the accused, his counsel, nor the court may be able to compel a witness to submit to a private interview, or not to attach such conditions to the matter as he, the witness, deems appropriate."[15] In 2015, Congress made technical amendments to Article 46(a) and (b), changing the terms "trial counsel" and "defense counsel" wherever they appeared to "counsel for the Government" and "counsel for the accused," respectively.

4. Contemporary Practice

The President has addressed Articles 46 and 47 through R.C.M. 701 (Discovery) and R.C.M. 703 (Production of witnesses and evidence), which primarily address post-referral rules of procedure. R.C.M. 405, a related provision concerning production of witnesses and evidence for a proceeding under Article 32, was recently amended to conform to the recent transformation of the Article 32 proceeding from an investigation to a preliminary hearing.[16] During the pretrial and trial stages of court-martial proceedings, these rules guide the parties with respect to disclosure of evidence and names of witnesses; access to witnesses and evidence and regulation of discovery; the parties' rights to production of witnesses and evidence; the rules and procedures applicable to Article 32 hearings; and the procedures for issuing, challenging, and enforcing subpoenas for witnesses and evidence.

Under R.C.M. 703, each party is entitled to the production of any witness whose testimony on a matter in issue would be relevant and necessary; similarly, each party is entitled to the production of evidence that is relevant and necessary.[17] Because the convening authority

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[14] *See, e.g.*, ABA RULE OF PROFESSIONAL CONDUCT 4.2.

[15] United States v. Enloe, 35 C.M.R. 228, 235 (C.M.A. 1965); *accord* United States v. Alston, 33 M.J. 370, 373 (C.M.A. 1991).

[16] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

[17] R.C.M. 703(b)(1) and (f)(1).

generally funds all court-martial costs, including witness expenses, the rules require the defense to submit its witness and evidence requests to the convening authority via the trial counsel and staff judge advocate.[18] Based on the "relevant and necessary" standard, the trial counsel normally determines "whether to grant or deny defense witness requests, other than expert witness requests which require the convening authority's personal decision."[19] Under current law, "[I]f the convening authority denies the request, the defense counsel must wait until the case is referred to submit the request to the military judge" for review of the convening authority's decision.[20]

When civilian witnesses and evidence not under the control of the government are determined to be relevant and necessary to a matter at issue in the case, the trial counsel issues subpoenas using the standard DD Form 453.[21] Subpoenas for live witness testimony (subpoenas ad testificandum) compel the civilian recipient—under penalty of federal prosecution—to attend and give testimony at a court-martial, court of inquiry, or deposition. These witness subpoenas are not authorized for Article 32 hearings, and generally are not issued until after referral of charges and specifications for trial (subpoenas for pre-referral depositions under Article 49 and R.C.M. 702 being the exception to this general rule).[22] Subpoenas for the production of evidence (subpoenas duces tecum) compel the recipient to produce the "books, papers, documents, data, or other objects or electronically stored information designated therein at the proceeding or at an earlier time for inspection by the parties."[23] When civilian recipients wish to

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[18] R.C.M. 703(c)(2).

[19] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 49-50 (June 2014).

[20] *Id.*

[21] MCM, App. 7. This form has been in use since May 2000, has not been updated to incorporate recent amendments to Article 47 authorizing pre-referral subpoenas duces tecum. *See* Pehrson, *supra* note 8, at 13 ("[DD Form 453] does not reflect the new power of the Article 32 to issue process, nor does it account for . . . the nuances particular to the Art. 32 subpoena. For instance, [it] commands a person 'to testify as a witness' and to bring specified evidence 'with them' to the proceeding. This language contradicts R.C.M. 703(f)(4)(B), which permits a person to comply with the Article 32 subpoena without having to personally appear.").

[22] R.C.M. 703(e)(2)(C).

[23] Exec. Order No. 13,669, 79 FED. REG. 34,999, 35,002 (Jun. 18, 2014) (R.C.M. 703(e)(2)(B), as amended). The rules and procedures pertaining to pre-referral subpoenas duces tecum have been in a state of flux due to the multiple amendments to Article 47(a)(1) over the past three years. On June 13, 2014, the President issued Executive Order (EO) 13669, modifying various sections of R.C.M. 703 and R.C.M. 405 to implement the 2012 amendments that created the initial authority for issuance of subpoenas duces tecum for "investigation[s] pursuant to" Article 32. Exec. Order No. 13,669, 79 Fed. Reg. 34,999, 35,000-35,005 (Jun. 18, 2014). Under the revised rules, following the convening authority's order directing an Article 32 investigation, the Article 32 investigating officer makes an initial determination of whether documentary evidence requested by the parties is relevant to the investigation and non-cumulative. *Id.* at 35,000-35,001, 35,004-35,005 (describing amended R.C.M. 405(g) and R.C.M. 703(f)(4)(B)). If that determination is positive, the trial counsel or the investigating officer is authorized to issue a subpoena duces tecum to attempt to obtain the relevant evidence. *Id.* On June 17, 2015, the President signed Executive Order 13,696, implementing new changes to R.C.M. 405 and 703. Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015). Under the recent revisions, only "counsel for the Government" would be authorized to issue subpoenas duces tecum to obtain evidence for

challenge military subpoenas on the grounds that the demands for testimony or evidence contained therein are "unreasonable or oppressive" (the applicable federal civilian standard), they are authorized to submit requests that the subpoena be modified or withdrawn ("quashed").[24] Under current law, when subpoenas are issued after referral of charges and specifications for trial, such requests are received and acted upon by the military judge detailed to the court-martial; before referral of charges and specifications—including for any Article 32 subpoena duces tecum—the convening authority is responsible for acting upon these requests.[25] If the appropriate authority determines that the subpoenas are not unreasonable or oppressive, then warrants of attachment (DD Form 454) may be issued to compel the appearance of the witness or the production of documents.[26]

Subpoenas issued pursuant to Articles 46 and 47 and the procedures provided in R.C.M. 703 have been described as "judicial subpoenas"—roughly equivalent to subpoenas issued under Fed. R. Crim. P. 17 in U.S. district court.[27] Under current law, however, military criminal investigative organizations and military trial counsel are unable to utilize the subpoena authority to order production of relevant evidence from electronic communications service providers—including cell phone records, emails, and text messages. This is because such information is protected by the Stored Communications Act,[28] a federal privacy-protection law, and military courts are not defined as "courts of competent jurisdiction" under the law's definitions section.[29] Furthermore, military judges do not currently have the authority to issue "warrants," which are required for most types

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Article 32 preliminary hearings. The standard for determining whether a subpoena duces tecum should issue would be: (1) "whether the evidence [sought] is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing"; and (2) whether issuance of the subpoena duces tecum would "cause undue delay to the preliminary hearing."

[24] R.C.M. 703(e)(2)(F). *Cf.* FED. R. CRIM. P. 17(c) ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.").

[25] R.C.M. 703(e)(2)(F).

[26] R.C.M. 703(e)(2)(G). *See generally* United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006).

[27] United States v. Curtin, 44 M.J. 439 (C.M.A. 1996); *see id.* at 441 (finding that the trial counsel's subpoena authority in "the military justice system parallels the functions of the clerk of court of the United States District Court who issues subpoenas for that court as a ministerial act.").

[28] 18 U.S.C. §§ 2701-2712 (2006).

[29] 18 U.S.C. § 2711. *See generally* Lt Col Thomas Dukes, Jr. & Lt Col Albert C. Rees, Jr., *Military Criminal Investigations and the Stored Communications Act*, 64 A.F. L. REV. 103 (2009). As noted by Dukes and Rees, under the Stored Communications Act, authorities may seek disclosure of certain classes of protected data with notice to the subscriber and a subpoena or a court order. 10 U.S.C. § 2703(b)(1)(B). However, in *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010), the Sixth Circuit held such procedures to be unconstitutional. Several providers, including Google and Yahoo!, have cited the Sixth Circuit's position and refused to provide any class of stored electronic communications without a search warrant issued by a "court of competent jurisdiction" under Section 2711 of the Act. Major Sam C. Kidd, *Military Courts Declared Incompetent: What Practitioners (Including Defense Counsel) Need to Know About the Stored Communcations Act*, 40 No. 3 THE REP. 17, 21 (2013).

of information protected under the Act. As a result, only the most basic account data and account holder information are generally obtainable for use in military investigations.

One alternative to obtaining relevant electronic communications for investigative purposes is to request an administrative subpoena issued under the authority of the DoD Inspector General.[30] These administrative subpoenas traditionally were limited to Department investigations concerning fraud, waste, and abuse, but in 2009, the program was expanded to include "support of certain DoD non-fraud related [general crimes] investigations."[31] Under the expanded mandate, the Inspector General's Office may exercise its administrative subpoena power in support of general crimes investigations when there is a "sufficient DoD nexus to the crime at issue," and when "the particular crime at issue is of such a nature and/or such concern to DoD as to warrant the DoD IG's involvement in the investigation."[32] Under this "Particular Crimes Test," one of twenty listed offenses—including sexual assault, murder, espionage, drug trafficking, and other serious offenses under the UCMJ—must be alleged in order for the Inspector General's Office to issue an administrative subpoena in support of a general crimes investigation.[33] Although these administrative subpoenas have certain advantages over subpoenas issued under Articles 46 and 47,[34] generally they are viewed as an inadequate alternative, due both to the limited scope of offenses for which they are available and their lengthy administrative requirements.[35] A second alternative, often equally if not more difficult as a practical matter, is for the trial counsel and the military criminal investigative organization to request subpoena assistance from U.S. Attorney offices, state prosecutors, and local law enforcement. Generally, these agencies are fully occupied in the prosecution of federal and state crimes and find it difficult to provide additional support for military investigations and prosecutions.

5. Relationship to Federal Civilian Practice

In federal civilian practice, discovery rules and procedures are provided under Fed. R. Crim. P. 16, and subpoena procedures are provided under Fed. R. Crim. P. 17. Although federal

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[30] *See generally* Dep't of Defense Inspector General's Office Subpoena Program website, *at* http://www.dodig.mil/programs/subpoena/index.html.

[31] Dep't of Defense Inspector General, Memorandum for Director, Defense Criminal Investigative Service, Jun. 16, 2009. *See generally* Maj. Stephen Nypaver III, *Department of Defense Inspector General Subpoena*, 1989 ARMY LAW. 17.

[32] Dep't of Defense Inspector General Subpoena Reference Guide 35-36 (Aug. 2009).

[33] *Id.*

[34] *See* Dep't of Defense Inspector General Subpoena Reference Guide 6 (Aug. 2009).

[35] *See* Dukes & Rees, *supra* note 29, at 120 (noting that most offenses that are prosecuted at special courts-martial do not qualify under the DoD IG's "particular crimes" test); *see also* Topinka, *supra* note 4, at 22 (describing the lengthy documentary requirements for DoD IG subpoenas and noting that many investigators "who must also follow their own regulations, believe . . . MCIO regulations and the IG documentary requirements are too lengthy, cumbersome, and difficult to handle").

discovery rules are similar to military discovery rules in many ways, in terms of practice, discovery in military cases has traditionally been much broader than the discovery provided for in federal district court cases.[36] In part, this difference between military and federal civilian discovery practice can be attributed to tradition and custom, and the orientation in the military justice system toward "open-file" disclosure policies that are not as common in federal prosecution offices.

With respect to subpoena practice, despite the similarities between military subpoenas and subpoenas issued under Fed. R. Crim. P. 17,[37] federal prosecutors and law enforcement agencies have much broader authority to utilize subpoenas during the investigative, pre-indictment (pre-referral) stages of a case.[38] Under Fed. R. Crim. P. 6 and 17, federal prosecutors have access to grand jury investigative subpoenas as soon as a grand jury is summoned, which often happens before the accused is even aware of the investigation or afforded the right to counsel. Similarly, in many states, prosecutors are given investigative subpoena authority by statute, to be exercised in advance of filing charges with the court or obtaining an indictment.[39] In the military justice system, by contrast, an accused is provided with a defense counsel as soon as charges are preferred—generally weeks before an Article 32 hearing or before referral of charges and specifications to general or special courts-martial for trial. Furthermore, whereas probable cause is not required for the issuance of grand jury subpoenas,[40] the vast majority of military subpoenas are issued post-referral, after the probable cause threshold has already been met. This difference provides federal prosecutors with a superior investigative tool during the preliminary, investigative stages of a case.[41] In addition, federal prosecutors and law enforcement agencies have several available means for obtaining electronic communications and other stored data protected by the Stored Communications Act, including—depending on the classification level of the information sought—grand jury investigative subpoenas, trial subpoenas, and search warrants and court orders issued by district court judges.[42]

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[36] *See* United States v. Kinney, 56 M.J. 156 (C.A.A.F. 2001) ("One of the hallmarks of the military justice system is that it provides an accused with a broader right of discovery than required by the Constitution . . . or otherwise available to federal defendants in civilian trials under Fed. R. Crim. P. 12 and 16."); United States v. Killebrew, 9 M.J. 154, 159 (C.M.A. 1980); United States v. Simmons, 38 M.J. 376 (C.M.A. 1993).

[37] *See* United States v. Curtin, 44 M.J. 439, 441 (C.M.A. 1996) (the trial counsel's subpoena authority in "the military justice system parallels the functions of the clerk of court of the United States District Court who issues subpoenas for that court as a ministerial act.").

[38] Topinka, *supra* note 4, at 20-21.

[39] *See generally* WAYNE LAFAVE, JEROLD ISRAEL., NANCY KING & ORIN KERR, CRIMINAL PROCEDURE § 8.3(c) (Subpoena duces tecum) and § 8.1(c) (Alternative procedures) (3d ed. 2013); *see also* Oman v. State, 737 N.E.2d 1131, 1136 (Ind. 2000); United States v. Santucci, 674 F.2d 624, 627, 632 (7th Cir.1982).

[40] *See* United States v. Williams, 504 U.S. 36, 48 (1992).

[41] *See* Topinka, *supra* note 4, at 21.

[42] *But see* note 29, *supra*, concerning the *Warshak* decision and the requirement for a search warrant regardless of the classification level of the information sought.

Another difference between military practice and federal civilian practice in this area is the new Article 46(b), the provision placing statutory conditions on the defense counsel's ability to interview victims of sex-related offenses. There is no federal equivalent for this provision; however, some states have created constitutional, statutory, and regulatory protections for crime victims—generally tied to other Crime Victim's Rights Act-like protections—formalizing the right of victims to refuse interviews with defense attorneys or to place reasonable conditions on the conduct of such interviews. For example, under the California Constitution, "In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to . . . [the right] to refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interview to which the victim consents."[43]

6. Recommendation and Justification

Recommendation 46.1: Amend Articles 46 and 47 to clarify the authority to issue and enforce subpoenas for witnesses and other evidence, to allow subpoenas duces tecum to be issued for "investigations of offenses under" the UCMJ when authorized by a general court-martial convening authority, and to authorize military judges to issue warrants and orders for the production of stored electronic communications under the Stored Communications Act.

This proposal would restructure Articles 46 and 47 to clarify and enhance the relationship between the two statutes. It also would enhance the government's ability to issue investigative subpoenas prior to trial, consistent with federal and state practice. These changes would provide military trial counsel with similar subpoena authority to grand jury investigative subpoenas issued by federal prosecutors in federal district court, and the investigative subpoena authority granted to prosecutors and attorneys general by statute in many state jurisdictions.

The proposed amendments are similar to the amendments to Article 47 proposed by the Department of Defense in 2011. There are two key differences between the two proposals:

First, this proposal would amend Article 46, which is the statutory authority under the UCMJ for the issuance of process, rather than Article 47, which is a punishment provision only. Because the authority "to compel the production of other evidence" under Article

[43] CAL. CONST. art. 1 Sect. 28(b)(5). The manner in which such provisions are implemented may raise due process issues with respect to the rights of an accused. *See* State v. Murtagh, 169 P.3d 602, 615, 624 (Alaska 2007) (holding that the accused's rights under the Alaska state constitution to "reasonable access to witnesses without unjustified state interference" were violated by certain provisions in the state's victims' rights, which provided that: (1) defense counsel in sexual offense cases must obtain written consent from a witness or victim before interviewing them; (2) defense representatives must advise all victims and witnesses that they did not have to talk to them and could have a prosecuting attorney or other person present during the interview; (3) defense representatives in sexual offense cases are prohibited from contacting a witness who provided written notice that they did not wish to be contacted; and (4) defense representatives must obtain consent of a victim or witness prior to recording an interview). Part II of this Report will propose implementing rules consistent with the right to due process.

46(c) is limited to "court-martial cases," it is necessary to extend this authority to include "investigations of alleged offenses under this chapter" as well.[44]

Second, this proposal would condition the issuance of pre-referral subpoenas duces tecum on the approval of a general court-martial convening authority. This requirement would provide an administrative check on this pre-referral authority, and is consistent with the convening authority's law enforcement role in the investigative stages of a potential court-martial.

These changes would result in more well-developed military criminal investigations before the ultimate charging decision by the convening authority, as well as enhanced cooperation between military criminal investigative organizations and military prosecutors during the investigative stages of a court-martial.

This proposal would clarify the provisions governing the opportunity to obtain witnesses and other evidence in cases referred to trial by court-martial. This proposal also would make technical changes to Article 46 to clarify the relationship between Articles 46, 47, and 49 with respect to subpoenas for witnesses and other evidence for courts-martial, military commissions, courts of inquiry, and depositions. Currently, Article 47 references each of these proceedings; Article 46, on the other hand, refers only to "court-martial cases," while Article 49 authorizes the ordering of depositions for use at courts-martial as well as at Article 32 preliminary hearings.

This proposal would create two related judicial authorities. First, it would authorize military judges to review requests from civilian subpoena recipients to modify or quash subpoenas for testimony and production of evidence, both before and after referral of charges. Currently, R.C.M. 703 authorizes military judges to perform this function only after charges are referred to court-martial; before charges are referred, subpoena recipients must petition the convening authority for relief.

This change would ensure that subpoenas issued to civilian witnesses and evidence custodians are reviewed, modified, and enforced by trained judicial officers at all stages of the court-martial process, consistent with the procedures and standards of review applicable in federal district court. Part II of the Report will address these standards in the rules implementing Articles 46 and 47.

In the context of pre-referral requests for depositions of crime victims, the proposed amendment would ensure that any subpoena issued to compel a victim to provide a deposition would be reviewed by a military judge, as opposed to the convening authority who ordered the deposition.

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[44] *See* Topinka, *supra* note 4, at 21 ("There is no trial counsel or court-martial . . . until a convening authority has referred a case to trial and counsel is detailed to the court-martial. By implication, there is no trial counsel subpoena authority in a military case until after referral of the charges."); LCDR James Warns, *Obtaining of Witnesses*, JAG JOURNAL 5 (1951) ("In order for this penalty language [in Article 47] to have any application, authority must exist to issue the process compelling the production of documentary evidence.").

Second, this proposal also would authorize military judges to issue warrants and court orders for the production of stored electronic communications, consistent with federal and state practice under the Stored Communications Act. This amendment would better align military practice with federal civilian practice with respect to the ability to obtain protected electronic communications during the investigative and trial stages of a court-martial proceeding. In many criminal investigations, this type of information is critical to successful law enforcement and criminal prosecutions. The UCMJ's current lack of authority to obtain this information without assistance of federal and state prosecutors inhibits law enforcement efforts and impacts the military's ability to investigate and prosecute offenders.

This proposal would include conforming amendments to the Stored Communications Act, Chapter 121 of Title 18, United States Code.

Although this is an area of federal law that is currently in flux, with various appellate court decisions making proper application of the Stored Communications Act uncertain, these amendments would ensure that military criminal investigations and courts-martial have the same access provided to state and federal investigators and courts with respect to this type of highly relevant information.

Recommendation 46.2: Amend Article 46 by moving the provisions under subsection (b) concerning defense counsel interviews of victims of sex-related offenses to Article 6b and extending those provisions to victims of all offenses, consistent with related victims' rights provisions.

The proposed amendments would extend recent protections provided to victims of sex-related offenses to all victims, consistent with the purpose and function of Article 6b and other victims' rights provisions that apply equally to all victims of offenses under the UCMJ.

Part II of the Report will address implementing rules, including R.C.M. 701, 702, and 703, and will specifically address the opportunity for expanded defense access to subpoenas during the pretrial and trial stages of courts-martial, consistent with federal civilian practice.

7. Relationship to Objectives and Related Provisions

This proposal would support the MJRG Terms of Reference by better aligning military practice with respect to the investigative use of subpoenas and warrants with the practices and procedures applicable in federal district court.

This proposal would support MJRG Operational Guidance by employing the standards and procedures of the civilian sector insofar as practicable, and by addressing ambiguities in the relationship between Articles 46, 47, and 49 thereby reducing the potential for litigation in these areas.

This proposal relates to the proposed enactment of Article 30a concerning pre-referral proceedings presided over by a military judge. The proposed new article would allow

military judges to modify, quash, or order compliance with subpoenas during the pre-referral, investigative stage of a court-martial case.

8. Legislative Proposals

SEC. 708. SUBPOENA AND OTHER PROCESS.

(a) IN GENERAL.—Section 846 of title 10, United States Code (article 46 of the Uniform Code of Military Justice), is amended as follows:

(1) Subsection (a) of such section (article) is amended—

(A) in the heading, by inserting, "IN TRIALS BY COURTS-MARTIAL" after "EVIDENCE"; and

(B) by striking "The counsel for the Government, the counsel for the accused," and inserting "In a case referred for trial by court-martial, the trial counsel, the defense counsel,".

(2) Subsection (b) of such section (article) is amended to read as follows:

"(b) SUBPOENA AND OTHER PROCESS GENERALLY.—Any subpoena or other process issued under this section (article)—

"(1) shall be similar to that which courts of the United States having criminal jurisdiction may issue;

"(2) shall be executed in accordance with regulations prescribed by the President; and

"(3) shall run to any part of the United States and to the Commonwealths and possessions of the United States.".

(3) Subsection (c) of such section (article) is amended to read as follows:

"(c) SUBPOENA AND OTHER PROCESS FOR WITNESSES.—A subpoena or other process may be issued to compel a witness to appear and testify—

"(1) before a court-martial, military commission, or court of inquiry;

"(2) at a deposition under section 849 of this title (article 49); or

"(3) as otherwise authorized under this chapter."

(4) The following new subsections are added at the end of such section (article):

"(d) SUBPOENA AND OTHER PROCESS FOR EVIDENCE.—

"(1) IN GENERAL.—A subpoena or other process may be issued to compel the production of evidence—

"(A) for a court-martial, military commission, or court of inquiry;

"(B) for a deposition under section 849 of this title (article 49);

"(C) for an investigation of an offense under this chapter; or

"(D) as otherwise authorized under this chapter.

"(2) INVESTIGATIVE SUBPOENA.—An investigative subpoena under paragraph (1)(C) may be issued before referral of charges to a court-martial only if a general court-martial convening authority has authorized counsel for the Government to issue such a subpoena.

"(3) WARRANT OR ORDER FOR WIRE OR ELECTRONIC COMMUNICATIONS.—With respect to an investigation of an offense under this chapter, a military judge

detailed in accordance with section 826 or 830a of this title (article 26 or 30a), may issue warrants or court orders for the contents of, and records concerning, wire or electronic communications in the same manner as such warrants and orders may be issued by a district court of the United States under chapter 121 of title 18, subject to such limitations as the President may prescribe by regulation.

"(e) REQUEST FOR RELIEF FROM SUBPOENA OR OTHER PROCESS.—If a person requests relief from a subpoena or other process under this section (article) on grounds that compliance is unreasonable or oppressive or is prohibited by law, a military judge detailed in accordance with section 826 or 830a of this title (article 26 or 30a) shall review the request and shall—

"(1) order that the subpoena or other process be modified or withdrawn, as appropriate; or

"(2) order the person to comply with the subpoena or other process."

(b) CONFORMING AMENDMENTS.—(1) Section 2703 of title 18, United States Code, is amended—

(A) in the first sentence of subsection (a);

(B) in subsection (b)(1)(A); and

(C) in subsection (c)(1)(A);

by inserting after "warrant procedures" the following: "and, in the case of a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of

Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President".

(2) Section 2711(3) of title 18, United States Code, is amended by—

(A) striking "or" at the end of subparagraph (A);

(B) striking "and" at the end of subparagraph (B) and inserting "or"; and

(C) adding the following new subparagraph:

"(C) a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), to which a military judge has been detailed; and".

SEC. 709. REFUSAL OF PERSON NOT SUBJECT TO UCMJ TO APPEAR, TESTIFY, OR PRODUCE EVIDENCE.

(a) IN GENERAL.—Subsection (a) of section 847 of title 10, United States Code (article 47 of the Uniform Code of Military Justice), is amended to read as follows:

"(a) IN GENERAL.—(1) Any person described in paragraph (2)—

"(A) who willfully neglects or refuses to appear; or

"(B) who willfully refuses to qualify as a witness or to testify or to produce any evidence which that person is required to produce;

is guilty of an offense against the United States.

"(2) The persons referred to in paragraph (1) are the following:

"(A) Any person not subject to this chapter—

"(i) who is issued a subpoena or other process described in subsection (c) of section 846 of this title (article 46); and

"(ii) who is provided a means for reimbursement from the Government for fees and mileage at the rates allowed to witnesses attending the courts of the United States or, in the case of extraordinary hardship, is advanced such fees and mileage.

"(B) Any person not subject to this chapter who is issued a subpoena or other process described in subsection (d) of section 846 of this title (article 46).".

(b) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§847. Art. 47. Refusal of person not subject to chapter to appear, testify, or produce evidence".

9. Sectional Analysis

Section 708 contains several amendments to Article 46 pertaining to the opportunity to obtain witnesses and other evidence and the use of subpoenas and other process for courts-martial and for investigative purposes. Currently, Article 46 states only that process issued in "court-martial cases" for witnesses and evidence shall be similar to process issued in federal district court, with no explicit subpoena authority provided, and with no distinction made between different types of proceedings under the UCMJ and the different authorities for subpoenaing witnesses and evidence at different stages in the court-martial process. The proposed changes would maintain and enhance the core features of Article 46, while strengthening the relationships among related provisions in Articles 46, 47, and 49.

Section 708(a) would revise Article 46 as follows:

Article 46(a) would be amended to clarify the provisions governing the opportunity to obtain witnesses and other evidence in cases referred to trial by court-martial.

The limitations and conditions on defense counsel interviews of victims of sex-related offenses currently in Article 46(b) would be moved to Article 6b and expanded to cover all crime victims, consistent with related victims' rights provisions under that statute.

Article 46(b) would restate the current provisions of Article 46(c).

Article 46(c) would clarify current law concerning the issuance of subpoenas or other process to compel witnesses to appear and testify before a court-martial, military commission, court of inquiry, or other court or board, or at a deposition under Article 49.

Article 46(d) would provide for subpoenas to compel the production of evidence before a court-martial, military commission, court of inquiry, or other court or board, or at a deposition under Article 49. It would also include an additional paragraph providing authority to issue subpoenas duces tecum for investigations of offenses under the UCMJ, if authorized by a general court-martial convening authority. This provision would enhance the government's ability to issue investigative subpoenas prior to trial, consistent with federal and state practice, and would replace the provision currently contained in Article 47(a)(1) concerning the issuance of subpoenas duces tecum for Article 32 preliminary hearings. In addition, Article 46(d) would authorize military judges to issue warrants or court orders for information pertaining to stored electronic communications in the same manner as U.S. district court judges under the Stored Communications Act (Chapter 121, Title 18) subject to limitations prescribed by the President. This new provision would ensure military criminal investigative organizations and military prosecutors have access to electronic evidence during the investigative stages of court-martial cases, similar to their federal counterparts, and under the same limitations and conditions applicable in federal district court.

Article 46(e) would add a new subsection to provide explicit authority for military judges to modify, quash, or order compliance with subpoenas before and after referral of charges.

Section 708(b) would make conforming amendments to 18 U.S.C. §§ 2703 and 2711(3) to include process issued in court-martial proceedings.

Section 709 contains amendments to Article 47, which provides for criminal prosecution in U.S. district court of civilians who fail to comply with military subpoenas issued under Article 46. The amendments would retain current law under Article 47(a), while updating and clarifying the statute's provisions and the relationship between Articles 46 and 47.

Article 48 – Contempts
10 U.S.C. § 848

1. Summary of Proposal

This proposal would extend the contempt power of military judges under Article 48 to pre-referral proceedings, consistent with the proposal to enact Article 30a (Proceedings Conducted Before Referral). This proposal also would clarify recent amendments to Article 48 in order to remove ambiguities in the language of the current statute with respect to the contempt power of appellate judges. In addition, this proposal would provide for appellate review of contempt punishments in a manner consistent with the review of other orders and judgments under the UCMJ. Part II of the Report will address additional changes needed in the rules implementing Article 48.

2. Summary of the Current Statute

Article 48 provides statutory authority for the punishment of acts of contempt and violations of court orders and rules in courts-martial and other military proceedings. The article's main provision, subsection (a), defines who may punish acts of contempt: judges detailed to courts-martial, courts of inquiry, the Court of Appeals for the Armed Forces, the military Courts of Criminal Appeals, provost courts, and military commissions. It then defines which acts constitute contempt under the statute: (1) the use of "any menacing word, sign, or gesture in the presence of the judge during the proceedings of the court-martial, court, or military commission"; (2) disturbances to such proceedings; and (3) willful failures to obey "the lawful writ, process, order, rule, decree, or command of the court-martial, court, or military commission." Article 48(b) provides that the maximum punishment for contempt is 30 days confinement, a fine of $1,000, or both; and Article 48(c) makes the article inapplicable to military commissions established under Chapter 47A.

3. Historical Background

The power of military courts to punish contemptuous acts has been a part of the military justice system since the original Articles of War provided that "[n]o person whatsoever shall use menacing words, signs, or gestures in the presence of a court-martial then sitting, or shall cause any disorder or riot, so as to disturb their proceeding, on the penalty of being punished at the discretion of the said court-martial."[1] By 1893, the language of the statute evolved nearly to its current form, providing courts-martial with the power to summarily punish "any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder."[2] In 1921, Congress expanded this

[1] AW XL of 1775.

[2] AW 86 of 1893.

authority to include "military tribunals" and added a maximum punishment of "one month's confinement or a fine of $100, or both."[3] Under the Articles of War, civilians were not punished for contempt, and only "direct" contempts were proscribed (i.e. those committed in the direct presence of the court or in its immediate proximity).[4] When the UCMJ was enacted in 1950, the contempt authority under Article 48 was revised to include "[a] court-martial, provost court, or military commission."[5] The conduct covered under the statute continued to include only "direct" contempts;[6] however, for the first time, civilians could be punished for contempt by military courts.[7] As Mr. Larkin noted during the Subcommittee hearings:

> Unless [the court-martial] has the power to discipline those before it you may have the most erratic kind of proceedings, and the most disturbing circus atmosphere, as you very frequently have in some sensational civil cases. If the court cannot operate its own proceedings in a dignified manner its proceedings become intolerable.[8]

From 1950 until 2011, Congress substantively amended Article 48 just once, in 2006, when it excluded military commissions under chapter 47A from the article's applicability.[9]

In 2011, Congress made the first significant amendments to Article 48. First, it amended Article 48(a) to identify the "judge detailed to" the court-martial, provost court, or military commission—rather than the court itself—as the disposition authority for contempts.[10] Second, Congress extended the contempt authority to judges detailed to courts of inquiry, the Court of Appeals for the Armed Forces, and the military Courts of Criminal Appeals. The purpose of these changes was to better align military courts procedurally with federal district courts, by providing military trial and appellate judges with a means to directly enforce their court orders, particularly with respect to civilian attorneys who are not

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[3] AW 32 of 1921.

[4] *See, e.g.*, MCM 1917, ¶173(b) (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 306 (1920 reprint) (2d ed. 1896)) ("In view, however, of the embarrassment liable to attend the execution, through military machinery, of a punishment adjudged against a civilian for a contempt under the article, it would generally be advisable for the court to confine itself to causing the party to be removed as a disorderly person, and, in an aggravated instance, to procure a complaint to be lodged against him for breach of the public peace."); *see also id.* at ¶173(c) (discussing direct and constructive contempts).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1959 (1949) [hereinafter *Hearings on H.R. 2498*].

[6] *See* MCM 1951, ¶118; R.C.M. 809(a) (Discussion).

[7] *See* 1951 MCM, ¶118 ("The words 'any person' as used in Article 48, include all persons, whether or not subject to military law, except the law officer and the members of the court.").

[8] *Hearings on H.R. 2498*, *supra* note 5, at 1060.

[9] Military Commissions Act of 2006, Pub. L. No. 109-366, § 4(a)(2), 120 Stat. 2600 (2006).

[10] NDAA FY 2011, Pub. L. No. 111-383, § 542, 124 Stat. 4218 (2011).

subject to military discipline.[11] These changes also better aligned Article 48 with the procedures applicable to contempt proceedings under R.C.M. 809, which was amended in 1998 in order to eliminate the members' involvement in the contempt disposition process.[12] In addition to vesting the contempt authority in trial and appellate judges, the 2011 amendments: (1) raised the maximum monetary punishment under Article 48(b) from $100 to $1,000; and (2) added subsection (a)(3) to the statute to make "indirect" contempts directly punishable by the military judge, including willful failures to follow the lawful writ, process, orders, or rules of the court.[13] Article 47 (Refusal to appear or testify), by contrast, provides only for indirect enforcement of process issued to civilian witnesses and evidence custodians, via prosecution by the U.S. attorney in U.S. district court.

4. Contemporary Practice

The President has implemented Article 48 through R.C.M. 201(c), defining court-martial jurisdiction for the contempt power, and R.C.M. 809, providing the rules and procedures for contempt proceedings. R.C.M. 809(b) provides that acts of contempt directly witnessed by the court may be punished summarily, and that acts committed outside the immediate presence of the court (such as disturbances in the waiting area) shall be disposed of through notice and hearing. R.C.M. 809(c) provides the procedures applicable for contempt proceedings, and R.C.M. 809(d) provides that convening authorities—rather than the Courts of Criminal Appeals—are responsible for reviewing the records of contempt proceedings and approving or disapproving the findings and sentence in whole or in part. Under the rule, the convening authority's action is not subject to further review or appeal.[14] Because of this, there has been very little litigation concerning Article 48 and the rules implementing the statute, and the Court of Appeals for the Armed Forces has reviewed contempt rulings at the trial level only as mandamus requests.[15]

As currently drafted, R.C.M. 201(c) and R.C.M. 809 contain several ambiguities that may prevent the contempt authority under Article 48 from being exercised effectively by military trial and appellate judges. First, despite the 2011 amendments to Article 48, both rules continue to refer to the "court-martial" itself as the contempt authority; both rules also continue to quote the pre-2011 version of the article, in which only "direct" contempts were punishable and the maximum monetary punishment for a contempt finding was

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[11] *See* Article 48, UCMJ – DoD Proposed NDAA FY 2011 Amendment, as included in S. 3454 by the Senate Armed Services Committee, June 4, 2010, *available at* http://www.dod.gov/dodgc/images/article48_ucmj.pdf. The fact that judges on the Court of Appeals for the Armed Forces and the military Courts of Criminal Appeals are not "detailed" to their respective courts in the same way that military judges are "detailed" to courts-martial appears to have been an oversight in the 2011 amendments.

[12] *See* MCM, App. 21 (R.C.M. 809(f), Analysis).

[13] NDAA FY 2011, *supra* note 10, at § 542.

[14] R.C.M 809(d); *see Hearings on H.R. 2498*, *supra* note 5, at 1060 (statement of Mr. Smart) ("There is a limited punishing power and there is no appeal. It is a summary citation for contempt.").

[15] *See, e.g.*, United States v. Burnett, 27 M.J. 99 (C.M.A. 1988); Hassan v. Gross, 71 M.J. 416 (C.A.A.F. 2012).

$100.[16] Second, R.C.M. 809 appears to have been drafted entirely with an eye toward contempt findings at trial by a detailed military judge, as there is no mechanism provided in the rule for a convening authority to "review" or "approve" a contempt finding by a judge serving on the Court of Appeals for the Armed Forces or a military Court of Criminal Appeals. Finally, because the convening authority's action on the court's contempt findings and sentence is final and not subject to further review or appeal, the military judge's ability to use the contempt power to enforce court rules is limited. This limitation is inconsistent with other judicial functions—deciding on continuance requests, excluding evidence, determining which witnesses and evidence will be produced—which are reviewed by the appellate courts for abuse of discretion. It also creates a potential for disparate treatment of trial and defense counsel with respect to the convening authority's action on any contempt findings by the military judge. The requirement for convening authority review is based on previous practice and appears to be a holdover from Manual provisions that pre-dated the establishment of military judges and the military Courts of Criminal Appeals.[17]

5. Relationship to Federal Civilian Practice

Although the 2011 amendments to Article 48 helped to bring military contempt procedures into closer alignment with the contempt procedures applicable in U.S. district court, several major differences remain. First, because federal civilian courts are permanent standing courts—as opposed to the *ad hoc* courts convened under the UCMJ—the contempt power of federal judges is provided by statute in terms that do not limit its exercise to specified proceedings.[18] For example, under 28 U.S.C. § 636, magistrate judges have the power "within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority" with respect to any contemptuous acts conducted "in the magistrate judge's presence so as to obstruct the administration of justice."[19] By contrast, under Article 48, the judge's contempt authority is confined to the specific court-martial or other proceeding to which the judge has been detailed. A second major difference between the two systems is that in the federal civilian system, a person punished for contempt is provided a right of appeal to the appropriate United States court of appeals upon entry of judgment.[20] Neither R.C.M. 809 nor Article 66 (Review by Court of Criminal Appeals) provide for appellate review of the detailed military judge's contempt

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[16] *Compare* Article 48 ("A judge detailed to a court-martial . . . may punish for contempt any person who . . .") *with* R.C.M. 201(c) ("A court-martial may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both.") *and* R.C.M. 809(a) ("Courts-martial may exercise contempt power under Article 48") *and* R.C.M. 809(a), Discussion (quoting and providing analysis of the pre-2011 version of Article 48).

[17] *Hearings on H.R. 2498, supra* note 5, at 1060 (statement of Mr. Smart) ("There is a limited punishing power and there is no appeal. It is a summary citation for contempt.").

[18] *See* 18 U.S.C. § 401 (Power of court).

[19] 28 U.S.C. § 636(e)(1)-(2) (emphasis added).

[20] *See, e.g.*, 28 U.S.C. § 636(c)(3).

findings. Instead, as noted above, R.C.M. 809(d) provides for convening authority review of all contempt findings, and "[t]he action of the convening authority is not subject to further review or appeal."[21] Also, unlike military contempt proceedings, where the military judge always determines the findings and sentence, persons cited for contempt in federal district court are entitled to jury trials in certain cases, and judges are disqualified from presiding over contempt trials when the alleged contempt involves disrespect toward or criticism of the judge, unless the defendant consents.[22] Finally, unlike the fixed maximum punishment for contempt under Article 48, the maximum punishment in federal district court varies depending on the forum: when tried by a jury, the maximum punishment for contempt is a $1000 fine and confinement for six months; when the judge issues a summary disposition, the maximum punishment is a fine of $300 or 45 days confinement; and when a magistrate judge presides over the contempt proceedings, the punishment cannot exceed the penalties for a Class C misdemeanor.[23]

6. Recommendation and Justification

Recommendation 48.1: Amend Article 48(a) to extend the contempt power to include military judges and military magistrates detailed to pre-referral proceedings under the proposed Article 30a.

This change would ensure that military judges and magistrates have the authority to directly enforce their orders and court rules in any proceeding to which they have been detailed, including pre-referral proceedings under the proposed Article 30a.

Part II of this Report will address whether the contempt powers of military judges and military magistrates should involve different maximum punishments, consistent with the tiered approach in federal civilian practice.

Recommendation 48.2: Amend Article 48(a) to clarify that judges on the Court of Appeals for the Armed Forces and the Courts of Criminal Appeals do not have to be "detailed" to cases or proceedings in order to exercise the contempt power under Article 48, and to clarify that the president (as opposed to the judge) of a court of inquiry is vested with the contempt power.

As amended by NDAA FY 2011, Article 48 vests the contempt power in "judge[s] detailed to" various military courts, including the Court of Appeals for the Armed Forces and the Courts of Criminal Appeals. This is inconsistent with the fact that military and civilian judges who serve on these appellate courts are not "detailed" to cases in the same sense that military judges are detailed to courts-martial. Unlike courts-martial, which are *ad hoc* courts convened to consider specific cases, these appellate courts are standing courts; the

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[21] R.C.M. 809(d).

[22] FED. R. CRIM. P. 42(a)(3).

[23] *See* 42 U.S.C. § 1995; 28 U.S.C. § 636.

contempt authority of the judges who serve on these courts, therefore, should not be contingent on having been "detailed."

This proposal also would clarify that the "president of a court of inquiry," as opposed to "a judge detailed to . . . a court of inquiry," is vested with the contempt authority. This change reflects that military judges are not detailed to courts of inquiry. It is consistent with R.C.M. 703(e)(2)(C), which provides that "the president of a court of inquiry" may issue subpoenas to secure witnesses or evidence for the proceeding.

Recommendation 48.3: Amend Article 48 to provide for appellate review of contempt punishments consistent with the review of other orders and judgments under the UCMJ.

The proposed new subsection (c) providing for appellate review of contempt punishments would better align military procedures with respect to review of contempt findings and sentences by military courts with the procedures applicable in federal district courts and federal appellate courts.

By transferring the review function for the military judge's contempt findings from the convening authority to the Courts of Criminal Appeals, this proposal would eliminate the potential for unequal treatment of the trial and defense counsel by the convening authority exercising the contempt review authority. In addition, this proposal would eliminate the anomaly under the current rules that the convening authority is responsible for reviewing contempt orders by appellate judges.

This change also would enhance the legitimacy of the military's contempt power under Article 48, by ensuring that individuals—particularly civilian attorneys and witnesses—who are held in contempt of court by military judges can seek review of the contempt citation by a neutral, detached appellate judge, as opposed to the convening authority who referred the charges for trial in the underlying case.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by employing the standards and procedures of the civilian sector insofar as practicable in military criminal practice.

This proposal would support the MJRG Operational Guidance by ensuring that the court-martial process employs the standards and procedures of the civilian sector with respect to the contempt power of trial judges insofar as practicable. Though this is an area recently addressed by Congress, the proposed amendments would further the intent of the recent amendments by better aligning the contempt power of military judges with that of federal court judges and strengthening the contempt power as a tool to directly enforce court rules and orders in military proceedings.

8. Legislative Proposal

SEC. 710. CONTEMPT.

(a) AUTHORITY TO PUNISH.—Subsection (a) of section 848 of title 10, United States Code (article 48 of the Uniform Code of Military Justice), is amended to read as follows:

"(a) AUTHORITY TO PUNISH.—(1) With respect to any proceeding under this chapter, a judicial officer specified in paragraph (2) may punish for contempt any person who—

"(A) uses any menacing word, sign, or gesture in the presence of the judicial officer during the proceeding;

"(B) disturbs the proceeding by any riot or disorder; or

"(C) willfully disobeys a lawful writ, process, order, rule, decree, or command issued with respect to the proceeding.

"(2) A judicial officer referred to in paragraph (1) is any of the following:

"(A) Any judge of the Court of Appeals for the Armed Forces and any judge of a Court of Criminal Appeals under section 866 of this title (article 66).

"(B) Any military judge detailed to a court-martial, a provost court, a military commission, or any other proceeding under this chapter.

"(C) Any military magistrate designated to preside under section 819 or section 830a of this title (article 19 or 30a).

"(D) Any commissioned officer detailed as a summary court-martial.

"(E) The president of a court of inquiry.".

(b) REVIEW.—Such section (article) is further amended—

(1) by redesignating subsection (c) as subsection (d); and

(2) by inserting after subsection (b) the following new subsection (c):

"(c) REVIEW.—A punishment under this section—

"(1) if imposed by a military judge or military magistrate, may be reviewed by the Court of Criminal Appeals in accordance with the uniform rules of procedure for the Courts of Criminal Appeals under section 866(i) of this title (article 66(i));

"(2) if imposed by a judge of the Court of Appeals for the Armed Forces or a judge of a Court of Criminal Appeals, shall constitute a judgment of the court, subject to review under the applicable provisions of section 867 or 867a of this title (article 67 or 67a); and

"(3) if imposed by a summary court-martial or court of inquiry, shall be subject to review by the convening authority in accordance with rules prescribed by the President.".

(c) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§848. Art. 48. Contempt".

9. Sectional Analysis

Section 710 would amend Article 48, which provides statutory authority for the punishment of acts of contempt and violations of court orders and rules in courts-martial and other proceedings under the UCMJ. In 2011, Congress made significant amendments to Article 48 that provided a more direct means for military judges to enforce court orders and military subpoenas, and better aligned the contempt authority and procedures in military courts with those in federal district courts. However, the language of the statute as amended is ambiguous with respect to the contempt power of judges serving on the Court of Appeals for the Armed Forces and the military Courts of Criminal Appeals.

Section 710(a) would clarify the recent amendments to Article 48 by defining the judicial officers who may exercise the contempt authority to include judges of the Court of Appeals for the Armed Forces and the Courts of Criminal Appeals; military judges detailed to courts-martial, provost courts, military commissions, or any other proceeding under the UCMJ (including the proposed Article 30a proceedings); military magistrates designated under Articles 19 or 30a; commissioned officers detailed as summary courts-martial; and presidents of courts of inquiry.

Section 710(b) would transfer the review function for contempt punishments issued by military and appellate judges from the convening authority to the appropriate appellate court. This change would strengthen the contempt power and would ensure that persons held in contempt of court by military judges and appellate judges—particularly civilian attorneys and witnesses—are afforded a fair appellate review process, comparable to the review process applicable in civilian criminal courts and appellate courts across the country. The convening authority's review function would be retained for contempt punishments issued by summary courts-martial and courts of inquiry.

Article 49 – Depositions
10 U.S.C. § 849

1. Summary of Proposal

This proposal would amend Article 49 to reflect current deposition practice, case law, related statutory provisions, and related proposals in this Report. The proposed amendments also would better align military deposition practice with federal civilian deposition practice by ensuring that depositions generally are ordered in military criminal cases only when it is likely that a prospective witness's trial testimony otherwise would be lost.

2. Summary of the Current Statute

Article 49 provides statutory authority for the taking of depositions by the parties; it also places statutory restrictions on the conduct of depositions and on their use as a substitute for live witness testimony at trial. Subsection (a) requires the party requesting a deposition to demonstrate that, "due to exceptional circumstances, it is in the interest of justice that the testimony of the prospective witness be taken and preserved for use at a preliminary hearing . . . or a court-martial." Subsection (a)(1) provides that depositions may be ordered between preferral and referral of charges by the convening authority, and after referral of charges by either the convening authority or the military judge. Under subsection (a)(3), the convening authority may designate commissioned officers to represent the prosecution and the defense during deposition hearings and to take the deposition of any witness. The article's remaining five subsections require that the party requesting the deposition give reasonable notice to the other parties of the time and place of the deposition; authorize the deposition officer to be any military or civil officer authorized to take oaths; provide rules and restrictions concerning the admissibility of depositions at trial in non-capital cases; and authorize the use of depositions by the defense in capital cases, and by either party in cases when death is authorized but not mandatory and the convening authority directs that the case be treated as not capital.

3. Historical Background

Congress derived Article 49 from Articles 25 and 26 of the 1920 Articles of War, as amended by the Elston Act of 1948.[1] Under the Articles of War, the parties had greater flexibility in taking depositions and using them at trial than in most civilian jurisdictions, where the ordering of depositions is generally tied to prospective witness unavailability at trial. When the UCMJ was enacted in 1950, Congress maintained this variance with civilian practice (and expanded it slightly) by expressly allowing the parties to take oral or written

[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1065 (1949) [hereinafter *Hearings on H.R. 2498*].

depositions at any time after preferral of charges, unless forbidden by a competent convening authority "for good cause."[2] The main justifications offered for Article 49's openness to taking depositions and using them as a substitute for live witness testimony at trial included the greater mobility of servicemembers, the risk of sudden death for potential court-martial witnesses prior to trial, and the remoteness of many overseas duty stations. As Professor Everett commented in 1960:

> Many exigencies peculiar to the Armed Services undoubtedly led Congress to authorize in Article 49 of the [UCMJ]—and in previous parallel legislation—a use of depositions unparalleled elsewhere in American criminal law administration. 'For instance, when the Armed Services are operating in foreign countries where there is no American subpoena power, it might be impossible to compel a foreign civilian witness to come to the place where the trial is held, and yet he may be quite willing to give a deposition. Furthermore, military life is marked by transfers of personnel—the military community being much more transient than most groups of civilians. To retain military personnel in one spot so that they will be available for a forthcoming trial, or to bring them back from a locale to which they have been transferred, might involve considerable disruption of military operations. Likewise, in combat areas there is often considerable risk that a witness may be dead before trial date, in which event, were civilian rules to be followed, his testimony would be lost.[3]

During the 1949 congressional hearings, Representative Elston suggested that Article 49 provided an important protection for servicemembers accused of offenses, particularly in deployed environments: "I think the reason we provided for depositions . . . was to give the accused a greater opportunity. . . . [T]he complaint we had to deal with was that an accused person was often deprived of witnesses. So we wrote into the law that depositions could be taken."[4] In the decade following the UCMJ's enactment, military courts generally embraced these early justifications for the Article 49's openness to allowing depositions to be taken and used at trial.[5] When the position of military judge was created in 1968, Congress chose

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[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Hearings on H.R. 2498*, *supra* note 1, at 1065.

[3] Robinson O. Everett, *The Role of Depositions in Military Justice*, 7 MIL. L. REV. 131 (1960) (quoting ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 221-22 (1956)). Two decades after writing these comments on Article 49, Professor Everett would become Chief Judge of the Court of Military Appeals.

[4] *Hearings on H.R. 2498*, *supra* note 1, at 696. Not everyone at the Congressional hearings shared Representative Elston's (and Professor Everett's) view that an expansive use of depositions in courts-martial was desirable, let alone necessary. As stated by Mr. John Finn, spokesperson for the American Legion: "[Article 49] loses sight of the ancient right afforded in English and American justice of the right of confrontation of an accused by his accusers. It is believed that no greater latitude with regard to the use of depositions should be allowed in the proposed code than is presently allowed under the rules of criminal procedure presently in effect in the United States courts. . . . It seems that the military services were able to get along from their inception until comparatively recent times without the use of depositions to convict alleged guilty parties. In these days of airplane and other means of rapid transportation, the necessity for the use of depositions seems to be less apparent than ever." *Id.* at 685.

[5] *See, e.g.*, United States v. Drain, 16 C.M.R. 220, 221 (C.M.A. 1954) ("We recognize that the broad use of depositions against a defendant in criminal cases is peculiar to military law, and that it arises justifiably from

to maintain a key aspect of this variance between military and civilian deposition practice, extending Article 49(a)'s limited authority to forbid depositions "for good cause" to military judges following referral of charges to court-martial.[6]

In the 1960s and '70s, military courts endeavored to reconcile Article 49's broad language concerning the availability of depositions in court-martial proceedings with the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[7] In *United States v. Jacoby*, the Court of Military Appeals reversed a line of cases which held that Article 49 "expressly or by necessary implication" made the Sixth Amendment right of confrontation inapplicable in the military setting.[8] In its decision, the Court acknowledged "[t]hat the exigencies of the military service frequently prohibit the appearance of a military witness or a civilian far removed from the place of trial"; nevertheless, it held that the Sixth Amendment right to confront witnesses does indeed apply to servicemembers in court-martial proceedings, and that a military accused's right of confrontation is not satisfied unless he or she is given the opportunity to be present at the taking of depositions and to cross-examine the deposed witnesses in person.[9] A decade later, in *United States v. Davis*, the Court of Military Appeals struck down the so-called "100-mile rule" of Article 49(d)(1) with respect to military witnesses, announcing that "depositions are an exception to the general rule of live testimony and are to be used only when the Government cannot reasonably have the witness present at trial."[10] Then, in 1980, the President exercised rule-making authority

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difficulties in obtaining witnesses—which difficulties are unique to law administration in the Armed Forces"); *see also* LT Dale Read, Jr., *Depositions in Military Law*, 26 JAG JOURNAL 181, 184-85 (1972) ("[T]he court's assertion that 'the broad use of depositions against a defendant in criminal cases is peculiar to military law' stems from no more than a recognition that the basic nature of military life is such that a significantly greater percentage of witnesses will be unavailable at the time of trial than is true in civilian courts."); Col. Mark L. Allred, *Depositions and a Case Called Savard*, 63 A.F. L. REV. 1, 7-10 (2009) ("[A]s our military society is both highly mobile and of global reach, situations in which there is no legal process for securing the attendance of potentially important witnesses are not uncommon in courts-martial. . . . Because military members deploy to war zones, the high seas, and other locations from which they cannot easily return, taking their depositions is often wise.").

[6] Article 49(a) (1968-2014) ("... [A]ny party may take oral or written depositions unless the military judge or court-martial without a military judge hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause.").

[7] U.S. CONST. amend. VI.

[8] 29 C.M.R. 244 (C.M.A. 1960) (reversing United States v. Sutton, 11 C.M.R. 220 (C.M.A. 1953); United States v. Parrish, 22 C.M.R. 127 (C.M.A. 1956)).

[9] 29 C.M.R. at 249.

[10] 41 C.M.R. 217, 220 (C.M.A. 1970); *see also* Read, Jr., *supra* note 5, at 198 ("The effect of this section is to emasculate the nationwide service of process in article 46; though service of subpoena may still be made, a deposition may be used instead if the witness is presently beyond a 100-mile radius, or beyond a state line regardless of distance. This provision differs markedly from civilian practice and cannot be justified by any condition 'unique to law administration in the Armed Forces.' Moreover, it contravenes the congressional intent to place, 'in so far as reasonably possible . . . military justice on the same plane as civilian justice.'") (citations omitted).

under Article 36 to adopt the military rules of evidence (modeled after the federal rules of evidence), including M.R.E. 804(a), which provided situational definitions for "unavailability as a witness" that effectively replaced Article 49(d)'s "unavailability" criteria. Each of these events brought military deposition practice closer in line with federal civilian deposition practice—affording the accused greater protections while narrowing the range of situations in which depositions could be presented as evidence by either party in courts-martial.

Aside from considerations governing the use of depositions at trial, depositions also have been used in connection with Article 32 investigations as a means of defense discovery.[11] In 2014, Congress transformed the Article 32 investigation into a "preliminary hearing" and provided that crime victims may not be compelled to testify at the hearing.[12] In 2015, Congress amended Article 49(a) to expressly authorize the ordering of depositions to preserve prospective witness testimony "for use at a preliminary hearing."[13] At the same time, Congress removed the broad language in Article 49 authorizing the parties to take depositions at any time unless forbidden "for good cause." In place of this broad language, Congress provided a more restrictive standard for ordering depositions, based on the language of R.C.M. 702 and Fed. R. Crim. P. 15. Under the amended statute, depositions may be ordered by convening authorities—and by military judges after referral of charges—"only if the [requesting] party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of the prospective witness be taken and preserved for use at a preliminary hearing . . . or a court-martial."[14]

4. Contemporary Practice

The ordering and use of depositions in current military practice is somewhat rare. R.C.M. 702(a) emphasizes that depositions should be ordered in "exceptional circumstances . . . [when] it is in the interest of justice that the testimony of a prospective witness be taken

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[11] *See* MCM, App. 21 (R.C.M. 702(c)(3)(A), Analysis) ("Article 49 [has served] as a means of satisfying the discovery purposes of Article 32 when the Article 32 proceeding fails to do so.") (citing United States v. Chuculate, 5 M.J. 143, 145 (C.M.A. 1978) (deposition may be an appropriate means to allow sworn cross-examination of an essential witness who was unavailable at the Article 32 hearing), United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976) (deposition may be an appropriate means to cure error where witness was improperly found unavailable at Article 32 hearing), and United States v. Cumberledge, 6 M.J. 203, 205, n.3 (C.M.A. 1980)); *see also Hearings on H.R. 2498*, *supra* note 1, at 997 (statement of Mr. Larkin) ("[N]ot only does [Article 32] enable the investigating officer to determine whether there is probable cause . . . but it is partially in nature of a discovery for the accused in that he is able to find out a good deal of the facts and circumstances which are alleged to have been committed which by and large is more than an accused in a civil case is entitled to."); United States v. Samuels, 27 C.M.R. 280, 286 (C.M.A. 1959) ("It is apparent that [Article 32] serves a twofold purpose. It operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.").

[12] NDAA FY 2014, § 1702.

[13] Article 49(a)(2), as amended by NDAA FY 2015, § 532.

[14] *Id.* In its current form, Article 49 authorizes the ordering of depositions for use at preliminary hearings, but Article 47 does not provide a mechanism for enforcing these orders in the case of civilian witnesses.

and preserved for use at a preliminary hearing . . . or a court-martial."[15] This language was derived, in part, from the federal rule on depositions, which states that "[a] party may move that a prospective witness be deposed in order to preserve testimony for trial," and that "[t]he court may grant the motion because of exceptional circumstances and in the interest of justice."[16] The 2015 amendments to Article 49(a) updated the statute to reflect the more restrictive language from R.C.M. 702(a). R.C.M. 702's remaining subsections cover who may order depositions; the procedures for requesting, acting upon requests for, and conducting depositions; notice requirements; the duties of deposition officers; objections; and depositions by agreement of the parties.[17] With respect to the admissibility of depositions at court-martial, M.R.E. 804 prohibits the use of depositions unless the moving party can establish that the deponent is unavailable to testify in person. Article 49(d)(1)'s "100-mile rule" is not included among the situational definitions of "unavailability" given in M.R.E. 804(a); rather, the rule states that "'[u]navailability as a witness' includes situations in which the declarant is unavailable within the meaning of Article 49(d)(2)."[18] There are four unavailability criteria contained in Article 49(d)(2) that are not *also* contained in M.R.E. 804(a): age, imprisonment, military necessity, and "other reasonable cause."[19]

In 2014, the Response Systems to Adult Sexual Assault Crimes Panel observed that Congress's transformation of the Article 32 investigation into a preliminary hearing "may result in additional requests to depose victims and other witnesses."[20] In a recent executive order, the President has amended R.C.M. 702 to clarify the recent amendments to Articles 32 and 49.[21] The amendments to the rule are as follows:

R.C.M. 702(a) clarifies that "exceptional circumstances" for ordering a deposition do not include a victim's refusal to testify at a preliminary hearing or to submit to pretrial interviews. Subsection (a) also requires the convening authority or military judge to

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[15] R.C.M. 702(a).

[16] FED. R. CRIM. P. 15(a)(1).

[17] R.C.M. 702(b)-(i).

[18] M.R.E. 804(a)(6).

[19] *See* MCM, App. 22 (M.R.E. 804(a)(6), Analysis) ("Rule 804(a)(6) . . . has been added in recognition of certain problems, such as combat operations, that are unique to the armed forces. Thus, Rule 804(a)(6) will make unavailable a witness who is unable to appear and testify in person for reason of military necessity within the meaning of Article 49(d)(2). The meaning of 'military necessity' must be determined by reference to the cases construing Article 49. The expression is not intended to be a general escape clause, but must be restricted to the limited circumstances that would permit use of a deposition."). The analysis section is silent on the other three "unavailability" criteria that appear in Article 49(d)(2) but do not appear in Rule 804(a): age, imprisonment, and "other reasonable cause."

[20] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 48 (June 2014) [hereinafter RESPONSE SYSTEMS PANEL REPORT].

[21] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

determine, by a preponderance of the evidence, that the victim will not be available to testify at court-martial before ordering a deposition of the victim.[22]

The standard for acting on requests for depositions of (non-victim) witnesses under R.C.M. 702(c)(3)(A) has been changed from "may be denied only for good cause" to "whether the requesting party has shown, by a preponderance of the evidence, that due to exceptional circumstances and in the interest of justice, the testimony of the prospective witness must be taken and preserved for use at a preliminary hearing under Article 32 or court-martial."

The requirement under R.C.M. 702(c)(2) that parties requesting depositions must include "[a] statement of the reasons for taking the deposition" in their request has been eliminated.

The Discussion section after R.C.M. 702(c)(3)(A) explaining which situations would constitute good cause for denial of a deposition request has been eliminated.

R.C.M. 702(d)(1) requires that a judge advocate certified under Article 27(b) be detailed as the deposition officer, unless "not practicable."

The rule changes create two different standards in the context of ordering pretrial depositions of prospective witnesses: one standard for victims (unavailability at trial), and a slightly broader standard for non-victim witnesses (exceptional circumstances and in the interest of justice). The changes also closely align the qualification requirements for deposition officers with those of preliminary hearing officers under the 2014 amendments to Article 32.[23]

5. Relationship to Federal Civilian Practice

In the federal criminal justice system and in the vast majority of state jurisdictions, depositions are not authorized for purposes of discovery. Instead, depositions are generally tied to prospective witness unavailability.[24] This is particularly true in jurisdictions that utilize the preliminary hearing as the primary pretrial screening device for charges.[25] In the federal civilian system, the primary purpose of depositions in criminal cases is explicitly to "preserve testimony for trial," and the admissibility of a deposition at trial is determined solely by the rules of evidence.[26] The courts have held that a federal judge's discretion in ordering depositions "is not broad and should be exercised carefully."[27] Also under the

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[22] *Id.*

[23] *See* Article 32(b) ("A preliminary hearing . . . shall be conducted by an impartial judge advocate certified under [article 27(b)] whenever practicable or, in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a judge advocate.").

[24] WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING & ORIN KERR, CRIMINAL PROCEDURE § 20.2(e) (3d ed. 2013).

[25] *Id.*

[26] FED. R. CRIM. P. 15(a)(1) and 15(d).

[27] United States v. Mann, 590 F.2d 361, 365 (1st Cir. 1978).

federal rule, "only the 'testimony of a prospective witness of a party' can be taken . . . [which] means the party's own witness [and not] an adverse witness."[28] In contrast to the opportunity under Article 49 for the use of depositions as a discovery device, the standards in the federal civilian system do not include such situations, regardless of the witness's availability to testify at trial. A slightly different formulation of the rule is prevalent in many state jurisdictions, where statutes and rules of criminal procedure concerning the ordering of depositions require a showing "that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that the witness' testimony is material, and that it is necessary to take the witness' deposition in order to prevent a failure of justice."[29]

With respect to the admissibility of depositions at trial, Article 49(d)'s rules for using depositions at trial are significantly less restrictive than the rules provided under federal common law, where the Supreme Court has long held the use of depositions in criminal cases to be violative of the accused's Sixth Amendment right to confront adverse witnesses except in a narrow range of situations. In *Mattox v. United States*, 156 U.S. 237 (1895), the Court explained the antagonism between depositions and the Confrontation Clause as follows:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[30]

More recently, the Court has held that depositions may not be used against an accused at trial even when the deposed witness is incarcerated at the time of trial and the accused previously has had ample opportunity to cross-examine the witness at a preliminary hearing, unless the prosecution can affirmatively show that the witness's presence at trial cannot practicably be obtained.[31] The enactment of the Federal Rules of Evidence in 1975 and the Military Rules of Evidence five years later narrowed the gap between the two systems with respect to the admissibility of depositions as evidence at trial, as the situational definitions for "unavailability as a witness" contained in M.R.E. 804(a) are largely identical to those contained in Fed. R. Evid. 804(a). However, the additional

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[28] FED. R. CRIM. P. 15 advisory committee note to 1974 Amendments.

[29] LAFAVE ET AL., *supra* note 24, at § 20.2(e) (3d ed.) (citing Idaho Crim. Rules 15(a); Kan. Stat. Ann. § 22-3211; Ky. R. Crim. P. 7.10; Me. R. Crim. P. 15(a)).

[30] 156 U.S. 237, 242-43 (1895). *See also* Motes v. United States, 178 U.S. 458 (1900) (Confrontation Clause violated by permitting a deposition of an absent witness taken at a preliminary proceeding to be read at the final trial where the witness's unavailability at trial was caused by the negligence of the prosecution and not because of any suggestion, connivance, or procurement of the accused).

[31] Barber v. Page, 390 U.S. 719 (1968).

"unavailability" criteria in Article 49(d)(2) that are not contained in the Rule—age, imprisonment, military necessity, and "other reasonable cause"—continue to allow for greater use of depositions in military criminal proceedings than in federal civilian practice.

A final difference between military and civilian deposition practice concerns the timing of the right to request depositions. Article 49(a) expressly limits the parties' ability to request depositions until after preferral of charges; Fed. R. Crim. P. 15(a), by contrast, contains no such limitation. In 1971, the Army Court of Military Review considered whether "pre-preferral" depositions could be ordered and concluded that, by its text, Article 49 does not authorize such depositions. In so holding, the Court also noted that, from the accused's perspective, "knowledge of the charge is essential to effective cross examination."[32] Federal case law has echoed this Sixth Amendment concern in the face of government motions for "pre-indictment" depositions of prospective witnesses.[33] However, in one recent decision, a federal district court ordered pre-indictment depositions on government motion where the prospective witnesses were likely to die soon.[34] In resolving the matter in favor of the government, the court looked to the text and history of the federal rule, which suggests that pre-indictment depositions may be ordered "in exceptional circumstances and in the interests of justice." Regarding the accused's Sixth Amendment concerns, the court noted that "the defense can always file a motion to suppress before trial" if the government moves to introduce a deposition that should not be admitted as a Constitutional matter.[35] Conceivably, the government could face a similar situation in a military case, particularly in a deployed environment, where it would be premature to prefer charges but also highly likely that a prospective witness's testimony would be lost without a deposition. In such a situation, the federal rule's greater flexibility allows the court to craft appropriate protections for the accused's Sixth Amendment rights on a case-by-case basis, ensuring that the "interests of justice" are not sacrificed merely because the factual situation confronted by the government is unusual. It is also arguable that the term "party" in Article 49(a) already implies the existence of an "accused," which itself implies the existence of preferred charges and specifications.[36] If this is the case, then Article 49(a)'s "post-preferral" timing requirement is not only unnecessary; it is redundant.

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[32] United States v. Vicencio, 44 C.M.R. 323, 329 (A.C.M.R. 1971).

[33] *See* In re Grand Jury Proceedings, 697 F. Supp. 2d 262 (D.R.I. 2010) (holding that "pre-indictment" depositions of nine terminally ill witnesses who were bystanders in an alleged scheme to defraud insurers were authorized under the rule, where the government assured the court that it would provide the defense with necessary discovery to cross-examine the witnesses effectively, and where the interests of justice favored ordering depositions, because otherwise the witnesses would likely die and prosecuting the case would become impossible).

[34] *Id.*

[35] *Id.* at 266, 274.

[36] *See* R.C.M. 103(16) (definition of "party"); Article 1(9) ("The term 'accuser' means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.").

6. Recommendation and Justification

Recommendation 49.1: Amend Article 49(a) to more closely mirror the language and function of Fed. R. Crim. P. 15(a)(1), while moving the more procedural aspects of this provision to R.C.M. 702. Specifically, amend subsection (a)(1) to provide that "a convening authority or a military judge may order depositions . . . only if the requesting party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness be preserved for use at a court-martial, military commission, court of inquiry, or other military court or board.

This proposal would reduce Article 49(a) to its essential elements, allowing the more procedural aspects of requesting and ordering depositions to be moved to the rules implementing the statute. The result would be a clearer, more functional statute, and one less likely to require further amendments as practice in this area develops over time.

This proposal would clarify that depositions may not be ordered specifically for use at Article 32 preliminary hearings. This change would reflect federal civilian practice and would address the absence of subpoena authority under Article 47 to compel civilian witnesses to provide such depositions for use at preliminary hearings (as opposed to depositions for use at courts-martial, military commissions, and courts of inquiry). Importantly, depositions are not the only means of obtaining information for an Article 32 proceeding when in person testimony is not available. R.C.M. 405, the rule implementing Article 32, also provides for the use of sworn statements and testimony via remote means for witnesses who are not reasonably available to testify in person (as well as unsworn statements when the defense does not object). These alternatives should provide a sufficient means to obtain relevant witness testimony for the limited purposes of the preliminary hearing in most cases.

Under the proposal, a properly ordered deposition that complies with Article 49(a) (e.g., one not ordered specifically for use at an Article 32 preliminary hearing) may be used as a substitute for live testimony at a preliminary hearing.

Under current law, military judges are unable to order depositions or review denials of deposition requests by convening authorities until after the charges are referred to court-martial. By removing this prohibition, the proposed amendments to Article 49(a) would—in conjunction with the proposal to enact Article 30a—give the accused an avenue for judicial relief in cases where the convening authority improperly denies a pretrial deposition request.[37] Under current practice, such denials can result in lost testimony during the critical, investigative stages of a military criminal case. This change would prevent such loss.

This proposal also would remove Article 49(a)'s timing requirement, which limits the parties' ability to request depositions until after preferral of charges under Article 30. This timing requirement varies from the federal civilian rule unnecessarily. The new statutory rule for ordering depositions—"due to exceptional circumstances, [and] in the interest of

[37] *Accord* RESPONSE SYSTEMS PANEL REPORT, *supra* note 20, at 49 (Recommendation 118).

justice"—provides convening authorities and military judges with a clear standard for determining when, if ever, "pre-preferral" depositions may be warranted. Furthermore, under R.C.M. 103(16) and Article 1(9), the definition of "party" in military law arguably implies the existence of preferred charges and specifications, making this qualification in the current statute redundant at best.

Recommendation 49.2: Redesignate Article 49(b) as Article 49(a)(3), and amend the language of the provision by replacing the phrase "The party at whose instance a deposition is to be taken . . ." with the more direct phrase, "A party who requests a deposition . . . ."

This proposal would update the language of Article 49(b) to clarify the provision in the context of the statute's other provisions.

Recommendation 49.3: Redesignate Article 49(c) as Article 49(a)(4), and amend the language of the provision to reflect recent amendments to Article 32(b) and proposed changes to R.C.M. 702(d)(1), by requiring that deposition officers be judge advocates certified under Article 27(b) "whenever practicable."

Under current law, depositions "may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths." This allows for the detail of deposition officers who are not legally trained, with no requirement that judge advocates act as the deposition officer whenever practicable.

The proposed change to R.C.M. 702(d)(1) would require the convening authority to detail impartial judge advocates certified under Article 27(b) as deposition officers unless "not practicable." Similarly, Article 32(b) now requires judge advocates to be detailed as preliminary hearing officers "whenever practicable." This amendment would align deposition officer qualification requirements under Article 49 with the similar qualification requirements for preliminary hearing officers under Article 32.

Recommendation 49.4: Redesignate Article 49(a)(3) as Article 49(b) (Representation by Counsel), and amend the provision to provide that: (1) representation of the parties with respect to a deposition shall be by counsel detailed in the same manner as trial counsel and defense counsel are detailed under Article 27; and (2) the accused shall have the right to be represented by civilian or military counsel in the same manner as such counsel are provided for in Article 38(b).

Article 49(a)(3) currently provides that the convening authority "may designate commissioned officers as counsel for the Government and counsel for the accused, and may authorize those officers to take the deposition of any witness." R.C.M. 702(d)(2), by contrast, provides that the convening authority "shall ensure that counsel qualified as required under R.C.M. 502(d) are assigned to represent each party." R.C.M. 502(d), in turn, provides that trial and defense counsel in general courts-martial, and defense counsel in special courts-martial, must be certified under Article 27(b) unless the accused elects individual military or civilian defense counsel in accordance with Article 38(b)(2)-(3).

With respect to detailing of trial and defense counsel to depositions generally, both the statute and the rules need to be updated to reflect current practice, in which trial and defense counsel are detailed to courts-martial by their respective legal service departments, not by the convening authority.

This change would align Article 49 with the counsel qualification requirements of R.C.M. 702(d)(2) and R.C.M. 502(d), and with current practice with respect to the detailing of trial and defense counsel by legal chains of command rather than convening authorities. At the same time, it would preserve the option of the accused to be represented by non-Article 27(b) certified civilian defense counsel at depositions.

Recommendation 49.5: Amend Article 49(d) to replace that subsection's recitation of the situations in which depositions may be used in military proceedings with a more direct reference to the military rules of evidence, consistent with the federal rule.

The current version of Article 49(d) is basically unchanged from how it appeared in 1950, despite the President's adoption of the military rules of evidence in 1980, including M.R.E. 804(a), and despite court rulings in the intervening decades that have significantly narrowed this subsection's scope and effect. The proposed amendment would simplify Article 49(d) and better align the provision with current practice.

The proposed amendment, if adopted, would necessitate a change to M.R.E. 804(a)(6), which currently cross-references to Article 49(d)(2), in order to allow the use of depositions at trial when the deponent is unavailable as a witness due to military necessity or other reasonable cause. This rule change will be considered in Part II of this Report.

Recommendation 49.6: Amend Article 49(e) and (f) by redesignating the two subsections as a single Article 49(d) (Capital Cases), providing that "[t]estimony by deposition may be presented in capital cases only by the defense."

When the UCMJ was enacted, if an offense was punishable by death, the case was classified as "capital" unless the convening authority opted against a capital referral. Under R.C.M. 103(2) and R.C.M. 1004(b)(1), however, a case is not capital unless the convening authority specifically refers the case as capital through special instruction. Because of this change, Article 49(e)'s cross-reference to Article 49(d) is unnecessary.

7. Relationship to Objectives and Related Provisions

This proposal would support the GC Terms of Reference and Article 36 of the UCMJ by conforming Article 49 to current military deposition practice and case law, and by aligning military deposition practice more closely with deposition practices and procedures applicable in federal district court and most state jurisdictions.

This proposal would support MJRG Operational Guidance by providing greater internal consistency among related UCMJ articles, MCM provisions, and other MJRG proposals, including the proposal to expand the pre-referral authorities of military judges.

8. Legislative Proposal

SEC. 711. DEPOSITIONS.

Section 849 of title 10, United States Code (article 49 of the Uniform Code of Military Justice), is amended to read as follows:

"§849. Art. 49. Depositions

"(a) IN GENERAL.—(1) Subject to paragraph (2), a convening authority or a military judge may order depositions at the request of any party.

"(2) A deposition may be ordered under paragraph (1) only if the requesting party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness be preserved for use at a court-martial, military commission, court of inquiry, or other military court or board.

"(3) A party who requests a deposition under this section shall give to every other party reasonable written notice of the time and place for the deposition.

"(4) A deposition under this section shall be taken before, and authenticated by, an impartial officer, as follows:

"(A) Whenever practicable, by an impartial judge advocate certified under section 827(b) of this title (article 27(b)).

"(B) In exceptional circumstances, by an impartial military or civil officer authorized to administer oaths by (i) the laws of the United States or (ii) the laws of the place where the deposition is taken.

"(b) REPRESENTATION BY COUNSEL.—Representation of the parties with respect to a deposition shall be by counsel detailed in the same manner as trial counsel and defense counsel are detailed under section 827 of this title (article 27). In addition, the accused shall have the right to be represented by civilian or military counsel in the same manner as such counsel are provided for in section 838(b) of this title (article 38(b)).

"(c) ADMISSIBILITY AND USE AS EVIDENCE.—A deposition order under subsection (a) does not control the admissibility of the deposition in a court-martial or other proceeding under this chapter. Except as provided by subsection (d), a party may use all or part of a deposition as provided by the rules of evidence.

"(d) CAPITAL CASES.—Testimony by deposition may be presented in capital cases only by the defense.".

9. Sectional Analysis

Section 711 contains a complete revision of Article 49. Article 49 provides statutory authority for the taking of depositions by the parties of a court-martial; it also places statutory restrictions on the conduct of depositions and on their use as a substitute for live witness testimony at trial. Consistent with Article 36, the proposed amendments would conform Article 49's substantive provisions, to the extent practicable, to the procedures and principles of law pertaining to depositions applicable in federal district court. These amendments also would conform the statute to the Confrontation Clause. As revised, Article 49 would contain the following provisions:

Article 49(a) would better align military deposition practice under Article 49 with federal and state deposition practice, and with the authority to issue and enforce subpoenas for witnesses under Articles 46 and 47, by ensuring that depositions of prospective witnesses will generally be ordered only when it is likely that the witness's trial testimony otherwise would be lost. By eliminating the reference to Article 32 preliminary hearings, the proposed amendments would ensure that depositions are permitted only for the purpose of preserving testimony for trial, not for pretrial discovery purposes. As amended,

subsection (a) would conform to the proposed Article 30a concerning pre-referral duties of military judges. As amended, the authority to order depositions could be exercised by military judges detailed under Articles 26 or 30a (consistent with the definition of "military judge" proposed under Article 1(10)), as well as military magistrates designated by the detailed military judge under Articles 19 or 30a.

Article 49(a)(3) would replace and clarify the requirement for notice currently contained in subsection (b).

Article 49(a)(4) would replace and update subsection (c), providing greater consistency between Articles 49 and 32 with respect to the qualifications of deposition officers and preliminary hearing officers.

Article 49(b) would replace and update the counsel provisions currently contained in subsection (a), ensuring that the parties at a deposition will be represented by counsel detailed in the same manner as under Articles 27 and 38.

Article 49(c) would update and replace obsolete provisions in subsection (d) concerning the admissibility of depositions as evidence at trial. These changes would reflect the adoption of the Military Rules of Evidence in 1980 and provide greater consistency with federal civilian deposition practice.

Article 49(d) would update and replace subsections (e) and (f) to clarify the prohibition on the use of depositions in capital cases by the government.

Article 50 – Admissibility of Records of Courts of Inquiry
10 U.S.C. § 850

1. Summary of Proposal

This proposal would amend Article 50 to permit sworn testimony from a court of inquiry to be either played from an audiovisual recording or read into evidence when it is otherwise admissible.

2. Summary of the Current Statute

Article 50 concerns the admissibility of records of courts of inquiry in courts-martial and military commissions. Under the statute, authenticated records from courts of inquiry may be read into evidence at a court-martial or military commission if the witness is unavailable at trial and the evidence is otherwise admissible. In capital cases or cases extending to the dismissal of commissioned officers, however, testimony can be read only by the defense.

3. Historical Background

Article 50 was derived from Article 27 of the Articles of War and was consistent with the practice in the Navy prior to the UCMJ's enactment in 1950.[1] At the time, courts of inquiry were used frequently to investigate allegations of officer misconduct.[2] Boards of investigation, where sworn testimony was not taken, were generally used in cases involving enlisted members.[3] The only amendment to Article 50 came in 2006 when Congress excluded the admissibility of courts of inquiry records in a military commission established under 10 U.S.C. § 948a et seq.[4]

4. Contemporary Practice

The President has implemented Article 50 through M.R.E. 804(b)(1), which expressly includes testimony from a court of inquiry within the definition of former testimony that may be admissible when the declarant is found to be unavailable at trial. Although courts of inquiry have a long tradition in the military, they are rarely conducted today, having given way to other investigative and administrative procedures. Because of the infrequent use of

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[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1070 (1949).

[2] *Id.*

[3] *Id.* at 1071.

[4] Military Commissions Act of 2006, Pub. L. No. 109-366, § 4(a)(2); 120 Stat. 2600, 2631 (2006).

courts of inquiry, Article 50 is rarely used as a basis for admitting the former testimony of an unavailable declarant.

5. Relationship to Federal Civilian Practice

Article 50 has no corresponding rule in federal civilian criminal practice. Fed. R. Evid. 804(b)(1), however, does provide a hearsay exception for former testimony nearly identical to the exception contained in M.R.E. 804(b)(1).[5]

6. Recommendation and Justification

Recommendation 50: Amend Article 50 to permit sworn testimony from a court of inquiry to be played, in addition to read, into evidence in courts-martial and military commissions not established under 10 U.S.C. § 948a et seq. when it is otherwise admissible under the rules of evidence.

As noted, use of courts of inquiry today is extremely rare. When they are used, however, the manner of presenting the evidence to a factfinder at a court-martial should not be limited to the reading of a transcript. Allowing an authenticated audio recording to be played for the members allows for more flexibility in the manner of presentation and is more efficient.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

This proposal supports the MJRG operational guidance by promoting efficiency in the court-martial process.

[5] FED. R. EVID. 804(b)(1) (providing for the admissibility at trial of prior sworn testimony, subject to cross examination by the accused and submitted at trial when the declarant is "unavailable"). In practice this essentially extends only to testimony from prior trials, as grand jury testimony does not qualify as the witnesses at a grand jury are not subject to cross-examination. *See* FED. R. CRIM. P. 6(d)(1) (providing that only the grand jurors, testifying witness, prosecutor, and court reporter, and court interpreter (if necessary) are authorized to be present during grand jury proceedings).

8. Legislative Proposal

SEC. 712. ADMISSIBILITY OF SWORN TESTIMONY BY AUDIOTAPE OR VIDEOTAPE FROM RECORDS OF COURTS OF INQUIRY.

(a) IN GENERAL.—Section 850 of title 10, United States Code (article 50 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(d) AUDIOTAPE OR VIDEOTAPE.—Sworn testimony that—

"(1) is recorded by audiotape, videotape, or similar method; and

"(2) is contained in the duly authenticated record of proceedings of a court of inquiry;

is admissible before a court-martial, military commission, court of inquiry, or military board, to the same extent as sworn testimony may be read in evidence before any such body under subsection (a), (b), or (c).".

(b) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§850. Art. 50. Admissibility of sworn testimony from records of courts of inquiry".

9. Sectional Analysis

Section 712 would amend Article 50 to update the statute to permit sworn testimony from a court of inquiry to be played from an audiovisual recording if the deposed witness is unavailable at trial and the evidence is otherwise admissible under the rules of evidence.

Article 50a – Defense of Lack of Mental Responsibility
10 U.S.C. § 850a

1. Summary of Proposal

This proposal would align Article 50a with the changes proposed in Article 16. Part II of the Report will consider whether any changes are needed in the rules implementing Article 50a.

2. Summary of the Current Statute

Article 50a defines the defense of "lack of mental responsibility." This defense is an affirmative defense. In order to succeed, the accused must prove by "clear and convincing" evidence that the accused: (1) suffered a severe mental disease or defect; and (2) as a result, was unable to appreciate the nature and quality or the wrongfulness of the acts. After the accused raises this defense, the members may find the accused guilty, not guilty, or not guilty only by reason of lack of mental responsibility. The statute requires a majority of the panel to find the accused is "not guilty only by reason of lack of mental responsibility." In a case tried before a military judge only, the military judge determines that the defense of lack of mental responsibility has been established. In a case tried with members, the military judge instructs the members on the defense. In a court-martial tried with members but no military judge, the President of the panel instructs the other members as to the defense.

3. Historical Background

For most of American history, the insanity defense was governed by the *M'Naghten* rule from England. This defense required a mental disease or defect which caused the defendant to either not know the nature of a committed act, or to not know that the act was wrong. This defense was judicially adopted and defined in most American jurisdictions, including the military's case law. Over time, many jurisdictions expanded this defense to include any act committed because of the accused's mental defect, or any act which was an "irresistible impulse." In 1984, Congress passed the Insanity Defense Reform Act[1]. The Act required the mental defect to be "severe" and eliminated the "irresistible impulse" defense. The Act also made the defense an affirmative defense, which placed the burden on the accused to prove lack of mental responsibility. Shortly after the Act was passed, Article 50a was added to the

[1] 18 U.S.C. § 17 (1984).

UCMJ.[2] Article 50a essentially mirrors the requirements of the Insanity Defense Reform Act.

4. Contemporary Practice

The defense of lack of mental responsibility is not frequently raised and there are few reported military appellate cases addressing the defense.[3] The military courts recognize that, while lack of mental responsibility is an affirmative defense which the accused has the burden of proving, if evidence is introduced which calls into question the mens rea of the accused on a specific intent element of an offense, the government has the burden of proving specific intent.[4] In *United States v. Berri*, the Court of Military Appeals held that "[i]f admissible evidence suggests that the accused, for whatever reason, including mental abnormality, lacked mens rea, the factfinder must weigh it along with any evidence to the contrary."[5] Thus, if a specific mens rea is an element of a crime, the government must prove it as they would any other element. The President has implemented Article 50a through R.C.M. 916(k)(2). The article also details procedures for instructing members in cases where a special court-martial has been convened without a military judge. Under longstanding practice among all the services, such courts-martial are extremely rare because a military judge is typically detailed to every general and special court-martial.

5. Relationship to Federal Civilian Practice

Although Article 50a is essentially identical to the provisions of the Insanity Defense Reform Act, federal and military courts have taken different approaches to diminished mental capacity as a way to negate mens rea as an element of an offense. The military courts allow evidence of partial mental responsibility to negate the mens rea of specific intent crimes.[6] In *United States v. Berri*, the U.S. Court of Military Appeals cited to cases in the Eleventh and Third Circuits for this rule.[7] Not all of the federal circuits have followed the Eleventh and Third Circuits.[8]

6. Recommendation and Justification

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[2] NDAA FY 1987, Pub. L. No. 99-661, tit. VIII, 100 Stat. 3905; 10 U.S.C. § 850a.

[3] *See* Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 12 (2007) (observing that the insanity defense is raised in 1% of all felony cases but successful in less than 25% of those).

[4] United States v. Berri, 33 M.J. 337, 342-43 (C.M.A. 1991).

[5] *Id.*

[6] *Id.*

[7] *See* United States v. Cameron, 907 F.2d 1051 (11th Cir. 1990); United States v. Pohlot, 827 F.2d 889, 897 (3d. Cir. 1987).

[8] *See* FEDERAL JURY PRACTICE AND INSTRUCTIONS, 1A FED. JURY PRAC. & INSTR. § 19:03 (6th ed.).

Recommendation 50a: Amend Article 50a to delete provisions pertaining to courts-martial without a military judge, with no substantive changes.

In view of the well-established case law addressing Article 50a, only conforming changes are necessary. Article 50a mirrors federal law and both are generally similar in practice.

Part II of the Report will consider whether any changes are needed in the rules implementing Article 50a.

7. Relationship to Objectives and Related Provisions

Article 50a is a stable area of military criminal justice practice and mirrors federal law.

8. Legislative Proposal

SEC. 713. CONFORMING AMENDMENT RELATING TO DEFENSE OF LACK OF MENTAL RESPONSIBILITY.

Section 850a(c) of title 10, United States Code (article 50a(c) of the Uniform Code of Military Justice), is amended by striking ", or the president of a court-martial without a military judge,".

9. Sectional Analysis

Section 713 would amend Article 50a to conform the statute to the proposed changes in Article 16 to eliminate special courts-martial without a military judge.

Article 51 – Voting and Rulings
10 U.S.C. § 851

1. Summary of Proposal

This proposal would align Article 51 with the changes proposed in Article 16. Part II of the Report will consider changes in the rules implementing Article 51 necessitated by the proposed statutory amendments.

2. Summary of the Current Statute

Article 51 concerns voting by the members of a court-martial and rulings by the military judge. Article 51(a) prescribes the procedures for the members of a general or special court-martial to vote by secret written ballot on the findings and sentence. Article 51(b) provides that the military judge or, in a special court-martial without a military judge, the President of the court-martial panel, shall issue final rulings upon all questions of law and all interlocutory questions arising during the proceedings. Article 51(c) lists required instructions pertaining to presumptions of innocence and the government's burden of proving guilt beyond a reasonable doubt. And Article 51(d) exempts courts-martial tried by military judge alone from the requirements of subsections (a)-(c).

3. Historical Background

With the exception of the change from "law officer" to "military judge" in 1968, Article 51 has remained relatively unchanged since the UCMJ was enacted in 1950.[1]

4. Contemporary Practice

The President has implemented Article 51 through R.C.M. 920 (Instructions on findings), 921 (Deliberations and voting on findings), and 922 (Announcement of findings), which provide additional rules and procedures for voting by secret ballot, rulings by the military judge, the limited role of the members, members instructions prior to findings, and trial by a military judge alone. The rules also provide specific instructions for these functions in cases where a special court-martial has been convened without a military judge. Under longstanding practice among all the services, such courts-martial are extremely rare because a military judge typically is detailed to every general and special court-martial.

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108. *See* Military Justice Act of 1968, Pub. L. No. 90-632, § 2(2)-(21), 82 Stat. 1335, 1335-1340 (1968) (replacing "law officer" with "military judge," reflecting the introduction of military judges into the UCMJ).

5. Relationship to Federal Civilian Practice

The rules and procedures pertaining to deliberations and voting under Article 51 and the Rules for Courts-Martial differ in several ways from federal civilian practice. First, due to the differences in rank between court-martial members, Article 51 requires that all voting be by secret written ballot. This helps to preserve anonymity and minimize the potential for unlawful command influence in deliberations. In federal civilian practice, a party may request to poll the jury after the verdict is announced and determine each juror's individual vote in order to ensure unanimity.[2] Another area of difference is with members (or jury) instructions, which tend to be more detailed and uniform in military practice than in federal civilian practice. Article 51 gives specific members instructions that must be given in each case, and the Military Judge's Benchbook provides suggested instructions on elements of offenses, how to view evidence, defenses, and other matters.[3] In federal civilian practice, jury instructions may be given when specifically requested by a party, but they are not required.[4] Each circuit has pattern jury instructions proposed by a Committee on Pattern Jury Instructions.[5] When a judge fails to give a requested instruction, the courts will look at the totality of the circumstances to determine whether an accused received a constitutionally fair trial.[6]

With respect to judicial rulings before findings, military practice and federal civilian practice are closely aligned. Both require the presiding judge to rule on motions, questions of law, excusal requests, and other related matters. While the military technically allows the president of a special court-martial without a military judge to issue rulings, this procedure is not used in practice.

6. Recommendation and Justification

Recommendation 51: Amend Article 51 to delete references and rules pertaining to courts-martial without a military judge.

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[2] *Compare* FED. R. CRIM. P. 31(d) (Jury Poll) *with* R.C.M. 922(e) (Polling prohibited).

[3] MILITARY JUDGES' BENCHBOOK, DA PAM 27-9 (Jan. 1, 2010).

[4] FED. R. CRIM. P. 30.

[5] *See, e.g.*, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES), COMMITTEE ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASSOCIATION, FIFTH CIRCUIT (2012).

[6] *See* Kentucky v. Whorton, 441 U.S. 786, 789 (1979) (failure to give a requested instruction on the presumption of innocence must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial); *cf.* United States v. Carruthers, 64 M.J. 340, 346 (C.A.A.F. 2007) ("We apply a three-pronged test to determine whether the failure to give a requested instruction is error: '(1) the requested instruction is correct; (2) it is not substantially covered in the main instruction; and (3) it is on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its effective presentation.'") (citation omitted).

This proposal would conform Article 51 to longstanding practice and the proposed changes in Article 16.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

This proposal is related to the proposed changes in Article 16.

8. Legislative Proposal

SEC. 714. VOTING AND RULINGS.

Section 851 of title 10, United States Code (article 51 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a), by striking ", and by members of a court-martial without a military judge upon questions of challenge," in the first sentence;

(2) in subsection (b)—

(A) by striking "and, except for questions of challenge, the president of a court-martial without a military judge" in the first sentence; and

(B) by striking ", or by the president" in the second sentence and all that follows through the end of the subsection and inserting "is final and constitutes the ruling of the court, except that the military judge may change a ruling at any time during trial."; and

(3) in subsection (c), by striking "or the president of a court-martial without a military judge" in the matter before paragraph (1).

9. Sectional Analysis

Section 714 would amend Article 51, which concerns voting by members of a court-martial and rulings by military judges. These amendments would remove statutory references to courts-martial without a military judge, reflecting the proposed amendments to Article 16 to require the detailing of a military judge in all general and special courts-martial. The amendments would retain current law and procedures for voting on the findings and sentence, and for rulings by the military judge, other than those aspects of Article 51 and the implementing rules which specifically concern courts-martial without a detailed military judge.

Article 52 – Number of Votes Required
10 U.S.C. § 852

1. Summary of Proposal

This proposal, in conjunction with the recommendation for fixed panel sizes under Article 16, would eliminate inconsistencies and uncertainties in court-martial voting requirements by standardizing the requirements for each type of court-martial. The proposal also would make conforming changes to align Article 52 with the proposed changes in Articles 16, 25a, and 53.

2. Summary of the Current Statute

Article 52 requires that for an accused to be convicted of an offense there must be a concurrence of all the members in cases where death is required, and two-thirds of the members for all other offenses. The statute requires unanimity for a death sentence, three-fourths concurrence for a sentence to confinement for more than ten years, and a two-thirds concurrence for all other sentences. A vote for reconsideration of a finding of guilt requires more than one-third of the panel for non-capital offenses and any one member may move for reconsideration of a finding of guilt in a capital case. All other matters require a majority vote.[1] Finally, Article 52 discusses voting on issues pertaining to special courts-martial without a military judge, such as members voting on challenges to another member and motions to suppress evidence.

3. Historical Background

Under the original Articles of War, a majority vote of a thirteen-person court-martial panel was required for conviction.[2] After the American Revolution, and in order to account for the limited size of America's military forces, the Articles of War and the Articles for the Government of the Navy adopted the practice of seating five to thirteen officers in general courts-martial, with regimental courts-martial (or "summary" courts-martial in the Navy) fixed at three members.[3] In 1920, amendments to the Articles of War increased the majority vote requirements for a conviction to a three-fourths requirement in cases where death was mandatory and a two-thirds requirement in all other cases.[4] When Congress

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[1] For example, the military judge may instruct the members that the President of the panel should determine the order of which specification to vote on first, unless a majority of the panel objects. *See* U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook, ¶2-5-14 (15 Sept. 2002) (C2, 1 July 2003).

[2] AW XXXVII of 1775.

[3] *See, e.g.*, AW 5 and 6 of 1916; *see also* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 3-11 (1998).

[4] AW 43 of 1920.

enacted the UCMJ in 1950, it kept in place the two-thirds voting requirement for most cases, but added a requirement of unanimity for death sentences and a requirement for three-fourths of the members to agree in order to adjudge sentences over 10 years. Since military judges were introduced to the system in 1968, the practice has evolved such that military judges are detailed to all special courts-martial, rendering obsolete the provisions of Article 52 directed at a special court-martial without a military judge.

4. Contemporary Practice

Under current law, a special court-martial can consist of as few as three members. However, a special court-martial frequently will include more members because of uncertainty as to the number who will remain after excusals and challenges. A general court-martial may consist of as few as five members, but for the same reasons often will have more than five members. Because there is no maximum number of members in general and special courts-martial, the number of members who are impaneled can fluctuate from case to case. Because a concurrence of at least two-thirds of the panel is required for a conviction, the actual percentage necessary for conviction changes with the size of the panel. The following table shows the varying percentages required for conviction in typical courts-martial.[5]

# of members	3	4	5	6	7	8	9	10	11	12	13
% required for conviction	67%	75%	80%	67%	71%	75%	67%	70%	73%	67%	69%

Panel members also vote on sentencing. The voting requirements range from unanimous (for a death sentence) to a minimum of two-thirds. A sentence of more than ten years confinement requires the concurrence of at least three-fourths of the panel. The following table shows the necessary percentages required for sentences in typical courts-martial.

# of members	3	4	5	6	7	8	9	10	11	12	13
% required for sentence ≤ 10 years	67%	75%	80%	67%	71%	75%	67%	70%	73%	67%	69%
% required for > 10 years	NA	NA	80%	83%	86%	75%	78%	80%	82%	75%	77%

[5] Because there currently is no maximum number of members who may sit on a panel, this table is not exhaustive.

5. Relationship to Federal Civilian Practice

Civilian practice and military practice concerning voting differ with respect to minimum requirements. In federal civilian practice, all findings by a jury must be unanimous. In capital cases, a jury must also unanimously agree to a sentence of death. The federal district court judge is the sentencing authority in all other cases. There are no federal courts without a trial judge or magistrate. Every state except Oregon and Louisiana requires unanimous verdicts. Those two states require at least ten of twelve jurors for a conviction.[6]

6. Recommendation and Justification

Recommendation 52.1: Amend Article 52 to require concurrence of at least three-fourths of the members present.

With the fixed panel sizes established under the proposal for Article 16, this proposal would set the voting percentage for a conviction to 75% (e.g., 6 of 8 at general courts-martial; 3 of 4 at special courts-martial).

Recommendation 52.2: Amend Article 52 to require concurrence of at least three-fourths of the members present on offenses in a case referred for trial as a capital case, where there was not a unanimous finding of guilty.

In order for the accused to be sentenced to death, the panel must be unanimous on both findings and sentence. The panel in a capital case first considers the findings on both capital and non-capital offenses that have been referred to the court-martial. For non-capital offenses in such a case, this proposal would require concurrence of at least three-fourths of the members present to convict. With respect to a capital offense, concurrence of at least three-fourths of the members present would be sufficient for a conviction, but only unanimous concurrence by all members present on findings for a capital offense would authorize the court-martial to consider the death penalty on sentencing.

Recommendation 52.3: Amend Article 52(c) to eliminate the language concerning "tie vote[s]" on challenges, motions, and other questions, which is applicable only to special courts-martial without a military judge, and which would no longer be necessary given the proposal in Article 16 to eliminate these members-only courts-martial.

This is a conforming change to align Article 52 with the proposed amendments to Article 16.

Recommendation 52.4: Amend Article 52 to conform the statute to the proposal in Article 53 for judicial sentencing in all non-capital cases, and member sentencing in capital cases with respect to sentences of death and life without parole.

This proposal would conform Article 52 to the proposal in Article 53 for judge-sentencing in all non-capital cases and members-sentencing in capital cases with respect to the sentences of death and life without parole.

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[6] Or. Rev. Stat. § 136.450 (2013); La. Code Crim. Proc. Ann. art. 782 (2013).

With respect to sentences of death and life without parole, the proposed amendments retain the current requirement for unanimity as to the death sentence, and reflect the current three-fourths floor for life without parole by requiring a three-fourths vote for other sentences.

This proposal conforms to federal civilian law, in which the judge determines the sentence in capital cases where the jury does not vote for death or life without parole.[7]

7. Relationship to Objectives and Related Provisions

These proposed changes would align the court-martial voting process with the standardized panel size and judicial sentencing provisions in the proposed amendments to Article 16 (setting a fixed number of members on a courts-martial panel and requiring a military judge at all general and special courts-martial), Article 25a (fixing the number of members in a capital case at twelve), and Article 53 (adding a requirement that all sentences except for death will be determined by the military judge).

This proposal supports the GC Terms of Reference by incorporating, insofar as practicable, voting requirements applicable in U.S. district court.

8. Legislative Proposal

SEC. 715. VOTES REQUIRED FOR CONVICTION, SENTENCING, AND OTHER MATTERS.

Section 852 of title 10, United States Code (article 52 of the Uniform Code of Military Justice), is amended to read as follows:

"§852. Art. 52. Votes required for conviction, sentencing, and other matters

"(a) IN GENERAL.—No person may be convicted of an offense in a general or special court-martial, other than—

"(1) after a plea of guilty under section 845(b) of this title (article 45(b));

"(2) by a military judge in a court-martial with a military judge alone, under section 816 of this title (article 16); or

[7] 18 U.S.C. § 3594.

"(3) in a court-martial with members under section 816 of this title (article 16), by the concurrence of at least three-fourths of the members present when the vote is taken.

"(b) LEVEL OF CONCURRENCE REQUIRED.—

"(1) IN GENERAL—Except as provided in subsection (a) and in paragraph (2), all matters to be decided by members of a general or special court-martial shall be determined by a majority vote, but a reconsideration of a finding of guilty or reconsideration of a sentence, with a view toward decreasing the sentence, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence.

"(2) SENTENCING.—A sentence of death requires (A) a unanimous finding of guilty of an offense in this chapter expressly made punishable by death and (B) a unanimous determination by the members that the sentence for that offense shall include death. All other sentences imposed by members shall be determined by the concurrence of at least three-fourths of the members present when the vote is taken.".

9. Sectional Analysis

Section 715 would amend Article 52 concerning the number of votes required for the findings in members cases, and for the findings and sentence in capital cases. Under current law, because the requirement for a two-thirds vote on the findings (and on most sentences) in Article 52 establishes a floor, not a fixed requirement, none of the parties or the public knows at the outset of a court-martial how many votes will be required for a conviction. The percentage required for a conviction and for a specific sentence can be affected significantly by the number of members detailed to a court-martial and the number of

members removed through excusal, challenges for cause, and peremptory challenges. As a result, it is not unusual to see variations in voting requirements ranging from 67 percent to 80 percent of the members of the court-martial panel. The proposed amendments, in conjunction with the proposal for standard panel sizes under Article 16, would standardize the voting requirement in each type of court-martial at three-fourths (75 percent) in non-capital members cases, and unanimous on the findings and the sentence in capital cases. The proposal also would make conforming changes to align Article 52 with the proposed changes in Articles 16, 25a, and 53 with respect to capital cases and judge-alone sentencing. Implementing rules would address the procedures concerning voting on sentences of death, life without the possibility of parole, and other lawful sentences.

Article 53 – Court to Announce Action
10 U.S.C. § 853

1. Summary of Proposal

This proposal would amend Article 53 to provide for judicial sentencing for all non-capital offenses. For capital offenses, the panel members would decide whether the accused should be sentenced to death, life without eligibility for parole, or to a lesser sentence adjudicated by the military judge. This proposal has been developed in conjunction with this Report's recommendations to: establish "segmented sentencing"—a sentence adjudged for each offense for which an accused is convicted; develop sentencing parameters and criteria to guide judicial discretion in sentencing while fashioning an individualized sentence for each offender; modernize military appellate practice; enhance the selection criteria for military judges; and establish minimum tour lengths for military judges. Taken together, these proposals present a significant opportunity to enhance transparency in military sentencing. The proposals are designed to facilitate sentencing consistency in a manner that permits each sentence to be tailored to address the specific offense and the specific offender.

2. Summary of the Current Statute

Article 53 requires a court-martial to announce its findings and sentence to the parties as soon as they are determined. The sentence is determined by either a panel or a military judge, depending on the accused's forum selection. Article 16 provides that a general or special court-martial may be composed of a military judge with no members, but only if the accused formally requests such composition before the court is assembled and the military judge approves.

3. Historical Background

Under the Articles of War, courts-martial were composed solely of members, there were no judges, often no counsel, and there was no separate sentencing proceeding following the announcement of findings.[1] Instead, the court deliberated on the findings and sentence at the end of the trial and announced them at the same time.[2] To determine an appropriate sentence, the members were instructed (by guidance contained in the MCM) to consider

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[1] *See, e.g.*, AW 5, 6, and 29 of 1920; MCM 1921, ¶294 (explaining that votes on findings are immediately followed, in the event of a conviction, by votes on sentencing). For an in depth discussion of 19th century court-martial sentencing practice, see WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 278-80 (photo reprint 1920) (2d ed. 1896). *See generally* Capt. Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 (1986); Maj. James K. Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1 (1994).

[2] *See* MCM 1921, ¶294; MCM 1943, ¶77 (explaining, in effect, that findings and sentencing arguments are made by counsel at the close of the case on the merits), ¶80b (discussing sentencing rules), ¶81 (explaining that the findings and sentence on a charge are announced at the same time, in open court).

the accused's background and the goals of general deterrence, discipline, and uniformity in sentencing, as well as the nature and circumstances of the offense.[3] If the court's judgment was for acquittal on all charges and specifications, it announced its findings immediately; in all other cases, the announcement of findings and sentence was left to regulations.[4] In Navy practice, the court's findings and sentence were not announced until after the first reviewing authority had completed its action.[5] The drafters of the UCMJ felt it appropriate that the accused be informed of the outcome of the trial as soon as possible, regardless of the specific findings and sentence, so they made this practice a uniform requirement in Article 53.[6] The change was adopted without objection, and Article 53 has not been significantly amended since its enactment.[7]

The rules providing for a separate sentencing proceeding directly following trial on the merits were first established in the 1951 MCM, and have evolved since then.[8] At first, these rules generally allowed the parties to present "appropriate matter to aid the court in determining the kind and amount of punishment to be imposed."[9] However, the government's ability to offer evidence in aggravation was limited: it could present aggravating circumstances of the offense that were not introduced on the merits, but only in guilty plea cases.[10] Evidence of the accused's prior court-martial convictions was limited to the previous three years or the current service enlistment, and evidence of uncharged misconduct, prior arrests, civil convictions, and other criminal history information was

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[3] MCM 1949, ¶80a. *See also* MCM 1928, ¶80 (instructing the members to consider former discharges, prior convictions, and circumstances that tended to aggravate, mitigate, or extenuate either the offense or the collateral consequences of the offense); MCM 1917, ¶342 (instructing members that "the best interest of the service and of society demand thoughtful application of the following principles: That because of the effect of confinement upon the soldier's self-respect, confinement is not to be ordered when the interests of the service permit it to be avoided; that a man against whom there is no evidence of previous convictions for the same or similar offenses should be punished less severely than one who has offended repeatedly; the presence or absence of extenuating or aggravating circumstances should be taken into consideration in determining the measure of punishment in any case; that the maximum limits of punishment authorized are to be applied only in cases in which from the nature and circumstances of the offense and the general conduct of the offender, severe punishment appears to be necessary to meet the ends of discipline; and that in adjudging punishment the court should take into consideration the individual characteristics of the accused, with a view to determining the nature of the punishment best suited to produce the desire results in the case in question, as the individual factor in one case may be such that punishment of one kind would serve the ends of discipline, while in another case punishment of a different kind would be required.").

[4] AW 29 of 1920.

[5] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1083 (1949).

[6] *Id.*

[7] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[8] MCM 1951, ¶75.

[9] *Id.*, ¶75*a*.

[10] *Id.*, ¶75*b*.3.

strictly prohibited, even when the accused was responsible for introducing it.[11] Although the relevance of such information to the goals of sentencing was generally acknowledged, the use of such information was deemed inappropriate in the military setting where court-martial members—not a judge, as in most civilian systems—determined the accused's sentence, and where the risk of confusing the members and prejudicing the accused was acute.[12] Under the new rules, the accused could make an unsworn statement, and the law officer could relax the rules of evidence for the accused's presentation of extenuation and mitigation evidence.[13] The government's sentencing case, however, was strictly limited by the rules of evidence, even in rebuttal.[14]

In 1968, Congress created the position of military judge and amended Article 16 to provide for general and special courts-martial composed of a military judge and panel members. As amended, the accused could elect to be tried and sentenced by a military judge alone, subject to the military judge's approval.[15] Subsequently, the President modified presentencing procedures in the MCM to allow for argument by counsel as to the appropriate sentence;[16] and the next year, a rule was added to allow the trial counsel to present "any personnel records" of the accused when sentencing was before a military judge without members.[17] The Court of Military Appeals later restricted the practice of providing complete personnel records to the military judge, noting that "sentencing in the federal civilian courts is based on statutes not yet found applicable to courts-martial," and the decisions reflected ongoing concerns about the inherent risks of allowing this type of information into a sentencing system that generally, if not always, relied on members to determine the accused's sentence.[18]

The rules concerning sentencing evidence began to expand in the 1980s. Beginning in 1981, the military judge was allowed to keep the rules of evidence relaxed for the government in rebuttal, and evidence of civil convictions could be offered.[19] In 1982, the

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[11] *Id.* ¶75*b*.2; *see, e.g.*, United States v. Averette, 38 C.M.R. 117 (C.M.A. 1967) (error for the judge not to give a limiting instruction after accused admitted a civilian conviction during a sworn statement).

[12] MCM, App. 21 (R.C.M. 1001, Analysis).

[13] *Id.*, ¶75*c*.

[14] *Id.*, ¶75*d*.

[15] Article 16 (1968-current).

[16] MCM 1968, ¶75*e*.

[17] MCM 1969, ¶75*d*; *see* United States v. Boles, 11 M.J. 195, 198 n.5 (C.M.A. 1981).

[18] *Id. See also* United States v. Warren, 10 M.J. 603, 606 (A.F.C.M.R. 1980) (Kastl, J., concurring) ("[I]t is one thing to permit a trained judge to consider an accused's false testimony in reaching a sentence . . . but it is quite a different matter to permit a court-martial consisting of members to do this."); Lovejoy, *supra* note 1, at 36 ("The susceptibility of court members requires the military judge to assume a proactive role in protecting members from evidence that may 'unduly arouse the members' hostility or prejudice against an accused.'") (quoting *Boles*, 11 M.J. at 201).

[19] MCM 1969, ¶75c-d, *amended by* Exec. Order 12315, 3 C.F.R. 163 (1982).

Court of Military Appeals overruled prior case law that limited the government's ability to introduce aggravation evidence to guilty plea cases.[20] Three years later it allowed for the government to introduce uncharged misconduct directly related to the offense in all cases.[21] Beginning in 1984, the government was allowed to introduce evidence concerning the accused's rehabilitative potential in the form of opinion testimony.[22] Subsequent rule changes have clarified the definition of "conviction" and the aggravating nature of hate crimes, and permit the introduction of victim impact evidence.[23] Otherwise, the rules for presentencing procedures today are similar to when R.C.M. 1001 was first adopted in 1984.

As the rules for the presentencing proceeding evolved, so did the rules for determining an appropriate sentence. In 1957, the Court of Military Appeals prohibited the use of the MCM by the members during their deliberations on findings and sentence.[24] In 1959, the Court of Military Appeals held that the standard instruction to members that "sentences should . . . be relatively uniform throughout the armed forces," was "impractical, confusing, and of such doubtful validity [it] should not be given to the court-martial members."[25] Noting that the law prohibited providing the members other cases for comparative purposes, the court stated the "principle is founded on the hypothesis that accused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment."[26] This focus on individualized sentencing became the bedrock of military sentencing philosophy, and, in 1969, the President removed "sentence uniformity" from the list of sentencing goals in the Manual.[27]

Subsequent editions of the MCM have not included guidance to members on how to arrive at an appropriate sentence. This reflects two factors. First, as rehabilitation replaced retribution as the primary sentencing theory during the first three quarters of the twentieth century, individualized sentencing was prioritized over uniformity as a

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[20] United States v. Vickers, 13 M.J. 403, 406 (C.M.A. 1982).

[21] United States v. Martin, 20 M.J. 227, 230 (C.M.A. 1985).

[22] R.C.M. 1001(b)(5).

[23] *See* R.C.M. 1001(b)(3)-(4).

[24] United States v. Rinehart, 24 C.M.R. 212 (C.M.A. 1957). The court stated its grounds for rejecting the practice of members consulting the Manual for guidance in sentence determination as follows: "We cannot sanction a practice which permits court members to rummage through a treatise on military law, such as the *Manual*, indiscriminately rejecting and applying a myriad of principles—judicial and otherwise—contained therein. The consequences that flow from such a situation are manifold. . . . It is fundamental that the only appropriate source of the law applicable to any case should come from the law officer. . . . [T]he great majority of court members are untrained in the law. A treatise on the law in the hands of a nonlawyer creates a situation which is fraught with potential harm, especially when one's life and liberty hang in the balance." *Id.* at 216-17.

[25] United States v. Mamaluy, 27 C.M.R. 176, 180 (C.M.A. 1959).

[26] *Id.*

[27] MCM 1969, ¶76.

sentencing goal.[28] Second, there was increasing concern that influencing, or attempting to influence, the discretion of the sentencing authority in adjudging a sentence was *per se* improper.[29] To some extent, this lack of sentencing guidance has been assuaged through model instructions suggested in the Military Judges' Benchbook and supplemental member instructions under R.C.M. 1005.

In 1983, a year before the enactment of the Federal Sentencing Guidelines, Congress directed the Secretary of Defense to establish a commission to study and make recommendations to Congress regarding a number of military justice issues. One of the issues assigned to this Advisory Commission was whether the sentencing authority in court-martial cases should be exercised by the military judge in all non-capital cases to which a military judge has been detailed.[30] The Commission ultimately recommended no change to the existing system, noting, among other reasons, that "participation of military members in court-martial punishment decisions . . . fosters understanding of military justice by all servicemembers and belief in the fairness of the system."[31]

In the three decades since the Advisory Commission issued its report, practitioners and scholars have continued to recommend revisiting the issue of judge-alone sentencing.[32] As noted in 1998 by Brigadier General John S. Cooke, the Chief Judge of the Army Court of Criminal Appeals:

> Since [the Advisory Commission's Report], we have seen the movement in civilian courts toward greater uniformity in sentencing, and the nature of our caseload has continued to swing toward crimes against society, not just against the military. . . . [J]udge alone sentencing would bring, I am confident, greater uniformity and consistency. It also would make it easier to present more information at the sentencing phase, without fear that it would be used improperly. Certainly, it would be more efficient, both in terms of the court-martial itself, and by freeing the members for other duties.[33]

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[28] *See generally* Vowell, *supra* note 1; *see also* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, AND ORIN KERR, CRIMINAL PROCEDURE § 26.3(a) (3d ed. 2013).

[29] Vowell, *supra* note 1, at 137 ("Since the Court of Military Appeals had already prohibited consideration of most of these guides (and the members had never been given any guidance on how to apply them), their elimination from the Manual had little direct impact on sentencing. There was a concern, almost bordering on paranoia, that anything which could influence the members in their sentencing decision was improper.").

[30] REPORT OF THE MILITARY JUSTICE ACT OF 1983 ADVISORY COMMISSION 2 (1984) [hereinafter ADVISORY COMMISSION REPORT].

[31] *Id.* at 6.

[32] *See, e.g.*, Colin Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39 (2009).

[33] Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 20 (1998).

In 2014, the Comparative Systems Subcommittee of the Congressionally mandated Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel) recommended that military judges should be the sole sentencing authority in sexual assault and other non-capital cases:

> Forty-four states and the federal criminal justice system all require judges, not juries, to impose sentences for convicted offenders in noncapital cases, including adult sexual assault cases. This change has the potential to improve sentencing consistency and fairness without the imposition of sentencing guidelines because of the advantage in experience and expertise that military judges have over panel members. It will also reduce the administrative burden of panel member sentencing and help to minimize the perception of command influence.[34]

4. Contemporary Practice

The President has implemented Article 53 through R.C.M. 922 and 1007, and has provided the rules for sentencing in Chapter X of the Rules for Courts-Martial. Currently, the rules do not include separate procedures for sentencing by members and sentencing by the military judge. R.C.M. 1001 and 1002 provide presentencing procedures and the rules for sentence determination applicable in all cases, and R.C.M. 1004 provides additional rules and procedures applicable only in capital cases.

Under current law, the sentencing authority—either members or, in most guilty plea cases, a military judge—exercises broad discretion to determine an appropriate sentence, constrained by the maximum punishments for offenses prescribed by the President, and any statutory provisions concerning mandatory minimum sentences.[35] Guidance on how to exercise discretion is very limited.[36] In members cases, R.C.M. 1005 requires the military judge to give the members "appropriate instructions on sentence," and required instructions include: guidance on the maximum punishment; guidance on the effect of any sentence on the accused's entitlement to pay and allowances; guidance on the procedures for deliberation and voting; advice that the members are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and instructions that the members should consider all matters in extenuation, mitigation, and aggravation.[37]

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[34] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, ANNEX, REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE 9 (May 2014). This recommendation of the subcommittee was not adopted by the full Panel. Instead, the Response Systems Panel recommended that "The Secretary of Defense direct a study to analyze whether changes should be made to . . . make military judges the sole sentencing authority in sexual assault and other cases in the military justice system." *Id.* at 51 (Recommendation 122).

[35] *See* R.C.M. 1002.

[36] *See* Maj. Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159, 171 (2000) ("Despite having a wide range of sentencing options available, the sentencing authority has little guidance on how to actually form a sentence.").

[37] R.C.M. 1005(e)(1)-(5). *See also* R.C.M. 1005(a) (Discussion) (noting that the judge's instructions "should be tailored to the facts and circumstances of the individual case.").

The Military Judges' Benchbook provides judges with additional guidance on how to craft supplemental instructions.[38] The Benchbook recommends a general statement of the purposes of punishment and suggests that military judges complete their sentencing instructions to members with a brief reiteration of the overall purposes of military law: "In arriving at your determination, you should select the sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society."[39] However, the Benchbook does not instruct members (or provide guidance to a military judge who is adjudging a sentence) how the general purposes of punishment and the overall purposes of military law should inform their consideration of the evidence introduced during the two phases of the trial. Furthermore, the Benchbook does not instruct members how to connect the nature of the particular offense and the background of the particular offender to these purposes in a meaningful way.[40]

The sentencing proceeding prescribed under R.C.M. 1001 is an adversarial proceeding that largely resembles a trial on guilt or innocence. R.C.M. 1001 is divided into seven subparts, covering the sequence of the proceeding, matters to be presented by the prosecution and defense, rebuttal, production of witnesses, and argument. The rule limits the evidence that the government can present in aggravation to "aggravating circumstances directly relating to or resulting from the [adjudged] offenses" including the impact of the offense on any victim and evidence of adverse impact on the mission of the command.[41] The trial counsel may introduce evidence of prior convictions of the accused under R.C.M. 1001(b)(3), but the scope of other evidence of criminal history, such as arrests, is limited.[42] The rule allows the military judge to relax the rules of evidence, upon defense request, during the defense presentation of evidence and the government has a similar allowance in its rebuttal case if

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[38] *See* MILITARY JUDGES' BENCHBOOK, DA PAM 27-9 (Jan. 1, 2010) [hereinafter BENCHBOOK], at § 2-5-23 (laying out the so-called *Wheeler*-factors to help the military judge specifically tailor his/her sentencing instructions to the facts of the case). United States v. Wheeler, 38 C.M.R. 72, 75-76 (C.M.A. 1967).

[39] B ENCHBOOK, *supra* note 38, at § 2-5-24.

[40] *See* BENCHBOOK, *supra* note 38, at §§ 2-5-21 and 2-6-9 ("You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, *rests solely within your discretion.*") (emphasis added); Immel, *supra* note 36, at 195 ("While the sentencing authority receives instruction that they may consider rehabilitation, punishment, deterrence, and protection of society when fashioning an appropriate sentence, neither the *Manual for Courts-Martial* nor the *Judges' Benchbook* provides any concrete guidance on how the sentencing goals are to be applied in order to fulfill the purposes of military law.").

[41] R.C.M. 1001(b)(4) (emphasis added). *See* United States v. Rust, 41 M.J. 472, 478 (C.A.A.F. 1995) ("The phrase 'directly relating to or resulting from the offenses' imposes a 'higher standard' than 'mere relevance.'") (quoting United States v. Gordon, 31 M.J. 30, 36 (C.M.A. 1990)); United States v. King, 30 M.J. 334 (C.M.A. 1990) (government cannot offer evidence that accused appeared before the United States Disciplinary Barracks disciplinary board on 19 occasions while confined because it is not directly related to charged offense).

[42] MCM, App. 21 (R.C.M. 1001, Analysis).

the rules were relaxed for the defense.[43] During the defense case, the accused may make a sworn statement, an unsworn statement, or both.[44] The defense may also choose to offer no evidence in sentencing. During argument, the trial counsel may relate the specific sentence argued for to the generally accepted sentencing goals of rehabilitation, specific and general deterrence, social retribution.[45] Both trial and defense counsel may recommend a particular sentence to the members or the judge in their arguments on sentence.

5. Relationship to Federal Civilian Practice

Although there is no specific rule concerning the announcement of findings and sentence in U.S. district courts, federal civilian practice and military practice in this area are generally consistent.[46] The overall goals of sentencing in the federal civilian system and the military justice system are nearly identical. The goals of sentencing in the federal civilian system include just punishment (retribution), general and specific deterrence, incapacitation, and (albeit it to a lesser degree than in the past) rehabilitation.[47] The military justice system recognizes these four sentencing goals plus "preservation of good order and discipline."[48] Despite this basic similarity between the two systems in terms of their overall objectives,[49]

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[43] R.C.M. 1001(c)(3)-(d).

[44] R.C.M. 1001(c)(2).

[45] R.C.M. 1001(g).

[46] *See* FED. R. CRIM. P. 31-32.

[47] 18 U.S.C. § 3553(a)(2); *see also* ABA CRIMINAL JUSTICE STANDARDS: SENTENCING 18-2.1 [hereinafter ABA STANDARDS].

[48] BENCHBOOK, *supra* note 38, at 2-5-21; *see also* United States v. Barrow, 26 C.M.R. 123 (C.M.A. 1958) ("In civilian courts, a judge is primarily concerned with the protection of society, the discipline of the wrongdoer, the reformation and rehabilitation potential of the defendant, and the deterrent effect on others who are apt to offend against society. Those are all essential matters to be considered by a convening authority but, in addition, he must consider the accused's value to the service if he is retained and the impact on discipline if he permits an incorrigible to remain in close association with other members of the armed services.").

[49] Although both systems continue to embrace all four of sentencing goals (plus good order and discipline in the military), the goal of rehabilitation was de-emphasized, though not rejected, by the Sentencing Reform Act of 1984. The Act retained rehabilitation as a sentencing purpose, but reduced its importance by barring sentencing courts from seeking to achieve that purpose through the sanction of imprisonment. *Compare* In re Sealed Case, 573 F.3d 844, 850-51 (D.C. Cir. 2009) (discussing the decreased significance of rehabilitation as a sentencing goal in the federal system) *with* 10 U.S.C. § 951(b) (directing the Secretary concerned to "provide for the education, training, rehabilitation, and welfare of offenders confined in a military correctional facility of his department; and [to] provide for the organization and equipping of offenders selected for training with a view to their honorable restoration to duty or possible reenlistment."). As rehabilitation fell somewhat out of favor in the federal system in the 1970's and 80's, deterrence and incapacitation gained favor as alternative sentencing theories, including within the military. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 822-23 (1974); *see also* United States v. Lewis, 2 M.J. 834, 839 (A.C.M.R. 1976) (Costello, J., concurring) ("Deterrence theory has a place in military sentencing procedures today, just as it does in civilian practice. That place is both proper and necessary; proper because it does not offend against the maxim that a sentence ought to fit the individual

military sentencing procedures and rules for sentence determination differ from those applicable in federal district court. This difference may be attributed to the lack of jury participation in sentencing in the federal civilian system in all non-capital cases.[50] (In capital cases, absent an agreement by the parties to sentencing by the trial judge, the jury determines aggravating and mitigating factors and makes a sentencing recommendation to the trial judge.[51])

Before the Sentencing Reform Act of 1984, federal judges exercised virtually unfettered sentencing discretion, similar to the discretion exercised by both military judges and members in current military practice. As in the military system, the only limitations on federal judges' sentencing discretion were statutory maximum sentences.[52] Judges were free to sentence based on the sentencing goals (retribution, deterrence, incapacitation, rehabilitation) and sentencing objectives (uniformity, proportionality, individualization) of their choosing.[53] This discretionary system was criticized for resulting in unwarranted sentencing disparity.[54] Federal judges operating within this discretionary system were well-trained concerning the general theories of sentencing, the rules of evidence, data

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criminal and necessary because the notion of deterrence is fundamental to our basic concepts of the criminal justice system in the United States.").

[50] *See* REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 139 (June 2014) ("In the federal criminal justice system and 44 states, judges, not juries, impose sentences for convicted offenders in noncapital cases, including adult sexual assault cases.").

[51] 18 U.S.C. §§ 3593-94.

[52] *Compare* 10 U.S.C. § 856 (UCMJ art. 56) *with* Williams v. New York, 337 U.S. 241 (1949); *see* LAFAVE ET AL., *supra* note 28, at §§ 26.1(a) and 26.3(a)-(b).

[53] *See* Immel, *supra* note 36, at 181 ("Sentencing goals should not be confused with sentencing objectives. Sentencing goals relate to why an individual is punished. Sentencing objectives relate to the goals of the sentencing system in meting out that punishment. . . . The military pursues its sentencing goals using sentencing discretion and individual sentencing. The federal system pursues [nearly identical] goals through the U.S. Sentencing Commission and the use of sentencing guidelines.").

[54] *See* ADVISORY COMMISSION REPORT, *supra* note 30, at 5 ("[C]ivilian judges demonstrate that disparities are inevitable when judges or juries sentence in a system that gives the sentencing authority a wide range of choices."); ABA STANDARDS, *supra* note 47 18-2.6, Commentary ("Systems of 'indeterminate' sentencing, which invest sentencing judges and parole boards with broad discretion in making sentencing decisions, have resulted in unwarranted disparity in individual sentences and have contributed to decades of unplanned change in overall patterns of sentencing."); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1688-89 (1992) ("In a system without acknowledged starting points, measuring rods, stated reasons, or principled review, unwarranted (or at least unexplained) disparity and disproportionality seemed to flourish. Some observers placed the blame for disparity on judges. Others faulted the system: it lacked up-front standards for selecting sentences and had no appellate review to provide principles and precedents. At least one critic found judges rudderless and the system lawless."); *see generally* Stith, Kate and Koh, Steve Y., "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines" (1993), *Faculty Scholarship Series*, Paper 1273.

concerning which sentences are commonly imposed for certain crimes, and other information relevant to determining appropriate sentences in individual cases.[55]

With the enactment of the Sentencing Reform Act of 1984 and the implementation of Sentencing Guidelines three years later,[56] the wide discretion exercised by federal judges during sentencing became more constrained, as their sentence determinations were tethered to statutory sentencing factors, sentencing ranges, and clearly defined sentencing goals.[57] The purpose of this shift toward less discretion was to:

> [P]rovide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and [to] reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process . . . .[58]

Today, the sentencing ranges established by the federal sentencing guidelines are just one of eight factors the judge is required to consider at sentencing, but they are not mandatory and do not bind the judge in his sentencing determination, and federal sentencing under discretionary guidelines is less uniform than under mandatory guidelines. The other factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the general goals of sentencing; (3) the kinds of sentence available; (4) the sentences and sentencing ranges established by the Sentencing Guidelines; (5) any policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.[59] In contrast, the military justice system does not currently have statutory

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[55] *See* ADVISORY COMMISSION REPORT, *supra* note 30, at 28 (Minority Report in Favor of Proposed Change to Judge-Alone Sentencing); ABA STANDARDS, *supra* note 47, at 18-2.6, Commentary ("By institutional training, judges have long experience in rendering particularized outcomes within a legal framework, and their decisions are uniquely public and subject to appellate review.").

[56] 28 U.S.C. §§ 991-998; *see* UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (2013), *available at* http://www.ussc.gov/guidelines-manual/2013-ussc-guidelines-manual.

[57] *See* 18 U.S.C. § 3553(a) (Factors to be Considered in Imposing a Sentence).

[58] 28 U.S.C. § 991(b)(1)(B)-(C). *See generally* Stith and Koh, *supra* note 54. In the years leading up to the passage of the Sentencing Reform Act, there was public debate about the goals of criminal sentencing and the need for clear, statutory guidance. *See, e.g., Rational Sentencing*, N.Y. TIMES, May 29, 1976, at A22 (editorial) ("Any new sentencing program which does not address itself to [the purposes of sentencing] . . . is apt ultimately to lapse into confusion born of the absence of an intellectual core."); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 424 (1993) ("Determining which disparities are unwarranted necessarily requires some standard of 'unwarrantedness' *other than disparity itself*.").

[59] 18 U.S.C. § 3553(a).

sentencing factors, and R.C.M. 1002 provides little guidance regarding determining an appropriate sentence.

A second area of difference between military sentencing practice and federal civilian sentencing practice concerns the sentencing proceeding itself. In the federal civilian system, the merits and sentencing phases of the trial are bifurcated. Following a guilty verdict, probation officers conduct a presentence investigation and prepare an extensive presentence report to inform the discretion of the sentencing judge.[60] The sentencing proceeding takes place no sooner than 35 days following the issuance of the pre-sentencing report to the defendant.[61] In addition, in the federal civilian system, the rules of evidence are not applied during sentencing, and judges exercise wide discretion in the sources and types of evidence they may use to adjudge an appropriate sentence.[62]

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[60] FED. R. CRIM. P. 32(c)-(d). The presentence report evolved from a document historically prepared only as a precondition to probation into mandatory requirement, seen as a basis for informed sentencing and appropriate individualization of sentences. ABA STANDARDS, *supra* note 47, at 18-5.2, Commentary.

[61] FED. R. CRIM. P. 32(e)(2). The presentence report contains a wide variety of information about the offense and the offender relevant to the sentencing factors listed in 18 U.S.C. § 3553, including: identification of applicable sentencing guidelines and policy statements; calculation of the defendant's offense level, criminal history category, and the sentencing range available; identification of factors relevant to the sentences range or departures therefrom; the defendant's history and characteristics, including prior criminal record, financial condition, and unique behavioral circumstances; information concerning the financial, social, psychological, and medical impact on any victim; a description of any non-prison programs or resources available; information on restitution and forfeiture; and any specific information that the court requests. The probation officer tasked with producing the presentence report is given wide investigative authority, including the authority to interview the defendant and incorporate any findings into the report. These presentence reports contribute to the federal sentencing goals by giving the sentencing judge a more thorough basis of information upon which to base his determinations, and by ensuring that the information before the court is reliable, material, and relevant to the sentencing factors listed in 18 U.S.C. § 3553(a). *See* Williams v. New York, 337 U.S. 241, 249 (1949) ("[A] strong motivating force for the changes [in sentencing philosophy and treatment of offenders] has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified."); *accord* United States v. Loving, 68 M.J. 1 (C.A.A.F. 2009) (discussing the Supreme Court's recognition that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.") (quoting Boyde v. California, 494 U.S. 370, 382 (1990)). *But see* ABA STANDARDS, *supra* note 47, at 18-532, Commentary (addressing two "troublesome" aspects of presentence reports: inclusion of too much material, and inclusion of material of dubious accuracy.).

[62] 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); *see Williams*, 337 U.S. at 246-47 (1949) ("A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."); United States v. Pratt, 553 F.3d 1165, 1170 (8th Cir. 2009) (sentencing judges have "wide discretion at sentencing as to the kind of information considered or its

Federal courts have held that consideration of certain factors is never permissible, including the race or gender of the defendant or the victim, the defendant's exercise of fundamental rights, or the defendant's exercise of certain procedural rights.[63] Second, the courts have fashioned a due process test for determining the admissibility of sentencing evidence objected to by either party:

> In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, *provided that the information has sufficient indicia of reliability to support its probable accuracy.*[64]

Under federal law, the court's determination of whether "sufficient indicia of reliability" exist in a given instance is a factual determination within the discretion of the sentencing judge—although there is some variance among the Circuits on the amount or quality of corroborating information needed to establish "sufficient indicia of reliability,"[65] and on the standard of review applicable when reviewing a sentencing judge's findings in this area.[66]

Military sentencing procedures vary from these aspects of federal civilian practice. First, there currently are no probation officers or presentence reports in military practice.[67] The Analysis to R.C.M. 1001(b) notes that the intent of the rule is to "allow the presentation of

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source."); *see also* LAFAVE ET AL., *supra* note 28, at § 26.4(a) ("*Williams* is considered the leading ruling on at least three basic elements of due process in sentencing procedure: (i) the range of the factors that a judge may consider in imposing a sentence; (ii) the right of the defendant to be informed of the factors being considered by the judge and of the evidence being advanced in support of those factors; and (iii) the opportunity given to the defendant to challenge the existence and relevancy of those factors.").

[63] *See* LAFAVE ET AL., *supra* note 28, at §§ 26.4(b)-(c).

[64] *Pratt*, 553 F.3d at 1170 (emphasis added); *see id.* (officer's testimony about pending drug investigations was based on hearsay but still sufficiently reliable for sentencing purposes) (citing GUIDELINES § 6A1.3(a)); United States v. Rodriguez-Ramos, 663 F.3d 356, 364 (8th Cir. 2011) (double hearsay evidence concerning accused's outstanding warrants in Mexico sufficiently reliable for sentencing purposes); United States v. Galvan 949 F.2d 777, 784 (5th Cir. 1991) ("the court is not bound by the rules of evidence and may consider any relevant information without regard to its admissibility provided the information considered has sufficient indicia of reliability."); United States v. Silverman, 976 F.2d 1502, 1512 (6th Cir. 1992) (en banc) (a "district court may consider hearsay evidence in determining an appropriate sentence, but the accused must be given an opportunity to refute it, and the evidence must bear some minimal indicia of reliability in respect of defendant's right to due process.").

[65] *Compare* United States v. Petty, 982 F.2d 1365, 1367 (9th Cir. 1993) (hearsay statements may be sufficiently reliable if corroborated by physical evidence or the testimony of other witnesses) *with* United States v. Rogers, 1 F.3d 341, 344 (5th Cir. 1993) (finding sufficient indicia of reliability in a confidential informant's reports regarding the quantity of accused's drugs even without independent corroboration of the specific amounts alleged).

[66] *Compare* United States v. Sprauer, 358 Fed.Appx. 871, 872 (9th Cir. 2009) (district court's finding that a letter from the Department of Corrections had "sufficient indicia of reliability" reviewed for abuse of discretion) *with* United States v. Manis, 344 Fed.Appx. 160, 164 (6th Cir. 2009) (district court's admission of hearsay statements at sentencing reviewed for clear error).

[67] United States v. Hill, 4 M.J. 33, 37 n.18 (C.M.A. 1977).

much of the same information to the court-martial as would be contained in a [federal] presentence report, but . . . within the protections of an adversarial proceeding, to which rules of evidence apply."[68] However, the only mandatory information that the Rule requires to be introduced in sentencing is the accused's service data from the charge sheet.[69] Also, in military practice, the sentencing proceeding itself generally is held immediately after the announcement of findings, which promotes efficiency and finality. Finally, despite *Williams*, military practice applies the rules of evidence at the sentencing hearing (subject to the military judge's ability to relax the rules for the defense). Whether or not required due to members sentencing, the application of the full rules of evidence to the sentencing proceeding has been cited as both unnecessary and contrary to the ultimate ends of military justice.[70]

6. Recommendation and Justification

Recommendation 53.1: Amend Article 53 to require sentencing by a military judge in all non-capital general and special courts-martial.

This proposal would present an opportunity for military judges to fashion appropriate sentences based on all relevant information available about the accused and the circumstances surrounding the offenses of which he is convicted, which would align military practice more closely to federal civilian practice.

In addition, the proposed changes would conform military sentencing standards to the practice in the vast majority of state courts, as reflected in the ABA Standards for Criminal Justice in Sentencing, which state: "Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. The jury's role in a criminal trial should not extend to determination of the appropriate sentence."[71]

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[68] 2012 MCM, app. 21, p. 72 (Analysis of RCM 1001(b)).

[69] *Id.*, R.C.M. 1001(b)(1).

[70] *See, e.g.*, Vowell, *supra* note 1, at 89 ("The current rules for admissibility of evidence at the sentencing phase of a court-martial are an attempt to engraft the full measure of constitutional due process and confrontation protections from the findings phase without ever determining if such protections are either essential to our system of justice or constitutionally required."); Lovejoy, *supra* note 1, at 35-36 ("[T]he Military Rules of Evidence severely limit the evidence members may be exposed to. Consequently, the government's ability to offer substantial evidence about the accused or the offense often is frustrated and the resultant sentence is based on little or no information about the accused or the offense. Moreover, it is the accused and not the government who controls the amount and type of evidence that the government may introduce regarding the accused's background and character. If the accused has a bad record, he or she can keep this from the members by not 'opening the door' for the government by introducing any good character evidence. Conversely, if he or she has a good background, the defense can present a great variety of evidence in extenuation and mitigation.").

[71] ABA STANDARDS, *supra* note 47, at 18-1.4.

This proposal would allow reforms in the sentencing process in general and special courts-martial that are impractical absent judge-alone sentencing. Specifically:

Judge-alone sentencing would allow for changes in the rules and procedures pertaining to sentencing that would expand the range of evidence and information provided to the sentencing authority to adjudge an appropriate sentence and increase the transparency of the sentencing process.

Judge-alone sentencing would allow for victim-impact statements to be introduced and used in the sentencing proceeding in the same manner as in civilian courts, and would allow for incorporation of victim impact statement procedures directly into R.C.M. 1001, the rule governing sentencing proceedings.

Judge-alone sentencing would allow for expansion of R.C.M. 1002 and the implementation of sentencing guidance similar to the "sentencing factors" used to guide the sentencing discretion of federal judges under 18 U.S.C. § 3553(a). Such a rule would promote greater consistency and uniformity among sentencing authorities with respect to the goals of military sentencing and the factors that must be considered and balanced in each individual case.

Judge-alone sentencing would eliminate the need for member instructions before sentencing. These instructions, which are imperative in a members sentencing system, often give rise to objections and can sometimes result in sentences being vacated on appeal.

Judge-alone sentencing would allow for a shift to segmented sentencing, where the military judge would consider an appropriate sentence for each offense rather than an overall sentence based on the combined offenses. (This proposal is discussed in detail in the section of this Report concerning Article 56.) In a members' sentencing system, panel voting requirements and the need to determine whether periods of confinement run consecutively or concurrently make segmented sentencing impractical.

Judge-alone sentencing would enhance review of sentence determinations by appellate courts. In a members sentencing system, appellate review of such determinations is not possible, as a panel cannot be called upon to explain how it arrived at a particular sentence. This would intrude upon the members' sentencing deliberations, and potentially subject the members to allegations of improper influence. More problematically, each member of a panel may vote for a particular sentence for different reasons.

Recommendation 53.2: Amend Article 53 to provide that, in cases where the accused may be sentenced to death, the members shall participate in the sentence determination consistent with federal civilian practice.

This proposal would better align military sentencing practice in capital cases with the practice in federal district courts under 18 U.S.C. §§ 3593-94. Under the proposal, a panel would determine whether the accused should be sentenced to death, to life without eligibility for parole, or to some lesser sentence for capital offenses. The panel's sentence determination with respect to death or life without eligibility of parole would be binding on

the military judge. The military judge would determine all other punishments (e.g. reduction, forfeitures, discharge), and in cases where the panel voted for a sentence less than life without parole, the judge would determine the entire sentence.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by incorporating sentencing practices used in U.S. district courts, and almost all state jurisdictions. The proposal draws upon the experience of members and considers a broad range of information to arrive at its final recommendation. This proposal also considers the recommendations of the Response Systems Panel to Adult Sexual Assault Crimes Panel.

This proposal supports MJRG Operational Guidance by employing the standards and procedures of the civilian sector insofar as practicable, by promoting justice and enhanced efficiency during the sentencing phase of the court-martial. With respect to sentencing in capital cases, this proposal relates to other proposals in this Report that also address capital cases, including the proposals relating to Article 52 (requiring a unanimous finding of guilt); Article 56 (exempting capital cases from sentencing parameters and criteria), and Article 27 (requiring learned counsel, to the greatest extent practicable, for death penalty cases, including during the sentencing phase).

8. Legislative Proposal

SEC. 716. FINDINGS AND SENTENCING.

Section 853 of title 10, United States Code (article 53 of the Uniform Code of Military Justice), is amended to read as follows:

"§853. Art. 53. Findings and sentencing

"(a) ANNOUNCEMENT.—A court-martial shall announce its findings and sentence to the parties as soon as determined.

"(b) SENTENCING GENERALLY.—(1) Except as provided in subsection (c) for capital offenses, if the accused is convicted of an offense in a trial by general or special court-martial, the military judge shall sentence the accused. The sentence determined by the military judge constitutes the sentence of the court-martial.

"(2) If the accused is convicted of an offense in a trial by summary court-martial, the court-martial shall sentence the accused.

"(c) SENTENCING FOR CAPITAL OFFENSES.—(1) In a capital case, if the accused is convicted of an offense for which the court-martial may sentence the accused to death—

"(A) the members shall determine whether the sentence for that offense shall be death, life in prison without eligibility for parole, or a lesser punishment determined by the military judge; and

"(B) the military judge shall sentence the accused for that offense in accordance with the determination of the members under subparagraph (A).

"(2) In accordance with regulations prescribed by the President, the military judge may include in any sentence to death or life in prison without eligibility for parole other lesser punishments authorized under this chapter.".

9. Sectional Analysis

Section 716 would amend Article 53 to provide for judicial sentencing in all general and special courts-martial. This change would better align military sentencing practice with federal civilian sentencing practice, as well as the practice in the majority of state jurisdictions. Judicial sentencing would create the opportunity for greater uniformity and consistency in court-martial sentences, enhanced efficiency and cost-savings, and would facilitate further reforms in military sentencing practices and procedures.

Article 53(c), as amended, would provide that, for capital offenses, members will determine whether the sentence shall include death, life without eligibility for parole, or such other lesser punishments as may be determined by the military judge. The military judge would sentence the accused in accordance with the determination of the members, including to other lesser punishments in accordance with regulations prescribed by the President.

Implementing rules would address procedures for sentencing proceedings and sentence determination in the context of judge-alone sentencing, including with respect to: releasing the members, subject to recall, after the findings are announced in a non-capital case; the admissibility of sentencing information offered by the parties and the grounds for objection to such information; the rights of victims to participate in sentencing proceedings; the use of victim impact statements during sentencing; the duties of trial and defense counsel before and during the proceeding; the rules and factors to guide military judges in their sentence determinations (similar to 18 U.S.C. § 3553(a)); and rules pertaining to appellate review of military judge sentence determinations and findings.

Article 53a (New Provision) – Plea Agreements
10 U.S.C. § 853a

1. Summary of Proposal

This proposal would create a new statute, transferring the authority for plea agreements—currently referred to as "pretrial agreements"—from Article 60 (Action of Convening Authority) to a new Article 53a (Plea Agreements). The proposed statute would provide basic rules concerning: (1) the construction and negotiation of plea agreements concerning the charges, the sentence, or both; (2) the military judge's determination of whether to accept a proposed plea agreement; and (3) the operation of plea agreements containing sentence limitations with respect to the military judge's sentencing authority. This proposal is related to the proposals in this Report to amend Articles 16, 53, 56, and 60 to allow for judge-alone sentencing in all non-capital cases, to establish sentencing parameters and criteria, and to move to an "entry of judgment" post-trial procedure model. Part II of the Report will provide more detailed implementing rules and procedures for the new statute.

2. Summary of the Current Statute

Currently, three articles in the UCMJ provide statutory authority for the government to negotiate binding agreements with a military accused concerning the charges to be referred to court-martial, the level of court-martial or other disciplinary proceeding to be convened, and the sentence that may be approved on the charges. Article 60 provides convening authorities with "the authority to approve, disapprove, commute, or suspend the sentence adjudged by the court-martial in whole or in part pursuant to the terms of [a] pre-trial agreement." Because courts-martial are transitory in nature, all plea agreements that contain binding sentence limitations derive their authority from this statute. In addition, Articles 30 and 34 vest discretion in convening authorities to dispose of charges and specifications against an accused "in the interest of justice and discipline," including by referring (or not referring) the charges to court-martial for trial. These articles are the basis of all agreements concerning disposition of the charges and specifications in a particular manner or to a particular forum in exchange for the accused's plea and other concessions.

3. Historical Background

Although there were no specific statutory or regulatory provisions governing the use of plea agreements in courts-martial until 1984, these agreements have been a part of military practice at least as far back as 1953. At that time, the Assistant Judge Advocate General of the Army, Major General Franklin P. Shaw, successfully proposed the use of plea agreements to help relieve a military justice system that was over-worked and over-

clogged as the result of two major wars.[1] That year, the Court of Military Appeals gave an initial non-committal acknowledgement of the use of plea agreements,[2] and it began to issue decisions that shaped plea-bargaining practice shortly thereafter.[3] By the end of the decade, a reference to plea-bargaining had been inserted into the MCM,[4] and the practice of using plea agreements to secure convictions—the "adoption of [which] was not an altruistic act, but a pragmatic decision to avoid drowning in a sea of litigation"[5]—had achieved widespread acceptance within the Army, Navy, and Coast Guard. The Air Force, however, continued to prohibit their use until 1975.[6]

In the absence of statutory and regulatory guidance on plea agreements during most of the formative years under the UCMJ, the rules for their use in courts-martial developed primarily through case law. In the mid-1950s, and from the late 1960s through the 1970s, plea agreements were looked upon with substantial skepticism, and terms that are now commonplace were subjected to severe appellate scrutiny.[7] Even terms that were found permissible were accepted with some degree of derision. For example, an agreement calling for trial by military judge alone was allowed but had "the appearance of evil,"[8] and a term prohibiting the accused from engaging in future misconduct was allowable but not "proper."[9] When the Rules for Courts-Martial were adopted in 1984, the rules concerning

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[1] Col. Carlton L. Jackson, *Plea-Bargaining in the Military: An Unintended Consequence of the Uniform Code of Military Justice*, 179 MIL. L. REV. 1, 4 (2004).

[2] United States v. Gordon, 10 C.M.R. 130, 132 (C.M.A. 1953) ("While we express no view relative to the desirability or feasibility of such a practice before courts-martial, we observe that it has the sanction of long usage before the criminal courts of the Federal and state jurisdictions.").

[3] *See, e.g.*, United States v. Allen, 25 C.M.R. 8, 11 (C.M.A. 1957) ("If [an accused] enters into a pretrial agreement in regard to his plea with the [convening authority], the agreement cannot transform the trial into an empty ritual.").

[4] *See* MCM 1951, Part. XII, ¶70b, (1951) [hereinafter 1951 MCM], *as amended in* Manual for Courts-Martial, United States 1959, Pocket Part, at 39-40 (1960).

[5] Jackson, *supra* note 1, at 4. "Between 1952 and 1956, the guilty plea rate in Army general courts-martial rose from less than one percent to sixty percent. This allowed staff judge advocates to substantially reduce general courts-martial processing times, enabling them to process 11,168 general courts-martial in FY 1953, and then catch their breath as the number of such trials dropped to 7,750 in 1956. By 1958, this combination of increased guilty pleas and decreased general courts-martial reduced the workload of the Army Board of Military Review enough to eliminate three of its seven panels of appellate judges." *Id.* at 4-5.

[6] *Id.* at 4.

[7] *Compare* United States v. Cummings, 38 C.M.R. 174, 177 (C.M.A. 1968) (holding that waiver of speedy trial "has no place in any pretrial agreement" and that pretrial agreements should "concern themselves with nothing more than bargaining on the charges and sentence, not with ancillary conditions . . .") *with* United States v. Rivera, 46 M.J. 52, 54 (C.A.A.F. 1997) (enforcing any agreement not prohibited by the rules); *see* Jackson, *supra* note 1, at 35-39; *see also* Maj Stefan Wolfe, *Pretrial Agreements: Going Beyond the Guilty Plea*, 2010 ARMY LAW. 27, 29 (Oct. 2010) ("In the initial years of the UCMJ, courts were extraordinarily paternalistic in reviewing pretrial agreements.").

[8] United States v. Schmeltz, 1 M.J. 8, 11 (C.M.A. 1975).

[9] United States v. Dawson, 10 M.J. 142, 148-49 (C.M.A. 1981).

permissible and prohibited pretrial agreement terms and conditions reflected the prevailing case law at the time.[10]

Because of the unique role of the convening authority in military justice practice, the rules and procedures applicable to plea agreements concerning the sentence to be adjudged and approved developed much differently than in the federal civilian system. Under applicable case law and rules, the military judge's determination of an appropriate sentence must be independent, without prior reference to any sentence agreement between the convening authority and the accused.[11] To accommodate this, plea agreements are divided into two parts: the first part of the agreement contains the agreement's terms and conditions; the second part contains the sentence limitations (the "cap" or "quantum"). The military judge is prohibited from examining Part 2 of the agreement until after announcing the adjudged sentence.[12]

This practice results from a confluence of two UCMJ Articles. First, Article 60 gives convening authorities discretion to decrease adjudged sentences, but it prohibits them from increasing sentences. Thus, even if the parties were to agree in advance to a specific sentence or sentence range, the convening authority would be powerless to increase any adjudged sentence to conform to the agreement. Second, under a practice that was developed before the establishment of military judges in 1968, the sentencing authority cannot be informed in advance of a sentence limitation because that would be tantamount to allowing the court to be influenced by the convening authority's view on an appropriate sentence, in violation of Article 37's prohibition on unlawful command influence.

In short, in military plea-bargaining practice, if the sentence adjudged at trial is below the sentence "cap" agreed to by the parties—a cap that is not disclosed to the sentencing authority at trial—the accused receives the lower sentence, the sentence adjudged at trial.

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[10] R.C.M. 705(c) (1984). *See* United States v. Thomas, 6 M.J. 573 (A.C.M.R. 1978) (finding term in pretrial agreement requiring the accused to enter into a stipulation of fact was not an illegal collateral condition); United States v. Reynolds, 2 M.J. 887, 888 (A.C.M.R. 1976) (finding a provision requiring the accused to testify truthfully in other proceedings to be permissible); United States v. Callahan, 8 M.J. 804, 806 (N.M.C.M.R. 1980) (allowing a term requiring that the accused pay cash restitution to victims acceptable and cautioning against restitution "in-kind," such as labor); United States v. Dawson, 10 M.J. 142, 150 (C.M.A. 1982) (approving 'no misconduct' provision in plea deal, but holding that the CA must give accused due process before setting aside sentence limitation); United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982) (finding that it is permissible to waive the Article 32 Investigation as part of a pretrial agreement); United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975) (approving a plea deal in which the accused was required to request trial by judge alone); United States v. Mills, 12 M.J. 1 (C.M.A. 1981) (allowing the accused to waive Government production of sentencing witnesses as part of pretrial agreement).

[11] United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976) ("Inquiry into the actual sentence limitations specified in the plea bargain should be delayed until after announcing sentence where the accused elects to be sentenced by the military judge rather than a court with members"); *see* R.C.M. 910(f)(3) ("If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge-alone the military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.").

[12] *See* R.C.M. 910(f)(3).

But if the sentence adjudged at trial is above the sentence cap agreed to by the parties, the accused gets the benefit of the sentence cap, because the convening authority is prohibited from approving any sentence above the agreed upon cap. This system—which was not planned by the drafters of the UCMJ, but which rather evolved from a confluence of statutory structure, case law, and procedural rules over the course of several decades—has come to be known, and criticized, as "beat the deal" plea-bargaining.[13]

4. Contemporary Practice

Today, the use of plea agreements to secure convictions in exchange for sentence caps and other concessions is standard practice throughout the services—though service practices with respect to standard terms, conditions, and restrictions in agreements vary.[14] In addition to the statutory provisions concerning plea agreements in Article 60, the President has prescribed two rules controlling their use, acceptance, and effect in court-martial cases. R.C.M. 705 (Pretrial agreements) provides specific guidance on the use, structure, and effect of pretrial agreements, including permissible and prohibited terms and conditions and the prohibition on disclosing the existence of a pretrial agreement to the panel.[15] Under the rule, "The decision whether to accept or reject an offer [of the accused to enter into a pretrial agreement] is within the sole discretion of the convening authority."[16] R.C.M. 910 (Pleas) implements Article 45, and governs the plea process itself, including the duties of the military judge to advise the accused properly, to ensure the plea is voluntary and accurate, to ensure the accused understands the terms and effect of any pretrial agreement, and to issue findings appropriately upon acceptance of the plea.[17] Under the rule, the military judge may strike any provisions in a pretrial agreement that are prohibited by R.C.M. 705(c)(1) or that "violate appellate case law, public policy, or notions of fundamental fairness."[18]

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[13] *See, e.g.*, Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39, 46 (2009) (criticizing "beat the deal" plea-bargaining as inherently slanted in favor of the convicted servicemember).

[14] *See, e.g.*, AIR FORCE INSTR. 51-201, Administration of Military Justice (6 June 2013) [hereinafter AFI 51-201], at 8.4.1–8.4.3 (setting forth restrictions on the use of pretrial agreements that differ from the practice in the other services).

[15] R.C.M. 705(b)-(e).

[16] R.C.M. 705(d)(3) (emphasis added); *see also* United States v. Callahan, No. 200100696, 2003 CCA LEXIS 165, at n.3 (N-M Ct. Crim. App. July 30, 2003) ("this Court gives deference to a CA's decision on the appropriate disposition of charges or a decision regarding the appropriate limitations of punishment agreed to in a pretrial agreement as these decisions are also exercises of *prosecutorial* discretion."). *Cf.* FED. R. CRIM. P. 11(c)(3)(A) ("... the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.").

[17] R.C.M. 910(a)-(j).

[18] United States v. Thomas, 60 M.J. 521, 528 (N-M Ct. Crim. App. 2004). In some cases, military courts have held that the presence of an impermissible term requires nullification of the entire pretrial agreement and the authorization of a rehearing. *See, e.g.*, United States v. Holland, 1 M.J. 58, 60 (C.M.A. 1975). In most cases,

5. Relationship to Federal Civilian Practice

In both military practice and federal civilian practice, the parties are allowed to plea-bargain on the charges, the sentence, or both. Both systems rely on plea-bargaining to efficiently administer justice, and both systems provide safeguards to ensure the accused is not coerced by the government into signing a plea agreement that does not represent the accused's actual guilt, or that exaggerates his or her wrongdoing. The Supreme Court recognizes the federal plea-bargaining process provides systemic benefits, including facilitating pleas and speeding the process of rehabilitation; increasing the certainty of both parties in the results; protecting society from individuals who otherwise might be out on bail pending completion of their trials; and helping to conserve limited judicial and prosecutorial resources.[19] These benefits are applicable to plea-bargaining in the military justice system, as well. The two systems differ in the area of sentence agreements.

In federal civilian practice, the parties can bargain on sentence by agreeing that a specific sentence or sentencing range is appropriate for the offense, which may or may not be binding on the judge's sentencing discretion.[20] If the agreement is one that binds the sentencing discretion of the sentencing judge, after reviewing the agreement, the judge has three options: (1) accept the agreement and adjudge the sentence (or within the limits of the sentence range) agreed to by the parties; (2) reject the agreement entirely; or (3) defer the decision until after review of the presentence report.[21] Because the sentence agreement is binding, the parties—and any victim of the offense—are able to know in advance the upper and lower bounds of the sentence that is likely to be adjudged. If the judge rejects an agreement, that rejection is reviewable (at the request of the defendant) for abuse of discretion.[22] The federal rule states that "[t]he court must not participate in these [plea agreement] discussions."[23]

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however, an impermissible term may be stricken without impairing the remainder of the agreement. *See, e.g.*, United States v. McLaughlin, 50 M.J. 217, 218-19 (C.A.A.F. 1999).

[19] Blackledge v. Allison, 431 U.S. 63, 71 (1977).

[20] *See* FED. R. CRIM. P. 11(c)(1)(C). The Rule 11(c)(1)(C) agreement is one of two types of sentence agreements in federal practice. Under Rule 11(c)(1)(B), the prosecutor makes a recommendation to the judge that a particular sentence or sentencing range is appropriate. The recommendation is not binding on the judge's sentencing discretion. Whether prosecutors use the recommendation-type sentence agreement under Rule 11(c)(1)(B) or the binding "C" sentence agreement is largely a function of local practice, as usage varies by district. In recent years, type "C" agreements have become more favored. *See generally* Wes R. Porter, *The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post*-Booker, 37 WM. MITCHELL L. REV. 469 (2011); *see also* Barry Boss and Nicole L. Angarella, *Negotiating Federal Plea Agreements Post*-Booker*: Same As It Ever Was?*, 2 CRIM. J. 22 (2006).

[21] FED. R. CRIM. P. 11(c)(3)(A).

[22] *See, e.g.*, In re Morgan, 506 F.3d 705, 710-711 (9th Cir. 2007). Federal judges exercise wide discretion with respect to accepting or rejecting binding sentence agreements. *See, e.g.*, Ellis v. United States District Court, 356 F.3d 1198, 1209 (9th Cir. 2004) (upholding a district court's rejection of a sentence agreement where the court "viewed the sentence resulting from the plea bargain as not in the best interest of society, given [the accused's] criminal history and the circumstances of the offense charged."); State v. Conger, 325 Wis.2d 664, 797 N.W.2d 341 (2010) ("[A] circuit court must review a plea agreement independently and may, if it

In the federal system, use of "specific sentence/sentencing range" plea agreements predates the adoption of the Federal Sentencing Guidelines in 1984. Since their adoption, the Guidelines have provided a framework—in addition to the other sentencing factors under 18 U.S.C. § 3553(a)—for analyzing the discretionary acceptance/rejection of sentence agreements by trial judges.[24] Under the Guidelines, a court may impose the agreed-upon sentence only if it is satisfied that the sentence is either "within the applicable guideline range" or "departs from the applicable guidelines range for justifiable reasons."[25]

6. Recommendation and Justification

Recommendation 53a.1: Enact a new Article 53a to provide statutory authority and basic rules for: (1) the construction and negotiation of charge and sentence agreements; (2) the military judge's determination of whether to accept a proposed plea agreement; and (3) the operation of sentence agreements with respect to the military judge's sentencing authority.

Under this Report's proposal to amend Article 60 to establish an "entry of judgment" model for the military judge's sentence determinations, a new statutory authority for the convening authority's ability to enter into binding plea agreements with the accused will be necessary. This proposal would create a new statute to transfer the authority currently in Article 60 into a new article, while providing more robust statutory rules concerning the construction and operation of plea agreements in the adjudication process.

Part II of the Report will provide implementing rules for this proposed statute, with particular emphasis on the opportunity for negotiated sentencing ranges. Under this proposal, if the agreement contained a negotiated sentencing range or sentence limitation, the military judge would enter a sentence in accordance with the agreement unless the judge determined the negotiated sentencing range or sentence limination to be plainly unreasonable or otherwise unlawful.

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appropriately exercises its discretion, reject any plea agreement that does not, in its view, serve the public interest"). However, the discretion of district judges to reject sentence agreements "is not unbounded," and courts abuse their discretion when they fail to "consider individually every sentence bargain presented to them and . . . set forth, on the record, [their] reasons in light of the specific circumstances of the case for rejecting the bargain." *In re Morgan*, 506 F.3d at 712; *accord* United States v. Robertson, 45 F.3d 1423 (10th Cir. 1995) (noting that the requirement for judges to set forth the reasons for their rejection of a plea agreement "helps insure the court is aware of and gives adequate deference to prosecutorial discretion" and "is the surest, indeed the only way to facilitate appellate review of rejected plea bargains.").

[23] FED. R. CRIM. P. 11(c)(1). *See* United States v. Baker, 489 F.3d 366 (D.C. Cir. 2007) (district court violated rule when it impermissibly engaged in lengthy plea discussion with defendant concerning sentence length).

[24] *See* United States v. Wright, 291 F.R.D. 85, 88 (E.D. Penn. 2013) ("In considering . . . plea agreements, courts follow the framework provided by the United States Sentencing Guidelines, which are now advisory. An agreement should be accepted 'only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence departs from the applicable guideline range for justifiable reasons.'") (citing U.S. Sentencing Guidelines Manual § 6B1.2 cmt. (2012)). *See generally* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, & ORIN KERR, CRIMINAL PROCEDURE § 21.1(h) (3d ed. 2013).

[25] U.S.S.G. § 6B1.2(b)-(c).

Part II of the Report will also address procedures to allow the victim to be heard by the convening authority before a decision on a plea agreement. Plea agreements are one of the primary tools convening authorities utilize to dispose of charges against an accused; however, currently, R.C.M. 705 does not address the role of the victim in this decision. The implementing rules that will be proposed in Part II of the Report will address this gap in the current rules.

Recommendation 53a.2: In the new Article 53a, provide that the military judge shall accept any lawful sentence agreement submitted by the parties, except that: (1) in the case of an offense with a sentencing parameter under Article 56, the military judge may reject the agreement only if it proposes a sentence that is both outside the sentencing parameter and plainly unreasonable; and (2) in the case of an offense without a sentencing parameter, the military judge may reject the agreement only if it proposes a sentence that is plainly unreasonable.

This proposal would better align military plea-bargaining practice with federal civilian plea-bargaining practice, and would result in increased efficiencies and greater bargaining power for both parties.

The proposed "plainly unreasonable" standard would ensure that military judges are appropriately constrained in their ability to reject sentence agreements entered into by the parties, while at the same time providing military judges the authority to reject agreements they determine are unacceptable, consistent with federal civilian practice. The decision of a military judge to reject an agreement would be reviewable for an abuse of discretion.

This proposal takes into account the Response Systems to Adult Sexual Assault Crimes Panel's recommendation to "study whether the military plea bargaining process should be modified."[26]

Part II of the Report will address the rules implementing Article 53a, including a requirement that if the military judge holds that a sentence agreement is plainly unreasonable, the judge must set forth on the record the findings of fact and conclusions of law supporting that determination.

7. Relationship to Objectives and Related Provisions

This proposal is related to the proposals concerning Articles 16, 53, 56, and 60.

This proposal would support the GC Terms of Reference by incorporating, insofar as practicable, plea-bargaining practices and procedures applicable in federal district court into military justice practice. This proposal also supports the GC terms of Reference by considering the recommendations of the Response Systems Panel.

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[26] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 49 (June 2014) (Recommendation 117).

8. Legislative Proposal

SEC. 717. PLEA AGREEMENTS.

Subchapter VII of chapter 47 of title 10, United States Code, is amended by inserting after section 853 (article 53 of the Uniform Code of Military Justice) the following:

"§853a. Art. 53a. Plea agreements

"(a) IN GENERAL.—(1) At any time before the announcement of findings under section 853 of this title (article 53), the convening authority and the accused may enter into a plea agreement with respect to such matters as—

"(A) the manner in which the convening authority will dispose of one or more charges and specifications; and

"(B) limitations on the sentence that may be adjudged for one or more charges and specifications.

"(2) The military judge of a general or special court-martial may not participate in discussions between the parties concerning prospective terms and conditions of a plea agreement.

"(b) ACCEPTANCE OF PLEA AGREEMENT.—Subject to subsection (c), the military judge of a general or special court-martial shall accept a plea agreement submitted by the parties, except that—

"(1) in the case of an offense with a sentencing parameter under section 856 of this title (article 56), the military judge may reject a plea agreement that proposes a sentence that is outside the sentencing parameter if the military judge determines that the proposed sentence is plainly unreasonable; and

"(2) in the case of an offense with no sentencing parameter under section 856 of this title (article 56), the military judge may reject a plea agreement that proposes a sentence if the military judge determines that the proposed sentence is plainly unreasonable.

"(c) LIMITATION ON ACCEPTANCE OF PLEA AGREEMENTS.—The military judge of a general or special court-martial shall reject a plea agreement that—

"(1) contains a provision that has not been accepted by both parties;

"(2) contains a provision that is not understood by the accused; or

"(3) except as provided in subsection (d), contains a provision for a sentence that is less than the mandatory minimum sentence applicable to an offense referred to in section 856(b)(2) of this title (article 56(b)(2)).

"(d) LIMITED CONDITIONS FOR ACCEPTANCE OF PLEA AGREEMENT FOR SENTENCE BELOW MANDATORY MINIMUM FOR CERTAIN OFFENSES.—With respect to an offense referred to in section 856(b)(2) of this title (article 56(b)(2))—

"(1) the military judge may accept a plea agreement that provides for a sentence of bad conduct discharge; and

"(2) upon recommendation of the trial counsel, in exchange for substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, the military judge may accept a plea agreement that provides for a sentence that is less than the mandatory minimum sentence for the offense charged.

"(e) BINDING EFFECT OF PLEA AGREEMENT.—Upon acceptance by the military judge of a general or special court-martial, a plea agreement shall bind the parties and the military judge.".

9. Sectional Analysis

Section 717 would create a new section, Article 53a, transferring the statutory authority for plea agreements from Article 60 to the new Article 53a. The proposed new article would provide basic rules for: (1) the construction and negotiation of plea agreements concerning the charge and the sentence; (2) allowing the convening authority and the accused to enter into binding agreements regarding the sentence that may be adjudged at a court-martial; and (3) the military judge's determination of whether to accept a proposed plea agreement in a general or special court-martial. Under the amended statute, the military judge would review the entire agreement, including any negotiated sentence agreement, prior to determining whether to accept the agreement and adjudge the sentence. If the agreement contains a negotiated sentencing range, the military judge would enter a sentence within that range unless the judge determines that the negotiated sentencing range is plainly unreasonable or otherwise unlawful. The new statute would preserve current law pertaining to plea agreements involving offenses with mandatory minimum sentences.

Implementing rules for the new Article 53a would address a number of issues concerning plea agreements, including the structure and procedures for sentence agreements; the opportunity for negotiated sentencing ranges; a requirement that, if the military judge determines that a sentence agreement is plainly unreasonable, the judge must set forth on the record the findings of fact and conclusions of law supporting that determination; plea agreements in summary courts-martial; and the role of the victim in plea agreements, with particular emphasis on the rules structuring the convening authority's decision-making with respect to acceptance of plea agreements proposed by the defense.

Article 54 – Record of Trial
10 U.S.C. § 854

1. Summary of Proposal

This proposal would amend Article 54 to facilitate the use of modern court reporting technology in the recording, certification, and distribution of court-martial records and would facilitate the provision of courts-martial records to victims of crime.

2. Summary of the Current Statute

Article 54 requires a complete record of the proceedings and testimony: (1) in each general court-martial in which the sentence includes death, dismissal, a punitive discharge, or a punishment in excess of that which could be adjudged by special court-martial; and (2) when the adjudged sentence includes a punitive discharge, confinement for more than six months, or forfeitures of pay for more than six months. Under the statute, the military judge must authenticate the record of each general court-martial, subject to exceptions when the judge is unable to authenticate the record. The records of special and summary courts-martial are authenticated under rules prescribed by the President. Article 54(d) provides that a copy of the record of each general and special court-martial must be given to the accused as soon as it is authenticated. In a case involving rape, sexual assault, or another offense under Article 120, Article 54(e) provides that the record also must be given to the victim of the offense, without charge, if the victim testified at the proceedings.

Article 54 authorizes the President to prescribe rules and procedures concerning what must be included in courts-martial records of trial, and focuses on the authentication requirements for the record in each court-martial proceeding. The specific requirements for the preparation and content of records of trial are defined in Article 1(14) and the implementing rules. Article 1(14) defines "record" as an official written transcript, written summary, or other writing relating to the proceedings; or an official audiotape, videotape, or similar material from which sound, or sound and visual images depicting the proceedings may be reproduced. R.C.M. 1103 primarily implements Article 54.

3. Historical Background

When Congress enacted the UCMJ in 1950, Article 54 provided that each general court-martial was to keep a separate record of its proceedings, with a requirement that both the president of the court-martial and the law officer authenticate the record.[1] The President implemented this provision in the Manual for Courts-Martial with a requirement for a

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 512 (photo reprint 1920) (2d ed. 1896) (noting that the authentication requirement reflected practice dating from the 19th Century, in which the record was authenticated by both the president of the court-martial and the trial judge advocate).

verbatim record in general courts-martial.[2] In addition, subsection (b) of the original statute authorized the President to prescribe the contents and authentication requirements for special courts-martial. The President implemented this provision by requiring a verbatim transcript in special courts-martial that adjudged a bad-conduct discharge, and a summarized record in all other special courts-martial, along with a requirement for authentication of special courts-martial by the president of the court-martial and the trial counsel.[3] The legislation also directed that a copy of the record of the proceedings should be provided to the accused, with copies of all documentary exhibits.[4] In the Military Justice Act of 1968, Congress codified the records requirement in special courts-martial, and provided for authentication of the record of trial in general courts-martial by the signature of the military judge.[5]

In 1983, Congress amended Article 54 to include a new subsection (c) that required a "complete" record.[6] In the same legislation, Congress included a new definition in Article 1(14) for the term "record."[7] The "record" could include "an official audiotape, videotape, or similar material from which sound or sound and visual images, depicting the proceedings may be reproduced."[8] The purpose of this change was to "reflect modern trends by authorizing use of videotape and audiotape as a means of recording the proceeding in order to take advantage of the developing technology on use of such materials to serve as a record of trial or depositions."[9] Congress was concerned that the limitation on the record of trial to be in writing did not permit the military to "take advantage of the developing technology on use of audiotape, videotape, and similar materials to serve as a record of trial."[10] The Senate Report indicated that the Manual for Courts-Martial should provide procedures enabling trial and defense counsel to obtain transcripts of audio or visual materials where they are entitled to the record in connection with the convening authority's action.[11]

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[2] MCM 1951, ¶82*b*.(1).

[3] MCM 1951, ¶83.

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 644 (1949).

[5] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[6] Military Justice Act of 1983, Pub. L. No. 98-209, § 6(c), 97 Stat. 1393.

[7] *Id.* at § 6(a). This change was enacted after *United States v. Barton*, 6 M.J. 16, 18 (C.M.A. 1978), in which the Court of Military Review held that videotapes could not be substituted for written or printed transcripts of trial proceedings. The court refused to review the proceeding because it determined that the videotapes did not constitute a "lawful record of trial."

[8] *Id.*

[9] S. REP. NO. 98-53, at 5-6 (1983).

[10] *Id.* at 25-26.

[11] *Id.*

The President implemented the 1983 amendments to Article 54 and Article 1(14) in R.C.M. 1103 of the 1984 MCM. The rule included a provision for recording courts-martial by videotape or audiotape, and also for preparation of a written record, with limited exceptions.[12] This preference for a written record was based on a consideration that written records would be easier to use and easier to produce in multiple copies.[13] In 2008, R.C.M. 1103 was changed to recognize that military exigencies could prevent preparation of a written transcript, in either its verbatim or summary form. In such cases, if an accurate record exists, the rule allows audiotape, videotape, or other material to be authenticated and forwarded in accordance with R.C.M. 1104 (Records of trial: Authentication; service; loss; correction; forwarding).

In NDAA FY 2012, Congress amended Article 54 to include a new subsection (e), similar to subsection (d), requiring that a copy of the record of court-martial proceedings be provided not only to the accused, but also to the victim in any case involving Article 120 offenses where the victim testified during the proceedings.[14] Under the statute, the record of the proceedings must be provided free of charge and as soon as the records are authenticated.

4. Contemporary Practice

The President has implemented Article 54 through R.C.M. 1103. Under current law, a "complete record" is required in each general and special court-martial in which the adjudged sentence included a dismissal or a bad-conduct discharge, or confinement or forfeitures greater than six months. R.C.M. 1103 defines a "complete record" as including a "verbatim transcript" of all sessions except sessions closed for deliberations and voting.[15] Summary courts-martial and special courts-martial with an adjudged sentence of less than six months and no bad-conduct discharge do not require a verbatim transcript, but may utilize a summarized report of the proceedings.[16] In addition, R.C.M. 1103 sets forth a list of "other matters" that must be included in the "complete record." The list includes, among other items, exhibits received in evidence, the charge sheet, and a copy of the convening order.[17] Currently, a complete record usually includes a substantially verbatim transcript, authenticated by a military judge.[18]

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[12] R.C.M. 1103(j).

[13] MCM, App. 21 (R.C.M. 1103, Analysis).

[14] NDAA FY 2012, Pub. L. No. 112-81, § 586(e), 125 Stat. 1298 (2011).

[15] R.C.M. 1103(b)(2)(D).

[16] R.C.M. 1103(b)(2)(C).

[17] R.C.M. 1103(b)(2)(D).

[18] R.C.M. 1103(b)(2)(B); *see* United States v. Davenport, 73 M.J. 373, 376 (C.A.A.F. 2014) (whether a record is complete and a transcript is verbatim are questions of law that the appellate court reviews *de novo*); *id.* at 377 (a verbatim transcript need not be word for word, but must be "substantially verbatim").

Generally, the record for a general or special court-martial begins as an audio file that is transcribed by a court reporter or transcription service.[19] The transcript is normally first reviewed and corrected by the trial counsel, followed by the defense counsel, and finally reviewed and authenticated by the military judge.[20] The authenticated record is then copied and forwarded to the accused and to any victim of an offense under Article 120 who testified at the proceedings. Copies are usually standard paper copies, but some jurisdictions provide scanned copies of authenticated records of trial on compact disks instead of, or in addition to, paper copies.

5. Relationship to Federal Civilian Practice

The procedure for creating, maintaining, and distributing records of trial in federal criminal trials differs substantially from military practice. In federal civilian practice, although a verbatim record is kept in most cases, it is not transformed into a written document unless there is a request from a party or an appellate court for a transcript of designated portions of the record or the full record.[21] The record is certified by the reporter, not the trial judge. There is no requirement for either the prosecutor or the trial judge to conduct a line-by-line review or otherwise authenticate the accuracy of the record.[22] To the extent that a question arises about the accuracy of a specific portion of the record, it is addressed through a motion for correction.[23]

6. Recommendations and Justification

Recommendation 54.1: Amend Article 54 to require certification of the record by a court reporter.

This proposal would align military practice with the practice in federal civilian courts by placing the responsibility for certification of the record on the court reporter rather than on the prosecutor or presiding judge.

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[19] R.C.M. 503(e)(3)(B). *See* R.C.M. 808 (Discussion).

[20] R.C.M. 1103(i)(1)(A).

[21] 28 U.S.C. § 753(b); FED. R. CRIM. P. 11(g); FED. R. APP. P. 10(a). The federal record on appeal consists of the original papers and exhibits filed in the district court, the transcript of proceedings ordered by the appellant—either the entire transcript or a partial transcript, if any—and a certified copy of the docket entries prepared by the district clerk. It is the appellant's duty to order from the reporter a transcript of any parts of the proceedings not already on file that the appellant considers necessary for the appeal.

[22] *See* Mayer v. Chicago, 404 U.S. 189, 194 (1971) (holding that the Constitution requires a record of sufficient completeness to allow consideration of what occurred at trial, but not necessarily a verbatim transcript); 28 U.S.C. § 753(b) (requiring that each session of court be recorded verbatim by shorthand, mechanical means, electronic sound recording equipment, or "any other method" subject to regulations and the judge's discretion, the district court judge electing the method of recording).

[23] FED. R. CRIM. P. 36; FED. R. APP. P. 10(e).

In Part II of this Report, the proposed amendments to the rules implementing Article 54 will address the opportunity to file a motion to correct the record, utilizing procedures similar to those available in the federal civilian courts.

Recommendation 54.2: Amend Article 54 to require a complete record in any general or special court-martial in which confinement or forfeitures exceed six months.

Article 54, which currently requires a "complete record" in all cases involving death, dismissal, or a discharge, contains an anomaly with respect to cases involving confinement. The current law requires a complete record in all special courts-martial involving confinement or forfeitures in excess of six months irrespective of whether the sentence includes a discharge, but does not require a complete record in similar general courts-martial unless the period of confinement or forfeitures is greater than 12 months.[24] This proposal would require a complete record anytime a sentence includes death, dismissal, discharge, or confinement or forfeitures in excess of six months. Thus, the proposal would eliminate any distinction between the types of court-martial, to include the anomaly where the requirements for a complete record are less stringent at a general court-martial than at a special court-martial. Part II of this Report will address the requirements for the record in other cases that are subject to review in the Court of Criminal Appeals.

As under current law, the requirements for a "complete" record will be set forth by the President in the R.C.M. Part II of the Report will address these rules, including the circumstances under which a written transcript will be prepared and the procedures for preparing a written transcript. In the near term, the rules will provide for the availability of a written transcript during the appellate process in the types of cases in which a written transcript is available under current military practice, subject to rules similar to the federal rule for requesting all or part of a transcript.[25]

Part II of the Report will also address the potential in the future for use in the appellate process of electronic transcriptions to the extent that the development and use of such technology for legal proceedings provides for increasing comfort and familiarity with electronic formats.

Recommendation 54.3: Amend Article 54 to provide all victims who testify at a court-martial with access to records of trial.

This proposal would amend Article 54 to provide that all victims who testify at court-martial would be entitled to access to the record of trial. Currently, only victims of sex-related offenses under Article 120 are entitled to such access.

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[24] In practice, R.C.M. 1103(b)(2)(B) requires a verbatim transcript in a general court-martial whenever the sentence exceeds six months.

[25] FED. R. APP. P. 10(b).

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by incorporating the practices used in federal district courts insofar as practicable in military practice. By allowing the services to certify a verbatim recording, whether that means audio, video, or any other method, the proposal will allow the military services to take advantage of developing technology, especially in the area of voice recognition software.

The proposal reflects an opportunity to reduce the need for review of written records, as a result of changes in appellate procedures recommended elsewhere in this Report. To the extent that the services decide to retain procedures not required by statute—especially for purposes of transition—they may choose to do so.

This proposal is related to the proposed changes in Articles 60, 66, and 69. The proposed amendments would streamline the preparation and distribution of the record of trial, in light of the convening authority's reduced scope of post-trial review. The proposals for Articles 66 and 69 recommend revising the current appellate system into an appeal of right model. A written transcript would be needed only to the extent necessary for the accused to determine whether to file an appeal, the government to respond to a filing, and the court to decide the appeal. While a verbatim transcript of the trial may be needed in many cases, it would not be needed in all cases.

8. Legislative Proposal

SEC. 718. RECORD OF TRIAL.

Section 854 of title 10, United States Code (article 54 of the Uniform Code of Military Justice), is amended—

(1) by striking subsection (a) and inserting the following:

"(a) GENERAL AND SPECIAL COURTS-MARTIAL.—Each general or special court-martial shall keep a separate record of the proceedings in each case brought before it. The record shall be certified by a court-reporter, except that in the case of death, disability, or absence of a court reporter, the record shall be certified by an official selected as the President may prescribe by regulation.";

(2) in subsection (b)—

(A) by striking "(b) Each special and summary court-martial" and inserting "(b) SUMMARY COURT-MARTIAL.—Each summary court-martial"; and

(B) by striking "authenticated" and inserting "certified";

(3) by striking subsection (c) and inserting the following:

"(c) CONTENTS OF RECORD.—(1) Except as provided in paragraph (2), the record shall contain such matters as the President may prescribe by regulation.

"(2) In accordance with regulations prescribed by the President, a complete record of proceedings and testimony shall be prepared in any case of a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months.".

(4) in subsection (d)—

(A) by striking "(d) A copy" and inserting "(d) COPY TO ACCUSED.— A copy"; and

(B) by striking "authenticated" and inserting "certified"; and

(5) in subsection (e)—

(A) by striking "involving a sexual assault or other offense covered by section 920 of this title (article 120)" in the first sentence and inserting "upon request,"; and

(B) by striking "authenticated" in the second sentence and inserting "certified".

9. Sectional Analysis

Section 718 would amend Article 54, which provides the basic rules and procedures for producing, authenticating, and distributing records of proceedings in general, special, and summary courts-martial. The amendments would facilitate the use of modern court reporting technology in the recording, certification, and distribution of court-martial records. The use of this technology would streamline preparation and distribution of the

record of trial in light of recent amendments that reduce or eliminate post-trial proceedings under Article 60. In addition, the proposed amendments would increase the availability of court-martial records to victims of crime.

The amendments to Article 54 would: (1) require the court reporter, instead of the military judge or the prosecutor, to certify the record of trial; (2) require a complete record of trial in any general or special court-martial if the sentence includes death, dismissal, discharge, or confinement or forfeitures for more than six months; and (3) provide all victims who testify at a court-martial with access to records of trial, eliminating the distinction in the statute that currently provides such access only to victims of sex-related offenses under Article 120.

Changes in the rules implementing Article 54 would address the opportunity to file a motion to correct the record, utilizing procedures similar to those available in the federal civilian courts. Implementing rules also would address the rules for providing a "complete" record of trial, including the circumstances under which a written transcript will be prepared and the procedures for preparing a written transcript. In the near term, the statute's implementing rules would provide for the availability of a written transcript during the appellate process in the types of cases in which a written transcript is available under current military practice, subject to rules similar to the federal rule for requesting all or part of a transcript. Implementing rules also would address the potential in the future for use in the appellate process of electronic transcriptions to the extent that the development and use of such technology for legal proceedings provides for increasing comfort and familiarity with electronic formats.

Subchapter VIII. Sentences

Article 55 – Cruel and Unusual Punishment Prohibited
10 U.S.C. § 855

1. Summary of Proposal

This Report recommends no change to Article 55. Part II of the Report will consider whether any changes are needed in the rules implementing Article 55.

2. Summary of the Current Statute

Article 55 prohibits any cruel and unusual punishment in the armed forces. Article 55 specifically prohibits the historical military punishments of flogging, branding, marking, or tattooing on the body. Also prohibited is the use of irons or handcuffs, except for the purpose of safe custody.

3. Historical Background

Article 55 was included in the UCMJ as enacted in 1950. It incorporated then-present Army and Navy provisions prohibiting flogging, branding, marking or tattooing as forms of punishment.[1] It has remained unchanged since the UCMJ's enactment.[2]

4. Contemporary Practice

Under current law, the primary test military appellate courts use for determining whether punishment qualifies as "cruel and unusual" is whether the conditions can be said to be cruel and unusual under contemporary standards of decency.[3] Such conditions include, but are not limited to: (1) conditions which result in a clear and serious deprivation of basic human needs; (2) conditions which deprive inmates of the minimal civilized measure of life's necessities; and (3) conditions which result in punishment grossly disproportionate to the inmate's offenses.[4] In practice, the President's limitation on authorized punishments in R.C.M. 1003 has made appellate litigation on what constitutes cruel and unusual punishment rare.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1087 (1949); *see also* Article 45 of the 1948 Articles of War; PROF. EDMUND MORGAN, TEXT OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY AS IT WILL APPEAR AFTER AMENDMENT BY H.R. 3687 AND S.1338 (star reprint) 19-20 (1947), *available at* http://www.loc.gov/mwg-internal/de5fs23hu73ds/progress?id=islDXo5-hxJA5Gp97zqfO1D7zPv-RrEpNdbfs1IeRQ, (last accessed 16 March 2015).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] United States v. Martinez, 19 M.J. 744, 748 (A.C.M.R. 1984) (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[4] *Martinez*, 19 M.J. at 748 (citing Weems v. United States, 217 U.S. 349, 367 (1910)).

5. Relationship to Federal Civilian Practice

Article 55 is similar to the Eighth Amendment of the Constitution, which states that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.[5]

6. Recommendation and Justification

Recommendation 55: No change to Article 55.

In view of the well-developed case law addressing Article 55's provisions, a statutory change is not necessary.

Part II of the Report will consider whether any changes are needed in the rules implementing Article 55.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[5] U.S. CONST. amend. VIII.

Articles 56-56a – Maximum and Minimum Limits & Sentence of Confinement for Life without Eligibility for Parole

10 U.S.C. §§ 856-56a

1. Summary of Proposal

This proposal would align court-martial sentencing procedures with this Report's proposal for judicial sentencing in all noncapital general and special courts-martial. The proposal would enable military sentencing to benefit from the experiences of state and federal civilian courts in sentencing reform, while adapting the lessons learned from those experiences to the special needs of the military justice system.

The sentencing reforms proposed by this Report are made possible by the amendments to Article 53 providing for judicial sentencing, and come in three parts.

First, as discussed in the proposal for Article 53, the current adversarial sentencing process (which utilizes many of the same procedural and evidentiary rules applicable during findings) would be modified to more closely align with the process used in civilian courts, in which all relevant information is presented to aid the judge in fashioning an appropriate sentence. Part II of this Report will set forth the rules for such sentencing proceedings, taking into account the interests of the government, the accused, and any victims in having a thorough, balanced, and transparent proceeding.

Second, this proposal would replace the current requirement to adjudge a unitary sentence, in which a single sentence is adjudged for all offenses for which there has been a finding of guilty without the need to identify which portions of the sentence are attributable to which offense. Under the proposal, which follows the practice used in most civilian proceedings, the judge would pronounce a distinct sentence for those portions of a sentence that can be segmented and attributed to a specific offense—confinement and fines—with a requirement to designate whether any segmented portions will run concurrently or consecutively in the sentence.

Third, this proposal implements sentencing parameters and criteria to guide the discretion of the military judge in determining a sentence for each guilty finding. This proposal would establish a Sentencing Parameters and Criteria Board to develop parameters and criteria. The sentencing parameters and criteria proposed by the Board would be subject to approval by the President. As in many civilian courts, a parameter for an offense would set a boundary on the judge's discretion, subject to a departure for case specific reasons set forth by the judge in the record. Sentencing parameters would not be required for those offenses for which it would be impracticable to set a parameter, such as unique military offenses that vary greatly in seriousness depending on the context. The Board would establish sentencing criteria for those offenses without parameters. The implementation of

parameters and criteria would draw upon best practices at the federal and state level, and would replace the current practice of adjudging sentences with little or no guidance.

This proposal provides for a four-year period to develop sentencing parameters and criteria. This four-year implementation period allows for the Board to collect and analyze sentencing data—especially the data made available after the implementation of segmented sentencing.

2. Summary of the Current Statute

Article 56 provides the authority for the President to set maximum punishments for UCMJ violations. The President has exercised this authority in two ways: First, the President has limited the types of punishments that may be imposed at a court-martial to those specified in R.C.M. 1003, which prohibits punishments other than reprimands, forfeitures, fines, reductions in grade, restriction, hard labor, confinement, punitive discharges, and death. Second, for most offenses, the President has limited the amount of confinement, forfeitures, or the type of punitive discharge that may be imposed. The President's authority is subject to any maximum or mandatory punishments Congress establishes in the UCMJ.

Article 56(b), added to the statute in 2014, mandates that an accused convicted of certain sex offenses (and attempts of those crimes), be discharged from the military with a dishonorable discharge or a dismissal. An enlisted accused who pleads guilty to rape or sexual assault may receive a bad-conduct discharge, in lieu of a dishonorable discharge, as a term of a plea agreement.

Article 56a authorizes the punishment of confinement for life without the possibility of parole any time confinement for life is an authorized punishment. A sentence to life without parole may be reduced only by: (1) the convening authority, pursuant to a pretrial agreement;[1] (2) the convening authority, upon recommendation of trial counsel after the accused has provided substantial assistance in another investigation or prosecution;[2] (3) the appellate courts;[3] (4) the Service Secretary (personally, and non-delegable);[4] or (5) through a pardon by the President.[5]

3. Historical Background

The sentencing procedures in courts-martial have changed substantially throughout the history of military law. Under the early Articles of War, sentences were determined by

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[1] 10 U.S.C. § 860(c)(4)(C).

[2] 10 U.S.C. § 860(c)(4)(B).

[3] 10 U.S.C. § 866(c); 10 U.S.C. § 867; 10 U.S.C. § 867a.

[4] 10 U.S.C. § 874(a).

[5] *See* Article 60(c)(4) (Action by the Convening Authority); Article 66(c) (Review by Court of Criminal Appeals); Article 67 (Review by the Court of Appeals for the Armed Forces); Article 67a (Review by the Supreme Court); U.S. CONST. art. II, § 2 (Presidential pardon power).

majority vote.[6] Although the Articles of War provided for several mandatory sentences,[7] most offenses were punished entirely within the discretion of the court-martial. In 1890, Congress authorized the President to establish maximum sentences in times of peace.[8]

When the UCMJ was enacted in 1950, Congress provided the President with the authority to promulgate rules on sentencing under Article 36; in Article 56, Congress specifically authorized the President to determine the maximum punishments for violations of the UCMJ.[9] As originally enacted, the only offenses in the UCMJ that included mandatory minimum sentences were premeditated murder (life in prison); felony murder (life in prison) and spying (mandatory death).[10] In 1960, Congress enacted Article 58a to establish mandatory reductions for the enlisted grades as a collateral effect of a court-martial sentence, subject to exceptions in Service regulations.[11] In 1996, Congress enacted Article 58b to require mandatory forfeitures, if not adjudged at trial, during certain periods of confinement.[12] In 1997, Congress enacted Article 56a, to provide for the punishment of confinement for life without parole and restricted clemency authority for such sentences.[13] In 2013, Congress amended Article 56 to provide for mandatory punitive discharges for rape and sexual assault.[14]

There is no specific statutory requirement for restitution as part of court-martial practice, although restitution has been recognized as a valid term of a plea agreement since at least 1977.[15] When Congress enacted the Mandatory Victims Restitution Act of 1996, it did not specifically address victims of crimes tried by courts-martial.[16]

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[6] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 391-92 (photo reprint 1920) (2d ed. 1896).

[7] *See, e.g.,* AW 14 of 1895 ("Any officer who knowingly makes a false muster of man or horse . . . shall, upon proof thereof by two witnesses . . . be dismissed from the service").

[8] 26 Stat. 491, ch. 998 (1890); *see also* Carter v. McClaughry, 183 U.S. 365, 381-82 (1902) (Writ of habeas corpus filed from Fort Leavenworth when court-martial sentence exceeded maximum authorized by the President).

[9] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[10] *Id.*

[11] Act of July 12, 1960, Pub. L. No. 86-633, 74 Stat. 468.

[12] NDAA FY 1997, Pub. L. No. 104-201, § 1068, 110 Stat. 2655 (1996).

[13] NDAA FY 1998, Pub. L. No. 105-85, §S 581-82, 1073(a)(9)-(11), 111 Stat. 1759, 1900 (1997). The limitations on clemency were passed in 2000 and are contained in Article 74.

[14] NDAA FY 2014, Pub. L. No. 113–66, § 1705(a)(1), (2)(A), 127 Stat. 672 (2013). This amendment also provided for mandatory minimum sentences for convictions for rape and sexual assault of a child, forcible sodomy, and attempts of these offenses.

[15] *See* United States v. Brown, 4 M.J. 654, 655 (A.C.M.R. 1977).

[16] *See* 18 U.S.C. § 3663A.

4. Contemporary Practice

Currently, military practice utilizes unitary sentencing, in which a court-martial adjudges a single sentence for the accused, regardless of the number of offenses for which the accused has been found guilty. This practice is specifically required by the Rules for Courts-Martial,[17] and is implicitly required by Article 52's requirement for panel voting.[18] If the accused has been found guilty of multiple offenses, the maximum authorized sentence is the sum of the maximum punishments for all offenses individually.[19]

R.C.M. 1002 provides the rule for sentence determination in courts-martial. The rule states that the sentence "is a matter within the discretion of the court-martial." Pursuant to this rule, except for the few offenses that have mandatory minimum sentences—which include premeditated murder and the sexual offenses described earlier—the court is free to arrive at a sentence anywhere from no punishment to the maximum established by the President under Article 56(a). The appropriate sentence for an accused is generally within the discretion of the court-martial, and the court may adjudge any lawful sentence, from no punishment to the maximum established by the President. With a few exceptions, there are few constraints on the discretion of the sentencing authority in courts-martial.

With respect to restitution, under current law, victims who suffer property losses are allowed to file a claim for payment under Article 139. However, such claims are not part of the formal court-martial process, and are limited to instances of willful destruction of property. Article 139 claims do not cover, for example, medical bills, missed wages, or other economic losses recoverable in federal court.[20] Under current practice, restitution is addressed primarily through the use of pretrial agreements between the convening authority and the accused.[21]

5. Relationship to Federal Civilian Practice

Military practice and federal civilian practice differ significantly in the areas of sentence determination, restitution, and appeals of sentences.

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[17] R.C.M. 1006(c).

[18] To sentence an accused to more than ten years confinement requires a concurrence of three-fourths of the panel members. A sentence of less than 10 years requires a two-thirds concurrence. These voting requirements would not work in a non-unitary sentencing model, for example, when each individual sentence was less than 10 years but the combined sentence was more than 10 years. Additionally, a single sentence has long been military practice. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 404 (photo reprint 1920) (2d ed. 1896).

[19] R.C.M. 1003(c)(1)(C).

[20] Article 139 claims provide superior victim rights to restitution awarded in federal court in one limited manner: they generally require proof only by a preponderance of the evidence that the accused committed the alleged offense.

[21] R.C.M. 705(c)(2)(C).

Prior to the Sentencing and Reform Act of 1984,[22] a federal district judge exercised "virtually unlimited discretion to sentence a convicted defendant anywhere within the range created by the statutory maximum and minimum penalties for the offense or offenses of conviction."[23] During the 1970s and 1980s, academics, the public, and eventually policymakers grew concerned about sentencing disparities in the federal courts. A political consensus arose in the early 1980s that the prevailing system of indeterminate sentencing no longer adequately fulfilled the primary objectives of the criminal justice system. Criticisms of the system at the time echo current criticisms of courts-martial and included sentencing disparity and loss of public confidence.[24] In 1984, Congress established the U.S. Sentencing Commission, directing it to create federal sentencing guidelines.

Statutory provisions required the original Commission to promulgate a sentencing guidelines grid, based on the offense and criminal history of the defendant, with 258 different "boxes." While initially intended as binding, the Supreme Court later declared mandatory guidelines unconstitutional as a violation of the Sixth Amendment.[25] Since the Court's *Booker* decision, the guidelines have been advisory only; district courts are required to take them into account, but are not bound to apply them when determining an appropriate sentence for an accused. Federal judges may depart upward or downward from an advisory sentencing range for an offense due to "an array of mitigating and aggravating factors listed under 18 U.S.C. § 3553(b)"—including circumstances not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.[26] The federal

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[22] 18 U.S.C. § 3551 *et. seq.*

[23] Frank O. Bowman, *The Quality of Mercy must be Restrained, and other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 682 (1996). Professor Bowman served as Special Counsel to the U.S. Sentencing Commission.

[24] *See id.* ("A variety of complaints arose about this [pre-sentencing guidelines] system. First, critics said that it led to tremendous sentencing disparity. . . . Second, critics believed that plea bargaining exacerbated the potential for disparity between similarly-situated defendants. . . . Third, critics observed that because of the parole system, the real power to determine the length of time a defendant actually spent in prison rested not with judges, prosecutors, defense attorneys or legislators, but with a parole board that operated substantially out of public view. . . . Fourth, indeterminate sentencing was thought to erode public faith in the criminal justice system. Because defendants rarely served anything close to the amount of time the judge announced, observers unfamiliar with the system's rituals saw the system as fraudulent. . . . Fifth, observers had the sense that lazy prosecutors were indiscriminately plea bargaining away cases against vicious criminals to reduce their workloads, and that soft judges were letting criminals get away with minimal sentences. . . . Finally, I suspect that all these critiques rooted in concerns about fairness would not have led to global reform if people felt that the system worked, in the sense that it reduced or controlled crime.") (internal citations omitted).

[25] United States v. Booker, 543 U.S. 220 (2005).

[26] Kimbrough v. United States, 552 U.S. 85, 105 (2007); *see also* Gall v. United States, 552 U.S. 38, 51 (2007); United States v. Booker, 543 U.S. 220, 233 (2005).

guidelines have been criticized on a variety of grounds, including for being unnecessarily complex.[27]

In brief, the federal sentencing guidelines operate as follows:

As with courts-martial, in federal district court the maximum sentence is determined by the statute criminalizing the offense. The appropriate sentence range is often determined by judicial fact-finding, made with the aid of a presentence report. The guideline range is determined by two factors: (1) the defendant's criminal history category; and (2) the offense level.

A defendant's criminal history category is determined by the defendant's previous interactions with the criminal justice system. A defendant who previously received substantial prison sentences, or who committed the current offense while still under probation, will receive a higher criminal history category, and in most cases a higher sentencing guideline range.

The U.S. Sentencing Guidelines assign most criminal violations of federal law an offense level ranging from 1-43. The offense level is adjusted based on the severity of the crime, victim status, the role of the defendant in the crime, and the defendant's acceptance of responsibility, among other factors. If the defendant played a small role in the offense, assisted the prosecution, and took responsibility for his role in the crime, the offense level can be decreased substantially. Thus, two defendants convicted of the same offense may face different sentencing guideline ranges based on the manner in which they committed the offense and their prior criminal histories. Different charging decisions, different government priorities, and the exercise of sentencing discretion by different judges may also result in markedly different sentences, even if two individuals are sentenced within the guideline range for the same offense.

Generally, the federal judge will repeat this process for every offense, although there are rules for grouping offenses—for example, offenses involving the same victim and the same act. Although the judge is required to consider the sentencing guidelines, the judge is not required to apply the guidelines when determining the appropriate sentence for a defendant. In addition, federal civilian judges must determine whether multiple terms of imprisonment imposed on a defendant will run concurrently or consecutively.[28]

With respect to restitution, federal law provides for mandatory restitution for victims of crimes of violence, crimes against property, and any crime for which the victim suffers a pecuniary loss.[29] Restitution is determined as part of the sentencing proceedings,[30] and

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[27] Erik S. Siebert, *The Process is the Problem: Lessons Learned from United States Drug Sentencing Reform*, 44 U. RICH. L. REV. 867 (2010).

[28] 18 U.S.C.S. § 3584.

[29] *See* 18 U.S.C. § 3663A (mandatory restitution); § 3664 (enforcement); and §§3612-3614 (collection and penalties for failure to pay). Federal courts of appeal are split on whether restitution is a punishment or civil remedy. *See* Paroline v. United States, 134 S. Ct. 1710, 1724 (2014) (Aside from the manifest procedural differences between criminal sentencing and civil tort lawsuits, restitution serves purposes that differ from

may include the return of property; compensation for damaged or destroyed property; compensation for medical bills, physical therapy, occupational therapy, and professional services (including psychiatric care); and compensation for income lost as a result of the offense.[31] Restitution is ordered without consideration of the defendant's ability to pay,[32] and a defendant who defaults on a restitution payment may be resentenced, or the court may order the sale of the defendant's property and impose civil remedies.[33]

With respect to sentencing appeals, in federal civilian practice both the government and defense may appeal a sentence if it is unreasonable.[34] A government appeal of a sentence may not be prosecuted without the approval of the Solicitor General or Deputy Solicitor General.[35]

6. Recommendation and Justification

Recommendation 56.1: Amend Article 56 to replace the court-martial practice of "unitary" sentencing with "segmented sentencing" where, if confinement is adjudged for guilty findings, the amount of confinement for each guilty finding would be determined separately. This proposal also would provide for segmented sentencing for fines.

This proposal would increase transparency in military sentencing by allowing the parties and the public to know the specific punishments for each offense. Additionally, for cases involving a victim (or multiple victims), identifying the sentence associated with their injury may provide clarity and increase confidence in the results of the court-martial.

(though they overlap with) the purposes of tort law); Kelly v. Robinson, 479 U. S. 36, 49, n.10 (1986) (noting that restitution is, inter alia, "an effective rehabilitative penalty"); United States v. Serawop, 505 F.3d 1112, 1122-1123, (10th Cir. 2007) (finding restitution is not punitive and summarizing the circuit split).

[30] Prior to sentencing, the district court directs a probation officer to collect, (as part of the presentence report or as a separate document), sufficient information for the court to fashion an appropriate restitution order. Each defendant is required to file an affidavit describing his or her financial resources with the probation officer. The government provides the probation officer with the amount of restitution due each victim. Victims may also independently provide input. The court may request additional information, and may receive evidence in camera. The burden is on the government to establish the amount of loss sustained by a victim; the burden of establishing the financial resources of the defendant is on the defense. 18 U.S.C. § 3664(a), (d)(2)-(4).

[31] 18 U.S.C. § 3663A(c).

[32] 18 U.S.C. § 3663A(f)(1)(A). Restitution may be ordered to be paid as a lump sum, in installments, or even in-kind services. If there are multiple defendants, the court may order each defendant liable for the full amount. If the defendant knowingly fails to pay restitution, the court may resentence the defendant to any sentence which may have been originally imposed, but may not increase punishment if the failure to pay is "solely" because of the defendant's indigence. 18 U.S.C. § 3664(f)(3)(A).

[33] 18 U.S.C. § 3614; 18 U.S.C. § 3613(f).

[34] United States v. Booker, 543 M.J. 220 (2005).

[35] 18 U.S.C. § 3742(b)(4).

On appeal, segmented sentencing will increase the efficiency of appellate review and may result in fewer remands for resentencing. Under current law, when an appellate court sets aside a guilty specification, the appellate court can reassess the sentence if it can be assured "that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed."[36] If not, the case may be remanded for a new sentencing proceeding. Non-unitary sentencing would simplify this burden for appellate courts.

Segmented sentencing should provide practitioners and policy makers with more accurate information about punishments in courts-martial, particularly in the development and refinement of sentencing parameters and criteria. As most cases involve convictions for more than one offense, it is challenging to assemble reliable sentencing data in courts-martials. More accurate data would allow policy makers to know how the sentencing system is functioning, which is a significant prerequisite to evaluating its effectiveness and proposing changes.

Segmented sentencing requires protections to ensure that an accused is not unfairly sentenced twice for what is essentially one offense. This proposal therefore also would require that the military judge determine whether terms of confinement will run concurrently, or consecutively. Under segmented sentencing, an accused convicted of two offenses would receive a term of confinement appropriate for each offense. If the offenses involved the same transaction, victim, and harm, the sentence could be overly severe for what was essentially one criminal act. This is of special concern in the military justice system where the UCMJ has several ambiguous offenses, unknown in the civilian practice, that increase the potential for unreasonable multiplication of charges;[37] where prosecutors are expected to charge all known offenses at a single trial;[38] and the accused must reach a high bar to have charges severed.[39]

Under the proposed amendments, military judges would need to make a determination, on the record, as to the appropriate amount of confinement for each offense. At the same time, the military judge would determine whether the sentences should run concurrently or consecutively. This proposal is rooted in the federal system, where federal district courts generally have broad discretion to impose a consecutive or concurrent sentence.[40] The

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[36] United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986).

[37] *See e.g.,* Articles 89-92, UCMJ (disrespect, disobedience, and dereliction offenses); Article 133, UCMJ (conduct unbecoming an officer); Article 134, UCMJ (the General Article).

[38] *See* R.C.M. 601(e)(2) (Discussion) ("Ordinarily all known charges should be referred to a single court-martial.").

[39] *See* R.C.M. 906(b)(10) (Accused must show "manifest injustice" for severance of charges).

[40] Sester v. United States, 132 S.Ct. 1463, 1468 (2012); 18 U.S.C. § 3584. Exercise of that discretion, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission. For example, under U.S. Sentencing Guidelines § 3D1.1 and 3D1.2, all counts involving "substantially the same harm" are grouped together into a single group if they 1) involve the same victim and the same act or transaction; 2) involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a

Supreme Court has made clear, however, that double-jeopardy principles prohibit imposing consecutive sentences for "the same offense," unless the legislature specifically authorizes multiple sentences.[41]

This proposal would not apply segmented sentencing to unique military punishments that affect the accused's status in the service (e.g., discharges, forfeitures, reductions in pay grade, or reprimands). These punishments are best determined by looking at the sum of the accused's crimes in relation to the accused's potential for future service. The case of a servicemember convicted of more than one minor offense, for example, may warrant a punitive discharge, even though no one offense, standing alone, would warrant such punishment.

Recommendation 56.2: Establish sentencing parameters and criteria to provide guidance to military judges in determining an appropriate sentence.

This proposal would establish a more structured sentencing system that draws upon practice and experience in the civilian sector, including under the U.S. Sentencing Guidelines, while utilizing an approach that reflects that an effective military justice system requires a range of punishments and procedures that have no direct counterpart in civilian criminal trials.

Criminal sentencing systems face two competing goals: consistency and individualized consideration. Consistency in sentencing (similar offenses by similar accused receiving similar sentences) may serve to increase deterrence, predictability, and public confidence in criminal sentences. Individualized sentencing tailors a sentence to the accused and the particular circumstances of his or her crime. Despite similar goals, direct application of the U.S. Sentencing Guidelines presents several concerns. First, military judges do not have the equivalent logistical support and staff to mirror the duties of a federal district court.[42] Second, federal sentencing guidelines were developed for federal crimes. While the UCMJ

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common scheme or plan; 3) when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts; and 4) when the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of the substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior. *See* United States Sentencing Guidelines, § 3D1.2.

[41] *See* Missouri v. Hunter, 459 U.S. 359, 368 (1983) (Where unequivocal legislative intent was to impose consecutive sentences for even arguably same conduct, such sentences do not violate double-jeopardy principles); Albernaz v. United States, 450 U.S. 333, 344 (1981) ("[T]he question of what punishments are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.").

[42] The Administrative Office of the United States Courts has over 32,000 employees, with almost 100,000 criminal cases processed each year. The military justice system, by contrast, tried less than 2500 cases in 2013, and military judges often cover a large geographical area and may not even have a single clerk. http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx; http://www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-caseload-indicators.aspx; Annual Report Submitted to the Committees on Armed Services of the U.S. Senate and the House of Representatives (2013).

includes offenses common to the federal code, many offenses are unique to the military and have no counterpart in civilian criminal law. Third, military justice has as an additional purpose: the maintenance of good order and discipline. Finally, military justice has traditionally focused on rehabilitation, to include the possibility of return to service in appropriate cases, and most offenders have no prior criminal record. As an overriding constraint, a court-martial sentencing scheme must be effective during peacetime and war, state-side and overseas.

In view of these considerations, this proposal differs from the approach taken in the U.S. Sentencing Guidelines in several key respects:

First, the proposal would establish a maximum of 12 offense categories, as compared to the 43 in the US Sentencing Guidelines. Broad offense categories ensure that there is a sufficiently large sentencing range to capture an offense. With no more than 12 categories to cover offenses from petty theft to premeditated murder, each offense category must be broad.

Second, this proposal would require that the sentencing parameter for any given offense be based on the offense at findings, not on other factors. Under the U.S. Sentencing Guidelines, a defendant's guideline sentence is often based on judicial fact-finding made during the presentencing proceeding. In the extreme situation, a federal judge can find, by a preponderance of the evidence, that the defendant committed additional misconduct—and therefore deserves a higher offense category—even if the jury acquitted him of that same misconduct.

Third, some military unique offenses are unsuitable for parameters entirely. Some military offenses are so varied in their nature that they escape any reasonable categorization. The effect of disobeying an order ranges from the trivial to the perilous, and this fact is reflected in the range of lawful punishment.

A sentencing system in the military must reflect the unique offenses under the UCMJ, and must serve the dual goals of justice and discipline. This proposal is therefore designed around the key principle of flexibility. A military sentencing scheme must be flexible enough to adjudge any lawful sentence when appropriate. Crimes committed in combat, for example, may severely aggravate an offense if the accused put the unit or mission at risk, or may mitigate an offense committed during or after intense operations. Courts-martial, while often trying crimes similar to those in civilian courts, need to have the flexibility to impose an appropriate sentence stemming from extreme situations (or unique military contexts).

Accordingly, this proposal directs the establishment of two forms of guidance for military judges in determining an appropriate sentence: "sentencing parameters" and "sentencing criteria." A sentencing parameter would provide an upper and lower limit on the sentence that may be imposed, but one that the military judge could depart from when warranted by the facts of a case and to fashion an individualized sentence for the offender. Sentencing criteria would consist of factors that aggravate or mitigate the severity of an offense and

that the military judge must consider, but would not constrain the development of an appropriate sentence.

In short, this proposal would retain flexibility in sentences, recognizing the unique offenses and circumstances of military justice; it would continue the current emphasis on rehabilitation of an accused; and it would alter current practice by providing guidance to the judge on how to fashion an appropriate sentence.

The proposal would be implemented as follows:

Interim Period. This Report's proposals generally become effective one year after enactment. For sentencing parameters and criteria, this proposal calls for implementation within four years of enactment. This transitional period allows time for the Board to collect and analyze sentencing data, propose sentencing parameters and criteria, and submit the proposals to the President for approval. This proposal also requires the President to establish interim guidance during this period until parameters become effective.

Sentencing Parameters and Criteria Board. Upon enactment, the proposed amendment of Article 56 would establish a Board within the Department of Defense to develop sentencing parameters and criteria, as well as review and recommend changes to sentencing rules and procedures. The Board would develop and propose either sentencing parameters or criteria for all military offenses. Proposals for sentencing parameters and criteria would require approval by the President to take effect. The five-member board would be composed of the chief trial judge from each service (plus a designated trial judge from either the Navy or Marine Corps, depending on the service affiliation of the chief trial judge of the Navy-Marine Corps Trial Judiciary). The Secretary of Defense would designate one member to serve as Chair, and one as Vice-Chair. *Ex-officio* members would be designated by the Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, and the Department of Defense General Counsel. Board members would serve as a collateral duty. The Department of Defense would provide a full-time staff. The Board's proposals would be developed in consultation with advisory groups comprised of senior officers and enlisted members and practitioners selected by the services.

Sentencing Parameters. The proposal for Article 56 requires, within four years of enactment, the establishment of sentencing parameters for most offenses under the UCMJ. Similar to federal sentencing guidelines, a sentencing parameter anchors the discretion of a military judge within a specified range, but allows the military judge to exercise discretion in deviating from the established parameter.

Sentencing Criteria. For military unique offenses unsuitable for sentencing parameters this proposal would require the development of sentencing criteria. Sentencing criteria are offense specific factors that the military judge must consider in determining a proper sentence, but that do not direct a particular sentence. Sentencing criteria apply to all offenses for which a sentencing parameter is not established. Sentencing criteria may also provide guidance about when a punishment is appropriate or inappropriate, and the proper consideration of collateral effects of a sentence. For example, a punitive discharge

deprives a servicemember of substantially all benefits administered by the Department of Veterans Affairs and the Department of Defense. In cases with a retirement eligible accused, a punitive discharge deprives the accused, and their dependents, of receiving retired pay and benefits.[43] Sentencing criteria established by the President could assist the military judge in determining how to determine an appropriate sentence, but would not direct any particular sentence.

When sentencing parameters and criteria take effect, this proposal would sunset the mandatory punitive discharge provisions in Article 56(b). This would eliminate a current incongruity in the system where designated sex offenses result in mandatory discharge, but there is no equivalent mandatory discharge for other serious crimes such as murder. Mandatory discharges have the potential to distort sentencing proceedings in an undesirable fashion. As a collateral consequence of a dishonorable discharge or dismissal an accused loses essentially all benefits administered by their Service and the Department of Veterans Affairs. The mandatory discharge provisions prohibit alternative resolutions of a case (such as confinement and administrative separation). A purpose of establishing sentencing parameters is to provide sufficient guidance to military judges as to make mandatory minimum sentences unnecessary. This recommendation, combined with the proposal to allow for government appeals of sentences, provides sufficient protections against improper sentences, but also eliminates the current incongruity where only one type of offense has a mandatory discharge.

Appeals. Under this proposal, Article 56 would address the standards for appealing sentences. Both the government and the accused could appeal a sentence, although under different circumstances. Both the government and the accused could file an appeal if the sentence was unlawful, incorrectly calculated, or plainly unreasonable. The government would not be permitted to file an appeal during the interim period prior to the establishment of sentencing parameters, and an appeal by the government after parameters are established would require the approval of the Judge Advocate General.

The general structure of this subsection is adopted from 18 U.S.C. § 3742, with modifications that reflect military practice.

Recommendation 56.3: Incorporate Article 56a into Article 56 without substantive change.

Article 56a allows for a sentence of confinement for life without the eligibility of parole any time a life sentence is authorized. The article also specifies the limited circumstances under which a sentence to life without parole can be reduced. Relief is limited to action under Article 60, appellate review, a Presidential pardon, and clemency personally granted by the Service Secretary under Article 74.[44] Clemency by the Secretary may not be taken until after 20 years.

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[43] *See, e.g.* Army Pamphlet 27-9 ("Military Judges' Benchbook") pg. 104, 10 September 2014.

[44] The 2014 amendment to Article 60 limited the convening authority's power to reduce the punishment in most serious offenses (i.e. a case where LWOP was adjudged).

This Report does not recommend any substantive change to Article 56a, but as part of the review of the UCMJ recommends that Article 56a be incorporated into Article 56, and that Article 56a be stricken.

Recommendation 56.4: Additional study of restitution in courts-martial.

Article 6b(a)(6) provides that a victim has the "right to receive restitution as provided in law." As a matter of current practice, non-statutory restitution may be included in pretrial agreements in guilty plea cases,[45] and a limited form of restitution related to property damage is available outside the sentencing process in the form of deductions from pay under Article 139. The congressionally-chartered Judicial Proceedings Panel is considering whether additional options for restitution should be provided in connection with sexual offense proceedings.[46] Given the limited jurisdiction of courts-martial over personal property and assets, it may be necessary to consider options outside the military sentencing process, and beyond the scope of this Report, for purposes of developing an effective restitution program. Because such options would include consideration of administrative and judicial procedures outside the military justice system, this Report recommends that development of any statutory changes regarding restitution take place after the Judicial Proceedings Panel presents its recommendations.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by more closely aligning the UCMJ with federal civilian practice, while accounting for unique circumstances specific to military practice.

The substantive recommendations in this proposal assume enactment of this Report's proposal for judge-alone sentencing, as sentencing parameters and non-unitary sentencing are infeasible for panels. First, the instructions necessary for a panel to implement sentencing parameters would be onerously complex. Second, the voting requirements would be difficult to apply if the panel were to vote on individual sentences for each offense.

8. Legislative Proposal

SEC. 801. SENTENCING.

(a) IN GENERAL.—Section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), is amended to read as follows:

[45] *See, e.g.*, R.C.M. 705(c)(2)(C).

[46] *See* NDAA FY 2014, Pub. L. No. 113- 66, § 1731(b)(1)(D), 127 Stat. 672 (2013).

"§856. Art. 56. Sentencing

"(a) SENTENCE MAXIMUMS.—The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

"(b) SENTENCE MINIMUMS FOR CERTAIN OFFENSES.—(1) Except as provided in subsection (d) of section 853a of this title (article 53a), punishment for any offense specified in paragraph (2) shall include dismissal or dishonorable discharge, as applicable.

"(2) The offenses referred to in paragraph (1) are as follows:

"(A) Rape under subsection (a) of section 920 of this title (article 120).

"(B) Sexual assault under subsection (b) of such section (article).

"(C) Rape of a child under subsection (a) of section 920b of this title (article 120b).

"(D) Sexual assault of a child under subsection (b) of such section (article).

"(E) An attempt to commit an offense specified in subparagraph (A), (B), (C), or (D) that is punishable under section 880 of this title (article 80).

"(c) IMPOSITION OF SENTENCE.—

"(1) IN GENERAL.—In sentencing an accused under section 853 of this title (article 53), a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—

"(A) the nature and circumstances of the offense and the history and characteristics of the accused;

"(B) the impact of the offense on—

"(i) the financial, social, psychological, or medical well-being of any victim of the offense; and

"(ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;

"(C) the need for the sentence—

"(i) to reflect the seriousness of the offense;

"(ii) to promote respect for the law;

"(iii) to provide just punishment for the offense;

"(iv) to promote adequate deterrence of misconduct;

"(v) to protect others from further crimes by the accused;

"(vi) to rehabilitate the accused; and

"(vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service;

"(D) the sentences available under this chapter; and

"(E) the applicable sentencing parameters or sentencing criteria prescribed under this section.

"(2) APPLICATION OF SENTENCING PARAMETERS IN GENERAL AND SPECIAL COURTS-MARTIAL.—

"(A) Except as provided in subparagraph (B), in a general or special court-martial in which the accused is convicted of an offense with a sentencing parameter under subsection (d), the military judge shall sentence the accused for that offense within the applicable parameter.

"(B) The military judge may impose a sentence outside a sentencing parameter upon finding specific facts that warrant such a sentence. The military judge shall include in the record a written statement of the factual basis for any sentence under this subparagraph.

"(3) USE OF SENTENCING CRITERIA IN GENERAL AND SPECIAL COURTS-MARTIAL.—In a general or special court-martial in which the accused is convicted of an offense with sentencing criteria under subsection (d), the military judge shall consider the applicable sentencing criteria in determining the sentence for that offense.

"(4) OFFENSE BASED SENTENCING IN GENERAL AND SPECIAL COURTS-MARTIAL.—In announcing the sentence under section 853 of this title (article 53) in a general or special court-martial, the military judge shall, with respect to each offense of which the accused is found guilty, specify the term of confinement, if any, and the amount of the fine, if any. If the accused is sentenced to confinement for more than

one offense, the military judge shall specify whether the terms of confinement are to run consecutively or concurrently.

"(5) NONAPPLICABILITY TO DEATH PENALTY.—Sentencing parameters and sentencing criteria are not applicable to the issue of whether an offense should be punished by death.

"(6) SENTENCE OF CONFINEMENT FOR LIFE WITHOUT ELIGIBILITY FOR PAROLE.—(A) If an offense is subject to a sentence of confinement for life, a court-martial may impose a sentence of confinement for life without eligibility for parole.

"(B) An accused who is sentenced to confinement for life without eligibility for parole shall be confined for the remainder of the accused's life unless—

"(i) the sentence is set aside or otherwise modified as a result of—

"(I) action taken by the convening authority or the Secretary concerned; or

"(II) any other action taken during post-trial procedure and review under any other provision of subchapter IX of this chapter;

"(ii) the sentence is set aside or otherwise modified as a result of action taken by a Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court; or

"(iii) the accused is pardoned.

"(d) ESTABLISHMENT OF SENTENCING PARAMETERS AND SENTENCING CRITERIA.—

"(1) IN GENERAL.—The President shall prescribe regulations establishing sentencing parameters and sentencing criteria in accordance with this subsection.

"(2) SENTENCING PARAMETERS.—(A) A sentencing parameter provides a delineated sentencing range for an offense that is appropriate for a typical violation of the offense, taking into consideration—

"(i) the severity of the offense;

"(ii) the guideline or offense category that would apply to the offense if the offense were tried in a United States district court;

"(iii) any military-specific sentencing factors; and

"(iv) the need for the sentencing parameter to be sufficiently broad to allow for individualized consideration of the offense and the accused.

"(B) Sentencing parameters established under paragraph (1)—

"(i) shall include no fewer than seven and no more than twelve offense categories;

"(ii) other than for offenses identified under paragraph (5)(B), shall assign each offense under this chapter to an offense category;

"(iii) shall delineate the confinement range for each offense category by setting an upper confinement limit and a lower confinement limit; and

"(iv) shall be neutral as to the race, sex, national origin, creed, sexual orientation, and socioeconomic status of offenders.

"(3) SENTENCING CRITERIA.—Sentencing criteria are factors concerning available punishments that may aid the military judge in determining an appropriate sentence when there is no applicable sentencing parameter for a specific offense.

"(4) MILITARY SENTENCING PARAMETERS AND CRITERIA BOARD.—

"(A) IN GENERAL.—There is established within the Department of Defense a board, to be known as the 'Military Sentencing Parameters and Criteria Board', hereinafter referred to in this subsection as the 'Board'.

"(B) VOTING MEMBERS.—The Board shall have five voting members, as follows:

"(i) The four chief trial judges designated under section 826(g) of this title (article 26(g)), except that, if the chief trial judge of the Coast Guard is not available, the Judge Advocate General of the Coast Guard may designate as a voting member a judge advocate of the Coast Guard with substantial military justice experience.

"(ii) A trial judge of the Navy, designated under regulations prescribed by the President, if the chief trial judges designated under section 826(g) of this title (article 26(g)) do not include a trial judge of the Navy.

"(iii) A trial judge of the Marine Corps, designated under regulations prescribed by the President, if the chief trial judges designated under section 826(g) of this title (article 26(g)) do not include a trial judge of the Marine Corps.

"(C) NONVOTING MEMBERS.—The Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, and the

General Counsel of the Department of Defense shall each designate one nonvoting member of the Board.

"(D) CHAIR AND VICE-CHAIR.—The Secretary of Defense shall designate one voting member as chair of the Board and one voting member as vice-chair.

"(5) DUTIES OF BOARD.—

"(A) As directed by the President, the Board shall submit to the President for approval—

"(i) sentencing parameters for all offenses under this chapter, other than offenses that are identified by the Board as unsuitable for sentencing parameters; and

"(ii) sentencing criteria to be used by military judges in determining appropriate sentences for offenses that are identified as unsuitable for sentencing parameters.

"(B) For purposes of this paragraph, an offense is unsuitable for sentencing parameters if—

"(i) the nature of the offense is indeterminate and unsuitable for categorization; and

"(ii) there is no similar criminal offense under the laws of the United States or the laws of the District of Columbia.

"(C) The Board shall consider the appropriateness of sentencing parameters for punitive discharges, fines, reductions, forfeitures, and other punishments authorized under this chapter.

"(D) The Board shall regularly review, and propose revision to, in consideration of comments and data coming to its attention, the sentencing parameters and sentencing criteria prescribed under subsection (d)(1).

"(E) The Board shall develop means of measuring the degree to which applicable sentencing, penal, and correctional practices are effective with respect to the sentencing factors and policies set forth in this section.

"(F) In fulfilling its duties and in exercising its powers, the Board shall consult authorities on, and individual and institutional representatives of, various aspects of the military criminal justice system. The Board shall establish separate advisory groups consisting of individuals with current or recent experience in command and in senior enlisted positions, individuals with experience in the trial of courts-martial, and such other groups as the Board deems appropriate.

"(G) The Board shall submit to the President proposed amendments to the rules for courts-martial with respect to sentencing proceedings and maximum punishments, together with statements explaining the basis for the proposed amendments.

"(H) The Board shall submit to the President proposed amendments to the sentencing parameters and sentencing criteria, together with statements explaining the basis for the proposed amendments.

"(I) The Board may issue nonbinding policy statements to achieve the Board's purposes and to guide military judges in fashioning appropriate sentences,

including guidance on factors that may be relevant in determining where in a sentencing parameter a specification may fall, or whether a deviation outside of the sentencing range may be warranted.

"(J) The Federal Advisory Committee Act shall not apply with respect to the Board or any advisory group established by the Board.

"(6) VOTING REQUIREMENT.—An affirmative vote of at least three members is required for any action of the Board under this subsection.

"(e) APPEAL OF SENTENCE BY THE UNITED STATES.—(1) With the approval of the Judge Advocate General concerned, the Government may appeal a sentence to the Court of Criminal Appeals, on the grounds that—

"(A) the sentence violates the law;

"(B) in the case of a sentence for an offense with a sentencing parameter under this section, the sentence is a result of an incorrect application of the parameter; or

"(C) the sentence is plainly unreasonable.

"(2) An appeal under this subsection must be filed within 60 days after the date on which the judgment of a court-martial is entered into the record under section 860c of this title (article 60c).

"(3) The Government may appeal a sentence under this section only after sentencing parameters are first prescribed under subsection (f).".

(b) CONFORMING AMENDMENT.—Section 856a of title 10, United States Code (article 56a of the Uniform Code of Military Justice), is repealed.

(c) IMPLEMENTATION OF SENTENCING PARAMETERS AND CRITERIA.—(1) Not later than four years after the date of the enactment of this Act, the President shall prescribe the regulations for sentencing parameters and criteria required by subsection (d) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice).

(2) Not later than one year after the date of the enactment of this Act, the President shall prescribe interim guidance for use in sentencing at courts-martial before the implementation of sentencing parameters and criteria pursuant to the regulations referred to in paragraph (1). Insofar as the President considers practicable, the interim guidance shall be consistent with the purposes and procedures set forth in subsections (c) and (d) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), taking into account the interim nature of the guidance. For purposes of sentencing under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), the interim guidance shall be treated as sentencing parameters and criteria.

(3) The President shall prescribe the effective dates of the regulations referred to in paragraph (1) and of the interim guidance referred to in paragraph (2).

(d) PROSPECTIVE REPEAL OF SENTENCE MINIMUMS FOR CERTAIN OFFENSES.—Upon the taking effect of sentencing parameters for offenses specified in paragraph (2) of subsection (b) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), as in effect on the day after the date of the enactment of this Act—

(1) section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), is amended—

(A) in subsection (a), by striking "(a) SENTENCE MAXIMUMS.—"; and

(B) by striking subsection (b); and

(2) section 853a of title 10, United States Code (article 53a of the Uniform Code of Military Justice), is amended by striking subsections (c) and (d) and inserting the following new subsection:

"(c) LIMITATION ON ACCEPTANCE OF PLEA AGREEMENTS.—The military judge shall reject a plea agreement that—

"(1) contains a provision that has not been accepted by both parties; or

"(2) contains a provision that is not understood by the accused.".

9. Sectional Analysis

Section 801 would amend Article 56, which provides the authority for the President to set maximum punishments for UCMJ violations, subject to any maximum or mandatory punishments Congress has established in the UCMJ. The President has exercised this authority in two ways: (1) by limiting the types of punishments that may be imposed at a court-martial to those specified in R.C.M. 1003; and (2) by limiting the amount of confinement, forfeitures, or the type of punitive discharge that may be imposed at a court-martial.

The proposed amendments would align court-martial sentencing procedures with the proposal for judicial sentencing in all non-capital general and special courts-martial. *See* Section 716, *supra*. The amendments are designed to be phased in over a four-year period to enable military sentencing to benefit from the experiences of state and federal civilian courts in sentencing reform, while adapting the lessons learned from those experiences to the special needs of the military justice system. The amendments also would increase the transparency of military sentencing practices and provide additional structure in sentencing, while retaining flexibility in determining an appropriate sentence for the individual.

The amendments proposed in Section 801 would take effect in two phases, as follows:

Phase One. The first phase would begin on the date the legislation is enacted. During the first phase, the Military Sentencing Parameters and Criteria Board (the Board) would begin the process of gathering sentencing data for the development of sentencing parameters and criteria. During this Phase, the President would establish interim guidance, to become effective upon the effective date of the legislation. The Board would be primarily responsible for developing the interim guidance. In this phase, judicial sentencing in all non-capital general and special courts-martial would take effect. *See* Section 716, *supra*. Under judicial sentencing, the current adversarial sentencing process (which utilizes many of the procedural and evidentiary rules applicable during findings) would be modified to more closely align with the process used in civilian courts, in which all relevant information is presented to aid the judge in fashioning an appropriate sentence. The sentencing process during the first phase also would replace the current requirement to adjudge a unitary sentence, in which a single sentence is adjudged for all offenses for which there has been a finding of guilty without any explanation as to how the sentence was reached or which portions of the sentence are attributable to which offense.

In the first phase, which would be completed within four years after the legislation is enacted, the Board also would develop sentencing parameters and criteria to replace the interim guidance. The sentencing parameters and criteria proposed by the Board would be subject to approval by the President. As in many civilian courts, a sentencing parameter for an offense would set a boundary on the judge's discretion, subject to a departure for case specific reasons set forth by the judge in the record. Sentencing parameters would not be required for those offenses for which it would be impracticable to set a parameter, such as unique military offenses that vary greatly in seriousness depending on the context. The Board also would establish sentencing criteria—factors that a judge must consider when sentencing a case, but that do not propose a specific punishment. The implementation of parameters and criteria would draw upon best practices at the federal and state level, and would replace the current practice of adjudging sentences with little or no guidance. Until the parameters and criteria are implemented, the sentencing process would utilize the procedures set forth in Phase One.

Phase Two. In the second phase, which would begin four years after the legislation is enacted, the parameters and criteria approved by the President would apply to sentencing proceedings for general and special courts-martial. Military judges would utilize the parameters and criteria in conjunction with the segmented sentencing procedures and other changes in the sentencing process developed during Phase One. Military judges would retain discretion to sentence outside parameters in order to fashion individualized sentences, subject to a requirement to set forth on the record reasons for any departure.

Finally, once sentencing parameters are in place, this proposal would authorize government appeals of sentences and eliminate the requirement for mandatory minimum discharges. By addressing sentencing discretion through the use of parameters, Article 56 would reduce the need for rigid mandatory minimum sentences.

Section 801(a) would amend Article 56 in its entirety. As amended, Article 56 would contain the following provisions:

Article 56(a)-(b) would retain current law regarding maximum and minimum sentences, subject to Section 801(d), *infra*.

Article 56(c)(1) would enumerate factors the court-martial would be required to consider before imposing a sentence. The proposed factors are adapted from 18 U.S.C. § 3553(a).

Article 56(c)(2) would require the military judge to determine a sentence in accordance with the sentencing parameters established by the President. Consistent with federal civilian practice, a military judge could sentence outside the parameter based upon written factual findings that such a sentence is justified. This paragraph would not apply to summary courts-martial.

Article 56(c)(3) would require the military judge to consider sentencing criteria established by the President when determining a sentence. The sentencing criteria would provide factors for the military judge to consider, and would not direct any specific punishment. This paragraph would not apply to summary courts-martial.

Article 56(c)(4) would require the military judge to determine the appropriate amount of fine and confinement for each separate offense of which the accused is found guilty. The assignment of a specific sentence for each offense is designed to provide additional transparency to the parties and the public and advance the purposes of sentencing. With respect to all other punishments (discharges, reductions, forfeitures, and similar unique military punishments), the current practice of awarding a single sentence for all offenses would be retained, as these punishments are not readily segmented. To ensure the accused is not punished twice for what is substantially one offense, the military judge would be required to determine whether periods of confinement should run concurrently or consecutively. The requirement to determine whether sentences should run concurrently or consecutively is in the statute, and the process for making the determination is left to the Rules for Courts-Martial. A sentence to confinement for one offense that runs concurrently with the sentence to confinement of another offense would not increase the total period of

confinement for purposes of determining whether the period of confinement satisfies a jurisdictional predicate (i.e., confinement for more than six months) for an appeal as of right to the Court of Criminal Appeals under proposed revisions to Article 66(b)(1)(A). In general, this subsection envisions requiring military judges to impose concurrent sentences when the offenses involve the same act, transaction, or criminal objective and the same victim. This would be similar to the rules governing the grouping of offenses under § 3D1.2(a-b) of the United States Sentencing Commission Guidelines Manual. In other circumstances, the decision to have sentences run concurrently would be left to the discretion of the judge, informed by consideration of the purposes of sentencing. This paragraph would not apply to summary courts-martial.

Article 56(c)(5) would provide that sentencing parameters and criteria do not apply to the issue of whether an offense should be punished by death.

Article 56(c)(6) would incorporate Article 56a (Sentence of confinement for life without eligibility for parole) into Article 56 without substantive change. Article 56a would be repealed. *See* Section 801(b), *infra.*

Article 56(d)(1) would require the President to establish sentencing parameters and criteria.

Article 56(d)(2) would establish the requirements for sentencing parameters. Except for unique military offenses, all violations of the UCMJ would be assigned to between seven and twelve offense categories. Each offense category would specify a range of confinement and may include an appropriate range for other punishments such as discharges. The subsection also would prescribe the minimum requirements for each sentencing parameter.

Article 56(d)(3) defines sentencing criteria as factors that the military judge must consider when sentencing. Under the proposal, there are two types of sentencing criteria: criteria that inform how to punish a violation of a specific offense (e.g., factors that aggravate or mitigate the harm of a military offense); and criteria that inform when certain punishments may be appropriate or inappropriate (e.g., factors that inform when a reduction or discharge may be appropriate).

Article 56(d)(4) would create the Military Sentencing Parameters and Criteria Board to develop parameters and criteria. The Board would be created within the Department of Defense, and would be composed of the chief trial judge of each service, subject to the opportunity to detail alternate members when required by circumstances applicable to the Navy, Marine Corps, and Coast Guard. The chief trial judges would be detailed by the Judge Advocate General of each military Service and the Secretary of Defense would select a chair and vice-chair of the Board. Service on the Board would be a collateral duty. The Board would have non-voting members designated by the Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, and the

General Counsel of the Department of Defense. The Department of Defense would provide full-time staff to assist the Board.

Article 56(d)(5) would prescribe the duties of the Board. The Board would be required to develop sentencing parameters, criteria, and sentencing rules for submission to the President. The Board also could promulgate non-binding policies on sentencing. In fulfilling its duties, the Board would be required to consult with commanders, enlisted leaders, practitioners, and others. The Board would be required to establish two advisory groups. The first advisory group would be composed of senior officer and enlisted members who provide guidance on the effectiveness of military justice on discipline. The second advisory group would be composed of military justice practitioners.

Article 56(e) would provide for limited appeal of sentences by the government. This right would be available only after the establishment of sentencing parameters. Similar to 18 U.S.C. § 3742(b)(4), the government would be required to obtain the approval of the Judge Advocate General before filing an appeal on the sentence. Finally, such appeals would be limited to whether the sentence is illegal, calculated incorrectly, or is plainly unreasonable. In determining whether a sentence is plainly unreasonable, a Court of Criminal Appeals could, but would not be required to, presume that a sentence within a sentencing parameter is reasonable. The core of the subsection is taken from 18 U.S.C. § 3742, modified for military practice and reflecting the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005).

Section 801(b) is a conforming amendment.

Section 801(c) would require the President to prescribe the regulations for sentencing parameters and criteria required by Article 56(d), as amended, not later than four years after enactment of the bill. It also would require the President to prescribe interim guidance.

Section 801(d) would repeal Article 56(b) and Article 53a(d) upon the taking effect of sentencing parameters for the offenses specified in Article 56(b)(2) that have mandatory minimum punishments. *See also* Section 717, *supra.*

Articles 57, 57a, and 71 – Effective Date of Sentences; Deferment of Sentences; & Execution of Sentence; Suspension of Sentence

10 U.S.C. §§ 857-57a, 871

1. Summary of Proposal

This proposal would consolidate Articles 57, 57a, and 71 into Article 57 (Effective Date of Sentences). The proposal would address in a single article the effective date for all punishments that could be adjudged at a court-martial. This proposal also would make conforming changes to reflect the proposed changes to Article 60 (Action of Convening Authority), Article 66 (Review by Court of Criminal Appeals), Article 69 (Review in the office of the Judge Advocate General), and the proposed Article 60c (Entry of Judgment).

2. Summary of the Current Statutes

Articles 57, 57a, and 71 address related aspects of court-martial sentences, as follows:

- Article 57 (Effective date of sentences): Article 57 establishes when punishments adjudged by a court-martial become effective. Article 57(a) provides that a sentence to forfeitures or a reduction in pay-grade becomes effective either fourteen days after the sentence is adjudged, or when the convening authority approves the sentence, whichever is earlier. The convening authority may defer the effective date of a sentence of forfeitures or reduction until the convening authority approves the sentence under Article 60. A deferral may be rescinded at any time. Under Article 57(b), a sentence to confinement begins to run on the day the sentence is adjudged, excluding periods when the confinement is deferred or suspended. Subsection (c) provides that all other punishments become effective when ordered executed by the convening authority or other authorized person.

- Article 57a (Deferment of sentences): Article 57a authorizes the convening authority to defer a sentence to confinement for any of three conditions. First, under subsection (a), at the request of the accused, the convening authority may defer the service of confinement until the convening authority orders the sentence executed. Second, under subsection (b), a convening authority may defer a sentence to confinement without the consent of the accused, in limited circumstances when the accused is in the custody of a state or territory of the United States or a foreign government. Finally, under subsection (c), the Service Secretary may defer a sentence to confinement when the Judge Advocate General has certified the case for review to the U.S. Court of Appeals for the Armed Forces under Article 67(a)(2).

- Article 71 (Execution of sentences; suspension of sentence): Article 71 authorizes and limits the convening authority's ability to order a sentence executed. Article 71(a) requires that a sentence of death must be approved by the President. Subsection (b) requires that a

dismissal of an officer, cadet, or midshipman must be approved by the Service Secretary (with limited delegation authority). Subsection (c) requires that, in addition to the requirements of subsections (a)-(b), the part of a sentence that includes death or a punitive discharge may be executed only after a final judgment on the legality of the proceedings (i.e. completion of appellate review). Article 71(c)(2) provides that all other punishments included in a sentence may be ordered executed when the convening authority approves the sentence under Article 60. Article 71(d) authorizes the convening authority to suspend any sentence except for a death sentence. By reference to Article 60, the authority to suspend a sentence or any part thereof is limited to: (1) offenses that have a maximum punishment of two years or less, and when the sentence did not include a punitive discharge or confinement for more than six months; (2) pretrial agreements; and (3) instances when the accused has provided substantial assistance in the investigation or prosecution of another case.

3. Historical Background

Under the Articles of War, court-martial sentences did not become effective until they were approved and ordered executed by the convening authority.[1] When the UCMJ was enacted in 1950, Article 57 provided that confinement could begin to run on the day the sentence was adjudged.[2] Article 57a (Deferment of sentences) was added to the Code in 1968.[3] In 1996, Congress passed several reforms aimed at stopping convicted servicemembers from receiving most pay and allowances while confined.[4] Included in the reforms was an amendment to Article 57 providing that a sentence of forfeiture of pay or reduction in rank would take effect no later than fourteen days after the sentence was adjudged.[5] Article 71 prohibits executing a discharge until after the completion of appellate review and has remained relatively unchanged since the UCMJ's enactment in 1950.[6]

4. Contemporary Practice

The President has implemented Articles 57, 57a, and 71 through R.C.M. 1108 (Suspension of execution of sentence; remission) and R.C.M. 1113 (Execution of sentences). Under current law and practice, a sentence to confinement takes effect on the day the sentence is announced. A sentence that includes reduction in pay grade or forfeitures takes effect when

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[1] *See* AW 46 of 1917 ("No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court . . . .").

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[4] NDAA FY 1997, Pub. L. No. 104-201, § 1068, 110 Stat. 2655 (1996) (amending Article 58b to limit the circumstances in which a confined accused could continue to receive pay and allowances); 10 U.S.C. § 12740 (requiring that an accused sentenced to a punitive discharge would lose entitlement to retired pay).

[5] NDAA FY 1996, Pub. L. No. 104-106, tit. XI, 110 Stat. 461-67.

[6] *See* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (redefining when appellate review is complete to account for the limited Supreme Court review added in 1983).

the sentence is approved, or fourteen days after the sentence is announced, whichever is earlier. The convening authority may defer confinement and forfeitures and reduction until the convening authority approves the sentence and orders it executed. When approving the sentence, consistent with Article 71, the convening authority will normally order the sentence executed except for the part of the sentence that includes a punitive discharge or death. Typically, a sentence that includes a fine, restriction, reprimand, or hard labor takes effect when the convening authority approves the sentence and orders it executed.

For capital cases, the President must approve the sentence; this includes the authority to commute or suspend any part of the sentence other than death. In cases involving the dismissal of an officer, cadet, or midshipman, the Service Secretary (or designated deputy or assistant secretary) must approve the dismissal; this includes the authority to commute or set aside any part of the sentence.

In addition to the requirement for approval by the President or Service Secretary, a sentence that includes a punitive discharge or death may not be executed until a final judgment as to the legality of the proceedings is complete (i.e. the completion of appellate review). Appellate review is complete when the appeal is waived under Article 61, or when the Court of Criminal Appeals has reviewed the case and any petition to a higher court for review has been addressed, or the time to petition higher courts has expired. After the completion of appellate review (and approval by the President or the Secretary concerned, if required), the convening authority may order the remaining part of the sentence executed. In practice, the services have generally designated a single convening authority to address the execution of discharges.

5. Relationship to Federal Civilian Practice

In federal civilian practice, the district court judge enters the judgment and the sentence is executed in accordance with the court's judgment or order.[7] A sentence of death is stayed automatically if the defendant files an appeal.[8] For other punishments, a district court judge has broad discretion to stay a sentence.

6. Recommendations and Justification

Recommendation 57.1: Combine the relevant portions of Article 57 and 57a that govern deferment of sentence into a single subsection within Article 57 ("Deferment").

As a conforming change to the proposal for an entry of judgment under Article 60c, the deferment of a sentence would terminate at entry of judgment instead of action by the convening authority under Article 60. No substantive change in the convening authority's ability to defer, rescind a deferral, or other change is proposed.

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[7] FED. R. CRIM. P. 32(k)(1) (Judgment).

[8] FED. R. CRIM. P. 38 (Staying a Sentence or a Disability).

Recommendation 57.2: Combine the relevant provisions of Articles 57 and 71 that govern when sentences become effective into a single subsection within Article 57 ("Effective date of sentences").

The proposed new subsection would continue current practices for when a sentence becomes effective (e.g. immediately for confinement, upon completion of appellate review for discharges). As a conforming change to the proposal for an entry of judgment under Article 60c, the requirement that a sentence be ordered executed would be removed.

Also, in order to conform with the proposed changes to Article 60c, punishments that currently become effective when the convening authority takes action under Article 60 would become effective upon entry of judgment. Under this proposal, all punishments (other than punitive discharges and death sentences) would be effective upon entry of judgment by operation of law. Discharges would be issued after the completion of appellate review in accordance with service regulations, but would not require action by a convening authority ordering the discharge executed. No change is proposed to the requirement for presidential and secretarial approval for death and dismissals, respectively.

This proposal would allow all parties to more clearly understand when sentences become effective and reduce the possibility of error. For example, under current law, a convening authority may defer confinement, forfeitures and reduction. However, the authority for deferment is contained in two different articles,[9] which have slightly different definitions of when a deferment ends,[10] and differ on which "convening authority" is authorized to defer the sentence.[11]

Recommendation 57.3: Remove from Article 71 the authority for a convening authority to suspend a sentence under Article 71(d).

This is a conforming change to the proposal for Article 60a, which addresses suspension authority.

Recommendation 57.4: Delete Articles 57a and 71.

As described above, the authorities contained in Articles 57a and 71 will be placed within Article 57.

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[9] *Compare* Article 57(a)(2) (deferment of reduction and forfeitures) *with* Article 57a(a) (deferment of confinement).

[10] *Compare* Article 57(a)(2) (deferment ends when the sentence is "approved") *with* Article 57a(a) (deferment ends when the sentence "is ordered executed").

[11] *Compare* Article 57(a)(4) (convening authority is the person authorized to act under Article 60) *with* Article 57a(a) (convening authority or, if the accused is no longer under his jurisdiction, the officer currently exercising general court-martial jurisdiction over the accused).

7. Relationship to Objectives and Related Provisions

This proposal incorporates several conforming changes related to proposed changes to the post-trial and appellate process. Under the proposal for Article 60c, an "entry of judgment" would serve as a substitute for the convening authority's "action" in stating the results of the court-martial. For purposes of determining when a discharge can be effectuated, the proposed revision of review procedures under Article 66 (Review by Court of Criminal Appeals) and Article 69 (Review in the office of the Judge Advocate General) require conforming changes.

This proposal supports MJRG Operational Guidance by addressing ambiguities in related statutory authorities that are currently spread across three different UCMJ articles.

8. Legislative Proposal

SEC. 802. EFFECTIVE DATE OF SENTENCES.

(a) IN GENERAL.—Section 857 of title 10, United States Code (article 57 of the Uniform Code of Military Justice), is amended to read as follows:

"§857. Art. 57. Effective date of sentences

"(a) EXECUTION OF SENTENCES.—A court-martial sentence shall be executed and take effect as follows:

"(1) FORFEITURE AND REDUCTION.—A forfeiture of pay or allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence takes effect. Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-martial takes effect on the earlier of—

"(A) the date that is 14 days after the date on which the sentence is adjudged; or

"(B) in the case of a summary court-martial, the date on which the sentence is approved by the convening authority.

"(2) CONFINEMENT.—Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement.

"(3) APPROVAL OF SENTENCE OF DEATH.—If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as the President sees fit. That part of the sentence providing for death may not be suspended.

"(4) APPROVAL OF DISMISSAL.—If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary, or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of

the sentence, as the Secretary sees fit. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

"(5) COMPLETION OF APPELLATE REVIEW.—If a sentence extends to death, dismissal, or a dishonorable or bad-conduct discharge, that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may be executed, in accordance with service regulations, after completion of appellate review (and, with respect to death or dismissal, approval under paragraph (3) or (4), as appropriate).

"(6) OTHER SENTENCES.—Except as otherwise provided in this subsection, a general or special court-martial sentence is effective upon entry of judgment and a summary court-martial sentence is effective when the convening authority acts on the sentence.

"(b) DEFERRAL OF SENTENCES.—(1) On application by an accused, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may, in his or her sole discretion, defer the effective date of a sentence of confinement, reduction, or forfeiture. The deferment shall terminate upon entry of judgment or, in the case of a summary court-martial, when

the convening authority acts on the sentence. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.

"(2) In any case in which a court-martial sentences a person referred to in paragraph (3) to confinement, the convening authority may defer the service of the sentence to confinement, without the consent of that person, until after the person has been permanently released to the armed forces by a State or foreign country referred to in that paragraph.

"(3) Paragraph (2) applies to a person subject to this chapter who—

"(A) while in the custody of a State or foreign country is temporarily returned by that State or foreign country to the armed forces for trial by court-martial; and

"(B) after the court-martial, is returned to that State or foreign country under the authority of a mutual agreement or treaty, as the case may be.

"(4) In this subsection, the term 'State' includes the District of Columbia and any Commonwealth, territory, or possession of the United States.

"(5) In any case in which a court-martial sentences a person to confinement, but in which review of the case under section 867(a)(2) of this title (article

67(a)(2)) is pending, the Secretary concerned may defer further service of the sentence to confinement while that review is pending.

"(c) APPELLATE REVIEW.—(1) Appellate review is complete under this section when—

"(A) a review under section 865 of this title (article 65) is completed; or

"(B) an appeal is filed with a Court of Criminal Appeals or the sentence includes death, and review is completed by a Court of Criminal Appeals and—

"(i) the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

"(ii) such a petition is rejected by the Court of Appeals for the Armed Forces; or

"(iii) review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and—

"(I) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

"(II) such a petition is rejected by the Supreme Court; or

"(III) review is otherwise completed in accordance with the judgment of the Supreme Court.

"(2) The completion of appellate review shall constitute a final judgment as to the legality of the proceedings.".

(b) CONFORMING AMENDMENTS.—(1) Subchapter VIII of chapter 47 of title 10, United States Code, is amended by striking section 857a (article 57a of the Uniform Code of Military Justice).

(2) Subchapter IX of chapter 47 of title 10, United States Code, is amended by striking section 871 (article 71 of the Uniform Code of Military Justice).

(3) The second sentence of subsection (a)(1) of section 858b of title 10, United States Code (article 58b of the Uniform Code of Military Justice), is amended by striking "section 857(a) of this title (article 57(a))" and inserting "section 857 of this title (article 57)".

9. Sectional Analysis

Section 802(a) would consolidate Articles 57, 57a, and 71 into Article 57 (Effective date of sentences) to address in a single article the effective date for all punishments that could be adjudged at a court-martial. Article 57, as amended, would contain the following provisions:

Article 57(a) would establish when the punishment adjudged at a court-martial sentence becomes effective. The proposed subsection combines portions of Articles 57, 57a, and 71, and removes the distinction between when a sentence becomes effective and when it is ordered executed. With the exception of death and punitive discharges, sentences would be effective by operation of law without any additional approval upon entry of judgment. This is a conforming change to the proposed changes in Article 60 (Post-trial processing in general and special courts-martial) and the proposed enactment of Articles 60a (Limited authority to act on sentence in specified post-trial circumstances), 60b (Post-trial actions in

summary courts-martial and certain general and special courts-martial), and 60c (Entry of judgment).

Article 57(a)(1) would address when forfeitures and reduction become effective. The first sentence of this paragraph is taken without modification from Article 57(a)(3). The remainder of this paragraph is taken from Article 57(a)(1).

Article 57(a)(2) is taken, without change, from Article 57(b). Article 57(b) would be modified to apply only to summary courts-martial.

Article 57(a)(3) is taken, without change, from Article 71(a).

Article 57(a)(4) is taken, without change, from Article 71(b).

Article 57(a)(5) is taken from Article 71(c)(1) with modification. The provisions of Article 71(c)(1) regarding waiver or withdrawal of an appeal and the definition of what constitutes a final appeal are consolidated in subsection (c).

Article 57(a)(6) is taken from Article 57(c) with modification. As a conforming change to the proposal for Article 60c, in general and special courts-martial "entry of judgment" is substituted for "on the date ordered executed." *See* Section 904, *infra.* For consistency, a summary court-martial sentence would become effective when approved by the convening authority.

Article 57(b)(1) is a combination of Article 57(a)(2), authorizing the deferment of forfeitures and reduction, and Article 57a(a), authorizing the deferment of confinement. The definition of convening authority is taken from Article 57a(a). As a conforming change to the proposal for Article 60c, the deferment of a sentence would terminate upon entry of judgment.

Article 57(b)(2)-(4) are taken from Article 57a(b)(1)-(3), with no substantive changes.

Article 57(b)(5) is taken from Article 57a(c) with conforming changes to reflect the proposed new section, Article 60c (Entry of judgment). *See* Section 904, *infra.*

Article 57(c)(1) is taken from Article 71(c)(1)-(2) with modification to reflect the proposal for an appeal of right. Under the revised language, appellate review would be complete when an Article 65 review is finished, or when the Court of Criminal Appeals has reviewed the case and any petition to a higher court for review has been addressed, or the time to petition higher courts has expired. Paragraph (2) incorporates the current provision in Article 71(c)(1) that the completion of appellate review is a final determination on the legality of the proceedings.

Section 802(b) contains conforming amendments to strike Articles 57a and 71 and an additional conforming amendment to Article 58b.

Article 58 – Execution of Confinement
10 U.S.C. § 858

1. Summary of Proposal

This Report recommends no change to Article 58. Part II of the Report will consider whether changes are needed in the rules implementing Article 58.

2. Summary of the Current Statute

Article 58 concerns the execution of confinement of members who have been found guilty and sentenced to confinement. Article 58 is a permissive article, allowing a sentence of confinement to be executed in any military confinement facility, any penal or correctional facility of the United States, or in any facility that the United States is allowed to use. Under the statute, the Service Secretaries are authorized to provide additional instructions on the execution of confinement. Article 58 specifies that an accused's military status does not relieve him or her from the same discipline as other persons confined in the same institution. Under Article 58(b), "[t]he omission of the words 'hard labor' from any sentence of a court-martial adjudging confinement does not deprive the authority executing that sentence of the power to require hard labor as a part of the punishment."

3. Historical Background

Congress enacted Article 58 as part of the original UCMJ in 1950.[1] The article was derived from Articles 37 and 42 of the Articles of War, and Article 7 of the Articles for the Government of the Navy, which allowed flexibility in the places of confinement for an accused in order to maximize rehabilitative potential.[2]

4. Contemporary Practice

Under current practice, if a military confinement facility is not available, the Department of Defense specifically allows for military prisoners to be confined in civilian facilities used by the U.S. Marshals Service. If a facility used by the U.S. Marshals Service is not available, then a facility accredited by the American Correctional Association or by the State in which the prisoner is to be confined may be used.[3]

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1093-94 (1949). Although Congress has twice amended the article, the changes were minor and did not alter the article's substance. Act of Aug. 10, 1956, Pub. L. No. 84-0128, 80A Stat. 1; NDAA FY 2006, Pub. L. No. 109-163, § 1057(a)(3), 119 Stat. 3136.

[3] DEP'T OF DEF. INSTR. 1325.07, March 11, 2013. This DoD instruction is applicable also to the Coast Guard at all times, including, by agreement, when it is a Service of the Department of Homeland Security.

In 2005, the Defense Base Closure and Realignment Commission (BRAC) recommended the reduction and realignment of a number of military confinement facilities to create five Joint Regional Correctional Facilities.[4] The closure of many local facilities created a logistical difficulty on bases located long distances from any of the regional confinement facilities. As a result, most services contract with civilian confinement facilities when there is not a nearby military facility.[5]

5. Relationship to Federal Civilian Practice

The Attorney General controls and manages. Federal penal and correctional institutions outside of military and naval institutions.[6] For the purpose of providing suitable quarters for the safekeeping, care and subsistence of prisoners, the Attorney General can contract with the proper authorities of any State, Territory, or political subdivision for the imprisonment, subsistence, care, and proper employment of prisoners.[7] If there are no suitable or sufficient facilities available in a State, Territory, or political subdivision, the Attorney General can order the creation of a new place of confinement.[8]

6. Recommendation and Justification

Recommendation 58: No change to Article 58.

In view of the well-developed case law addressing Article 58's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

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[4] *See* DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION REPORT 208-209 (2005). The Southwest Joint Regional Correctional Facility consolidated the Naval Consolidated Brig Miramar, the Edwards Confinement Facility, the Kirtland Confinement Facility, and the Marine Corps Base Brig, Camp Pendleton. The Midwestern Joint Regional Correctional Facility consolidated the Lackland Confinement Facility, the Army Regional Correctional Facility, and the components of the US Disciplinary Barracks at Fort Leavenworth, Kansas. The Southeastern Joint Regional Correctional Facility consolidated the Naval Consolidated Brig Charleston, and the Waterfront Brig Jacksonville. The Mid-Atlantic Joint Regional Correctional Facility consolidated the Naval Brig Norfolk, Marine Corps Base Brig, Quantico, VA, and Marine Corps Base Brig Camp LeJeune, NC. The Northwestern Joint Regional Correctional Facility consolidated the Army Regional Correctional Facility at Fort Lewis and the Waterfront Brig Puget Sound.

[5] *See, e.g.*, ARMY REG. 190-47, at 4, 68-69 (5 June 2006).

[6] 18 U.S.C. § 4001.

[7] 18 U.S.C. § 4002.

[8] 18 U.S.C. § 4003.

Article 58a – Sentences: Reduction in Enlisted Grade upon Approval

10 U.S.C. § 858a

1. Summary of Proposal

This proposal would sunset this article when the sentencing parameters and criteria established under the proposal for Article 56 take effect.

2. Summary of the Current Statute

Article 58a provides a mechanism to order a reduction of enlisted members to the grade of E-1 whenever the approved sentence of a court-martial includes a punitive discharge, confinement, or hard labor without confinement, irrespective of whether the adjudged and approved sentence includes a reduction to that grade.

3. Historical Background

Congress enacted Article 58a in 1960, requiring automatic reduction in grade by law unless otherwise provided for in service regulations.[1] The precursor to Article 58a was paragraph 126(e) of the 1951 Manual for Courts Martial, which required that an enlisted member be reduced to the lowest pay grade upon receiving a sentence that included a punitive discharge, confinement, or hard labor without confinement.[2] In 1959, in *United States v. Simpson*, the Court of Military Appeals held that the Manual provision operated improperly to increase the sentence of courts-martial.[3] The Comptroller General disagreed with the court's decision and directed servicemembers to be paid at the reduced grade.[4] To resolve the dispute, Congress enacted Article 58a, which has remained unchanged since its enactment in 1960.[5]

4. Contemporary Practice

The Service Secretaries have taken different approaches in exercising their authority under Article 58a. The Air Force and Coast Guard Secretaries have essentially exempted their services from automatic reduction in pay grade. Regardless of whether a punitive discharge was approved or the length of confinement approved by the convening authority, an

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[1] Act of July 12, 1960, Pub. L. No. 86-633, 74 Stat. 468.

[2] MCM 1951, ¶126*e*.

[3] United States v. Simpson, 27 C.M.R. 303 (1959).

[4] Comp. Gen decision, B-139988 (Aug 19, 1959).

[5] Pub. L. No. 86-633, § 1(1), July 12, 1960, 74 Stat. 468.

enlisted member in the Air Force or Coast Guard will be reduced in pay grade only if a reduction was part of the adjudged sentence.[6] Under Army regulations, an accused is reduced to pay grade E-1 whenever the approved sentence includes a punitive discharge or confinement in excess of six months.[7] And in the Navy and Marine Corps, automatic reduction to E-1 is triggered by the convening authority's approval of three months or more confinement or a punitive discharge, but is at the discretion of the convening authority.[8]

5. Relationship to Federal Civilian Practice

A reduction in rank or status based on the sentence awarded at a trial is unique to the military, with no civilian counterpart. The most comparable provision in federal civilian practice is a provision of the U.S. Code that specifies a conviction for certain specified offenses results in forfeiture of civilian retirement pay.[9]

6. Recommendation and Justification

Recommendation 58a: Amend Article 58a by sunsetting the statute after the implementation of the proposed changes to Article 56 punishments.

This proposal is consistent with the accompanying proposals for judge-alone sentencing (Article 53) and the requirement for sentencing parameters and criteria (Article 56). The goal of these related proposals is to improve military sentencing by giving the decision making authority to judges, providing the sentencing judges with objective standards through sentencing parameters and criteria.

Currently, the Army, Navy, and Marine Corps impose automatic reduction to pay grade E-1 based upon two different standards, and the Air Force and the Coast Guard do not impose automatic reduction to pay grade E-1 at all. Eliminating Article 58a would address the substantial discrepancies between the services' different approaches to automatic reductions.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by applying provisions uniformly across the Services to the extent practicable.

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[6] AIR FORCE INSTR. 51-201 (6 Jun 2013); COMMANDANT INSTR. M5810.1E (13 April 2011).

[7] ARMY REG. 27-10 (3 Oct 2011).

[8] JAGINST 5800.7F (26 Jun 2012).

[9] 5 U.S.C. § 8312.

8. Legislative Proposal

SEC. 803. SENTENCE OF REDUCTION IN ENLISTED GRADE.

Section 858a of title 10, United States Code (article 58a of the Uniform Code of Military Justice), is amended—

(1) in subsection (a)—

(A) by striking "as approved by the convening authority" and inserting "as set forth in the judgment of the court-martial entered into the record under section 860c of this title (article 60c)"; and

(B) in the matter after paragraph (3), by striking "of that approval" and inserting "on which the judgment is so entered"; and

(2) in subsection (b), by striking "disapproved, or, as finally approved" and inserting "reduced, or, as finally affirmed".

SEC. 804. REPEAL OF SENTENCE REDUCTION PROVISION WHEN PARAMETERS TAKE EFFECT.

Effective on the effective date of sentencing parameters prescribed by the President under section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), as amended by section 801, section 858a of title 10, United States Code (article 58a of the Uniform Code of Military Justice), is repealed.

9. Sectional Analysis

Section 803 would amend Article 58a (Sentences: reduction in enlisted grade upon approval), which provides a mechanism for the individual services to order a reduction of enlisted members to the grade of E-1 whenever the approved sentence of a court-martial

includes a punitive discharge, confinement, or hard labor without confinement. The amendments would conform the statute to the changes proposed in post-trial procedure under Article 60 and the proposed Article 60c (Entry of judgment). *See* Section 904, *infra*.

Section 804 would sunset Article 58a after the enactment of sentencing parameters and criteria under Article 56. This sunset provision is consistent with the proposals for judge-alone sentencing under Article 53 and for sentencing parameters and criteria under Article 56. *See* Sections 716 and 801, *supra.* The sentencing parameters and criteria proposed in Section 801 would include objective factors for the military judge to consider in determining whether a sentence should include a reduction in pay grade.

Article 58b – Sentences: Forfeiture of Pay and Allowances During Confinement

10 U.S.C. § 858b

1. Summary of Proposal

This Report recommends no change to Article 58b. Part II of the Report will consider whether any changes are needed in the rules implementing Article 58b.

2. Summary of the Current Statute

Article 58b provides for forfeiture of pay and allowances due during any period of confinement or parole for certain categories of courts-martial sentences. Sentences subject to forfeiture include death, confinement for more than six months, or confinement of six months or less combined with a punitive discharge or dismissal. The extent of the forfeitures differs depending upon the court-martial forum. In general courts-martial, the statute requires all pay and allowances to be forfeited. In special courts-martial, two-thirds of all pay due must be forfeited. If the accused has dependents, the person exercising Article 60 authority may waive any or all of the forfeitures of pay and allowances for up to six months. The money from the waived forfeitures will be paid directly to the dependents. If the sentence of an accused who forfeits pay and allowances is set aside or disapproved, or if the sentence approved does not trigger automatic forfeitures, the accused will receive the previously forfeited money.

3. Historical Background

Article 58b was enacted in 1996 and, with the exception of two minor amendments, has not been changed since then.[1] The statute was a response to Congressional concern that some military servicemembers continued to receive active duty pay and allowances while serving extended prison sentences.[2]

4. Contemporary Practice

Under current law, the Article 60 authority (normally the convening authority) can act on a request for waiver of automatic forfeitures at any time prior to or at the time of action. A request for a waiver is a common term in pretrial agreements for an accused with dependents. Absent a deferment or waiver, automatic forfeitures go into effect fourteen

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[1] NDAA FY 1996, Pub. L. No. 104-201, § 1068, 110 Stat. 2655 (1996), *amended by* NDAA FY 1998, Pub. L. No. 105-85, §581-582, 113 Stat. 512 (1999).

[2] H.R. REP. NO. 104-131 (1995).

days after the sentence is adjudged or when the convening authority takes action, whichever occurs first.

5. Relationship to Federal Civilian Practice

Although the concept of forfeiture of property is present in federal civilian practice,[3] the concept of automatic forfeitures as a collateral consequence of an awarded sentence is a predominantly military-specific concept.

6. Recommendation and Justification

Recommendation 58b: No change to Article 58b.

In view of the policy considerations that led to the statutory requirements for forfeiture of pay during specified periods of confinement, and the well-developed case law addressing Article 58b, no statutory change is needed.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[3] *See, e.g.*, FED. R. CRIM. P. 32.2 (Criminal Forfeiture).

Subchapter IX. Post-Trial Procedure and Review of Courts-Martial

Article 59 – Error of Law; Lesser Included Offense
10 U.S.C. § 859

1. Summary of Proposal

This Report recommends no change to Article 59. Part II of the Report will consider whether any changes are needed in the rules implementing Article 59.

2. Summary of the Current Statute

Article 59(a) provides that "[a] finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(b) provides that "[a]ny reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense."

3. Historical Background

Article 59(a) was derived from Article 37 of the Articles of War and Section 472 of Navy Courts and Boards, and is intended to preclude reversals "for minor technical errors that do not prejudice the rights of the accused."[1] The committee drafting the original UCMJ noted in particular the statement in Section 472 of the Navy Courts and Boards manual requiring that "[i]f there has been no miscarriage of justice, the finding of the court should not be set aside or a new trial granted because of technical errors or defects which do not affect the substantial rights of the accused." Article 59(b) was derived from Articles 47 and 49 of the Articles of War and Article 39 of the proposed Articles for the Government of the Navy.[2] The statute has remained unchanged since the UCMJ was enacted in 1950,[3] and the 1951 Manual for Courts-Martial provided guidance incorporating the federal harmless error rule then in effect, based on the Supreme Court's opinion in *Kotteakos v. United States*.[4]

In addition to harmless error review, military appellate courts embrace the concept of plain error on appeal.[5] The military courts commonly cite to federal law when reviewing for

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[1] United States v. Powell, 49 M.J. 460, 462 (C.A.A.F. 1998) (citing *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. Of the House Armed Services Comm.*, 81st Cong., 1st Sess. 1174-75 (1949)).

[2] UNIFORM CODE OF MILITARY JUSTICE, TEXT REFERENCES AND COMMENTARY BASED ON THE REPORT OF THE CODE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE TO THE SECRETARY OF DEFENSE (1949) (The "Morgan" draft).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] 328 U.S. 750 (1946); *see also* Captain Murl A. Larkin, JAGC, USN, *When Is an Error Harmless?* 22 JAG JOURNAL 65 (1968).

[5] The concept that an appellate court can review legal error that was not raised at trial dates back to the nineteenth century. *See* Jeffrey L. Lowry, *Plain Error Rule — Clarifying Plain Error Analysis under Rule 52(b) of*

plain error, while acknowledging the constraints of Article 59(a).[6] For example, in 1951, the Court of Military Appeals looked to the federal plain-error rule in assessing a trial error asserted for the first time on appeal:

> We adopt and follow the rule announced by the federal courts in those cases where error is asserted for the first time on appeal. . . . The admitted normal rule is that an appellate court will not consider matters which are alleged as error for the first time on appeal. . . . However, an exception exists in criminal cases where the alleged error would result in a manifest miscarriage of justice, or would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'[7]

In 1998, in *United States v. Powell*, the Court of Appeals for the Armed Forces explained that, although Courts of Criminal Appeals may notice otherwise forfeited errors, they are constrained by Article 59(a), because they may not reverse for legal error unless the error "materially prejudices the substantial rights of the accused."[8]

4. Contemporary Practice

Military appellate courts test errors under both "harmless error" and "plain error" standards of review, depending on whether the error was raised at trial or noticed for the first time on appeal. The standard for demonstrating harmlessness may vary, depending on whether the type of error being assessed is a constitutional error or a non-constitutional error.[9] These standards of review largely track with federal appellate standards of review, with some variation due to the language of Article 59(a) and the unique appellate authority of the military Courts of Criminal Appeals under Article 66(c). Article 59(a) limits the appellate court's authority to reverse a finding or sentence for an error of law unless the

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the Federal Rules of Criminal Procedure, 84 J. CRIM. L. & CRIMINOLOGY 1065, 1066 (1994) (citing FED. R. CRIM. P. 52(b) advisory committee's note). As early as 1896, the Supreme Court recognized that "if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it, even though the defendants in the case had not 'duly excepted' to the error at trial." Wilborg v. United States, 163 U.S. 632, 658 (1896). Forty years later, the Court reaffirmed that, "in exceptional circumstances, especially in criminal cases, appellate courts . . . may . . . notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. United States v. Atkinson, 297 U.S. 157, 160 (1936). Eventually, the federal common law on plain error was codified in FED. R. CRIM. P. 52(b).

[6] *Powell*, 49 M.J. at 464.

[7] *Id.* (citing *Atkinson*, 297 U.S. at 160); *see also* United States v. Stephen, 35 C.M.R. 286, 289 (C.M.A. 1965) (finding that the appellate courts, in exceptional circumstances, may "notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of the judicial proceedings"); United States v. Stringer, 16 C.M.R. 68, 72-3 (C.M.A. 1954) (applying *Atkinson* plain error test to consider whether the error, alleged for the first time on appeal, would "seriously affect the fairness, integrity, or public reputation of judicial proceedings.").

[8] 49 M.J. at 464.

[9] United States v. Davis, 64 M.J. 445, 449 (C.A.A.F. 2007); *see also* Major Terri J. Erisman, *Defining the Obvious: Addressing the Use and Scope of Plain Error*, 61 A.F. L. REV. 41, 45 (2008).

error "materially prejudices the substantial rights of the accused."[10] Accordingly, when conducting plain error review, military appellate courts have articulated a three-part test. An appellant has the burden of demonstrating: (1) that there is error; (2) that the error is plain or obvious; and (3) that the error materially prejudiced a substantial right of the accused."[11]

The President has implemented Article 59, in part, through M.R.E. 103(a).[12] This rule provides that error may not be predicated upon a ruling which admits or excludes evidence unless the ruling "materially prejudices a substantial right of the party" and a timely objection was made. M.R.E. 103(a) was adapted from the corresponding federal rule of evidence, with the exception that the military rule requires that the ruling "materially prejudices a substantial right," whereas the federal rule requires that the error "affects a substantial right."[13] The formulation of the harmless error language in M.R.E. 103(a) is required by Article 59(a).[14]

5. Relationship to Federal Civilian Practice

The federal standards for harmless error and plain error review are articulated in Fed. R. Crim. P. 52(a) and (b), and are similar to military standards of review under Article 59. Fed. R. Crim. P. 52(a) provides: "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."[15] Fed. R. Crim. P. 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." These rules are restatements of the common law. The meanings of "harmless error" and "plain error" are not defined in the rules, but have developed through the case law.

Currently, the federal courts articulate "plain error" slightly differently than in military appellate practice. In federal civilian appellate practice, plain error doctrine allows, but does not require, an appellate court to correct an error not raised at trial only when the appellant demonstrates that: (1) there is error; (2) the error is clear or obvious; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.[16] In *United States v.*

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[10] *Powell*, 49 M.J. at 464.

[11] United States v. Paige, 67 M.J. 442, 449 (C.A.A.F. 2009) (citing United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008)).

[12] *Powell*, 49 M.J. at 462.

[13] FED. R. EVID. 103(a); *see also* FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

[14] MCM, App. 22 (M.R.E. 103(a), Analysis).

[15] There is no military counterpart to FED. R. CRIM. P. 52(b) in the Manual. However, the President has promulgated M.R.E. 103(f) based on Rule 52(b).

[16] United States v. Marcus, 560 U.S. 258, 262 (2010).

Dominguez Benitez, the Supreme Court further refined the plain-error test for a guilty-plea case, stating that relief for Rule 11 error must be tied to prejudicial effect.[17] Under the test, in order to demonstrate that an error affected substantial rights, the appellant must show that the error had a prejudicial effect on the outcome of a judicial proceeding. The Court held that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the . . . court committed plain error under Rule 11 . . . must show a reasonable probability that, but for the error, he would not have entered the guilty plea."[18]

6. Recommendation and Justification

Recommendation 59: No change to Article 59.

Litigation in the military justice system concerning review for error takes place in the context of a well-developed and evolving area of law. To the extent that specific aspects of military justice practice need a particular formula for identifying and addressing error, those matters will be addressed in the statutes and rules governing the specific substantive or procedural issues involved. For example, the accompanying proposal to amend Article 45 (Pleas of the accused) would codify harmless error review for guilty pleas. As part of a larger effort to improve the effectiveness of appellate review in the military, that proposal would apply harmless error review to deviations from the requirements of the guilty plea inquiry that were properly preserved at trial. It also would encourage the accused to identify errors in the guilty plea process and bring them to the attention of the trial judge to correct, rather than raise such errors for the first time on appeal and face the more stringent plain error review.

In addition, Part II of the Report will propose two new plain error rules for the Manual for Courts-Martial. It will consider including a broadly-applicable rule for plain error, similar to Fed. R. Crim. P. 52(b), with language appropriate to the military justice system, and will also consider including a new sentence addressing plain error in R.C.M. 910(j), regarding errors in guilty plea inquiries that are not brought to the attention of the trial judge prior to entry of judgment.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to federal criminal trials insofar as practicable in military criminal practice.

Article 59(b) authorizes a reviewing authority to affirm a lesser included offense to a finding of guilty.

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[17] United States v. Dominguez Benitez, 542 U.S. 74, 81 (2004).

[18] *Id.* at 83.

Article 60 (Current Law) – Action by the Convening Authority &
Articles 60a, 60b, and 60c (New Provisions)
10 U.S.C. §§ 860-60c

1. Summary of Proposal

This proposal would amend Article 60 (Action by the convening authority), retitling that provision as "Post-trial processing," and would create three new provisions—Article 60a (Limited authority to act on sentence in specified post-trial circumstances); Article 60b (Post-trial actions in summary courts-martial and certain general and special courts-martial); and Article 60c (Entry of judgment). These provisions would align the convening authority's post-trial review responsibilities with current law and with this Report's proposed changes to related statutory provisions. Part II of the Report will address changes in the rules implementing Article 60 and the proposed new statutory provisions in Articles 60a, 60b, and 60c.

2. Summary of the Current Statute

Legislation enacted by Congress in 2013 significantly altered the convening authority's post-trial role under Article 60.[1] Prior to the 2013 legislation, a convening authority possessed virtually unlimited power to disapprove or modify the findings and sentence of a general or special court-martial.

Under the recently revised statute, the convening authority cannot set aside or modify the findings as to any offense unless the offense meets all four of the following criteria: (1) the authorized maximum period of confinement that could have been adjudged in the case must not exceed two years; (2) the sentence adjudged in the case must not include confinement for more than six months; (3) the sentence adjudged in the case must not include a punitive discharge; and (4) the offense must not be a violation of Articles 120(a)-(b), 120b, 125 or any such other offense the Secretary of Defense may specify by regulation. In all other cases, Congress has removed the convening authority's power to disapprove or modify the findings.

In the revised statute, Congress also removed the convening authority's power to disapprove or modify a punitive discharge, or disapprove or modify a sentence to confinement for more than six months, subject to two narrow exceptions: (1) the convening authority still maintains the authority to reduce a sentence pursuant to a pretrial agreement; and (2) upon recommendation by the trial counsel, the convening

[1] NDAA FY 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 672 (2013). The changes to Article 60 went into effect on 24 June 2014.

authority may reduce the sentence of the accused if the accused provided substantial assistance in the investigation or prosecution of another person. As a practical matter, these results have reduced the scope of the convening authority's discretion to acting only on a narrow range of punishments, such as forfeitures, reductions, fines, and confinement for six months or less.

3. Historical Background

Historically, the convening authority's post-trial role in courts-martial has been both executive and quasi-judicial. Prior to the enactment of the UCMJ in 1950, the judgment and sentence of a court-martial was "incomplete and inconclusive, being in the nature of a recommendation only" to the military commander who convened the court-martial.[2] The commander's authority to disapprove or approve in whole or in part the findings and sentence was a matter wholly within the commander's discretion.[3]

Under Article 60 of the UCMJ, as enacted in 1950, the convening authority retained broad authority to modify the findings and sentence so long as the modification did not increase the findings or sentence.[4] The convening authority thus initiated the court-martial (by convening the court and referring charges under Article 34), and terminated it (by taking action on the case under Article 60). In this regard, Article 60 served several important purposes. First, it required prompt reporting to the convening authority of the results of the court-martial to facilitate a timely review. Second, it provided an accused with an opportunity to submit matters for consideration by the convening authority. Third, in many cases it provided for the first-level review by a legal officer (typically the convening authority's staff judge advocate). Fourth, it provided the convening authority with broad discretion to modify the findings or the sentence for legal errors, unjust findings, onerous sentences, or as an act of clemency.[5] Fifth, it required the convening authority to take action on the sentence to effectuate the findings and sentence. Sixth, it empowered the convening authority to order proceedings in revision or rehearings to correct apparent errors or omissions, or improper action by the court-martial with respect to the findings and sentence that could be rectified without material prejudice to accused's substantial rights. Seventh, the convening authority's action terminated the court-martial and transferred the case for appellate review.

4. Contemporary Practice

Under current practice, after the announcement of sentence, the military judge authenticates the record of trial for general and special courts-martial pursuant to R.C.M.

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[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 447 (photo reprint 1920) (2d ed. 1896).

[3] *Id.* at 449.

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] In 1983, Congress removed the requirement for the convening authority to conduct a legal review or otherwise act as an "appellate tribunal," but retained the convening authority's power to modify the findings and sentence as a matter of "command prerogative." S. REP. NO. 98-53, at 7, 19, 21 (1983).

1104. Under this rule, trial counsel serves a copy of the record of trial on the accused, who may submit matters to the convening authority for consideration prior to taking action. In cases involving a victim, the victim may submit matters to the convening authority. The staff judge advocate also must make a recommendation to the convening authority for all general courts-martial and any special court-martial case that includes a punitive discharge or confinement for one year or more. The accused has an opportunity to respond to the staff judge advocate recommendation. As noted above, under the recent amendments to Article 60, the convening authority does not have the power to take any substantive action based upon these submissions except in a limited number of cases involving relatively light sentences. The convening authority's "action" on the court-martial terminates the convening authority's ability to order new trials and proceedings in revision, and transfers jurisdiction of the case to the appellate system, for review under either Article 64 (Review by a judge advocate), Article 69 (Review in the Office of the Judge Advocate General), or Article 66 (Review by Court of Criminal Appeals), depending on the type of court-martial involved and the severity of the sentence.

Although the NDAA FY 2014 amendments substantially reduced the convening authority's power over all but a limited set of cases, the legislation did not revise the comprehensive and time-consuming post-trial process that had been used to inform the discretion previously exercised by the convening authority. As a result, the recent modifications have created some anomalies in the application of Article 60's statutory requirements. For example, the staff judge advocate recommendation is not required under the statute for many cases in which the convening authority's power to act on the qualifying offense was retained; on the other hand, the statute continues to require a staff judge advocate's recommendation in many cases where the convening authority no longer has the power to modify the findings or a sentence of confinement or punitive discharge.[6] Additionally, some cases are now too serious to qualify for discretionary relief from the convening authority under Article 60, but are not serious enough to qualify for automatic appellate review by the Courts of Criminal Appeals.[7]

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[6] In special courts-martial, if the sentence includes a bad-conduct discharge, the staff judge advocate must provide a written recommendation to the convening authority providing advice on the disposition of the case. This written advice is served on the accused, who has an opportunity to respond; the staff judge advocate often then writes an addendum to incorporate issues raised by the accused. However, no written advice is required under Article 60 for special courts-martial that do not involve a bad-conduct discharge. After the recent amendments to Article 60, the convening authority cannot modify the sentence in any case involving a punitive discharge or confinement for more than six months, and can modify the findings in only a limited class of cases constituting relatively minor offenses. Accordingly, in many special courts-martial, written legal advice to the convening authority is required under Article 60 when the convening authority cannot modify the findings or sentence, and no written advice is required when the convening authority has substantial discretion to do so.

[7] This is the result of the intersection of qualifying offenses under Articles 60, and the requirements under Article 66 to qualify for appellate review. These cases fall into one of two categories: (1) cases in which the confinement adjudged was for six months or less, no punitive discharge was awarded, but the offense was punishable by more than two years of confinement; and (2) cases in which the accused was sentenced to between six and twelve months of confinement, and did not receive a punitive discharge.

5. Relationship to Federal Civilian Practice

Article 60 has no direct counterpart in federal civilian practice. The closest approximation to the convening authority's role in "approving" the findings and sentence of a court-martial is the "entry of judgment" under Fed. R. Crim. P. 32(k). That rule describes the entry of judgment in federal cases as follows:

> In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

The entry of judgment is the tool by which the jurisdiction of the district court terminates and the case may be appealed. The time of entry of judgment fixes the time within which an appeal may be taken.

With respect to suspending a sentence, federal district court judges have broad authority to place a defendant on supervised release.[8]

6. Recommendation and Justification

Recommendation 60.1: Clarify and streamline the statutes governing post-trial processing of courts-martial.

This proposal would revise Article 60, creating three new articles and dividing the convening authority's post-trial powers among these articles.

Article 60. This proposal would amend Article 60 to provide for prompt forwarding of trial results to the parties, any victim, and the convening authority. As amended, Article 60 also would establish the authority for post-trial hearings to address any motions that may arise after the trial adjourns.

Article 60a. The proposed Article 60a would—

Retain the current prohibition on the convening authority to disapprove, commute, suspend, or modify a punitive discharge or a sentence to confinement if the total confinement running consecutively in the case exceeds six months;

Retain the convening authority's limited power to modify the remaining parts of an adjudged sentence in every case—including, for example, fines, forfeitures, reductions in rank, reprimands, and hard labor without confinement;

Provide the convening authority in all cases with a new limited authority to suspend a sentence of confinement or a punitive discharge upon a recommendation of the military judge (discussed below under Recommendation 60.2); and

[8] 18 U.S.C. §3583(a).

Preserve the convening authority's current authority in any case to reduce a sentence when an accused provides substantial assistance to the government (with a clarifying adjustment to the applicable time frame, discussed below under Recommendation 60.3).

Article 60b. This article would preserve the convening authority's discretion to act on the findings and sentence in a narrowly limited class of cases.

In all summary courts-martial, the convening authority would have the power to act on the findings and sentence. In view of the nature of a summary court-martial—a proceeding in which a judge does not preside and the accused does not have the right to counsel—the opportunity for corrective action by the convening authority is particularly important.

In addition, this proposal would maintain the convening authority's current discretion to act on the findings and sentence in general and special courts-martial in which: (1) the adjudged sentence does not include a punitive discharge; (2) the total of all confinement running consecutively does not exceed six months; (3) the maximum possible confinement that may be adjudged for any offense is two years or less; and (4) the adjudged offenses do not include Article 120(a)–(b), 120b, 125, or any other offense designated by the Secretary of Defense.

Article 60c. This Article would establish a new requirement for the military judge to make an entry of judgment into the record of trial in every case. This proposal is discussed in more detail below under Recommendation 60.5.

Recommendation 60.2: Under the proposed Article 60a, provide a limited authority to suspend sentences in cases where the military judge recommends suspension and the convening authority acts within the scope of the military judge's recommendation.

The NDAA FY 2014 amendments removed the convening authority's discretion to suspend a sentence of confinement for more than six months or a punitive discharge, with two exceptions: (1) upon recommendation of the trial counsel in recognition of substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense; and (2) when called for in a pretrial agreement.

Because military judges lack suspension authority, these changes have created a gap in the military justice system: Neither the judge nor the convening authority may suspend a punitive discharge or sentence to confinement for more than six months. Suspensions, however, may be appropriate in limited circumstances where the armed forces have invested substantially in training a servicemember, the member has committed misconduct warranting a period of confinement, and the member has demonstrated rehabilitative potential.

This proposal would provide a limited authority for suspension, but only in circumstances when a military judge recommends in writing that part of a sentence be suspended, and the convening authority determines that a period of suspension, not to exceed the suspension recommendation of the military judge, would be warranted. Under this proposal, a suspended sentence would require the concurrence of the military judge (who sentenced

the accused and saw the evidence) and the convening authority (whose act of suspension may allow the accused to return to the unit).

Recommendation 60.3: Under the proposed Article 60a, provide an expanded timeframe within which a convening authority can modify a sentence for an accused who provides substantial assistance in another case.

The current power of the convening authority to reduce a sentence for substantial assistance generally terminates when the convening authority acts on the case under Article 60. That is, an accused who provides assistance after he is sentenced for his own crimes may only be eligible for relief until convening authority action—a relatively short time period for the accused to notify the government of the ability to assist, provide the assistance in a separate prosecution or investigation, and then seek relief from the convening authority. An accused who is unable to assist the government until after convening authority action—for example, by becoming aware of evidence only after convening authority action—currently cannot receive relief under Article 60.

This proposal would extend the convening authority's timeframe to reduce the sentence of an accused who assists the government in prosecuting or investigating another person. Under this proposal, the authority to grant sentencing relief would not be triggered until the accused's provision of substantial assistance, encouraging timely cooperation by an accused. Part II of this Report will propose rules implementing this provision modeled on Fed. R. Crim. P. 35(b).

Recommendation 60.4: Streamline post-trial administrative requirements to match the changes to the convening authority's post-trial powers.

This proposal would revise post-trial procedural requirements to reflect the recent legislation that has substantially reduced the convening authority's power to modify the findings and sentence in most cases. The recent modifications to Article 60 reduced the convening authority's power in the post-trial process, but did not modify post-trial administrative requirements, which were developed at a time when the convening authority had broad power to modify the findings and sentence in every case.

This proposal would eliminate the requirement for a Staff Judge Advocate Recommendation and update the current requirement in Article 60 regarding the submission of matters by the accused and victim. Part II of this Report will propose flexible rules governing post-trial legal advice to the convening authority and will continue the current provisions for the accused and victim to submit matters to the convening authority.

This proposal would eliminate the requirement for the convening authority to take action in every special and general court-martial. Under the proposal, the military judge will be notified either that the convening authority has taken a specific action in the case or that the convening authority will not act on the case.

Part II of this Report will propose changes to the implementing rules to include eliminating the requirement for the preparation of written, authenticated transcripts prior to post-trial processing.

Recommendation 60.5: Require the military judge to make an "entry of judgment" to reflect the results of the court-martial as part of the proposed Article 60c.

Under this proposal, the military judge would enter the judgment of the court-martial into the record of trial. The entry of judgment would include the findings and sentence, and would incorporate any relevant terms of a plea agreement. In cases where the convening authority modifies the findings or sentence under Articles 60a or 60b, the entry of judgment would incorporate the convening authority's action. The entry of judgment would terminate the court-martial at the trial level.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to federal court insofar as practicable in military practice, and by ensuring that the court-martial process appropriately balances the limitation of rights available to members of the armed forces generally with procedures designed to ensure protection of rights that are provided under military law.

This proposal supports MJRG Operational Guidance by enhancing efficiency during the post-trial phase of the court-martial process.

This proposal is related to the proposed creation of Article 53a (Plea Agreements) and the proposed amendments to Article 54 (Record of Trial).

8. Legislative Proposal

SEC. 901. POST-TRIAL PROCESSING IN GENERAL AND SPECIAL COURTS-MARTIAL.

Section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), is amended to read as follows:

"§860. Art. 60. Post-trial processing in general and special courts-martial

"(a) STATEMENT OF TRIAL RESULTS.—(1) The military judge of a general or special court-martial shall enter into the record of trial a document entitled 'Statement of Trial Results', which shall set forth—

"(A) each plea and finding;

"(B) the sentence, if any; and

"(C) such other information as the President may prescribe by regulation.

"(2) Copies of the Statement of Trial Results shall be provided promptly to the convening authority, the accused, and any victim of the offense.

"(b) POST-TRIAL MOTIONS.—In accordance with regulations prescribed by the President, the military judge in a general or special court-martial shall address all post-trial motions and other post-trial matters that—

"(1) may affect a plea, a finding, the sentence, the Statement of Trial Results, the record of trial, or any post-trial action by the convening authority; and

"(2) are subject to resolution by the military judge before entry of judgment.".

SEC. 902. LIMITED AUTHORITY TO ACT ON SENTENCE IN SPECIFIED POST-TRIAL CIRCUMSTANCES.

Subchapter IX of chapter 47 of title 10, United States Code, is amended by inserting after section 860 (article 60 of the Uniform Code of Military Justice), as amended by section 901, the following new section (article):

"§860a. Art. 60a. Limited authority to act on sentence in specified post-trial circumstances

"(a) IN GENERAL.—(1) The convening authority of a general or special court-martial described in paragraph (2)—

"(A) may act on the sentence of the court-martial only as provided in subsection (b), (c), or (d); and

"(B) may not act on the findings of the court-martial.

"(2) The courts-martial referred to in paragraph (1) are the following:

"(A) A general or special court-martial in which the maximum sentence of confinement established under subsection (a) of section 856 of this title (article 56) for any offense of which the accused is found guilty is more than two years.

"(B) A general or special court-martial in which the total of the sentences of confinement imposed, running consecutively, is more than six months.

"(C) A general or special court-martial in which the sentence imposed includes a dismissal, dishonorable discharge, or bad-conduct discharge.

"(D) A general or special court-martial in which the accused is found guilty of a violation of subsection (a) or (b) of section 920 of this title (article 120), section 920b of this title (article 120b), or such other offense as the Secretary of Defense may specify by regulation.

"(3) Except as provided in subsection (d), the convening authority may act under this section only before entry of judgment.

"(4) Under regulations prescribed by the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

"(b) REDUCTION, COMMUTATION, AND SUSPENSION OF SENTENCES GENERALLY.—(1) Except as provided in subsection (c) or (d), the convening authority may not reduce, commute, or suspend any of the following sentences:

"(A) A sentence of confinement, if the total period of confinement imposed for all offenses involved, running consecutively, is greater than six months.

"(B) A sentence of dismissal, dishonorable discharge, or bad-conduct discharge.

"(C) A sentence of death.

"(2) The convening authority may reduce, commute, or suspend any sentence not specified in paragraph (1).

"(c) SUSPENSION OF CERTAIN SENTENCES UPON RECOMMENDATION OF MILITARY JUDGE.—(1) Upon recommendation of the military judge, as included in the Statement of Trial Results, together with an explanation of the facts supporting the recommendation, the convening authority may suspend—

"(A) a sentence of confinement, in whole or in part; or

"(B) a sentence of dismissal, dishonorable discharge, or bad-conduct discharge.

"(2) The convening authority may not, under paragraph (1)—

"(A) suspend a mandatory minimum sentence; or

"(B) suspend a sentence to an extent in excess of the suspension recommended by the military judge.

"(d) REDUCTION OF SENTENCE FOR SUBSTANTIAL ASSISTANCE BY ACCUSED.—(1) Upon a recommendation by the trial counsel, if the accused, after sentencing and before entry of judgment, provides substantial assistance in the investigation or prosecution of another person, the convening authority may reduce, commute, or suspend a sentence, in whole or in part, including any mandatory minimum sentence.

"(2) Upon a recommendation by a trial counsel, designated in accordance with rules prescribed by the President, if the accused, after entry of judgment, provides substantial assistance in the investigation or prosecution of another person, a convening authority, designated under such regulations, may reduce, commute, or suspend a sentence, in whole or in part, including any mandatory minimum sentence.

"(3) In evaluating whether the accused has provided substantial assistance under this subsection, the convening authority may consider the presentence assistance of the accused.

"(e) SUBMISSIONS BY ACCUSED AND VICTIM.—(1) In accordance with rules prescribed by the President, in determining whether to act under this section, the convening authority shall consider matters submitted in writing by the accused or any victim of an offense. Such rules shall include—

"(A) procedures for notice of the opportunity to make such submissions;

"(B) the deadlines for such submissions; and

"(C) procedures for providing the accused and any victim of an offense with a copy of the recording of any open sessions of the court-martial and copies of, or access to, any admitted, unsealed exhibits.

"(2) The convening authority shall not consider under this section any submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial.

"(f) DECISION OF CONVENING AUTHORITY.—(1) The decision of the convening authority under this section shall be forwarded to the military judge, with copies provided to the accused and to any victim of the offense.

"(2) If, under this section, the convening authority reduces, commutes, or suspends the sentence, the decision of the convening authority shall include a written explanation of the reasons for such action.

"(3) If, under subsection (d)(2), the convening authority reduces, commutes, or suspends the sentence, the decision of the convening authority shall be forwarded to the chief trial judge for appropriate modification of the entry of judgment, which shall be transmitted to the Judge Advocate General for appropriate action.".

SEC. 903. POST-TRIAL ACTIONS IN SUMMARY COURTS-MARTIAL AND CERTAIN GENERAL AND SPECIAL COURTS-MARTIAL.

Subchapter IX of chapter 47 of title 10, United States Code, is amended by inserting after section 860a (article 60a of the Uniform Code of Military Justice), as amended by section 902, the following new section (article):

"§860b. Art. 60b. Post-trial actions in summary courts-martial and certain general and special courts-martial

"(a) IN GENERAL.—(1) In a court-martial not specified in subsection (a)(2) of section 860a of this title (article 60a), the convening authority may—

"(A) dismiss any charge or specification by setting aside the finding of guilty;

"(B) change a finding of guilty to a charge or specification to a finding of guilty to a lesser included offense;

"(C) disapprove the findings and the sentence and dismiss the charges and specifications;

"(D) disapprove the findings and the sentence and order a rehearing as to the findings and the sentence;

"(E) disapprove, commute, or suspend the sentence, in whole or in part; or

"(F) disapprove the sentence and order a rehearing as to the sentence.

"(2) In a summary court-martial, the convening authority shall approve the sentence or take other action on the sentence under paragraph (1).

"(3) Except as provided in paragraph (4), the convening authority may act under this section only before entry of judgment.

"(4) The convening authority may act under this section after entry of judgment in a general or special court-martial in the same manner as the convening authority may act under subsection (d)(2) of section 860a of this title (article 60a). Such action shall be forwarded to the chief trial judge, who shall ensure appropriate modification to the entry of judgment and shall transmit the entry of judgment to the Judge Advocate General for appropriate action.

"(5) Under regulations prescribed by the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

"(b) LIMITATIONS ON REHEARINGS.—The convening authority may not order a rehearing under this section—

"(1) as to the findings, if there is insufficient evidence in the record to support the findings;

"(2) to reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty; or

"(3) to reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this chapter.

"(c) SUBMISSIONS BY ACCUSED AND VICTIM.—In accordance with rules prescribed by the President, in determining whether to act under this section, the convening authority shall consider matters submitted in writing by the accused or any victim of the offense. Such rules shall include the matter required by subsection (e) of section 860a of this title (article 60a).

"(d) DECISION OF CONVENING AUTHORITY.—(1) In a general or special court-martial, the decision of the convening authority under this section shall be forwarded to the military judge, with copies provided to the accused and to any victim of the offense.

"(2) If the convening authority acts on the findings or the sentence under subsection (a)(1), the decision of the convening authority shall include a written explanation of the reasons for such action."

SEC. 904. ENTRY OF JUDGMENT.

Subchapter IX of chapter 47 of title 10, United States Code, is amended by inserting after section 860b (article 60b of the Uniform Code of Military Justice), as added by section 903, the following new section (article):

"§860c. Art 60c. Entry of judgment

"(a) ENTRY OF JUDGMENT OF GENERAL OR SPECIAL COURT-MARTIAL.—(1) In accordance with rules prescribed by the President, in a general or special court-martial, the military judge shall enter into the record of trial the judgment of the court. The judgment of the court shall consist of the following:

"(A) The Statement of Trial Results under section 860 of this title (article 60).

"(B) Any modifications of, or supplements to, the Statement of Trial Results by reason of—

"(i) any post-trial action by the convening authority; or

"(ii) any ruling, order, or other determination of the military judge that affects a plea, a finding, or the sentence.

"(2) Under rules prescribed by the President, the judgment under paragraph (1) shall be—

"(A) provided to the accused and to any victim of the offense; and

"(B) made available to the public.

"(b) SUMMARY COURT-MARTIAL JUDGMENT.—The findings and sentence of a summary court-martial, as modified by any post-trial action by the convening authority under section 860b of this title (article 60b), constitutes the judgment of the court-martial and shall be recorded and distributed under rules prescribed by the President.".

9. Sectional Analysis

Sections 901-904 concern post-trial processing and post-trial action by the convening authority. These processes are currently prescribed under Article 60 (Action by the convening authority). These sections would amend Article 60 of the UCMJ in its entirety.

Section 901 would amend Article 60 to provide for the distribution of the trial results and to authorize the filing of post-trial motions with the military judge in general and special courts-martial. The convening authority's role in post-trial processing would be moved to new Articles 60a and 60b. *See* Sections 902-903, *infra*. Article 60, as amended, would include the following provisions:

Article 60(a) would require the military judge to immediately enter into the record the Statement of Trial Results, consisting of the pleas of the accused, the findings and sentence of the court-martial, and any other information required by the President. The statute would require that copies be provided to the convening authority, the accused, and any victim of any offense. The statement of trial results would serve as the basis for the entry of judgment under Article 60c.

Article 60(b) would require the President to establish rules governing submission of post-trial motions to the military judge. The implementing rules would establish filing deadlines for the parties and provide explicit authority for the military judge and convening authority to direct post-trial hearings when necessary to address allegations of legal error. The authority to order post-trial hearings would replace the previous authority to order proceedings in revision. *See* Article 60(f)(1)-(2).

Section 902 would create a new section, Article 60a (Limited authority to act on sentence in specified post-trial circumstances), which would retain current limitations on the convening authority's post-trial actions in most general and special courts-martial, subject

to a narrowly limited suspension authority under Article 60a(c) and a revised authority related to substantial assistance under Article 60a(d). Article 60a, as proposed, would contain the following provisions:

Article 60a(a)-(b) would retain and clarify existing limitations on the convening authority's post-trial actions in general and special courts-martial in which: (1) the maximum sentence of confinement for any offense is more than two years; (2) adjudged confinement exceeds six months; (3) the sentence includes dismissal or discharge; or (4) the accused is found guilty of designated sex-related offenses. Under current law, the convening authority in such cases is prohibited from modifying the findings of the court-martial, or reducing, commuting, or suspending a punishment of death, confinement of more than six months, or a punitive discharge.

Article 60a(c) would provide a limited suspension authority in specified circumstances. For the convening authority to exercise this authority, the military judge would be required to make a specific suspension recommendation in the Statement of Trial Results. The suspension authority under subsection (c) would be limited to punishments of confinement in excess of six months and punitive discharges.

Article 60a(d) would retain, with clarifying amendments, the key features of current law with respect to the convening authority's power to reduce the sentence of an accused who assists in the prosecution or investigation of another person. As amended, the President may prescribe rules providing for a convening authority to exercise this power after entry of judgment. This provision is designed to allow for the reduction of a sentence of an accused who provides substantial assistance in the prosecution of another person, even well after his own trial is over and appellate review is complete. The implementing rules will be modeled on Fed. R. Crim. P. 35(b).

Article 60a(e) would allow the accused and a victim of the offense to submit matters to the convening authority for consideration. The implementing rules would establish the timelines for submitting matters under this subsection and procedures for responding to submissions. The implementing rules also would require the accused and victim to have a copy or access to the recording of the open sessions of the court-martial and admitted unsealed exhibits.

Article 60a(f) would require the decision of the convening authority to be forwarded to the military judge. If the convening authority modified the sentence of the court-martial, the convening authority would be required to explain the reasons for the modification. An explanation for the convening authority's decision would only be required when the convening authority modifies the sentence. No approval of the findings or sentence would be required. The decision of the convening authority would be forwarded to the military judge, who would incorporate any change in the sentence into the entry of judgment. In a case where the accused provides substantial assistance under subsection (d) and a designated convening authority reduces the sentence of the accused after entry of judgment, the convening authority's action would be forwarded to the chief trial judge, who would be responsible for ensuring appropriate modification of the entry of judgment.

Because a modification might happen during or after the completion of appellate review, the modified entry of judgment would be forwarded to the Judge Advocate General for appropriate action.

Section 903 would create a new section, Article 60b (Post-trial actions in summary courts-martial and certain general and special courts-martial). The new section would retain and clarify the convening authority's post-trial authorities and responsibilities with respect to the findings and sentence of a court-martial not covered by subsection (a)(2) of new Article 60a. This post-trial authority would be available in summary courts-martial and a limited number of general and special courts-martial which, because of the offenses charged and the sentence adjudged, would not be covered under Article 60a. Consistent with existing law, the convening authority in such cases would be authorized to act on the findings and the sentence, and could order rehearings, subject to certain limitations. The procedural requirements under Article 60b, to include consideration of matters submitted by the accused and victim, would be the same as those provided in Article 60a. In summary courts-martial, the convening authority would be required to act on the sentence, and would have discretion to act on the findings, as under current law.

Section 904 would create a new section, Article 60c (Entry of judgment). The entry of judgment would require the military judge to enter the judgment of the court-martial into the record in all general and special courts-martial, and would mark the conclusion of trial proceedings. The judgment would reflect the Statement of Trial Results, any action by the convening authority on the findings or sentence, and any post-trial rulings by the military judge. The judgment also would indicate the time when the accused's case becomes eligible for direct appeal to a Court of Criminal Appeals under Article 66, or for review by the Judge Advocate General under Article 65. This requirement for an entry of judgment is modeled after Fed. R. Crim. P. 32(k). The findings and sentence of a summary court-martial, as modified by any post-trial action by the convening authority under Article 60b, would constitute the judgment of the court-martial.

Article 61 – Waiver or Withdrawal of Appeal
10 U.S.C. § 861

1. Summary of Proposal

This proposal would make conforming changes to Article 61 to align it with proposed revisions to Articles 60, 65, and 69, as well as the proposal to enact a new Article 60c (Entry of judgment). This proposal also would modify references in Article 61 to Articles 66 and 69, to conform the statute to proposed changes to those articles and to the appellate process generally. Part II of the Report will address changes in the rules implementing Article 61 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 61 provides that an accused may file a statement with the convening authority after he or she takes action expressly waiving the right to appellate review under Article 66 (Review by Court of Criminal Appeals) or Article 69 (Review by the Office of the Judge Advocate General), unless the approved sentence includes death. The waiver must be signed by both the accused and defense counsel, and must be filed within 10 days after the accused is served with a copy of the convening authority's action under Article 60(c). The convening authority may extend this timeline for good cause for not more than 30 days. In addition, an accused may withdraw an appeal at any time, unless the approved sentence includes death.

3. Historical Background

Before 1983, appellate review could not be waived. In the Military Justice Act of 1983, Congress provided a narrow timeframe during which an accused could waive appellate review in non-capital cases.[1] Congress enacted this provision to "accommodate convicted servicemembers who were eager to be separated immediately—albeit, with a punitive discharge—and whose continued retention in the service hindered the military mission."[2] The waiver could be filed only within a 10-day period after the convening authority acted and the action was served on the accused or defense counsel.[3] The mandatory delay in waiving appellate review until after the convening authority's action provided the accused time to reflect on the consequences of the conviction and sentence, as approved by the convening authority, before weighing grounds to appeal, and to ensure that the court-

[1] Military Justice Act of 1983, Pub. L. No. 98–209, 97 Stat. 1393.

[2] United States v. Hernandez, 33 M.J. 145, 148 (C.M.A. 1991).

[3] S. REP. NO. 98-53, at 22 (1983).

martial produces "an accurate result and not merely one that an accused is willing to accept."[4]

4. Contemporary Practice

The President has implemented Article 61 through R.C.M. 1110, which provides additional rules and procedures concerning waiver and withdrawal from appellate review, including the right to counsel, the form and effect of waivers and withdrawals, and the applicable time limits for submission by the accused. Waiver of and withdrawal from appellate review occurs infrequently in military practice. In accordance with case law addressing the statute and the implementing rules, in order for a waiver under Article 61 to be accepted, it must be accompanied by proof that it was voluntary after full advice from counsel.[5]

5. Relationship to Federal Civilian Practice

Article 61 has no direct counterpart in federal civilian practice. In federal court, the accused must request appellate review by filing a notice of appeal.[6] There is no automatic appellate review, even in capital cases.[7] In civilian practice, "[t]he right to appeal can be waived in a plea agreement."[8] By way of comparison, Article 61 permits a waiver only after the convening authority approves the finding and sentence, and not as part of a plea agreement. Likewise, R.C.M. 705(c)(1)(B) prohibits any term or condition in a pretrial agreement that deprives the accused of the complete and effective exercise of post-trial and appellate rights. Given the unique pressures and circumstances of military life, the military system has retained the opportunity for appellate review "to ensure judicially that the accused's plea was provident, that the accused entered the plea agreement voluntarily, and that sentencing proceedings met acceptable standards."[9]

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[4] *Hernandez*, 33 M.J. at 148.

[5] *See* United States v. Miller, 62 M.J. 471 (C.A.A.F. 2006); *see also* MCM, App. 19 (Waiver/Withdrawal of Appellate Rights in General and Special Courts-Martial Subject to Review by a Court of Military Review (DD Form 2330)).

[6] FED. R. APP. P. 3.

[7] FED. R. APP. P. 4(b)(1)(A); 18 U.S.C. § 3595(a) (in a case in which a death sentence is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified).

[8] *See* FED. R. CRIM. P. 11(b)(1)(N) (requiring the judge to determine that the defendant understands the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence); United States v. Feichtinger, 105 F.3d 1188, 1190 (7th Cir. 1997), *cert. denied*, 520 U.S. 1281 (1997). *See also* In re Sealed Case, 702 F.3d 59, 63 (D.C. Cir. 2012) ("A waiver of the right to appeal a sentence is presumptively valid and is enforceable if the defendant's decision to waive is knowing, intelligent, and voluntary.").

[9] MCM, App. 21 (R.C.M. 705, Analysis).

6. Recommendation and Justification

Recommendation 61: Amend Article 61 to align the statute with proposed amendments to Articles 60, 65, and 69.

This is a conforming change only.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to federal courts insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 905. WAIVER OF RIGHT TO APPEAL AND WITHDRAWAL OF APPEAL.

Section 861 of title 10, United States Code (article 61 of the Uniform Code of Military Justice), is amended to read as follows:

"§861. Art. 61. Waiver of right to appeal; withdrawal of appeal

"(a) WAIVER OF RIGHT TO APPEAL.—After entry of judgment in a general or special court-martial, under procedures prescribed by the Secretary concerned, the accused may waive the right to appeal. Such a waiver shall be —

"(1) signed by the accused and by defense counsel; and

"(2) attached to the record of trial.

"(b) WITHDRAWAL OF APPEAL.—In a general or special court-martial, the accused may withdraw an appeal at any time.

"(c) DEATH PENALTY CASE EXCEPTION.—Notwithstanding subsections (a) and (b), an accused may not waive the right to appeal or withdraw an appeal with respect to a judgment that includes a sentence of death.

"(d) WAIVER OR WITHDRAWAL AS BAR.—A waiver or withdrawal under this section bars review under section 866 of this title (article 66).".

9. Sectional Analysis

Section 905 would amend Article 61, which provides that an accused may file a statement with the convening authority expressly waiving the right to appellate review under Article 66 or Article 69. The amendments would conform the statute to the changes proposed in Articles 60, 65, and 69 concerning post-trial processing. *See* Sections 901-904, *supra*; Sections 909, 913, *infra*.

Article 62 – Appeal by the United States
10 U.S.C. § 862

1. Summary of Proposal

This proposal would align interlocutory appeals in the military more closely with federal civilian practice. Part II of the Report will consider whether changes are needed in the rules implementing Article 62.

2. Summary of the Current Statute

Article 62 provides a limited basis for government interlocutory appeals. Under the statute, such appeals generally are limited to: (1) cases that may award a punitive discharge; (2) dismissal of specifications; (3) rulings and orders dealing with classified information; and (4) the exclusion of key government evidence. Currently, there is no jurisdiction under Article 62 for the government to appeal a military judge's decision to set aside a panel's guilty verdict based on legally insufficient evidence.

3. Historical Background

In the Military Justice Act of 1983, Congress amended Article 62 to provide authority for interlocutory government appeals.[1] Congress based this statutory change on 18 U.S.C. § 3731, the statute applicable to the trial of criminal cases in the federal district courts, with the goal of "allow[ing] appeal by the government under procedures similar to an appeal by the United States in a federal civilian prosecution."[2]

4. Contemporary Practice

The President has implemented Article 62 through R.C.M. 908, which provides the rules and procedures for government appeals. Under the rule, appeals are limited to courts-martial presided over by a military judge where a bad-conduct discharge could be adjudged.[3] Government appeals are limited to rulings and orders excluding key evidence, dismissing charges or specifications, or involving the protection of classified information.[4] After a military judge issues such a ruling, a trial counsel may request a 72-hour delay to decide whether to appeal the order.[5] To pursue an appeal, the trial counsel must file a

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[1] Pub. L. No. 98-209, § 10, 97 Stat. 1393 (1983).

[2] S. REP. NO. 98-53, at 6 (1983).

[3] R.C.M. 908(a).

[4] *Id.*

[5] R.C.M. 908(b).

notice of appeal with the judge within that same 72-hour period. An appeal cannot be taken for the purposes of delay. In general, notice of appeal stays the court-martial, with two exceptions. First, an appeal under Article 62 does not prohibit the military judge from addressing motions unrelated to the matter being appealed. Second, the affected charges may be severed under R.C.M. 906, or with the concurrence of all parties. The rule provides that the government shall diligently prosecute the appeal, and that the Court of Criminal Appeals shall prioritize the appeal over other issues if practical.[6]

5. Relationship to Civilian Practice

In federal civilian practice, government appeals are authorized under 18 U.S.C. § 3731. Although Article 62 is based upon this Title 18 provision, there are several differences between the two provisions. First, under Section 3731, the government may appeal the release of a defendant from confinement.[7] Such appeals must be taken within thirty days of the judge's determination and must be "diligently prosecuted." Second, the government may appeal a finding of not guilty under Section 3731 as long as there is no violation of the Double Jeopardy Clause (e.g. upon motion by the defense, the judge enters a finding of not guilty after the jury returns a guilty verdict).[8] Third, the Courts of Appeals are required to liberally construe the provisions in Section 3731 authorizing government interlocutory appeals.[9]

6. Recommendation and Justification

Recommendation 62.1: Amend Article 62 to authorize the government to appeal a decision that terminates the proceedings as to a specification, except in cases where such an appeal would violate Article 44's prohibitions on double jeopardy.

This proposal would provide for government appeals in the same manner as federal civilian practice. Consistent with that practice, it would authorize an appeal when, upon defense motion, the military judge sets aside a panel's finding of guilty because of legally insufficient evidence.

Recommendation 62.2: Amend Article 62 to align the rule of construction with the similar rule applicable to the interlocutory appeals in federal civilian courts.

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[6] R.C.M. 908(c).

[7] 18 U.S.C. § 3731 ("An appeal by the United States shall lie . . . from a decision or order . . . granting the release of a person").

[8] 18 U.S.C. § 3731 ("An appeal by the United States shall lie . . . from a decision, judgment or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment . . . except that no appeal shall lie where the double jeopardy clause . . . prohibits further prosecution.").

[9] 18 U.S.C. § 3731 ("The provisions of this section shall be liberally construed to effectuate its purposes"). Article 62 does not contain a similar rule of construction. *See, e.g.*, United States v. Wuterich, 67 M.J. 63, 74 (2008); United States v. Vargas, 74 M.J. 1 (2014).

The final sentence in 18 U.S.C. § 3731, which authorizes interlocutory appeals in federal civilian courts, states that "[t]he provisions of this section shall be liberally construed to effectuate its purposes"[10] The federal civilian courts consider that rule of construction when interpreting provisions in Section 3731 that are similar to the provisions in Article 62. This proposal would better align Article 62 with the rule of construction applicable in federal civilian courts under 18 U.S.C. § 3731.

Recommendation 62.3: Amend Article 62 to conform to the proposed revisions to the review and appeal provisions under Articles 66 and 69.

Currently, the government may not file an interlocutory appeal in cases where a punitive discharge is not authorized. The prohibition on interlocutory appeals in cases where no punitive discharge may be adjudged reflects the fact that those cases were not entitled to appellate court review, except when certified by the Judge Advocate General.

This proposal amends Article 62 to eliminate the requirement that the court-martial must be able to adjudge a bad-conduct discharge as a jurisdictional prerequisite to filing an Article 62 appeal.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by: (1) employing the standards and procedures applicable to government interlocutory appeals in the federal civilian practice insofar as practicable in military criminal practice; (2) ensuring that the court-martial process appropriately balances the limitation of rights available to members of the armed forces generally with procedures designed to ensure protection of rights that are provided under military law; (3) enhancing efficiency during the post-trial phase of the court-martial process; and (4) addressing ambiguities and inconsistencies among Article 62, its implementing rules, and the case law interpreting the statute concerning applicable rule of construction, thereby reducing the potential for unnecessary litigation in this area.

Under the related provisions of Articles 66, the accused would have an opportunity to seek direct review of the findings in a case where the government had invoked interlocutory review under Article 62, including cases not otherwise eligible for direct review under Article 66. The Article 66 provision would ensure continuity in appellate review of a case.

8. Legislative Proposal

SEC. 906. APPEAL BY THE UNITED STATES.

Section 862 of title 10, United States Code (article 62 of the Uniform Code of Military Justice), is amended—

[10] 18 U.S.C. § 3731.

(1) in paragraph (1) of subsection (a)—

(A) in the matter before subparagraph (A), by striking "court-martial" and all that follows through the colon at the end and inserting "general or special court-martial or in a pretrial proceeding under section 830a of this title (article 30a), the United States may appeal the following:"; and

(B) by adding at the end the following new subparagraph:

"(G) An order or ruling of the military judge entering a finding of not guilty with respect to a charge or specification following the return of a finding of guilty by the members.";

(2) in paragraph (2) of subsection (a)—

(A) by striking "(2)" and inserting "(2)(A)"; and

(B) by adding at the end the following new subparagraph:

"(B) An appeal of an order or ruling may not be taken when prohibited by section 844 of this title (article 44)."; and

(3) by adding at the end the following:

"(d) The United States may appeal a ruling or order of a military magistrate in the same manner as had the ruling or order been made by a military judge, except that the issue shall first be presented to the military judge who designated the military magistrate or to a military judge detailed to hear the issue.

"(e) The provisions of this article shall be liberally construed to effect its purposes.".

9. Sectional Analysis

Section 906 concerns government interlocutory appeals. Presently, Article 62 provides a limited basis for government interlocutory appeals. This section would amend Article 62 to better align interlocutory appeals in the military with federal civilian practice, by authorizing an appeal when, upon defense motion, the military judge sets aside a panel's finding of guilty because of legally insufficient evidence. Additionally, the amendments would better align Article 62 with the rule of construction applicable to 18 U.S.C. § 3731, by directing military courts to liberally construe the statute's provisions to effect its purposes. As amended, the authority for interlocutory appeals under Article 62 would be extended to all general and special courts-martial, which would replace the current limitation authorizing such appeals only if the offense at issue carries the potential for a punitive discharge.

Article 63 – Rehearings
10 U.S.C. § 863

1. Summary of Proposal

This proposal would amend Article 63 to align the sentencing limitations at a rehearing with federal civilian practice in two circumstances. First, if an accused at a rehearing has changed a prior plea of guilty to a plea of not guilty or otherwise has not complied with the terms of a pretrial agreement, the sentence would not be limited to the sentence imposed at the earlier trial. Second, if the government on appeal obtains an order for a rehearing on the sentence under this Report's proposal for Article 56, the sentence at the rehearing is not limited to the sentence erroneously adjudged at the earlier trial. Part II of the Report will address changes in the rules implementing Article 63 that will be necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 63 limits the findings and sentences that may be adjudged at a rehearing. For findings, the statute precludes a rehearing on any offense for which the accused was found not guilty by the first court-martial. In this respect, Article 63 is consistent with the Double Jeopardy Clause.[1] With respect to sentencing, Article 63 prohibits the court-martial from imposing a higher sentence at a rehearing than was approved by the convening authority at the first trial, with three exceptions: (1) when the accused is convicted of offenses at the rehearing that were not part of the prior trial; (2) when a mandatory minimum sentence is required by law; and (3) when the accused pleaded guilty at the first trial pursuant to a pretrial agreement and the accused at the rehearing either changes the plea to not guilty with respect to the offenses covered by the pretrial agreement or fails to comply with the terms of the pretrial agreement. When a case falls within the third category, Article 63 limits the sentence that can be approved after a rehearing to the sentence adjudged by the court-martial at the first trial.

3. Historical Background

Article 63, which was derived from Article 52 of the Articles of War, contained a prohibition against any increase in the sentence upon a rehearing.[2] As pretrial agreements came into general use in the 1950s and 1960s, the rigidity of the prohibition on any

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[1] *Compare* Article 63, UCMJ ("Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial . . .") *with* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."); *see also* Article 44(a) ("No person may, without his consent, be tried a second time for the same offense.").

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1180 (1949).

increase in punishment at a rehearing had an unintended consequence: An accused who entered a not guilty plea at the rehearing could nonetheless retain the benefit of the sentence cap resulting from the plea agreement at the original trial because, under then-existing law, the sentence at rehearing could not exceed the sentence approved by convening authority after the first trial.[3] This took into account the fact that appeal of the accused's conviction was automatic. The statute was amended in 1983 to permit a limited increase in the sentence at a rehearing if the accused changed his plea from guilty to not guilty. Under Article 63, as amended, the sentence at the rehearing may exceed the sentence approved by the convening authority at the first court-martial but may not exceed the sentence that was adjudged by the first court-martial.[4] Other than this change, the statute has not been amended significantly since the UCMJ was enacted in 1950.[5]

4. Contemporary Practice

The President has implemented Article 63 through R.C.M. 810, which provides additional rules and procedures applicable to rehearings and new trials. When the accused at the rehearing changes a plea from guilty to not guilty, the accused benefits from the first court-martial's consideration of the guilty plea as a mitigating factor, and the sentence at the rehearing is accordingly limited to the sentence adjudged at the first trial even though the plea has changed at the rehearing.

5. Relationship to Federal Civilian Practice

In federal civilian practice, federal defendants whose convictions are reversed on appeal are subject to retrial, and "neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction."[6] This result rests on the premise that a defendant's original conviction is nullified at his behest, with the "slate wiped clean," as a direct result of the appeal.[7] In *Alabama v. Smith*, a unanimous Supreme Court held that a sentence could be increased at a retrial when a defendant changes a plea from guilty to not guilty.[8] Additionally, in federal civilian practice either a defendant or the government may appeal a sentence adjudged by the District Court. A sentence may be appealed because it is unlawful, the district judge misapplied the sentencing guidelines, or the sentence is unreasonable.[9]

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[3] *See generally* Randy V. Cargill, *The Article 63 Windfall*, 1989 ARMY LAW. 26 (Dec. 1989).

[4] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[6] North Carolina v. Pearce 395 U.S. 711, 720-721 (1969).

[7] *Id.*

[8] Alabama v. Smith, 490 U.S. 794, 803 (1989).

[9] *See* 18 U.S.C. § 3742(a-b). 18 U.S.C. § 3742(e) contained a detailed provision on appellate review of sentences; however, in *United States v. Booker*, 543 U.S. 220, 223 (2005), the Supreme Court excised the subsection and replaced it with a standard of reasonableness.

6. Recommendation and Justification

Recommendation 63: Amend Article 63 to remove the sentence limitation at a rehearing in cases in which: (1) an accused changes the plea from guilty to not guilty, or otherwise fails to comply with the terms a pretrial agreement; or (2) as a conforming change to the proposal under Article 56, a sentence is set aside based on a government appeal.

This proposal would better align military practice with federal civilian practice with respect to rehearings when an accused changes his or her plea or otherwise fails to comply with the terms of a plea agreement. Under the proposed amendments, an accused in these situations would be in the same position as if the guilty plea had not been taken in the first trial. This change would restore the parties to the position they were in at the beginning of the first trial with respect to the possible range of punishments.

Under the proposal for Article 56, after the establishment of sentencing parameters and criteria, the government would be able to appeal a sentence under certain conditions. As a conforming change to that proposal, this proposal amends Article 63 to allow a remedy after a successful government appeal.

The proposed amendments would continue the remaining limitations on the sentence that could be imposed at a rehearing. An accused who enters the same plea at the rehearing as at the first trial, or changes the plea from not guilty to guilty, would not face the possibility of an increased sentence at rehearing.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by better aligning military practice with federal civilian practice with respect to rehearings and new trials in the same case.

8. Legislative Proposal

SEC. 907. REHEARINGS.

Section 863 of title 10, United States Code (article 63 of the Uniform Code of Military Justice), is amended—

(1) by inserting "(a)" before "Each rehearing";

(2) in the second sentence, by striking "may be approved" and inserting "may be adjudged";

(3) by striking the third sentence; and

(4) by adding at the end the following new subsections:

"(b) If the sentence adjudged by the first court-martial was in accordance with a plea agreement under section 853a of this title (article 53a) and the accused at the rehearing does not comply with the agreement, or if a plea of guilty was entered for an offense at the first court-martial and a plea of not guilty was entered at the rehearing, the sentence as to those charges or specifications may include any punishment not in excess of that which could have been adjudged at the first court-martial.

"(c) If, after appeal by the Government under section 856(e) of this title (article 56(e)), the sentence adjudged is set aside and a rehearing on sentence is ordered by the Court of Criminal Appeals or Court of Appeals for the Armed Forces, the court-martial may impose any sentence that is in accordance with the order or ruling setting aside the adjudged sentence.".

9. Sectional Analysis

Section 907 would amend Article 63 to remove the sentence limitation at a rehearing in cases in which: (1) an accused changes his or her plea from guilty to not guilty, or otherwise fails to comply with the terms a pretrial agreement; or (2) a sentence is set aside based on a government appeal. The amendments would better align military practice with federal civilian practice in the area of rehearings.

Article 64 – Review by a Judge Advocate
10 U.S.C. § 864

1. Summary of Proposal

This proposal would amend Article 64 to limit its applicability to summary courts-martial. As amended, the article would address only the initial review of summary courts-martial, since they are not eligible for direct review by the Courts of Criminal Appeals under Article 66 (Review by Courts of Criminal Appeals). In a related proposal, Article 65 (Transmittal and Review of Records) would address the initial review of general and special courts-martial that are not eligible for direct review by the Courts of Criminal Appeals. Part II of the Report will address changes in the rules implementing Article 64 required by these statutory amendments.

2. Summary of the Current Statute

Article 64 provides for review of court-martial cases following the convening authority's action approving findings of guilty under Article 60 (Action of Convening Authority). Review under Article 64 applies to those cases not subject to automatic review under Article 66 (Review by Court of Criminal Appeals) and Article 69(a) (Review in the office of the Judge Advocate General). Article 64 applies to all summary courts-martial, and to special courts-martial in which a bad-conduct discharge was not adjudged. Article 64 currently requires a judge advocate to provide a written review of the case that includes conclusions as to jurisdiction, whether the charges and specifications stated offenses, and whether the sentence was within the limits prescribed by law. This review is also required to address any allegations of error submitted in writing by the accused. If the reviewing judge advocate recommends corrective action (and in certain other circumstances), the case is transmitted to the general court-martial convening authority, who has authority to take appellate corrective action on the case. If the convening authority disagrees with the recommendation, the case is transmitted to the Judge Advocate General for review under Article 69(b).

3. Historical Background

Since its inception, the UCMJ has required some form of legal review for minor cases. This review was initially required under Article 65.[1] In 1983, as part of the Military Justice Reform Act, the requirement was moved to Article 64.[2] Article 64 is the only direct appellate review available for summary court-martials. The summary court-martial is a unique military proceeding, designed to dispense justice promptly for relatively minor offenses under a simple form of procedure. Because of its summary nature, the Supreme

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

Court has stated that a summary court-martial is disciplinary in nature, rather than punitive, and does not result in a "criminal conviction."[3]

4. Contemporary Practice

The President has implemented Article 64 through R.C.M. 1112.

5. Relationship to Federal Civilian Practice

The summary court-martial is without a civilian counterpart. The closest comparison to summary court-martial offenses in the federal civilian system would be "Class C misdemeanors," punishable by confinement for thirty days or less but more than five days; and "infractions," punishable by confinement for five days or less.[4] Subject to limitations, such offenses may be tried by a magistrate judge in federal court. A federal defendant is entitled to an "appeal as of right" from a misdemeanor conviction, sentence, judgment or order by a U.S. magistrate judge to "a judge of the district court of the district in which the offense was committed."[5] A federal defendant is also entitled to an "appeal as of right" from a judgment or order of a federal district court to a circuit court of appeals.[6] Although there is no express provision for an appeal of right from a judgment of the district court affirming a magistrate's conviction, such appeals have been allowed as a matter of course.[7]

6. Recommendation and Justification

Recommendation 64: Amend Article 64 to apply only to summary courts-martial.

This proposal would amend Article 64 so that it applies only to the initial review of summary courts-martial. The proposal for Article 65 addresses the review of all general and special courts-martial that do not qualify for direct review by the Courts of Criminal Appeals.

This proposal would make no substantive change to the procedures or scope of review of summary courts-martial. Part II of this Report will address the opportunity for an accused to consult with counsel before filing any matter in connection with an Article 64 review.

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[3] Middendorf v. Henry, 425 U.S. 25, 34 (1976).

[4] 18 U.S.C. § 3559 (Sentencing classification of offenses).

[5] 18 U.S.C. § 3402; FED. R. CRIM. P. 58(g)(2).

[6] 28 U.S.C. § 1291; FED. R. APP. P. 3 & 4(c).

[7] *See* United States v. Forcellati, 610 F.2d 25, 28 (1st Cir. 1979) ("While there is thus no express provision for even the defendant to appeal from a judgment of the district court affirming a magistrate's conviction, such appeals have been allowed apparently as a matter of course . . . . The statutory grant to the courts of appeals of jurisdiction to review "all final decisions" of district courts is literally sufficient to include final decisions reviewing criminal convictions before magistrates, and no reason for excluding them from its embrace appears. Indeed, the assurance of that further review in the courts of appeals encourages use of magistrates' trials for minor offenses.") (quoting 28 U.S.C. § 1291).

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by ensuring that the court-martial process appropriately balances the limitation of rights available to members of the armed forces generally with procedures designed to ensure protection of rights that are provided under military law.

8. Legislative Proposal

SEC. 908. JUDGE ADVOCATE REVIEW OF FINDING OF GUILTY IN SUMMARY COURT-MARTIAL.

(a) IN GENERAL.—Subsection (a) of section 864 of title 10, United States Code (article 64 of the Uniform Code of Military Justice), is amended by striking the first two sentences and inserting the following:

"(a) IN GENERAL.—Under regulations prescribed by the Secretary concerned, each summary court-martial in which there is a finding of guilty shall be reviewed by a judge advocate. A judge advocate may not review a case under this subsection if the judge advocate has acted in the same case as an accuser, preliminary hearing officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—(1) The heading for such section (article) is amended to read as follows:

"§864. Art. 64. Judge advocate review of finding of guilty in summary court-martial".

(2) Subsection (b) of such section is amended—

(A) by striking "(b) The record" and inserting "(b) RECORD.—The record";

(B) by inserting "or" at the end of paragraph (1);

(C) by striking paragraph (2); and

(D) by redesignating paragraph (3) as paragraph (2).

(3) Subsection (c)(3) of such section (article) is amended by striking "section 869(b) of this title (article 69(b))." and inserting "section 869 of this title (article 69).".

9. Sectional Analysis

Section 908 concerns review of court-martial cases not otherwise subject to appellate review under Article 66 or review by the Office of the Judge Advocate General under Article 69. Under current law, Article 64 provides for judge advocate review of such cases, including conclusions as to jurisdiction, whether the charges and specifications stated offenses, and whether the sentence was within the limits prescribed by law. This section would amend Article 64 to apply only to the initial review of summary courts-martial. Article 65, as amended, would provide for review of general and special courts-martial that do not qualify for direct review by the Courts of Criminal Appeals. No substantive changes to the procedures or scope of review of summary courts-martial would be made. Implementing rules will address the opportunity for an accused to consult with counsel before filing any matter in connection with an Article 64 review.

Article 65 – Disposition of Records
10 U.S.C. § 865

1. Summary of Proposal

This proposal would amend Article 65 to provide additional guidance on the disposition of records of trial. The proposed amendments would require that the record of trial be forwarded to appellate defense counsel for review whenever the case is eligible for direct review under Article 66. For those cases that are not eligible for direct appellate review under Article 66, the proposal would provide for a limited form of review similar to the limited review that currently is provided under Article 64. Part II of the Report will address changes in the rules implementing Article 65 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 65 concerns the disposition of court-martial records. It requires that the records of trial in all cases subject to review under either Article 66 (review by Court of Criminal Appeals) or Article 69 (review in the office of the Judge Advocate General) be forwarded to the Judge Advocate General for appropriate action unless the accused has waived the right to review or an appeal has been withdrawn. The transmitted records of trial are then either forwarded to the Court of Criminal Appeals under Article 66 or reviewed by the Office of the Judge Advocate General under Article 69. All other records are handled in accordance with service regulations.

3. Historical Background

Article 65 was derived from Articles 35 and 36 of the Articles of War and proposed Articles 21 and 39 of the Articles for the Government of the Navy.[1] The original statute required that a judge advocate review any court-martial that was not subject to any other appellate review (i.e. summary courts-martial and special courts-martial without a bad-conduct discharge).[2] In 1983, Congress amended Article 65 by moving the requirement for a review by a judge advocate to Article 64.[3]

4. Contemporary Practice

The President has implemented Article 65 through R.C.M. 1111. Under the rule, the records of trial in all general courts-martial and in special courts-martial in which a bad-conduct discharge was adjudged are forwarded to the Judge Advocate General unless the accused

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1186 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

waives appeal. Cases forwarded to the Judge Advocate General are then reviewed under Article 66 (review by Court of Criminal Appeals) or Article 69 (review in the office of the Judge Advocate General), depending on the sentences adjudged. Cases not forwarded to the Judge Advocate General are reviewed by a judge advocate under Article 64 (review by a judge advocate).

5. Relationship to Federal Civilian Practice

Federal civilian practice and military practice differ in the treatment of records of trial. Under federal practice, the appellant has the responsibility to identify and request a transcript of those parts of the proceedings the appellant considers to be necessary for the appeal.[4] After ordering transcripts, it is the appellant's duty to "do whatever else is necessary to enable the clerk to assemble and forward the record."[5] The court clerk then forwards the record of trial to the appellate court.[6]

6. Recommendation and Justification

Recommendation 65.1: Amend Article 65 by requiring that the record of trial be forwarded to appellate defense counsel for review whenever the case is eligible for an appeal under Article 66.

Under the related proposal concerning Article 66, any sentence that exceeds six months of confinement, includes a punitive discharge, or where the government has previously appealed under Article 62 would be eligible for direct appeal to a Court of Criminal Appeals. This proposal would require the Judge Advocate General to notify the accused of the right to appeal in all such cases and to provide appellate defense counsel with a copy of the record of trial. The appellate defense counsel would then be required to review the record and advise the accused on the merits of filing an appeal. Upon request of the accused, appellate defense counsel would file an appeal on behalf of the accused.

This proposal would continue to require mandatory appellate review in all cases that include a sentence of death.

Recommendation 65.2: Amend Article 65 to require a review by the Judge Advocate General of all general and special court-martial cases not eligible for direct appeal under Article 66.

The proposed review would be similar to the review currently conducted under Article 64, and would apply to cases in which the sentence does not contain a punitive discharge and includes confinement for six months or less, and where the government has not previously appealed under Article 62 (i.e., cases that do not qualify for direct review in the Court of Criminal Appeals under Article 66). The review would be conducted by an attorney in the

[4] FED. R. APP. P. 10(b).

[5] FED. R. APP. P. 11(a).

[6] FED. R. APP. P. 11(b)(2).

Office of the Judge Advocate General or designated by the Judge Advocate General. For this review, the accused would have an opportunity to submit a list of legal errors in writing. This review would state conclusions as to whether the court had jurisdiction over the accused and the offense; whether the charge and specification stated an offense; and whether the sentence was within the limits prescribed as a matter of law. It also would provide a response to each allegation of error made in writing by the accused.

Under the related proposed amendments to Article 64, summary courts-martial would be reviewed under the procedures of that Article.

General and special courts-martial reviewed under this proposal also would be eligible for further review by the Judge Advocate General under the standards set forth in the proposed revision to Article 69. All cases reviewed under Article 69, including summary courts martial, would then become eligible for appellate review by the Courts of Criminal Appeals, either by certification of the Judge Advocate General or through an application from the accused for discretionary review.[7]

Recommendation 65.3: Amend Article 65 to require a review of all general and special courts-martial cases that are eligible for an appeal under Article 66, but where appeal has been waived, withdrawn, or not filed.

This proposed review would be similar to the review currently conducted under Article 64 and would be conducted by an attorney in the Office of the Judge Advocate General or another attorney designated under rules established by the military department concerned. These rules could include review in the field, as under the current version of Article 64. The limited review would focus on whether the court-martial had jurisdiction over the accused and the offense, whether the charges and specifications each stated an offense, and whether the adjudged sentence was within the limits prescribed as a matter of law.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by incorporating, insofar as practicable, the appellate practices used in U.S. district courts.

This proposal supports MJRG Operational Guidance by enhancing efficiency during the post-trial phase of the court-martial process.

[7] The proposal for Article 69 would end the automatic review of general courts-martial under Article 69(a), but would provide for review upon request.

8. Legislative Proposal

SEC. 909. TRANSMITTAL AND REVIEW OF RECORDS.

Section 865 of title 10, United States Code (article 65 of the Uniform Code of Military Justice), is amended to read as follows:

"§865. Art. 65. Transmittal and review of records

"(a) TRANSMITTAL OF RECORDS.—(1) If the judgment of a general or special court-martial entered under section 860c of this title (article 60c) includes a finding of guilty, the record shall be transmitted to the Judge Advocate General.

"(2) In all other cases, records of trial by court-martial and related documents shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.

"(b) CASES ELIGIBLE FOR DIRECT APPEAL—

"(1) MANDATORY REVIEW.—If the judgment includes a sentence of death, the Judge Advocate General shall forward the record of trial to the Court of Criminal Appeals for review under section 866(b)(2) of this title (article 66(b)(2)).

"(2) CASES ELIGIBLE FOR DIRECT APPEAL REVIEW.—(A) If the case is eligible for direct review under section 866(b)(1) of this title (article 66(b)(1)), the Judge Advocate General shall—

"(i) forward a copy of the record of trial to an appellate defense counsel who shall be detailed to review the case and, upon request of the accused, to represent the accused before the Court of Criminal Appeals; and

"(ii) upon written request of the accused, forward a copy of the record of trial to civilian counsel provided by the accused.

"(B) Subparagraph (A) shall not apply if the accused—

"(i) waives the right to appeal under section 61 of this title (article 61); or

"(ii) declines in writing the detailing of appellate defense counsel under paragraph (2)(A)(i).

"(c) NOTICE OF RIGHT TO APPEAL.—(1) The Judge Advocate General shall provide notice to the accused of the right to file an appeal under section 866(b)(1) of this title (article 66(b)(1)) by means of depositing in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the official service record of the accused.

"(2) Paragraph (1) shall not apply if the accused waives the right to appeal under section 61 of this title (article 61).

"(d) REVIEW BY JUDGE ADVOCATE GENERAL.—

"(1) BY WHOM.—A review conducted under this subsection may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated under regulations prescribed by the Secretary concerned.

"(2) REVIEW OF CASES NOT ELIGIBLE FOR DIRECT APPEAL.—

"(A) A review under subparagraph (B) shall be completed in each general and special court-martial that is not eligible for direct appeal under paragraph (1) or (2) of section 866(b) of this title (article 66(b)).

"(B) A review referred to in subparagraph (A) shall include a written decision providing each of the following:

"(i) A conclusion as to whether the court had jurisdiction over the accused and the offense.

"(ii) A conclusion as to whether the charge and specification stated an offense.

"(iii) A conclusion as to whether the sentence was within the limits prescribed as a matter of law.

"(iv) A response to each allegation of error made in writing by the accused.

"(3) REVIEW WHEN DIRECT APPEAL IS WAIVED, WITHDRAWN OR NOT FILED.—

"(A) A review under subparagraph (B) shall be completed in each general and special court-martial if—

"(i) the accused waives the right to appeal or withdraws appeal under section 861 of this title (article 61); or

"(ii) the accused does not file a timely appeal in a case eligible for direct appeal under subparagraph (A) or (B) of section 866(b)(1) of this title (article 66(b)(1)).

"(B) A review referred to in subparagraph (A) shall include a written decision limited to providing conclusions on the matters specified in clauses (i), (ii), and (iii) of paragraph (2)(B).

"(e) REMEDY.—(1) If after a review of a record under subsection (d), the attorney conducting the review believes corrective action may be required, the record shall be forwarded to the Judge Advocate General, who may set aside the findings or sentence, in whole or in part.

"(2) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (article 44).

"(3)(A) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

"(B) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.".

9. Sectional Analysis

Section 909 would amend Article 65 to conform the statute to the changes proposed in Articles 66 and 69. *See* Sections 910, 914, *infra.* As amended, Article 65 would: (1) provide additional guidance on the disposition of records; (2) require that the record of trial be forwarded to appellate defense counsel for review whenever the case is eligible for direct review under Article 66; and (3) provide for appellate review of all cases that are not

subject to direct appellate review by a Court of Criminal Appeals, similar to the current review under Article 64. As amended, Article 65 would contain the following provisions:

Article 65(a) would require the record of trial in all general and special courts-martial in which there is a finding of guilty to be transmitted to the Office of the Judge Advocate General. In all other cases, the records of trial would be transmitted and disposed of in accordance with service regulations.

Article 65(b) would address the processing of records of trial in cases eligible for direct appeal to a Court of Criminal Appeals. Under paragraph (1), consistent with current practice, if the judgment of the court-martial included a sentence of death, the Judge Advocate General would be required to forward the record of trial to the Court of Criminal Appeals for automatic review. Paragraph (2) would address processing of records of trial in cases eligible for direct review by a Court of Criminal Appeals under Article 66(b)(1). The Judge Advocate General would be required to forward a copy of the record to an appellate defense counsel, who would be detailed to review the case and, upon request of the accused, to represent the accused before the Court of Criminal Appeals. The appellate defense counsel would review the record, advise the accused on the merits of an appeal, and, upon request, file the appeal with the Court of Criminal Appeals. The accused would be able to request that a copy of the record of trial be forwarded to civilian counsel provided by the accused. These provisions would not apply if the accused waived the right to appeal under Article 61 or declined representation by appellate defense counsel.

Article 65(c) would require the Judge Advocate General to provide a "Notice of the Right to Appeal" to an accused eligible to file an appeal under Article 66(b)(1).

Article 65(d) would provide for limited review by an attorney within the Office of Judge Advocate General, or another attorney designated under service regulations, in cases not eligible for direct appeal to a Court of Criminal Appeals under Articles 66(b). Cases not eligible for direct review under Article 66 would be those in which a punitive discharge was not imposed and confinement imposed was for six months or less. The review would focus on three issues: whether the court-martial had jurisdiction over the accused and the offense; whether each charge and specification stated an offense; and whether the sentence was within the limits prescribed as a matter of law. The review also would include a response to any allegation of error submitted by the accused in writing. Under paragraph (3), this limited review—except for the response to allegations of error—also would be provided when an accused who is eligible to file an appeal for direct review under Article 66 waives or withdraws from appellate review, and when an accused fails to file an appeal under Article 66. This limited and expeditious review would satisfy a condition precedent to execution of certain sentences under Article 57 (Effective date of sentences), as amended. *See* Section 802, *supra.*

Article 65(e) would provide that, if the attorney conducting the review under subsection (d) believes corrective action may be required, the record shall be forwarded to the Judge Advocate General, who may set aside the findings or sentence, in whole or in part. If the Judge Advocate General sets aside the findings or sentence, he or she would be required to

either order a rehearing or dismiss the charges. In addition, where the Judge Advocate General sets aside the findings or sentence and orders a rehearing, if the convening authority determines that a rehearing would be impractical, the convening authority should dismiss the charges.

Under the related proposal for Article 64, summary courts-martial would still be reviewed under the procedures contained in that statute. General and special courts-martial reviewed under Article 65, as well as summary courts-martial reviewed under Article 64, would be eligible for further review by the Judge Advocate General under the standards set forth in Article 69, as amended. *See* Section 913, *supra.* Those cases would then become eligible for appellate review by the Court of Criminal Appeals, either by certification of the Judge Advocate General or through application of the accused for discretionary review.

Article 66 – Review by Court of Criminal Appeals
10 U.S.C. § 866

1. Summary of Proposal

This proposal would: (1) replace automatic review in non-capital cases with a filing procedure similar to the appeal as of right process used in the federal civilian appellate courts; (2) retain mandatory review in capital cases; (3) expand the opportunity for servicemembers to request review by the Courts of Criminal Appeals; (4) provide statutory standards for factual sufficiency review, sentence appropriateness review, and review of excessive post-trial delays; and (5) provide a statutory framework for cases involving remands and rehearings.

2. Summary of the Current Statute

Article 66 provides for the establishment of Courts of Criminal Appeals and provides the procedures for appellate review. Under Article 66(a)-(b), each Judge Advocate General is required to establish a Court of Criminal Appeals; to designate a chief judge for the court; and to refer to the court the record of each court-martial in which the sentence approved by the convening authority includes a punitive discharge, confinement for one year or more, or death. The statute also specifies court composition, and the court's authority to reconsider its decisions.

Under Article 66(c), the court may act only with respect to the findings and sentence approved by the convening authority, and may affirm only such findings and sentence as it finds correct in law and fact and which it determines, on the basis of the entire record, should be approved. In considering the record, the court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Article 66(d) authorizes the Court of Criminal Appeals to order a rehearing in cases where the court sets aside the findings and sentence, except in those cases where the court dismisses the findings of a court-martial due to either factual or legal insufficiency. If the Court of Criminal Appeals sets aside the findings and sentence but does not order a rehearing, the court must dismiss the charges. In those cases where the court has ordered a rehearing, the convening authority may decide that a rehearing is impractical and may dismiss the charges.

Article 66(e) and Article 66(f) authorize the Judge Advocates General to instruct convening authorities with respect to decisions of the Courts Criminal Appeals; to prescribe rules of procedure for the Courts of Criminal Appeals; and to meet periodically with the courts to formulate policies for review of courts-martial.

Article 66(g) and Article 66(h) prohibit members of a Court of Criminal Appeals from preparing, reviewing, or submitting in any way a performance review or other fitness review concerning the assignment or promotion or retention of another member of a Court of Criminal Appeals; and from reviewing the record in a trial if the member previously served as an investigating officer in the case or member of the court-martial or as judge, or trial or defense counsel in the case.

In addition to direct review under Article 66, the Courts of Criminal Appeals, as well as the Court of Appeals for the Armed Forces, may consider petitions for extraordinary relief under the All Writs Act, 28 U.S.C. §1651(a).[1]

3. Historical Background

Before Congress enacted the UCMJ in 1950, each military service operated under its own unique statutory authority, with limited appellate processes.[2] Following complaints against the military justice system during and after World War I, the Army developed a regulatory procedure for reviewing cases with significant punishments by a board of judge advocates.[3] In the 1920 Articles of War, Congress provided statutory authority for the Army's review process, requiring the Judge Advocate General of the Army to establish one or more Boards of Review to review specified types of cases.[4] Prior to the UCMJ's enactment, the Navy did not have Boards of Review.[5] In 1948, in the Elston Act, Congress authorized these Boards of Review to weigh the evidence in addition to determining matters of law, and to modify the findings and sentence when "deemed necessary to the ends of justice," even where the verdict was legally sufficient.[6]

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[1] *See, e.g.*, Noyd v. Bond, 395 U.S. 683, 695 n.7 (1969); Clinton v. Goldsmith, 526 U.S. 529 (1999); United States v. Denedo , 556 U.S. 904 (2009); *see also* Article 6b(e) (petitions for writs of mandamus filed by a victim in with respect to M.R.E. 513 (the psychotherapist-patient privilege) and M.R.E. 412 (evidence regarding a victim's sexual background).

[2] The Army operated under the Articles of War and the Navy operated under Articles for the Government of the Navy. The Revenue-Cutter Service practice was governed by the Act to Regulate Enlistments and Punishments in the United States Revenue-Cutter Service of May 26, 1906, 34 Stat. 200, until consolidation with the U.S. Lifesaving Service to form the U.S. Coast Guard in 1915. Coast Guard review of cases was governed by the Part IX of the Courts and Boards Manual until the adoption of the UCMJ.

[3] *See* Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 32 (1967); William F. Fratcher, *Appellate Review in Military Law*, 14 MO. L. REV. 15, 40-43 (1949); Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1989). Although these Boards employed procedures similar to those of appellate courts, their opinions were not binding on the Judge Advocate General.

[4] *See* Act of June 4, 1920, ch. 2, 41 Stat. 759 (art. 50 1/2).

[5] *See, e.g.*, AGN 53 and 54 of 1930.

[6] Act of June 24, 1948, Pub. L. No. 80-759, ch. 625, tit. II, 62 Stat. 627, 635-37. These amendments were made in recognition that the "absence of this authority [to weigh the evidence in addition to determining matters of law] heretofore has been a common cause of criticism." H. REP. NO. 80-1034, at 7 (1948). In the Elston Act amendments, Congress also established a body above the board of review, known as the Judicial Council,

When Congress enacted the UCMJ in 1950, it established Boards of Review (now the Courts of Criminal Appeals) for all of the services, and provided the Boards with the power to issue decisions binding on the Judge Advocates General.[7] The UCMJ provisions reflected the prior Army practice of limiting the jurisdiction of the Boards of Review to cases with at least a set minimum punishment, designating certain cases for review at the unit level, and designating other cases for review in the Office of the Judge Advocate General. Accordingly, the Boards of Review automatically reviewed all cases in which the approved sentence included death, confinement for one year or more, a punitive separation, or affected a general or flag officer.[8] Such cases were subject to further review by the Court of Military Appeals (now the United States Court of Appeals for the Armed Forces). The Judge Advocate General automatically reviewed all general courts-martial that were not reviewed by the Boards of Review. The Judge Advocate General could submit such cases to the Boards of Review, but they were not subject to further review by the Court of Military Appeals. The remaining cases—special courts-martial not involving a punitive discharge and summary courts-martial—were reviewed by judge advocates at the unit level.

4. Contemporary Practice

The President has implemented Article 66 through R.C.M. 1203. Pursuant to Article 66(f), the Judge Advocates General prescribed Uniform Rules of Procedure for the Courts of Criminal Appeals.[9] The scope of the Courts of Criminal Appeals' review authority is well-established on matters such as automatic review, errors of law, factual sufficiency and fact-finding, sentence appropriateness, and the Court's authority to affirm only such findings and sentence as it finds correct in law and fact, and which it determines, on the basis of the entire record, should be approved.[10]

5. Relationship to Federal Civilian Practice

Federal civilian appellate practice can be differentiated from military appellate practice primarily by: (1) the right of any person convicted of a criminal offense to appeal his or her

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composed of judge advocates at the general officer level, whose opinions also could be treated as advisory in nature by the Judge Advocate General. *See* Fratcher, *supra* note 3, at 62-67 (discussing the functions of the Judicial Council).

[7] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat 1335, 1341 (Courts of Military Review); National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2831 (1994) (Courts of Criminal Appeals.

[8] In the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, Congress eliminated automatic review of general and flag officer cases and authorized en banc reconsideration proceedings.

[9] Joint Courts of Criminal Appeals Rules of Practice and Procedure, 32 C.F.R. Part 150 (2014).

[10] Consider the Court of Appeals for the Armed Force's comprehensive analysis of Article 66(c) in *United States v. Nerad*, 69 M.J. 138 (2010).

conviction and sentence to a court of record; and (2) the lack of automatic appellate review, even in capital cases.[11]

Federal civilian defendants are entitled to "appeals as of right" from judgments or orders of a federal district courts,[12] and from misdemeanor convictions or sentences by a U.S. magistrate judges.[13] Appeals are required to be filed within 14 days of the entry of judgment or order by the district judge or the filing of the government's notice of appeal, whichever is later.[14] The notice of appeal must identify the judgment or final ruling that is being appealed.[15] The appellant also is required to file a brief which must contain, *inter alia*, "a statement of the issues presented," "a concise statement of the case setting out the facts relevant to the issues," and "argument, which must contain appellant's contentions and the reasons for them."[16] There is no requirement for the appellate court to look for errors not raised by the defendant, and federal courts regularly hold that a defendant forfeits claims of error not raised or not fully developed in their brief.[17] When appealing a criminal conviction, the record of trial consists generally of the original exhibits from trial and "the transcript of proceedings (if any)."[18]

Federal appellate courts do not perform a *de novo* review of the facts. Generally, federal courts review verdicts only for legal sufficiency.[19] However, federal civilian trial courts have the discretionary authority to order a retrial "in the interest of justice" if they conclude the verdict is so contrary to the "weight of the evidence" that a new trial is required.[20] With respect to sentence appeals, in federal civilian practice, both the defendant and the government have the right to appeal the sentence if "(1) imposed in violation of law; (2) imposed as a result of an incorrect application of the sentencing guidelines; (3) is greater than or less than the sentence specified in the applicable guideline

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[11] 18 U.S.C. 3595(a) (If "a sentence of death is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified[.]").

[12] 28 U.S.C. § 1291; FED. R. APP. P. 3 & 4(c) (providing for an appeal to the U.S. circuit court of appeals).

[13] *See* 18 U.S.C. § 3402; FED. R. CRIM. P. 58(g)(2) (providing for an appeal to a "judge of the district court of the district in which the offense was committed.").

[14] FED. R. APP. P. 4(b)(1)(A) (The time period for the government to appeal is 30 days).

[15] FED. R. APP. P. 3(c)(1). Generally, failure to file a timely notice of appeal is a jurisdictional bar.

[16] FED. R. APP. P. 28(a)(5-8). Generally, the appellate court will review only those issues specified by the appellant. *See, e.g.* C.A. May Marine Supply Co. v. Brunswick Corp., 649 R.2d 1049 (5th Cir. 1981).

[17] *See, e.g*, United States v. Clark, 469 F.3d 568, 569-70 (6th Cir. 2006).

[18] FED. R. APP. P. 10(a-b). Under the rule, it is the appellant's responsibility to obtain a copy of the transcript.

[19] Jackson v. Virginia, 443 U.S 307, 319 (1979) (The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

[20] FED. R. CRIM. P. 33(a); *see, e.g.*, United States v. Chambers, 642 F.3d 588, 592 (7th Cir. 2011); United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002).

range [with additional caveats]; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable."[21]

Every state jurisdiction provides some means of appellate review by a court for defendants in criminal cases. The intermediate appellate courts in New York exercise a scope of review over felony cases similar to that exercised by the Courts of Criminal Appeals in terms of authority to review cases for factual sufficiency and to determine whether a sentence is unduly harsh or severe.[22]

6. Recommendation and Justification

Recommendation 66.1: Amend Article 66 to establish an appeal as of right in non-capital cases similar to federal civilian appellate courts, and expand the opportunity for direct review by the Courts of Criminal Appeals of courts-martial convictions.

This proposal would retain automatic review of all cases that include a sentence determined by the members in a capital case including a sentence of death. The finality of the punishment, role of members in determining the sentence, and other unique procedural and substantive requirements of capital cases warrant no change in this area.

For non-capital cases that are subject to automatic review under current law, this proposal would require the accused to file an appeal in order to obtain direct review by the Courts of Criminal Appeals. This proposal would expand the opportunity for servicemembers to request review by the Courts of Criminal Appeals, through an appeal of right, in cases that are not now eligible for direct review at the request of the accused. Currently, direct review in non-capital cases is limited to cases in which the sentence includes confinement for a year or more or a punitive separation. Under this proposal, cases with a sentence that includes confinement for more than six months, or a punitive separation, would be eligible for direct appellate review. The opportunity to request direct appellate review also would be available to the accused in cases where the government appeals the sentence under proposed Article 56(p), or where the government has previously filed an interlocutory appeal under Article 62 in the same case. An additional opportunity to obtain review by the Courts of Criminal Appeals is addressed in the proposed revision to Article 69.[23]

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[21] 18 U.S.C.S. § 3742(a)-(b). Under the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 245 (2005), the Guidelines are treated as advisory.

[22] N.Y. CRIM. PROC. § 470.15 ("The kinds of determinations of reversal or modification deemed to be on the facts include, but are not limited to, a determination that a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the evidence."); People v. Romero, 7 N.Y.3d 633 (2006).

[23] Under the proposal for Article 69 (Review in the Office of the Judge Advocate General), servicemembers whose general, special, or summary courts-martial resulted in sentences of confinement for six months or less and who otherwise do not qualify for direct review under Article 66 would have a pathway to review by a Court of Criminal Appeals. Such accused would be required to file an application for review with the Court of Criminal Appeals and such review would be at the discretion of the court.

This proposal would preserve complete review of the record by appellate defense counsel in cases eligible for review under Article 66 and eliminate the requirement for automatic record review by Courts of Criminal Appeals. This proposal also would require the accused and appellate defense counsel to decide whether to appeal, and, if so, which issues to appeal. The courts would only review the record after the accused files an appeal, and then with the benefit of issues identified and briefed by counsel. The courts would retain the ability to specify issues for briefing, argument, and decision, and to review for plain error. Consistent with past military practice, military accused would continue to be represented by appellate defense counsel at no cost and without regard to the accused's ability to pay. In those cases where an accused chooses not to exercise an appeal, the decisions of the trial court would be subject to limited review under proposed amendments to Article 65.[24]

Recommendation 66.2: Amend Article 66 to provide statutory standards for factual sufficiency review, sentence appropriateness review, and review of excessive post-trial delay.

Current law requires the Court of Criminal Appeals to independently review every case for the factual sufficiency of every conviction. This proposal would require the accused to raise any factual sufficiency issues regarding the findings and would authorize the Courts of Criminal Appeals to dismiss a finding that it is clearly convinced is contrary to the weight of the evidence.

The proposal draws upon New York state practice, in a manner that reflects military practice since 1948.[25] Under this proposal: (1) the accused would be required to raise the issue and to make a specific showing of deficiencies in proof; and (2) the court could then set aside the finding if it is clearly convinced the finding was against the weight of the evidence. Although the court could weigh the evidence and determine controverted questions of fact, it would be required to give deference to the trial court on those matters. Similar to current practice, the court could affirm a lesser finding. If a finding is dismissed because the finding was against the weight of the evidence as a factual matter, retrial would be prohibited.

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[24] See the related proposal for Article 65 (Disposition and Review of Records), in which limited review of the record would be conducted when the accused fails to timely file an appeal or waives or withdraws from appellate review.

[25] In New York, upon request of the defendant, the intermediate appellate court must conduct a weight of the evidence review. New York Criminal Procedure Law 470.15 [5]. This weight of evidence review is a two-step process: (1) the court must "determine whether an acquittal would not have been unreasonable"; and (2) "[i]f so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt." People v. Danielson, 9 N.Y.3d 342, 348 (2007) (citing People v Crum, 272 N.Y. 348 (1936)). If the appellate court concludes that the trier of fact has failed to give the evidence the weight it should be accorded, then the appellate court may set aside the verdict. People v. Bleakley, 69 N.Y. 2d 490, 495; People v. Romero, 7 N.Y. 3d 633, 644 (N.Y.C.A. 2006).

The proposal would provide authority for sentence review under the standards set forth in the proposed amendments to Article 56. The standard for providing relief for excessive post-trial delay is contained in the proposed amendment to Article 66(d)(3).

Recommendation 66.3: Amend Article 66 to provide the Courts of Criminal Appeals with explicit authority to order a hearing, rehearing or remand for further proceedings as may be necessary to address a substantial issue.

This proposal would expressly provide the authority for the court to remand a case for additional proceedings as may be necessary to address a substantial issue. This proposal would incorporate current practice (i.e., "*Dubay*" hearings) and could include orders to either a convening authority or Chief Trial Judge for delegation to a military judge.[26] The procedure for such additional proceedings would be addressed in regulations prescribed by the President. Part II of this Report will address these procedures.

This proposal would generally comport with practice in the federal civilian courts.[27]

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by employing the standards and procedures applicable to appellate rights and practice in the civilian sector.

The elimination of automatic review by the Courts of Criminal Appeals in all but capital cases and the creation of an appeal of right system would better align with practice in the federal and state courts. The proposal has the potential for increasing the efficiency and effectiveness of the appellate process by focusing the courts on issues raised by the parties. Key to these benefits is the accused's right to assistance of qualified appellate defense counsel, at no cost, to include review of the record by appellate defense counsel in all cases with a sentence including a punitive discharge, confinement in excess of six months, or where the government has previously filed an interlocutory or sentence appeal.

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[26] United States v. Dubay, 37 C.M.R. 411 (1967).

[27] *See* FED. R. APP. P. 12.1(a) ("If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue."); FED. R. APP. P. 12.1(b) ("If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal[.]").

8. Legislative Proposal

SEC. 910. COURTS OF CRIMINAL APPEALS.

(a) APPELLATE MILITARY JUDGES.—Subsection (a) of section 866 of chapter 47 of title 10, United States Code (article 66 of the Uniform Code of Military Justice), is amended—

(1) in the second sentence, by striking "subsection (f)" and inserting "subsection (i)";

(2) in the fourth sentence, by inserting after "highest court of a State" the following: "and must be certified by the Judge Advocate General as qualified, by reason of education, training, experience, and judicial temperament, for duty as an appellate military judge"; and

(3) by adding at the end the following new sentence: "In accordance with regulations prescribed by the President, assignments of appellate military judges under this section (article) shall be for appropriate minimum periods, subject to such exceptions as may be authorized in the regulations.".

(b) REVISION OF APPELLATE PROCEDURES.—Such section (article) is further amended—

(1) by redesignating subsections (e), (f), (g), and (h) as subsections (h), (i), (j), and (k), respectively; and

(2) by striking subsections (b), (c), and (d) and inserting the following new subsections:

"(b) REVIEW.—

"(1) APPEALS BY ACCUSED.—A Court of Criminal Appeals shall have jurisdiction of a timely appeal from the judgment of a court-martial, entered into the record under section 860c of this title (article 60c), as follows:

"(A) On appeal by the accused in a case in which the sentence extends to dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for more than six months.

"(B) On appeal by the accused in a case in which the Government previously filed an appeal under sections 856(e) or 862 of this title (articles 56(e) or 62).

"(C) In a case in which the accused filed an application for review with the Court under section 869(d)(1)(B) of this title (article 69(d)(1)(B)) and the application has been granted by the Court.

"(2) REVIEW OF CAPITAL CASES.—A Court of Criminal Appeals shall have jurisdiction of a court-martial in which the judgment entered into the record under section 860c of this title (article 60c) includes a sentence of death.

"(c) TIMELINESS.—An appeal under subsection (b) is timely if it is filed as follows:

"(1) In the case of an appeal by the accused under subsection (b)(1)(A) or (b)(1)(B), if filed before the later of—

"(A) the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under section 865(c) of this title (article 65(c)); or

"(B) the date set by the Court of Criminal Appeals by rule or order.

"(2) In the case of an appeal by the accused under subsection (b)(1)(C), if filed before the later of—

"(A) the end of the 90-day period beginning on the date the accused is notified that the application for review has been granted by letter placed in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record; or

"(B) the date set by the Court of Criminal Appeals by rule or order.

"(d) DUTIES.—

"(1) In any case before the Court of Criminal Appeals under paragraph (1) of subsection (b), the Court shall affirm, set aside, or modify the findings, sentence, or order appealed.

"(2) In any case before the Court of Criminal Appeals under paragraph (2) of subsection (b), the Court shall review the record of trial and affirm, set aside, or modify the findings or sentence.

"(3) In any case before the Court of Criminal Appeals under paragraph (1) or (2) of subsection (b), the Court may provide appropriate relief if the accused

demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record under section 860c of this title (article 60c).

"(e) CONSIDERATION OF THE EVIDENCE.—

"(1) In an appeal of a finding of guilty under paragraph (1)(A), (1)(B), or (2) of subsection (b), the Court of Criminal Appeals, upon request of the accused, may consider the weight of the evidence upon a specific showing of deficiencies in proof by the accused. The Court may set aside and dismiss a finding if clearly convinced that the finding was against the weight of the evidence. The Court may affirm a lesser finding. A rehearing may not be ordered.

"(2) When considering a case under paragraph (1)(A), (1)(B), or (2) of subsection (b), the Court may weigh the evidence and determine controverted questions of fact, subject to—

"(A) appropriate deference to the fact that the court-martial saw and heard the witnesses and other evidence; and

"(B) appropriate deference to findings of fact entered into the record by the military judge.

"(f) CONSIDERATION OF SENTENCE.—(1) In considering a sentence on appeal, other than as provided in section 856(e) of this title (article 56(e)), the Court of Criminal Appeals may consider—

"(A) whether the sentence violates the law;

"(B) whether the sentence is inappropriately severe—

"(i) if the sentence is for an offense for which there is no sentencing parameter under section 856(d) of this title (article 56(d)); or

"(ii) in the case of an offense with a sentencing parameter under section 856(d) of this title (article 56(d)), if the sentence is above the upper range under subsection (d)(2)(B)(iii).

"(C) in the case of a sentence for an offense with a sentencing parameter under this section, whether the sentence is a result of an incorrect application of the parameter;

"(D) whether the sentence is plainly unreasonable; and

"(E) in review of a sentence to death or to life in prison without eligibility for parole determined by the members in a capital case under section 853(d) of this title (article 53(d)), whether the sentence is otherwise appropriate, under rules prescribed by the President.

"(2) In an appeal under this subsection or section 856(e) of this title (article 56(e)), other than review under subsection (b)(2), the record on appeal shall consist of—

"(A) any portion of the record in the case that is designated as pertinent by either of the parties;

"(B) the information submitted during the sentencing proceeding; and

"(C) any information required by rule or order of the Court of Criminal Appeals.

"(g) LIMITS OF AUTHORITY.—

"(1)(A) If the Court of Criminal Appeals sets aside the findings, the Court—

"(i) may affirm any lesser included offense; and

"(ii) may, except when prohibited by section 844 of this title (article 44), order a rehearing.

"(B) If the Court of Criminal Appeals orders a rehearing on a charge and the convening authority finds a rehearing impracticable, the convening authority may dismiss the charge.

"(C) If the Court of Criminal Appeals sets aside the findings and does not order a rehearing, the Court shall order that the charges be dismissed.

"(2) If the Court of Criminal Appeals sets aside the sentence, the Court may—

"(A) modify the sentence to a lesser sentence; or

"(B) order a rehearing.

"(3) If the Court determines that additional proceedings are warranted, the Court may order a hearing as may be necessary to address a substantial issue, subject to such limitations as the Court may direct and under such regulations as the President may prescribe.".

(c) ACTION WHEN REHEARING IMPRACTICABLE AFTER REHEARING ORDER.—Subsection (h) of such section (article), as redesignated by subsection (b)(1), is amended—

(1) in the first sentence, by striking "convening authority" and inserting "appropriate authority"; and

(2) by striking the last sentence.

(d) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§866. Art. 66. Courts of Criminal Appeals.".

9. Sectional Analysis

Section 910 would amend Article 66 to revise the scope of review and enlarge the category of cases eligible for review by the Courts of Criminal Appeals under Article 66. Specifically, the proposed amendments would: (1) replace automatic review in non-capital cases with a filing procedure similar to the appeal as of right process used in the federal civilian appellate courts; (2) retain mandatory review in capital cases; (3) provide for discretionary review by the Courts of Criminal Appeals in cases that are not eligible for an appeal as of right; (4) provide standards of review for appeals; and (5) codify the authority of Courts of Criminal Appeals to remand cases and order rehearings. As amended, Article 66 would contain the following provisions:

Article 66(a) would require the President to establish minimum tour lengths, with appropriate exceptions, for appellate military judges, and would require the Judge Advocate General of each service to certify the qualifications of appellate military judges consistent with the proposed amendment to Article 26 regarding the assignment and qualifications of military judges. *See* Section 504(b), *supra.* Implementing rules will reflect the Services' role and discretion in applying exceptions to the minimum tour lengths.

Article 66(b) would expand the categories of cases in which servicemembers may seek direct review by the Courts of Criminal Appeals. It would replace automatic review in non-capital cases with an appeal of right. It also would continue to require automatic review of all capital cases. The amendments would provide every servicemember found guilty of an offense by a court-martial with a pathway to review by a court of record. As amended, there would be two prerequisites for review of non-capital cases by the Courts of Criminal

Appeals under Article 66(b): (1) entry of the court-martial judgment into the record by a military judge under proposed Article 60c; and (2) timely filing of an appeal. The Court of Criminal Appeals would be able to review: (1) any case with a sentence to a punitive separation or confinement of more than six months; (2) any case that was previously the subject of an appeal by the United States under Article 62 or Article 56; and (3) any other case in which an application for discretionary review under Article 69(e)(2) was granted. For purposes of this subsection, the term "confinement for more than six months" would mean the total period of confinement adjudged, but would not aggregate periods of confinement running concurrently.

Article 66(c) prescribes jurisdictional timelines for appellate review by the Courts of Criminal Appeals.

Article 66(d) defines the duties of the Courts of Criminal Appeals, which would be consistent with current practice except that the obligation to review every case for factual sufficiency and sentence appropriateness would be eliminated. Under paragraph (3), the Courts of Criminal Appeals could provide relief for post-trial errors and excessive post-trial delay.

Article 66(e) details the limited authorities of the Courts of Criminal Appeals to weigh and consider evidence. The Court's authority to set aside a finding that is contrary to the weight of the evidence would be retained, but would require the accused to identify deficiencies in the proof and would allow the Court to set aside such findings only if "clearly convinced that the finding was against the weight of the evidence." This would channel the exercise of such authority through standards that are more deferential to the factfinder at trial and more reviewable by higher courts.

Article 66(e)(2) would address consideration of the entire case, including a finding of guilty and the sentence. The Court's authority to weigh the evidence and to determine controverted questions of fact would be retained, but would channel the exercise of such authority through standards that are more deferential to the factfinder at trial. This change would enable application of differing standards of review tailored to widely varied matters, including rulings on pretrial motions, the findings and sentence adjudged by the court-martial, and sentences of death determined by members.

Article 66(f) would provide standards of review applicable to sentences adjudged both before and after sentencing parameters are implemented under the proposed amendments to Article 56. *See* Section 801, *supra*. The proposed standards of review would provide the accused with several avenues to appeal a court-martial sentence. First, the accused would be able to appeal a sentence that was unlawful, or that resulted from incorrect application of a sentencing parameter. Second, consistent with the government's ability to appeal a sentence under Article 56(e) (as amended) the accused could appeal a sentence on the grounds that it is plainly unreasonable. *See* Section 801, *supra*. The term "plainly unreasonable" is taken from 18 U.S.C. § 3742 and is intended to provide substantial deference to the trial judge. Third, in cases where an adjudged offense has no sentencing

parameter, or where the sentence imposed was above the applicable sentencing parameter for the offense, the accused would be able to appeal the sentence as inappropriately severe. This provision recognizes that a sentence may be "inappropriately severe" despite being reasonable. Finally, in the case of a sentence determined by a panel in a capital case, consistent with current practice, the Court would be required to determine whether the sentence is appropriate.

Article 66(g)(3) would codify the authority of Courts of Criminal Appeals to remand a case for additional proceedings as may be necessary to address substantial issues. This authority would be subject to any limitations the Court may direct or the President may prescribe by regulation. This provision would codify current practice (i.e., *DuBay* Hearings). *See United States v. Dubay*, 37 C.M.R. 411 (1967).

In addition to the authority to review specific types of cases designated in Article 66, the Courts of Criminal Appeals consider interlocutory appeals under Article 62 and petitions for extraordinary relief under the All Writs Act, 28 U.S.C. § 1651(a). *See, e.g., Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969); *Clinton v. Goldsmith*, 526 U.S. 529 (1999); *United States v. Denedo*, 556 U.S. 904 (2009). The Courts of Criminal Appeals also review cases sent to the Court by the Judge Advocate General under Article 69. Under the proposed amendments to Article 56, the Courts of Criminal Appeals also would review sentence appeals filed by the Government under Article 56(e). The procedures applicable to proceedings arising under Article 56, like the procedures applicable to proceedings arising under Article 62, Article 69, and the All Writs Act, may be set forth in the rules for the Courts of Criminal Appeals prescribed under Article 66.

Article 67 – Review by the Court of Appeals for the Armed Forces
10 U.S.C. § 867

1. Summary of Proposal

This proposal would make a conforming change to Article 67 to align the statute with the creation of an "entry of judgment" in Article 60c and related amendments to Articles 60 and 66. In addition, this proposal would provide for notification to the Judge Advocates General in connection with a decision to certify a case for review by the Court of Appeals for the Armed Forces.

2. Summary of the Current Statute

Article 67 authorizes review in the Court of Appeals for the Armed Forces of cases from the Courts of Criminal Appeals. Review is mandatory in capital cases and in cases certified by one of the Judge Advocates General. Review is discretionary on petition by the accused upon a showing of good cause. The Court's review is limited to questions of law.[1]

3. Historical Background

Under the Articles of War, review of courts-martial relied primarily on review by commanders in the field and senior civilian officials, with judicial review by civilian courts limited to a narrow class of cases subject to collateral review through procedures such as habeas corpus.[2] When the UCMJ was enacted in 1950,[3] Congress established the Court of Military Appeals to provide for review by a civilian appellate court with judges appointed by the President, subject to Senate confirmation.[4] The Report of the House Armed Services Committee accompanying the legislation emphasized that the new court would be "completely removed from all military influence of persuasion."[5] The Military Justice Act of 1983 authorized direct Supreme Court review of decisions by the Court.[6] Congress revised

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[1] 10 U.S.C. § 867(c); *see also* United States v. Leak, 61 M.J. 234, 239 (C.A.A.F. 2005).

[2] See Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 6 (1985).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1187-95 (1949).

[5] H.R. REP. No. 81–491, at 7 (1949).

[6] *See* Article 67a, UCMJ (designating the class of cases subject to review by the Supreme Court by writ of certiorari).

Article 67 in 1989 to provide for a five-judge court and revised statutes governing the court's organization and administration.[7] The legislation transferred the provisions concerning organization and administration of the Court to Articles 141 through 146.[8] In 1994, Congress renamed the Court the U.S. Court of Appeals for the Armed Forces.[9]

4. Contemporary Practice

The Court of Appeals for the Armed Forces considers appeals from decisions of the Courts of Criminal Appeals, including decisions that address the approved findings and sentence of a court-martial, interlocutory appeals, and writ appeals.[10] The Court of Appeals for the Armed Forces also considers original petitions for extraordinary writs.[11]

5. Relationship to Federal Civilian Practice

In the Article III civilian courts, both the government and the defendant have the right to appeal a judgment or an order of a federal district court to a circuit court of appeals.[12] Except in capital and certified cases, the Court of Appeals for the Armed Forces has discretion to accept or decline review.

6. Recommendation and Justification

Recommendation 67.1: Provide conforming changes to Article 67(c) to align the provision with proposed creation of an "entry of judgment" in Article 60c and related amendments to Articles 60 and 66.

This is a conforming change. The proposal would not expand or otherwise alter the jurisdiction of the Court of Appeals for the Armed Forces.

Recommendation 67.2: Amend Article 67 by adding a notification requirement to the certification process under Article 67(a)(2).

The addition of a notification requirement to the certification process under Article 67(a)(2) is designed to ensure that each of the Judge Advocates General has a meaningful opportunity to share views on any proposed certification of an issue before the certification is filed with the Court of Appeals for the Armed Forces.

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[7] NDAA FY 1990-91, Pub. L. No. 101-189, tit. XIII, 103 Stat. 1569-1577 (1989). The 1989 amendments transferred the provisions governing the organization and administration of the Court to Articles 141-146. *See* H.R. REP. NO. 101-331, at 657 (1989) (Conf. Rep.).

[8] NDAA FY 1990-1991, Pub. L. No. 101-189, tit. XIII, 103 Stat. 1569-1577 (1989).

[9] Codified as amended at 10 U.S.C. §§ 867, 941-946 (re-designating the U.S. Court of Military Appeals as the U.S. Court of Appeals for the Armed Forces).

[10] *See* USCAAF Rule 18(a) (citing Articles 62, 66, and 28 U.S.C. § 1651(a)).

[11] *See* USCAAF Rule 4(b)(1) and 18(b) (citing 28 U.S.C. § 1651(a)).

[12] 28 U.S.C. § 1291; FED. R. APP. P. 3; FED. R. APP. P. 4(b).

The proposed change would not limit the discretion or authority of a Judge Advocate General to certify issues to the Court of Appeals for the Armed Forces. It is intended to ensure that each Judge Advocate General has an opportunity to provide input on the decision to appeal cases that have the potential for impacting the law that affects all the services.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

This proposal supports MJRG Operational Guidance by enhancing efficiency during the appellate phase of the court-martial process.

8. Legislative Proposal

SEC. 911. REVIEW BY COURT OF APPEALS FOR THE ARMED FORCES.

(a) JAG NOTIFICATION.—Subsection (a)(2) of section 867 of title 10, United States Code (article 67 of the Uniform Code of Military Justice), is amended by inserting after "the Judge Advocate General" the following: ", after appropriate notification to the other Judge Advocates General,".

(b) BASIS FOR REVIEW.—Subsection (c) of such section (article) is amended—

(1) by inserting "(1)" after "(c)";

(2) by designating the second sentence as paragraph (2);

(3) by designating the third sentence as paragraph (3);

(4) by designating the fourth sentence as paragraph (4); and

(5) in paragraph (1), as designated by paragraph (1) of this subsection, by striking "only with respect to" and all that follows through the end of the sentence and inserting the following:

"only with respect to—

"(A) the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals; or

"(B) a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals.".

9. Sectional Analysis

Section 911 would amend Article 67, which sets forth the procedures for the Court of Appeals for the Armed Forces to review cases from the Courts of Criminal Appeals, to conform the statute to proposed changes in Articles 60 and 66, including the creation of an "entry of judgment" in the proposed Article 60c (Entry of judgment). *See* Sections 901-904, 910, *supra.* In addition, the amendments would provide for notification by a Judge Advocate General to the other Judge Advocates General prior to certifying a case for review by the Court of Appeals for the Armed Forces. The recommendation for "appropriate notification to the other Judge Advocates General" would apply only to cases the Judge Advocate General intends to certify to the Court of Appeals for the Armed Forces pursuant to Article 67(a)(2). This change is intended to ensure that each Judge Advocate General has an opportunity to provide meaningful input on the decision to appeal cases that have the potential to impact the law applicable to all the services. The change would not alter the jurisdiction of the Court of Appeals for the Armed Forces over these cases nor would it limit the discretion or authority of a Judge Advocate General to certify issues to the Court of Appeals for the Armed Forces.

Article 67a – Review by the Supreme Court
10 U.S.C. § 867a

1. Summary of Proposal

This proposal would make a technical amendment to Article 67a.

2. Summary of the Current Statute

Article 67a specifies that decisions of the Court of Appeals for the Armed Forces are subject to review at the U.S. Supreme Court by a writ of certiorari, except in cases where the Court of Appeals for the Armed Forces has refused to grant a petition for review. For cases subject to Supreme Court review under the statute, the accused is not required to submit an affidavit demonstrating indigency as a precondition to filing a petition for a writ of certiorari without prepayment of fees and costs.

3. Historical Background

Prior to the enactment of the Military Justice Act of 1983, decisions of the Court of Military Appeals (now the Court of Appeals for the Armed Forces) were not subject to direct review by the Supreme Court.[1] In a limited number of cases, the accused could seek collateral review through an extraordinary writ, but the government had no opportunity of review.[2] The Military Justice Act of 1983 provided the first avenue of direct review by the Supreme Court.[3] This review was limited to cases that the Court of Military Appeals had itself already reviewed, or for which the court had otherwise granted relief.[4] This limitation was placed in the statute out of concern about the volume of cases from the military justice system that might be the subject of petitions for review.[5]

4. Contemporary Practice

The President has implemented Article 67a through R.C.M. 1205, which tracks the statutory provisions closely. All capital cases under the UCMJ are eligible for Supreme Court review.[6] The government can ensure the eligibility of any case in which it has an

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[1] *See* H.R. REP. 98-549, at 16 (1983).

[2] *See id.*

[3] Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393.

[4] *See* H.R. REP. 98-549 at 10, 13 (1983); *see also* 28 U.S.C. § 1259.

[5] *See* H.R. REP. 98-549 at 16-17 ("In view of current concerns about the Supreme Court's Docket, the Legislation has been drafted in a manner that will limit the number of cases subject to direct review.").

[6] 28 U.S.C. § 1259(1) (2015).

interest by certifying the case to the Court of Appeals for the Armed Forces. Any such certified case must be decided by the Court of Appeals, and any case in which the government does not prevail is eligible for review.[7] Legislation to provide servicemembers with a similar degree of access to the Supreme Court has been introduced but not enacted.[8] Since enactment of the Military Justice Act of 1983, the number of petitions for certiorari filed in the Supreme Court seeking review of courts-martial has turned out to be lower than expected. Even in those cases eligible for Supreme Court review, petitions to the Supreme Court have been filed in only a fraction of the cases.[9]

5. Relationship to Federal Civilian Practice

Every federal criminal case is eligible for Supreme Court review at the request of either the government or the defense. Every state criminal case is eligible for Supreme Court review of federal issues at the request of either the government or the defense. Every trial of an alien unprivileged enemy belligerent before military commission is eligible for Supreme Court review at the request of the government or the accused.[10] In contrast, a court-martial is not eligible for Supreme Court review unless it is a capital case, a case certified by the Judge Advocate General, or a case in which the Court of Appeals for the Armed Forces grants review or otherwise grants relief.

6. Recommendation and Justification

Recommendation 67a: Consult all three branches of government regarding enhanced access by members of the armed forces to review by the Supreme Court.

The issue of whether servicemembers should be provided with the same level of access to the Supreme Court available to defendants in federal and state criminal proceedings, as well as in military commissions, is a matter that requires consultation among the legislative, executive, and judicial branches of government. Pending such consultation, the proposal includes a technical amendment to Article 67a (setting forth the full name of the United States Court of Appeals for the Armed Forces).

7. Relationship to Objectives and Related Provisions

The proposed amendments to Articles 60-67 endeavor to align more closely appellate review within the military justice system with the scope of review generally available to litigants throughout the American legal system. Consultation among the three branches of

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[7] 28 U.S.C. § 1259(2)-(4) (2015).

[8] *See, e.g.*, Equal Justice for Our Military Act of 2013, H.R. 1435, 113th Cong., 1st Sess. (2013).

[9] On average over the past five years, fewer than a dozen petitions per year have been filed with the Supreme Court for review under Article 67a according to data compiled by the U.S. Court of Appeals for the Armed Forces.

[10] 10 U.S.C. § 950g (2015).

government will provide an opportunity to consider whether similar changes are needed in the access of accused servicemembers to direct review by the Supreme Court.

8. Legislative Proposal

SEC. 912. SUPREME COURT REVIEW.

The second sentence of subsection (a) of section 867a of title 10, United States Code (article 67a of the Uniform Code of Military Justice), is amended by inserting before "Court of Appeals" the following: "United States".

9. Sectional Analysis

Section 912 would make a technical amendment to Article 67a.

Article 68 – Branch Offices
10 U.S.C. § 868

1. Summary of Proposal

This Report recommends no change to Article 68. Part II of the Report will consider whether any changes are needed in the rules implementing Article 68.

2. Summary of the Current Statute

Article 68 authorizes the Service Secretary to direct the Judge Advocate General to establish branch offices within any command.

3. Historical Background

Article 68 was modeled after Article 50(c) of the Articles of War.[1] As enacted, Article 68 required Presidential direction to establish a branch office with a "distant command."[2] In 1968, the statute was amended to substitute the Service Secretary for the President, and removed the limitation that branch offices could be established only in a "distant command."[3] In 1994, Article 68 was amended to substitute "Court of Criminal Appeals" for "Court of Military Review."[4]

4. Contemporary Practice

No service currently has a branch office established pursuant to Article 68. Advances in electronic communication have made the possibility of establishing branch offices less likely.

5. Relationship to Federal Civilian Practice

In federal civilian practice, the U.S. Courts of Appeals are established by statute. Except for the Court of Appeals for the Federal Circuit, the courts of appeals are geographically located within their jurisdiction.

6. Recommendation and Justification

Recommendation 68: No change to Article 68.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1195 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(29), 82 Stat. 1342 (1968).

[4] NDAA FY 1995, Pub. L. No. 103-337, Div. A, Title IX, § 924(c)(2), 108 Stat. 2831 (1994).

Article 68 allows for efficient appellate review during times of mass mobilization and geographic isolation. While the current force structure and advances in electronic communication have lessened the importance of Article 68, it continues to serve a purpose in ensuring that the UCMJ remains flexible enough to account for all future environments.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 69 – Review in the Office of the Judge Advocate General
10 U.S.C § 869

1. Summary of Proposal

The proposal would align the procedures for review in the Office of the Judge Advocate General under Article 69 with the proposed revisions in the appellate process under Article 66 (Review by Court of Criminal Appeals), and with the related revisions in the review process under Articles 64 (Review by a judge advocate) and 65 (Disposition of records). The proposal also would provide servicemembers with an opportunity to apply to the applicable Court of Criminal Appeals for judicial review of decisions made under Article 69. Part II of the Report will address changes in the rules implementing Article 69 provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 69 authorizes the Judge Advocate General of each service to review courts-martial that are not subject to direct review by the Courts of Criminal Appeals under Article 66. Article 69 provides two forms of review. The first form of review, set forth in Article 69(a), is automatic and applies to those general courts-martial in which the sentence does not include a punitive discharge, confinement for 12 months or more, or capital punishment—unless, pursuant to Article 61 (waiver or withdrawal of appeal), the accused has waived or withdrawn the right to Article 69(a) review. If, during the Article 69(a) review, the Judge Advocate General determines that any part of the findings or sentence is unsupported in law or that sentence reassessment is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both.

The second form of review, set forth in Article 69(b), applies to any case that did not receive direct review in the Office of the Judge Advocate General under Article 69(a) or in a Court of Criminal Appeals under Article 66. In general, these cases are summary and special courts-martials that were reviewed under Article 64, as well as any case where the accused waived or withdrew appeal under Article 61. In such cases, the findings, the sentence, or both may be modified or set aside on the basis of newly discovered evidence, fraud on the court, lack of jurisdiction, prejudicial error, or sentence appropriateness. If not automatically forwarded as part of the review under Article 64, an accused must apply for this review within two years after the convening authority approves the results of trial under Article 60; an extension may be granted when the accused shows good cause for the failure to file within the two-year period.

Article 69(c) provides that, under both forms of Article 69 review, the power of the Judge Advocate General to modify or set aside the sentence includes the power to order a rehearing or dismiss charges in specified circumstances. Decisions by the Judge Advocate General under Article 69(a)-(b) may be reviewed by the Courts of Criminal Appeals only

upon certification by the Judge Advocate General. In such cases, appellate review is limited to matters of law.

3. Historical Background

When the UCMJ was enacted in 1950,[1] Congress adapted the review process for courts-martial from the review system under the Articles of War.[2] Article 69 initially was limited to review of general courts-martial. The Judge Advocate General automatically reviewed all general courts-martial that did not receive automatic review by the boards of review.[3] At that time, the Judge Advocate General was authorized to certify issues to the then Courts of Military Review, because "even minor cases may involve major differences of interpretation of the law."[4] The remaining cases—special courts-martial not involving a punitive discharge and summary courts-martial—were reviewed in the field.

The Military Justice Act of 1968 expanded the review authority of the Judge Advocate General to include special and summary courts-martial.[5] In addition, the legislation authorized the Judge Advocate General to vacate or modify the findings or sentence in any court-martial case which had been finally reviewed, but which had not been reviewed by a court of military review, because of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused.[6] In 1981, Congress imposed a two-year limit on the statutory right to apply for Article 69 relief, unless the accused established good cause for failure to file within that time.[7] The legislative history of the 1981 amendment reflects a desire to limit the time for application of review in order to bring finality to these courts-martial.[8] The two-year time limit was adopted because that was the same limit applicable to a petition for a new trial

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1196 (1949).

[3] *Id.*

[4] United States v. Monett, 36 C.M.R. 335, 336-337 (C.M.A. 1966) (citing S. REP. NO. 81-486, 30 (1949)).

[5] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[6] *Military Justice: Joint Hearings before the Subcomm. on Constitutional Rights of the Senate Subcomm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services*, 87th Cong. 553 (1966) (Part 1) (Testimony of Eugene N. Zuckert, Dep't of the Air Force before the Chairman, Senate Committee on Armed Services). This amendment was considered in concert with the amendment to extend the time for submitting a petition for a new trial under Article 73. One service representative testified that "it would be preferable to authorize the Judge Advocate General to take direct corrective action on these additional cases, rather than to limit his authority to granting a new trial." *Id.*

[7] Military Justice Amendments of 1981, Pub. L. No. 97-81, 95 Stat 1085.

[8] H.R. REP. NO. 97-306, at 8 (1981).

under Article 73.[9] The Military Justice Act of 1983 further amended the text of Article 69 to include Articles 69(a)-(c).[10]

In 1989, Congress established procedures for the Judge Advocates General to certify cases to the Courts of Criminal Appeals that were not otherwise subject to automatic review under Article 66.[11] The authority of the appellate courts under such cases is limited to "matters of law."[12]

4. Contemporary Practice

The President has implemented Article 69 through R.C.M. 1201(b). Under current law, the accused cannot obtain judicial review of an Article 69 decision within the military justice system unless the case is certified to the Court of Criminal Appeals by the Judge Advocate General.

5. Relationship to Federal Civilian Practice

Article 69 has no direct federal counterpart. In the federal civilian system, offenses punishable by confinement for one year or less are classified as misdemeanors, and, subject to limitations, may be tried in U.S. magistrate court or federal district court.[13] A defendant in federal court is entitled to an "appeal as of right" from a misdemeanor conviction, sentence, judgment or order of a U.S. magistrate judge to "a judge of the district court of the district in which the offense was committed."[14] A federal civilian defendant is also entitled to an "appeal as of right" from a judgment or order of a federal district court to a circuit court of appeals.[15] Although there is no express provision for an appeal of right from a judgment of the district court affirming a magistrate's conviction, such appeals have been allowed as a matter of course.[16] In an appeal from a magistrate court to a district court, the

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[9] *Id.*

[10] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

[11] NDAA FY 1990 and 1991, Pub. L. No. 101-189, tit. XIII, 103 Stat. 1569-1577 (1989); *see also* H.R. REP. No. 101-331, at 977, 1115 (1989) (Conf. Rep.).

[12] *Id.*

[13] *See* 18 U.S.C. § 3559 (Sentencing classification of offenses).

[14] *See* 18 U.S.C. § 3402; FED. R. CRIM. P. 58(g)(2).

[15] 28 U.S.C. § 1291; FED. R. APP. P. 3 & 4.

[16] *See, e.g.*, United States v. Apel, 134 S. Ct. 1144 (2014) (reviewing an appeal of a conviction by a U.S. magistrate judge); United States v. Forcellati, 610 F.2d 25, 28 (1st Cir. 1979) ("While there is thus no express provision for even the defendant to appeal from a judgment of the district court affirming a magistrate's conviction, such appeals have been allowed apparently as a matter of course . . . . The statutory grant to the courts of appeals of jurisdiction to review 'all final decisions' of district courts is literally sufficient to include final decisions reviewing criminal convictions before magistrates, and no reason for excluding them from its embrace appears. Indeed, the assurance of that further review in the courts of appeals encourages use of magistrates' trials for minor offenses.") (citing 28 USCS § 1291).

"defendant is not entitled to trial *de novo* by a district judge [and] [t]he scope of appeal shall be the same as an appeal from a judgment of a district court to a court of appeals."[17] Every state provides some means of appellate review by a court for defendants in criminal cases, including review of misdemeanors. "In misdemeanor cases, defendants commonly have a right of review in the general trial court (in some states, by trial *de novo*) with subsequent discretionary appellate review."[18]

6. Recommendation and Justification

Recommendation 69: Amend Article 69 to provide the accused with an opportunity to apply for review by a court of criminal appeals.

Article 69 provides servicemembers with an opportunity to obtain corrective action in cases that do not qualify for appellate review in a judicial forum before the Courts of Criminal Appeals. Under current law, an accused cannot obtain judicial review of Article 69 decisions unless the case is certified to the Court of Criminal Appeals by the Judge Advocate General.

This proposal would provide access to judicial review for servicemembers whose general, special, or summary courts-martial resulted in sentences of confinement for six months or less upon application by the accused. Such access would be at the discretion of the Court of Criminal Appeals following completion of review in the Office of the Judge Advocate General and would run in parallel with the Judge Advocate General's discretionary authority to send such cases to the Court of Criminal Appeals for review.

This proposal would more closely align appellate review of minor offenses with the practice in the state and federal civilian courts. Under the proposal, appellate review would be akin to the review process for a defendant convicted in federal magistrate court with a right of appeal to a district court, and with the additional right to appeal the district court's decision to a circuit court of appeals.

The proposed amendments would improve the appellate process by providing an accused who believes that his case includes legal error with an opportunity to apply directly to a court for appellate review.

Consistent with the proposed revision of Article 66 to require the filing of an appeal with the Court of Criminal Appeals in more serious cases with punishments including a punitive discharge or confinement for more than six months, this proposal would eliminate automatic review of general courts-martial under Article 69. Instead, the proposed change to Article 69 would require an accused to request review by a Judge Advocate General. This proposal would preserve the authority of the Judge Advocate General to take direct corrective action in those cases reviewable under Article 69.

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[17] FED. R. CRIM. P. 58(g)(2)(D).

[18] Westlaw Appeals (2014), § 27.1(a) at 3.

In the related proposals to amend Articles 64 and 65, this Report recommends that all general and special courts-martial not reviewed under Article 66 first should be reviewed automatically under Article 65, and that all summary courts-martial should continue to be first reviewed under Article 64. Then, an accused who is dissatisfied with the results of the Article 64 or Article 65 review would have one year to request further review under Article 69. However, if an accused can show good cause for a failure to file within one year, the Judge Advocate General can consider the application so long as it is filed within a three year period, which is consistent with the time limit for a petition for new trial under Article 73. After the Article 69 review is complete, the accused will have an additional 60 days to apply for review at the Court of Criminal Appeals. The Court of Criminal Appeals would have discretion to grant or deny the application for review if the accused demonstrates a "substantial basis for concluding that the action on review [by the Judge Advocate General] constituted prejudicial error." The Courts of Criminal Appeals' authority to take action on such cases would be limited to matters of law, reflecting the current standard under Article 69(e).

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by ensuring that the court-martial process appropriately balances the limitation of rights available to members of the armed forces generally with procedures designed to ensure protection of rights that are provided under military law.

8. Legislative Proposal

SEC. 913. REVIEW BY JUDGE ADVOCATE GENERAL.

Section 869 of title 10, United States Code (article 69 of the Uniform Code of Military Justice), is amended to read as follows:

"§869. Art. 69. Review by Judge Advocate General

"(a) IN GENERAL.—Upon application by the accused and subject to subsections (b), (c), and (d), the Judge Advocate General may modify or set aside, in whole or in part, the findings and sentence in a court-martial that is not reviewed under section 866 of this title (article 66).

"(b) TIMING.—To qualify for consideration, an application under subsection (a) must be submitted to the Judge Advocate General not later than one year after the

date of completion of review under section 864 or 865 of this title (article 64 or 65), as the case may be. The Judge Advocate General may, for good cause shown, extend the period for submission of an application, but may not consider an application submitted more than three years after such completion date.

"(c) SCOPE.—(1)(A) In a case reviewed under section 864 or section 865(d) of this title (article 64 or 65(d)), the Judge Advocate General may set aside the findings or sentence, in whole or in part on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

"(B) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (Article 44).

"(C) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

"(D) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.

"(2) In a case reviewed under section 865(d) of this title (article 65(d)), review under this section is limited to the issue of whether the waiver, withdrawal, or failure to file an appeal was invalid under the law. If the Judge Advocate General

determines that the waiver, withdrawal, or failure to file an appeal was invalid, the Judge Advocate General shall order appropriate corrective action under rules prescribed by the President.

"(d) COURT OF CRIMINAL APPEALS.—(1) A Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c)—

"(A) in a case sent to the Court of Criminal Appeals by order of the Judge Advocate General; or

"(B) in a case submitted to the Court of Criminal Appeals by the accused in an application for review.

"(2) The Court of Criminal Appeals may grant an application under paragraph (1)(B) only if—

"(A) the application demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error; and

"(B) the application is filed not later than the earlier of—

"(i) 60 days after the date on which the accused is notified of the decision of the Judge Advocate General; or

"(ii) 60 days after the date on which a copy of the decision of the Judge Advocate General is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has

been provided by the accused, at the latest address listed for the accused in his official service record.

"(3) The submission of an application for review under this subsection does not constitute a proceeding before the Court of Criminal Appeals for purposes of section 870(c)(1) of this title (article 70(c)(1)).

"(e) Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Criminal Appeals under subsection (d), the Court may take action only with respect to matters of law.".

9. Sectional Analysis

Section 913 would amend Article 69 to more closely align appellate review of minor offenses with the practice in the federal civilian courts. Presently, Article 69 authorizes the Judge Advocate General to conduct a post-final review of courts-martial that are not subject to direct review by the Courts of Criminal Appeals under Article 66 and that were not previously reviewed under Article 69. As amended, the accused would have a one-year period in which to file for review under Article 69 in the Office of the Judge Advocate General, extendable to three years for good cause. The three-year upper limit for filing is consistent with the proposed amendments to Article 73 (Petition for a new trial) to allow an accused to petition for a new trial based on newly discovered evidence or fraud on the court. *See* Section 916, *supra.* A review under Article 69, as amended, could consider issues of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. The statute would permit the accused, after a decision is issued by the Office of the Judge Advocate General, to apply for discretionary review by the Court of Criminal Appeals under Article 66. The Judge Advocate General's authority to certify cases for review at the appellate courts would be retained.

Article 70 – Appellate Counsel
10 U.S.C. § 870

1. Summary of Proposal

This proposal would amend Article 70 by requiring to the greatest extent practicable that, in appeals of courts-martial in which the death penalty has been adjudged, at least one appellate defense counsel representing an accused must be learned in the law applicable to capital cases.

2. Summary of the Current Statute

Article 70 requires that appellate government counsel represent the government before the Courts of Criminal Appeals, the Court of Appeals for the Armed Forces, and, when requested by the Attorney General, before the Supreme Court. The statute also requires that appellate defense counsel represent the accused before those appellate courts when requested by the accused, or when counsel represents the government. Article 70(d) establishes the right of the accused to provide for his or her own representation by civilian counsel in these same appellate courts. Article 70(e) provides that the Judge Advocates General may direct military appellate counsel to perform other functions in connection with review of courts-martial.

3. Historical Background

Article 70 was included in the UCMJ as enacted in 1950 to provide for representation of the parties in conjunction with the establishment of the Boards of Review and the Court of Military Appeals (now Court of Appeals for the Armed Forces) as appellate courts within the military justice system.[1] The statute reflected a congressional desire to create a centralized group of appellate defense attorneys within the office of the Judge Advocate General.[2] Amendments in the Military Justice Act of 1983 expanded the responsibility of appellate counsel to represent the government and the accused before the Supreme Court under certain circumstances in conjunction with the enactment of authority for direct appellate review by the Supreme Court.[3] Subsequent amendments consisted of conforming changes to the legislation renaming the Courts of Criminal Appeals and the Court of Appeals for the Armed Forces.[4]

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1197-98 (1949).

[2] *See id.* at 1197-98.

[3] Military Justice Act of 1983, Pub. L. No. 98-209, § 10(c)(3), 97 Stat. 1393.

[4] NDAA FY 1995, Pub. L. No. 103-337, §924, 108 Stat. 2831-32 (1994).

4. Contemporary Practice

The President has implemented Article 70 through R.C.M. 1202, which largely repeats the statutory provisions. Under Article 70 and R.C.M. 1202, an accused has the right to effective representation by counsel when a case will be reviewed by a Court of Criminal Appeals, and, in appropriate cases, at the U.S. Court of Appeals for the Armed Forces under Article 67.[5] The rights under Article 70 are limited to the appellate level.[6] There is no right for the accused to be represented by trial defense counsel on appeal, nor is there a right to representation by appellate counsel at a later rehearing.[7]

Article 70 and Article 27(b) both address the qualifications of appellate defense counsel, and specify that counsel must be a judge advocate who is a graduate of an accredited law school or a member of the bar of a federal court or of the highest court of a state, and certified as competent to perform duties by the Judge Advocate General. In military death penalty cases, no unique qualifying criteria are imposed on defense counsel at trial or on appeal, other than the competency standards applicable in all cases.[8]

5. Relationship to Federal Civilian Practice

The Sixth Amendment right to counsel applies to all criminal defendants, with the state required to provide counsel to an indigent defendant.[9] The Supreme Court extended the right to counsel to the first appeal granted by state law as a matter of right,[10] and at other "critical" stages of the criminal proceedings.[11] Once a state grants a defendant the right of appeal, it cannot condition that right in a manner that violates the constitutional guarantee of equal protection. Although the Constitution does not require a state to provide an indigent with counsel when seeking a second-level, discretionary review, as a matter of practice, the Supreme Court and the state high courts appoint counsel once review has been granted.[12] State and federal public defenders usually continue their representation to

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[5] Diaz v. Judge Advocate General of the Navy, 59 M.J. 34, 37 (C.A.A.F. 2003).

[6] United States v. Kelker, 4 M.J. 323, 325 (C.M.A. 1978).

[7] United States v. Martin, 4 M.J. 852, 855 (A.C.M.R. 1978).

[8] United States v. Curtis, 44 M.J. 106, 126 (C.A.A.F. 1996).

[9] Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972) (extending 6th Amendment right to counsel to misdemeanor cases subject to imprisonment).

[10] Douglas v. California, 372 U.S. 353 (1963) (addressing only appeals granted as a matter of right from a criminal conviction, not discretionary review).

[11] Hamilton v. Alabama, 368 U.S. 52 (1963) (extended the right to counsel to arraignment); Mempa v. Rhay, 389 U.S. 128 (1967) (appointment of counsel for an indigent is required at every state of a criminal proceeding where substantial rights of a criminal accused may be affected, in this case a sentencing hearing after the defendant had been placed on probation).

[12] WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING & ORIN KERR, CRIMINAL PROCEDURE § 11.1(b) (3d ed. 2013).

include the certiorari petition when warranted.[13] State laws vary with respect to the appointment of counsel for second-tier, discretionary review.[14] With respect to collateral attacks on a conviction under state post-conviction relief procedures, the Supreme Court has held that the Constitution does not require the state to supply a lawyer.[15] However, by statute, Congress has provided for the appointment of counsel for indigents seeking collateral relief in federal court, including the Criminal Justice Act, 18 U.S.C. § 3006(a), and Rules 6 and 8 of the Rules Governing §2254 and §2255 proceedings.[16]

The civilian criminal justice system and the Military Commissions Act of 2009 both require unique qualifications for appellate defense counsel in capital cases, commonly referred to as "learned counsel." Federal law requires that, in a capital case in federal court, the defendant is entitled to at least two attorneys, one of whom "shall be learned in the law applicable to capital cases."[17] The Military Commissions Act also provides that a defendant is entitled to be represented "to the greatest extent practicable, by at least one additional counsel who is learned in applicable law relating to capital cases and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense . . . ."[18] The supporting regulations for the Military Commissions Act extend this obligation through appellate review. The "Regulation for Trial by Military Commission" provides:

> The Chief Defense Counsel shall establish . . . a section dedicated to providing appellate representation for the accused on appeal, to include appellate representation by counsel learned in the law applicable to capital cases for cases in which the appellant has been sentenced to death, and shall establish procedures for the appointment of appellate counsel to represent an accused before the United States Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and the United States Supreme Court. Appellate defense counsel shall meet the requirements for counsel appearing before military commissions.[19]

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[13] *Id.* at § 11.2(b) (citing Austin v. United States, 513 U.S. 5 (1994)) (noting circuit court rules requiring counsel to prepare and file petitions for writ of certiorari upon request of defendant and adding that these rules should relieve counsel of such obligations where petition would present only frivolous claims).

[14] *Id.*

[15] Pennsylvania v. Finley, 481 U.S. 551 (1987).

[16] LAFAVE ET AL., *supra* note 12, at § 28.12(b).

[17] 18 U.S.C. § 3005.

[18] 10 U.S.C. § 949a(b)(2)(c)(ii).

[19] Regulation for Trial by Military Commission, ¶9-1 (a)(17) (2011).

6. Recommendation and Justification

Recommendation 70: Amend Article 70 by requiring to the greatest extent practicable that, in appeals of courts-martial in which the death penalty has been adjudged, at least one appellate defense counsel representing an accused must be learned in the law applicable to capital cases.

This proposed amendment would better align the appellate counsel rights of servicemembers with the rights provided to defendants facing the death penalty in in the military commissions and in federal civilian appellate courts.

Part II of the Report will address changes in the rules implementing Article 70, with particular attention to the applicable procedures for assigning qualified appellate defense counsel in capital cases.

7. Relationship to Objectives and Related Provisions

The proposal to assign "learned counsel" on appeal in capital cases, and the assistance of counsel for petitions for review by the military Courts of Criminal Appeals after Article 69 review, is consistent with the practice in the federal and state courts and the requirements at the trial level under the proposed amendments to Article 27.

As noted in the discussion of the proposed amendments to Article 69, the opportunity to submit an application to the Court of Criminal Appeals for review of an Article 69 decision would not establish a right to the assistance of government furnished counsel in preparing the submission. If, however, the Court of Criminal Appeals grants the application, the accused would receive the assistance of counsel under Article 70 in proceedings on the merits of the case before the Court of Criminal Appeals.

8. Legislative Proposal

SEC. 914. APPELLATE DEFENSE COUNSEL IN DEATH PENALTY CASES.

Section 870 of title 10, United States Code (article 70 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(f) To the greatest extent practicable, in any capital case, at least one defense counsel under subsection (c) shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a

civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.".

9. Sectional Analysis

Section 914 would amend Article 70 to require, to the greatest extent practicable, at least one appellate defense counsel shall be learned in the law applicable to capital cases in any case in which the death penalty was adjudged at trial. This change would provide the accused with the same access to an expert in death penalty litigation that is currently provided to defendants in Article III courts and before military commissions under Chapter 47a of Title 10.

Article 71 – Execution of Sentence; Suspension of Sentence

10 U.S.C. § 871

This Report would consolidate Articles 57 (Effective date of sentences), Article 57a (Deferment of sentences), and Article 71 (Execution of sentence; suspension of sentence) into Article 57. *See* Article 57, *supra.* Accordingly, the proposed legislation would strike Article 71.

Article 72 – Vacation of Suspension
10 U.S.C. § 872

1. Summary of Proposal

This proposal would amend Article 72 to authorize a special court-martial convening authority to detail a judge advocate to preside at the hearing that must be held before a suspended sentence can be vacated.

2. Summary of the Current Statute

Article 72 establishes the due process requirements to vacate a suspended court-martial sentence. In all general courts-martial and in special courts-martial where a bad-conduct discharge was adjudged, the special court-martial convening authority must personally conduct a hearing on the alleged violation. The special court-martial convening authority then forwards the record of the hearing to the general court-martial convening authority, who may vacate the suspension. In all other special courts-martial and summary courts-martial cases, Article 72 does not prescribe specific procedural requirements.[1]

3. Historical Background

Article 72 has not been substantially revised since the enactment of the UCMJ in 1950.[2]

4. Contemporary Practice

Vacation proceedings are conducted pursuant to R.C.M. 1109. A vacation hearing utilizes the rules applied in Article 32 proceedings under R.C.M. 405(g), (h)(1) and (i). In view of the impending changes to R.C.M. 405(g) implementing the recent amendments to Article 32, Part II of this report will address whether additional changes are needed to ensure that R.C.M. 1109 contains adequate procedural rules.[3]

5. Relationship to Federal Civilian Practice

In federal civilian practice, Fed. R. Crim. P. 32.1 governs the procedures for revoking a probationary or suspended sentence. Under the rule, a magistrate judge first conducts a probable cause hearing to determine if there is probable cause to believe that a violation occurred. If there is probable cause, a revocation hearing is held. At the revocation hearing the defendant is entitled to discovery and may present evidence and cross-examine

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[1] *See* R.C.M. 1109(e) and (g).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] *See* Manual for Courts-Martial; Proposed Amendments, 79 Fed. Reg. 59,938-59,959 (Oct. 3, 2014).

adverse witnesses. The rules of evidence do not apply at a revocation hearing,[4] and a violation does not need to be proven beyond a reasonable doubt.[5] If the judge finds that the defendant violated the terms of the suspension or probation, the judge may revoke the suspension and resentence the defendant.[6] Revocation is mandatory if the defendant possessed a firearm, a controlled substance, or refused to take required drug tests.[7]

6. Recommendation and Justification

Recommendation 72: Amend Article 72 to allow the special court-martial convening authority to detail a judge advocate to conduct the vacation hearing.

This proposal removes the requirement that the special court-martial convening authority personally hold the vacation hearing. Instead, a judge advocate could be detailed to conduct the hearing.

This change would enable the convening authority to assign the responsibilities to an individual experienced in hearing procedures. As under current law, the results of the hearing would be provided to the general court-martial convening authority, who would continue to exercise discretion as to whether the suspension should be vacated.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to vacation proceedings in the civilian sector insofar as practicable in military criminal practice, and by enhancing efficiency during the post-trial phase of the court-martial process.

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[4] Morrisey v. Brewer, 408 U.S. 471, 489 (1972) (laying out the minimum requirements of due process for revocation hearings, in which adherence to the rules of evidence is not included).

[5] United States v. Francischine, 512 F.2d. 827, 829 (5th Cir. 1975).

[6] 18 U.S.C. §3572(a).

[7] 18 U.S.C. §3572(b).

8. Legislative Proposal

SEC. 915. AUTHORITY FOR HEARING ON VACATION OF SUSPENSION OF SENTENCE TO BE CONDUCTED BY QUALIFIED JUDGE ADVOCATE.

(a) IN GENERAL.—Subsection (a) of section 872 of title 10, United States Code (article 72) of the Uniform Code of Military Justice), is amended by inserting after the first sentence the following new sentence: "The special court-martial convening authority may detail a judge advocate, who is certified under section 827(b) of this title (article 27(b)), to conduct the hearing.".

(b) TECHNICAL AMENDMENTS.—Such section (article) is further amended—

(1) in the last sentence of subsection (a), by striking "if he so desires" and inserting "if the probationer so desires"; and

(2) in the second sentence of subsection (b)—

(A) by striking "If he" and inserting "If the officer exercising general court-martial jurisdiction"; and

(B) by striking "section 871(c) of this title (article 71(c))." and inserting "section 857 of this title (article 57)).".

9. Sectional Analysis

Section 915 would amend Article 72, which establishes the process for vacating a suspended court-martial sentence. The amendments would authorize a special court-martial convening authority to detail a judge advocate qualified under Article 27(b) to preside at the vacation hearing, which must be held before a suspended sentence can be vacated. The detailed judge advocate would replace the special court-martial convening

authority at the hearing and would make factual determinations about whether a violation occurred. Under current law, the procedures applicable at vacation hearings under Article 72 are prescribed by cross-reference to R.C.M. 405, which provides the rules and procedures applicable at Article 32 hearings. The recent changes to Article 32 (Preliminary hearing) and R.C.M. 405 no longer provide a hearing structure that can be used in vacation proceedings. The implementing rules for Article 72 will be updated to reflect this change and to provide procedures applicable at vacation hearings.

Article 73 – Petition for a New Trial
10 U.S.C. § 873

1. Summary of Proposal

This proposal would amend Article 73 by increasing the period to file a petition for a new trial from two to three years, the time period provided in similar civilian proceedings.

2. Summary of the Current Statute

Article 73 permits an accused to petition the Judge Advocate General for a new trial because of "newly discovered evidence or fraud on the court." Under the statute, the time to file a petition is limited to two years from when the convening authority approved the sentence. If the case is pending on appeal, the Judge Advocate General must forward the petition to the appellate court for an appropriate decision.

3. Historical Background

When the UCMJ was first enacted in 1950, an accused's ability to petition the Judge Advocate General for a new trial was more limited. Petitions were only allowed within one year and were limited to cases that included at least a bad-conduct discharge or confinement of at least a year.[1] In 1968, the ability to file a petition was expanded to include all courts-martials and the time to file a petition was extended to two years.[2] Other than minor changes, the statute has not changed substantively since 1968.

4. Contemporary Practice

The President has implemented Article 73 through R.C.M. 1210, which restricts the circumstances when a petition for a new trial may be granted. Under the rule, a petition for new trial, for example, may not be granted because of newly discovered evidence when an accused pled guilty to an offense, or when the new evidence could have been discovered by the petitioner through the exercise of due diligence. In practice, most petitions are filed when the case is still pending before an appellate court and are resolved at that time.

5. Relationship to Federal Civilian Practice

In federal civilian practice, a motion for new trial because of newly discovered evidence may be filed within three years of the verdict.[3]

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] The Military Justice Act of 1968, Pub. L. No. 90-632, § 4(c), 82 Stat. 1335.

[3] FED. R. CRIM. P. 33(b)(1); *see also* FED. R. CRIM. P. 33(b)(2) (motion for a new trial for any other reason must be filed within 14 days of the verdict).

6. Recommendation and Justification

Recommendation 73: Amend Article 73 to expand the time to file a petition for a new trial from two years to three years.

This proposal would align military justice practice with federal civilian practice. In 1968, when Article 73 was amended to increase the time period for filing a petition for a new trial to two years, this was consistent with federal civilian practice. When the federal rules were amended to expand the time period to three years in 1998, no similar change was made to Article 73.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by employing the standards and procedures applicable to petitions for a new trial in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 916. EXTENSION OF TIME FOR PETITION FOR NEW TRIAL.

The first sentence of section 873 of title 10, United States Code (article 73 of the Uniform Code of Military Justice), is amended by striking "two years after approval by the convening authority of a court-martial sentence," and inserting "three years after the date of the entry of judgment under section 860c of this title (article 60c).".

9. Sectional Analysis

Section 916 would amend Article 73 to conform the statute to the proposed changes in Article 60 and to increase the time period for an accused to petition for a new trial from two years to three years, consistent with the three-year period in Fed. R. Crim. P. 33(b)(1).

Articles 74-75 – Remission and Suspension & Restoration

10 U.S.C. §§ 874-75

1. Summary of Proposal

This proposal would amend Article 75 to authorize regulations governing eligibility for pay and allowances during the period after a court-martial sentence is set aside or disapproved until any sentence is imposed upon a new trial or rehearing. Part II of the Report will propose rules implementing the change to Article 75. This Report recommends no change to Article 74.

2. Summary of the Current Statute

Article 74 provides the Service Secretaries and their designees the power to remit or suspend any part of an unexecuted part of any sentence, with two exceptions: (1) the power to act on a death sentence is retained by the President under Article 71(a); and (2) with respect to a sentence to life without parole, the Secretary concerned can only act after the accused has served no less than 20 years confinement, and may not delegate this power. Article 74 also gives the Service Secretaries the ability to substitute an administrative discharge for a punitive discharge or dismissal.

Article 75 concerns restoration of a member's rights, privileges and property following a court-martial conviction. The statute is divided into three subsections. Subsection (a) authorizes the President to prescribe regulations for the restoration of all rights, privileges, and property affected by an executed part of a court-martial sentence, except discharge or dismissal, which has been set aside or disapproved unless a new trial or rehearing is ordered and such executed part is included in a sentence imposed upon the new trial or rehearing. Subsection (b) provides that if a previously executed sentence of dishonorable or bad-conduct discharge is not imposed at a new trial, the Service Secretary can either allow the accused to serve out the remainder of his or her enlistment, or shall substitute an appropriate administrative discharge. Subsection (c) provides that if a previously executed sentence of dismissal is not imposed on a new trial, the Secretary concerned shall substitute an appropriate administrative discharge, and the commissioned officer dismissed by the sentence may be reappointed by the President alone to the commissioned grade and rank that, in the opinion of the President, the former officer would have attained had he or she not been dismissed.

3. Historical Background

Article 74 has remained unchanged since the UCMJ's enactment in 1950, except for one amendment in 2000 that added a restriction on the Service Secretary's authority to

delegate powers for sentences of life without parole.[1] Article 75 has remained unchanged since the UCMJ was first enacted.[2]

4. Contemporary Practice

DOD Instruction 1325.7 guides the services' implementation of Articles 74 and 75. The Instruction governs the administration of military correctional facilities, clemency and parole, restoration, and reenlistment. Under the Instruction, each Service Secretary is required to establish a Clemency and Parole Board to assist the Secretary to exercise clemency, parole, and mandatory supervised release authority, and to serve as the primary authority for administration of clemency, parole, mandatory supervised release, restoration to duty, and reenlistment actions. The Military Department Clemency and Parole Board has approval authority for nearly all clemency, parole, mandatory supervised release, restoration to duty, and reenlistment actions. The Boards strive to achieve uniformity, effectiveness, and efficiency in the administration of corrections functions and clemency and supervision programs, and are instructed to foster the safe and appropriate release of military offenders under terms and conditions consistent with the needs of society, the rights and interests of victims, and the rehabilitation of the prisoner.

Currently, the Army, Navy and Air Force each independently operate separate clemency and parole boards. The Coast Guard operates an independent clemency board, but utilizes the Navy board for matters relating to parole. To promote consistency in action, representatives from the Military Department Clemency and Parole Boards must meet at least semiannually to exchange views on clemency, parole, and mandatory supervised release philosophy; procedures; significant cases; and similar matters. Outside of the military justice system, as an additional check and balance, Congress has enabled the Service Secretaries, acting primarily through administrative boards, to correct military records and review discharges or dismissals.[3] These boards are not intended to circumvent the military justice system, but only to review matters submitted under certain guidelines and to act when necessary to correct an error or remove an injustice.[4]

There has been litigation on whether an accused, while pending a rehearing, is entitled to pay and allowances at his or her former grade. As a result of this litigation, current law has been interpreted as providing that an accused will not receive pay and allowances at the former grade, even if performing full military duties while awaiting the rehearing.[5]

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[1] NDAA FY 2001, Pub. L. No. 106-398, § 553(a), 555, 114 Stat. 1654 (2000).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] 10 U.S.C. §§ 1552 (Correction of military records); 10 U.S.C. § 1553 (Review of discharge or dismissal). The authority under Section 1553 does not extend to a discharge or dismissal by sentence of a general court-martial.

[4] *See id.*

[5] Dock v. United States, 46 F.3d 1083, 1091 (Fed. Cir. 1995). *But see* Keys v. Cole, 31 M.J. 228, 232 (C.M.A. 1990).

5. Relationship to Federal Civilian Practice

The federal parole system was created in 1910 and granted the power of parole over prisoners sentenced to terms of one year or more to boards of parole at several penitentiaries and prisons.[6] In 1930, Congress materially altered the parole system by disbanding the multiple board concept for a single parole board in the Department of Justice.[7] In 1987, the adoption of sentencing guidelines precipitated the removal of parole for all defendants whose offenses were committed on or after November 1, 1987.[8]

6. Recommendation and Justification

Recommendations 74: No change to Article 74.

In light of the well-developed case law and stable practice concerning Article 74, a statutory change is not necessary. Part II of the Report will consider whether any changes are needed in the rules implementing Article 74.

Recommendation 75: Amend Article 75 to require the President to establish rules governing the eligibility for pay and allowances during the period after a court-martial sentence is set aside or disapproved.

Under this proposal, the President would establish rules governing the eligibility criteria for pay and allowances during the period after a court-martial sentence is set aside or disapproved. This would clarify the circumstances under which pay and allowances would be authorized during the pendency of the new trial.

The proposed amendment would clarify the authority to provide pay and allowances to a servicemember who is performing duties while pending rehearing to receive pay and allowances. Part II of this Report will propose rules limiting this provision to periods when an accused is not in confinement while awaiting the rehearing.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Articles 74 and 75 are in addition to the Service Secretaries' clemency and parole authority under 10 U.S.C. §§ 951-954.

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[6] U.S. DEP'T OF JUSTICE, HISTORY OF THE FEDERAL PAROLE SYSTEM 6 (2003).

[7] *Id.* at 7.

[8] *Id.* at 28.

8. Legislative Proposal

SEC. 917. RESTORATION.

Section 875 of title 10, United States Code (article 75 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(d) The President shall prescribe regulations, with such limitations as the President considers appropriate, governing eligibility for pay and allowances for the period after the date on which an executed part of a court-martial sentence is set aside.".

9. Sectional Analysis

Section 917 would amend Article 75, which provides the basic rules and procedures for the restoration of a member's rights, privileges, and property when a court-martial conviction is set aside during review. As amended, the statute would authorize the President to establish regulations governing when an accused may receive pay and allowances while pending a rehearing. The implementing rules will set forth the authority to provide pay and allowances to an accused who is pending a rehearing, performing duties, and not in confinement.

Article 76 – Finality of Proceedings, Findings, and Sentences
10 U.S.C. § 876

1. Summary of Proposal

This Report recommends no change to Article 76. Part II of the Report will consider whether any changes are needed in the rules implementing Article 76.

2. Summary of the Current Statute

Article 76 concerns the finality of courts-martial. Under the statute, the findings and sentence of a court-martial that have been approved, reviewed, or affirmed as required by the UCMJ are final and conclusive on all courts and agencies of the United States.

3. Historical Background

Other than minor changes, Article 76 has remained unchanged since the UCMJ was enacted in 1950.[1]

4. Contemporary Practice

Article 76 serves to provide finality to court-martial verdicts and to limit the collateral review of courts-martial by other courts and agencies. The Supreme Court has addressed Article 76 in the context of identifying the standards and procedures applicable to collateral review of courts-martial.[2] The Court of Appeals for the Armed Forces has addressed Article 76 in the context of collateral review within the military justice system.[3]

5. Relationship to Federal Civilian Practice

In federal civilian practice, a federal judgment generally becomes final for appellate review and claim preclusion purposes when the district court "disassociates" itself from the case, leaving nothing to be done except the execution of the judgment.[4] United States district court orders that are properly appealed may be reviewed by an appellate court.[5] For cases

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] *See, e.g.*, Burns v. Wilson, 346 U.S. 137, 152 (1953); Schlesinger v. Councilman, 420 U.S. 738, 753 (1975); United States v. Denedo, 556 U.S. 904, 915 (2009).

[3] *See, e.g.*, Loving v. United States, 68 M.J. 1 (C.A.A.F. 2009).

[4] *See* Clay v. United States, 537 U.S. 522, 527 (2003).

[5] *See* Union Pac. R. Co. v. Greentree Transp. Trucking Co., 293 F.3d 120, 126 (3d Cir. 2002).

that are appealed, finality attaches when the time for filing a certiorari petition to the Supreme Court expires, the Supreme Court denies a petition for a writ of certiorari, or the Supreme Court affirms a conviction.[6]

6. Recommendation and Justification

Recommendation 76: No change to Article 76.

In view of the well-developed case law addressing Article 76's provisions, a statutory change is not necessary.

Part II of the Report will consider whether any changes are needed in the rules implementing Article 76.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by using the current UCMJ as a point of departure for a baseline reassessment.

[6] *Clay*, 537 U.S. at 527.

Article 76a – Leave Required to be Taken Pending Review of Certain Court-Martial Convictions

10 U.S.C. § 876a

1. Summary of Proposal

This proposal would align the language of Article 76a with proposed changes in Article 60 (Action by the Convening Authority) and the proposed new Article 60c (Entry of judgment), with no substantive changes. Part II of the Report will consider whether any changes are needed in the rules implementing Article 76a.

2. Summary of the Current Statute

Article 76a authorizes the services, at their discretion, to involuntarily place an accused on leave if the accused has been sentenced to an unsuspended punitive discharge or dismissal that has been approved by the convening authority.

3. Historical Background

Article 76a was enacted in 1981, and was amended in 1983 to address the status of personnel who had been convicted at courts-martial but whose cases were in the process of appellate review.[1] The statute was designed to give the services the option of placing the accused on involuntary leave following a court-martial conviction where the accused's sentence included a dismissal or a punitive discharge. Prior to Article 76a, the services had no other option for an accused in this scenario but to retain the individual in a full-pay status pending completion of review.

4. Contemporary Practice

The term "appellate leave" is used to refer to both involuntary appellate leave of Article 76a and voluntary appellate leave. The accused frequently requests to be placed on appellate leave either through an obligation in a pretrial agreement or on the accused's own volition. A servicemember in appellate leave status has access to medical, dental, exchange, and commissary benefits. The member is placed in a no-pay status, except for payments attributable to accrued leave.

[1] Military Justice Amendments of 1981, Pub. L. No. 97–81, 95 Stat 1085; Military Justice Act of 1983, Pub. L. No. 98–209, § 5(g), 97 Stat 1393.

5. Relationship to Federal Civilian Practice

Although largely a military specific issue, appellate leave draws some similarities to circumstances in which certain public officials are placed on involuntary administrative leave without pay pending the conclusion of a criminal or administrative investigation.[2]

6. Recommendation and Justification

Recommendation 76a: Amend Article 76a to align the statute with proposed changes in Articles 60, 60a, 60b, and 60c, with no substantive changes.

Given the well-developed case law addressing Article 76a's provisions, a substantive statutory change is not necessary. The statute allows the government to remove personnel from a unit who have been convicted at courts-martial and whose sentence includes dismissal or a punitive discharge. This serves to preserve good order and discipline within the unit and restricts expenditures on pay and allowances for those sentenced to discharge or dismissal. In some cases convicted members find appellate leave advantageous in terms of early separation from the military environment and an opportunity to transition to civilian life.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 918. LEAVE REQUIREMENTS PENDING REVIEW OF CERTAIN COURT-MARTIAL CONVICTIONS.

Section 876a of title 10, United States Code (article 76a of the Uniform Code of Military Justice), is amended—

(1) in the first sentence, by striking ", as approved under section 860 of this title (article 60),"; and

[2] 5 U.S.C. § 7532.

(2) in the second sentence, by striking "on which the sentence is approved under section 860 of this title (article 60)" and inserting "of the entry of judgment under section 860c of this title (article 60c).".

9. Sectional Analysis

Section 918 would align the language of Article 76a with proposed changes in Article 60 (Action by the Convening Authority) and the proposed new Article 60c (Entry of Judgment), with no substantive changes. Article 76a currently authorizes the services, at their discretion, to involuntarily place an accused on leave if the accused has been sentenced to an unsuspended punitive discharge or dismissal that has been approved by the convening authority.

Article 76b – Lack of Mental Capacity or Mental Responsibility: Commitment of Accused for Examination and Treatment

10 U.S.C. § 876b

1. Summary of Proposal

This Report recommends no change to Article 76b. Part II of the Report will consider whether any changes are needed in the rules implementing Article 76b.

2. Summary of the Current Statute

Article 76b provides the rules and procedures applicable when an accused is found either mentally incompetent to stand trial, or not guilty by reason of lack of mental responsibility. Under subsection (a) of the statute, when an accused is found incompetent to stand trial, the accused is committed to the custody of the Attorney General. The Attorney General must then follow the requirements of 18 U.S.C. § 4241(d). After an initial period of required hospitalization, the accused is either returned to the custody of the convening authority (if the accused is determined to be competent) or indefinitely hospitalized until found competent pursuant to 18 U.S.C. § 4246. Under subsection (b), when an accused is found not guilty by reason of lack of mental responsibility, the court-martial must conduct a hearing pursuant to 18 U.S.C. § 4243. During that hearing, the accused must prove by clear and convincing evidence that he no longer poses a threat of bodily injury or serious property damage due to mental disease or defect. If the charged crime did not involve bodily injury or serious damage to property, the accused's burden is only by a preponderance of the evidence. If the accused fails to meet this standard, he may be committed to the custody of the Attorney General. The Attorney General must then follow the procedures of 18 U.S.C. § 4243 concerning the accused's hospitalization.

3. Historical Background

Article 76b was added to the Code in 1996, the same year that the principal underlying federal statute (18 U.S.C. § 4243—Hospitalization of a person found not guilty only by reason of insanity) was last amended.[1]

4. Contemporary Practice

The President has implemented Article 76b, in part, through R.C.M. 909, which provides the procedures for incompetence determination hearings. Findings of mental incompetency

[1] NDAA FY 1996, Pub. L. No. 104-106, § 1133(c), 110 Stat. 461-67; 502 (codified at 10 U.S.C. § 876b); Pub. L. No. 104-294, Title III, § 301(a), 110 Stat. 3494 (codified at 18 U.S.C. § 4243).

and findings of not guilty due to lack of mental responsibility are exceptionally rare in military practice.[2] When these matters are raised, the procedures of Article 76b and R.C.M. 909 are generally followed without issue.[3]

5. Relationship to Federal Civilian Practice

The rules and procedures applicable under Article 76b largely mirror the rules and procedures applicable in federal civilian practice with respect to commitment of the accused for mental examination and treatment, as codified in 18 U.S.C. §§ 4241-4247. Given the purposeful modeling of Article 76b off of the corollary Title 18 statutes cited above, there is little variation in military practice and federal civilian practice in this area.

6. Recommendation and Justification

Recommendation 76b: No change to Article 76b.

Article 76b reflects current federal law and practice.

The statute and the rule implementing the statute are uncontroversial and stable, and there are no reported problems with the statute in its current form.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by employing the standards and procedures of the civilian sector insofar as practicable in the area of mental incapacity and lack of mental responsibility.

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[2] *See* Major Jeremy A. Ball, *Solving the Mystery of Insanity Law: Zealous Representation for Mentally Ill Servicemembers*, 2005 ARMY LAWYER 1, 1 (December 2005) (noting the majority of military justice practitioners rarely encounter lack of mental responsibility issues at trial).

[3] *See, e.g.*, United States v. Salhuddin, 54 M.J. 918, 920 (A.F. Ct. Crim. App. 2001) (upholding convening authority's order to commit the servicemember to the custody of the Attorney General pursuant to R.C.M. 909(c) after a "sanity board" convened under R.C.M. 706 found the servicemember incompetent to stand trial).

Subchapter X. Punitive Articles

Article 77 – Principals
10 U.S.C. § 877

1. Summary of Proposal

This Report recommends no change to Article 77. Part II of the Report will consider whether any changes are needed in the Manual for Courts-Martial provisions implementing Article 77.

2. Summary of the Current Statute

Article 77 sets forth a standard of accountability that applies to all offenses under the UCMJ. Under Article 77, a person is liable as a principal if the person: (1) commits an offense under the UCMJ; (2) aids, abets, counsels, commands, or procures the commission of an offense under the UCMJ; or (3) causes the commission of an offense under the UCMJ.

3. Historical Background

Principal liability was a common-law concept used in American military law from 1775 to 1949.[1] The inclusion of Article 77 in the UCMJ as enacted in 1950 provided a specific statutory provision and replaced the common-law distinctions between aider and abettor and accessory-before-the-fact liability. Article 77 has not been amended since the UCMJ's enactment in 1950.[2]

4. Contemporary Practice

Article 77—which applies the doctrine of principals to all offenses under the UCMJ—does not establish a separate offense. In addition to covering perpetrators, criminal liability under Article 77 extends to others who assist, encourage, advise, instigate, counsel, command, or procure another person to commit an offense; or who assist, encourage, or advise another in the commission of the offense.[3]

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 588, 592, 654 (photo reprint 1920) (2d ed. 1896) (discussing aiders and abettors as "principals" to the underlying misconduct).

[2] 10 U.S.C. § 877.

[3] Article 77 is often used to charge and hold accountable servicemembers as principals under an aiding and abetting theory. *See, e.g.*, United States v. Mitchell, 66 M.J. 176, 180 (C.A.A.F. 2008) (accused was guilty of indecent assault for encouraging perpetrator to have sex with the victim). *But see, e.g.*, United States v. Bennitt, 72 M.J. 266, 269 (C.A.A.F. 2013) (accused was not guilty of involuntary manslaughter for a death caused by overdose after he prepared the drug for the victim); United States v. Simmons, 63 M.J. 89, 93-94 (C.A.A.F. 2006) (accused was not guilty of a physical assault when he failed to intervene and stop the fight because he did not share assailant's criminal intent).

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2 (Principals) is nearly identical to Article 77.[4] The only difference between 18 U.S.C. § 2 and Article 77 is that the former includes the word "induces" in the list of actions describing principal liability, whereas Article 77 does not.[5]

6. Recommendation and Justification

Recommendation 77: No change to Article 77.

In view of the well-developed case law addressing Article 77's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by minimizing change when established military law is similar to the law applied in U.S. district courts.

[4] The legislative history of Article 77 indicates that Congress intended both statutes to share the same scope. *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1240 (1949).

[5] *Compare* Article 77 ("Any person punishable under this chapter who . . . aids, abets, counsels, commands, or procures its commission. . . ") *with* 18 U.S.C. § 2 ("Whoever . . . aids, abets, counsels, commands, *induces* or procures its commission . . . .") (emphasis added).

Article 78 – Accessory After the Fact
10 U.S.C. § 878

1. Summary of Proposal

This Report recommends no change to Article 78. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 78.

2. Summary of the Current Statute

Article 78 prohibits a person subject to the UCMJ from receiving, comforting, or assisting an offender for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

3. Historical Background

Article 78 was derived from 18 U.S.C. § 3 and conforms to prior military practice.[1] Article 78 has not been amended since the UCMJ's enactment in 1950.[2]

4. Contemporary Practice

Article 78 imposes criminal liability on those who knowingly render assistance to offenders after the offender has committed the crime, provided that those giving assistance do so knowing that an offense punishable by the UCMJ has been committed.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 3 (Accessory after the fact) is nearly identical to Article 78. The only difference between 18 U.S.C. § 3 and Article 78 is that the former includes the word "relieves" in the list of actions describing accessory after the fact, whereas Article 78 does not.[3]

6. Recommendation and Justification

Recommendation 78: No change to Article 78.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1224 (1949).

[2] Article 78, UCMJ (1950).

[3] *Compare* Article 78 ("receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial or punishment . . . ") *with* 18 U.S.C. § 3 ("Whoever . . . receives, *relieves*, comforts or assists the offender in order to prevent his apprehension, trial or punishment . . . .") (emphasis added).

In view of the well-developed case law addressing Article 78's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance of minimizing change when established military law is the law applied in U.S. district courts.

Article 79 – Conviction of Lesser Included Offense
10 U.S.C. § 879

1. Summary of Proposal

This proposal would amend Article 79 to authorize the President to designate an authoritative but non-exhaustive list of lesser included offenses for all punitive articles in the UCMJ. Part II of the Report will address changes in the Manual provisions implementing Article 79 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 79 defines lesser included offenses under military law as those "necessarily included" in a greater offense, or attempts to commit either the charged offense or an offense necessarily included. Article 79 does not otherwise provide a list of lesser included offenses to specific punitive articles in the UCMJ.

3. Historical Background

Article 79 was derived[1] from the Federal Rules of Criminal Procedure.[2] The statute has remained unchanged since the UCMJ was enacted in 1950.[3] In the 1951 Manual, the President provided a list of lesser included offenses for the punitive articles, styled as the "Table of Commonly Included Offenses."[4] However, the introduction to this Table cautioned practitioners that it was only intended as a guide; it was neither an all-inclusive list nor could it be applied mechanically in every case.[5]

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[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1224 (1949) (citing FED. R. CRIM. P. 31(c) (1949)).

[2] Before the UCMJ was enacted, the military employed by regulation a "lesser kindred offense" doctrine. The Articles of War did not contain a statutory provision for lesser included offenses. For example, in 1890, an Army instruction manual provided that, "[i]f the evidence proves the commission of an offense less than that specified, yet kindred thereto, the court may except words of the specification, substitute others instead, pronounce the guilt and innocence of the substituted and excepted words respectively, and then find the accused not guilty of the charge, but guilty of the lesser kindred offense." P. HENRY RAY, INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES (1890). It was not until 1921 that the MCM for the first time employed the phrase "lesser included offense." MCM 1921, ¶¶298, 300, 377.

[3] 10 U.S.C. § 879.

[4] MCM 1951, App. 12.

[5] *Id.*

4. Contemporary Practice

The lesser included offense doctrine provides the accused with notice of potential offenses that the accused should be prepared to defend against at trial as well as the basis to plead double jeopardy in a later case.[6]

Article 79 mirrors Federal Rule of Criminal Procedure 31(c) defining lesser included offenses, and the test for determining whether an offense is a lesser included offense under Article 79 – the elements test – is derived from the test used by the federal civilian courts under Rule 31(c).[7] Under the elements test, an offense is necessarily included in a greater offense when the elements of the lesser offense are a subset of the elements of the charged offense.[8]

Part IV of the Manual for Courts-Martial, which covers substantive offenses, provides a list of lesser included offenses for many of the punitive articles. The listing of lesser included offenses in Part IV has been treated as constituting persuasive but not binding authority.[9]

Applying the elements test as the basis for satisfying Article 79 has resulted in exclusion of Article 134 offenses as lesser included offenses of any enumerated punitive article.[10] This is because the terminal element of Article 134, requiring an offense to be of a nature to discredit the armed forces or prejudicial to good order and discipline, is neither articulated nor inherent in any of the enumerated punitive articles. As a result, offenses that otherwise would be factually subsumed within a greater offense, *e.g.* negligent homicide as a lesser included offense of murder, do not currently qualify as a lesser included offense because of the terminal element of Article 134.[11]

5. Relationship to Federal Civilian Practice

Federal Rule of Criminal Procedure 31(c) is identical to Article 79. Both military and federal courts utilize the "elements test" to determine "necessarily included" lesser offenses. A minority of the states follow this approach as well.[12] However, the "elements

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[6] United States v. Schmuck, 489 U.S. 705, 720-21 (1989).

[7] United States v. Jones, 68 M.J. 465, 469-70 (C.A.A.F. 2010).

[8] *Id.* at 468.

[9] *Id.* at 471-72 (citing United States v. Miller, 67 M.J. 385, 388 n.5 (C.A.A.F. 2009)).

[10] *United States v. Jones* held that the "elements" test excluded Article 134 offenses from qualifying as lesser included offense of "enumerated" punitive articles. 68 M.J. at 473. The Court's decision in *Jones* was premised upon *Miller*, holding that the Article 134 "terminal elements" are not inherently included in every punitive article. 67 M.J. at 388, *overturning* United States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994).

[11] *See* United States v. Girouard, 70 M.J. 5, 9 (C.A.A.F. 2011); United States v. McMurrin, 70 M.J. 15, 17 (C.A.A.F. 2011).

[12] Fourteen states follow a strict application of the elements test, including Arizona, Colorado, Iowa, Massachusetts, Michigan, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, South Carolina, Wisconsin, and Wyoming. *See* Amanda Peters, *Thirty-One Years in the Making: Why the Texas Court of Criminal*

test" is not constitutionally required if the accused receives notice of the lesser included offenses.[13] Accordingly, the majority of states employ one of the three alternate theories: (1) cognate-pleadings approach;[14] (2) cognate evidence approach;[15] and (3) inherently-related offense approach.[16] One example is the approach taken by the State of Florida, where the Florida Supreme Court provides notice by publishing an exhaustive list of lesser included offenses for the state's criminal code.[17]

Appeals' New Single-Method Approach to lesser-Included Offense Analysis is a Step in the Right Direction, 60 BAYLOR L. REV. 231, 238 (2008) (citations omitted).

[13] Federal courts considering the issue have held that the due process notice requirement may be satisfied even if the indictment or information was deficient so long as the defendant received actual notice of the charges against him and the inadequate indictment did not lead to a trial with an unacceptable risk of convicting the innocent. *See* Hartman v. Lee, 283 F.3d 190, 195 (4th Cir. 2002); Parks v. Hargett, 188 F.3d 519, *3 (10th Cir. 1999) ("need not decide whether the charging information in this case was sufficiently specific because it is clear that Parks received actual notice of the specific charges against him"); Hulstine v. Morris, 819 F.2d 861, 864 (8th Cir.1987) ("Due process requirements may be satisfied if a defendant receives actual notice of the charges against him, even if the indictment or information is deficient.").

For a general discussion of the superiority of actual notice to constructive notice, see Espinosa v. United Student Aid Funds, Inc., 553 F.3d 1193 (9th Cir. 2008) ("Because due process does not require actual notice of a pending action, it follows a fortiori that actual notice satisfies due process"), *aff'd* 559 U.S. 260, 261 (2010) ("[A]ctual notice more than satisfied due process rights").

[14] The cognate-pleadings approach uses the pleadings, rather than the statutory elements, to determine whether a lesser-included offense charge is acceptable. States using this approach compare the elements, as modified by the defendant's charging instrument, to the elements of the proposed lesser-included offense. At least seven states utilize this approach, including California, Connecticut, Florida, Idaho, Pennsylvania, Tennessee, and Washington. *Id.* at 240 (citations omitted).

[15] The cognate-evidence approach allows a court to examine all the evidence admitted during the course of the trial in determining whether an offense is truly a lesser-included offense. Commentators have noted that this approach often results in a larger universe of available lesser included offenses at trial with the added likelihood that defendants may be deprived of due process "notice" as to which criminal theories of liability they should be prepared to defend themselves against. *See* Peters, *supra* note 12, at 240 (citations omitted). Nonetheless, at least five states still employ this approach, including: Alabama; Alaska; Kentucky; Oklahoma; and Utah. *Id.* at 241 (citations omitted).

[16] The inherently-related offense approach is the most liberal construction theory applied in the United States and is utilized by the fewest states. It permits a lesser included offense instruction even if the proof of one offense does not invariably require proof of the others as long as the two offenses serve the same legislative goals. This is the approach championed by the Model Penal Code, Section 107(4) (1980), and at least four states currently employ this test: Illinois, Mississippi, Montana, and New Jersey. *See* Peters, *supra* note 12, at 242 (citations omitted).

[17] *Schedule of Lesser Included Offenses*, Supreme Court of Florida (2007), *available at* http://www.floridasupremecourt.org/jury_instructions/chapters/chapter33/schedlesserincludoffens.rtf (*last accessed* 22 February 2015); In re Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, 596 (Fla. 1981) (noting the Florida Supreme Court LIO list is: "designed to be a complete, authoritative compilation that is presumed to be correct and upon which a trial court can confidently rely.").

6. Recommendation and Justification

Recommendation 79: Amend Article 79 to provide statutory authority for the President to designate lesser included offenses.

The military justice system has a significant number of unique, but closely related, military offenses, which are not "necessarily included" lesser offenses under the "elements test." If authorized by statute, the President could publish an authoritative, non-exhaustive list of "reasonably included" lesser offenses. Convening authorities could then refer to trial only the charges that capture the gravamen of the accused's misconduct, instead of having to file additional, alternative charges, which unnecessarily expose the accused to excessively greater criminal liability. The President's list would afford trial participants actual notice of lesser included offenses pertinent to the case, compared to the "elements test," which only gives constructive notice of these offenses.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1002. CONVICTION OF OFFENSE CHARGED, LESSER INCLUDED OFFENSES, AND ATTEMPTS.

Section 879 of title 10, United States Code (article 79 of the Uniform Code of Military Justice), is amended to read as follows:

"§879. Art. 79. Conviction of offense charged, lesser included offenses, and attempts

"(a) IN GENERAL.—An accused may be found guilty of any of the following:

"(1) The offense charged.

"(2) A lesser included offense.

"(3) An attempt to commit the offense charged.

"(4) An attempt to commit a lesser included offense, if the attempt is an offense in its own right.

"(b) DEFINITION.—In this section (article), the term 'lesser included offense' means—

"(1) an offense that is necessarily included in the offense charged; and

"(2) any lesser included offense so designated by regulation prescribed by the President.

"(c) REGULATORY AUTHORITY.—Any designation of a lesser included offense in a regulation referred to in subsection (b) shall be reasonably included in the greater offense.".

9. Sectional Analysis

Section 1002 would amend Article 79 and retitle the statute as "Conviction of offense charged, lesser included offenses, and attempts." As amended, Article 79 would authorize the President to designate an authoritative, but non-exhaustive, list of lesser included offenses for each punitive article of the UCMJ in addition to judicially determined lesser included offenses. This change would provide actual notice of applicable lesser included offenses to all parties. Implementing provisions will provide the President with the flexibility to designate factually similar offenses as lesser included offenses under a "reasonably included" standard. The "reasonably included" standard would enhance actual notice by requiring a measurable relationship between the greater offense and the listed offense.

Presidentially designated lesser included offenses under Article 79 and the implementing provisions and judicially determined lesser included offenses would work in concert at trial. The statute's implementing provisions would explain to practitioners that potential lesser included offenses may be established at trial either by: (1) designation by the President; or (2) by the military judge at trial when the military judge determines that an offense raised by the evidence at trial is "necessarily included within the greater offense."

Article 80 – Attempts
10 U.S.C. § 880

1. Summary of Proposal

This Report recommends no change to Article 80. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 80.

2. Summary of the Current Statute

Article 80 prohibits an act by a person subject to the UCMJ done with the intent to commit an offense under the UCMJ. The act must amount to more than mere preparation but need not result in commission of the offense.

3. Historical Background

Article 80 was derived from prior military practice under the Articles of War and Articles for Government of the Navy.[1] The statute has remained unchanged since the UCMJ was enacted in 1950.[2]

4. Contemporary Practice

Article 80 imposes criminal liability on offenders who perform an overt act with the specific intent to commit an offense under the UCMJ. Article 80 requires more than mere preparation to commit the target offense; the overt act must constitute a "substantial step" that directly tends to accomplish the unlawful purpose.[3] Article 79 (conviction of lesser included offense) designates attempts as lesser-included offenses with respect to every punitive article of the UCMJ.

The President, under Article 56, has prescribed the following maximum punishment for the offense of Attempt: the same maximum punishment as the underlying offense, except that the death penalty shall not be adjudged, the mandatory minimum punishment provisions

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1224 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 248-249 (1951).

[2] 10 U.S.C. § 880.

[3] *See* United States v. Winckelmann, 70 M.J. 403, 407 (C.A.A.F. 2011) ("a substantial step must 'unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances.'") (citations omitted).

shall not apply, and, other than for attempted murder, no confinement exceeding 20 years shall be adjudged.[4]

5. Relationship to Federal Civilian Practice

Article 80 has no direct counterpart in federal law. Unlike the UCMJ and state law, federal law has no generally applicable crime of attempt; instead, Congress has outlawed the attempt to commit a number of individual federal crimes. Generally, it is not a crime to attempt to commit most federal offenses.[5]

6. Recommendation and Justification

Recommendation 80: No change to Article 80.

In view of the well-developed case law addressing Article 80's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[4] MCM, Part IV, ¶4.e.

[5] CHARLES DOYLE, CONG. RESEARCH SERV., R42002, "ATTEMPT: AN ABRIDGED OVERVIEW OF FEDERAL CRIMINAL LAW," at 1 (2011), *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/R42002_09132011.pdf.

Article 81 – Conspiracy
10 U.S.C. § 881

1. Summary of Proposal

This Report recommends no change to Article 81. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 81.

2. Summary of the Current Statute

Article 81(a) prohibits a person from entering into an agreement with one or more other individuals to commit an offense under the UCMJ. Article 81(b) provides that in time of war, the offense is punishable by death or other such punishment as a court-martial may direct.

3. Historical Background

Enacted in 1950, Article 81 was derived from 18 U.S.C. § 371.[1] In 2006, the statute was amended to add subsection (b) which makes conspiracy in violation of the law of war that results in death an offense punishable by the death penalty at a court-martial or military commission.[2]

4. Contemporary Practice

Under Article 81, one or more of the conspirators must do some overt act to affect the object of the conspiracy.[3] The President, under Article 56, has prescribed the following maximum punishment for the offense of Conspiracy: the maximum punishment authorized for the offense which is the object of the conspiracy, except that the death penalty may not be adjudged.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 371 (Conspiracy to commit offense or to defraud the United States) is nearly identical to Article 81.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1224 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 194, 249-50 (1951).

[2] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat 2600 (2006).

[3] MCM, Part IV, ¶5.c.(4)(a); United States v. Harman, 68 M.J. 325, 327 (C.A.A.F. 2010) (applying the elements of conspiracy as contained in the MCM).

[4] MCM, Part IV, ¶5.e.

6. Recommendation and Justification

Recommendation 81: No change to Article 81.

In view of the well-developed case law addressing Article 81's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 82 – Solicitation
10 U.S.C. § 882

1. Summary of Proposal

This proposal would consolidate all solicitation offenses into one punitive Article. The general offense of soliciting another to commit an offense currently in Article 134 (the General Article) [1] would be migrated into Article 82 (Solicitation) to create a comprehensive "solicitation" offense which criminalizes soliciting the commission of any offense punishable under the UCMJ.[2] The punishments for all solicitation offenses would remain the same. Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 82 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 82 prohibits a person from soliciting or advising others to commit any of the following four offenses: Desertion (Article 85); Mutiny (Article 94); Sedition (Article 94); or Misbehavior Before the Enemy (Article 99). Article 82 provides that if the offense solicited is attempted or committed, the accused may be punished with the punishment provided for in the commission of the offense, but if the offense solicited is not attempted or committed, the accused may be punished as a court-martial may direct.

3. Historical Background

Solicitation was not an enumerated offense in either the Articles of War or the Articles for Government of the Navy.[3] Since the UCMJ was enacted in 1950,[4] Article 82 has remained unchanged.

4. Contemporary Practice

Under current law, the government must charge a solicitation offense under either Article 82 or Article 134, depending upon the crime solicited. Article 82 prohibits a servicemember from soliciting others to commit the offenses of desertion (Article 85), mutiny (Article 94), sedition (Article 94), or misbehavior before the enemy (Article 99),

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[1] MCM, Part IV, ¶105.

[2] The offense of soliciting another to commit an offense is discussed in this Report under "Article 82 – Solicitation – Addendum."

[3] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1238 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

each of which has been a matter of deep concern for commanders since the inception of military justice.[5]

The maximum punishments for "solicitation" were based upon corollary Title 18 solicitation statutes.[6] The President, under Article 56, has prescribed the following maximum punishments for the offense of Solicitation under Article 82:

If the solicited offense has been committed, then the maximum punishment is the same as that authorized for the committed offense (including the death penalty for capital offenses); and

If the solicited offense has only been attempted, dishonorable discharge, forfeiture of all pay and allowances, and, depending on the specifics of the underlying offense, confinement for up to 10 years.[7]

5. Relationship to Federal Civilian Practice

Federal law sets forth similar offenses to Article 82, including solicitation of others to commit crimes of violence,[8] bribing public officials,[9] and soliciting gifts.[10]

6. Recommendation and Justification

Recommendation 82: Transfer the general solicitation offense defined under Article 134, the General Article (MCM, Part IV, ¶105), to Article 82.

The proposed amendments would align solicitation offenses under Article 82.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

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[5] DAVID A. SCHLUETER, ET AL., MILITARY CRIMES AND DEFENSES § 4.7[2] (2012) (footnotes omitted).

[6] *Id.* at 194.

[7] MCM, Part IV, ¶6.e.

[8] 18 U.S.C. § 373.

[9] 18 U.S.C. § 211.

[10] 18 U.S.C. § 663.

8. Legislative Proposal

SEC. 1003. SOLICITING COMMISSION OF OFFENSES.

Section 882 of title 10, United States Code (article 82 of the Uniform Code of Military Justice), is amended to read as follows:

"§882. Art. 82. Soliciting commission of offenses

"(a) SOLICITING COMMISSION OF OFFENSES GENERALLY.—Any person subject to this chapter who solicits or advises another to commit an offense under this chapter (other than an offense specified in subsection (b)) shall be punished as a court-martial may direct.

"(b) SOLICITING DESERTION, MUTINY, SEDITION, OR MISBEHAVIOR BEFORE THE ENEMY.—Any person subject to this chapter who solicits or advises another to violate section 885 of this title (article 85), section 894 of this title (article 94), or section 99 of this title (article 99)—

"(1) if the offense solicited or advised is attempted or is committed, shall be punished with the punishment provided for the commission of the offense; and

"(2) if the offense solicited or advised is not attempted or committed, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1003 would amend Article 82 and retitle the statute as "Soliciting commission of offenses." The amendments would migrate the general solicitation offense under Article 134 into Article 82, as a separate subsection before the specific solicitation offenses in the existing statute. The general solicitation offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article

134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality. Implementing provisions will maintain the same punishments for all solicitation offenses as under current law.[11]

[11] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 82 – Solicitation – Addendum
(Soliciting Another to Commit an Offense)

1. Summary of Proposal

This proposal would migrate the offense of soliciting another to commit an offense currently addressed under Article 134 (the General Article) into Article 82 (Soliciting commission of offenses). Part II of this Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶105, the offense consists of soliciting or advising another to commit an offense under the UCMJ other than the four offenses of desertion, mutiny, sedition, or misbehavior before the enemy listed in Article 82, with the intent that the offense actually be committed. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated the offense of solicitation under Article 134 in the 1984 MCM.[1]

4. Contemporary Practice

Under current law, the government must charge a solicitation offense under either Article 82 or Article 134, depending upon the crime solicited. The President, under Article 56, has prescribed the following maximum punishment for the offense of Soliciting Another to Commit an Offense: 5 years confinement or the maximum punishment for the underlying solicited offense, whichever is less.[2]

5. Relationship to Federal Civilian Practice

Federal law sets forth similar offenses to Article 134, ¶105, including solicitation of others to commit crimes of violence,[3] bribing public officials,[4] and soliciting gifts.[5]

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[1] MCM 1984, App. 23, ¶105.

[2] MCM, Part IV, ¶105.e.

[3] 18 U.S.C. § 373 (2014).

[4] 18 U.S.C. § 211 (2014).

6. Recommendation and Justification

Recommendation 134-105: Migrate the general solicitation offense defined under Article 134, the General Article (MCM, Part IV, ¶105), to Article 82.

The offense of soliciting another to commit an offense is inherently prejudicial to good order and discipline. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.[6]

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 82 (Solicitation), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 82 (Solicitation), *supra*, at paragraph 9.

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[5] 18 U.S.C. § 663 (2014).

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 83 (Current Law) – Fraudulent Enlistment, Appointment, or Separation

10 U.S.C. § 883

1. Summary of Proposal

This Report recommends no change to Article 83, except to redesignate it under Article 104a as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial implementing the new Article 104a as necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 83 prohibits servicemembers from joining or leaving the military through false or fraudulent means, or by deliberate concealment as to qualifications for enlistment or appointment or eligibility for separation.

3. Historical Background

Article 83 is derived from Article 54 of the 1920 Articles of War and Article 22(b) of the 1930 Articles for the Government of the Navy.[1] Since the UCMJ was enacted in 1950,[2] the statute has remained unchanged.

4. Contemporary Practice

When servicemembers enlist, they obligate themselves contractually for a term of service. This private contract between the individual and the U.S. government confers military status and jurisdiction on the individual. A fraudulent enlistment or separation does not affect the previously created status.[3]

Article 83 (Fraudulent enlistment, appointment, or separation) is a companion article to Article 84 (Unlawful enlistment, appointment, or separation), which concerns the criminal liability of servicemembers who assist others in obtaining a fraudulent enlistment, appointment, or separation.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1225 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 250-51 (1951) (noting that Article 83 extended "fraudulent enlistment" to officers for the first time).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] *See* DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.2[2] at 206 (2012) (footnotes omitted); *see also* Article 3(b) (preserving court-martial jurisdiction over servicemembers who fraudulently separate military service).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Fraudulent enlistment, appointment or separation: dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to 5 years.[4]

5. Relationship to Federal Civilian Practice

Article 83 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 83: No change to Article 83, except to redesignate it as Article 104a.

In view of the well-developed case law addressing Article 83's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

This recommendation is related to this Report's recommended amendment to Article 43, which would extend the statute of limitations for Article 83 cases to the length of the period of enlistment or appointment or five years, whichever period is longer.

[4] MCM, Part IV, ¶7.e.

Article 84 (Current Law) – Unlawful Enlistment, Appointment, or Separation

10 U.S.C. § 884

1. Summary of Proposal

This Report recommends no change to Article 84, except to redesignate it as Article 104b as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial implementing the new Article 104b as necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 84 prohibits servicemembers from assisting another in joining or leaving the military through false or fraudulent means.

3. Historical Background

Article 84 derived from Article of War 55 and Article for the Government of the Navy 19.[1] Article 84 first appeared in its current form in the UCMJ. Since the UCMJ was enacted in 1950,[2] the statute has remained unchanged.

4. Contemporary Practice

Article 84 (Unlawful enlistment, appointment, or separation) is a companion article to Article 83 (Fraudulent enlistment, appointment, or separation) and concerns the criminal liability of servicemembers who assist others in obtaining a fraudulent enlistment, appointment, or separation of officer or enlisted personnel.

The President, under Article 56, has prescribed the following maximum punishment for the offense of Unlawful enlistment, appointment, or separation: dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.[3]

5. Relationship to Federal Civilian Practice

Article 84 is a unique military offense with no direct federal civilian counterpart.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1225 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 251 (1951) (noting that Article 84 extended liability to fraudulently effecting the unlawful appointment of or separation of officers for the first time).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] MCM, Part IV, ¶8.e.

6. Recommendation and Justification

Recommendation 84: No change to Article 84, except to redesignate it as Article 104b.

In view of the well-developed case law addressing Article 84's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

Article 84 (New Location) – Breach of Medical Quarantine
10 U.S.C. § 884

1. Summary of Proposal

This proposal would migrate the offense of breaking a medical quarantine currently addressed under Article 134 (the General Article)[1] into the newly re-designated Article 84 (Breach of Medical Quarantine). Part II of the Report will address changes in the Manual provisions implementing the new Article 84 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶100, the offense of breaking a medical quarantine requires a showing that a person who had been ordered into quarantine went beyond the limits of the quarantine before being released. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The concept of a medical quarantine is firmly rooted in nautical history: the word is derived from the Italian word "quaranta," which meant "forty," or the number of days that a ship suspected of containing diseased persons or animals would be isolated and detained before being permitted to make landfall.[2] The President first designated breaking a medical quarantine as an Article 134 offense in the 1951 MCM.[3]

4. Contemporary Practice

Each service empowers its installation commanders to declare medical quarantines in the event of a public health emergency.[4]

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[1] MCM, Part IV, ¶100.

[2] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSON & CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.47[2] at 948 (2d ed. 2012).

[3] MCM 1951, App. 6c, ¶163.

[4] *See* U.S. DEP'T OF DEF. INSTR. 6200.03, PUBLIC HEALTH EMERGENCY MANAGEMENT WITH THE DEPARTMENT OF DEFENSE enclosure 3, ¶2(a) (dated 5 March 2010) (authorizing quarantine and isolation of individuals within the scope of the installation commander's authority in consultation with the Center for Disease Control designated "Quarantine Officer").

The President, under Article 56, has prescribed the following maximum punishment for the offense of breaching a medical quarantine: forfeiture of two-thirds pay per month for 6 months and confinement for 6 months.[5]

5. Relationship to Federal Civilian Practice

42 U.S.C § 271 (Penalties for violation of quarantine laws) provides a similar offense to the offense of breaking a medical quarantine in Article 134.

6. Recommendation and Justification

Recommendation 134-100: Redesignate the offense of breaking a medical quarantine in Article 134 (MCM, Part IV, ¶100) as Article 84.

Migrating the offense of breaking medical quarantine to its own punitive article (newly redesignated Article 84, Breach of medical quarantine) locates the offense near similar "place of duty" offenses under the Code. Breach of a medical quarantine is recognized under federal criminal law and is also inherently prejudicial to good order and discipline. Accordingly, the offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1005. BREACH OF MEDICAL QUARANTINE.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 883 (article 83 of the Uniform Code of Military Justice), as added by section 1004, the following new section (article):

[5] MCM, Part IV, ¶100.e.

"§884. Art. 84. Breach of medical quarantine

"Any person subject to this chapter—

"(1) who is ordered into medical quarantine by a person authorized to issue such order; and

"(2) who, with knowledge of the quarantine and the limits of the quarantine, goes beyond those limits before being released from the quarantine by proper authority;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1005 would migrate the offense of "Quarantine: medical, breaking" from Article 134, the General article, to redesignated Article 84 (Breach of medical quarantine). The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 85 – Desertion
10 U.S.C. § 885

1. Summary of Proposal

This Report recommends no change to Article 85. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 85.

2. Summary of the Current Statute

Article 85 prohibits servicemembers from deserting or permanently quitting their military unit or branch of military service, or wrongfully absenting themselves to avoid hazardous duty; it also prohibits those who have not been regularly separated from enlisting or accepting an appointment in the same or another one of the armed forces without fully disclosing the fact that they have not been regularly separated; it also prohibits servicemembers from entering a foreign armed service without authority; it is punishable by death in time of war.

3. Historical Background

Desertion is one of the oldest military offenses, punishable under American military law since the 1775 Articles of War.[1] Article 85 was derived from Articles 28 and 58 of the 1948 Articles of War and Articles 4, 8, and 10 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Desertion: dishonorable discharge, forfeiture of all pay and allowances, and, depending on whether the absence was terminated by apprehension or with the intent to avoid hazardous duty, confinement for 2, 3, or 5 years, and, in time of war, death.[4]

5. Relationship to Federal Civilian Practice

Article 85 is a unique military offense with no direct federal civilian counterpart.

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 636 (photo reprint 1920) (2d ed. 1896).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 605, 1225 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶9.e.

6. Recommendation and Justification

Recommendation 85: No change to Article 85.

In view of the well-developed case law addressing Article 85's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

Article 86 – Absence Without Leave
10 U.S.C. § 886

1. Summary of Proposal

This Report recommends no change to Article 86. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 86.

2. Summary of the Current Statute

Article 86 prohibits servicemembers from, without authority, failing to go to their place of duty or temporarily absenting themselves from their place of duty.

3. Historical Background

Like desertion, "absence without leave" has been punishable under American military law since the 1775 Articles of War.[1] Article 86 was derived from Article 61 of the 1948 Articles of War and Articles 4 and 8 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

Unlike Article 85 (desertion), Article 86 (absence without leave) punishes temporary, rather than permanent, absence. And unlike the offense of desertion, which requires a specific intent to remain away from the unit or service, the offense of absence without leave requires only the general intent to be absent.[4]

The President, under Article 56, has prescribed the following maximum punishments for the offense of Absence Without Leave, depending on the length of the absence and whether it was terminated by apprehension: dishonorable discharge, forfeiture of all pay and allowances, and confinement from 1 month to 18 months.[5]

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[1] *See* WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 107, 607, 636 (photo reprint 1920) (2d ed. 1896) (classifying "absence without leave" as a pure military offense, and explaining that different variations of "absence without leave" were chargeable under AW 31, 32, 33, 34, and 40 of 1874).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1225-26 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶10.c(2)(b); United States v. Holder, 22 C.M.R. 3, 6 (C.M.A. 1956).

[5] MCM, Part IV, ¶10.e.

5. Relationship to Federal Civilian Practice

Article 86 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 86: No change to Article 86.

In view of the well-developed case law addressing Article 86's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

Article 87 – Missing Movement
10 U.S.C. § 887

1. Summary of Proposal

This proposal would migrate the offense of jumping from a vessel into the water currently addressed under Article 134 (the General Article)[1] into Article 87, retitling the statute as "Missing movement; jumping from vessel." Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 87 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 87 prohibits servicemembers from, by neglect or design, missing the movement of a ship, aircraft, or unit with which they are required to move.

3. Historical Background

During World War II, the United States military experienced difficulties when members of units or crews failed to show up when their units or ships moved out. The offense of missing movement was created to address this issue. This offense was designed to address the gray area between the less egregious offense of AWOL in violation of Article 86 and the more serious offense of desertion in violation of Article 85.[2] Since the enactment of the UCMJ in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

Article 87 (missing movement) is a companion to Article 85 (desertion) and Article 86 (absence without leave).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Missing Movement, depending on whether it was by design or neglect: dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to 2 years.[4]

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[1] MCM, Part IV, ¶91. The offense of jumping from a vessel is discussed in this Report under "Article 134 – Jumping from a vessel – Addendum."

[2] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.6[2] at 253-54 (2d ed. 2012) (footnotes omitted); *see also Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 605, 1226 (1949) (noting that Article 87 is "in effect, an aggravated form of absence without leave").

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶11.e.

5. Relationship to Federal Civilian Practice

Article 87 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 87: Transfer the offense of jumping from a vessel into the water defined under Article 134, the General Article (MCM, Part IV, ¶¶107 & 91), to Article 87.

This change would align Missing Movement under Article 87 with jumping from a vessel into the water.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1006. MISSING MOVEMENT; JUMPING FROM VESSEL.

Section 887 of title 10, United States Code (article 87 of the Uniform Code of Military Justice), is amended to read as follows:

"§887. Art. 87. Missing movement; jumping from vessel

"(a) MISSING MOVEMENT.—Any person subject to this chapter who, through neglect or design, misses the movement of a ship, aircraft, or unit with which the person is required in the course of duty to move shall be punished as a court-martial may direct.

"(b) JUMPING FROM VESSEL INTO THE WATER.—Any person subject to this chapter who wrongfully and intentionally jumps into the water from a vessel in use by the armed forces shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1006 would consolidate the offenses of "Missing movement" in existing Article 87 and "Jumping from vessel into the water" in Article 134 (the General article) into a single offense under Article 87 (Missing movement; jumping from vessel). The consolidated offense would prohibit servicemembers from, by neglect or design, missing the movement of a ship, aircraft, or unit with which they are required to move or jumping from a vessel into the water. These offenses are well-recognized concepts in military criminal law. Accordingly, they do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.[5]

[5] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 87 – Missing Movement; Jumping from Vessel – Addendum

(Jumping from Vessel into the Water)

1. Summary of Proposal

This proposal would migrate the offense of jumping from a vessel into the water currently addressed under Article 134 (the General Article)[1] into Article 87 (Missing Movement; Jumping from Vessel). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶91, the offense prohibits servicemembers from engaging in such conduct when it is wrongful and intentional. Because the offense falls under Article 134, the prosecution also must prove the conduct was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated jumping from a vessel into the water as an Article 134 offense in the 1984 MCM[2], although a conviction for this offense under Article 134 had been affirmed as early as 1964.[3] The offense is designed to target the dangerous and disruptive practice of individuals intentionally jumping from vessels in use by the Armed Forces, thereby endangering the safe operation of military vessels, their own lives, and the lives of would-be rescuers.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Jumping from a Vessel into the Water: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[5]

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[1] MCM, Part IV, ¶91.

[2] MCM 1984, App. 23, ¶91.

[3] United States v. Sandinsky, 34 C.M.R. 343, 346 (C.M.A. 1964) (appellant's conviction under Article 134 for jumping off of the aircraft carrier on which he served into the sea upheld).

[4] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.36[2] at 80 (2d ed. 2012).

[5] MCM, Part IV, ¶91.e.

5. Relationship to Federal Civilian Practice

The offense of jumping from a vessel into the water is a unique military offense with no direct counterpart in federal civilian practice.

6. Recommendation and Justification

Recommendation 134-91: Migrate the offense of jumping from a vessel into the water in Article 134 (MCM, Part IV, ¶92) to Article 87.

Migrating the offense of jumping from a vessel into the water to Article 87 (Missing Movement) aligns the offense with the other similar subject matter offenses under the UCMJ. Intentional, wrongful jumping into the sea from a vessel is inherently prejudicial to good order and discipline as it needlessly disrupts operations and possibly endangers military lives and property in follow-on rescue efforts. Accordingly, this offense does not rely upon additional proof of the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 87 (Missing movement; jumping from vessel), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 87 (Missing movement; jumping from vessel), *supra*, at paragraph 9.

Article 87b (New Provision) – Offenses against Correctional Custody and Restriction

(Restriction, breaking)

10 U.S.C. § 887b

1. Summary of Proposal

This proposal would migrate the offense of breaking restriction currently addressed under Article 134 (the General Article)[1] to a new enumerated punitive article, Article 87b (Offenses against correctional custody and restriction). Part II of the Report will address changes to the Manual for Courts-Martial provisions implementing the new Article 87b (Offenses against correctional custody and restriction).

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶70, the offense requires a showing that the accused went beyond the limits of the restriction in which he had been placed. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law has criminalized restriction breaking since the 1921 MCM.[2] Under the UCMJ, the President designated restriction breaking as an Article 134 offense in the 1951 MCM.[3]

4. Contemporary Practice

Restriction is a form of moral restraint imposed by an order directing a person to remain within certain specified limits.[4] Servicemembers may be placed in restriction in lieu of arrest while awaiting trial by court-martial as an authorized punishment imposed via Article 15 nonjudicial punishment; or by the sentence of a court-martial.[5] Restriction can

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[1] MCM, Part IV, ¶102.

[2] MCM 1921, ¶44 (permitting "restriction to limits" as a court-martial punishment), ¶¶310, 311.

[3] MCM 1951, App. 6c, ¶165.

[4] MCM, Part IV, ¶102.c.

[5] R.C.M. 304(2) (pretrial restriction); MCM, Part V, ¶5(c)(2) (nonjudicial punishment restriction); R.C.M. 1003(b)(6) (court-martial punishment restriction).

also be imposed for reasons unrelated to military justice, "in the interests of training, operations, security, or safety."[6]

The President, under Article 56, has prescribed the following maximum punishment for the offense of Breaking Restriction: forfeiture of two-thirds pay per month for 1 month and confinement for 1 month.[7]

5. Relationship to Federal Civilian Practice

Breaking restriction is a unique military offense with no direct counterpart in federal civilian practice.

6. Recommendation and Justification

Recommendation 134-102: Migrate the offense of breaking restriction in Article 134 (MCM, Part IV, ¶102) to Article 87b.

Migrating the restriction breaking offense to Article 87b aligns the offense with other similar subject matter offenses under the UCMJ involving violations of various forms of custody. Breaking restriction involves a direct flouting of command authority and thus is inherently prejudicial to good order and discipline. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

8. Legislative Proposal

SEC. 1007. OFFENSES AGAINST CORRECTIONAL CUSTODY AND RESTRICTION.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 887a (article 87a of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(2), the following new section (article):

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[6] MCM, Part IV, ¶102.c.

[7] MCM, Part IV, ¶102.e.

"§887b. Art. 87b. Offenses against correctional custody and restriction

"(a) ESCAPE FROM CORRECTIONAL CUSTODY.—Any person subject to this chapter—

"(1) who is placed in correctional custody by a person authorized to do so;

"(2) who, while in correctional custody, is under physical restraint; and

"(3) who escapes from the physical restraint before being released from the physical restraint by proper authority;

shall be punished as a court-martial may direct.

"(b) BREACH OF CORRECTIONAL CUSTODY.—Any person subject to this chapter—

"(1) who is placed in correctional custody by a person authorized to do so;

"(2) who, while in correctional custody, is under restraint other than physical restraint; and

"(3) who goes beyond the limits of the restraint before being released from the correctional custody or relieved of the restraint by proper authority;

shall be punished as a court-martial may direct.

"(c) BREACH OF RESTRICTION.—Any person subject to this chapter—

"(1) who is ordered to be restricted to certain limits by a person authorized to do so; and

"(2) who, with knowledge of the limits of the restriction, goes beyond those limits before being released by proper authority;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1007 would migrate and consolidate the offenses of "Restriction, breaking" and Correctional custody – offenses against" from Article 134 (the General article) to a new section, Article 87b (Offenses against correctional custody and restriction). These offenses are well-recognized concepts in criminal law. Accordingly, they do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.[8]

[8] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 87b (New Provision - Addendum) – Offenses against Correctional Custody and Restriction

(Correctional Custody – Offenses Against)

1. Summary of Proposal

This proposal would migrate the offense of "Correctional custody—offenses against" currently addressed under Article 134 (the General Article)[1] to Article 87b (Offenses against correctional custody and restriction). Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 87b necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶70, the offense requires a showing that the accused escaped from correctional custody or breached a restraint while in correctional custody. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

Correctional custody first came into existence in 1962 as a form of nonjudicial punishment imposed under Article 15, UCMJ.[2] The Court of Military Appeals first recognized breach of correctional custody as an Article 134 offense in 1965.[3] Thereafter, the President designated it as an Article 134 offense in the 1968 MCM.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the Offenses Against Correctional Custody: for escape, dishonorable discharge, forfeiture of

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[1] MCM, Part IV, ¶70.

[2] Act of Sep. 7, 1962, Pub. L. No. 87-648, § 1, 76 Stat 447, 448 (1962).

[3] United States v. Carson, 35 C.M.R. 379, 381 (C.M.A. 1965).

[4] MCM 1969, App. 6c, ¶135.

all pay and allowances, and confinement for 1 year; for a breach of custody, bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[5]

5. Relationship to Federal Civilian Practice

The offenses against correctional custody are unique military offenses, with no counterpart in federal civilian practice.

6. Recommendation and Justification

Recommendation 134-70: Migrate the offenses against correctional custody in Article 134 (MCM, Part IV, ¶70) to Article 87b.

Migrating the correctional custody offenses to Article 87b logically aligns the offense with existing UCMJ "custody" breaking offenses.[6] Correctional custody offenses are not reliant on the terminal elements of Article 134 as the act is inherently prejudicial to good order and discipline.[7]

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See 87b (Offenses against Correctional Custody and Restriction), *supra*, at paragraph 8.

9. Sectional Analysis

See 87b (Offenses against Correctional Custody and Restriction), *supra*, at paragraph 9.

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[5] MCM, Part IV, ¶70.e.

[6] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

[7] "The act itself, occurring in direct violation of a lawful punishment is prejudicial to good order and discipline; it tears at the foundation of moral authority that undergirds all lawful orders." DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSON & CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.15[3][b][i], [ii] at 783 (2d ed. 2012).

Article 88 – Contempt toward Officials
10 U.S.C. § 888

1. Summary of Proposal

This Report recommends no change to Article 88. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions implementing Article 88.

2. Summary of the Current Statute

Article 88 prohibits an officer from using contemptuous words towards certain government officials: the President, the Vice President, Congress, the Secretary of Defense, the Secretary of any military department, the Secretary of Homeland Security, or the governor or legislature of any State, Commonwealth, or possession in which the officer is on duty or present.

3. Historical Background

American military law has criminalized contemptuous words towards public officials by servicemembers since the 1775 Articles of War.[1] Historically, the Articles of War criminalized contemptuous words toward public officials by officer and enlisted personnel alike.[2] The current Article 88 was derived from Article 62 of the 1920 Articles of War, however, Article 88 applies the offense to commissioned officers only.[3] Since the enactment of the UCMJ in 1950,[4] Article 88 has remained virtually unchanged.

4. Contemporary Practice

There has only been one reported appellate case for a violation of Article 88,[5] although there have been many non-judicial proceedings and adverse administrative actions based on Article 88.[6]

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 953-54 (photo reprint 1920) (2d ed. 1896).

[2] *Id.* at 565 (citing AW 19 of 1874).

[3] AW 62 of 1920; *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 823, 1226 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] United Stated v. Howe, 37 C.M.R. 429, 433, 438, 447 (C.M.A. 1967) (affirming conviction for use contemptuous words against President Lyndon B. Johnson).

[6] DAVID A. SCHLUETER, ET AL., MILITARY CRIMES AND DEFENSES § 5.7[2] n. 339-40 (2d ed. 2012).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Contempt toward Officials: dismissal, forfeiture of all pay and allowances, and confinement for 1 year.

5. Relationship to Federal Civilian Practice

Article 88 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 88: No change to Article 88.

In view of the well-developed case law addressing Article 88's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

Article 89 – Disrespect Toward a Superior Commissioned Officer
10 U.S.C. § 889

1. Summary of Proposal

This would amend Article 89 by transferring the offense of assaulting a superior commissioned officer, currently under Article 90 (MCM, Part IV, ¶14), to Article 89 (Disrespect toward superior commissioned officer; assault of superior commissioned officer).[1] Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 89 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 89 prohibits servicemembers from engaging in disrespectful behavior toward a superior commissioned officer.

3. Historical Background

American military law has criminalized assaults against superior commissioned officers since the Revolutionary War.[2] The current Article 89 was derived from Article 63 of the 1948 Articles of War and Article 8 of the 1930 Articles for the Government of the Navy.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

Under Article 89, the term "superior commissioned officer" means someone within the same armed service as the accused who is a commissioned officer superior in grade to the accused, or superior in command to the accused.[5]

When the accused and the victim are members of different armed services, the superior commissioned officer must also be in the accused's chain of command or, except for

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[1] The offense of assaulting a superior commissioned officer is discussed in this Report under "Article 90 – Assaulting a Superior Commissioned Officer."

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 565-66 (photo reprint 1920) (2d ed. 1896).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1226 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 256 (1951) (noting Article 89 was a consolidation of existing Army and Navy practice).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶13.c(1)(a) (noting that an officer who is "superior in command" may still qualify as a superior commissioned officer even over an officer who is otherwise "superior in grade").

medical officers or chaplains, the superior commissioned officer and the accused must both be detained by a hostile entity.[6]

The President, under Article 56, has prescribed the following maximum punishment for the offense of Disrespect toward a Superior Commissioned Officer: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.[7]

5. Relationship to Federal Civilian Practice

Article 89 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 89: Amend Article 89 by transfering "assaulting a superior commissioned officer" from Article 90 to Article 89.

This proposal would align similar offenses under Article 89 with technical amendments.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment .

8. Legislative Proposal

SEC. 1008. DISRESPECT TOWARD SUPERIOR COMMISSIONED OFFICER; ASSAULT OF SUPERIOR COMMISSIONED OFFICER.

Section 889 of title 10, United States Code (article 89 of the Uniform Code of Military Justice), is amended to read as follows:

[6] *Id.* at ¶13.c(1)(b).

[7] *Id.* at ¶13.e.

"§889. Art. 89. Disrespect toward superior commissioned officer; assault of superior commissioned officer

"(a) DISRESPECT.—Any person subject to this chapter who behaves with disrespect toward that person's superior commissioned officer shall be punished as a court-martial may direct.

"(b) ASSAULT.—Any person subject to this chapter who strikes that person's superior commissioned officer or draws or lifts up any weapon or offers any violence against that officer while the officer is in the execution of the officer's office shall be punished—

"(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

"(2) if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.".

9. Sectional Analysis

Section 1008 would amend Article 89 and retitle the statute as "Disrespect toward superior commissioned officer; assault of superior commissioned officer." As amended, Article 89 would include the offense of "Assaulting a superior commissioned officer," which would be transferred from Article 90. This change would align these closely related provisions in Articles 89.

Article 90 (Current Law) – Assaulting or Willfully Disobeying Superior Commissioned Officer

10 U.S.C. § 890

1. Summary of Proposal

This proposal would amend Article 90 by transferring the offense of assaulting a superior commission officer, currently included in Article 90, to Article 89 in order to consolidate factually similar offenses.[1] Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 90 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 90 prohibits servicemembers from both striking and disobeying a superior commissioned officer. In time of war, the offense is punishable by death or such other punishment as a court-martial may direct.

3. Historical Background

American military law has criminalized assaulting and disobeying superior commissioned officers since the Revolutionary War.[2] The current Article 90 was derived from Article 64 of the 1948 Articles of War and Article 4 of the 1930 Articles for the Government of the Navy.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

Under Article 90, the term "superior commissioned officer" means someone within the same armed service as the accused who is a commissioned officer superior in grade to the accused, or superior in command to the accused, regardless of rank.[5]

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[1] The offenses to be realigned are also discussed in the Report under "Article 89 – Disrespect Toward a Superior Commissioned Officer."

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 569 (photo reprint 1920) (2d ed. 1896).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1226 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 256-57 (1951) (noting Article 90 was a consolidation of existing Army and Navy practice).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶14.c(1)(a)(i) (citing ¶13.c(1)(a), (b)).

When the accused and the victim are members of different armed services, the superior commissioned officer must also be in the accused's chain of command or, except for medical officers or chaplains, the superior commissioned officer and the accused must both be detained by a hostile entity.[6]

The President, under Article 56, has prescribed the following maximum punishment for the offense of Assaulting or Willfully Disobeying a Superior Commissioned Officer: if in time of war, by death; otherwise, dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to 10 years (for assault), or for up to 5 years (for disobedience)[7]

5. Relationship to Federal Civilian Practice

Article 90 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 90: Amend Article 90 to transfer the offense of "assaulting a superior commissioned officer" to Article 89.

This proposal would align similar offenses under Article 89 and amend the statute to use gender-neutral terms.

Part II of the Report will address the definition of "superior commissioned officer" when the accused and victim are in different uniformed services.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1009. WILLFULLY DISOBEYING SUPERIOR COMMISSIONED OFFICER.

Section 890 of title 10, United States Code (article 90 of the Uniform Code of Military Justice), is amended to read as follows:

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[6] *Id.*

[7] *Id.* at ¶14.e.

"§890. Art. 90. Willfully disobeying superior commissioned officer

"Any person subject to this chapter who willfully disobeys a lawful command of that person's superior commissioned officer shall be punished—

"(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

"(2) if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.".

9. Sectional Analysis

Section 1009 would amend Article 90 by transferring the offense of "Assaulting a superior commissioned officer" to Article 89 and retitling the statute as "Willfully disobeying superior commissioned officer." This change would realign closely related provisions in Articles 89 and focus the Article as amended on the willful disobedience of a lawful command of a superior commissioned officer.

Article 91 – Insubordinate Conduct Toward Warrant Officer, Noncommissioned Officer, or Petty Officer

10 U.S.C. § 891

1. Summary of Proposal

This Report recommends no change to Article 91. Part II of the Report will address any changes that may be needed to the Manual for Courts-Martial provisions implementing Article 91.

2. Summary of the Current Statute

Article 91 prohibits enlisted servicemembers and warrant officers from assaulting, disobeying, or disrespecting warrant, noncommissioned, or petty officers in the execution of their office.

3. Historical Background

American military law has criminalized disrespectful behavior towards superior noncommissioned officers since the 1806 Articles of War.[1] The current Article 91 was derived from Article 65 of the 1948 Articles of War and Article 4 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

Unlike Articles 89 and 90 (which punish similar conduct toward superior commissioned officers), Article 91 does not require a superior-subordinate relationship.[4]

The President, under Article 56, has prescribed the following maximum punishment for the offense of Insubordinate Conduct Toward Warrant Officer, Noncommissioned Officer, or

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[1] *See* WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 722, 726, 732 (photo reprint 1920) (2d ed. 1896). ("noting that "all such insubordination; disrespectful or insulting language or behaviour [sic] towards superiors . . . in rank" was punishable under the "General Article" (then AW 64 of 1874), and specifically including "Any insubordinate, drunken, or disorderly conduct, resistance to arrest, violence toward a non-commissioned officer or soldier.").

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1226 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM Part IV, ¶15.c.(1).

Petty Officer: dishonorable discharge, forfeiture of all pay and allowances, and, depending of the specifics of the underlying offense, confinement for 3 months to 5 years.[5]

5. Relationship to Federal Civilian Practice

Article 91 is a unique military offense with no direct federal civilian counterpart. There are, however, federal statutes that prohibit encouraging insubordination or disloyalty among the armed forces.[6]

6. Recommendation and Justification

Recommendation 91: No change to Article 91.

In view of the well-developed case law addressing Article 91's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[5] *Id.* at ¶15.e.

[6] 18 U.S.C. § 2387.

Article 92 – Failure to Obey Order or Regulation
10 U.S.C. § 892

1. Summary of Proposal

This Report recommends no change to Article 92. Part II of the Report will address any changes that may be needed to the Manual for Courts-Martial provisions implementing Article 92.

2. Summary of the Current Statute

Article 92 prohibits violations of a general order or regulation; violations of "other lawful orders"; and dereliction of military duties.

General orders or regulations are those published by the President, the Secretary of Defense, the Secretary of Homeland Security (for the Coast Guard), the service secretaries of the various military departments, general court-martial convening authorities, and general and flag officers in command.[1] "Other lawful orders" include "local orders" whose violations are not prohibited by Article 90(2), 91, or 92(1).[2] Military duties may be created by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.[3] For instance, Article 92 has been used to address violations of the international law of armed conflict and the failure to report such violations.[4]

3. Historical Background

Concern for disobedience to orders and derelictions of duty are as old as the military itself and violations were typically prosecuted under the "General Article" of the Articles of War.[5] Article 92 was derived from Article 96 (the "general article") of the 1948 Articles of War

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[1] MCM, Part IV, ¶16.c.(1)(a).

[2] MCM, Part IV, ¶16.c.(2) & ¶14.c.(2).

[3] MCM, Part IV, ¶16.c.(3).

[4] *See generally* DEFENSE LEGAL POLICY BOARD, REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES (2013), Appendix V, 152-181 (recounting courts-martial involving alleged Law of Armed Conflict violations or failure to report alleged LOAC violations by servicemembers during Operations Enduring Freedom and Iraqi Freedom).

[5] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 567, 571, 725 (photo reprint 1920) (2d ed. 1896) (citing AW 21 and 62 of 1874).

and Article 9 of the 1930 Articles for the Government of the Navy.[6] The statute has remained unchanged since the UCMJ was enacted in 1950.

4. Contemporary Practice

Article 92 covers a broad range of orders and duties. An order is presumed lawful.[7] However, this is a rebuttable presumption determined as a matter of law by the military judge.[8]

The President, under Article 56, has prescribed the following maximum punishment for the offense of Failure to Obey Order or Regulation: Dishonorable discharge, forfeiture of all pay and allowances, and, depending on the violation and whether it was willful or through neglect, confinement for 3 months to 2 years.[9]

5. Relationship to Federal Civilian Practice

Article 92 is a unique military offense with no direct federal civilian counterpart.

In civilian employment practice, misconduct is typically addressed through administrative or employment related proceedings.[10]

6. Recommendation and Justification

Recommendation 92: No change to Article 92.

In view of the well-developed case law addressing Article 92's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

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[6] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1227 (1949).

[7] MCM, pt. IV, ¶14.c(2)(a); 16.c(1)(c).

[8] *New*, 55 M.J. at 104-05 (military judge did not err in deciding issue of lawfulness of order without submitting it to the members, as lawfulness of the order was not an element of the offense, but a question of law).

[9] MCM, Part IV, ¶16.e.

[10] *See, e.g.*, 5 C.F.R. § 752.603 (2014) (Federal agencies may take adverse administrative action against an employee for "reasons of misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.").

Article 93 – Cruelty and Maltreatment
10 U.S.C. § 893

1. Summary of Proposal

This Report recommends no change to Article 93. Part II of the Report will consider whether any changes are needed to the provisions in the Manual for Courts-Martial implementing Article 93.

2. Summary of the Current Statute

Article 93 prohibits abuses of authority by superior ranking military members over persons subject to their orders. Misconduct includes assaults on subordinates, imposing improper punishments, and sexual harassment.[1] The alleged physical or mental maltreatment must satisfy an objective standard, which involves ascertaining whether the conduct reasonably could have caused physical or mental harm or suffering.[2] The imposition of legitimate military duties does not constitute this offense, regardless of whether those duties are arduous, hazardous, or both.[3]

3. Historical Background

American military law has criminalized maltreatment of a subordinate by a superior since the nineteenth century.[4] The current Article 93 was derived from Article 96 (the "general article") of the 1948 Articles of War, and Article 8 of the 1930 Articles for the Government of the Navy.[5] Since the UCMJ was enacted in 1950,[6] the statute has remained unchanged.

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[1] MCM, Part IV, ¶17.c(2).

[2] *Id.*; *see also* United States v. Carson, 57 M.J. 410, 415 (C.A.A.F. 2002) (a higher ranking sergeant's indecent exposure of his genitalia to his subordinate female constituted maltreatment).

[3] *See* DAVID A. SCHLUETER ET AL, MILITARY CRIMES AND DEFENSES § 5.12[2] (2d ed. 2012).

[4] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 727 (photo reprint 1920) (2d ed. 1896) (noting "abuse of authority in assaulting or punishing inferiors" as misconduct punishable under the "general article" (then AW 62 of 1874)).

[5] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1226-27 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 259 (1951).

[6] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

4. Contemporary Practice

The essence of the offense is abuse of authority.[7] In practice, there is considerable overlap between misconduct addressed by both Article 93 (Cruelty and Maltreatment) and Article 92 (Failure to Obey Order or Regulation). Although Article 93 addresses a wide range of potential misconduct, each service also has published punitive orders and regulations addressing specific misconduct, such as hazing, sexual harassment, and inappropriate sexual acts between recruiters and recruits and between trainers and trainees.

The President, under Article 56, has prescribed the following maximum punishment for the offense of Cruelty and Maltreatment: dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.[8] By contrast, the maximum punishment for a violation of Article 92 (Failure to Obey Order or Regulation) is 2 years.[9]

5. Relationship to Federal Civilian Practice

Article 93 is a unique military offense with no direct federal civilian counterpart. 18 U.S.C. § 2191 (Cruelty to Seamen) is the closest federal civilian equivalent offense to maltreatment; in practice it has been used primarily to establish tort liability in maltreatment cases in federal civil disputes.[10]

6. Recommendation and Justification

Recommendation 93: No change to Article 93.

In view of the well-developed case law addressing Article 93's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

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[7] *Carson*, 57 M.J. at 415; *see, e.g.,* United States v. Bright, 66 M.J. 359, 366 (C.A.A.F. 2008) (affirming maltreatment conviction, where the accused drill instructor threatened to impose extra duties and fatigue details on the training platoon if she did not have sex with him).

[8] MCM, Part IV, ¶17.e.

[9] *Id.* at ¶16.e.

[10] *See, e.g.,* Stewart v. Moore, 334 F. Supp. 396, 397-398 (S.D. TX) (Plaintiff relying on 18 U.S.C. § 2191 as source of "duty of care"); Fowler v. American Mail Line, Ltd, 69 F.2d 905, 906 (9th Cir. 1934) (same, relying upon prior codification at 46 U.S.C. § 712).

Article 93a – Prohibited Activities with Military Recruit or Trainee by Person in Position of Special Trust

10 U.S.C. § 893a

1. Summary of Proposal

This proposal would add a new provision, Article 93a, to the UCMJ. Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 93a.

2. Summary of the Current Statute

The proposed statute has not yet been enacted.

3. Historical Background

The existing Article 93 (Cruelty and Maltreatment) prohibits conduct that would be an "abuse of authority" by superior ranking military members toward persons subject to their orders. Under current law, however, a consensual sexual relationship between a subordinate and a superior, without more, does not constitute "maltreatment."[1]

The 2014 National Defense Authorization Act, § 1741 ("Enhanced Protections for Prospective Members and New Members of the Armed Forces During Entry-Level Processing and Training"), directed the DoD to take the following actions:

§ 1741(a): maintain policies defining and proscribing inappropriate and prohibited relationships, communications, conduct, and contact (including consensual interactions) between recruits and trainees and their respective recruiters and trainers;

§ 1741(b): ensure any military member engaging in conduct referenced in 1741 (a) be subject to prosecution.

According to the Report on Protections for Prospective Members and New Members of the Armed Forces During Entry-Level Processing and Training (May 2014), "statutes and regulations are in place to hold offenders appropriately accountable when prospective and new members of the military are victimized by servicemembers who exercise control over them."[2]

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[1] *See, e.g.*, United States v. Fuller, 54 M.J. 107, 110-11 (C.A.A.F. 2000) (holding that E-3's voluntary sexual acts with her E-5 training cadre did not constitute maltreatment).

[2] DEP'T OF DEFENSE, REPORT ON PROTECTIONS FOR PROSPECTIVE MEMBERS AND NEW MEMBERS OF THE ARMED FORCES DURING ENTRY-LEVEL PROCESSING AND TRAINING 1, 12-13 (May 2014).

4. Contemporary Practice

Currently, all of the services prohibit by regulation sexual relations between recruiters and recruits, and trainers and trainees.[3] Accordingly, prohibited sexual relations can be punished under Article 92 (Failure to Obey Order or Regulation) with confinement for 2 years.

5. Relationship to Federal Civilian Practice

Federal law criminalizes sexual acts between prison guards and prisoners in a federal prison.[4] A conviction for this offense requires sex offender registration.[5]

Thirty states criminalize sexual relations between teachers and students,[6] with seven states prohibiting sex even if the student is over the age of 18.[7] In all 30 states, a conviction for this offense requires sex offender registration.

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[3] ***Air Force***: Air Force Instruction (AFI) 36-2909, *Professional and Unprofessional Relationships* (1 May 1999), para. 2.2; Air Education and Training Command (AETC) Supplement, AFI 36-2909, *Recruiting Education, and Training Standards of Conduct* (2 December 2013), para. 2.3.2, 2.3.3. ***Army:*** Army Training and Doctrine Command (TRADOC) Regulation 350-6, *Enlisted Initial Entry Training Policies and Administration*, para. 2-6; US Army Recruiting Command (USARC) Regulation 600-25, *Prohibited and Regulated Activities*, Ch. 2; Army Regulation (AR) 600-20, *Army Command Policy*, para. 4-14. ***Coast Guard:*** COMDTINST. M1600.2 (series) and ALCOAST 417/13 (301909Z SEP 13)) prohibits romantic relationships between instructors and recent graduates of recruit training for a period of one year after graduation. ***Marines***: Navy Regulations § 1165 (1990); Marine Corps Recruit Depot (MCRD) Paris Island Depot Order 1100.5B; MCRD San Diego Depot Order 1100.4B; Marine Corps Training Command General Oder 01-03; Marine Corps Order 1510.32F. ***Navy:*** Navy Regulations § 1165 (1990); Chief of Naval Operations Instruction (OPNAVINST) 5370.2C (26 April 2007); Navy Recruit Training Command Instructions (NACCRUITRACOMINST) 1600.3 (19 March 2013); NAVCRUITRACOMINST 5370.3 (29 May 2013); Commander, Navy Recruiting Command Instruction (COMNAVCUITCOM) 5370.1F (12 October 2011); Judge Advocate General Instruction (JAGINST) 5370 (6 December 2010); Commandant of the United States Naval Academy Instruction (COMDTMININST) 5400.6Q.

[4] 18 U.S.C. §§ 2243 & 2244.

[5] 42 U.S.C. § 16911(3)(A)(ii); (4)(A)(ii). 18 U.S.C. § 2243 is a Tier II offense (25-year registration); 18 U.S.C. § 2244 is a Tier III offense (15-year registration).

[6] ***Alabama***: AL CODE 13A-6-81; 13A-6-82; ***Alaska***: ALASKA STAT. § 11.41.434(a)(3)(B); ***Arkansas***: ARK CODE ANN. 5-14-125(a)(6); 5-14-126(a)(1)(C); ***California***: WEST'S ANN. CAL. PENAL CODE § 261.5; ***Colorado***: COL REV. STAT. 18-3-405.3; ***Connecticut:*** CT GEN STAT § 53a-71; ***Delaware***: 11 DEL. CODE ANN. § 761, 770-773; ***Florida***: FL. CODE ANN. § 775.0862; ***Illinois***: 720 Ill. Comp. Stat. 5/11-9.2 (2001); ***Iowa:*** IOWA CODE ANN. § 709.15; ***Kansas***: KANS. STAT. ANN. § 21-3520; ***Maryland:*** MD. CODE § 3-308; ***Michigan:*** Mich. Comp. Laws Ann. 750.520b; ***Minnesota:*** Minn. Stat. Ann. 609.344(1); ***Maine:*** 17-A MAINE REV. STAT. ANN. § 255-A; **Massachusetts**: MASS. GEN. LAWS ANN. § 23A; ***Montana***: MONTANA CODE ANN. 45-5-502(5)(a)(iii), (iv); ***New Hampshire***: N.H. REV. STAT. § 632-A:3; ***New Jersey:*** N.J. REV. STAT. § 2C 14-2; ***New York:*** NY PENAL LAW, § 130.25; ***North Carolina:*** N.C. GEN. STAT. ANN. § 14-27.7; 14-202.4(a); ***Oklahoma:*** 21 OKLA. STAT. ANN. § 1111, 1114; ***Ohio:*** OHIO REV. CODE § 2907.03; 2907.05(A)(1)-(3), (5); 2907.07; ***South Carolina:*** SC CODE § 16-3-755; ***Tennessee***: TENN. CODE ANN. § 39-13-527; ***Texas:*** TX PENAL CODE § 21.12; ***Utah:*** U.C.A. § 76-5-413; ***Virginia:*** VA CODE ANN. § 18.2-64.1, 18-2.370.1; ***Vermont:*** 13 VT. REV. STAT. ANN. §3252; ***Washington:*** WASH. REV. CODE § 9A.44.093; § 9A.44.096; ***Wisconsin:*** W.S.A. 948.095(b).

6. Recommendation and Justification

Recommendation 93a: Enact new Article 93a.

This proposal provides enhanced accountability for sexual misconduct committed by recruiters and trainers in the recruiting and basic military training environments.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by enacting a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

The Judicial Proceedings Panel decided to study whether Article 120 should provide for a strict liability offense (which necessarily would qualify as a sex offender registration offense) or whether non-Art. 120 offenses would be appropriate for this misconduct, and if so, whether they should be sex offender registration offenses.[8]

8. Legislative Proposal

SEC. 1010. PROHIBITED ACTIVITIES WITH MILITARY RECRUIT OR TRAINEE BY PERSON IN POSITION OF SPECIAL TRUST.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 893 (article 93 of the Uniform Code of Military Justice), the following new section (article):

"§893a. Art. 93a. Prohibited activities with military recruit or trainee by person in position of special trust

"(a) ABUSE OF TRAINING LEADERSHIP POSITION.—Any person subject to this chapter—

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[7] Those seven states include ***Alabama*** (19 years old); ***Arkansas*** (21 years old); ***Connecticut*** (high school students); ***Michigan*** (high school students over 18 years old); ***North Carolina***; ***Washington*** (students over 18, but teacher must be at least 5 years older); ***Utah*** (persons under the age of 21 receiving state services).

[8] JUDICIAL PROCEEDINGS PANEL—INITIAL REPORT 15, 37-43 (February 4, 2015), ("[T]he 2012 version of Article 120 does not sufficiently criminalize sexual relationships between senior and subordinates when force or the threat of force is not overt.").

"(1) who is an officer, a noncommissioned officer, or a petty officer;

"(2) who is in a training leadership position with respect to a specially protected junior member of the armed forces; and

"(3) who engages in prohibited sexual activity with such specially protected junior member of the armed forces;

shall be punished as a court-martial may direct.

"(b) ABUSE OF POSITION AS MILITARY RECRUITER.—Any person subject to this chapter—

"(1) who is a military recruiter and engages in prohibited sexual activity with an applicant for military service; or

"(2) who is a military recruiter and engages in prohibited sexual activity with a specially protected junior member of the armed forces who is enlisted under a delayed entry program;

shall be punished as a court-martial may direct.

"(c) CONSENT.—Consent is not a defense for any conduct at issue in a prosecution under this section (article).

"(d) DEFINITIONS.—In this section (article):

"(1) SPECIALLY PROTECTED JUNIOR MEMBER OF THE ARMED FORCES.—The term 'specially protected junior member of the armed forces' means—

"(A) a member of the armed forces who is assigned to, or is awaiting assignment to, basic training or other initial active duty for training, including a member who is enlisted under a delayed entry program;

"(B) a member of the armed forces who is a cadet, a midshipman, an officer candidate, or a student in any other officer qualification program; and

"(C) a member of the armed forces in any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial career qualification.

"(2) TRAINING LEADERSHIP POSITION.—The term 'training leadership position' means, with respect to a specially protected junior member of the armed forces, any of the following:

"(A) Any drill instructor position or other leadership position in a basic training program, an officer candidate school, a reserve officers' training corps unit, a training program for entry into the armed forces, or any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial career qualification.

"(B) Faculty and staff of the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, and the United States Coast Guard Academy.

"(3) APPLICANT FOR MILITARY SERVICE.—The term 'applicant for military service' means a person who, under regulations prescribed by the Secretary concerned, is an applicant for original enlistment or appointment in the armed forces.

"(4) PROHIBITED SEXUAL ACTIVITY.—The term 'prohibited sexual activity' means, as specified in regulations prescribed by the Secretary concerned, inappropriate physical intimacy under circumstances described in such regulations.".

9. Sectional Analysis

Section 1010 would create a new section, Article 93a (Prohibited activities with military recruit or trainee by person in position of special trust). The new section would provide enhanced accountability for sexual misconduct committed by recruiters and trainers during the various phases within the recruiting and basic military training environments. The term "officer" as used in subsection (a)(1) of this statute would have the same meaning ascribed to it as in 10 U.S.C. § 101(b)(1). The term "applicant for military service" would include persons in the process of applying for an original enlistment or appointment in the armed services as defined in applicable service regulations. The primary focus of the new statute is on recruiting and initial entry training. Because of the unique nature of military training and the different training environments among the services, the statute would authorize the Service Secretaries to publish regulations designating the types of physical intimacy that would constitute a "prohibited sexual activity" under subsections (a) and (b) of the new statute.

Article 93a would cover military recruiters and trainers who knowingly engage in prohibited sexual activity with prospective recruits or junior members of the armed forces in initial training environments. Consent would not be a defense to this offense.

Article 93a is intended to address specific conduct and is not intended to supersede or preempt service regulations governing professional conduct by staff involved in recruiting, entry level training, or other follow on training programs. The Secretary concerned could prescribe by regulation any additional initial career qualification training programs related to servicemembers they determine should fall under this statute. Implementing rules will address appropriate maximum punishments for the new offense.

Article 94 – Mutiny or Sedition
10 U.S.C. § 894

1. Summary of Proposal

This Report recommends no change to Article 94. Part II of the Report will address any changes needed to the Manual for Courts-Martial provisions implementing Article 94.

2. Summary of the Current Statute

Article 94 prohibits mutiny and sedition, and prohibits officers from failing to do their utmost to suppress them. Mutiny is the usurping or overriding of lawful military authority. Sedition is the overthrow or destruction of lawful civil authority. The offense is punishable by death or such other punishment as a court-martial may direct.

3. Historical Background

American military law has criminalized mutiny and sedition since the Revolutionary War.[1] Article 94 was derived from Articles 66 and 67 of the 1948 Articles of War and from Articles 4 and 8 from the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for all offenses under Article 94: death.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. §§ 2383 (Rebellion or insurrection), 2384 (Seditious conspiracy), 2385 Advocating overthrow of Government), 2387 (Activities affecting armed forces generally), and 2388 (Activities affecting armed forces during war) set forth similar offenses to Article 94.

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[1] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 578 (photo reprint 1920) (2d ed. 1896) (discussing the origin of mutiny and sedition under the British Articles of War, and General George Washington's adaptation of the British Model under the Articles of War for the Continental Army) (footnotes omitted).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1227 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 259-60 (1951) (analyzing how the UCMJ "mutiny provision" departed from the former Navy definition).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶18.e.

6. Recommendation and Justification

Recommendation 94: No change to Article 94.

In view of the well-developed case law addressing Article 94's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 95 (Current Law) – Resistance, Flight, Breach of Arrest, and Escape

10 U.S.C. § 895

1. Summary of Proposal

This Report recommends no change to Article 95, except to redesignate it as Article 87a as part of the realignment of the punitive articles. Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 87a.

2. Summary of the Current Statute

Article 95 prohibits resisting arrest or apprehension, fleeing apprehension, breaking arrest, and escaping from custody or confinement.

3. Historical Background

Article 95 was derived from Article 69 of the 1948 Articles of War and Article 22 of the 1930 Articles for the Government of the Navy.[1] Since the UCMJ was enacted in 1950,[2] the statute has been amended only once, to insert the word "flight."[3]

4. Contemporary Practice

Military apprehension is the same as civil arrest,[4] and military arrest is the same as restriction to specified limits.[5]

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1227 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 260 (1951).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] NDAA FY 1996, Pub. L. No. 104-106, Div. A, Title XI, § 1112(a), 110 Stat. 186, 461 (1996). Note, until 1996, military courts held that escape from apprehension (military arrest) was not resisting apprehension under Article 95. *See* United States v. Burgess, 32 M.J. 446, 447-48 (C.M.A. 1991) (holding accused's flight from attempted apprehension, when he ignored military policeman's order to stop and drove away in car, was not kind of "active resistance" needed to support conviction for resisting apprehension). Congress amended the statute in 1996 to expressly include "flight" from apprehension as an offense. *See* DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.14[2] at 324 (2d ed. 2012).

[4] R.C.M. 302(a)(1) (Discussion).

[5] R.C.M. 304(a)(3) (noting military personnel under "arrest" are not permitted to perform full military duties).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Resistance, Flight, Breach of Arrest, and Escape: dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. §§ 751-58 applies to offenses similar to Article 95, prohibiting escape, attempts to escape, or assisting escape from custody of the Attorney General or his or her representatives.

6. Recommendation and Justification

Recommendation 95: No change to Article 95, except to redesignate it as Article 87a.

In view of the well-developed case law addressing Article 95's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal is consistent with the GC Terms of Reference directive to conduct a comprehensive review of the military justice system.

[6] MCM, Part IV, ¶19.e.

Article 95 (New Location) – Offenses by Sentinel or Lookout

10 U.S.C. § 895

1. Summary of Proposal

This proposal would migrate the loitering portion of offenses against or by sentinel or lookout, which is currently addressed under Article 134 (the General Article),[1] to the new Article 95 (Offenses by sentinel or lookout). Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶104, the offense prohibits misconduct toward or by sentinel or lookout not addressed in Article 113, Misbehavior of Sentinel or Lookout. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated offenses against or by a sentinel or lookout under Article 134 in the 1951 MCM.[2]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Offenses Against or By Sentinel or Lookout. If a sentinel or lookout wrongfully loiters or sits upon a post in time of war or while receiving special pay, the maximum punishment authorized is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years; otherwise, bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months. If a servicemember shows disrespect towards a sentinel or lookout, the maximum punishment authorized is forfeiture of two-thirds pay per month for three months and confinement for 3 months.[3]

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[1] MCM, Part IV, ¶104b(2).

[2] MCM 1984, App. 6c, ¶166.

[3] MCM, Part IV, ¶104.e.

5. Relationship to Federal Civilian Practice

Offenses against or by a sentinel or lookout are unique military offenses. For civilians in the federal government who hold security positions, these acts are typically characterized as "neglect of duty" infractions and addressed through adverse administrative actions that can result in reprimands, suspensions, or terminations of employment.[4]

6. Recommendation and Justification

Recommendation 134-104: Migrate Article 134 (¶104) to the new Article 95.

Offenses against or by a lookout addresses conduct that is inherently prejudicial to good order and discipline. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

This Report also proposes that the disrespect portion currently addressed under Article 134 (MCM, Part IV, ¶104b(1)) be migrated to a new enumerated punitive article, Article 95a (Disrespect Towards Sentinel or Lookout).

8. Legislative Proposal

SEC. 1011. OFFENSES BY SENTINEL OR LOOKOUT.

Section 895 of title 10, United States Code (article 95 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(8), is amended to read as follows:

"§895. Art. 95. Offenses by sentinel or lookout

[4] 5 C.F.R. § 752.603—Standard for Action (2014). Federal agencies are empowered to take adverse administrative action against an employee for "reasons of misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function." 5 C.F.R. § 752.603(a); *see also* 5 U.S.C. § 7503(b).

"(a) DRUNK OR SLEEPING ON POST, OR LEAVING POST BEFORE BEING RELIEVED.—Any sentinel or lookout who is drunk on post, who sleeps on post, or who leaves post before being regularly relieved, shall be punished—

"(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

"(2) if the offense is committed other than in time of war, by such punishment, other than death, as a court-martial may direct.

"(b) LOITERING OR WRONGFULLY SITTING ON POST.—Any sentinel or lookout who loiters or wrongfully sits down on post shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1011 would migrate the loitering portion of the offense of "Sentinel or lookout: offenses against or by" from Article 134 (the General article) to the redesignated Article 95 (Offenses by sentinel or lookout). The wrongfulness of loitering by a sentinel or lookout is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[5]

[5] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 95a (New Provision) – Disrespect Toward Sentinel or Lookout

10 U.S.C. § 895a

1. Summary of Proposal

This proposal would migrate the disrespect offense currently addressed under Article 134 (the General Article)[1] to a new enumerated punitive article, Article 95a (Disrespect towards sentinel or lookout). Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 95a.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶104, the offense prohibits misconduct toward or by sentinel or lookout not addressed in Article 113, Misbehavior of Sentinel or Lookout. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated offenses against or by a sentinel or lookout under Article 134 in the 1951 MCM.[2]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Offenses Against or By Sentinel or Lookout. If a sentinel or lookout wrongfully loiters or sits upon a post in time of war or while receiving special pay, the maximum punishment authorized is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years; otherwise, bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months. If a servicemember shows disrespect towards a sentinel or lookout, the maximum punishment authorized is forfeiture of two-thirds pay per month for three months and confinement for three months.[3]

5. Relationship to Federal Civilian Practice

Offenses against or by a sentinel or lookout are unique military offenses. For civilians in the federal government who hold security positions, these acts are typically characterized as

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[1] MCM, Part IV, ¶104b(1).

[2] MCM 1984, App. 6c, ¶166.

[3] MCM, Part IV, ¶104.e.

"neglect of duty" infractions and addressed through adverse administrative actions that can result in reprimands, suspensions, or terminations of employment.[4]

6. Recommendation and Justification

Recommendation 134-104: Migrate Article 134 (¶104) to the redesignated Article 95.

Offenses against or by a lookout addresses conduct that is inherently prejudicial to good order and discipline. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

This Report also proposes migrating the loitering portion of offenses against or by sentinel or lookout currently addressed under Article 134 (the General Article (MCM, Part IV, ¶104b(2)) to a new Article 95 (Offenses by Sentinel or Lookout).

8. Legislative Proposal

See the Legislative Proposal for §913. Art. 113. Misbehavior of Sentinel or Lookout, for the loitering portion of the offense.

SEC. 1012. DISRESPECT TOWARD SENTINEL OR LOOKOUT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 895 (article 95 of the Uniform Code of Military Justice), as amended by section 1011, the following new section (article):

"§895a. Art. 95a. Disrespect toward sentinel or lookout

"(a) DISRESPECTFUL LANGUAGE TOWARD SENTINEL OR LOOKOUT.—Any person subject to this chapter who, knowing that another person is a sentinel or lookout, uses wrongful and disrespectful language that is directed toward and within the

[4] 5 C.F.R. § 752.603—Standard for Action (2014). Federal agencies are empowered to take adverse administrative action against an employee for "reasons of misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function." 5 C.F.R. § 752.603(a); *see also* 5 U.S.C. § 7503(b).

hearing of the sentinel or lookout, who is in the execution of duties as a sentinel or lookout, shall be punished as a court-martial may direct.

"(b) DISRESPECTFUL BEHAVIOR TOWARD SENTINEL OR LOOKOUT.—Any person subject to this chapter who, knowing that another person is a sentinel or lookout, behaves in a wrongful and disrespectful manner that is directed toward and within the sight of the sentinel or lookout, who is in the execution of duties as a sentinel or lookout, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1012 would create a new section, Article 95a (Disrespect toward a sentinel or lookout). The new statute would include the disrespect portion of the offense of "Sentinel or lookout: offenses against or by," which would be migrated from Article 134 (the General article). The offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[5]

[5] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 96 (Current Law) – Releasing Prisoner Without Proper Authority

10 U.S.C. § 896

1. Summary of Proposal

This proposal would retain the existing provisions of Article 96 and migrate into the statute the offense of drinking liquor with a prisoner currently addressed under Article 134 (the General Article).[1] Article 96 would be retitled as "Release of prisoner without authority; drinking with prisoner." Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 96 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 96 prohibits servicemembers who are responsible for prisoners from releasing them without proper authority, or allowing them to escape.

3. Historical Background

Article 96 was derived from Article 73 of the 1948 Articles of War.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Releasing Prisoner without Proper Authority: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.[4]

5. Relationship to Federal Civilian Practice

18 USC § 752 (Instigating or assisting escape) sets forth a similar offense to Article 96. It proscribes instigating, aiding or assisting in the escape of a prisoner from custody or confinement.

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[1] MCM, Part IV, ¶74. The offense of drinking liquor with a prisoner is discussed in this Report under "Article 96 – Releasing Prisoner Without Proper Authority – Addendum."

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1227 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶20.e.

6. Recommendation and Justification

Recommendation 96: Migrate the offense of drinking liquor with prisoner in Article 134, the General Article (MCM, Part IV, ¶74), to Article 96.

This change would align offenses concerning custody of prisoners under Article 96.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1013. RELEASE OF PRISONER WITHOUT AUTHORITY; DRINKING WITH PRISONER.

Section 896 of title 10, United States Code (article 96 of the Uniform Code of Military Justice), is amended to read as follows:

"§896. Art. 96. Release of prisoner without authority; drinking with prisoner

"(a) RELEASE OF PRISONER WITHOUT AUTHORITY.—Any person subject to this chapter—

"(1) who, without authority to do so, releases a prisoner; or

"(2) who, through neglect or design, allows a prisoner to escape;

shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with the law.

"(b) DRINKING WITH PRISONER.—Any person subject to this chapter who unlawfully drinks any alcoholic beverage with a prisoner shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1013 would amend Article 96 and retitle the statute as "Release of prisoner without authority; drinking with prisoner." As amended, Article 96 would include the offense of "Drinking liquor with prisoner," which would be migrated from Article 134 (the General article). The latter offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[5]

[5] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 96 – Release of Prisoner without Authority; Drinking with Prisoner – Addendum

(Drinking Liquor with Prisoner)

1. Summary of Proposal

This proposal would migrate the offense of drinking liquor with prisoner currently addressed under Article 134 (the General Article)[1] to Article 96 (Releasing prisoner without proper authority; drinking with prisoner). Part II of this Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶74, the offense requires a showing that a person with charge over a prisoner drank liquor with that prisoner. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized "drinking liquor with a prisoner" via the "General Article" since the 1775 Articles of War.[2] Under the UCMJ, the President has designated "drinking liquor with a prisoner" as an Article 134 offense since the 1951 MCM.[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of drinking liquor with prisoner: forfeiture of two-thirds pay for three months and confinement for three months.[4]

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[1] MCM, Part IV, ¶74.

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 729 (photo reprint 1920) (2d ed. 1896) (citations omitted) (noting successful prosecutions for soldiers under the General Article for soldiers "bringing whiskey into the guardhouse").

[3] MCM 1951, App. 6c, ¶133.

[4] MCM, Part IV, ¶74.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1791 (Providing or Possessing Contraband in Prison) sets forth a similar offense to the offense of drinking liquor with a prisoner in Article 134. It imposes a maximum of 1 year of confinement for providing alcohol to any federal prison inmate.[5]

6. Recommendation and Justification

Recommendation 134-74: (1) Modify drinking liquor with a prisoner to (a) apply to all alcoholic beverages; and (b) apply to all persons subject to the code; (2) migrate the offense of drinking liquor with prisoner in Article 134, the General Article (MCM, Part IV, ¶74), to Article 96.

Fraternizing with prisoners by consuming alcohol with them in violation of confinement facility rules erodes discipline regardless of whether it is a prison guard or any other person subject to the UCMJ.

Migrating the offense drinking liquor with a prisoner to Article 96 logically aligns the offense with the existing UCMJ prisoner-related offenses. Drinking liquor with a prisoner would ordinarily be in violation of confinement facility regulations. Accordingly, it is inherently prejudicial to good order and discipline and is not reliant upon the "terminal element" of Article 134 as the basis for its criminality.[6]

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

See Article 96 (Releasing Prisoner Without Proper Authority), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 96 (Releasing Prisoner Without Proper Authority), *supra*, at paragraph 9.

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[5] 18 U.S.C. § 1791(b)(2), (d)(1)(D).

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 97 – Unlawful Detention
10 U.S.C. § 897

1. Summary of Proposal

This Report recommends no change to Article 97. Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 97.

2. Summary of the Current Statute

Article 97 prohibits the unlawful arrest, apprehension or confinement of another person.

3. Historical Background

Article 97 is derived from Article 96 (the "General Article") of the 1948 Articles of War, as well as Navy court-martial practice under the Navy Courts and Boards Manual, § 101.[1] Article 97 was designed to prevent abuse of authority by military law enforcement personnel and other individuals with confinement authority, and to punish such abuses.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

Article 97 applies to military law enforcement personnel acting under "color of authority" for their official duties.[4] The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Unlawful Detention: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[5]

5. Relationship to Federal Civilian Practice

The Fourth Amendment to the Constitution prohibits the seizure of a person without probable cause. In addition, 42 U.S.C. § 1983 permits civil actions to vindicate violations of

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[1] LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 260 (1951).

[2] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.16[2] at 337-38 (2d ed. 2012).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] *See* United States v. Johnson, 3 M.J. 361, 363 (C.M.A. 1977) (Scope of this section pertaining to unlawful apprehension is limited to improper acts by those delegated authority with respect to arrest, apprehension and confinement and does not apply to the private act of false imprisonment by one not acting under a delegation of authority).

[5] MCM, Part IV, ¶21.e.

a person's civil rights by persons acting in their official capacity "under color of law," including alleged law enforcement misconduct.[6]

6. Recommendation and Justification

Recommendation 97: No change to Article 97.

In view of the well-developed case law addressing Article 97's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[6] *See, e.g.,* Monroe v. Pape, 365 U.S. 167, 172 (1961) (holding that actions of city police officers in conducting allegedly illegal search and seizure were performed "under color of" state statute within meaning of 42 U.S.C. § 1983); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 396 (1971) (ruling that 42 U.S.C. § 1983 permits an "implied cause of action" to vindicate Fourth Amendment freedom from unreasonable search and seizures had been violated by federal agents; victims of Fourth Amendment violations may sue for the violation of the Amendment itself).

Article 98 (Current Law) – Noncompliance with Procedural Rules
10 U.S.C. § 898

1. Summary of Proposal

This Report recommends no change to Article 98, except to redesignate it as Article 131f as part of the realignment of the punitive articles. Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 131f.

2. Summary of the Current Statute

Article 98 prohibits commanders and other persons with duties related to the administration of military justice from unnecessarily delaying disposition of a case or knowingly and intentionally failing to enforce or comply with any provisions of the UCMJ.

3. Historical Background

Article 98 was derived from Article 70 of the 1948 Articles of War.[1] Since the UCMJ was enacted in 1951,[2] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Noncompliance with Procedural Rules: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[3]

5. Relationship to Federal Civilian Practice

The Hyde Amendment, which is widely published as a "legislative note" attached to 18 U.S.C. § 3006A (popularly entitled "The Criminal Justice Act"), authorizes federal courts to award attorneys' fees and court costs to criminal defendants "where the court finds that the position of the United States was 'vexatious, frivolous, or in bad faith.'" In such cases, the federal court may allow defendants to recover some of the costs they incurred in

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1228 (1949) (noting that Article 98 was intended to enforce procedural provisions of this code, for example, article 37 (unlawfully influencing action of court) and article 31 (compulsory self-incrimination)"); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 260-61 (1951) (noting punishment for Article 98 type misconduct would have fallen under the "general articles" for the respective AW and AGN prior to the UCMJ).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] MCM, Part IV, ¶22.e.

fighting the government's investigation and prosecution by authorizing an award of attorneys' fees and court costs when the prosecution's evidence was so baseless as to be "frivolous."[4]

6. Recommendation and Justification

Recommendation 98: No change to Article 98, except to redesignate it as Article 131f.

In view of the well-developed law addressing Article 98's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[4] *See* United States v. Gilbert, 198 F.3d 1293, 1299 (11th Cir. 1999) (interpreting "frivolous" in the law enforcement context, as requiring "bad faith" manifested by "a reckless disregard for the truth") (citation omitted).

Article 99 – Misbehavior Before the Enemy
10 U.S.C. § 899

1. Summary of Proposal

This Report recommends no change to Article 99. Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 99.

2. Summary of the Current Statute

Article 99 prohibits misbehavior before the enemy, including surrendering or through disobedience, neglect, or intentional misconduct endangering the safety of a command. The offense is punishable by death or such other punishment as a court-martial may direct.

3. Historical Background

Misbehavior before the enemy has been criminalized under American military law since the 1775 Articles of War.[1] Article 99 is derived from Article 75 of the 1948 Articles of War and Article 9 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

Cowardice is defined under Article 99 as misbehavior motivated by fear.[4] Military appellate courts have held that while fear itself is a natural feeling of apprehension when going into battle, the mere display of apprehension is not enough to constitute this offense.[5]

The President, under Article 56, has prescribed death as the maximum punishment for the offense of Misbehavior before the Enemy.[6]

5. Relationship to Federal Civilian Practice

Article 99 is a unique military offense with no direct federal civilian counterpart.

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 622-23 (photo reprint 1920) (2d ed. 1896).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1228 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶23.b.5.

[5] *See* United States v. Yarborough, 5 C.M.R. 106 (C.M.A. 1968).

[6] MCM, Part IV, ¶23.e.

6. Recommendation and Justification

Recommendation 99: No change to Article 99.

In view of the well-developed case law addressing Article 99's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment

Article 100 – Subordinate Compelling Surrender
10 U.S.C. § 900

1. Summary of Proposal

This Report recommends no change to Article 100. Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 100.

2. Summary of the Current Statute

Article 100 prohibits a subordinate from compelling or attempting to compel the commander of any place, vessel, aircraft, unit or other military property, to give it up to an enemy or to abandon it. Article 100 also prohibits any attempt to surrender without proper authority. The offense is punishable by death or other such punishment as a court-martial may direct.

3. Historical Background

American military law has forbid subordinates compelling their commander to surrender since the Revolutionary War.[1] Article 100 was derived from Article 76 of the 1948 Articles of War and Article 4 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Subordinate Compelling Surrender: death or such other punishment as a court-martial may direct.[4]

5. Relationship to Federal Civilian Practice

Article 100 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 100: No change to Article 100.

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 622 (photo reprint 1920) (2d ed. 1896).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1228 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶24.e.

In view of the well-developed case law addressing Article 100's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 101 – Improper Use of Countersign
10 U.S.C. § 901

1. Summary of Proposal

This Report recommends no change to Article 101. Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 101.

2. Summary of the Current Statute

Article 101 prohibits the unauthorized disclosure of the parole or countersign in time of war. A "countersign" is a word, signal, or procedure given from the principal headquarters of a command to aid guards and sentinels in their scrutiny of persons who apply to pass the lines.[1] It consists of a secret challenge and a password, signal, or procedure.[2] By contrast, a "parole" is a word used as a check on the countersign; it is given only to those who are entitled to inspect guards and to commanders of guards.[3] In time of war, this offense is punishable by death or other such punishment as a court-martial may direct.

3. Historical Background

Countersigns and parole are used to control specific areas of military significance, and they have been in existence since commanders set pickets and sentries stood their posts.[4] In American military law, improper use of a countersign has constituted a military offense since the Revolutionary War.[5] Article 101 was derived from Article 77 of the 1948 Articles of War.[6] Since the UCMJ was enacted in 1950,[7] the statute has remained unchanged.

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[1] MCM, Part IV, ¶25.c.(1).

[2] *Id.*

[3] *Id.* at ¶25.c.(2).

[4] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.20[2] at 360 (2nd. ed. 2012).

[5] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 619-20 (photo reprint 1920) (2d ed. 1896) (reciting historic development of AW 41 of 1874 from the British Articles of War, through the 1775 and 1776 American Articles of War).

[6] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1228 (1949).

[7] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Improper Use of Countersign: death, or such other punishment as a court-martial may direct.[8]

5. Relationship to Federal Civilian Practice

Article 101 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 101: No change to Article 101.

In view of the well-developed case law addressing Article 101's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[8] MCM, Part IV, ¶25.e.

Article 102 – Forcing a Safeguard
10 U.S.C. § 902

1. Summary of Proposal

This Report recommends no change to Article 102. Part II of the Report will address the Manual for Courts-Martial provisions implementing the Article 102.

2. Summary of the Current Statute

A safeguard is a "detachment, guard, or detail posted by a commander for the protection of persons, places, or property of the enemy, or of a neutral affected by the relationship of belligerent forces in their prosecution of war . . . ."[1] Article 102 prohibits the forcing of a violation of the protection of a safeguard. In time of war, or in circumstances amounting to a state of belligerency short of war, the offense is punishable by death or other such punishment as a court-martial may direct.

3. Historical Background

American military law has criminalized forcing a safeguard since the Revolutionary War.[2] The current Article 102 was derived from Article 78 of the 1948 Articles of War.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

The Manual for Courts-Martial states that a formal "time of war" is not required for Article 102 to apply; the offense also is punishable during "a state of belligerency short of formal war."[5] The legislative history to Article 102 indicates the drafters of the UCMJ were concerned that safeguards may be necessary in times when a formal state of war did not

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[1] MCM, Part IV, ¶26.c(1).

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 663 (photo reprint 1920) (2d ed. 1896) (noting that the American "forcing a safeguard offence first appeared in the 1776 Articles of War and originally only extended to periods of defined "war" or open rebellion against the United States).

[3] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1228-29 (1949) [hereinafter *Hearings on H.R. 2498*]; LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 262 (1951) (noting "the words time of war have been deleted [in the conversion of AW 78 to UCMJ Article 102] in order to cover situations where a safeguard has been placed but a formal state of war does not exist.").

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] *Id.* at ¶26.c(3).

exist.[6] The President, under Article 56, has prescribed the following maximum punishment for the offense of Forcing a Safeguard: death, or such other punishment as a court-martial may direct.[7]

5. Relationship to Federal Civilian Practice

Article 102 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 102: No change to Article 102.

In view of the well-developed case law addressing Article 102's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[6] See *Hearings on H.R. 2498, supra* note 3, at 1228-29.

[7] MCM, Part IV, ¶26.e.

Article 103 (Current Law) – Captured or Abandoned Property
10 U.S.C. § 903

1. Summary of Proposal

This Report recommends no change to Article 103, except to redesignate it as Article 108a as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial implementing the new Article 108a.

2. Summary of the Current Statute

Article 103 prohibits the misuse or neglect of captured or abandoned property, to include buying, selling, or trading in captured or abandoned property, and engaging in looting or pillaging.

3. Historical Background

American military law has criminalized wrongful disposition of captured property since the Revolutionary War.[1] The current Article 103 was derived from Articles 79 and 80 of the 1948 Articles of War and Article 8 of the 1930 Articles for Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Captured or Abandoned Property: for looting and pillaging, any punishment, other than death, that a court-martial may direct; otherwise, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[4]

5. Relationship to Federal Civilian Practice

Article 103 is a unique military offense with no direct federal civilian counterpart.

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 557 (photo reprint 1920) (2d ed. 1896) (tracing the origins of the American "capture property" offense to Article of War XXIX of 1775).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1229 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 262 (1951) (noting that language "against looting and pillaging," was specifically added to the new Article 103 in addition to the provisions in the 1948 Articles of War).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶27.e.

6. Recommendation and Justification

Recommendation 103: No change to Article 103, except to redesignate it as Article 108a.

In view of the well-developed case law addressing Article 103's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 104 (Current Law) – Aiding the Enemy
10 U.S.C. § 904

1. Summary of Proposal

This Report recommends no change to Article 104, except to redesignate it as Article 103b as part of the realignment of the punitive articles. Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 103b.

2. Summary of the Current Statute

Article 104 prohibits aiding the enemy, or attempting to do so, with arms, ammunition, supplies, money, or other things; or by harboring, protecting, or giving intelligence to or communicating with the enemy.[1] The offense is punishable by death, or other such punishment as a court-martial may direct.

3. Historical Background

American military law has criminalized "aiding the enemy" since the Revolutionary War.[2] The current Article 104 was derived from Article 81 of the 1948 Articles of War and Article 4 of the 1930 Articles for Government of the Navy.[3] The statute remains unchanged since the UCMJ was enacted in 1950.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Aiding the Enemy: death, or such other punishment as a court-martial may direct.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 794 (Gathering or delivering defense information to aid foreign government) sets forth a similar offense to Article 104.

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[1] Article 104 applies "to all persons, whether or not subject to military law." MCM, Part IV, ¶28.c(1). The MCM also makes allowance for trial by military commission for civilians accused of "aiding the enemy" under Article 104. *See id.*

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 629 (photo reprint 1920) (2d ed. 1896) (tracing the origins of the American "aiding the enemy" offense to Articles of War XXVII and XXVIII of 1775).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1229 (1949).

[4] MCM, Part IV, ¶28.e.

6. Recommendation and Justification

Recommendation 104: No change to Article 104, except to redesignate it as Article 103b.

In view of the well-developed case law addressing Article 104's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 104 (New Location) – Public Records Offenses
10 U.S.C. § 904

1. Summary of Proposal

This proposal would migrate the offense of altering, concealing, removing, mutilating, obliterating, or destroying a public record, which is currently addressed under Article 134 (the General Article) to the redesignated Article 104 (Public record offenses).[1] Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶99, the offense of altering a public record requires a showing that the accused altered, concealed, removed, mutilated, obliterated, destroyed, or took a public record with the intent to do any of those actions. A public record includes "records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to which there was a duty to report."[2] Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated altering a public record as an Article 134 offense in the 1951 MCM.[3] The offense of altering a public record was derived from 18 U.S.C. § 2071.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Altering, Concealing, Removing, Mutilating, Obliterating, or Destroying a

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[1] MCM, Part IV, ¶99.

[2] MCM, Part IV, ¶99.c.

[3] MCM 1951, App. 6c, ¶160.

[4] *See* United States v. Ogilve, 29 M.J. 1069, 1071-72 (A.C.M.R. 1990) (comparing the UCMJ altering a public record offense to 18 U.S.C. § 2701 and determining that they encompass the same scope of documents).

Public Record: forfeiture of two-thirds pay per month for 6 months and confinement for 6 months.[5]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2071 (Concealment, removal, or mutilation generally) sets forth a similar offense to the offense in Article 134.

6. Recommendation and Justification

Recommendation 134-99: Migrate the offense of altering, concealing, removing, mutilating, obliterating, or destroying a public record in Article 134 (MCM, Part IV, ¶99) to Article 104.

Destroying or altering public records is a well-recognized concept in criminal law. Accordingly, this offense does not rely upon the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1015. PUBLIC RECORDS OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 903b (article 103b of the Uniform Code of Military Justice), as redesignated by section 1001(5), the following new section (article):

"§904. Art. 104. Public records offenses

"Any person subject to this chapter who, willfully and unlawfully—

"(1) alters, conceals, removes, mutilates, obliterates, or destroys a public record; or

[5] MCM, Part IV, ¶99.e.

"(2) takes a public record with the intent to alter, conceal, remove, mutilate, obliterate, or destroy the public record;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1015 would migrate the offense of "Public record: altering, concealing, removing, mutilating, obliterating, or destroying" from Article 134 (the General article) to redesignated Article 104 (Public records offenses). The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 105 (Current Law) – Misconduct as Prisoner
10 U.S.C. § 905

1. Summary of Proposal

This Report recommends no change to Article 105, except to redesignate it as Article 98 as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial implementing the new Article 98.

2. Summary of the Current Statute

Article 105 prohibits misconduct by those subject to the UCMJ, while in the hands of the enemy in time war, from securing favorable treatment from their captors in a manner contrary to law, custom, or regulation.[1] Article 105 also prohibits those in position of authority over such persons from maltreating them.

3. Historical Background

Although the Articles of War did not include a specific Article proscribing misconduct while held as an enemy prisoner, prior to enactment of the UCMJ such misconduct was punishable under the "General Article."[2] Article 105 established a new offense when the UCMJ was enacted, and stemmed from episodes of prisoner misconduct during World War II.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

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[1] *See generally* United States v. Batchelor, 22 C.M.R. 144, 149, 161-62 (C.M.A. 1956) (accused's recommending a fellow prisoner be shot to protect the Chinese if the fellow prisoner were returned to American control violated Article 105).

[2] *See* WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 91-92 (photo reprint 1920) (2d ed. 1896) ("So a prisoner of war, though not subject, while held by the enemy, to the discipline of his own army, would, when exchanged or paroled, be not exempt from liability for such offences as criminal acts or injurious conduct committed during his captivity against other officers or soldiers in the same status.").

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1229 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 262 (1951).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Misconduct as a Prisoner: any punishment, other than death, as a court-martial may direct.[5]

5. Relationship to Federal Civilian Practice

Article 105 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 105: No change to Article 105, except to redesignate it as Article 98.

In view of the well-developed case law addressing Article 105's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[5] MCM, Part IV, ¶29.e.

Article 105a (New Provision) – False or Unauthorized Pass Offenses

10 U.S.C. § 905a

1. Summary of Proposal

This proposal would migrate the offense of false or unauthorized pass, currently addressed under Article 134 (the General Article)[1] to a newly designated punitive article, Article 105a (False or unauthorized pass offenses). Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 105a.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶77, the offense of false or unauthorized pass offenses requires proof that the accused wrongfully made or altered an official pass, permit, certificate, identification card, or similar document; wrongfully sold or transferred such a document; or wrongfully used such a document. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized use and production of "false passes" via the "General Article" since the 1775 Articles of War.[2] Under the UCMJ, the President has designated "false or unauthorized pass offenses" as an Article 134 offense since the 1951 MCM.[3]

4. Contemporary Practice

In practice, this offense prohibits a wide variety of fraud and wrongful use of identification documents, discharge certificates, official passes and other military permits.[4]

The President, under Article 56, has prescribed the following maximum punishments for the offense of False or Unauthorized Pass Offenses: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[5]

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[1] MCM, Part IV, ¶77.

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 732 (photo reprint 1920) (2d ed. 1896) (citing a successful prosecution under the General Article for "forging the name of an officer to a pass or furlough").

[3] MCM 1951, App. 6c, ¶138.

[4] MCM, Part IV, ¶77.c(1).

5. Relationship to Federal Civilian Practice

18 U.S.C. § 499 (Military, naval, or official passes) sets forth a similar offense to the offense of false or unauthorized pass offenses in Article 134.

6. Recommendation and Justification

Recommendation 134-77: Migrate the offense of false or unauthorized pass offenses in Article 134 (MCM, Part IV, ¶77) to Article 105a.

Migrating the false or unauthorized pass offenses to Article 105a aligns the offense with the relocated and similar subject matter Article 105 forgery offense. Producing or using false or unauthorized passes is inherently prejudicial to good order and discipline. Accordingly, it does not rely upon the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1016. FALSE OR UNAUTHORIZED PASS OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 905 (article 105 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(12), the following new section (article):

"§905a. Art. 105a. False or unauthorized pass offenses

"(a) WRONGFUL MAKING, ALTERING, ETC.—Any person subject to this chapter who, wrongfully and falsely, makes, alters, counterfeits, or tampers with a military or official pass, permit, discharge certificate, or identification card shall be punished as a court-martial may direct.

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[5] MCM, Part IV, ¶77.e.

"(b) WRONGFUL SALE, ETC.—Any person subject to this chapter who wrongfully sells, gives, lends, or disposes of a false or unauthorized military or official pass, permit, discharge certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as a court-martial may direct.

"(c) WRONGFUL USE OR POSSESSION.—Any person subject to this chapter who wrongfully uses or possesses a false or unauthorized military or official pass, permit, discharge certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1016 would create a new section, Article 105a (False or unauthorized pass offenses). The new statute would include the offense of "False or unauthorized pass offenses," which would be migrated from Article 134 (the General article). This offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 106 (Current Law) – Spies
10 U.S.C. § 906

1. Summary of Proposal

This proposal would amend Article 106 by aligning the death penalty provision in the offense with the standard set forth in Article 106a (Espionage) and in the other capital offenses under the UCMJ. This proposal would revise the current provision to reflect the standard used for other capital offenses, under which an accused guilty of a capital offense may be sentenced to "death or other such punishment as a court-martial may direct." This proposal also recommends redesignating the offense as Article 103 (Spies) as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 103 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 106 prohibits any person in time of war from spying for the enemy, by lurking or acting as a spy in or about any place, aircraft, or vessel, within the control or jurisdiction of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or in any other place engaged in the work in aid of the prosecution of the war by the United States. It is the only offense in the UCMJ in which the court-martial has no option at sentencing other than death.

3. Historical Background

The death penalty has not always been a mandatory punishment for spies in American military justice. It was not mandatory in the Articles of War during the Revolutionary War;[1] became mandatory only for aliens in 1806,[2] and then in 1862 became the mandatory penalty for all persons convicted of spying under the Articles of War.[3] In the Navy, death was not a mandatory punishment for spying until 1950 when the UCMJ was enacted.[4]

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[1] David A. Anderson, *Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of Its Mandatory Death Penalty*, 127 MIL. L. REV. 1, 4 (1990) (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 765 n. 11 (photo reprint 1920) (2d ed. 1896)).

[2] Anderson, *supra* note 1, at 5.

[3] *Id.* at 6 (citing WINTHROP, *supra* note 1, at 766, n.11).

[4] *See* AGN 4, 5 of 1930.

Article 106 was derived from Article 82 of the Articles of War.[5] Since the UCMJ was enacted in 1950,[6] the statute has remained unchanged.

More recently, the Military Commissions Act of 2006, which applies to alien unprivileged enemy belligerents, makes the death penalty discretionary for spies.[7]

4. Contemporary Practice

There are no reported cases of a prosecution under Article 106.[8] Article 106 prescribes the following mandatory punishment for the offense of spying: death.[9]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 794 (Gathering or delivering defense information to aid foreign government) sets forth a similar offense to Article 106, with the death penalty available, but not mandatory. The statute authorizes punishment "by death or by imprisonment for any term of years or for life."[10]

6. Recommendation and Justification

Recommendation 106: Amend Article 106 to make the death penalty discretionary, and to redesignate it as Article 103.

This proposed amendment would return the authorized punishment to what it was previously in the armed forces, and would align the authorized punishment for spying to closely related punitive articles, and with federal practice and the military commissions.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by addressing inconsistencies in the current Article 106 with similar provisions in the UCMJ and in U.S. law.

Article 106a prohibits espionage and includes the death penalty as an available punishment, but does not make the death penalty a mandatory punishment.

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[5] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1229 (1949) [hereinafter *Hearings on H.R. 2498*].

[6] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[7] 10 U.S.C. §§ 948c & 950t (27).

[8] The most recent reported military prosecution for spying was in a military commission in 1945, in which the death sentence was later commuted to life in prison. Colepaugh v. Looney, 235 F.2d 429, 433 (10th Cir. 1956).

[9] MCM, Part IV, ¶30.e.

[10] 18 U.S.C. § 794.

8. Legislative Proposal

SEC. 1014. PENALTY FOR ACTING AS A SPY.

Section 903 of title 10, United States Code (article 103 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(7), is amended by inserting before the period at the end of the first sentence the following: "or such other punishment as a court-martial or a military commission may direct.".

9. Sectional Analysis

Section 1014 would amend Article 103 (Spies), as transferred and redesignated by Section 1001(7), *supra*, by replacing the mandatory death penalty currently required with a discretionary death penalty similar to that authorized under existing Article 106a (Espionage) and for all other capital offenses under the Code.

Article 106 (New Location) – Impersonating a Commissioned, Warrant, Noncommissioned, or Petty Officer, or an Agent or Official

10 U.S.C. § 906

1. Summary of Proposal

This proposal would migrate the offense of impersonating a commissioned, warrant, noncommissioned or petty officer, or an agent or official, currently addressed under Article 134 (the General Article)[1] to a new stand-alone enumerated punitive article, Article 106 (Impersonation of officer, noncommissioned or petty officer, or agent or official). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶86, the offense of impersonating a military official requires a showing that the accused willfully and wrongfully impersonated a commissioned, warrant, noncommissioned, or petty officer, or an agent of superior authority of one of the armed forces of the United States, or an official of a certain government. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law has criminalized "impersonating an officer" via the "General Article" since the 1775 Articles of War.[2] Under the UCMJ, the President has designated "impersonating an officer" as an Article 134 offense since the 1951 MCM.[3] In one of the first cases to construe the new Article 134 version of the "impersonating an officer" offense, the (then) Court of Military Appeals succinctly explained the gravamen of the offense: "It requires little imagination to conclude that a spirit of confusion and disorder, and lack of

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[1] MCM, Part IV, ¶86.

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 731 (photo reprint 1920) (2d ed. 1896) (noting "Falsely personating and acting as an officer" constituted an offense under the General Article).

[3] MCM 1951, App. 6c, ¶145.

discipline in the military would result if enlisted personnel were permitted to assume the role of officers and masquerade as persons of high rank."[4]

4. Contemporary Practice

In its modern form, the offense forbids impersonation not only of military officials, but also other governmental agents or officials.[5] The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Impersonating a Commissioned, Warrant, Noncommissioned or Petty Officer, or an Agent or Official: if with intent to defraud, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years; otherwise, bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[6]

5. Relationship to Federal Civilian Practice

U.S. Code Title 18, Chapter 43 (False Personation) sets forth a series of factually similar offenses to impersonating an officer under Article 134, in particular 18 U.S.C. § 912 (Officer or employee of the United States).

6. Recommendation and Justification

Recommendation 134-86: Migrate the offense of impersonating a commissioned, warrant, noncommissioned or petty officer, or an agent or official to the new stand-alone Article 106, and conform the article to the definition of "officer" in 10 U.S.C. § 101(1).

Migrating the impersonating an officer offense to its own enumerated punitive article—Article 106 (Impersonation of officer, noncommissioned or petty officer, or agent or official)—would align the offense with the other similar subject matter offenses under the UCMJ (i.e., "wearing unauthorized insignia, decoration, etc." migrating from Article 134 (MCM, Part IV, ¶113) to Article 106a). Impersonating a commissioned officer, warrant officer, noncommissioned officer, or petty officer is inherently prejudicial to good order and discipline. Accordingly, this offense does not rely upon additional proof of the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

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[4] United States v. Messenger, 6 C.M.R. 21, 25 (C.M.A. 1952) (affirming conviction for impersonation of a naval officer by a junior enlisted sailor even where the sailor derived no direct "benefit" from the impersonation).

[5] MCM, Part IV, ¶86.b(1); *see also* DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.31[2][a] at 860 (2nd ed. 2012) (citing United States v. Felton, 31 M.J. 526, 530 (A.C.M.R. 1990) (impersonation of CID agent)).

[6] MCM, Part IV, ¶86.e.

8. Legislative Proposal

SEC. 1017. IMPERSONATION OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 905a (article 105a of the Uniform Code of Military Justice), as added by section 1016, the following new section (article):

"§906. Art. 106. Impersonation of officer, noncommissioned or petty officer, or agent or official

"(a) IN GENERAL.—Any person subject to this chapter who, wrongfully and willfully, impersonates—

"(1) an officer, a noncommissioned officer, or a petty officer;

"(2) an agent of superior authority of one of the armed forces; or

"(3) an official of a government;

shall be punished as a court-martial may direct.

"(b) IMPERSONATION WITH INTENT TO DEFRAUD.—Any person subject to this chapter who, wrongfully, willfully, and with intent to defraud, impersonates any person referred to in paragraph (1), (2), or (3) of subsection (a) shall be punished as a court-martial may direct.

"(c) IMPERSONATION OF GOVERNMENT OFFICIAL WITHOUT INTENT TO DEFRAUD.—Any person subject to this chapter who, wrongfully, willfully, and without intent to defraud, impersonates an official of a government by committing an act that

exercises or asserts the authority of the office that the person claims to have shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1017 would migrate the offense of "Impersonating a commissioned, warrant, noncommissioned, petty officer or agent of official" from Article 134 (the General article) into the redesignated Article 106 (Impersonation of officer, noncommissioned or petty officer, or agent or official). The term "officer" as used in subsection (a)(1) of the statute would have the same meaning ascribed to it as in 10 U.S.C. § 101(b)(1). This offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[7]

[7] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 106a (Current Law) – Espionage
10 U.S.C. § 906a

1. Summary of Proposal

This Report recommends no change to Article 106a, except to redesignate it as Article 103a as part of the realignment of the punitive articles. Part II of this Report will address the Manual for Courts-Martial provisions implementing the new Article 103a.

2. Summary of the Current Statute

Article 106a prohibits espionage during peacetime. It is the peacetime equivalent to Article 106 (Spies). The offense of Espionage is punishable by death or other such punishment as a court-martial may direct.

3. Historical Background

Article 106a was added to the Code in 1985.[1] The statute has remained unchanged since then.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Espionage: death, or such other punishment as a court-martial may direct.[2]

5. Relationship to Federal Civilian Practice

18 U.S.C. §§ 792-99 (Espionage and Censorship) set forth a similar offenses to Article 106a.

6. Recommendation and Justification

Recommendation 106a: No change to Article 106a, except to redesignate it as Article 103a.

In view of the well-developed case law addressing Article 106a's provisions, change to the content of the statute is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

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[1] NDAA FY 1986, Pub. L. No. 99-145, Title V, § 534(a), 99 Stat. 583, 634 (1985).

[2] MCM, Part IV, ¶30.e.

Article 106a (New Location) – Wearing Unauthorized Insignia, Decoration, Badge, Ribbon, Device, or Lapel Button

10 U.S.C. § 906a

1. Summary of Proposal

This proposal would migrate the offense of wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button, currently addressed under Article 134 (the General Article)[1] to a new enumerated punitive Article 106a (Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button). Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 106a.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶113, the offense of wearing unauthorized insignia requires proof that the accused willfully and wrongfully wore an unauthorized insignia, decoration, badge, ribbon, device, or lapel button. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law has criminalized the wearing of unauthorized insignia, decoration, badge, ribbon, device, or lapel button since the 1775 Articles of War.[2] The first commander in chief, General George Washington, created the very first "honorary badges of distinction" for service in our country's military; he established a rigorous system to ensure that these awards would be received and worn by only the truly deserving.[3] The President designated wearing unauthorized wearing insignia, etc. as an Article 134 offense in the 1951 MCM.[4]

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[1] MCM, Part IV, ¶113.

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 730 (1920 photo reprint) (2d ed. 1896).

[3] *See* General Orders of George Washington Issued at Newburgh on the Hudson, 1782–1783, p. 35 (E. Boynton ed. 1883) (reprint 1973) (requiring the submission of "incontestable proof " of "singularly meritorious action" to the Commander in Chief).

[4] MCM 1951, App. 6c, para. 176 (model specification).

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Wearing Unauthorized Insignia, Decoration, Badge, Ribbon, Device, or Lapel Button: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[5]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 704 (Military medals or decorations) sets forth a similar offense to the offense of wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button in Article 134. However, in 2012 the Supreme Court did declare the statute unconstitutional as to *civilians.*[6]

"Article 106a" is likely constitutional in the military context. In light of Congress' legislative authority under the Constitution to regulate the armed forces,[7] any similar criminal enactment under the special auspices of the UCMJ gains constitutional strength and enjoys significant judicial deference. This owes to the unique attributes of military society and the specialized need for discipline within that society, as repeatedly recognized by the Supreme Court.[8] Also, similar subject matter statutes currently exist under the UCMJ.[9] Finally, legal authority to criminalize the wearing of unauthorized medals is further bolstered by U.S. Supreme Court precedent establishing that false factual statements enjoy little First Amendment protection.[10]

6. Recommendation and Justification

Recommendation 134-113: Migrate the offense of wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button in Article 134 (MCM, Part IV, ¶113) to the new Article 106a.

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[5] MCM, Part IV, ¶113.e.

[6] United States v. Alvarez, 132 S.Ct. 2537, 2551 (2012); *cf.* Schact v. United States, 398 U.S. 58 (1970) (upholding constitutionality of the similar 18 U.S.C. § 702 offense, prohibiting unauthorized wear of the United States military uniform by any person).

[7] *See* U.S. CONST. art I, § 8, cl. 14.

[8] *See* Parker v. Levy, 417 U.S. 733, 760 (1974) ("There is a wide range of the conduct of military personnel to which [the UCMJ] may be applied without infringement of the First Amendment."); *accord* United States v. Forney, 67 M.J. 271, 275 (C.A.A.F. 2009) ("Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.") (citing *Levy*, 417 U.S. at 758).

[9] *See e.g.* Article 134 (para. 86)—Impersonating an officer. *See also* United States v. Wells, 519 U.S. 482, 505-507, and nn.8-10 (1997) (Stevens, J., dissenting) (citing "at least 100 federal false statement statutes" in the United States Code).

[10] *See, e.g.*, Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U. S. 600, 612 (2003) ("Like other forms of public deception, fraudulent charitable solicitation is unprotected speech.").

This proposal would align similar offenses under Article 106a.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

8. Legislative Proposal

SEC. 1018. INSIGNIA OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 906 (article 106 of the Uniform Code of Military Justice), as added by section 1017, the following new section (article):

"§906a. Art. 106a. Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

"Any person subject to this chapter—

"(1) who is not authorized to wear an insignia, decoration, badge, ribbon, device, or lapel button; and

"(2) who wrongfully wears such insignia, decoration, badge, ribbon, device, or lapel button upon the person's uniform or civilian clothing;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1018 would create a new section, Article 106a (Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button), and would migrate the offense of "Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button" from Article 134 (the General article) into the new statute. When committed by servicemembers, the offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon proof of the "terminal element" of Article 134 (that the conduct

was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[11]

[11] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 107 – False Official Statements
10 U.S.C. § 907

1. Summary of Proposal

This proposal would retain the existing provisions in Article 107 and migrate into the statute the offense of false swearing, which is currently addressed under Article 134 (the General Article).[1] Article 107 would be retitled as "False official statements; false swearing." Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 107 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 107 prohibits the making, with intent to deceive, of false official statements. Statements are "official" if they relate to the military duties of either the speaker or the hearer.[2]

3. Historical Background

Article 107 was derived from Articles 56 and 57 of the 1948 Articles of War, and Article 8 of the 1930 Articles for Government of the Navy.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of False Official Statement: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[5]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1001 (Statements or entries generally) sets forth a similar offense to Article 107.

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[1] MCM, Part IV, ¶79. The offense of false swearing is discussed in this Report under "Article 107 – False Swearing – Addendum."

[2] United States v. Spicer, 71 M.J. 470, 473 (C.A.A.F. 2013) (noting the critical distinction is whether the statements relate to the official duties of either the speaker or the hearer, and whether those official duties fall within the scope of the UCMJ's reach).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1229-30 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶31.e.

6. Recommendation and Justification

Recommendation 107: Migrate the offense of false swearing from Article 134, the General Article (MCM, Part IV, ¶79), to Article 107.

This change would align similar offenses under Article 107.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1019. FALSE OFFICIAL STATEMENTS; FALSE SWEARING.

Section 907 of title 10, United States Code (article 107 of the Uniform Code of Military Justice), is amended to read as follows:

"§907. Art. 107. False official statements; false swearing

"(a) FALSE OFFICIAL STATEMENTS.—Any person subject to this chapter who, with intent to deceive—

"(1) signs any false record, return, regulation, order, or other official document, knowing it to be false; or

"(2) makes any other false official statement knowing it to be false;

shall be punished as a court-martial may direct.

"(b) FALSE SWEARING.—Any person subject to this chapter—

"(1) who takes an oath that—

"(A) is administered in a matter in which such oath is required or authorized by law; and

"(B) is administered by a person with authority to do so; and

"(2) who, upon such oath, makes or subscribes to a statement;

if the statement is false and at the time of taking the oath, the person does not believe the statement to be true, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1019 would amend Article 107 and retitle the statute as "False official statements; false swearing." As amended, Article 107 would include the offense of "False swearing," which would be migrated from Article 134 (the General article). The offense of false swearing is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 107 – False Official Statements; False Swearing – Addendum
(False Swearing)

1. Summary of Proposal

This proposal would migrate the offense of false swearing currently addressed under Article 134 (the General Article)[1] into Article 107 (False Official Statements; False Swearing). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶79, the offense requires a showing of false statements made under oath. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law has criminalized "false swearing" (distinct from perjury) since the 1921 MCM.[2] The President designated false swearing as an Article 134 offense in the 1951 MCM.[3] While originally designated in the 1951 MCM as a lesser included offense of perjury,[4] under current law false swearing does not apply to statements made in judicial proceedings.[5]

4. Contemporary Practice

The UCMJ provides three separate charges for prosecuting false or deceptive acts or statements: Article 107 (False Official Statement); Article 132 (Perjury); and Article 134 (para. 80) (False Swearing). False swearing differs from a false official statement in that the

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[1] MCM, Part IV, ¶79.

[2] MCM 1921, ¶446d at 463.

[3] MCM 1951, App. 6c, ¶139.

[4] MCM 1951, ¶213d(4).

[5] United States v. Smith, 26 C.M.R. 16, 18 (1958) (holding if a false statement is made under oath in a judicial proceeding, it must meet the requirements for perjury under Article 131 or no offense has been committed).

statement does not have to be official,[6] nor does it have to be made with the intent to deceive the recipient.[7] False swearing differs from Article 131 perjury in that it does not apply to statements made at a judicial proceeding.[8] Accordingly, the typical false swearing case involves a statement made under oath to law enforcement during an investigation.[9]

The President, under Article 56, has prescribed the following maximum punishment for the offense of False Swearing: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[10]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1621 (Perjury) sets forth a similar offense to the offense of false swearing in that the federal statute covers false statements both in and out of judicial proceedings.

6. Recommendation and Justification

Recommendation 134-79: Migrate the offense of false swearing in Article 134, the General Article (MCM, Part IV, ¶79), to Article 107.

Migrating the false swearing to Article 107 aligns the offense with the other nonjudicial false statements offense under the UCMJ. False swearing is inherently prejudicial to good order and discipline. Accordingly, it does not rely upon the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable.

8. Legislative Proposal

See Article 107 (False Official Statements), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 107 (False Official Statements), *supra*, at paragraph 9.

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[6] United States v. Spicer, 71 M.J. 470, 474-75 (C.A.A.F. 2013) (holding statements are "official" if they relate to the military duties of either the speaker or the hearer).

[7] MCM 2012, Part IV, ¶79(c)(1).

[8] *Id.*

[9] *See, e.g.,* United States v. Fisher, 58 M.J. 300, 304 (C.A.A.F. 2003) (affirming guilty plea for false swearing to law enforcement officers during interrogation; noting statement need not be false in every detail).

[10] MCM, Part IV, ¶79.e.

Article 107a (New Provision) – Parole Violation
10 U.S.C. § 907a

1. Summary of Proposal

This proposal would migrate the offense of violation of parole currently addressed under Article 134 (the General Article)[1] to a new enumerated punitive article, Article 107a (Parole violation). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶97a, the offense requires a showing that a prisoner, having been released on his word of honor from the correctional system and subject to an agreed-upon plan, has violated his word of honor and breached the terms and conditions of the plan. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated violation of parole as an Article 134 offense in the 1951 MCM[2]. However, the President only first provided elements and an explanation of the offense within Part IV of the MCM in 1998.[3]

4. Contemporary Practice

The military corrections system provides parole eligibility for all persons convicted under the code sentenced with unsuspended sentences of confinement for more than twelve months up to life imprisonment (with the possibility of parole).[4] To qualify for parole, an inmate must have served at least 1/3 of the adjudged sentence (or 20 years for a life sentence), and in no case less than 6 months of the sentence.[5]

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[1] MCM, Part IV, ¶97a.

[2] MCM 1951, App. 6c, ¶158.

[3] MCM 1998, Part IV, ¶97a.

[4] Dep't of Defense Instruction 1325.7, Administration of Military Correctional Facilities and Clemency and Parole Authority, ¶6.17 (Jul. 17, 2001, as amended on Jun. 10, 2003).

[5] *Id.* at ¶¶6.17.1.2.1-6.17.1.2.3.

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Violation of Parole: bad-conduct discharge, forfeiture of two-thirds pay per month for 6 months, and confinement for 6 months.[6]

5. Relationship to Federal Civilian Practice

While the federal penal system has discontinued parole, the Title 18 equivalent is "supervised release." Under 18 U.S.C. § 3583 a court may require the convict to complete a period of supervised release following the completion of his confinement, adhering to specific conditions set forth by the court for a period of time not exceeding 5 years. Violation of supervised release may result in revocation and re-incarceration for up to 5 years (if the underlying offense prompting supervised release was a class A felony); 3 years (class B felony); 2 years (class C or D felony); or 1 year (misdemeanors).[7]

6. Recommendation and Justification

Recommendation 134-97a: Migrate the offense of violation of parole in Article 134 (MCM, Part IV, ¶97a) to the new Article 107a.

Parole violation (or in the federal criminal system, supervised release violation) is a well recognized concept in criminal law. Accordingly, parole violation offenses do not rely upon the terminal element of Article 134 as the basis for their criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1020. PAROLE VIOLATION.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 907 (article 107 of the Uniform Code of Military Justice), as amended by section 1019, the following new section (article):

"§907a. Art. 107a. Parole violation

"Any person subject to this chapter—

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[6] MCM, Part IV, ¶97a.e.

[7] 18 U.S.C. § 3583(e)(3).

"(1) who, having been a prisoner as the result of a court-martial conviction or other criminal proceeding, is on parole with conditions; and

"(2) who violates the conditions of parole;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1020 would create a new section, Article 107a (Parole violation), and would migrate the offense of "Parole, Violation of" from Article 134 (the General article) into the new statute. This offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[8]

[8] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 108 – Military Property of United States – Sale, Loss, Damage, Destruction, or Wrongful Disposition

10 U.S.C. § 908

1. Summary of Proposal

This Report recommends no change to Article 108. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions implementing Article 108.

2. Summary of the Current Statute

Article 108 prohibits the misuse and abusing military property, whether by design or through neglect; misuse and abuse of military property includes selling, damaging, destroying, and losing it; military property includes all property, real or personal.

3. Historical Background

American military law has criminalized the loss, damage or sale of military property since the Revolutionary War.[1] The current Article 108 was derived from Articles 83 and 84 of the 1948 Articles of War and Article 8 of the 1930 Articles for Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Sale, Loss, Damage, Destruction, or Wrongful Disposition of Military Property: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[4]

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 629 (photo reprint 1920) (2d ed. 1896) (tracing the origins of the American "sale/loss/damage/destruction of military property" offense to the 1776 Articles of War, § 12, Art. 3).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1230 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 264 (1951) (noting that language "Article 108, applying to all persons subject to the Uniform Code, is more extensive than Article of War 84 which applied only to 'soldiers'.").

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶32.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1361 (Government property or contracts) sets forth a similar offense to Article 108.

6. Recommendation and Justification

Recommendation 108: No change to Article 108.

In view of the well-developed case law addressing Article 108's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 109 – Property other than Military Property of the United States – Waste, Spoilage, or Destruction

10 U.S.C. § 909

1. Summary of Proposal

This Report recommends no change to Article 109. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions implementing Article 109.

2. Summary of the Current Statute

Article 109 prohibits the willful or reckless wasting, spoiling, destroying or damaging of property other than military property of the United States.[1]

3. Historical Background

Articles 108 and 109 are companion articles. Article 108 concerns military property, while Article 109 concerns property "other than military property of the United States." Article 109 was derived from Article 89 of the 1948 Articles of War.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Waste, Spoilage, or Destruction of Property other than Military Property of the United States: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[4]

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[1] This category of applicable property is broad, encompassing both real and personal property. "Wasting" and "spoiling" pertains only to real property. MCM, Part. IV, ¶33.c(1). Whereas "damaging" and "destroying" pertains only to the personal property of another. *Id.* at ¶33.c(2).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1230 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶33.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. §§ 1362-67 set forth similar offenses to Article 109; these provisions concern damage or injury to instrumentalities or items used in interstate and foreign commerce.

6. Recommendation and Justification

Recommendation 109: No change to Article 109.

In view of the well-developed case law addressing Article 109's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 109a (New Provision) – Mail Matter, Taking, Opening, etc.
10 U.S.C. § 909a

1. Summary of Proposal

This proposal would migrate the offense of taking, opening, secreting, destroying, or stealing mail, currently addressed under Article 134 (the General Article)[1] to a new enumerated punitive article, Article 109a (Mail matter, taking, opening, etc). Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶93, the offense requires a showing that the accused wrongfully took, opened, secreted, destroyed or stole certain mail. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

Previously, the offenses of "failing to deliver the mail, or opening the mail" were charged under the General Article of the Articles of War of 1874.[2] The President first designated the "mail offenses" as an Article 134 offense in the 1951 MCM.[3] The military offenses of taking, opening, secreting, destroying, or stealing mail are designed to ensure continuous protection of mail matter regardless of whether it is part of the United States Postal Service system or the military mail system.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Mail: Taking, Opening, Secreting, Destroying, or Stealing: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[5]

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[1] MCM, Part IV, ¶93.

[2] WINTHROP, MILITARY LAW AND PRECEDENTS 731 (photo reprint 1920) (2d ed. 1896).

[3] MCM 1951, App. 6c, ¶151.

[4] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.38[2] at 901 (2d ed. 2012).

[5] MCM, Part IV, ¶93.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1702 (Obstruction of correspondence) sets forth a similar offense to the offense of taking, opening, secreting, destroying, or stealing mail Article 134.

6. Recommendation and Justification

Recommendation 134-93: Migrate the offense of taking, opening, secreting, destroying, or stealing mail in Article 134 (MCM, Part IV, ¶93) to the new Article 109a.

The offense of taking, opening, secreting, destroying, or stealing mail is a well recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1021. WRONGFUL TAKING, OPENING, ETC. OF MAIL MATTER

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 909 (article 109 of the Uniform Code of Military Justice), the following new section (article):

"§909a. Art. 109a. Mail matter: wrongful taking, opening, etc.

"(a) TAKING.—Any person subject to this chapter who, with the intent to obstruct the correspondence of, or to pry into the business or secrets of, any person or organization, wrongfully takes mail matter before the mail matter is delivered to or received by the addressee shall be punished as a court-martial may direct.

"(b) OPENING, SECRETING, DESTROYING, STEALING.—Any person subject to this chapter who wrongfully opens, secretes, destroys, or steals mail matter before the

mail matter is delivered to or received by the addressee shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1021 would create a new section, Article 109a (Mail matter: wrongful taking, opening, etc.), and would migrate the offense of "Mail: taking, opening, secreting, destroying, or stealing" from Article 134 (the General article) into the new statute. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 110 – Improper Hazarding of Vessel
10 U.S.C. § 910

1. Summary of Proposal

This proposal would amend Article 110 (Improper hazarding of vessel) to also address improper hazarding of aircraft. Part II of the Report will address any changes needed in the Manual for Courts-Martial provisions implementing Article 110.

2. Summary of the Current Statute

Article 110 prohibits hazarding or suffering another to hazard a vessel of the armed forces, whether by design or through negligence. "Hazard" means to put in danger of loss or injury.

3. Historical Background

Military law has criminalized hazarding a vessel since the first Articles for the Government of the Navy in 1799.[1] The current Article 110 was derived from Articles 8 and 9 of the 1930 Articles for the Government of the Navy.[2] As construed by the MCM, "vessel" pertains only to "watercraft."[3] Since the UCMJ was enacted in 1950,[4] Article 110 has remained unchanged.

4. Contemporary Practice

Since no punitive article directly addresses the improper hazarding of aircraft, the military has had to resort to other punitive articles to respond to misconduct relating to aircraft, such as Article 92 (Dereliction of duty) (confinement for 2 years) and Article 108 (Military property of the United States – sale, loss, damage, destruction, or wrongful disposition) (confinement for 10 years).[5] However, these other offenses do not carry the same maximum punishment as Article 110 (Improper hazarding of vessel).

The President, under Article 56, has prescribed the following maximum punishments for the offense of Improper Hazarding of Vessel: if done willfully and wrongfully, death or such

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[1] AGN 42 of 1799.

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1230 (1949).

[3] MCM, Part IV, ¶35.c(2) (citing to 1 U.S.C. § 3, defining "vessel" as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.").

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] *See, e.g.*, United States v. Ortiz, 25 M.J. 570, 572-73 (A.F.C.M.R. 1987) (disconnecting electrical relay in aircraft's landing system constituted willful damage to government property under Article 108).

other punishment as a court-martial may direct; otherwise, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1115 (Misconduct or neglect of ship officers) and § 2280 (violence against maritime navigation) set forth a similar offenses to Article 110.

By contrast, 18 U.S.C. § 32 (Destruction of aircraft or aircraft facilities) sets forth an offense not covered by Article 110. Additionally, 10 U.S.C. § 950t(23) (Military Commissions Act) also sets forth an offense regarding the crime of hijacking or hazarding a vessel or aircraft, which is broader than Article 110.

6. Recommendation and Justification

Recommendation 110: Amend Article 110 to also address improper hazarding of aircraft.

No punitive article currently addresses the potential for catastrophic loss of life and property, as well as harm to the strategic interests of the United States, caused by the improper hazarding of an aircraft.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to offenses involving aircraft in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1022. IMPROPER HAZARDING OF VESSEL OR AIRCRAFT.

Section 910 of title 10, United States Code (article 110 of the Uniform Code of Military Justice), is amended to read as follows:

"§910. Art. 110. Improper hazarding of vessel or aircraft

"(a) WILLFUL AND WRONGFUL HAZARDING.—Any person subject to this chapter who, willfully and wrongfully, hazards or suffers to be hazarded any vessel or

[6] MCM, Part IV, ¶34.e.

aircraft of the armed forces shall be punished by death or such other punishment as a court-martial may direct.

"(b) NEGLIGENT HAZARDING.—Any person subject to this chapter who negligently hazards or suffers to be hazarded any vessel or aircraft of the armed forces shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1022 would amend Article 110 (Improper hazarding of vessel) to also prohibit improper hazarding of an aircraft. Although other punitive articles, such as Article 92 (dereliction of duty) and Article 108 (destruction of military property) may speak to the loss or destruction of government property generally, no punitive article captures the act of improper hazarding of an aircraft, considering the potential for catastrophic loss of life and property, as well as harm to the strategic interests of the United States. This amendment would align the conduct involving an aircraft with the maximum punishments authorized under Article 110.

Article 111 (Current Law) – Drunken or Reckless Operation of Vehicle, Aircraft, or Vessel

10 U.S.C. § 911

1. Summary of Proposal

This proposal would amend Article 111 to specify a breath or blood alcohol content (BAC) limit of .08, consistent with federal and state practice. This Report also proposes that it be redesignated as Article 113 as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial implementing the new Article 111 as necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 111 prohibits operating or controlling any vehicle, vessel, or aircraft (1) in a reckless manner; (2) while drunk or impaired; or (3) when the alcohol concentration in the accused's blood equals or exceeds 0.10 grams of alcohol per 1000 milliliters of blood, or 0.10 grams per 210 liters of breath (or lower, depending upon the jurisdiction of the offense).

3. Historical Background

Drunk driving first appeared in military law as a designated offense under Article 96 of the 1948 Articles of War.[1] In 1950, the offense of drunk driving was included in the UCMJ as Article 111.[2] The statute has been amended five times since the UCMJ was enacted in 1950: in 1986 it was amended to prohibit the operation of a vehicle "while impaired by a substance,"[3] in 1992 it was expanded to cover the "operation of a vehicle, aircraft or vessel,"[4] and in 1993 the blood alcohol level of 0.10 grams "or more" of alcohol was specified.[5] In 2003, Article 111 was amended to provide that the BAC limit could be .010 or the limit under the law of the state where the conduct occurred, whichever was lower.[6]

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[1] *See* MCM App. 4, ¶142 (1949).

[2] Article 111, UCMJ (1950).

[3] NDAA FY 1986, Pub. L. No. 99-570, Title III, § 3055, 100 Stat. 3207, 3207-76 (1986).

[4] NDAA FY 1993, Pub. L. No. 102-484, Div. A, Title X, § 1066(a)(1), 106 Stat. 2315, 2506 (1992).

[5] NDAA FY 1994, Pub. L. No. 103-160, Div. A, Title V, § 576(a), 107 Stat. 1547, 1677 (1993).

[6] NDAA FY 2004, Pub. L. No. 108-136, Div. A, Title V, § 552, 117 Stat. 1392, 1481-82 (2003).

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Drunken or Reckless Operation of Vehicle, Aircraft, or Vessel: if the operation of the vehicle resulted in personal injury, dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to 18 months; otherwise, bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[7]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 13 (Laws of States adopted for areas within federal jurisdiction), the "Assimilative Crimes Act" adopts state law on federal enclaves of exclusive or concurrent federal jurisdiction. As a matter of federal regulation, 0.08 is the applicable blood alcohol level on federal national parks.[8]

Since July of 2004, every state, the District of Columbia, and Puerto Rico have enacted 0.08 BAC per se drunk driving laws.[9]

6. Recommendation and Justification

Recommendation 111: Redesignate Article 111 as Article 113, and amend it to specify a breath or BAC limit of .08.

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to driving under the influence in the civilian sector insofar as practicable in military criminal practice.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1025. LOWER BLOOD ALCOHOL CONTENT LIMITS FOR CONVICTION OF DRUNKEN OR RECKLESS OPERATION OF VEHICLE, AIRCRAFT, OR VESSEL.

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[7] MCM, Part IV, ¶35.e.

[8] 36 C.F.R. § 4.23 (enacted 6 August 2003) (current through 5 March 2015).

[9] *See* GOVERNOR'S HIGHWAY SAFETY ADMIN, DRUNK DRIVING LAWS (March 2015), *available at* http://www.ghsa.org/html/stateinfo/laws/impaired_laws.html last accessed 11 March 2015.

Subsection (b)(3) of section 913 of title 10, United States Code (article 113 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(9), is amended—

(1) by striking "0.10 grams" both places it appears and inserting "0.08 grams"; and

(2) by adding at the end the following new sentence: "The Secretary may by regulation prescribe limits that are lower than the limits specified in the preceding sentence, if such lower limits are based on scientific developments, as reflected in Federal law of general applicability.".

9. Sectional Analysis

Section 1025 would amend Article 113 (Drunken or reckless operation of vehicle, aircraft, or vessel), as transferred and redesignated by Section 1001(9), *supra*, to align the BAC limits in the offense to the prevailing legal standard in the United States. All other jurisdictions in the United States, including all fifty states, each territory, the District of Columbia, and the national parks, have established BAC limits no higher than .08 for the offense of drunk driving. The amendment also would provide flexibility for the Department of Defense to prescribe lower breath/blood alcohol limits should scientific developments or other factors in the civilian sector lead to lower limits.

Article 111 (New Location) – Leaving Scene of Vehicle Accident

10 U.S.C. § 911

1. Summary of Proposal

This proposal would migrate the offense of fleeing the scene of any accident currently addressed under Article 134 (the General Article)[1] to a new enumerated punitive article, Article 111 (Leaving scene of vehicle accident). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶82, the offense of fleeing the scene of an accident requires a showing that the accused was either the driver or senior passenger of a vehicle involved in an accident and that the accused either drove away from the scene of the accident or wrongfully ordered or permitted the driver to do so, without providing assistance to an injured victim or providing identification. "Senior passenger" means a person who was the superior commissioned or noncommissioned officer of the driver.[2] Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated "fleeing the scene of an accident" as an Article 134 offense in the 1951 MCM.[3] The offense targets reckless or negligent disregard for the safety of others; it does not require an identifiable victim to be placed in apprehension of receiving immediate bodily harm.[4] The offense is intended to deter drivers of motor vehicles involved in accidents from seeking to avoid civil or criminal liability by escaping before their identity can be established, to avoid leaving persons injured in an accident in distress or danger for want of proper medical care, and to avoid the prejudice to good order and

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[1] MCM, Part IV, ¶82.

[2] MCM, Part IV, ¶82.b(2)(c).

[3] MCM 1951, App. 6c, ¶142.

[4] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.26[2] at 828 (2d ed. 2012).

discipline or discredit to the armed forces that would occur if servicemembers committed hit-and-run accidents with impunity.[5]

4. Contemporary Practice

The primary distinction between military and civilian "hit and run" statutes is that the UCMJ imposes an affirmative responsibility on the senior passenger (if a noncommissioned or commissioned officer) to prevent a driver from fleeing the scene after an accident. The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Fleeing the Scene of an Accident: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[6]

5. Relationship to Federal Civilian Practice

There is no direct Title 18 counterpart to "fleeing the scene of an accident." However other federal law (*i.e.* District of Columbia Statute § 50-2201.05(a)(1)-(3)), criminalizes fleeing the scene of an accident, and every state has adopted a "hit and run" statute.[7]

6. Recommendation and Justification

Recommendation 134-82: Migrate the offense of fleeing the scene of an accident in Article 134 (MCM, Part IV, ¶82) to Article 111.

Migrating the fleeing the scene of an accident offense to its own enumerated punitive article: Article 111, aligns the offense with similar subject matter offenses involving misuse of vehicles under the UCMJ. While the UCMJ is unique in imposing liability upon a "senior passenger" for a "hit and run", fleeing the scene of an accident itself is a well recognized area of criminal law. Accordingly, this offense does not rely upon the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1023. LEAVING SCENE OF VEHICLE ACCIDENT.

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[5] *Id.* (citing United States v. Thiel, 18 C.M.R. 934, 936-38 (A.F.C.M.R. 1955)).

[6] MCM, Part IV, ¶82.e.

[7] *See* http://traffic.findlaw.com/traffic-tickets/leaving-the-scene-of-an-accident-hit-and-run-state-laws.html *last accessed* 16 March 2015.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 910 (article 110 of the Uniform Code of Military Justice), as amended by section 1022, the following new section (article):

"§911. Art. 111. Leaving scene of vehicle accident

"(a) DRIVER.—Any person subject to this chapter—

"(1) who is the driver of a vehicle that is involved in an accident that results in personal injury or property damage; and

"(2) who wrongfully leaves the scene of the accident—

"(A) without providing assistance to an injured person; or

"(B) without providing personal identification to others involved in the accident or to appropriate authorities;

shall be punished as a court-martial may direct.

"(b) SENIOR PASSENGER.—Any person subject to this chapter—

"(1) who is a passenger in a vehicle that is involved in an accident that results in personal injury or property damage;

"(2) who is the superior commissioned or noncommissioned officer of the driver of the vehicle or is the commander of the vehicle; and

"(3) who wrongfully and unlawfully orders, causes, or permits the driver to leave the scene of the accident—

"(A) without providing assistance to an injured person; or

"(B) without providing personal identification to others involved in the accident or to appropriate authorities;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1023 would amend Article 111 and retitle the statute as "Leaving scene of vehicle accident." As amended, the statute would include the offense of "Fleeing the scene of an accident," which would be migrated from Article 134 (the General article) to place it next to other offenses under the UCMJ involving misuse of vehicles. The offense of fleeing the scene of an accident is a well-recognized concept in criminal law. Accordingly, this offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[8]

[8] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 112 – Drunk on Duty
10 U.S.C. § 912

1. Summary of Proposal

This proposal would retain the current provisions under Article 112, with minor changes, and would migrate into the statute the offenses of incapacitation for the performance of duties and drunk prisoner, both of which currently are addressed under Article 134 (the General Article).[1] Article 112 would be retitled as "Drunkenness and Other Incapacitation Offenses." Part II of the Report will consider whether any changes are needed in the Manual for Courts-Martial provisions implementing Article 112.

2. Summary of the Current Statute

Article 112 prohibits a person, other than sentinels or look-outs (who are covered in Article 113), from being drunk on duty.

3. Historical Background

American military law has forbidden drunkenness while on duty since the Revolutionary War.[2] Article 112 was derived from Article 85 of the 1948 Articles of War and Article 8 of the 1930 Articles for Government of the Navy.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

According to the MCM, "duty" means military duty and includes any duty that a servicemember is legally required to perform by a superior authority; a commander is always on duty when in the actual exercise of command; in areas of active hostilities, all members of a command are continuously on duty.[5]

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[1] MCM, Part IV, ¶¶75, 76. The offenses of incapacitating drunkenness for the performance of duties, drunk and disorderly conduct, and drunk prisoner are discussed in this Report under "Article 112 – Drunk on Duty – Addendum."

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 611 (photo reprint 1920) (2d ed. 1896) (tracing the origin for AW 38 of 1874 back to AW 20 of 1775).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1230 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶36.c(2); *see also* DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.32[2] at 425 (2d ed. 2012) (citations omitted).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Drunk on Duty: bad-conduct discharge, forfeiture of all pay and allowances and confinement for 9 months.[6]

5. Relationship to Federal Civilian Practice

Article 112 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 112: Migrate the offenses of incapacitation for the performance of duties and drunk prisoner (currently in Article 134, MCM, Part IV, ¶¶75, 76) to Article 112.

This proposal would align similar offenses under Article 112.

The exclusion of sentinels and lookouts from liability under Article 112 (Drunk on Duty) would be removed in order to resolve the ambiguity between Articles 112 and 113 (Misbehavior of sentinel) concerning the "on post" status of sentinels and lookouts.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1024. DRUNKENNESS AND OTHER INCAPACITATION OFFENSES.

Section 912 of title 10, United States Code (article 112 of the Uniform Code of Military Justice), is amended to read as follows:

"§912. Art. 112. Drunkenness and other incapacitation offenses

"(a) DRUNK ON DUTY.—Any person subject to this chapter who is drunk on duty shall be punished as a court-martial may direct.

"(b) INCAPACITATION FOR DUTY FROM DRUNKENNESS OR DRUG USE.—Any person subject to this chapter who, as a result of indulgence in any alcoholic beverage or

[6] MCM, Part IV, ¶36.e.

any drug, is incapacitated for the proper performance of duty shall be punished as a court-martial may direct.

"(c) DRUNK PRISONER.—Any person subject to this chapter who is a prisoner and, while in such status, is drunk shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1024 would amend Article 112 and retitle the statute as "Drunkenness and other incapacitation offenses." As amended, Article 112 would include the offenses of "Drunkenness—incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug" and "Drunk prisoner," which would be migrated from Article 134 (the General article). The express exclusion of sentinels and lookouts under Article 112 would be removed in order to resolve the ambiguity between Articles 112 and 113 concerning the "on post" status of sentinels and lookouts. The wrongfulness of being incapacitated for duty or as a prisoner is a well-recognized concept in military criminal law. Accordingly, this offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[7]

[7] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 112 – Drunkenness and Other Incapacitation Offenses – Addendum 1

(Drunkenness – Incapacitation for Performance of Duties through Prior Wrongful Indulgence in Intoxicating Liquor or any Drug)

1. Summary of Proposal

This proposal would migrate the offense of drunkenness (incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug) currently addressed under Article 134 (the General Article)[1] to Article 112 (Drunkenness and other incapacitation offenses). Part II of this Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM Part IV, ¶76, the offense of incapacitating drunkenness for performance of duties requires proof that the accused had wrongfully indulged in intoxicating liquor or any drug and, as a result, was incapacitated to properly perform certain duties. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized "drunken incapacitation for duty" via the "General Article" since the 1775 Articles of War.[2] Under the UCMJ, the President has designated drunken incapacitation for duty as an Article 134 offense since the 1951 MCM.[3]

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[1] MCM, Part IV, ¶76.

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 722-23 (photo reprint 1920) (2d ed. 1896) (citations omitted) (noting "There can indeed rarely be an occasion when a soldier, or an officer, in camp or at a military post, may become intoxicated, and thus incapacitated for properly answering a call for duty, without rendering himself liable to be treated as an offender within the terms of [the General Article]."); *see also id.* at 727 ("Rendering himself unfit for duty by excessive use of spirituous liquors.") (citations omitted).

[3] MCM 1951, App. 6c, ¶135.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of incapacitating drunkenness for the performance of duties: forfeiture of two-thirds pay per month for 3 months and confinement for 3 months.[4]

5. Relationship to Federal Civilian Practice

The offense of incapacitating drunkenness for the performance of duties is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 134-76: Migrate the offense of incapacitating drunkenness for the performance of duties (currently in Article 134, Part IV, ¶76), to Article 112.

Migrating the offense of drunken incapacitation for duty to Article 112 aligns the offense with the existing UCMJ drunkenness offense. Drunken incapacitation for duty is inherently prejudicial to good order and discipline. Accordingly, it does not rely upon the terminal element of Article 134 as the basis for its criminality.[5]

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

See Article 112 (Drunk on Duty), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 112 (Drunk on Duty), *supra*, at paragraph 9.

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[4] MCM, Part IV, ¶76.e.

[5] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 112 – Drunkenness and Other Incapacitation Offenses – Addendum 2
(Drunk Prisoner)

1. Summary of Proposal

This proposal would migrate the offense of drunk prisoner currently addressed under Article 134 (the General Article)[1] to Article 112 (Drunkenness and other incapacitation offenses). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶75, the offense of drunk prisoner requires proof that the accused was drunk, disorderly, or both, upon a ship or some other place. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized "drunk and disorderly conduct" generally via the "General Article" since the 1775 Articles of War.[2] However, neither the Articles of War nor UCMJ Article 112 (Drunk on duty) addressed the circumstance of a drunk prisoner specifically. The President has designated "drunk prisoner" as an Article 134 offense since the 1951 MCM.[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of drunk prisoner: forfeiture of two-thirds pay per month for 3 months and confinement for 3 months.[4]

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[1] MCM, Part IV, ¶75.

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 722 (photo reprint 1920) (2d ed. 1896) (citations omitted) ("Among 'disorders,' it may be noted here that simple *drunkenness* is in general a military offense in violation of this Article . . . it has always been a more heinous offence in the military than in the civil code.") (citations omitted).

[3] MCM 1951, App. 6c, ¶134.

[4] MCM, Part IV, ¶75.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1791 (Providing or Possessing Contraband in Prison) sets forth a similar offense to the offense of drunk prisoner.

6. Recommendation and Justification

Recommendation 134-75: Migrate the offense of drunk prisoner (currently in Article 134, Part IV, ¶75), to Article 112.

Migrating the offense drunk prisoner to Article 112 aligns the offense with the existing UCMJ drunkenness offenses. Drinking while incarcerated would ordinarily be in violation of confinement facility regulations. Accordingly, it is inherently prejudicial to good order and discipline and is not reliant upon the terminal element of Article 134 as the basis for its criminality. Prisoners using drugs, as opposed to alcohol, may be punished under Article 112a, Article 92, or Article 134 as appropriate.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 112 (Drunk on Duty), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 112 (Drunk on Duty), *supra*, at paragraph 9.

Article 112a – Wrongful Use, Possession, etc., of Controlled Substances

10 U.S.C. § 112a

1. Summary of Proposal

This Report recommends no change to Article 112a. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions implementing Article 112a.

2. Summary of the Current Statute

Article 112a prohibits the wrongful use, possession, manufacture, distribution, importation into or export out of the customs jurisdiction of the United States, or the introduction into an installation, vessel, vehicle, or aircraft any prohibited controlled substance.

3. Historical Background

The wrongful use or possession of a controlled substance was punished as a violation of the General Article under Article 96 of the 1948 Articles of War.[1] When the UCMJ was enacted in 1950, unlawful drug use and possession continued to be prosecuted as a violation of the General Article under Article 134.[2] Article 112a was enacted in 1983, prohibiting wrongful use and possession of certain controlled substances and incorporating prohibitions against other substances as defined by the Controlled Substances Act.[3] Article 112a has remained unchanged since then.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for offenses under Article 112a: dishonorable discharge, forfeiture of all pay and allowances, and, depending on the controlled substance and whether it was distributed, confinement for up to 15 years.[4] The services in some instances may also prosecute use and possession

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[1] MCM, App. 4, ¶¶173, 182 (1949).

[2] MCM App. 6, ¶¶136, 137 (1951).

[3] Military Justice Act of 1983, Pub. L. No. 98-209, § 8(a), 97 Stat. 1393, 1403-04 (1983); *see also* 21 U.S.C. 812.

[4] MCM, Part IV, ¶37.e.

of intoxicating substances not proscribed by the Controlled Substances Act as a violation of Article 92 if the substance has been prohibited by a lawful general order or regulation.[5]

5. Relationship to Federal Civilian Practice

21 U.S.C. § 841(a) (Drug abuse prevention and control) sets forth similar offenses to Article 112a. The primary distinction between Title 21 drug offenses and UCMJ drug offenses are: (1) Title 21 does not separately criminalize unauthorized "use" of a controlled substance;[6] and (2) the MCM provides for increased punishments when a drug offense occurs in a deployed environment.[7]

6. Recommendation and Justification

Recommendation 112a: No change to Article 112a.

In view of the well-developed case law addressing Article 112a's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[5] *See e.g.* OPNAVINST 5350.4D (Navy Alcohol and Drug Abuse Prevention and Control instruction, prohibiting use of controlled substance analogues (designer drugs), the illicit use of inhalants (huffing), the illicit use of anabolic steroids, and salvia divinorum.).

[6] 22 U.S.C. § 841(a)(1) (criminalizing the manufacture, distribution, or dispersion, or possession with intent to manufacture, distribute, or dispense, a controlled substance).

[7] *See* MCM, Part IV, ¶37.e(2)(b) (enhancing maximum punishments for any Article 112a drug offense by five years when that offense is committed in a "imminent danger/hostile fire" zone as designated under 37 U.S.C. § 310).

Article 113 (Current Law) – Misbehavior of Sentinel
10 U.S.C. § 913

1. Summary of Proposal

This proposal would redesignate Article 113 as Article 95 and migrate into the statute the loitering portion of the sentinel or lookout offenses, currently addressed under Article 134 (the General Article).[1] Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 95 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 113 prohibits misbehavior by a person on guard duty or while a lookout. Misbehavior includes being found drunk or sleeping, or leaving a post before being regularly relieved. In time of war, the offense is punishable by death or such other punishment as a court-martial may direct.

3. Historical Background

American military law has criminalized misconduct by a sentinel since the 1775 Articles of War.[2] The current Article 113 was derived from Article 86 of the 1948 Articles of War and Article 4 of the 1930 Articles for Government of the Navy.[3] The word lookout was added to cover Navy terminology.[4] Since the UCMJ was enacted in 1950,[5] the statute has remained unchanged.

4. Contemporary Practice

Article 113 encompasses only those specifically assigned as sentinels or lookouts, and is not applicable to an officer or enlisted person of the guard, or of a ship's watch.[6]

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[1] MCM Part IV, ¶104. The loitering portion of the offense of "offenses against or by sentinel or lookout" is discussed in this Report under "Article 113 Misbehavior of a Sentinel or Lookout – Addendum."

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 616 (photo reprint 1920) (2d ed. 1896) (discussing the importance of the sentinel's alertness as the essence of their service).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1230 (1949).

[4] LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 266 (1951).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[6] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.34[2] at 447(2d ed. 2012).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Misbehavior of Sentinel or Lookout: if committed in time of war, death or such other punishment as a court-martial may direct; otherwise, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[7]

5. Relationship to Federal Civilian Practice

Article 113 is a unique military offense, with no counterpart in federal civilian practice.

6. Recommendation and Justification

Recommendation 113: Redesignate Article 113 as Article 95 and migrate the loitering portion of the sentinel or lookout offenses (currently in Article 134, the General Article, Part IV, ¶104) to the new Article 95.

This change would align similar offenses under Article 95.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

See Article 95 (Offenses by sentinel or lookout), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 95 (Offenses by sentinel or lookout), *supra*, at paragraph 9.

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[7] MCM, Part IV, ¶38.e.

Article 114 (Current Law) – Dueling
10 U.S.C. § 914

1. Summary of Proposal

This proposal would retain the existing provisions in Article 114 and migrate into the statute the offenses of reckless endangerment, dueling, discharge of firearm/endangering human life, and carrying of a concealed weapon—all of which are currently addressed under Article 134 (the General Article).[1] Article 114 would be retitled as "Endangerment offenses." Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 114 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 114 prohibits fighting, promoting, or failing to report a challenge to a duel. A duel is defined as combat between two persons for private reasons fought with deadly weapons by prior agreement.

3. Historical Background

American military law has criminalized dueling since the 1775 Articles of War.[2] The current Article 114 was derived from Article 91 of the 1948 Articles of War and Article 9 of the 1930 Articles for the Government of the Navy.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Dueling: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.[5]

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[1] MCM, Part IV, ¶¶81, 100a, and 112. The offenses of reckless endangerment, discharge of firearm/endangering human life, and carrying of a concealed weapon are discussed in this Report under "Article 114 – Dueling – Addendum."

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 590 (2nd ed. 1920) (tracing the origins of the American military "dueling" offense from Article of War XI of 1775).

[3] *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1231 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶39.e.

5. Relationship to Federal Civilian Practice

Article 114 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 114: Migrate the offenses of reckless endangerment, discharge of firearm/endangering human life, and carrying of a concealed weapon (currently in Article 134, the General Article, MCM, Part IV, ¶¶81, 100a, and 112) to Article 114.

In view of the well-developed case law addressing Article 114's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1026. ENDANGERMENT OFFENSES.

Section 914 of title 10, United States Code (article 114 of the Uniform Code of Military Justice), is amended to read as follows:

"§914. Art. 114. Endangerment offenses

"(a) RECKLESS ENDANGERMENT.—Any person subject to this chapter who engages in conduct that—

"(1) is wrongful and reckless or is wanton; and

"(2) is likely to produce death or grievous bodily harm to another person;

shall be punished as a court-martial may direct.

"(b) DUELING.—Any person subject to this chapter—

"(1) who fights or promotes, or is concerned in or connives at fighting a duel; or

"(2) who, having knowledge of a challenge sent or about to be sent, fails to report the facts promptly to the proper authority;

shall be punished as a court-martial may direct.

"(c) FIREARM DISCHARGE, ENDANGERING HUMAN LIFE.—Any person subject to this chapter who, willfully and wrongly, discharges a firearm, under circumstances such as to endanger human life shall be punished as a court-martial may direct.

"(d) CARRYING CONCEALED WEAPON.—Any person subject to this chapter who unlawfully carries a dangerous weapon concealed on or about his person shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1026 would migrate the offenses of "Reckless endangerment," "Firearm, discharging—willfully, under such circumstances as to endanger human life," and "Weapon: concealed carrying" from Article 134 (the General article) to the redesignated Article 114 (Endangerment offenses), which currently includes the offense of "Dueling." The wrongfulness of failing to maintain weapon discipline is a well-recognized concept in criminal law. Accordingly, these offenses do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 114 – Endangerment Offenses
Addendum 1
(Reckless Endangerment)

1. Summary of Proposal

This proposal would migrate the offense of reckless endangerment currently addressed under Article 134 (the General Article)[1] to the newly redesignated Article 114 (Endangerment offenses). Part II of the Report will address changes to the Manual for Courts-Martial provisions implementing the new Article 114 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶100a, the offense requires proof that the accused was wrongfully engaged in reckless or wanton conduct that was likely to produce death or grievous bodily harm to another person. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated reckless endangerment as an Article 134 offense in 1999.[2]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Reckless Endangerment: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.[3]

5. Relationship to Federal Civilian Practice

There is no Title 18 equivalent offense to reckless endangerment. However, the Model Penal Code contains the offense of recklessly endangering another person,[4] which is similar to the military offense of reckless endangerment.

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[1] MCM, Part IV, ¶100a.

[2] MCM 2000, Part IV, ¶100a; App. 23 (Analysis of Punitive Articles) at A23-21 (citing United States v. Woods, 28 M.J. 318, 319-20 (C.M.A. 1989) (HIV positive servicemember convicted under Article 134 after continuing to have unprotected sex with partners without disclosing his HIV status contrary to direction of his military superiors as the policy basis for the President designating "reckless endangerment" as an offense).

[3] MCM, Part IV, ¶100a.e.

6. Recommendation and Justification

Recommendation 134-100a: Migrate the offense of reckless endangerment (currently in Article 134, MCM, Part IV, ¶100a), to Article 114.

Migrating the reckless endangerment offense to Article 114 (Endangerment Offenses) aligns the offense with other similar subject matter offenses which are also migrating to Article 114 (*e.g.* willful discharge of a firearm endangering human life). Wanton and reckless conduct creating a likelihood of inflicting death or grievous bodily harm is a recognized concept in criminal law. Accordingly, reckless endangerment does not rely upon the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 114 (Dueling) (Endangerment offenses, as amended), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 114 (Dueling) (Endangerment offenses, as amended), *supra*, at paragraph 9.

[4] MODEL PENAL CODE § 211.2 (Recklessly Endangering Another Person).

Article 114 – Endangerment Offenses – Addendum 2
(Firearm, Discharging – Willfully, Under Such Circumstances as to Endanger Human Life)

1. Summary of Proposal

This proposal would migrate the offense of willful discharge of a firearm/endangering human life currently addressed under Article 134 (the General Article)[1] to Article 114 (Endangerment offenses). Part II of this Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶81 the offense requires a showing that the accused discharged a firearm, willfully and wrongfully, and that the discharge was under circumstances such as to endanger human life. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated "willful discharge of a firearm/endangering human life" as an Article 134 offense in 1951.[2] The offense targets reckless or negligent disregard for the safety of others; it does not require an identifiable victim to be placed in apprehension of receiving immediate bodily harm.[3]

4. Contemporary Practice

The offense requires that there is a "reasonable potential" that human life could have been endangered.[4] It does not require human life to have been actually endangered by the willful discharge of a firearm. Under this standard, firing a weapon into an empty barracks room that an accused does not know to be unoccupied[5]; firing several rounds across a highway

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[1] MCM, Part IV, ¶81.

[2] MCM 1951, App. 6c, ¶141.

[3] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.26[2] at 828 (2d ed. 2012).

[4] MCM, Part IV, ¶81.c.

[5] United States v. Potter, 35 C.M.R. 243, 245 (C.M.A. 1965).

used as a main supply route;[6] firing rounds into the ground near other soldiers[7] all constitute "willful discharge of a firearm under circumstances to threaten human life."

The President, under Article 56, has prescribed the following maximum punishment for the offense of Willful Discharge of Firearm/Endangering Human Life: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.[8]

5. Relationship to Federal Civilian Practice

The offense of willful discharge of firearm/endangering human life has no direct federal civilian counterpart. Many states, however, have some type of comparable law, such as firing a weapon within city limits, or firing from a vehicle or building.[9]

6. Recommendation and Justification

Recommendation 134-81: Migrate the offense of willful discharge of firearm/endangering human life (currently in Article 134, MCM, Part IV, ¶81), to Art. 114.

Migrating the willful discharge of a firearm under circumstances to endanger human life offense to Article 114 Endangerment Offenses logically aligns the offense with the other offenses involving criminal use of firearms under the UCMJ. Failure to maintain weapon discipline that creates an actual risk of bodily harm to others is inherently prejudicial to good order and discipline. Accordingly, this offense does not rely upon the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 114 (Dueling) (Endangerment offenses, as amended), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 114 (Dueling) (Endangerment offenses, as amended), *supra*, at paragraph 9.

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[6] United States v. Christey, 6 C.M.R. 379, 381 (A.B.R. 1952).

[7] United States v. Simmons, 5 C.M.R. 119, 125 (C.M.A. 1952).

[8] MCM, Part IV, ¶81.e.

[9] *See, e.g.,* Ark. Code Ann. § 5-74-107; Colo. Rev. Stat. Ann. § 18-12-107.5; Fla. Stat. Ann. § 790.15; Idaho Code Ann. § 18-3317; Neb. Rev. Stat. § 28-1212.02; S.C. Code Ann. § 16-23-440; Va. Code Ann. § 18.2-279.

Article 114 – Endangerment Offenses – Addendum 3
(Weapon Concealed/Carry)

1. Summary of Proposal

This proposal would migrate the offense of carrying a concealed weapon currently addressed under Article 134 (the General Article)[1] to the newly redesignated Article 114 (Endangerment offenses). Part II of the Report will address changes in the Manual provisions implementing the new Article 114.

2. Summary of the Current Statute.

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶112, the offense requires a showing that the accused unlawfully carried a dangerous concealed weapon on or about his person. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated carrying a concealed weapon as an Article 134 offense in the 1951 MCM.[2]

4. Contemporary Practice

Unlawfully carrying a concealed weapon is a general-intent crime; there is no requirement to prove that the accused intended to violate the law so long as he had the intent to conceal the weapon on or about his person.[3] A weapon is "concealed" under this offense if it is readily available to the accused and is kept from sight.[4]

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[1] MCM, Part IV, ¶112.

[2] MCM 1951, App. 6c, ¶175.

[3] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.60[3][b][i] (2d ed. 2012); *see also* United States v. Bishop, 2 M.J. 741, 744-45 (A.F.C.M.R. 1977) (accused, mistakenly believing it was not a violation to carry a concealed weapon on post, concealed a .45 caliber pistol under the driver's seat of his vehicle; court held that his lack of intent to violate the law was irrelevant to the issue of guilt for a general intent crime but was an appropriate matter for mitigation).

[4] MCM, Part IV, ¶112.c.(1).

The President, under Article 56, has prescribed the following maximum punishment for the offense of carrying a concealed weapon: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.[5]

5. Relationship to Federal Civilian Practice

Federal law authorizes only law enforcement officers and retired law enforcement officers to carry concealed weapons. 18 U.S.C. §§ 926B, 926C. Most states authorize lay citizens to carry a concealed weapon, but require persons to have a permit.[6]

6. Recommendation and Justification

Recommendation 134-112: Migrate the offense of carrying a concealed weapon (currently in Article 134, MCM, Part IV, ¶112), to Article 114.

Migrating the carrying a concealed weapon offense logically aligns the offense with the other weapons based offenses under the newly reconstituted Article 114. Carrying a concealed weapon, without authorization, is a well-recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.[7]

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by reducing the potential for unnecessary litigation in this area.

8. Legislative Proposal

See Article 114 (Dueling) (Endangerment offenses, as amended), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 114 (Dueling) (Endangerment offenses, as amended), *supra*, at paragraph 9.

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[5] MCM, Part IV, ¶112.e.

[6] *See generally* BUREAU OF ALCOHOL TOBACCO AND FIREARMS PUBLICATION 5300.5, STATE LAWS AND PUBLISHED ORDINANCES- FIREARMS, 31ST ED. (2011) (providing a database for state concealed firearms laws) *available at* http://www.atf.gov/publications/firearms/state-laws/31st-edition/index.html (last visited 20 March 2015); 79 AMERICAN JURISPRUDENCE (SECOND): WEAPONS AND FIREARMS § 13 (2015) (discussing state court decisions upholding the validity of state "concealed weapons" permits requirements).

[7] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 115 (Current Law) – Malingering
10 U.S.C. § 915

1. Summary of Proposal

This Report recommends a technical change to the existing Article 115, and proposes that it be redesignated as Article 83. Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 83 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 115 prohibits the feigning of illness, physical disablement, mental lapse or derangement, or from intentionally inflicting self-injury, to avoid work, duty, or service.

3. Historical Background

Article 115 was derived primarily from the proposed Article 9 of the 1930 Articles for the Government of the Navy.[1] Since the UCMJ was enacted in 1950,[2] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Malingering: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[3]

5. Relationship to Federal Civilian Practice

Article 115 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 115: Redesignate Article 115 as Article 83, with a technical amendment.

In view of the well-developed case law addressing Article 115's provisions, other than this technical amendment, change to the statute's contents is not necessary.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1231 (1949); *see also* WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 730 (photo reprint 1920) (2d ed. 1896) (citing several prior malingering cases, dating from the late 1860s, as an example of a cognizable offense under the "general article" (then) AW 62 of 1874) (citations omitted).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] MCM, Part IV, ¶40.e.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1004. MALINGERING.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 882 (article 82 of the Uniform Code of Military Justice), as amended by section 1003, the following new section (article):

"§883. Art. 83. Malingering

"Any person subject to this chapter who, with the intent to avoid work, duty, or service—

"(1) feigns illness, physical disablement, mental lapse, or mental derangement; or

"(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.".

8. Sectional Analysis

Section 1004 would transfer and redesignate Article 115 (Malingering) as Article 83, and would make a technical change to the statute's provisions. The technical change would replace the words "for the purpose of avoiding" with the words "with the intent to avoid" to better address the mens rea required for the offense.

Article 115 (New Location) – Communicating Threats
10 U.S.C. § 915

1. Summary of Proposal

This proposal would migrate the offense of communicating a threat, and the offense of communicating a threat or hoax designed or intended to cause panic or public fear, both of which currently are addressed under Article 134 (the General Article)[1] to a new stand-alone enumerated punitive article, Article 115 (Communicating threats).[2] Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 115.

2. Narrative Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶110 ("Threat, communicating"), the offense requires a showing that the accused wrongfully communicated a threat to injure the person, property, or reputation of another person. Under MCM, Part IV, ¶ 109 ("Threat or hoax designed to cause panic or public fear"), the offense requires a showing that the accused wrongfully communicated a threat to commit harm by means of an explosive or other material, or maliciously communicated a false threat to commit harm by those means. Because these offenses fall under Article 134, the prosecution also must prove that the charged misconduct was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated communicating a threat as an Article 134 offense in the 1951 MCM.[3] The President designated communicating a threat or hoax designed to create public fear as an Article 134 offense in the 1984 MCM.[4] Prior to that time, threats or hoaxes designed to create public fear were charged as a violation of Article 134 under either Clause 1 or Clause 3.[5] The offense covers bomb threats and bomb hoaxes.

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[1] MCM, Part IV, ¶110 and ¶109.

[2] The additional offense to be realigned under this article is discussed in its portion of the Report.

[3] MCM 1951, App. 6, ¶ 171.

[4] MCM 1984, Part IV, ¶109.

[5] *See* United States v. Mayo, 12 M.J. 286, 293 (C.M.A. 1982), *overruled on other grounds by* United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011).

4. Contemporary Practice

To fall within the prohibition of communicating a threat under current law, the accused must both understand that the language constitutes a threat (regardless of whether the accused actually intended to do the injury threatened) and that a reasonable person would perceive the statement to be a true threat.[6] A declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute the offense.[7]

Under current law, a bomb threat occurs when an accused wrongfully communicates certain language amounting to a threat to commit harm by means of an explosive.[8] A bomb hoax occurs when an accused knowingly and maliciously communicates or conveys certain false information concerning an attempt being made or to be made by means of an explosive to kill, injure, or intimidate a person, or to damage or destroy certain property.[9] The law does not require the accused to have actually intended to carry out the threat.[10]

The President, under Article 56, has prescribed the following maximum punishment for the offense of communicating a threat: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years. The President has prescribed the following maximum punishment for an offense involving a threat or hoax designed or intended to cause panic or public fear: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[11]

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[6] MCM, Part IV, ¶ 110.b.(1), c. MCM, Part IV, ¶ 110.b.(2); *see* United States v. Bewsey, 54 M.J. 893, 896 (N-M.Ct.Crim.App. 2001) (to determine whether a threat has been communicated the objective test should ask whether a reasonable fact finder could determine beyond a reasonable doubt that the victim under a reasonable person standard would perceive the accused's statement to be a threat.). The Supreme Court recently utilized similar reasoning in an appeal arising from a defendant's conviction under 18 U.S.C. § 875(c), addressing the mental state requirement for communicating a threat. *See* Elonis v. United States, No. 13-983, slip. op. at 11 (June 1, 2015). The Court found that the mental state requirement for a threat "turns on whether a defendant knew the *character* of what was sent, not simply its contents and context." *Id.* (emphasis in original).

[7] *See* MCM, Part IV, ¶ 110.c; United States v. Phillips, 42 M.J. 127, 130 (C.A.A.F. 1995) (A statement may declare an intention to injure and thereby . . . establish this element of the offense, but the declarant's true intention, the understanding of the persons to whom the statement is communicated, and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal it to be a mere jest or idle banter).

[8] MCM, Part IV, ¶ 109.b.(1).

[9] MCM, Part IV, ¶ 109.b.(2).

[10] MCM, Part IV, ¶ 109.c.(1).

[11] MCM, Part IV, ¶109.e.

5. Relationship to Federal Civilian Practice

Title 18, Chapter 41 of the U.S. Code addresses offenses involving threats and extortion. 18 U.S.C. § 844(e), which proscribes bomb threats, sets forth a similar offense to the Article 134 offense of Threat or hoax designed or intended to cause panic or public fear.

6. Recommendation and Justification

Recommendation 134-109: Migrate the offense of "Threat, communicating," along with the offense of "Threat or hoax designed or intended to cause panic or public fear," both currently in Article 134 (MCM, Part IV, ¶¶109, 110), to the newly redesignated Article 115.

The offenses of Threat, communicating, and Threat or hoax designed or intended to cause panic or public fear are well-recognized concepts in criminal law. Accordingly, these offenses do not rely upon additional proof of the terminal element of Article 134 as the basis for their criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1027. COMMUNICATING THREATS.

Section 915 of title 10, United States Code (article 115 of the Uniform Code of Military Justice), is amended to read as follows:

"§915. Art. 115. Communicating threats

"(a) COMMUNICATING THREATS GENERALLY.—Any person subject to this chapter who wrongfully communicates a threat to injure the person, property, or reputation of another shall be punished as a court-martial may direct.

"(b) COMMUNICATING THREAT TO USE EXPLOSIVE, ETC.—Any person subject to this chapter who wrongfully communicates a threat to injure the person or property of another by use of (1) an explosive, (2) a weapon of mass destruction, (3) a

biological or chemical agent, substance, or weapon, or (4) a hazardous material, shall be punished as a court-martial may direct.

"(c) COMMUNICATING FALSE THREAT CONCERNING USE OF EXPLOSIVE, ETC.—Any person subject to this chapter who maliciously communicates a false threat concerning injury to the person or property of another by use of (1) an explosive, (2) a weapon of mass destruction, (3) a biological or chemical agent, substance, or weapon, or (4) a hazardous material, shall be punished as a court-martial may direct. As used in the preceding sentence, the term 'false threat' means a threat that, at the time the threat is communicated, is known to be false by the person communicating the threat.".

9. Sectional Analysis

Section 1027 would migrate the offenses of "Threat, communicating," and "Threat or hoax designed or intended to cause panic or public fear" from Article 134 (the General article) to the redesignated Article 115 (Communicating threats). These offenses are well-recognized concepts in criminal law. Accordingly, these offenses do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality. The guidance in the Manual for Courts-Martial will continue to reflect the limitations on these offenses established in the applicable case law.[12]

[12] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 116 – Riot or Breach of Peace
10 U.S.C. § 916

1. Summary of Proposal

This Report recommends no change to Article 116. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 116.

2. Summary of the Current Statute

Article 116 prohibits causing or participating in a riot or breach of the peace.

3. Historical Background

American military law has criminalized both rioting, and a superior officer's failure to quell a riot, since the 1775 Articles of War.[1] The current Article 116 was derived from Article 89 of the 1948 Articles of War and Article 22 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Riot or Breach of Peace: for riot, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years; for breach of peace, forfeiture of two-thirds pay per month for 6 months and confinement for 6 months.[4]

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[1] *See* WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 588, 657, 726 (photo reprint 1920) (2d ed. 1896) (tracing the origins of the military "riot" offense to the 1775 Articles of War; recognizing that failure of an officer to quell a riot involving soldiers violated AW 24, 54, 62 of 1874) (footnote omitted).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1231 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 267-68 (1951) (noting that military law traditionally punished riots, but the phrase "breach of peace" was a new offense in military justice).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶41.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2101 (Riots) sets forth a similar offense to Article 116.[5] The primary difference between the Title 18 and UCMJ "riot" statutes is that the UCMJ contains a lower level "breach of the peace" offense whereas Title 18 does not.

6. Recommendation and Justification

Recommendation 116: No change to Article 116.

In view of the well-developed case law addressing Article 116's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the MJRG Operational Guidance of minimizing change when established military law is similar to the law applied in U.S. district courts.

[5] *Compare* MCM, Part IV, ¶41.c(1) (defining "riot" as "a *tumultuous disturbance of the peace* by three or more persons assembled together in furtherance of a common purpose . . . in such a *violent and turbulent* manner as to cause or be calculated to cause a public terror") (emphasis added) *with* 18 U.S.C. § 2102(a) (defining "riot" as "an act or act of violence by one or more persons part of an assemblage of three or more persons, which acts shall constitute a *clear and present danger* to the property of any other person or to the person of any individual") (emphasis added).

Article 117 – Provoking Speeches or Gestures
10 U.S.C. § 917

1. Summary of Proposal

This Report recommends no change to Article 117. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 117.

2. Summary of the Current Statute

Article 117 prohibits using provoking or reproachful words or gestures towards any other person subject to the UCMJ.

3. Historical Background

American military law has criminalized "provoking speeches and gestures" since the 1775 Articles of War.[1] The current Article 117 was derived from Article 90 of the 1948 Articles of War and Article 8 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Provoking Speeches or Gestures: forfeiture of two-thirds pay per month for 6 months and confinement for 6 months.[4]

5. Relationship to Federal Civilian Practice

Article 117 is a unique military offense with no direct federal civilian counterpart. The Supreme Court has held that the First Amendment does not protect some types of speech, such as "fighting words" or other communications designed to incite violence.[5]

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 629 (photo reprint 1920) (2d ed. 1896) (tracing the origins of the provoking speeches and gestures to the 1775 and 1776 Articles of War); *see also* DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.38[2] at 468 (2d ed. 2012) (citations omitted).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1231 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶42.e.

6. Recommendation and Justification

Recommendation 117: No change to Article 117.

In view of the well-developed case law addressing Article 116's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[5] *Compare* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (upholding state statute against offensive name calling in public) *with* Cohen v. California, 403 U.S. 15 (1971) (jacket displaying vulgarity did not state fighting words because they were not directed at any particular person).

Article 118 – Murder
10 U.S.C. § 918

1. Summary of Proposal

This Report recommends a technical amendment to conform Article 118 to this Report's proposed clarification that forcible sodomy is punishable under Article 120. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions implementing Article 118.

2. Summary of the Current Statute

Article 118 prohibits the unlawful killing of a human being, when done by a premeditated design to kill, with an intent to kill or inflict great bodily harm, by an act that is inherently dangerous to another and evinces a wanton disregard of human life; or while engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery or aggravated arson. The offense is punishable by death or such other punishment as a court-martial may direct.

3. Historical Background

Until 1916, courts-martial exercised jurisdiction over murder only when the murder occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[1] In 1916, Congress amended the Articles of War to provide jurisdiction over murder and rape anytime the murder occurred outside of the territorial boundaries of the United States.[2] The current Article 118 applies anywhere, anytime, and was derived from Article 92 of the 1948 Articles of War and Article 6 of the 1930 Articles for the Government of the Navy.[3] The statute was amended in 1992,[4] 2006,[5] and 2011,[6] to add the

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 666-67, 670-71 (photo reprint 1920) (2d ed. 1896). Under the Articles of War, outside of wartime, prosecution of "common law" offenses like murder was permissible only under the "general article" dependent upon a showing that the underlying common law crime was prejudicial to good order and discipline under the circumstances. *Id.* at 671 (discussing AW 58 and AW 62 "the general article" of 1874).

[2] AW 92 of 1916 (extending court-martial jurisdiction to murder and rape when committed outside of the territorial boundaries of the United States).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 12231(1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 194, 268-69 (1951) (noting deletion of the prior restraints on court-martial jurisdiction over murder).

[4] NDAA FY 1993, Pub. L. 102-484, Div. A, Title X, § 1066(b), 106 Stat. 2315, 2506 (1992).

[5] NDAA FY 2006, Pub. L. No. 109-163, Div. A, Title V, § 552(d), 119 Stat. 3136, 3263 (2006).

felony offenses of rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child for the commission of felony murder.

4. Contemporary Practice

Article 118 has prescribed the following maximum punishment for the offense of premeditated murder (Article 118(1)): death or life imprisonment.[7] All other forms of murder under Article 118 (2)-(4) are punishable by "any punishment less than death."[8]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1111 (Murder) sets forth a similar offense to Article 118.

6. Recommendation and Justification

Recommendation 118: Amend Article 118(4) to conform to the proposed amendment to Article 125 (which has the effect of clarifying that forcible sodomy is included within the sexual offenses punishable under Article 120).

This technical change reflects the revision of Article 125 proposed by this Report.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1028. TECHNICAL AMENDMENT RELATING TO MURDER.

Section 918(4) of title 10, United States Code (article 118(4) of the Uniform Code of Military Justice), is amended by striking "forcible sodomy.".

9. Sectional Analysis

Section 1028 would make a technical amendment to Article 118 (Murder).

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[6] NDAA FY 2012, Pub. L. No. 112-81, 125 Stat. 1298, 1410 (2011).

[7] MCM, Part IV, ¶43.e(1).

[8] *Id.* at ¶43.e(2).

Article 119 – Manslaughter
10 U.S.C. § 919

1. Summary of Proposal

This Report recommends no change to the existing Article 119. Part II of the Report will consider whether any changes are needed in the Manual for Courts-Martial provisions implementing Article 119.

2. Summary of the Current Statute

Article 119 prohibits the unlawful and intentional killing of another human being in the heat of sudden passion caused by adequate provocation (manslaughter), and the unlawful killing of another by culpable negligence or while perpetrating or attempting to perpetrate an offense (involuntary manslaughter) other than those offenses named in Article 118 (Murder).

3. Historical Background

Until 1920, courts-martial exercised jurisdiction over manslaughter only when the killing occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[1] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over manslaughter and a list of other common law offenses.[2] The current Article 119 was derived from Article 93 of the 1948 Articles of War.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Manslaughter: dishonorable discharge, forfeiture of all pay and allowances, and,

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 666-67, 670-71 (photo reprint 1920) (2d ed. 1896). Under the Articles of War, outside of wartime, prosecution of "common law" offenses like murder was permissible only under the "general article" dependent upon a showing that the underlying common law crime was prejudicial to good order and discipline under the circumstances. *Id.* at 671 (discussing AW 58 and AW 62 "the general article" of 1874).

[2] AW 93 of 1920.

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 194, 270 (1951) (noting Article 119 created "involuntary manslaughter" as a military offense for the first time).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

depending on whether the victim was a child and whether the killing was voluntary or involuntary, confinement for up to 20 years.[5]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1112 (Manslaughter) sets forth a similar offense to Article 119.

6. Recommendation and Justification

Recommendation 119: No change to Article 119.

In view of the well-developed case law addressing Article 119's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[5] MCM, Part IV, ¶44.e.

Article 119a – Death or Injury of an Unborn Child
10 U.S.C. § 919a

1. Summary of Proposal

This Report recommends no change to Article 119a. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions implementing Article 119a.

2. Summary of the Current Statute

Article 119a prohibits the unlawful killing or infliction of bodily injury to an unborn child. Article 119a does not apply to a consensual abortion, medical treatment for mother or the unborn child, or to the mother of the unborn child.[1]

3. Historical Background

Article 119a was added to the UCMJ in 2004.[2] The statute has remained unchanged since then.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Death or Injury of an Unborn Child: such punishment, other than death, as a court-martial may direct.[3]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1841 (Protection of unborn children) sets forth a similar offense to Article 119a.

6. Recommendation and Justification

Recommendation 119a: No change to Article 119a.

The case law concerning Article 119a does not demonstrate a current need for statutory revisions.

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[1] MCM, Part IV, ¶44a.c(1)(a)-(c).

[2] Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, § 3(a), 118 Stat. 569 (2004).

[3] MCM, Part IV, ¶44a.e.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 119b (New Provision) – Child Endangerment

10 U.S.C. § 919b

1. Summary of Proposal

This proposal would migrate the offense of child endangerment currently addressed under Article 134 (the General Article)[1] to the new enumerated punitive article, Article 119b (Child endangerment). Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 119b necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In Part IV, ¶68a, the offense of child endangerment requires a showing that the accused had a duty to care for a child under the age of sixteen years, and that the accused endangered the child's mental or physical health, safety, or welfare, through design or culpable negligence. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The Court of Appeals for the Armed Forces first recognized "child endangerment" (without resulting physical harm) as qualifying misconduct under Article 134 in 2003.[2] The President then designated "child endangerment" as an Article 134 offense in the 2008 MCM.[3]

4. Contemporary Practice

At least thirty-three States and the District of Columbia currently have child endangerment statutes.[4]

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[1] MCM, Part IV, ¶68a.

[2] United States v. Vaughn, 58 M.J. 29, 32-33 (C.A.A.F. 2003) (holding military custom, state statutes, and military regulations provided the accused constructive notice that leaving a child unattended for prolonged number of hours violated Article 134).

[3] MCM 2008, Part IV, ¶68a.

[4] *Vaughn*, 58 M.J. at 32 n.2, Appendix (citing 33 States and the District of Columbia child endangerment statutes).

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Child Endangerment: dishonorable discharge, forfeiture of all pay and allowances, and, if the endangerment was by design, confinement for 8 years.[5]

5. Relationship to Federal Civilian Practice

The military offense of child endangerment has no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 134-68a: Migrate the offense of child endangerment in Article 134 (MCM, Part IV, ¶68a) to the new Article 119b.

Migrating the offense of child endangerment to the new Article 119b aligns the offense with Article 119a—Death or Injury of an Unborn Child. Child endangerment is well recognized in criminal law. Accordingly, it does not rely upon the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1029. CHILD ENDANGERMENT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 919a (article 119a of the Uniform Code of Military Justice), the following new section (article):

"§919b. Art. 119b. Child endangerment

"Any person subject to this chapter—

"(1) who has a duty for the care of a child under the age of 16 years; and

"(2) who, through design or culpable negligence, endangers the child's mental or physical health, safety, or welfare;

[5] MCM, Part IV, ¶68a.e.

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1029 would create a new section, Article 119b (Child endangerment), and would migrate the offense of "Child endangerment" from Article 134 (the General article) into the new statute. The new section would align with the closely related offense of "Death or injury of an unborn child" under Article 119a. The offense of child endangerment is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 120 – Rape and Sexual Assault Generally
10 U.S.C. § 920

1. Summary of Proposal

This proposal would conform the definition of "sexual act" in Article 120(g)(1) to the definition of "sexual act" in the comparable Title 18 provision, 18 U.S.C. § 2246(2). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by this statutory amendment.

Any changes in addition to the definition of "sexual act" should await further recommendations of the Judicial Proceedings Panel. The Judicial Proceedings Panel is conducting an extensive examination of whether further changes to Article 120 are warranted and recommended the Secretary of Defense establish a subcommittee of experts for that purpose.[1] The Judicial Proceedings Panel is also examining whether the definitions of rape and sexual assault should be amended to expressly cover a situation in which a person subject to the UCMJ commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.[2] Part II of the Report will address changes in the Manual provisions necessitated by this statutory amendment.

2. Summary of the Current Statute

Article 120 prohibits rape, sexual assault, aggravated sexual contact, and abusive sexual contact on another person.

Article 120(g)(1)(B) defines "sexual act", in pertinent part, as "(b) penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

3. Historical Background

Until 1916, courts-martial exercised jurisdiction over "rape" only when the rape occurred in wartime or under the General Article (*i.e.* "conduct prejudicial to good order and discipline").[3] In 1916, Congress amended the Articles of War to provide jurisdiction over

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[1] JUDICIAL PROCEEDINGS PANEL INITIAL REPORT 14-15 (February 4, 2015) [hereinafter JPP INITIAL REPORT].

[2] NDAA FY 2014, Pub. L. No. 113–66, 127, Div. A, Title XVII, Subtitle D, § 1731(b)(1)(A), 127 Stat. 672, 974 (2013).

[3] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 666-67, 670-71 (1920 photo reprint) (2d ed. 1896). Under the Articles of War, outside of wartime, prosecution of "common law" offenses like murder was permissible only under the "general article" dependent upon a showing that the underlying common law

murder and rape anytime the offense occurred outside of the territorial boundaries of the United States.[4] In the UCMJ as enacted in 1950,[5] Congress provided for worldwide applicability of all offenses under the Code.[6] The current Article 120 applies anywhere, anytime, and was derived from Article 92 of the 1948 Articles of War and Article 22 of the 1930 Articles for the Government of the Navy.[7] The statute was amended in 1992[8], in 1996,[9] in 2006,[10] in 2011,[11] and in 2013.[12]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of "Rape and Sexual Assault Generally" under Article 120: for rape, dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole; for sexual assault, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years; for aggravated sexual contact, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years; and for abusive sexual contact, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.[13]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2241 (Aggravated sexual abuse) and § 2441 (War crimes) set forth similar offenses to Article 120.

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crime was prejudicial to good order and discipline under the circumstances. *Id.* at 671 (discussing Articles 58 and 62 (the General Article) of the 1874 Articles of War).

[4] AW 92 of 1916.

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (1950).

[6] Article 5 of the UCMJ provides: "This chapter applies in all places."

[7] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1226-27 (1949).

[8] NDAA FY 1993, Pub. L. No. 102-484, Div. A, Title X, § 1066(c), 106 Stat. 2315, 2506 (1992).

[9] NDAA FY 1996, Pub. L. No. 104-106, Div. A, Title XI, § 1113, 110 Stat. 186, 462 (1996).

[10] NDAA FY 2006, Pub. L. No. 109-163, Div. A, Title V, § 552(a)(1), 119 Stat. 3136, 3257-63 (2006).

[11] NDAA FY 2012 Pub. L. No. 112-81, Div. A, Title V, § 541(a), 125 Stat. 1298, 1404-10 (2011).

[12] NDAA FY 2013, Pub. L. No. 112-239, Div. A, Title X, § 1076(f)(9), 126 Stat. 1632, 1952 (2013).

[13] Exec. Order 13643 of May 15, 2013. The current version of the MCM (2012) does not yet contain the President's maximum punishment designations for Article 120.

The current definition of "sexual act" in Article 120(g)(1)(B) includes non-sexual acts. Specifically, the definition extends to "the penetration, however slight of the vulva or anus or mouth of another *by any part of the body or by any object.*"[14]

18 U.S.C. § 2246(2), the comparable provision in Title 18, defines the term "sexual act" in a similar context to mean "the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse, or gratify the sexual desire of any person."

6. Recommendation and Justification

Recommendation 120: Amend the definition of "sexual act" in Article 120(g)(1) to conform it to 18 U.S.C. § 2246(2)(c).

As there are no military specific reasons for having a unique military definition for "sexual act," this report conforms Article 120 to its civilian counterpart.[15]

7. Relationship to Objectives and Related Provisions

This proposal is consistent with MJRG Terms of Reference to employ the standards and procedures applicable to federal criminal law in the civilian sector insofar as practicable in military criminal practice.

Any changes in addition to amending the definition of "sexual act" should await further recommendations of the Judicial Proceedings Panel, which is conducting an extensive examination of whether further changes to Article 120 are warranted, and has recommended the Secretary of Defense establish a subcommittee of experts for that purpose.[16]

The Judicial Proceedings Panel is also examining whether the definitions of rape and sexual assault should be amended to expressly cover a situation in which a person subject to the UCMJ commits a sexual act by abusing their position in the chain of command to gain access to or coerce the other person. [17] This Report proposes a new statute, Article 93a, to prohibit improper acts with recruits and trainees, addressing a specific category of abuse of position in the chain of command.

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[14] Article 120(g)(1)(B) (emphasis added).

[15] The Judicial Proceedings Panel, a Federal Advisory Committee established by Congress (*see* NDAA FY 2014, Pub. L. No. 113–66, 127, Div. A, Title XVII, Subtitle D, § 1731(b)(1)(A), 127 Stat. 672, 974 (2013)) is conducting an extensive examination of whether further changes to Article 120 are warranted, and has recommended the Secretary of Defense establish a subcommittee of experts for that purpose. JPP INITIAL REPORT at 14-15. In that context, this report recommends no further amendments to Article 120, beyond the conforming changes recommended herein.

[16] JPP INITIAL REPORT at 14-15.

[17] *Id.* at 15, 37-42.

8. Legislative Proposal

SEC. 1030. DEFINITION OF SEXUAL ACT FOR RAPE AND SEXUAL ASSAULT OFFENSES.

(a) RAPE AND SEXUAL ASSAULT GENERALLY.—Paragraph (1) of section 920(g) of title 10, United States Code (article 120(g) of the Uniform Code of Military Justice), is amended to read as follows:

"(1) SEXUAL ACT.—The term 'sexual act' means—

"(A) contact between the penis and the vulva or the penis and the anus, and for purpose of this subparagraph contact involving the penis occurs upon penetration, however slight;

"(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

"(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.".

(b) [Omitted. *See* Article 120b.]

9. Sectional Analysis

Section 1030 would amend the definition of "sexual act" in both Article 120 (Rape and sexual assault generally) and Article 120b (Rape and sexual assault of a child) to conform to the definition of that term in 18 U.S.C. § 2246(2)(A)-(C). The current definition of "sexual act" under Articles 120 and 120b is both overly broad (it captures non-sexual acts) and unduly narrow (it does not include all of the prohibited acts involving children listed in 18 U.S.C. § 2246(2)(D)).

Article 120a (Current Law) – Stalking
10 U.S.C. § 920a

1. Summary of Proposal

This proposal would update the current law to address cyberstalking and threats to intimate partners. Article 120a would be redesignated as Article 130. Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 130 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 120a prohibits a person from engaging in a course of conduct that would cause a reasonable person to fear death or bodily harm, including sexual assault, to themselves or a member of their immediate family.

3. Historical Background

Article 120a was added to the UCMJ in 2006 based on the 2000 version of 18 U.S.C. § 2261A (Interstate Stalking).[1] While Article 120a has remained unchanged since 2006,[2] 18 U.S.C. § 2261A was amended by the Violence Against Women and Department of Justice Reauthorization Act of 2006 and the Violence Against Women Reauthorization Act of 2013.[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of stalking: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2261A (Interstate stalking) sets forth a similar offense to Article 120a. 18 U.S.C. § 2261A differs from Article 120a in that the Title 18 offense requires a specific intent to "kill, injure, harass, or intimidate" and also prohibits conduct that "causes . . . or would be reasonably expected to cause substantial emotional distress." Section 2261A also has been broadened to cover the use of technology in stalking, or cyber-stalking.[5] Paragraph (1) of §

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[1] NDAA FY 2006, Pub. L. No. 109-163, § 551(a)(1), 119 Stat. 3256 (2006).

[2] 10 U.S.C. § 920a.

[3] Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, Title I, § 114(a), 119 Stat. 2987 (2006); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, Title I, § 107(b), 127 Stat. 77 (2013).

[4] MCM, Part IV, ¶45a.e.

[5] *See* 18 U.S.C. § 2261A(2).

2261A requires that a defendant "engages in conduct." Paragraph (2) of § 2261A and Article 120a require a "course of conduct.."[6]

6. Recommendation and Justification

Recommendation 120a: Amend Article 120a to address cyberstalking and threats to intimate partners, and redesignate Article 120a as Article 130.

As amended, the offense of "stalking" would include conduct that uses surveillance, the mails, an interactive computer service, an electronic communication service, or an electronic communication system. The offense also would include a definition of "intimate partner" to cover threats to former spouses and individuals who have been in an intimate relationship with the targeted person.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to stalking in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1043. STALKING.

Section 930 of title 10, United States Code (article 130 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(11), is amended to read as follows:

"930. Art. 130. Stalking

"(a) IN GENERAL.—Any person subject to this chapter—

"(1) who wrongfully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual

[6] Several Courts of Appeals have rejected constitutional challenges to the recent amendments to 18 U.S.C. § 2261A. *See, e.g.*, United States v. Osinger, 753 F.3d 939 (9th Cir. 2014); United States v. Petrovic, 701 F.3d 849 (8th Cir. 2012); United States v. Shrader, 675 F.3d 300 (4th Cir. 2012).

assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

"(2) who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner; and

"(3) whose conduct induces reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

is guilty of stalking and shall be punished as a court-martial may direct.

"(b) DEFINITIONS.—In this section:

"(1) The term 'conduct' means conduct of any kind, including use of surveillance, the mails, an interactive computer service, an electronic communication service, or an electronic communication system.

"(2) The term 'course of conduct' means—

"(A) a repeated maintenance of visual or physical proximity to a specific person;

"(B) a repeated conveyance of verbal threat, written threats, or threats implied by conduct, or a combination of such threats, directed at or toward a specific person; or

"(C) a pattern of conduct composed of repeated acts evidencing a continuity of purpose.

"(3) The term 'repeated', with respect to conduct, means two or more occasions of such conduct.

"(4) The term 'immediate family', in the case of a specific person, means—

"(A) that person's spouse, parent, brother or sister, child, or other person to whom he or she stands in loco parentis; or

"(B) any other person living in his or her household and related to him or her by blood or marriage.

"(5) The term 'intimate partner' in the case of a specific person, means—

"(A) a former spouse of the specific person, a person who shares a child in common with the specific person, or a person who cohabits with or has cohabited as a spouse with the specific person; or

"(B) a person who has been in a social relationship of a romantic or intimate nature with the specific person, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.".

9. Sectional Analysis

Section 1043 would redesignate Article 120a (Stalking) as Article 130, and would update current law to address cyberstalking and threats to intimate partners. The proposed amendments would continue to address stalking activity involving a broad range of misconduct including, but not limited to, sexual offenses. The redesignated stalking statute would not preempt service regulations that specify additional types of misconduct that

may be punishable at court-martial, including under Article 92 (Failure to obey order or regulation), nor would it preempt other forms of misconduct from being prosecuted under other appropriate Articles, such as under Article 134 (General article). These uniquely military offenses are available to address similar misconduct that, for example, causes substantial emotional distress or targets professional reputation.

Article 120a (New Location) – Mails: Deposit of Obscene Matter

10 U.S.C. § 920a

1. Summary of Proposal

This proposal would migrate the offense of depositing or causing to be deposited obscene materials in the mails currently under Article 134 (the General Article)[1] to the new Article 120a (Mails: deposit of obscene matter) as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶94 the offense requires a showing that the accused wrongfully deposited or caused to be deposited in the mails certain matter for mailing and delivery. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President designated depositing obscene matters in the mail as an Article 134 offense in the 1951 MCM.[2] Minor amendments to definitions in the offense were made in the 1984 MCM.[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Depositing or Causing to be Deposited Obscene Materials in the Mails: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1461 (Mailing obscene or crime-inciting matter) sets forth a similar offense to the offense of depositing or causing to be deposited obscene materials in the mails.

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[1] MCM, Part IV, ¶94.

[2] MCM 1951, App. 6c, ¶153.

[3] MCM 1984, Part IV, ¶94.

[4] MCM, Part IV, ¶94.e.

6. Recommendation and Justification

Recommendation 134-94: Migrate the offense of depositing or causing to be deposited obscene materials in the mails (currently under Article 134, the General Article, MCM, Part IV, ¶94), to create a new Article 120a.

The offense of depositing or causing to be deposited obscene materials in the mails is a well-recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the "terminal element" as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1031. DEPOSIT OF OBSCENE MATTER IN THE MAIL.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 920 (article 120 of the Uniform Code of Military Justice), the following new section (article):

"§920a. Art. 120a. Mails: deposit of obscene matter

"Any person subject to this chapter who, wrongfully and knowingly, deposits obscene matter for mailing and delivery shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1031 would redesignate Article 120a as "Mails: deposit of obscene matter" and would migrate the offense of "Mails: depositing or causing to be deposited obscene materials in" from Article 134 (the General article) into the redesignated statute. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[5]

[5] For further discussion of the concept of "migration" see *supra*, Exec. Sum., and *infra* Art. 134 (Gen. Art.).

Article 120b – Rape and Sexual Assault of a Child
10 U.S.C. § 920b

1. Summary of Proposal

This proposal would conform the definition of "sexual act" in Article 120b(h)(1) to the definition of "sexual act" in the comparable Title 18 provision, 18 U.S.C. § 2246(2). Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 120b prohibits the rape, sexual assault, or commission of "lewd acts" with a child. Lewd acts under the statute fall into four categories: (1) any sexual contact (as defined by Article 120(g)); (2) exposing one's genitalia, buttocks, or nipples to a child (either in person or via any communication technology); (3) communicating "indecent language" to a child, by any means[1]; and (4) a "catch all" indecent conduct provision.[2]

3. Historical Background

Until 2012, the UCMJ addressed rape and sexual assault of a child under Article 120.[3] The current Article 120b was enacted in 2012.[4] It consolidates the child sexual offenses contained in the 2007 version of Article 120(b), (d), (f), (g), (i), (j).[5]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for Article 120b: dishonorable discharge, forfeiture of all pay and allowances, and confinement

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[1] Article 120b(h)(5)(A)-(C).

[2] "Indecent conduct" would capture any act directed at a child that "amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." Article 120b(h)(5)(D).

[3] From 1950 to 2006 Article 120 classified child sex offenses as "carnal knowledge." 10 U.S.C. § 920(b) (2006) *amended by* NDAA FY 2006, Pub. L. No. 109-16 Div A, Title V, Subtitle E, § 552, 119 Stat. 3136, 3256 (2006)).

[4] NDAA FY 2012, Pub. L. No. 112–81, Div. A, Title V, Subtitle D, §541, 125 Stat. 1298, 1404-11 (2011).

[5] MCM, App. 23 (Analysis of Punitive Articles) at A23-16 to 17.

for life without eligibility for parole.[6] The Secretary of Defense lists every offense under Article 120b as a sex offender registration offense.[7]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2241 (Aggravated sexual abuse), §2243 (Sexual abuse of a minor or ward), §2244 (Abusive sexual contact), and §2251 (Sexual exploitation of children) set forth similar offenses to Article120b.

The current definition of "sexual act" in Article 120b(h)(1) does not include all of the acts proscribed by its federal counterpart definition, 18 U.S.C. 2246(2)(D). Specifically, §2246(2)(D) extends to intentional touching of the genitalia without requiring insertion of the genitalia into the mouth or "penetration, however slight" as Article 120b currently does.[8]

6. Recommendation and Justification

Recommendation 120b: Amend the definition of "sexual act" in Article 120b(h)(1) to conform it to 18 U.S.C. § 2246(2)(A)-(D).

This Report already recommends conforming the definition of "sexual act" under Article 120 to the federal definition in 18 U.S.C. §2246. Consistent with that recommendation, and as there is no military specific reason for having a unique military definition for "sexual act" as it pertains to a child under the age of 16, this report also recommends conforming the definition of "sexual act" in Article 120b to conform with the federal definition of "sexual act" set forth in 18 U.S.C. §2246.[9]

7. Relationship to Objectives and Related Provisions

This proposal supports the MJRG Operational Guidance to employ the standards and procedures applicable to federal criminal law in the civilian sector insofar as practicable in military criminal practice.

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[6] *See* Exec. Order No. 13643, 78 Fed. Reg. 98, 29559, 29606 (May 25, 2013). The current version of the MCM (2012 edition) does not yet contain the President's maximum punishments for Article 120b as promulgated in the May 2013 Executive Order.

[7] Dep't of Defense Instruction (DoDI) 1325.07 Administration of Military Correctional Facilities and Clemency and Parole Authority, Appendix 4 to Enclosure – Table 6 (March 11, 2013).

[8] Article 120b(h)(1) adopts the Article 120(g)(1) definition for sexual act, which by its terms is currently limited to vaginal sex, anal sex, fellatio, and digital penetration of the mouth, vulva, or anus. 10 U.S.C. § 920(g)(1)(A)-(B).

[9] The Judicial Proceedings Panel, a Federal Advisory Committee established by Congress (*see* NDAA FY 2014, Pub. L. No. 113–66, 127, Div. A, Title XVII, Subtitle D, § 1731(b)(1)(A), 127 Stat. 672, 974 (2013)) is conducting an extensive examination of whether further changes to Article 120 are warranted, and has recommended the Secretary of Defense establish a subcommittee of experts for that purpose. JPP INITIAL REPORT at 14-15. In that context, this report recommends no further amendments to Article 120b, beyond the conforming changes recommended herein.

8. Legislative Proposal

SEC. 1030. DEFINITION OF SEXUAL ACT FOR RAPE AND SEXUAL ASSAULT OFFENSES.

(a) [Omitted. *See* Article 120.]

(b) RAPE AND SEXUAL ASSAULT OF A CHILD.—Section 920b of title 10, United States Code (article 120b of the Uniform Code of Military Justice), is amended in subsection (h)(1) by inserting before the period at the end the following:

", except that the term 'sexual act' also includes the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person".

9. Sectional Analysis

Section 1030 would amend definition of "sexual act" in both Article 120 (Rape and sexual assault generally) and Article 120b (Rape and sexual assault of a child) to conform to the definition of that term in 18 U.S.C. § 2246(2)(A)-(C). The current definition of "sexual act" under Articles 120 and 120b is both overly broad (it captures non-sexual acts) and unduly narrow (it does not include all of the prohibited acts involving children listed in 18 U.S.C. § 2246(2)(D)).

Article 120c – Other Sexual Misconduct
10 U.S.C. § 920c

1. Summary of Proposal

This Report recommends no change to the current Article 120c. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions for this statute.

2. Summary of the Current Statute

Article 120c prohibits the indecent viewing, recording, or broadcasting of the private area of another person. In addition, the statute prohibits forcible pandering and indecent exposure.

3. Historical Background

Article 120c was enacted in 2012.[1] Prior to 2011, the offenses were defined in the 2007 Article 120(k), (l), and (n).[2]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for Article 120c: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 12 years.[3]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1801 (Video Voyeurism) sets forth a similar offense to Article 120c(a) (Indecent Viewing/Visual Recording/Broadcasting). 18 U.S.C. §§ 1591 and 2422 set forth similar offenses to Article 120c(b) (Forcible Pandering). There is no Title 18 equivalent to Article 120c(c) (Indecent Exposure).

6. Recommendation and Justification

Recommendation 120c: No change to Article 120c.

The case law concerning Article 120c does not demonstrate a current need for statutory revisions.

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[1] NDAA FY 2012, Pub. L. No. 112-81, Div. A, Title V, Subtitle D, § 541, 125 Stat. 1298, 1409 (2011).

[2] MCM, Part IV, App. 23 (Analysis of Punitive Articles) at A23-16 to 17.

[3] MCM, Part IV, ¶45c.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by minimizing change to an area recently revised by Congress.

Article 121 – Larceny and Wrongful Appropriation
10 U.S.C. § 921

1. Summary of Proposal

This Report recommends no change to Article 121. Part II of the Report will address any changes that may be needed in the Manual for Courts-Martial provisions implementing Article 121.

2. Summary of the Current Statute

Article 121 prohibits the wrongful taking, obtaining, or withholding from the possession of another person of any item of personal property with the intent to permanently (larceny) or temporarily (wrongful appropriation) deprive or defraud another person of the use and benefit of the property.

3. Historical Background

American military law has criminalized larceny of government property since the 1874 Articles of War.[1] Until 1920, however, courts-martial exercised jurisdiction over larceny of non-military property only when the offense occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[2] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over larceny and a list of other "common law" offenses, without requiring proof of prejudice to good order and discipline.[3] The current Article 121 was derived from Article 93 of the 1948 Articles of War and Article 9 of the 1930 Articles for the Government of the Navy.[4] Since the UCMJ was enacted in 1950,[5] the statute has remained unchanged.

4. Contemporary Practice

Article 121 combines the common law theories of larceny into a single statute, including: larceny by trick and device, larceny by asportation, obtaining property by false pretenses,

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 697-98, 704 (photo reprint 1920) (2d ed. 1896). (discussing AW 60 of 1874 (frauds and larcenies of government property)).

[2] *See id.* at 666-67, 670-71 (discussing AW 58 (extending jurisdiction over "common law" crimes, including larceny, in time of war) and AW 62 "the general article" of 1874).

[3] AW 93 of 1920.

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

and embezzlement.[6] The President, under Article 56, has prescribed the following maximum punishment for the offense of Larceny and Wrongful Appropriation: if the stolen property was military property and its value was over $500.00, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years; otherwise, dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to 5 years.[7]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 641 (Public money, property, or records) sets forth a similar offense to Article 121.

6. Recommendation and Justification

Recommendation 121: No change to Article 121.

In view of the well-developed case law addressing Article 121's provisions, a statutory change is not necessary, except for the proposed new offense that would address offenses involving credit cards, debit cards, and other access devices.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Offenses involving credit cards and debit cards, charged at courts-martial in current practice under Article 121 as a larceny by false pretenses, are addressed in this Report in "Article 121a – Fraudulent Use of Credit Cards, Debit Cards, and Other Access Devices."

[6] LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 270 (1951).

[7] MCM, Part IV, ¶46.e.

Article 121a (New Provision) – Fraudulent Use of Credit Cards, Debit Cards, and Other Access Devices

10 U.S.C. § 921a

1. Summary of Proposal

This proposal would create a new statute: Article 121a (Fraudulent use of credit cards, debit cards, and other access devices) similar to 18 U.S.C. § 1029 (Fraud and related activity in connection with access devices). Part II of this Report will address the Manual for Courts-Martial provisions implementing the new Article 121a.

2. Summary of the Current Statute

This proposal would create a new statute.

3. Historical Background

The theft and misuse of "access devices," such as credit, debit, or ATM cards or numbers has been prosecuted at courts-martial as a larceny by false pretenses under Article 121 (Larceny). The offense requires a correct identification of the victim incurring the ultimate loss, which may be difficult to determine, because of the complex contractual arrangements of the cardholder, the bank, and the merchant. The theft or misuse of a credit or debit card to obtain goods is "usually a larceny of those goods from the merchant offering them," while such misuse to obtain money from an automated teller machine is "usually a larceny of money from the entity presenting the money."[1]

4. Contemporary Practice

Reliance on the offense of larceny to address credit card offenses has proved problematic, particularly in terms of identifying whether the cardholder, the merchant, or the bank is the victim.[2]

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[1] MCM, Part IV, ¶46.c.(1)(h)(vi).

[2] *See, e.g.*, United States v. Lubasky, 68 M.J. 260, 263-264 (C.A.A.F. 2010) (accused's unauthorized use of credit cards to obtain cash advances and goods was a larceny against the cards' issuers or the business establishments where the goods were purchased, not against the cards' owner); United States v. Cimball-Sharpton, 73 M.J. 299, 302 (C.A.A.F. 2014) (victim of accused's credit card larceny was the Air Force, which paid for the unauthorized charges, rather than bank which issued the card or merchants which sold the goods purchased.); United States v. Endsley, (sum. disp.) __ M.J. __, No. 15-0202/AR (C.A.A.F. 14 January 2015) (the proper victims were the merchants who provided the goods upon false pretenses, not the debit cardholder), *reversing* 73 M.J. 909 (A. Ct. Crim. App. 2014).

5. Relationship to Federal Civilian Practice

In the 1980s, nearly every state, the District of Columbia, and the federal government enacted legislation specifically penalizing the misuse of credit cards and other access devices.[3] 18 U.S.C. § 1029 (Fraud and related activity in connection with access devices) sets forth a similar offense to the proposed Article 121a. The statute focuses on the wrongfulness of a misuse of a credit or debit card, done without authorization for personal gain; it avoids the need to identify the victim suffering the ultimate loss. The approach in 18 U.S.C. § 1029 presents a practical alternative to charging access-device related offenses as a larceny under the UCMJ.

6. Recommendation and Justification

Recommendation 121a: Enact Article 121a.

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to fraudulent use of credit cards, debit cards, and other access devices in the civilian sector insofar as practicable in military criminal practice.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by addressing ambiguities in the current Article 121 case law concerning offenses involving credit cards, debit cards, and other access devices, thereby reducing the potential for unnecessary litigation in this area.

8. Legislative Proposal

SEC. 1032. FRAUDULENT USE OF CREDIT CARDS, DEBIT CARDS, AND OTHER ACCESS DEVICES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 921 (article 121 of the Uniform Code of Military Justice), the following new section (article):

[3] WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, VOL. 3, § 19.7(j)(6) (2d ed. 2003). For an index of state statutes addressing credit card and other access device-related offenses see *State Credit Card Fraud Laws, available at* http://statelaws.findlaw.com/criminal-laws/credit-card-fraud.html.

"§921a. Art. 121a. Fraudulent use of credit cards, debit cards, and other access devices

"(a) IN GENERAL.—Any person subject to this chapter who, with intent to defraud, uses—

"(1) a stolen credit card, debit card, or other access device;

"(2) a revoked, cancelled, or otherwise invalid credit card, debit card, or other access device; or

"(3) a credit card, debit card, or other access device without the authorization of a person whose authorization is required for such use;

to obtain money, property, services, or anything else of value shall be punished as a court-martial may direct.

"(b) DEFINITION.—In this section (article), the term 'access device' has the meaning given that term in section 1029 of title 18.".

9. Sectional Analysis

Section 1032 would create a new section, Article 121a (Fraudulent use of credit cards, debit cards, and other access devices). Article 121a is designed specifically to address the misuse of credit cards, debit cards, and other electronic payment technology, also known as "access devices." This article is modeled on 18 U.S.C. § 1029. It would provide a more effective and efficient means of prosecuting crimes committed with credit cards, debit cards, and other access devices than under current practice, in which such crimes are prosecuted as a larceny by false pretenses under Article 121 (Larceny and wrongful appropriation). When a government-issued credit card, debit card, or other access device is misused, the authorized sentence can be addressed in the Manual through the President's delegated powers under Article 56, which is the current sentencing approach for theft of government property under Article 121.

Article 121b (New Provision) – False Pretenses to Obtain Services

10 U.S.C. § 921b

1. Summary of Proposal

This proposal would migrate the offense of obtaining services under false pretenses currently addressed under Article 134 (the General Article)[1] to the new enumerated punitive article, Article 121b (False pretenses to obtain services). Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 121b necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶78, the offense is similar to the offenses of larceny or wrongful appropriation except that the object of the obtaining is services, for example telephone services, rather than money, an item of personal property, or items of value of any kind. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

Traditionally, American military law did not recognize "theft of services" as a type of larceny punishable at courts-martial.[2] The President did not initially designate an "obtaining services under false pretenses" offense under Article 134 in the 1951 MCM.[3] In 1965, the Court of Military Appeals first recognized "obtaining services under false pretense" as qualifying misconduct under Article 134.[4] The President designated obtaining services under false pretenses as an offense under Article 134 in the 1968 MCM.[5]

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[1] MCM, Part IV, ¶78.

[2] *See* DAVID SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES §7.23[2] at 812 (2d ed. 2012) (noting "The offense of obtaining service under false pretense fills a prosecutorial void left open by U.C.M.J. Article 121.").

[3] *See* United States v. McCracken, 19 C.M.R. 876, 877 (A.F.B.R. 1955) (holding that obtaining the use of a rental car under false pretenses was not larceny within the meaning of Article 121); United States v. Jones, 23 C.M.R. 818, 821 (A.F.B.R. 1956) (theft of telephone services did not constitute Article 121 larceny).

[4] United States v. Herndon, 36 C.M.R. 8, 11 (C.M.A. 1965) (holding that theft of telephone services was akin to fraud and constituted "service discrediting" misconduct under Article 134).

[5] MCM 1968, App. 6c, ¶148.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Obtaining Services under False Pretenses: dishonorable discharge, forfeiture of all pay and allowances, and, depending on the value of the services obtained, confinement for up to 5 years.[6]

5. Relationship to Federal Civilian Practice

The offense of obtaining services by false pretenses under Article 134 has no direct federal civilian counterpart. However, Chapter 31, Title 18 of the U.S. Code includes a number of theft and embezzlement offenses that may address the conduct punishable under the Article 134 offense.

6. Recommendation and Justification

Recommendation 134-78: Redesignate the offense of obtaining services by false pretenses (currently in Article 134, MCM, Part IV, ¶78) as Article 121b.

Migrating the offense of obtaining services under false pretenses to its own enumerated punitive article: Article 121b, aligns the offense with the other UCMJ "larceny" offenses. Obtaining services by false pretenses is now well recognized in criminal law.[7] Accordingly, it does not rely upon the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1033. FALSE PRETENSES TO OBTAIN SERVICES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 921a (article 121a of the Uniform Code of Military Justice), as added by section 1032, the following new section (article):

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[6] MCM 2012, Part IV, ¶78.e.

[7] *See* MODEL PENAL CODE §2.23.7 (1980).

"§921b. Art. 121b. False pretenses to obtain services

"Any person subject to this chapter who, with intent to defraud, knowingly uses false pretenses to obtain services shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1033 would create a new section, Article 121b (False pretenses to obtain services), and would migrate the offense of "False pretenses, obtaining services under" from Article 134 (the General article) into the new statute. This change would align the offense of false pretenses with the related UCMJ "larceny" offenses. Obtaining services by false pretenses is now well recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[8]

[8] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 122 – Robbery
10 U.S.C. § 922

1. Summary of Proposal

This proposal would amend Article 122 to conform to the offense of robbery under 18 U.S.C. § 2111. Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 122 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 122 prohibits the taking of anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company.

3. Historical Background

Until 1920, courts-martial exercised jurisdiction over robbery only when the offense occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[1] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over robbery and a list of other common law offenses, without requiring proof of prejudice to good order and discipline.[2] The current Article 122 was derived from Article 93 of the 1948 Articles of War.[3] The statute remains unchanged since the UCMJ was enacted in 1950.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Robbery: if committed with a firearm, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years; otherwise, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[5]

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 666-67, 670-71 (2nd ed. 1920) (discussing AW 58 (extending jurisdiction over "common law" crimes, including robbery, in time of war) and AW 62 "the General Article" of 1874).

[2] AW 93 of 1920.

[3] *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶47.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2111 sets forth a similar offense to Article 122. It differs from the UCMJ, however, in that it simply requires a forcible taking of property without requiring proof of an "intent to deprive permanently" because the gravamen of robbery is the forcible taking of another's property, in their presence.[6]

6. Recommendation and Justification

Recommendation 122: Amend Article 122 by removing the intent to permanently deprive requirement.

The gravamen of robbery is the forcible taking of another's property, not the duration of time the accused intends to possess the property. To align Article 122 with federal practice, Article 122 should be amended to remove "with the intent to steal" (*i.e.* permanently deprive) as a statutory prerequisite and convert it into a potential maximum punishment enhancer under the MCM.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by reducing the potential for unnecessary litigation in this area.

8. Legislative Proposal

SEC. 1034. ROBBERY.

Section 922 of title 10, United States Code (article 122 of the Uniform Code of Military Justice), is amended to read as follows:

"§922. Art. 122. Robbery

"Any person subject to this chapter who takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of

[6] Congress modeled the federal bank robbery statute on the definition of robbery contained in Blackstone's Commentaries. *See* Carter v. United States, 530 U.S. 255, 271 (2000) (recounting legislative history of 18 U.S.C. 2113) (citing 62 Stat. 796 (1948)). However, in 1948, Congress made two changes to this statute, deleting "feloniously" from what is now § 2113(a) and dividing the "robbery" and "larceny" offenses into their own separate subsections. Thus, Congress purposefully severed the "intent to permanently deprive" offense into a separate larceny statute, leaving the federal robbery statute to focus on the forcible taking.

a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1034 would amend Article 122 (Robbery) to conform the statute to the offense of robbery under 18 U.S.C. § 2111. Article 122 prohibits the taking of anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a family member or others present. Article 122 would be amended to align with 18 U.S.C. § 2111 by removing the words "with the intent to steal" from the statute, thereby eliminating the requirement to show that the accused intended to permanently deprive the victim of his property. The amendments would focus the statute on the true gravamen of this offense: the forcible taking of the property by the accused from the victim, in the presence of the victim.

Article 122a (New Provision) – Receiving Stolen Property

10 U.S.C. § 922a

1. Summary of Proposal

This proposal would migrate the offense of receiving stolen property currently addressed under Article 134 (the General Article)[1] to the new punitive article, Article 122a (Receiving stolen property). Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶106, the offense requires a showing that the accused wrongfully received, bought, or concealed stolen property of some value belonging to another person. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

Under the UCMJ, the President first designated knowingly receiving, buying, or concealing stolen property as an Article 134 offense in the 1951 MCM.[2]

4. Contemporary Practice

When an accused is not the actual thief who can be found liable as a principal to a larceny, then he may be convicted for receiving stolen property under Article 134. The President, under Article 56, has prescribed the following maximum punishment for the offense of Receiving Stolen Property: dishonorable discharge, forfeiture of all pay and allowances, and depending on the value of the stolen property, confinement for up to 3 years.[3]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 662 (Receiving stolen property within special maritime and territorial jurisdiction) sets forth a similar offense to the offense of receiving stolen property in Article 134.

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[1] MCM, Part IV, ¶106.

[2] MCM 1951, App. 6c, ¶169.

[3] MCM, Part IV, ¶106.e.

6. Recommendation and Justification

Recommendation 134-106: Migrate the offense of receiving stolen property (currently in Article 134, the General Article, MCM, Part IV, ¶106) to Article 122a.

The offense of receiving stolen property is a well recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1035. RECEIVING STOLEN PROPERTY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 922 (article 122 of the Uniform Code of Military Justice), as amended by section 1034, the following new section (article):

"§922a. Art. 122a. Receiving stolen property

"Any person subject to this chapter who wrongfully receives, buys, or conceals stolen property, knowing the property to be stolen property, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1035 would create a new section, Article 122a (Receiving stolen property), and would migrate the offense of "Stolen property: knowingly receiving, buying, concealing) from Article 134 (the General article) into the new statute. The offense of receiving stolen property is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[4]

[4] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 123 (Current Law) – Forgery
10 U.S.C. § 923

1. Summary of Proposal

This Report recommends no change to Article 123, except to redesignate it as Article 105 as part of the realignment of the punitive articles. Part II of the Report will consider whether any changes are needed in the Manual for Courts-Martial provisions implementing the new Article 105.

2. Summary of the Current Statute

Article 123 prohibits a person from falsely making or altering a signature to a writing which would, if genuine, impose a legal liability on another person or change his legal right or liability to his prejudice; it also prohibits a person from uttering, offering, issuing, or transferring such a writing, known by them to be so made or altered.

3. Historical Background

American military law has specifically criminalized forgery involving frauds against the government since the 1874 Articles of War.[1] Until 1920, courts-martial exercised jurisdiction over non-government related forgeries only when the offense occurred either in wartime or when charged as an offense "prejudicial to good order and discipline."[2] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over larceny and a list of other common law offenses, without requiring proof of prejudice to good order and discipline.[3] The current Article 123 was derived from Article 93 of the 1948 Articles of War and Article 9 of the 1930 Articles for the Government of the Navy.[4] The statute has remained unchanged since the UCMJ was enacted in 1950.[5]

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 693, 697-98, 702 (photo reprint 1920) (2d ed. 1896) (discussing AW 60 of 1874 (frauds and larcenies of government property)).

[2] *See id.* at 666-67, 670-71 (discussing AW 58 of 1874 (extending jurisdiction over "common law" crimes, including larceny, in time of war) and AW 62 "the general article" of 1874).

[3] AW 93 of 1920.

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Forgery: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 470, et. seq (Counterfeiting and forgery) set forth similar offenses to Article 123.

6. Recommendation and Justification

Recommendation 123: No change to Article 105, except to redesignate it as Article 105.

In view of the well-developed case law addressing Article 123's provisions, change to the statute is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[6] MCM, Part IV, ¶48.e.

Article 123 (New Provision) – Offenses Concerning Government Computers

10 U.S.C. § 923

1. Summary of Proposal

This proposal would create a new enumerated Article 123 (Offenses concerning Government computers), similar to 18 U.S.C. § 1030 (Fraud and related activity in connection with computers). Part II of the Report will address the Manual provisions implementing the new Article 123.

2. Summary of the Current Statute

The proposal would create a new statute.

3. Historical Background

The proposal would create a new statute.

4. Contemporary Practice

If a computer crime is committed in the United States by a person subject to the UCMJ, military prosecutors can charge federal civilian offenses under Article 134, clause 3. But if the crime is committed elsewhere, the government is limited to charging the offense under Article 134, clause 1 (conduct prejudicial to good order and discipline) or clause 2 (service discrediting conduct), which require the government to charge and prove both the civilian offense and the terminal element of clause 1 or clause 2 when charging the federal statute. Prosecutors can also charge computer offenses under existing articles of the UCMJ, such as Article 92 (Failure to obey an order or regulation), with an authorized maximum confinement period of two years. Article 108 (Military property of the United States-sale, loss, destruction, or wrongful disposition) may also apply to misconduct involving government computers, with a maximum authorized confinement period of ten years.[1]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1030 (Fraud and related activity in connection with computers) sets forth a similar offense to the proposed Article 123, Computer Crime. The federal statute addresses conduct that targets computer systems.[2] The law protects computer systems from

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[1] *See* United States v. Walter, 43 M.J. 879, 884-85 (N-M. Ct. Crim. App. 1996) (Article 108 definition of military property was broad enough to cover computer data base files).

[2] Charles Doyle, *Cybercrime: An Overview of 18 U.S.C. 1030 and Related Federal Criminal Laws*, CRS Report 97-1025 (2010).

unauthorized access, threats, damage, espionage, and from being corruptly used as instruments of fraud. Conspiracy to commit and attempts to commit these crimes are also crimes under 18 U.S.C. § 1030(b).[3]

Two terms are common to most prosecutions under section 1030, and are thus key definitions for applying the statute: "protected computer" and "authorization." The term "protected computer," defined at 18 U.S.C. § 1030(e)(2), is a statutory term of art, applicable to computers used in or affecting interstate or foreign commerce and computers used by the federal government and financial institutions. With respect to "authorization," persons who "exceed authorized access" are generally insiders (e.g., employees using a victim's corporate computer network),[4] while persons who access computers "without authorization" will typically be outsiders (e.g., hackers).[5]

6. Recommendation and Justification

Recommendation 123.1: Enact Article 123, Offenses concerning Government computers.

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to computer offenses in the civilian sector insofar as practicable in military criminal practice.

7. Relationship to Objectives and Related Provisions

This proposal supports the MJRG Terms of Reference by incorporating practices used in U.S. district courts with respect to computer offenses.

8. Legislative Proposal

SEC. 1036. OFFENSES CONCERNING GOVERNMENT COMPUTERS.

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[3] *See* DEP'T OF JUSTICE, PROSECUTING COMPUTER CRIMES MANUAL 55-56 (2d ed.) (2010).

[4] Applying the definition of "exceeding authorized access" under 18 U.S.C. § 1030 has presented a recurrent challenge for federal courts. The most commonly litigated issue about "exceeding unauthorized access" in reported opinions is whether a particular defendant exceeded authorized access for a particular purpose. *See, e.g.*, United States v. John, 597 F.3d 263, 272 (5th Cir. 2010) ("Access to a computer and data that can be obtained from that access may be exceeded if the purposes for which the access has been given are exceeded."); *see also* United States v. Nosal, 676 F.3d 854, 864 (9th Cir. 2012) (phrase "exceeds authorized access," within the meaning of CFAA, is limited to access restrictions, not use restrictions). For a discussion of statutory definitions of "access" and "authorization," see Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596 (2003).

[5] *See* S. REP. NO. 99-432, at 10 (1986) (discussing section 1030(a)(5): "[I]nsiders, who are authorized to access a computer, face criminal liability only if they intend to cause damage to the computer, not for recklessly or negligently causing damage. By contrast, outside intruders who break into a computer could be punished for any intentional, reckless, or other damage they cause by their trespass."); *see also* S. REP. NO. 104-357, at 11 (1996); United States v. Phillips, 477 F.3d 215, 219 (5th Cir. 2007) (discussing legislative history); Int'l Airport Centers, L.L.C. v. Citrin, 440 F.3d 418, 420-21 (7th Cir. 2006) ("employee who breaches duty of loyalty terminated his agency relationship, and with it authority to access information").

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 922a (article 122a of the Uniform Code of Military Justice), as added by section 1035, the following new section (article):

"§923. Art. 123. Offenses concerning Government computers

"(a) IN GENERAL.—Any person subject to this chapter who—

"(1) knowingly accesses a Government computer, with an unauthorized purpose, and by doing so obtains classified information, with reason to believe such information could be used to the injury of the United States, or to the advantage of any foreign nation, and intentionally communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted such information to any person not entitled to receive it;

"(2) intentionally accesses a Government computer, with an unauthorized purpose, and thereby obtains classified or other protected information from any such Government computer; or

"(3) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a Government computer;

shall be punished as a court-martial may direct.

"(b) DEFINITIONS.—In this section:

"(1) The term 'computer' has the meaning given that term in section 1030 of title 18.

"(2) The term 'Government computer' means a computer owned or operated by or on behalf of the United States Government.

"(3) The term 'damage' has the meaning given that term in section 1030 of title 18.".

9. Sectional Analysis

Section 1036 would amend Article 123 in its entirety and retitle the statute as "Offenses concerning Government computers." The new enumerated punitive article would be similar to 18 U.S.C. § 1030 (Fraud and related activity in connection with computers). Computers are used extensively throughout the armed forces, and this proposed offense would facilitate prosecuting computer-related offenses at courts-martial. The new statute would provide a UCMJ punitive article to address computer-related offenses where the gravity of the offense may make Article 92-level punishment inappropriately low, but the misconduct may not meet the criteria of existing punitive articles such as Espionage. The new offense is modeled on 18 U.S.C. § 1030, tailored to address the needs of military justice. It would apply only to persons subject to the UCMJ, and it would be directed only at U.S. government computers and U.S. government protected information.

Article 123 would not supersede or preempt the prosecution of 18 U.S.C. § 1030 or other Title 18 offenses under Article 134, Clause 3. Further, service and DoD regulations provide a broadly applicable and flexible means to prosecute less serious computer offenses under Article 92 (Failure to obey order or regulation), and the proposed offense does not supersede or preempt those regulations. Article 108 (Military property of United States—Loss, damage, destruction, or wrongful disposition) covers computer files that have been altered or damaged by the accused through deletion or destruction of computer files or programs for purposes of the offense of willfully destroying military property.

The Manual for Courts-Martial guidance for Article 123 will define and clarify terms, including the term "with an unauthorized purpose," which includes circumstances involving more than one unauthorized purpose, as well as circumstances involving an unauthorized purpose in conjunction with an authorized purpose. The guidance also will reference the UCMJ Article 1(15) definition for "classified information," and will define "protected information" to include information that has been designated as For Official Use Only (FOUO), or as Personally Identifiable Information (PII).

Article 123a – Making, Drawing, or Uttering Check, Draft, or Order Without Sufficient Funds

10 U.S.C. § 923a

1. Summary of Proposal

This Report recommends no change to Article 123a. Part II of the Report will address any changes needed in the Manual for Courts-Martial provisions implementing Article 123a.

2. Summary of the Current Statute

Article 123a prohibits the writing, making, drawing, or uttering of checks with the intent to defraud or deceive when the servicemember knows there are insufficient funds to cover the cost of the check.

3. Historical Background

Congress enacted Article 123a in 1961[1] to criminalize "intentional disruption of the flow and undermining the soundness of commercial paper" in courts-martial.[2] Prior to Article 123a's enactment, bad check cases were prosecuted under Articles 121 (larceny), 123 (forgery) and 134 (general article), each of which presented technical difficulties in pleading and proof.[3] Article 123a remains unchanged since its enactment.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Making, Drawing, or Uttering Check, Draft, or Order Without Sufficient Funds: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1344 (Bank fraud) sets forth a similar offense to Article 123a.

6. Recommendation and Justification

Recommendation Article 123a: No change to Article 123a.

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[1] Act of Oct. 4, 1961, Pub. L. No. 87-385 § 1(1), 75 Stat. 814, 814.

[2] *See* United States v. Woodcock, 39 M.J. 104, 106 (C.M.A. 1994) (citations omitted).

[3] *See, e.g.,* United States v. Guess, 48 M.J. 69, 71 (C.A.A.F. 1998) (reciting the legislative history and policy purpose of Article 123a) (citing S. REP. NO. 87-659 (1961), *reprinted in* 1961 U.S.C.C.A.N. 3313–15).

[4] MCM, Part IV, ¶49.e.

In view of the well-developed case law addressing Article 123a's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 124 (Current Law) – Maiming
10 U.S.C. § 924

1. Summary of Proposal

This Report recommends no change to Article 124, except to redesignate it as Article 128a as part of the realignment of the punitive articles. Part II of the Report will consider whether any changes are needed in the Manual for Courts-Martial provisions implementing the new Article 128a.

2. Summary of the Current Statute

Article 124 prohibits the intentional disfigurement, disablement, or infliction of any other serious physically debilitating injury upon another person.

3. Historical Background

Until 1920, courts-martial exercised jurisdiction over maiming only when the offense occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[1] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over maiming and a list of other common law offenses, without requiring proof of prejudice to good order and discipline.[2] The current Article 124 was derived from Article 93 of the 1948 Articles of War.[3] Since the enactment of the UCMJ in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

The MCM makes clear that "maiming" does not require a specific intent to "maim," it only requires a specific intent to harm.[5] The President, under Article 56, has prescribed the

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 666-67, 670-71 (photo reprint 1920) (2d ed. 1896) (discussing AW 58 of 1874 (extending jurisdiction over "common law" crimes, including maiming, in time of war) and AW 62 "the general article" of 1874).

[2] AW 93 of 1920.

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 263 (1951) (explaining that while Article 124 maiming does require harm in excess of the "grievous bodily harm" standard under Article 128; it is broader than the common law offense of mayhem and encompassed a larger category of qualifying injuries).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶50.c(3); *see also* United States v. Hicks 20 C.M.R. 377 (C.M.A. 1956).

following maximum punishment(s) for the offense of Maiming: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 114 (Maiming within maritime and territorial jurisdiction) and other federal statutes[7] set forth similar offenses to Article 124.[8] There are however two primary differences between the UCMJ and Title 18 maiming offenses. First, the text of Article 124, provides broader categories of possible qualifying "maiming" injuries, whereas 18 U.S.C. § 114 is limited to a specific statutory list of injuries. Second, Article 124 only requires a specific intent to harm whereas Title 18 requires a specific intent to torture, maim, or disfigure.

6. Recommendation and Justification

Recommendation 124: No change to Article 124, except to redesignate it as Article 128a.

In view of the well-developed case law addressing Article 124's provisions, change to the statute's contents is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

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[6] MCM, Part IV, ¶50.e.

[7] *See also* 18 U.S.C. § 956 (Conspiracy to ... maim....); § 1959 (Violent crimes in aid of racketeering activity); § 2332b (Acts of terrorism transcending national boundaries); § 2441 (War crimes).

[8] The MCM and 18 U.S.C. § 114 provide a similar list of injuries qualifying as maiming., e.g. "putting out a person's eye, to cut off a hand, foot, or finger, to knock out a tooth; to cut off an ear; to scar a face with acid; MCM, Part IV, ¶50.c(1); "cuts, bites, or slits the nose, ear, or lip, cuts/disables the tongue, puts out/disables an eye, cuts off/disables a limb, or pours scalding water, acid, or a corrosive substance upon another." 18 U.S.C. § 114.

Article 124a (New Location) – Bribery
10 U.S.C. § 924a

1. Summary of Proposal

This Report recommends migrating the offense of bribery currently addressed under Article 134 (the General Article)[1] to a new section, Article 124a (Bribery). Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 124a.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶66, the offense requires a showing that the accused wrongfully asked, offered, received, promised, or gave a thing of value to a certain person who occupied an official position or had official duties, with the intent to influence the decision or actions, or be influenced in a decision or action in an official matter in which the United States was interested. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized bribery via the General Article since the 1775 Articles of War.[2] Under the UCMJ, the President has designated bribery (in conjunction with graft) as an Article 134 offense since the 1951 MCM.[3] The current military bribery offense was derived from what was then 18 U.S.C. § 202 (now 18 U.SC. § 201) (Bribery of Public Officials and Witnesses).[4] The offenses were designed to target public corruption by military members abusing their official position for personal financial gain.[5]

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[1] MCM, Part IV, ¶66.

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 716-17 n.46 (photo reprint 1920) (2d ed. 1896) (listing bribery as a form of "Acts of fraud or gross falsity, cheats, or other corrupt conduct not included under former heads" punishable under the General Article) (citations omitted).

[3] MCM 1951, App. 6c, ¶¶127, 128.

[4] *See* United States v. Standley, 6 C.M.R. 610, 612 (C.M.A. 1952).

[5] *See* United States v. Alexander, 12 C.M.R. 102, 105 (C.M.A. 1953).

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Bribery: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 201 (Bribery of public officials and witnesses) sets forth a similar offense to the military offense of Bribery in Article 134.

6. Recommendation and Justification

Recommendation 132: Migrate the offense of bribery currently addressed under Article 134 (the General Article (MCM, Part IV, ¶66)) to Article 124a Bribery.

Migrating the offense of bribery to the new Article 124a aligns the offense with the relocated fraud and graft offenses under the UCMJ. Bribery is a well recognized concept in criminal law. Accordingly, this offense does not rely upon the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports the MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

This Report also recommends no change to the existing Article 132 (Frauds against the United States), except to redesignate it as Article 124.

8. Legislative Proposal

SEC. 1037. BRIBERY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 924 (article 124 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(14), the following new section (article):

[6] MCM, Part IV, ¶68.e(1).

"§924a. Art. 124a. Bribery

"(a) ASKING, ACCEPTING, OR RECEIVING THING OF VALUE.—Any person subject to this chapter—

"(1) who occupies an official position or who has official duties; and

"(2) who wrongfully asks, accepts, or receives a thing of value with the intent to have the person's decision or action influenced with respect to an official matter in which the United States is interested;

shall be punished as a court-martial may direct.

"(b) PROMISING, OFFERING, OR GIVING THING OF VALUE.—Any person subject to this chapter who wrongfully promises, offers, or gives a thing of value to another person, who occupies an official position or who has official duties, with the intent to influence the decision or action of the other person with respect to an official matter in which the United States is interested, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1037 would create a new section, Article 124a (Bribery), and would migrate the offense of bribery from Article 134 (the General article) to the new statute. Migrating the offense of bribery to the new Article 124a aligns the offense with the relocated fraud and graft offenses under the UCMJ. Bribery is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[7]

[7] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 124b (New Location) – Graft
10 U.S.C. § 924b

1. Summary of Proposal

This Report recommends migrating the offenses of graft currently addressed under Article 134 (the General Article)[1] to Article 124b (Graft). Part II of the Report will address the Manual provisions implementing the new Article 124b.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶66, the offense requires a showing that the accused wrongfully asked, accepted, or received a thing of value in an official matter when no compensation was due. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized graft via the General Article since the 1775 Articles of War.[2] Under the UCMJ, the President has designated graft (in conjunction with bribery) as an Article 134 offense since the 1951 MCM.[3] The current military graft offense was derived from what was then 18 U.S.C. § 202 (now 18 U.SC. § 201) (Bribery of Public Officials and Witnesses).[4] The offense was designed to target public corruption by military members abusing their official position for personal financial gain.[5]

4. Contemporary Practice

Bribery and Graft are both currently listed as a combined offense under Article 134 (MCM, Part IV, ¶66). The primary distinction between the two offenses is that "bribery" requires

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[1] MCM, Part IV, ¶66.

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 716-17 n.46 (photo reprint 1920) (2d ed. 1896) (listing bribery as a form of "Acts of fraud or gross falsity, cheats, or other corrupt conduct not included under former heads" punishable under the General Article) (citations omitted).

[3] MCM 1951, App. 6c, ¶¶127, 128.

[4] *See* United States v. Standley, 6 C.M.R. 610, 612 (C.M.A. 1952).

[5] *See* United States v. Alexander, 12 C.M.R. 102, 105 (C.M.A. 1953).

an intent to be influenced as an essential element, whereas "graft" does not.[6] Accordingly, graft is a lesser included offense of bribery.[7]

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Frauds against the United States: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[8]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 201 (Bribery of public officials and witnesses) sets forth a similar offense to the military offense of Bribery in Article 134.

6. Recommendation and Justification

Recommendation 132: Migrate the offense of graft currently addressed under Article 134 (the General Article (MCM, Part IV, ¶66)) to Article 124b Graft.

Migrating the offense of graft to the new Article 124b aligns the offense with the relocated fraud and bribery offenses under the UCMJ. Graft is a well recognized concept in criminal law. Accordingly, this offense does not rely upon the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports the MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

The proposed amendments would align similar offenses under Article 124 and Article 124a.

8. Legislative Proposal

SEC. 1038. GRAFT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 924a (article 124a of the Uniform Code of Military Justice), as added by section 1037, the following new section (article):

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[6] MCM, para.

[7] United States v. McCrimmon, 60 M.J. 145, 151 (C.A.A.F. 2004) (upholding conviction for drill instructor accepting money from three trainees in exchange for protecting them from imposition of nonjudicial punishment).

[8] MCM, Part IV, ¶66.e(2).

"§924b. Art. 124b. Graft

"(a) ASKING, ACCEPTING, OR RECEIVING THING OF VALUE.—Any person subject to this chapter—

"(1) who occupies an official position or who has official duties; and

"(2) who wrongfully asks, accepts, or receives a thing of value as compensation for or in recognition of services rendered or to be rendered by the person with respect to an official matter in which the United States is interested;

shall be punished as a court-martial may direct.

"(b) PROMISING, OFFERING, OR GIVING THING OF VALUE.—Any person subject to this chapter who wrongfully promises, offers, or gives a thing of value to another person, who occupies an official position or who has official duties, as compensation for or in recognition of services rendered or to be rendered by the other person with respect to an official matter in which the United States is interested, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1038 would create a new section, Article 124b (Graft), and would migrate the offense of graft from Article 134 (the General article) to the new statute. Migrating the offense of graft to the new Article 124b aligns the offense with the relocated fraud and bribery offenses under the UCMJ. Graft is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[9]

[9] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 125 (Current Law) – Sodomy
10 U.S.C. §925

1. Summary of Proposal

This Report proposes to address the offense of forcible sodomy under Article 120 (Rape and sexual assault generally), and to address the sexual abuse of an animal, along with other types of animal abuse, under a new Article 134 offense. Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 125 prohibits forcible, non-consensual oral sex or anal sex between two persons, and it prohibits all sexual activity between humans and animals.

3. Historical Background

The current Article 125 was derived from Article 93 of the 1948 Articles of War and Article 9 of the 1930 Articles for the Government of the Navy.[1] The statute was amended in 2013 to eliminate the offense of consensual sodomy, while retaining the provisions addressing forcible sodomy and bestiality.[2]

4. Contemporary Practice

Currently, the same sexual acts of non-consensual oral or anal sex that may be charged under Article 125 (Sodomy) can also be charged under Article 120 (Rape and Sexual Assault Generally).[3]

There is currently no comprehensive animal abuse offense in the UCMJ; sexual acts with animals may be prosecuted under the current Article 125, and offenses committed against government-owned animals, such as military working dogs, may be prosecuted under

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[1] *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[2] NDAA FY 2014, Pub. L. No. 113-66, Div. A, Title XVII, § 1707(a), 127 Stat. 672, 961 (2013).

[3] *Compare* MCM, Part IV, ¶51.c (defining sodomy as a person "tak[ing] into that person's mouth or anus the sexual organ of another person") *with* Article 120(g)(1) (defining sexual act to include, *inter alia*, "contact between the penis and the . . . anus or mouth . . . contact involving the penis occurs upon penetration, however slight"). Under current law, the defense of reasonable mistake of fact as to age is defense is available to the accused in a prosecution under Article 120 for sexual offenses involving a minor, but is not available to an the accused in a prosecution under Article 125. *See* United States v. Wilson, 66 M.J. 39, 47 (C.A.A.F. 2008).

Article 134 (para. 61)-Abusing a Public Animal. In 2012, the Joint Services Committee proposed an animal abuse offense under Article 134.[4]

5. Relationship to Federal Civilian Practice

Article 125 has no direct federal civilian counterpart. Instead, the Title 18 sexual assault statute, 18 U.S.C. § 2241 (Aggravated sexual abuse), addresses a broad spectrum of sexual acts, encompassing sexual acts defined as sodomy in Article 125.

6. Recommendation and Justification

Recommendation 125: Address the offense of forcible sodomy under Article 120 (Rape and sexual assault generally), and address the sexual abuse of an animal under a new comprehensive animal abuse offense in Article 134.

A new animal cruelty offense under Article 134 would cover the misconduct currently addressed under Articles 125 and 134, and also would address other forms of animal abuse. Article 125 would serve as the location for the offense of kidnapping which would be migrated from Article 134 as set forth in the following section of this Report.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

[4] 77 Fed. Reg. 205, 64865 (Oct. 23, 2012).

Article 125 (New Location) – Kidnapping
10 U.S.C. §925

1. Summary of Proposal

This proposal would migrate the offense of kidnapping currently addressed under Article 134 (the General Article)[1] to the new Article 125 (Kidnapping) as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶92, the offense of kidnapping requires a showing that the accused seized, inveigled, decoyed, or carried away a person and then held them against their will. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated the offense of kidnapping under Article 134 in the 1984 MCM.[2] The intent of the offense's designation in Article 134 was to "end prosecutions under assimilated state law, put to a rest uncertainty concerning kidnapping offenses, and ensure the uniform treatment of the offense regardless of location."[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Kidnapping: dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1201 (Kidnapping) sets forth a similar offense to the offense of kidnapping under Article 134.

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[1] MCM, Part IV, ¶92.

[2] MCM 1984, Part IV, ¶92.

[3] MCM 1984, App. 23 (Analysis of the Punitive Articles), ¶92 at A23-21.

[4] MCM, Part IV, ¶92.e.

6. Recommendation and Justification

Recommendation 134-92: Migrate the offense of kidnapping in Article 134 (MCM, Part IV, ¶92) to the amended Article 125.

The offense of kidnapping is a well recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable.

8. Legislative Proposal

SEC. 1039. KIDNAPPING

Section 925 of title 10, United States Code (article 125 of the Uniform Code of Military Justice), is amended to read as follows:

"§925. Art. 125. Kidnapping

"Any person subject to this chapter who wrongfully—

"(1) seizes, confines, inveigles, decoys, or carries away another person; and

"(2) holds the other person against that person's will;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1039 would migrate the offense of "Kidnapping" from Article 134 (the General article) to the redesignated Article 125 (Kidnapping). The offense of kidnapping is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality. The removal of sodomy from Article 125 conforms the statute to the proposed treatment of the offense of forcible sodomy under Article 120 (Rape and sexual assault generally) and the proposal to provide comprehensive guidance on the treatment of animal abuse offenses, including bestiality, under Article 134.

Article 126 – Arson
10 U.S.C. § 926

1. Summary of Proposal

This proposal would migrate the offense of burning with intent to defraud currently addressed in Article 134 (the General Article)[1] to Article 126 (Arson; burning property with intent to defraud). This Report recommends no other changes to Article 126. Part II of the Report will address any changes needed in the Manual for Courts-Martial provisions implementing Article 126.

2. Summary of the Current Statute

Article 126 prohibits the willful and malicious burning or setting on fire of a dwelling or other structure. The article sets out two forms of aggravated arson and one form of simple arson.

3. Historical Background

Until 1920, courts-martial exercised jurisdiction over "arson" only when the offense occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[2] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over arson and a list of other "common law" offenses, without requiring proof of prejudice to good order and discipline.[3] The current Article 126 was derived from Article 93 of the 1948 Articles of War.[4] Since the UCMJ was enacted in 1950,[5] the statute has remained unchanged.

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[1] MCM, Part IV, ¶67. The offense of burning with intent to defraud is discussed under this report under "Article 126 – Arson – Addendum."

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 686-87, 670-71 (photo reprint 1920) (2d ed. 1896) (discussing AW 58 (extending jurisdiction over "common law" crimes, including arson, in time of war) and AW 62 "the general article" of 1874).

[3] AW 93 of 1920.

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Arson: depending on whether the structure was inhabited and its value, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 81 (Arson within maritime and territorial jurisdiction) sets forth a similar offense to Article 126.

6. Recommendation and Justification

Recommendation 126: Migrate the offense of burning with intent to defraud (currently in Article 134, the General Article, MCM, Part IV, ¶67), to Article 126.

This proposal would align similar offenses, and migrate the offense of Burning with Intent to Defraud from Article 134 to an enumerated punitive article, where the terminal element under Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) is not necessary to demonstrate criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1040. ARSON; BURNING PROPERTY WITH INTENT TO DEFRAUD.

Section 926 of title 10, United States Code (article 126 of the Uniform Code of Military Justice), is amended to read as follows:

"§926. Art. 126. Arson; burning property with intent to defraud

"(a) AGGRAVATED ARSON.—Any person subject to this chapter who, willfully and maliciously, burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein, to the knowledge of that person, there is at the

[6] MCM, Part IV, ¶52.e.

time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.

"(b) SIMPLE ARSON.—Any person subject to this chapter who, willfully and maliciously, burns or sets fire to the property of another is guilty of simple arson and shall be punished as a court-martial may direct.

"(c) BURNING PROPERTY WITH INTENT TO DEFRAUD.—Any person subject to this chapter who, willfully, maliciously, and with intent to defraud, burns or sets fire to any property shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1040 would migrate the offense of "Burning with intent to defraud" from Article 134 (the General article) to redesignated Article 126 (Arson; burning property with intent to defraud). Article 126 currently prohibits the willful and malicious burning or setting on fire of a dwelling or other structure. Article 126 sets out two forms of aggravated arson and one form of simple arson. The offense of burning with intent to defraud is similar to those offenses and is itself a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[7]

[7] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 126 – Arson – Addendum
(Burning with Intent to Defraud)

1. Summary of Proposal

This proposal would migrate the offense of burning with intent to defraud currently addressed under Article 134 (the General Article)[1] to Article 126. Article 126 would be retitled as "Arson; burning property with intent to defraud." Part II of this Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. MCM, Part IV, ¶67 requires a showing that the accused willfully and maliciously burned or set fire to the property of a certain person with the intent to defraud a certain person or organization. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The Court of Military Appeals first recognized the burning of an uninhabited building with the intent to defraud as qualifying misconduct under Article 134 in 1958.[2] The President then designated "burning with intent to defraud" as an Article 134 offense in the 1968 MCM.[3]

4. Contemporary Practice

Burning with the intent to defraud is a form of aggravated arson that falls outside of the current scope of Article 126 because it does not involve the burning of an inhabited dwelling or other structure. In practical terms, the offense is intended to criminalize burning property with intent to defraud an insurance provider.[4]

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[1] MCM, Part IV, ¶67.

[2] United States v. Fuller, 25 C.M.R. 405, 406-07 (C.M.A. 1958) (holding that the willful and intentional burning of the property of another, in agreement with the owners, in order to defraud an insurance company as "service discrediting conduct" in violation of Article 134).

[3] MCM 1968, App. 6c, ¶133.

[4] *See* DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.10[3][b][ii] at 749 (2d ed. 2012).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Burning with Intent to Defraud: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[5]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 81 (Arson within maritime and territorial jurisdiction) sets forth a similar offense to the offense of burning with intent to defraud in Article 134.

6. Recommendation and Justification

Recommendation 134-67: Migrate the offense of burning with intent to defraud in Article 134 (MCM, Part IV, ¶67) to Article 126.

Migrating the offense of burning with intent to defraud to Article 126 aligns the offense with the existing UCMJ arson offense. Burning with the intent to defraud is an aggravated form of arson well recognized in criminal law. Accordingly, it does not rely upon the "terminal element" of Article 134 as the basis for its criminality.[6]

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 126 (Arson), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 126 (Arson), *supra*, at paragraph 9.

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[5] MCM, Part IV, ¶67.e.

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 127 – Extortion
10 U.S.C. § 927

1. Summary of Proposal

This Report recommends no change to Article 127. Part II of the Report will consider whether any changes are needed to the provisions in the Manual for Courts-Martial provisions implementing Article 127.

2. Summary of the Current Statute

Article 127 prohibits the communication of threats to another person with the intention to obtain anything of value.

3. Historical Background

Prior to enactment of the UCMJ, courts-martial exercised jurisdiction over "extortion" only when the offense occurred under circumstances which were "prejudicial to good order and discipline" in violation of the "general article."[1] The current Article 127 was derived from practice under Article 96 of the 1948 Articles of War.[2] Since the enactment of the UCMJ in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

Military courts broadly construe the word "threats" when interpreting Article 127.[4] The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Extortion: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[5]

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 716-17 n.46 (photo reprint 1920) (2d ed. 1896) (listing extortion as a species of misconduct punishable under the "General Article") (discussing AW 62 "the general article" of 1874).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] *See, e.g.,* United States v. Farkas, 21 M.J. 458, 461 (C.M.A. 1986) (holding that appellant's threat to sell victim's diamond ring qualified as a sufficient threat to "injure person, property, or reputation of another" to state offense of extortion). *See also* United States v. Brown, 67 M.J. 147, 149 (C.A.A.F. 2009) (threat to disclose prior sexual relationship with the victim in a manner which would adversely impact her military career, unless she agreed to sexual advances constituted a "threat" to obtain a "thing of value" within the meaning of the statute).

[5] MCM, Part IV, ¶53.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 871 et seq. (Extortion and threats) set forth similar offenses to Article 127.

6. Recommendation and Justification

Recommendation 127: No change to Article 127.

In view of the well-developed case law addressing Article 127's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

This Report proposes that Communicating a Threat, previously addressed in MCM Part IV, ¶110, will be included under Article 115.

Article 128 – Assault
10 U.S.C. § 928

1. Summary of Proposal

This proposal would amend Article 128 to adopt the aggravated assault provision of 18 U.S.C. § 113. This proposal would further migrate into Article 128 the general offense of assault with intent to commit certain specified offenses currently addressed under Article 134 (the General Article).[1] Part II of the Report will address changes in the Manual provisions implementing Article 128 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 128 prohibits assaults (offers or attempts to do bodily harm to another person), batteries (harmful or offensive touching of another person), and aggravated assaults (using a weapon or other means or force likely to produce grievous bodily harm, or when grievous bodily harm has been intentionally inflicted with or without a weapon).

3. Historical Background

"Assaults" (including simple assault, battery, and aggravated assault) have their origins in the common law, and have been proscribed under military law since the 1775 Articles of War.[2] The current Article 128 was derived from Article 93 of the 1948 Articles of War.[3] Since the enactment of the UCMJ in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Assaults: dishonorable discharge, forfeiture of all pay and allowances, and depending on the nature of the assault, confinement for up to 10 years.[5]

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[1] MCM, Part IV, ¶64. The offense assault with intent to commit murder, etc., is discussed in the Report under "Article 128 – Assaults – Addendum." The "specified offenses" under that provision include voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking.

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 663, 666-67, 671, 687, 724 (photo reprint 1920) (2d ed. 1896).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1233-34 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 284-87 (1951) (discussing the incorporation of common law definitions of assault and battery into Article 128).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶54.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 113 (Assaults within maritime and territorial jurisdiction) sets forth a similar offense to Article 128. 18 U.S.C. § 113(a)(3), the aggravated assault provision in the offense, differs from Article 128(b)(1)'s aggravated assault provision; Article 128(b)(1) is narrower, because it requires that any dangerous weapon or other instrumentality be used in a manner "likely to produce death or grievous bodily harm."[6] 18 U.S.C. § 113 requires only that an accused use "a dangerous weapon with the intent to do bodily harm"; the statute focuses on the nature of the weapon and the accused's intent rather than the "likelihood of harm." Under federal case law, a "dangerous weapon" is "an instrument capable of inflicting death or serious bodily injury."[7]

Finally, while Article 128 recognizes two categories of harm: (1) bodily harm; and (2) grievous bodily harm; 18 U.S.C. § 113 recognizes these plus a third: "substantial bodily harm." It provides a middle tier of harm under the statute and is defined as a "temporary but substantial disfigurement; or a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty."[8]

6. Recommendation and Justification

Recommendation 128: Amend Article 128 to conform to 18 U.S.C. 113(a)(3) and migrate the general offense of assault in Article 134 (MCM, Part IV, ¶64) to Article 128.

This proposal improves Article 128 in three respects: (1) adopting the 18 U.S.C. § 113(a)(3) definition of aggravated assault provides clarity for "aggravated assault" and better accountability for malicious intent by focusing more on the intent of the accused rather than the "likelihood of harm";

(2) Adopting the 18 U.S.C. § 113(b)(1) "middle tier" of harm: "substantial bodily injury," into Article 128 aligns military law with federal practice and will better calibrate courts-martial punishments relative to the amount of harm caused;

(3) Removing Article 128(b)(1)'s higher "specific intent" threshold for aggravated assault (*i.e.* requiring specific intent to inflict grievous bodily harm) and adopting 18 U.S.C. §113's more modest "intent to cause bodily harm" standard will permit offenders to be held accountable for aggravated assault to the same extent under federal and military law.

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[6] United States v. Weatherspoon, 49 M.J. 209, 211 (C.A.A.F. 1998).

[7] United States v. Sturgis, 48 F.3d 784, 787 (4th Cir. 1995) (holding that defendant's teeth were a "deadly weapon").

[8] 18 U.S.C. § 113(b)(1).

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to assault in federal civilian practice insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1041. ASSAULT.

Section 928 of title 10, United States Code (article 128 of the Uniform Code of Military Justice), is amended to read as follows:

"§928. Art. 128. Assault

"(a) ASSAULT.—Any person subject to this chapter who, unlawfully and with force or violence—

"(1) attempts to do bodily harm to another person;

"(2) offers to do bodily harm to another person; or

"(3) does bodily harm to another person;

is guilty of assault and shall be punished as a court-martial may direct.

"(b) AGGRAVATED ASSAULT.—Any person subject to this chapter—

"(1) who, with the intent to do bodily harm, offers to do bodily harm with a dangerous weapon; or

"(2) who, in committing an assault, inflicts substantial bodily harm, or grievous bodily harm on another person;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

"(c) ASSAULT WITH INTENT TO COMMIT SPECIFIED OFFENSES.—

"(1) IN GENERAL.—Any person subject to this chapter who commits assault with intent to commit an offense specified in paragraph (2) shall be punished as a court-martial may direct.

"(2) OFFENSES SPECIFIED.—The offenses referred to in paragraph (1) are murder, voluntary manslaughter, rape, sexual assault, rape of a child, sexual assault of a child, robbery, arson, burglary, and kidnapping.".

9. Sectional Analysis

Section 1041 would amend Article 128 (Assault) to employ a standard that focuses attention on the malicious intent of the accused rather than the speculative "likelihood" of the activity actually resulting in harm, consistent with federal civilian practice.

This section also would migrate the offense of "Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking" from Article 134 (the General article) to Article 128. The offense of assault with intent to commit a serious felony is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[9]

[9] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 128 – Assault – Addendum
(Assault – with Intent to Commit Murder, Voluntary Manslaughter, Rape, Robbery, Sodomy, Arson, Burglary, or Housebreaking)

1. Summary of Proposal

This proposal would migrate the offenses of assault with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking offense currently addressed under Article 134 (the General Article),[1] with slight modifications to the qualifying list of offenses, into Article 128 (Assault). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶64, the offense of assault with intent to commit a specified offense requires a showing that the accused committed an assault upon another person with the intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized assault with intent to commit murder and other offenses via the General Article since the 1775 Articles of War.[2] Under the UCMJ, the President has designated assault with attempt to commit specified crimes as an Article 134 offense since the 1951 MCM.[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Assault with the Intent to Commit [a specified offense]: dishonorable

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[1] MCM, Part IV, ¶64.

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 723 (photo reprint 1920) (2d ed. 1896).

[3] MCM 1951, ¶213d.

discharge, forfeiture of all pay and allowances, and, depending on the underlying felony intended during the assault, confinement for up to 20 years.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 113(a)(1)(2) (Assault within maritime and territorial jurisdiction) sets forth a similar offense to the assault offense in Article 134. It differs in that it encompasses assault with intent to commit any felony.

6. Recommendation and Justification

Recommendation 134-64: Migrate the offense of assault with intent to commit an enumerated felony defined in Art. 134, the General Article (MCM, Part IV, ¶64) to Art. 128.

This series of offenses currently listed in MCM, Part IV, ¶64 are aggravated forms of assault already embraced by Article 128. Migrating this series of "assault with intent to commit" offenses to Article 128 also aligns Article 128 with federal practice under 18 U.S.C. § 113(a)(1), (2).

The list of qualifying offenses under MCM, Part IV, ¶64 should be updated to include the current Article 120b (Rape and Sexual Assault of a Child) and Kidnapping (current MCM, Part IV, ¶83). These offenses are sufficiently serious to warrant placement within the current list of qualifying offenses. Consistent with the MJRG's other realignment recommendations, "sodomy" and "housebreaking" should be deleted from the list as they are subsumed within "rape" and "burglary."

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable in federal civilian practice insofar as practicable.

8. Legislative Proposal

See Article 128 (Assault), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 128 (Assault), *supra*, at paragraph 9.

[4] MCM, Part IV, ¶64.e.

Article 129 – Burglary
10 U.S.C. § 929

1. Summary of Proposal

This proposal would amend Article 129 (Burglary) by removing the obsolete common law elements that the breaking and entering occur: (1) at a private dwelling; and (2) at nighttime. This proposal would also migrate the housebreaking provisions under Article 130 and the offense of unlawful entry under Article 134 (the General Article) into Article 129.[1] Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 129 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 129 prohibits the breaking and entering of a dwelling house of another during the nighttime with the specific intent to commit any offense punishable under Article 118-128 (excluding Article 123a (Making/Drawing/Uttering Checks without sufficient funds).

3. Historical Background

Until 1920, courts-martial exercised jurisdiction over burglary only when the offense occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[2] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over burglary and a list of other common law offenses, without requiring proof of prejudice to good order and discipline.[3] The current Article 129 was derived from Article 93 of the 1948 Articles of War.[4] Since the enactment of the UCMJ in 1950,[5] the statute has remained unchanged.

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[1] MCM, Part IV, ¶111. The offense of housebreaking is discussed in this Report under "Article 129 – Burglary – Addendum."

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 666-67, 670-71, 682 (photo reprint 1920) (2d ed. 1896) (discussing AW 58 (extending jurisdiction over "common law" crimes, including arson, in time of war) and AW 62 "the general article" of 1874).

[3] AW 93 of 1920.

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 287 (1951) (noting that Article 129 "includes all the common law elements").

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Burglary: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2117 (Breaking or entering of carrier facilities) and 18 U.S.C. § 2118 (Robberies and burglaries involving controlled substances) set forth similar offenses to Article 129. Neither 18 U.S.C. § 2117 nor § 2118 require a "breaking and entering" at nighttime; and they do not require that it be in the personal dwelling of another.

The modern trend, reflected in federal law and the Model Penal Code,[7] and followed by the majority of states is to use the factors of a "personal dwelling" and/or "nighttime" as aggravating factors for punishment purposes only, not as elements of burglary.[8]

6. Recommendation and Justification

Recommendation 129: Amend Article 129 by removing the "private dwelling" and "nighttime" elements, and migrate the provisions under Article 130 and the offense of unlawful entry in Article 134 (MCM, Part IV, ¶111) to Article 129.

Modernizing and consolidating Article 129 Burglary with housebreaking and unlawful entry aligns the UCMJ with federal and state practice and enables natural alignment of statutory lesser included offenses. There is no unique military reason to deviate from federal and state practice and require all burglaries to take place "at night" and in a "personal dwelling" as a statutory prerequisite rather than as a punishment enhancer.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to burglary in the civilian sector insofar as practicable in military criminal practice.

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[6] MCM, Part IV, ¶55.e.

[7] Model Penal Code § 221.1 (1981): "A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with the purpose to commit a crime therein . . ."

[8] WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, VOL. 3, § 21.1(a) (2d ed. 2003) ("Across the intervening centuries these elements [of common law burglary] have been expanded or discarded to such an extent that modern day offense common known as burglary bears little relation to its common law ancestor."); § 21.1(c) n.87 (citations omitted) (*Personal Dwelling*: citing several state statutes using "personal dwelling" factor as only a punishment enhancer) § 21.1(d) n.102 (citations omitted) (*Nighttime*: citing several states using "nighttime" factor as a burglary punishment enhancer, not a prerequisite).

8. Legislative Proposal

SEC. 1042. BURGLARY AND UNLAWFUL ENTRY.

Section 929 of title 10, United States Code (article 129 of the Uniform Code of Military Justice), and section 929a of such title (article 129a), as redesignated by section 1001(10), are amended to read as follows:

"§929. Art. 129. Burglary; unlawful entry

"(a) BURGLARY.—Any person subject to this chapter who, with intent to commit an offense under this chapter, breaks and enters the building or structure of another shall be punished as a court-martial may direct.

"(b) UNLAWFUL ENTRY.—Any person subject to this chapter who unlawfully enters—

"(1) the real property of another; or

"(2) the personal property of another which amounts to a structure usually used for habitation or storage;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1042 would amend Article 129 and retitle the statute as "Burglary; unlawful entry." In the amended statute, the common-law "personal dwelling" and "nighttime" elements would be removed to align Article 129 with the majority rule reflected in federal and state law. As part of the realignment of closely related offenses, the offense of "Housebreaking" would be incorporated into Article 129.

The offense of "Unlawful entry" would migrate as a separate subsection from Article 134 (the General article). Illegally accessing someone else's property is a well-recognized concept in criminal law. Accordingly, the offense of unlawful entry does not need to rely

upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[9]

[9] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 129 – Burglary – Addendum
(Unlawful Entry)

1. Summary of Proposal

This proposal would migrate the offense of unlawful entry currently addressed under Article 134 (the General Article)[1] to Article 129 (Burglary; Unlawful Entry). Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶111, the offense requires a showing that the accused entered the real or personal property of another without lawful authority. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated "Unlawful Entry" as an Article 134 offense in the 1951 MCM.[2] The military offense of "unlawful" entry was based upon a 1901 provision of the District of Columbia (later amended in 1951).[3] The Court of Military Appeals first affirmed a conviction for this offense under Article 134 in 1954 in *United States v. Love.*[4]

4. Contemporary Practice

Unlawful entry is a "general intent" crime.[5] The property protected under unlawful entry is broader than that for burglary (personal dwelling) or housebreaking (property used for habitation or storage), and unlike burglary, there is no "breaking" requirement.[6]

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[1] MCM, Part IV, ¶111.

[2] MCM 1951, App. 6c, ¶174.

[3] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSON & CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.59[2] at 1004 (2d ed. 2012) (citations omitted).

[4] 15 C.M.R. 260, 262 (C.M.A. 1954) (upholding unlawful entry conviction for accused entering into a billeting tent).

[5] SCHLUETER ET AL., *supra* note 3, at 1004 (citations omitted).

[6] *Id.*

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Unlawful Entry: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[7]

5. Relationship to Federal Civilian Practice

Title 18 does not provide a counterpart to "unlawful entry" under the UCMJ. However, state law punishes unlawful entry as criminal trespassing.

6. Recommendation and Justification

Recommendation 134-111: Migrate the offense of unlawful entry currently in Article 134, the General Article (MCM, Part IV, ¶111), to Article 129.

Migrating the unlawful entry offense aligns the offense with the other criminal trespass to property offenses under the newly reconstituted Article 129 (Burglary). Illegally accessing someone else's property is a well-recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 129 (Burglary), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 129 (Burglary), *supra*, at paragraph 9.

[7] MCM, Part IV, ¶111.e.

Article 130 (Current Law) – Housebreaking
10 U.S.C. § 930

1. Summary of Proposal

This Report recommends transferring the substance of Article 130 Housebreaking to the amended Article 129 (Burglary) as part of the revision of that offense. Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 129.

2. Summary of the Current Statute

Article 130 prohibits the unlawful entry into a building or structure with the intent to commit any criminal offense therein (excluding "purely military offenses").[1] The term "housebreaking" is a misnomer; the statute does not require that it be a dwelling or a separate structure; the place entered can be a room, shop, store, apartment building, compartment of a vessel, an inhabitable trailer, a tent, or a houseboat.[2] Furthermore, no "breaking" is required, only "unlawful entry."[3]

3. Historical Background

No specific "housebreaking" offense existed under the Articles of War until 1920.[4] During this time, conduct approximating housebreaking could only be prosecuted under the "general article" of the Articles of War which required proof that the offense was "prejudicial to good order and discipline."[5] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over housebreaking and a list of other "common law" offenses, without requiring proof of prejudice to good order and discipline.[6]

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[1] MCM, Part IV, ¶56.c.(3).

[2] *Id.* at ¶56.c.(4).

[3] *Id.* at ¶56.b(2) (elements requires only "unlawful entry"); ¶56.c(5) (entry defined solely as location, not method "entry of any part of the body, even a finger, is sufficient") (citing ¶55.c(3)).

[4] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 682-685 (photo reprint 1920) (2d ed. 1896) (discussing burglary and referencing no lesser included offense of "housebreaking").

[5] *Id.* at 670-71 (discussing jurisdiction over "common law" crimes, under the (then) "general article," AW 62 of 1874).

[6] AW 93 of 1920.

The current Article 130 was derived from Article 93 of the 1948 Articles of War.[7] Since the enactment of the UCMJ in 1950,[8] the statute has remained unchanged.

4. Contemporary Practice

Housebreaking is a lesser included offense of burglary.[9] Like burglary, it is a specific intent crime.[10] The offense of housebreaking should be viewed on a continuum with burglary and unlawful entry. Housebreaking is the middle tier of the three offenses. There are three primary differences between burglary and housebreaking: the property protected under housebreaking is broader than that for burglary (personal dwelling); unlike burglary, there is no "breaking" requirement; and the list of qualifying crimes includes any offense under the UCMJ which is not a "purely military offense."[11]

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Housebreaking: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[12]

5. Relationship to Federal Civilian Practice

Article 130 is a unique military offense with no direct federal civilian counterpart.[13]

6. Recommendation and Justification

Recommendation 130: Migrate the substance of Article 130 Housebreaking to the amended Article 129 (Burglary).

This change would align similar offenses under Article 129.

The term "housebreaking" is a misnomer; the statute does not require that the structure entered be the dwelling place of another or that an actual "breaking" occur. Accordingly, transferring the substance of Article 130 (Housebreaking) (which is a lesser included offense of Article 129 (Burglary)) would aid in the realignment of closely related offenses.

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[7] *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[8] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[9] United States v. Arriaga, 70 M.J. 51, 55 (C.A.A.F. 2010).

[10] United States v. Walsh, 5 C.M.R. 793, 794 (A.F.B.R. 1952).

[11] United States v. Contreras, 69 M.J. 120, 124 (C.A.A.F. 2010) (an offense is a purely military offense only if the UCMJ limits prosecution for the offense to servicemembers).

[12] MCM, Part IV, ¶56.e.

[13] The closest Title 18 corollaries are two narrow burglary statutes targeting offices housing controlled substances (18 U.S.C. § 2118), and common carrier facilities (18 U.S.C. § 2117).

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to burglary in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 129 (Burglary), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 129 (Burglary), *supra*, at paragraph 9.

Article 131 – Perjury
10 U.S.C. § 931

1. Summary of Proposal

This Report recommends no change to the Article 131. Part II of the Report will address any changes needed in the Manual for Courts-Martial provisions implementing Article 131.

2. Summary of the Current Statute

Article 131 prohibits the willful giving of false testimony or subscribing to a false statement in a judicial proceeding or in a course of justice. The testimony or statement must be made under oath or penalty of perjury as authorized by 28 U.S.C. § 1746. In the case of testimony, the oath or affirmation must be recognized or authorized by law and administered by someone having legal authority.[1]

3. Historical Background

American military law has made perjury punishable at courts-martial since the 1775 Articles of War, via prosecution under the General Article as conduct "prejudicial to good order and discipline."[2] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over perjury and a list of other "common law" offenses, without requiring proof of prejudice to good order and discipline.[3] Article 131, as enacted in 1950[4], was derived from Article 93 of the 1948 Articles of War.[5] The only substantive amendment to the statute occurred in 1976,[6] which conformed Article 131 to 28 U.S.C. § 1746 (unsworn declarations under penalty of perjury).

4. Contemporary Practice

Under current law, Article 131 divides perjury into two general categories; the first category is giving false testimony, while the second category is subscribing false

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[1] MCM, Part IV, ¶57.c(2)(a)-(d).

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 730 (photo reprint 1920) (2d ed. 1896) (listing fraud against the government as a species of conduct prejudicial to good order and discipline frequently punished via the (then) "general article," AW 62 of 1874).

[3] AW 93 of 1920.

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1234 (1949).

[6] Act of Oct. 18, 1976, Pub.L. 94-550, § 3, 90 Stat. 2534, 2535 (1976).

statements.[7] The President, under Article 56, has prescribed the following maximum punishments for the offense of Perjury: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[8]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1621(Perjury) sets forth a nearly identical offense to Article 131.

6. Recommendation and Justification

Recommendation 131: No change to Article 131.

In view of the well-developed case law addressing Article 131's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by minimizing change when established military law is similar to the law applied in U.S. district courts.

[7] MCM, Part IV, ¶57.c(2), (3).

[8] *Id.* at ¶57.e.

Article 131a (New Provision) – Subornation of Perjury

10 U.S.C. § 931a

1. Summary of Proposal

This proposal would migrate the offense of subornation of perjury currently addressed under Article 134 (the General Article)[1] to a new Article 131a (Subornation of Perjury). Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 131a.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶98, the offense requires a person to persuade someone else to commit perjury in court. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law has criminalized suborning perjury as a violation of the General Article since the Articles of War of 1775.[2] Under the UCMJ, the President has designated subornation of perjury as an Article 134 offense since the 1951 MCM.[3] The offense of subornation of perjury is designed to prevent the corruption of the trial process by false testimony.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Subornation of Perjury: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[5]

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[1] MCM, Part IV, ¶98.

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 702 (photo reprint 1920) (2d ed. 1896).

[3] MCM 1951, ¶213d.

[4] *See* United States v. Standifer, 40 M.J. 440, 443 (C.M.A. 1994).

[5] MCM, Part IV, ¶98.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1622 (Subornation of perjury) sets forth a similar offense to the offense of subornation of perjury in Article134.

6. Recommendation and Justification

Recommendation 134-98: Migrate the offense of subornation of perjury in Article 134 (MCM, Part IV, ¶98) to Article 131.

Migrating the offense of subornation of perjury to Article 131 aligns the offense with the other similar subject matter offenses under the UCMJ. Suborning perjury is a well recognized concept in criminal law and is inherently prejudicial to good order and discipline as it corrupts the trial process and interferes with the administration of justice. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1044. SUBORNATION OF PERJURY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931 (article 131 of the Uniform Code of Military Justice), the following new section (article):

"§931a. Art. 131a. Subornation of perjury

"(a) IN GENERAL.—Any person subject to this chapter who induces and procures another person—

"(1) to take an oath; and

"(2) to falsely testify, depose, or state upon such oath;

shall, if the conditions specified in subsection (b) are satisfied, be punished as a court-martial may direct.

"(b) CONDITIONS.—The conditions referred to in subsection (a) are the following:

"(1) The oath is administered with respect to a matter for which such oath is required or authorized by law.

"(2) The oath is administered by a person having authority to do so.

"(3) Upon the oath, the other person willfully makes or subscribes a statement.

"(4) The statement is material.

"(5) The statement is false.

"(6) When the statement is made or subscribed, the person subject to this chapter and the other person do not believe that the statement is true.".

9. Sectional Analysis

Section 1044 would create a new section, Article 131a (Subornation of perjury), and would migrate the offense of "Perjury: subornation of" from Article 134 (the General article) to the new statute. Migrating this offense would place it alongside similar offenses in the UCMJ. The offense of suborning perjury is a well-recognized concept in criminal law as it corrupts the trial process and interferes with the administration of justice. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 131b (New Provision) – Obstructing Justice
10 U.S.C. § 131b

1. Summary of Proposal

This proposal would migrate the offense of obstructing justice currently addressed under Article 134 (the General Article)[1] to a new Article 131b (Obstruction of Justice). Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 131b.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶96, the offense requires a showing that the accused did a wrongful act in the case of a person subject to criminal proceedings,[2] with the intent to influence, impede or otherwise obstruct the due administration of justice. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The military offense of obstructing justice began as an undesignated Article 134 offense.[3] In 1952, the Court of Military Appeals determined that a servicemember could also be prosecuted under the first two clauses of Article 134 for obstruction or interference with the administration of military justice, independent of other federal statutes.[4] The President first designated the offense of obstruction of justice under Article 134 in the 1969 Manual for Courts-Martial.[5]

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[1] MCM, Part IV, ¶96.

[2] Under current law, "criminal proceedings" includes nonjudicial punishment and summary court-martial proceedings. *See* MCM, Part IV, ¶96c.

[3] United States v. Long, 6 C.M.R. 60, 71 (C.M.A. 1952) (affirming legality of "obstruction of justice" as violative of Article 134 clauses 1 and 2 and utilizing the federal obstruction of justice statute to determine maximum punishment for the offense).

[4] *Id.* at 65.

[5] MCM 1969, App 6(c), ¶165.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Obstructing Justice: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[6]

5. Relationship to Federal Civilian Practice

MCM, Part IV, ¶96, addresses a broad spectrum of conduct analogous to, though not controlled by, offenses codified in Title 18, Chapter 73 (Obstruction of Justice) of the U.S. Code.[7]

6. Recommendation and Justification

Recommendation 134-96: Migrate the offense of obstructing justice in Article 134 (MCM, Part IV, ¶96) to the new Article 131b.

The offense of obstructing justice is well recognized in criminal law. Accordingly, this offense does not rely upon additional proof of the "terminal element" of Article 134 as the basis for its criminality.

As amended, Article 131b would cover conduct by an accused in the case of a person against whom the accused has reason to believe there were or would be "criminal or disciplinary proceedings pending." The addition of the word "disciplinary" is intended to clarify that the pending proceeding may include a summary court-martial proceeding, consistent with the proposal under Article 20 to clarify that the summary court-martial is a non-criminal forum.

Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 131b, including the provisions defining "criminal or disciplinary proceedings," which are intended to include non-judicial punishment and summary court-martial proceedings.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

This proposal is related to the proposed amendment to Article 20 to clarify that the summary court-martial is a non-criminal forum.

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[6] MCM, Part IV, ¶96e.

[7] *See* MCM, App 23, ¶96 (citing 18 U.S.C. §§ 1503, 1505, 1510, 1512, and 1513); *see also* United States v. Caudill, 10 M.J. 787, 789 (A.F.C.M.R. 1981) (elements of obstruction of justice under Article 134 are not controlled by the elements of similar offenses denounced by the United States Code).

8. Legislative Proposal

SEC. 1045. OBSTRUCTING JUSTICE.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931a (article 131a of the Uniform Code of Military Justice), as added by section 1044, the following new section (article):

"§931b. Art. 131b. Obstructing justice

"Any person subject to this chapter who engages in conduct in the case of a certain person against whom the accused had reason to believe there were or would be criminal or disciplinary proceedings pending, with intent to influence, impede, or otherwise obstruct the due administration of justice shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1045 would create a new section, Article 131b (Obstructing justice), and would migrate the offense of "Obstructing justice" from Article 134 (the General article) to the new statute. The offense of obstructing justice is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[8]

[8] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 131c (New Provision) – Misprision of Serious Offense

10 U.S.C. § 931c

1. Summary of Proposal

This proposal would migrate the offense of misprision of serious offense currently addressed under Article 134 (the General Article)[1] to a new Article 131c (Misprision of serious offense). Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 131c.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶95, the offense requires a showing that the accused knew that a particular person committed a serious offense and not only failed to report the offense to authorities, but actively aided in concealing it. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The offense of misprision of a serious offense was first designated by the President in the 1951 MCM.[2] Although it is rarely charged, the crime of misprision of a serious offense is well established in military law.[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Misprision of Serious Offense: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 4 (Misprision of felony) sets forth a similar offense to the offense of misprision of serious offense in Article 134.

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[1] MCM, Part IV, ¶95.

[2] MCM 1951, ¶213d.

[3] *See* United States v. Sanchez, 47 M.J. 794, 796 (N-M. Ct. Crim. App. 1998) *aff'd*, 51 M.J. 165 (C.A.A.F. 1999); United States v. Hoff, 27 M.J. 70, 72 (C.M.A. 1988); United States v. Assey, 9 C.M.R. 732, 735 (A.F.B.R.1953).

[4] MCM, Part IV, ¶95e.

6. Recommendation and Justification

Recommendation 134-95: Migrate the offense of misprision of serious offense in Article 134 (MCM, Part IV, ¶95) to the new Article 131c.

Migrating misprision of a serious offense to its own enumerated punitive article: Article 131c, aligns the offense with similar subject matter offenses involving obstruction of justice under the UCMJ. Obstruction of justice and wrongful concealment of information from law enforcement officials is a well-recognized concept in criminal law. Accordingly, this offense does not rely upon the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1046. MISPRISION OF SERIOUS OFFENSE.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931b (article 131b of the Uniform Code of Military Justice), as added by section 1045, the following new section (article):

"§931c. Art. 131c. Misprision of serious offense

"(a) IN GENERAL.—Any person subject to this chapter—

"(1) who knows that another person has committed a serious offense; and

"(2) wrongfully conceals the commission of the offense and fails to make the commission of the offense known to civilian or military authorities as soon as possible;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1046 would create a new section, Article 131c (Misprision of serious offense), and would migrate the offense of "Misprision of serious offense" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[5]

[5] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 131d (New Provision) - Wrongful Refusal to Testify
10 U.S.C. § 931d

1. Summary of Proposal

This proposal would migrate the offense of wrongful refusal to testify currently addressed under Article 134 (the General Article) to a new Article 131d (Wrongful refusal to testify). Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 131d.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶108, the offense of wrongful refusal to testify requires a showing that the accused refused to qualify as a witness in a court proceeding or refused to answer a certain question in the proceeding. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

The offense is a type of contempt, and is designed to punish witnesses subject to the Code who wrongfully refuse to testify. A good faith but legally mistaken belief in the right to remain silent is not a defense to a charge of wrongful refusal to testify.[1]

3. Historical Background

The President designated the offense of wrongful refusal to testify under Art. 134 in 1951.[2]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Wrongful Refusal to Testify: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[3]

5. Relationship to Federal Civilian Practice

28 U.S.C. § 1826 (Recalcitrant Witnesses) sets forth a similar offense to the offense of wrongful refusal to testify in Article 134.

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[1] MCM, Part IV, ¶108.c.

[2] MCM 1951, App. 6c, ¶164.

[3] MCM, Part IV, ¶108.e.

6. Recommendation and Justification

Recommendation 134-108: Migrate the offense of wrongful refusal to testify in Article 134 (MCM, Part IV, ¶108) as Article 131d.

The offense of wrongfully refusing to testify addresses conduct that is a well recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the terminal element of Art. 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable in federal civilian practice insofar as practicable.

8. Legislative Proposal

SEC. 1047. WRONGFUL REFUSAL TO TESTIFY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931c (article 131c of the Uniform Code of Military Justice), as added by section 1046, the following new section (article):

"§931d. Art. 131d. Wrongful refusal to testify

"Any person subject to this chapter who, in the presence of a court-martial, a board of officers, a military commission, a court of inquiry, preliminary hearing, or an officer taking a deposition, of or for the United States, wrongfully refuses to qualify as a witness or to answer a question after having been directed to do so by the person presiding shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1047 would create a new section, Article 131d (Wrongful refusal to testify), and would migrate the offense of "Testify: wrongful refusal" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Article 131e (New Provision) – Prevention of Authorized Seizure of Property

10 U.S.C. § 931e

1. Summary of Proposal

This proposal would migrate the offense of destruction, removal, or disposal of property to prevent seizure, currently addressed under Article 134 (the General Article),[1] to the new Article 131e (Prevention of authorized seizure of property). Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 131e.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶103, the offense requires a showing that an accused, knowing that authorized persons are in the process of lawfully seizing certain property, destroys, removes, or otherwise disposes of the property with intent to frustrate the seizure. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or service discrediting.

3. Historical Background

The President first designated destruction, removal, or disposal of property to prevent seizure as an Article 134 offense in the 1984 MCM.[2] This offense is based on 18 USC § 2232 - "Destruction or removal of property to prevent seizure."[3] Prior to 1984, destruction or removal of property to prevent seizure was charged by assimilating the federal statute under Clause 3 of Article 134.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Destruction, Removal, or Disposal of Property to Prevent Seizure: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.[5]

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[1] MCM, Part IV, ¶103.

[2] MCM 1984, Part IV, ¶103.

[3] MCM, App. 23 (Analysis of Punitive Articles), A23-26.

[4] *See, e.g.,* United States v. Fishel, 12 M.J. 602, 605 (A.C.M.R. 1981) (sustaining conviction for violation of assimilated federal statute where accused, knowing police had entered room to seize marijuana, threw it out the window).

[5] MCM, Part IV, ¶103.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2232 (Destruction or removal of property to prevent seizure) sets forth a similar offense to the offense of destruction, removal, or disposal of property to prevent seizure in Article 134.

6. Recommendation and Justification

Recommendation 134-103: Migrate the offense of destruction, removal, or disposal of property to prevent seizure in Article 134 (MCM, Part IV, ¶103) as Article 131e.

The offense of destruction, removal, or disposal of property to prevent seizure addresses conduct that is well recognized in criminal law and is inherently prejudicial to good order and discipline and of a nature to discredit the armed forces. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative proposal

SEC. 1048. PREVENTION OF AUTHORIZED SEIZURE OF PROPERTY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931d (article 131d of the Uniform Code of Military Justice), as added by section 1047, the following new section (article):

"§931e. Art. 131e. Prevention of authorized seizure of property

"Any person subject to this chapter who, knowing that one or more persons authorized to make searches and seizures are seizing, are about to seize, or are endeavoring to seize property, destroys, removes, or otherwise disposes of the property with intent to prevent the seizure thereof shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1048 would create a new section, Article 131e (Prevention of authorized seizure of property), and would migrate the offense of "Seizure: destruction, removal, or disposal of property to prevent" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 131g (New Provision) – Wrongful Interference with Adverse Administrative Proceeding

10 U.S.C. § 931g

1. Summary of Proposal

This proposal would migrate the offense of wrongful interference with an adverse administrative proceeding currently addressed under Article 134 (the General Article)[1] to a new Article 131g (Wrongful interference with an adverse administrative proceeding). Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 131g.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶96a, the offense occurs when an accused, knowing or having reason to believe there is an adverse administrative proceeding underway or pending against a certain person, commits certain wrongful acts with the intent to "influence, impede, or obstruct the conduct of such administrative proceeding, or otherwise obstruct the due administration of justice."[2] Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated wrongful interference in an adverse administrative proceeding as an Article 134 offense in the 1994 MCM.[3]

4. Contemporary Practice

The wording of the offense and its interpretation is similar to the offense of obstructing justice.[4] The purpose of the offense is to extend an "obstruction of justice" protection to

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[1] MCM, Part IV, ¶96a.

[2] MCM, Part IV, ¶96a.b.

[3] MCM 1994, Part IV, ¶96a.

[4] *See* United States v. DeMaro, 62 M.J. 663, 665 (C.G. Ct. Crim. App. 2006) (relying upon interpretation principles for "obstruction of justice" to construe the offense: "we draw upon cases considering nearly identical language contained within the obstruction of justice offense."), *rev. denied* 63 M.J. 470 (C.A.A.F. 2006).

administrative hearings "given the increased number of administrative actions initiated in each service."[5]

The President, under Article 56, has prescribed the following maximum punishment for the offense of Wrongful Interference with an Adverse Administrative Proceeding: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1505 (Obstruction of proceedings before departments, agencies, and committees) sets forth a similar offense to the offense of wrongful interference with an adverse administrative proceeding in Article 134.

6. Recommendation and Justification

Recommendation 134-96a: Migrate the offense of wrongful interference with an adverse administrative proceeding in Article 134 (MCM, Part IV, ¶96a) to the new Article 131g.

Migrating the offense of wrongful interference in an adverse administrative proceeding to Article 131g aligns the offense with the existing UCMJ "obstruction of justice" offenses. Wrongful interference and obstruction of official government proceedings is a well-recognized concept in criminal law. Accordingly, interference and obstruction offenses do not rely upon the "terminal element" of Article 134 as the basis for their criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1049. WRONGFUL INTERFERENCE WITH ADVERSE ADMINISTRATIVE PROCEEDING.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931f (article 131f of the Uniform Code of Military Justice), as

[5] *Id.* at App. 21 at A21-105.

[6] MCM, Part IV, ¶96a.e.

transferred and redesignated by section 1001(3), the following new section (article):

"§931g. Art. 131g. Wrongful interference with adverse administrative proceeding

"Any person subject to this chapter who, having reason to believe that an adverse administrative proceeding is pending against any person subject to this chapter, wrongfully acts with the intent—

"(1) to influence, impede, or obstruct the conduct of the proceeding; or

"(2) otherwise to obstruct the due administration of justice;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1049 would create a new section, Article 131g (Wrongful interference with adverse administrative proceeding), and would migrate the offense of "Wrongful interference with an adverse administrative proceeding" from Article 134 (the General article) to the new statute. The administrative proceedings addressed by this offense would include any administrative proceeding or action initiated against a servicemember that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

If, however, a servicemember wrongfully interferes with an administrative proceeding not addressed under this offense, and that interference takes place under circumstances that are prejudicial to good order and discipline or service discrediting, the new Article 131g is not intended to preempt prosecution for wrongful interference in those other administrative proceedings under clauses 1 or 2 of Article 134.

Article 132 (Current Law) – Frauds Against the United States

10 U.S.C. § 932

1. Summary of Proposal

This Report recommends no change to the existing Article 132, except to redesignate it as Article 124. Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 124.

2. Summary of the Current Statute

Article 132 prohibits making a false or fraudulent claim against the federal government.

3. Historical Background

American military law has made fraudulent claims against the federal government punishable at courts-martial since the 1775 Articles of War via prosecution under the "General Article" as conduct "prejudicial to good order and discipline."[1] In Article 60 of the 1874 Articles of War [2] and Article 94 of the 1920 Articles of War,[3] Congress enacted specific stand-alone statutes criminalizing frauds against the government. The current Article 132 was derived from Article 94 of the 1948 Articles of War and Article 14 of the 1930 Articles for the Government of the Navy.[4] Since the UCMJ was enacted in 1950,[5] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Frauds against the United States: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[6]

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[1] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 730 (photo reprint 1920) (2d ed. 1896) (listing perjury as a species of conduct prejudicial to good order and discipline frequently punished via the (then) "general article," AW 62 of 1874).

[2] *See id.* at 697-98, 704 (discussing AW 60 of 1874 (frauds and larcenies of government property)).

[3] MCM 1921, ¶444 (providing analysis for AW 94 of 1920); App. 1 (Articles of War) at 527-28 (providing statutory text for AW 94 of 1920).

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1234-35 (1949).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[6] MCM, Part IV, ¶58.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1001 (Statements or entries generally) and § 1031 (Major frauds against the United States) set forth similar offenses to Article 132.

6. Recommendation and Justification

Recommendation 132: No change to Article 132, except to redesignate it as Article 124.

The proposed amendments would align similar offenses under Article 124 and Article 124a.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 132 (New Provision) – Retaliation
10 U.S.C. § 932

1. Summary of Proposal

This proposal would create a new Article 132 (Retaliation). Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 132.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. MCM, Part IV, ¶96 (Obstructing Justice) requires a showing that the accused did a wrongful act in the case of a person subject to criminal proceedings, with the intent to influence, impede or otherwise obstruct the due administration of justice. This offense addresses a broad spectrum of conduct analogous to, though not controlled by, offenses codified in Title 18, Chapter 73 (Obstruction of Justice) of the U.S. Code.[1] Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The military offense of obstructing justice began as an Article 134 clause 3 offense, assimilating the federal statute.[2] In 1952, the Court of Military Appeals determined that a servicemember also could be prosecuted under the first two clauses of Article 134 for obstruction or interference with the administration of military justice, independent of other federal statutes.[3] The President first designated the offense of obstruction of justice under Article 134 in the 1969 MCM.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Obstructing Justice: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[5] The analysis to ¶96 in the Manual for Courts-Martial makes

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[1] *See* MCM, App 23 (Analysis of Punitive Articles), ¶96, (citing 18 U.S.C. §§ 1503, 1505, 1510, 1512, 1513). *But see also* United States v. Caudill, 10 M.J. 787, 789 (A.F.C.M.R. 1981) (elements of obstruction of justice under Article 134 are not controlled by the elements of similar offenses denounced by the United States Code).

[2] United States v. Long, 6 C.M.R. 60, 71 (C.M.A. 1952).

[3] *Id.* at 65.

[4] MCM 1969, App 6(c), ¶165.

[5] MCM, Part IV, ¶95e.

specific reference to 18 U.S.C. § 1513 (Retaliating against a witness, victim, or an informant).[6] Additionally, retaliatory conduct in the military that is in violation of Department of Defense and service regulations may be punished under Article 92 or as conduct prejudicial to good order and discipline under Article 134.[7]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1501 et seq. (Obstruction of Justice) set forth similar offenses to the offense of obstructing justice in Article 134. 18 U.S.C. § 1513(e) (Retaliating against a witness, victim, or an informant) prohibits retaliation against witnesses, victims, and other persons who provide truthful information to law enforcement relating to the commission or possible commission of a federal offense.

6. Recommendation and Justification

Recommendation 132: Enact a new enumerated Article 132 (Retaliation).

The offense of retaliation is inherently prejudicial to good order and discipline and of a nature to discredit the armed forces. Accordingly, this offense does not rely upon additional proof of the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to the offense of retaliation against victims and witnesses in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1050. RETALIATION.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931g (article 131g of the Uniform Code of Military Justice), as added by section 1049, the following new section (article):

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[6] MCM, App 23, ¶96.

[7] *See* DOD DIRECTIVE 7050.06, "Military Whistleblower Protection" (July 23, 2007); AIR FORCE INSTRUCTION 36-2909; ARMY REGULATION 600-20 and ARMY DIRECTIVE 2014-20; SECNAV INSTRUCTION 5370.7D (applicable to Navy and Marine-Corps); Coast Guard Civil Rights Manual, COMDTINST M5350.4C; *see also* 10 U.S.C. § 1034.

"§932. Art. 132. Retaliation

"Any person subject to this chapter who, with the intent to retaliate against any person for reporting or planning to report a criminal offense, or with the intent to discourage any person from reporting a criminal offense—

"(1) wrongfully takes or threatens to take an adverse personnel action against any person; or

"(2) wrongfully withholds or threatens to withhold a favorable personnel action with respect to any person;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1050 would amend Article 132 in its entirety and retitle the statute as "Retaliation." This new offense would provide added protection for witnesses, victims, and persons who report or plan to report a criminal offense to law enforcement or military authority. Article 132 would not preempt service regulations that specify additional types of retaliatory conduct that may be punishable at court-martial under Article 92 (Failure to obey order or regulation), nor would it preempt other forms of retaliatory conduct from being prosecuted under other appropriate Articles, such as Article 109 (destruction of property), Article 93 (Cruelty and maltreatment), Article 128 (Assault), Article 131b (Obstructing justice), Article 130 (Stalking), or Article 134 (General article).

Article 133 – Conduct Unbecoming an Officer and a Gentleman

10 U.S.C. § 933

1. Summary of Proposal

This Report recommends no change to Article 133. Part II of the Report will address any changes needed to the Manual for Courts-Martial provisions implementing Article 133.

2. Summary of the Current Statute

Article 133 prohibits conduct unbecoming an officer and a gentleman. Article 133 is intended to punish actions or behaviors of an officer, cadet or midshipman in both their official and private capacity when they dishonor or disgrace the person as an officer and seriously compromise the officer's character as a gentleman. The term "gentleman" includes both male and female commissioned officers, cadets, and midshipmen."[1]

3. Historical Background

American military law has criminalized "conduct unbecoming an officer and a gentleman" since the 1775 Articles of War.[2] The current Article 133 was derived from Article 95 of the 1948 Articles of War.[3] Since the UCMJ was enacted in 1950,[4] Article 133 has remained unchanged. The language of the statute has been broadly written, from the 1775 Articles of War[5] up through the UCMJ, and the offense has been used to address misconduct by officers not otherwise addressed in the punitive articles.

4. Contemporary Practice

Military custom and practice identifies typical examples of conduct unbecoming an officer to include, but not limited to: dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, and cruelty to subordinates.[6] Military courts limit the broad applicability of Article 133 by enforcing due process requirements for fair notice of

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[1] MCM, Part IV, ¶59.c(1).

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 710 (photo reprint 1920) (2d ed. 1896).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1235 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (1950).

[5] WINTHROP, *supra* note 2, at 711-12.

[6] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.2[2] at 693 (2nd ed. 2012); *see also* MCM, Part IV, ¶59.c(3).

misconduct applicable to Article 133. Although Article 133 applies to a broad spectrum of misconduct, the U.S. Supreme Court has determined that the offense is neither overly broad nor unconstitutionally vague under the Due Process Clause of the Fifth Amendment.[7] The President, under Article 56, has prescribed the following maximum punishment for the offense of Conduct Unbecoming an Officer and a Gentleman: dismissal, forfeiture of all pay and allowances, and confinement for the same period as that authorized by the most analogous offense, or if none is prescribed, for 1 year.[8]

5. Relationship to Federal Civilian Practice

Article 133 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 133: No change to Article 133.

In view of the well-developed case law addressing Article 133's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[7] Parker v. Levy, 417 U.S. 733, 733 (1974).

[8] MCM, Part IV, ¶59.e. The term "gentleman" connotes failings in an officer's personal character, regardless of gender. *See, e.g.*, United States v. Newak, 25 M.J. 564, 566 (A.F.C.M.R. 1987) (affirming conviction of female officer for violating Article 133, alluding to integrity without using the term "gentleman" where accused's misconduct constituted "conduct unbecoming an officer, . . . compromised her status as an officer, . . . [and] mortally wounded the confidence and respect others have for the authority of the officer corps."). Consistent with the MJRG guiding principles, this Report does not recommend an amendment where the case law is stable. If, however, consideration is given to replacing "gentleman" with a gender-neutral term, a phrase such as "person of integrity" could provide an option.

Article 134 – General Article
10 U.S.C. § 934

1. Summary of Proposal

This proposal would amend Article 134, clause 3, to clarify that it applies "extraterritorially" so as to permit prosecution of certain federal civilian "crimes and offenses, not capital" consistent with the principle of the worldwide applicability of the UCMJ as expressed by Congress in Article 5.[1]

The Report also proposes migrating 36 of the 53 presidentially designated offenses contained in the Manual for Courts-Martial under Article 134 to the enumerated punitive articles.[2]

The Report proposes a technical change to clarify that all forms of court-martial can take cognizance of offenses under Article 134.

Part II of the Report will address the designated offenses that are not recommended for migration to a punitive article; it will also discuss whether the remaining offenses should be retained and, if so, whether they should be modified. Part II of the Report will also address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134 creates three categories of offenses not specifically mentioned in an enumerated punitive article under the Code: (clause 1) all disorders and neglects prejudicial to good order and discipline; (clause 2) all conduct of a nature to bring discredit upon the armed forces; and (clause 3) certain "crimes and offenses, not capital."

Clause 1 requires proof that the accused did or failed to do a certain act, and that, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces.

Clause 2 requires proof that the accused did or failed to do a certain act, and that, under the circumstances, the accused's conduct was of a nature to bring discredit upon the armed forces.

Clause 3 enables prosecution of non-capital crimes which violate federal civilian law. The phrase "crimes and offenses, not capital" includes non-capital federal offenses under Title 18, United States Code, and state law offenses occurring on the exclusive or concurrent

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[1] Article 5, UCMJ ("This chapter applies in all places.").

[2] *See* Appendix—Migration of Article 134 Offenses.

federal jurisdiction enclaves, described in 18 U.S.C. § 7 (Special maritime and territorial jurisdiction of the United States defined), to the same extent permitted under 18 U.S.C. § 13 (Federal Assimilative Crimes Act).

3. Historical Background

The General Article has existed in military law since the 1775 Articles of War.[3] The current General Article, Article 134, was derived from Article 96 of the 1948 Articles of War and Article 22 of the 1930 Articles for the Government of the Navy.[4] Since the UCMJ was enacted in 1950,[5] the statute has remained unchanged.

Like the current version, the predecessors to Article 134 provided for "the trial and punishment of any and all military offences not expressly made cognizable by court-martial in the other more specific Articles, and thus to prevent the possibility of a failure of justice in the army."[6] The scope of misconduct punishable under Article 134 is broad, and includes conduct punishable at a court-martial which is not otherwise criminalized in civilian society. The Supreme Court explained this distinction in *Parker v. Levy,* noting that because of the factors differentiating the military from civilian society, Congress may legislate with greater breadth and flexibility in the military context.[7]

4. Contemporary Practice

Exercising the authority under Article 56 to designate maximum punishments for offenses under the Code,[8] the President currently designates offenses under clauses 1 and 2 of Article 134 and lists them in the MCM at Part IV, ¶61-113.[9] These listed offenses help provide servicemembers with notice of the scope of potential misconduct under Article 134. Furthermore, pursuant to Article 5, presidentially designated offenses under clause 1 and 2 apply in all places, *i.e.,* they have worldwide applicability.[10]

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[3] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS at 720 (photo reprint 1920) (2d ed. 1896).

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1235 (1949).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (1950).

[6] WINTHROP, *supra* note 3, at 720.

[7] Parker v. Levy, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

[8] *See* Loving v. United States, 517 U.S. 748, 769 (1996).

[9] *See* United States v. Jones, 68 M.J. 465, 471 ("this opinion does not—and should not be read to—question the President's ability to list examples of offenses with which one could be charged under Article 134, UCMJ."); *accord* United States v. Lingenfelter, 30 M.J. 302, 305 (C.M.A. 1990) (holding the President's designation of "elements" within the MCM function as factual "sentencing escalating elements" consistent with Article 56).

[10] MCM, Part IV, ¶ 60.e(4)(a).

Federal offenses under clause 3 (crimes and offenses not capital) are not "extra-territorial," unless the federal offenses themselves are of general applicability.[11] Otherwise, the government must charge federal crimes only indirectly by utilizing clauses 1 and 2, along with the terminal element. The main difficulty with the indirect method of charging federal civilian crimes under Article 134 is that, for most crimes committed outside the United States, the terminal element must also be alleged and proven in addition to the elements of the federal crime, while the terminal element does not have to be alleged and proven for crimes committed in the United States. This discrepancy undermines the uniform treatment of military members under the UCMJ.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 3261 (Military Extraterritorial Jurisdiction Act (MEJA)) is analogous to Article 134, clause 3. The statute applies to civilians accompanying the military outside of the United States; MEJA is broader than Article 134, clause 3, because it explicitly extends extraterritorial jurisdiction to all Title 18 non-capital offenses.[12]

6. Recommendation and Justification

Recommendation 134: Amend Article 134 to provide world-wide applicability of federal offenses charged under clause 3; migrate 36 of the 53 presidentially designated offenses to enumerated punitive articles.

The terminal element under Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) is not necessary to demonstrate criminality in the context of an enumerated offense. Accordingly, this Report would migrate offenses unless there is a military-specific reason for utilizing the terminal element under Article 134.[13]

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[11] MCM, Part IV, ¶ 60.c.(4); *see also* United States v. Martinelli, 62 M.J. 52, 57 (C.A.A.F. 2005) (holding that for Article 134 clause 3 purposes legislation of Congress applies only within the territorial jurisdiction of the United States unless explicitly indicated otherwise in the statute) (citations omitted).

[12] 18 U.S.C. § 3261(a); *see* H.R. REP. No 106-778, *Judiciary Committee Report on the Military Extraterritorial Jurisdiction Act of 2000* pt. 1 at 14 (2000) (reciting "Constitutional Authority Statement" for MEJA, including Art I, § 8, clauses 10, 14, 16, and 18). Federal courts have affirmed the constitutionality of MEJA. United States v. Plummer, 221 F.3d 1298, 1304 (11th Cir. 2000) ("Congress unquestionably has the authority to enforce its laws beyond the territorial boundaries of the United States."); United States v. King, 552 F.2d 833, 850 (9th Cir. 1976) ("There is no constitutional bar to the extraterritorial application of penal laws.").

[13] The MJRG recommends not migrating offenses in which the terminal element is essential to establishing the underlying criminality of the offense in a military context. Accordingly, this Report recommends not migrating the following offenses: (1) Abusing public animal (MCM, Part IV, ¶61); (2) Adultery (MCM, Part IV, ¶62); (3) Bigamy (¶65); (4) Check, worthless, making and uttering—dishonorably failing to maintain funds) (¶68); (5) Child Pornography (¶68b); (6) Cohabitation, wrongful (¶69); (7) Debt, Dishonorably failing to pay (¶71); (8) Disloyal Statements (¶72); (9) Drunk and Disorderly (¶73); (10) Firearm, discharging—through negligence(¶80); (11) Fraternization (¶83); (12) Gambling with subordinate (¶84); (13) Negligent Homicide (¶85); (14) Indecent Language (¶89); (15) Pandering and prostitution (¶97); (16) Self Injury without intent to avoid service (¶103a); and (17) Straggling (¶107). Part II of the Report will consider whether any modifications are needed in the provisions of the Manual for Courts-Martial that address these 17 offenses.

Migrating Article 134 offenses to the enumerated punitive articles arranges similar subject matter offenses together, providing a cohesive, thematic arrangement similar to state and federal criminal codes. It also enables the alignment of "lesser included offenses" in circumstances where a current Article 134 offense would be a lesser included offense of an enumerated punitive article, but for the existence of the Article 134 terminal element.[14]

Providing extraterritorial jurisdiction for Article 134, clause 3 ("all crimes not capital") aligns jurisdiction over civilians employed by or accompanying the military and servicemembers that commit federal crimes abroad.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment, and supports MJRG Operational Guidance by employing the standards and procedures applicable to extraterritorial jurisdiction in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1051. EXTRATERRITORIAL APPLICATION OF CERTAIN OFFENSES.

Section 934 of title 10, United States Code (article 134 of the Uniform Code of Military Justice), is amended by adding at the end the following new sentence: "As used in the preceding sentence, the term 'crimes and offenses not capital' includes any conduct engaged in outside the United States, as defined in section 5 of title 18, that would constitute a crime or offense not capital if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of title 18.".

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[14] *See* United States v. Jones, 68 M.J. 465, 473 (C.A.A.F. 2010) (holding that the Article 134 terminal element is a unique element that disqualifies Article 134 offense from qualifying as a lesser included offense under the "necessarily included" requirement of Article 79, as determined by the "elements test"); United States v. Miller, 67 M.J. 385, 388–89 (C.A.A.F. 2009) (holding that the Article 134 terminal elements of "conduct prejudicial to good order and discipline" and "service discrediting" are not inherently included in every enumerated punitive article) *overruling* United States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994).

9. Sectional Analysis

Section 1051 would amend Article 134, the General article, to cover all non-capital federal crimes of general applicability under clause 3, regardless of where the federal crime is committed. This change would make military practice uniform throughout the world and would better align it with the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261.

Subchapter XI. Miscellaneous Provisions

Article 135 – Courts of Inquiry
10 U.S.C. § 935

1. Summary of the Proposal

This proposal would amend Article 135 to provide individuals employed by the Department of Homeland Security (the department in which the Coast Guard operates) with the same rights regarding courts of inquiry that are provided to employees of the Department of Defense. Part II of the Report will address changes in the rules implementing Article 135 required as a result of this proposal.

2. Summary of the Current Statute

Article 135 provides for a court of inquiry as an administrative fact-finding body, convened by a general court-martial convening authority, and consisting of at least three commissioned officers. It may be convened either on the initiative of the convening authority or upon request of the individual under investigation. Under Article 47, courts of inquiry have the same power as courts-martial to compel the appearance and testimony of witnesses. Article 135(c) allows courts of inquiry to designate as parties individuals who are either the subject of the investigation, or persons who have a direct interest in the subject of the investigation. These parties have the right to be present, to be represented by counsel, to cross-examine witnesses, and to present evidence; however the current statute limits such "directly interested" persons to "[a]ny person subject to this chapter or employed by the Department of Defense . . . ." Article 135(d) requires the court of inquiry to make findings of fact regarding the subject of its investigation, but prohibits the court from expressing opinions or making recommendations except as requested by the convening authority. Where otherwise admissible and as prescribed under Article 50, the transcript of a court of inquiry may be used as evidence in a court-martial, and under certain conditions the proceeding may also be used as a substitute for the preliminary hearing required under Article 32.

3. Historical Background

Article 135 was based on Articles 97 to 103 of the Articles of War and Articles 42 to 44 of the proposed Articles for the Government of the Navy.[1] At that time, an Army court of inquiry could be convened only at the request of the individual whose conduct was the subject of the investigation, while in Navy practice courts of inquiry could be convened for

[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess., 1235 (1949).

any formal investigation.[2] The drafters chose to incorporate the Navy's broader power into Article 135.[3] The statute has remained unchanged since the UCMJ was enacted in 1950.[4]

4. Contemporary Practice

Courts of inquiry were originally used primarily to investigate the conduct of officers, whereas boards of investigation, where sworn testimony was not taken, were generally used in cases involving enlisted members. In current practice, however, courts of inquiry are not 'courts' as the term is commonly used; they are formal administrative investigations charged with examining and inquiring into a more significant incident or accident, especially where there is a need to designate parties, take sworn testimony, and issue subpoenas for the attendance of witnesses. The results of a court of inquiry may be a significant aid to the convening authority in determining whether additional administrative action, or potentially the referral of criminal charges to court-martial for trial, is warranted.

5. Relationship to Federal Civilian Practice

Article 135 has no direct counterpart in federal practice, although in some ways courts of inquiry function similarly to civilian grand juries—both with respect to their investigative capabilities and their utility in assisting the proper authority to determine whether to dispose of the charges by referring them to court-martial for trial.

6. Recommendation and Justification

Recommendation 135: Amend Article 135 to include the Department of Homeland Security and the Coast Guard.

This proposal would extend the Court of Inquiry protections to individuals employed by the Department of Homeland Security, as the department in which the Coast Guard operates, the same as employees of the Department of Defense, ensuring consistent application of this statute for all military services.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment and that, to the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the military services.

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[2] *Id.*

[3] *Id.* In addition, the drafters chose to incorporate the provision in the proposed Navy Articles that allowed Department of Defense employees whose conduct may be involved in the inquiry to intervene in order to protect their rights and reputation. *See* A Bill to Amend the Articles for the Government of the Navy to Improve the Administration of Naval Justice, H.R. 3687, 80th Cong., 1st Sess. (1947) (proposed Article 42(d)) ("Any person subject to these articles, or in the employ of the naval service, who has an interest in the subject of the inquiry, shall have a right to be present and to be represented by counsel of his own choice."). This provision became the basis for Article 135(c).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

This proposal supports MJRG Operational Guidance by addressing an inconsistency in the current Article 135 concerning Courts of Inquiry, thereby reducing the potential for unnecessary litigation.

8. Legislative Proposal

SEC. 1101. TECHNICAL AMENDMENT RELATING TO COURTS OF INQUIRY.

Section 935(c) of title 10, United States Code (article 135(c) of the Uniform Code of Military Justice), is amended—

(1) by striking "(c) Any person" and inserting "(c)(1) Any person";

(2) by designating the second and third sentences as paragraphs (2) and (3), respectively; and

(3) in paragraph (2), as so designated, by striking "subject to this chapter or employed by the Department of Defense" and inserting "who is (A) subject to this chapter, (B) employed by the Department of Defense, or (C) employed by the Department of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, and".

9. Sectional Analysis

Section 1101 would amend Article 135 (Courts of inquiry) to provide individuals employed by the Department of Homeland Security, the department under which the Coast Guard operates, the right to be designated as parties in interest when they have a direct interest in the subject of a court of inquiry convened under Article 135. This change would align the rights of employees of the Department of Homeland Security with the rights of employees of the Department of Defense, ensuring consistent application of this statute for all military services.

Article 136 – Authority to Administer Oaths and to Act as Notary

10 U.S.C. § 936

1. Summary of Proposal

This proposal would modify the heading of Article 136 to reflect the text of the statute, with no substantive changes.

2. Summary of the Current Statute

Article 136 provides statutory authority for the administering of oaths for purposes of military administration, including military justice; and it specifies the persons and positions that may administer oaths, including "all judge advocates." The heading of the statute, but not the text, also refers to the power to act as a notary.

3. Historical Background

Article 136 was based on Article 114 of the Articles of War and Article 69 of the Articles for the Government of the Navy.[1] As originally enacted, the statute included the authority to administer oaths as well as the authority to act as a notary.[2] The statute remained unchanged until 1991, when the authority to act as a notary was transferred from Article 136 to 10 U.S.C. § 1044a.[3] The title of Article 136, however, was not amended accordingly.

4. Contemporary Practice

10 U.S.C. § 1044a (Authority to act as notary) provides general powers of a notary public to: all judge advocates, including reserve judge advocates when not in a duty status; all civilian attorneys serving as legal assistance attorneys; all adjutants, assistant adjutants, and personnel adjutants, including reserve members when not in a duty status; all other members of the armed forces, including reserve members when not in a duty status, who are designated by regulations of the armed forces or by statute to have those powers; and for the performance of notarial acts at locations outside the United States, all employees of a military department or the Coast Guard who are designated by regulations of the Secretary concerned or by statute to have those powers for exercise outside the United States.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1236 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] NDAA FY 1991, Pub. L. No. 101-510, § 551, 104 Stat 1485 (1990).

5. Relationship to Federal Civilian Practice

Article 136 is fairly consistent with similar federal civilian standards and procedures concerning oaths. 5 U.S.C. § 2903 provides that "[a]n employee of an Executive agency designated in writing by the head of the Executive agency, or the Secretary of a military department with respect to an employee of his department, may administer . . . any other oath required by law in connection with employment in the executive branch."[4]

6. Recommendation and Justification

Recommendation 136: Amend Article 136 by removing "and to act as notary" from the section heading.

This is a technical change to conform the heading of Article 136 to the text.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by removing an inconsistency in the statutory provision concerning the authority to administer oaths and act as a notary.

8. Legislative Proposal

SEC. 1102. TECHNICAL AMENDMENT TO ARTICLE 136.

Section 936 of title 10, United States Code (article 136 of the Uniform Code of Military Justice), is amended by striking the last five words in the section heading.

9. Sectional Analysis

Section 1102 would make a technical amendment to Article 136 (Authority to administer oaths and to act as notary) to remove from the section heading the authority to act as a notary, which is not provided for in the text of the statute.

[4] 5 U.S.C. § 2903(b)(2).

Article 137 – Articles to Be Explained
10 U.S.C. § 937

1. Summary of Proposal

This proposal would amend Article 137 to require mandatory training on the UCMJ for officers, including a requirement for focused training to commanders with authority to impose non-judicial punishment or to act as convening authority on their roles and responsibilities under the UCMJ, in addition to the current training requirements under the statute for enlisted members. This proposal would further require the Secretary of Defense to maintain and update electronic versions of the UCMJ and MCM that would be readily accessible on the Internet by members of the armed forces and the public.

2. Summary of the Current Statute

Article 137 directs that enlisted members receive training on the UCMJ—specifically regarding Articles 2, 3, 7-15, 25, 27, 31, 37, 38, 55, 77-134, and 137-139—no later than fourteen days following their initial entrance into active duty or a duty status with a reserve component. Subsection (a)(2) of the statute requires that these articles be explained again to each enlisted member after the member has completed six months of active duty and when he or she reenlists; and, in the case of reserve members, after the member has completed basic training. Article 137(b) provides that the text of the UCMJ shall be made available to all military members upon their request.

3. Historical Background

Article 110 of the 1943 Articles of War required certain articles to be explained to every soldier at the time of enlistment.[1] When the UCMJ was enacted in 1950, Article 137 was based on this previous statute.[2] The drafters expressly provided that the specified articles were to be "explained"—as opposed to being read by the enlisted member—"as it [was] felt that a careful explanation is of more value than a mere readings."[3] In 1996, Congress amended the statute to provide for a fourteen-day window for the required explanation to be provided, as opposed to the previous six-day requirement. Other than this minor change, the statute has remained relatively unchanged since its enactment.[4]

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[1] AW 110 of 1943.

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1236 (1949).

[4] Aug. 10, 1956, c. 1041, 70A Stat. 78; Nov. 14, 1986, Pub. L. No. 99-661, Div. A, Title VIII, § 804(d), 100 Stat. 3907; NDAA FY 1996, Pub. L. No. 104-106, Div. A, Title XI, § 1152, 110 Stat. 468.

4. Contemporary Practice

Under current law, each of the services promulgates regulations implementing the requirements set forth in Article 137.[5] The services also incorporate military justice instruction into a variety of continuing professional education programs for officers and non-commissioned officers.

5. Relationship to Federal Civilian Practice

There is no provision directly equivalent to Article 137 in federal civilian practice.

6. Recommendation and Justification

Recommendation 137.1: Amend Article 137 to include specific UCMJ training requirements for officers, officers in command, and combatant commanders.

In its current form, Article 137 ensures that enlisted members—but not officers—are made aware of certain, important provisions of the UCMJ. The training occurs at the time of enlistment, at a point early in a member's initial service, and upon each reenlistment. This proposal would establish a similar requirement for officers.

In addition, the proposal would establish a statutory requirement for periodic training of all commanders who exercise responsibility for the imposition of non-judicial punishment or the exercise of convening authority powers. This training would be administered under regulations prescribed by each service, and by the Secretary of Defense with respect to those who exercise similar responsibilities in Joint and Combatant Commands.

This proposal takes into account the recommendation of the Response System to Adult Sexual Assault Crimes Panel (Response Systems Panel) to "ensure all officers preparing to assume senior command positions at the grade of 0-6 and above receive dedicated legal training that fully prepares them to exercise authorities assigned to them under the UCMJ."[6]

Recommendation 137.2: Amend Article 137 to require the Secretary of Defense to maintain and update an electronic version of the UCMJ and MCM for general reference by active and reserve members of the armed forces.

This proposal would require the maintenance of updated versions of the Uniform Code of Military Justice and the Manual for Courts-Martial.

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[5] ARMY REG. 27-10; AIR FORCE INSTR. 51-201; MARINE CORPS 1900.16; Navy MILPERSMAN 1160-031; COAST GUARD COMMANDANT INSTRUCTION 1600.2.

[6] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 23 (June 2014) (Recommendation 38).

7. Relationship to Objectives and Related Provisions

This proposal supports the DoD General Counsel's guiding principle to consider the recommendations of the Response Systems Panel.

This proposal supports MJRG Operational Guidance by addressing an inconsistency in the current Article 137, which prescribes a UCMJ training requirement only to enlisted members, and not to officers.

This proposal is related to all other proposals in this report, to the extent that it would facilitate timely training on the impact of all of these proposals with respect to the administration of military law in the armed forces by enlisted members and officers alike.

8. Legislative Proposal

SEC. 1103. ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE TO BE EXPLAINED TO OFFICERS UPON COMMISSIONING.

Section 937 of title 10, United States Code (article 137 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a), by striking "(a)(1) The sections of this title (articles of the Uniform Code of Military Justice)" and inserting "(a) ENLISTED MEMBERS.—(1) The sections (articles) of this chapter (the Uniform Code of Military Justice)";

(2) by striking subsection (b); and

(3) by inserting after subsection (a) the following new subsections:

"(b) OFFICERS.—(1) The sections (articles) of this chapter (the Uniform Code of Military Justice) specified in paragraph (2) shall be carefully explained to each officer at the time of (or within six months after)—

"(A) the initial entrance of the officer on active duty as an officer; or

"(B) the initial commissioning of the officer in a reserve component.

"(2) This subsection applies with respect to the sections (articles) specified in subsection (a)(3) and such other sections (articles) as the Secretary concerned may prescribe by regulation.

"(c) TRAINING FOR CERTAIN OFFICERS.—Under regulations prescribed by the Secretary concerned, officers with the authority to convene courts-martial or to impose non-judicial punishment shall receive periodic training regarding the purposes and administration of this chapter. Under regulations prescribed by the Secretary of Defense, officers assigned to duty in a combatant command, who have such authority, shall receive additional specialized training regarding the purposes and administration of this chapter.

"(d) AVAILABILITY AND MAINTENANCE OF TEXT.—The text of this chapter (the Uniform Code of Military Justice) and the text of the regulations prescribed by the President under this chapter shall be—

"(1) made available to a member on active duty or to a member of a reserve component, upon request by the member, for the member's personal examination; and

"(2) maintained by the Secretary of Defense in electronic formats that are updated periodically and made available on the Internet.".

9. Sectional Analysis

Section 1103 would amend Article 137 (Articles to be explained) to require that officers, in addition to enlisted personnel, receive training on the UCMJ upon entry to service, and

periodically thereafter. The amendments would provide for specific military justice training for military commanders and convening authorities, and would require the Secretary of Defense to prescribe regulations for additional specialized training on the UCMJ for combatant commanders and commanders of combined commands. Article 137(d), as amended, would require the Secretary of Defense to maintain an electronic version of the UCMJ and Manual for Courts-Martial that would be updated periodically and made available on the Internet for review by servicemembers and the public.

Article 138 – Complaints of Wrongs
10 U.S.C. § 938

1. Summary of Proposal

This Report recommends no change to Article 138. Part II of the Report will consider whether any changes are needed in the rules implementing Article 138.

2. Narrative Summary of the Current Statute

Article 138 provides an avenue of relief for servicemembers who believe themselves wronged by their commanding officer. The statute allows such members to file a complaint of wrong seeking redress from a senior military commander. The statute requires the officer exercising general court-martial convening authority over the commanding officer who is the subject of the complaint to examine the complaint; to take proper measures to redress the wrong complained of; and to send to the Secretary concerned a statement of the complaint, as well as any proceedings had to address the complaint.

3. Historical Background

Article 138 was derived from Article 121 of the Articles of War.[1] The Navy provided a similar procedure by regulation.[2] Article 138 has remained unchanged since the UCMJ was enacted in 1950.[3]

4. Contemporary Practice

Article 138 is implemented through service regulations.[4] When military members feel they have been wronged by their commanding officer, they may also seek redress under service-specific and Department of Defense Inspectors General programs,[5] which afford whistleblower protections with respect to a servicemember's ability to communicate with the Inspector General or with Members of Congress.[6]

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1236-37 (1949).

[2] *Id.*

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] AIR FORCE INSTRUCTION 51-904 (June 30, 1994); ARMY REG. 27-10 (Oct. 3, 2011); JAGINST 5800.7F (June 26, 2012); COAST GUARD COMMANDANT INSTRUCTION M5810.1E (Apr. 13, 2011).

[5] 5 U.S.C. § 8 (1978).

[6] 10 U.S.C. § 1034.

5. Relationship to Federal Civilian Practice

Administrative procedures that are similar to Article 138 apply in the civilian sector, including inspector general programs, whistleblower protection laws, and related administrative procedures.[7]

6. Recommendation and Justification

Recommendation 138: No change to Article 138.

A statutory change is not required for this article.

Part II of the Report will consider whether any changes are needed in the rules implementing Article 138.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice that helps to counterbalance the limitation of rights available to members of the armed forces with procedures that ensure protection of those rights that are provided under military law.

[7] *See, e.g.*, Civil Service Reform Act, Prohibited Personnel Practices, 5 U.S.C. § 2302; *see also* Civil Service Reform Act, Whistleblower Protection Act, 5 U.S.C. §§ 1211-1215, 1218-1219, 1221-1222.

Article 139 – Redress of Injuries to Property
10 U.S.C. § 939

1. Summary of Proposal

This Report recommends no change to Article 139.

2. Summary of the Current Statute

Article 139 provides for the direct payment of a claim for property willfully damaged or wrongfully taken due to the riotous, violent, or disorderly conduct of military personnel.

3. Historical Background

Article 139 was derived from Article 105 of the Articles of War.[1] The statute has remained unchanged since the UCMJ was enacted in 1950.[2]

4. Contemporary Practice

Article 139 is a claims payment provision. Although payments under Article 139 may result from conduct that is separately prosecuted under the UCMJ, a determination of liability under this statute is not dependent upon referral or disposition of UCMJ charges. Article 139 is implemented through service regulation.[3] If the claim is payable, and assessed against a military member, the claim is paid from that service-member's pay. Military appellate courts have had to consider Article 139 only occasionally.[4]

5. Relationship to Federal Civilian Practice

Article 139 has no direct federal counterpart. However, federal law permits persons to file administrative claims under the Federal Torts Claims Act or the Military Claims Act for damages caused by federal employees acting within the scope of their employment.[5]

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1237 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] AIR FORCE INSTRUCTION 51-502 (Nov. 10, 2008); ARMY REG. 27-20 (Feb. 8, 2008); JAGINST 5800.7F (June 26, 2012); COAST GUARD COMMANDANT INSTRUCTION M5890.9 (Mar. 3 1993).

[4] *See, e.g.*, United States v. Henderson, 23. M.J. 860, 862 (A.C.M.R. 1987).

[5] *See* 28 U.S.C. § 2680; 10 U.S.C. § 2733.

6. Recommendation and Justification

Recommendation 139: No change to Article 139.

In view of the well-settled practice addressing Article 139's provisions, a statutory change is not needed.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

Article 140 – Delegation by the President
10 U.S.C. § 940

1. Summary of Proposal

This Report recommends no change to Article 140. Part II of the Report will consider whether any changes are needed in the rules implementing Article 140.

2. Summary of the Current Statute

Article 140 provides that the President may delegate any authority vested in him under the Code, and may also provide for the sub-delegation of any such authority.

3. Historical Background

Article 140 has remained substantially unchanged since the UCMJ was enacted in 1950.[1]

4. Contemporary Practice

The President has retained authority under Article 36 for prescribing the Manual for Courts-Martial, including the Rules for Courts-Martial and the Military Rules of Evidence. The President also has retained authority under Article 56 to specify the maximum authorized punishments for UCMJ offenses. From time to time, the President has exercised discretion under Article 140 to delegate other authorities under the Code.[2]

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 140 in federal civilian practice.

6. Recommendation and Justification

Recommendation 140: No change to Article 140

In view of the well-established method of Presidential delegation of authority through Code provisions, as well as judicial decisions recognizing this practice, a statutory change is not necessary. Part II of the Report will consider whether any changes are needed in the rules implementing Article 140.

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] *See, e.g.*, R.C.M. 1108(d) (delegating the President's inherent authority to provide for suspension of court-martial sentences to the Secretary concerned); United States v. Kinney, 22 M.J. 872, 875 n.3 (A.C.M.R. 1986); United States v. Simpson, 2 M.J. 1125, 1127 (C.G.C.M.R. 1976).

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 140a (New Provision) – Case Management; Data Collection and Accessibility

10 U.S.C. § 940a

1. Summary of Proposal

This proposal would promote the development and implementation of case management, data collection, and data accessibility programs for the military justice system under standards and criteria prescribed by the Secretary of Defense.

2. Summary of the Current Statute

There is currently no UCMJ provision addressing the standards and criteria for case management, data collection, or data accessibility programs.

3. Historical Background

The military justice system developed as a highly decentralized process, with the primary responsibility for administration resting with local authorities. As a result, the responsibility for preparing records, collecting data, and providing public access to military justice information has been viewed largely as a local function, with funding responsibilities vested in officials at the installation level. Practices have varied widely among the services, and within the services, in terms of developing and implementing a modernized case management and data collection system.

4. Contemporary Practice

The UCMJ currently does not require the services to collect and maintain data for the military justice system outside of the broad categories of data collected for the annual reports required by Article 146. Each service collects, manages, and makes disclosure decisions regarding court-martial case information and documents differently through service-specific systems. The services have different programs for providing information on court-martial cases through public affairs channels. Other information typically is released only upon a request that complies with the often time-consuming requirements of the Freedom of Information Act.[1]

5. Relationship to Federal Civilian Practice

Federal civilian practice currently uses an electronic service called PACER (Public Access to Court Electronic Records) for United States federal court documents. PACER is a fee-based system, with specified opportunities for waiver of fees. In the field of case management, the

[1] 5 U.S.C. § 552.

Federal district courts use the Case Management/Electronic Case Files (CM/ECF) system. This system allows courts to accept filings and provide access to filed documents online. In the field of data collection, the National Criminal Incident Center maintains a computerized index of criminal incidents, including information on criminal offenders and on property. Civilian law enforcement agencies nationwide use and update this system. Additionally, the United States Sentencing Commission and the Administrative Office of the United States Courts maintain and publish data relating to federal sentences, criminal caseloads, and categories of cases.[2] State courts employ similar systems, with the degree of modernization, centralization, and cost of access varying from state to state.

6. Recommendation and Justification

Recommendation 140a: Enact a new Article 140a requiring the development and implementation of case management, data collection, and data accessibility programs for the military justice system under standards and criteria prescribed by the Secretary of Defense.

The separate case management, data access, and data collection practices currently in use by the services makes it difficult to collect and analyze military justice data on a system-wide basis very difficult. As noted by the Response Systems Panel in its 2014 Report to Congress, ". . . the lack of uniform, offense-specific sentencing data from military courts-martial makes meaningful comparison and analysis of sentencing outcomes in military and civilian courts difficult, if not impossible."[3]

This proposal would require the development of standards in the Manual for Courts-Martial outlining the minimum data collection requirements for military justice activities and statistics from across the Department of Defense and the Coast Guard.

A baseline of similarly collected and reported data would help facilitate periodic reviews of the military justice system by the Code Committee or its successor.

This proposal would better align military justice data collection with the Uniform Federal Crime Reporting Act of 1988, the victim and witness notifications mandated under the Crime Victims Fund pursuant to 42 U.S.C. §10601, the Victim's Rights and Restitution Act of 1990, and the Brady Handgun Violence Prevention Act of 1993.

Utilizing the experience of federal and state systems, there are significant opportunities to improve the efficiency of case management and the effectiveness of systemic analysis, by levering technology and best practices in the civilian sector. Similar considerations apply to the concept of accessibility. The civilian courts have developed systems that balance public access with the need to protect privacy, sensitive financial data, and classified information. There are well-developed models in the civilian sector which can be applied in a balanced manner to provide timely access to dockets, filings, and rulings.

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[2] *See* United States Sentencing Commission website, at http://www.ussc.gov/; Administrative Office of the United States Courts website, at http://www.uscourts.gov.

[3] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 136-137 (June 2014).

To ensure timely and effective action, the proposal requires the Secretary of Defense to develop a set of standards and criteria that would form the framework for modernization.

The Services would have the capability to add service specific requirements to the baseline. The proposal would require the Secretary of Defense to develop standards and procedures within two years after enactment of the legislation, and the services would be required to implement new systems within four years after enactment of the legislation.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by incorporating the recommendations of the Response Systems Panel concerning military justice data reporting and collection.

This proposal supports MJRG Operational Guidance by adopting standards and procedures applicable to criminal justice data collection in the civilian sector insofar as practicable in military criminal practice.

The collection and analysis of that data will provide a critical foundation to the development of sentencing parameters and guidelines under Article 56, and would facilitate the periodic evaluation of the military justice called for in this report under Article 146. This proposal would enable military justice managers to better take advantage of the opportunities for efficiency created by the amendments proposed in this report.

8. Legislative Proposal

SEC. 1104. MILITARY JUSTICE CASE MANAGEMENT; DATA COLLECTION AND ACCESSIBILITY.

(a) IN GENERAL.—Subchapter XI of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by adding at the end the following new section (article):

"§940a. Art. 140a. Case management; data collection and accessibility

"The Secretary of Defense shall prescribe uniform standards and criteria for conduct of each of the following functions at all stages of the military justice system, including pretrial, trial, post-trial, and appellate processes, using, insofar as practicable, the best practices of Federal and State courts:

"(1) Collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision making within the military justice system, and that enhances the quality of periodic reviews under section 946 of this title (article 146).

"(2) Case processing and management.

"(3) Timely, efficient, and accurate production and distribution of records of trial within the military justice system.

"(4) Facilitation of access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records.".

(b) EFFECTIVE DATES.—(1) Not later than 2 years after the date of the enactment of this Act, the Secretary of Defense shall carry out section 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice), as added by subsection (a).

(2) Not later than 4 years after the date of the enactment of this Act, the standards and criteria under section 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice), as added by subsection (a), shall take effect.

9. Sectional Analysis

*Section 1104(*a) would create a new section, Article 140a (Case management; data collection, and accessibility), which would require the Secretary of Defense to prescribe uniform standards and criteria for case processing and management, military justice data collection, production and distribution of records of trial, and access to case information. The purpose of this section is to enhance the management of cases, the collection of data

necessary for evaluation and analysis, and to provide appropriate public access to military justice information at all stages of court-martial proceedings. At a minimum, the system developed for implementation should permit timely and appropriate access to filings, objections, instructions, and judicial rulings at the trial and appellate level, and to actions at trial and in subsequent proceedings concerning the findings and sentences of courts-martial.

Section 1104(b) provides the timeline for implementation of Section 1104(a). In order to provide appropriate time for implementation, this section would require promulgation of standards by the Secretary of Defense not later than two years after enactment of Section 1104, with an effective date for such standards not later than four years after enactment.

Subchapter XII. Court of Appeals for the Armed Forces

Articles 141-145 – United States Court of Appeals for the Armed Forces

10 U.S.C. §§ 941-45

1. Summary of Proposal

This Report recommends no change to Articles 141-145.

2. Summary of the Current Statutes

Articles 141-145 provide the framework for the organization and administration of the United States Court of Appeals for the Armed Forces, including: (1) establishing the Court as a court of record under Article I of the Constitution; (2) governing the appointment, qualification, and removal procedures for judges on the Court; (3) defining the eligibility requirements to serve as chief judge and the terms for the chief judge, judges, and certain attorney positions; (4) authorizing the Court to prescribe its own rules of procedure and to determine the number of judges required to constitute a quorum; and (5) authorizing retirement annuities for judges and their survivors. [1]

3. Historical Background

In 1989, Congress enacted comprehensive legislation to enhance the effectiveness and stability of the Court of Military Appeals for the Armed Forces.[2] In 1994, Congress gave the Court its current designation, the United States Court of Appeals for the Armed Forces.[3]

4. Contemporary Practice

The United States Court of Appeals for the Armed Forces is an independent court under Article I of the Constitution.[4] The Court consists of five judges who are appointed by the President by and with the advice and consent of the Senate.[5]

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[1] Appellate review by the Court is addressed in this Report's discussion of Article 67.

[2] NDAA FY 1990-1991, Pub. L. No. 101-189, tit. XIII, 103 Stat. 1569-1577 (1989). A more detailed history of the Court of Appeals for the Armed Forces is contained in the discussion to Article 67 of this Report.

[3] NDAA FY 1995, Pub. L. No. 103-337, Div. A, Title IX, § 924(a)(1), Oct. 5, 1994, 108 Stat. 2831.

[4] Article 141.

[5] Article 142(a).

5. Relationship to Federal Civilian Practice

There are 12 regional United States Circuit Courts of Appeals and the Court of Appeals for the Federal Circuit, which are standing courts under Article III of the Constitution. The regional Circuit Courts of Appeals hear appeals from the district courts located within each circuit, as well as appeals from decisions of federal administrative agencies. The statutory provisions for judges appointed to the Courts of Appeals are contained in Chapter 3 of Title 28.[6] While similar in some ways to the provisions of Articles 141-145, the provisions for Article III judges reflect their lifetime appointment and, except for the Federal Circuit, the geographic boundaries of the twelve Circuit Courts of Appeal. The chief judge of a circuit serves for a seven-year term and is generally the circuit judge who is senior in commission, with additional requirements based on age and experience.[7] In the Article III Courts of Appeals, the number of judges that sit on a panel is as the court directs.[8]

6. Recommendation and Justification

Recommendations 141-145: No change to Articles 141-145.

Articles 141 through 145 primarily concern matters related to the internal organization and administration of the Court of Appeals for the Armed Forces. In view of the judicial independence of the Court, the Department of Defense, as a matter of policy, typically has deferred to the Court with respect to initiating any legislative proposal that might be necessary in the interests of judicial administration. In that context, this Report does not recommend any changes in Articles 141 through 145.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

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[6] 28 U.S.C. § 41 *et seq.*

[7] 28 U.S.C. § 45.

[8] 28 U.S.C. § 46(a).

Article 146 – Code Committee & Article 146a (New Provision) – Annual Reports

10 U.S.C. §§ 946-46a

1. Summary of Proposal

This proposal would enhance the efficiency and effectiveness of the UCMJ by establishing a blue ribbon panel of experts to conduct a periodic evaluation of military justice practices and procedures on a regular basis. This proposal also would create a new statute, Article 146a, to retain the valuable informational aspects of the annual reports issued individually by the Court of Appeals for the Armed Forces, the Judge Advocates General, and the Staff Judge Advocate to the Commandant of the Marine Corps.

2. Summary of the Current Statute

Article 146 provides for a Code Committee, consisting of the judges of the Court of Appeals for the Armed Forces, the individual service Judge Advocates General, the Staff Judge Advocate to the Commandant of the Marine Corps, and two members of the public appointed by the Secretary of Defense. The statute requires the Code Committee to meet at least once a year, to make an annual survey, and to submit an annual report to designated congressional and executive branch officials containing military justice data and any recommendations from the Committee regarding sentence uniformity, proposed amendments, or any other matter that the Committee considers appropriate.

3. Historical Background

Congress established the Code Committee under Article 67 of the UCMJ as enacted in 1950, consisting of the Judges of the Court of Military Appeals (the original title of the Court of Appeals for the Armed Forces) and the Judge Advocates General.[1] Since 1950, Congress has added two public members and the Staff Judge Advocate to the Commandant of the Marine Corps to the Committee; Congress also has added various data items for inclusion in Committee's annual reports.[2]

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] NDAA FY 1990 and 1991, 101 Pub. L. 189, § 1301(c), 103 Stat. 1352 (1989) (restatement and revision of subchapter XI of the UCMJ applicable to the Court of Appeals for the Armed Forces, then known as the Court of Military Appeals); NDAA FY 2013, 112 Pub. L. 239, § 532, 126 Stat. 1632 (2013) (requiring Code Committee to include in its report information concerning the appellate review process, practice of counsel and military judges in certain types of cases, and information on sufficiency of resources available to capably perform military justice functions).

4. Contemporary Practice

Since the UCMJ was enacted in 1950, the Code Committee's mission and function has evolved. Today, the Committee primarily concentrates its efforts on preparing an annual report that focuses mainly on military justice data, recent developments in the law, and related matters. In recent decades the Committee has not served as a vehicle for recommending substantive amendments to the UCMJ or the Manual for Courts-Martial.[3]

From time to time, Congress has established various blue ribbon advisory groups to address specific aspects of the military justice system.[4] The Services and outside entities have also conducted reviews that are often cited by military justice practitioners.[5]

Within the executive branch, the Joint Service Committee on Military Justice exercises the primary responsibility for recommending changes to the UCMJ and the MCM.[6] The members of the Joint Service Committee and its working group all have other major responsibilities, and serve on the Joint Service Committee as a collateral duty. Neither the Code Committee nor the Joint Service Committee has the full-time staffing necessary to conduct comprehensive periodic reviews of a complex governmental process, such as the military justice system, on a regular basis. As a result, the Code Committee has focused on the collection of information required for the annual report, and the Joint Service Committee has focused on targeted issues.

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[3] The Code Committee's annual reports are available at http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm.

[4] *See, e.g.*, NDAA FY 2013, Pub. L. No. 112-239, § 576(a)(1), 126 Stat. 1632 (2013) (requiring the Secretary of Defense to establish the Response Systems to Adult Sexual Assault Crimes Panel and the follow-on Judicial Proceedings Since Fiscal Year 2012 Amendments Panel).

[5] *See* REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001) (sponsored by the National Institute on Military Justice and Chaired by former Chief Judge of the Court of Appeals for the Armed Forces Walter T. Cox III, known as the "Cox Commission"), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Cox-Commission-Report-2001.pdf; AD HOC COMMITTEE TO STUDY THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO HON. WILLIAM R. BRUCKER, SECRETARY OF THE ARMY (Jan 18, 1960) (the "Powell Report"), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Powell_report.pdf.

[6] Exec. Order No. 12,473, 3 C.F.R. 1984 Comp., p. 201 (April 13, 1984) (rescinding the 1969 Manual for Courts-Martial and replacing it with the 1984 Manual, effective August 1, 1984 and requiring that "The Secretary of Defense shall cause this Manual to be reviewed annually and shall recommend to the President any appropriate amendments."). *See also* MCM, App. 26 (U.S. DEP'T OF DEF. DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE (May 3, 2003)), *available at* http://www.dtic.mil/whs/directives/corres/pdf/550017p.pdf. The Joint Service Committee reports to the General Counsel of the Department of Defense, and is comprised of voting members form the Judge Advocates General of the Navy, Air Force, Army and Coast Guard, and the Staff Judge Advocate of the Marine Corps. *See* The Joint Service Committee on Military Justice (JSC), *available at* http://www.jsc.defense.gov.

5. Relationship to Federal Civilian Practice

Congress has, from time to time, provided legislative authority for the Supreme Court to prescribe rules of procedure for the lower courts of the United States.[7] In 1948, Congress created the Judicial Conference, with the Chief Justice of the United States as the presiding officer.[8] Over time, the work and oversight of the rulemaking process has been delegated by the Court to committees of the Judicial Conference, the principal policy-making body of the United States Courts. The Judicial Conference is required to:

Make a comprehensive survey of the conditions of business in the courts of the United States;

Prepare plans for the assignment of judges to or from courts of appeals or district courts, where necessary;

Submit suggestions to the various courts in the interest of promoting uniformity of management procedures and the expeditious conduct of court business;

Exercise authority provided in the United States Codes for the review of circuit council conduct and disability orders filed under that chapter; and

Carry on a continuous study of the operation and effect of the general rules of practice and procedure in use within the federal courts, as prescribed by the Supreme Court pursuant to law.[9]

The advisory committees on appellate, bankruptcy, civil, criminal, and evidence rules evaluate suggestions for rules amendments in the first instance. If an advisory committee pursues a proposal, it may seek permission from the Standing Committee to publish a draft of the contemplated amendment. Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee. The Standing Committee independently reviews the findings of the advisory committees and, if satisfied, recommends changes to the Judicial Conference, which in turn recommends changes to the Supreme Court. The Court considers the proposals and, if it concurs, typically promulgates the revised rules by order before May 1, to take effect no earlier than December 1 of the same year unless Congress enacts legislation to reject, modify, or defer the pending rules.

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[7] *See* 28 U.S.C. § 2071 *et seq.* (2012).

[8] 28 U.S.C. § 331 (2012) (establishing the Judicial Conference of the United States and setting forth its duties and requirements). "The fundamental purpose of the Judicial Conference today is to make policy with regard to the administration of the U.S. Courts." *See* Judicial Conference of the United States' website, *available at* http://www.uscourts.gov/FederalCourts/JudicialConference.aspx.

[9] *Id.*

6. Recommendation and Justification

Recommendation 146.1: Establish a blue ribbon committee—the Military Justice Review Panel—composed of experts in military law and civilian criminal law, to conduct periodic reviews of the military justice system.

The proposed Military Justice Review Panel would be composed of thirteen members. Each of the following officials would select one person to serve on the Panel: the Secretary of Defense (in consultation with the Secretary of Homeland Security), the Attorney General, the Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps. The remaining members of the Panel would be selected by the Secretary of Defense based upon the recommendations of the each of the following: the chairman and ranking minority member of the House Armed Services Committee and the Senate Armed Services Committee, the Chief Justice of the United States, and the Chief Judge of the U.S. Court of Appeals for the Armed Forces. The Secretary of Defense would designate one member as the Chair; the Panel would have a full-time staff.

The Panel would issue its first report four years after the effective date of the legislation, focusing on the implementation of any recent amendments to the UCMJ and Manual for Courts-Martial. Eight years after the effective date of the legislation, the Panel would issue its first comprehensive review of the UCMJ and Manual for Courts-Martial. Thereafter, the Panel would issue comprehensive reports every eight years. Within each eight year cycle the Panel would issue targeted reports at the mid-point of each cycle, and could issue additional reports on matters referred to the Panel by the Secretary of Defense or Congress.

This proposal is 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. Accordingly, the comprehensive reviews are scheduled on an eight year schedule.

This proposal also relies on the expectation that the Joint Service Committee will continue to conduct its vital role within the executive branch addressing the type of targeted adjustments in law and regulation that are required on a more frequent basis to address specific issues in the law.

Recommendation 146.2: Retain the valuable informational aspects of the annual reports issued individually by the Court of Appeals for the Armed Forces, the Judge Advocates General, and the Staff Judge Advocate to the Commandant of the Marine Corps and set forth those requirements in a new statute, Article 146a.

This proposal would create a new statute, Article 146a. The proposal anticipates that the individual reports will be compiled into a single volume using the procedures currently employed to combine individual reports into a consolidated report under the present version of Article 146.

7. Relationship to Objectives and Related Provisions

Establishing a blue ribbon panel with the responsibility for periodic review of the UCMJ and MCM will enhance the potential for those responsible for military justice to fulfill their mission in a manner that adjusts to the evolution of legal and national requirements.

8. Legislative Proposal

SEC. 1201. MILITARY JUSTICE REVIEW PANEL.

Section 946 of title 10, United States Code (article 146 of the Uniform Code of Military Justice), is amended to read as follows:

"§946. Art. 146. Military Justice Review Panel

"(a) ESTABLISHMENT.—The Secretary of Defense shall establish a panel to conduct independent periodic reviews and assessments of the operation of this chapter. The panel shall be known as the 'Military Justice Review Panel', in this section referred to as the 'Panel'.

"(b) MEMBERS.—(1) The Panel shall be composed of thirteen members.

"(2) Each of the following shall select one member of the Panel:

"(A) The Secretary of Defense (in consultation with the Secretary of Homeland Security).

"(B) The Attorney General.

"(C) The Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps.

"(3) The Secretary of Defense shall select the remaining members of the Panel, taking into consideration recommendations made by each of the following:

"(A) The chairman and ranking minority member of the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

"(B) The Chief Justice of the United States.

"(C) The Chief Judge of the United States Court of Appeals for the Armed Forces.

"(c) QUALIFICATIONS OF MEMBERS.—The members of the Panel shall be appointed 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.

"(d) CHAIR.—The Secretary of Defense shall select the chair of the Panel from among the members.

"(e) TERM; VACANCIES.—Each member shall be appointed for a term of eight years, and no member may serve more than one term. Any vacancy shall be filled in the same manner as the original appointment.

"(f) REVIEWS AND REPORTS.—

"(1) INITIAL REVIEW OF RECENT AMENDMENTS TO UCMJ.—During fiscal year 2020, the Panel shall conduct an initial review and assessment of the implementation of the amendments made to this chapter during the preceding five years. In

conducting the initial review and assessment, the Panel may review such other aspects of the operation of this chapter as the Panel considers appropriate.

"(2) PERIODIC COMPREHENSIVE REVIEWS.—During fiscal year 2024 and every eight years thereafter, the Panel shall conduct a comprehensive review and assessment of the operation of this chapter.

"(3) PERIODIC INTERIM REVIEWS.—During fiscal year 2028 and every eight years thereafter, the Panel shall conduct an interim review and assessment of such other aspects of the operation of this chapter as the Panel considers appropriate. In addition, at the request of the Secretary of Defense, the Panel may, at any time, review and assess other specific matters relating to the operation of this chapter.

"(4) REPORTS.—Not later than December 31 of each year during which the Panel conducts a review and assessment under this subsection, the Panel shall submit a report on the results, including the Panel's findings and recommendations, through the Secretary of Defense to the Committees on Armed Services of the Senate and the House of Representatives.

"(g) HEARINGS.—The Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Panel considers appropriate to carry out its duties under this section.

"(h) INFORMATION FROM FEDERAL AGENCIES.—Upon request of the chair of the Panel, a department or agency of the Federal Government shall provide

information that the Panel considers necessary to carry out its duties under this section.

"(i) ADMINISTRATIVE MATTERS.—

"(1) MEMBERS TO SERVE WITHOUT PAY.—Members of the Panel shall serve without pay, but shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, while away from their homes or regular places of business in the performance of services for the Panel.

"(2) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the Panel.

"(j) FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Panel.".

SEC. 1202. ANNUAL REPORTS.

Subchapter XII of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by adding at the end the following new section (article):

"§946a. Art. 146a. Annual reports

"(a) COURT OF APPEALS FOR THE ARMED FORCES.—Not later than December 31 of each year, the Court of Appeals for the Armed Forces shall submit a report that, with respect to the previous fiscal year, provides information on the number and

status of pending cases and such other matters as the Court considers appropriate regarding the operation of this chapter.

"(b) SERVICE REPORTS.—Not later than December 31 of each year, the Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps shall each submit a report, with respect to the preceding fiscal year, containing the following:

"(1) Data on the number and status of pending cases.

"(2) Information on the appellate review process, including—

"(A) information on compliance with processing time goals;

"(B) descriptions of the circumstances surrounding cases in which general or special court-martial convictions were (i) reversed because of command influence or denial of the right to speedy review or (ii) otherwise remitted because of loss of records of trial or other administrative deficiencies; and

"(C) an analysis of each case in which a provision of this chapter was held unconstitutional.

"(3)(A) An explanation of measures implemented by the armed force involved to ensure the ability of judge advocates—

"(i) to participate competently as trial counsel and defense counsel in cases under this chapter;

"(ii) to preside as military judges in cases under this chapter; and

"(iii) to perform the duties of Special Victims' Counsel, when so designated under section 1044e of this title.

"(B) The explanation under subparagraph (A) shall specifically identify the measures that focus on capital cases, national security cases, sexual assault cases, and proceedings of military commissions.

"(4) The independent views of each Judge Advocate General and of the Staff Judge Advocate to the Commandant of the Marine Corps as to the sufficiency of resources available within the respective armed forces, including total workforce, funding, training, and officer and enlisted grade structure, to capably perform military justice functions.

"(5) Such other matters regarding the operation of this chapter as may be appropriate.

"(c) SUBMISSION.—Each report under this section shall be submitted—

"(1) to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives; and

"(2) to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Homeland Security.".

9. Sectional Analysis

Section 1201 would amend Article 146 (Code committee) and retitle the statute as "Military Justice Review Panel." The Military Justice Review Panel would replace the Code Committee. The Military Justice Review Panel would be an independent, blue ribbon panel of experts tasked to conduct a periodic evaluation of military justice practices and

procedures on a regular basis, thereby enhancing the efficiency and effectiveness of the UCMJ and the Code's implementing regulations.

The proposed Military Justice Review Panel would be composed of thirteen members. Each of the following officials would select one person to serve on the Panel: the Secretary of Defense (in consultation with the Secretary of Homeland Security), the Attorney General, the Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps. The remaining members of the Panel would be selected by the Secretary of Defense based upon the recommendations of each of the following: the chairman and ranking minority member of the House Armed Services Committee and the Senate Armed Services Committee, the Chief Justice of the United States, and the Chief Judge of the U.S. Court of Appeals for the Armed Forces. The Secretary of Defense would designate one member as the Chair; the Panel would have a full-time staff.

The Panel would issue its first report four years after the effective date of the legislation, focusing on the implementation of any recent amendments to the UCMJ and Manual for Courts-Martial. Eight years after the effective date of the legislation, the Panel would issue its first comprehensive review of the UCMJ and Manual for Courts-Martial. Thereafter, the Panel would issue comprehensive reports every eight years. Within each eight year cycle, the Panel would issue targeted reports at the mid-point of each cycle, and could issue additional reports on matters referred to the Panel by the Secretary of Defense or Congress.

This proposal is 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. Accordingly, the comprehensive reviews are scheduled on an eight-year schedule.

This proposal also relies on the expectation that the Joint Service Committee will continue to conduct its vital role within the executive branch addressing the type of targeted adjustments in law and regulation that are required on a more frequent basis to address specific issues in the law.

Section 1202 would create a new section, Article 146a (Annual reports), to retain the valuable informational aspects of the annual reports issued individually by the Court of Appeals for the Armed Forces, the Judge Advocates General, and the Staff Judge Advocate to the Commandant of the Marine Corps. The proposal anticipates that the individual reports will be compiled into a single volume using the procedures currently employed to combine individual reports into a consolidated report under the present version of Article 146.

Section C.
Consolidated Legislative Proposal

A Bill

To amend chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), to improve the quality and efficiency of the military justice system, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Military Justice Act of 2015".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

TITLE I—GENERAL PROVISIONS

SEC. 101. DEFINITIONS.

(a) DEFINITION OF MILITARY JUDGE.—Paragraph (10) of section 801 of title 10, United States Code (article 1 of the Uniform Code of Military Justice), is amended to read as follows:

"(10) The term 'military judge' means a judge advocate designated under section 826(c) of this title (article 26(c)) who is detailed under section 826(a) or section 830a of this title (article 26(a) or 30a)).".

(b) DEFINITION OF JUDGE ADVOCATE.—Paragraph (13) of such section (article) is amended—

(1) in subparagraph (A), by striking "the Army or the Navy" and inserting "the Army, the Navy, or the Air Force"; and

(2) in subparagraph (B), by striking "the Air Force or".

SEC. 102. CLARIFICATION OF PERSONS SUBJECT TO UCMJ WHILE ON INACTIVE-DUTY TRAINING.

Paragraph (3) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended to read as follows:

"(3)(A) While on inactive-duty training and during any of the periods specified in subparagraph (B)—

"(i) members of a reserve component; and

"(ii) members of the Army National Guard of the United States or the Air National Guard of the United States, but only when in Federal service.

"(B) The periods referred to in subparagraph (A) are the following:

"(i) Travel to and from the inactive-duty training site of the member, pursuant to orders or regulations.

"(ii) Intervals between consecutive periods of inactive-duty training on the same day, pursuant to orders or regulations.

"(iii) Intervals between inactive-duty training on consecutive days, pursuant to orders or regulations.".

SEC. 103. STAFF JUDGE ADVOCATE DISQUALIFICATION DUE TO PRIOR INVOLVEMENT IN CASE.

Subsection (c) of section 806 of title 10, United States Code (article 6 of the Uniform Code of Military Justice), is amended to read as follows:

"(c)(1) No person who, with respect to a case, serves in a capacity specified in paragraph (2) may later serve as a staff judge advocate or legal officer to any reviewing or convening authority upon the same case.

"(2) The capacities referred to in paragraph (1) are, with respect to the case involved, any of the following:

"(A) Preliminary hearing officer, court member, military judge, military magistrate, or appellate judge.

"(B) Counsel who have acted in the same case or appeared in any proceeding before a military judge, military magistrate, preliminary hearing officer, or appellate court.".

SEC. 104. CONFORMING AMENDMENT RELATING TO MILITARY MAGISTRATES.

The first sentence of section 806a(a) of title 10, United States Code (article 6a(a) of the Uniform Code of Military Justice), is amended by striking "military judge" and all that follows through the end of the sentence and inserting "military appellate judge, military judge, or military magistrate to perform the duties of the position involved.".

SEC. 105. RIGHTS OF VICTIM.

(a) DESIGNATION OF REPRESENTATIVE.—Subsection (c) of section 806b of title 10, United States Code (article 6b of the Uniform Code of Military Justice), is amended in the first sentence by striking "the military judge" and all that follows through the end of the sentence and inserting the following: "the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section.".

(b) RULE OF CONSTRUCTION.—Subsection (d) of such section (article) is amended—

(1) by striking "or" at the end of paragraph (1);

(2) by striking the period at the end of paragraph (2) and inserting "; or"; and

(3) by adding at the end the following new paragraph:

"(3) to impair the exercise of discretion under sections 830 and 834 of this title (articles 30 and 34).".

(c) INTERVIEW OF VICTIM.—Such section (article) is amended by adding at the end the following new subsection:

"(f) COUNSEL FOR ACCUSED INTERVIEW OF VICTIM OF ALLEGED OFFENSE.—(1) Upon notice by counsel for the Government to counsel for the accused of the name of an alleged victim of an offense under this chapter who counsel for the Government intends to call as a witness at a proceeding under this chapter, counsel for the accused shall make any request to interview the victim through the Special Victim's Counsel or other counsel for the victim, if applicable.

"(2) If requested by an alleged victim who is subject to a request for interview under paragraph (1), any interview of the victim by counsel for the accused shall take place only in the presence of the counsel for the Government, a counsel for the victim, or, if applicable, a victim advocate.".

TITLE II—APPREHENSION AND RESTRAINT

SEC. 201. RESTRAINT OF PERSONS CHARGED.

Section 810 of title 10, United States Code (article 10 of the Uniform Code of Military Justice), is amended to read as follows:

"§810. Art. 10. Restraint of persons charged

"(a) IN GENERAL.—(1) Subject to paragraph (2), any person subject to this chapter who is charged with an offense under this chapter may be ordered into arrest or confinement as the circumstances require.

"(2) When a person subject to this chapter is charged only with an offense that is normally tried by summary court-martial, the person ordinarily shall not be ordered into confinement.

"(b) NOTIFICATION TO ACCUSED AND RELATED PROCEDURES.—(1) When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken—

"(A) to inform the person of the specific offense of which the person is accused; and

"(B) to try the person or to dismiss the charges and release the person.

"(2) To facilitate compliance with paragraph (1), the President shall prescribe regulations setting forth procedures relating to referral for trial, including procedures for prompt forwarding of the charges and specifications and, if

applicable, the preliminary hearing report submitted under section 832 of this title (article 32).".

SEC. 202. MODIFICATION OF PROHIBITION OF CONFINEMENT OF ARMED FORCES MEMBERS WITH ENEMY PRISONERS AND CERTAIN OTHERS.

Section 812 of title 10, United States Code (article 12 of the Uniform Code of Military Justice), is amended to read as follows:

"§812. Art. 12. Prohibition of confinement of armed forces members with enemy prisoners and certain others

"No member of the armed forces may be placed in confinement in immediate association with—

"(1) enemy prisoners; or

"(2) other individuals—

"(A) who are detained under the law of war and are foreign nationals; and

"(B) who are not members of the armed forces.".

TITLE III—NON-JUDICIAL PUNISHMENT

SEC. 301. MODIFICATION OF CONFINEMENT AS NON-JUDICIAL PUNISHMENT.

Section 815 of title 10, United States Code (article 15 of the Uniform Code of Military Justice), is amended—

(1) in subsection (b)—

(A) in paragraph (2)(A), by striking "on bread and water or diminished rations"; and

(B) in the undesignated matter after paragraph (2), by striking "on bread and water or diminished rations" in the sentence beginning "No two or more"; and

(2) in subsection (d), by striking "on bread and water or diminished rations" in paragraphs (2) and (3).

TITLE IV—COURT-MARTIAL JURISDICTION

SEC. 401. COURTS-MARTIAL CLASSIFIED.

Section 816 of title 10, United States Code (article 16 of the Uniform Code of Military Justice), is amended to read as follows:

"§816. Art. 16. Courts-martial classified

"(a) IN GENERAL.—The three kinds of courts-martial in each of the armed forces are the following:

"(1) General courts-martial, as described in subsection (b).

"(2) Special courts-martial, as described in subsection (c).

"(3) Summary courts-martial, as described in subsection (d).

"(b) GENERAL COURTS-MARTIAL.—General courts-martial are of the following three types:

"(1) A general court-martial consisting of a military judge and eight members, subject to sections 825(d)(3) and 829 of this title (articles 25(d)(3) and 29).

"(2) In a capital case, a general court-martial consisting of a military judge and the number of members determined under section 825a of this title (article 25a), subject to sections 825(d)(3) and 829 of this title (articles 25(d)(3) and 29).

"(3) A general court-martial consisting of a military judge alone, if, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record or in writing, a court composed of a military judge alone and the military judge approves the request.

"(c) SPECIAL COURTS-MARTIAL.—Special courts-martial are of the following two types:

"(1) A special court-martial, consisting of a military judge and four members, subject to sections 825(d)(3) and 829 of this title (articles 25(d)(3) and 29).

"(2) A special court-martial consisting of a military judge alone—

"(A) if the case is so referred by the convening authority, subject to section 819 of this title (article 19) and such limitations as the President may prescribe by regulation; or

"(B) if the case is referred under paragraph (1) and, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record or in writing, a court composed of a military judge alone and the military judge approves the request.

"(d) SUMMARY COURT-MARTIAL.—A summary court-martial consists of one commissioned officer.".

SEC. 402. JURISDICTION OF GENERAL COURTS-MARTIAL.

Section 818 of title 10, United States Code (article 18 of the Uniform Code of Military Justice), is amended—

(1) in subsection (b), by striking "section 816(1)(B) of this title (article 16(1)(B))" and inserting "section 816(b)(3) of this title (article 16(b)(3))"; and

(2) by striking subsection (c) and inserting the following:

"(c) Consistent with sections 819 and 820 of this title (articles 19 and 20), only general courts-martial have jurisdiction over the following offenses:

"(1) A violation of subsection (a) or (b) of section 920 of this title (article 120).

"(2) A violation of subsection (a) or (b) of section 920b of this title (article 120b).

"(3) An attempt to commit an offense specified in paragraph (1) or (2) that is punishable under section 880 of this title (article 80).".

SEC. 403. JURISDICTION OF SPECIAL COURTS-MARTIAL.

Section 819 of title 10, United States Code (article 19 of the Uniform Code of Military Justice), is amended—

(1) by striking "Subject to" in the first sentence and inserting the following:

"(a) IN GENERAL.—Subject to";

(2) by striking "A bad-conduct discharge" and all that follows through the end; and

(3) by adding after subsection (a), as designated by paragraph (1), the following new subsections:

"(b) ADDITIONAL LIMITATION.—Neither a bad-conduct discharge, nor confinement for more than six months, nor forfeiture of pay for more than six months may be adjudged if charges and specifications are referred to a special court-martial consisting of a military judge alone under section 816(c)(2)(A) of this title (article 16(c)(2)(A)).

"(c) MILITARY MAGISTRATE.—If charges and specifications are referred to a special court-martial consisting of a military judge alone under section 816(c)(2)(A) of this title (article 16(c)(2)(A)), the military judge, with the consent of the parties, may designate a military magistrate to preside over the special court-martial.".

SEC. 404. SUMMARY COURT-MARTIAL AS NON-CRIMINAL FORUM.

Section 820 of title 10, United States Code (article 20 of the Uniform Code of Military Justice), is amended—

(1) by inserting "(a) IN GENERAL.—" before "Subject to"; and

(2) by adding at the end the following new subsection:

"(b) NON-CRIMINAL FORUM.—A summary court-martial is a non-criminal forum. A finding of guilty at a summary court-martial does not constitute a criminal conviction.".

TITLE V—COMPOSITION OF COURTS-MARTIAL

SEC. 501. TECHNICAL AMENDMENT RELATING TO PERSONS AUTHORIZED TO CONVENE GENERAL COURTS-MARTIAL.

Section 822(a)(6) of title 10, United States Code (article 22(a)(6) of the Uniform Code of Military Justice), is amended by striking "in chief".

SEC. 502. WHO MAY SERVE ON COURTS-MARTIAL; DETAIL OF MEMBERS.

(a) WHO MAY SERVE ON COURTS-MARTIAL.—Subsection (c) of section 825 of title 10, United States Code (article 25 of the Uniform Code of Military Justice), is amended to read as follows:

"(c)(1) Any enlisted member on active duty is eligible to serve on a general or special court-martial for the trial of any other enlisted member.

"(2) Before a court-martial with a military judge and members is assembled for trial, an enlisted member who is an accused may personally request, orally on the record or in writing, that—

"(A) the membership of the court-martial be comprised entirely of officers; or

"(B) enlisted members comprise at least one-third of the membership of the court-martial, regardless of whether enlisted members have been detailed to the court-martial.

"(3) Except as provided in paragraph (4), after such a request, the accused may not be tried by a general or special court-martial if the membership of the court-martial is inconsistent with the request.

"(4) If, because of physical conditions or military exigencies, a sufficient number of eligible officers or enlisted members, as the case may be, are not available to carry out paragraph (2), the trial may nevertheless be held. In that event, the convening authority shall make a detailed written statement of the reasons for nonavailability. The statement shall be appended to the record.".

(b) DETAIL OF MEMBERS.—Subsection (d) of such section (article) is amended by adding at the end the following new paragraph:

"(3) The convening authority shall detail not less than the number of members necessary to impanel the court-martial under section 829 of this title (article 29).".

SEC. 503. NUMBER OF COURT-MARTIAL MEMBERS IN CAPITAL CASES.

Section 825a of title 10, United States Code (article 25a of the Uniform Code of Military Justice), is amended to read as follows:

"§825a. Art. 25a. Number of court-martial members in capital cases

"(a) IN GENERAL.—In a case in which the accused may be sentenced to death, the number of members shall be 12.

"(b) CASE NO LONGER CAPITAL.—Subject to section 829 of this title (article 29)—

"(1) if a case is referred for trial as a capital case and, before the members are impaneled, the accused may no longer be sentenced to death, the number of members shall be eight; and

"(2) if a case is referred for trial as a capital case and, after the members are impaneled, the accused may no longer be sentenced to death, the number of members shall remain 12.".

SEC. 504. DETAILING, QUALIFICATIONS, ETC. OF MILITARY JUDGES.

(a) SPECIAL COURTS-MARTIAL.—Subsection (a) of section 826 of title 10, United States Code (article 26 of the Uniform Code of Military Justice), is amended—

(1) in the first sentence, by inserting after "each general" the following: "and special"; and

(2) by striking the second sentence.

(b) QUALIFICATIONS.—Subsection (b) of such section (article) is amended by striking "qualified for duty" and inserting "qualified, by reason of education, training, experience, and judicial temperament, for duty".

(c) DETAIL AND ASSIGNMENT.—Subsection (c) of such section (article) is amended to read as follows:

"(c)(1) In accordance with regulations prescribed under subsection (a), a military judge of a general or special court-martial shall be designated for detail by the Judge Advocate General of the armed force of which the military judge is a member.

"(2) Neither the convening authority nor any member of the staff of the convening authority shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to the military judge's performance of duty as a military judge.

"(3) A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial—

"(A) may perform such duties only when the officer is assigned and directly responsible to the Judge Advocate General of the armed force of which the military judge is a member; and

"(B) may perform duties of a judicial or nonjudicial nature other than those relating to the officer's primary duty as a military judge of a general court-martial when such duties are assigned to the officer by or with the approval of that Judge Advocate General.

"(4) In accordance with regulations prescribed by the President, assignments of military judges under this section (article) shall be for appropriate minimum periods, subject to such exceptions as may be authorized in the regulations.".

(d) DETAIL TO A DIFFERENT ARMED FORCE.—Such section (article) is further amended by adding at the end the following new subsection:

"(f) A military judge may be detailed under subsection (a) to a court-martial or a proceeding under section 830a of this title (article 30a) that is convened in a different armed force, when so permitted by the Judge Advocate General of the armed force of which the military judge is a member.".

(e) CHIEF TRIAL JUDGES.—Such section (article), as amended by subsection (d), is further amended by adding at the end the following new subsection:

"(g) In accordance with regulations prescribed by the President, each Judge Advocate General shall designate a chief trial judge from among the members of the applicable trial judiciary.".

SEC. 505. QUALIFICATIONS OF TRIAL COUNSEL AND DEFENSE COUNSEL

Section 827 of title 10, United States Code (article 27 of the Uniform Code of Military Justice), is amended—

(1) in the first sentence of paragraph (2) of subsection (a), by striking "No person" and all that follows through "trial counsel," the first place it

appears and inserting the following: "No person who, with respect to a case, has served as a preliminary hearing officer, court member, military judge, military magistrate, or appellate judge, may later serve as trial counsel,";

(2) in the first sentence of subsection (b), by striking "Trial counsel or defense counsel" and inserting "Trial counsel, defense counsel, or assistant defense counsel"; and

(3) by striking subsection (c) and inserting the following new subsections:

"(c)(1) Defense counsel and assistant defense counsel detailed for a special court-martial shall have the qualifications set forth in subsection (b).

"(2) Trial counsel and assistant trial counsel detailed for a special court-martial and assistant trial counsel detailed for a general court-martial must be determined to be competent to perform such duties by the Judge Advocate General, under such rules as the President may prescribe.

"(d) To the greatest extent practicable, in any capital case, at least one defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.".

SEC. 506. ASSEMBLY AND IMPANELING OF MEMBERS; DETAIL OF NEW MEMBERS AND MILITARY JUDGES.

Section 829 of title 10, United States Code (article 29 of the Uniform Code of Military Justice), is amended to read as follows:

"§829. Art. 29. Assembly and impaneling of members; detail of new members and military judges

"(a) ASSEMBLY.—The military judge shall announce the assembly of a general or special court-martial with members. After such a court-martial is assembled, no member may be absent, unless the member is excused—

"(1) as a result of a challenge;

"(2) under subsection (b)(1)(B); or

"(3) by order of the military judge or the convening authority for disability or other good cause.

"(b) IMPANELING.—(1) Under rules prescribed by the President, the military judge of a general or special court-martial with members shall—

"(A) after determination of challenges, impanel the court-martial; and

"(B) excuse the members who, having been assembled, are not impaneled.

"(2) In a general court-martial, the military judge shall impanel—

"(A) 12 members in a capital case; and

"(B) eight members in a noncapital case.

"(3) In a special court-martial, the military judge shall impanel four members.

"(c) ALTERNATE MEMBERS.—In addition to members under subsection (b), the military judge shall impanel alternate members, if the convening authority authorizes alternate members.

"(d) DETAIL OF NEW MEMBERS.—(1) If, after members are impaneled, the membership of the court-martial is reduced to—

"(A) fewer than 12 members with respect to a general court-martial in a capital case;

"(B) fewer than six members with respect to a general court-martial in a noncapital case; or

"(C) fewer than four members with respect to a special court-martial;

the trial may not proceed unless the convening authority details new members and, from among the members so detailed, the military judge impanels new members sufficient in number to provide the membership specified in paragraph (2).

"(2) The membership referred to in paragraph (1) is as follows:

"(A) 12 members with respect to a general court-martial in a capital case.

"(B) At least six but not more than eight members with respect to a general court-martial in a noncapital case.

"(C) Four members with respect to a special court-martial.

"(e) DETAIL OF NEW MILITARY JUDGE.—If the military judge is unable to proceed with the trial because of disability or otherwise, a new military judge shall be detailed to the court-martial.

"(f) EVIDENCE.—(1) In the case of new members under subsection (d), the trial may proceed with the new members present after the evidence previously introduced is read or, in the case of audiotape, videotape, or similar recording, is played, in the presence of the new members, the military judge, the accused, and counsel for both sides.

"(2) In the case of a new military judge under subsection (e), the trial shall proceed as if no evidence had been introduced, unless the evidence previously introduced is read or, in the case of audiotape, videotape, or similar recording, is played, in the presence of the new military judge, the accused, and counsel for both sides.".

SEC. 507. MILITARY MAGISTRATES.

Subchapter V of chapter 47 of title 10, United States Code, is amended by inserting after section 826 (article 26 of the Uniform Code of Military Justice) the following new section (article):

"§826a. Art. 26a. Military magistrates

"(a) QUALIFICATIONS.—A military magistrate shall be a commissioned officer of the armed forces who—

"(1) is a member of the bar of a Federal court or a member of the bar of the highest court of a State; and

"(2) is certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military magistrate by the Judge Advocate General of the armed force of which the officer is a member.

"(b) DUTIES.—In accordance with regulations prescribed by the Secretary concerned, in addition to duties when designated under section 819 of this title or section 830a of this title (articles 19 or 30a), a military magistrate may be assigned to perform other duties of a nonjudicial nature.".

TITLE VI—PRE-TRIAL PROCEDURE

SEC. 601. CHARGES AND SPECIFICATIONS.

Section 830 of title 10, United States Code (article 30 of the Uniform Code of Military Justice), is amended to read as follows:

"§830. Art. 30. Charges and specifications

"(a) IN GENERAL.—Charges and specifications—

"(1) may be preferred only by a person subject to this chapter; and

"(2) shall be preferred by presentment in writing, signed under oath before a commissioned officer of the armed forces who is authorized to administer oaths.

"(b) REQUIRED CONTENT.—The writing under subsection (a) shall state that—

"(1) the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and

"(2) the charges and specifications are true, to the best of the knowledge and belief of the signer.

"(c) DUTY OF PROPER AUTHORITY.—When charges and specifications are preferred under subsection (a), the proper authority shall, as soon as practicable—

"(1) inform the person accused of the charges and specifications; and

"(2) determine what disposition should be made of the charges and specifications in the interest of justice and discipline.".

SEC. 602. PROCEEDINGS CONDUCTED BEFORE REFERRAL.

Subchapter VI of chapter 47 of title 10, United States Code, is amended by inserting after section 830 (article 30 of the Uniform Code of Military Justice) the following new section (article):

"§830a. Art. 30a. Proceedings conducted before referral

"(a) IN GENERAL.—(1) The President shall prescribe regulations for proceedings conducted before referral of charges and specifications to court-martial for trial.

"(2) The regulations prescribed under paragraph (1) shall—

"(A) set forth the matters that a military judge may rule upon in such proceedings;

"(B) include procedures for the review of such rulings;

"(C) include appropriate limitations to ensure that proceedings under this section extend only to matters that would be subject to consideration by a military judge in a general or special court-martial; and

"(D) provide such limitations on the relief that may be ordered under this section as the President considers appropriate.

"(3) If any matter in a proceeding under paragraph (1) becomes a subject at issue with respect to charges that have been referred to a general or special court-martial, the matter shall be transferred to the military judge detailed to the court-martial.

"(b) DETAIL OF MILITARY JUDGE.—The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed to proceedings under subsection (a)(1).

"(c) DISCRETION TO DESIGNATE MAGISTRATE TO PRESIDE.—In accordance with regulations prescribed by the Secretary concerned, a military judge detailed to a proceeding under subsection (a)(1) may designate a military magistrate to preside over the proceeding.".

SEC. 603. PRELIMINARY HEARING REQUIRED BEFORE REFERRAL TO GENERAL COURT-MARTIAL.

(a) IN GENERAL.—Section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), is amended by striking the section heading and subsections (a), (b), and (c), and inserting the following:

"§832. Art. 32. Preliminary hearing required before referral to general court-martial

"(a) IN GENERAL.—(1)(A) Except as provided in subparagraph (B), a preliminary hearing shall be held before referral of charges and specifications for trial by general court-martial. The preliminary hearing shall be conducted by an impartial hearing officer, detailed by the convening authority in accordance with subsection (b).

"(B) Under regulations prescribed by the President, a preliminary hearing need not be held if the accused submits a written waiver to the convening authority and the convening authority determines that a hearing is not required.

"(2) The issues for determination at a preliminary hearing are limited to the following:

"(A) Whether or not the specification alleges an offense under this chapter.

"(B) Whether or not there is probable cause to believe that the accused committed the offense charged.

"(C) Whether or not the convening authority has court-martial jurisdiction over the accused and over the offense.

"(b) HEARING OFFICER.—(1) A preliminary hearing under this section shall be conducted by an impartial hearing officer, who—

"(A) whenever practicable, shall be a judge advocate who is certified under section 827(b)(2) of this title (article 27(b)(2)); or

"(B) in exceptional circumstances, shall be an impartial hearing officer, who is not a judge advocate so certified.

"(2) In the case of a hearing officer under paragraph (1)(B), a judge advocate who is certified under section 827(b)(2) of this title (article 27(b)(2)) shall be available to provide legal advice to the hearing officer.

"(3) Whenever practicable, the hearing officer shall be equal in grade or senior in grade to military counsel who are detailed to represent the accused or the Government at the preliminary hearing.

"(c) REPORT TO CONVENING AUTHORITY.—After a preliminary hearing under this section, the hearing officer shall submit to the convening authority a written report (accompanied by a recording of the preliminary hearing under subsection (e)) that includes the following:

"(1) For each specification, a statement of the reasoning and conclusions of the hearing officer with respect to determinations under subsection (a)(2), including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations of the hearing officer concerning the testimony of witnesses and the availability and admissibility of evidence at trial.

"(2) Recommendations for any necessary modifications to the form of the charges or specifications.

"(3) An analysis of any additional information submitted after the hearing by the parties or by a victim of an offense, that, under such rules as the President may prescribe, is relevant to disposition under sections 830 and 834 of this title (articles 30 and 34).

"(4) A statement of action taken on evidence adduced with respect to uncharged offenses, as described in subsection (f).".

(b) SUNDRY AMENDMENTS.—Subsection (d) of such section (article) is amended—

(1) in paragraph (1), by striking "subsection (a)" in the first sentence and inserting "this section";

(2) in paragraph (2), by striking "in defense" and all that follows through the end and inserting "that is relevant to the issues for determination under subsection (a)(2).";

(3) in paragraph (3), by adding at the end the following new sentence: "A declination under this paragraph shall not serve as the sole basis for ordering a deposition under section 849 of this title (article 49)."; and

(4) in paragraph (4), by striking "the limited purposes of the hearing, as provided in subsection (a)(2)." and inserting the following: "determinations under subsection (a)(2).".

(c) REFERENCE TO MCM.—Subsection (e) of such section (article) is amended by striking "as prescribed by the Manual for Courts-Martial" in the second sentence and inserting "under such rules as the President may prescribe".

(d) EFFECT OF VIOLATION.—Subsection (g) of such section (article) is amended by adding at the end the following new sentence: "A defect in a report under subsection (c) is not a basis for relief if the report is in substantial compliance with that subsection.".

SEC. 604. DISPOSITION GUIDANCE.

Section 833 of title 10, United States Code (article 33 of the Uniform Code of Military Justice), is amended to read as follows:

"§833. Art. 33. Disposition guidance

"The President shall direct the Secretary of Defense to issue, in consultation with the Secretary of Homeland Security, non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under sections 830 and 834 of this title (articles 30 and 34). Such guidance shall take into account, with appropriate consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in accordance with the principle of fair and evenhanded administration of Federal criminal law.".

SEC. 605. ADVICE TO CONVENING AUTHORITY BEFORE REFERRAL FOR TRIAL.

Section 834 of title 10, United States Code (article 34 of the Uniform Code of Military Justice), is amended to read as follows:

"§834. Art. 34. Advice to convening authority before referral for trial

"(a) GENERAL COURT-MARTIAL.—

"(1) STAFF JUDGE ADVOCATE ADVICE REQUIRED BEFORE REFERRAL.—Before referral of charges and specifications to a general court-martial for trial, the convening authority shall submit the matter to the staff judge advocate for advice, which the staff judge advocate shall provide to the convening authority in writing. The convening authority may not refer a specification under a charge to a general court-martial unless the staff judge advocate advises the convening authority in writing that—

"(A) the specification alleges an offense under this chapter;

"(B) there is probable cause to believe that the accused committed the offense charged; and

"(C) a court-martial would have jurisdiction over the accused and the offense.

"(2) STAFF JUDGE ADVOCATE RECOMMENDATION AS TO DISPOSITION.—Together with the written advice provided under paragraph (1), the staff judge advocate shall provide a written recommendation to the convening authority as to the disposition that should be made of the specification in the interest of justice and discipline.

"(3) STAFF JUDGE ADVOCATE ADVICE AND RECOMMENDATION TO ACCOMPANY REFERRAL.—When a convening authority makes a referral for trial by general court-martial, the written advice of the staff judge advocate

under paragraph (1) and the written recommendation of the staff judge advocate under paragraph (2) with respect to each specification shall accompany the referral.

"(b) SPECIAL COURT-MARTIAL; CONVENING AUTHORITY CONSULTATION WITH JUDGE ADVOCATE.—Before referral of charges and specifications to a special court-martial for trial, the convening authority shall consult a judge advocate on relevant legal issues.

"(c) GENERAL AND SPECIAL COURTS-MARTIAL; CORRECTION OF CHARGES AND SPECIFICATIONS BEFORE REFERRAL.—Before referral for trial by general court-martial or special court-martial, changes may be made to charges and specifications—

"(1) to correct errors in form; and

"(2) when applicable, to conform to the substance of the evidence contained in a report under section 832(c) of this title (article 32(c)).

"(d) DEFINITION.—In this section, the term 'referral' means the order of a convening authority that charges and specifications against an accused be tried by a specified court-martial.".

SEC. 606. SERVICE OF CHARGES AND COMMENCEMENT OF TRIAL.

Section 835 of title 10, United States Code (article 35 of the Uniform Code of Military Justice), is amended to read as follows:

"§835. Art. 35. Service of charges; commencement of trial

"(a) IN GENERAL.—Trial counsel detailed for a court-martial under section 827 of this title (article 27) shall cause to be served upon the accused a copy of the charges and specifications referred for trial.

"(b) COMMENCEMENT OF TRIAL.—(1) Subject to paragraphs (2) and (3), no trial or other proceeding of a general court-martial or a special court-martial (including any session under section 839(a) of this title (article 39(a)) may be held over the objection of the accused—

"(A) with respect to a general court-martial, from the time of service through the fifth day after the date of service; or

"(B) with respect to a special court-martial, from the time of service through the third day after the date of service.

"(2) An objection under paragraph (1) may be raised only at the first session of the trial or other proceeding and only if the first session occurs before the end of the applicable period under paragraph (1)(A) or (1)(B). If the first session occurs before the end of the applicable period, the military judge shall, at that session, inquire as to whether the defense objects under this subsection.

"(3) This subsection shall not apply in time of war.".

TITLE VII—TRIAL PROCEDURE

SEC. 701. DUTIES OF ASSISTANT DEFENSE COUNSEL.

Subsection (e) of section 838 of title 10, United States Code (article 38 of the Uniform Code of Military Justice), is amended by striking ", under the direction" and all that follows through "(article 27),".

SEC. 702. SESSIONS.

Section 839 of title 10, United States Code (article 39 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a)—

(A) by redesignating paragraph (4) as paragraph (5); and

(B) by striking paragraph (3) and inserting the following new paragraphs:

"(3) holding the arraignment and receiving the pleas of the accused;

"(4) conducting a sentencing proceeding and sentencing the accused; and"; and

(2) in the second sentence of subsection (c), by striking ", in cases in which a military judge has been detailed to the court,".

SEC. 703. TECHNICAL AMENDMENT RELATING TO CONTINUANCES.

Section 840 of title 10, United States Code (article 40 of the Uniform Code of Military Justice), is amended by striking "court-martial without a military judge" and inserting "summary court-martial".

SEC. 704. CONFORMING AMENDMENTS RELATING TO CHALLENGES.

Section 841 of title 10, United States Code (article 41 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a)(1), by striking ", or, if none, the court," in the second sentence;

(2) in subsection (a)(2) by striking "minimum" in the first sentence; and

(3) in subsection (b)(2), by striking "minimum".

SEC. 705. STATUTE OF LIMITATIONS.

(a) INCREASE IN PERIOD FOR CHILD ABUSE OFFENSES.—Subsection (b)(2)(A) of section 843 of title 10, United States Code (article 43 of the Uniform Code of Military Justice), is amended by striking "five years" and inserting "ten years".

(b) INCREASE IN PERIOD FOR FRAUDULENT ENLISTMENT OR APPOINTMENT OFFENSES.—Such section (article) is further amended by adding at the end the following new subsection:

"(h) FRAUDULENT ENLISTMENT OR APPOINTMENT.—A person charged with fraudulent enlistment or fraudulent appointment under section 904a(1) of this title (article 104a(1)) may be tried by court-martial if the sworn charges and specifications are received by an officer exercising summary court-martial jurisdiction with respect to that person, as follows:

"(1) In the case of an enlisted member, during the period of the enlistment or five years, whichever provides a longer period.

"(2) In the case of an officer, during the period of the appointment or five years, whichever provides a longer period.".

(c) DNA EVIDENCE.—Such section (article), as amended by subsection (b), is further amended by adding at the end the following new subsection:

"(i) DNA EVIDENCE.—If DNA testing implicates an identified person in the commission of an offense punishable by confinement for more than one year, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period.".

(d) CONFORMING AMENDMENTS.—Such section (article) is further amended in subsection (b)(2)(B) by striking clauses (i) through (v) and inserting the following:

"(i) Any offense in violation of section 920, 920a, 920b, 920c, or 930 of this title (article 120, 120a, 120b, 120c, or 130), unless the offense is covered by subsection (a).

"(ii) Maiming in violation of section 928a of this title (article 128a).

"(iii) Aggravated assault, assault consummated by a battery, or assault with intent to commit specified offenses in violation of section 928 of this title (article 128).

"(iv) Kidnapping in violation of section 925 of this title (article 125).".

(e) APPLICATION.—The amendments made by subsections (a), (b), (c), and (d) shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this subsection if the applicable limitation period has not yet expired.

SEC. 706. FORMER JEOPARDY.

Subsection (c) of section 844 of title 10, United States Code (article 44 of the Uniform Code of Military Justice), is amended to read as follows:

"(c)(1) A court-martial with a military judge alone is a trial in the sense of this section (article) if, without fault of the accused—

"(A) after introduction of evidence; and

"(B) before announcement of findings under section 853 of this title (article 53);

the case is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses.

"(2) A court-martial with a military judge and members is a trial in the sense of this section (article) if, without fault of the accused—

"(A) after the members, having taken an oath as members under section 842 of this title (article 42) and after completion of challenges under section 841 of this title (article 41), are impaneled; and

"(B) before announcement of findings under section 853 of this title (article 53);

the case is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses.".

SEC. 707. PLEAS OF THE ACCUSED.

(a) PLEAS OF GUILTY.—Subsection (b) of section 845 of title 10, United States Code (article 45 of the Uniform Code of Military Justice), is amended—

(1) in the first sentence, by striking "may be adjudged" and inserting "is mandatory"; and

(2) in the second sentence—

(A) by striking "or by a court-martial without a military judge"; and

(B) by striking ", if permitted by regulations of the Secretary concerned,".

(b) HARMLESS ERROR.—Such section (article) is further amended by adding at the end the following new subsection:

"(c) HARMLESS ERROR.—A variance from the requirements of this article is harmless error if the variance does not materially prejudice the substantial rights of the accused.".

SEC. 708. SUBPOENA AND OTHER PROCESS.

(a) IN GENERAL.—Section 846 of title 10, United States Code (article 46 of the Uniform Code of Military Justice), is amended as follows:

(1) Subsection (a) of such section (article) is amended—

(A) in the heading, by inserting, "IN TRIALS BY COURTS-MARTIAL" after "EVIDENCE"; and

(B) by striking "The counsel for the Government, the counsel for the accused," and inserting "In a case referred for trial by court-martial, the trial counsel, the defense counsel,".

(2) Subsection (b) of such section (article) is amended to read as follows:

"(b) SUBPOENA AND OTHER PROCESS GENERALLY.—Any subpoena or other process issued under this section (article)—

"(1) shall be similar to that which courts of the United States having criminal jurisdiction may issue;

"(2) shall be executed in accordance with regulations prescribed by the President; and

"(3) shall run to any part of the United States and to the Commonwealths and possessions of the United States.".

(3) Subsection (c) of such section (article) is amended to read as follows:

"(c) SUBPOENA AND OTHER PROCESS FOR WITNESSES.—A subpoena or other process may be issued to compel a witness to appear and testify—

"(1) before a court-martial, military commission, or court of inquiry;

"(2) at a deposition under section 849 of this title (article 49); or

"(3) as otherwise authorized under this chapter."

(4) The following new subsections are added at the end of such section (article):

"(d) SUBPOENA AND OTHER PROCESS FOR EVIDENCE.—

"(1) IN GENERAL.—A subpoena or other process may be issued to compel the production of evidence—

"(A) for a court-martial, military commission, or court of inquiry;

"(B) for a deposition under section 849 of this title (article 49);

"(C) for an investigation of an offense under this chapter; or

"(D) as otherwise authorized under this chapter.

"(2) INVESTIGATIVE SUBPOENA.—An investigative subpoena under paragraph (1)(C) may be issued before referral of charges to a court-martial only if a general court-martial convening authority has authorized counsel for the Government to issue such a subpoena.

"(3) WARRANT OR ORDER FOR WIRE OR ELECTRONIC COMMUNICATIONS.—With respect to an investigation of an offense under this chapter, a military judge detailed in accordance with section 826 or 830a of this title (article 26 or 30a), may issue warrants or court orders for the contents of, and records concerning, wire or electronic communications in the same manner as such warrants and orders may be issued by a district court of the United States under chapter 121 of title 18, subject to such limitations as the President may prescribe by regulation.

"(e) REQUEST FOR RELIEF FROM SUBPOENA OR OTHER PROCESS.—If a person requests relief from a subpoena or other process under this section (article) on grounds that compliance is unreasonable or oppressive or is prohibited by law, a

military judge detailed in accordance with section 826 or 830a of this title (article 26 or 30a) shall review the request and shall—

"(1) order that the subpoena or other process be modified or withdrawn, as appropriate; or

"(2) order the person to comply with the subpoena or other process."

(b) CONFORMING AMENDMENTS.—(1) Section 2703 of title 18, United States Code, is amended—

(A) in the first sentence of subsection (a);

(B) in subsection (b)(1)(A); and

(C) in subsection (c)(1)(A);

by inserting after "warrant procedures" the following: "and, in the case of a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President".

(2) Section 2711(3) of title 18, United States Code, is amended by—

(A) striking "or" at the end of subparagraph (A);

(B) striking "and" at the end of subparagraph (B) and inserting "or"; and

(C) adding the following new subparagraph:

"(C) a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), to which a military judge has been detailed; and".

SEC. 709. REFUSAL OF PERSON NOT SUBJECT TO UCMJ TO APPEAR, TESTIFY, OR PRODUCE EVIDENCE.

(a) IN GENERAL.—Subsection (a) of section 847 of title 10, United States Code (article 47 of the Uniform Code of Military Justice), is amended to read as follows:

"(a) IN GENERAL.—(1) Any person described in paragraph (2)—

"(A) who willfully neglects or refuses to appear; or

"(B) who willfully refuses to qualify as a witness or to testify or to produce any evidence which that person is required to produce;

is guilty of an offense against the United States.

"(2) The persons referred to in paragraph (1) are the following:

"(A) Any person not subject to this chapter—

"(i) who is issued a subpoena or other process described in subsection (c) of section 846 of this title (article 46); and

"(ii) who is provided a means for reimbursement from the Government for fees and mileage at the rates allowed to witnesses

attending the courts of the United States or, in the case of extraordinary hardship, is advanced such fees and mileage.

"(B) Any person not subject to this chapter who is issued a subpoena or other process described in subsection (d) of section 846 of this title (article 46).".

(b) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§847. Art. 47. Refusal of person not subject to chapter to appear, testify, or produce evidence".

SEC. 710. CONTEMPT.

(a) AUTHORITY TO PUNISH.—Subsection (a) of section 848 of title 10, United States Code (article 48 of the Uniform Code of Military Justice), is amended to read as follows:

"(a) AUTHORITY TO PUNISH.—(1) With respect to any proceeding under this chapter, a judicial officer specified in paragraph (2) may punish for contempt any person who—

"(A) uses any menacing word, sign, or gesture in the presence of the judicial officer during the proceeding;

"(B) disturbs the proceeding by any riot or disorder; or

"(C) willfully disobeys a lawful writ, process, order, rule, decree, or command issued with respect to the proceeding.

"(2) A judicial officer referred to in paragraph (1) is any of the following:

"(A) Any judge of the Court of Appeals for the Armed Forces and any judge of a Court of Criminal Appeals under section 866 of this title (article 66).

"(B) Any military judge detailed to a court-martial, a provost court, a military commission, or any other proceeding under this chapter.

"(C) Any military magistrate designated to preside under section 819 or section 830a of this title (article 19 or 30a).

"(D) Any commissioned officer detailed as a summary court-martial.

"(E) The president of a court of inquiry.".

(b) REVIEW.—Such section (article) is further amended—

(1) by redesignating subsection (c) as subsection (d); and

(2) by inserting after subsection (b) the following new subsection (c):

"(c) REVIEW.—A punishment under this section—

"(1) if imposed by a military judge or military magistrate, may be reviewed by the Court of Criminal Appeals in accordance with the uniform rules of procedure for the Courts of Criminal Appeals under section 866(i) of this title (article 66(i));

"(2) if imposed by a judge of the Court of Appeals for the Armed Forces or a judge of a Court of Criminal Appeals, shall constitute a judgment of the court, subject to review under the applicable provisions of section 867 or 867a of this title (article 67 or 67a); and

"(3) if imposed by a summary court-martial or court of inquiry, shall be subject to review by the convening authority in accordance with rules prescribed by the President.".

(c) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§848. Art. 48. Contempt".

SEC. 711. DEPOSITIONS.

Section 849 of title 10, United States Code (article 49 of the Uniform Code of Military Justice), is amended to read as follows:

"§849. Art. 49. Depositions

"(a) IN GENERAL.—(1) Subject to paragraph (2), a convening authority or a military judge may order depositions at the request of any party.

"(2) A deposition may be ordered under paragraph (1) only if the requesting party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness be preserved for use at a court-martial, military commission, court of inquiry, or other military court or board.

"(3) A party who requests a deposition under this section shall give to every other party reasonable written notice of the time and place for the deposition.

"(4) A deposition under this section shall be taken before, and authenticated by, an impartial officer, as follows:

"(A) Whenever practicable, by an impartial judge advocate certified under section 827(b) of this title (article 27(b)).

"(B) In exceptional circumstances, by an impartial military or civil officer authorized to administer oaths by (i) the laws of the United States or (ii) the laws of the place where the deposition is taken.

"(b) REPRESENTATION BY COUNSEL.—Representation of the parties with respect to a deposition shall be by counsel detailed in the same manner as trial counsel and defense counsel are detailed under section 827 of this title (article 27). In addition, the accused shall have the right to be represented by civilian or military counsel in the same manner as such counsel are provided for in section 838(b) of this title (article 38(b)).

"(c) ADMISSIBILITY AND USE AS EVIDENCE.—A deposition order under subsection (a) does not control the admissibility of the deposition in a court-martial or other proceeding under this chapter. Except as provided by subsection (d), a party may use all or part of a deposition as provided by the rules of evidence.

"(d) CAPITAL CASES.—Testimony by deposition may be presented in capital cases only by the defense.".

SEC. 712. ADMISSIBILITY OF SWORN TESTIMONY BY AUDIOTAPE OR VIDEOTAPE FROM RECORDS OF COURTS OF INQUIRY.

(a) IN GENERAL.—Section 850 of title 10, United States Code (article 50 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(d) AUDIOTAPE OR VIDEOTAPE.—Sworn testimony that—

"(1) is recorded by audiotape, videotape, or similar method; and

"(2) is contained in the duly authenticated record of proceedings of a court of inquiry;

is admissible before a court-martial, military commission, court of inquiry, or military board, to the same extent as sworn testimony may be read in evidence before any such body under subsection (a), (b), or (c).".

(b) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§850. Art. 50. Admissibility of sworn testimony from records of courts of inquiry".

SEC. 713. CONFORMING AMENDMENT RELATING TO DEFENSE OF LACK OF MENTAL RESPONSIBILITY.

Section 850a(c) of title 10, United States Code (article 50a(c) of the Uniform Code of Military Justice), is amended by striking ", or the president of a court-martial without a military judge,".

SEC. 714. VOTING AND RULINGS.

Section 851 of title 10, United States Code (article 51 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a), by striking ", and by members of a court-martial without a military judge upon questions of challenge," in the first sentence;

(2) in subsection (b)—

(A) by striking "and, except for questions of challenge, the president of a court-martial without a military judge" in the first sentence; and

(B) by striking ", or by the president" in the second sentence and all that follows through the end of the subsection and inserting "is final and constitutes the ruling of the court, except that the military judge may change a ruling at any time during trial."; and

(3) in subsection (c), by striking "or the president of a court-martial without a military judge" in the matter before paragraph (1).

SEC. 715. VOTES REQUIRED FOR CONVICTION, SENTENCING, AND OTHER MATTERS.

Section 852 of title 10, United States Code (article 52 of the Uniform Code of Military Justice), is amended to read as follows:

"§852. Art. 52. Votes required for conviction, sentencing, and other matters

"(a) IN GENERAL.—No person may be convicted of an offense in a general or special court-martial, other than—

"(1) after a plea of guilty under section 845(b) of this title (article 45(b));

"(2) by a military judge in a court-martial with a military judge alone, under section 816 of this title (article 16); or

"(3) in a court-martial with members under section 816 of this title (article 16), by the concurrence of at least three-fourths of the members present when the vote is taken.

"(b) LEVEL OF CONCURRENCE REQUIRED.—

"(1) IN GENERAL—Except as provided in subsection (a) and in paragraph (2), all matters to be decided by members of a general or special court-martial shall be determined by a majority vote, but a reconsideration of a finding of guilty or reconsideration of a sentence, with a view toward decreasing the sentence, may be made by any lesser vote which indicates

that the reconsideration is not opposed by the number of votes required for that finding or sentence.

"(2) SENTENCING.—A sentence of death requires (A) a unanimous finding of guilty of an offense in this chapter expressly made punishable by death and (B) a unanimous determination by the members that the sentence for that offense shall include death. All other sentences imposed by members shall be determined by the concurrence of at least three-fourths of the members present when the vote is taken.".

SEC. 716. FINDINGS AND SENTENCING.

Section 853 of title 10, United States Code (article 53 of the Uniform Code of Military Justice), is amended to read as follows:

"§853. Art. 53. Findings and sentencing

"(a) ANNOUNCEMENT.—A court-martial shall announce its findings and sentence to the parties as soon as determined.

"(b) SENTENCING GENERALLY.—(1) Except as provided in subsection (c) for capital offenses, if the accused is convicted of an offense in a trial by general or special court-martial, the military judge shall sentence the accused. The sentence determined by the military judge constitutes the sentence of the court-martial.

"(2) If the accused is convicted of an offense in a trial by summary court-martial, the court-martial shall sentence the accused.

"(c) SENTENCING FOR CAPITAL OFFENSES.—(1) In a capital case, if the accused is convicted of an offense for which the court-martial may sentence the accused to death—

"(A) the members shall determine whether the sentence for that offense shall be death, life in prison without eligibility for parole, or a lesser punishment determined by the military judge; and

"(B) the military judge shall sentence the accused for that offense in accordance with the determination of the members under subparagraph (A).

"(2) In accordance with regulations prescribed by the President, the military judge may include in any sentence to death or life in prison without eligibility for parole other lesser punishments authorized under this chapter.".

SEC. 717. PLEA AGREEMENTS.

Subchapter VII of chapter 47 of title 10, United States Code, is amended by inserting after section 853 (article 53 of the Uniform Code of Military Justice) the following:

"§853a. Art. 53a. Plea agreements

"(a) IN GENERAL.—(1) At any time before the announcement of findings under section 853 of this title (article 53), the convening authority and the accused may enter into a plea agreement with respect to such matters as—

"(A) the manner in which the convening authority will dispose of one

or more charges and specifications; and

"(B) limitations on the sentence that may be adjudged for one or more charges and specifications.

"(2) The military judge of a general or special court-martial may not participate in discussions between the parties concerning prospective terms and conditions of a plea agreement.

"(b) ACCEPTANCE OF PLEA AGREEMENT.—Subject to subsection (c), the military judge of a general or special court-martial shall accept a plea agreement submitted by the parties, except that—

"(1) in the case of an offense with a sentencing parameter under section 856 of this title (article 56), the military judge may reject a plea agreement that proposes a sentence that is outside the sentencing parameter if the military judge determines that the proposed sentence is plainly unreasonable; and

"(2) in the case of an offense with no sentencing parameter under section 856 of this title (article 56), the military judge may reject a plea agreement that proposes a sentence if the military judge determines that the proposed sentence is plainly unreasonable.

"(c) LIMITATION ON ACCEPTANCE OF PLEA AGREEMENTS.—The military judge of a general or special court-martial shall reject a plea agreement that—

"(1) contains a provision that has not been accepted by both parties;

"(2) contains a provision that is not understood by the accused; or

"(3) except as provided in subsection (d), contains a provision for a sentence that is less than the mandatory minimum sentence applicable to an offense referred to in section 856(b)(2) of this title (article 56(b)(2)).

"(d) LIMITED CONDITIONS FOR ACCEPTANCE OF PLEA AGREEMENT FOR SENTENCE BELOW MANDATORY MINIMUM FOR CERTAIN OFFENSES.—With respect to an offense referred to in section 856(b)(2) of this title (article 56(b)(2))—

"(1) the military judge may accept a plea agreement that provides for a sentence of bad conduct discharge; and

"(2) upon recommendation of the trial counsel, in exchange for substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, the military judge may accept a plea agreement that provides for a sentence that is less than the mandatory minimum sentence for the offense charged.

"(e) BINDING EFFECT OF PLEA AGREEMENT.—Upon acceptance by the military judge of a general or special court-martial, a plea agreement shall bind the parties and the military judge.".

SEC. 718. RECORD OF TRIAL.

Section 854 of title 10, United States Code (article 54 of the Uniform Code of Military Justice), is amended—

(1) by striking subsection (a) and inserting the following:

"(a) GENERAL AND SPECIAL COURTS-MARTIAL.—Each general or special court-martial shall keep a separate record of the proceedings in each case brought before it. The record shall be certified by a court-reporter, except that in the case of death, disability, or absence of a court reporter, the record shall be certified by an official selected as the President may prescribe by regulation.";

(2) in subsection (b)—

(A) by striking "(b) Each special and summary court-martial" and inserting "(b) SUMMARY COURT-MARTIAL.—Each summary court-martial"; and

(B) by striking "authenticated" and inserting "certified";

(3) by striking subsection (c) and inserting the following:

"(c) CONTENTS OF RECORD.—(1) Except as provided in paragraph (2), the record shall contain such matters as the President may prescribe by regulation.

"(2) In accordance with regulations prescribed by the President, a complete record of proceedings and testimony shall be prepared in any case of a sentence of

death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months.".

(4) in subsection (d)—

(A) by striking "(d) A copy" and inserting "(d) COPY TO ACCUSED.— A copy"; and

(B) by striking "authenticated" and inserting "certified"; and

(5) in subsection (e)—

(A) by striking "involving a sexual assault or other offense covered by section 920 of this title (article 120)" in the first sentence and inserting "upon request,"; and

(B) by striking "authenticated" in the second sentence and inserting "certified".

TITLE VIII—SENTENCES

SEC. 801. SENTENCING.

(a) IN GENERAL.—Section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), is amended to read as follows:

"§856. Art. 56. Sentencing

"(a) SENTENCE MAXIMUMS.—The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

"(b) SENTENCE MINIMUMS FOR CERTAIN OFFENSES.—(1) Except as provided in subsection (d) of section 853a of this title (article 53a), punishment for any offense specified in paragraph (2) shall include dismissal or dishonorable discharge, as applicable.

"(2) The offenses referred to in paragraph (1) are as follows:

"(A) Rape under subsection (a) of section 920 of this title (article 120).

"(B) Sexual assault under subsection (b) of such section (article).

"(C) Rape of a child under subsection (a) of section 920b of this title (article 120b).

"(D) Sexual assault of a child under subsection (b) of such section (article).

"(E) An attempt to commit an offense specified in subparagraph (A), (B), (C), or (D) that is punishable under section 880 of this title (article 80).

"(c) IMPOSITION OF SENTENCE.—

"(1) IN GENERAL.—In sentencing an accused under section 853 of this title (article 53), a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—

"(A) the nature and circumstances of the offense and the history and characteristics of the accused;

"(B) the impact of the offense on—

"(i) the financial, social, psychological, or medical well-being of any victim of the offense; and

"(ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;

"(C) the need for the sentence—

"(i) to reflect the seriousness of the offense;

"(ii) to promote respect for the law;

"(iii) to provide just punishment for the offense;

"(iv) to promote adequate deterrence of misconduct;

"(v) to protect others from further crimes by the accused;

"(vi) to rehabilitate the accused; and

"(vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service;

"(D) the sentences available under this chapter; and

"(E) the applicable sentencing parameters or sentencing criteria prescribed under this section.

"(2) APPLICATION OF SENTENCING PARAMETERS IN GENERAL AND SPECIAL COURTS-MARTIAL.—

"(A) Except as provided in subparagraph (B), in a general or special court-martial in which the accused is convicted of an offense with a sentencing parameter under subsection (d), the military judge shall sentence the accused for that offense within the applicable parameter.

"(B) The military judge may impose a sentence outside a sentencing parameter upon finding specific facts that warrant such a sentence. The military judge shall include in the record a written statement of the factual basis for any sentence under this subparagraph.

"(3) USE OF SENTENCING CRITERIA IN GENERAL AND SPECIAL COURTS-MARTIAL.—In a general or special court-martial in which the accused is convicted of an offense with sentencing criteria under subsection (d), the military judge shall consider the applicable sentencing criteria in determining the sentence for that offense.

"(4) OFFENSE BASED SENTENCING IN GENERAL AND SPECIAL COURTS-MARTIAL.—In announcing the sentence under section 853 of this title (article 53) in a general or special court-martial, the military judge shall, with

respect to each offense of which the accused is found guilty, specify the term of confinement, if any, and the amount of the fine, if any. If the accused is sentenced to confinement for more than one offense, the military judge shall specify whether the terms of confinement are to run consecutively or concurrently.

"(5) NONAPPLICABILITY TO DEATH PENALTY.—Sentencing parameters and sentencing criteria are not applicable to the issue of whether an offense should be punished by death.

"(6) SENTENCE OF CONFINEMENT FOR LIFE WITHOUT ELIGIBILITY FOR PAROLE.—(A) If an offense is subject to a sentence of confinement for life, a court-martial may impose a sentence of confinement for life without eligibility for parole.

"(B) An accused who is sentenced to confinement for life without eligibility for parole shall be confined for the remainder of the accused's life unless—

"(i) the sentence is set aside or otherwise modified as a result of—

"(I) action taken by the convening authority or the Secretary concerned; or

"(II) any other action taken during post-trial procedure and review under any other provision of subchapter IX of this chapter;

"(ii) the sentence is set aside or otherwise modified as a result of action taken by a Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court; or

"(iii) the accused is pardoned.

"(d) ESTABLISHMENT OF SENTENCING PARAMETERS AND SENTENCING CRITERIA.—

"(1) IN GENERAL.—The President shall prescribe regulations establishing sentencing parameters and sentencing criteria in accordance with this subsection.

"(2) SENTENCING PARAMETERS.—(A) A sentencing parameter provides a delineated sentencing range for an offense that is appropriate for a typical violation of the offense, taking into consideration—

"(i) the severity of the offense;

"(ii) the guideline or offense category that would apply to the offense if the offense were tried in a United States district court;

"(iii) any military-specific sentencing factors; and

"(iv) the need for the sentencing parameter to be sufficiently broad to allow for individualized consideration of the offense and the accused.

"(B) Sentencing parameters established under paragraph (1)—

"(i) shall include no fewer than seven and no more than twelve offense categories;

"(ii) other than for offenses identified under paragraph (5)(B), shall assign each offense under this chapter to an offense category;

"(iii) shall delineate the confinement range for each offense category by setting an upper confinement limit and a lower confinement limit; and

"(iv) shall be neutral as to the race, sex, national origin, creed, sexual orientation, and socioeconomic status of offenders.

"(3) SENTENCING CRITERIA.—Sentencing criteria are factors concerning available punishments that may aid the military judge in determining an appropriate sentence when there is no applicable sentencing parameter for a specific offense.

"(4) MILITARY SENTENCING PARAMETERS AND CRITERIA BOARD.—

"(A) IN GENERAL.—There is established within the Department of Defense a board, to be known as the 'Military Sentencing

Parameters and Criteria Board', hereinafter referred to in this subsection as the 'Board'.

"(B) VOTING MEMBERS.—The Board shall have five voting members, as follows:

"(i) The four chief trial judges designated under section 826(g) of this title (article 26(g)), except that, if the chief trial judge of the Coast Guard is not available, the Judge Advocate General of the Coast Guard may designate as a voting member a judge advocate of the Coast Guard with substantial military justice experience.

"(ii) A trial judge of the Navy, designated under regulations prescribed by the President, if the chief trial judges designated under section 826(g) of this title (article 26(g)) do not include a trial judge of the Navy.

"(iii) A trial judge of the Marine Corps, designated under regulations prescribed by the President, if the chief trial judges designated under section 826(g) of this title (article 26(g)) do not include a trial judge of the Marine Corps.

"(C) NONVOTING MEMBERS.—The Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of

the Joint Chiefs of Staff, and the General Counsel of the Department of Defense shall each designate one nonvoting member of the Board.

"(D) CHAIR AND VICE-CHAIR.—The Secretary of Defense shall designate one voting member as chair of the Board and one voting member as vice-chair.

"(5) DUTIES OF BOARD.—

"(A) As directed by the President, the Board shall submit to the President for approval—

"(i) sentencing parameters for all offenses under this chapter, other than offenses that are identified by the Board as unsuitable for sentencing parameters; and

"(ii) sentencing criteria to be used by military judges in determining appropriate sentences for offenses that are identified as unsuitable for sentencing parameters.

"(B) For purposes of this paragraph, an offense is unsuitable for sentencing parameters if—

"(i) the nature of the offense is indeterminate and unsuitable for categorization; and

"(ii) there is no similar criminal offense under the laws of the United States or the laws of the District of Columbia.

"(C) The Board shall consider the appropriateness of sentencing parameters for punitive discharges, fines, reductions, forfeitures, and other punishments authorized under this chapter.

"(D) The Board shall regularly review, and propose revision to, in consideration of comments and data coming to its attention, the sentencing parameters and sentencing criteria prescribed under subsection (d)(1).

"(E) The Board shall develop means of measuring the degree to which applicable sentencing, penal, and correctional practices are effective with respect to the sentencing factors and policies set forth in this section.

"(F) In fulfilling its duties and in exercising its powers, the Board shall consult authorities on, and individual and institutional representatives of, various aspects of the military criminal justice system. The Board shall establish separate advisory groups consisting of individuals with current or recent experience in command and in senior enlisted positions, individuals with experience in the trial of courts-martial, and such other groups as the Board deems appropriate.

"(G) The Board shall submit to the President proposed amendments to the rules for courts-martial with respect to sentencing

proceedings and maximum punishments, together with statements explaining the basis for the proposed amendments.

"(H) The Board shall submit to the President proposed amendments to the sentencing parameters and sentencing criteria, together with statements explaining the basis for the proposed amendments.

"(I) The Board may issue nonbinding policy statements to achieve the Board's purposes and to guide military judges in fashioning appropriate sentences, including guidance on factors that may be relevant in determining where in a sentencing parameter a specification may fall, or whether a deviation outside of the sentencing range may be warranted.

"(J) The Federal Advisory Committee Act shall not apply with respect to the Board or any advisory group established by the Board.

"(6) VOTING REQUIREMENT.—An affirmative vote of at least three members is required for any action of the Board under this subsection.

"(e) APPEAL OF SENTENCE BY THE UNITED STATES.—(1) With the approval of the Judge Advocate General concerned, the Government may appeal a sentence to the Court of Criminal Appeals, on the grounds that—

"(A) the sentence violates the law;

"(B) in the case of a sentence for an offense with a sentencing parameter under this section, the sentence is a result of an incorrect application of the parameter; or

"(C) the sentence is plainly unreasonable.

"(2) An appeal under this subsection must be filed within 60 days after the date on which the judgment of a court-martial is entered into the record under section 860c of this title (article 60c).

"(3) The Government may appeal a sentence under this section only after sentencing parameters are first prescribed under subsection (f).".

(b) CONFORMING AMENDMENT.—Section 856a of title 10, United States Code (article 56a of the Uniform Code of Military Justice), is repealed.

(c) IMPLEMENTATION OF SENTENCING PARAMETERS AND CRITERIA.—(1) Not later than four years after the date of the enactment of this Act, the President shall prescribe the regulations for sentencing parameters and criteria required by subsection (d) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice).

(2) Not later than one year after the date of the enactment of this Act, the President shall prescribe interim guidance for use in sentencing at courts-martial before the implementation of sentencing parameters and criteria pursuant to the regulations referred to in paragraph (1). Insofar as the President considers

practicable, the interim guidance shall be consistent with the purposes and procedures set forth in subsections (c) and (d) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), taking into account the interim nature of the guidance. For purposes of sentencing under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), the interim guidance shall be treated as sentencing parameters and criteria.

(3) The President shall prescribe the effective dates of the regulations referred to in paragraph (1) and of the interim guidance referred to in paragraph (2).

(d) PROSPECTIVE REPEAL OF SENTENCE MINIMUMS FOR CERTAIN OFFENSES.—Upon the taking effect of sentencing parameters for offenses specified in paragraph (2) of subsection (b) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), as in effect on the day after the date of the enactment of this Act—

(1) section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), is amended—

(A) in subsection (a), by striking "(a) SENTENCE MAXIMUMS.—"; and

(B) by striking subsection (b); and

(2) section 853a of title 10, United States Code (article 53a of the Uniform Code of Military Justice), is amended by striking subsections (c) and (d) and inserting the following new subsection:

"(c) LIMITATION ON ACCEPTANCE OF PLEA AGREEMENTS.—The military judge shall reject a plea agreement that—

"(1) contains a provision that has not been accepted by both parties; or

"(2) contains a provision that is not understood by the accused.".

SEC. 802. EFFECTIVE DATE OF SENTENCES.

(a) IN GENERAL.—Section 857 of title 10, United States Code (article 57 of the Uniform Code of Military Justice), is amended to read as follows:

"§857. Art. 57. Effective date of sentences

"(a) EXECUTION OF SENTENCES.—A court-martial sentence shall be executed and take effect as follows:

"(1) FORFEITURE AND REDUCTION.—A forfeiture of pay or allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence takes effect. Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-martial takes effect on the earlier of—

"(A) the date that is 14 days after the date on which the sentence is adjudged; or

"(B) in the case of a summary court-martial, the date on which the sentence is approved by the convening authority.

"(2) CONFINEMENT.—Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement.

"(3) APPROVAL OF SENTENCE OF DEATH.—If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as the President sees fit. That part of the sentence providing for death may not be suspended.

"(4) APPROVAL OF DISMISSAL.—If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary, or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of

the sentence, as the Secretary sees fit. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

"(5) COMPLETION OF APPELLATE REVIEW.—If a sentence extends to death, dismissal, or a dishonorable or bad-conduct discharge, that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may be executed, in accordance with service regulations, after completion of appellate review (and, with respect to death or dismissal, approval under paragraph (3) or (4), as appropriate).

"(6) OTHER SENTENCES.—Except as otherwise provided in this subsection, a general or special court-martial sentence is effective upon entry of judgment and a summary court-martial sentence is effective when the convening authority acts on the sentence.

"(b) DEFERRAL OF SENTENCES.—(1) On application by an accused, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may, in his or her sole discretion, defer the effective date of a sentence of confinement, reduction, or forfeiture. The deferment shall terminate upon entry of judgment or, in the case of a summary court-martial, when

the convening authority acts on the sentence. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.

"(2) In any case in which a court-martial sentences a person referred to in paragraph (3) to confinement, the convening authority may defer the service of the sentence to confinement, without the consent of that person, until after the person has been permanently released to the armed forces by a State or foreign country referred to in that paragraph.

"(3) Paragraph (2) applies to a person subject to this chapter who—

"(A) while in the custody of a State or foreign country is temporarily returned by that State or foreign country to the armed forces for trial by court-martial; and

"(B) after the court-martial, is returned to that State or foreign country under the authority of a mutual agreement or treaty, as the case may be.

"(4) In this subsection, the term 'State' includes the District of Columbia and any Commonwealth, territory, or possession of the United States.

"(5) In any case in which a court-martial sentences a person to confinement, but in which review of the case under section 867(a)(2) of this title (article

67(a)(2)) is pending, the Secretary concerned may defer further service of the sentence to confinement while that review is pending.

"(c) APPELLATE REVIEW.—(1) Appellate review is complete under this section when—

"(A) a review under section 865 of this title (article 65) is completed; or

"(B) an appeal is filed with a Court of Criminal Appeals or the sentence includes death, and review is completed by a Court of Criminal Appeals and—

"(i) the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

"(ii) such a petition is rejected by the Court of Appeals for the Armed Forces; or

"(iii) review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and—

"(I) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

"(II) such a petition is rejected by the Supreme Court; or

"(III) review is otherwise completed in accordance with the judgment of the Supreme Court.

"(2) The completion of appellate review shall constitute a final judgment as to the legality of the proceedings.".

(b) CONFORMING AMENDMENTS.—(1) Subchapter VIII of chapter 47 of title 10, United States Code, is amended by striking section 857a (article 57a of the Uniform Code of Military Justice).

(2) Subchapter IX of chapter 47 of title 10, United States Code, is amended by striking section 871 (article 71 of the Uniform Code of Military Justice).

(3) The second sentence of subsection (a)(1) of section 858b of title 10, United States Code (article 58b of the Uniform Code of Military Justice), is amended by striking "section 857(a) of this title (article 57(a))" and inserting "section 857 of this title (article 57)".

SEC. 803. SENTENCE OF REDUCTION IN ENLISTED GRADE.

Section 858a of title 10, United States Code (article 58a of the Uniform Code of Military Justice), is amended—

(1) in subsection (a)—

(A) by striking "as approved by the convening authority" and inserting "as set forth in the judgment of the court-martial entered into the record under section 860c of this title (article 60c)"; and

(B) in the matter after paragraph (3), by striking "of that approval" and inserting "on which the judgment is so entered"; and

(2) in subsection (b), by striking "disapproved, or, as finally approved" and inserting "reduced, or, as finally affirmed".

SEC. 804. REPEAL OF SENTENCE REDUCTION PROVISION WHEN PARAMETERS TAKE EFFECT.

Effective on the effective date of sentencing parameters prescribed by the President under section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), as amended by section 801, section 858a of title 10, United States Code (article 58a of the Uniform Code of Military Justice), is repealed.

TITLE IX—POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL

SEC. 901. POST-TRIAL PROCESSING IN GENERAL AND SPECIAL COURTS-MARTIAL.

Section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), is amended to read as follows:

"§860. Art. 60. Post-trial processing in general and special courts-martial

"(a) STATEMENT OF TRIAL RESULTS.—(1) The military judge of a general or special court-martial shall enter into the record of trial a document entitled 'Statement of Trial Results', which shall set forth—

"(A) each plea and finding;

"(B) the sentence, if any; and

"(C) such other information as the President may prescribe by regulation.

"(2) Copies of the Statement of Trial Results shall be provided promptly to the convening authority, the accused, and any victim of the offense.

"(b) POST-TRIAL MOTIONS.—In accordance with regulations prescribed by the President, the military judge in a general or special court-martial shall address all post-trial motions and other post-trial matters that—

"(1) may affect a plea, a finding, the sentence, the Statement of Trial Results, the record of trial, or any post-trial action by the convening authority; and

"(2) are subject to resolution by the military judge before entry of judgment.".

SEC. 902. LIMITED AUTHORITY TO ACT ON SENTENCE IN SPECIFIED POST-TRIAL CIRCUMSTANCES.

Subchapter IX of chapter 47 of title 10, United States Code, is amended by inserting after section 860 (article 60 of the Uniform Code of Military Justice), as amended by section 901, the following new section (article):

"§860a. Art. 60a. Limited authority to act on sentence in specified post-trial circumstances

"(a) IN GENERAL.—(1) The convening authority of a general or special court-martial described in paragraph (2)—

"(A) may act on the sentence of the court-martial only as provided in subsection (b), (c), or (d); and

"(B) may not act on the findings of the court-martial.

"(2) The courts-martial referred to in paragraph (1) are the following:

"(A) A general or special court-martial in which the maximum sentence of confinement established under subsection (a) of section 856 of this title (article 56) for any offense of which the accused is found guilty is more than two years.

"(B) A general or special court-martial in which the total of the sentences of confinement imposed, running consecutively, is more than six months.

"(C) A general or special court-martial in which the sentence imposed includes a dismissal, dishonorable discharge, or bad-conduct discharge.

"(D) A general or special court-martial in which the accused is found guilty of a violation of subsection (a) or (b) of section 920 of this title (article 120), section 920b of this title (article 120b), or such other offense as the Secretary of Defense may specify by regulation.

"(3) Except as provided in subsection (d), the convening authority may act under this section only before entry of judgment.

"(4) Under regulations prescribed by the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

"(b) REDUCTION, COMMUTATION, AND SUSPENSION OF SENTENCES GENERALLY.—(1) Except as provided in subsection (c) or (d), the convening authority may not reduce, commute, or suspend any of the following sentences:

"(A) A sentence of confinement, if the total period of confinement imposed for all offenses involved, running consecutively, is greater than six months.

"(B) A sentence of dismissal, dishonorable discharge, or bad-conduct discharge.

"(C) A sentence of death.

"(2) The convening authority may reduce, commute, or suspend any sentence not specified in paragraph (1).

"(c) SUSPENSION OF CERTAIN SENTENCES UPON RECOMMENDATION OF MILITARY JUDGE.—(1) Upon recommendation of the military judge, as included in the Statement of Trial Results, together with an explanation of the facts supporting the recommendation, the convening authority may suspend—

"(A) a sentence of confinement, in whole or in part; or

"(B) a sentence of dismissal, dishonorable discharge, or bad-conduct discharge.

"(2) The convening authority may not, under paragraph (1)—

"(A) suspend a mandatory minimum sentence; or

"(B) suspend a sentence to an extent in excess of the suspension recommended by the military judge.

"(d) REDUCTION OF SENTENCE FOR SUBSTANTIAL ASSISTANCE BY ACCUSED.—(1) Upon a recommendation by the trial counsel, if the accused, after sentencing and before entry of judgment, provides substantial assistance in the investigation or prosecution of another person, the convening authority may reduce, commute, or suspend a sentence, in whole or in part, including any mandatory minimum sentence.

"(2) Upon a recommendation by a trial counsel, designated in accordance with rules prescribed by the President, if the accused, after entry of judgment, provides substantial assistance in the investigation or prosecution of another person, a convening authority, designated under such regulations, may reduce, commute, or suspend a sentence, in whole or in part, including any mandatory minimum sentence.

"(3) In evaluating whether the accused has provided substantial assistance under this subsection, the convening authority may consider the presentence assistance of the accused.

"(e) SUBMISSIONS BY ACCUSED AND VICTIM.—(1) In accordance with rules prescribed by the President, in determining whether to act under this section, the convening authority shall consider matters submitted in writing by the accused or any victim of an offense. Such rules shall include—

"(A) procedures for notice of the opportunity to make such submissions;

"(B) the deadlines for such submissions; and

"(C) procedures for providing the accused and any victim of an offense with a copy of the recording of any open sessions of the court-martial and copies of, or access to, any admitted, unsealed exhibits.

"(2) The convening authority shall not consider under this section any submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial.

"(f) DECISION OF CONVENING AUTHORITY.—(1) The decision of the convening authority under this section shall be forwarded to the military judge, with copies provided to the accused and to any victim of the offense.

"(2) If, under this section, the convening authority reduces, commutes, or suspends the sentence, the decision of the convening authority shall include a written explanation of the reasons for such action.

"(3) If, under subsection (d)(2), the convening authority reduces, commutes, or suspends the sentence, the decision of the convening authority shall be forwarded to the chief trial judge for appropriate modification of the entry of judgment, which shall be transmitted to the Judge Advocate General for appropriate action.".

SEC. 903. POST-TRIAL ACTIONS IN SUMMARY COURTS-MARTIAL AND CERTAIN GENERAL AND SPECIAL COURTS-MARTIAL.

Subchapter IX of chapter 47 of title 10, United States Code, is amended by inserting after section 860a (article 60a of the Uniform Code of Military Justice), as amended by section 902, the following new section (article):

"§860b. Art. 60b. Post-trial actions in summary courts-martial and certain general and special courts-martial

"(a) IN GENERAL.—(1) In a court-martial not specified in subsection (a)(2) of section 860a of this title (article 60a), the convening authority may—

"(A) dismiss any charge or specification by setting aside the finding of guilty;

"(B) change a finding of guilty to a charge or specification to a finding of guilty to a lesser included offense;

"(C) disapprove the findings and the sentence and dismiss the charges and specifications;

"(D) disapprove the findings and the sentence and order a rehearing as to the findings and the sentence;

"(E) disapprove, commute, or suspend the sentence, in whole or in part; or

"(F) disapprove the sentence and order a rehearing as to the sentence.

"(2) In a summary court-martial, the convening authority shall approve the sentence or take other action on the sentence under paragraph (1).

"(3) Except as provided in paragraph (4), the convening authority may act under this section only before entry of judgment.

"(4) The convening authority may act under this section after entry of judgment in a general or special court-martial in the same manner as the convening authority may act under subsection (d)(2) of section 860a of this title (article 60a). Such action shall be forwarded to the chief trial judge, who shall ensure appropriate modification to the entry of judgment and shall transmit the entry of judgment to the Judge Advocate General for appropriate action.

"(5) Under regulations prescribed by the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

"(b) LIMITATIONS ON REHEARINGS.—The convening authority may not order a rehearing under this section—

"(1) as to the findings, if there is insufficient evidence in the record to support the findings;

"(2) to reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty; or

"(3) to reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this chapter.

"(c) SUBMISSIONS BY ACCUSED AND VICTIM.—In accordance with rules prescribed by the President, in determining whether to act under this section, the convening authority shall consider matters submitted in writing by the accused or any victim of the offense. Such rules shall include the matter required by subsection (e) of section 860a of this title (article 60a).

"(d) DECISION OF CONVENING AUTHORITY.—(1) In a general or special court-martial, the decision of the convening authority under this section shall be forwarded to the military judge, with copies provided to the accused and to any victim of the offense.

"(2) If the convening authority acts on the findings or the sentence under subsection (a)(1), the decision of the convening authority shall include a written explanation of the reasons for such action.".

SEC. 904. ENTRY OF JUDGMENT.

Subchapter IX of chapter 47 of title 10, United States Code, is amended by inserting after section 860b (article 60b of the Uniform Code of Military Justice), as added by section 903, the following new section (article):

"§860c. Art 60c. Entry of judgment

"(a) ENTRY OF JUDGMENT OF GENERAL OR SPECIAL COURT-MARTIAL.—(1) In accordance with rules prescribed by the President, in a general or special court-

martial, the military judge shall enter into the record of trial the judgment of the court. The judgment of the court shall consist of the following:

"(A) The Statement of Trial Results under section 860 of this title (article 60).

"(B) Any modifications of, or supplements to, the Statement of Trial Results by reason of—

"(i) any post-trial action by the convening authority; or

"(ii) any ruling, order, or other determination of the military judge that affects a plea, a finding, or the sentence.

"(2) Under rules prescribed by the President, the judgment under paragraph (1) shall be—

"(A) provided to the accused and to any victim of the offense; and

"(B) made available to the public.

"(b) SUMMARY COURT-MARTIAL JUDGMENT.—The findings and sentence of a summary court-martial, as modified by any post-trial action by the convening authority under section 860b of this title (article 60b), constitutes the judgment of the court-martial and shall be recorded and distributed under rules prescribed by the President.".

SEC. 905. WAIVER OF RIGHT TO APPEAL AND WITHDRAWAL OF APPEAL.

Section 861 of title 10, United States Code (article 61 of the Uniform Code of Military Justice), is amended to read as follows:

"§861. Art. 61. Waiver of right to appeal; withdrawal of appeal

"(a) WAIVER OF RIGHT TO APPEAL.—After entry of judgment in a general or special court-martial, under procedures prescribed by the Secretary concerned, the accused may waive the right to appeal. Such a waiver shall be —

"(1) signed by the accused and by defense counsel; and

"(2) attached to the record of trial.

"(b) WITHDRAWAL OF APPEAL.—In a general or special court-martial, the accused may withdraw an appeal at any time.

"(c) DEATH PENALTY CASE EXCEPTION.—Notwithstanding subsections (a) and (b), an accused may not waive the right to appeal or withdraw an appeal with respect to a judgment that includes a sentence of death.

"(d) WAIVER OR WITHDRAWAL AS BAR.—A waiver or withdrawal under this section bars review under section 866 of this title (article 66).".

SEC. 906. APPEAL BY THE UNITED STATES.

Section 862 of title 10, United States Code (article 62 of the Uniform Code of Military Justice), is amended—

(1) in paragraph (1) of subsection (a)—

(A) in the matter before subparagraph (A), by striking "court-martial" and all that follows through the colon at the end and inserting "general or special court-martial or in a pretrial proceeding under section 830a of this title (article 30a), the United States may appeal the following:"; and

(B) by adding at the end the following new subparagraph:

"(G) An order or ruling of the military judge entering a finding of not guilty with respect to a charge or specification following the return of a finding of guilty by the members.";

(2) in paragraph (2) of subsection (a)—

(A) by striking "(2)" and inserting "(2)(A)"; and

(B) by adding at the end the following new subparagraph:

"(B) An appeal of an order or ruling may not be taken when prohibited by section 844 of this title (article 44)."; and

(3) by adding at the end the following:

"(d) The United States may appeal a ruling or order of a military magistrate in the same manner as had the ruling or order been made by a military judge, except that the issue shall first be presented to the military judge who designated the military magistrate or to a military judge detailed to hear the issue.

"(e) The provisions of this article shall be liberally construed to effect its purposes.".

SEC. 907. REHEARINGS.

Section 863 of title 10, United States Code (article 63 of the Uniform Code of Military Justice), is amended—

(1) by inserting "(a)" before "Each rehearing";

(2) in the second sentence, by striking "may be approved" and inserting "may be adjudged";

(3) by striking the third sentence; and

(4) by adding at the end the following new subsections:

"(b) If the sentence adjudged by the first court-martial was in accordance with a plea agreement under section 853a of this title (article 53a) and the accused at the rehearing does not comply with the agreement, or if a plea of guilty was entered for an offense at the first court-martial and a plea of not guilty was entered at the rehearing, the sentence as to those charges or specifications may include any punishment not in excess of that which could have been adjudged at the first court-martial.

"(c) If, after appeal by the Government under section 856(e) of this title (article 56(e)), the sentence adjudged is set aside and a rehearing on sentence is ordered by the Court of Criminal Appeals or Court of Appeals for the Armed

Forces, the court-martial may impose any sentence that is in accordance with the order or ruling setting aside the adjudged sentence.".

SEC. 908. JUDGE ADVOCATE REVIEW OF FINDING OF GUILTY IN SUMMARY COURT-MARTIAL.

(a) IN GENERAL.—Subsection (a) of section 864 of title 10, United States Code (article 64 of the Uniform Code of Military Justice), is amended by striking the first two sentences and inserting the following:

"(a) IN GENERAL.—Under regulations prescribed by the Secretary concerned, each summary court-martial in which there is a finding of guilty shall be reviewed by a judge advocate. A judge advocate may not review a case under this subsection if the judge advocate has acted in the same case as an accuser, preliminary hearing officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—(1) The heading for such section (article) is amended to read as follows:

"§864. Art. 64. Judge advocate review of finding of guilty in summary court-martial".

(2) Subsection (b) of such section is amended—

(A) by striking "(b) The record" and inserting "(b) RECORD.—The record";

(B) by inserting "or" at the end of paragraph (1);

(C) by striking paragraph (2); and

(D) by redesignating paragraph (3) as paragraph (2).

(3) Subsection (c)(3) of such section (article) is amended by striking "section 869(b) of this title (article 69(b))." and inserting "section 869 of this title (article 69).".

SEC. 909. TRANSMITTAL AND REVIEW OF RECORDS.

Section 865 of title 10, United States Code (article 65 of the Uniform Code of Military Justice), is amended to read as follows:

"§865. Art. 65. Transmittal and review of records

"(a) TRANSMITTAL OF RECORDS.—(1) If the judgment of a general or special court-martial entered under section 860c of this title (article 60c) includes a finding of guilty, the record shall be transmitted to the Judge Advocate General.

"(2) In all other cases, records of trial by court-martial and related documents shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.

"(b) CASES ELIGIBLE FOR DIRECT APPEAL—

"(1) MANDATORY REVIEW.—If the judgment includes a sentence of death, the Judge Advocate General shall forward the record of trial to the

Court of Criminal Appeals for review under section 866(b)(2) of this title (article 66(b)(2)).

"(2) CASES ELIGIBLE FOR DIRECT APPEAL REVIEW.—(A) If the case is eligible for direct review under section 866(b)(1) of this title (article 66(b)(1)), the Judge Advocate General shall—

"(i) forward a copy of the record of trial to an appellate defense counsel who shall be detailed to review the case and, upon request of the accused, to represent the accused before the Court of Criminal Appeals; and

"(ii) upon written request of the accused, forward a copy of the record of trial to civilian counsel provided by the accused.

"(B) Subparagraph (A) shall not apply if the accused—

"(i) waives the right to appeal under section 61 of this title (article 61); or

"(ii) declines in writing the detailing of appellate defense counsel under paragraph (2)(A)(i).

"(c) NOTICE OF RIGHT TO APPEAL.—(1) The Judge Advocate General shall provide notice to the accused of the right to file an appeal under section 866(b)(1) of this title (article 66(b)(1)) by means of depositing in the United States mails for delivery by first class certified mail to the accused at an address provided by the

accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the official service record of the accused.

"(2) Paragraph (1) shall not apply if the accused waives the right to appeal under section 61 of this title (article 61).

"(d) REVIEW BY JUDGE ADVOCATE GENERAL.—

"(1) BY WHOM.—A review conducted under this subsection may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated under regulations prescribed by the Secretary concerned.

"(2) REVIEW OF CASES NOT ELIGIBLE FOR DIRECT APPEAL.—

"(A) A review under subparagraph (B) shall be completed in each general and special court-martial that is not eligible for direct appeal under paragraph (1) or (2) of section 866(b) of this title (article 66(b)).

"(B) A review referred to in subparagraph (A) shall include a written decision providing each of the following:

"(i) A conclusion as to whether the court had jurisdiction over the accused and the offense.

"(ii) A conclusion as to whether the charge and specification stated an offense.

"(iii) A conclusion as to whether the sentence was within the limits prescribed as a matter of law.

"(iv) A response to each allegation of error made in writing by the accused.

"(3) REVIEW WHEN DIRECT APPEAL IS WAIVED, WITHDRAWN OR NOT FILED.—

"(A) A review under subparagraph (B) shall be completed in each general and special court-martial if—

"(i) the accused waives the right to appeal or withdraws appeal under section 861 of this title (article 61); or

"(ii) the accused does not file a timely appeal in a case eligible for direct appeal under subparagraph (A) or (B) of section 866(b)(1) of this title (article 66(b)(1)).

"(B) A review referred to in subparagraph (A) shall include a written decision limited to providing conclusions on the matters specified in clauses (i), (ii), and (iii) of paragraph (2)(B).

"(e) REMEDY.—(1) If after a review of a record under subsection (d), the attorney conducting the review believes corrective action may be required, the record shall be forwarded to the Judge Advocate General, who may set aside the findings or sentence, in whole or in part.

"(2) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (article 44).

"(3)(A) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

"(B) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.".

SEC. 910. COURTS OF CRIMINAL APPEALS.

(a) APPELLATE MILITARY JUDGES.—Subsection (a) of section 866 of chapter 47 of title 10, United States Code (article 66 of the Uniform Code of Military Justice), is amended—

(1) in the second sentence, by striking "subsection (f)" and inserting "subsection (i)";

(2) in the fourth sentence, by inserting after "highest court of a State" the following: "and must be certified by the Judge Advocate General as qualified, by reason of education, training, experience, and judicial temperament, for duty as an appellate military judge"; and

(3) by adding at the end the following new sentence: "In accordance with regulations prescribed by the President, assignments of appellate

military judges under this section (article) shall be for appropriate minimum periods, subject to such exceptions as may be authorized in the regulations.".

(b) REVISION OF APPELLATE PROCEDURES.—Such section (article) is further amended—

(1) by redesignating subsections (e), (f), (g), and (h) as subsections (h), (i), (j), and (k), respectively; and

(2) by striking subsections (b), (c), and (d) and inserting the following new subsections:

"(b) REVIEW.—

"(1) APPEALS BY ACCUSED.—A Court of Criminal Appeals shall have jurisdiction of a timely appeal from the judgment of a court-martial, entered into the record under section 860c of this title (article 60c), as follows:

"(A) On appeal by the accused in a case in which the sentence extends to dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for more than six months.

"(B) On appeal by the accused in a case in which the Government previously filed an appeal under sections 856(e) or 862 of this title (articles 56(e) or 62).

"(C) In a case in which the accused filed an application for review with the Court under section 869(d)(1)(B) of this title (article 69(d)(1)(B)) and the application has been granted by the Court.

"(2) REVIEW OF CAPITAL CASES.—A Court of Criminal Appeals shall have jurisdiction of a court-martial in which the judgment entered into the record under section 860c of this title (article 60c) includes a sentence of death.

"(c) TIMELINESS.—An appeal under subsection (b) is timely if it is filed as follows:

"(1) In the case of an appeal by the accused under subsection (b)(1)(A) or (b)(1)(B), if filed before the later of—

"(A) the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under section 865(c) of this title (article 65(c)); or

"(B) the date set by the Court of Criminal Appeals by rule or order.

"(2) In the case of an appeal by the accused under subsection (b)(1)(C), if filed before the later of—

"(A) the end of the 90-day period beginning on the date the accused is notified that the application for review has been granted by

letter placed in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record; or

"(B) the date set by the Court of Criminal Appeals by rule or order.

"(d) DUTIES.—

"(1) In any case before the Court of Criminal Appeals under paragraph (1) of subsection (b), the Court shall affirm, set aside, or modify the findings, sentence, or order appealed.

"(2) In any case before the Court of Criminal Appeals under paragraph (2) of subsection (b), the Court shall review the record of trial and affirm, set aside, or modify the findings or sentence.

"(3) In any case before the Court of Criminal Appeals under paragraph (1) or (2) of subsection (b), the Court may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record under section 860c of this title (article 60c).

"(e) CONSIDERATION OF THE EVIDENCE.—

"(1) In an appeal of a finding of guilty under paragraph (1)(A), (1)(B), or (2) of subsection (b), the Court of Criminal Appeals, upon request of the accused, may consider the weight of the evidence upon a specific showing of deficiencies in proof by the accused. The Court may set aside and dismiss a finding if clearly convinced that the finding was against the weight of the evidence. The Court may affirm a lesser finding. A rehearing may not be ordered.

"(2) When considering a case under paragraph (1)(A), (1)(B), or (2) of subsection (b), the Court may weigh the evidence and determine controverted questions of fact, subject to—

"(A) appropriate deference to the fact that the court-martial saw and heard the witnesses and other evidence; and

"(B) appropriate deference to findings of fact entered into the record by the military judge.

"(f) CONSIDERATION OF SENTENCE.—(1) In considering a sentence on appeal, other than as provided in section 856(e) of this title (article 56(e)), the Court of Criminal Appeals may consider—

"(A) whether the sentence violates the law;

"(B) whether the sentence is inappropriately severe—

"(i) if the sentence is for an offense for which there is no sentencing parameter under section 856(d) of this title (article 56(d)); or

"(ii) in the case of an offense with a sentencing parameter under section 856(d) of this title (article 56(d)), if the sentence is above the upper range under subsection (d)(2)(B)(iii).

"(C) in the case of a sentence for an offense with a sentencing parameter under this section, whether the sentence is a result of an incorrect application of the parameter;

"(D) whether the sentence is plainly unreasonable; and

"(E) in review of a sentence to death or to life in prison without eligibility for parole determined by the members in a capital case under section 853(d) of this title (article 53(d)), whether the sentence is otherwise appropriate, under rules prescribed by the President.

"(2) In an appeal under this subsection or section 856(e) of this title (article 56(e)), other than review under subsection (b)(2), the record on appeal shall consist of—

"(A) any portion of the record in the case that is designated as pertinent by either of the parties;

"(B) the information submitted during the sentencing proceeding; and

"(C) any information required by rule or order of the Court of Criminal Appeals.

"(g) LIMITS OF AUTHORITY.—

"(1)(A) If the Court of Criminal Appeals sets aside the findings, the Court—

"(i) may affirm any lesser included offense; and

"(ii) may, except when prohibited by section 844 of this title (article 44), order a rehearing.

"(B) If the Court of Criminal Appeals orders a rehearing on a charge and the convening authority finds a rehearing impracticable, the convening authority may dismiss the charge.

"(C) If the Court of Criminal Appeals sets aside the findings and does not order a rehearing, the Court shall order that the charges be dismissed.

"(2) If the Court of Criminal Appeals sets aside the sentence, the Court may—

"(A) modify the sentence to a lesser sentence; or

"(B) order a rehearing.

"(3) If the Court determines that additional proceedings are warranted, the Court may order a hearing as may be necessary to address a substantial

issue, subject to such limitations as the Court may direct and under such regulations as the President may prescribe.".

(c) ACTION WHEN REHEARING IMPRACTICABLE AFTER REHEARING ORDER.—Subsection (h) of such section (article), as redesignated by subsection (b)(1), is amended—

(1) in the first sentence, by striking "convening authority" and inserting "appropriate authority"; and

(2) by striking the last sentence.

(d) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§866. Art. 66. Courts of Criminal Appeals".

SEC. 911. REVIEW BY COURT OF APPEALS FOR THE ARMED FORCES.

(a) JAG NOTIFICATION.—Subsection (a)(2) of section 867 of title 10, United States Code (article 67 of the Uniform Code of Military Justice), is amended by inserting after "the Judge Advocate General" the following: ", after appropriate notification to the other Judge Advocates General,".

(b) BASIS FOR REVIEW.—Subsection (c) of such section (article) is amended—

(1) by inserting "(1)" after "(c)";

(2) by designating the second sentence as paragraph (2);

(3) by designating the third sentence as paragraph (3);

(4) by designating the fourth sentence as paragraph (4); and

(5) in paragraph (1), as designated by paragraph (1) of this subsection, by striking "only with respect to" and all that follows through the end of the sentence and inserting the following:

"only with respect to—

"(A) the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals; or

"(B) a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals.".

SEC. 912. SUPREME COURT REVIEW.

The second sentence of subsection (a) of section 867a of title 10, United States Code (article 67a of the Uniform Code of Military Justice), is amended by inserting before "Court of Appeals" the following: "United States".

SEC. 913. REVIEW BY JUDGE ADVOCATE GENERAL.

Section 869 of title 10, United States Code (article 69 of the Uniform Code of Military Justice), is amended to read as follows:

"§869. Art. 69. Review by Judge Advocate General

"(a) IN GENERAL.—Upon application by the accused and subject to subsections (b), (c), and (d), the Judge Advocate General may modify or set aside, in whole or in part, the findings and sentence in a court-martial that is not reviewed under section 866 of this title (article 66).

"(b) TIMING.—To qualify for consideration, an application under subsection (a) must be submitted to the Judge Advocate General not later than one year after the date of completion of review under section 864 or 865 of this title (article 64 or 65), as the case may be. The Judge Advocate General may, for good cause shown, extend the period for submission of an application, but may not consider an application submitted more than three years after such completion date.

"(c) SCOPE.—(1)(A) In a case reviewed under section 864 or section 865(d) of this title (article 64 or 65(d)), the Judge Advocate General may set aside the findings or sentence, in whole or in part on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

"(B) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (Article 44).

"(C) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

"(D) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.

"(2) In a case reviewed under section 865(d) of this title (article 65(d)), review under this section is limited to the issue of whether the waiver, withdrawal, or failure to file an appeal was invalid under the law. If the Judge Advocate General determines that the waiver, withdrawal, or failure to file an appeal was invalid, the Judge Advocate General shall order appropriate corrective action under rules prescribed by the President.

"(d) COURT OF CRIMINAL APPEALS.—(1) A Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c)—

"(A) in a case sent to the Court of Criminal Appeals by order of the Judge Advocate General; or

"(B) in a case submitted to the Court of Criminal Appeals by the accused in an application for review.

"(2) The Court of Criminal Appeals may grant an application under paragraph (1)(B) only if—

"(A) the application demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error; and

"(B) the application is filed not later than the earlier of—

"(i) 60 days after the date on which the accused is notified of the decision of the Judge Advocate General; or

"(ii) 60 days after the date on which a copy of the decision of the Judge Advocate General is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

"(3) The submission of an application for review under this subsection does not constitute a proceeding before the Court of Criminal Appeals for purposes of section 870(c)(1) of this title (article 70(c)(1)).

"(e) Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Criminal Appeals under subsection (d), the Court may take action only with respect to matters of law.".

SEC. 914. APPELLATE DEFENSE COUNSEL IN DEATH PENALTY CASES.

Section 870 of title 10, United States Code (article 70 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(f) To the greatest extent practicable, in any capital case, at least one defense counsel under subsection (c) shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.".

SEC. 915. AUTHORITY FOR HEARING ON VACATION OF SUSPENSION OF SENTENCE TO BE CONDUCTED BY QUALIFIED JUDGE ADVOCATE.

(a) IN GENERAL.—Subsection (a) of section 872 of title 10, United States Code (article 72) of the Uniform Code of Military Justice), is amended by inserting after the first sentence the following new sentence: "The special court-martial convening authority may detail a judge advocate, who is certified under section 827(b) of this title (article 27(b)), to conduct the hearing.".

(b) TECHNICAL AMENDMENTS.—Such section (article) is further amended—

(1) in the last sentence of subsection (a), by striking "if he so desires" and inserting "if the probationer so desires"; and

(2) in the second sentence of subsection (b)—

(A) by striking "If he" and inserting "If the officer exercising general court-martial jurisdiction"; and

(B) by striking "section 871(c) of this title (article 71(c))." and inserting "section 857 of this title (article 57)).".

SEC. 916. EXTENSION OF TIME FOR PETITION FOR NEW TRIAL.

The first sentence of section 873 of title 10, United States Code (article 73 of the Uniform Code of Military Justice), is amended by striking "two years after approval by the convening authority of a court-martial sentence," and inserting "three years after the date of the entry of judgment under section 860c of this title (article 60c),".

SEC. 917. RESTORATION.

Section 875 of title 10, United States Code (article 75 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(d) The President shall prescribe regulations, with such limitations as the President considers appropriate, governing eligibility for pay and allowances for the period after the date on which an executed part of a court-martial sentence is set aside.".

SEC. 918. LEAVE REQUIREMENTS PENDING REVIEW OF CERTAIN COURT-MARTIAL CONVICTIONS.

Section 876a of title 10, United States Code (article 76a of the Uniform Code of Military Justice), is amended—

(1) in the first sentence, by striking ", as approved under section 860 of this title (article 60),"; and

(2) in the second sentence, by striking "on which the sentence is approved under section 860 of this title (article 60)" and inserting "of the entry of judgment under section 860c of this title (article 60c)".

TITLE X—PUNITIVE ARTICLES

SEC. 1001. REORGANIZATION OF PUNITIVE ARTICLES.

Sections of subchapter X of chapter 47 of title 10, United States Code (articles of the Uniform Code of Military Justice), are transferred within subchapter X and redesignated as follows:

(1) ENLISTMENT AND SEPARATION.—Sections 883 and 884 (articles 83 and 84) are transferred so as to appear (in that order) after section 904 (article 104) and are redesignated as sections 904a and 904b (articles 104a and 104b), respectively.

(2) RESISTANCE, FLIGHT, BREACH OF ARREST, AND ESCAPE.—Section 895 (article 95) is transferred so as to appear after section 887 (article 87) and is redesignated as section 887a (article 87a).

(3) NONCOMPLIANCE WITH PROCEDURAL RULES.—Section 898 (article 98) is transferred so as to appear after section 931 (article 131) and is redesignated as section 931f (article 131f).

(4) CAPTURED OR ABANDONED PROPERTY.—Section 903 (article 103) is transferred so as to appear after section 908 (article 108) and is redesignated as section 908a (article 108a).

(5) AIDING THE ENEMY.—Section 904 (article 104) is redesignated as section 903b (article 103b).

(6) MISCONDUCT AS PRISONER.—Section 905 (article 105) is transferred so as to appear after section 897 (article 97) and is redesignated as section 898 (article 98).

(7) SPIES; ESPIONAGE.—Sections 906 and 906a (articles 106 and 106a) are transferred so as to appear (in that order) after section 902 (article 102) and are redesignated as sections 903 and 903a (articles 103 and 103a), respectively.

(8) MISBEHAVIOR OF SENTINEL.—Section 913 (article 113) is transferred so as to appear after section 894 (article 94) and is redesignated as section 895 (article 95).

(9) DRUNKEN OR RECKLESS OPERATION OF A VEHICLE, AIRCRAFT, OR VESSEL.—Section 911 (article 111) is transferred so as to appear after section 912a (article 912a) and is redesignated as section 913 (article 113).

(10) HOUSEBREAKING.—Section 930 (article 130) is redesignated as section 929a (article 129a).

(11) STALKING.—Section 920a (article 120a) is transferred so as to appear after section 929a (article 129a), as redesignated by paragraph (10), and is redesignated as section 930 (article 130).

(12) FORGERY.—Section 923 (article 123) is transferred so as to appear after section 904b (article 104b), as transferred and redesignated by paragraph (1), and is redesignated as section 905 (article 105).

(13) MAIMING.—Section 924 (article 124) is transferred so as to appear after section 928 (article 128) and is redesignated as section 928a (article 128a).

(14) FRAUDS AGAINST THE UNITED STATES.—Section 932 of (article 132) is transferred so as to appear after section 923a (article 123a) and is redesignated as section 924 (article 124).

SEC. 1002. CONVICTION OF OFFENSE CHARGED, LESSER INCLUDED OFFENSES, AND ATTEMPTS.

Section 879 of title 10, United States Code (article 79 of the Uniform Code of Military Justice), is amended to read as follows:

"**§879. Art. 79. Conviction of offense charged, lesser included offenses, and attempts**

"(a) IN GENERAL.—An accused may be found guilty of any of the following:

"(1) The offense charged.

"(2) A lesser included offense.

"(3) An attempt to commit the offense charged.

"(4) An attempt to commit a lesser included offense, if the attempt is an offense in its own right.

"(b) DEFINITION.—In this section (article), the term 'lesser included offense' means—

"(1) an offense that is necessarily included in the offense charged; and

"(2) any lesser included offense so designated by regulation prescribed by the President.

"(c) REGULATORY AUTHORITY.—Any designation of a lesser included offense in a regulation referred to in subsection (b) shall be reasonably included in the greater offense.".

SEC. 1003. SOLICITING COMMISSION OF OFFENSES.

Section 882 of title 10, United States Code (article 82 of the Uniform Code of Military Justice), is amended to read as follows:

"§882. Art. 82. Soliciting commission of offenses

"(a) SOLICITING COMMISSION OF OFFENSES GENERALLY.—Any person subject to this chapter who solicits or advises another to commit an offense under this chapter (other than an offense specified in subsection (b)) shall be punished as a court-martial may direct.

"(b) SOLICITING DESERTION, MUTINY, SEDITION, OR MISBEHAVIOR BEFORE THE ENEMY.—Any person subject to this chapter who solicits or advises another to violate section 885 of this title (article 85), section 894 of this title (article 94), or section 99 of this title (article 99)—

"(1) if the offense solicited or advised is attempted or is committed, shall be punished with the punishment provided for the commission of the offense; and

"(2) if the offense solicited or advised is not attempted or committed, shall be punished as a court-martial may direct.".

SEC. 1004. MALINGERING.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 882 (article 82 of the Uniform Code of Military Justice), as amended by section 1003, the following new section (article):

"§883. Art. 83. Malingering

"Any person subject to this chapter who, with the intent to avoid work, duty, or service—

"(1) feigns illness, physical disablement, mental lapse, or mental derangement; or

"(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.".

SEC. 1005. BREACH OF MEDICAL QUARANTINE.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 883 (article 83 of the Uniform Code of Military Justice), as added by section 1004, the following new section (article):

"§884. Art. 84. Breach of medical quarantine

"Any person subject to this chapter—

"(1) who is ordered into medical quarantine by a person authorized to issue such order; and

"(2) who, with knowledge of the quarantine and the limits of the quarantine, goes beyond those limits before being released from the quarantine by proper authority;

shall be punished as a court-martial may direct.".

SEC. 1006. MISSING MOVEMENT; JUMPING FROM VESSEL.

Section 887 of title 10, United States Code (article 87 of the Uniform Code of Military Justice), is amended to read as follows:

"§887. Art. 87. Missing movement; jumping from vessel

"(a) MISSING MOVEMENT.—Any person subject to this chapter who, through neglect or design, misses the movement of a ship, aircraft, or unit with which the person is required in the course of duty to move shall be punished as a court-martial may direct.

"(b) JUMPING FROM VESSEL INTO THE WATER.—Any person subject to this chapter who wrongfully and intentionally jumps into the water from a vessel in use by the armed forces shall be punished as a court-martial may direct.".

SEC. 1007. OFFENSES AGAINST CORRECTIONAL CUSTODY AND RESTRICTION.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 887a (article 87a of the Uniform Code of Military Justice),

as transferred and redesignated by section 1001(2), the following new section (article):

"§887b. Art. 87b. Offenses against correctional custody and restriction

"(a) ESCAPE FROM CORRECTIONAL CUSTODY.—Any person subject to this chapter—

"(1) who is placed in correctional custody by a person authorized to do so;

"(2) who, while in correctional custody, is under physical restraint; and

"(3) who escapes from the physical restraint before being released from the physical restraint by proper authority;

shall be punished as a court-martial may direct.

"(b) BREACH OF CORRECTIONAL CUSTODY.—Any person subject to this chapter—

"(1) who is placed in correctional custody by a person authorized to do so;

"(2) who, while in correctional custody, is under restraint other than physical restraint; and

"(3) who goes beyond the limits of the restraint before being released from the correctional custody or relieved of the restraint by proper authority;

shall be punished as a court-martial may direct.

"(c) BREACH OF RESTRICTION.—Any person subject to this chapter—

"(1) who is ordered to be restricted to certain limits by a person authorized to do so; and

"(2) who, with knowledge of the limits of the restriction, goes beyond those limits before being released by proper authority;

shall be punished as a court-martial may direct.".

SEC. 1008. DISRESPECT TOWARD SUPERIOR COMMISSIONED OFFICER; ASSAULT OF SUPERIOR COMMISSIONED OFFICER.

Section 889 of title 10, United States Code (article 89 of the Uniform Code of Military Justice), is amended to read as follows:

"§889. Art. 89. Disrespect toward superior commissioned officer; assault of superior commissioned officer

"(a) DISRESPECT.—Any person subject to this chapter who behaves with disrespect toward that person's superior commissioned officer shall be punished as a court-martial may direct.

"(b) ASSAULT.—Any person subject to this chapter who strikes that person's superior commissioned officer or draws or lifts up any weapon or offers any violence against that officer while the officer is in the execution of the officer's office shall be punished—

"(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

"(2) if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.".

SEC. 1009. WILLFULLY DISOBEYING SUPERIOR COMMISSIONED OFFICER.

Section 890 of title 10, United States Code (article 90 of the Uniform Code of Military Justice), is amended to read as follows:

"§890. Art. 90. Willfully disobeying superior commissioned officer

"Any person subject to this chapter who willfully disobeys a lawful command of that person's superior commissioned officer shall be punished—

"(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

"(2) if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.".

SEC. 1010. PROHIBITED ACTIVITIES WITH MILITARY RECRUIT OR TRAINEE BY PERSON IN POSITION OF SPECIAL TRUST.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 893 (article 93 of the Uniform Code of Military Justice), the following new section (article):

"§893a. Art. 93a. Prohibited activities with military recruit or trainee by person in position of special trust

"(a) ABUSE OF TRAINING LEADERSHIP POSITION.—Any person subject to this chapter—

"(1) who is an officer, a noncommissioned officer, or a petty officer;

"(2) who is in a training leadership position with respect to a specially protected junior member of the armed forces; and

"(3) who engages in prohibited sexual activity with such specially protected junior member of the armed forces;

shall be punished as a court-martial may direct.

"(b) ABUSE OF POSITION AS MILITARY RECRUITER.—Any person subject to this chapter—

"(1) who is a military recruiter and engages in prohibited sexual activity with an applicant for military service; or

"(2) who is a military recruiter and engages in prohibited sexual activity with a specially protected junior member of the armed forces who is enlisted under a delayed entry program;

shall be punished as a court-martial may direct.

"(c) CONSENT.—Consent is not a defense for any conduct at issue in a prosecution under this section (article).

"(d) DEFINITIONS.—In this section (article):

"(1) SPECIALLY PROTECTED JUNIOR MEMBER OF THE ARMED FORCES.—The term 'specially protected junior member of the armed forces' means—

"(A) a member of the armed forces who is assigned to, or is awaiting assignment to, basic training or other initial active duty for training, including a member who is enlisted under a delayed entry program;

"(B) a member of the armed forces who is a cadet, a midshipman, an officer candidate, or a student in any other officer qualification program; and

"(C) a member of the armed forces in any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial career qualification.

"(2) TRAINING LEADERSHIP POSITION.—The term 'training leadership position' means, with respect to a specially protected junior member of the armed forces, any of the following:

"(A) Any drill instructor position or other leadership position in a basic training program, an officer candidate school, a reserve officers' training corps unit, a training program for entry into the armed forces, or any program that, by regulation prescribed by the

Secretary concerned, is identified as a training program for initial career qualification.

"(B) Faculty and staff of the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, and the United States Coast Guard Academy.

"(3) APPLICANT FOR MILITARY SERVICE.—The term 'applicant for military service' means a person who, under regulations prescribed by the Secretary concerned, is an applicant for original enlistment or appointment in the armed forces.

"(4) PROHIBITED SEXUAL ACTIVITY.—The term 'prohibited sexual activity' means, as specified in regulations prescribed by the Secretary concerned, inappropriate physical intimacy under circumstances described in such regulations.".

SEC. 1011. OFFENSES BY SENTINEL OR LOOKOUT.

Section 895 of title 10, United States Code (article 95 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(8), is amended to read as follows:

"§895. Art. 95. Offenses by sentinel or lookout

"(a) DRUNK OR SLEEPING ON POST, OR LEAVING POST BEFORE BEING RELIEVED.—Any sentinel or lookout who is drunk on post, who sleeps on post, or who leaves post before being regularly relieved, shall be punished—

"(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

"(2) if the offense is committed other than in time of war, by such punishment, other than death, as a court-martial may direct.

"(b) LOITERING OR WRONGFULLY SITTING ON POST.—Any sentinel or lookout who loiters or wrongfully sits down on post shall be punished as a court-martial may direct.".

SEC. 1012. DISRESPECT TOWARD SENTINEL OR LOOKOUT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 895 (article 95 of the Uniform Code of Military Justice), as amended by section 1011, the following new section (article):

"§895a. Art. 95a. Disrespect toward sentinel or lookout

"(a) DISRESPECTFUL LANGUAGE TOWARD SENTINEL OR LOOKOUT.—Any person subject to this chapter who, knowing that another person is a sentinel or lookout, uses wrongful and disrespectful language that is directed toward and within the hearing of the sentinel or lookout, who is in the execution of duties as a sentinel or lookout, shall be punished as a court-martial may direct.

"(b) DISRESPECTFUL BEHAVIOR TOWARD SENTINEL OR LOOKOUT.—Any person subject to this chapter who, knowing that another person is a sentinel or lookout, behaves in a wrongful and disrespectful manner that is directed toward and within the sight of the sentinel or lookout, who is in the execution of duties as a sentinel or lookout, shall be punished as a court-martial may direct.".

SEC. 1013. RELEASE OF PRISONER WITHOUT AUTHORITY; DRINKING WITH PRISONER.

Section 896 of title 10, United States Code (article 96 of the Uniform Code of Military Justice), is amended to read as follows:

"§896. Art. 96. Release of prisoner without authority; drinking with prisoner

"(a) RELEASE OF PRISONER WITHOUT AUTHORITY.—Any person subject to this chapter—

"(1) who, without authority to do so, releases a prisoner; or

"(2) who, through neglect or design, allows a prisoner to escape;

shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with the law.

"(b) DRINKING WITH PRISONER.—Any person subject to this chapter who unlawfully drinks any alcoholic beverage with a prisoner shall be punished as a court-martial may direct.".

SEC. 1014. PENALTY FOR ACTING AS A SPY.

Section 903 of title 10, United States Code (article 103 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(7), is amended by inserting before the period at the end of the first sentence the following: "or such other punishment as a court-martial or a military commission may direct".

SEC. 1015. PUBLIC RECORDS OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 903b (article 103b of the Uniform Code of Military Justice), as redesignated by section 1001(5), the following new section (article):

"§904. Art. 104. Public records offenses

"Any person subject to this chapter who, willfully and unlawfully—

"(1) alters, conceals, removes, mutilates, obliterates, or destroys a public record; or

"(2) takes a public record with the intent to alter, conceal, remove, mutilate, obliterate, or destroy the public record;

shall be punished as a court-martial may direct.".

SEC. 1016. FALSE OR UNAUTHORIZED PASS OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 905 (article 105 of the Uniform Code of Military Justice), as

transferred and redesignated by section 1001(12), the following new section (article):

"§905a. Art. 105a. False or unauthorized pass offenses

"(a) WRONGFUL MAKING, ALTERING, ETC.—Any person subject to this chapter who, wrongfully and falsely, makes, alters, counterfeits, or tampers with a military or official pass, permit, discharge certificate, or identification card shall be punished as a court-martial may direct.

"(b) WRONGFUL SALE, ETC.—Any person subject to this chapter who wrongfully sells, gives, lends, or disposes of a false or unauthorized military or official pass, permit, discharge certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as a court-martial may direct.

"(c) WRONGFUL USE OR POSSESSION.—Any person subject to this chapter who wrongfully uses or possesses a false or unauthorized military or official pass, permit, discharge certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as a court-martial may direct.".

SEC. 1017. IMPERSONATION OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 905a (article 105a of the Uniform Code of Military Justice), as added by section 1016, the following new section (article):

"§906. Art. 106. Impersonation of officer, noncommissioned or petty officer, or agent or official

"(a) IN GENERAL.—Any person subject to this chapter who, wrongfully and willfully, impersonates—

"(1) an officer, a noncommissioned officer, or a petty officer;

"(2) an agent of superior authority of one of the armed forces; or

"(3) an official of a government;

shall be punished as a court-martial may direct.

"(b) IMPERSONATION WITH INTENT TO DEFRAUD.—Any person subject to this chapter who, wrongfully, willfully, and with intent to defraud, impersonates any person referred to in paragraph (1), (2), or (3) of subsection (a) shall be punished as a court-martial may direct.

"(c) IMPERSONATION OF GOVERNMENT OFFICIAL WITHOUT INTENT TO DEFRAUD.—Any person subject to this chapter who, wrongfully, willfully, and without intent to defraud, impersonates an official of a government by committing

an act that exercises or asserts the authority of the office that the person claims to have shall be punished as a court-martial may direct.".

SEC. 1018. INSIGNIA OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 906 (article 106 of the Uniform Code of Military Justice), as added by section 1017, the following new section (article):

"§906a. Art. 106a. Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

"Any person subject to this chapter—

"(1) who is not authorized to wear an insignia, decoration, badge, ribbon, device, or lapel button; and

"(2) who wrongfully wears such insignia, decoration, badge, ribbon, device, or lapel button upon the person's uniform or civilian clothing;

shall be punished as a court-martial may direct.".

SEC. 1019. FALSE OFFICIAL STATEMENTS; FALSE SWEARING.

Section 907 of title 10, United States Code (article 107 of the Uniform Code of Military Justice), is amended to read as follows:

"§907. Art. 107. False official statements; false swearing

"(a) FALSE OFFICIAL STATEMENTS.—Any person subject to this chapter who, with intent to deceive—

"(1) signs any false record, return, regulation, order, or other official document, knowing it to be false; or

"(2) makes any other false official statement knowing it to be false;

shall be punished as a court-martial may direct.

"(b) FALSE SWEARING.—Any person subject to this chapter—

"(1) who takes an oath that—

"(A) is administered in a matter in which such oath is required or authorized by law; and

"(B) is administered by a person with authority to do so; and

"(2) who, upon such oath, makes or subscribes to a statement;

if the statement is false and at the time of taking the oath, the person does not believe the statement to be true, shall be punished as a court-martial may direct.".

SEC. 1020. PAROLE VIOLATION.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 907 (article 107 of the Uniform Code of Military Justice), as amended by section 1019, the following new section (article):

"§907a. Art. 107a. Parole violation

"Any person subject to this chapter—

"(1) who, having been a prisoner as the result of a court-martial conviction or other criminal proceeding, is on parole with conditions; and

"(2) who violates the conditions of parole;

shall be punished as a court-martial may direct.".

SEC. 1021. WRONGFUL TAKING, OPENING, ETC. OF MAIL MATTER

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 909 (article 109 of the Uniform Code of Military Justice), the following new section (article):

"§909a. Art. 109a. Mail matter: wrongful taking, opening, etc.

"(a) TAKING.—Any person subject to this chapter who, with the intent to obstruct the correspondence of, or to pry into the business or secrets of, any person or organization, wrongfully takes mail matter before the mail matter is delivered to or received by the addressee shall be punished as a court-martial may direct.

"(b) OPENING, SECRETING, DESTROYING, STEALING.—Any person subject to this chapter who wrongfully opens, secretes, destroys, or steals mail matter before the mail matter is delivered to or received by the addressee shall be punished as a court-martial may direct.".

SEC. 1022. IMPROPER HAZARDING OF VESSEL OR AIRCRAFT.

Section 910 of title 10, United States Code (article 110 of the Uniform Code of Military Justice), is amended to read as follows:

"§910. Art. 110. Improper hazarding of vessel or aircraft

"(a) WILLFUL AND WRONGFUL HAZARDING.—Any person subject to this chapter who, willfully and wrongfully, hazards or suffers to be hazarded any vessel or aircraft of the armed forces shall be punished by death or such other punishment as a court-martial may direct.

"(b) NEGLIGENT HAZARDING.—Any person subject to this chapter who negligently hazards or suffers to be hazarded any vessel or aircraft of the armed forces shall be punished as a court-martial may direct.".

SEC. 1023. LEAVING SCENE OF VEHICLE ACCIDENT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 910 (article 110 of the Uniform Code of Military Justice), as amended by section 1022, the following new section (article):

"§911. Art. 111. Leaving scene of vehicle accident

"(a) DRIVER.—Any person subject to this chapter—

"(1) who is the driver of a vehicle that is involved in an accident that results in personal injury or property damage; and

"(2) who wrongfully leaves the scene of the accident—

"(A) without providing assistance to an injured person; or

"(B) without providing personal identification to others involved in the accident or to appropriate authorities;

shall be punished as a court-martial may direct.

"(b) SENIOR PASSENGER.—Any person subject to this chapter—

"(1) who is a passenger in a vehicle that is involved in an accident that results in personal injury or property damage;

"(2) who is the superior commissioned or noncommissioned officer of the driver of the vehicle or is the commander of the vehicle; and

"(3) who wrongfully and unlawfully orders, causes, or permits the driver to leave the scene of the accident—

"(A) without providing assistance to an injured person; or

"(B) without providing personal identification to others involved in the accident or to appropriate authorities;

shall be punished as a court-martial may direct.".

SEC. 1024. DRUNKENNESS AND OTHER INCAPACITATION OFFENSES.

Section 912 of title 10, United States Code (article 112 of the Uniform Code of Military Justice), is amended to read as follows:

"§912. Art. 112. Drunkenness and other incapacitation offenses

"(a) DRUNK ON DUTY.—Any person subject to this chapter who is drunk on duty shall be punished as a court-martial may direct.

"(b) INCAPACITATION FOR DUTY FROM DRUNKENNESS OR DRUG USE.—Any person subject to this chapter who, as a result of indulgence in any alcoholic beverage or any drug, is incapacitated for the proper performance of duty shall be punished as a court-martial may direct.

"(c) DRUNK PRISONER.—Any person subject to this chapter who is a prisoner and, while in such status, is drunk shall be punished as a court-martial may direct.".

SEC. 1025. LOWER BLOOD ALCOHOL CONTENT LIMITS FOR CONVICTION OF DRUNKEN OR RECKLESS OPERATION OF VEHICLE, AIRCRAFT, OR VESSEL.

Subsection (b)(3) of section 913 of title 10, United States Code (article 113 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(9), is amended—

(1) by striking "0.10 grams" both places it appears and inserting "0.08 grams"; and

(2) by adding at the end the following new sentence: "The Secretary may by regulation prescribe limits that are lower than the limits specified in the preceding sentence, if such lower limits are based on scientific developments, as reflected in Federal law of general applicability.".

SEC. 1026. ENDANGERMENT OFFENSES.

Section 914 of title 10, United States Code (article 114 of the Uniform Code of Military Justice), is amended to read as follows:

"§914. Art. 114. Endangerment offenses

"(a) RECKLESS ENDANGERMENT.—Any person subject to this chapter who engages in conduct that—

"(1) is wrongful and reckless or is wanton; and

"(2) is likely to produce death or grievous bodily harm to another person;

shall be punished as a court-martial may direct.

"(b) DUELING.—Any person subject to this chapter—

"(1) who fights or promotes, or is concerned in or connives at fighting a duel; or

"(2) who, having knowledge of a challenge sent or about to be sent, fails to report the facts promptly to the proper authority;

shall be punished as a court-martial may direct.

"(c) FIREARM DISCHARGE, ENDANGERING HUMAN LIFE.—Any person subject to this chapter who, willfully and wrongly, discharges a firearm, under circumstances such as to endanger human life shall be punished as a court-martial may direct.

"(d) CARRYING CONCEALED WEAPON.—Any person subject to this chapter who unlawfully carries a dangerous weapon concealed on or about his person shall be punished as a court-martial may direct.".

SEC. 1027. COMMUNICATING THREATS.

Section 915 of title 10, United States Code (article 115 of the Uniform Code of Military Justice), is amended to read as follows:

"§915. Art. 115. Communicating threats

"(a) COMMUNICATING THREATS GENERALLY.—Any person subject to this chapter who wrongfully communicates a threat to injure the person, property, or reputation of another shall be punished as a court-martial may direct.

"(b) COMMUNICATING THREAT TO USE EXPLOSIVE, ETC.—Any person subject to this chapter who wrongfully communicates a threat to injure the person or property of another by use of (1) an explosive, (2) a weapon of mass destruction, (3) a biological or chemical agent, substance, or weapon, or (4) a hazardous material, shall be punished as a court-martial may direct.

"(c) COMMUNICATING FALSE THREAT CONCERNING USE OF EXPLOSIVE, ETC.—Any person subject to this chapter who maliciously communicates a false threat concerning injury to the person or property of another by use of (1) an explosive, (2) a weapon of mass destruction, (3) a biological or chemical agent, substance, or weapon, or (4) a hazardous material, shall be punished as a court-

martial may direct. As used in the preceding sentence, the term 'false threat' means a threat that, at the time the threat is communicated, is known to be false by the person communicating the threat.".

SEC. 1028. TECHNICAL AMENDMENT RELATING TO MURDER.

Section 918(4) of title 10, United States Code (article 118(4) of the Uniform Code of Military Justice), is amended by striking "forcible sodomy,".

SEC. 1029. CHILD ENDANGERMENT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 919a (article 119a of the Uniform Code of Military Justice), the following new section (article):

"§919b. Art. 119b. Child endangerment

"Any person subject to this chapter—

"(1) who has a duty for the care of a child under the age of 16 years; and

"(2) who, through design or culpable negligence, endangers the child's mental or physical health, safety, or welfare;

shall be punished as a court-martial may direct.".

SEC. 1030. DEFINITION OF SEXUAL ACT FOR RAPE AND SEXUAL ASSAULT OFFENSES.

(a) RAPE AND SEXUAL ASSAULT GENERALLY.—Paragraph (1) of section 920(g) of title 10, United States Code (article 120(g) of the Uniform Code of Military Justice), is amended to read as follows:

"(1) SEXUAL ACT.—The term 'sexual act' means—

"(A) contact between the penis and the vulva or the penis and the anus, and for purpose of this subparagraph contact involving the penis occurs upon penetration, however slight;

"(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

"(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.".

(b) RAPE AND SEXUAL ASSAULT OF A CHILD.—Section 920b of title 10, United States Code (article 120b of the Uniform Code of Military Justice), is amended in subsection (h)(1) by inserting before the period at the end the following:

", except that the term 'sexual act' also includes the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person".

SEC. 1031. DEPOSIT OF OBSCENE MATTER IN THE MAIL.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 920 (article 120 of the Uniform Code of Military Justice), the following new section (article):

"§920a. Art. 120a. Mails: deposit of obscene matter

"Any person subject to this chapter who, wrongfully and knowingly, deposits obscene matter for mailing and delivery shall be punished as a court-martial may direct.".

SEC. 1032. FRAUDULENT USE OF CREDIT CARDS, DEBIT CARDS, AND OTHER ACCESS DEVICES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 921 (article 121 of the Uniform Code of Military Justice), the following new section (article):

"§921a. Art. 121a. Fraudulent use of credit cards, debit cards, and other access devices

"(a) IN GENERAL.—Any person subject to this chapter who, with intent to defraud, uses—

"(1) a stolen credit card, debit card, or other access device;

"(2) a revoked, cancelled, or otherwise invalid credit card, debit card, or other access device; or

"(3) a credit card, debit card, or other access device without the authorization of a person whose authorization is required for such use;

to obtain money, property, services, or anything else of value shall be punished as a court-martial may direct.

"(b) DEFINITION.—In this section (article), the term 'access device' has the meaning given that term in section 1029 of title 18.".

SEC. 1033. FALSE PRETENSES TO OBTAIN SERVICES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 921a (article 121a of the Uniform Code of Military Justice), as added by section 1032, the following new section (article):

"§921b. Art. 121b. False pretenses to obtain services

"Any person subject to this chapter who, with intent to defraud, knowingly uses false pretenses to obtain services shall be punished as a court-martial may direct.".

SEC. 1034. ROBBERY.

Section 922 of title 10, United States Code (article 122 of the Uniform Code of Military Justice), is amended to read as follows:

"§922. Art. 122. Robbery

"Any person subject to this chapter who takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.".

SEC. 1035. RECEIVING STOLEN PROPERTY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 922 (article 122 of the Uniform Code of Military Justice), as amended by section 1034, the following new section (article):

"§922a. Art. 122a. Receiving stolen property

"Any person subject to this chapter who wrongfully receives, buys, or conceals stolen property, knowing the property to be stolen property, shall be punished as a court-martial may direct.".

SEC. 1036. OFFENSES CONCERNING GOVERNMENT COMPUTERS.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 922a (article 122a of the Uniform Code of Military Justice), as added by section 1035, the following new section (article):

"§923. Art. 123. Offenses concerning Government computers

"(a) IN GENERAL.—Any person subject to this chapter who—

"(1) knowingly accesses a Government computer, with an unauthorized purpose, and by doing so obtains classified information, with reason to believe such information could be used to the injury of the United States, or to the advantage of any foreign nation, and intentionally communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted such information to any person not entitled to receive it;

"(2) intentionally accesses a Government computer, with an unauthorized purpose, and thereby obtains classified or other protected information from any such Government computer; or

"(3) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a Government computer;

shall be punished as a court-martial may direct.

"(b) DEFINITIONS.—In this section:

"(1) The term 'computer' has the meaning given that term in section 1030 of title 18.

"(2) The term 'Government computer' means a computer owned or operated by or on behalf of the United States Government.

"(3) The term 'damage' has the meaning given that term in section 1030 of title 18.".

SEC. 1037. BRIBERY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 924 (article 124 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(14), the following new section (article):

"§924a. Art. 124a. Bribery

"(a) ASKING, ACCEPTING, OR RECEIVING THING OF VALUE.—Any person subject to this chapter—

"(1) who occupies an official position or who has official duties; and

"(2) who wrongfully asks, accepts, or receives a thing of value with the intent to have the person's decision or action influenced with respect to an official matter in which the United States is interested;

shall be punished as a court-martial may direct.

"(b) PROMISING, OFFERING, OR GIVING THING OF VALUE.—Any person subject to this chapter who wrongfully promises, offers, or gives a thing of value to another person, who occupies an official position or who has official duties, with the intent to influence the decision or action of the other person with respect to an official matter in which the United States is interested, shall be punished as a court-martial may direct.".

SEC. 1038. GRAFT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 924a (article 124a of the Uniform Code of Military Justice), as added by section 1037, the following new section (article):

"§924b. Art. 124b. Graft

"(a) ASKING, ACCEPTING, OR RECEIVING THING OF VALUE.—Any person subject to this chapter—

"(1) who occupies an official position or who has official duties; and

"(2) who wrongfully asks, accepts, or receives a thing of value as compensation for or in recognition of services rendered or to be rendered by

the person with respect to an official matter in which the United States is interested;

shall be punished as a court-martial may direct.

"(b) PROMISING, OFFERING, OR GIVING THING OF VALUE.—Any person subject to this chapter who wrongfully promises, offers, or gives a thing of value to another person, who occupies an official position or who has official duties, as compensation for or in recognition of services rendered or to be rendered by the other person with respect to an official matter in which the United States is interested, shall be punished as a court-martial may direct.".

SEC. 1039. KIDNAPPING.

Section 925 of title 10, United States Code (article 125 of the Uniform Code of Military Justice), is amended to read as follows:

"§925. Art. 125. Kidnapping

"Any person subject to this chapter who wrongfully—

"(1) seizes, confines, inveigles, decoys, or carries away another person; and

"(2) holds the other person against that person's will;

shall be punished as a court-martial may direct.".

SEC. 1040. ARSON; BURNING PROPERTY WITH INTENT TO DEFRAUD.

Section 926 of title 10, United States Code (article 126 of the Uniform Code of Military Justice), is amended to read as follows:

"§926. Art. 126. Arson; burning property with intent to defraud

"(a) AGGRAVATED ARSON.—Any person subject to this chapter who, willfully and maliciously, burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein, to the knowledge of that person, there is at the time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.

"(b) SIMPLE ARSON.—Any person subject to this chapter who, willfully and maliciously, burns or sets fire to the property of another is guilty of simple arson and shall be punished as a court-martial may direct.

"(c) BURNING PROPERTY WITH INTENT TO DEFRAUD.—Any person subject to this chapter who, willfully, maliciously, and with intent to defraud, burns or sets fire to any property shall be punished as a court-martial may direct.".

SEC. 1041. ASSAULT.

Section 928 of title 10, United States Code (article 128 of the Uniform Code of Military Justice), is amended to read as follows:

"§928. Art. 128. Assault

"(a) ASSAULT.—Any person subject to this chapter who, unlawfully and with force or violence—

"(1) attempts to do bodily harm to another person;

"(2) offers to do bodily harm to another person; or

"(3) does bodily harm to another person;

is guilty of assault and shall be punished as a court-martial may direct.

"(b) AGGRAVATED ASSAULT.—Any person subject to this chapter—

"(1) who, with the intent to do bodily harm, offers to do bodily harm with a dangerous weapon; or

"(2) who, in committing an assault, inflicts substantial bodily harm, or grievous bodily harm on another person;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

"(c) ASSAULT WITH INTENT TO COMMIT SPECIFIED OFFENSES.—

"(1) IN GENERAL.—Any person subject to this chapter who commits assault with intent to commit an offense specified in paragraph (2) shall be punished as a court-martial may direct.

"(2) OFFENSES SPECIFIED.—The offenses referred to in paragraph (1) are murder, voluntary manslaughter, rape, sexual assault, rape of a child, sexual assault of a child, robbery, arson, burglary, and kidnapping.".

SEC. 1042. BURGLARY AND UNLAWFUL ENTRY.

Section 929 of title 10, United States Code (article 129 of the Uniform Code of Military Justice), and section 929a of such title (article 129a), as redesignated by section 1001(10), are amended to read as follows:

"§929. Art. 129. Burglary; unlawful entry

"(a) BURGLARY.—Any person subject to this chapter who, with intent to commit an offense under this chapter, breaks and enters the building or structure of another shall be punished as a court-martial may direct.

"(b) UNLAWFUL ENTRY.—Any person subject to this chapter who unlawfully enters—

"(1) the real property of another; or

"(2) the personal property of another which amounts to a structure usually used for habitation or storage;

shall be punished as a court-martial may direct.".

SEC. 1043. STALKING.

Section 930 of title 10, United States Code (article 130 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(11), is amended to read as follows:

"930. Art. 130. Stalking

"(a) IN GENERAL.—Any person subject to this chapter—

"(1) who wrongfully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

"(2) who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner; and

"(3) whose conduct induces reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

is guilty of stalking and shall be punished as a court-martial may direct.

"(b) DEFINITIONS.—In this section:

"(1) The term 'conduct' means conduct of any kind, including use of surveillance, the mails, an interactive computer service, an electronic communication service, or an electronic communication system.

"(2) The term 'course of conduct' means—

"(A) a repeated maintenance of visual or physical proximity to a specific person;

"(B) a repeated conveyance of verbal threat, written threats, or threats implied by conduct, or a combination of such threats, directed at or toward a specific person; or

"(C) a pattern of conduct composed of repeated acts evidencing a continuity of purpose.

"(3) The term 'repeated', with respect to conduct, means two or more occasions of such conduct.

"(4) The term 'immediate family', in the case of a specific person, means—

"(A) that person's spouse, parent, brother or sister, child, or other person to whom he or she stands in loco parentis; or

"(B) any other person living in his or her household and related to him or her by blood or marriage.

"(5) The term 'intimate partner' in the case of a specific person, means—

"(A) a former spouse of the specific person, a person who shares a child in common with the specific person, or a person who cohabits with or has cohabited as a spouse with the specific person; or

"(B) a person who has been in a social relationship of a romantic or intimate nature with the specific person, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.".

SEC. 1044. SUBORNATION OF PERJURY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931 (article 131 of the Uniform Code of Military Justice), the following new section (article):

"§931a. Art. 131a. Subornation of perjury

"(a) IN GENERAL.—Any person subject to this chapter who induces and procures another person—

"(1) to take an oath; and

"(2) to falsely testify, depose, or state upon such oath;

shall, if the conditions specified in subsection (b) are satisfied, be punished as a court-martial may direct.

"(b) CONDITIONS.—The conditions referred to in subsection (a) are the following:

"(1) The oath is administered with respect to a matter for which such oath is required or authorized by law.

"(2) The oath is administered by a person having authority to do so.

"(3) Upon the oath, the other person willfully makes or subscribes a statement.

"(4) The statement is material.

"(5) The statement is false.

"(6) When the statement is made or subscribed, the person subject to this chapter and the other person do not believe that the statement is true.".

SEC. 1045. OBSTRUCTING JUSTICE.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931a (article 131a of the Uniform Code of Military Justice), as added by section 1044, the following new section (article):

"§931b. Art. 131b. Obstructing justice

"Any person subject to this chapter who engages in conduct in the case of a certain person against whom the accused had reason to believe there were or would be criminal or disciplinary proceedings pending, with intent to influence, impede, or otherwise obstruct the due administration of justice shall be punished as a court-martial may direct.".

SEC. 1046. MISPRISION OF SERIOUS OFFENSE.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931b (article 131b of the Uniform Code of Military Justice), as added by section 1045, the following new section (article):

"§931c. Art. 131c. Misprision of serious offense

"(a) IN GENERAL.—Any person subject to this chapter—

"(1) who knows that another person has committed a serious offense; and

"(2) wrongfully conceals the commission of the offense and fails to make the commission of the offense known to civilian or military authorities as soon as possible;

shall be punished as a court-martial may direct.".

SEC. 1047. WRONGFUL REFUSAL TO TESTIFY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931c (article 131c of the Uniform Code of Military Justice), as added by section 1046, the following new section (article):

"§931d. Art. 131d. Wrongful refusal to testify

"Any person subject to this chapter who, in the presence of a court-martial, a board of officers, a military commission, a court of inquiry, preliminary hearing, or an officer taking a deposition, of or for the United States, wrongfully refuses to

qualify as a witness or to answer a question after having been directed to do so by the person presiding shall be punished as a court-martial may direct.".

SEC. 1048. PREVENTION OF AUTHORIZED SEIZURE OF PROPERTY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931d (article 131d of the Uniform Code of Military Justice), as added by section 1047, the following new section (article):

"§931e. Art. 131e. Prevention of authorized seizure of property

"Any person subject to this chapter who, knowing that one or more persons authorized to make searches and seizures are seizing, are about to seize, or are endeavoring to seize property, destroys, removes, or otherwise disposes of the property with intent to prevent the seizure thereof shall be punished as a court-martial may direct.".

SEC. 1049. WRONGFUL INTERFERENCE WITH ADVERSE ADMINISTRATIVE PROCEEDING.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931f (article 131f of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(3), the following new section (article):

"§931g. Art. 131g. Wrongful interference with adverse administrative proceeding

"Any person subject to this chapter who, having reason to believe that an adverse administrative proceeding is pending against any person subject to this chapter, wrongfully acts with the intent—

"(1) to influence, impede, or obstruct the conduct of the proceeding; or

"(2) otherwise to obstruct the due administration of justice;

shall be punished as a court-martial may direct.".

SEC. 1050. RETALIATION.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931g (article 131g of the Uniform Code of Military Justice), as added by section 1049, the following new section (article):

"§932. Art. 132. Retaliation

"Any person subject to this chapter who, with the intent to retaliate against any person for reporting or planning to report a criminal offense, or with the intent to discourage any person from reporting a criminal offense—

"(1) wrongfully takes or threatens to take an adverse personnel action against any person; or

"(2) wrongfully withholds or threatens to withhold a favorable personnel action with respect to any person;

shall be punished as a court-martial may direct.".

SEC. 1051. EXTRATERRITORIAL APPLICATION OF CERTAIN OFFENSES.

Section 934 of title 10, United States Code (article 134 of the Uniform Code of Military Justice), is amended by adding at the end the following new sentence: "As used in the preceding sentence, the term 'crimes and offenses not capital' includes any conduct engaged in outside the United States, as defined in section 5 of title 18, that would constitute a crime or offense not capital if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of title 18.".

SEC. 1052. TABLE OF SECTIONS.

The table of sections at the beginning of subchapter X of chapter 47 of title 10, United States Code, is amended to read as follows:

"SUBCHAPTER X—PUNITIVE ARTICLES

"Sec.	Art.	
"877.	77.	Principals.
"878.	78.	Accessory after the fact.
"879.	79.	Conviction of offense charged, lesser included offenses, and attempts.
"880.	80.	Attempts.
"881.	81.	Conspiracy.
"882.	82.	Soliciting commission of offenses.

"883.	83.	Malingering.
"884.	84.	Breach of medical quarantine.
"885.	85.	Desertion.
"886.	86.	Absence without leave.
"887.	87.	Missing movement; jumping from vessel.
"887a.	87a.	Resistance, flight, breach of arrest, and escape.
"887b.	87b.	Offenses against correctional custody and restriction.
"888.	88.	Contempt toward officials.
"889.	89.	Disrespect toward superior commissioned officer; assault of superior commissioned officer.
"890.	90.	Willfully disobeying superior commissioned officer.
"891.	91.	Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer.
"892.	92.	Failure to obey order or regulation.
"893.	93.	Cruelty and maltreatment.
"893a.	93a.	Prohibited activities with military recruit or trainee by person in position of special trust.
"894.	94.	Mutiny or sedition.
"895.	95.	Offenses by sentinel or lookout.
"895a.	95a.	Disrespect toward sentinel or lookout.
"896.	96.	Release of prisoner without authority; drinking with prisoner.
"897.	97.	Unlawful detention.
"898.	98.	Misconduct as prisoner.
"899.	99.	Misbehavior before the enemy.
"900.	100.	Subordinate compelling surrender.
"901.	101.	Improper use of countersign.
"902.	102.	Forcing a safeguard.
"903.	103.	Spies.
"903a.	103a.	Espionage.
"903b.	103b.	Aiding the enemy.
"904.	104.	Public records offenses.
"904a.	104a.	Fraudulent enlistment, appointment, or separation.
"904b.	104b.	Unlawful enlistment, appointment, or

		separation.
"905.	105.	Forgery.
"905a.	105a.	False or unauthorized pass offenses.
"906.	106.	Impersonation of officer, noncommissioned or petty officer, or agent or official
"906a.	106a.	Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button.
"907.	107.	False official statements; false swearing.
"907a.	107a.	Parole violation.
"908	108	Military property of United States—Loss, damage, destruction, or wrongful, disposition.
"908a.	108a.	Captured or abandoned property.
"909.	109.	Property other than military property of United States—Waste, spoilage, or destruction.
"909a.	109a.	Mail matter: wrongful taking, opening, etc.
"910.	110.	Improper hazarding of vessel or aircraft.
"911.	111.	Leaving scene of vehicle accident.
"912.	112.	Drunkenness and other incapacitation offenses.
"912a.	112a.	Wrongful use, possession, etc., of controlled substances.
"913.	113.	Drunken or reckless operation of vehicle, aircraft, or vessel.
"914.	114.	Endangerment offenses.
"915.	115.	Communicating threats.
"916.	116.	Riot or breach of peace.
"917.	117.	Provoking speeches or gestures.
"918.	118.	Murder.
"919.	119.	Manslaughter.
"919a.	119a.	Death or injury of an unborn child.
"919b.	119b.	Child endangerment.
"920.	120.	Rape and sexual assault generally.
"920a.	120a.	Mails: deposit of obscene matter.
"920b.	120b.	Rape and sexual assault of a child.
"920c.	120c.	Other sexual misconduct.
"921.	121.	Larceny and wrongful appropriation.
"921a.	121a.	Fraudulent use of credit cards, debit cards, and other access devices.
"921b.	121b.	False pretenses to obtain services.
"922.	122.	Robbery.

"922a.	122a.	Receiving stolen property.
"923.	123.	Offenses concerning Government computers.
"923a.	123a.	Making, drawing, or uttering check, draft, or order without sufficient funds.
"924.	124.	Frauds against the United States.
"924a.	124a.	Bribery.
"924b.	124b.	Graft.
"925.	125.	Kidnapping.
"926.	126.	Arson; burning property with intent to defraud.
"927.	127.	Extortion.
"928.	128.	Assault.
"928a.	128a.	Maiming.
"929.	129.	Burglary; unlawful entry.
"930.	130.	Stalking.
"931.	131.	Perjury.
"931a.	131a.	Subornation of perjury.
"931b.	131b.	Obstructing justice.
"931c.	131c.	Misprision of serious offense.
"931d.	131d.	Wrongful refusal to testify.
"931e.	131e.	Prevention of authorized seizure of property.
"931f.	131f.	Noncompliance with procedural rules.
"931g.	131g.	Wrongful interference with adverse administrative proceeding.
"932.	132.	Retaliation.
"933.	133.	Conduct unbecoming an officer and a gentleman.
"934.	134.	General article.".

TITLE XI—MISCELLANEOUS PROVISIONS

SEC. 1101. TECHNICAL AMENDMENT RELATING TO COURTS OF INQUIRY.

Section 935(c) of title 10, United States Code (article 135(c) of the Uniform Code of Military Justice), is amended—

(1) by striking "(c) Any person" and inserting "(c)(1) Any person";

(2) by designating the second and third sentences as paragraphs (2) and (3), respectively; and

(3) in paragraph (2), as so designated, by striking "subject to this chapter or employed by the Department of Defense" and inserting "who is (A) subject to this chapter, (B) employed by the Department of Defense, or (C) employed by the Department of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, and".

SEC. 1102. TECHNICAL AMENDMENT TO ARTICLE 136.

Section 936 of title 10, United States Code (article 136 of the Uniform Code of Military Justice), is amended by striking the last five words in the section heading.

SEC. 1103. ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE TO BE EXPLAINED TO OFFICERS UPON COMMISSIONING.

Section 937 of title 10, United States Code (article 137 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a), by striking "(a)(1) The sections of this title (articles of the Uniform Code of Military Justice)" and inserting "(a) ENLISTED MEMBERS.—(1) The sections (articles) of this chapter (the Uniform Code of Military Justice)";

(2) by striking subsection (b); and

(3) by inserting after subsection (a) the following new subsections:

"(b) OFFICERS.—(1) The sections (articles) of this chapter (the Uniform Code of Military Justice) specified in paragraph (2) shall be carefully explained to each officer at the time of (or within six months after)—

"(A) the initial entrance of the officer on active duty as an officer; or

"(B) the initial commissioning of the officer in a reserve component.

"(2) This subsection applies with respect to the sections (articles) specified in subsection (a)(3) and such other sections (articles) as the Secretary concerned may prescribe by regulation.

"(c) TRAINING FOR CERTAIN OFFICERS.—Under regulations prescribed by the Secretary concerned, officers with the authority to convene courts-martial or to impose non-judicial punishment shall receive periodic training regarding the purposes and administration of this chapter. Under regulations prescribed by the Secretary of Defense, officers assigned to duty in a combatant command, who have such authority, shall receive additional specialized training regarding the purposes and administration of this chapter.

"(d) AVAILABILITY AND MAINTENANCE OF TEXT.—The text of this chapter (the Uniform Code of Military Justice) and the text of the regulations prescribed by the President under this chapter shall be—

"(1) made available to a member on active duty or to a member of a reserve component, upon request by the member, for the member's personal examination; and

"(2) maintained by the Secretary of Defense in electronic formats that are updated periodically and made available on the Internet.".

SEC. 1104. MILITARY JUSTICE CASE MANAGEMENT; DATA COLLECTION AND ACCESSIBILITY.

(a) IN GENERAL.—Subchapter XI of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by adding at the end the following new section (article):

"§940a. Art. 140a. Case management; data collection and accessibility

"The Secretary of Defense shall prescribe uniform standards and criteria for conduct of each of the following functions at all stages of the military justice system, including pretrial, trial, post-trial, and appellate processes, using, insofar as practicable, the best practices of Federal and State courts:

"(1) Collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision making within the military justice system, and that enhances the quality of periodic reviews under section 946 of this title (article 146).

"(2) Case processing and management.

"(3) Timely, efficient, and accurate production and distribution of records of trial within the military justice system.

"(4) Facilitation of access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records.".

(b) EFFECTIVE DATES.—(1) Not later than 2 years after the date of the enactment of this Act, the Secretary of Defense shall carry out section 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice), as added by subsection (a).

(2) Not later than 4 years after the date of the enactment of this Act, the standards and criteria under section 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice), as added by subsection (a), shall take effect.

TITLE XII—MILITARY JUSTICE REVIEW PANEL AND ANNUAL REPORTS

SEC. 1201. MILITARY JUSTICE REVIEW PANEL.

Section 946 of title 10, United States Code (article 146 of the Uniform Code of Military Justice), is amended to read as follows:

"§946. Art. 146. Military Justice Review Panel

"(a) ESTABLISHMENT.—The Secretary of Defense shall establish a panel to conduct independent periodic reviews and assessments of the operation of this chapter. The panel shall be known as the 'Military Justice Review Panel', in this section referred to as the 'Panel'.

"(b) MEMBERS.—(1) The Panel shall be composed of thirteen members.

"(2) Each of the following shall select one member of the Panel:

"(A) The Secretary of Defense (in consultation with the Secretary of Homeland Security).

"(B) The Attorney General.

"(C) The Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps.

"(3) The Secretary of Defense shall select the remaining members of the Panel, taking into consideration recommendations made by each of the following:

"(A) The chairman and ranking minority member of the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

"(B) The Chief Justice of the United States.

"(C) The Chief Judge of the United States Court of Appeals for the Armed Forces.

"(c) QUALIFICATIONS OF MEMBERS.—The members of the Panel shall be appointed 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.

"(d) CHAIR.—The Secretary of Defense shall select the chair of the Panel from among the members.

"(e) TERM; VACANCIES.—Each member shall be appointed for a term of eight years, and no member may serve more than one term. Any vacancy shall be filled in the same manner as the original appointment.

"(f) REVIEWS AND REPORTS.—

"(1) INITIAL REVIEW OF RECENT AMENDMENTS TO UCMJ.—During fiscal year 2020, the Panel shall conduct an initial review and assessment of the implementation of the amendments made to this chapter during the preceding five years. In conducting the initial review and assessment, the Panel may review such other aspects of the operation of this chapter as the Panel considers appropriate.

"(2) PERIODIC COMPREHENSIVE REVIEWS.—During fiscal year 2024 and every eight years thereafter, the Panel shall conduct a comprehensive review and assessment of the operation of this chapter.

"(3) PERIODIC INTERIM REVIEWS.—During fiscal year 2028 and every eight years thereafter, the Panel shall conduct an interim review and assessment of such other aspects of the operation of this chapter as the Panel considers appropriate. In addition, at the request of the Secretary of Defense, the Panel may, at any time, review and assess other specific matters relating to the operation of this chapter.

"(4) REPORTS.—Not later than December 31 of each year during which the Panel conducts a review and assessment under this subsection, the Panel shall submit a report on the results, including the Panel's findings and recommendations, through the Secretary of Defense to the Committees on Armed Services of the Senate and the House of Representatives.

"(g) HEARINGS.—The Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Panel considers appropriate to carry out its duties under this section.

"(h) INFORMATION FROM FEDERAL AGENCIES.—Upon request of the chair of the Panel, a department or agency of the Federal Government shall provide

information that the Panel considers necessary to carry out its duties under this section.

"(i) ADMINISTRATIVE MATTERS.—

"(1) MEMBERS TO SERVE WITHOUT PAY.—Members of the Panel shall serve without pay, but shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, while away from their homes or regular places of business in the performance of services for the Panel.

"(2) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the Panel.

"(j) FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Panel.".

SEC. 1202. ANNUAL REPORTS.

Subchapter XII of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by adding at the end the following new section (article):

"§946a. Art. 146a. Annual reports

"(a) COURT OF APPEALS FOR THE ARMED FORCES.—Not later than December 31 of each year, the Court of Appeals for the Armed Forces shall submit a report that, with respect to the previous fiscal year, provides information on the number

and status of pending cases and such other matters as the Court considers appropriate regarding the operation of this chapter.

"(b) SERVICE REPORTS.—Not later than December 31 of each year, the Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps shall each submit a report, with respect to the preceding fiscal year, containing the following:

"(1) Data on the number and status of pending cases.

"(2) Information on the appellate review process, including—

"(A) information on compliance with processing time goals;

"(B) descriptions of the circumstances surrounding cases in which general or special court-martial convictions were (i) reversed because of command influence or denial of the right to speedy review or (ii) otherwise remitted because of loss of records of trial or other administrative deficiencies; and

"(C) an analysis of each case in which a provision of this chapter was held unconstitutional.

"(3)(A) An explanation of measures implemented by the armed force involved to ensure the ability of judge advocates—

"(i) to participate competently as trial counsel and defense counsel in cases under this chapter;

"(ii) to preside as military judges in cases under this chapter; and

"(iii) to perform the duties of Special Victims' Counsel, when so designated under section 1044e of this title.

"(B) The explanation under subparagraph (A) shall specifically identify the measures that focus on capital cases, national security cases, sexual assault cases, and proceedings of military commissions.

"(4) The independent views of each Judge Advocate General and of the Staff Judge Advocate to the Commandant of the Marine Corps as to the sufficiency of resources available within the respective armed forces, including total workforce, funding, training, and officer and enlisted grade structure, to capably perform military justice functions.

"(5) Such other matters regarding the operation of this chapter as may be appropriate.

"(c) SUBMISSION.—Each report under this section shall be submitted—

"(1) to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives; and

"(2) to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Homeland Security.".

TITLE XIII— CONFORMING AMENDMENTS AND EFFECTIVE DATES

SEC. 1301. AMENDMENTS TO UCMJ SUBCHAPTER TABLES OF SECTIONS.

The tables of sections for the specified subchapters of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), are amended as follows:

(1) The table of sections at the beginning of subchapter II is amended by striking the item relating to section 810 and inserting the following new item:

"810. 10. Restraint of persons charged.".

(2) The table of sections at the beginning of subchapter II, as amended by paragraph (1), is amended by striking the item relating to section 812 and inserting the following new item:

"812. 12. Prohibition of confinement of armed forces members with enemy prisoners and certain others.".

(3) The table of sections at the beginning of subchapter V is amended by striking the item relating to section 825a and inserting the following new item:

"825a. 25a. Number of court-martial members in capital cases.".

(4) The table of sections at the beginning of subchapter V, as amended by paragraph (3), is amended by inserting after the item relating to section 826 the following new item:

"826a. 26a. Military magistrates.".

(5) The table of sections at the beginning of subchapter V, as amended by paragraphs (3) and (4), is amended by striking the item relating to section 829 and inserting the following new item:

"829. 29. Assembly and impaneling of members; detail of new members and military judges.".

(6) The table of sections at the beginning of subchapter VI is amended by inserting after the item relating to section 830 the following new item:

"830a. 30a. Proceedings conducted before referral.".

(7) The table of sections at the beginning of subchapter VI, as amended by paragraph (6), is amended by striking the item relating to section 832 and inserting the following new item:

"832. 32. Preliminary hearing required before referral to general court-martial.".

(8) The table of sections at the beginning of subchapter VI, as amended by paragraphs (6) and (7), is amended by striking the item relating to section 833 and inserting the following new item:

"833. 33. Disposition guidance.".

(9) The table of sections at the beginning of subchapter VI, as amended by paragraphs (6), (7), and (8), is amended by striking the item relating to section 834 and inserting the following new item:

"834. 34. Advice to convening authority before referral for trial.".

(10) The table of sections at the beginning of subchapter VI, as amended by paragraphs (6), (7), (8), and (9), is amended by striking the item relating to section 835 and inserting the following new item:

"835. 35. Service of charges; commencement of trial.".

(11) The table of sections at the beginning of subchapter VII is amended by striking the item relating to section 847 and inserting the following new item:

"847. 47. Refusal of person not subject to chapter to appear, testify, or produce evidence.".

(12) The table of sections at the beginning of subchapter VII, as amended by paragraph (11), is amended by striking the item relating to section 848 and inserting the following new item:

"848. 48. Contempt.".

(13) The table of sections at the beginning of subchapter VII, as amended by paragraphs (11) and (12), is amended by striking the item relating to section 850 and inserting the following new item:

"850. 50. Admissibility of sworn testimony from records of courts of inquiry.".

(14) The table of sections at the beginning of subchapter VII, as amended by paragraphs (11), (12), and (13), is amended by striking the item relating to section 852 and inserting the following new item:

"852. 52. Votes required for conviction, sentencing, and other matters.".

(15) The table of sections at the beginning of subchapter VII, as amended by paragraphs (11), (12), (13), and (14), is amended by striking the item relating to section 853 and inserting the following new item:

"853. 53. Findings and sentencing.".

(16) The table of sections at the beginning of subchapter VIII is amended by striking the item relating to section 856 and inserting the following new item:

"856. 56. Sentencing.".

(17) The table of sections at the beginning of subchapter VIII, as amended by paragraph (16), is amended by striking the items relating to section 856a and 857a.

(18) The table of sections at the beginning of subchapter IX is amended by striking the item relating to section 860 and inserting the following new item:

"860. 60. Post-trial processing in general and special courts-martial.".

(19) The table of sections at the beginning of subchapter IX is amended by inserting after the item relating to section 860, as amended by paragraph (18), the following new items:

"860a. 60a. Limited authority to act on sentence in specified post-trial circumstances.
"860b. 60b. Post-trial actions in summary courts-martial and certain general and special courts-martial.
"860c. 60c. Entry of judgment.".

(20) The table of sections at the beginning of subchapter IX, as amended by paragraphs (18) and (19), is amended by striking the item relating to section 861 and inserting the following new item:

"861. 61. Waiver of right to appeal; withdrawal of appeal.".

(21) The table of sections at the beginning of subchapter IX, as amended by paragraphs (18), (19), and (20), is amended by striking the item relating to section 864 and inserting the following new item:

"864. 64. Judge advocate review of finding of guilty in summary court-martial.".

(22) The table of sections at the beginning of subchapter IX, as amended by paragraphs (18), (19), (20), and (21), is amended by striking the item relating to section 865 and inserting the following new item:

"865. 65. Transmittal and review of records.".

(23) The table of sections at the beginning of subchapter IX, as amended by paragraphs (18), (19), (20), (21), and (22), is amended by

striking the item relating to section 866 and inserting the following new item:

"866. 66. Courts of Criminal Appeals.".

(24) The table of sections at the beginning of subchapter IX, as amended by paragraphs (18), (19), (20), and (21), (22), and (23), is amended by striking the item relating to section 869 and inserting the following new item:

"869. 69. Review by Judge Advocate General.".

(25) The table of sections at the beginning of subchapter IX, as amended by paragraphs (18), (19), (20), (21), (22), (23), and (24), is amended by striking the item relating to section 871 and inserting the following new item:

"871. 71. [Repealed.]".

(26) The table of sections at the beginning of subchapter XI is amended by striking the item relating to section 936 and inserting the following new item:

"936. 136. Authority to administer oaths.".

(27) The table of sections at the beginning of subchapter XI, as amended by paragraph (26), is amended by inserting after the item relating to section 940 the following new item:

"940a. 140a. Case management; data collection and accessibility.".

(28) The table of sections at the beginning of subchapter XII is amended by striking the item relating to section 946 and inserting the following new items:

"946. 146. Military Justice Review Panel.
"946a. 146a. Annual reports.".

SEC. 1302. EFFECTIVE DATES.

(a) Except as otherwise provided in this Act, the amendments made by this Act shall take effect on the first day of the first calendar month that begins one year after the date of the enactment of this Act.

(b) The amendments made by this Act shall not apply to any case in which charges are referred to trial by court-martial before the effective date of such amendments. Proceedings in any such case shall be held in the same manner and with the same effect as if such amendments had not been enacted.

(c)(1)(A) The amendments made by title X shall not apply to any offense committed before the effective date of such amendments.

(B) Nothing in subparagraph (A) shall be construed to invalidate the prosecution of any offense committed before the effective date of such amendments.

(2) The regulations prescribing the authorized punishments for any offense committed before the effective date of the amendments made by title VIII shall

apply the authorized punishments for the offense, as in effect at the time the offense is committed.

Section D.
Section-by-Section Analysis

Military Justice Act of 2015

Section-by-Section Analysis

Section 1 contains the short title of the bill and a table of contents for the bill.

TITLE I—GENERAL PROVISIONS

Section 101 contains amendments to Article 1 of the UCMJ concerning the definitions of "military judge" and "judge advocate," as follows:

Section 101(a) would amend the definition of "military judge" in Article 1(10) to reflect the changes in Articles 16, 19, 26, and 30a regarding the detailing of military judges. *See* Sections 401, 403, 504, and 602, *infra.*

Section 101(b) would make a technical amendment to Article 1 to reflect the 2003 name change from the "Air Force Judge Advocate General's Department" to the "Air Force Judge Advocate General's Corps."

Section 102 would amend Article 2(a)(3) of the UCMJ to clarify jurisdiction over reserve component members performing periods of inactive-duty training. The amendment would provide commanders clearer authority to address misconduct that takes place during periods incident to inactive-duty training, and during intervals between inactive-duty training on consecutive days.

Section 103 would amend Article 6, which concerns the assignment for duty of judge advocates and the role of staff judge advocates and legal officers in military justice matters. Article 6(c) currently disqualifies military judges, trial and defense counsel, investigating officers, and panel members from later acting as a staff judge advocate or legal officer to any reviewing authority in a case in which they previously participated. The proposed amendments would expressly cover military magistrates when presiding over pre-referral proceedings under Article 30a, or when presiding, with the parties' consent, over cases referred to judge-alone special courts-martial, under Article 19. *See* Sections 403, 602, *infra.* The amendments also would revise the disqualification provision under Article 6(c) to include appellate judges and counsel (including victims' counsel) who have participated previously in the same case or in any proceeding before a military judge (to include a military magistrate designated under Articles 19 or 30a), preliminary hearing officer, or appellate court in the same case.

Section 104 would amend Article 6a of the UCMJ to align the statute with the changes proposed in Article 19 and the proposed new sections, Articles 26a and 30a, concerning military magistrates. *See* Sections 403, 507, and 602, *infra.* Article 6a directs the President to prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of military judges and military appellate judges to perform their judicial duties. The proposed amendment would add "military magistrate" to the list of officials whose fitness to perform duties shall be subject to investigation and disposition under regulations prescribed by

the President, consistent with federal law concerning the investigation and disposition of matters relating to the fitness of federal magistrate judges in the performance of their judicial duties.

Section 105 contains amendments related to the rights of victims under Article 6b of the UCMJ, as follows:

Section 105(a) would clarify the procedure for appointment of individuals to assume the rights of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, consistent with the similar provision in the Crime Victims' Rights Act. This change would conform military law to federal civilian law with respect to the procedure for appointment of individuals to assume the rights of certain victims.

Section 105(b) would clarify the relationship between the rights provided to victims under the UCMJ and the exercise of disposition discretion under Articles 30 and 34, consistent with a similar provision in the Crime Victims' Rights Act concerning the exercise of prosecutorial discretion. This change would conform military law to federal civilian law with respect to the relationship between the rights of victims and the duties of government officials to investigate crimes and properly dispose of criminal offenses.

Section 105(c) would move the recently enacted provisions concerning defense counsel interviews of victims of sex-related offenses from Article 46(b) into Article 6b and would extend those provisions to victims of all offenses, consistent with related victims' rights provisions.

Implementing regulations would address a number of matters concerning the rights of victims under Article 6b, to include: the ability of victims to be heard on the plea, confinement, release, and sentencing (including through an unsworn statement); the victim's input on the disposition of offenses to the convening authority; the right to notice of proceedings and the release or escape of the accused; the right not to be excluded from proceedings absent a required showing; and the right to submit post-trial matters to the convening authority.

TITLE II—APPREHENSION AND RESTRAINT

Section 201 would amend Article 10 to conform the language of the statute to current practice and related statutory provisions concerning restraint of persons charged with offenses and the actions that must be taken by military commanders and convening authorities when persons subject to the Code are held for trial by court-martial. The amendments would clarify the general provisions concerning restraint under Article 10, and would incorporate into Article 10 the requirement under Article 33 for prompt forwarding of charges in cases involving pretrial confinement. The amendments would expand the requirement for prompt forwarding to cover special courts-martial as well as general courts-martial, and would require the establishment of prompt processing timeframes in the Manual for Courts-Martial. Implementing rules would address pre-referral review of confinement orders by military magistrates and military judges under the proposed Article 30a, as well as the requirements for prompt disposition of offenses by military commanders and convening authorities.

Section 202 would amend Article 12 to limit the prohibition on confinement of military members with foreign nationals to situations where the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war. Under current law, it is a violation of Article 12 if a military member is held in "immediate association" with enemy prisoners or foreign nationals who are not members of the armed forces. Under current practice, however, it is not uncommon for non-U.S. citizens to be held in the same civilian confinement facilities where our military members are held during periods of pretrial or post-trial confinement. This practice was not anticipated by the drafters of the UCMJ in 1949. The proposed amendment to Article 12 would maintain the current strict prohibition against confining military members in immediate association with enemy prisoners of war, while clarifying that the restrictions in Article 12 relating to confinement of military member with "foreign nationals" are limited to situations in which the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war. This change would ease the administrative burden placed on civilian confinement facilities that hold confined military members, and would prevent military members in these facilities from being isolated unnecessarily.

TITLE III—NON-JUDICIAL PUNISHMENT

Section 301 contains amendments concerning non-judicial punishment under Article 15. Non-judicial punishment under Article 15 provides commanders with a range of disciplinary measures for minor offenses to promote good order and discipline in the armed forces and correct deficiencies in servicemembers without the stigma of a court-martial conviction. Article 15, as amended, would retain the wide range of punishments available to commanders to address misconduct through non-judicial proceedings, while precluding punishment in the form of a diet consisting only of bread and water. Implementing rules would address several issues concerning the administration of non-judicial punishment under Article 15, including the standard of evidence at non-judicial punishment proceedings, the administrative consequences of non-judicial punishment for minor disciplinary offenses, and the circumstances qualifying for the "vessel exception."

TITLE IV—COURT-MARTIAL JURISDICTION

Section 401 contains amendments concerning courts-martial classifications under Article 16 of the UCMJ. Under current law, general courts-martial consist of a military judge and not less than five members in non-capital cases, or a military judge alone upon the election of the accused. Special courts-martial consist of not less than three members, a military judge and not less than three members, or a military judge alone upon the election of the accused. Because there is a variable number of members in each case, the number of votes required for a conviction under Article 52 can fluctuate from case to case without any guiding principle to ensure consistency. *See* Section 715, *infra* (discussing voting by the court-martial panel under Article 52). The proposed amendments seek to enhance military justice and improve the consistency of court-martial panel deliberations by establishing standard panel sizes: twelve members in capital general courts-martial, eight members in non-capital general courts-martial, and four members in special courts-martial. As amended, Article 16 would include references to Article 25a (addressing panel size in capital cases), Article 25(d) (addressing the initial detailing

of members by the convening authority), and Article 29 (addressing the impaneling of members and the impact of excusals on panel composition).

Article 16(c), as amended, would require a military judge to be detailed to all special courts-martial, reflecting current military practice and similar federal and state civilian practice. The amendments also would add the option of referral to a non-jury (judge-alone) special court-martial. Such a forum is common among civilian criminal jurisdictions. *See* 18 U.S.C. § 3559; Fed. R. Crim. P. 58(b)(2); *United States v. Merrick*, 459 F.2d 644 (4th Cir. 1972). Providing commanders with this option would generate greater efficiencies in the military justice system for the adjudication of low-level, misdemeanor-equivalent offenses. As provided in the proposed amendments to Article 19, punishments at this forum could include confinement and forfeitures limited to no more than six months and would not include a punitive discharge. In addition, a military magistrate designated by the detailed military judge could preside when authorized under service regulations and with the consent of the parties. *See* Section 403, *infra.* Implementing provisions in the Manual for Courts-Martial would establish limits on the types of offenses that could be referred for trial at this forum.

Section 402 would make conforming changes to Article 18 of the UCMJ to align the statute with the revised descriptions of types of courts-martial under Article 16. The amendments also would modify Article 18 to specify the sexual offenses (currently listed by cross-reference to Article 56(b)(2)) over which general courts-martial have exclusive jurisdiction. This would accommodate the proposal under Section 801, *infra*, to repeal Article 56(b) following the enactment of sentencing parameters under Article 56(d).

Section 403 would amend Article 19 to align the statute with proposed changes in Article 16 regarding the composition of special courts-martial. *See* Section 401, *supra.*

Section 404 would amend Article 20 to clarify the status of the summary court-martial as a non-criminal forum. In *Middendorf v. Henry*, 425 U.S. 25 (1976), the Supreme Court held that a summary court-martial does not constitute a criminal prosecution. Although a summary court-martial appropriately may result in administrative and personal consequences, it does not have the collateral consequences of a criminal conviction because it does not reflect a determination made by a judicial, criminal forum. The proposed amendment would clarify that, because of its non-judicial nature, a summary court-martial is not a "criminal prosecution," within the traditional due process understanding of a criminal prosecution (i.e., presided over by a judicial officer, and where the accused has a right to counsel) and that a finding of guilty at a summary court-martial does not constitute a "criminal conviction."

TITLE V—COMPOSITION OF COURTS-MARTIAL

Section 501 would make a technical amendment to Article 22 to reflect the current terminology for the title of an officer commanding a naval fleet, with no substantive changes.

Section 502 concerns the eligibility requirements for service on court-martial panels. The proposed amendments to Article 25 would expand the opportunity for service on a court-martial panel by permitting the detail of enlisted personnel as panel members without requiring a

specific request from the accused. As amended, Article 25 would contain the following provisions:

Article 25(c)(1) and (d)(1) would retain the statutory prohibition against detailing panel members junior in rank and grade to the accused, but the statutory prohibition against detailing enlisted panel members who are of the same unit as an enlisted accused would be eliminated. There is no such limitation on the detailing of officers from the same unit as the accused under current law. As such, current law provides an unnecessary distinction between enlisted members and officers. The amendments would eliminate this outmoded distinction, and rely instead on the well-developed procedures for voir dire and challenges to address any concerns about bias or conflicts—the same process that is used to address any issues involving officers from the same unit as the accused. This change would enhance the convening authority's ability to draw from a large pool of highly qualified members, thereby expanding the opportunity for courts-martial to reflect the input of the high caliber enlisted personnel in the modern armed forces.

Article 25(c)(2) would retain the option for the accused to request a panel with at least one-third enlisted members. In addition, it would grant the accused the option to request an all-officer panel, which is the default panel composition under current practice. The Article 25(d)(2) member-selection criteria (age, education, training, experience, length of service, and judicial temperament) would be retained to ensure that court-martial panels continue to be composed of the most highly qualified, eligible personnel. The statute's implementing rules would include appropriate adjustments to address requests for panels that include all officers or at least one-third enlisted representation.

Article 25(d)(3) would require that the convening authority detail a sufficient number of members for impanelment under the proposed amendments to Article 29. *See* Section 506, *infra.*

Section 503 would amend Article 25a to establish a standard panel size of twelve members in capital cases, consistent with the standard size for juries in federal civilian capital trials. Under current law, panels in capital courts-martial are composed of a variable number of members no fewer than twelve, which means that the number of members can vary from case to case without any guiding principle to ensure consistency. Under the statute, as amended, in the event a case becomes non-capital as a result of developments after referral but prior to impanelment, the case would proceed in accordance with the membership requirements under Articles 16 and 29. If the case becomes non-capital after twelve members have been impaneled, it would proceed with twelve members subject to the excusal provisions in Articles 29.

Section 504 contains amendments to Article 26 pertaining to the detailing and qualifications of military judges, as follows:

Section 504(a) would amend Article 26(a) to conform to the proposed amendments to Article 16 and to reflect current practice in which a military judge is detailed to every general and special court-martial.

Section 504(b) would amend Article 26(b) to provide that the Judge Advocates General certify officers to be military judges who are most qualified to serve by virtue of meeting

statutory criteria and through an evaluation of their individual education, training, experience, and judicial temperament.

Section 504(c) would amend Article 26(c) to provide for Manual provisions concerning minimum tour lengths for military judges. Implementing rules would enable the Services to apply appropriate exceptions to the minimum tour lengths.

Section 504(d) would add a new subsection (f) to Article 26 to expressly authorize cross-service detailing of military judges. Although such detailing has been addressed in the Rules for Courts-Martial, these amendments would provide clear statutory authority for this practice.

Section 504(e) would further amend Article 26 by adding a new subsection (g) to codify the position of chief trial judge. Under implementing regulations, the chief judge could detail subordinate military judges to particular cases, and carry out additional duties as directed by the Judge Advocates General or as identified in the UCMJ, MCM, and service regulations.

The proposed amendments to Article 26 also would remove the phrase "or his designee" from Article 26 in the three instances where it occurs. This change would conform the statute to current practice under the UCMJ, in which the Judge Advocate General has designated other officials to perform duties without express statutory reference to the ability to designate.

Section 505 would amend Article 27, which concerns the detailing of trial and defense counsel to courts-martial, prescribes minimum qualification requirements for counsel, and disqualifies persons who have acted as the investigating officer, military judge, or a court member from later acting as trial or defense counsel in the same case.

Section 505(1) would broaden the disqualification provision under Article 27(a)(2) to include appellate judges who have participated previously in the same case.

Section 505(2) would amend Article 27(b) to extend the qualification requirement to any assistant defense counsel detailed to a general court-martial.

Section 505(3) would amend Article 27(c)(1) by requiring any defense counsel or assistant defense counsel detailed to a special court-martial to be qualified under Article 27(b). Article 27(c)(2), as amended, would retain the authority for the Services to detail individuals such as law students preparing to become judge advocates to serve as trial counsel in special courts-martial and assistant trial counsel in both general and special courts-martial without a requirement for certification under Article 27(b), so long as such individuals are determined to be competent to perform such duties by the Judge Advocate General. These changes are consistent with current practice, applicable federal civilian practice, and with the proposed changes to Articles 16 and 26, which would require a military judge to preside at all special courts-marital.

Section 505(3) also would add a new subsection (d) to Article 27. The new provision would require, to the greatest extent practicable, in any capital case, at least one defense counsel shall be learned in the law applicable to capital cases, reflecting the standard applicable in capital cases tried in the Article III courts and before military commissions.

Section 506 contains amendments to Article 29 pertaining to the assembly, impaneling, and excusal of members, and the detailing of new court members and military judges. As amended, Article 29 would contain the following provisions:

Article 29(a) would clarify the function of assembly in general and special courts-martial with members, and the limited situations in which a member may be absent or excused after assembly of the court-martial.

Article 29(b)-(c) would require the military judge to impanel the number of members required under Articles 16 and 25a: twelve members in a capital case; eight members in a non-capital general court-martial; and four members in a special court-martial. The military judge would impanel any alternate members authorized by the convening authority in a specific case, and would then excuse any member who was detailed but not impaneled.

Article 29(d) would provide for the detail of new members if, as a result of excusals after the members have been impaneled, the membership on the panel is reduced below the following: twelve members in a capital general court-martial; six members in a non-capital general court-martial; and four members in a special court-martial. Because excusal of a member for good cause mid-trial is not a common occurrence, this provision should be used only in unusual situations. As under current law, the prohibition on further trial proceedings when the panel membership falls below the required number of members does not preclude sessions under Article 39.

Article 29(e) would address the detailing of a new military judge when the military judge is unable to proceed as a result of physical disability or otherwise.

Article 29(f) would establish the procedure for presenting the prior trial proceedings to the newly detailed members or judge. In addition to retaining the current procedure for reading a transcript of the prior proceedings, the amendment would permit the previously admitted evidence to be presented to the new members through play-back of a recording.

Section 507 would create a new section, Article 26a, which would set forth minimum qualifications under which the Judge Advocates General, in accordance with service regulations, could certify military magistrates who could preside over proceedings under Articles 19 and 30a when designated by the detailed military judge.

Under Article 26a(b), military magistrates also could be assigned to non-judicial duties if so authorized under regulations of the Secretary concerned. This provision recognizes that the services have programs through which qualified officers may be detailed to perform duties of a non-judicial nature—that is, duties that do not have to be performed by a military judge—such as issuing search authorizations or serving as a summary court-martial officer, preliminary hearing officer, or pretrial confinement review officer.

TITLE VI—PRE-TRIAL PROCEDURE

Section 601 would amend Article 30, which provides basic statutory requirements for the initial signing and swearing of criminal charges against a military accused, and for the disposition of charges and specifications by military commanders and convening authorities exercising various levels of disciplinary authority over persons subject to the Code. By reorganizing Article 30 into three subsections and removing the requirement for commanders to take "immediate steps" to dispose of charges and specifications, the amendments would improve the functionality of the statute and better align the statute's provisions with current practice.

Section 602 would create a new section, Article 30a, to authorize military judges to preside over certain pretrial issues that arise prior to referral of charges in a case. The authority under this section would extend only to issues: (1) that would be subject to post-referral review by a military judge at a general or special court-martial; and (2) that are designated expressly by the President as eligible for pre-referral review under this section. To the extent identified by the President in implementing regulations, judicial proceedings under this section could include matters currently reviewed in post-referral proceedings, such as search authorizations; requests for mental competency evaluations, individual military counsel, depositions, and subpoenas; review of pretrial confinement determinations; and enforcing victims' rights in pretrial proceedings under Article 6b. The rules prescribed by the President would set forth the procedures military judges should use under this section, and would limit the available remedies to those expressly identified by the President. Any pre-referral judicial consideration of these select issues would occur after an appropriate authority had the opportunity to take action to resolve them.

Article 30a(c) would allow the detailed military judge to designate a military magistrate to preside over the proceeding. The statute would provide for the creation of regulations by which military judges could formally review a military magistrate's rulings on pretrial matters. In addition to acting on pretrial matters, military magistrates also could preside over special court-martial cases referred as judge-alone trials, as proposed in Article 19, with the parties' consent. *See* Section 403, *supra.*

Section 603 would amend Article 32 to clarify current law concerning the requirement for and the conduct of preliminary hearings before referral of charges and specifications to general courts-martial for trial. The amendments would focus the preliminary hearing on an initial determination of probable cause, jurisdiction, and the form of the charges, and would provide for the production of evidence and the examination of witnesses to assist the preliminary hearing officer in making these determinations. In addition, the amendments would revise the requirement for a disposition recommendation—currently provided as a fourth, distinct purpose of the preliminary hearing—to focus the preliminary hearing officer more directly on providing a thorough analysis of the information developed at the hearing. The purpose of this analysis would be to inform the staff judge advocate's recommendation and the convening authority's ultimate disposition decision with respect to the charges and specifications in the case, rather than providing a disposition recommendation in summary form without supporting analysis. The report and the analysis contained within it would be advisory in nature and would be designed to assist the staff judge advocate and the convening authority. The analysis contained within the

report would not provide a basis for complaint or relief when in substantial compliance with the requirements of the amended Article 32. As amended, Article 32 would contain the following provisions:

Article 32(a) would state the issues for determination at the preliminary hearing: (1) whether or not the specification alleges an offense under the UCMJ; (2) whether or not there is probable cause to believe that the accused committed the offense charged; and (3) whether or not the convening authority has court-martial jurisdiction over the accused and over the offense.

Article 32(b) would retain and clarify current law concerning the qualifications of the preliminary hearing officer.

Article 32(c) would require the preliminary hearing officer's report to include an analysis of whether each specification alleges an offense; whether there is probable cause to believe the accused committed the offense; any necessary modifications to the form of the charges and specifications; the state of the evidence supporting the elements of each offense; a summary of witness testimony and documentary evidence; a statement regarding the availability and admissibility of evidence; additional information relevant to disposition of charges and specification under Articles 30 and 34; and a discussion of any uncharged offenses. The proposed amendments recognize that the primary responsibility for a disposition recommendation resides with the staff judge advocate under Article 34. Also, while not requiring the preliminary hearing officer to make a recommendation, the proposed legislation does not preclude the preliminary hearing officer from doing so, either when required by service regulations or by the convening authority in a particular case.

Article 32(c)(2) would provide the parties and any victim with the opportunity to submit additional information to the preliminary hearing officer for transmission for consideration by the convening authority with respect to disposition. The procedure for submission of additional information would be separate from the hearing, reflecting the broader range of information that may be pertinent to the exercise of disposition discretion. The implementing regulations would provide procedures for sealing or otherwise protecting sensitive or personal material in the additional information submitted by the parties or the victim.

Article 32(d)(3) would clarify that a victim's declination to participate in the Article 32 hearing "shall not serve as the sole basis for ordering a deposition" under Article 49. This change would ensure that a victim's declination under Article 32(d)(3) is not used to circumvent the limited purpose of depositions under Article 49: to preserve prospective witness testimony for use at trial, generally in cases where the prospective witness will be unavailable to testify in person. *See* Section 711, *infra.*

The proposed changes are based in part on a recognition that the convening authority's ultimate disposition decision depends on a broad range of factors relating to good order and discipline—of which the preliminary hearing officer may not be aware and which may not directly relate to the legal or factual strengths or weaknesses of the limited case as presented at the preliminary hearing—including those factors contained in the disposition guidance under the proposed new Article 33. In addition, consistent with the proposed amendments to Articles 46

and 47 (and as will be more fully developed in the Rules for Courts-Martial), the authority to issue pre-referral investigative subpoenas would be governed by a uniform policy that will apply throughout the process prior to referral, and would not be limited narrowly to Article 32 proceedings.

Section 604 contains a complete revision of Article 33. The current statute concerning forwarding of charges in general courts-martial when the accused is in confinement would be incorporated into the closely related provisions in Article 10. Article 33, as amended, would require the establishment and maintenance of non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under Articles 30 and 34. This disposition guidance would draw upon the Principles of Federal Prosecution in the United States Attorneys' Manual, with appropriate modifications to reflect the unique purposes and requirements of military law. In doing so, the proposed guidance would enhance the disposition decision-making process and better align military charging practice with the standards and principles applicable in most civilian jurisdictions. The proposed disposition guidance would be issued by the Department of Defense, and would be included in the Manual for Courts-Martial as an appendix.

Section 605 would amend Article 34, which concerns the relationship between the staff judge advocate and the convening authority in the disposition decision-making process in general court-martial cases. The section would amend Article 34 to clarify ambiguities in the language of the current statute, to require judge advocate consultation before referral of charges to special courts-martial, and to expressly tie the staff judge advocate's pre-referral disposition recommendation in general courts-martial to the "in the interest of justice and discipline" standard for disposition of charges and specifications under Article 30. As amended, Article 34 would contain the following provisions:

Article 34(a) would replace and clarify the provisions concerning staff judge advocate advice before referral to general courts-martial currently contained in Article 34(a)-(b). Article 34(a)(2) would expressly tie the staff judge advocate's disposition recommendation to the "in the interest of justice and discipline" disposition standard under Article 30.

Article 34(b) would require that convening authorities consult a judge advocate on relevant legal issues before referral of charges and specifications to special courts-martial for trial, consistent with current practice.

Article 34(c) would allow formal corrections to the charges and specifications to be made before referral in both general and special courts-martial.

Article 34(d) would define "referral," in the context of Article 34, to mean "the order of the convening authority that charges and specifications against an accused be tried by a specified court-martial," consistent with current implementing regulations.

The changes to Article 34 are intended to solidify and enhance the decision-making partnership between judge advocates and court-martial convening authorities, ensuring that the

interests of justice and discipline are well-considered and appropriately balanced in each individual case. Implementing regulations will address additional changes in the rules implementing Article 34, with particular focus on the content of advice with respect to the staff judge advocate's conclusion regarding probable cause and jurisdiction, and with respect to those matters in which the staff judge advocate disagrees with the conclusions of the preliminary hearing officer. Implementing regulations also would address the baseline requirements for pre-referral judge advocate consultation on relevant legal issues in special courts-martial.

Section 606 would amend Article 35, which requires the trial counsel to ensure that a copy of the charges and specifications is served upon the accused following referral of charges. Article 35 also provides the accused with the opportunity, in time of peace, to object to the commencement of trial until the completion of a statutory period following service of charges—three days for special courts-martial, and five days for general courts-martial. These requirements, consistent with similar procedural requirements in federal district court, would ensure that military accused receive sufficient notice of the charges upon which they are to be tried by court-martial, and sufficient time to prepare for trial with their defense counsel. The present statute contains ambiguities with respect to each of these statutory requirements. The proposed revision would address these ambiguities and make other clarifying and conforming changes, none of which alter the purposes of Article 35.

TITLE VII—TRIAL PROCEDURE

Section 701 would amend Article 38 to conform it to the proposed amendments in Article 27 concerning the requirement for all defense counsel in general and special courts-martial to be qualified under Article 27(b).

Section 702 would amend Article 39 to codify current practice, in which military judges preside at arraignments. The amendments also would conform the statute to the proposed amendments to Articles 16, 19, and 53 requiring military judges to be detailed to preside over and to sentence the accused in all non-capital general courts-martial and all special courts-martial.

Section 703 would make a technical amendment to Article 40 to clarify that "a summary court-martial" is the narrow exception to the general rule that the authority to grant continuances is vested solely in the military judge, with no substantive change to the law. This change would conform the statute to the proposed amendments to Articles 16 and 19 requiring military judges to be detailed to preside over all general and special courts-martial, and would better align military practice regarding continuances with federal civilian practice.

Section 704 would amend Article 41 to conform the statute to the changes proposed in Article 16 concerning standard panel sizes in general and special courts-martial and the elimination of special courts-martial without a military judge. The statute's implementing rules would address application of the "liberal grant mandate" with respect to "for cause" challenges by each party in a general or special court-martial. *See United States v. Smart*, 21 M.J. 15 (C.M.A. 1985) (addressing the importance of ensuring that the court-martial panel is composed of individuals with a fair and open mind).

Section 705 contains amendments to Article 43 pertaining to the statute of limitations for certain UCMJ offenses. The statute would be amended as follows:

Section 705(a) would extend the statute of limitations applicable to child abuse offenses under Article 43 from the current five years or the life of the child, whichever is longer, to ten years or the life of the child, whichever is longer, thereby aligning Article 43(b)(2)(A) with 18 U.S.C. § 3283 (Offenses against children).

Section 705(b) would create a new subsection (h), extending the statute of limitations for Article 83 (fraudulent enlistment) cases from five years, as it currently stands, to (1) the length of the enlistment, in the case of enlisted members; (2) the length of the appointment, in the case of officers; or (3) five years, whichever is longer.

Section 705(c) would create a new subsection (i), extending the statute of limitations until a period of time following the implication of an identified person by DNA testing that is equal to the otherwise applicable limitations period.

Section 705(d) contains conforming amendments based on the proposed realignment of the punitive articles.

Section 705(e) establishes the applicability of the amendments made by subsections (a), (b), (c), and (d) to the prosecution of any offense committed before, on, or after the date of the enactment of the statute if the applicable limitations period has not yet expired.

Section 706 would amend Article 44 (Former jeopardy) to align the military more closely with federal civilian standards concerning double jeopardy.

Section 707 contains amendments to Article 45 concerning the pleas of the accused.

Section 707(a) would amend Article 45(b) to permit an accused to plead guilty in a capital case when the death penalty is not a mandatorily prescribed punishment. It would further amend the statute to conform to the proposed changes in Articles 16 and 19 to require a military judge to be detailed to all general and special courts-martial, and to eliminate the unnecessary requirement under current law for members to enter a finding of guilty where the military judge has already accepted the accused's guilty plea.

Section 707(b) would codify a harmless error rule in a new subsection (c) of Article 45. The proposed language is adapted from Fed. R. Crim. P. 11(h), using the language of Article 59(a) by substituting the phrase "materially prejudice the substantial rights of the accused" for the phrase "affects" substantial rights. *See* Article 59(a) ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."); *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (describing Article 59(a) as the military counterpart to Fed. R. Crim. P. 52(a)). These changes would reflect federal practice and procedure with respect to harmless error and plain error review, while recognizing the unique aspects of military practice.

The proposed amendments to Article 45 aim to improve the efficiency and effectiveness of appellate review of unconditional guilty pleas, while also preserving the unique procedural protections in the military system to ensure a guilty plea is voluntary, knowing, and intelligent. The amendments fit within the larger goal of encouraging error correction at the trial stage and would make no change to the responsibilities of the military judge under Article 45(a). The changes seek to eliminate the sanction of reversal for harmless errors, and would conform the statute to the proposed changes in Article 66 (replacing automatic review in non-capital cases with review based upon the accused's right to file an appeal). Subsection (c) addresses only harmless error. Implementing rules will prescribe plain error review for matters not properly preserved at trial. The addition of subsection (c) reflects the specific structure of Article 45, and is not intended to disturb the longstanding application of standards of review, including a harmless error test, to other aspects of the Code that are not accompanied by a statutory standard of review.

Section 708 contains several amendments to Article 46 pertaining to the opportunity to obtain witnesses and other evidence and the use of subpoenas and other process for courts-martial and for investigative purposes. Currently, Article 46 states only that process issued in "court-martial cases" for witnesses and evidence shall be similar to process issued in federal district court, with no explicit subpoena authority provided, and with no distinction made between different types of proceedings under the UCMJ and the different authorities for subpoenaing witnesses and evidence at different stages in the court-martial process. The proposed changes would maintain and enhance the core features of Article 46, while strengthening the relationships among related provisions in Articles 46, 47, and 49.

Section 708(a) would revise Article 46 as follows:

Article 46(a) would be amended to clarify the provisions governing the opportunity to obtain witnesses and other evidence in cases referred to trial by court-martial.

The limitations and conditions on defense counsel interviews of victims of sex-related offenses currently in Article 46(b) would be moved to Article 6b and expanded to cover all crime victims, consistent with related victims' rights provisions under that statute.

Article 46(b) would restate the current provisions of Article 46(c).

Article 46(c) would clarify current law concerning the issuance of subpoenas or other process to compel witnesses to appear and testify before a court-martial, military commission, court of inquiry, or other court or board, or at a deposition under Article 49.

Article 46(d) would provide for subpoenas to compel the production of evidence before a court-martial, military commission, court of inquiry, or other court or board, or at a deposition under Article 49. It would also include an additional paragraph providing authority to issue subpoenas duces tecum for investigations of offenses under the UCMJ, if authorized by a general court-martial convening authority. This provision would enhance the government's ability to issue investigative subpoenas prior to trial, consistent with federal and state practice, and would

replace the provision currently contained in Article 47(a)(1) concerning the issuance of subpoenas duces tecum for Article 32 preliminary hearings. In addition, Article 46(d) would authorize military judges to issue warrants or court orders for information pertaining to stored electronic communications in the same manner as U.S. district court judges under the Stored Communications Act (Chapter 121, Title 18) subject to limitations prescribed by the President. This new provision would ensure military criminal investigative organizations and military prosecutors have access to electronic evidence during the investigative stages of court-martial cases, similar to their federal counterparts, and under the same limitations and conditions applicable in federal district court.

Article 46(e) would add a new subsection to provide explicit authority for military judges to modify, quash, or order compliance with subpoenas before and after referral of charges.

Section 708(b) would make conforming amendments to 18 U.S.C. §§ 2703 and 2711(3) to include process issued in court-martial proceedings.

Section 709 contains amendments to Article 47, which provides for criminal prosecution in U.S. district court of civilians who fail to comply with military subpoenas issued under Article 46. The amendments would retain current law under Article 47(a), while updating and clarifying the statute's provisions and the relationship between Articles 46 and 47.

Section 710 would amend Article 48, which provides statutory authority for the punishment of acts of contempt and violations of court orders and rules in courts-martial and other proceedings under the UCMJ. In 2011, Congress made significant amendments to Article 48 that provided a more direct means for military judges to enforce court orders and military subpoenas, and better aligned the contempt authority and procedures in military courts with those in federal district courts. However, the language of the statute as amended is ambiguous with respect to the contempt power of judges serving on the Court of Appeals for the Armed Forces and the military Courts of Criminal Appeals.

Section 710(a) would clarify the recent amendments to Article 48 by defining the judicial officers who may exercise the contempt authority to include judges of the Court of Appeals for the Armed Forces and the Courts of Criminal Appeals; military judges detailed to courts-martial, provost courts, military commissions, or any other proceeding under the UCMJ (including the proposed Article 30a proceedings); military magistrates designated under Articles 19 or 30a; commissioned officers detailed as summary courts-martial; and presidents of courts of inquiry.

Section 710(b) would transfer the review function for contempt punishments issued by military and appellate judges from the convening authority to the appropriate appellate court. This change would strengthen the contempt power and would ensure that persons held in contempt of court by military judges and appellate judges—particularly civilian attorneys and witnesses—are afforded a fair appellate review process, comparable to the review process applicable in civilian criminal courts and appellate courts across the country. The convening authority's review function would be retained for contempt punishments issued by summary courts-martial and courts of inquiry.

Section 711 contains a complete revision of Article 49. Article 49 provides statutory authority for the taking of depositions by the parties of a court-martial; it also places statutory restrictions on the conduct of depositions and on their use as a substitute for live witness testimony at trial. Consistent with Article 36, the proposed amendments would conform Article 49's substantive provisions, to the extent practicable, to the procedures and principles of law pertaining to depositions applicable in federal district court. These amendments also would conform the statute to the Confrontation Clause. As revised, Article 49 would contain the following provisions:

Article 49(a) would better align military deposition practice under Article 49 with federal and state deposition practice, and with the authority to issue and enforce subpoenas for witnesses under Articles 46 and 47, by ensuring that depositions of prospective witnesses will generally be ordered only when it is likely that the witness's trial testimony otherwise would be lost. By eliminating the reference to Article 32 preliminary hearings, the proposed amendments would ensure that depositions are permitted only for the purpose of preserving testimony for trial, not for pretrial discovery purposes. As amended, subsection (a) would conform to the proposed Article 30a concerning pre-referral duties of military judges. As amended, the authority to order depositions could be exercised by military judges detailed under Articles 26 or 30a (consistent with the definition of "military judge" proposed under Article 1(10)), as well as military magistrates designated by the detailed military judge under Articles 19 or 30a.

Article 49(a)(3) would replace and clarify the requirement for notice currently contained in subsection (b).

Article 49(a)(4) would replace and update subsection (c), providing greater consistency between Articles 49 and 32 with respect to the qualifications of deposition officers and preliminary hearing officers.

Article 49(b) would replace and update the counsel provisions currently contained in subsection (a), ensuring that the parties at a deposition will be represented by counsel detailed in the same manner as under Articles 27 and 38.

Article 49(c) would update and replace obsolete provisions in subsection (d) concerning the admissibility of depositions as evidence at trial. These changes would reflect the adoption of the Military Rules of Evidence in 1980 and provide greater consistency with federal civilian deposition practice.

Article 49(d) would update and replace subsections (e) and (f) to clarify the prohibition on the use of depositions in capital cases by the government.

Section 712 would amend Article 50 to update the statute to permit sworn testimony from a court of inquiry to be played from an audiovisual recording if the deposed witness is unavailable at trial and the evidence is otherwise admissible under the rules of evidence.

Section 713 would amend Article 50a to conform the statute to the proposed changes in Article 16 to eliminate special courts-martial without a military judge.

Section 714 would amend Article 51, which concerns voting by members of a court-martial and rulings by military judges. These amendments would remove statutory references to courts-martial without a military judge, reflecting the proposed amendments to Article 16 to require the detailing of a military judge in all general and special courts-martial. The amendments would retain current law and procedures for voting on the findings and sentence, and for rulings by the military judge, other than those aspects of Article 51 and the implementing rules which specifically concern courts-martial without a detailed military judge.

Section 715 would amend Article 52 concerning the number of votes required for the findings in members cases, and for the findings and sentence in capital cases. Under current law, because the requirement for a two-thirds vote on the findings (and on most sentences) in Article 52 establishes a floor, not a fixed requirement, none of the parties or the public knows at the outset of a court-martial how many votes will be required for a conviction. The percentage required for a conviction and for a specific sentence can be affected significantly by the number of members detailed to a court-martial and the number of members removed through excusal, challenges for cause, and peremptory challenges. As a result, it is not unusual to see variations in voting requirements ranging from 67 percent to 80 percent of the members of the court-martial panel. The proposed amendments, in conjunction with the proposal for standard panel sizes under Article 16, would standardize the voting requirement in each type of court-martial at three-fourths (75 percent) in non-capital members cases, and unanimous on the findings and the sentence in capital cases. The proposal also would make conforming changes to align Article 52 with the proposed changes in Articles 16, 25a, and 53 with respect to capital cases and judge-alone sentencing. Implementing rules would address the procedures concerning voting on sentences of death, life without the possibility of parole, and other lawful sentences.

Section 716 would amend Article 53 to provide for judicial sentencing in all general and special courts-martial. This change would better align military sentencing practice with federal civilian sentencing practice, as well as the practice in the majority of state jurisdictions. Judicial sentencing would create the opportunity for greater uniformity and consistency in court-martial sentences, enhanced efficiency and cost-savings, and would facilitate further reforms in military sentencing practices and procedures.

Article 53(c), as amended, would provide that, for capital offenses, members will determine whether the sentence shall include death, life without eligibility for parole, or such other lesser punishments as may be determined by the military judge. The military judge would sentence the accused in accordance with the determination of the members, including to other lesser punishments in accordance with regulations prescribed by the President.

Implementing rules would address procedures for sentencing proceedings and sentence determination in the context of judge-alone sentencing, including with respect to: releasing the members, subject to recall, after the findings are announced in a non-capital case; the admissibility of sentencing information offered by the parties and the grounds for objection to such information; the rights of victims to participate in sentencing proceedings; the use of victim impact statements during sentencing; the duties of trial and defense counsel before and during the proceeding; the rules and factors to guide military judges in their sentence determinations

(similar to 18 U.S.C. § 3553(a)); and rules pertaining to appellate review of military judge sentence determinations and findings.

Section 717 would create a new section, Article 53a, transferring the statutory authority for plea agreements from Article 60 to the new Article 53a. The proposed new article would provide basic rules for: (1) the construction and negotiation of plea agreements concerning the charge and the sentence; (2) allowing the convening authority and the accused to enter into binding agreements regarding the sentence that may be adjudged at a court-martial; and (3) the military judge's determination of whether to accept a proposed plea agreement in a general or special court-martial. Under the amended statute, the military judge would review the entire agreement, including any negotiated sentence agreement, prior to determining whether to accept the agreement and adjudge the sentence. If the agreement contains a negotiated sentencing range, the military judge would enter a sentence within that range unless the judge determines that the negotiated sentencing range is plainly unreasonable or otherwise unlawful. The new statute would preserve current law pertaining to plea agreements involving offenses with mandatory minimum sentences.

Implementing rules for the new Article 53a would address a number of issues concerning plea agreements, including the structure and procedures for sentence agreements; the opportunity for negotiated sentencing ranges; a requirement that, if the military judge determines that a sentence agreement is plainly unreasonable, the judge must set forth on the record the findings of fact and conclusions of law supporting that determination; plea agreements in summary courts-martial; and the role of the victim in plea agreements, with particular emphasis on the rules structuring the convening authority's decision-making with respect to acceptance of plea agreements proposed by the defense.

Section 718 would amend Article 54, which provides the basic rules and procedures for producing, authenticating, and distributing records of proceedings in general, special, and summary courts-martial. The amendments would facilitate the use of modern court reporting technology in the recording, certification, and distribution of court-martial records. The use of this technology would streamline preparation and distribution of the record of trial in light of recent amendments that reduce or eliminate post-trial proceedings under Article 60. In addition, the proposed amendments would increase the availability of court-martial records to victims of crime.

The amendments to Article 54 would: (1) require the court reporter, instead of the military judge or the prosecutor, to certify the record of trial; (2) require a complete record of trial in any general or special court-martial if the sentence includes death, dismissal, discharge, or confinement or forfeitures for more than six months; and (3) provide all victims who testify at a court-martial with access to records of trial, eliminating the distinction in the statute that currently provides such access only to victims of sex-related offenses under Article 120.

Changes in the rules implementing Article 54 would address the opportunity to file a motion to correct the record, utilizing procedures similar to those available in the federal civilian courts. Implementing rules also would address the rules for providing a "complete" record of trial, including the circumstances under which a written transcript will be prepared and the procedures

for preparing a written transcript. In the near term, the statute's implementing rules would provide for the availability of a written transcript during the appellate process in the types of cases in which a written transcript is available under current military practice, subject to rules similar to the federal rule for requesting all or part of a transcript. Implementing rules also would address the potential in the future for use in the appellate process of electronic transcriptions to the extent that the development and use of such technology for legal proceedings provides for increasing comfort and familiarity with electronic formats.

TITLE VIII—SENTENCES

Section 801 would amend Article 56, which provides the authority for the President to set maximum punishments for UCMJ violations, subject to any maximum or mandatory punishments Congress has established in the UCMJ. The President has exercised this authority in two ways: (1) by limiting the types of punishments that may be imposed at a court-martial to those specified in R.C.M. 1003; and (2) by limiting the amount of confinement, forfeitures, or the type of punitive discharge that may be imposed at a court-martial.

The proposed amendments would align court-martial sentencing procedures with the proposal for judicial sentencing in all non-capital general and special courts-martial. *See* Section 716, *supra.* The amendments are designed to be phased in over a four-year period to enable military sentencing to benefit from the experiences of state and federal civilian courts in sentencing reform, while adapting the lessons learned from those experiences to the special needs of the military justice system. The amendments also would increase the transparency of military sentencing practices and provide additional structure in sentencing, while retaining flexibility in determining an appropriate sentence for the individual.

The amendments proposed in Section 801 would take effect in two phases, as follows:

Phase One. The first phase would begin on the date the legislation is enacted. During the first phase, the Military Sentencing Parameters and Criteria Board (the Board) would begin the process of gathering sentencing data for the development of sentencing parameters and criteria. During this Phase, the President would establish interim guidance, to become effective upon the effective date of the legislation. The Board would be primarily responsible for developing the interim guidance. In this phase, judicial sentencing in all non-capital general and special courts-martial would take effect. *See* Section 716, *supra.* Under judicial sentencing, the current adversarial sentencing process (which utilizes many of the procedural and evidentiary rules applicable during findings) would be modified to more closely align with the process used in civilian courts, in which all relevant information is presented to aid the judge in fashioning an appropriate sentence. The sentencing process during the first phase also would replace the current requirement to adjudge a unitary sentence, in which a single sentence is adjudged for all offenses for which there has been a finding of guilty without any explanation as to how the sentence was reached or which portions of the sentence are attributable to which offense.

In the first phase, which would be completed within four years after the legislation is enacted, the Board also would develop sentencing parameters and criteria to replace the interim guidance. The sentencing parameters and criteria proposed by the Board would be subject to

approval by the President. As in many civilian courts, a sentencing parameter for an offense would set a boundary on the judge's discretion, subject to a departure for case specific reasons set forth by the judge in the record. Sentencing parameters would not be required for those offenses for which it would be impracticable to set a parameter, such as unique military offenses that vary greatly in seriousness depending on the context. The Board also would establish sentencing criteria—factors that a judge must consider when sentencing a case, but that do not propose a specific punishment. The implementation of parameters and criteria would draw upon best practices at the federal and state level, and would replace the current practice of adjudging sentences with little or no guidance. Until the parameters and criteria are implemented, the sentencing process would utilize the procedures set forth in Phase One.

Phase Two. In the second phase, which would begin four years after the legislation is enacted, the parameters and criteria approved by the President would apply to sentencing proceedings for general and special courts-martial. Military judges would utilize the parameters and criteria in conjunction with the segmented sentencing procedures and other changes in the sentencing process developed during Phase One. Military judges would retain discretion to sentence outside parameters in order to fashion individualized sentences, subject to a requirement to set forth on the record reasons for any departure.

Finally, once sentencing parameters are in place, this proposal would authorize government appeals of sentences and eliminate the requirement for mandatory minimum discharges. By addressing sentencing discretion through the use of parameters, Article 56 would reduce the need for rigid mandatory minimum sentences.

Section 801(a) would amend Article 56 in its entirety. As amended, Article 56 would contain the following provisions:

Article 56(a)-(b) would retain current law regarding maximum and minimum sentences, subject to Section 801(d), *infra.*

Article 56(c)(1) would enumerate factors the court-martial would be required to consider before imposing a sentence. The proposed factors are adapted from 18 U.S.C. § 3553(a).

Article 56(c)(2) would require the military judge to determine a sentence in accordance with the sentencing parameters established by the President. Consistent with federal civilian practice, a military judge could sentence outside the parameter based upon written factual findings that such a sentence is justified. This paragraph would not apply to summary courts-martial.

Article 56(c)(3) would require the military judge to consider sentencing criteria established by the President when determining a sentence. The sentencing criteria would provide factors for the military judge to consider, and would not direct any specific punishment. This paragraph would not apply to summary courts-martial.

Article 56(c)(4) would require the military judge to determine the appropriate amount of fine and confinement for each separate offense of which the accused is found guilty. The assignment of a specific sentence for each offense is designed to provide additional transparency to the

parties and the public and advance the purposes of sentencing. With respect to all other punishments (discharges, reductions, forfeitures, and similar unique military punishments), the current practice of awarding a single sentence for all offenses would be retained, as these punishments are not readily segmented. To ensure the accused is not punished twice for what is substantially one offense, the military judge would be required to determine whether periods of confinement should run concurrently or consecutively. The requirement to determine whether sentences should run concurrently or consecutively is in the statute, and the process for making the determination is left to the Rules for Courts-Martial. A sentence to confinement for one offense that runs concurrently with the sentence to confinement of another offense would not increase the total period of confinement for purposes of determining whether the period of confinement satisfies a jurisdictional predicate (i.e., confinement for more than six months) for an appeal as of right to the Court of Criminal Appeals under proposed revisions to Article 66(b)(1)(A). In general, this subsection envisions requiring military judges to impose concurrent sentences when the offenses involve the same act, transaction, or criminal objective and the same victim. This would be similar to the rules governing the grouping of offenses under § 3D1.2(a-b) of the United States Sentencing Commission Guidelines Manual. In other circumstances, the decision to have sentences run concurrently would be left to the discretion of the judge, informed by consideration of the purposes of sentencing. This paragraph would not apply to summary courts-martial.

Article 56(c)(5) would provide that sentencing parameters and criteria do not apply to the issue of whether an offense should be punished by death.

Article 56(c)(6) would incorporate Article 56a (Sentence of confinement for life without eligibility for parole) into Article 56 without substantive change. Article 56a would be repealed. *See* Section 801(b), *infra*.

Article 56(d)(1) would require the President to establish sentencing parameters and criteria.

Article 56(d)(2) would establish the requirements for sentencing parameters. Except for unique military offenses, all violations of the UCMJ would be assigned to between seven and twelve offense categories. Each offense category would specify a range of confinement and may include an appropriate range for other punishments such as discharges. The subsection also would prescribe the minimum requirements for each sentencing parameter.

Article 56(d)(3) defines sentencing criteria as factors that the military judge must consider when sentencing. Under the proposal, there are two types of sentencing criteria: criteria that inform how to punish a violation of a specific offense (e.g., factors that aggravate or mitigate the harm of a military offense); and criteria that inform when certain punishments may be appropriate or inappropriate (e.g., factors that inform when a reduction or discharge may be appropriate).

Article 56(d)(4) would create the Military Sentencing Parameters and Criteria Board to develop parameters and criteria. The Board would be created within the Department of Defense, and would be composed of the chief trial judge of each service, subject to the opportunity to detail alternate members when required by circumstances applicable to the Navy, Marine Corps,

and Coast Guard. The chief trial judges would be detailed by the Judge Advocate General of each military Service and the Secretary of Defense would select a chair and vice-chair of the Board. Service on the Board would be a collateral duty. The Board would have non-voting members designated by the Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, and the General Counsel of the Department of Defense. The Department of Defense would provide full-time staff to assist the Board.

Article 56(d)(5) would prescribe the duties of the Board. The Board would be required to develop sentencing parameters, criteria, and sentencing rules for submission to the President. The Board also could promulgate non-binding policies on sentencing. In fulfilling its duties, the Board would be required to consult with commanders, enlisted leaders, practitioners, and others. The Board would be required to establish two advisory groups. The first advisory group would be composed of senior officer and enlisted members who provide guidance on the effectiveness of military justice on discipline. The second advisory group would be composed of military justice practitioners.

Article 56(e) would provide for limited appeal of sentences by the government. This right would be available only after the establishment of sentencing parameters. Similar to 18 U.S.C. § 3742(b)(4), the government would be required to obtain the approval of the Judge Advocate General before filing an appeal on the sentence. Finally, such appeals would be limited to whether the sentence is illegal, calculated incorrectly, or is plainly unreasonable. In determining whether a sentence is plainly unreasonable, a Court of Criminal Appeals could, but would not be required to, presume that a sentence within a sentencing parameter is reasonable. The core of the subsection is taken from 18 U.S.C. § 3742, modified for military practice and reflecting the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005).

Section 801(b) is a conforming amendment.

Section 801(c) would require the President to prescribe the regulations for sentencing parameters and criteria required by Article 56(d), as amended, not later than four years after enactment of the bill. It also would require the President to prescribe interim guidance.

Section 801(d) would repeal Article 56(b) and Article 53a(d) upon the taking effect of sentencing parameters for the offenses specified in Article 56(b)(2) that have mandatory minimum punishments. *See also* Section 717, *supra.*

Section 802(a) would consolidate Articles 57, 57a, and 71 into Article 57 (Effective date of sentences) to address in a single article the effective date for all punishments that could be adjudged at a court-martial. Article 57, as amended, would contain the following provisions:

Article 57(a) would establish when the punishment adjudged at a court-martial sentence becomes effective. The proposed subsection combines portions of Articles 57, 57a, and 71, and removes the distinction between when a sentence becomes effective and when it is ordered executed. With the exception of death and punitive discharges, sentences would be effective by operation of law without any additional approval upon entry of judgment. This is a conforming

change to the proposed changes in Article 60 (Post-trial processing in general and special courts-martial) and the proposed enactment of Articles 60a (Limited authority to act on sentence in specified post-trial circumstances), 60b (Post-trial actions in summary courts-martial and certain general and special courts-martial), and 60c (Entry of judgment).

Article 57(a)(1) would address when forfeitures and reduction become effective. The first sentence of this paragraph is taken without modification from Article 57(a)(3). The remainder of this paragraph is taken from Article 57(a)(1).

Article 57(a)(2) is taken, without change, from Article 57(b). Article 57(b) would be modified to apply only to summary courts-martial.

Article 57(a)(3) is taken, without change, from Article 71(a).

Article 57(a)(4) is taken, without change, from Article 71(b).

Article 57(a)(5) is taken from Article 71(c)(1) with modification. The provisions of Article 71(c)(1) regarding waiver or withdrawal of an appeal and the definition of what constitutes a final appeal are consolidated in subsection (c).

Article 57(a)(6) is taken from Article 57(c) with modification. As a conforming change to the proposal for Article 60c, in general and special courts-martial "entry of judgment" is substituted for "on the date ordered executed." *See* Section 904, *infra.* For consistency, a summary court-martial sentence would become effective when approved by the convening authority.

Article 57(b)(1) is a combination of Article 57(a)(2), authorizing the deferment of forfeitures and reduction, and Article 57a(a), authorizing the deferment of confinement. The definition of convening authority is taken from Article 57a(a). As a conforming change to the proposal for Article 60c, the deferment of a sentence would terminate upon entry of judgment.

Article 57(b)(2)-(4) are taken from Article 57a(b)(1)-(3), with no substantive changes.

Article 57(b)(5) is taken from Article 57a(c) with conforming changes to reflect the proposed new section, Article 60c (Entry of judgment). *See* Section 904, *infra.*

Article 57(c)(1) is taken from Article 71(c)(1)-(2) with modification to reflect the proposal for an appeal of right. Under the revised language, appellate review would be complete when an Article 65 review is finished, or when the Court of Criminal Appeals has reviewed the case and any petition to a higher court for review has been addressed, or the time to petition higher courts has expired. Paragraph (2) incorporates the current provision in Article 71(c)(1) that the completion of appellate review is a final determination on the legality of the proceedings.

Section 802(b) contains conforming amendments to strike Articles 57a and 71 and an additional conforming amendment to Article 58b.

Section 803 would amend Article 58a (Sentences: reduction in enlisted grade upon approval), which provides a mechanism for the individual services to order a reduction of enlisted members to the grade of E-1 whenever the approved sentence of a court-martial includes a punitive discharge, confinement, or hard labor without confinement. The amendments would conform the statute to the changes proposed in post-trial procedure under Article 60 and the proposed Article 60c (Entry of judgment). *See* Section 904, *infra.*

Section 804 would sunset Article 58a after the enactment of sentencing parameters and criteria under Article 56. This sunset provision is consistent with the proposals for judge-alone sentencing under Article 53 and for sentencing parameters and criteria under Article 56. *See* Sections 716 and 801, *supra.* The sentencing parameters and criteria proposed in Section 801 would include objective factors for the military judge to consider in determining whether a sentence should include a reduction in pay grade.

TITLE IX—POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL

Sections 901-904 concern post-trial processing and post-trial action by the convening authority. These processes are currently prescribed under Article 60 (Action by the convening authority). These sections would amend Article 60 of the UCMJ in its entirety.

Section 901 would amend Article 60 to provide for the distribution of the trial results and to authorize the filing of post-trial motions with the military judge in general and special courts-martial. The convening authority's role in post-trial processing would be moved to new Articles 60a and 60b. *See* Sections 902-903, *infra.* Article 60, as amended, would include the following provisions:

Article 60(a) would require the military judge to immediately enter into the record the Statement of Trial Results, consisting of the pleas of the accused, the findings and sentence of the court-martial, and any other information required by the President. The statute would require that copies be provided to the convening authority, the accused, and any victim of any offense. The statement of trial results would serve as the basis for the entry of judgment under Article 60c.

Article 60(b) would require the President to establish rules governing submission of post-trial motions to the military judge. The implementing rules would establish filing deadlines for the parties and provide explicit authority for the military judge and convening authority to direct post-trial hearings when necessary to address allegations of legal error. The authority to order post-trial hearings would replace the previous authority to order proceedings in revision. *See* Article 60(f)(1)-(2).

Section 902 would create a new section, Article 60a (Limited authority to act on sentence in specified post-trial circumstances), which would retain current limitations on the convening authority's post-trial actions in most general and special courts-martial, subject to a narrowly limited suspension authority under Article 60a(c) and a revised authority related to substantial assistance under Article 60a(d). Article 60a, as proposed, would contain the following provisions:

Article 60a(a)-(b) would retain and clarify existing limitations on the convening authority's post-trial actions in general and special courts-martial in which: (1) the maximum sentence of confinement for any offense is more than two years; (2) adjudged confinement exceeds six months; (3) the sentence includes dismissal or discharge; or (4) the accused is found guilty of designated sex-related offenses. Under current law, the convening authority in such cases is prohibited from modifying the findings of the court-martial, or reducing, commuting, or suspending a punishment of death, confinement of more than six months, or a punitive discharge.

Article 60a(c) would provide a limited suspension authority in specified circumstances. For the convening authority to exercise this authority, the military judge would be required to make a specific suspension recommendation in the Statement of Trial Results. The suspension authority under subsection (c) would be limited to punishments of confinement in excess of six months and punitive discharges.

Article 60a(d) would retain, with clarifying amendments, the key features of current law with respect to the convening authority's power to reduce the sentence of an accused who assists in the prosecution or investigation of another person. As amended, the President may prescribe rules providing for a convening authority to exercise this power after entry of judgment. This provision is designed to allow for the reduction of a sentence of an accused who provides substantial assistance in the prosecution of another person, even well after his own trial is over and appellate review is complete. The implementing rules will be modeled on Fed. R. Crim. P. 35(b).

Article 60a(e) would allow the accused and a victim of the offense to submit matters to the convening authority for consideration. The implementing rules would establish the timelines for submitting matters under this subsection and procedures for responding to submissions. The implementing rules also would require the accused and victim to have a copy or access to the recording of the open sessions of the court-martial and admitted unsealed exhibits.

Article 60a(f) would require the decision of the convening authority to be forwarded to the military judge. If the convening authority modified the sentence of the court-martial, the convening authority would be required to explain the reasons for the modification. An explanation for the convening authority's decision would only be required when the convening authority modifies the sentence. No approval of the findings or sentence would be required. The decision of the convening authority would be forwarded to the military judge, who would incorporate any change in the sentence into the entry of judgment. In a case where the accused provides substantial assistance under subsection (d) and a designated convening authority reduces the sentence of the accused after entry of judgment, the convening authority's action would be forwarded to the chief trial judge, who would be responsible for ensuring appropriate modification of the entry of judgment. Because a modification might happen during or after the completion of appellate review, the modified entry of judgment would be forwarded to the Judge Advocate General for appropriate action.

Section 903 would create a new section, Article 60b (Post-trial actions in summary courts-martial and certain general and special courts-martial). The new section would retain and clarify

the convening authority's post-trial authorities and responsibilities with respect to the findings and sentence of a court-martial not covered by subsection (a)(2) of new Article 60a. This post-trial authority would be available in summary courts-martial and a limited number of general and special courts-martial which, because of the offenses charged and the sentence adjudged, would not be covered under Article 60a. Consistent with existing law, the convening authority in such cases would be authorized to act on the findings and the sentence, and could order rehearings, subject to certain limitations. The procedural requirements under Article 60b, to include consideration of matters submitted by the accused and victim, would be the same as those provided in Article 60a. In summary courts-martial, the convening authority would be required to act on the sentence, and would have discretion to act on the findings, as under current law.

Section 904 would create a new section, Article 60c (Entry of judgment). The entry of judgment would require the military judge to enter the judgment of the court-martial into the record in all general and special courts-martial, and would mark the conclusion of trial proceedings. The judgment would reflect the Statement of Trial Results, any action by the convening authority on the findings or sentence, and any post-trial rulings by the military judge. The judgment also would indicate the time when the accused's case becomes eligible for direct appeal to a Court of Criminal Appeals under Article 66, or for review by the Judge Advocate General under Article 65. This requirement for an entry of judgment is modeled after Fed. R. Crim. P. 32(k). The findings and sentence of a summary court-martial, as modified by any post-trial action by the convening authority under Article 60b, would constitute the judgment of the court-martial.

Section 905 would amend Article 61, which provides that an accused may file a statement with the convening authority expressly waiving the right to appellate review under Article 66 or Article 69. The amendments would conform the statute to the changes proposed in Articles 60, 65, and 69 concerning post-trial processing. *See* Sections 901-904, *supra*; Sections 909, 913, *infra*.

Section 906 concerns government interlocutory appeals. Presently, Article 62 provides a limited basis for government interlocutory appeals. This section would amend Article 62 to better align interlocutory appeals in the military with federal civilian practice, by authorizing an appeal when, upon defense motion, the military judge sets aside a panel's finding of guilty because of legally insufficient evidence. Additionally, the amendments would better align Article 62 with the rule of construction applicable to 18 U.S.C. § 3731, by directing military courts to liberally construe the statute's provisions to effect its purposes. As amended, the authority for interlocutory appeals under Article 62 would be extended to all general and special courts-martial, which would replace the current limitation authorizing such appeals only if the offense at issue carries the potential for a punitive discharge.

Section 907 would amend Article 63 to remove the sentence limitation at a rehearing in cases in which: (1) an accused changes his or her plea from guilty to not guilty, or otherwise fails to comply with the terms a pretrial agreement; or (2) a sentence is set aside based on a government appeal. The amendments would better align military practice with federal civilian practice in the area of rehearings.

Section 908 concerns review of court-martial cases not otherwise subject to appellate review under Article 66 or review by the Office of the Judge Advocate General under Article 69. Under current law, Article 64 provides for judge advocate review of such cases, including conclusions as to jurisdiction, whether the charges and specifications stated offenses, and whether the sentence was within the limits prescribed by law. This section would amend Article 64 to apply only to the initial review of summary courts-martial. Article 65, as amended, would provide for review of general and special courts-martial that do not qualify for direct review by the Courts of Criminal Appeals. No substantive changes to the procedures or scope of review of summary courts-martial would be made. Implementing rules will address the opportunity for an accused to consult with counsel before filing any matter in connection with an Article 64 review.

Section 909 would amend Article 65 to conform the statute to the changes proposed in Articles 66 and 69. *See* Sections 910, 914, *infra*. As amended, Article 65 would: (1) provide additional guidance on the disposition of records; (2) require that the record of trial be forwarded to appellate defense counsel for review whenever the case is eligible for direct review under Article 66; and (3) provide for appellate review of all cases that are not subject to direct appellate review by a Court of Criminal Appeals, similar to the current review under Article 64. As amended, Article 65 would contain the following provisions:

Article 65(a) would require the record of trial in all general and special courts-martial in which there is a finding of guilty to be transmitted to the Office of the Judge Advocate General. In all other cases, the records of trial would be transmitted and disposed of in accordance with service regulations.

Article 65(b) would address the processing of records of trial in cases eligible for direct appeal to a Court of Criminal Appeals. Under paragraph (1), consistent with current practice, if the judgment of the court-martial included a sentence of death, the Judge Advocate General would be required to forward the record of trial to the Court of Criminal Appeals for automatic review. Paragraph (2) would address processing of records of trial in cases eligible for direct review by a Court of Criminal Appeals under Article 66(b)(1). The Judge Advocate General would be required to forward a copy of the record to an appellate defense counsel, who would be detailed to review the case and, upon request of the accused, to represent the accused before the Court of Criminal Appeals. The appellate defense counsel would review the record, advise the accused on the merits of an appeal, and, upon request, file the appeal with the Court of Criminal Appeals. The accused would be able to request that a copy of the record of trial be forwarded to civilian counsel provided by the accused. These provisions would not apply if the accused waived the right to appeal under Article 61 or declined representation by appellate defense counsel.

Article 65(c) would require the Judge Advocate General to provide a "Notice of the Right to Appeal" to an accused eligible to file an appeal under Article 66(b)(1).

Article 65(d) would provide for limited review by an attorney within the Office of Judge Advocate General, or another attorney designated under service regulations, in cases not eligible for direct appeal to a Court of Criminal Appeals under Articles 66(b). Cases not eligible for direct review under Article 66 would be those in which a punitive discharge was not imposed

and confinement imposed was for six months or less. The review would focus on three issues: whether the court-martial had jurisdiction over the accused and the offense; whether each charge and specification stated an offense; and whether the sentence was within the limits prescribed as a matter of law. The review also would include a response to any allegation of error submitted by the accused in writing. Under paragraph (3), this limited review—except for the response to allegations of error—also would be provided when an accused who is eligible to file an appeal for direct review under Article 66 waives or withdraws from appellate review, and when an accused fails to file an appeal under Article 66. This limited and expeditious review would satisfy a condition precedent to execution of certain sentences under Article 57 (Effective date of sentences), as amended. *See* Section 802, *supra.*

Article 65(e) would provide that, if the attorney conducting the review under subsection (d) believes corrective action may be required, the record shall be forwarded to the Judge Advocate General, who may set aside the findings or sentence, in whole or in part. If the Judge Advocate General sets aside the findings or sentence, he or she would be required to either order a rehearing or dismiss the charges. In addition, where the Judge Advocate General sets aside the findings or sentence and orders a rehearing, if the convening authority determines that a rehearing would be impractical, the convening authority should dismiss the charges.

Under the related proposal for Article 64, summary courts-martial would still be reviewed under the procedures contained in that statute. General and special courts-martial reviewed under Article 65, as well as summary courts-martial reviewed under Article 64, would be eligible for further review by the Judge Advocate General under the standards set forth in Article 69, as amended. *See* Section 913, *supra.* Those cases would then become eligible for appellate review by the Court of Criminal Appeals, either by certification of the Judge Advocate General or through application of the accused for discretionary review.

Section 910 would amend Article 66 to revise the scope of review and enlarge the category of cases eligible for review by the Courts of Criminal Appeals under Article 66. Specifically, the proposed amendments would: (1) replace automatic review in non-capital cases with a filing procedure similar to the appeal as of right process used in the federal civilian appellate courts; (2) retain mandatory review in capital cases; (3) provide for discretionary review by the Courts of Criminal Appeals in cases that are not eligible for an appeal as of right; (4) provide standards of review for appeals; and (5) codify the authority of Courts of Criminal Appeals to remand cases and order rehearings. As amended, Article 66 would contain the following provisions:

Article 66(a) would require the President to establish minimum tour lengths, with appropriate exceptions, for appellate military judges, and would require the Judge Advocate General of each service to certify the qualifications of appellate military judges consistent with the proposed amendment to Article 26 regarding the assignment and qualifications of military judges. *See* Section 504(b), *supra.* Implementing rules will reflect the Services' role and discretion in applying exceptions to the minimum tour lengths.

Article 66(b) would expand the categories of cases in which servicemembers may seek direct review by the Courts of Criminal Appeals. It would replace automatic review in non-capital cases with an appeal of right. It also would continue to require automatic review of all capital

cases. The amendments would provide every servicemember found guilty of an offense by a court-martial with a pathway to review by a court of record. As amended, there would be two prerequisites for review of non-capital cases by the Courts of Criminal Appeals under Article 66(b): (1) entry of the court-martial judgment into the record by a military judge under proposed Article 60c; and (2) timely filing of an appeal. The Court of Criminal Appeals would be able to review: (1) any case with a sentence to a punitive separation or confinement of more than six months; (2) any case that was previously the subject of an appeal by the United States under Article 62 or Article 56; and (3) any other case in which an application for discretionary review under Article 69(e)(2) was granted. For purposes of this subsection, the term "confinement for more than six months" would mean the total period of confinement adjudged, but would not aggregate periods of confinement running concurrently.

Article 66(c) prescribes jurisdictional timelines for appellate review by the Courts of Criminal Appeals.

Article 66(d) defines the duties of the Courts of Criminal Appeals, which would be consistent with current practice except that the obligation to review every case for factual sufficiency and sentence appropriateness would be eliminated. Under paragraph (3), the Courts of Criminal Appeals could provide relief for post-trial errors and excessive post-trial delay.

Article 66(e) details the limited authorities of the Courts of Criminal Appeals to weigh and consider evidence. The Court's authority to set aside a finding that is contrary to the weight of the evidence would be retained, but would require the accused to identify deficiencies in the proof and would allow the Court to set aside such findings only if "clearly convinced that the finding was against the weight of the evidence." This would channel the exercise of such authority through standards that are more deferential to the factfinder at trial and more reviewable by higher courts.

Article 66(e)(2) would address consideration of the entire case, including a finding of guilty and the sentence. The Court's authority to weigh the evidence and to determine controverted questions of fact would be retained, but would channel the exercise of such authority through standards that are more deferential to the factfinder at trial. This change would enable application of differing standards of review tailored to widely varied matters, including rulings on pretrial motions, the findings and sentence adjudged by the court-martial, and sentences of death determined by members.

Article 66(f) would provide standards of review applicable to sentences adjudged both before and after sentencing parameters are implemented under the proposed amendments to Article 56. *See* Section 801, *supra.* The proposed standards of review would provide the accused with several avenues to appeal a court-martial sentence. First, the accused would be able to appeal a sentence that was unlawful, or that resulted from incorrect application of a sentencing parameter. Second, consistent with the government's ability to appeal a sentence under Article 56(e) (as amended) the accused could appeal a sentence on the grounds that it is plainly unreasonable. *See* Section 801, *supra.* The term "plainly unreasonable" is taken from 18 U.S.C. § 3742 and is intended to provide substantial deference to the trial judge. Third, in cases where an adjudged offense has no sentencing parameter, or where the sentence imposed was above the applicable

sentencing parameter for the offense, the accused would be able to appeal the sentence as inappropriately severe. This provision recognizes that a sentence may be "inappropriately severe" despite being reasonable. Finally, in the case of a sentence determined by a panel in a capital case, consistent with current practice, the Court would be required to determine whether the sentence is appropriate.

Article 66(g)(3) would codify the authority of Courts of Criminal Appeals to remand a case for additional proceedings as may be necessary to address substantial issues. This authority would be subject to any limitations the Court may direct or the President may prescribe by regulation. This provision would codify current practice (i.e., *DuBay* Hearings). *See United States v. Dubay*, 37 C.M.R. 411 (1967).

In addition to the authority to review specific types of cases designated in Article 66, the Courts of Criminal Appeals consider interlocutory appeals under Article 62 and petitions for extraordinary relief under the All Writs Act, 28 U.S.C. § 1651(a). *See, e.g.*, *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969); *Clinton v. Goldsmith*, 526 U.S. 529 (1999); *United States v. Denedo*, 556 U.S. 904 (2009). The Courts of Criminal Appeals also review cases sent to the Court by the Judge Advocate General under Article 69. Under the proposed amendments to Article 56, the Courts of Criminal Appeals also would review sentence appeals filed by the Government under Article 56(e). The procedures applicable to proceedings arising under Article 56, like the procedures applicable to proceedings arising under Article 62, Article 69, and the All Writs Act, may be set forth in the rules for the Courts of Criminal Appeals prescribed under Article 66.

Section 911 would amend Article 67, which sets forth the procedures for the Court of Appeals for the Armed Forces to review cases from the Courts of Criminal Appeals, to conform the statute to proposed changes in Articles 60 and 66, including the creation of an "entry of judgment" in the proposed Article 60c (Entry of judgment). *See* Sections 901-904, 910, *supra.* In addition, the amendments would provide for notification by a Judge Advocate General to the other Judge Advocates General prior to certifying a case for review by the Court of Appeals for the Armed Forces. The recommendation for "appropriate notification to the other Judge Advocates General" would apply only to cases the Judge Advocate General intends to certify to the Court of Appeals for the Armed Forces pursuant to Article 67(a)(2). This change is intended to ensure that each Judge Advocate General has an opportunity to provide meaningful input on the decision to appeal cases that have the potential to impact the law applicable to all the services. The change would not alter the jurisdiction of the Court of Appeals for the Armed Forces over these cases nor would it limit the discretion or authority of a Judge Advocate General to certify issues to the Court of Appeals for the Armed Forces.

Section 912 would make a technical amendment in Article 67a.

Section 913 would amend Article 69 to more closely align appellate review of minor offenses with the practice in the federal civilian courts. Presently, Article 69 authorizes the Judge Advocate General to conduct a post-final review of courts-martial that are not subject to direct review by the Courts of Criminal Appeals under Article 66 and that were not previously reviewed under Article 69. As amended, the accused would have a one-year period in which to file for review under Article 69 in the Office of the Judge Advocate General, extendable to three

years for good cause. The three-year upper limit for filing is consistent with the proposed amendments to Article 73 (Petition for a new trial) to allow an accused to petition for a new trial based on newly discovered evidence or fraud on the court. *See* Section 916, *supra*. A review under Article 69, as amended, could consider issues of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. The statute would permit the accused, after a decision is issued by the Office of the Judge Advocate General, to apply for discretionary review by the Court of Criminal Appeals under Article 66. The Judge Advocate General's authority to certify cases for review at the appellate courts would be retained.

Section 914 would amend Article 70 to require, to the greatest extent practicable, at least one appellate defense counsel shall be learned in the law applicable to capital cases in any case in which the death penalty was adjudged at trial. This change would provide the accused with the same access to an expert in death penalty litigation that is currently provided to defendants in Article III courts and before military commissions under Chapter 47a of Title 10.

Section 915 would amend Article 72, which establishes the process for vacating a suspended court-martial sentence. The amendments would authorize a special court-martial convening authority to detail a judge advocate qualified under Article 27(b) to preside at the vacation hearing, which must be held before a suspended sentence can be vacated. The detailed judge advocate would replace the special court-martial convening authority at the hearing and would make factual determinations about whether a violation occurred. Under current law, the procedures applicable at vacation hearings under Article 72 are prescribed by cross-reference to R.C.M. 405, which provides the rules and procedures applicable at Article 32 hearings. The recent changes to Article 32 (Preliminary hearing) and R.C.M. 405 no longer provide a hearing structure that can be used in vacation proceedings. The implementing rules for Article 72 will be updated to reflect this change and to provide procedures applicable at vacation hearings.

Section 916 would amend Article 73 to conform the statute to the proposed changes in Article 60 and to increase the time period for an accused to petition for a new trial from two years to three years, consistent with the three-year period in Fed. R. Crim. P. 33(b)(1).

Section 917 would amend Article 75, which provides the basic rules and procedures for the restoration of a member's rights, privileges, and property when a court-martial conviction is set aside during review. As amended, the statute would authorize the President to establish regulations governing when an accused may receive pay and allowances while pending a rehearing. The implementing rules will set forth the authority to provide pay and allowances to an accused who is pending a rehearing, performing duties, and not in confinement.

Section 918 would align the language of Article 76a with proposed changes in Article 60 (Action by the Convening authority) and the proposed new Article 60c (Entry of judgment), with no substantive changes. Article 76a currently authorizes the services, at their discretion, to involuntarily place an accused on leave if the accused has been sentenced to an unsuspended punitive discharge or dismissal that has been approved by the convening authority.

TITLE X—PUNITIVE ARTICLES

Section 1001 would reorganize the punitive articles by transferring and redesignating 16 articles within Subchapter X of the UCMJ. In the context of the substantive changes in various punitive articles proposed in Title X of the bill, the reorganization of articles listed in section 1001 would serve to more closely group related offenses. The substantive amendments to the punitive articles, including the articles reorganized under Section 1001, are set forth in Sections 1002-1051.

Section 1001(1) would transfer and redesignate Articles 83 (Fraudulent enlistment, appointment, or separation) and 84 (Unlawful enlistment, appointment, or separation) as Articles 104a and 104b, respectively.

Section 1001(2) would transfer and redesignate Article 95 (Resistance, flight, breach of arrest, and escape) as Article 87a.

Section 1001(3) would transfer and redesignate Article 98 (Noncompliance with procedural rules) as Article 131f.

Section 1001(4) would transfer and redesignate Article 103 (Captured or abandoned property) as Article 108a.

Section 1001(5) would transfer and redesignate Article 104 (Aiding the enemy) as Article 103b.

Section 1001(6) would transfer and redesignate Article 105 (Misconduct as prisoner) as Article 98.

Section 1001(7) would transfer and redesignate Articles 106 (Spies) and 106a (Espionage) as Articles 103 and 103a, respectively.

Section 1001(8) would transfer and redesignate Article 113 (Misbehavior of sentinel) as Article 95.

Section 1001(9) would transfer and redesignate Article 111 (Drunken or reckless operation of a vehicle, aircraft, or vessel) as Article 113.

Section 1001(10) would transfer and incorporate Article 130 (Housebreaking) as part of the amended Article 129a.

Section 1001(11) would transfer and redesignate Article 120a (Stalking) as Article 130.

Section 1001(12) would transfer and redesignate Article 123 (Forgery) as Article 105.

Section 1001(13) would transfer and redesignate Article 124 (Maiming) as Article 128a.

Section 1001(14) would transfer and redesignate Article 132 (Frauds against the United States) as Article 124.

Section 1002 would amend Article 79 and retitle the statute as "Conviction of offense charged, lesser included offenses, and attempts." As amended, Article 79 would authorize the President to designate an authoritative, but non-exhaustive, list of lesser included offenses for each punitive article of the UCMJ in addition to judicially determined lesser included offenses. This change would provide actual notice of applicable lesser included offenses to all parties. Implementing provisions will provide the President with the flexibility to designate factually similar offenses as lesser included offenses under a "reasonably included" standard. The "reasonably included" standard would enhance actual notice by requiring a measurable relationship between the greater offense and the listed offense.

Presidentially designated lesser included offenses under Article 79 and the implementing provisions and judicially determined lesser included offenses would work in concert at trial. The statute's implementing provisions would explain to practitioners that potential lesser included offenses may be established at trial either by: (1) designation by the President; or (2) by the military judge at trial when the military judge determines that an offense raised by the evidence at trial is "necessarily included within the greater offense."

Section 1003 would amend Article 82 and retitle the statute as "Soliciting commission of offenses." The amendments would migrate the general solicitation offense under Article 134 into Article 82, as a separate subsection before the specific solicitation offenses in the existing statute. The general solicitation offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality. Implementing provisions will maintain the same punishments for all solicitation offenses as under current law.

Section 1004 would transfer and redesignate Article 115 (Malingering) as Article 83, and would make a technical change to the statute's provisions. The technical change would replace the words "for the purpose of avoiding" with the words "with the intent to avoid" to better address the mens rea required for the offense.

Section 1005 would migrate the offense of "Quarantine: medical, breaking" from Article 134, the General article, to redesignated Article 84 (Breach of medical quarantine). The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1006 would consolidate the offenses of "Missing movement" in existing Article 87 and "Jumping from vessel into the water" in Article 134 (the General article) into a single offense under Article 87 (Missing movement; jumping from vessel). The consolidated offense would prohibit servicemembers from, by neglect or design, missing the movement of a ship, aircraft, or unit with which they are required to move or jumping from a vessel into the water. These offenses are well-recognized concepts in military criminal law. Accordingly, they do not

need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.

Section 1007 would migrate and consolidate the offenses of "Restriction, breaking" and Correctional custody – offenses against" from Article 134 (the General article) to a new section, Article 87b (Offenses against correctional custody and restriction). These offenses are well-recognized concepts in criminal law. Accordingly, they do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.

Section 1008 would amend Article 89 and retitle the statute as "Disrespect toward superior commissioned officer; assault of superior commissioned officer." As amended, Article 89 would include the offense of "Assaulting a superior commissioned officer," which would be transferred from Article 90. This change would align these closely related provisions in Articles 89.

Section 1009 would amend Article 90 by transferring the offense of "Assaulting a superior commissioned officer" to Article 89 and retitling the statute as "Willfully disobeying superior commissioned officer." This change would realign closely related provisions in Articles 89 and focus the Article as amended on the willful disobedience of a lawful command of a superior commissioned officer.

Section 1010 would create a new section, Article 93a (Prohibited activities with military recruit or trainee by person in position of special trust). The new section would provide enhanced accountability for sexual misconduct committed by recruiters and trainers during the various phases within the recruiting and basic military training environments. The term "officer" as used in subsection (a)(1) of this statute would have the same meaning ascribed to it as in 10 U.S.C. § 101(b)(1). The term "applicant for military service" would include persons in the process of applying for an original enlistment or appointment in the armed services as defined in applicable service regulations. The primary focus of the new statute is on recruiting and initial entry training. Because of the unique nature of military training and the different training environments among the services, the statute would authorize the Service Secretaries to publish regulations designating the types of physical intimacy that would constitute a "prohibited sexual activity" under subsections (a) and (b) of the new statute.

Article 93a would cover military recruiters and trainers who knowingly engage in prohibited sexual activity with prospective recruits or junior members of the armed forces in initial training environments. Consent would not be a defense to this offense.

Article 93a is intended to address specific conduct and is not intended to supersede or preempt service regulations governing professional conduct by staff involved in recruiting, entry level training, or other follow on training programs. The Secretary concerned could prescribe by regulation any additional initial career qualification training programs related to servicemembers they determine should fall under this statute. Implementing rules will address appropriate maximum punishments for the new offense.

Section 1011 would migrate the loitering portion of the offense of "Sentinel or lookout: offenses against or by" from Article 134 (the General article) to the redesignated Article 95 (Offenses by sentinel or lookout). The wrongfulness of loitering by a sentinel or lookout is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1012 would create a new section, Article 95a (Disrespect toward a sentinel or lookout). The new statute would include the disrespect portion of the offense of "Sentinel or lookout: offenses against or by," which would be migrated from Article 134 (the General article). The offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1013 would amend Article 96 and retitle the statute as "Release of prisoner without authority; drinking with prisoner." As amended, Article 96 would include the offense of "Drinking liquor with prisoner," which would be migrated from Article 134 (the General article). The latter offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1014 would amend Article 103 (Spies), as transferred and redesignated by Section 1001(7), *supra*, by replacing the mandatory death penalty currently required with a discretionary death penalty similar to that authorized under existing Article 106a (Espionage) and for all other capital offenses under the Code.

Section 1015 would migrate the offense of "Public record: altering, concealing, removing, mutilating, obliterating, or destroying" from Article 134 (the General article) to redesignated Article 104 (Public records offenses). The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1016 would create a new section, Article 105a (False or unauthorized pass offenses). The new statute would include the offense of "False or unauthorized pass offenses," which would be migrated from Article 134 (the General article). This offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1017 would migrate the offense of "Impersonating a commissioned, warrant, noncommissioned, petty officer or agent of official" from Article 134 (the General article) into the redesignated Article 106 (Impersonation of officer, noncommissioned or petty officer, or agent or official). The term "officer" as used in subsection (a)(1) of the statute would have the same meaning ascribed to it as in 10 U.S.C. § 101(b)(1). This offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the

"terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1018 would create a new section, Article 106a (Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button), and would migrate the offense of "Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button" from Article 134 (the General article) into the new statute. When committed by servicemembers, the offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon proof of the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1019 would amend Article 107 and retitle the statute as "False official statements; false swearing." As amended, Article 107 would include the offense of "False swearing," which would be migrated from Article 134 (the General article). The offense of false swearing is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1020 would create a new section, Article 107a (Parole violation), and would migrate the offense of "Parole, Violation of" from Article 134 (the General article) into the new statute. This offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1021 would create a new section, Article 109a (Mail matter: wrongful taking, opening, etc.), and would migrate the offense of "Mail: taking, opening, secreting, destroying, or stealing" from Article 134 (the General article) into the new statute. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1022 would amend Article 110 (Improper hazarding of vessel) to also prohibit improper hazarding of an aircraft. Although other punitive articles, such as Article 92 (dereliction of duty) and Article 108 (destruction of military property) may speak to the loss or destruction of government property generally, no punitive article captures the act of improper hazarding of an aircraft, considering the potential for catastrophic loss of life and property, as well as harm to the strategic interests of the United States. This amendment would align the conduct involving an aircraft with the maximum punishments authorized under Article 110.

Section 1023 would amend Article 111 and retitle the statute as "Leaving scene of vehicle accident." As amended, the statute would include the offense of "Fleeing the scene of an accident," which would be migrated from Article 134 (the General article) to place it next to other offenses under the UCMJ involving misuse of vehicles. The offense of fleeing the scene of an accident is a well-recognized concept in criminal law. Accordingly, this offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1024 would amend Article 112 and retitle the statute as "Drunkenness and other incapacitation offenses." As amended, Article 112 would include the offenses of "Drunkenness—incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug" and "Drunk prisoner," which would be migrated from Article 134 (the General article). The express exclusion of sentinels and lookouts under Article 112 would be removed in order to resolve the ambiguity between Articles 112 and 113 concerning the "on post" status of sentinels and lookouts. The wrongfulness of being incapacitated for duty or as a prisoner is a well-recognized concept in military criminal law. Accordingly, this offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1025 would amend Article 113 (Drunken or reckless operation of vehicle, aircraft, or vessel), as transferred and redesignated by Section 1001(9), *supra*, to align the BAC limits in the offense to the prevailing legal standard in the United States. All other jurisdictions in the United States, including all fifty states, each territory, the District of Columbia, and the national parks, have established BAC limits no higher than .08 for the offense of drunk driving. The amendment also would provide flexibility for the Department of Defense to prescribe lower breath/blood alcohol limits should scientific developments or other factors in the civilian sector lead to lower limits.

Section 1026 would migrate the offenses of "Reckless endangerment," "Firearm, discharging—willfully, under such circumstances as to endanger human life," and "Weapon: concealed carrying" from Article 134 (the General article) to the redesignated Article 114 (Endangerment offenses), which currently includes the offense of "Dueling." The wrongfulness of failing to maintain weapon discipline is a well-recognized concept in criminal law. Accordingly, these offenses do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.

Section 1027 would migrate the offenses of "Threat, communicating," and "Threat or hoax designed or intended to cause panic or public fear" from Article 134 (the General article) to the redesignated Article 115 (Communicating threats). These offenses are well-recognized concepts in criminal law. Accordingly, these offenses do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality. The guidance in the Manual for Courts-Martial will continue to reflect the limitations on these offenses established in the applicable case law.

Section 1028 would make a technical amendment to Article 118 (Murder).

Section 1029 would create a new section, Article 119b (Child endangerment), and would migrate the offense of "Child endangerment" from Article 134 (the General article) into the new statute. The new section would align with the closely related offense of "Death or injury of an unborn child" under Article 119a. The offense of child endangerment is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal

element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1030 would amend the definition of "sexual act" in both Article 120 (Rape and sexual assault generally) and Article 120b (Rape and sexual assault of a child) to conform to the definition of that term in 18 U.S.C. § 2246(2)(A)-(C). The current definition of "sexual act" under Articles 120 and 120b is both overly broad (it captures non-sexual acts) and unduly narrow (it does not include all of the prohibited acts involving children listed in 18 U.S.C. § 2246(2)(D)).

Section 1031 would redesignate Article 120a as "Mails: deposit of obscene matter" and would migrate the offense of "Mails: depositing or causing to be deposited obscene materials in" from Article 134 (the General article) into the redesignated statute. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1032 would create a new section, Article 121a (Fraudulent use of credit cards, debit cards, and other access devices). Article 121a is designed specifically to address the misuse of credit cards, debit cards, and other electronic payment technology, also known as "access devices." This article is modeled on 18 U.S.C. § 1029. It would provide a more effective and efficient means of prosecuting crimes committed with credit cards, debit cards, and other access devices than under current practice, in which such crimes are prosecuted as a larceny by false pretenses under Article 121 (Larceny and wrongful appropriation). When a government-issued credit card, debit card, or other access device is misused, the authorized sentence can be addressed in the Manual through the President's delegated powers under Article 56, which is the current sentencing approach for theft of government property under Article 121.

Section 1033 would create a new section, Article 121b (False pretenses to obtain services), and would migrate the offense of "False pretenses, obtaining services under" from Article 134 (the General article) into the new statute. This change would align the offense of false pretenses with the related UCMJ "larceny" offenses. Obtaining services by false pretenses is now well recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1034 would amend Article 122 (Robbery) to conform the statute to the offense of robbery under 18 U.S.C. § 2111. Article 122 prohibits the taking of anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a family member or others present. Article 122 would be amended to align with 18 U.S.C. § 2111 by removing the words "with the intent to steal" from the statute, thereby eliminating the requirement to show that the accused intended to permanently deprive the victim of his property. The amendments would focus the statute on the true gravamen of this offense: the forcible taking of the property by the accused from the victim, in the presence of the victim.

Section 1035 would create a new section, Article 122a (Receiving stolen property), and would migrate the offense of "Stolen property: knowingly receiving, buying, concealing) from Article 134 (the General article) into the new statute. The offense of receiving stolen property is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1036 would amend Article 123 in its entirety and retitle the statute as "Offenses concerning Government computers." The new enumerated punitive article would be similar to 18 U.S.C. § 1030 (Fraud and related activity in connection with computers). Computers are used extensively throughout the armed forces, and this proposed offense would facilitate prosecuting computer-related offenses at courts-martial. The new statute would provide a UCMJ punitive article to address computer-related offenses where the gravity of the offense may make Article 92-level punishment inappropriately low, but the misconduct may not meet the criteria of existing punitive articles such as Espionage. The new offense is modeled on 18 U.S.C. § 1030, tailored to address the needs of military justice. It would apply only to persons subject to the UCMJ, and it would be directed only at U.S. government computers and U.S. government protected information.

Article 123 would not supersede or preempt the prosecution of 18 U.S.C. § 1030 or other Title 18 offenses under Article 134, Clause 3. Further, service and DoD regulations provide a broadly applicable and flexible means to prosecute less serious computer offenses under Article 92 (Failure to obey order or regulation), and the proposed offense does not supersede or preempt those regulations. Article 108 (Military property of United States—Loss, damage, destruction, or wrongful disposition) covers computer files that have been altered or damaged by the accused through deletion or destruction of computer files or programs for purposes of the offense of willfully destroying military property.

The Manual for Courts-Martial guidance for Article 123 will define and clarify terms, including the term "with an unauthorized purpose," which includes circumstances involving more than one unauthorized purpose, as well as circumstances involving an unauthorized purpose in conjunction with an authorized purpose. The guidance also will reference the UCMJ Article 1(15) definition for "classified information," and will define "protected information" to include information that has been designated as For Official Use Only (FOUO), or as Personally Identifiable Information (PII).

Section 1037 would create a new section, Article 124a (Bribery), and would migrate the offense of bribery from Article 134 (the General article) to the new statute. Migrating the offense of bribery to the new Article 124a aligns the offense with the relocated fraud and graft offenses under the UCMJ. Bribery is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1038 would create a new section, Article 124b (Graft), and would migrate the offense of graft from Article 134 (the General article) to the new statute. Migrating the offense of graft to the new Article 124b aligns the offense with the relocated fraud and bribery offenses under the

UCMJ. Graft is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1039 would migrate the offense of "Kidnapping" from Article 134 (the General article) to the redesignated Article 125 (Kidnapping). The offense of kidnapping is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality. The removal of sodomy from Article 125 conforms the statute to the proposed treatment of the offense of forcible sodomy under Article 120 (Rape and sexual assault generally) and the proposal to provide comprehensive guidance on the treatment of animal abuse offenses, including bestiality, under Article 134.

Section 1040 would migrate the offense of "Burning with intent to defraud" from Article 134 (the General article) to redesignated Article 126 (Arson; burning property with intent to defraud). Article 126 currently prohibits the willful and malicious burning or setting on fire of a dwelling or other structure. Article 126 sets out two forms of aggravated arson and one form of simple arson. The offense of burning with intent to defraud is similar to those offenses and is itself a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1041 would amend Article 128 (Assault) to employ a standard that focuses attention on the malicious intent of the accused rather than the speculative "likelihood" of the activity actually resulting in harm, consistent with federal civilian practice.

This section also would migrate the offense of "Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking" from Article 134 (the General article) to Article 128. The offense of assault with intent to commit a serious felony is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1042 would amend Article 129 and retitle the statute as "Burglary; unlawful entry." In the amended statute, the common-law "personal dwelling" and "nighttime" elements would be removed to align Article 129 with the majority rule reflected in federal and state law. As part of the realignment of closely related offenses, the offense of "Housebreaking" would be incorporated into Article 129.

The offense of "Unlawful entry" would migrate as a separate subsection from Article 134 (the General article). Illegally accessing someone else's property is a well-recognized concept in criminal law. Accordingly, the offense of unlawful entry does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1043 would redesignate Article 120a (Stalking) as Article 130, and would update current law to address cyberstalking and threats to intimate partners. The proposed amendments would continue to address stalking activity involving a broad range of misconduct including, but not limited to, sexual offenses. The redesignated stalking statute would not preempt service regulations that specify additional types of misconduct that may be punishable at court-martial, including under Article 92 (Failure to obey order or regulation), nor would it preempt other forms of misconduct from being prosecuted under other appropriate Articles, such as under Article 134 (General article). These uniquely military offenses are available to address similar misconduct that, for example, causes substantial emotional distress or targets professional reputation.

Section 1044 would create a new section, Article 131a (Subornation of perjury), and would migrate the offense of "Perjury: subornation of" from Article 134 (the General article) to the new statute. Migrating this offense would place it alongside similar offenses in the UCMJ. The offense of suborning perjury is a well-recognized concept in criminal law as it corrupts the trial process and interferes with the administration of justice. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1045 would create a new section, Article 131b (Obstructing justice), and would migrate the offense of "Obstructing justice" from Article 134 (the General article) to the new statute. The offense of obstructing justice is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1046 would create a new section, Article 131c (Misprision of serious offense), and would migrate the offense of "Misprision of serious offense" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1047 would create a new section, Article 131d (Wrongful refusal to testify), and would migrate the offense of "Testify: wrongful refusal" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1048 would create a new section, Article 131e (Prevention of authorized seizure of property), and would migrate the offense of "Seizure: destruction, removal, or disposal of property to prevent" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1049 would create a new section, Article 131g (Wrongful interference with adverse administrative proceeding), and would migrate the offense of "Wrongful interference with an

adverse administrative proceeding" from Article 134 (the General article) to the new statute. The administrative proceedings addressed by this offense would include any administrative proceeding or action initiated against a servicemember that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

If, however, a servicemember wrongfully interferes with an administrative proceeding not addressed under this offense, and that interference takes place under circumstances that are prejudicial to good order and discipline or service discrediting, the new Article 131g is not intended to preempt prosecution for wrongful interference in those other administrative proceedings under clauses 1 or 2 of Article 134.

Section 1050 would amend Article 132 in its entirety and retitle the statute as "Retaliation." This new offense would provide added protection for witnesses, victims, and persons who report or plan to report a criminal offense to law enforcement or military authority. Article 132 would not preempt service regulations that specify additional types of retaliatory conduct that may be punishable at court-martial under Article 92 (Failure to obey order or regulation), nor would it preempt other forms of retaliatory conduct from being prosecuted under other appropriate Articles, such as Article 109 (destruction of property), Article 93 (Cruelty and maltreatment), Article 128 (Assault), Article 131b (Obstructing justice), Article 130 (Stalking), or Article 134 (General article).

Section 1051 would amend Article 134, the General article, to cover all non-capital federal crimes of general applicability under clause 3, regardless of where the federal crime is committed. This change would make military practice uniform throughout the world and would better align it with the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261.

Section 1052 provides the amended table of sections for the beginning of Subchapter X, the punitive articles, reflecting all proposed new sections and proposed amendments to section headings.

TITLE XI—MISCELLANEOUS PROVISIONS

Section 1101 would amend Article 135 (Courts of inquiry) to provide individuals employed by the Department of Homeland Security, the department under which the Coast Guard operates, the right to be designated as parties in interest when they have a direct interest in the subject of a court of inquiry convened under Article 135. This change would align the rights of employees of the Department of Homeland Security with the rights of employees of the Department of Defense, ensuring consistent application of this statute for all military services.

Section 1102 would make a technical amendment to Article 136 (Authority to administer oaths and to act as notary) to remove from the section heading the authority to act as a notary, which is not provided for in the text of the statute.

Section 1103 would amend Article 137 (Articles to be explained) to require that officers, in addition to enlisted personnel, receive training on the UCMJ upon entry to service, and periodically thereafter. The amendments would provide for specific military justice training for military commanders and convening authorities, and would require the Secretary of Defense to prescribe regulations for additional specialized training on the UCMJ for combatant commanders and commanders of combined commands. Article 137(d), as amended, would require the Secretary of Defense to maintain an electronic version of the UCMJ and Manual for Courts-Martial that would be updated periodically and made available on the Internet for review by servicemembers and the public.

*Section 1104(*a) would create a new section, Article 140a (Case management; data collection, and accessibility), which would require the Secretary of Defense to prescribe uniform standards and criteria for case processing and management, military justice data collection, production and distribution of records of trial, and access to case information. The purpose of this section is to enhance the management of cases, the collection of data necessary for evaluation and analysis, and to provide appropriate public access to military justice information at all stages of court-martial proceedings. At a minimum, the system developed for implementation should permit timely and appropriate access to filings, objections, instructions, and judicial rulings at the trial and appellate level, and to actions at trial and in subsequent proceedings concerning the findings and sentences of courts-martial.

Section 1104(b) provides the timeline for implementation of Section 1104(a). In order to provide appropriate time for implementation, this section would require promulgation of standards by the Secretary of Defense not later than two years after enactment of Section 1104, with an effective date for such standards not later than four years after enactment.

TITLE XII—MILITARY JUSTICE REVIEW PANEL AND ANNUAL REPORTS

Section 1201 would amend Article 146 (Code committee) and retitle the statute as "Military Justice Review Panel." The Military Justice Review Panel would replace the Code Committee. The Military Justice Review Panel would be an independent, blue ribbon panel of experts tasked to conduct a periodic evaluation of military justice practices and procedures on a regular basis, thereby enhancing the efficiency and effectiveness of the UCMJ and the Code's implementing regulations.

The proposed Military Justice Review Panel would be composed of thirteen members. Each of the following officials would select one person to serve on the Panel: the Secretary of Defense (in consultation with the Secretary of Homeland Security), the Attorney General, the Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps. The remaining members of the Panel would be selected by the Secretary of Defense based upon the recommendations of each of the following: the chairman and ranking minority member of the House Armed Services Committee and the Senate Armed Services Committee, the Chief Justice of the United States, and the Chief Judge of the U.S. Court of Appeals for the Armed Forces. The Secretary of Defense would designate one member as the Chair; the Panel would have a full-time staff.

The Panel would issue its first report four years after the effective date of the legislation, focusing on the implementation of any recent amendments to the UCMJ and Manual for Courts-Martial. Eight years after the effective date of the legislation, the Panel would issue its first comprehensive review of the UCMJ and Manual for Courts-Martial. Thereafter, the Panel would issue comprehensive reports every eight years. Within each eight year cycle, the Panel would issue targeted reports at the mid-point of each cycle, and could issue additional reports on matters referred to the Panel by the Secretary of Defense or Congress.

This proposal is 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. Accordingly, the comprehensive reviews are scheduled on an eight-year schedule.

This proposal also relies on the expectation that the Joint Service Committee will continue to conduct its vital role within the executive branch addressing the type of targeted adjustments in law and regulation that are required on a more frequent basis to address specific issues in the law.

Section 1202 would create a new section, Article 146a (Annual reports), to retain the valuable informational aspects of the annual reports issued individually by the Court of Appeals for the Armed Forces, the Judge Advocates General, and the Staff Judge Advocate to the Commandant of the Marine Corps. The proposal anticipates that the individual reports will be compiled into a single volume using the procedures currently employed to combine individual reports into a consolidated report under the present version of Article 146.

TITLE XIII—CONFORMING AMENDMENTS AND EFFECTIVE DATES

Section 1301 contains 25 conforming amendments to the tables of sections necessitated by proposed amendments to section titles.

Section 1302 establishes the effective date of amendments contained in the legislation. The amendments would become effective on the first day of the first month that begins a year after enactment, subject to exceptions for ongoing proceedings, prior offenses, and specific effective dates within the bill.

Appendices

APPENDIX A:
Memorandum from Chairman of the Joint Chiefs Of Staff General Martin E. Dempsey of August 5, 2013, to Secretary Of Defense Chuck Hagel Requesting a Review of the Uniform Code of Military Justice

[redacted]

OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

WASHINGTON, DC 20318-9999

CM-0210-13
5 August 2013

MEMORANDUM FOR SECRETARY OF DEFENSE

SUBJECT: (U) Recommendation of the Joint Chiefs of Staff with respect to a Holistic Review of the Uniform Code of Military Justice

1. [redacted] During a recent Tank session on Sexual Assault Prevention and Response, the Joint Chiefs of Staff (JCS) discussed the current state of the military justice system.

2. [redacted] The U.S. Armed Forces operated under the Articles of War from 1775 until 1950. In 1950, President Truman signed the first Uniform Code of Military Justice (UCMJ) into law. We noted that the last comprehensive review and update of the UCMJ took place in 1984. Much has changed since then, to include the end of the Cold War, the successful integration of the All-Volunteer Force, and the enactment of the Goldwater-Nichols Act of 1986. The JCS concluded that, given the changes in the force and society since 1984, a DOD-led holistic review of the UCMJ and the military justice system would be appropriate.

3. [redacted] Accordingly, the JCS and I recommend that you direct the Department of Defense General Counsel to conduct a comprehensive, holistic review of the UCMJ and the military justice system. This proposal should not be taken to signal a sense among the JCS that the UCMJ has proved inadequate to its purpose, or as a measure intended to forestall criticism of the manner in which any case or cases are handled within the military justice system. The review is solely intended to ensure that our system most effectively and efficiently does justice consistent with due process and good order and discipline. The JCS recognizes that such a review would be broader than the work ongoing with the 576 Response Systems Panel and that the Services will need to support this holistic review by providing military justice experts for extended periods of time.

MARTIN E. DEMPSEY
General, USA
Chairman of the Joint Chiefs of Staff

[redacted]

OSD009257-13

APPENDIX B:
Memorandum from Secretary Hagel of October 18, 2013, Directing the General Counsel of the Department Of Defense to Conduct a Comprehensive Review of the Uniform Code of Military Justice

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

OCT 18 2013

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
CHIEFS OF THE MILITARY SERVICES
DIRECTOR, COST ASSESSMENT AND PROGRAM EVALUATION
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT

SUBJECT: Comprehensive Review of the Uniform Code of Military Justice

As proposed by the Chairman of the Joint Chiefs of Staff and the other members of the Joint Chiefs, I direct the General Counsel to conduct a comprehensive review of the Uniform Code of Military Justice (UCMJ) and the military justice system with support from military justice experts provided by the Services.

Such a comprehensive review is appropriate given the many amendments to the UCMJ since the Military Justice Act of 1983 and to the Manual for Courts-Martial (MCM) since 1984. The review should include an analysis of not only the UCMJ, but also its implementation through the MCM and Service regulations. The review should consider any report and recommendations issued by the Response Systems Panel. I direct that a report including a recommendation for any appropriate amendments to the UCMJ be submitted within 12 months and that a second report recommending any appropriate amendments to the MCM be submitted within 18 months. The General Counsel will submit an Issue Nomination to the Director, Cost Assessment and Program Evaluation, describing the additional resources necessary for this review.

OSD009257-13

APPENDIX C:
Terms of Reference with Addendum dated March 12, 2014

Terms of Reference

for

Military Justice Review Committee

January 2014

1. Objectives and Scope. These Terms of Reference set forth the objectives for the Secretary of Defense-directed comprehensive review of the military justice system, including the Uniform Code of Military Justice (UCMJ), the Manual for Courts-Martial (MCM), and implementing Service regulations. The review will be conducted by the Military Justice Review Committee (MJRC). The MJRC will submit a report including recommended UCMJ amendments no later than October 20, 2014. The MJRC will submit a second report including recommended MCM amendments no later than April 20, 2015.

2. Background.

a. The last time our system of military justice underwent a comprehensive review was in 1984. That was before passage of the Goldwater-Nichols Department of Defense Reorganization Act of 1986, which resulted in fundamental changes to the organization of the Department of Defense and the operation of U.S. military forces. It was also before the terrorist attacks of 9/11, years of ensuing armed conflict, and the current security environment. Indeed, much has changed over the past 30 years, from advancements in information and communications technologies to efforts to address issues related to gender, sexual orientation and sexual assault. While there have been numerous amendments to the Uniform Code of Military Justice in response to discrete challenges, it has been a very long time since the Department has undertaken to examine and update the Code in a systematic fashion.

b. A comprehensive review of the military justice system was proposed by the Chairman of the Joint Chiefs of Staff and the other members of the Joint Chiefs in an August 5, 2013, memorandum to the Secretary of Defense. This memorandum stated, in part, that "the Services will need to support this holistic review by providing military justice experts for extended periods of time."

c. On September 18, 2013, the Acting General Counsel recommended that the Secretary of Defense direct the General Counsel to conduct a comprehensive review of the military justice system with support from military justice experts provided by the Services. The Acting General Counsel estimated that such a review "would require a budget estimated at $2.35 to $2.95 million over the review's 18-month timespan and would require extensive ongoing internal coordination among the Military Departments and external coordination with the Department of Homeland Security." The Acting General Counsel also noted that the Services have a limited ability to contribute personnel due to increased demands on their military justice resources and severe financial constraints affecting the Services. As a result, conducting a comprehensive review of the military justice system "may require extensive use of DoD civilian attorneys (including new hires)."

d. Along with his recommendation, the Acting General Counsel submitted a budget justification to the Secretary of Defense that outlined the estimated costs and requirements for the proposed review, to include numbers of personnel and their qualifications. The budget justification assumed a staff of 22 DoD personnel (the Coast Guard would be invited to provide up to three additional personnel). The budget justification also proposed that any new hires from outside the government, including the project's director, would be hired as full-time Highly Qualified Experts (HQE), and that the MJRC's staff would be co-located.

e. On October 18, 2013, the Secretary of Defense directed the General Counsel "to conduct a comprehensive review of the Uniform Code of Military Justice (UCMJ) and military justice system with support from military justice experts provided by the Services." He directed that the review include "an analysis of not only the UCMJ, but also its implementation through the [Manual for Courts-Martial (MCM)] and Service regulations." He further directed that "a report including a recommendation for any appropriate amendments to the UCMJ be submitted within 12 months and that a second report recommending any appropriate amendments to the MCM be submitted within 18 months."

3. Committee and Advisors.

a. **MJRC Chairman.** The General Counsel will designate a Chairman of the MJRC. That Chairman will be a civilian employee of the United States Government and may be hired for that purpose as an HQE or in another appropriate status. The Chairman will perform his duties subject to the direction of the General Counsel.

b. **MJRC Members.** The General Counsel will designate the members of the MJRC, who will be either civilian employees of the United States Government or military personnel. Each Military Service within DoD will nominate at least one military justice expert in the grade of O-6 or O-5, two judge advocates in the grade of O-4 or O-3, and one enlisted member in the grade of E-5 or higher with an MOS or AFSC in the legal field to be detailed to the MJRC. The Coast Guard will be invited to nominate a military justice expert in the grade of O-6 or O-5 and one or two judge advocates in the grade of O-4 or O-3 to be detailed to the MJRC. Non-judge advocate military personnel and/or retired military personnel (who will be recalled to active duty or employed as HQEs or in another appropriate civilian status) may also be designated as members of the MJRC. An attorney in the Office of the Deputy General Counsel (Personnel & Health Policy) will serve as Staff Director of the MJRC.

c. **Senior Advisors.** The General Counsel may appoint one or more Senior Advisors to support the MJRC. Such a Senior Advisor may be hired for that purpose as an HQE or provided another appropriate status. If one or more of those Senior Advisors is not a full-time government employee or permanent

part-time employee, he or she will be consulted on an individual basis only. The Chairman will consult with any such Senior Advisors as the Chairman deems appropriate.

d. **Department of Justice Advisor**. The General Counsel of the Department of Defense will request the Department of Justice to designate an advisor to the MJRC who is an expert in the litigation of criminal trials in United States district courts.

4. Guiding Principles. The MJRC will apply the following guiding principles to the comprehensive review:

a. Use the current UCMJ as a point of departure for a baseline reassessment.

b. Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice.

c. To the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the Military Services.

d. Consider any recommendations, proposals, or analysis relating to military justice issued by the Response Systems Panel established under Section 576 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632, 1760 (2013).

e. Consider, as appropriate, the recommendations, proposals, and analysis in the report of the Defense Legal Policy Board, including the report of that Board's Subcommittee on Military Justice in Combat Zones.

5. Process.

a. The MJRC will consider such information and perform such analysis as it deems appropriate. The expectation is that the judge advocates on the MJRC will have experience as military judges, prosecutors, defense counsel, and victim's counsel, or access to others in their organizations with those perspectives. They may also draw on their experience as staff judge advocates advising military commanders as convening authorities. In addition, at a point in the review process where the Chairman believes it would be most useful, the MJRC will solicit the views of general and flag officers with experience as general court-martial convening authorities. The Chairman may ask the Legal Counsel to the Chairman of the Joint Chiefs of Staff (CJCS Legal Counsel) to assist in convening a meeting or meetings with a suitable group of officers for this purpose.

b. The MJRC will coordinate proposed amendments to either the UCMJ or MCM on an ongoing "rolling" basis. The goal of this coordination process will be to achieve consensus on proposed reforms or identify points of disagreement, so that the MJRC will know whether a proposal has been accepted or rejected before dealing with other UCMJ articles or MCM provisions that may be affected by that proposal.

c. The Chairman has the sole discretion and authority to forward any proposal for coordination. Such coordination will be with the Deputy General Counsel (Personnel & Health Policy), the Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and the CJCS Legal Counsel. The Chairman will determine the frequency and level of detail with which such proposals will be forwarded for coordination. The Chairman may group related proposed changes for this coordination process. The Chairman should exercise this discretion in a manner that will allow final decisions to be made on major reform proposals at an early point in the review process.

d. A failure to concur or non-concur within seven duty days of receipt of a request for concurrence will be deemed to be a concurrence unless, upon request, the Chairman extends the period for concurrence. Any proposal that does not receive unanimous concurrence or non-concurrence will be presented to the General Counsel of the Department of Defense, and, as appropriate, via the General Counsel to the Secretary of Defense or Deputy Secretary of Defense for resolution.

6. Suspense Dates The MJRC will submit to the General Counsel a report including recommended UCMJ amendments no later than September 22, 2014. The MJRC will submit to the General Counsel a second report including recommended MCM amendments no later than March 20, 2015.

7. Support.

a. The members of the MJRC will be co-located at One Liberty Center, 875 North Randolph Street, Arlington, VA 22203.

b. The Office of General Counsel will coordinate human resources, office/facilities, and other support for the MJRC.

c. The Military Departments and other DoD Components will provide full support to the MJRC with detailed personnel, information (including but not limited to review of documents and interviews of personnel), analytical capacity as determined necessary, and any other support as requested.

Approved: _____
Stephen W. Preston, General Counsel, DoD

Date: 24 January 2014

Addendum to the January 24, 2014 "Terms of Reference for Military Justice Review Committee"

1. The name of the organization conducting the Secretary of Defense-directed comprehensive review of the military justice system is the Military Justice Review Group. That word "Group" is substituted for the word "Committee" at each point the latter appears in the January 24, 2014 Terms of Reference. The abbreviation "MJRG" is substituted for "MJRC" at each point the latter appears in the January 24, 2014 Terms of Reference.

2. The title of the head of the Military Justice Review Group is Director. The word "Director" is substituted for "Chairman" at each point the latter appears in paragraphs 3, 5.c., and 5.d of the January 24, 2014 Terms of Reference. Paragraph 5.a is revised to read as follows:

a. The MJRG will consider such information and perform such analysis as it deems appropriate. The expectation is that the judge advocates on the MJRG will have experience as military judges, prosecutors, defense counsel, and victim's counsel, or access to others in their organizations with those perspectives. They may also draw on their experience as staff judge advocates advising military commanders as convening authorities. In addition, at a point in the review process where the Director believes it would be most useful, the MJRG will consult with general and flag officers who have had experience as general court-martial convening authorities. The Director may ask the Legal Counsel to the Chairman of the Joint Chiefs of Staff (CJCS Legal Counsel) to assist in convening a meeting or meetings with a suitable group of officers for this purpose.

Approved: _____

Stephen W. Preston, General Counsel, DoD

Date: 3/12/14

APPENDIX D:
Military Justice Review Group Staff Members

Director

Honorable Andrew S. Effron
Former Chief Judge, U.S. Court of Appeals
for the Armed Forces

Executive Secretariat

Staff Directors

Lieutenant Colonel Charles C. Hale
U.S. Marine Corps
(from January 2015)

Mr. David J. Gruber
Captain, U.S. Navy (Retired)
(December 2013 - January 2015)

Attorney Advisors/Special Assistants

Mr. David P. Bennett
DoD Office of the General Counsel

Mr. Andrew S. Williams
Colonel, U.S. Air Force (Retired)

Ms. Patricia A. Ham
Colonel, U.S. Army (Retired)

Mr. John G. Crews
Department of Justice

Ms. Theresa A. Gallagher
Colonel, U.S. Army (Retired)

Legislative Counsel
Mr. Willoughby G. Sheane

Office Manager/Senior Paralegal
Ms. Tiffany V. Streeter

Interns

Ms. Tara J. Pistorese

Mr. David N. Bowen

Structure Team

Team Lead
Colonel Louis P. Yob
U.S. Army

Attorney Advisors

Captain Richard E. Batson
U.S. Coast Guard

Commander Michael C. Wessel
U.S. Coast Guard

Major Erika L. Sleger
U.S. Air Force

Captain Christopher P. Whelan
U.S. Marine Corps

Paralegal
Master Sergeant Charles L. Zaldivar
U.S. Air Force

Punitive Articles Team

Team Lead
Lieutenant Colonel Charles C. Hale
U.S. Marine Corps

Attorney Advisors

Professor Mark R. Strickland
Lieutenant Colonel, U.S. Air Force
(Retired)

Major Charles G. Warren
U.S. Air Force

Lieutenant Commander Kirtland C. Marsh
U.S. Navy

Paralegal
Sergeant Claire V. Jorns
U.S. Army

Pretrial and Trial Process Team

Team Lead
Colonel Charles E. Wiedie
U.S. Air Force

Attorney Advisors

Lieutenant Robert J. Miller
U.S. Navy

Captain Matthew M. Jones
U.S. Army

Paralegals

Legalman Chief Cindy J. Huamani
U.S. Navy

Legalman First Class Briana L. Ridlon
U.S. Navy

Sentencing and Post-Trial Process Team

Team Lead
Captain Eric C. Price
U.S. Navy

Attorney Advisors

Lieutenant Colonel Stefan R. Wolfe
U.S. Army

Ms. Eleanor Magers Vuono

Major John A. Cacioppo
U.S. Marine Corps

Paralegal
Gunnery Sergeant Jorge M. Rico
U.S. Marine Corps

Intern

Mr. Chris J. Galiardo

Advisors

Senior Advisors

Honorable David B. Sentelle
U.S. Court of Appeals for the District of Columbia Circuit

Honorable Judith A. Miller
Former Department of Defense General Counsel

Department of Justice Advisor
Mr. Jonathan J. Wroblewski, Director
Office of Policy and Legislation

U.S. Court of Appeals for the Armed Forces Advisor
Mr. John E. Sparks, Commissioner
Chambers of Chief Judge James E. Baker

Mr. Clark A. Price, Attorney Advisor
Central Legal Staff, USCAAF

Department of Defense General Counsel Advisors

Mr. William R. Sprance

Ms. Maria Fried

APPENDIX E: Article Comparison Tables

Table 1: Current/Proposed Article Designations and Titles

Designation and Title in Current UCMJ	Designation and Title in Proposed UCMJ
Article 1 — Definitions	Same
Article 2 — Persons subject to this chapter	Same
Article 3 — Jurisdiction to try certain personnel	Same
Article 4 — Dismissed officer's right to trial by court-martial	Same
Article 5 — Territorial applicability of this chapter	Same
Article 6 — Judge advocates and legal officers	Same
Article 6a — Investigation and disposition of matters pertaining to the fitness of military judges	Same
Article 6b — Rights of the victim of an offense under this chapter	Same
Article 7 — Apprehension	Same
Article 8 — Apprehension of deserters	Same
Article 9 — Imposition of restraint	Same
Article 10 — Restraint of persons charged with offenses	Same
Article 11 — Reports and receiving of prisoners	Same
Article 12 — Confinement with enemy prisoners prohibited	Same *(Prohibition of confinement of armed forces members with enemy prisoners and certain others)*
Article 13 — Punishment prohibited before trial	Same
Article 14 — Delivery of offenders to civil authorities	Same
Article 15 — Commanding Officer's non-judicial punishment	Same
Article 16 — Courts-martial classified	Same
Article 17 — Jurisdiction of courts-martial in general	Same
Article 18 — Jurisdiction of general courts-martial	Same
Article 19 — Jurisdiction of special courts-martial	Same
Article 20 — Jurisdiction of summary courts-martial	Same
Article 21 — Jurisdiction of courts-martial not exclusive	Same
Article 22 — Who may convene general courts-martial	Same
Article 23 — Who may convene special courts-martial	Same
Article 24 — Who may convene summary courts-martial	Same
Article 25 — Who may serve on courts-martial	Same
Article 25a — Number of members in capital cases	Same *(Number of court-martial members in capital cases)*
Article 26 — Military judge of a general or special court-martial	Same
Article 27 — Detail of trial counsel and defense counsel	Same
Article 28 — Detail or employment of reporters and interpreters	Same
Article 29 — Absent and additional members	Same *(Assembly and impaneling of members; detail of new members and military judges)*
Article 30 — Charges and specifications	Same

Designation and Title in Current UCMJ	Designation and Title in Proposed UCMJ
Article 31 — Compulsory self-incrimination prohibited	Same
Article 32 — Preliminary Hearing	Same *(Preliminary hearing required before referral to general court-martial)*
Article 33 — Forwarding of charges	*Move requirement to Art.10, strike this article*
Article 34 — Advice of staff judge advocate and reference for trial	Same *(Advice to convening authority before referral for trial)*
Article 35 — Service of charges	Same *(Service of charges; commencement of trial)*
Article 36 — President may prescribe rules	Same
Article 37 — Unlawfully influencing action of court	Same
Article 38 — Duties of trial counsel and defense counsel	Same
Article 39 — Sessions	Same
Article 40 — Continuances	Same
Article 41 — Challenges	Same
Article 42 — Oaths	Same
Article 43 — Statute of limitations	Same
Article 44 — Former jeopardy	Same
Article 45 — Pleas of the accused	Same
Article 46 — Opportunity to obtain witnesses and other evid.	Same
Article 47 — Refusal to appear or testify	Same *(Refusal of person not subject to this chapter to appear, testify, or produce evid.)*
Article 48 — Contempts	Same
Article 49 — Depositions	Same
Article 50 — Admissibility of records of courts of inquiry	Same
Article 50a — Defense of lack of mental responsibility	Same
Article 51 — Voting and rulings	Same
Article 52 — Number of votes required	Same *(Votes required for conviction, sentencing, and other matters)*
Article 53 — Court to announce action	Same *(Findings and sentencing)*
Article 54 — Record of trial	Same
Article 55 — Cruel and unusual punishments prohibited	Same
Article 56 — Maximum and minimum limits	Same *(Sentencing)*
Article 56a — Sentence of confinement for life w/o parole	*Move requirement to Article 56, strike this article*
Article 57 — Effective date of sentences	Same
Article 57a — Deferment of sentences	*Move requirement to Article 57, strike this article*
Article 58 — Execution of confinement	Same
Article 58a — Sentences: red. in enlisted grade upon approval	Same
Article 58b — Sentences: forfeiture of pay during confinement	Same
Article 59 — Error of law; lesser included offense	Same

Designation and Title in Current UCMJ	Designation and Title in Proposed UCMJ
Article 60 — Action by the Convening authority	Same *(Post-trial processing in general and special courts-martial." Some requirements moved to new Arts. 60a, 60b, 60c, and 53a)*
Article 61 — Waiver or withdrawal of appeal	Same *(Waiver of right to appeal; withdrawal of appeal)*
Article 62 — Appeal by the United States	Same
Article 63 — Rehearings	Same
Article 64 — Review by a judge advocate	Same *(Judge advocate review of finding of guilty in summary court-martial)*
Article 65 — Disposition of records	Same *(Transmittal and review of records)*
Article 66 — Review by Court of Criminal Appeals	Same *(Courts of Criminal Appeals)*
Article 67 — Review by the Court of Appeals for the Armed Forces	Same
Article 67a — Review by the Supreme Court	Same
Article 68 — Branch offices	Same
Article 69 — Review in the office of the Judge Advocate General	Same *(Review by Judge Advocate General)*
Article 70 — Appellate counsel	Same
Article 71 — Execution of sentence; suspension of sentence	*Move requirement to Article 57, strike this article*
Article 72 — Vacation of suspension	Same
Article 73 — Petition for a new trial	Same
Article 74 — Remission and suspension	Same
Article 75 — Restoration	Same
Article 76 — Finality of proceedings, findings, and sentences	Same
Article 76a — Leave required to be taken pending review of convictions	Same
Article 76b — Lack of mental capacity or mental responsibility: commitment of accused for examination and treatment	Same
Article 77 —Principals	Same
Article 78 —Accessory after the fact	Same
Article 79 —Conviction of lesser included offense	Same *(Conviction of offense charged, lesser included offenses, and attempts)*
Article 80 —Attempts	Same
Article 81 —Conspiracy	Same
Article 82 —Solicitation	Same *(Soliciting commission of offenses)*
Article 83 —Fraudulent enlistment, appointment, or separation	*Article 104a*
Article 84 —Unlawful enlistment, appointment, or separation	*Article 104b*
Article 85 —Desertion	Same
Article 86 —Absence without leave	Same

Designation and Title in Current UCMJ	Designation and Title in Proposed UCMJ
Article 87 —Missing movement	Same *(Missing movement; jumping from vessel)*
Article 88 —Contempt toward officials	Same
Article 89 —Disrespect toward a superior commissioned officer	Same *(Disrespect toward/ assault of a superior commissioned officer)*
Article 90 —Assaulting or willfully disobeying superior commissioned officer	Same *(Willfully disobeying superior commissioned officer)*
Article 91 —Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer	Same
Article 92 —Failure to obey order or regulation	Same
Article 93 —Cruelty and maltreatment	Same
Article 94 —Mutiny or sedition	Same
Article 95 —Resistance, flight, breach of arrest, and escape	*Article 87a*
Article 96 —Releasing prisoner without proper authority	Same
Article 97 —Unlawful detention	Same
Article 98 —Noncompliance with procedural rules	*Article 131f*
Article 99 —Misbehavior before the enemy	Same
Article 100 —Subordinate compelling surrender	Same
Article 101 —Improper use of countersign	Same
Article 102 —Forcing a safeguard	Same
Article 103 —Captured or abandoned property	*Article108a*
Article 104 —Aiding the enemy	*Article 103b*
Article 105 —Misconduct as prisoner	*Article 98*
Article 106 —Spies	*Article 103*
Article 106a —Espionage	*Article 103a*
Article 107 —False official statements	Same
Article 108 —Military property of the U.S.—sale, loss, damage	Same
Article 109 —Property other —waste, spoilage, or destruction	Same
Article 110 —Improper hazarding of vessel	Same *(Improper hazarding of vessel or aircraft)*
Article 111 —Drunken or reckless operation of vehicle , aircraft, or vessel	*Article 113*
Article 112 —Drunk on duty	Same *(Drunkenness and other incapacitation offenses)*
Article 112a —Wrongful use, possession, etc., of controlled substances	Same
Article 113 —Misbehavior of sentinel	*Article 95 (Offenses of sentinel or lookout)*
Article 114 —Dueling	Same *(Endangerment offenses)*
Article 115 —Malingering	*Article 83*
Article 116 —Riot or breach of peace	Same
Article 117 —Provoking speeches or gestures	Same
Article 118 —Murder	Same
Article 119 —Manslaughter	Same
Article 119a —Death or injury of an unborn child	Same

Designation and Title in Current UCMJ	Designation and Title in Proposed UCMJ
Article 120 —Rape and sexual assault generally	Same
Article 120a —Stalking	*Art. 130*
Article 120b —Rape and sexual assault of a child	Same
Article 120c —Other sexual misconduct	Same
Article 121 —Larceny and wrongful appropriation	Same
Article 122 —Robbery	Same
Article 123 —Forgery	*Article 105*
Article 123a —Making, drawing, or uttering check, draft, etc.	Same
Article 124 —Maiming	*Article 128a*
Article 125 —Forcible sodomy; bestiality	*Forcible sodomy - Art. 120 (Rape and sexual assault generally); Bestiality - Art. 134 (Animal abuse)*
Article 126 —Arson	Same *(Arson; burning with intent to defraud)*
Article 127 —Extortion	Same
Article 128 —Assault	Same
Article 129 —Burglary	Same *(Burglary;unlawful entry)*
Article 130 —Housebreaking	*Article 129*
Article 131 —Perjury	Same
Article 132 —Frauds against the United States	*Article 124*
Article 133 —Conduct unbecoming an officer and gentleman	Same
Article 134 —General article	Same
Article 134 —Abusing public animal	Same, subject to Part II review
Article 134 —Adultery	Same, subject to Part II review
Article 134 —Assault—with intent to commit offenses	*Article 128*
Article 134 —Bigamy	Same, subject to Part II review
Article 134 —Bribery and graft	*Articles 124a & 124b*
Article 134 —Burning with intent to defraud	*Article 126*
Article 134 —Check, worthless—making and uttering	Same, subject to Part II review
Article 134 —Child endangerment	*Article 119b*
Article 134 —Child pornography	Same, subject to Part II review
Article 134 —Cohabitation, wrongful	*Art. 134, subject to Part II rev.*
Article 134 —Correctional custody—offenses against	*Article 87b*
Article 134 —Debt, dishonorably failing to pay	Same, subject to Part II review
Article 134 —Disloyal statements	Same, subject to Part II review
Article 134 —Disorderly conduct, drunkenness	Same, subject to Part II review
Article 134 —Drinking liquor with prisoner	*Article 96*
Article 134 —Drunk prisoner	*Article 112*
Article 134 —Drunkenness—incapacitation for duties	*Article 112*
Article 134 —False or unauthorized pass offenses	*Article 105a*
Article 134 —False pretenses, obtaining services under	*Article 121b*
Article 134 —False swearing	*Article 107*
Article 134 —Firearm, discharging—through negligence	Same, subject to Part II review
Article 134 —Firearm, discharging - willful	*Article 114*
Article 134 —Fleeing scene of accident	*Article 111*

Designation and Title in Current UCMJ	Designation and Title in Proposed UCMJ
Article 134 —Fraternization	Same, subject to Part II review
Article 134 —Gambling with subordinate	Same, subject to Part II review
Article 134 —Homicide, negligent	Same, subject to Part II review
Article 134—Impersonating a commissioned officer, warrant, etc	*Article 106*
Article 134 —Indecent language	Same, subject to Part II review
Article 134 —Jumping from vessel into the water	*Article 87*
Article 134 —Kidnapping	*Article 125*
Article 134 —Mail: taking, opening, secreting, etc.	*Article 109a*
Article 134 —Mails: depositing or causing to be deposited obscene matters in	*Article 120a*
Article 134 —Misprision of serious offense	*Article 131c*
Article 134 —Obstructing justice	*Article 131b*
Article 134 —Wrongful interference with adverse admin. proc.	*Article 131g*
Article 134 —Pandering and prostitution	Same, subject to Part II review
Article 134 —Parole, Violation of	*Article 107a*
Article 134 —Perjury: subornation of	*Article 131a*
Article 134 —Public record: altering, concealing, etc.	*Article 104*
Article 134 —Quarantine: medical, breaking	*Article 84*
Article 134 —Reckless endangerment	*Article 114*
Article 134 —Restriction, breaking	*Article 87b*
Article 134 —Seizure: destruction, removal, or disposal of prop.	*Article 131e*
Article 134 —Self-injury without intent to avoid service	Same, subject to Part II review
Article 134 —Sentinel or lookout: offenses against or by	*Article 95*
Article 134 —Soliciting another to commit an offense	*Article 82*
Article 134 —Stolen property: knowingly receiving, buying, etc.	*Article 122a*
Article 134 —Straggling	Same, subject to Part II review
Article 134 —Testify: wrongful refusal	Article 131g
Article 134 —Threat or hoax - panic or public fear	*Article 115*
Article 134 —Threat, communicating	*Article 115*
Article 134 —Unlawful entry	*Article 129*
Article 134 —Weapon: concealed, carrying	*Article 114*
Article 134 —Wearing unauthorized insignia	*Article 106a*
Article 135 —Courts of inquiry	Same
Article 136 —Authority to administer oaths and to act as notary	Same *(Auth. to admin. oaths)*
Article 137 —Articles to be explained	Same
Article 138 —Complaints of wrongs	Same
Article 139 —Redress of injuries to property	Same
Article 140 —Delegation by the President	Same
Article 141 —Status	Same
Article 142 —Judges	Same
Article 143 —Organization and employees	Same
Article 144 —Procedure	Same
Article 145 —Annuities for judges and survivors	Same
Article 146 — Code committee	Same *(Military Justice Review Panel)*

Proposed New Articles
Article 26a – Military Magistrates
Article 30a – Proceedings Conducted Before Referral
Article 33 – Disposition Guidance
Article 53a – Plea Agreements
Article 60a – Limited authority to act on the sentence in specified post-trial circumstances
Article 60b – Post-trial actions in summary courts-martial and certain general and special courts-martial
Article 60c – Entry of judgment
Article 87a – Resistance, flight, breach of arrest, and escape
Article 87b – Correctional custody offenses
Article 93a – Prohibited activities with military recruit or trainee by person in position of special trust
Article 103a – Espionage
Article 103b – Aiding the enemy
Article 104a – Fraudulent Enlistment, Appointment, or Separation
Article 104b – Unlawful Enlistment, Appointment, or Separation
Article 105a – False or unauthorized pass offenses
Article 107a – Parole violation
Article 108a – Captured, abandoned property; failure to secure, etc.
Article 109a – Mail: taking, opening, secreting, destroying or stealing
Article 119b – Child endangerment
Article 121a – Unauthorized use of credit cards, debit cards, and access devices
Article 121b – False pretenses, obtain services under
Article 122a – Stolen property: knowingly receiving, buying
Article 123 – Offenses concerning Government computers
Article 124a – Bribery
Article 124b – Graft
Article 125 – Kidnapping
Article 128a – Maiming
Article 131a – Subornation of Perjury
Article 131b – Obstruction of justice
Article 131c – Misprision of serious offense
Article 131d – Wrongful refusal to testify
Article 131e – Prevention of authorized seizure of property
Article 131f – Noncompliance with procedural rules, etc.
Article 131g – Wrongful interference with an adverse administrative proceeding
Article 132 – Retaliation
Article 140a – Case management; data collection and accessibility
Article 146a – Annual reports

Table 2: Proposed/Current Article Designations and Titles

Designation in Proposed UCMJ	Designation in Current UCMJ
Article 1 —Definitions	Same
Article 2 —Persons subject to this chapter	Same
Article 3 —Jurisdiction to try certain personnel	Same
Article 4 —Dismissed officer's right to trial by court-martial	Same
Article 5 —Territorial applicability of this chapter	Same
Article 6 —Judge Advocates and legal officers	Same
Article 6a —Investigation and disposition of matters pertaining to the fitness of military judges	Same
Article 6b —Rights of the victim of an offense under this chapter	Same
Article 7 —Apprehension	Same
Article 8 —Apprehension of deserters	Same
Article 9 —Imposition of restraint	Same
Article 10 —Restraint of persons charged	Same
Article 11 —Reports and receiving of prisoners	Same
Article 12 — Prohibition of confinement of armed forces members with enemy prisoners and certain others	Same *(Confinement with enemy prisoners prohibited)*
Article 13 —Punishment prohibited before trial	Same
Article 14 —Delivery of offenders to civil authorities	Same
Article 15 —Commanding Officer's non-judicial punishment	Same
Article 16 —Courts-martial classified	Same
Article 17 —Jurisdiction of courts-martial in general	Same
Article 18 —Jurisdiction of general courts-martial	Same
Article 19 —Jurisdiction of special courts-martial	Same
Article 20 —Jurisdiction of summary courts-martial	Same
Article 21 —Jurisdiction of courts-martial not exclusive	Same
Article 22 —Who may convene general courts-martial	Same
Article 23 —Who may convene special courts-martial	Same
Article 24 —Who may convene summary courts-martial	Same
Article 25 —Who may serve on courts-martial	Same
Article 25a —Number of court-martial members in capital cases	Same *(Number of members in capital cases)*
Article 26 —Military judge of a general or special court-martial	Same
Article 26a —Military magistrates	*New article*
Article 27 —Detail of trial counsel and defense counsel	Same
Article 28 —Detail or employment of reporters and Interpreters	Same
Article 29 —Assembly and impaneling of members; detail of new members and military judges	Same *(Absent and additional members)*
Article 30 —Charges and specifications	Same
Article 30a —Proceedings conducted before referral	*New article*
Article 31 —Compulsory self-incrimination prohibited	Same
Article 32 —Preliminary hearing required before referral to general court-martial	Same *(Preliminary hearing)*

Designation in Proposed UCMJ	Designation in Current UCMJ
Article 33 —Disposition guidance	*New article*
Article 34 —Advice to convening authority before referral for trial	Same *(Advice of staff judge advocate and reference for trial)*
Article 35 —Service of charges; commencement of trial	Same *(Service of charges)*
Article 36 —President may prescribe rules	Same
Article 37 —Unlawfully influencing action of court	Same
Article 38 —Duties of trial counsel and defense counsel	Same
Article 39 —Sessions	Same
Article 40 —Continuances	Same
Article 41 —Challenges	Same
Article 42 —Oaths	Same
Article 43 —Statute of limitations	Same
Article 44 —Former jeopardy	Same
Article 45 —Pleas of the accused	Same
Article 46 —Opportunity to obtain witnesses and other evidence	Same
Article 47 —Refusal of person not subject to this chapter to appear, testify, or produce evidence	Same *(Refusal to appear or testify)*
Article 48 —Contempts	Same
Article 49 —Depositions	Same
Article 50 —Admissibility of records of courts of inquiry	Same
Article 50a —Defense of lack of mental responsibility	Same
Article 51 —Voting and rulings	Same
Article 52 —Votes required for conviction, sentencing, and other matters	Same *(Number of votes required)*
Article 53 —Findings and sentencing	Same *(Court to announce action)*
Article 53a —Plea Agreements	*New article*
Article 54 —Record of trial	Same
Article 55 —Cruel and unusual punishments prohibited	Same
Article 56 —Sentencing	*Replacing old Article 56—Maximum and Minimum Limits*
Article 57 —Effective date of sentences	*Same, incorporating Arts. 57a and 71*
Article 58 —Execution of confinement	Same
Article 58a —Sentences: reduction in enlisted grade upon approval	Same
Article 58b —Sentences: forfeiture of pay during confinement	Same
Article 59 —Error of law; lesser included offense	Same
Article 60 —Post-trial processing in general and special courts-martial	*Replacing old Article 60—Action by the convening authority*
Article 60a —Limited authority to act in specified post-trial circumstances	*New article*
Article 60b—Post-trial actions in summary courts-martial and certain general and special courts-martial	*New article*

Designation in Proposed UCMJ	Designation in Current UCMJ
Article 60c—Entry of judgment	*New article*
Article 61 —Waiver of right to appeal; withdrawal of appeal	Same *(Waiver or withdrawal of appeal)*
Article 62 —Appeal by the United States	Same
Article 63 —Rehearings	Same
Article 64 —Judge advocate review of finding of guilty in summary court-martial	Same *(Review by a judge advocate)*
Article 65 —Transmittal and review of records	Same *(Disposition of records)*
Article 66 —Courts of Criminal Appeals	Same *(Review by Court of Criminal Appeals)*
Article 67 —Review by the Court of Appeals for the Armed Forces	Same
Article 67a —Review by the Supreme Court	Same
Article 68 —Branch offices	Same
Article 69 —Review by Judge Advocate General	Same *(Review in the Office of the Judge Advocate General)*
Article 70 —Appellate counsel	Same
Article 71—*Reserved*	
Article 72 —Vacation of suspension	Same
Article 73 —Petition for a new trial	Same
Article 74 —Remission and suspension	Same
Article 75 —Restoration	Same
Article 76 —Finality of proceedings, findings, and sentences	Same
Article 76a —Leave required to be taken pending review of convictions	Same
Article 76b —Lack of mental capacity or mental responsibility: commitment of accused for examination and treatment	Same
Article 77 —Principals	Same
Article 78 —Accessory after the fact	Same
Article 79 —Conviction of offense charges, lesser included offenses, and attempts	Same *(Conviction of lesser included offense)*
Article 80 —Attempts	Same
Article 81 —Conspiracy	Same
Article 82 —Soliciting commission of offenses	Same *(Solicitation)*
Article 83 —Malingering	*Article 115*
Article 84 —Breach of medical quarantine	*Article 134*
Article 85 —Desertion	Same
Article 86 —Absence without leave	Same
Article 87 —Missing movement; jumping from a vessel	*Same / Article 134*
Article 87a —Resistance, flight, breach of arrest, and escape	*Article 95*
Article 87b —Offenses against correctional custody and restriction	*Article 134*
Article 88 —Contempt toward officials	Same
Article 89 —Disrespect toward superior commissioned officer; assault of a	*Same/Article 90(1)*

Designation in Proposed UCMJ	Designation in Current UCMJ
superior commissioned officer	
Article 90 —Willfully disobeying superior commissioned officer	Same
Article 91 —Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer	Same
Article 92 —Failure to obey order or regulation	Same
Article 93 —Cruelty and maltreatment	Same
Article 93a —Prohibited activities with military recruit or trainee by person in position of special trust	*New article*
Article 94 —Mutiny or sedition	Same
Article 95 —Offenses by sentinel or lookout	*Article 113 (Misbehavior of sentinel)*
Article 95a —Disrespect toward sentinel or lookout	*Article 134*
Article 96 —Release of prisoner without authority; drinking with prisoner	*Same/Article 134*
Article 97 —Unlawful detention	Same
Article 98 —Misconduct as prisoner	*Article 105*
Article 99 —Misbehavior before the enemy	Same
Article 100 —Subordinate compelling surrender	Same
Article 101 —Improper use of countersign	Same
Article 102 —Forcing a safeguard	Same
Article 103 —Spies	*Article 106*
Article 103a —Espionage	*Article 106a*
Article 103b —Aiding the enemy	*Article 104*
Article 104 —Public records offenses	*Article 134*
Article 104a—Fraudulent enlistment, appointment, or separation	*Article 83*
Article 104b—Unlawful enlistment, appointment, or separation	*Article 84*
Article 105 —Forgery	*Article 123*
Article 105a —False or unauthorized pass offenses	*Article 134*
Article 106 —Impersonation of officer, noncommissioned or petty officer, or agent or official	*Article 134*
Article 106a —Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button	*Article 134*
Article 107 —False official statements; false swearing	*Same / Article 134*
Article 107a —Parole violation	*Article 134*
Article 108 —Military property of the U.S.: sale, loss, damage, etc.	Same
Article 108a —Captured or abandoned property	*Article 103*
Article 109 —Property other than military property of the United States - Waste, spoilage, or destruction	Same
Article 109a —Mail matter: wrongful taking, opening, etc.	*Article 134*
Article 110 —Improper hazarding of vessel or aircraft	Same *(Improper hazarding of vessel)*
Article 111 —Leaving scene of vehicle accident	*Article 134*
Article 112 —Drunkenness and other incapacitation offenses	*Same / Article 134*
Article 112a —Wrongful use, possession, etc., of controlled substances	Same
Article 113 —Drunken or reckless operation of a vehicle, aircraft or vessel	*Article 111*
Article 114 —Endangerment offenses	*Same / Article 134*

Designation in Proposed UCMJ	Designation in Current UCMJ
Article 115 —Communicating threats	*Article 134*
Article 116 —Riot or breach of peace	Same
Article 117 —Provoking speeches or gestures	Same
Article 118 —Murder	Same
Article 119 —Manslaughter	Same
Article 119a —Death or injury of an unborn child	Same
Article 119b —Child endangerment	*Article 134*
Article 120 —Rape and sexual assault generally	Same
Article 120a —Mails: deposit of obscene matter	*Article 134*
Article 120b —Rape and sexual assault of a child	Same
Article 120c —Other sexual misconduct	Same
Article 121 —Larceny and wrongful appropriation	Same
Article 121a —Fraudulent use of credit cards, debit cards, and other access devices	*New article*
Article 121b —False pretenses to obtain services	*Article 134*
Article 122 —Robbery	Same
Article 122a —Receiving stolen property	*Article 134*
Article 123 —Offenses concerning Government computers	*New article*
Article 123a —Making, drawing, or uttering check, draft, or order without sufficient funds	Same
Article 124 —Frauds against the United States	*Article 132*
Article 124a —Bribery	*Article 134*
Article 124b —Graft	*Article 134*
Article 125 —Kidnapping	*Article 134*
Article 126 —Arson; burning with intent to defraud	*Same / Article 134*
Article 127 —Extortion	Same
Article 128 —Assault	*Same / Article 134*
Article 128a —Maiming	*Article 124*
Article 129 —Burglary; unlawful entry	Same
Article 130 —Stalking	*Article 120a*
Article 131 —Perjury	Same
Article 131a —Subornation of perjury	*Article 134*
Article 131b —Obstruction of justice	*Article 134*
Article 131c —Misprision of serious offense	*Article 134*
Article 131d —Wrongful refusal to testify	*Article 134*
Article 131e —Prevention of authorized seizure of property	*Article 134*
Article 131f —Noncompliance with procedural rules	*Article 98*
Article 131g —Wrongful interference with an adverse administrative proceeding	*Article 134*
Article 132 —Retaliation	*New article*
Article 133 —Conduct unbecoming an officer and a gentleman	Same
Article 134 —General article	Same
Article 134—Abusing public animal *(subject to Part II review)*	Same
Article 134—Adultery *(subject to Part II review)*	Same
Article 134—Bigamy *(subject to Part II review)*	Same

Designation in Proposed UCMJ	Designation in Current UCMJ
Article 134—Check, worthless making and uttering *(subject to Part II review)*	Same
Article 134—Child pornography *(subject to Part II review)*	Same
Article 134—Cohabitation, wrongful *(subject to Part II review)*	Same
Article 134 —Debt, dishonorably failing to pay *(subject to Part II review)*	Same
Article 134 —Disloyal statements *(subject to Part II review)*	Same
Article 134—Disorderly conduct, drunkenness *(subject to Part II review)*	Same
Article 134 —Firearm, discharging through negligence *(subject to Part II review)*	Same
Article 134—Fraternization *(subject to Part II review)*	Same
Article 134 —Gambling with subordinate *(subject to Part II review)*	Same
Article 134 —Homicide, negligent *(subject to Part II review)*	Same
Article 134 —Indecent language *(subject to Part II review)*	Same
Article 134—Prostitution and Pandering *(subject to Part II review)*	Same
Article 134 —Self-injury without intent to avoid service *(subject to Part II review)*	Same
Article 134 —Straggling *(subject to Part II review)*	Same
Article 135 —Courts of inquiry	Same
Article 136 —Authority to administer oaths	Same *(Authority to administer oaths and act as notary)*
Article 137 —Articles to be explained	Same
Article 138 —Complaints of wrongs	Same
Article 139 —Redress of injuries to property	Same
Article 140 —Delegation by the President	Same
Article 140a —Case management; data collection and accessibility	*New article*
Article 141 —Status	Same
Article 142 —Judges	Same
Article 143 —Organization and employees	Same
Article 144 —Procedure	Same
Article 145 —Annuities for judges and survivors	Same
Article 146 —Military Justice Review Panel	*Replacing old Article 146—Code committee*
Article 146a —Annual reports	*New article*

APPENDIX F:
Memorandum from Mr. Preston of September 29, 2014, Directing the Military Justice Review Group to consider the Response Systems Panel recommendations

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

GENERAL COUNSEL

SEP 29 2014

MEMORANDUM FOR DIRECTOR, MILITARY JUSTICE REVIEW GROUP

SUBJECT: Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel

On August 21, 2014, the Secretary of Defense directed that the Department review the recommendations made by the Response Systems to Adult Sexual Assault Crimes Panel to assess whether the recommendations should be approved, approved in part, or disapproved. Our office has reviewed the recommendations and has identified 14 recommendations that could benefit from an assessment by the Military Justice Review Group.

As you continue to review the military justice system, I request that you consider the 14 recommendations as part of your review. The 14 recommendations are attached.

I am grateful for the Military Justice Review Group's expertise and the important work it is performing in analyzing and proposing improvements to the military justice system.

Stephen W. Preston

Attachment:
As stated

RSP Recommendation 37: Congress not further limit the authority under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and DoD policy.

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

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

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

RSP Recommendation 42: Congress not adopt additional amendments to Article 60 of the UCMJ beyond the significant limits on discretion already adopted, and the President should not impose additional limits to the post-trial authority of convening authorities.

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

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

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

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

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

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

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

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

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

OFFICE OF THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1000

AUG 21 2014

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARY OF DEFENSE FOR COMPTROLLER/CHIEF FINANCIAL OFFICER
UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel

Over the past year, the Response Systems to Adult Sexual Assault Crimes Panel (RSP) conducted a comprehensive review of the response systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses. The RSP issued its report on June 27, 2014; the report contained 132 recommendations on how to improve the effectiveness of such systems. The Secretary of Defense appreciates your efforts in supporting the work of the RSP by responding to numerous requests for information and making your personnel available to address questions. Now that the RSP has concluded its work, the Department must consider its recommendations. The work of the RSP affords a unique opportunity to consider the input from numerous subject matter experts in a broad range of disciplines, as well as victims, to inform our efforts to eradicate sexual assault from our ranks.

Please provide your views on whether to approve, approve in part, or disapprove each of the attached recommendations to the DoD General Counsel by September 5, 2014. The General Counsel should also refer the RSP's recommendations for assessment to the Military Justice Review Group and the Joint Service Committee on Military Justice, as appropriate. A tentative assignment of responsibility for implementing each recommendation (if approved) is included in the list of recommendations. Your coordination or comments on these tentative assignments should also be provided to the General Counsel by September 5, 2014. As the sponsor to the RSP, the General Counsel will consolidate the views provided and submit them with a proposed implementation plan to the Secretary of Defense for his consideration by October 8, 2014. The DoD General Counsel point of contact is Ms. Maria Fried at maria.a.fried.civ@mail.mil.

Michael L. Bruhn
Executive Secretary

Attachment:
As stated

OSD008991-14

REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL

June 2014

RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL
ONE LIBERTY CENTER
875 NORTH RANDOLPH STREET
ARLINGTON, VA 22203-1995

June 27, 2014

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

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

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

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

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

Dear Chairmen, Ranking Members, and Mr. Secretary:

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

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

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

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

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

Respectfully submitted,

Honorable Barbara S. Jones, Chair

Honorable Elizabeth Holtzman

James W. Houck

Elizabeth L. Hillman

Harvey Bryant

Malinda E. Dunn

Colleen L. McGuire

Mai Fernandez

Holly O'Grady Cook

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EXECUTIVE SUMMARY

RESPONSIBILITY OF THE RESPONSE SYSTEMS PANEL

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

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

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

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

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

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

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

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

- An assessment of the strengths and weakness of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crime;

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

- An assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under the UCMJ, would have on overall reporting and prosecution of sexual assault cases;

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

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

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

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

- An assessment of whether the Department of Defense should promulgate, and ensure the understanding of and compliance with, a formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response, as a means for addressing those issues within the Armed Forces. If the response systems panel recommends such a formal statement, the response systems panel shall provide key elements or principles that should be included in the formal statement;

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

- Such other matters and materials the panel considers appropriate.

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

OVERVIEW OF PANEL RECOMMENDATIONS

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

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

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

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

Measuring the Scope of Sexual Assault in the Military

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

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

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

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

Civilian Communities

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

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

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

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

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

Commander Responsibility and Accountability

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

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

Sexual Assault Prevention

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

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

- *Male-on-Male Sexual Assault.* The Secretary of Defense should direct DoD SAPRO and the Services to enhance their efforts to prevent and respond to male-on-male sexual assault.
    - Prevention efforts should ensure commanders directly acknowledge the potential for male-on-male sexual assault in their commands and directly confront the stigma associated with it.
    - Prevention efforts should also ensure Service members understand that sexually demeaning or humiliating behaviors that may have been minimized as hazing or labeled as "horseplay" in the past are not tolerated and may constitute punishable offenses.
    - DoD SAPRO should fund research and seek expert assistance to understand the risk and protective factors that are unique to male-on-male sexual assault in the military and should develop targeted prevention programs for male-on-male sexual assault offenses.

- *Bystander Intervention.* According to the CDC and leading sexual assault prevention research experts and organizations, effective bystander intervention programs encourage peer groups to guard against attitudes, beliefs, and behaviors that contribute to a climate in which sexual violence is more likely to occur. This includes language and behaviors such as sexist comments, sexually objectifying jokes, and vulgar gestures. The Secretary of Defense and Service Secretaries should direct DoD SAPRO and the Services, respectively, to review bystander intervention programs to ensure they do not rely upon common misconceptions or overgeneralized perceptions. In particular, programs should not overemphasize the problems created by serial rapists and other sexual "predators" and should also emphasize encouraging Service member attention and vigilance toward seemingly harmless attitudes and behaviors that increase the potential for sexual assault.

- *Alcohol Mitigation.* The Secretary of Defense should direct appropriate DoD authorities to work with researchers to determine how best to implement promising, evidence-based alcohol mitigation strategies (e.g., those that affect pricing, outlet density, and the availability of alcohol). The Secretary of Defense should ensure DoD's strategic policies emphasize these strategies and direct DoD SAPRO to coordinate with the Services to evaluate promising programs some local commanders have initiated to mitigate alcohol consumption.

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

The Commander as Convening Authority

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

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

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

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

Special Victim Counsel

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

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

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

Victim Rights

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

Victim Support

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

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

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

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

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

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

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

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

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

IMPROVING MILITARY JUSTICE PROCEDURES

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

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

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

SUSTAINING AND ADEQUATELY FUNDING PROMISING DEPARTMENT OF DEFENSE PROGRAMS AND INITIATIVES

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

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

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

CONDUCTING INDEPENDENT AUDITS AND ASSESSMENTS

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

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

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

CONCLUSION

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

PANEL RECOMMENDATIONS

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

Collecting and Comparing Data

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

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

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

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

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

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

The study should at least assess the following:

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

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

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

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

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

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

Independent Evaluation of WGRA Data and Designing Future Surveys

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

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

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

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

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

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

Survey Response Rates and Survey Fatigue

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

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

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

- The recent dramatic increase in the use and frequency of surveys administered by Defense Equal Opportunity Management Institute (DEOMI) last year raises concerns about survey fatigue. Personnel who are tasked repeatedly to complete surveys for their immediate unit and its parent commands may become less inclined to participate or provide meaningful input.

Sentencing Data

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

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

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

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

Sexual Assault Prevention

RSP Recommendation 13: The Secretary of Defense direct DoD SAPRO and the Services to enhance their efforts to prevent and respond to male-on-male sexual assault.

- Prevention efforts should ensure commanders directly acknowledge the potential for male-on-male sexual assault in their commands and directly confront the stigma associated with it.
- Prevention efforts should also ensure Service members understand that sexually demeaning or humiliating behaviors that may have been minimized as hazing or labeled as "horseplay" in the past are not tolerated and may constitute punishable offenses.
- DoD SAPRO should fund research on and seek expert assistance to understand the risk and protective factors that are unique to male-on-male sexual assault in the military and should develop targeted prevention programs for male-on-male sexual assault offenses.

RSP Recommendation 14: The Service Secretaries ensure commanders focus on effective prevention strategies. Commanders must demonstrate leadership of DoD's prevention approach and its principles, and they must ensure members of their commands are effectively trained by qualified and motivated trainers who are skilled in teaching methods that will keep participants tuned in to prevention messages.

RSP Recommendation 15: The Secretary of Defense direct appropriate DoD authorities to work with researchers to determine how best to implement promising, evidence-based alcohol mitigation strategies (e.g., those that affect pricing, outlet density, and the availability of alcohol). The Secretary of Defense should ensure DoD's strategic policies emphasize these strategies and direct DoD SAPRO to coordinate with the Services to evaluate promising programs some local commanders have initiated to mitigate alcohol consumption.

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

RSP Recommendation 16: The Secretary of Defense direct DoD SAPRO to evaluate development of risk-management programs directed toward populations with particular risk and protective factors that are associated with prior victimization. In particular, DoD SAPRO should work with researchers to determine to what extent prior sexual victimization increases Service members' risk for sexual assault in the military to develop effective programs to protect against re-victimization.

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

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

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

Training the Force on Sexual Assault Prevention

RSP Recommendation 18: The Secretary of Defense and Service Secretaries direct DoD SAPRO and the Services, respectively, to review bystander intervention programs to ensure they do not rely upon common misconceptions or overgeneralized perceptions. In particular, programs should not overemphasize serial rapists and other sexual "predators" and should instead emphasize preventive engagement, encouraging Service member attention and vigilance toward seemingly harmless attitudes and behaviors that increase the potential for sexual assault.

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

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

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

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

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

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

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

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

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

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

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

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

RSP Recommendation 25: The Department of Defense not promulgate at this time an additional formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response.

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

Organizational Climate Surveys

RSP Recommendation 26: DoD SAPRO and the Defense Equal Opportunity Management Institute ensure survey assessments and other methods for assessing command climate accurately assess and evaluate the effectiveness of subordinate organizational leaders and supervisors in addition to commanders.

- Commanders are ultimately accountable for their unit's performance and climate, but unit climate assessments must consider the effectiveness of all leaders in the organization, including all subordinate personnel exercising leadership or supervisory authority.
- Most issues and concerns expressed by victims are with lower-level leaders, not senior commanders or convening authorities. Unit climate assessments and response measures must be sufficiently comprehensive to include leaders and supervisors at every level.
- Commanders must pay particular attention to the critical role played by noncommissioned officers and subordinate leaders and supervisors, and they must set expectations that establish appropriate organizational climate and ensure unit leaders are appropriately trained to effectively perform their roles in sexual assault prevention and response.

RSP Recommendation 27: The Secretary of Defense and Service Secretaries ensure commanders are required to develop action plans following completion of command climate surveys that outline steps the command will take to validate or expand upon survey information and steps the command will take to respond to issues identified through the climate assessment process.

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

- Although surveys may provide helpful insight into positive and negative climate factors within an organization, surveys alone do not provide a comprehensive assessment of the climate in an organization.

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

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

RSP Recommendation 30: Congress not adopt Section 3(d) of the Victim's Protection Act of 2014. Alternatively, the Secretary of Defense direct the formulation of a review process to be applied following each reported instance of sexual assault to determine the non-criminal factors surrounding the event. Such reviews should address what measures ought to be taken to lessen the likelihood of recurrence (e.g.; physical security, lighting, access to alcohol, off-limits establishments, etc.).

- While information about a unit's culture or climate may prove helpful or relevant in some criminal investigations, it is not clear how organizational climate surveys would be effective following each report of a sexual assault offense. Organizational climate may not be a contributing factor in every alleged crime of sexual assault. Additional survey requirements increase concerns about survey fatigue and the accuracy of the information collected.
- DoD has not formalized a standard process to review reported incidents of sexual assault to determine what additional actions might be taken in the future to prevent the occurrence of such an incident. Some organizations and commands within DoD have developed review processes that warrant evaluation by DoD.

Commander Evaluation and Accountability

RSP Recommendation 31: DoD and the Services consider opportunities and methods for effectively factoring accountability metrics into commander performance assessments, including climate survey results, indiscipline trends, sexual assault statistics, and equal opportunity data.

- While ineffective or inadequate commanders should be relieved, accountability must also include positive reinforcement that will strengthen good commanders.
- Although this provision would require assessment of the ability of commanders to foster a safe climate for crime reporting and adequately respond to allegations of sexual assault, Section 3(c) would not require performance appraisals to specifically address how a commander performs his or her sexual assault prevention responsibilities.
- All Services have policies and methods for evaluating commanders on their ability to foster a positive command climate, but definitions and evaluation mechanisms vary across the Services.

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

- While performance appraisals in each Service now directly impact promotion potential and future assignments, including command selection, the evaluation scope and level of detail required vary among the Services.
- If performance evaluation assessment increases attention to and support of SAPR programs, differences among the Services in assessment requirements may result in uneven support and attention among subordinate leaders and personnel.
- Subordinate leaders in a unit play a significant role in the success or failure of SAPR efforts, and accountability should extend beyond commanders to junior officers, noncommissioned officers, and civilian supervisors.
- SAPR program effectiveness will be limited without the full investment of subordinate leaders.
- Section 3(c) of the Victim's Protection Act of 2014 would extend evaluation requirements to all Service members.

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

- Commanders should be measured according to clearly defined and established standards for SAPR leadership and performance.
- Mandated reporting of command climate surveys to the next higher level of command has the potential to improve command visibility of climate issues of subordinate commanders. Meaningful review by senior commanders increases opportunities for early intervention and can improve command response to survey feedback. However, commanders and leaders must recognize that surveys may or may not reflect long-term trends, and they provide only one measure of a unit's actual command climate and the commander's contribution to that climate.

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

- The Navy's accountability effort, which provides specific direction and command-tailored direction on SAPR and other command climate initiatives, offers an encouraging model for ensuring compliance and fostering program success.

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

Role of the Commander in the Military Justice System

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

- Congress has enacted significant amendments to the UCMJ to enhance the response to sexual assault in the military, and the DoD implemented numerous changes to policies and programs for the same purpose. Some changes have only just been implemented and other amendments to the UCMJ have not yet been implemented, and DoD has not yet fully evaluated what impact these reforms will have on the incidence, reporting or prosecution of sexual assault in the military.
- The Military Justice Improvement Act (MJIA) includes a statutory restriction on the expenditure of additional resources and authorization of additional personnel, yet implementing the convening authority mandate included in the MJIA will involve significant personnel and administrative costs. Resources are an issue of primacy for any legislation that creates additional structure.
- Implementing the MJIA will require reassignment of O-6 judge advocates who meet the statutory prosecutor qualifications. The existing pool of O-6 judge advocates who meet these requirements is finite; and many of these officers routinely serve in assignments related to other important aspects of military legal practice. Therefore, implementing MJIA's mandate, absent an increase in personnel resources, may result in under-staffing of other important senior legal advisor positions.

RSP Recommendation 37: Congress not further limit the authority under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and DoD policy.

- Criticism of the military justice system often confuses the term "commander" with the person authorized to convene courts-martial for serious violations of the UCMJ. These are not the same thing.
- Pursuant to the Fiscal Year 2014 (FY14) NDAA amendments to the UCMJ and current practice, only a general court-martial convening authority is authorized to order trial by court-martial for any offense of rape, sexual assault, rape or sexual assault of a child, forcible sodomy, or attempts to commit these offenses. Subordinate officers, even when in positions of command, may not do so.
- Commanders with authority to refer a sexual assault allegation for trial by court-martial will normally be removed from any personal knowledge of the accused or victim.
- If a convening authority has something other than an official interest in a particular case, the convening authority is required to recuse himself or herself.
- Under current law and practice, the authority to make disposition decisions regarding sexual assault allegations is limited to senior commanders who must receive advice from judge advocates before determining appropriate resolution.
- The evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault or increase reporting of sexual assaults in the Armed Forces.
- The evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will improve the quality of investigations and prosecutions or increase the conviction rate in these cases.

- Senior commanders vested with convening authority do not face an inherent conflict of interest when they convene courts-martial for sexual assault offenses allegedly committed by members of their command. As with leaders of all organizations, commanders often must make decisions that may negatively impact individual members of the organization when those decisions are in the best interest of the organization.
- Civilian jurisdictions face underreporting challenges that are similar to the military, and it is not clear that the criminal justice response in civilian jurisdictions, where prosecutorial decisions are supervised by elected or appointed lawyers, is more effective.
- None of the military justice systems employed by our Allies was changed or set up to deal with the problem of sexual assault, and the evidence does not indicate that the removal of the commander from the decision making process in non-U.S. military justice systems has affected the reporting of sexual assaults. In fact, despite fundamental changes to their military justice systems, including eliminating the role of the convening authority and placing prosecution decisions with independent military or civilian entities, our Allies still face many of the same issues in preventing and responding to sexual assaults as the United States military.
- It is not clear what impact removing convening authority from senior commanders would have on the military justice process or what consequences would result to organization discipline or operational capability and effectiveness.

RSP Recommendation 38: The Secretary of Defense ensure all officers preparing to assume senior command positions at the grade of O-6 and above receive dedicated legal training that fully prepares them to exercise authorities assigned to them under the UCMJ.

- Legal training provided to senior commanders through resident and on-site Service Judge Advocate General School hosted courses varies significantly among the Services. For example, the Army and Navy Judge Advocate General Schools provide senior commanders with resident or on-site courses on legal issues. Formal Air Force legal training is less robust and is incorporated into group and wing commander courses hosted by Air University.

Reviewing Convening Authorities' Referral Decisions

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

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

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

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

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

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

- Most "senior trial counsel" assigned to cases are more junior and less experienced than the staff judge advocate advising the convening authority. This provision inappropriately elevates the assessments of generally more junior judge advocates and would likely prove to be unproductive, disruptive, and unnecessary to ensuring the fair disposition of cases.

Convening Authority and Clemency

RSP Recommendation 42: Congress not adopt additional amendments to Article 60 of the UCMJ beyond the significant limits on discretion already adopted, and the President should not impose additional limits to the post-trial authority of convening authorities.

- Section 1702 of the FY14 NDAA, which modifies Article 60 of the UMCJ, significantly limits the post-trial authority and discretion of convening authorities for serious sexual offenses by precluding them from disapproving findings and reducing their discretion to reduce the court-martial sentence for such offenses.

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

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

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

Special Victim Counsel

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

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

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

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

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

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

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

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

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

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

Sustain Special Victim Counsel

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

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

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

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

Assess Special Victim Counsel

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

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

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

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

Victim Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reporting

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

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

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

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

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

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

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

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

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

RSP Recommendation 65: The Secretary of Defense direct DoD SAPRO to ensure sexual assault reporting options are clarified to ensure all members of the military, including the most junior personnel, understand their options for making a restricted or unrestricted report and the channels through which they can make a report.

- Sexual assault victims currently have numerous channels outside the chain of command to report incidents of sexual assault, and they are not required to report to anyone in their military unit or any member of their chain of command. Reporting channels are broadly publicized throughout the military. Military personnel in the United States may always call civilian authorities, healthcare professionals, or other civilian agencies to report a sexual assault.
- It is not clear that a sufficient percentage of military personnel understand sexual assault reporting options. Based on recent survey results, junior enlisted personnel scored lowest in understanding the options for filing a restricted report. Nearly one-half of junior enlisted personnel surveyed believed they could make a restricted report to someone in their chain of command, which is incorrect.
- Under current law and practice, unrestricted reports of sexual assault must be referred to, and investigated by, MCIO that are independent of the chain of command. No commander or convening authority may refuse to forward an allegation to the MCIO or impede an investigation. Any attempt to do so would constitute a dereliction of duty or obstruction of justice, in violation of the UCMJ.

Reporting Data

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

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

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

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

Victim Services

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

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

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

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

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

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

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

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

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

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

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

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

RSP Recommendation 73: The Service Secretaries direct further development of local coordination requirements both on and off the installation, and expand requirements for installation commanders to liaison with victim support agencies.

Victim Services Personnel

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

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

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

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

Assess Sexual Assault Prevention and Response

RSP Recommendation 76: The Secretary of Defense establish an advisory panel, comprised of persons external to the DoD, to offer to the Secretary and other senior leaders in DoD independent assessment and feedback on the effectiveness of DoD's sexual assault prevention and response programs and policies.

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

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

RSP Recommendation 78: The Secretary of Defense direct periodic and regular evaluations of individual DoD, Service, or local Sexual Assault Prevention and Response programs and performance, to be conducted by independent organizations, which would serve to validate or disprove DoD's own internal assessments and would provide useful feedback to the Department and enhance public confidence in Sexual Assault Prevention and Response programs and initiatives.

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

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

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

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

Unlawful Command Influence

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

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

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

Defense Investigators

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

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

Military Defense Counsel Training, Funding, and Personnel

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

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

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

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

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

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

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

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

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

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

Assess Defending Service Members Accused of Sexual Assault

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

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

V. IMPROVING MILITARY JUSTICE PROCEDURES

Standardize Procedures for the Investigation of Reports of Sexual Assault

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Audit Investigations

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

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

Sustain and Fund Forensic and Investigative Capabilities

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

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

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

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

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

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

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

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

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

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

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

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

Train Sexual Assault Forensic Examiners

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

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

Special Victim Capability in Sexual Assault Cases

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

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

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

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

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

Sustain Special Victim Capability

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

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

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

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

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

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

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

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

Assess Special Victim Capability

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

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

Sustain and Fund Judge Advocate Training

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

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

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

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

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

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

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

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

Military Sexual Assault Statute and Jurisdiction

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

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

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

Article 32 Proceedings

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

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

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

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

Study Military Plea Bargaining Process

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

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

Study Military Judge's Pre-Referral Role

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

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

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

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

Training Military Judges

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

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

Character Evidence of the Accused at Trial

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

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

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

Study Judge-Alone Sentencing

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

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

Unitary Sentencing

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

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

Sentencing Guidelines

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

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

  - The actual prison sentences defendants serve in jurisdictions with sentencing guidelines also varies depending on laws affecting parole and other "truth in sentencing" issues.
- The public has an interest in military justice case outcomes, especially in adult sexual assault cases. In 2013, the Navy began publishing the results of all special and general courts-martial to the Navy Times on a monthly basis.

Mandatory Minimums

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

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

Chapter One:

OVERVIEW OF PANEL ASSESSMENT

A. RESPONSE SYSTEMS PANEL STATUTORY CHARTER

Congress directed the Secretary of Defense to establish the Response Systems to Adult Sexual Assault Crimes Panel ("Response Systems Panel," "RSP," or "Panel") "to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under Section 920 of Title 10, United States Code (Article 120 of the Uniform Code of Military Justice (UCMJ)), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems."[1] The nine-member Panel, established in May 2013, was composed of five Secretary of Defense appointees and one member each appointed by the chairman and ranking members of the Committees on Armed Services of the Senate and House of Representatives.[2] The Honorable Barbara S. Jones (Retired) served as Panel Chair.

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

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

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

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

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

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

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

7. An assessment of the strengths and weakness of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crime;

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

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

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

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

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

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

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

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

6. An assessment of whether the Department of Defense should promulgate, and ensure the understanding of and compliance with, a formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response, as a means for addressing those issues within the Armed Forces. If the

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

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

B. METHODOLOGY SUMMARY

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

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

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

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

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

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

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

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

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

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

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

Chapter Two:

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

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

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

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

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

A. BARRIERS TO REPORTING SEXUAL VIOLENCE

Most victims of violent crimes such as robbery or aggravated assault report the crimes to the police. Victims of sexual assault, however, chronically underreport, compared to reporting rates for other forms of violent crime, in both the military and the civilian sector. Studies indicate that reporting rates among female victims are similar in the military and civilian sectors.[22] As a result, the Department of Defense and the Services have focused significant efforts on increasing sexual assault reporting, because "every report that comes forward is one where a victim can receive the appropriate care and . . . is a bridge to accountability where offenders can be held appropriately accountable."[23] However, various societal and military-specific barriers deter victims from reporting and accessing available services.

1. Societal Barriers

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

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

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

2. Reporting Barriers Unique to the Military

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

a. Retaliation and Harassment

In a June 2013 hearing, a representative from the Service Women's Action Network (SWAN) told the Senate Armed Services Committee that "Servicemembers tell us that they do not report for two reasons primarily. They fear retaliation, and they are convinced that nothing will happen to their perpetrator."[34] According to the Department of Defense's 2012 Workplace and Gender Relations Survey (WGRA),[35] 47% of women surveyed who did not report "unwanted sexual contact" indicated they were afraid of reprisal or retaliation from the person who did it, or from their friends, or thought they would be labeled a troublemaker.[36] Of those victims surveyed who did not report the unwanted contact to the chain of command, 43% of active duty women who were victims and 14% of active duty men who were victims indicated that they did not report because they heard about negative experiences of other victims who reported their situations.[37]

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

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

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

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

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

b. Prosecution for Collateral Misconduct

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

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

c. Damage to Military Career

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

d. Deference to Seniority

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

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

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

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

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

e. Subordination of the Individual to the Mission

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

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

f. Limited Focus on Male Sexual Assault Victims

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

g. Victim's Lack of Control over the Report

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

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

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

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

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

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

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

1. Development of Department of Defense Sexual Assault Reporting Options

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

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

2. Department of Defense Sexual Assault Reporting Trends

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

FIGURE 1 - SEXUAL ASSAULT REPORTS RECEIVED[77]

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

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

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

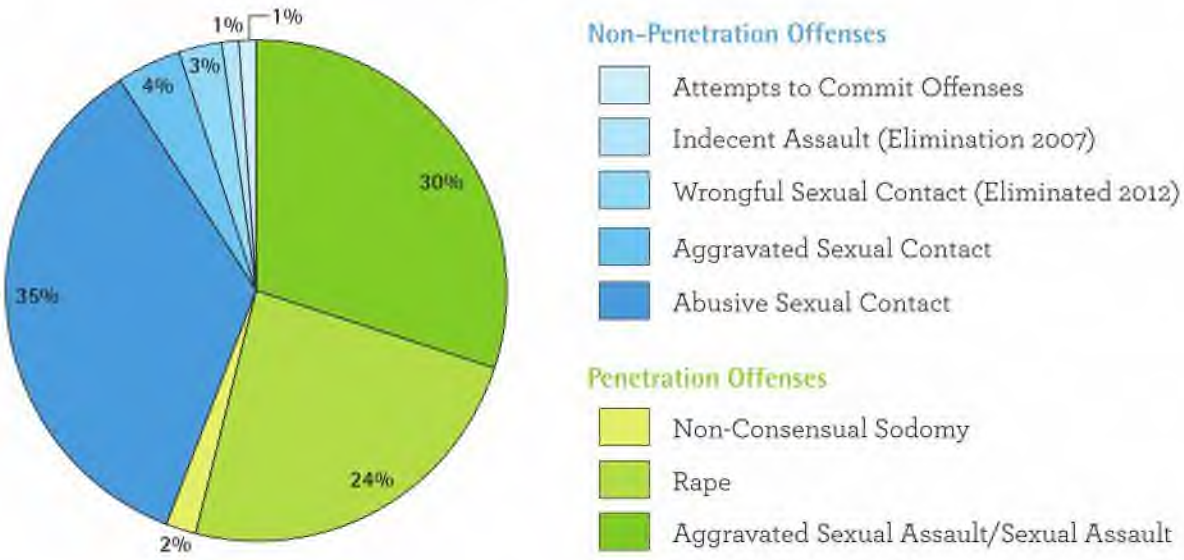
Prior to October 1, 2007	October 1, 2007 to June 27, 2012	Since June 28, 2012
The offenses that constituted sexual assault: • Rape (Article 120, UCMJ); • Forcible Sodomy (Article 125, UCMJ); • Indecent Assault (Article 134, UCMJ); and • Attempts to Commit these Crimes (Article 80, UCMJ).	The offenses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

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

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

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

FIGURE 2: UNRESTRICTED REPORTS OF SEXUAL ASSAULT, FY13



D. SEXUAL ASSAULT SURVEYS

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

FIGURE 3: KEY SURVEY TERMS

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

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

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

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

1. Survey Types and Methodologies

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

largely unverified because there is little or no follow-up to distinguish timeline, definitions, or if the reported behavior actually falls within the intended survey parameters.[108]

The criminal justice approach seeks to account for unreported incidences of criminal sexual misconduct and measure the scope of unreported sexual offenses. Criminal justice surveys are designed to determine whether a well-defined, specified criminal event falls into the time period captured by the survey; they are normally used for comparison with actual arrest and conviction statistics.[109] The method of defining a time period and ensuring that events are accurately captured within the desired time frame is known as "bounding" a survey.

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

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

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

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

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

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

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

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

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

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

3. Using WGRA Survey Results

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

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

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

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

4. Developing a Crime Victimization Survey

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

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

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

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

5. Improving the Workplace and Gender Relations Survey

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

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

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

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

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

A. COMMANDERS

Military commanders are a select group, comprising approximately one percent of military Service members.[147] The term "commander" has a unique and specific meaning within the military. It indicates a position of seniority, authority, and responsibility. The Rules for Courts-Martial distinguish "commander" from "convening authority;" and the two roles, while overlapping, are not interchangeable.[148] The commander is the head of a military organization and is primarily responsible for ensuring mission readiness and maintaining good order and discipline within the unit. Several commanders serve as part of the "chain of command," the succession of commanders from superior to subordinate that exercise command authority.[149]

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

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

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

B. CONVENING AUTHORITY

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

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

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

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

The following table illustrates the total number of active duty personnel and commanders in each Service compared to the small number of SPCMCAs and even smaller number of GCMCAs:[157]

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

C. COMMANDER AND CONVENING AUTHORITY TRAINING

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

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

hosted courses varies significantly among the Services. The Naval Justice School (NJS) and the Army Judge Advocate General's Legal Center and School (TJAGLCS) provide commander-focused courses in military law, including the commander's role in the military justice process.[162] NJS offers courses to Navy and Marine Corps commanders through on-site training at various Navy installations.[163] TJAGLCS offers resident courses in Charlottesville, Virginia. Formal Air Force legal training for senior commanders is less robust and incorporated into group and wing commander courses hosted by Air University at Maxwell Air Force Base, Alabama.[164]

Senior commander training should be uniform, to the greatest extent possible, and a prerequisite to assuming command. Further, considering DoD's recent "initial disposition authority" policy that withholds authority over the most serious sexual assault offenses to senior commanders (explained *infra* at Chapter 8, Section B), *the Secretary of Defense should ensure all officers preparing to assume senior command positions at the grade of O-6 and above receive dedicated legal training that fully prepares them for the military justice responsibilities, particularly as the "initial disposition authority," assigned to them under the UCMJ. [RSP Recommendation 38]*

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

The military justice system is designed to hold offenders accountable for criminal acts, "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[165] All Service members (including National Guard and Reservists on active Federal duty or in Title 10 status) are subject to the UCMJ, which sets forth both procedural and substantive military criminal law.[166] Historically, the military commander has always been at the center of the military justice system.

Summary of the Military Justice Process for Sexual Assault Cases

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

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

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

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

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

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

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

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

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

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

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

1. Standardizing Prosecution and Conviction Rate Methodologies

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

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

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

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

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

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

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

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

FIGURE 5 - "WATERFALL" CALCULATIONS TO STANDARDIZE PROSECUTION AND CONVICTION RATES

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

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

2. Reporting Mandates Must Track Actual Disposition of Cases

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

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

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

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

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

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

3. Comparing Military and Civilian Prosecution Statistics

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

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

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

Chapter Four:

SEXUAL ASSAULT PREVENTION IN THE MILITARY

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

A. PREVENTION STRATEGIES, INITIATIVES, AND TECHNIQUES

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

1. Leading Practices in Sexual Assault Prevention Strategies

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

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

a. Public Health Approach to Sexual Assault Prevention

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

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

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

To leverage partnerships, DoD SAPRO's 2008 Prevention Strategy recognized that "sexual assault prevention cannot solely be the responsibility of victim services personnel on a military base or in a combat theater."[200] Accordingly, the 2008 Strategy recommended inclusion of outside agencies and organizations such as rape crisis centers and domestic violence service providers in local prevention networks for military organizations.[201] *DoD must further develop local coordination requirements both on and off the installation. Installation commanders should be coordinating with victim support agencies in their surrounding local communities. [RSP Recommendation 73]*

b. Correcting Myths and Popular Misconceptions

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

The Department of Defense should review its bystander intervention programs to ensure they do not rely upon such common misconceptions or overgeneralized perceptions. In particular, programs should not overemphasize serial rapists and other sexual "predators" and should instead emphasize preventive engagement, encouraging Service member attention and vigilance toward seemingly harmless attitudes and behaviors that increase the potential for sexual assault. [RSP Recommendation 18]

c. Mitigating Current Gaps in Research

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

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

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

a. Evolution of DoD's Prevention Efforts

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

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

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

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

Implementing the kind of robust prevention efforts described above requires great care by commanders to avoid creating the appearance of unlawful command influence.[221] Commanders must remember that, in addition to protecting Service members from sexual assault and responding appropriately to incidents when they occur, they have an equally important obligation to support and safeguard the due process rights of those accused of sexual assault crimes. By executing prevention programs in a balanced way, commanders can avoid creating the appearance of unlawful command influence. In particular, *prevention programs should emphasize the presumption of innocence for anyone accused of misconduct, the right to fair investigation and resolution, and the right to seek and present witnesses and evidence. In addition, prevention programs must avoid creating perceptions among those who may serve as panel members at courts-martial that commanders expect particular findings and/or sentences at trials. [RSP Recommendation 80]*

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

Historically, the Services primarily implemented DoD prevention policies and initiatives through training. As part of Service training efforts, *the Service Secretaries should ensure commanders focus on effective prevention strategies. Commanders must demonstrate leadership of DoD's prevention approach and its principles, and they must ensure members of their command are effectively trained by qualified and motivated trainers who are skilled in teaching methods that will keep participants tuned in to prevention messages. [RSP Recommendation 14]* A brief explanation of the current efforts of commanders follows in Section B below; a detailed description can be found in the Role of the Commander Subcommittee Report, included in the Annex to this report.

b. DoD Assessment of Effectiveness of Prevention Efforts

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

In addition, following the broad reforms in the FY14 NDAA, the President directed the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to conduct a full-scale review of progress with respect to sexual assault prevention and response.[223] Pursuant to the President's directive, DoD SAPRO recently developed eleven new assessment metrics that are in addition to the six metrics currently tracked.[224] Several of these new metrics, which are in early development and use, focus on prevention efforts.[225] In the shorter term, DoD SAPRO will focus on other assessment measures such as surveys, research studies, and on-site visits.[226]

3. Effective Prevention Practices and Techniques

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

FIGURE 6 – DoD and CDC Comprehensive Public Health Approach Models

a. Bystander Intervention

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

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

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

b. Alcohol Policy

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

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

c. Identifying Populations with Heightened Vulnerability

In addition to alcohol consumption, studies increasingly identify prior victimization as a sexual violence risk factor. Studies show that individuals, especially women, who are sexual assault victims, are significantly more likely to suffer sexual victimization again later in their lives.[241] Nineteen percent of men and 45% of women who indicated on the 2012 WGRA survey that they experienced unwanted sexual contact in the Armed Forces also said they also experienced unwanted sexual contact prior to entering the military.[242] Programs focusing on survivors of prior sexual assault are a "secondary prevention" strategy.[243] In order for participants to be receptive to such programs, they must teach risk-reduction techniques in a way that avoids unintentional victim-blaming messages.[244]

The Department of Defense has only begun to address strategies that target populations at heightened vulnerability; increased consideration and emphasis on these populations are warranted.[245] Research underscores the importance of developing programs to identify Service members who are victimized prior to entering the military and strengthen these members' ability to deal with the consequences of prior victimization and avoid being victimized again. *Through training, DoD has increased focus on special populations that may require targeted interventions, but it should do more to further develop targeted risk-management programs. [RSP Recommendation 16]*

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

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

B. TRAINING OF PERSONNEL IN SEXUAL ASSAULT PREVENTION AND RESPONSE

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

1. General Personnel Training

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

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

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

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

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

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

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

Recent policies and training initiatives have sought to identify special populations within the military to prevent sexual assault. However, male victims of sexual assault are often left out of conversations about how sexual assault occurs in the military. This omission is a lost opportunity to validate and encourage male victims to come forward and may even deter some male victims from reporting sexual assault. *DoD prevention efforts should ensure commanders directly acknowledge the potential for male-on-male sexual assault in their commands and directly confront the stigma associated with it. They should also ensure Service members understand that sexually demeaning or humiliating behaviors that may have been minimized as hazing or labeled as "horseplay" in the past are not tolerated and may constitute punishable offenses. DoD SAPRO should fund research on, and seek expert assistance to understand, the risk and protective factors that are unique to male-on-male sexual assault in the military and should develop targeted prevention programs for male-on-male sexual assault offenses. [RSP Recommendation 13]* Additionally, *the Secretary of Defense should continue to develop and implement training for Service members with examples of male-on-male sexual assault, including hazing and sexual abuse by groups of men. The training should also emphasize the psychological damage done by sexual assault against male victims. [RSP Recommendation 20]*

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

2. Commander Training on Prevention

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

and establishing training emphasizing the role of the commander and senior leaders in preventive efforts.[260] DoD has also required the Services to: (1) provide a dedicated, two-hour block of SAPR training in all pre-command and senior enlisted leader training courses; (2) provide commanders a SAPR "quick reference" program and information guide; (3) assess commanders' and senior enlisted leaders' understanding and mastery of key SAPR concepts; and (4) develop and implement refresher training for sustainment of SAPR skills and knowledge.[261]

Further, effective February 12, 2014, DoD policy required a SAPR training module for training new or prospective commanders at all levels. Tailored to the commanders' responsibilities and leadership requirements, the pre-command training must "foster[ ] a command climate in which persons assigned to the command are encouraged to intervene to prevent potential incidents of sexual assault."[262]

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

- As Army commanders and leaders progress through their careers and levels of responsibility, they are provided SAPR training, including on bystander intervention, tailored to specific leadership positions and/or increased rank, in addition to mandatory annual training. Each year, the Army conducts a Sexual Harassment/Assault Response and Prevention Summit where commanders hear from national leaders, DoD and Army leadership, and subject matter experts, as well as exchange ideas with one another and provide feedback to Army leadership on challenges in executing SAPR responsibilities. In addition, victim service personnel receive training on how to support commander efforts to prevent sexual harassment and sexual assault.

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

- The Navy and Marine Corps integrate SAPR training into critical leadership training, including the Senior Enlisted Academy and Command Leadership School. Sexual Assault Prevention and Response training for Navy and Marine Corps leaders emphasizes their role in educating subordinates about sexual assault, including "the influence and power of alcohol" and "the importance of Bystander Intervention."

- All Coast Guard leadership courses include a SAPR module. Annual Coast Guard sexual assault specific training includes prevention and bystander intervention education, and is offered to victim advocates and SARCs.[263]

Chapter Five:

COMMAND ACCOUNTABILITY IN SEXUAL ASSAULT PREVENTION AND RESPONSE

A. ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

Defining, assessing, and improving command accountability for incidents of sexual violence is central to reducing sexual assault and sex-related offenses. The Panel received overwhelming evidence that indicates the climate commanders establish in their units has a direct causal relationship to increasing reporting of sexual assaults when they occur and to the legally appropriate, timely, and compassionate response to reported sexual assaults. The Services seek to select commanders who possess the highest standards of professional competence and character to discharge their responsibilities effectively. The effort to ensure only the very best are selected for command increases proportionally, according to the level of command, with the process becoming more centralized and deliberate for levels of command that are also vested with special and general court-martial convening authority.

To enhance confidence that commanders will establish command climates that contribute to reducing sexual violence, the DoD and Congress have sought to ensure those selected for command are appropriately trained for their role in preventing and responding to sex-related offenses and, as climate assessment tools continue to develop, are held accountable when the climate within their commands undermines this effort. Determining and standardizing methods and mechanisms by which commanders are held accountable, however, is not a simple task. *DoD and the Services should consider opportunities and methods for effectively factoring accountability metrics into commander performance assessments, including climate survey results, indiscipline trends, sexual assault statistics, and equal opportunity data. [RSP Recommendation 31]*

1. Training and Selection of Commanders

Military commanders comprise approximately one percent of the active military service.[354] 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.[355] 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.[356]

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.[357]

Throughout their careers, military officers receive continual training and education. Each Service has a command and staff college where a command-tracked officer spends "an entire year learning about and studying command."[358] As officers develop and are prepared for command, they attend additional training courses and leadership schools, with each Service offering instruction in legal roles and responsibilities.[359] Once selected for command, officers receive tailored pre-command training and other Service-specific courses based

on the level of command and nature of the unit. Commanders, who are paired with an assigned senior enlisted leader, often attend pre-command training course as a team.[270]

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

2. Recent Legislation and Department of Defense Initiatives on Accountability

a. Department of Defense Efforts at Enhancing Accountability of Commanders

With standardized training objectives and core competencies in sexual assault prevention and response, the DoD has attempted to develop methods to evaluate commanders and ensure accountability. In the words of one retired general officer, "Command without accountability is a failed model. It absolutely will not work."[276] Requirements in the FY13 NDAA, several of which were incorporated by the Undersecretary of Defense for Personnel and Readiness into mandates for pre-command SAPR training, provided additional measures to improve commander accountability by adding a SAPR module in training for new or prospective commanders and requiring commanders to conduct regular climate assessments.[277]

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

To ensure military leaders clearly understand their duties and responsibilities, DoD SAPRO and the Service Secretaries must ensure SAPR programs and initiatives are clearly defined and establish objective standards when possible. [RSP Recommendation 34] For example, the Navy has adopted a definition for "positive command climate" that extends beyond sexual assault prevention to include professionalism, dignity and respect, and efforts to oppose improper discrimination, sexual harassment, hazing, and other inappropriate conduct.[280] In addition, the Navy has provided tailored and specific guidance on implementation of Navy SAPR program initiatives to the entire fleet, including programs, directives, and expectations focused on "improving the safety of our Sailors and reducing incidents of sexual assault" for immediate implementation by Navy commanders.[281]

b. Assessing Commander Performance in Sexual Assault Prevention and Response

Performance evaluation reporting systems now include commander effectiveness in sexual assault prevention and response to sexual assault allegations.[282] The Deputy Chief of DoD SAPRO expressed optimism about recent Service changes adding SAPR support to performance appraisals: "My personal feeling is when you start measuring on somebody's evaluation report, it starts to change leaders' attitudes and behaviors, and they pay attention to it. So I think it will have a profound effect."[283]

Commanders should be measured according to clearly defined and established standards for SAPR leadership and performance. As described previously, command climate surveys are a principal method used by DoD to evaluate climate factors and assess a commander's performance in sustaining an appropriate unit climate. Mandated reporting of command climate surveys to the next higher level of command has the potential to improve command visibility of climate issues of subordinate commanders. Meaningful review by senior commanders increases opportunities for early intervention and can improve command response to survey feedback.

However, commanders and leaders must recognize that surveys may or may not reflect long-term trends and they provide only one measure of a unit's actual command climate and the commander's contribution to that climate. To ensure accurate assessment of subordinate command climate, commanders at all levels must be continuously engaged with subordinate commanders and their units. *The Service Secretaries should ensure assessment of commander performance in sexual assault prevention and response incorporates more than results from command climate surveys. [RSP Recommendation 33]*

Moreover, assessment of a commander's performance does not necessarily culminate when the commander relinquishes the position and departs the unit. Most command assignments are relatively short, with officers serving in a command position for only two years. Problems related to a commander's tenure may not be known until after the commander departs. Command climate surveys conducted by new commanders shortly after assuming command will likely provide insight into the effectiveness of previous unit leadership. This insight should be appropriately assessed and fully validated, but the Services must ensure post-command feedback on a commander's service is considered and appropriately documented.

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

c. Enhancing Accountability of Subordinate Leaders

A commander may shape the climate in a command, but subordinate leaders and supervisors engaged in day-to-day interactions with unit personnel are also principal contributors to command climate. A former director of DoD SAPRO observed that accountability is essential at all levels, including "commanders, junior officers, and NCOs, because I have heard many times from victims that it's not the commander who's the problem but the supervisors in between the victim and the commander."[286]

The Secretary of Defense's May 2013 directive to the Services required each Service to develop methods and metrics for enhancing commander accountability, tailored to Service needs and structure.[287] Thereafter, each of the Services reported modification of performance evaluations as a primary initiative. The Navy, Army, and Air Force issued Service-wide, direct guidance on performance evaluations that now requires specific consideration of command climate and SAPR issues in officer and noncommissioned officer performance appraisals. While performance appraisals in each Service directly impact promotion potential and future assignments, including command selection, the evaluation scope and level of detail of consideration of command climate and SAPR issues required vary among the Services.[288] Differences among the Services' requirements for SAPR performance assessment may result in uneven support and attention among subordinate leaders and personnel.

The Service Secretaries should ensure SAPR performance assessment requirements extend below unit commanders to include subordinate leaders, including officers, noncommissioned officers, and civilian

supervisors. [RSP Recommendation 32] Section 3(c) of the VPA would extend evaluation requirements to all Service members by mandating that the Service Secretaries "ensure that the written performance appraisals of members of the Armed Forces . . . include an assessment of the extent to which each such member supports the sexual assault prevention and response program of the Armed Force concerned."[289]

3. Methods of Accountability

The most fundamental way a commander may be held accountable for any failure in his or her responsibilities is relief from command.[290] Commanders serve at the discretion of their superior commanders and leaders.[291] In addition to requiring senior officers to evaluate subordinate commanders on their performance in establishing a healthy command climate, Section 1751 of the FY14 NDAA provides the sense of Congress that "the failure of commanding officers to maintain such a command climate is an appropriate basis for relief from their command positions."[292]

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

Commanders should be consistently held accountable in three primary instances: (1) when they are personally involved in misconduct; (2) when they fail to act in a legally or ethically proper manner in response to an incident; or (3) when a superior commander determines that there are poor climate indicators demonstrating inadequate prevention or response efforts within the organization.

Senior leaders' sexual misconduct or failure to take appropriate action in response to sexual assault reports often leads to a perception that high-ranking members are impervious to disciplinary action for wrongdoing, which results in an erosion of trust among the force and the public. Command accountability is a critical concern which needs to continually be monitored, with consistency in actions taken against members, regardless of their rank, and transparency in those disposition decisions.[296]

It is important to continue to leverage accountability mechanisms that encourage commanders to set a positive command climate that contributes to sexual assault prevention and appropriate response to sexual assault allegations. While ineffective or inadequate commanders should be relieved, accountability must also include positive reinforcement that will strengthen good commanders. DoD and the Services must pay particular attention to developing leaders who are well suited for command at every level, selecting the best among this pool for positions of command, and training them in effective leadership and oversight of SAPR issues.

B. COMMAND CLIMATE ASSESSMENT

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

Additionally, external evaluation of institutional and installation command climate is important to achieving credible, unbiased measurement of SAPR initiatives, programs, and effectiveness. DoD SAPRO serves as the Department's single point of accountability and oversight for developing and implementing SAPR programs and initiatives, and it is also responsible for assessing and monitoring the effectiveness of these efforts. *External, independent reviews of SAPR efforts in DoD, whether or not they validate or disprove DoD's own internal assessments, would provide useful feedback to the Department and the public on SAPR programs, initiatives, and effectiveness. [RSP Recommendation 78]*

1. Assessment Methods

The Department of Defense and the Services use a variety of tools and methods to assess institutional and command effectiveness in preventing sexual assault and responding appropriately to sexual assault reports. Institutional assessment measures include metrics based on sexual assault case report information in the Defense Sexual Assault Incident Database (DSAID). DoD SAPRO currently monitors DoD and Service performance on six metrics, including trends in overall reports of sexual assault and number and certification of full-time SAPR personnel; fifteen additional metrics are in development.[297] DoD SAPRO and the Services also use information from the biannual Workplace and Gender Relations Surveys, as well as the Defense Equal Opportunity Management Institute (DEOMI) Equal Opportunity Climate Surveys (DEOCS) to assess DoD and Service effectiveness in sexual assault prevention and response.[298]

The Services assess the effectiveness of individual commands in sexual assault prevention and response in a variety of ways. All of the Services use command climate surveys as a primary information source to assess the SAPR climate within commands, requiring units to conduct surveys when a new commander assumes responsibility for the organization and annually thereafter. Additionally, a variety of other assessment methods, including individual incident reports, SAPR office feedback from training course evaluations or Case Management Group and Sexual Assault Response Team meetings, DoD and Service inspectors general inspections, SAPR program compliance inspections, 360-degree and other leadership assessments, and local personnel surveys are used to obtain information about the climate in a command.

2. Command Climate Surveys

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

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

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

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

While commanders are ultimately accountable for their unit's performance and climate, unit climate assessments must consider the effectiveness of all leaders in the organization, including other officers, enlisted leaders, supervisors, and noncommissioned officers. Most issues and concerns expressed by victims are with lower-level leaders, not senior commanders or convening authorities.[303] Therefore, *assessment of command climate must accurately assess and evaluate the effectiveness of subordinate organizational leaders in addition to commanders. [RSP Recommendation 26]* Additionally, commanders must pay particular attention to the critical role noncommissioned officers, subordinate leaders, and supervisors play. They must set expectations that establish appropriate organizational climate and ensure unit leaders are appropriately trained to effectively perform their roles in sexual assault prevention and response.

3. Frequency, Use, and Reporting of Command Climate Surveys

Prior to 2013, the Services had individual policies for frequency and use of command climate surveys. Section 572(a)(3) of the FY13 NDAA established a common command climate assessment standard, mandating that all military commanders conduct a climate assessment of the command within 120 days after assuming command and at least annually thereafter.[304] In July 2013, the Under Secretary of Defense for Personnel and Readiness required the Secretaries of the Military Departments to establish procedures to ensure commanders of all units of 50 or more persons conduct climate assessments in accordance with the FY13 NDAA requirement.[305] Section 587(b) of the FY14 NDAA required performance evaluations for all commanders to include a statement whether required climate assessments were conducted, and Section 587(c) directed that failure to conduct required assessments must be noted in a commander's performance evaluation.[306]

In addition, DoD mandated in July 2013 that the commander at the next level in the chain of command also receive survey results and analysis within 30 days after the requesting commander received the survey results.[307] This policy took effect prior to passage of Section 587(a) of the FY14 NDAA, which mandated that results of command climate assessments must go to the individual commander and the next higher level of command.[308] The Services have since established policies in accordance with DoD's guidance for survey frequency and result reporting requirements.[309]

DEOMI's leadership notes that administering a survey does not complete assessment of a command's climate because the results obtained from a DEOCS are only the "starting point" that may "highlight issues."[310] Based on survey results, DEOMI provides additional recommendations for assessment tools, such as focus groups, interviews, or records reviews that a commander may use to better diagnose areas of concern. Additionally, DEOMI provides training tools and other resources for commanders to improve command performance in specific focus areas that are assessed through the DEOCS.[311]

With the additional mandate requiring superior commanders to receive command climate survey results for their subordinate units, DEOMI expects "the accountability level is going to go up" on command climate survey results.[312] In addition to superior commanders receiving access to results through DEOMI, each of the Services has established policies requiring commanders to brief survey results to their superior commanding officer within 30 days. In September 2013, the Marine Corps implemented a policy requiring commanders to develop an action plan that addresses concerns identified in a DEOCS report and identifies periodic evaluations for assessing the plan's effectiveness. Marine Corps commanders must brief the survey results, analysis, and action plan to the next higher-level commander, who must then approve the plan prior to implementation.[313] While other Services recently implemented similar policies for climate assessment action plans and reporting,[314] such *action plans should be mandated by all Services and should outline the steps the command will take to validate or expand upon survey information. [RSP Recommendation 27]*

In addition to personnel surveys, DoD, the Services, and commanders should identify other resources for feedback on SAPR programs and local command climate. [RSP Recommendation 29] Chaplains, social services providers, military judges, inspectors general, and officers and enlisted personnel participating in professional military education courses may be underutilized resources for obtaining accurate, specific, and unvarnished information about institutional and local climate. Victim satisfaction interviews may provide direct insight into climate factors and feedback on installation services and organizational support.

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

In addition to unit-level report results, DEOMI aggregates SAPR climate data from DEOCS and provides summary reports to DoD SAPRO and the Services. Monthly reports provided to DoD SAPRO include unit-level and demographic subgroup summaries of the previous four months of data collected across the DoD, and quarterly reports provide trend analyses of survey results. DEOMI prepares similar quarterly summaries for the Army, Navy, Air Force, Marine Corps, National Guard, Reserve Component, and Joint Commands.[315]

As described above, surveys administered by DEOMI have increased substantially, and it appears this trend will continue based on new statutory and policy climate survey requirements. Although a climate survey can be a valuable tool for assessment, accurate and thoughtful feedback from unit members is essential to ensuring meaningful survey information.

The recent dramatic increase in the use and frequency of surveys administered by DEOMI last year raises concerns about survey fatigue. Personnel who are tasked repeatedly to complete surveys for their immediate unit and its parent commands may become less inclined to participate or provide meaningful input. *DoD and the Services must be mindful of survey fatigue, and they should monitor and assess what impact increased survey requirements have on survey response rates and survey results. [RSP Recommendation 10]*

Section 3(d) of the Victims Protection Act of 2014 proposes to further expand climate assessment mandates by requiring climate assessments for the commands of the accused and the victim following an incident involving a covered sexual offense. The results of these climate assessments must be provided to the MCIO investigating the offense concerned and next higher level commander of the command.

The Panel recommends that Congress not adopt Section 3(d) of the Victims Protection Act. [RSP Recommendation 30] While information about a unit's culture or climate may prove helpful or relevant in some criminal investigations, it is not clear how organizational climate surveys would be effective following each report of a sexual assault offense. Organizational climate may not be a contributing factor in every alleged sexual assault crime. Additional survey requirements increase concerns about survey fatigue and the accuracy of the information collected.

Instead, the Secretary of Defense should direct the formulation of a review process to be applied following each reported instance of sexual assault to determine the non-criminal factors surrounding the event. Such reviews should address what measures ought to be taken to lessen the likelihood of recurrence (e.g., physical security, lighting, access to alcohol, off-limits establishments, etc.). DoD has not formalized a standard process to review reported incidents of sexual assault to determine what additional actions might be taken in the future to prevent the occurrence of such an incident. Some organizations and commands within DoD have developed review processes that warrant evaluation by DoD.

Chapter Six:

SEXUAL ASSAULT REPORTING, VICTIM SERVICES, AND RESOURCES

A. PERSONNEL AND PROGRAMS ENGAGED IN SEXUAL ASSAULT RESPONSE

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

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

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

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

Sexual Assault Medical Forensic Examiner (SAMFE)	Medical personnel who are clinically trained to perform a sexual assault exam and have obtained an additional forensic certification to collect forensic evidence from sexual assault victims. Often, the SAMFE is a SANE nurse who has completed the forensic certification.[347]
Specially Trained Prosecutors or Special Victim Prosecutor (SVP)	Specially trained and experienced judge advocates detailed by Service TJAGs, the SJA to the Commandant of the Marine Corps (CMC), or other appropriate authority to litigate or assist with the prosecution of special victim cases and provide advisory support to MCIO investigators and responsible legal offices as part of the Special Victim Capability. Before specially trained prosecutors are detailed, their Service TJAG, SJA to CMC, or other appropriate authority has determined they have the necessary training, maturity, advocacy, and leadership skills to carry out those duties.[348] DoD uses the term specially trained prosecutors. The Army uses the term special victim prosecutor, while the Air Force and Navy refer to this person as senior trial counsel. The Marines use complex trial teams for serious sexual assault cases and rely on the regional trial counsel to provide the support for the Special Victim Capability.
Victim Witness Liaison (VWL)	An individual who works within the civilian prosecutors' office or with the military prosecutors' office to assist victims throughout the trial process. In the military, the VWL is part of the Victim Witness Assistance Program and coordinates efforts to ensure systems are in place at the installation level to provide information on available benefits and services. Assists victims and witnesses in obtaining those benefits and services.
The Victim Witness Assistance Program (VWAP)	A program designed to coordinate efforts and ensure that systems are in place at the installation level to provide information to victims and witnesses on available benefits and services and to provide assistance in obtaining those benefits and services. VWAP applies to all crime victims and witnesses. The local responsible official (in charge of the installation level program) establishes oversight procedures to ensure the establishment of an integrated support system capable of providing services to victims and witnesses. Ensures victims and witnesses are informed on the military justice process and available medical and social services.[349] A program that provides policies and responsibilities for assisting victims and witnesses of crimes committed in violation of the UCMJ or in violation of the law of another jurisdiction if any portion of the investigation is conducted primarily by a DoD component.[350]

B. OVERVIEW OF VICTIM SERVICES

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

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

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

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

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

C. REPORTING SEXUAL ASSAULTS IN THE MILITARY

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

1. Options for Reporting

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

After receiving a restricted report a SARC or SAPR victim advocate is required to report the fact of the assault to the installation commander,[340] but the report will not contain personally identifiable information and may not be used for investigative purposes.[341] Accordingly, the identities of the victim and the offender, if known, remain confidential in a restricted report.[342] If a victim confides in another person about a sexual assault, the victim retains the restricted reporting option, unless the confidant is a member of law enforcement or is in the victim's supervisory hierarchy or chain of command.[343]

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

Though several categories of military personnel are trained as initial responders to sexual assault reports, only SARCs and SAPR victim advocates are responsible for formally documenting reports.[347] The following table depicts the different reporting resources available within DoD to victims of sexual assault:

Unrestricted Reporting Resources

- Sexual Assault Response Coordinators (SARCs)
- Victim Advocates (VAs)
- Health Care Professionals or Personnel
- Chaplains[349]
- Legal Personnel
- Chain of Command
- Law Enforcement – Military Police or Military Criminal Investigative Organizations

Restricted Reporting Resources[348]

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

2. Ensuring Service Members Understand Reporting Options

Reporting options are broadly publicized throughout the military. DoD policy requires that all military personnel must receive tailored sexual assault prevention and response training upon initial entry to the military, annually, during professional military education and leadership development training, before and after deployments, and prior to filling a command position.[352] Training must explain available restricted and unrestricted reporting options and the advantages and limitations of each option, and it must highlight that victims may seek help or report offenses outside their chain of command.[353]

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

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

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

3. Resolving Collateral Misconduct in Sexual Assault Reporting

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

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

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

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

4. Maintaining Offender Information from Restricted Reports

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

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

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

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

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

D. SPECIAL VICTIM COUNSEL PROGRAM

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

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

1. Eligibility for Services

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

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

2. Selection of Special Victim Counsel

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

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

3. Assignment Length and Duration of Representation

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

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

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

4. Assessments of the Special Victim Counsel Program

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

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

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

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

E. ADDITIONAL VICTIM SERVICES IN THE MILITARY AND CIVILIAN COMMUNITIES

1. Select Military Sexual Assault Response Practices and Initiatives

a. Eight Day Report

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

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

b. Expedited Transfer

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

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

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

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

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

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

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

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

c. Department of Defense Safe Helpline

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

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

FIGURE 7 – FORT BRAGG SHARP ADVERTISING

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

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

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

d. Psychological Healthcare

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

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

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

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

2. Coordinating Victim Services among Victim Assistance Personnel

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

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

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

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

3. Civilian Jurisdiction Support of Sexual Assault Victims

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

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

a. Community-Based Advocates

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

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

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

b. Hospital Victim Advocates

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

c. Law Enforcement Victim Advocates

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

d. Prosecution Victim Advocates

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

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

1. SARC and Victim Advocate Training

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

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

2. First Responder Training

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

3. Experiential Training for Civilian Victim Support Personnel

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

4. Utilization and Experiential Training for Military Victim Advocates

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

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

5. Special Victim Counsel Training

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

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

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

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

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

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

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

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

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

FIGURE 8 - THE MILITARY VICTIM-CENTRIC APPROACH[472]

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

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

FIGURE 9 - PRIMARY PERSONNEL RESPONSIBILITIES IN CIVILIAN SEXUAL ASSAULT RESPONSE[473]

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

FIGURE 10 - PRIMARY PERSONNEL RESPONSIBILITIES IN MILITARY SEXUAL ASSAULT RESPONSE

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

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

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

Chapter Seven:

INVESTIGATING SEXUAL ASSAULT REPORTS

A. INVESTIGATION MANDATES

All unrestricted reports of sexual assault must be immediately reported by the receiving party to an MCIO, regardless of the severity of the crime alleged.[474] A commanding officer who receives a report of a sex-related offense involving a Service member in his or her chain of command must immediately report it to the MCIO.[475] A commander of a victim or alleged offender may not ignore a complaint or judge its veracity.[476] Section 1743 of the FY14 NDAA requires the SARC provide written notification to the installation commander and first O-6 and general or flag officers in the chains of command of the victim and alleged offender within eight days of the filing of an unrestricted report of sexual assault.[477]

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

Allegations of sexual assault by a Service member are often subject to investigation and prosecution by more than one jurisdiction, depending on the location of the alleged crime. Civilian law enforcement must be informed if the reported crime occurred in an area with concurrent Federal (military) and civilian criminal jurisdiction. The investigation may be worked jointly by the MCIO and the civilian agency, or the civilian agency may accept investigative responsibility if the MCIO declines.[482] If a reported crime occurs off a military installation in a location under civilian jurisdiction, civilian law enforcement has primary jurisdiction over the investigation and the MCIO will provide assistance as requested or deemed appropriate.[483]

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

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

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

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

B. INVESTIGATIVE PROTOCOLS

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

1. Special Investigators and Sexual Assault Investigations

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

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

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

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

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

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

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

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

3. Pretext Phone Calls and Text Messages

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

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

4. Forensic Evidence and Examinations

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

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

5. Oversight and Review of Sexual Assault Investigations

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

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

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

C. DECISIONS TO UNFOUND SEXUAL ASSAULT REPORTS

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

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

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

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

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

The Secretary of Defense should direct the Service Secretaries to standardize the process for determining if a case is unfounded. The decision to unfound reports should apply the UCR Program standard to determine if a case should be unfounded. Only those reports determined to be false or baseless should be unfounded.[544] *[RSP Recommendation 93]*

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

COMPARISON OF PROCEDURES TO REVIEW INVESTIGATIONS PRIOR TO DISPOSITION DECISION

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

Probable Cause Assessments in Sexual Assault Investigations

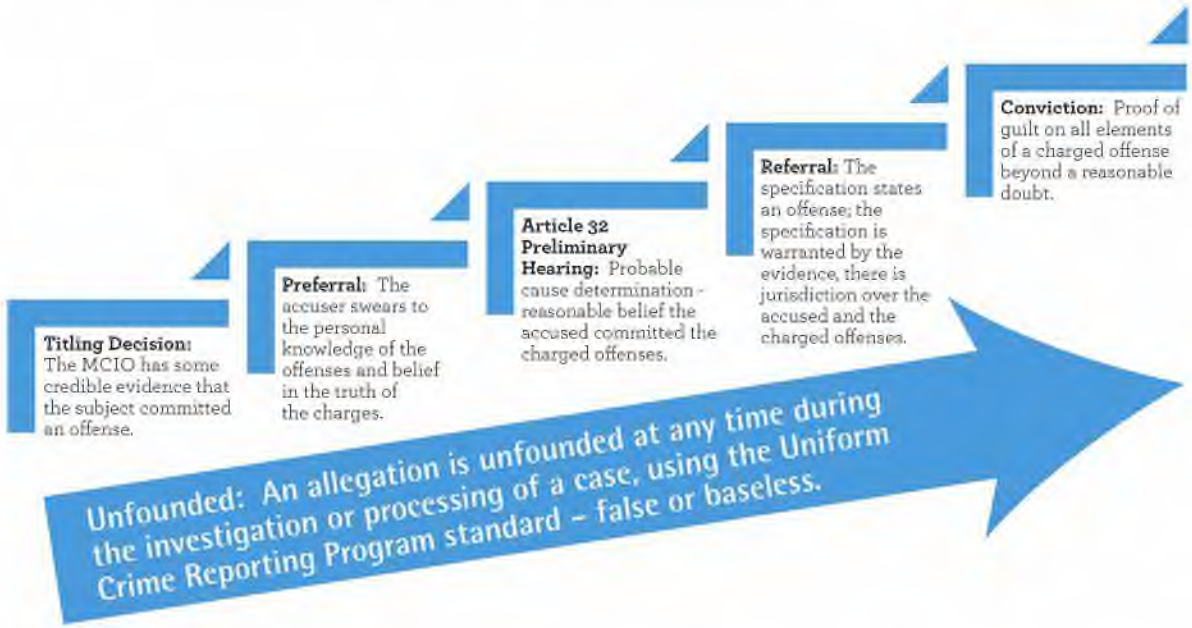
Prosecutors may provide opinions about the existence of probable cause as part of their advice to commanders or investigators. For example, a trial counsel may tell an investigator that further investigation is needed to establish probable cause. Moreover, commanders making disposition decisions may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

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

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

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

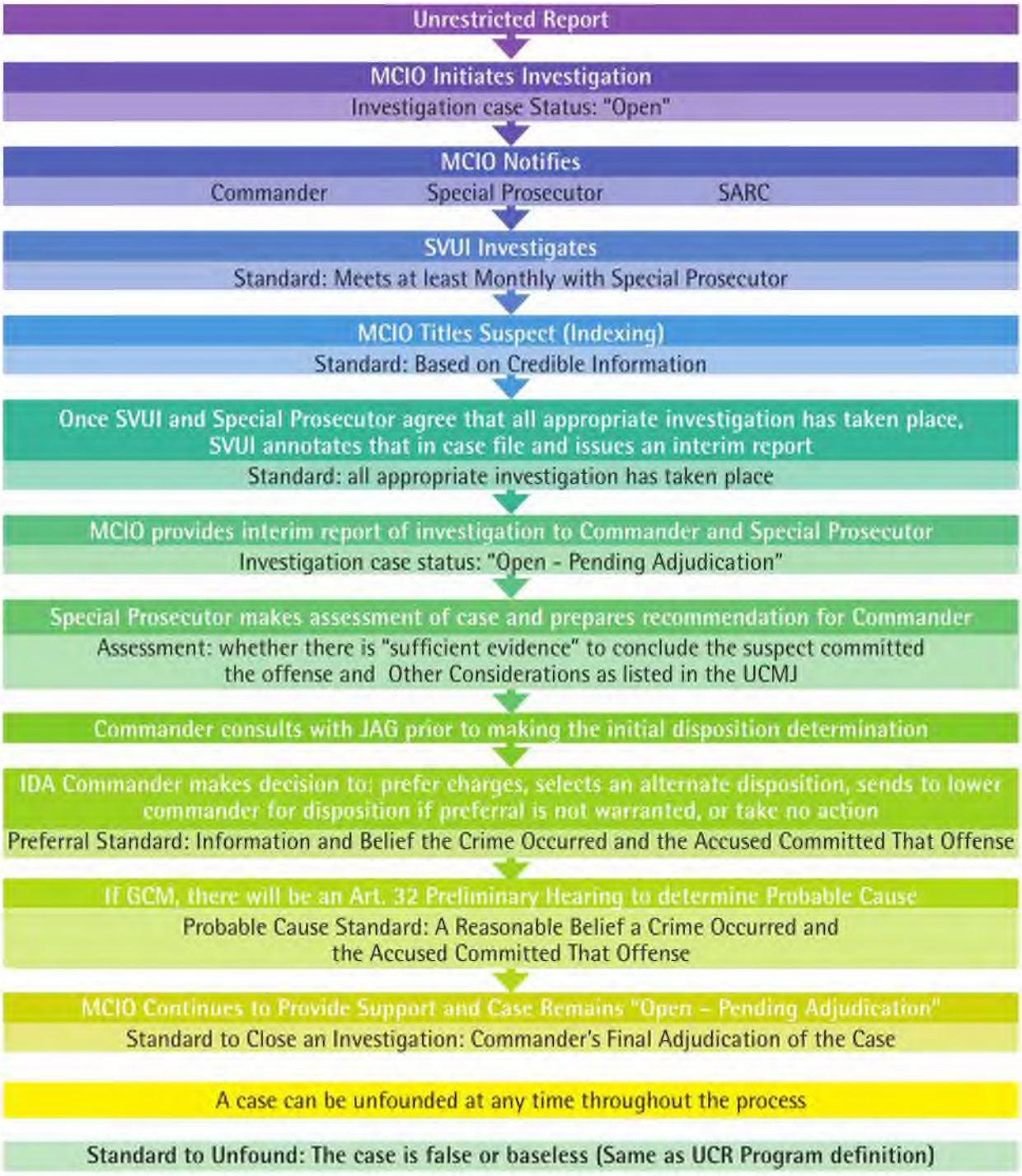
FIGURE 11 – PROGRESSION OF PROOF STANDARDS IN MILITARY CRIMINAL JUSTICE CASES



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

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

FIGURE 12 - RECOMMENDED INVESTIGATIVE PROCESSING FOR UNRESTRICTED SEXUAL ASSAULT REPORTS



Chapter Eight:

THE MILITARY JUSTICE PROCESS FOR SEXUAL ASSAULT REPORTS AND VICTIM RIGHTS

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

A. HISTORICAL EVOLUTION OF THE UNIFORM CODE OF MILITARY JUSTICE

The authority to convene and manage courts-martial has been vested in U.S. military commanders since the colonial period.[555] Indeed, until after World War II, commanders enjoyed "virtually unfettered" discretion in determining whether to try soldiers and sailors by court-martial.[556] Reviews in the years following World War II challenged the commander's discretion in convening courts-martial. By the time it held hearings on drafts of the UCMJ in 1949, Congress heard from those opposing proposals to reduce commander authority over courts-martial,[557] and also from those "urg[ing] [it] to remove the authority to convene courts martial from 'command' and place that authority in judge advocates or legal officers, or at least in a superior command."[558] While commanders retained convening authority under the UCMJ, the Code that was adopted was a compromise between those opposing any erosion of absolute commander control and those advocating change.[559]

Today, the authority vested in senior commanders to convene courts-martial remains a central tenet of the UCMJ, but Congress has refined procedural requirements for their disposition decisions. For example, in Article 34(a) the UCMJ initially provided that the convening authority may not refer a charge for trial by general court-martial "unless he has found" that the charge alleges an offense under the UCMJ and is warranted by the evidence.[560] In 1983, Congress changed Article 34(a) to state that the convening authority may not refer such a charge "unless he has been advised in writing by the staff judge advocate that" the charge alleges an offense, that the charges are supported by the evidence, and that there is jurisdiction over the accused and the offense.[561]

There have been other significant changes and revisions to the UCMJ since its enactment. Most recently, the FY14 NDAA modified several provisions of the UCMJ related to commander authority and responsibility, as well as the prosecution of sexual assault crimes.[562] As a military historian told the Panel, "the system has changed over time; first courts-martial [were] made more like courts, and then because of this desire to have our system mirror what's going on in civilian courts, more and more courts-martial look like any trial in Federal District Court."[563]

B. INITIAL DISPOSITION AUTHORITY IN SEXUAL ASSAULT CASES

Both military authorities and civilian prosecutors exercise "tremendous discretion over the decision" to send a case to trial.[564] Unless otherwise limited by a higher authority, military commanders generally have "discretion to dispose of offenses [committed] by members of [his or her] command."[565] On April 20, 2012, the Secretary of Defense issued a policy establishing the minimum level of command that may decide whether or not to proceed to courts-martial for an allegation of sexual assault.[566] The first special court-martial convening authority in the grade of O-6 or above in the chain of command of the accused serves as the "initial disposition authority" for all allegations of rape and sexual assault in violation of Article 120 of the UCMJ, forcible sodomy in violation of Article 125 of the UCMJ, and attempts to commit those offenses, in violation of Article 80 of the UCMJ.[567] This policy applies to all other alleged offenses arising from or relating to the same incident, whether committed by the alleged perpetrator or the alleged victim.[568] Senior commanders with initial disposition authority often have no personal knowledge of either the accused or the victim. When an investigation is complete, the initial disposition authority reviews the results of the investigation, in consultation with a trial counsel, and determines the appropriate disposition of the case.[569]

Initial disposition authorities consult with their trial counsel, special victim prosecutor, or if applicable, staff judge advocate before determining how to proceed. Commanders rely on the prosecutors' legal expertise to determine the proper charges, draft the charges for the commander to consider, and recommend an appropriate disposition.[570] In advising commanders, including initial disposition authorities and convening authorities, military attorneys acting on behalf of the Government are bound by their Service's rules of professional conduct, which require them to advise the convening authority when a charge is not warranted by the evidence or supported by probable cause.[571]

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

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

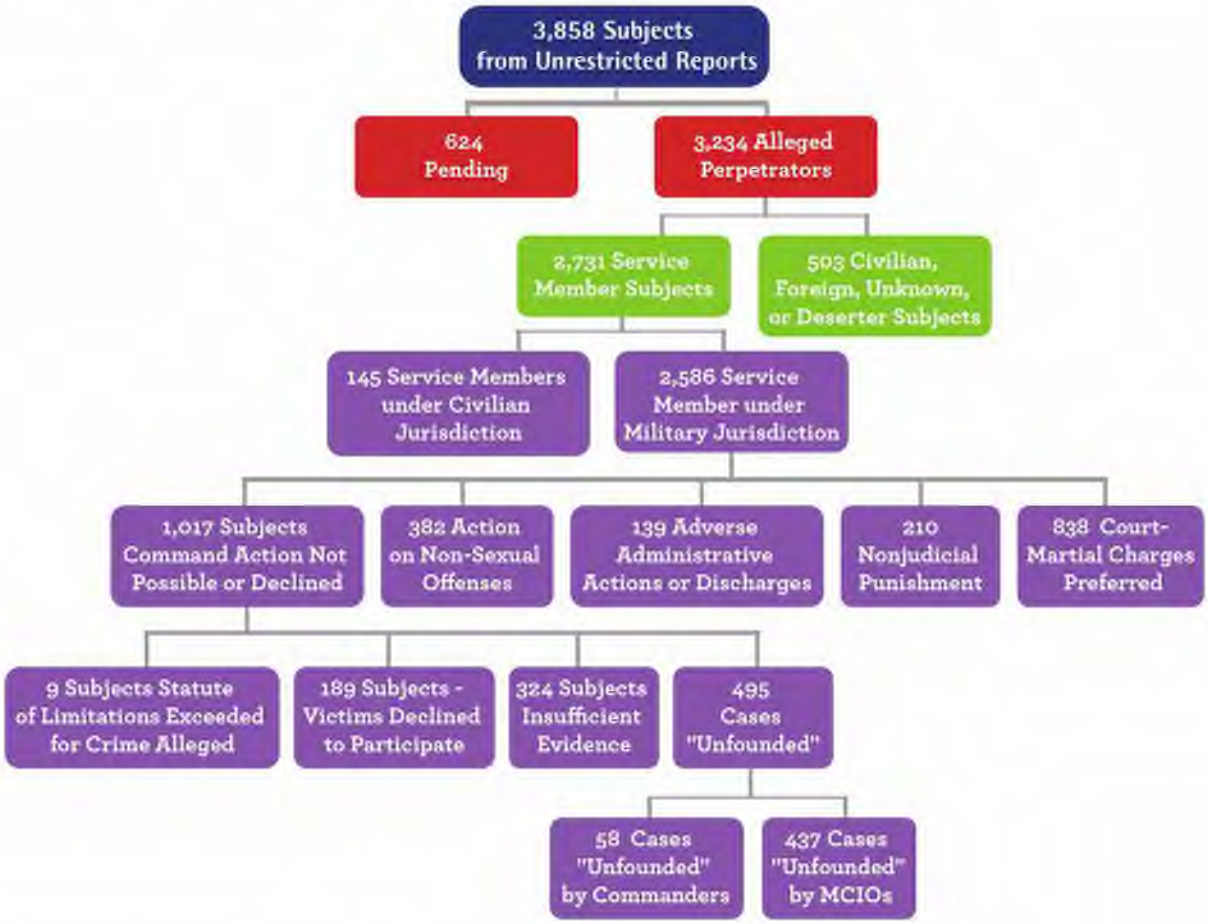
In sexual assault cases, the initial disposition authority, in consultation with the trial counsel or special victim prosecutor, considers the factors in the discussion to Rule for Courts-Martial 306 prior to preferral and referral of charges. The initial disposition authority may dispose of allegations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

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

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

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

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



C. PRETRIAL RESPONSIBILITIES OF CONVENING AUTHORITIES: PREFERRAL TO REFERRAL

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

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

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

Under current law, an Article 32 investigation "shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of the charges, and a recommendation as to disposition which should be made of the case in the interest of justice and discipline."[589] However, Section 1702(a) of the FY14 NDAA, in conjunction with other amendments, changes the review standard under Article 32 from a "thorough and impartial investigation" of charges to a preliminary hearing for the narrow purposes of: (1) determining whether probable cause exists to believe an offense has been committed and that the accused committed the offense; (2) determining whether the convening authority has court-martial jurisdiction over the offense and the accused; (3) consideration of the form of charges; and (4) recommending disposition.[590] These changes take effect on December 27, 2014.[591] Beyond changes to the scope and quality of the evidence that will be considered by the Article 32 hearing officer, it is unclear how Article 32 investigations, which will be called "preliminary hearings," will change after this law takes effect.

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

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

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

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

As of June 24, 2014, Section 1705 of the FY14 NDAA amended Article 18 of the UCMJ to restrict jurisdiction for trial for charges of rape or sexual assault under Article 120(a) or (b), rape or sexual assault of a child under Article 120b, forcible sodomy under Article 125, or attempts to commit these offenses under Article 80 to general courts-martial.[597] Once a matter has been forwarded to the general court-martial convening authority following an Article 32 investigation, he or she must comply with certain statutory requirements prior to referring a case to trial. The general court-martial convening authority must ensure the Article 32 investigation was properly conducted,[598] and before he or she may refer charges to a general court-martial, the staff judge advocate[599] must provide, in writing, his or her own legal opinion expressing whether the charges state an offense, whether the charges are warranted[600] by the evidence in the Article 32 investigation report, and whether a court-martial would have jurisdiction over the individual and the offense.[601]

The staff judge advocate must also provide a recommendation as to the disposition of the offenses, but this recommendation is not binding on the convening authority.[602] So long as the staff judge advocate advises that the charge meets the requirements for referral, the convening authority may refer the charge to court-martial, even if the staff judge advocate recommends a different disposition. The convening authority may also elect, contrary to the staff judge advocate's recommendation, not to refer the charge for trial.[603]

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

Staff judge advocates who testified before the Panel stressed that convening authorities weigh factors differently than lawyers when assessing whether cases should be tried by court-martial. Brigadier General Richard Gross, Legal Counsel to the Chairman of the Joint Chiefs of Staff, cited information provided by the Vice Chairman of the Joint Chiefs of Staff to the Senate Armed Services Committee that indicated commanders took recent action in roughly one hundred cases where civilian prosecutors had declined to prosecute.[606] "Commanders have consistently shown willingness to go forward in cases where attorneys have been more risk adverse. Commanders zealously seek accountability when they hear there's a possibility that misconduct has occurred within their units, both for the victim and in the interest of military discipline, and we need to maintain the ability to do so."[607] The Judge Advocate General of the Army described seventy-nine cases where Army commanders chose to prosecute off-post offenses after civilians declined to prosecute or could not prosecute. She said the cases demonstrated that "Army commanders are willing to pursue difficult cases to serve the interests of both the victims and our community."[608] Legal advisors said commanders consider factors, including responsibility for good order and discipline and accountability to the organization, which legal advisors may not.[609]

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

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

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

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

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

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

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

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

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

D. ROLE OF CONVENING AUTHORITIES AND MILITARY JUDGES

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

The convening authority funds witness and travel costs; most defense requests for production of witnesses are approved or disapproved by the trial counsel.[625] Except where the Services have established central funding resources, the convening authority is also responsible for funding expert assistance or expert witnesses for the prosecution and defense, including the expert assistance of defense investigators. This means the convening authority is responsible for authorizing the production of witnesses, experts, documents, and other resources.

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

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

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

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

Section 1704 of the FY14 NDAA amends Article 46 of the UCMJ to include a provision limiting defense counsel access to interview victims of sex-related offenses.[634] If a trial counsel notifies a defense counsel of the name of an alleged victim of a sexual offense whom the trial counsel intends to call at an Article 32 hearing or court-martial, the defense counsel must submit any request to interview the alleged victim through the trial counsel. If requested by the alleged victim, "any interview of the victim by defense counsel shall take place only in the presence of trial counsel, a counsel for the victim, or a Sexual Assault Victim Advocate."[635]

Following referral of charges, several of the pretrial responsibilities vested in the convening authority shift to the military judge, who schedules and presides over any initial sessions and trial.[636] The military judge for a court-martial is detailed, in accordance with Service regulations, by a senior military judge directly responsible to the Service TJAG or TJAG's designee.[637] Accordingly, the military judge exists entirely outside the chain of command of the convening authority.[638]

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

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

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

E. PRETRIAL AGREEMENTS IN SEXUAL ASSAULT CASES

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

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

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

Pretrial agreements developed out of the convening authority's clemency power. The most common commitment made by convening authorities is to take a specified action on the adjudged sentence; for example, a commitment to disapprove confinement in excess of a certain amount, or to disapprove a certain level of punitive discharge, which the convening authority may do pursuant to Article 60 of the UCMJ. However, Section 1702 of the FY14 NDAA, which took effect on June 24, 2014, restricts a convening authority's Article 60 clemency authority.[645] Under the new framework, convening authorities cannot agree to disapprove a punitive discharge entirely under a pretrial agreement, but they may still agree to commute a mandatory minimum dishonorable discharge to a bad-conduct discharge, which is a lesser form of punitive discharge.[646]

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

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

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

1. Overview of Military Crime Victims' Rights

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

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

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

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

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

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

a. Victim's Right to Confer

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

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

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

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

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

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

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

c. Victim's Legal Standing to Enforce Rights

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

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

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

d. Victim's Right to be Heard Through Counsel

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

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

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

e. Victim Rights Notification and Enforcement

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

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

3. Investigating Violations or Failures to Accord Victim Rights

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

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

G. SENTENCING

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

1. Improving Sentencing Data Quality and Availability

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

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

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

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

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

2. Sentencing Procedures in Federal and Military Systems

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

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

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

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

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

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

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

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

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

4. Sentencing Authority – Military Judge or Jury

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

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

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

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

5. Unitary Sentencing

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

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

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

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

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

6. Sentencing Guidelines

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

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

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

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

- There are two approaches used in creating sentencing guidelines: (1) a descriptive approach, which is data-driven and used to achieve uniformity, and (2) a prescriptive approach, which is used to promote certain sentences.

- Different entities oversee sentencing guidelines in the state and federal systems, with some choosing judicial agencies and others choosing legislative agencies.

- The flexibility of sentencing guidelines varies widely in the states, ranging from mandatory to presumptively applicable to completely discretionary.

- Additional details include: (1) whether a worksheet or structured form is required, (2) whether the commission regularly reports on guidelines compliance, (3) whether compelling and substantial reasons are required for departures, (4) whether written rationales are required for departures, and (5) whether there is appellate review of defendant or government based challenges related to sentencing guidelines.

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

Most jurisdictions that have employed sentencing guidelines have had clearly articulated policy reasons for implementing those guidelines, and each jurisdiction's policy followed deliberate collection of quantifiable, empirical evidence.[706] "The most frequent [reason] that's cited or articulated is to reduce sentencing disparity or increase consistency in sentencing outcomes."[708] As noted above, the Panel heard no empirical evidence of whether inappropriate sentencing disparities exist in sexual assault or other courts-martial. *The Panel does not recommend the military adopt sentencing guidelines in sexual assault or other cases at this time. [RSP Recommendation 124]*

7. Mandatory Minimum Sentences

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

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

Mandatory minimum sentences remain controversial.[714] Testimony and other evidence gathered from civilian prosecutors, civilian defense counsel, and victim advocacy organizations demonstrates that mandatory minimum sentences do not prevent or deter adult sexual assault crimes, increase victim confidence, or increase victim reporting.[715] Some evidence indicates that mandatory minimum sentences, especially if too rigid or severe, may chill victim reporting in some cases because the victim may not want to be the cause of such consequences.[716]

The Panel also found that mandatory minimum sentences may decrease the likelihood of resolving cases through guilty pleas, especially if the mandatory minimum sentences are perceived as severe. In the FY14 NDAA, Congress tasked the JPP to examine mandatory minimums over a period of years. The JPP will be better positioned to further analyze the potential impact of mandatory minimum sentences on military sexual assault offenses. Based on the information received about mandatory minimum sentences, including their potential to deter victim reporting, *the Panel recommends Congress not enact further mandatory minimum sentences in sexual assault cases at this time. [RSP Recommendation 125]*

8. Victim Allocution in Sentencing

The victim's right to be heard at sentencing is currently governed by the Rules for Courts-Martial. Under military rules, a sexual assault victim may present evidence during the sentencing proceedings of financial, social, psychological, and medical impact of an offense the accused committed. Military procedure requires the victim and other witnesses -- except the accused -- to appear and testify under oath at the sentencing proceeding, subject to the rules of evidence and defense cross-examination.[717] This means that unless there is an agreement from the defense, the victim must testify under oath, and is subject to cross-examination.

The requirement that a victim testify in person and under oath to present victim impact evidence contrasts with the Federal Rules of Criminal Procedure, which generally permit a victim of a sexual abuse to make an unsworn statement or present information at sentencing.[718] Military practice is also inconsistent with statutes in a number of state jurisdictions, which permit a victim to present a victim impact statement without testifying under oath or being subject to cross-examination.[719] Additionally, the CVRA includes the opportunity for a victim to be reasonably heard at sentencing by allowing him or her to make a statement that is neither under oath nor subject to cross-examination. The newly enacted military victim rights in Article 6b of the UCMJ also include the right for the victim to be heard at sentencing.[720]

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

- *The members should be instructed similarly to the instruction they receive when the accused makes an unsworn statement;*
- *The substance of the unsworn statement, including all material facts, should be in writing, available to the defense counsel before sentencing, be subject to the same objections available to the government regarding the accused's unsworn statement; and*
- *If there is "new matter" that could affect the sentence brought up in the victim's unsworn statement, a military judge may take whatever action he or she believes is appropriate. [RSP Recommendation 56]*

H. POST-TRIAL AND CLEMENCY

Once completed, convening authorities must "act" on courts-martial results—in other words, approve the sentence—before it becomes final.[721] A convening authority may not disapprove a finding of not guilty or any judicial ruling amounting to a finding of not guilty.[722] If an accused is convicted of a charge and sentenced to confinement, he or she begins serving confinement immediately and the immediate commander and convening authority are notified of the findings and sentence.[723] The accused may petition the convening authority to defer the effective date of any sentence to confinement, forfeitures of pay, or reduction in grade/rank which have not been ordered executed.[724] If granted, the deferment ends when the sentence is ordered executed by the convening authority, or the convening authority may rescind it at any time prior to action.[725]

After trial, a court reporter prepares the record of trial, which all counsel review before the military judge authenticates it.[726] The record is served on the accused with a copy of the staff judge advocate's required written recommendation to the convening authority, which summarizes the trial result, advises whether any corrective action should be taken on allegation of legal error, and provides a recommendation on clemency.[727] The accused, with the advice of counsel, may submit additional clemency matters to the convening authority.[728] Article 54(e) of the UCMJ provides a copy of the record of trial to any victim of any 120 offense who testified at trial,[729] and Section 1706 of the FY14 NDAA requires that the victim of any offense "in which findings and sentence have been adjudged for an offense that involved a victim . . . shall be provided an opportunity to submit matters for consideration by the convening authority."[730]

1. Article 60 Clemency Overview

Action on the findings of a court-martial by the convening authority is not required, but Article 60 of the UCMJ provides clemency discretion to a convening authority, deemed "a matter of command prerogative involving the sole discretion of the convening authority," to disapprove or commute findings of guilt.[731] Clemency authority differs in civilian and military systems. Military convening authorities normally exercise clemency authority under Article 60 of the UCMJ after the findings and sentence of a court-martial, before appellate review. The scope of appellate review varies by the length of sentence approved.[732] In civilian jurisdictions, each state has its own rules for handling clemency matters, but many vest the governor with the power to pardon criminals and commute sentences as the final act after a convicted person exhausts the judicial appellate process.

Section 1702(b) of the FY14 NDAA, which took effect on June 24, 2014, substantially reduces the convening authority's authority to commute or otherwise disapprove findings. Findings of guilt may only be set aside or commuted for "qualifying offense[s]"— qualifying offenses are those where the maximum sentence of confinement that may be adjudged does not exceed two years; the sentence adjudged does not include a punitive discharge or confinement for more than six months; and none of the offenses is a violation of Article 120(a) (rape) or 120(b) (sexual assault), Article 120b (rape and sexual assault of a child), or Article 125 (forcible sodomy) of the UCMJ.[733]

In contrast to the presumptive regularity of court-martial findings, the convening authority must take action on the adjudged sentence.[734] A convening authority may not increase the severity of the sentence. While Article 60 provided broad discretion to convening authorities as a matter of "command prerogative" to disapprove, commute, or suspend punishments, Section 1702 of the FY14 NDAA reduced this discretion.[735] Under Section 1702's revisions to Article 60, convening authorities may not disapprove, commute, or suspend adjudged sentences of confinement of more than six months or sentences that include a punitive discharge except for limited circumstances upon recommendation of the trial counsel in recognition of "substantial assistance by the accused in the investigation or prosecution of another person" or in accordance with a pretrial agreement, subject to certain limitations where the offense requires a mandatory minimum sentence.[736] If the convening authority disapproves, commutes, or reduces any portion of a court-martial sentence, the convening authority must explain the reason in writing, and the written explanation becomes part of the record of trial and convening authority action.[737]

The impact of recent modifications to Article 60 of the UCMJ is not fully known at this time, but they may bring some unintended consequences. For instance, the convening authority may no longer provide relief from forfeitures of pay to dependents of convicted Service members (who may themselves have been sexual assault victims). Also unclear is the convening authority's ability to grant clemency in cases in which there are convictions for both Article 120 and other offenses, because of the unitary nature of courts-martial sentences. *The Panel recommends that Congress not adopt additional amendments to Article 60 of the UCMJ beyond the significant limits on discretion already adopted, and the President should not impose additional limits to the post-trial authority of convening authorities. [RSP Recommendation 42] The Panel also recommends that*

Congress should amend Section 1702(b) of the FY14 NDAA to allow convening authorities to grant clemency as formerly permitted under the UCMJ to protect dependents of convicted Service members by relieving them of the burden of automatic and adjudged forfeitures. [RSP Recommendation 43]

2. Appeals

Following convening authority action on the sentence,[738] the record of trial is either reviewed by a judge advocate under Article 64 of the UCMJ, or transmitted to the Judge Advocate General of the Service for appellate action in accordance with Articles 66 and 69 of the UCMJ, respectively, depending on the sentence.[739] A sentence to confinement of a year or more or a punitive discharge receives full appellate review[740] unless waived or withdrawn. After the record of trial and convening authority action are forwarded, the convening authority may not modify the action unless an appellate review authority directs.[741]

Chapter Nine:

ORGANIZING, TRAINING, AND RESOURCING INVESTIGATORS, PROSECUTORS, AND DEFENSE COUNSEL

A. ORGANIZING PROSECUTION RESOURCES

The organizational structure within civilian prosecution offices varies greatly. Some civilian prosecutors specialize in sexual assault for their entire careers[743] or rotate through sex crimes units specializing for a few years,[744] whereas others do not specialize and handle all felony level crimes.[744] Most of the prosecutors in medium size and smaller jurisdictions are assigned cases based on their experience level rather than a specific expertise in sexual assault cases.[745] The organizational structure in civilian prosecution offices depends upon the size of the jurisdiction, the resources available, the caseload, as well as the leadership's philosophy for assigning these complex cases.

Rather than imposing a specific organizational structure on the Services, as previously noted, Congress required the Services to provide a Special Victim Capability by January 2014 consisting of specially trained investigators, prosecutors, paralegals, and victim witness liaisons.[746] The Services have implemented the Special Victim Capability and the Panel is optimistic about each Service's approach.

The Service Secretaries need to continue to fully implement the special victim prosecutor programs within the Special Victim Capability and further develop and sustain the expertise of prosecutors, investigators, victim witness liaisons, and paralegals in large jurisdictions or by regions for complex sexual assault cases. [RSP Recommendation 105] One way to enhance Special Victim Capability may be to co-locate some of the personnel so they could work more effectively together.

1. Co-locating Prosecutors, Investigators, and Victim Support Personnel

Civilian jurisdictions and the Services use different organizational structures to maximize the efficiency and effectiveness of coordination among sexual assault response personnel and minimize trauma to the victim. The Panel studied four types of co-location models used in some civilian and military jurisdictions.

FIGURE 14 – CO-LOCATION MODELS

(1) The all-inclusive "one-stop shop" model combines all the personnel who respond to a sexual assault allegation, including victim advocates, mental health personnel, SANEs, investigators, and prosecutors in a single location.[747] The goal is to increase communication among the stakeholders, minimize victim travel, and enhance the multidisciplinary approach in sexual assault cases. One civilian facility, Dawson Place in Everett, Washington, includes SANEs, and/or victim advocate agencies and mental health personnel, investigators, prosecutors and victim witness liaisons to handle child and adult sexual assault cases. The Army recently established a similar facility, the Sexual Assault Response Center, at Joint Base Lewis-McChord (JBLM) in Washington for adult sexual assault cases.[748]

There are potential drawbacks to co-locating all of these services. Co-locating victim services personnel with law enforcement and prosecution officials could create the perception that victim services are aligned with, or a part of, the prosecution team – and do not operate independently – with several potentially deleterious effects: First, although the intent of this consolidation model is to support victims, these arrangements may actually deter reporting if victims perceive victim services are tied to, or working with, investigators or prosecutors. Second, victim services medical personnel who work too closely with prosecutors may not be perceived as independent medical providers, but rather as extensions of law enforcement.[749] And third, the victim advocate-victim privilege, which generally ensures that communications between victims and advocates remain confidential, may be degraded or lost if confidential statements are made in the presence of, or disclosed to prosecutors.[750] Accordingly, if larger military installations adopt this model, any multidisciplinary meetings between victim services personnel, the prosecutor, and investigator should be limited to topics related to victim support and ensuring the victim remains informed and engaged in the process, but should not include discussions about case details.

(2) The second model, seen in the Philadelphia Sexual Assault Response Center (PSARC) in Pennsylvania and the Austin Police Department (PD) Special Victim Unit (SVU) in Texas, integrates the victim advocate, SANE, investigators, and prosecutors. PSARC partnered with Women Organized Against Rape (WOAR) and other local victim advocate agencies to gain victim confidence and encourage victims to utilize their resources.

The PSARC facility's capacity to perform SANE exams is unique in that the exam room is co-located with the Philadelphia PD Special Victim Unit, yet maintains independence with Drexel University providing PSARC's SANE support and other medical assistance to victims, regardless of whether they wish to file a police report.[751] Austin PD provides an office for victim advocates from SafePlace – a local rape crisis center – to work at the SVU. Austin PD works with a SANE Coordinator to arrange for forensic exams from a group of experienced SANEs who respond to a local emergency room.[752]

(3) The third model co-locates prosecutors and investigators. In Arlington, Virginia and at Fort Hood, Texas, the investigators and prosecutors work in the same building.[753] This model is easier for small to medium jurisdictions or installations to adopt because it requires fewer resources, but still yields the positive results associated with investigators and prosecutors working closely together.

(4) The fourth model co-locates all victim services support personnel. At Marine Corps Base Quantico, Virginia, the Marine Corps has collected all of the different services available to victims under one roof, including the SARC, victim advocate, and special victim counsel.[754] This is a positive step, especially when there are so many resources and service providers available to sexual assault victims.

Overall, consolidated facilities can improve communication between prosecutors, investigators, and victims. These facilities may help minimize unnecessary trauma to victims following a sexual assault by locating all of the resources required to respond, support, investigate, and prosecute sexual assault cases in one building. However, these models require substantial resources and the right mix of personnel. Co-locating prosecutors and victim services personnel may also compromise privileges for military victim advocates or cause other perception problems.[755]

The Secretary of Defense needs to assess the various strengths and weaknesses of different co-location models at locations throughout the Armed Forces in order to continue to improve the efficiency and effectiveness of investigation and prosecution of sexual assault offenses. [RSP Recommendation 107-A] Likewise, *the Service Secretaries should direct that each Service's Judge Advocate General Corps and MCIOs work together to co-locate prosecutors and investigators who handle sexual assault cases on installations where sufficient caseloads justify consolidation and resources are available. Additionally, locating a forensic exam room with special victims' prosecutors and investigators, where caseloads justify such an arrangement, can help minimize the travel and trauma to victims while maximizing the speed and effectiveness of investigations. Because of the importance of protecting privileged communication with victims, the SARC, victim advocate, special victim counsel or other victim support personnel should not be merged with the offices of prosecutors and investigators. [RSP Recommendation 107-B]*

2. Sexual Assault Nurse Examiners (SANEs)

In civilian jurisdictions, specially trained nurses or other trained health care providers perform SAFEs. Most police departments coordinate with local hospitals; however, not all civilian hospitals have a trained provider on staff. In those locations, victims may be transported to a designated location where forensic exams are routinely performed or a provider will respond to the victim's hospital. Having a pool of designated trained professionals who frequently are called to conduct SAFEs increases the level of expertise of those examiners and improves the quality of the exam.

Many installations coordinate with civilian forensic examiners to provide SAFE services. Depending on the location, many civilian medical facilities serve as the community's center of excellence for SAFEs and have more experienced SANEs than are typically available on a military installation. SANEs in civilian medical facilities typically have more experience in conducting forensic exams because they see more sexual assault victims over the course of a year than SANEs on most military installations.[756] On most, if not all, military installations, a full time SANE is unnecessary because not enough sexual assaults are reported within the first

96 hours of an incident to require a nurse physically located at a consolidated sexual assault center. However, it may be useful to provide appropriate space, supplies and equipment for SANE forensic exams in facilities housing investigators and prosecutors in order to support currently existing arrangements between military installations and civilian forensic examiners. Further, such arrangements would increase communication between prosecutors, investigators, and forensic examiners while easing the burden on victims by limiting the need to travel to a military hospital or off base civilian facility.

The FY14 NDAA Section 1725 requirement that every military installation medical treatment facility (MTF) with an emergency department that operates 24 hours per day, seven days a week to have at least one assigned SANE is overly prescriptive.[757] DoD policy already required timely, accessible, and comprehensive healthcare for victims of sexual assault, including a SAFE Kit.[758] In light of the DoD policy, and actual need for forensic exams in the military, *the Service Secretaries should direct their Surgeons General to: (1) review Section 1725 of the FY14 NDAA, which requires the assignment of at least one full-time SANE to each military medical facility with a 24 hour, seven days a week emergency room, and (2) provide recommendations to amend the legislation so as to permit the most effective way to provide SAFEs at their facilities, given that many civilian medical facilities have more experienced forensic examiners than are typically located on a military installation and those facilities serve as the community's center of excellence for SAFEs. [RSP Recommendation 99]*

3. Special Victim Capability Policy and Assessment

The Special Victim Capability strives to provide a level of prosecution expertise through specialization in complex sex-related cases, while recognizing that not every judge advocate is a subject matter expert in sexual assault prosecution. DoD's policy document Directive-Type Memorandum (DTM) 14-003 advances Congress's requirements by including timelines for special prosecutors' involvement in reported sexual assaults, criteria to measure effectiveness, and other standards.[759]

a. Terminology

Pursuant to DoD policy, the Special Victim Capability team responds to "covered offenses" which includes "sexual assault, domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm, and child abuse involving sexual assault and/or aggravated assault with grievous bodily harm, in accordance with the UCMJ."[760] Accordingly, the prosecutors and investigators of the Special Victim Capability team are required to handle cases beyond Article 120 offenses. *The Secretary of Defense should direct the DTM 14-003 be revised so that definitions of "covered offenses" accurately reflect specific offenses currently listed in the relevant version(s) of Article 120 of the UCMJ. [RSP Recommendation 103]*

In large jurisdictions, prosecutors specializing in sexual assault cases handle felony level offenses, whereas less experienced attorneys handle misdemeanors or contact offenses. Article 120 of the UCMJ covers conduct from contact offenses to penetrative offenses, so a blanket requirement for using Special Victim Capability in all Article 120 cases would not be comparable to such civilian systems. Therefore, *the Secretary of Defense and Service Secretaries should develop policy that does not require special victim prosecutors to handle every sexual assault under Article 120 of the UCMJ. Due to the resources required, the wide range of conduct that falls within current sexual assault offenses in the UCMJ, and the difficulty of providing the capability in remote locations, a blanket requirement for special prosecutors to handle every case undermines effective prevention, investigation, and prosecution. [RSP Recommendation 104]*

b. Timelines

DoD established timelines to ensure military prosecutors' early involvement in sexual assault investigations. MCIOs inform the Staff Judge Advocate's legal office within 24 hours of learning of a report; the special victim prosecutor coordinates with the investigator within 48 hours.[761] The DoD policy is supported by studies that concluded when prosecutors become involved in sexual assault cases early, including meeting with the victim,

there is a greater likelihood the victim will cooperate in the investigation and prosecution of the alleged offender.[762] The large urban prosecution offices have programs that include protocols for investigators to notify prosecutors as soon as serious sexual assaults are identified. The protocols also provide for prosecutors to accompany investigators in certain circumstances, and for the coordination between the investigator and prosecutor through much of the process.[763] Military special victim prosecutors are on call and follow similar procedures as their civilian counterparts in large offices with ride-along programs. While the coordination between the military investigator and prosecutor follows the civilian best practice, there is no current requirement for the military prosecutor to meet with the victim as soon as possible.

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

c. Measuring the Effectiveness of the Special Victim Capability

Department of Defense policy complies with the FY13 NDAA requirement for the Secretary of Defense to prescribe common criteria for measuring the effectiveness and impact of the Special Victim Capability from investigative, prosecutorial, and victim perspectives.[764] DoD established five evaluation criteria "to ensure that special victim offense cases are expertly prosecuted, and that victims and witnesses are treated with dignity and respect at all times, have a voice in the process, and that their specific needs are addressed in a competent and sensitive manner by Special Victim Capability personnel."[765] The DoD and the Services will assess the Special Victim Capability by reviewing the following measures:[766]

- Percentage of Special Victim Capability cases preferred, compared to overall number of courts-martial preferred in each fiscal year;
- Percentage of special victim offense courts-martial tried by, or with the direct advice and assistance of, a specially trained prosecutor;
- Compliance with DoD Victim Witness Assistance Program reporting requirements to ensure Special Victim Capability legal personnel consult with and regularly update victims as required;
- Percentage of specially-trained prosecutors and other legal support personnel who receive additional and advanced training in Special Victim Capability topic areas; and
- Victim feedback on the effectiveness of Special Victim Capability prosecution and legal support services and recommendations for possible improvements.[767]

In addition to the DoD criteria, the Army uses the victim "drop out" rate to measure the effectiveness of the special victim counsel or special victim prosecutor. Evidence indicates that these programs, thus far, have been effective. Since the Army established the Special Victim Prosecutor Program in 2009, only six percent of sexual assault victims "dropped out" or were unable to continue to cooperate in the investigation and prosecution of the case.[768] In contrast, in 2011, prior to implementing the specially trained prosecutors or victims' counsel programs, the Air Force suffered from a 29 percent victim dropout rate.[769]

Special prosecutors, and now special victim counsel, are trained to prevent victim fatigue and ensure victims remain informed. Considering the correlation between the Special Victim Prosecutor Program's implementation and a reduced victim dropout rate, it is reasonable to conclude that special victim prosecutors

are making the process less intimidating for victims and are causing victims to have more faith in the process.[770] Nonetheless, to assess the long-term effectiveness of these programs, the Services should track the percentage of cases in which the victim declines to cooperate after filing an unrestricted report and the reasons for the declination. This additional data could reflect the effectiveness of both the special victim prosecutor and special victim counsel.

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

B. DEFENSE COUNSEL ORGANIZATION AND RESOURCE REQUIREMENTS

Defense counsel from across the Services informed the Panel that the mission of the military Defense Services is to provide independent, world-class representation in a zealous, ethical, and professional manner, thereby ensuring the military justice system is both fair and just.[771] While it is important to hold offenders appropriately accountable, it is also crucial that the military justice system remains balanced and respects the rights of the accused, particularly the presumption of innocence.

As required by law and policy, the Services provide military defense counsel, free of charge, to Service members facing potential court-martial, nonjudicial punishment, administrative separation, and similar adverse action.[772] Defense counsel perform a wide range of duties, including:

- representing Service members before tribunals and other administrative bodies – e.g., at courts-martial, Article 32 hearings, lineups and administrative separation boards;
- counseling Service members under investigation or prior to being subject to punitive or negative administrative action – e.g., those suspected of offenses, pending nonjudicial punishment under Article 15 of the UCMJ, subject to Summary Court-martial (where Service members are not entitled to attorney representation), recommended for administrative separation; and
- other legal services as determined by the Services.

All of the Services organize their trial defense services by geographic region.[773] Military defense counsel are assigned to separate and independent organizations, not under the supervision or control of their clients' commanders. This organizational structure ensures the independence of military defense counsel, both in fact and perception.

Unlike military or civilian special victim prosecutors, neither civilian public defenders offices nor military defense services have attorneys specializing in sexual assault cases;[774] instead both attempt to use the most experienced attorneys to try more complex cases, such as sexual assaults. The Services' regionally organized trial defense systems meet the demand for competent and independent legal representation of Service members accused of sexual assault. Therefore, rather than developing specialized defense counsel, DoD and the Services should continue to focus on improving defense counsel training and ensuring sufficient resources are provided so that military defense organizations and counsel can perform effectively.

Currently, military defense counsel cannot use the MCIO to conduct additional investigation for the defense, assuming the MCIO would agree to do so, because any information would not be protected by the attorney-client or work-product privileges,[775] and the alternative – military defense counsel conducting his or her own case investigations – is equally unsatisfactory. This places an additional burden on military defense counsel

who may be untrained in investigative techniques and lacking investigative assets. Further, it may place defense counsel in ethically compromising circumstances if he or she becomes the only witness to exculpatory, inconsistent, or other statements.

Unlike public defenders who employ their own investigators, military defense counsel have none. Civilian defense investigators typically assist the defense in locating and interviewing witnesses, finding appropriate experts, and finding services to assist the defense in complying with court ordered treatment or services.[776] The investigators' involvement and contributions permit civilian defense counsel to prepare for trial and may assist in reaching alternate dispositions in cases.[777] Investigators can "give[] attorneys a fighting chance to develop facts and other evidence that is rarely provided to them by the government and is crucial for the proper representation of their clients" and "contribute to the efficient disposition of cases." [778] One public defender from the Washington, D.C. Public Defender's Office told the Panel, "[I]t's surprising to hear about the lack of investigators involved when we're trying to uphold the Constitution here and try to give our clients the utmost in representation and being zealous."[779]

Currently, military defense counsel instead must rely solely on the MCIO investigation and defense counsel and defense paralegals, if available, to conduct any additional investigation. Although defense counsel can request an investigator be detailed to the defense team for a particular case, defense counsel told the Panel that convening authorities and military judges routinely deny their requests.[780] *The Secretary of Defense should direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission in cases and the fair administration of justice. 781 [RSP Recommendation 81]* Many civilian public defender offices have investigators on their staffs and consider them critical.[782]

The are several potential ways DoD could fulfill the requirement to provide defense investigators. One would create MCIO positions within the defense counsel offices[783] and ensure the investigators' evaluation and supervisory chains remain within the military trial defense organizations.[784] Investigators could "unplug" from the parent MCIO for an assignment, "plug" into the defense system, then "unplug" to resume work for the MCIO.[785] This would mirror JAG Corps attorneys who serve as both prosecutors and defense counsel, although always in different assignment tours. Another option is to hire civilian investigators as full time government employees or hire contractors to work for the defense.[786] Some public defender offices hire former law enforcement personnel who get narrow-purpose credentials issued to them to perform the investigative functions for the defense.[787]

Regardless of the way DoD implements this requirement, military defense counsel need independent, deployable defense investigators to zealously represent their clients and correct an obvious imbalance of resources.

C. TRAINING INVESTIGATORS, PROSECUTORS, AND DEFENSE COUNSEL

Overall, military trial counsel, defense counsel, and investigators are competently and professionally performing their duties in adult sexual assault cases. Collaboration and standardization of assignments and training across the Services are areas ripe for further improvement.

1. Improving Special Victim Unit Investigator Personnel Assignments

Military and civilian agencies with SVUs recognize that detectives assigned to those units should have both the capability and commitment to investigate sexual assaults.[788] Best practices in civilian SVU investigative agencies involve reassigning personnel experiencing "burn out" and careful interviewing and selection of applicants to weed out those investigators with biases or a lack of interest in investigating sexual assault

cases.[790] Based on military mission requirements and the resulting need for flexibility in personnel assignments, a military Service member agent may be assigned to support an SVU or act as the lead agent on a sexual assault investigation, even though he or she did not volunteer for the position. To mitigate this problem, the MCIOs created civilian SVU team chief and investigator positions, carefully staffing them with specifically selected investigators.[791] Thus, a military best practice is assigning civilian investigators to supervise the SVU, which enhances the continuity of investigations and coordination with other agencies involved in responding to sexual assault cases.

The Secretary of Defense should direct MCIO commanders and directors to carefully select and train military investigators assigned as investigators for SVUs, and whenever possible, utilize civilians for specialized investigative oversight to maximize continuity and expertise. MCIO commanders and directors should ensure that military personnel assigned to an SVU have the competence and commitment to investigate sexual assault cases. [RSP Recommendation 96]

2. Training to Improve Sexual Assault Investigations and Reports

Both military and civilian agencies recognize the possibility of potential biases or factually inaccurate perceptions of victim behavior (commonly referred to as "rape myths") among their officers and investigators.[793] Left unaddressed, such biases can result in failures to aggressively follow up on a complaint of sexual assault, inappropriate disposition of cases, or inaccurate reports.[792] One of the primary ways to address these issues is through targeted training.[793]

Civilian experts report that relatively few law enforcement professionals have sufficient training to write effective reports of sexual assaults.[794] In both civilian and military law enforcement communities, bias in the terms used in documenting sexual assaults sometimes inappropriately or inaccurately suggests consent of the victim.[795] One expert noted, "We talk about victims having sex with their perpetrators. We talk about victims performing oral sex on their perpetrators. And we don't think of the word picture that creates, which does not in any way show the reality of the crime."[796]

The MCIOs have identified this concern and are trying to address potential biases through training and policy.[797] Army CID has issued guidance about the use of language that may imply consent and has required investigators to complete the End Violence Against Women International (EVAWI) online course entitled "Effective Report Writing: The Language of Non-Consensual Sex" as part of its annual refresher training in FY 2013.[798] Though the other Services do not have specific policies on this subject, all stated they train investigators on eliminating bias in investigations, particularly regarding victim behaviors.[799]

A best practice in both military and civilian agencies is to provide training to address potential biases and inaccurate perceptions of victim behavior, preparing officers and investigators to more effectively respond to, investigate, and document reported sexual assaults. Therefore, *the Secretary of Defense should direct commanders and directors of the MCIOs to continue training of all levels of law enforcement personnel on potential biases and inaccurate perceptions of victim behavior. Investigators should also be trained against the use of language that inaccurately or inappropriately implies consent of the victim in reports. [RSP Recommendation 97]*

3. Collaboration and Consistency in Sexual Assault Forensic Examinations

FY14 NDAA requires that the curriculum and other components of the program for certification of SANE (Adult/Adolescent) use the most recent guidelines and standards, as outlined by the Department of Justice, Office on Violence Against Women.[800] While not all civilian agencies require their nurses performing forensic examinations to be certified as a SANE, all must have at least the required training as a forensic examiner (40

hours of training are required, but taking the national exam is not). Twelve hours of continuing education is required annually to maintain certification as a SANE.[801]

While the Department of Justice national guidelines form the basis for SAFE training in the military and civilian communities, each of the Military Services instituted different programs and developed guidelines independently. *To improve and synchronize these programs and efforts, the Secretary of Defense should direct the Services to create a working group to coordinate the Services' efforts, leverage expertise, and consider whether a joint forensic exam course open to all military and DoD practitioners, perhaps at the Joint Medical Education and Training Center, or portable forensic training and jointly designed refresher courses would help to ensure a robust baseline of common training across all Services. [RSP Recommendation 101]*

4. Training Prosecutors in Adult Sexual Assault Cases

The Panel gathered and examined comparative information and received witness testimony from twenty prosecution offices across the nation to assess and compare military prosecutor training.[802] There are no national or state minimum training standards or experience floors for civilian prosecutors handling adult sexual assault crimes. Though each civilian prosecution office has different training practices, most sex crime prosecutors are trained through supervised experience handling pretrial motions, trials, and appeals.[803] Civilian sex crimes prosecutors usually have at least three years of prosecution experience, and often more than five. Experience can also be measured by the number of trials completed, though there is no uniform minimum required number of trials to be assigned adult sexual assault cases. Some prosecutors in medium to large offices have caseloads of at least 50-60 cases, and spend at least two days per week in court.

Likewise, all the Services have specially-trained and selected lawyers who serve as lead trial counsel in sexual assault crimes cases. As discussed further below, specialized military prosecutors handling adult sexual assault cases receive advanced training and have access to a network of senior judge advocates, civilian experts, and prosecution specialists.

a. Specially Trained Prosecutor Programs

All of the Services have trained specially trained prosecutors to support the special victim capability. The Army selects trial lawyers with the most demonstrated court-martial experience, experience with special victim cases, general expertise in criminal law, and interpersonal skills in handling sensitive victim cases.[804] The table below details experience and training for specialized sexual assault prosecution programs:

EXPERIENCE AND TRAINING FOR PROSECUTORS TRYING SEXUAL ASSAULT CASES[805]

Organization and Authorizations	Selection and Experience	Specialized Education and Training
U.S. Army ***Special Victim Prosecutor (SVP)*** • **23 Special Victim Prosecutors covering worldwide area spanning 65 installations.** • **Army SVPs work with CID special investigators and Special Victim Unit (SVU) investigative teams.**	• Individually selected from the Army's most experienced trial lawyers. • Demonstrated court-martial experience. • Experience with sexual assault and special victim cases. • General expertise in criminal law. • Interpersonal skill in handling sensitive victim cases. • Both prosecution and defense experience are not required for selection, but is preferred.[806]	• Specialized military and civilian courses. • Two weeks "on the job" with a civilian district attorney's office. • Special training on victim care and interviewing.
U.S. Air Force ***Special Victims Unit – Senior Trial Counsel (SVU-STC)*** • **16 Senior Trial Counsel, including 10 who are members of the SVU.** • **Work alongside 24 Air Force Office of Special Investigations (AFOSI) special investigators.** • **Located at 16 Air Force installations with a high number of reported sexual offenses.**	• Senior Trial Counsel (STC) litigate the Air Force's most difficult cases, including the vast majority of sexual-assault prosecutions. • STC typically have at least three years of experience and are selected to be STCs. • A subset of STC are members of the Special Victims Unit (SVU-STC) and specialize in the prosecution of sexual assault and family violence cases.[807]	• Air Force lawyers selected for litigation positions attend the Trial and Defense Advocacy Course (TDAC) and the Advanced Trial Advocacy Course (ATAC). • All SVU-STC attend the Advanced Sexual Assault Litigation Course (ASALC), focused on sexual assault, domestic violence, and child abuse course annually. • SVU JAGs also continuously attend various advanced training courses.[808]
U.S. Navy ***Military Justice Litigation Career Track (MJLCT) and Senior Trial Counsel (STC)*** • **9 regionally-based Senior Trial Counsel.** • **Collaborate with Naval Criminal Investigative Service (NCIS) special investigators to investigate, review, and prosecute special victim cases.**	• With demonstrated aptitude and a desire to further specialize in litigation, may apply for inclusion in the MJLCT. • MJLCT officers spend most of their career in litigation-related billets as trial counsel, defense counsel, and military judges.[809]	• An MJLCT officer can advance from Specialist I to Specialist II to Expert. • Most MJLCT officers also receive an advanced law degree (a Master of Laws or LL.M.) in trial advocacy or litigation from a civilian institution. • Complete a follow-on tour in a courtroom intensive billet with leadership requirements.[810]

U.S. Marine Corps ***Special Victim Qualified Trial Counsel (SVTC) and Complex Trial Teams (CTT)*** • **Specially qualified, geographically-assigned Complex Trial Teams led by experienced Regional Trial Counsel** • **Provide special victim prosecutorial expertise and support.**	• Prosecute a contested special or general court-martial in a special victim case as an assistant trial counsel. • Be a General Court-Martial Qualified trial counsel (experience requirement). • Receive written recommendation from the Regional Trial Counsel regarding expertise to try a special victim case. • Satisfy requisite expertise, experience, education, innate ability, and disposition to competently try special victim cases (to the approval an O-6 level Officer-in-Charge).	• Complete the Marine Corps basic judge advocate training requirements, including courses at the Naval Justice School. • Attend an intermediate-level trial advocacy training course for the prosecution of special victim cases.

b. Trial Counsel Assistance Programs and Highly Qualified Experts (HQEs)

In addition to specialized prosecutors, the Army, Navy, and Marine Corps each have a Trial Counsel Assistance Program (TCAP) that oversees training. TCAPs across the Services provide training to increase the expertise of trial counsel and lay a foundation for them to later serve as experienced and capable defense counsel, chiefs of military justice (i.e., supervisory trial counsel), deputy SJAs, and SJAs.[811] The table below describes each Service's TCAP organization, support, and budget:

TRIAL COUNSEL ASSISTANCE PROGRAMS[812]

Organization	Responsibilities	HQE Support	Budget
U.S. Army **Trial Counsel Assistance Program (TCAP)**	• Increase the expertise of trial counsel. • Lay a foundation for trial counsel to later serve as experienced and capable defense counsel, chiefs of military justice (i.e., supervisory trial counsel), deputy SJAs, and SJAs.[813]	• 3 Highly Qualified Experts (HQEs) provide supplemental support. • The HQEs are civilians with more than 30 years of combined prosecution experience.[814]	• $468,734.64 (annual "sexual assault training funds"). • $1,407 per trial counsel per year.
U.S. Air Force **No Centralized Program**	• N/A	• N/A	• $2,105 per STC.[815]
U.S. Navy **Trial Counsel Assistance Program** **(TCAP)**	• Oversees training for trial counsel. • Provides on scene and online training to prosecutors in specialized areas, including adult sexual assault. • Conducts annual mobile training. • Installation site-visits with training sections on special victim crimes and process inspection. • Live online training. • Interactive Web-based training (sponsored by TCAP and conducted by subject matter experts).	• In May of 2013 the Navy hired an HQE to work with its TCAP. • HQE has 17 years of experience as a prosecutor and as an instructor and course coordinator for the NDAA.	• Not provided.
U.S. Marine Corps **Trial Counsel Assistance Program** **(TCAP)**	• To train trial counsel to prosecute sexual assault cases.[816] • Answers questions from prosecutors in the field, • Maintains a Web site for trial counsel to share motions and best practices, • Conducts training—in conjunction with Navy TCAP.[817] • Marine Corps trial counsel must consult with their regional HQE within ten days of being detailed to any sexual assault case.[818]	• The Marine Corps recently hired three HQEs to assist in all sexual assault cases; • Two of the HQEs are assigned to the prosecution.[819]	• $250,000 (SAPR/ SVC annual training funds). • $2,778 per trial counsel per year.

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

Trial counsel in all the Military Services generally have more standardized and extensive training than some of their civilian counterparts, but fewer years of prosecution and trial experience. The Services all use a combination of experienced supervising attorneys, systematic sexual assault training, and smaller caseloads to address experience disparities.

As a promising option for increasing experience levels of military trial counsel, the Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps should study the Navy's Military Justice Litigation Career Track (MJLCT), outlined in the chart above,[820] to determine whether this model, or a similar one, would be effective in enhancing expertise in litigating sexual assault cases in his or her Service.

5. Military Defense Counsel Training and Experience

The Panel compared civilian approaches and examined best and promising practices in assessing training and experience levels of military defense counsel. Defense counsel handling adult sexual assault cases in all the Services receive specialized training.[821] Many also have previous experience as trial counsel.[822] The table below illustrates training and experience of defense counsel across the Services:

EXPERIENCE AND TRAINING FOR DEFENSE COUNSEL TRYING SEXUAL ASSAULT CASES[823]

Organization	Experience	Training
U.S. Army Defense Counsel	• Majority of DCs have prior courtroom experience. No specific minimum experience required. • Experience sitting "second chair" until supervisor deems fit to try cases as first chair.	• Graduate of the Judge Advocate Officer Basic Course. • Defense Counsel "101," taught by DCAP. • Advanced Trial Advocacy Courses.
U.S. Air Force Defense Counsel	• The Air Force is unique in that defense counsel are selected in a competitive, best-qualified standard by the Air Force Judge Advocate General. • Most defense counsel arrive with two to five years of experience working in a base legal office, which includes time as a trial counsel in courts-martial. • New defense counsel normally have between eight and 10 courts-martial trials before starting as a defense counsel.[824]	• Specialized courses provided by the Air Force Judge Advocate General's School. • On-the-job training. • Group training remains a challenge because of geographic diversity of counsel and length of tours.[825] • Out of the 19 Senior Defense Counsel regions, only three (San Antonio, Colorado Springs and the National Capitol Region) have the majority of their bases in close enough proximity to drive to group training.[826]

U.S. Navy Defense Counsel	• Following their first 24-month tour handling administrative separations and other non-judicial issues, Navy Judge Advocates become eligible to be assigned to a Defense Service Office (DSO) as a defense counsel.[827] • MJLCT officers are stationed in all DSO headquarters offices and some detachments, which are smaller regional offices.[828]	• Once selected, counsel receive additional training, including a basic trial advocacy course focusing on courtroom advocacy. • Within the first year at a DSO, defense counsel also attend the defending sexual assault cases class, an intense one-week course involving experts from forensics and psychology and very experienced civilian defense counsel.[829]
U.S. Marine Corps Defense Counsel	• The vast majority of the Marine Corps' 72 defense counsel are first-tour judge advocates with less than three years of experience as an attorney.[830] • They typically serve 18 months as defense counsel before moving to another assignment. • The average litigation experience of both senior defense counsel and defense counsel is 14 months, which includes both prosecution and defense time.[831]	• Defense counsel training requirements are set forth in Marine Corps policy.[832]
U.S. Coast Guard Defense Counsel	• By memorandum of agreement between the Coast Guard and the Navy JAG Corps, the Navy is principally responsible for defending Coast Guard members accused of UCMJ crimes.[833] • In return, four Coast Guard judge advocates are detailed to work at various Navy Defense Service offices on two-year rotations, which provide another significant source of trial experience to Coast Guard judge advocates.[834]	• Coast Guard Defense Counsel attend Navy Defense Training.

Military defense counsel in all the Services tend to have more standardized and extensive course training than their civilian counterparts to compensate for a relative lack of experience.[835] Like their prosecution counterparts, defense counsel receive training, oversight, and mentoring from senior counsel.[836] *The Services should continue to provide experienced defense counsel through the regional defense organizations and draw from personnel with extensive trial experience and expertise in the Reserve component. [RSP Recommendation 85]*

It is difficult to develop defense experience given the relatively low number of courts-martial and personnel turnover. The Marine Corps faces particular problems with personnel turnover because their attorneys perform line duty mission requirements and may serve in defense counsel tour lengths as short as 12 months.[837] As previously discussed, not all military defense counsel possess trial experience prior to assuming the role of defense counsel. Some defense counsel said they were assigned adult sexual assault cases during their first tour of duty, when they had no prior litigation experience.[838]

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

6. Defense Counsel Assistance Programs (DCAPs) and HQEs

All of the Military Services except the Air Force have DCAPs and HQEs to assist with training and trial consultation in all cases, including sexual assaults. The table below describes these programs:

DEFENSE COUNSEL ASSISTANCE PROGRAMS[839]

Organization	Responsibilities	HQE Support[840]	Budget
U.S. Army Trial Defense Service and Defense Counsel Assistance Program (DCAP)	• Provides training, resources and assistance for defense counsel worldwide, including "reach back" capability. • Coordinates with, but operates independently from The Judge Advocate General's Legal Center and School. • "Available around the clock for case consultation. [In FY13], DCAP received over 2,000 inquiries from defense counsel in the form of emails, phone calls and in-person inquiries during training events."[841]	• Two civilian HQEs. • Both HQEs are former military judges and experienced trial practitioners with over 40 years of combined military justice experience.	• $377,178.96 (annual). • $1,033.36 per counsel.
U.S. Air Force No Centralized Program	• Training and support provided internally through supervisory counsel.	• No HQE Support.	• $350,000.00 annually for "other than litigation" travel. • $1,870.00 per counsel.

U.S. Navy Defense Counsel Assistance Program (DCAP)	• In conjunction with the Naval Justice School, provides ongoing training to current and prospective defense counsel worldwide, through on-site command visits and online training.[842] • Tracks trends and identifies areas for training; monitors evaluations for improvement in practice.[843] • Hosts an online forum where counsel post, download, and share resources involving sexual assault litigation as well as a "discussion board" where defense counsel anywhere in the world can receive nearly instantaneous assistance from DCAP and the Navy defense bar.[844]	• One HQE (former military judge with extensive criminal law experience).	• Not Provided.
U.S. Marine Corps Defense Services Organization (DSO)	• Provides training and support to 72 defense counsel, most of whom are first-tour judge advocates with less than three years of experience as an attorney.[845]	• One HQE, a retired civilian public defender from San Diego with over 30 years of experience.[846]	• DSO has access to $250,000 in SAPR/SVC Training Funds. • $1870.00 per counsel.

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

7. Ensuring the Continued Effectiveness of Military Defense Counsel

In contrast to assessment of the performance of prosecutors there are currently no requirements or pending initiatives for the Services to measure military defense counsel performance in trying sexual assault cases. It is difficult for civilian or military defense counsel to measure success in defending those accused of sexual assault offenses. Just as conviction rates are not an accurate or desirable measure of prosecution success, acquittal rates are also not an accurate or desirable measure of defense success. Instead, a favorable plea agreement, sentence, or agreement to dispose of a case through alternate means for a client may be an accomplishment. Additionally, high acquittal rates in military sexual assault cases may indicate that staff judge advocates are recommending, and convening authorities are referring, cases that do not warrant trial by court-martial.

Therefore, *the Secretary of Defense should direct the Services to assess military defense counsels' performance in sexual assault cases similar to performance assessment of prosecutors and identify areas that may need improvement. [RSP Recommendation 87]*

8. Sexual Assault Working Group for Military Lawyers

Currently, all Services send attorneys to the training courses and JAG schools of the other Services. They also informally share resources, personnel, lessons for training, and collaborate on some training, enabling counsel to share successful tactics, strategies, and approaches.[847] However, these processes are not formal or standardized. There does not appear to be any synchronized effort in creating, funding, and growing training programs—as evidenced by the varying names and acronyms used to describe similar programs. For example, military judges in the Navy prepare quarterly evaluations of counsel's advocacy that are forwarded to the Chief Judge of the Navy for review and shared with DCAP for use in training plans.[848] It does not appear that the other Services similarly measure and assess performance. The absence of standardization and coordination can create confusion, duplication of effort, and a lack of clarity and credibility to those outside of the system. Conversely, if formalized and shared across the Services, these processes and terms could enhance comparability and efficiency.

The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps should sustain and broaden the emphasis on developing and maintaining shared resources, expertise, and experience in prosecuting and defending adult sexual assault crimes. [RSP Recommendation 111] To that end, a working group is an effective means of showing progress and development and ensuring that initiatives and promising practices are disseminated throughout the Services to avoid duplication and continue improving training practices. Therefore, *the Secretary of Defense should direct the establishment of a DoD judge advocate criminal law joint training working group to optimize sharing of best practices, resources, and expertise for prosecuting and defending adult sexual assault cases. The working group should produce a concise written report, delivered to the Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps at least annually, for the next five calendar years. The working group should identify best practices, strive to eliminate redundancy, consider consolidated training, consider ways to enhance expertise in litigating sexual assault cases, and monitor training and experience throughout the Services. The working group should review training programs such as: the Army's Special Victim Prosecutor program; the Navy's Military Justice Litigation Career Track (MJLCT); the Highly Qualified Expert (HQE) programs used for training in the Army, Navy, and Marine Corps; the Trial Counsel Assistance and Defense Counsel Assistance Programs (TCAP and DCAP); the Navy's use of quarterly judicial evaluations of counsel; and any other potential best practices, civilian or military. [RSP Recommendation 112]*

D. RESOURCING AND FUNDING

1. Defense Services Funding

Maintaining adequate resources for the defense of military personnel accused of crimes, including sexual assault, is essential to the legitimacy and fairness of the military justice system. Unlike many civilian public defender offices,[849] military defense counsel organizations generally do not maintain their own budget; instead, they receive funding from the convening authority, their Service legal commands, or other sources.

Some civilian public defender offices maintain their own budgets or request experts through a trial judge who manages the budget.[850] In the federal system, there is specific funding to pay for defense witness travel and experts for Federal Defender organizations. Federal discovery rules generally require the defense to disclose experts and other witnesses to the government before trial, but not as early as military defense counsel. Military defense counsel must also request their witnesses through the trial counsel.[851]

The Panel concludes that separate budgets for military defense organizations are not necessary at this time. However, *the Service Secretaries should ensure military defense counsel organizations are adequately resourced in funding resources and personnel, including defense supervisory personnel with training and experience*

comparable to their prosecution counterparts, and direct the Services to assess if that is the case. [RSP Recommendation 82]

2. Reviewing Defense Counsel Training Budgets

During site visits and meetings, defense counsel and HQEs voiced concerns about training budget funding inequities between prosecutors and defense counsel, particularly in the Marine Corps.[852] Defense counsel from the Air Force, Army, and Navy also mentioned inequities in funding generally between the prosecution and defense, but did not specifically emphasize training. Some defense counsel told the Panel that because they do not have independent budgets, their training opportunities were insufficient and unequal to those of their trial counsel counterparts.[853]

The Services provided details about their training budgets, which reflected that defense counsel training budgets are generally equivalent to those for military prosecutors. *The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps should review military defense counsel training for adult sexual assault cases to ensure funding of defense training opportunities is on par with that of trial counsel. [RSP Recommendation 83]*

3. Maintaining Experienced Civilian Advocates

As discussed in the TCAP, DCAP, and HQE sections above, experienced civilian advocates play an important role training both prosecution and defense counsel in the Army, Air Force, Navy, and Marine Corps. Given the attrition and transience of military counsel, civilian involvement in training adds an important perspective and ensures a base level of experience and continuity. Most HQEs have 20-30 years of criminal law experience, often in both civilian and military practice—rare among lawyers in the Services.[854] Working in tandem with TCAP and DCAP, the HQEs add substantial specialized expertise in adult sexual assault litigation. Such civilian expert advocate participation also adds transparency and validity to military counsel training programs.

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

4. Supporting Military Judicial Training

Military judges, both trial and appellate, are selected based on their legal experience, military service record, and exemplary personal character, including sound ethics and good judgment.[855] Military judges participate in joint training at the Army's Judge Advocate General's Legal Center and School before their respective Service TJAGs will certify them to be judges.[856] This three-week course at the Army JAG School in Charlottesville, Virginia, covers judicial philosophy, case management, and specific scenarios.[857] The course, which is designed around a sexual assault case, includes substantive criminal law and procedure, practical exercises designed to simulate trial practice, and scenarios focusing on factors for consideration in reaching appropriate sentences.[858] The chief trial judges of all Services collaborate to create the Military Judge Course curriculum, and all Services provide instructors.[859] Experienced senior military judges grade the capstone exercise, which is a mock trial over which student military judges must preside.[860]

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

5. Ensuring Funding for Investigator Training

The MCIOs face an ongoing challenge of ensuring adequate funding is available to send investigators to advanced sexual assault investigation training courses. The increased workload and agent turnover requires training more investigators.[861] Congress has not specifically set aside money for sexual assault investigator training, leading to concerns that as resources wane within the military, the Services may be forced to cut training funds.[862] It is critical to sustain funding for training investigators, often the first responders to a report of sexual assault. Therefore, *Congress should appropriate funds for training of sexual assault investigation personnel. The Secretary of Defense should direct the Service Secretaries to program and budget funding, as allowed by law, for the MCIOs to provide advanced training on sexual assault investigations to SVU investigators. [RSP Recommendation 98]*

6. Ensuring Resourcing of Special Victim Capability

The DoD has dedicated an immense amount of resources to combat sexual assault. However, DoD did not authorize any additional personnel to the individual Services specifically to meet the requirement for special prosecutors within the Special Victim Capability, although the Services may have obtained additional personnel prior to the Congressional mandate. Currently, the Military Services fully fund special prosecutors' case preparation requirements.

Prior to the Congressional requirement for a Special Victim Capability in FY13 NDAA, the Services established programs that centralized specially trained prosecutors for complex cases.[863] The requirement to establish a Special Victim Capability within each Service did not significantly impact overall JAG personnel requirements because the Services were already developing these capabilities and, depending on the Service, may have already received additional authorizations for personnel. However, in a time of scarce resources and drawdown, it may be difficult to maintain this kind of capability in each of the different Services. Therefore, DoD and the Services need to ensure continued resources and permanent personnel are dedicated to this capability. Accordingly, *the Service Secretaries should continue to assess and meet the need for well-trained prosecutors to support the Services' Special Victim Capabilities, especially if there is increased reporting. [RSP Recommendation 106]*

Chapter Ten:

ASSESSING MILITARY AND CIVILIAN JUSTICE SYSTEM STRUCTURE AND PROPOSED LEGISLATIVE CHANGES

A. MILITARY JUSTICE SYSTEM STRUCTURE: EFFECTS ON SEXUAL ASSAULT REPORTING AND ADJUDICATION

Critics of the military justice system have argued that removing prosecutorial discretion from the chain of command will increase victim confidence and sexual assault reporting, as well as make the system fairer.[864] In considering this position, the Panel heard extensive testimony from sexual assault survivors, victim advocacy organizations, legislators, academics, and retired Service members.

The Panel also considered the testimony of active and retired military officers, judge advocates, legislators, academics, and victims who testified that it was vital for commanders to retain prosecutorial discretion. Proponents of the military justice system argued that the maintenance of good order and discipline, which is vital to mission-readiness, is the duty of commanders.[865] And, therefore, commanders must retain convening authority to remain credible leaders with the ability to administer justice and enforce values.[866] They also testified that commanders need prosecutorial discretion in order to create a command environment in which victims feel comfortable reporting crimes.[867]

Most of this testimony, whether from opponents or proponents of the current military justice system, was anecdotal. To develop empirical data points, the Panel reviewed Allied military justice systems and United States civilian justice systems to determine whether these systems faced problems with reporting sexual violence crimes similar to those seen in the military justice system.[868]

1. Alternative Allied and Civilian Justice Systems

The Panel reviewed Allied military justice systems that have removed prosecutorial discretion from the chain of command and placed it with independent military or civilian prosecutors. None of the military justice systems employed by our Allies was changed or set up to deal with the problem of sexual assault. Further, despite already making this fundamental change to their military justice systems, the evidence does not indicate that these Allies have seen any increase in sexual assault reporting or convictions due to this change.[869] In fact, despite removing prosecutorial discretion from the chain of command, Allied militaries face many of the same challenges as the U.S. military in preventing and responding to sexual assaults.[870]

Similarly, as previously noted, the Panel found that civilian jurisdictions face under-reporting challenges similar to those of the military.[871] Further, it is not clear that the criminal justice response in civilian jurisdictions—where prosecutorial decisions are supervised by elected or appointed lawyers—are any more effective at encouraging reporting of sexual assaults, or investigating and prosecuting these assaults when they are reported.[872] A recent White House report, describing the civilian sector, notes that "[a]cross all demographics, rapists and sex offenders are too often not made to pay for their crimes, and remain free to assault again. Arrest rates are low and meritorious cases are still being dropped—many times because law enforcement officers and prosecutors are not fully trained on the nature of these crimes or how best to investigate and prosecute them."[873] The White House report also highlighted low prosecution rates in the civilian sector and prosecution decisions

that ignored the wishes of sexual assault survivors.[874] Often, prosecutors based charging decisions on whether "physical evidence connecting the suspect to the crime was present, if the suspect had a prior criminal record, and if there were no questions about the survivor's character or behavior."[875]

In short, arguments suggesting that there is an advantage to vesting prosecutorial discretion with independent civilian or military prosecutors, rather than convening authorities, have no empirical support.

2. Convening Authority Fairness and Objectivity

Criticism of the military justice system often confuses the term "commander" with the person authorized to convene courts-martial for serious violations of the UCMJ. These are not the same thing. Convening authorities consist of a very small group of the larger category of commanders. Only senior officers who occupy specific command positions are afforded special court-martial and general court-martial convening authority, and it is unlikely convening authorities will have personal knowledge or familiarity with either the victim or the accused.[876] Further, only a GCMCA is authorized to order trial by court-martial for any offense of rape, sexual assault, rape or sexual assault of a child, forcible sodomy, or attempts to commit these offenses. Subordinate officers, even when in positions of command, may not do so.

There are systemic checks in place to ensure unbiased disposition decisions; i.e., the convening authority is required to recuse himself or herself if the convening authority has an other than official interest in a case.[877] Also, as discussed previously, staff judge advocates have the legal authority under Article 6 of the UCMJ to raise concerns with judge advocates further up the chain of command.

Moreover, senior commanders vested with convening authority do not face an inherent conflict of interest when they convene courts-martial for sexual assault offenses allegedly committed by members of their command. As with leaders of all organizations, commanders often must make decisions that may negatively impact individual members of the organization when those decisions are in the best interest of the organization.[878]

3. Convening Authority Legal Training and Advice

Senior officers entrusted with convening authority receive military justice training in pre-command courses, as well as specific legal training conducted by judge advocate instructors.[879] In addition to military justice training, those relatively few senior commanders who also serve as convening authorities for sexual assault allegations do not make prosecutorial decisions in isolation. Convening authorities are required by law to receive advice from judge advocates before making these decisions. Nonetheless, *the Secretary of Defense should ensure all officers preparing to assume senior command positions at the grade of O-6 and above receive dedicated legal training that fully prepares them to perform the duties and functions assigned to them under the UCMJ. [RSP Recommendation 38]*

4. Anticipated Consequences of Removing Convening Authority

It is not clear what impact removing prosecutorial discretion from the chain of command would have on the organization, discipline, operational capability or effectiveness of the Armed Forces.[880] And as previously noted, the Panel received only anecdotal evidence that removing prosecutorial discretion from the chain of command would increase reporting or prosecution of sexual assaults.[881] But the notion that independent prosecutors are a panacea for sexual assault in the Armed Forces is misplaced. The evidence does not support a conclusion that removing the authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault, increase reporting of sexual assaults, or improve the quality of investigations and prosecutions of sexual assaults, or increase the conviction rate in sexual assault cases in the Armed Forces.[882] Moreover, Allied military justice systems and civilian justice systems, which do not have a comparable entity to the convening authority, face similar reporting and prosecution problems as the U.S. military.

Accordingly, the Panel recommends that Congress not further limit the authority under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and Department of Defense policy. [RSP Recommendation 37]

B. ASSESSMENT OF PROPOSED LEGISLATIVE CHANGES

Congress has enacted significant amendments to the UCMJ to enhance the response to sexual assault in the military, and the DoD implemented numerous changes to policies and programs for the same purpose. Preliminary indicators demonstrated in recent reporting and prosecution trends appear encouraging. However, the FY14 NDAA reforms are not yet fully implemented and it will take time to assess their impact on sexual assault reporting and prosecution.

Four additional bills are currently pending in Congress that propose additional substantial systemic changes to the military justice system. Three of the pending bills are discussed below.[883]

1. Victims Protection Act (VPA) of 2014

On January 14, 2014, Senator Claire McCaskill (D-MO) filed the Victims Protection Act of 2014 (VPA), which provides additional enhancements to the Armed Forces' sexual assault prevention and response activities.[884] On March 10, 2014, the Senate unanimously passed the VPA.

Section 2 of the VPA would mandate Secretarial or higher convening authority review of referral decisions in addition to similar provisions Congress enacted in the FY14 NDAA.[885] If the staff judge advocate or the senior trial counsel recommends the convening authority refer a sex-related offense to trial by court-martial, and the convening authority does not do so, the case is forwarded to the Service Secretary for further review. In addition, if the staff judge advocate or senior trial counsel recommends the convening authority not refer a sex-related offense to trial by court-martial, and the convening authority agrees, the case is forwarded to the next higher general court-martial convening authority for review.[886]

The Panel recommends that Congress not enact Section 2 of the VPA. [RSP Recommendation 41] In addition to the Panel's concern, discussed earlier[887] about undue pressure on staff judge advocates and convening authorities when deciding whether to refer cases, the Panel believes the decision whether to refer a case to court-martial should continue to be a decision formed by the convening authority in consultation with his or her staff judge advocate. Most "senior trial counsel" assigned to cases are more junior and less experienced than the staff judge advocate advising the convening authority. Section 2 would inappropriately elevate the assessments of generally more junior judge advocates and would likely prove to be unproductive, unnecessary, and disruptive to ensuring the fair disposition of cases.

Section 3(b) of the VPA would require a consultation process for a sexual assault victim in the United States regarding his or her preference on prosecution by court-martial or the appropriate civilian jurisdiction. While not binding, the victim's preference would be entitled to "great weight" in determining prosecution forum. Should the victim prefer a civilian forum for prosecution and the civilian jurisdiction declines to prosecute, the victim must be "promptly" informed.[888]

The Panel recommends that Congress not enact Section 3(b) of the VPA. [RSP Recommendation 114] Jurisdiction is based on legal authority, not necessarily the victim's preferences. The decision whether civilian or military authorities will prosecute a case is routinely negotiated between the military and civilian authorities in cases with shared jurisdiction. In addition, the Panel did not receive evidence of problems with coordination between civilian prosecutors and military legal offices. In fact, the opposite appears to be true. There appears to be significant coordination and cooperation between military and civilian authorities with concurrent jurisdiction.

Forum selection should remain within the discretion of the civilian prosecutor's office and the Convening Authority.

Section 3(g) of the VPA would modify Military Rule of Evidence 404(a) regarding the character of the accused.[889] The provision prohibits the admission at trial of evidence of general military character to raise reasonable doubt as to the accused's guilt. The proposal permits the admission of evidence of military character at trial when it is relevant to an element of an offense for which the accused has been charged. Therefore, the accused retains the ability to offer military character evidence so long as defense counsel establish a proper basis to demonstrate its relevance to an element of a charged offense.[890]

The Panel recommends that Congress should enact Section 3(g) of the VPA. The Panel believes that implementing this section may increase victim confidence, but does not recommend further changes to the military rules of evidence regarding character. [RSP Recommendation 121] The Panel cautions, however, that this change is unlikely to result in significant modification of current trial practice. Military and other character evidence properly remains relevant and admissible at trial as part of the accused's defense under appropriate circumstances, and can, on its own, raise reasonable doubt as to the accused's guilt.

2. Sexual Assault Training Oversight and Prevention Act and the Military Justice Improvement Act of 2013

Representative Jackie Speier (D-CA) and Senator Kirsten Gillibrand (D-NY) have each filed bills in their respective chambers to remove commanders from serving as convening authorities. The primary feature of Representative Speier's proposal is removing commanders as convening authority for sex-related offenses.[891] Senator Gillibrand's proposal is broader and would remove commanders' authority to decide disposition of most "felony" offenses under the UCMJ.[892] Thus, the Military Justice Improvement Act (MJIA) would make a fundamental change to the structure and operation of the military justice system.

Representative Speier initially introduced the Sexual Assault Training Oversight and Prevention Act (STOP) in 2011 during the 112th Congress,[893] and re-introduced it as H.R. 1593 in 2013.[894] The STOP Act seeks to remove reporting, oversight, investigation and victim care of sexual assaults from the military chain of command and place jurisdiction in a newly created, autonomous Sexual Assault Oversight and Response Office.[895] In addition, the STOP Act would create a Sexual Assault Oversight and Response Council, composed primarily of civilians "independent from the chain of command within the Department of Defense," which would oversee the Sexual Assault Oversight and Response Office and appoint a Director of Military Prosecutions.[896] The Director of Military Prosecutions would have independent and final authority to oversee the prosecution of all sex-related offenses committed by a member of the Armed Forces, and to refer such cases to trial by courts-martial.[897] All other offenses under the UCMJ would remain under the current system. Congress has not enacted the STOP Act.[898]

On May 16, 2013, Senator Gillibrand introduced S. 967, the MJIA.[899] The Senate Armed Services Committee did not include the MJIA in the FY14 NDAA, so, on November 18, 2013, Senator Gillibrand filed an amended version of the MJIA.[900] The amendment addressed technical criticisms levied against S. 967 but retained the bill's primary feature of transferring convening authority for most serious crimes to independent, senior judge advocates.[901] The amendment was not enacted as part of the FY14 NDAA. On November 20, 2013, Senator Gillibrand filed the MJIA as a stand-alone bill, S. 1752, which remains pending in the Senate.

Under the MJIA, disposition authority for "covered offenses,"[902] including sexual assault and many other offenses that are not "excluded offenses,"[903] would no longer be vested in senior commanders in the chain of command who have authority to convene courts-martial. Instead, a new cadre of O-6 judge advocates with significant prosecutorial experience, assigned by the Chiefs of the Services who are independent of the chains of command of victims and those accused, would decide whether to refer charges to courts-martial.[904]

To that end, the MJIA requires each Service Chief or Commandant (for the Marine Corps and Coast Guard) to establish an office (Section 3(c) Office) to convene general and special courts-martial for covered offenses, and to detail members to those courts-martial, responsibilities assigned currently to those senior commanders serving as convening authorities.[905] The MJIA would also amend authority to convene general courts-martial to add two additional convening authorities: (1) officers in the Section 3(c) Office and (2) officers in the grade of O-6 or higher who are assigned such responsibility by the Service Chief or Commandant. This new convening authority would have authority with respect to the list of covered offenses.[906]

While the MJIA would create an entirely new office to convene general and special courts-martial for covered offenses, the MJIA includes a statutory restriction on the expenditure of additional resources and authorization of additional personnel to staff and operate that office. The Panel has serious concerns about the MJIA's restriction on additional expenditure and personnel, as resources are a primary issue for any legislation that creates additional structure.[907]

The evidence supports a conclusion that implementing the MJIA will require reassignment of O-6 judge advocates who meet the statutory prosecutor qualifications. The existing pool of O-6 judge advocates who meet these requirements is finite; and many of these officers routinely serve in assignments related to other important aspects of military legal practice. Therefore, implementing MJIA's mandate, absent an increase in personnel resources, may result in under-staffing of other important senior legal advisor positions.

For the same reasons the Panel concluded that Congress should not remove the authority to convene courts-martial from senior commanders,[908] *the Panel does not recommend Congress adopt the reforms in either the STOP Act or the MJIA. [RSP Recommendation 36]* In addition, proposals for systemic changes to the military justice system should be considered carefully in the context of the many changes that have recently been made to the form and function of the military justice system. The numerous and substantive changes recently enacted require time to be implemented and then assessed prior to enacting additional reforms.

Chapter Eleven:

ADDITIONAL VIEWS OF PANEL MEMBERS

Response Systems Panel on Military Sexual Assault

Separate Statement of Dean Elizabeth L. Hillman & Mr. Harvey Bryant

June 22, 2014

Congress created the Response Systems Panel to make an independent assessment of the military's response to sexual assault. Perhaps no other aspect of military operations has generated worse outcomes in recent decades than military leaders' efforts to reduce and punish sexual assaults. The Panel's assessment revealed many improvements already in place and other areas in which changes should be made. Removing prosecutorial discretion from the chain of command, however, is not among the changes recommended by the Panel. We write separately because it should be.

Court-martial convening authorities, a small and high-ranking part of the military's command structure,[1] should no longer control the decision to prosecute sexual assault cases in the military justice system. The Panel's recommendation that the authority to prosecute remain within the command structure of the military is based on the testimony of high-ranking commanders and attorneys within the U.S. military. It neglects the words of survivors of sexual assault, rank-and-file Service members, outside experts, and officers in our allies' militaries. They tell us that the commander as prosecutor creates doubt about the fairness of military justice, has little connection to exercising legitimate authority over subordinates, and undermines the confidence of victims.[2] Preserving command authority over case disposition, pre-trial processes, and post-trial matters prevents commanding officers from acting assertively to deter and punish military sexual assault.[3] It also undermines the rights of both victims and accused Service members, all of whom deserve an independent and impartial tribunal.

Command authority in military justice has already been reduced significantly over time.[4] It will be further limited through recently enacted changes.[5] The United Kingdom, Canada, Australia, and many other countries have already ended command control of courts-martial.[6] When these nations proposed replacing convening authorities with experienced and trained prosecutors, opponents of reform voiced concerns about the deterioration of command similar to those articulated by some U.S. military leaders and accepted by our colleagues on the Panel.[7] Yet no country with independent prosecutors has reported any of the dire consequences forecast by those opposed to prosecutorial independence.[8]

Maintaining the status quo on this issue was often justified on the basis that there was no evidence changing it would increase victim reporting.[9] But increasing victim reporting rates, while an important goal, is not the only or even primary goal and benefit of having prosecutors and judges make, respectively, prosecutorial and judicial decisions rather than convening authorities. Even the suggestion of a pilot program to test the

premises advanced on both sides of the issue, which would presumably result in evidence as to the efficacy of a change, was met with resistance.[10]

Requiring commanders to exercise prosecutorial discretion and perform judicial functions hinders their ability to respond vigorously and fairly to sexual assault.[11] It also exacerbates the negative impact of inevitable failures of commanders to fairly and objectively act as prosecutors and judges.[12] It rejects the independent prosecutors on whom every other criminal justice system—U.S. state and federal criminal courts, our allies' military courts, and international criminal courts—relies. As a result, the U.S. military justice system will continue to operate outside the constraints of 21st-century norms for fairness and transparency in criminal justice.[13] We dissent.

1 *See* RSP Report, Page 74 (providing the number of convening authorities across the branches of Service). Given that women make up fewer than 7% of flag officers in the U.S. military, despite being 15% of Service members overall today, means that not only are very few, high-ranking officers making decisions, almost all of those decisions are being made by men. *See* Defense Manpower Data Center, "Active Duty Military Personnel by Service Rank/Grade: April 2014," *at*, https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&tsubCat=milActDutReg (reflecting the latest number of women in each Service, by rank, and the percentage of those who are female within the total force.). This is particularly problematic given the fact that service women are victims of sexual assault at higher rates than their male counterparts. *See* U.S. Dep't of Def., SAPRO, Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2013, Exhibit 17 at 90 (Apr. 15, 2014) *available at* http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf. (illustrating the gender of victims in completed investigations of unrestricted reports in Fiscal Year 2013, with 86% being female and 14% male).

2 *See Transcript of RSP Public Meeting* 19 (Nov. 8, 2013) (testimony of Mr. Brian K. Lewis) ("[P]ossibly the biggest hurdle facing survivors of military sexual trauma is the continued involvement of the chain of command in prosecuting these crimes."); *id.* at 52-54 (testimony of Ms. Sarah Plummer that "when you're raped by a fellow service member, it's like being raped by your brother and having your father decide the case"); *see also id.* at 44 (testimony of Ms. Ayana Harrell); *Transcript of RSP Public Meeting* 324 (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Our Defenders); *id.* at 333-36, 407-08 (testimony of Mr. Greg Jacob, Policy Director, Service Women's Action Network); *Transcript of RSP Public Meeting* 346-50 (Sept. 25, 2013) (testimony of Ms. Miranda Petersen, Program and Policy Director, Protect Our Defenders); *Transcript of RSP Public Meeting* 71-73 (Sept. 24, 2013) (testimony of Lord Martin Thomas); *id.* at 73-74 (testimony of Professor Michel Drapeau); *id.* at 181-82 (testimony of Major General Blaise Cathcart, Judge Advocate General of Canadian Armed Forces); *id.* at 226-28, 236 (testimony of Air Commodore Paul Cronan); *id.* at 253-55 (testimony of Commodore Andrei Spence, Naval Legal Services, Royal Navy, United Kingdom); *id.* at 58, 61, 68-69, 93-94 (testimony of Professor Eugene Fidell, Yale Law School).

3 The Panel also rejected the Comparative Systems Subcommittee's recommendations that military judges be involved earlier in the criminal justice process and adjudge sentences upon conviction, both of which would enhance fairness while re-aligning the responsibilities of commanders in military justice. *See* Report of the Comparative Systems Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel (May 2014) [hereinafter CSS Report to RSP], Annex, *infra*, Recommendations 43A - F and 54 at 28-30, 36, 180-188, 221-228 (recommending the military judge be available at the time of preferral or pretrial confinement to rule on issues raised by victims, trial counsel, or defense counsel, including presiding over the Article 32 hearing with a binding decision regarding probable cause, and serving as the sole sentencing authority, thereby eliminating military panel member sentencing).

4 *See, e.g.*, Press Release, "Secretary Panetta Remarks on Capitol Hill" (Apr. 17, 2012) (announcing elevation of convening authority in sexual assault cases), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5013; *Transcript of RSP Public Meeting* 194-97 (June 27, 2013) (testimony of testimony of Fred Borch, Regimental Historian, U.S. Army Judge Advocate General's Corps, describing judicialization of military justice system); *United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994) (extending prohibition of unlawful command influence of Article 37, UCMJ, to anyone acting with "mantle of command authority").

5 *See, e.g.*, FY14 NDAA, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672 (2013) (precluding convening authorities from dismissing or modifying convictions for qualifying sexual assault offenses and requiring them to explain in writing any sentence modification); *id.* at § 1705 (requiring dishonorable discharge or dismissal for certain sex offenses when found guilty for such offenses at a general court-martial); *id.* at § 1708 (eliminating character and military service of accused as factor commanders should consider in deciding how to dispose of an offense); *id.* at § 1744 (requiring review of decisions of convening authority not to refer sexual assault charges to trial by court-martial).

6 *See* L. Libr. of Cong., Mil. J.: Adjudication of Sexual Offenses 4-5, 55-58 (July 2013); *Transcript of RSP Public Meeting* 38-42 (Sept. 24, 2013) (testimony of Lord Martin Thomas); *id.* at 223 (testimony of Air Commodore Paul Cronan); *id.* at 156-58 (testimony of Major General Blaise Cathcart); *see also* L. Libr. of Cong., *supra*, at 42-43 (noting that Israel adopted Military Justice Law in 1955, which vested prosecutorial discretion in independent Military Advocate General). Many other countries subject to the European Court of Human Rights have either eliminated convening authorities or radically reduced military jurisdiction, much like countries subject to the Inter-American Commission on Human Rights (IACHR), which has limited military jurisdiction to address human rights

abuses. For two very recent examples of this accelerating trend, see the IACHR response to Colombia's attempt to expand military jurisdiction and Taiwan's abolition of military justice entirely, both in January 2014. See Inter-American Commission on Human Rights Press Release, "IACHR Expresses Concern over Constitutional Reform in Colombia" (Jan. 4, 2013), *available at* https://www.oas.org/en/iachr/media_center/PReleases/2013/004.asp; Amnesty International Public Statement, "Taiwan government must ensure the reform of military criminal procedure legislation lives up to its promise of greater accountability" (Jan. 13, 2014), *available at* http://www.amnesty.org/en/library/asset/ASA38/001/2014/en/5c6a95be-d90c-4378-8a6c-d941c2a83cb4/asa380012014en.pdf.

7 *See Transcript of RSP Public Meeting* 41 (Sept. 24, 2013) (testimony of Lord Martin Thomas describing opposition of British commanders prior to reforms); *id.* at 240-41 (testimony of Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service, describing sense of uncertainty prior to reforms among Australian commanders).

8 *See Transcript of RSP Public Meeting* 71-73 (Sept. 24, 2013) (testimony of Lord Martin Thomas); *id.* at 73-74 (testimony of Professor Michel Drapeau); *id.* at 181-82 (testimony of Major General Blaise Cathcart, Judge Advocate General of Canadian Armed Forces); *id.* at 226-28, 236 (testimony of Air Commodore Paul Cronan); *id.* at 253-55 (testimony of Commodore Andrei Spence, Naval Legal Services, Royal Navy, United Kingdom).

9 *See* RoC Report to RSP, Annex, *infra*, at 112; *Transcript of RSP Public Meeting* 232-233, 235 (Jan. 30, 2014) (Hon. Barbara S. Jones reading the draft of the majority of the Panel's initial assessment for deliberations); *Transcript of RSP Public Meeting* 105 (Sept. 24, 2013) (Hon. Barbara S. Jones "[O]ur interest in empirical evidence such as this flows from the rationale that is out there behind making the change to the role of the commander in our military. And the rationale, or at least the primary one, is that it will increase the confidence of victims and will increase reporting. And so, to some extent it's obviously important for us to see whether there is, in fact, that empirical connection."); *id.* at 89 (testimony of Professor Vanlandingham); *id.* at 238 (Air Commodore Paul Cronon); *id.* at 347-349 (testimony of Senator Claire McCaskill); *Contra Transcript of RSP Public Meeting* 55 (Sept. 24, 2013) (testimony of Professor Guiora, "I would suggest that that increased sense of confidence is directly related, at least in Israel, to the forceful prosecution policy implemented by the JAGs who are, again, not in the chain of command."); *id.* at 317-318, 332 (testimony of Senator Kirsten Gillibrand).

10 *Transcript of RSP Public Meeting* 299-304 (Jan. 30, 2014) (discussion of a pilot program by the Panel members). *Transcript of RSP Public Meeting* 176-181 (testimony from Commander William Dwyer, U.S. Coast Guard, General Edward Rice, U.S. Air Force, Lieutenant Colonel Kevin Harris, U.S. Marine Corps, and Major General Steven Busby, U.S. Marine Corps); *Transcript of RSP Public Meeting* 372-374 (Sept. 24, 2013)(Mr. Bryant asking Senator McCaskill if a pilot program would give more confidence in the proposed changes rather than requiring them to implement reforms immediately).

11 *See, e.g.*, the impact of unlawful command influence on commanders, *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); *see also Transcript of RSP Public Meeting* 294 (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service) ("Increasingly, defense counsel must also confront and overcome instances of unlawful command influence in sexual assault cases. There is tremendous pressure on senior leaders to articulate zero tolerance policies and pass judgment on those merely accused of sexual assault. Even if command actions do not rise to the level of unlawful command influence, it contributes to an environment that unfairly prejudices an accused's right to a fair trial."); *id.* at 336-38 (testimony of Mr. Jack Zimmermann of Lavine, Zimmermann and Sampson, P.C., explaining how claims of unlawful command influence have arisen from recent training on sexual assault prevention and response).

12 The Panel's Report describes the uniqueness of command and the care with which commanders are "groomed" to make disposition decisions. No matter how rigorous the selection and vetting process for command, it cannot guarantee unbiased, impartial commanders, and it cannot make convening authorities into experienced prosecutors. Two recent examples demonstrate that some of these high ranking commanders engage in sexual misconduct themselves. *See* Alan Blinder, *General in Sex Case to Retire With a 2-Rank Demotion, Jeffrey Sinclair to Receive Benefits, but at a Lower Level*, New York Times (June 20, 2014)(explaining the sentence for an Army brigadier general convicted at court-martial for maltreatment and adultery will include retirement benefits, but at a different rank due to his "pattern of inappropriate and at time illegal behavior both while serving as a brigadier general and a colonel) *available at* http://www.nytimes.com/2014/06/21/us/general-in-sex-case-jeffrey-sinclair-to-retire-with-a-2-rank-demotion.html?_r=0; Craig Whitlock, *Navy Reassigns ex-Blue Angels Commander after Complaint He Allowed Sexual Harassment*, Wash. Post (Apr. 23, 2014) (reporting on a complaint that a former commander of the elite naval aviators and president of Tailhook Association created a permissive environment in which pornography, lewd behavior, and hazing were common), *available at* http://www.washingtonpost.com/world/national-security/navy-investigates-ex-blue-angels-commander-after-complaint-he-allowed-sexual-harassment/2014/04/23/be42211e-cb0f-11e3-95f7-7ecdde72d2ea_story.html.

13 *See* CSS Report to RSP, Annex, *infra*, Recommendations 10-B, 10C, 13, 43-A to F, 46, at 15, 17, 28-30, 36, 83-86, 90-92, 180-188, 192-194, 221-229) (highlighting the primary differences between military justice system and civilian practices and recommending changes be considered in the following areas: (1) immunity for victims' minor collateral misconduct, (2) shifting the unfounding decision from the commander to the prosecutor and investigator, (3) plea bargaining process to mirror the agreement between the defendant and prosecutor, (4) increasing the role of the military judge to align with most federal and State judges who control cases earlier in the process and usually act as the sole sentencing authority in the justice system, and (5) abandoning unitary sentencing, all to increase confidence in the system, as well as transparency and fairness of decisions).

Additional Statement

by

The Honorable Elizabeth Holtzman, Dean Elizabeth L. Hillman, & Ms. Mai Fernandez

The recommendations of this Panel cannot be understood in isolation. Fighting sexual assault in the military depends in the end on instilling among all Service members respect for others as equals. This goal, however, cannot be realized as long as women are still not treated equally in the military. Yes, much progress has taken place, but until women share fully in the responsibilities of military service in terms of the roles they are allowed to fill and the positions they hold, the message will be sent by the Armed Forces themselves that women are not equally capable and deserving of respect. This must change, and change quickly.

ENDNOTES TO CHAPTERS 1-10

[1] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239 [hereinafter FY13 NDAA], § 576, 126 Stat. 1632 (2013).

[2] Brief biographies of the nine Panel members are provided at Appendix B.

[3] FY13 NDAA, *supra* note 1, at § 576.

[4] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [hereinafter FY14 NDAA] § 1731(a)(1), 127 Stat. 672 (2013).

[5] Letter from Robert S. Taylor, Acting General Counsel, Department of Defense, to The Honorable Barbara S. Jones, Panel Chair, (September 4, 2013) (available at http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Correspondence/Dignitaries/Letter_From_OGC_Taylor_20130904.pdf). The Panel Chair responded that, "In [her] opinion, the study of mandatory minimum sentences and their possible collateral consequences is an implied task in [the Panel's] statutory requirement to study sentencing guidelines," and agreed to "study the advisability of adopting mandatory minimum sentences." Letter from The Honorable Barbara S. Jones, Panel Chair, to Robert S. Taylor, Acting General Counsel, Department of Defense (September 17, 2013) (available at http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Correspondence/Dignitaries/Letter_To_OGC_Taylor_20130917.pdf).

[6] 5 U.S.C. App. 2 (1972) as amended, 41 C.F.R. section 102-3.50(a) [hereinafter FACA].

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

[8] FY14 NDAA, *supra* note 4, at §§ 1701-1709, 1711-1716, 1721-1726, 1731-1735, 1741-1747, 1751-1753.

[9] DoD formally issued the first SAPR policy in October 2005 and issued initial SAPR program procedures in 2006. In 2007, SAPRO held its first Prevention Summit, a three-day meeting of DoD leadership, military SAPR program managers, and experts recommended by the National Sexual Violence Resource Center, including representatives from the CDC and the California Coalition Against Sexual Assault and subsequently issued the 2008 Prevention Strategy that outlined a comprehensive plan for DoD's prevention efforts. *Transcript of Role of the Commander Subcommittee Meeting* 173-75 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO).

[10] Patrick McGann and Paul Schewe, The Department of Defense Sexual Assault Prevention Strategy: Creating a National Benchmark Program (Sept. 30, 2008) [hereinafter DoD SAPRO 2008 Prevention Strategy]; *Transcript of Role of the Commander Subcommittee Meeting* 173-75 (Feb. 12, 2014) (testimony of Dr. Galbreath); DoD Response to RSP Request for Information 79a (Dec. 19, 2013). U.S. Dep't of Def., 2014-2016 Sexual Assault Prevention Strategy 4 (Apr. 30, 2014) [hereinafter DoD 2014-2016 Prevention Strategy], *available at* http://sapr.mil/public/docs/prevention/DoD_SAPR_Prevention_Strategy_2014-2016.pdf. *See also* Chapter 4 for further discussion of DoD SAPR prevention policy and efforts.

[11] U.S. Dep't of Def., "News Transcript: Secretary Panetta Remarks on Capitol Hill" (Apr. 17, 2012) [hereinafter SecDef Apr. 2012 Remarks], *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5013; *see also* .S. Dep't of Def., SAPRO, "DoD Sexual Assault Prevention and Response Initiatives as of April 2013," [hereinafter DoD SAPR Initiatives] at 3, *available at* http://www.defense.gov/news/DoDSexualAssaultPreventionandResponseInitiatives.pdf .

[12] Even if the House of Representatives does not pass the VPA, four parts of the Act were incorporated into the Fair Military Act, filed by Congressman Mike Turner (R-OH) and Congresswoman Niki Tsongas (D-MA). *See* H.R. 4485, 113th Cong. (2014). Additionally, at least two VPA sections were incorporated into the Fiscal Year 2015 National Defense Authorization Act as passed by the House of Representatives on May 22, 2014. *See* Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 4435, 113th Cong. §§ 506, 534 (2014).

[13] S. 1752, 113th Cong., Military Justice Improvement Act of 2013 (2013) [hereinafter MJIA].

[14] On March 6, 2014, the Senate, on a 55 to 45 vote, rejected a motion for cloture on the MJIA, which precluded the Senate from voting on the underlying bill. *See* Senate Rule XXII, *available at* http://www.rules.senate.gov/public/index.cfm?p=RuleXXII. Cloture is the procedure by which the Senate can vote to end debate on a bill without rejecting the bill; if cloture in invoked, a bill may proceed to a vote. The majority required to invoke cloture on this motion was 60 Senators.

[15] See Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 4435, 113th Cong. §§ 506, 532-539, 582, 585 (2014); Carl Levin National Defense Authorization Act for Fiscal Year 2015, S. 2410, 113th Cong. §§ 541-555 (2014).

[16] The White House Council on Women and Girls, Rape and Sexual Assault: A Renewed Call to Action 9 (Jan. 2014) [hereinafter White House Report], *available at* http://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf (citing National Center for Injury Prevention and Control, The National Intimate Partner and Sexual Violence Survey 2010 Summary Report (Nov. 2011), [hereinafter NISVS 2010 Summary Report], *available at* http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf).

[17] *Id.* at 7.

[18] *Id.* at 10 (citing National Intimate Partner and Sexual Violence Survey (NISVS)) 2010 Summary Report, *supra* note 16; Christopher P. Krebs, et al., The Campus Sexual Assault (CSA) Study (Oct. 2007) [hereinafter CSA Study], *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf; Christopher P. Krebs, et al., *College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, 57(6) J. of Am. College Health 639-47 (2009) [hereinafter *College Women's Experiences*].

[19] *Transcript of RSP Public Meeting* 124-26 (June 27, 2013) (testimony of Nathan Galbreath, Ph.D.) (citing NISVS Technical Report, *infra* note 20); *see also* DoD SAPRO June 2013 PowerPoint Presentation to RSP at 60 [hereinafter DoD SAPRO June 2013 PowerPoint Presentation]. Contact sexual violence is defined as oral, anal, vaginal penetration or sexual contact without consent. *Id.*

[20] National Center for Injury Prevention and Control, Prevalence of Intimate Partner Violence, Stalking, and Sexual Violence Among Active Duty Women and Wives of Active Duty Men – Comparisons with Women in the U.S. General Population, 2010: Technical Report 27 (March 2010) [hereinafter NISVS Technical Report], *available at* http://www.sapr.mil/public/docs/research/2010_National_Intimate_Partner_and_Sexual_Violence_Survey-Technical_Report.pdf. The study did not compare prevalence rates for men. However, the study's survey of U.S. men determined one in 71 men in the general population experienced rape in their lifetimes (compared to one in five women), while 22.2 percent of men experienced sexual violence victimization other than rape at some point in their lives. NISVS 2010 Summary Report, *supra* 16, at 18-19.

[21] For more information on sexual assault rates in the military compared to the civilian population, see DoD SAPRO, Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012, Vol. I, at 1-6, 27-30 (May 2013) [hereinafter DoD SAPRO FY12 Report, Vol. I], *available at* http://sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.

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

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

[24] *See, e.g., Transcript of RSP Victim Services Subcommittee Meeting* 313 (Feb. 26, 2014) (testimony of Captain John A. Ralph, U.S. Navy) (stating that he has never encountered "a patient who was a sexual assault victim or a combat victim who didn't engage in self-blame" and that self-blame is "almost universal after a traumatic experience").

[25] White House Report, *supra* note 16, at 9.

[26] U.S. Dep't of Justice, Bureau of Justice Statistics, Special Report: Female Victims of Sexual Violence, 1994-2010, at 7, Table 9 (Mar. 2013) [hereinafter BJS Special Report] (presenting national reporting rates), *available at* http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf.

[27] *Id.*

[28] "College students are especially at risk [for sexual assault]: 1 in 5 women has been sexually assaulted while in college." White House Report, *supra* note 16, at 10 (citing CSA Study, *supra* note 18, and *College Women's Experiences*, *supra* note 18, at 639-47).

[29] National Institute of Justice, "Measuring Frequency," (Oct. 1, 2008) *at* http://nij.gov/topics/crime/rape-sexual-violence/campus/Pages/measuring.aspx?utm_source=dyk&utm_medium=nijgov&utm_campaign=saam (citing CSA Study, *supra* note 18).

[30] *Id.*

[31] *Id.* Survey participants were able to offer more than one reason. *Id.*

[32] Of the female military victims who reported their sexual assaults, they did so because it was the right thing to do; to seek closure on the incident; to stop the offender from hurting others; to stop the offender from hurting them again; to discourage other potential offenders; to seek help dealing with an emotional incident; to identify a fellow military member who was acting inappropriately; to seek justice; to punish the offender; to seek mental health assistance; to stop rumors by coming forward; to seek medical assistance; and to prevent the offender from continuing in the military. *Transcript of RSP Role of the Commander Subcommittee Meeting* 58-59 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D.); DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 22, at 8. Reasons cited by male victims for reporting were not noted. *Id.*

[33] *Transcript of RSP Role of the Commander Subcommittee Meeting* 22 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler, Deputy Director, DoD SAPRO).

[34] *Transcript of Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the Senate Armed Services Committee* [hereinafter *Transcript of SASC Hearing*] 110 (June 4, 2013) (testimony of Ms. Anu Bhagwati, Executive Director, Service Women's Action Network).

[35] Defense Manpower Data Center, 2012 Workplace and Gender Relations Survey of Active Duty Members, Survey Note [DMDC 2012 Survey Note] (Mar. 15, 2013), *available at* http://www.sapr.mil/public/docs/research/2012_workplace_and_gender_relations_survey_of_active_duty_members-_survey_note_and_briefing.pdf.

[36] See DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 22, at 9.

[37] See *id.*

[38] As one victim explained:

> One of the problems I had was, early on my command tried to get [the offender] moved to get us separated and no other command on base would take him. They didn't want to deal with it. So he ended up still working with me on different shifts. There was a no contact order in place, but I still saw him around. He was still around. He lived across the street.

Transcript of RSP Victim Services Subcommittee Meeting 50 (Mar. 13, 2014) (testimony of Ms. P.C.).

[39] *Transcript of RSP Public Meeting* 498 (Dec. 11, 2013) (public comment of Major Melissa Brown, Texas National Guard).

[40] *Transcript of RSP Victim Services Subcommittee Meeting* 27-28 (Mar. 13, 2014) (testimony of Ms. P.C.).

[41] Center for the Army Profession and Ethic (CAPE), *The Effects of Sexual Assault/Sexual Harassment on the Army Profession* (transcribing videotaped statement of Private First Class Natasha Schuette) [hereinafter CAPE Video], *available at* http://cape.army.mil/repository/video-case-studies/facilitator-guides/facilitator-guide-pfc-schuette.pdf.

[42] See DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 22 at 9.

[43] *Transcript of RSP Public Meeting* 325-26 (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Our Defenders).

[44] Protect Our Defenders, "Nine Roadblocks to Justice: The Need for an Independent, Impartial Military Justice System," at 1, *available at* http://www.protectourdefenders.com/roadblocks-to-justice/.

[45] See DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 22 at 9.

[46] See *id.*

[47] U.S. Dep't of Def., Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures encl. 5, ¶ 7.a (Mar. 28, 2013) [hereinafter DoDI 6495.02], *available at* http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf.

[48] *Id.*

[49] Services' Responses to RSP Request for Information 49 (Nov. 21, 2013).

[50] Army's Response to RSP Request for Information 138 (Apr. 11, 2014).

[51] DMDC 2012 Survey Note, *supra* note 35, at 107-108.

[52] See DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 22, at 9.

[53] *Transcript of RSP Victim Services Subcommittee Meeting* 17 (Mar. 13, 2014) (testimony of Ms. J.P.).

[54] CAPE Video, *supra* note 41.

[55] *Transcript of RSP Victim Services Subcommittee Meeting* 11 (Mar. 13, 2014) (testimony of Ms. E.M.).

[56] *Id.*

[57] *Transcript of RSP Public Meeting* 497-98 (Dec. 11, 2013) (public comment of Major Melissa Brown).

[58] *Transcript of RSP Public Meeting* 18 (Nov. 8, 2013) (testimony of Mr. Brian Lewis).

[59] 10 U.S.C. § 654 (repealed Dec. 22, 2010).

[60] DMDC 2012 Survey Note, *supra* note 35, at 106.

[61] *See* DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 22, at 9.

[62] U.S. Dep't of Def., Memorandum from the Secretary of Defense on Department of Defense Care for Victims of Sexual Assaults (Feb. 5, 2004), *available at* http://www.sapr.mil/public/docs/laws/d20040213satf.pdf.

[63] Task Force Report on Care for Victims of Sexual Assault 46 (Apr. 2004) [hereinafter 2004 Task Force Report], *available at* http://www.sapr.mil/public/docs/reports/task-force-report-for-care-of-victims-of-sa-2004.pdf.

[64] *Id.* In August 2004, DoD established the Joint Task Force for Sexual Assault Prevention and Response as a single point of accountability for sexual assault policy in DoD. U.S. Dep't of Def., Memorandum from the Under Secretary of Defense (Plans) on Joint Task Force (Sexual Assault Prevention and Response) (Aug. 20, 2004), *available at* http://www.sapr.mil/public/docs/news/USD-PR-JTF-SAPR-08-20-04.pdf.

[65] National Defense Authorization Act for Fiscal Year 2005 [hereinafter FY05 NDAA], Pub. L. No. 108-375, § 577(a), 118 Stat. 1926 (2004).

[66] U.S. Dep't of Def., SAPRO, Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2013, at 6 (Apr. 15, 2014) [hereinafter DoD SAPRO FY13 Report], *available at* http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

[67] U.S. Dep't of Def., Dir. 6495.01, Sexual Assault Prevention and Response (SAPR) Program (Oct. 6, 2005), *available at* http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf.

[68] *Transcript of RSP Public Meeting* 94-95 (June 27, 2013) (testimony of Major General Gary S. Patton).

[69] *See* DoD SAPR Initiatives, *supra*, note 11, at 3; "Advance Policy Questions for the Honorable Jessica L. Wright Nominee for Under Secretary of Defense for Personnel and Readiness," at 15-16, *available at* http://www.armed-services.senate.gov/imo/media/doc/Wright_09-19-13.pdf; *see also Transcript of RSP Public Meeting* 35 (Nov. 7, 2013) (testimony of Major General Gary S. Patton).

[70] DoDD 6495.01 Glossary.

[71] *Transcript of RSP Public Meeting* 96-97 (June 27, 2013) (testimony of Major General Gary S. Patton). The then Director, DoD SAPRO told the Panel that DoD's definition includes the following offenses under the current version of the Uniform Code of Military Justice (UCMJ): rape, sexual assault, aggravated sexual contact, and abusive sexual contact under Article 120; forcible sodomy under article 125; and attempts to commit these offenses under Article 80. *Id.* at 97; *see also* DoD SAPRO June 2013 PowerPoint Presentation, *supra* note 19, at 5. The current version of Article 120 of the UCMJ became effective on June 28, 2012. The previous version of Article 120, which was in effect from 2007 to 2012, did not include a specific offense of "sexual assault." *See* Manual for Courts-Martial, United States pt. IV, ¶ 45 (2008 ed.) [hereinafter 2008 MCM].

[72] *See* 10 U.S.C. § 920(b), UCMJ art. 120(b) (sexual assault).

[73] 2004 Task Force Report, *supra* note 63, at 49.

[74] DoDI 6495.02 encl. 4, ¶ 1a. MCIOs include the Army Criminal Investigation Command (CID), the Naval Criminal Investigative Service (NCIS), and the Air Force Office of Special Investigations (AFOSI). The Coast Guard Investigative Service (CGIS) is not formally considered an MCIO, because it falls under the Department of Homeland Security, but it provides the same function and capability. For purposes of this report, CGIS is treated as an MCIO.

[75] DoD SAPRO FY12 Report, Vol. I, *supra* note 21, at 52.

[76] DoD SAPRO FY13 Report *supra* note 66, at 45; *Transcript of RSP Public Meeting* 34-35 (Nov. 7, 2013) (testimony of Major General Patton). DoD SAPRO began reporting sexual assault statistics in calendar year 2005, but switched to a fiscal year reporting in 2007. As such, data from calendar and fiscal year reports are not equivalent. Additionally, reporting results for October 2006 to December 2006 are included in totals for both Calendar Year 2006 and Fiscal Year 2007. Department of Defense FY07 Report on Sexual Assault in the Military 4, 15 (Mar. 2008) [hereinafter DoD SAPRO FY07 Report], *available at* http://sapr.mil/public/docs/reports/2007-annual-report.pdf.

[77] DoD SAPRO sexual assault reporting data do not necessarily reflect the total number of reported sexual assaults that involve a military subject or military victim. *See*, DoD SAPRO FY13 Report, *supra* note 66, at 62. DoD maintains a separate system for tracking victims and perpetrators of domestic violence including spouse or intimate partner sexual violence which is tracked through the Family Advocacy Program (FAP) rather than DoD SAPRO. DoD initiated the Family Advocacy Program (FAP) over twenty years ago to support military families and to provide services for victims of domestic violence and child abuse. Domestic violence victims who are also victims of sexual assault are treated and supported by the FAP. In these cases, FAP does not record or track the sexual assaults in the same database maintained by the SAPR program and used to collect data for SAPRO's annual report to Congress about reported adult sexual assaults. Specifically, FAP tracks reports of spouses and adult children of Service members who are sexually assaulted by a spouse or intimate partner and children of Service members under the age of 17 who are sexually assaulted by any offender. These cases must be accounted for when assessing the full scope of sexual assault in DoD. *The Secretary of Defense should direct that the annual DoD SAPRO report of adult sexual assault cases include the reports handled by FAP and recorded in its database. [RSP Recommendation 41]*

[78] DoD SAPRO FY13 Report, *supra* note 66, at 62.

[79] In the FY05 NDAA, *supra* note 65, Congress directed the Secretary of Defense to review the UCMJ and the Manual for Courts-Martial (MCM) to determine what changes were required to improve the military justice system's handling of sexual assault and to conform the UCMJ and MCM more closely to other Federal laws and regulations that address such issues. At the time of that review, Article 120 of the UCMJ simply covered rape (sexual intercourse between a man and woman by force and without consent) and carnal knowledge (sexual intercourse with a child under 16). 2012 Manual for Courts-Martial, United States, app. 27 (2012 ed.) [hereinafter 2012 MCM]. In 2006, Congress comprehensively reformed Article 120 into a far more expansive punitive article through the National Defense Authorization Act for Fiscal Year 2006 (FY06 NDAA). *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3134 (2006) (expanding Article 120 to cover: (a) rape, (b) rape of a child, (c) aggravated sexual assault, (d) aggravated sexual assault of a child, (e) aggravated sexual contact, (f) aggravated sexual abuse of a child, (g) aggravated sexual contact with a child, (h) abusive sexual contact, (i) abusive sexual contact with a child, (j) indecent liberty with a child, (k) indecent act, (l) forcible pandering, (m) wrongful sexual contact, and (n) indecent exposure.). The revised Article 120 received a great deal of criticism and some provisions were ultimately successfully challenged on constitutional grounds. *See United States v. Prather*, 69 M.J. 338, 343-45 (C.A.A.F. 2011); *see also United States v. Medina*, 69 M.J. 462, 464 (C.A.A.F. 2011) ("In this court's recent opinion in *Prather*, we analyzed the shifting burdens found in Article 120(t)(16), UCMJ, and held that the statutory interplay among Article 120(c)(2), UCMJ, Article 120(t)(14), UCMJ, and Article 120(t)(16), UCMJ, resulted in an unconstitutional burden shift to an accused.") (citing *Prather*, 69 M.J. at 343). This led Congress to again revise the framework for prosecuting sexual assaults. FY12 NDAA streamlined Article 120 to cover only adult offenses; it separated out sexual offenses against children and other non-contact sexual misconduct like voyeurism and indecent exposure. In addition to restructuring Article 120, Congress also adopted seven additional provisions targeted at improving sexual assault prevention and response in the Armed Forces in the FY12 NDAA. FY12 NDAA, *supra* note 7, §§ 542, 581, 582, 583, 584, 585, 586, 125. The following year, in the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA, *supra* note 1), Congress included twelve sexual assault related provisions.

[80] *See* Manual for Courts-Martial, United States pt. IV, ¶ 45 (2005 ed.) [hereinafter 2005 MCM].

[81] *Id.* at 45, 51, 60.

[82] *See* 2008 MCM, *supra* note 71, pt. IV, ¶ 45.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *See* 2012 MCM *supra* note 79, pt. IV, ¶ 45.

[87] *Id.* ¶ 45(g)(1)-(2).

[88] *Id.* at ¶ 45.

[89] Id. at ¶ 45(g)(5).

[90] *Id.* at ¶¶ 45a-c.

[91] *See* 2008 MCM, *supra* note 71, pt. IV, ¶ 45.

[92] *See id.*; *United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2010).

[93] *See* 2012 MCM, *supra* note 79, pt. IV, ¶ 45.

[94] 10 U.S.C. § 920 (UCMJ art. 120).

[95] In Fiscal Year 2013, 2,128 (56.5%) of the 3,768 unrestricted reports alleged penetration-type offenses. DoD SAPRO FY13 Report, *supra* note 66, at 75.

[96] *Id.*

[97] In Fiscal Year (FY) 2007, 1,383 (66.3%) of the 2,085 unrestricted reports alleged penetration-type offenses; in FY 2008, 1,548 (68.3%) of the 2,265 unrestricted reports alleged penetration-type offenses; in FY 2009, 1,701 (67.6%) of the 2,516 unrestricted reports alleged penetration-type offenses; in FY 2010, 1,590 (66%) of the 2,410 unrestricted reports alleged penetration-type offenses; in FY 2011, 1,631 (66.9%) of the 2,439 unrestricted reports alleged penetration-type offenses; and in FY 2012, 1,562 (61.1%) of the 2,558 unrestricted reports alleged penetration-type offenses. *See* DoD SAPRO FY07 Report, *supra* note 76, at 17; DoD SAPRO, Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2008 34 (Mar. 2009), [hereinafter DoD SAPRO FY08 Report] *available at* http://www.sapr.mil/public/docs/reports/dod_fy08_annual_report_combined.pdf; DoD SAPRO, Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2009 61 (Mar. 2010) [hereinafter DoD SAPRO FY09 REPORT], *available at* http://www.sapr.mil/public/docs/reports/fy09_annual_report.pdf; DoD SAPRO, Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2010 67 (Mar. 2011), [hereinafter DoD SAPRO FY10 Report] *available at* http://www.sapr.mil/public/docs/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf; DoD SAPRO, Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2011 37-38 (Apr. 2012), [hereinafter DoD SAPRO FY11 Report] *available at* http://www.sapr.mil/public/docs/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf; DoD SAPRO FY12 Report, Vol. I, *supra* note 21, at 64.

[98] *Transcript of RSP Comparative Systems Subcommittee Meeting* 9 (Apr. 11, 2014) (testimony of James P. Lynch, Ph.D.).

[99] *Transcript of RSP Public Meeting* 13 (June 27, 2013) [testimony of Lynn Addington, Ph.D.]; *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 118 (Apr. 11, 2014) (testimony of William J. Sabol, Ph.D., Acting Director, Bureau of Justice Statistics).

[100] The National Academy of Sciences Committee on National Statistics Report on *Estimating the Incidence of Rape and Sexual Assault* [hereinafter NAS Report] 1 (2014).

[101] *Id.* at 2 (2014).

[102] *Transcript of RSP Public Meeting* 13 (June 27, 2013) (testimony of Dr. Lynn Addington, Ph.D.); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 25 (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland); *id.* at 124 (testimony of Dr. William J. Sabol, Ph.D.).

[103] NAS Report, *supra* note 100 at 1.

[104] *Id.* at 2.

[105] William J. Sabol and Allen Beck, "Appearance before the Comparative Systems Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel," at 13 (Apr. 11, 2014) (PowerPoint Presentation to Panel Comparative Systems Subcommittee) [hereinafter BJS PowerPoint Presentation].

[106] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 30 (Apr. 11, 2014) (testimony of James P. Lynch, Ph.D.).

[107] *See id.* at 118 (testimony of William J. Sabol, Ph.D., Acting Director, Bureau of Justice Statistics, regarding comparison of NCVS data to actual crimes to determine number of unreported crimes).

[108] BJS PowerPoint Presentation, *supra* note 105, at 13.

[109] Bureau of Justice Statistics, "Data Collection: National Crime Victimization Survey (NCVS): Methodology," *at* http://www.bjs.gov/index.cfm?ty=dcdetail&tiid=245#Methodology.

[110] *Transcript of RSP Public Meeting* 13 (June 27, 2013) (testimony of Lynn Addington, Ph.D.); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 25 (Apr. 11, 2014) (testimony of James P. Lynch, Ph.D); *id.* at 124 (testimony of William J. Sabol, Ph.D.).

[111] *Transcript of RSP Comparative Systems Subcommittee Meeting* 31-36 (Apr. 11, 2014) (testimony of James P. Lynch, Ph.D.); BJS PowerPoint Presentation, *supra* note 105, at 23.

[112] Bonnie S. Fisher, *Measuring Rape Against Women: The Significance of Survey Questions* I-4-4 (2004), *available at* https://www.ncjrs.gov/pdffiles1/nij/199705.pdf (citing Ronet Bachman, *A Comparison of Annual Incidence Rates and Contextual Characteristics of Intimate-Partner Violence Against Women From the National Crime Victimization Survey (NCVS) and the National Violence Against Women Survey (NVAWS)*, 6(8) Violence Against Women 839-67 (2000); James P. Lynch, *Clarifying Divergent Estimates of Rape From Two National Surveys*, 60(3) Public Opinion Quarterly, 410-30 (1996); James P. Lynch, *Understanding Differences in the Estimates of Rape from Self-Report Surveys*, in From Data to Public Policy: Affirmative Action, Sexual Harassment, and Domestic Violence, and Social Welfare (Rita J. Simon ed., 1996); and Martin D. Schwartz, *Methodological Issues in the Use of Survey Data for Measuring and Characterizing Violence Against Women*, 6(8) Violence Against Women 815 (2000)).

[113] *See generally* BJS PowerPoint Presentation, *supra* note 105 at 5-115.

[114] James P. Lynch, "Measuring Rape and Sexual Assault in Self-Report Surveys" at 3 (Apr. 11, 2014) (PowerPoint Presentation to RSP Comparative Systems Subcommittee).

[115] Department of Defense 2012 Workplace and Gender Relations Survey of Active Duty Members Survey Instrument 2 (2012) [hereinafter WGRA 2012 Survey], *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140411_CSS/03d_DMDC_WorkPlace_PublicRelations_Survey_2012.pdf. The DoD acronym for the Workplace Gender Relation Survey for active duty personnel is "WGRA." The "WGRS" refers to DoD's survey of both active duty and Reservists.

[116] *Id.*

[117] *See* 10 U.S.C. § 481 (2013).

[118] *See id.*

[119] *See* DoD SAPRO, 2012 Workplace and Gender Relations Survey of Active Duty Members: Statistical Methodology Report iii (Dec. 2012) (noting that "[t]he 2012 WGRA used a single-stage stratified sample design"), *available at* http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/2012WGRA_Statistical_Methodology_Report_Final.pdf; *see also Transcript of RSP Role of the Commander Subcommittee Meeting* 81-83 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D.); *see generally* Lisa M. Schenck, *Informing the Debate about Sexual Assault in the Military Services: Is the DoD Its Own Worst Enemy?*, 11 Ohio St. J. Crim. L. 579 (Spring 2014); *see also* Report of the Comparative Systems Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel (May 2014) [hereinafter CSS Report to RSP], Annex, *infra*, at 58-62 (discussing public health surveys, including NISVS).

[120] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 29-30 (Apr. 11, 2014) (testimony of James P. Lynch, Ph.D.).

[121] *See Transcript of RSP Role of the Commander Subcommittee* 24-25 (Oct. 23, 2013) (testimony of Elise Van Winkle, Ph.D., Branch Chief of Research, Defense Manpower Data Center (DMDC)).

[122] DMDC 2012 Survey Note, *supra* note 35, at 1.

[123] *Id.*

[124] *Id.*

[125] WGRA 2012 Survey, *supra* note 115, at 12 (Question 32). The specific question asked of survey recipients was as follows:

> In the past 12 months, have you experienced any of the following intentional sexual contacts that were against your will or occurred when you did not or could not consent where someone...
>
> - Sexually touched you (e.g., intentional touching of genitalia, breasts, or buttocks) or made you sexually touch them?
> - Attempted to make you have sexual intercourse, but was not successful?
> - Made you have sexual intercourse?
> - Attempted to make you perform or receive oral sex, anal sex, or penetration by a finger or object, but was not successful?
> - Made you perform or receive oral sex, anal sex, or penetration by a finger or object?

[126] "Completed" surveys were those surveys in which the respondents answered 50% or more of the survey questions. WGRA 2012 Survey, *supra* note 115, at 6.

[127] U.S. Dep't of Def., SAPRO, Department of Defense Annual Report on Military Services Sexual Assault for Calendar Year 2006 [hereinafter DoD SAPRO CY06 Report], *available at* http://sapr.mil/public/docs/reports/2006-annual-report.pdf.

[128] U.S. Dep't of Def., SAPRO, Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2010, [hereinafter DoD SAPRO FY10 Report], *available at* http://sapr.mil/public/docs/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

[129] DoD SAPRO FY12 Report, *supra* note 21, Vol. II.

[130] *See, e.g.*, Schenck, *supra* note 119; *see also* Captain Lindsay Rodman, *The Pentagon's Bad Math on Sexual Assault*, Wall St. J. (May 19, 2013). *See generally, e.g.*, DoD SAPRO FY13 Report, *supra* note 66.

[131] *See generally* BJS PowerPoint Presentation, *supra* note 105, at 3.

[132] *Transcript of RSP Public Meeting* 52 (June 27, 2013) (testimony of Ms. Delilah Rumburg, Executive Director, Pennsylvania Coalition Against Rape).

[133] Report of the Defense Task Force on Sexual Assault in the Military Services 19 n.45 (Dec. 2009) [hereinafter DTFSAMS], *available at* http://www.sapr.mil/public/docs/research/DTFSAMS-Rept_Dec09.pdf; DoD SAPRO, "2012 Workplace and Gender Relations Survey of Active Duty Members Fact Sheet," at 2 (2013), *available at* http://www.sapr.mil/public/docs/research/WGRA_Survey_Fact_Sheet.pdf.

[134] S. Rep. No. 113-44, at 119 (2013).

[135] *Id.* at 120. DoD has not had an opportunity to incorporate the SASC's direction because the WGRA is conducted every other year and did not occur in 2013. The WGRA for 2014 was being developed while this report was being published.

[136] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 8-9 (Apr. 11, 2014) (testimony of James P. Lynch, Ph.D.).

[137] NAS Report, *supra* note 100, at 162.

[138] DoD SAPRO FY12 Report, Vol. II, Annex A, *supra* note 129, at 6.

[139] *See Transcript of RSP Public Meeting* 120-121 (June 27, 2013) (testimony of Nathan Galbreath, Ph.D.).

[140] *Transcript of RSP Public Meeting* 15-16 (June 27, 2013) (testimony of Lynn Addington, Ph.D.).

[141] BJS PowerPoint Presentation, *supra* note 105, at 6.

[142] *Transcript of RSP Public Meeting* 16 (June 27, 2013) (testimony of Lynn Addington).

[143] *See generally id.* at 122-23 (testimony of Nate Galbreath, Ph.D.).

[144] The WGRS includes the Workplace and Gender Relations Survey of both Active duty and Reserve Component members. *See* U.S. Dep't of Def., SAPRO, "2014 DoD Workplace and Gender Relations Survey (WGRS)" (Apr. 2014), *currently available at* http://responsesystemspanel.whs.mil/index.php/home/materials.

[145] *See id.*

[146] *See id.*

[147] The chart in Section B of this chapter indicates the number of commanders compared to the total active duty population in each Service.

[148] *See* 2012 MCM, *supra* note 79, R.C.M. 103(5),(6).

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

[150] *See* 10 U.S.C. § 822(a)(1, 2, 4) (UCMJ art. 22(a)(1, 2, 4)).

[151] 10 U.S.C. §§ 822-824 (UCMJ arts. 22-24).

[152] In this context, the term "statutory authority" includes Secretarial and Presidential designation of convening authorities under Article 22(a)(8)(9), Article 23 (a)(7), and Article 24(a)(4), UCMJ.

[153] 10 U.S.C. § 818 (UCMJ art. 18). For the maximum punishments that may be imposed by a General Court-Martial, see 2012 MCM, *supra* note 79, app. 12.

[154] *Transcript of RSP Public Meeting* 270-71 (Sept. 25, 2013) (testimony of Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army).

[155] 10 U.S.C. § 819 (UCMJ art. 19). For the maximum punishments that may be imposed by a Special Court-Martial, see 2012 MCM, *supra* note 79, at app. 12.

[156] Role of the Commander Subcommittee, Initial Assessment of Whether Senior Commanders Should Retain Authority to Refer Cases of Sexual Assault to Courts-Martial 4 (Jan. 2014), *reprinted in* Report of the Role of the Commander Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel, Annex, [hereinafter RoC Subcommittee Report to RSP] (May 2014) *infra* at app. G.

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

[158] *See* Army's Response to RSP Request for Information 1(c) (Nov. 1, 2013).

[159] *See, e.g., Transcript of RSP Role of the Commander Subcommittee Meeting* 151-52 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler).

[160] *Id.* The courses of study for the command and staff colleges each last about twelve months.

[161] *See* Services' Responses to RSP Request for Information 1(c) (Nov. 1, 2013).

[162] *See* Army's and Navy's Responses to RSP Request for Information 1(c) (Nov. 1, 2013).

[163] *See* Navy's Responses to RSP Request for Information 1(c) (Nov. 1, 2013).

[164] *See* Air Force's Response to RSP Request for Information 1(c) (Nov. 1, 2013).

[165] 2012 MCM, *supra* note 79, pt. I, ¶3.

[166] 10 U.S.C. § 802 (UCMJ art. 2).

[167] *Transcript of RSP Public Meeting* 243-45 (Jun. 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).

[168] 10 U.S.C. § 818 (UCMJ art. 18). For the maximum punishments that may be imposed by a general court-martial, see 2012 MCM, *supra* note 79, app. 12.

[169] 10 U.S.C. § 819 (UCMJ art. 19). For the maximum punishments that may be imposed by a special court-martial, see 2012 MCM, *supra* note 79, app. 12.

[170] Here, the term "Sexual Assault" includes rape, in violation of Art. 120, UCMJ; sexual assault, in violation of Art. 120, UCMJ; forcible sodomy, in violation of Art. 125, UCMJ; and attempts to commit such offenses, in violation of Art. 80, UCMJ. *See* U.S. Dep't of Def., Memorandum from the Secretary of Defense on Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012) [hereinafter SecDef Apr. 2012 Withhold Memo].

[171] This chart is adapted from Gregory E. Maggs and Lisa M. Schenck, Modern Military Justice: Cases and Materials (2012).

[172] *See generally* DoD SAPRO FY13 Report, *supra* note 66.

[173] *Id.* at 80-81.

[174] *Id.* at 80.

[175] *Transcript of RSP Public Meeting* 211 (Dec. 12, 2013) (testimony of Captain Jason Brown, Military Justice Officer, Military Justice Branch, Judge Advocate Division, Headquarters Marine Corps, U.S. Marine Corps). Another Service representative describing Service statistics concurred, stating, "I agree with that." *Id.* (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force).

[176] The Services collect and report data to DoD SAPRO, Congress, the Service appellate courts, the Court of Appeals for the Armed Forces, the American Bar Association, and others, including this Panel.

[177] *Transcript of RSP Public Meeting* 217 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

[178] *Id.* at 217-218.

[179] In response to RSP Request for Information 39, the Navy stated that "[t]he reasons unrestricted reports do not result in a commander's ability to take action include the offender is unknown, offender is a civilian not subject to military jurisdiction, civilian authorities prosecute the military offender, the victim declines to participate, the evidence is insufficient or the allegation is unfounded." Navy's Response to RSP Request for Information 39 (Nov. 21, 2013). In response to the same question, the Marine Corps explained that NCIS does not unfound cases, and the vast majority of cases unfounded by the commander were victim recantations. Marine Corps' Response to RSP Request for Information 39 (Nov. 21, 2013); *see also* Coast Guard's Response to Request for Information 49 (stating that "CGIS does not classify crimes as 'unfounded' at the current time").

[180] U.S. Dep't of Justice, Uniform Crime Reporting Handbook 41 (2004) [hereinafter UCR Handbook], *available at* http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf.

[181] The Services provided data summaries of sexual assault crime prosecutions for the Panel's consideration. However, comparing data among the Services or with other jurisdictions is difficult, since Service calculation methodologies do not align with each other or with DoD SAPRO reports. Service representatives suggested a number of reasons for these differences. *Transcript of RSP Public Meeting* 208 (Dec. 12, 2013) (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force) ("One of the other unique differences, I think most of us, the investigating–so the MCIO, Air Force OSI does not unsubstantiate any of our cases. So, before – so, our commanders get all of our cases to adjudicate, which I think it gets factored in when you look at – and I use this very subjectively ... but the type of case that is presented. If you have an investigative agency that said no, we unsubstantiate this [like the Army's procedure], so you're only being presented with substantiated cases, I think you get a different type of case."). *Cf. id.* at 221-22 (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army) ("Founding is a probable cause determination. The commander [in the Army] does not have a role in founding or unfounding of a case. Lawyers in coordination with investigating agencies, CID for the Army, make that determination. And it is a permanent law enforcement record.") The Comparative Systems Subcommittee assessed that the Army reports a higher prosecution rate than the other Services because the convening authority is only considering cases that an attorney and MCIO investigator previously determined had probable cause, so there is a greater probability the convening authority will take some adverse action on those cases. For instance, in FY12, 118 out of 476 cases were closed by the Army CID for lack of probable cause, and the convening authority only considered 358 cases. Since an attorney already determined there was reason to believe an offense had been committed, those cases were more likely to be prosecuted, resulting in a higher prosecution rate (number of courts-martial divided by 358). If the Army's prosecution rate was based on all 476 possible cases, the prosecution rate would likely have been lower (number of courts-martial divided by 476). The Air Force and Navy MCIOs, on the other hand, presented all cases to the commander, and divided the number of cases preferred by all sexual assault cases, resulting in a lower percentage. *See* CSS Report to RSP, Annex, *infra*, at 90-91.

[182] DoD SAPRO FY11 Report, *supra* note 97, at 43.

[183] *Transcript of RSP Public Meeting* 284-85 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).

[184] *Id.* at 202 (testimony of Captain Robert Crow, Director, Criminal Law Division, U.S. Navy) ("[T]here is no uniform way on how we measure prosecution rate. There is no uniform way on how we measure conviction rate.").

[185] The Comparative Systems Subcommittee developed a proposal for standardizing data collection across the Services. *See* CSS Report to RSP, Annex, *infra*, at 204-07.

[186] National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1631, 124 Stat. 4137 (2011).

[187] "A substantiated report of sexual assault is an Unrestricted Report that was investigated by an MCIO, provided to the appropriate military command for consideration of action, and found to have sufficient evidence to support the command's action against the subject." DoDI 6495.02 encl. 12 (app.), ¶ a.

[188] FY13 NDAA, *supra* note 1 at § 576(d)(1)(E).

[189] This conclusion is supported by the results of Dr. Spohn's attempt to compare rates among DoD and studies of which she was aware in civilian jurisdictions. *See Transcript of RSP Public Meeting* 259 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University). For detailed examples of problems associated with comparing civilian and military statistics, *see* CSS Report to RSP, Annex, *infra*, at 209-12.

[190] The Comparative Systems Subcommittee Report describes numerous, significant differences between civilian jurisdictions and the military in the calculation, tracking, and processing of information in sexual assault cases. *See* CSS Report to RSP, Annex, *infra*, at 209-212.

[191] U.S. Dep't of Justice, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division Uniform Crime Reporting (UCR) Program: Reporting Rape in 2013, at 2 (Apr. 2014), *available at* http://www.fbi.gov/about-us/cjis/ucr/recent-program-updates/reporting-rape-in-2013-revised.

[192] DoD 2014-2016 Prevention Strategy, *supra* note 10, at 8.

[193] *Transcript of RSP Role of the Commander Subcommittee Meeting* 16-17 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D., Health Scientist, Research and Evaluation Branch, Division of Violence Prevention, CDC) (explaining CDC's focus on primary prevention).

[194] *Transcript of SASC Hearing, supra* note 34, at 19 (testimony of Admiral Robert J. Papp, Jr., Commandant, U.S. Coast Guard).

[195] *See* RoC Subcommittee Report to RSP, Annex, *infra* note 156, at 60-61 (May 2014); *see also Transcript of RSP Role of the Commander Subcommittee Meeting* 77 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D) (noting that CDC prevention experts have "been very encouraged and pleased by the way that [SAPRO] ha[s] taken so much information and, in the midst of all these gaps [in research] . . . distilled it to what could be a very profitable direction to move in to really create some change").

[196] *Transcript of RSP Role of the Commander Subcommittee Meeting* 9-14, 36 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.). In addition to comprehensiveness, as the "best practices" of prevention, the CDC recommends that prevention programs: be based on theory and research; promote positive relationships; be appropriately timed in participants' development; use varied teaching methods; reflect the culture of participants; use evaluation to assess impact and effects; employ well-trained staff; and be of sufficient dosage. *Id.; accord* National Sexual Violence Resource Center, "Resources for Sexual Violence Preventionists: Resource Packet: Intro" (2012), *available at* http://nsvrc.org/sites/default/files/Publications_NSVRC_Fact-sheet_Prevention-Resource-Packet-Intro.pdf; *see also* Andra Teten Tharp, Ph.D., "Preventing Sexual Violence Perpetration" 10-11 (Feb. 12, 2014) (PowerPoint presentation to RSP Role of the Commander Subcommittee) [hereinafter CDC PowerPoint Presentation], *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140212_ROC/Materials_Presenters/09_CDC_Tharp_Presentation_201402.pdf.

[197] DoD SAPRO 2008 Prevention Strategy, *supra* note 10; *Transcript of RSP Role of the Commander Subcommittee Meeting* 173-75 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D.); DoD Response to RSP Request for Information 79a (Dec. 19, 2013).

[198] DoD SAPRO 2008 Prevention Strategy, *supra* note 10 at 18-20; *see also Transcript of RoC Subcommittee Meeting* 175-77, 186 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D.) (testifying that pursuant to 2008 Strategy, spectrum of prevention became "a lens through which" SAPRO focuses its prevention work to ensure that it is addressing prevention "at every level" of military society and emphasizing that "[t]here is no single bullet answer"); U.S. Dep't of Def., SAPRO, "Prevention Strategy Update" 3 (Feb. 12, 2014) (PowerPoint presentation to RSP Role of the Commander Subcommittee) [hereinafter DoD SAPRO Feb. 2014 PowerPoint Presentation], *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140212_ROC/Materials_Presenters/13_DoD_SAPRO_Brief_20140212.pdf.

[199] DoD 2014-2016 Prevention Strategy, *supra* note 10, at 8 at 8.

[200] DoD SAPRO 2008 Prevention Strategy, *supra* note 10 at 18-20.

[201] *Id.* at 29-31.

[202] *Transcript of RSP Role of the Commander Subcommittee Meeting* 20-22 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.). *But cf.* Anna Mulrine, *US military's new tactic to curtail sexual assaults: nab serial "predators,"* The Christian Science Monitor (Feb. 24, 2014) (noting that DoD "is putting new emphasis on ferreting out serial predators within the ranks, as military officials become increasingly convinced that relatively few people are responsible for the bulk of sex crimes"), *available at* http://www.csmonitor.com/USA/Military/2014/0224/US-military-s-new-tactic-to-curtail-sexual-assaults-nab-serial-predators.

[203] *Transcript of RSP Role of the Commander Subcommittee Meeting* 17-20 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

[204] *Id.* at 20.

[205] NISVS Technical Report, *supra* note 20, at 2, stating, "Additional research would be important in improving our understanding of how military-specific factors, such as deployment, might increase risk (e.g., by examining the impact of multiple deployments and deployment in high-conflict settings)."

[206] *See* DoD SAPRO 2008 Prevention Strategy, *supra* note 10, at 25 (calling generally for funding for sexual assault prevention that ultimately is "authorized, appropriated, and planned as part of established programming within the Department of Defense" and noting that primary prevention programs and staff specifically trained to conduct them require "stable and protected funding" from Congress); *Transcript of RSP Role of the Commander Subcommittee Meeting* 227-28 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D.) (noting that while FY14 NDAA introduces various requirements and resources that can be expected to have significant positive effects in terms of secondary prevention, "very little" in statute supports DoD's efforts in primary prevention).

[207] DoDD 6495.01 ¶¶ 4.d, 4.f.

[208] Joint Chiefs of Staff, "Strategic Direction to the Joint Force on Sexual Assault Prevention and Response," at 5 (May 7, 2012), *available at* http://www.sapr.mil/public/docs/directives/Strategic_Direction_on_SAPR.pdf.

[209] SecDef Apr. 2012 Remarks, *supra* note 11; DoD SAPR Initiatives, *supra* note 11.

[210] U.S. Dep't of Def., Memorandum from the Secretary of Defense on Evaluation of Pre-Command Sexual Assault Prevention and Response Training (Sept. 25, 2012), *available at* http://www.sapr.mil/public/docs/news/EVALUATION_OF_TRAINING.pdf.

[211] U.S. Dep't of Def., Sexual Assault Prevention and Response Strategic Plan 18 (Apr. 30, 2013), *available at* http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Atch_06052013.pdf; *Transcript of RSP Role of the Commander Subcommittee Meeting* 198-202 (Feb. 12, 2014) (testimony of Colonel Alan R. Metzler).

[212] *Id.*

[213] *Id.*; U.S. Dep't of Def., SAPRO, Feb. 2014 PowerPoint Presentation, *supra* note 198, at 6-7; *see also id.* at 17 (enumerating and describing five core competencies and various learning objectives resulting from each).

[214] *Transcript of RSP Role of the Commander Subcommittee Meeting* 204-08 (Feb. 12, 2014) (testimony of Colonel Litonya Wilson, Chief of Prevention and Victim Assistance, DoD SAPRO); DoD SAPRO Feb. 2014 PowerPoint Presentation, *supra* note 198, at 8-9; DoD Response to RSP Request for Information 79a (Dec. 19, 2013).

[215] *Transcript of RSP Role of the Commander Subcommittee Meeting* 76-77 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

[216] DoD 2014-2016 Prevention Strategy, *supra* note 10.

[217] *Id.*

[218] *Id.* at 9.

[219] *Id.* at 10-12.

[220] *Id.*

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

[222] DoDD 6495.01 encl. 2, ¶ 1.c.

[223] The White House, "Statement by the President on Eliminating Sexual Assault in the Armed Forces" (Dec. 20, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/12/20/statement-president-eliminating-sexual-assault-armed-forces. The President directed the Secretary and Chairman to report to him by December 1, 2014. *Id.*

[224] *Transcript of RSP Role of the Commander Subcommittee Meeting* 214-15 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D.).

[225] *Id.* at 215; *see* DoD 2014-2016 Prevention Strategy, *supra* note 10, at 13 (enumerating as key prevention metrics: past-year prevalence of unwanted sexual contact; prevalence vs. reporting; bystander intervention experience in past 12 months; and command climate index – addressing continuum of harm).

[226] *Id.* at 216-219.

[227] *Transcript of RSP Role of the Commander Subcommittee Meeting* 36-38 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); CDC PowerPoint Presentation, *supra* note 196, at 43.

[228] *Id.*; *accord* National Sexual Violence Resource Center, Engaging Bystanders to Prevent Sexual Violence: A Guide for Preventionists 2 (2013) [hereinafter NSVRC], *available at* http://www.nsvrc.org/publications/nsvrc-publications-guides/engaging-bystanders-prevent-sexual-violence-guide; *see also Transcript of RSP Role of the Commander Subcommittee Meeting* 107-10 (Feb. 12, 2014) (testimony of Kelly Ziemann, Education and Prevention Coordinator, Iowa Coalition Against Sexual Assault) (emphasizing diversity of motivations for individuals' changes in behavior) ("[I]f we really want to be serious about preventing sexual violence, we have to look at it on all these different levels, because some things are going to resonate with some folks, and other things aren't[.]"); *id.* at 121 (testimony of Victoria L. Banyard, Ph.D., Co-Director, Prevention Innovations, University of New Hampshire) ("[O]ne of the things that we have learned in our research on college campuses is that the same prevention program . . . will have different impacts for different people, based on their level of awareness, their level of motivation for engaging in it.").

[229] NSVRC, *supra* note 228, at 2.

[230] *Id.* at 3; *see, e.g.*, Sharyn J. Potter and Mary M. Moynihan, *Bringing in the Bystander In-Person Prevention Program to a U.S. Military Installation: Results from a Pilot Study*, 176 Military Medicine 870, 870 (2011); Victoria L. Banyard, et al., *Sexual Violence Prevention through Bystander Education: An Experimental Evaluation*, 35: 4 J. of Community Psychol. 463 - 465 (2007).

[231] *Transcript of RSP Role of the Commander Subcommittee Meeting* 86-89 (Feb. 12, 2014) (testimony of Jackson Katz, Ph.D.); Jackson Katz, "Penn State: The mother of all teachable moments for the bystander approach" (Dec. 1, 2011), *available at* http://nsvrc.org/news/Jackson-Katz-Series_Penn-State-Teachable-moment.

[232] *See, e.g.*, Banyard, *supra* note 230, at 477-79.

[233] Jackson Katz, "Penn State and the bystander approach: Laying bare the dynamics in male peer culture" (Dec. 8, 2011), *available at* http://www.nsvrc.org/news/Jackson-Katz-Series_Penn-State-and-Bystander-Approach; *see also Transcript of RSP Role of the Commander Subcommittee Meeting* 153-154 (Feb. 12, 2014) (testimony of Victoria L. Banyard, Ph.D., Co-Director, Prevention Innovations, University of New Hampshire).

[234] *Transcript of RSP Role of the Commander Subcommittee Meeting* 31-34 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.) (observing that "approximately half of sexual assaults involve consumption of alcohol, 34 to 74 percent of sexual violence perpetrators used alcohol at the time of assault, and men who drink heavily are more likely to report committing sexual assault"); Caroline Lippy and Sarah DeGue, "Summary of Preliminary Findings for Members of the *Response Systems to Adult Sexual Assault Crimes Panel* in the Office of the General Counsel, Department of Defense," at 1 (unnumbered) (Feb. 13, 2014) (summarizing preliminary findings of review expected to be made publicly available by late 2014 entitled Using Alcohol Policy to Prevent Sexual Violence Perpetration: A Review of Current Evidence) [hereinafter Lippy and DeGue Summary], *currently available at* http://responsesystemspanel.whs.mil/index.php/home/materials.

[235] Lippy and DeGue Summary, *id* at 1.

[236] *Transcript of RSP Role of the Commander Subcommittee Meeting* 34-35, 41 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); *id.* at 65-66 (testimony of Sarah DeGue, Ph.D.); Lippy and DeGue Summary, *supra* note 234, at Table 1; *see also* CDC PowerPoint Presentation, *supra* note 196, at 39-41.

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

[238] DoD SAPRO 2008 Prevention Strategy, *supra* note 10, at 34-35.

[239] *See* RoC Subcommittee Report to RSP, Annex, *infra*, at 59-61.

[240] *See generally* DoD SAPRO 2008 Prevention Strategy, *supra* note 10; *see also* DoD 2014-2016 Prevention Strategy, *supra* note 10, at 12 (recommending that prevention programs include "harm reduction" efforts that, in turn, "can include" alcohol policies); *id.* at 16 (enumerating as a "prevention task" that DoD "[r]eview and if necessary expand . . . alcohol policies").

[241] White House Report, *supra* note 16, at 9 and n.8 (citing National Center for Injury Prevention and Control, National Intimate Partner and Sexual Violence Survey (2010)); DoD SAPRO June 2013 PowerPoint Presentation, *supra* note 19, at 13.

[242] *See, e.g.*, DMDC 2012 Survey Note, *supra* note 35, at 4.

[243] *Transcript of RSP Role of the Commander Subcommittee Meeting* 26 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

[244] *Id.* at 16-17, 72-74; Letter from Scott Berkowitz and Rebecca O'Connor, RAINN (Rape, Abuse and Incest National Network) to White House Task Force to Protect Students from Sexual Assault at 5 (unnumbered) (Feb. 28, 2014) [hereinafter RAINN Letter], *available at* http://rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf.

[245] *See generally* DoD 2014-2016 Prevention Strategy, *supra* note 10.

[246] *Transcript of RSP Role of the Commander Subcommittee Meeting* 9-10, 16-17 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); RAINN Letter, *supra* note 246244, at 5.

[247] *See* DoD 2014-2016 Prevention Strategy, *supra* note 10, at 9. For example, the 2008 Strategy recommended that Service members be trained on the "role of beliefs about alcohol, social norms that link masculinity and alcohol, negative stereotypes about drinking and women, and the pharmacological effects of alcohol on decision-making and violent behavior." *Id.* at 34-35. In addition, DoD policy requires commanders and managers to ensure Service members receive prevention training which incorporates adult learning theory; is appropriate to Service members' grade and commensurate with their level of responsibility; and identifies prevention strategies and behaviors that may reduce sexual assault, including bystander intervention, risk reduction, and obtaining affirmative consent.

[248] The proscribed training was intended "to strengthen individual knowledge, skills, and capacity to prevent" sexual assault. FY12 NDAA, *supra* note 7, § 585(b), 125 Stat. 1298 (2011). Commanders are now required to ensure that SAPR training for all Service members incorporates adult learning theory, is appropriate to grade and commensurate with level of responsibility, identifies prevention strategies and behaviors that may reduce sexual assault, and provides scenario-based, real-life situations. RoC Subcommittee Report to RSP, Annex, *infra*, at 56.

[249] DoDI 6495.02 encl. 10, ¶ 3.

[250] FY13 NDAA, *supra* note 1 at § 574.

[251] U.S. Dep't of Def., SAPRO, Memorandum from Major General Gary S. Patton, Director on Assessment of Services' Reviews of Prevention and Reporting of Sexual Assault and Other Misconduct in Initial Military Training at 3 (unnumbered) (Apr. 3, 2013), *reprinted in* DoD Response to RSP Request for Information 31 at 000760, *currently available at* http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q31.pdf; DoD SAPRO, Report to the Secretary of Defense: Evaluation of Pre-Command Sexual Assault Prevention and Response Training 6 (May 2012) [hereinafter DoD Pre-Command SAPR Report], *available at* http://www.sapr.mil/public/docs/news/PreCommand_Training_Evaluation_Final_Report.pdf.

[252] In a Defense Equal Opportunity Climate Survey (DEOCS) conducted in January and February 2014, 94% of DoD respondents "indicated that they would take an intervening action if they witnessed a situation that might lead to sexual assault (selecting either seeking assistance, telling the person, or confronting the Service member)." DEOMI Directorate of Research Development and Strategic Initiatives, Sexual Assault Prevention and Response Climate Report: Department of Defense and Reserve Component Results 37 (Mar. 2014) [hereinafter DEOMI SAPR Climate Report], *reprinted in* DoD Response to RSP Request for Information 152 at 003286, *currently available at* http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q152.pdf.

[253] Services' Responses to Request for Information 1b (Nov. 5, 2013); Services' Responses to Requests for Information 79a, 80c (Dec. 19, 2013); U.S. Navy, Take the Helm: Sexual Assault Prevention and Response Training for the Fleet (SAPR-F) Facilitation Guide FY 12/13, *available at* http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/sapr/Documents/Navy_SAPR-F_FacilitationGuide.pdf.

[254] DoDI 6495.02 encl. 10, ¶¶ 3(a)-(g).

[255] The Safe Helpline is described in greater detail in the Report of the Victim Services Subcommittee. *See* Report of the Victim Services Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel, Annex, (May 2014) [hereinafter VSS Report to RSP] *infra*, at 43-45.

[256] DoDI 6495.02 encl. 10, ¶¶ 2d(1)-(12), 3a(1),(2).

[257] *See generally*, VSS Report to RSP, Annex, *infra*, at 36-38.

[258] FY14 NDAA, *supra* note 4, at §1731.

[259] SecDef Apr. 2012 Remarks, *supra* note 11; DoD SAPR Initiatives, *supra* note 69.

[260] Services' Responses to RSP Request for Information 1b (Nov. 5, 2013); Services' Responses to RSP Requests for Information 79a, 80c, 80d (Dec. 19, 2013); U.S. Navy, Take the Helm: Sexual Assault Prevention and Response Training for Leaders (SAPR-L) Facilitation Guide FY 12, at 70 [hereinafter Navy Leaders Guide], *available at* http://www.c6f.navy.mil/navy_sapr-l_fac_guide_final_v2_072612.pdf.

[261] U.S. Dep't of Def., Memorandum from the Secretary of Defense on Evaluation of Pre-Command Sexual Assault Prevention and Response Training (Sept. 25, 2012), *available at* http://www.sapr.mil/public/docs/news/EVALUATION_OF_TRAINING.pdf. In particular, professional military education (PME), leadership development training (LDT) for senior NCOs and officers, and pre-command training must include: an explanation of the commander's role in the SAPR program; rape myths, facts, and trends; procedures to protect victims of sexual assault from coercion, retaliation, and reprisal; and actions that constitute reprisal. DoDI 6495.02 encl. 10, ¶¶ 1-3; *see also* FY13 NDAA, *supra* note 1 at § 574 (requiring sexual assault prevention and response training for new or prospective commanders at all levels of command); DoDI 6495.02 Glossary (defining reprisal as "[t]aking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, or any other act of retaliation, against a Service member for making, preparing, or receiving a communication"). Commanders are also required to receive similar prevention training prior to assuming a command position, appropriate to the level of responsibility and commensurate with the level of command. DoDI 6495.02 encl. 10, ¶ 3.g(1)-(6).

[262] *Id.* at encl. 10, ¶ 3.g(5).

[263] Services' Responses to RSP Request for Information 1c. (Nov. 1, 2013); Services' Responses to RSP Requests for Information 79a, 80c, 80d (Dec. 19, 2013). *See also*, NAVY LEADERS GUIDE, *supra* note 260, at 13.

[264] *See* Chapter 3, Section B, for additional discussion on the distinction between commanders and convening authority.

[265] *See, e.g.*, Army's Response to RSP Request for Information 1c (Nov. 1, 2013).

[266] *See, e.g., Transcript of RSP Role of the Commander Subcommittee Meeting* 151-52 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler) (outlining deliberate nature of command selection screening process) ("[T]hrough your development as a junior officer, you are singled out as somebody that could compete for command. And if you don't have a record that supports even competing for command and getting on a command list, you're not going to be there. Then you have to be competitively selected to be on the command list, and then you have to be hired because usually there's two to three times as many people qualified for command as those that get hired.").

[267] *See id.* at 152.

[268] *Id.* The courses of study for the command and staff colleges each last about ten months.

[269] *See* Services' Responses to RSP Request for Information 1c (Nov. 1, 2013).

[270] *See id.*

[271] DOD PRE-COMMAND SAPRO REPORT, *supra* note 251, at 5. Because the evaluation was directed by the Secretary of Defense, Coast Guard sexual assault prevention and response training was not evaluated.

[272] *Id.*

[273] *Id.* at 3-4.

[274] *Id.*

[275] DoD SAPRO, ENHANCEMENTS TO PRE-COMMAND AND SENIOR ENLISTED LEADER SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING (Jan. 2013), *reprinted in* DoD Response to RSP Request for Information 8 at 000088.

[276] *Transcript of RSP Role of the Commander Subcommittee Meeting* 236 (Jan. 8, 2014) (testimony of Lieutenant General (Retired) John F. Sattler, U.S. Marine Corps).

[277] FY13 NDAA, *supra* note 1 at §§ 572(a)(3), 574.

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

[279] *See id.*; Section 587 of the FY14 NDAA codified this requirement and provided that failure to conduct required climate assessments must be noted in a commander's performance evaluation. *See* FY14 NDAA, *supra* note 4.

[280] NAVY ADMINISTRATIVE MESSAGE 216/13, NAVY PERFORMANCE EVALUATION CHANGES (Aug. 2013), *available at* http://www.public.navy.mil/bupers-npc/reference/messages/Documents/NAVADMINS/NAV2013/NAV13216.txt, explaining "positive command climate" by noting, "Sailors must demonstrate how they have cultivated or maintained command climates where improper discrimination of any kind, sexual harassment, sexual assault, hazing, and other inappropriate conduct is not tolerated; where all hands are treated with dignity and respect; and where professionalism is the norm."

[281] NAVY ADMINISTRATIVE MESSAGE 181/13, IMPLEMENTATION OF NAVY SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM INITIATIVES (July 2013) [hereinafter NAVADMIN 181/13], *available at* http://www.public.navy.mil/bupers-npc/reference/messages/Documents/NAVADMINS/NAV2013/NAV13181.txt.

[282] *See Transcript of RSP RoC Subcommittee Meeting* 153 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler).

[283] *Id.* at 95.

[284] Section 3(c) provides that "[t]he Secretaries of the military departments shall ensure that the performance appraisals of commanding officers . . . indicate the extent to which each such commanding officer has or has not established a command climate in which (A) allegations of sexual assault are properly managed and fairly evaluated; and (B) a victim can report criminal activity, including sexual assault, without fear of retaliation, including ostracism and group pressure from other members of the command. S. 1917, § 3(c)(2), 113th Cong., Victims Protection Act of 2014 (2014). Section 1751 of the FY14 NDAA expressed the sense of Congress on a commanding officer's responsibility for a command climate free of retaliation and the responsibility for senior officers to evaluate subordinate commanding officers on their performance in these areas. FY14 NDAA. Section 1751 further specifies the sense of Congress that commander evaluations should be maintained for use in personnel assignment decisions as well as promotion and command selection boards. *Id.*

[285] *See* S. 1917, § 3(c), 113th Cong., Victims Protection Act of 2014 (2014).

[286] *Transcript of RSP Role of the Commander Subcommittee Meeting* 223 (Jan. 8, 2014) (testimony of Major General (Retired) Mary Kay Hertog, U.S. Air Force).

[287] *See* U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (May 6, 2013), *available at* http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Atch_06052013.pdf. The Secretary of Defense meets weekly with senior Service leadership to review SAPR efforts and progress to ensure full implementation of all initiatives. U.S. Dep't of Def., News Release, Statement by Secretary of Defense Chuck Hagel on Sexual Assault Prevention and Response (Dec. 20, 2013), *available at* http://www.defense.gov/releases/release.aspx?releaseid=16443.

[288] *See* RoC Subcommittee Report to RSP, Annex, *infra*, at 125-128.

[289] S. 1917, § 3(c)(1), 113th Cong., Victims Protection Act of 2014 (2014).

[290] Each Service employs a process for removing a member from a duty position after a senior commander loses confidence in the officer, or determines that the officer has displayed substandard performance, or engaged in unprofessional or illegal conduct. While governed by individual Service guidelines, all Services require that a relief for cause action be documented in an officer's performance evaluation. *See* U.S. Dep't of the Army Reg. 600-20, Army Command Policy, ¶ 2-17 (Sep. 20, 2012), *available at* http://www.apd.army.mil/pdffiles/r600_20.pdf; U.S. Dep't of the Navy MILPERSMAN 1611-020, Officer Detachment For Cause (Mar. 30, 2007), *available at* http://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1600Performance/Documents/1611-020.pdf; U.S. Dep't of the Air Force Inst. 36-2406, Officer and Enlisted Evaluation Systems ¶ 7.4.5 (Apr. 15, 2005), *available at* http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2406/afi36-2406.pdf; U.S. Marine Corps, Order P1610.7F, ch. 2, Performance Evaluation System (Nov. 19, 2010), *available at* http://www.marines.mil/Portals/59/Publications/MCO P1610.7F W CH 1-2.pdf.pdf; U.S. Coast Guard Commandant Inst. M1000.6A (including changes 1-36), Coast Guard Personnel Manual ch. 4F (Jan. 8, 1988), *available at* http://isddc.dot.gov/OLPFiles/USCG/010564.pdf.

[291] As a retired senior Air Force commander explained to the RSP, "[t]here is no process in our society that is easier to execute than removing a commander. That person's superior only has to say: 'I have lost confidence in your ability to command this organization.' That's it." *Transcript of RSP Public Meeting* 105 (Jan. 30, 2013) (testimony of General (Retired) Roger A. Brady, U.S. Air Force); *see also Transcript of RSP Role of the Commander Subcommittee Meeting* 211 (Nov. 20, 2013) (testimony of Lieutenant General Howard B. Bromberg, Deputy Chief of Staff for Personnel, U.S. Army, noting Army's standard for relief for cause of commander is loss of trust and confidence in subordinate's ability to perform his or her job). A Marine commander explained to the Subcommittee that commander reliability and accountability go hand-in hand: "We can be relied on by our seniors . . . so we can be relieved by our seniors, and we can relieve our subordinates, too." *Id.* at 235 (testimony of Colonel Robin A. Gallant, Commanding Officer, Headquarters and Service Battalion Quantico, U.S. Marine Corps).

[292] FY14 NDAA, *supra* note 4, at § 1751.

[293] *Id.* at § 1701(b)(2)(E).

[294] Article 92 of the UCMJ criminalizes failure to obey a lawful order, as well as willful or negligent dereliction of duty, which includes failure to obey the statutory obligations related to the reporting and resolution of sexual assault reports. Article 98 of the UCMJ criminalizes noncompliance with procedural rules in the UCMJ. Articles 133 and 134 are more general in nature; they proscribe other conduct that is "unbecoming an officer" or that is "prejudicial to good order and discipline" or "of a nature to bring discredit upon the Armed Forces," such as obstruction of justice or interference with administrative proceedings. 10 U.S.C. §§ 892, 898, 933, 934 (UCMJ arts. 92, 98, 133, 134).

[295] Commanders may receive administrative correction from their superiors, such as a letter of reprimand or admonishment. As described above, poor performance may be documented on the commander's evaluation and fitness report. An officer who has been selected for promotion to the next higher grade may be recommended for a promotion delay or removal from the promotion list, which elevates review of the officer's capacity to serve in the higher grade to the Service Secretary. Officer promotions and selection for higher command are extremely competitive, and any indicators in an officer's record that reflect negatively on his or her performance in command will undoubtedly impact the officer's prospect for future promotion or command selection.

[296] The Services have different interpretations of the Privacy Act of 1974, 5 U.S.C. § 552a and the implications of administrative actions that hold commanders accountable. The Service policies for releasing or publicizing instances where commanders are relieved differ substantially. For example, the Navy publicizes when and why a commander is relieved for cause, while the Air Force and Army generally release information only if the commander is a general officer or the incident receives substantial public interest. *See* RoC Subcommittee Report to RSP, Annex, *infra*, at 130.

[297] *Transcript of RSP Public Meeting* 26-29 (Nov. 7, 2013) (testimony of Major General Gary S. Patton); *see also* U.S. Dep't of Def., SAPRO, "DoD Sexual Assault Prevention and Response Metrics" 6-14 (Nov. 7, 2013) (PowerPoint presentation to RSP) [hereinafter DoD SAPRO Nov. 2013 PowerPoint Presentation].

[298] *Transcript of RSP Public Meeting* 27-28 (Nov. 7, 2013) (testimony of Major General Gary S. Patton); *see also* DoD SAPRO Nov. 2013 PowerPoint Presentation, *supra* note 19, at 3.

[299] *Transcript of RSP Role of the Commander Subcommittee Meeting* 77-80 (Nov. 20, 2013) (testimony of Mr. Jimmy Love, Acting Director, Military Equal Opportunity and Defense Equal Opportunity and Management Institute (DEOMI) Liaison, DoD Office of Diversity Management and Equal Opportunity).

[300] *Id.* at 83-85 (testimony of Dan McDonald, Ph.D., Executive Director, Research, Development and Strategic Initiatives, DEOMI). According to Dr. McDonald, DEOCS assessments have increased from ten to 15 assessments per week in 2005 to 250 per week currently, reaching approximately 50,000 personnel with a 53-percent return rate on surveys. *Id.* at 84-85.

[301] DEOMI SAPR Climate Report, *supra* note 252, at i-iii. In January and February 2014, DEOMI administered 2,582 climate surveys for DoD and Coast Guard units, which resulted in 122,003 responses from personnel. *Id.* at 16.

[302] *Id.*

[303] *See* VSS Report to RSP, Annex, *infra*, at 37 and n.93 (noting that 47 percent of women who did not report 'unwanted sexual contact' indicate that they were afraid of reprisal or retaliation from persons who did it, or from their friends, or thought they would be labeled a troublemaker") (citing 2012 WGRA); RoC Subcommittee Report to RSP, Annex, *infra*, at 112 (noting that "[r]etaliation concerns raised by victims generally relate to peers or direct supervisors and rarely involve convening authorities").

[304] FY13 NDAA, *supra* note 1, at § 572(a)(3); Section 1721 of the FY14 NDAA subsequently amended Section 572 of the FY13 NDAA to add a requirement that the Secretary of Defense direct the Secretaries of the Military Departments to verify and track compliance of commanding officers in conducting organizational climate assessments. FY14 NDAA, *supra* note 4, at § 1721.

[305] U.S. Dep't of Def., Memorandum from the Under Secretary of Defense for Personnel and Readiness on Command Climate Assessments (July 25, 2013) [hereinafter USDPR Memo], *reprinted in* DoD Response to RSP Request for Information 31, at 000760, *currently available at* http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q31.pdf.

[306] FY14 NDAA, *supra* note 4, at § 587(b),(c).

[307] USDPR Memo, *supra* note 305.

[308] FY14 NDAA, *supra*, note 4, at § 587(b),(c).

[309] All Service policies comply with the frequency and reporting requirements of the FY13 NDAA mandate, but the Service policies differ in terms of the required frequency for completing command climate surveys and how survey results are shared or conveyed to the next echelon commander. *See* Marine Corps Administrative Message 464/13, "Command Climate Assessments" (Sept. 17, 2013) [hereinafter MARADMIN 464/13], *available at* http://www.marines.mil/News/Messages/MessagesDisplay/tabid/13286/Article/150139/command-climate-assessments.aspx; U.S. Dep't of the Army Dir. 2013-29, "Army Command Climate Assessments" (Dec. 23, 2013) [hereinafter Army Dir. 2013-29], *available at* http://armypubs.army.mil/epubs/pdf/ad2013_29.pdf; Navy Personnel Command, "Command Climate Assessment Process," *at* http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/equal_opportunity/Pages/COMMANDCLIMATEASSESSMENT.aspx); Dep't of the Air Force, Memorandum from the Acting Secretary of the Air Force on Enhancing Commander Assessment and Accountability, Improving Response and Victim Treatment (Oct. 28, 2013), *currently available at* http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131120_ROC/08a_AF_EnhancingCdrAccountability.pdf.

[310] *Transcript of RSP Role of the Commander Subcommittee Meeting* 108 (Nov. 20, 2013) (testimony of Mr. Jimmy Love, Acting Director, Military Equal Opportunity and DEOMI Liaison, DoD Office of Diversity Management and Equal Opportunity).

[311] *Id.* at 104-05.

[312] *Id.* at 101. Additionally, DoD Directive 1350.2 requires the Service Secretaries to ensure commanders are held accountable for the equal opportunity climates within their commands. U.S. Dep't of Def. Dir. 1350.2, Department of Defense Military Equal Opportunity (MEO) Program ¶ 6.2.2 (Nov. 21, 2003), *available at* http://www.dtic.mil/whs/directives/corres/pdf/135002p.pdf.

[313] *See* MARADMIN 464/13, *supra* note 309.

[314] *See* Army Dir. 2013-29, *supra* note 309; Navy Personnel Command, "Command Climate Assessment Process," *at* http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/equal_opportunity/Pages/COMMANDCLIMATEASSESSMENT.aspx."

[315] *See* DEOMI Responses to RSP Requests for Information 33c, 33e (Nov. 21, 2013).

[316] The terms described in this chart are used to provide standard definitions used throughout this report.

[317] U.S. Dep't of Def. Dir. 6400.1, Family Advocacy Program encl. 1 (Aug. 23, 2004), *available at* http://www.dtic.mil/whs/directives/corres/pdf/640001p.pdf.

[318] *See* U.S. Army, Special Victim Counsel Handbook 1 (Nov. 2013) [hereinafter Army SVC Handbook], *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/03a_USA_SpecialVictimsConsel_Handbook.pdf

[319] U.S. Air Force, Special Victims' Counsel Rules of Practice and Procedure [hereinafter Air Force SVC Rules], Rule 4 (July 2013), *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/05_USAF_SpecialVictimsCounsel_RulesofPracticeandProcedure.pdf; *see also* Army SVC Handbook, *supra* note 318, ch. 4; Services' Responses to RSP Requests for Information 4 (Nov. 5, 2013).

[320] *See* VSS Report to RSP, Annex, *infra*, at 81-84.

[321] *See* Air Force SVC Rules, *supra* note 319, Rule 4; *see also* Army SVC Handbook, *supra* note 318, ch. 4.

[322] *See* DoDD 6495.01 ¶ 4.e; DoDI 6495.02 encl. 6 ¶1.

[323] *See* U.S. Dep't of Justice, Office on Violence Against Women, A National Protocol for Sexual Assault Medical Forensic Examinations: Adults/Adolescents (Apr. 2013) [hereinafter OVW Protocol], *available at* https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf.

[324] *See* DoDD 6495.01 ¶ 4.e.

[325] *Id.*

[326] *See* OVW Protocol, *supra* note 323.

[327] *Id.*

[328] U.S. Dep't of Def. Directive-type Memorandum 14-003, DoD Implementation of Special Victim Capability Prosecution and Legal Support 12 (Feb. 12, 2014) [hereinafter DTM 14-003], *available at* http://www.dtic.mil/whs/directives/corres/pdf/DTM-14-003.pdf.

[329] DoDD 1030.2, Department of Defense Instruction, Victim and Witness Procedures ¶ 6.1 (June 4, 2004), *available at* http://www.dtic.mil/whs/directives/corres/pdf/103002p.pdf.

[330] DTM 14-003, *supra* note 328, at 13.

[331] *Transcript of RSP Public Meeting* 94 (June 27, 2013) (testimony of Major General Gary S. Patton,); *see also* DoD SAPRO June 2013 PowerPoint Presentation, *supra* note 19, at 3 ("The Department of Defense prevents and responds to the crime of sexual assault in order to enable military readiness and reduce – with goal to eliminate – sexual assault from the military."). Note: the Panel uses the term "testimony" to describe the unsworn remarks and responses made by individuals invited to appear before the RSP and Subcommittee to share their experiences and expertise on issues related to sexual assault in the military. For further discussion of the SAPR program, see VSS Report to RSP, Annex, *infra* at 29-30.

[332] *See generally* DoD SAPRO FY09 REPORT, *supra* note 97, at 6 (providing history of DoD Sexual Assault Prevention and Response (SAPR) program).

[333] DoDD 6495.01 ¶ 4.c(1),(2). DoD SAPR policy is set forth in DoD Directive 6495.01 and DoD Instruction 6495.02.

[334] The legislative history of the development and oversight of the DoD SAPR program is described in more detail in Appendix B to the Report of the Victim Services Subcommittee. *See* VSS Report to RSP, Annex, *infra* at 135-146.

[335] *Transcript of RSP Public Meeting* 218 (Nov. 7, 2013) (testimony of Master Sergeant Carol Chapman, U.S. Army, SHARP Program Manager, 7th Infantry Division, Joint Base Lewis-McChord).

[336] For a more complete discussion of these programs and initiatives, see VSS Report to RSP, Annex, *infra*, at 46-49.

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

[338] DoDI 6495.02 encl. 4, ¶ 1.b.

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

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

[341] DoDI 6495.02 encl. 4, ¶ 1.b.

[342] *Id.*

[343] *Id.*, encl. 4, ¶ 1.c.

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

[345] Chaplains and legal assistance attorneys have protected communications with victims, but they do not take reports. *See id.* They confer with victims and may help direct them to a SARC to assess their reporting options.

[346] No commander or convening authority may refuse to forward an allegation or impede an investigation. Any attempt to do so would constitute a dereliction of duty or obstruction of justice, in violation of the UCMJ. DoD policy indicates that MCIOs should honor a victim's choice to decline to participate in an investigation. DoDI 6495.02, encl. 4, ¶ 1.c(1).

[347] *See id.*

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

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

[350] Outcry in the course of otherwise privileged communications does not eliminate the restricted reporting option. "In the course of otherwise privileged communications with a chaplain or legal assistance attorney, a victim may indicate that he or she wishes to file a Restricted Report. If this occurs, a chaplain and legal assistance attorney shall facilitate contact with a SARC or SAPR VA to ensure that a victim is offered SAPR services and so that a DD Form 2910 can be completed. A chaplain or legal assistance attorney cannot accept a Restricted Report." *See* DoDI 6495.02, encl. 4, ¶ 1.b(3).

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

[352] DoDI 6495.02, encl. 10, ¶ 3. Training must be specific to a Service member's grade and commensurate with his or her level of responsibility. *Id.*, encl. 10, ¶ 2.d.

[353] *Id.*, encl. 10, ¶ 2.d(6, 11).

[354] DEOMI SAPR Climate Report, *supra* note 252, at iii-iv, 45-46. The information reflects data from 2,582 climate surveys conducted in January and February 2014, which resulted in 122,003 responses from DoD and Coast Guard personnel.

[355] *See* Air Force SVC Rules, *supra* note 319, Rule 6; *see also* Army SVC Handbook, *supra* n. 318, Ch. 1.; *Transcript of RSP Public Meeting* 104-160 (Nov. 8, 2013) (testimony of SVC Program Heads). For a complete description of the SVC program and the Panel's findings and recommendations with regard to the program, see Section D of this chapter, *infra*.

[356] DoDI 6495.02 encl. 4, ¶ 1.

[357] *Id.*, encl. 5, ¶ 7.

[358] *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 167-170 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, Associate Director for Criminal Investigations, AFOSI); *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP) (interviews of investigators); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBSA* (Dec. 13, 2013) (on file at RSP) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap (NBK) and Joint Base Lewis-McChord (JBLM)* (Feb. 5, 2014) (on file at RSP).

[359] DoDI 6495.02 encl. 5, ¶ 7.

[360] *See* 2012 MCM, *supra* note 79, R.C.M. 704(c).

[361] Appendices to the Report of the Joint Service Committee – Sexual Assault Subcommittee (Sept. 2013) [hereinafter JSC-SAS Appendices], app. M at 8, *currently available at* http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20140131_CSS/JSC_SAS_Report_Appendices.pdf. The Joint Service Committee - Sexual Assault Subcommittee was formed at the direction of the acting DoD General Counsel. The JSC-SAS traveled to eighteen civilian jurisdictions in 2013, gathering information and conducting interviews of law enforcement, prosecutors, public defenders, victims' attorneys, and victim advocates for an independent panel to complete a comparative analysis.

[362] DoD and Services' Responses to RSP Request for Information 141 (Apr. 11, 2014).

[363] *Id.*

[364] *See, e.g.*, Report of the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies 28 (June 2005), *available at* http://www.sapr.mil/public/docs/research/High_GPO_RRC_tx.pdf; 2004 Task Force Report, *supra* note 63, at 28.

[365] DoDD 6495.01 encl. 2, ¶ 1.f(5).

[366] DoDI 6495.02 encl. 4, ¶ 4.

[367] FY14 NDAA, *supra* note 4, at § 1731.

[368] DoDI 6495.02 encl. 4, ¶ 5.b(2).

[369] Army's Response to RSP Request for Information 135 (Apr. 14, 2014).

[370] *See Transcript of RSP Public Meeting* 323 (Dec. 11, 2013) (testimony of Deputy Chief Corey Falls, Ashland, Oregon Police Department).

[371] DoD currently uses the acronym "SVC" to refer to both special victim counsel, the attorneys who assist victims, and the Special Victim Capability designed to enhance the investigation and prosecution process. This section focuses on the special victim counsel.

[372] ARMY SVC HANDBOOK, *supra* note 318, at 1.

[373] AIR FORCE SVC RULES, *supra* note 319, at 2.

[374] *See generally Transcript of RSP Public Meeting* 118-90 (Nov. 8, 2013) (testimony of SVC program heads).

[375] *See* AIR FORCE SVC RULES, *supra* note 319, Rule 4; *see also* ARMY SVC HANDBOOK, *supra* note 318, ch. 4; Services' Responses to RSP Request for Information 4 (Nov. 5, 2013).

[376] *See* VSS REPORT TO RSP, Annex, *infra*, at 81-84.

[377] *Id.*

[378] *See* AIR FORCE SVC RULES, *supra* note 319, Rule 4; *see also* ARMY SVC HANDBOOK, *supra* note 318, ch. 4; U.S. MARINE CORPS ORDER P5800.16A, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION ¶ 6004 (Feb. 10, 2014) [hereinafter MCO P5800.16A], *available at* http://www.marines.mil/Portals/59/Publications/MCO%20P5800_16A%20CH%201-6%20PT%201.pdf; Services' Responses to RSP Request for Information 4 (Nov. 1, 2013); *see generally Transcript of RSP Public Meeting* 110-80 (Nov. 8, 2013) (testimony of SVC program heads).

[379] *See* AIR FORCE SVC RULES, *supra* note 319, Rule 4; *see also* ARMY SVC HANDBOOK, *supra* note 318, ch. 4.

[380] FY14 NDAA, *supra* note 4, at § 1716.

[381] *See id.* at § 1716(a); *see also* AIR FORCE SVC RULES, *supra* note 319, Rule 1; ARMY SVC HANDBOOK, *supra* note 318, ch. 1; MCO P5800.16A ¶ 6003, *supra* note 380.

[382] AIR FORCE SVC RULES, *supra* note 319, Rule 2; *see also* ARMY SVC HANDBOOK, *supra* note 318, ch. 2; MCO P5800.16A ¶ 6003, *supra* note 380.

[383] FY14 NDAA, *supra* note 4, at § 1716(d).

[384] *Transcript of RSP Public Meeting* 104-60 (Nov. 8, 2013) (testimony of SVC program heads); *see also* Services' Responses to RSP Request for Information 4 (Nov. 1, 2013); AIR FORCE SVC RULES, *supra* note 319, Rule 8; ARMY SVC HANDBOOK, *supra* note 318, ch. 8.

[385] *Transcript of RSP Public Meeting* 131 (Nov. 8, 2013) (testimony of Captain Karen Fischer-Anderson, Chief of Staff, Victims' Legal Counsel, U.S. Navy); *see also* Services' Responses to RSP Request for Information 4 (Nov. 1, 2013); U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE REPORT ON IMPLEMENTATION OF SECTION 1716 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, at 1, 3, 5-6 (Apr. 2014) [hereinafter DoD SECTION 1716 REPORT], *currently available at* http://responsesystemspanel.whs.mil/index.php/home/materials.

[386] *See* Services' Responses to RSP Request for Information 4 (Nov. 1, 2013); *see also* U.S. Army, Memorandum from The Judge Advocate General on Office of the Judge Advocate General Policy Memorandum #14-01, Special Victim Counsel (Nov. 1, 2013), *reprinted in* DoD Response to RSP Request for Information 4 at 200204-07, *currently available at* http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q4.pdf.

[387] *Transcript of RSP Public Meeting* 166-67 (Nov. 8, 2013) (testimony of Captain Karen Fischer-Anderson, Chief of Staff, Victims' Legal Counsel Program, U.S. Navy).

[388] *See* AIR FORCE SVC RULES, *supra* note 319, Rule 8.

[389] ARMY SVC HANDBOOK, *supra* note 318, ch. 8.

[390] Final disposition is considered the point when the convening authority takes action on the findings and sentence of the court-martial. For non-judicial punishment actions under Article 15 of the UCMJ, final disposition is considered the point when the punishment is complete. For administrative actions, case disposition occurs when the separation authority takes action. *Id.*, ch. 3; *see also* AIR FORCE SVC RULES, *supra* note 3557, Rule 3; MCO P5800.16A, *supra* note 378 ¶ 6005.

[391] *Id.*

[392] *See Transcript of RSP Victim Services Subcommittee Meeting* 14-37 (Mar. 13, 2014) (testimony of sexual assault survivors).

[393] *Id.* at 16-22, 28, 57, 78.

[394] *See* Air Force's Response to RSP Request for Information 1(d), Victim Impact Survey Attachment; DoD SECTION 1716 REPORT, *supra* note 385, at 8; U.S. Air Force, "Air Force Special Victims' Counsel Program Victim Impact Survey" (provided to RSP Victim Services Subcommittee in March 2013), *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140313_VSS/17_AirForce_VictimImpactSurvey_Results.pdf.

[395] *See Transcript of RSP Public Meeting* 150-57 (Nov. 8, 2013) (testimony of Colonel Dawn Hankins, Chief, Victims' Counsel Division, Air Force Legal Operations Agency, U.S. Air Force); DoD SECTION 1716 REPORT, *supra* note 385, at 8.

[396] *See* CSS REPORT TO RSP, Annex, *infra*, at 161.

[397] *See Transcript of RSP Public Meeting* 187 (Nov. 8, 2013) (testimony of Colonel James McKee, Chief, Special Victims' Advocate Program, U.S. Army; Colonel Carol Joyce, Officer in Charge, Victims' Legal Counsel Organization, U.S. Marine Corps; and Captain Karen Fisher-Anderson, Chief of Staff, Victims' Legal Counsel Program, U.S. Navy).

[398] *See id.* at 165 (testimony of Colonel James McKee, Chief, Special Victims' Advocate Program, U.S. Army).

[399] *See generally id.* at 104-60 (testimony of SVC program heads).

[400] *See* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 8124, 128 Stat. 5 (2014).

[401] DoD Section 1716 Report, *supra* note 385, at 3.

[402] DoDI 6495.02 encl. 5, ¶ 3.c(2),(3).

[403] FY14 NDAA, *supra* note 4, at § 1743(a). (The statute only specifies that the report is to be submitted by a "designated person.") *Id.*

[404] *Id.* at § 1743(b),(c)(E)(i)-(iv).

[405] An Air Force VA told the RSP: "With the program changes that have been made since 2005 until now, I think expedited transfers have been huge for victims . . . ." *Transcript of Public Meeting* 233 (Nov. 7, 2013) (testimony of Master Sergeant Stacia Rountree, Victim Advocate, 11th Wing, Andrews Air Force Base, U.S. Air Force). Victim advocate groups also attest to the necessity of this policy for victim care. In his testimony before the RSP, a representative of the Service Women's Action Network explained that "policies that allow victims to transfer away from hostile units . . . go a long way in ensuring that victims are not in continued jeopardy." *Id.* at 339-40 (testimony of Mr. Greg Jacob, Policy Director, Service Women's Action Network).

[406] *See generally Transcript from RSP Public Meeting*, 145 (Nov. 7, 2013) (testimony of Rear Admiral Sean Buck, Director, Twenty-First Century Sailor Office, U.S. Navy); *Transcript from RSP Public Meeting* 161 (Nov. 7, 2013) (testimony of Christine Altendorf, Ph.D., Director, Sexual Harassment/Assault Response and Prevention (SHARP), U.S. Army).

[407] *Id.; see also* DoDI 6495.02 encl. 5, ¶ 5.b.

[408] *See id; see also Transcript from RSP Public Meeting* 160 (Nov. 7, 2013) (testimony of Christine Altendorf, Ph.D.)

[409] *Id.* 160.

[410] *See generally id.* at 160-66 (testimony of SAPR and SHARP program heads).

[411] DoDI 6495.02 encl. 5, ¶ 5.b(2).

[412] FY14 NDAA, *supra* note 4, at § 1742.

[413] DoDI 6495.02 encl. 7.

[414] *See Transcript of RSP Public Meeting* 95 (May 16, 2014) (discussing evidence taken at site visits by the Victim Services Subcommittee).

[415] DoD SAPRO FY12 Report, Vol. I, *supra* note 21, at 30.

[416] *Id.*

[417] *See* DoDI 6495.02 encl. 2 ¶6.y.

[418] DoD SAPRO FY12 Report, Vol. I, *supra* note 21, at 30; The Safe Helpline phone number is (877) 995-5247 and the website is www.SafeHelpline.org.

[419] VSS Report to RSP, Annex, *infra*, at 43-45.

[420] *See id.*

[421] *See id.*

[422] Department of Defense Task Force on Mental Health: An Achievable Vision 12 (Jun. 2007), *An achievable vision: Report of the Department of Defense Task Force on Mental Health, available at* http://www.taps.org/uploadedFiles/TAPS/RESOURCES/DOD%20Mental%20Health%20Task%20Force%20Report.pdf.

[423] *See* VSS Report to RSP, Annex, *infra*, at 33-35.

[424] *See id.* at 31.

[425] *See id.* at 35.

[426] *Id.* at 39.

[427] *See, e.g.*, JSC-SAS Appendices, *supra* note 361, app. D (Arizona); *id.*, app. I (Maryland); *id.*, app. L (Oregon); *id.*, app. N (Texas).

[428] *See id.* apps. C-P (providing overview of victim advocacy services provided in 18 jurisdictions in 14 states); *see also Transcript of RSP Victim Services Subcommittee Meeting* 211 (Feb. 26, 2014) (testimony of Mr. Scott Berkowitz, Founder and President, Rape, Abuse and Incest National Network (RAINN)) (indicating there are more than 1,000 local sexual assault service programs throughout United States that respond to extensive array of mental health, medical, legal and other needs).

[429] *See* JSC-SAS Appendices, *supra* note 361, apps. C-P.

[430] *See* BJS Special Report, *supra* note 26, at 6.

[431] *See, e.g.*, JSC-SAS APPENDICES, *supra* note 361, app. M at 6 (stating Women Organized Against Rape (WOAR) advocates provide services that include 24-hour hotline, medical accompaniment, adult drop-in groups, counseling and support, accompaniment to court hearings, and support during court process in Philadelphia); *Transcript of RSP Victim Services Subcommittee Meeting* 211(Feb. 26, 2014) (testimony of Mr. Scott Berkowitz, Founder and President, RAINN).

[432] *See* JSC-SAS APPENDICES, *supra* note 361, app. H at 3.

[433] *Id.*

[434] *Transcript of RSP Victim Services Subcommittee Meeting* 343-45 (Feb. 26, 2014) (testimony of Ms. Patricia Haist, Director, Clinical Services, YWCA West Central, Grand Rapids, Michigan) (stating that victims may receive SANE exam and other services without reporting crime to police and that there is agreement with local law enforcement to permit "anonymous" reporting which victim may later convert to actual standard report).

[435] *Id.* at 343.

[436] *Id. at 346.*

[437] Id.at *348.*

[438] *See, e.g., Transcript of RSP Public Meeting* 284 (Nov. 8, 2013) (testimony of Mr. Chris Mallios, Attorney Advisor, AEquitas); *see also* JSC-SAS APPENDICES, *supra* note 361, app. K-3 (Manhattan, NY); *id.*, app. K-4 (Queens, NY); *id.*, app. M at 5 (Philadelphia, PA); *Transcript of RSP Public Meeting* 283 (Nov. 8, 2013) (testimony of Ms. Marjory Fisher, Chief, Special Victims Bureau, Queens, New York).

[439] *Transcript of RSP Public Meeting* 228 (Nov. 8, 2013) (testimony of Ms. Marjory Fisher, Chief, Special Victims Bureau, Queens, New York).

[440] *Id.*

[441] *Id.*

[442] *Id.*

[443] *See* JSC-SAS APPENDICES, *supra* note 361, app. D at 3 (Maricopa County, AZ) (explaining that victim advocates are employed by some police departments in Arizona); *id.*, app. E at 3-5 (San Diego, CA) (describing San Diego Police Department crisis intervention unit which provides short-term support and referral services); *id.*, app. G at 1-3 (Washington, DC) (explaining that both FBI and local law enforcement agencies such as Metropolitan Police Department have victim advocates who are assigned as soon as officers respond to a crime scene); *see also Transcript of RSP Public Meeting* 260 (Dec. 11, 2013) (testimony of Deputy Chief Kirk Albanese, Chief of Detectives, Detective Bureau, Los Angeles Police Department).

[444] JSC-SAS APPENDICES, *supra* note 361, app. C at 2 (Anchorage, AK) (explaining that Standing Together Against Rape (STAR) advocates will accompany victim through investigative process in Alaska); *id.*, app. D at 3 (Maricopa County, AZ) (explaining that in Arizona where there are no police advocates employed by agency, community victim advocates working out of advocacy centers are present for victim support from beginning of investigation); *id.*, app. E at 3-5 (San Diego, CA) (explaining that in addition to advocates who work for San Diego Police Department, community-based advocates are available to accompany victims to law enforcement interviews); *id.*, app. I at 3-4 (Baltimore, MD) (explaining that Turnaround has collaborative relationship with Baltimore County Police Department such that when law enforcement is called to scene, Turnaround is also notified so victim advocate can respond).

[445] *See id.*, apps. C-P.

[446] *See, e.g., id.*, app. I (explaining that social worker on staff with State's Attorney for Baltimore City may work with victim when discussing a case that prosecutor has determined cannot be charged); *id.*, app. L (discussing role victim advocate in Yamill County, OR plays in discussing prosecutor's decision that sexual assault charge cannot be filed).

[447] FY12 NDAA, *supra* note 7, § 584; *see also* U.S., DEP'T OF DEF., SAPRO, OBSERVATION OF SEXUAL ASSAULT RESPONSE COORDINATOR (SARC) AND VICTIM ADVOCATE (VA) SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING: REPORT TO THE U.S. ARMY 2 (Jan. 2013) [hereinafter DoD SAPRO TRAINING REPORT TO ARMY], *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140313_VSS/02a_DoD_SARC_Army_VA_TrainingObservationReport_20130122.pdf; Under Secretary of Defense for Personnel and Readiness, Performance Work Statement for DoD Sexual Assault Advocate Certification Program (D-SAACP) 2 (Jan. 7, 2012) [hereinafter D-SAACP Statement], *currently available at* http://responsesystemspanel.whs.mil/public/docs/meetings/20131107/20131107/01_Overview_DoD_Victims_Svcs/PWS_DoD_SAACP.pdf; DTFSAMS, *supra* note 133, at 50-52 (Dec. 2009).

[448] D-SAACP Statement, *supra* note 447, at § 1.1. The certification program was developed in collaboration with civilian subject matter experts from the Department of Justice's Office of Victims of Crime, National Organization of Victim Advocates (NOVA), the National Advocate Credentialing Program (NACP), and the National Victim Assistance Standards Consortium.

[449] *See* D-SAACP Statement, *supra* note 447.

[450] *See* VSS REPORT TO RSP, Annex, *infra*, at 81-83 (discussing formal training for victim advocate personnel in civilian agencies that include both formal training courses and shadowing, observation, or other experiential requirements before advocates are permitted to work without direct supervision).

[451] *See* DoD SAPRO Training Report to Army, *supra* note 447, at 2. "This report is in response to the requirement in DoDI 6495.02 for Services and the National Guard Bureau to submit a copy of their SAPR training programs, or SAPR training elements, to the Under Secretary of Defense (Personnel and Readiness) through the SAPRO for evaluation of consistency and compliance with DoD SAPR training standards contained in DoDI 6495.02." SAPRO Training Report to Army, *supra* note 447 at 2; *see also* U.S. DoD SAPRO, Observation of Sexual Assault Response Coordinator (SARC) and Victim Advocate (VA) Sexual Assault Prevention and Response Training: Report to the U.S. Air Force (Jan. 2013); U.S. DoD SAPRO, Observation of Sexual Assault Response Coordinator (SARC) and Victim Advocate (VA) Sexual Assault Prevention and Response Training: Report to the U.S. Navy (Mar. 2013); U.S. DoD SAPRO, Observation of Sexual Assault Response Coordinator (SARC) and Victim Advocate (VA) Sexual Assault Prevention and Response Training: Report to the U.S. Marine Corps (Feb. 2013); U.S. DoD SAPRO, Observation of Sexual Assault Response Coordinator (SARC) and Victim Advocate (VA) Sexual Assault Prevention and Response Training: Report to the National Guard Bureau (Jan. 2013). All five training reports are currently available at http://responsesystemspanel.whs.mil/index.php/meetings/meetings-panel-sessions-2/20131107-4/vs-20140313.

[452] DoDI 6495.02 encl. 10, ¶ 7 (Feb. 12, 2014) (Change 1).

[453] *Id.*

[454] *Id.* encl. 10, ¶ 7 (a)(1)-(2).

[455] *Id.* encl. 10, ¶ 7 (b)-(c).

[456] *See* JSC-SAS Appendices, *supra* note 361, apps. C-P.

[457] *Id.*, app. K-1 at 3 (Bronx, NY).

[458] *Transcript of RSP Public Meeting* 257 (Nov. 7, 2013) (testimony of Ms. Autumn Jones, Director, Victim/Witness Program, Arlington County and Falls Church, Virginia); *see also* JSC-SAS Appendices, *supra* note 361, app. M at 6 (Philadelphia, PA).

[459] *See, e.g.*, JSC-SAS Appendices, *supra* note 361, app. K-2 (Brooklyn, NY). Some agencies, such as the YWCA in Grand Rapids, Michigan, have both paid staff and volunteer victim advocates. Volunteer advocates are not required to be college graduates and are provided 35 to 40 hours of training prior to providing any services, such as court-accompaniment. Their work is also observed by a more seasoned volunteer. The YWCA also holds monthly in-house training meetings for advocates. *Transcript of RSP Victim Services Subcommittee Meeting* 354, 360 (Feb. 26, 2014) (testimony of Ms. Patricia Haist, Director, Clinical Services, YWCA West Central, Grand Rapids, Michigan). Prosecution offices in several jurisdictions the Panel examined have formal training for their victim advocates, including observation of court procedures and shadowing an experienced advocate before working independently with victims. *See, e.g.*, JSC-SAS Appendices, *supra* note 361, app. K-2 (Brooklyn, NY) (social workers in Brooklyn District Attorney's Office undergo two-week training program that includes training by ADA's, speakers, sexual assault victim testimonials, shadowing experienced social works and other on-the-job training for which new social worker must by "signed off" or certified by experienced supervisor before beginning duties). For example, victim advocates in the Bronx District Attorney's Office undergo formal training, court observation, and other on-the-job training before receiving their own cases. Informal shadowing may include observing criminal trials and meeting with system based advocates. *Id.*, app. K-1 (Bronx, NY) (victim advocates must complete two-week observation period in courtroom, in addition to unit training and observation by supervisor). In San Diego, advocates from a local community advocate organization are required to complete a five week training period, which encompasses both a formal program and shadowing other advocates. *Id.*, app. E at 5. At the Maricopa County Attorney's Office in Arizona, victim advocates are required to have bachelor's degrees, prior experience as an advocate, parole or probation officer, and complete a training program before beginning to shadow other advocates. *Id.*, app. D at 4. They typically do not handle cases on their own until working in the office for a few months.

[460] *See Minutes of Victim Services Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 9, 2013).

[461] *Id.*

[462] FY 14 NDAA, Pub. L. No. 113-66, §1716(b), 127 Stat. 672 (2013).

[463] *See* Army's and Air Force's Responses to RSP Request for Information 4 (Nov. 1, 2013).

[464] *Transcript of RSP Public Meeting* 114 (Nov. 8, 2013) (testimony of Colonel James McKee, Chief, Special Victims' Advocate Program, U.S. Army).

[465] Army's Response to RSP Request for Information 144 (Apr. 2014).

[466] U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Aug. 14, 2013), *available at* http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf.

[467] Army's Response to RSP Request for Information 144 (Apr. 2014).

[468] *Id.*

[469] U.S. Dep't of Def., Establishment of Special Victim Capabilities within the Military Departments to Respond to Allegations of Certain Special Victim Offenses: Report to the Committees on Armed Services of the U.S. Senate and U.S. House of Representatives 3 (Dec. 2013) [hereinafter DoD Special Victim Capabilities Report], *available at* http://www.sapr.mil/public/docs/reports/DoD_SpecialVictimsCapabilities_Report_20131213.pdf. For further discussion of the Special Victim Capability, see Chapter 9, Section A, *infra*.

[470] DTM 14-003, *supra* note 328, at 3, 4. Funding and requirements are legislated by Congress and established by DoD policy; however, implementation of the Special Victim Capability is left for each Service to tailor programs to the specific needs of their Service's needs, structure, and culture. For more detail on DoD's collective capability and how it is implemented in each Military Service, see CSS Report to RSP, Annex, *infra*, at 65-102, 141-152.

[471] DTM 14-003, *supra* note 328, at 3, 4.

[472] This diagram is an adaptation from a similar graphic the Marine Corps provided the panel in response to Request for Information 21. See Marine Corps' Response to RSP Request for Information 21 (Nov. 21, 2013), at 400419.

[473] The Command support personnel, victim advocate, and special victim counsel (personnel annotated with an asterisk in Figure 9) may remain involved in the case to assist the victim through each phase of the military response process.

[474] U.S. Dep't of Def. Instr. 5505.18, Investigation of Adult Sexual Assault in the Department of Defense ¶ 3.c (May 1, 2013) [hereinafter DoDI 5505.18], *available at* http://www.dtic.mil/whs/directives/corres/pdf/550518p.pdf.

[475] FY14 NDAA, *supra* note 4, at §§ 1742, 1714; *see also*, DoDI 6495.02.

[476] DoDI 6495.02 encl. 5, ¶ 3.h(1).

[477] *See* FY14 NDAA, *supra* note 4, at § 1743. DoD policy also requires SARCs to provide all unrestricted reports and notice of restricted reports to the installation commander within 24 hours of the report. *See* DoDI 6495.02 encl. 4, ¶ 4.

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

[479] DoDI 5505.18, *supra* note 474, at ¶ 3.a.

[480] *Id.*, encl. 2, ¶ 6.

[481] *Id.*, encl. 2, ¶ 1.

[482] *Id.*, ¶ 3.c(3).

[483] *Id.* Additionally, UCMJ jurisdiction over an accused Service member does not deprive state courts of concurrent jurisdiction over that Service member, and states may elect to charge and try military personnel for crimes that occurred in a civilian jurisdiction, regardless of whether the military prosecutes the accused. *See United States v. Delarosa*, 67 M.J. 318, 321 (C.A.A.F. 2009); *see also Heath v. Alabama*, 474 U.S. 82, 89 (1985) (holding that federal and state governments are treated as separate sovereigns, in which criminal proceedings by one sovereign do not preclude proceedings by the other). For offenses that occur on post, the local United States Attorney may also exercise jurisdiction as the Federal sovereign in place of the military. Crimes that occur overseas fall within the jurisdiction of the host country unless exempted by law or agreement with the United States, often through status of forces agreements that provide specific guidance for jurisdiction over Service members.

[484] U.S. Dep't of Def., Directive-Type Memorandum 14-002, The Establishment of Special Victim Capability (SVC) Within the Military Criminal Investigative Organizations (Feb. 11, 2014) [hereinafter DTM 14-002], http://www.dtic.mil/whs/directives/corres/pdf/DTM-14-002.pdf. *See* FY13 NDAA, *supra* note 1 at§ 573 (mandating Special Victim Capabilities in DoD).

[485] For further discussion on the structure and implementation of Special Victim Capabilities, see CSS Report to RSP, Annex, *infra*, at 89-98.

[486] U.S. Dep't of Def., Instr. 5505.03 Initiation of Investigations by Defense Criminal Investigative Organizations, ¶ 4a (Mar. 24, 2011), *available at* http://www.dtic.mil/whs/directives/corres/pdf/550503p.pdf.

[487] DoDI 6495.02, Appendix to Encl. 12, ¶ a (referring to standard reporting of substantiated reports).

[488] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 80 (Nov. 19, 2013) (testimony of Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, Army CID).

[489] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 172-173 (Nov. 19, 2013) (testimony of Chief Warrant Officer Wilson, Marine Corps CID); *see also Transcript of RSP Public Meeting* 255 (Dec. 11, 2013) (testimony of Mr. Kevin Poorman, Associate Director for Criminal Investigations, AFOSI).

[490] *See id.* at 172-73 (testimony of Chief Warrant Officer Five Shannon Wilson, U.S. Marine Corps).

[491] *See id.* at 173.

[492] *See Transcript of RSP Public Meeting* 256 (Dec. 11, 2013)(testimony of Mr. Kevin Poorman, Associate Director for Criminal Investigations, AFOSI); *id.* 251-252 (testimony of Mr. Gilliard, Deputy Assistant Director, NCIS).

[493] *See, e.g., id.* at 190-191.

[494] Colby T. Hauser, "Army Expert Receives National Recognition for Combating Sexual Assault," *available at* http://www.army.mil/article/72055/ (Jan. 17, 2012) (quoting Joanne Archambault, executive director of End Violence Against Women International (EVAWI) and 23-year veteran of San Diego Police Department).

[495] *See generally,* JSC-SAS Appendices, *supra* note 361 (Special Victim Unit (SVU) is used as a generic term for any unit designated to handle sexual assault and other crimes with a more vulnerable victim; police agencies use a variety of terms for these specialized units).

[496] *See generally, Transcript of RSP Public Meeting* 91-92 (Dec. 11, 2013) (testimony of Mr. Guy Surian, U.S. Army CID); Army's and Air Force's Responses to RSP Request for Information 50 (Nov. 21, 2013); *see also* Naval Criminal Investigative Service, "Family and Sexual Violence Program," *available at* http://www.ncis.navy.mil/CoreMissions/FI/Pages/FamilySexualViolenceProgram.aspx; *see also* DTFSAMS, *supra* note 133, at 88.

[497] *See, e.g., Transcript of RSP Public Meeting* 194, 197-198 (Dec. 11, 2013) (testimony of Mr. Neal Marzloff, Special Agent in Charge, Central Region, U.S. Coast Guard Investigative Service (CGIS).

[498] *See id.* at 275 (testimony of Sergeant Liz Donegan, Austin Police Department).

[499] Maryland Coalition Against Sexual Assault, Baltimore City Sexual Assault Response Team, Annual Report (Oct. 5, 2011) [hereinafter MCASA].

[500] *Id.; see also* Joanna Walters, *Investigating Rape in Philadelphia: How One City's Crisis Stands to Help Others,* The Guardian (July 2, 2013).

[501] POLICE EXECUTIVE RESEARCH FORUM (PERF), CRITICAL ISSUES IN POLICING SERIES: IMPROVING THE POLICE RESPONSE TO SEXUAL ASSAULT 2 (Mar. 2012), available at http://www.policeforum.org/critical-issues-series.

[502] *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish Country).

[503] MCASA, *supra* note 499, at 8.

[504] *See, e.g., Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish County Sheriff's Office); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Philadelphia Sexual Assault Response Center (PSARC)* (Feb. 20, 2014) (on file at RSP).

[505] DoDI 5505.18, *supra* note 474, at ¶ 3c. ("All unrestricted reports of sexual assault (and attempts) against adults will be immediately reported to the MCIO, regardless of the severity of the allegation.").

[506] *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP) (interviews of law enforcement personnel); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Joint Base San Antonio (JBSA)* (Dec. 13, 2013) (same).

[507] *Transcript of RSP Public Meeting* 212-13 (Dec. 11, 2013) (testimony of Mr. Guy Surian); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 168-169 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, Associate Director for Criminal Investigations, AFOSI); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP) (interviews of investigators); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBSA* (Dec. 13, 2013) (on file at RSP) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBLM* (Feb. 5, 2014) (on file at RSP) (same).

[508] *Id.; see also* DTFSAMS, *supra* note 133, at 31, 36. For additional discussion, see Chapter 2, Section A.

[509] *See* Navy's Response to RSP Request for Information 137 (Apr. 11, 2014); *see also* Navy's Response to Request for Information 64 (Nov. 21, 2013). NCIS further stated: "In the majority of NCIS sexual assault investigations, the victim's collateral misconduct does not rise to the felony level. Often, the misconduct is a status offense such as underage drinking or adultery or other minor UCMJ violation." *Id.; see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014); (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap* (Feb. 5, 2014) (on file at RSP).

[510] *See* Navy's Response to RSP Request for Information 64 (Nov. 21, 2013) ("In practice, an investigator would rad a victim his/her Article 31 rights if the victim was suspected of a serious collateral offense. For non-serious collateral misconduct, the collateral misconduct would be noted in the NCIS report and deferred to the command for disposition."); *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap* (Feb. 5, 2014) (on file at RSP).

[511] *Transcript of RSP Public Meeting* 262 (Dec. 11, 2013) (testimony of Deputy Chief Kirk Albanese, Chief of Detectives, Detective Bureau, Los Angeles Police Department); JSC-SAS Appendices, *supra* note 361, apps. C-P.

[512] *See, e.g., Transcript of RSP Public Meeting* 262 (Dec. 11, 2013) (testimony of Deputy Chief Kirk Albanese, Los Angeles Police Department).

[513] *Id.*

[514] *See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Station Kitsap* (Feb. 5, 2014) (on file at RSP).

[515] Requirements for approval of the use of electronic intercept and recording communications are governed by a DoD Instruction that is not publicly available. *See* U.S. DEP'T OF THE ARMY REG. 190-53, INTERCEPTION OF WIRE, ELECTRONIC, AND ORAL COMMUNICATIONS FOR LAW ENFORCEMENT PURPOSES (Nov. 3, 1986). *See also Transcript of RSP Public Meeting* 212 (Dec. 11, 2013) (testimony of Mr. Guy Surian); *Transcript of RSP Comparative Systems Subcommittee Meeting* 169 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman); *id.* at 170 (testimony of Mr. Guy Surian).

[516] *Id.*

[517] OVW PROTOCOL, *supra* note 323, at 101.

[518] *See, e.g., Minutes of RSP Comparative Systems Subcommittee Preparatory Session, DFSC/USACIL* (Nov. 14, 2013) (on file at RSP) (interview of Dr. Jeff Salyards, Executive Director, DFSC); *Transcript of RSP Comparative Systems Subcommittee Meeting* 333-334 (Nov. 19, 2013) (testimony of Sue Rotolo, Ph.D., former SANE Coordinator, Inova Fairfax Hospital, Fairfax, Virginia), (testimony of Commander Kristie Robson, Dept. Head of Clinical Programs, U.S. Navy Bureau of Medicine and Surgery), and (Colonel (Retired) Carol Haig, Chief, Women's Health Service Line and Deputy, Sexual Harassment/Assault Response and Prevention Workgroup, office of the U.S. Army Surgeon General); *see also, Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview with Ms. Paula Newman-Skomski, Nurse Practitioner, Providence Intervention Center for Assault and Abuse).

[519] *See, e.g., Transcript of RSP Comparative System Subcommittee Meeting* 27, 37-38 (Nov. 19, 2013) (testimony of Mr. Scott Russell, Director, Violent Crimes Division, DoD IG).

[520] *See, e.g., id.* at 13-20, 51-58 (testimony of Mr. Scott Russell).

[521] DoDI 6495.02 encl. 2, ¶ 5a.

[522] DoD IG, EVALUATION OF THE MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS' SEXUAL ASSAULT INVESTIGATIONS (July 2013) [hereinafter DoD IG JULY 2013 REPORT], *available at* http://www.dodig.mil/pubs/documents/DODIG-2013-091.pdf.

[523] *See, e.g.*, MCASA, *supra* note 499 at 9-11; Walters, *supra* note 500; *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, PSARC* (Feb. 20, 2014) (on file at RSP); *Transcript of RSP Comparative Systems Subcommittee Meeting* 339 (Nov. 19, 2013) (testimony of Major Martin Bartness, Baltimore Police Department). Additionally, Cassia Spohn, a criminal justice expert who has written and studied policing and prosecuting sexual assault cases recently reviewed sexual assault case files from the Los Angeles Police Department and the Los Angeles Sheriff's Office and found that a significant number of cases were inappropriately unfounded or inappropriately closed through clearance by exceptional means. Cassia Spohn and Katherine Tellis, *Policing and Prosecuting Sexual Assault in Los Angeles City and County: A Collaborative Study in Partnership with the Los Angeles Police Department, the Lost Angeles County Sheriff's Department, and the Los Angeles County District Attorney's Office* (Feb. 2012), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf.

[524] *See* DoD Response to RSP Request for Information 59 (Nov. 21, 2013).

[525] DoDI 6495.02, Appendix to encl. 12 ¶ d.

[526] *See* UCR HANDBOOK, *supra* note 180, at 41.

[527] DoD SAPRO FY13 REPORT, *supra* note 66, at 77. This report also defines unfounded as "false or baseless."

[528] For more information on the minimum level of commander/convening authority who may resolve sexual assault allegations, *see* discussion of "Initial Disposition Authority," *infra*, at Part B.2. of this Chapter.

[529] *Transcript of RSP Public Meeting* 268-69 (Dec. 12, 2013) (testimony of Cassia Spohn, Ph.D., Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University); *see also* Air Force Response to RSP Request for Information 39 (at attached Powerpoint slides) (Nov. 21, 2013); Services' Responses to RSP Request for Information 59 (Nov. 21, 2013).

[530] Navy and Marine Corps' Response to RSP Request for Information 59 (Nov. 21, 2013).

[531] U.S. DEP'T OF THE ARMY REG. 190-45, LAW ENFORCEMENT REPORTING 136 (Mar. 30, 2007).

[532] Army's Responses to RSP Requests for Information 58, 59, 66 (Nov. 21, 2013); *see also Transcript of RSP Public Meeting* 221-22 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Office of The Judge Advocate General, U.S. Army, discussing role of trial counsel in founding and unfounding offenses).

[533] FY14 NDAA, *supra* note 4, at §1732 provided, "the Secretary of Defense shall conduct a review of the practices of the military criminal investigative organizations (Army Criminal Investigative Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigation) in response to an allegation that a member of the Armed Forces has committed an offense under the Uniform Code of Military Justice, including the extent to which the military criminal investigative organizations make a recommendation regarding whether an allegation appears founded or unfounded." The Panel did not receive or review this report prior to the publication of the report.

[534] UCR Handbook, *supra* note 180, at 77-78.

[535] A best practice among civilian law enforcement agencies requires detectives to remain assigned to cases after the cases are referred to the prosecutor. JSC-SAS Appendices, *supra* note 361, apps. C-P. For example, in Philadelphia, detectives and investigative staff will remain involved after the case goes to the prosecutor and will complete follow-up work requested by the prosecutor. *Id.*, app. M at 2.

[536] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 357 (Nov. 19, 2013) (testimony of Lieutenant Mark Kidd, Fairfax Police Department).

[537] *See, e.g., id.* at 357-58 (testimony of Lieutenant Mark Kidd and Lieutenant Paul Thompson, Fairfax County Police Department, Detective Lanis Geluso, Virginia Beach Police Department, and Ms. Rhonnie Jaus, explaining that most civilian police procedures require the detective to get supervisor approval to unfound a sexual assault case).

[538] JSC-SAS Appendices, *supra* note 361, apps. C-P.

[539] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 389 (Nov. 19, 2013) (testimony of Detective Lanis Geluso, Virginia Beach Police Department).

[540] *See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, PSARC* (Feb. 20, 2014) (on file at RSP) (interview with Captain John Darby). For example, the Philadelphia SVU uses nine percent as a benchmark, and does an in-depth review if the unfounded rate goes into the double digits. *Id.* The Baltimore Police Department adopted a similar practice after discovering that "more than 30 percent of the cases investigated each year were determined by officers to be false or baseless . . . five times the national average." MCASA, *supra* note 499, at 2. Both Philadelphia and Baltimore detectives said this required culture change regarding measuring success – they had to accept a lower number of closed, unfounded cases, and adjust to having a higher number of open cases.

[541] *See Transcript of RSP Public Meeting* 221-22 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

[542] *Id.* at 180 (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force); *id.* at 245 (testimony of Captain Stephen McCleary, Chief, Office of Legal Policy and Program Development, U.S. Coast Guard); *id.* at 250 testimony of Captain Robert Crow, Director, Criminal Law Division, U.S. Navy).

[543] Air Force and Navy Responses to RSP Request for Information 58 (Nov. 21, 2013).

[544] DoD IG July 2013 Report, *supra* note 522.

[545] *See Transcript of RSP Public Meeting* 221-222 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army); *see also* Army's Responses to RSP Request for Information 58 (Nov. 21, 2013).

[546] *See* Army's Response to RSP Request for Information 66 (Nov. 21, 2013).

[547] 2012 MCM, *supra* note 79, R.C.M. 601(d)(1); *see also, id.* at R.C.M. 406 discussion; 10 U.S.C. §834 (UCMJ art. 34).

[548] DoDI 5505.18, *supra* note 474, at encl. 2, ¶ 5.

[549] *See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session,* JBSA (Dec. 13, 2013) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and JBLM* (Feb. 5, 2014) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (same).

[550] *See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP).

[551] *Id.*; A best practice used by the Coast Guard in case classification describes cases as "open," "open – pending adjudication," or "closed – based on final adjudication."

[552] *Transcript of RSP Public Meeting* 80 (Sept. 25, 2013) (testimony of Lieutenant Colonel Kevin C. Harris, U.S. Marine Corps).

[553] *Id.*

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

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

[556] Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 Tul. J. Int'l and Comp. L. 419, 426 (Spring 2008).

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

[558] The Committee addressed such testimony in its report as follows:

> We fully agreed that such a provision might be desirable if it were practicable, but we are of the opinion that it is not practicable. We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations. Our conclusions in this respect are contrary to the recommendations of numerous capable and respected witnesses who testified before our committee, but the responsibility for the choice was a matter which had to be resolved according to the dictates of our own conscience and judgment.

H.R. Rep. No. 81-491, at 7-8 (1949).

[559] *See* Hansen, *supra* note 556, at 427; Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 Mil. L. Rev. 190, 226 (June 2003) (noting "legislative compromise" reflected in UCMJ in that Congress "retained the commander as the central figure of the military justice system, yet significantly modified his powers and added statutory checks and balances to limit outright despotism"); Major General Kenneth J. Hodson, U.S. Army, *Perspective: The Manual for Courts-Martial – 1984*, 57 Mil. L. Rev. 1, 5 (July 1972) (describing UCMJ as representing "liberal compromise between the commanders and the lawyers"); The Judge Advocate General's School, The Background of the Uniform Code of Military Justice 10 (1959) [hereinafter TJAG's School].

[560] Manual for Courts-Martial, United States ¶ 35b (1969); Manual for Courts-Martial, United States ¶ 35b (1951). This "clarified th[e] ambiguity" that existed in this regard in the Articles of War. TJAG's School, *supra* note 559.

[561] Manual for Courts-Martial, United States pt. IV, ¶ A2-11 (1984). In codifying this clarification, Congress noted that, in practice, commanders already "normally rel[ied] on" their staff judge advocates for such "complex legal determinations." S. Rep. No. 98-53, at 4 (1983); *accord* H.R. Rep. No. 98-549, at 14 (1983).

[562] For a summary of the FY14 NDAA provisions that impact roles and responsibilities of commanders in sexual assault prevention and response, see Part III of RoC Subcommittee Report to RSP, Annex, *infra*.

[563] *Transcript of RSP Public Meeting* 197 (June 27, 2013) (testimony of Mr. Fred Borch, Regimental Historian, U.S. Army Judge Advocate General's Corps).

[564] Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 Harv. L. Rev. 937, 943 (2010).

[565] *See* 2012 MCM, *supra* note 79, R.C.M. 306.

[566] SecDef Apr. 2012 Withhold Memo, *supra* note 170.

[567] DoDI 6495.02 encl. 5, ¶ 7.b (referring to SecDef Apr. 2012 Withhold Memo, *supra* note 170).

[568] *Id.*

[569] DODI 6495.02, appendix to Encl. 12 ¶¶ a, c. d. *See generally* SecDef Apr. 2012 Withhold Memo, *supra* note 170; *see also Transcript of RSP Public Meeting* 210-11 (June 27, 2013) (testimony of Mr. Fred Borch, Regimental Historian, U.S. Army Judge Advocate General's Corps) ("[C]ommanders do not make decisions in a vacuum . . . and their [j]udge [a]dvocates are involved at every step of the way . . . ."). Disposition may include no action, nonjudicial punishment, administrative action such as administrative separation from the service, referral to a summary or special court-martial, or directing a pretrial investigation pursuant to Article 32 of the UCMJ if the disposition authority determines a general court-martial may be warranted.

[570] *See generally Transcript of RSP Role of the Commander Subcommittee Meeting* 6-199 (Sept. 25, 2013) (testimony of senior military commanders and staff judge advocates explaining convening authority's reliance on advice of staff judge advocate).

[571] *See* U.S. Dep't of Army, Army Reg. 27-26, Rules of Professional Conduct for Lawyers 23 (Rule 3.8) (May 1, 1992), *available at* http://www.apd.army.mil/pdffiles/r27_26.pdf; U.S. Dep't of Air Force, Air Force Instr. 51-201, Administration of Military Justice 299 (Standard 3-3.9) (June 6, 2013), *available at* http://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf; U.S. Dep't of Navy, Judge Advocate General Instr. 5803.1D, Professional Conduct of Attorneys Practicing under the Cognizance and Supervision of The Judge Advocate General 95 (Rule 3.8) (May 1, 2012), *available at* http://www.jag.navy.mil/library/instructions/JAGINST_5803-1D.pdf.

[572] 2012 MCM, *supra* note 79, R.C.M. 306 disc.

[573] For a comparison of the factors considered by military authorities versus federal and state prosecutors, see CSS Report to RSP, Annex, *infra*, at 168-75.

[574] 2012 MCM, *supra* note 79, R.C.M. 306 disc.

[575] FY14 NDAA, *supra* note 4, at § 1708.

[576] For a comparison with civilian prosecutors' consideration of the suspects' background, see Cassia Spohn and David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 Just. Quarterly 651 (2004) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)) ("These studies suggest that although [civilian] prosecutors' assessments of convictability are based primarily on legal factors such as the seriousness of the offense, the strength of evidence in the case, and the culpability of the defendant, legally irrelevant characteristics of the suspect and victim also come into play.").

[577] 2012 MCM, *supra* note 79, at R.C.M. 401(c).

[578] For additional discussion of the prosecutor disposition decisions according to the Department of Justice's United States Attorney's Manual, see CSS Report to RSP, Annex, *infra*, at 172-79.

[579] For additional discussion of the prosecutor disposition decisions according to the Department of Justice's United States Attorney's Manual, see CSS Report to RSP, Annex, *infra*, at 172-79.

[580] *See Transcript of CSS Meeting* 289, 293-97 (Apr. 11, 2014) (Ms. Jaus, a subcommittee member, explained there are alternate dispositions available to civilian prosecutors similar to those in the military. For instance, she compared a prosecutor informing a teacher that he must resign from his job or he will face criminal charges which may be compared to a resignation in lieu of a court-martial.).

[581] For a summary of situations provided by the Services where alternatives to courts-martial may be appropriate, see CSS Report to RSP, Annex, *infra*, at 172-79.

[582] *See* Services' Responses to RSP Request for Information 41(d) (Nov. 21, 2013) (noting that of 117 cases where commander imposed nonjudicial punishment, none involved penetrative offense and most consisted of unwanted touching over clothing).

[583] In FY13, there were 5,061 reports of sexual assault incidents, with 1,293 filed as restricted reports and 3,768 filed as unrestricted reports. In the 3,768 unrestricted reports, there were 3,858 subjects identified, which is depicted in Figure 13. *Transcript of RSP Public Meeting* 73-76 (May 5, 2014) (testimony of Major General Jeffrey J. Snow, Director, DoD SAPRO). *See also* DoD SAPRO FY13 Report, *supra* note 66, at 76, 78, 79 (Exhibits 9, 10, Table 4). For additional discussion regarding the multiple definitions of "unfounded" applied by MCIOs and commanders, *see* Chapter 7, Part C of this report.

[584] *See* 10 U.S.C. § 830 (UCMJ art. 30).

[585] An accused may waive an Article 32 hearing, but the government does not have to accept the waiver. *See* 2012 MCM, *supra* note 79, R.C.M 405(k).

[586] *Id.*, R.C.M. 405(c). The SPCMCA normally orders Article 32 investigations.

[587] For a description of the "Initial Disposition Authority" *see supra*, Part B of this Chapter.

[588] *Id.* at R.C.M. 405(d)(1). Section 1702 mandates that a judge advocate of equal or senior rank to the military counsel is required serve as the hearing officer "whenever practicable" in all cases. FY14 NDAA, *supra* note 4, § 1702(b)(2). In an August 2013 memorandum, the Secretary of Defense mandated that all Services would provide judge advocates as investigating officers in Article 32 investigations where sexual assault is alleged by December 1, 2013. U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Aug. 14, 2013).

[589] 10 U.S.C. § 832 (UCMJ art. 32).

[590] *See* FY14 NDAA, *supra* note 4, at § 1702(a).

[591] *Id.* at § 1702(d)(1).

[592] *See* 2012 MCM, *supra* note 79, R.C.M. 702(a) disc.

[593] *Id.*, R.C.M. 702(b).

[594] *See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Philadelphia Sexual Assault Response Center, PA.* (Feb. 20, 2014) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session Everett, WA* (Feb. 6, 2014) (on file at RSP).

[595] *See* 2012 MCM, *supra* note 79, R.C.M. 405(j). The report should include the name of the defense counsel, the substance of the testimony taken, other matters considered, a statement of any reasonable grounds to question the accused's mental responsibility for the offense or ability to participate, a statement regarding the availability of witnesses and evidence, an explanation of delays, a conclusion as to whether the charges are in their proper form, a conclusion as to whether reasonable grounds exist to believe the accused committed the charged offenses, and a recommendation that includes disposition.

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

[597] *See* FY14 NDAA, *supra* note 4, at § 1705.

[598] 10 U.S.C. § 832 (UCMJ art. 32); 2012 MCM, *supra* note 79, R.C.M. 405. As noted above, the FY14 NDAA mandated substantial changes to Article 32 investigations, which will take effect on December 27, 2014. *See supra* note 588 and accompanying text.

[599] A staff judge advocate is a senior military attorney who serves as the principal legal advisor of a command. 2012 MCM, *supra* note 79, R.C.M. 103(17), R.C.M. 105(a). Staff judge advocates to GCMCAs are typically in the grade of O-5 or O-6. *See Transcript of RSP Public Meeting* 244 (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).

[600] The discussion to R.C.M. 406 provides that a staff judge advocate will use a probable cause standard of proof in assessing whether the allegation of each offense is warranted by the evidence in the report of investigation. MCM, *supra* note 179, R.C.M. 406(b)(2) discussion; *see also, id.* at R.C.M. 601(d)(1).

[601] 10 U.S.C. § 834 (UCMJ art. 34); 2012 MCM, *supra* note 79, R.C.M. 406.

[602] *Id.* Article 34 of the UCMJ requires only written SJA advice for referral to general courts-martial, 10 U.S.C. § 834, but written advice may be provided to the convening authority in referrals to lesser courts-martial as well.

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

[604] RoC Subcommittee Report to RSP, Annex, *infra*, at 82.

[605] *See* 10 U.S.C. § 806(b) (UCMJ art. 6(b)).

[606] *Transcript of RSP Public Meeting* 206-07 (Sept. 25, 2013) (testimony of Brigadier General Richard C. Gross, U.S. Army).

[607] *Id.* at 207.

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

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

[610] FY14 NDAA, *supra* note 4, at § 1744.

[611] S. 1917, § 2, 113th Cong., Victims Protection Act of 2014 (2014).

[612] FY14 NDAA, *supra* note 4, at § 1744.

[613] S. 1917, § 2, 113th Cong., Victims Protection Act of 2014 (2014).

[614] FY14 NDAA, *supra* note 4, at § 1744(e)(6). The case file must include: the preferral of charges, reports of MCIO investigations and Article 32 reports, the written advice of the staff judge advocate to the convening authority, a written statement explaining the reasons for the convening authority's decision not to refer any charges for trial by court-martial, and certification of compliance with victim rights and the victim's statements to the MCIO, chain of command, and convening authority.

[615] *See* Services' Responses to RSP Requests for Information 69 (Nov. 21, 2013) (stating consistently that there is no formal written requirement but that they each follow general policies requiring communication between staff judge advocates and convening authorities). If the charges are forwarded to the general court-martial convening authority, the staff judge advocate must provide written advice on the legal sufficiency of the charges and a recommended disposition as to the charges pursuant to Article 34 of the UCMJ and Rule for Courts-Martial 406. *See* 10 U.S.C. § 834; 2012 MCM, *supra* note 79, R.C.M. 406. The general court-martial convening authority can then refer the charges to a court-martial or dismiss the charges and no further written documentation is required. Additionally, Rule 604 contemplates a written declination for cases that have been withdrawn and are re-referred. *See* 2012 MCM, *supra* note 79, R.C.M. 604. Withdrawal does not automatically require written justification; however, in the event that the charges are later referred to another court-martial, the discussion to Rule for Court-Martial 604 suggests that the reasons for the withdrawal and later referral should be included in the record of the later court-martial. *Id.* disc.

[616] *Id.*

[617] 10 U.S.C. § 834 (UCMJ art. 34); 2012 MCM, *supra* note 79, R.C.M. 604.

[618] *See* Services' Responses to RSP Request for Information 69 (Nov. 21, 2013).

[619] *See generally* JSC-SAS APPENDICES, *supra* note 361, apps. C-P.

[620] *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL 9-2001 (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

[621] 2012 MCM, *supra* note 79, R.C.M. 601.

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

[623] 10 U.S.C. § 825(d)(2) (UCMJ art. 25(d)(2)).

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

[625] 2012 MCM, *supra* note 79, R.C.M. 703(c)(2)(D).

[626] 10 U.S.C. § 846 (UCMJ art. 46); 2012 MCM, *supra* note 79, R.C.M. 701, 703.

[627] *Transcript of RSP Public Meeting* 297 (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service, U.S. Army).

[628] 2012 MCM, *supra* note 79, R.C.M. 703(c)(1). *See also Transcript of RSP Public Meeting* 297 (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service, U.S. Army).

[629] *See Transcript of RSP Public Meeting* 327 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps).

[630] *Id.*

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

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

[633] *Transcript of RSP Public Meeting* 374 (Dec. 12, 2013) (testimony of Ms. Amy Muth, Attorney-at-Law, Law Offices of Amy Muth).

[634] Section 1704 applies to any allegation of a violation of Articles 120, 120a, 120b, 120c, 125, or attempts to commit any of these offenses under Article 80 of the UCMJ.

[635] FY14 NDAA, *supra* note 4, at § 1704.

[636] 2012 MCM, *supra* note 79, R.C.M. 801. Under Article 35 of the UCMJ, the initial session cannot be held earlier than five days following referral to general court-martial (or three days in the case of a special court-martial). 10 U.S.C. § 835.

[637] 2012 MCM, *supra* note 79, R.C.M. 503(b)(1).

[638] The only possible exception to this would be instances in which a court-martial is convened by the Service Secretary, the Secretary of Defense, or the President.

[639] 2012 MCM, *supra* note 79, R.C.M. 703(c)(2)(D).

[640] For an earlier study, see U.S. DEP'T OF THE ARMY, MILITARY JUSTICE REVIEW (2004), *currently available at* http://responsesystemspanel.whs.mil/index.php/meetings/meetings-panel-sessions-2/20131107-5/roc-20140312?highlight=WyJtaWxpdGFyeSBqdXN0aWNlIHJldmlld3Jd. The Army's 2004 study included a detailed analysis and recommendation to insert the military judge earlier in the military justice process. The Army study provided this summary of their proposed change:

> Although the court-martial itself does not come into existence prior to referral, every case has a life of its own that begins at the time of the alleged offense, and significant legal issues arise prior to referral. This proposal recognizes that a military judge could play an important supervisory role in the military justice process prior to referral of charges. While commanders and convening authorities will continue to make all critical decisions in the case: preferral, level of referral,[be responsible for] funding witnesses and experts, and clemency, this proposal will relieve the Special Court-Martial Convening Authorities (SPCMCA) and General Court-Martial Convening Authorities (GCMCA) from the burden of making essentially judicial decisions on other matters.

Id.

[641] David A. Schlueter, "A White Paper on the Proposed Amendments to the Uniform Code of Military Justice" 6 (Nov. 2013) (submitted to RSP Jan. 7, 2014), *currently available at* http://responsesystemspanel.whs.mil/public/docs/Public_Comment_Unrelated/05-Nov-13/WhitePaper_Propposed_Amend_to_UCMJ_DavidSchlueter_201311.pdf.

[642] David A. Schlueter, "A White Paper on the Proposed Amendments to the Uniform Code of Military Justice," at 2 (Nov. 2013) (submitted to Response Systems Panel Jan. 7, 2014), *currently available at* http://responsesystemspanel.whs.mil/public/docs/Public_Comment_Unrelated/05-Nov-13/WhitePaper_Propposed_Amend_to_UCMJ_DavidSchlueter_201311.pdf.

[643] Some civilian defense attorneys use sex offender risk assessments at various stages of proceedings, including during plea bargain negotiations. These assessments can help promote rehabilitation and prevent recidivism by identifying appropriate therapy.

[644] Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-martial*, 58 Naval L. Rev. 39 (2009), explains the plea process in the military as follows:

> During a judge-alone guilty plea with a pretrial agreement, a military judge conducts a "providence inquiry" to ensure the defendant is really guilty, and announces a sentence without knowing the punishment limitations of the pretrial agreement between the defendant and the officer convening the court-martial. If the military judge (or the members in a members' sentencing case with a pretrial agreement) adjudges less time than the confinement cap in the pretrial agreement, the defendant "beats the deal" and receives only what the sentencing authority has adjudged. On the other hand, if the judge sentences the defendant to more confinement time than contained in the agreement, the excess is typically either suspended or disapproved. A military judge is not permitted to remedy a pretrial agreement he perceives as too lenient but may make a clemency recommendation to the Convening Authority to reduce an adjudged sentence.

Id. at 46 (referring to R.C.M. 910(f)(3) and 1106(d)(3)).

[645] The convening authority's ability to enter into certain terms of a pretrial agreement will be limited based on statutory changes to Articles 18 and 60 of the UCMJ. *See* FY14 NDAA, *supra* note 4, at § 1702.

[646] *Id.* at §§ 1702(b), 1705.

[647] *See* Services' Responses to RSP Request for Information 41 (Nov. 21, 2013). In FY 2013, 70% of Army sexual assault cases involved not guilty pleas, compared to 77% of Navy cases. The Coast Guard's contested case rate was 22%, but that Service completed only nine trials. Data was not provided by the Air Force, and the percentage of total cases was not available for the Marine Corps. The Army was the only Service that tracked plea data prior to FY13.

[648] *Transcript of RSP Victim Services Subcommittee Meeting* 224-225 (Jan. 9, 2014) (testimony of Major Ryan Oakley, Office of the Under Secretary of Defense for Personnel and Readiness, Office of Legal Policy); U.S. Dep't of Def. Dir. 1030.01Victim Witness Assistance ¶ 4 (Apr. 13, 2004) [hereinafter DoDD 1030.01], *available at* http://www.dtic.mil/whs/directives/corres/pdf/103001p.pdf.

[649] 18 U.S.C. § 3771. The Crime Victims' Rights Act was enacted in October 2004 as part of the Justice for All Act. It provides victims eight rights in federal criminal cases: (1) The right to be reasonably protected from the accused; (2) The right to reasonable, accurate, and timely notice of any public court proceeding or any parole proceeding involving the crime, or of any release or escape of the accused; (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

[650] *Transcript of RSP Victim Services Subcommittee Meeting* 226 (Jan. 9, 2014) (testimony of Major Ryan Oakley, Office of the Under Secretary of Defense for Personnel and Readiness, Office of Legal Policy, that these rights were modeled on the Victims' Rights and Restitution Act of 1990, predecessor of CVRA); *see also* VSS Report to RSP, Annex, *infra*, at 136-38.

[651] 18 U.S.C. § 3771.

[652] FY14 NDAA, *supra* note 4, at § 1731.

[653] A detailed comparison of rights provided to crime victims under DoD policy, the CVRA, and the FY14 NDAA is provided at Appendix H, *infra*.

[654] *See* FY14 NDAA, *supra* note 4, at § 1701; DoDD 1030.01, *supra* note 648, ¶ 4.

[655] *See infra* Appendix H (comparing victim rights under CVRA, DoD policy, and FY14 NDAA).

[656] U.S. Dep't of Def. Inst. 1030.02, Victim Witness Assistance Procedures ¶ 6.3 (June 4, 2004), *available at* http://www.dtic.mil/whs/directives/corres/pdf/103002p.pdf.

[657] *Id.*

[658] *See* FY14 NDAA, *supra* note 4, at § 1701.

[659] *See* VSS Report to RSP, Annex, *infra*, at 136-38.

[660] FY14 NDAA, *supra* note 4, at §§ 1716, 1716 .

[661] *Id.* at § 1701(b); *see also* VSS Report to RSP, Annex, *infra*, at 111-17; and see discussion of special victim counsel, *supra* at Chapter 4, part D.

[662] *L.R.M. v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013).

[663] *See* VSS Report to RSP, Annex, *infra*, at 114-17.

[664] *See* 2012 MCM, *supra* note 79, R.C.M. 1001-1007 (sentencing).

[665] *Id.*

[666] *See* Fed. R. Crim. P. 32.

[667] DoD SAPRO FY13 Report, *supra* note 66, encls. 2-5.

[668] *Id.*

[669] *See, e.g.*, "Navy Releases March Court-Martial Results," Navy Times (Apr. 15, 2014); *see also* "Navy, Marine Corps to Post Offender List on Homepages," Marine Corps Times (July 18, 2013); U.S. Marine Corps, "Marine Corps General and Special Court-Martial Dispositions: Oct 13 - Mar 14" (directly accessible at Marine Corps homepage, http://www.marines.mil/ at "Courts-Martial" link at bottom right), *at* http://www.hqmc.marines.mil/portals/61/Docs/courtsmartial0314.pdf.

[670] Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 Mil. L. Rev. 159, 161 (2000) (comparing 18 U.S.C. § 3553(a)(2) with U.S. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook 64 (Sept. 30, 1996)).

[671] The term "federal judicial system" or "federal system" refers to the U.S. Federal Courts, established by Article III of the U.S. Constitution.

[672] *See* 18 U.S.C. § 3553(a)(2).

[673] *See* FY14 NDAA, *supra* note 4, § 1702(b). Section C of this Chapter, *supra*, explains the discretionary limits established by Section 1702(b).

[674] DoD SAPRO FY13 Report, *supra* note 66, encls. 2-5.

[675] The exceptions are Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. *See* Ark Code Ann. § 5-4-103(a) (1987) ("If a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment in a separate proceeding as authorized by this chapter."); Ky. Rev. Stat. Ann. § 532.055(2) (2008) ("Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury."); Mo. Rev. Stat. § 557.036 (2003) ("If the jury at the first stage of a trial finds the defendant guilty of the submitted offense, the second stage of the trial shall proceed . . . . The jury shall assess and declare the punishment as authorized by statute."); Okla. Stat. Ann. tit. 22, § 926.1 (2003) ("In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law . . . ."); Tex. Code Crim. Proc. Ann. § 37.07(2)(b) (2007) ("[W]here the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury . . . ."); Va. Code Ann. § 19.2-295 (2009) ("Within the limits prescribed by law, the term of confinement in the state correctional facility or in jail and the amount of fine, if any, of a person convicted of a criminal offense, shall be ascertained by the jury . . . .").

[676] *See, e.g.*, Fed. R. Crim. P. 32; *see also, e.g.*, Administrative Office of the U.S. Courts, The Federal Court System in the United States: An Introduction for Judges and Judicial Administrators in Other Countries 29-30 (2010) [hereinafter AOUSC] (describing role of federal district judges in sentencing).

[677] *See* 2012 MCM, *supra* note 79, R.C.M. 903.

[678] *See id.*, R.C.M. 903 (forum selection); *id.*, R.C.M. 910 (pleas). For analysis and discussion of Rules 903 and 910, see *id.*, app. 21. The Service member also has the right to know the military judge's identity before making this election. 10 U.S.C. § 816 (UCMJ art. 16). The convening authority selects members "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825 (UCMJ art. 25). By default members are officers, unless the accused is enlisted and requests enlisted members; in that case, at least one-third must be enlisted, and must be from another unit. *Id.*

[679] *See* 2012 MCM, *supra* note 79, R.C.M. 903(b)(2) (noting that approval or disapproval of request for military judge alone is at discretion of military judge). The discussion following R.C.M. 903(b)(2)(B) states: "A timely request for trial by military judge alone should be granted unless there is substantial reason why, in the interest of justice, the military judge should not sit as fact finder. The military judge may hear arguments from counsel before acting on the request. The basis for denial of a request must be made a matter of record." *Id.*, R.C.M. 903(b)(2)(B) disc.

[680] *Id.*, R.C.M. 903 (forum selection).

[681] *Id.*

[682] *See, e.g.*, Military Justice Act of 1983 Advisory Commission, Advisory Comm'n Report (1984) [hereinafter Advisory Comm'n Report], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/ACR-1983-I.pdf.

[683] *See* Services' Responses to RSP Request for Information 148 (Nov. 21, 2014).

[684] Major General (Retired) Kenneth J. Hodson, former Judge Advocate General of the Army, testified before the 1983 Commission, in part, as follows:

> I dealt with many convening authorities, and none have ever complained of the findings of a court, but many have been upset by the sentence . . . Incidentally, I have never had a convening authority complain about a sentence imposed by a judge . . . Sentences adjudged by court members are adjudged pretty much in ignorance, and they tend to vary widely for the same or similar offenses. They amount almost to sentencing by lottery.

Advisory Comm'n Report, *supra* note 682, at 90.

[685] *See, e.g.*, Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 Wash. U. J. Urb. and Contemp. L. 3, 39 (1994) (discussing jury sentencing in statistical analysis of sentences imposed by judges and juries demonstrating that jurors sentenced more severely and concluding that jurors "may be both more harsh and more erratic than judges").

[686] For a complete discussion of issues, including arguments to retain and eliminate the current sentencing authority of military panels, see CSS Report to RSP, Annex, *infra*, at 219, 239.

[687] *See, e.g.*, Army's Response to RSP Request for Information 147 (Apr. 11, 2014) (stating that military judges in Army are selected by The Judge Advocate General, upon recommendation by Chief Trial Judge, pursuant to criteria including legal and military justice experience, length of service, demonstration of mature judgment and high character, and other factors listed in Chapter 8 of JAGC Publication 1-1); *see* U.S. Dep't of the Army, Office of The Judge Advocate General, Pub. 1-1 ("Personnel Policies") (Jan. 1, 2014) (updated Mar. 17, 2014)..

[688] *See* 10 U.S.C. § 825 (UCMJ art. 25); *see generally, e.g.*, *United States v. Gutierrez*, 11 M.J. 122, 125 (C.M.A. 1981) (Everett, C.J., dissenting) (discussing maximum punishment advisement to members and stating about sentencing that "[w]hile court-martial members should not languish in ignorance, they should also be shielded from information which could well tend to confuse or mislead them").

[689] Sentencing complexity may be one reason: In the military, all known offenses committed by an accused may be tried at the same time, even if the offenses are not related to each other in any way. 2012 MCM, *supra* note 79, R.C.M. 307(c)(4) ("Charges and specifications alleging all known offenses by an accused may be preferred at the same time."). Further, punishments not available in civilian courts include: reprimand; reduction in pay grade; restriction to specified limits; hard labor without confinement; and punitive separation. *See id.*, R.C.M. 1006, R.C.M. 1007. Punishments typically available in the civilian setting include: the death penalty; incarceration; probation (remain at liberty but subject to certain conditions and restrictions such as drug testing or drug treatment); fines; and restitution. *See* Bureau of Justice Statistics, "The Justice System: What Is the Sequence of Events in the Criminal Justice System: Sentencing and Sanctions," *available at* http://www.bjs.gov/content/justsys.cfm#sentencing.

[690] Brigadier General John S. Cooke, *The Twenty Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 Mil. L. Rev. 11, 25 (1998).

[691] *See, e.g.*, Fed. R. Crim. P. 32; *see also, e.g.*, AOUSC, *supra* note 676, at 29-30 (describing role of federal district judges in sentencing).

[692] *See, e.g.*, Advisory Comm'n Report, *supra* note 682, at 14.

[693] Cooke, *supra* note 690, at 20.

[694] UCMJ Article 25(d)(2) states, in pertinent part, that the convening authority should select members who "are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *See* 10 U.S.C. § 825.

[695] *See United States v. Weymouth*, 43 M.J. 329, 336 (C.A.A.F. 1995); *Jackson v. Taylor*, 353 U.S. 569 (1957).

[696] FY14 NDAA, *supra* note 4, § 1702(b).

[697] *See, e.g.*, Fed. R. Crim. P. 32; *see generally* 18 U.S.C. § 3585 (calculating federal terms of imprisonment).

[698] *See, e.g., Setser v. United States*, 132 S. Ct. 1463 (2012) (discussing concurrent and consecutive sentences in the context of federal and state convictions); *see also Weymouth*, 43 M.J. 329, 336 (C.A.A.F. 1995) (discussing unitary sentencing and distinctions between military and federal law).

[699] *Transcript of RSP Comparative Systems Subcommittee Meeting* 242 (Feb. 11, 2014) (testimony of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission).

[700] *Transcript of RSP Comparative Systems Subcommittee Meeting* 242 (Feb. 11, 2014) (testimony of Ms. Meredith Farrar-Owens, Virginia State Sentencing Commission).

[701] *See id.* at 150-52 (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, describing Sentencing Guidelines).

[702] *See* 28 U.S.C. §§ 991-998.

[703] *Transcript of RSP Comparative Systems Subcommittee Meeting* 149 (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, describing Sentencing Guidelines).

[704] *Transcript of RSP Comparative Systems Subcommittee Meeting* 242 (Feb. 11, 2014) (testimony of Ms. Meredith Farrar-Owens, Virginia State Sentencing Commission).

[705] *See generally Transcript of RSP Comparative Systems Subcommittee Meeting* (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission; Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission; and Mr. Mark Bergstrom, Pennsylvania Commission on Sentencing, discussing history and development of sentencing commissions and guidelines).

[706] *Id.* at 243 (testimony of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission). For further information on study and implementation of sentencing guidelines, see Meredith Farrar-Owens, "Overview of State Sentencing Guidelines and Sentencing Guidelines for Sexual Assault Offenses in VA" (Feb. 11, 2014) (PowerPoint Presentation to RSP Comparative Systems Subcommittee).

[707] U.S. Dep't of Def., Memorandum from the Secretary of Defense to the Acting General Counsel of the Department of Defense (Sept. 4, 2013), *currently available at* http://responsesystemspanel.whs.mil/index.php/home/materials.

[708] Letter from the Acting General Counsel of the Department of Defense to the Honorable Barbara Jones, Chair, Response Systems Panel (Sept. 4, 2013), *see infra* Appendix A.

[709] *See* Letter from Robert S. Taylor, Acting General Counsel, Department of Defense, to The Honorable Barbara S. Jones, Panel Chair *supra* note 5.

[710] "Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the Armed Forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death." 10 U.S.C. § 906 (UCMJ art. 106).

[711] "Any person subject to this chapter, who, without justification or excuse, unlawfully kills a human being, when he—(1) has a premeditated design to kill . . . ." *Id.* at § 918 (UCMJ art. 118).

[712] "Any person subject to this chapter, who, without justification or excuse, unlawfully kills a human being, when he . . . (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct." *Id.*

[713] FY14 NDAA, *supra* note 4, § 1705(a).

[714] *See, e.g.*, Human Rights Watch, An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Defendants to Plead Guilty (2013) (discussing mandatory minimum sentences in context of drug crimes), *available at* http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0.pdf.

[715] *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 353 (Feb. 11, 2014) (testimony of Ms. Annette Burrhus-Clay, President, National Alliance to End Sexual Violence and Executive Director, Texas Association Against Sexual Assault) ("My experience tells me that victims will be less likely to report sexual assault if we have mandatory minimums.").

[716] *See id.* at 356 ("From the perspective of the sexual assault victim, the system is broken. However, adopting mandatory minimum sentencing is unlikely to mend the justice system. The net result of this type of get tough on crime, make everybody feel better reform may very well be less reporting, fewer prosecutions for sexual assault, and ultimately a step backwards in justice for survivors."); *see also, e.g.*, DEFENSE MANPOWER DATA CENTER, 2013 SERVICE ACADEMY GENDER RELATIONS FOCUS GROUPS: OVERVIEW REPORT 164, *available at* http://www.sapr.mil/public/docs/research/2013_sagr_focus_group_report.pdf . ("The punishment of turning someone in is so extreme. If you were to turn someone in for touching your butt, they could honestly be sitting in confinement for the rest of the year. That's a huge punishment for probably not that big of a crime. But if you don't stop it, then it escalates. So it's a huge Catch-22, actually.").

[717] *See* 2012 MCM, *supra* note 79, R.C.M.'s 405(h)(1)(A), 1001(b)(4), and 1001(c)(2).

[718] *See* FED. R. CRIM. P. 32(i)(4)(B) (addressing a crime victim's opportunity to speak, "Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.")

[719] *See, e.g.*, ARIZ. REV. STAT. § 13-4426.01 (amend. 2003) (providing that a victim giving victim impact statements at sentencing "is not subject to cross-examination"); IOWA CODE § 915.21.3 (amend. 2002) ("A victim shall not be placed under oath and subjected to cross-examination at the sentencing hearing."); N.H. REV. STAT. ANN. § 21-M:8-k (II)(p) (amend. 2007) ("No victim shall be subject to questioning by counsel when giving when giving an impact statement."); *see also Michael v. State*, Nos. A-7890, 4665, 2003 Alas. App. LEXIS 21 (Alaska Ct. App. Feb. 12, 2003) (finding where witness gave oral victim impact statement not under oath describing impact of defendant's conduct, defendant's right to confrontation was not violated).

[720] FY14 NDAA, *supra* note 4, § 1701.

[721] 10 U.S.C. § 860 (UCMJ art. 60); 2012 MCM, *supra* note 79, R.C.M. 1107.

[722] 2012 MCM, *supra* note 79, R.C.M. 1107(b)(4).

[723] See 10 U.S.C. §§ 857, 857a, 858 (UCMJ Art. 57, 57a, 58); *see also* 2012 MCM, *supra* note 79, R.C.M. 1101(a)

[724] 10 U.S.C. §§ 857, 857a, 858b (UCMJ arts. 57, 57a, 58b); 2012 MCM, *supra* note 79, R.C.M. 1101.

[725] 10 U.S.C. § 857(a)(2) (UCMJ art. 57(a)(2)); 2012 MCM, *supra* note 79, R.C.M. 1101(c)(7).

[726] 10 U.S.C. § 854 (UCMJ art. 54).

[727] 10 U.S.C. § 860 (UCMJ art. 60).

[728] 2012 MCM, *supra* note 79, R.C.M. 1103, 1104, 1105; *see also* FY14 NDAA, *supra* note 4, § 1706(b) (prohibiting convening authority from considering "submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial").

[729] 10 U.S.C. § 854(e) (UCMJ art. 54(e)). It merits noting that records of trial are only provided by statute to victims of offenses under Article 120 of the UCMJ who testified at trial. Other victims of crime normally must request a copy of the proceedings under the Freedom of Information Act, as the UCMJ does not provide for mandatory copies of the authenticated record of trial to assist in preparation of matters for submission to the clemency authority.

[730] FY14 NDAA, *supra* note 4, § 1706(a). Section 1706 does not specify what matters a victim may submit for consideration. *See id.*

[731] 10 U.S.C. § 860 (UCMJ art. 60(a)(4)).

[732] *See* 10 U.S.C. §§ 864, 866, 867, 869 (UCMJ arts. 64, 66, 67, 69).

[733] FY14 NDAA, *supra* note 4, § 1702(b).

[734] 2012 MCM, *supra* note 79, R.C.M. 1107(d).

[735] FY14 NDAA, *supra* note 4, § 1702(b).

[736] Unlike civilian jurisdictions, the accused in a court-martial benefits from the lower of the adjudged punishment or the agreed-upon punishment in a pretrial agreement. The authority vested in convening authorities under Article 60 of the UCMJ permits them to reduce sentencing terms in an adjudged sentence to comply with provisions of pretrial agreements limiting sentencing terms. Under Section 1702(b), a convening authority may not commute a mandatory minimum sentence except to reduce a mandatory dishonorable discharge to a bad-conduct discharge. FY14 NDAA, *supra* note 4, § 1702(b).

[737] *Id.*

[738] Section 572(a)(2) of the FY13 NDAA also requires initiation of administrative discharge proceedings against any Service member who is convicted of a covered offense (rape or sexual assault under Article 120, forcible sodomy under Article 125, or an attempt to commit one of these offenses under Article 80) and not punitively discharged. FY13 NDAA, *supra* note 1, at § 572(a)(2).

[739] 10 U.S.C. §§ 864, 865 (UCMJ arts. 64, 65).

[740] 10 U.S.C. § 866 (UCMJ art. 66).

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

[742] *See* JSC-SAS APPENDICES, *supra* note 361, apps. C-P; *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 95-96 (Jan. 7, 2014) (testimony of Ms. Candace Mosley, Director of Programs and Director, National Center for the Prosecution of Violence Against Women (NCPVAW), National District Attorneys Association (NDAA)). Ms. Mosley testified as follows:

> [O]ne of the things that I was asked was the relative level of experience of prosecutors handling these [sexual assault] cases. . . . [It] is just so varied. I mean, you would think that, obviously, promising practices would dictate that it would be a more seasoned prosecutor who has had some experience, has a certain number of trials and felonies, had maybe chiefed or supervised somebody in the misdemeanor division before going to a felony. But many offices across the country many people think are large urban offices and they are not. Many of the prosecutors that we have seen that come to training are in two- and three- person offices. There are, obviously, some that are very structured like New York and Houston, and Dallas, and large urban areas. But the majority of prosecutors' offices out there for state and local prosecutors are these smaller offices in rural areas. So, we get technical assistance requests constantly from a person who doesn't have trial experience and they have got the felony.

[743] *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* 20 (Feb. 6, 2014) (on file at RSP) (interview of Mr. Mark Roe, Prosecuting Attorney, Snohomish County, Washington); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 183 (Jan. 7, 2014) (testimony of Ms. Candace Mosley, Director, NCPVAW, NDAA) ("There are prosecutors who only want to do sexual assault cases for their entire career and then there are some that shouldn't be in there for a long period of time. It really does, it depends on the individual, their passions."); *id.* at 186 (commentary of Ms. Rhonnie Jaus, RSP Comparative Systems Subcommittee Member). Ms. Jaus stated as follows:

> I also think it was unrealistic for them to conclude the other prosecutors that there was very little burn [out]. I think that is crazy. I have been doing this as a prosecutor for 30 years. I ran the sex crimes division for like 25. There is burnout. People get burned out. I mean, it is crazy to think they don't. People leave the job. Not everyone stays or else there would never be any movement. But I think that some people are, as Candace [Mosley] is saying, [there are prosecutors who] are incredibly committed and passionate, but there are people who do burn out and I think that it is the same as the military.

[744] *See generally* JSC-SAS APPENDICES, *supra* note 361, apps. C-P.

[745] *See generally id.*

[746] FY13 NDAA, PUB. L. NO. 112-239, § 573(a), 126 Stat. 1632 (2013).

[747] Dawson Place; Everett, Washington; and Joint-Base Lewis-McChord (JBLM) share this structure. *See* JSC-SAS APPENDICES, *supra* note 361, app. P; *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBLM* (Feb. 5, 2014) (on file at RSP).

[748] At JBLM, the Army created a consolidated facility with representatives from Army CID, as well as a Special Victim Prosecutor, SARC, Victim Advocate, and the Special Victim Counsel, and Sexual Assault Care Coordinator. The sexual assault forensic exam takes place at Madigan Army Medical Center located on JBLM. Victims are not required to go to the consolidated facility for services. The facility is arranged so that a victim who makes a restricted report to the SARC or VA will not come into contact with those on the criminal justice side (investigators and prosecutors) unless the victim decides to convert his or her report to an unrestricted one. *See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBLM* (Feb. 5, 2014) (on file at RSP).

[749] For example, while visiting Dawson Place, Subcommittee members observed a multidisciplinary meeting where both the SANE and victim advocate offered solutions to the prosecutor to deal with a witness cooperation problem in a pending case unrelated to the services they provided to the victim. *See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP).

[750] In accordance with the victim advocate-victim privilege found in Military Rule of Evidence 514(a),"[a] victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating advice or supportive assistance to the alleged victim." 2012 MCM, *supra* note 79, M.R.E. 514. However, the rule provides an exception that there is no privilege under the rule "when admission or disclosure of a communication is constitutionally required." *Id.*, M.R.E. 514(d)(6). If the victim advocate and prosecutor are co-located and have such a close working relationship, the victim advocate may be associated as part of the prosecutor team, in which case the prosecutor has a duty to turn over any exculpatory evidence as a constitutional right of the accused. *Cf. Transcript of RSP Public Meeting* 231 (Nov. 8, 2013) (testimony of Ms. Marjory Fisher, Chief, Special Victims Bureau, Queens, New York).

[751] JSC-SAS APPENDICES, *supra* note 361, app. M (Philadelphia, PA).

[752] The Sexual Assault Response and Resource Team (SARRT) in Austin, Texas consists of the Austin Police Department Sex Crimes Unit, Advocates from SafePlace, prosecutors, and SANES. *See* http://www.austintexas.gov/department/sex-crimes. In Austin, sexual assault victims are taken to the emergency room at St. David's Hospital where they have a room dedicated for exams. *See* Jenni Lee, CrimeWatch: Sexual Assault Response, KTBC Channel 7 (Apr. 3, 2010, 8:54 PM), http://www.myfoxaustin.com/story/18298466/crimewatch-sexual-assault-response . A dedicated group of SANEs are on call and conduct examinations of survivors. Id. In 2010, Travis County went beyond the State's 96 hour period for obtaining a forensic exam and expanded it to 120 hours, or 5 days. *Id.* Jenny Black, the County's SANE Coordinator explained, "It lets us expand our services to care for more people. It helps them into the system where there's a lot of follow up and a lot of care as well as the medical services that we provide and collecting of evidence for criminal prosecution, so it's helpful in a lot of ways." *Id.*

[753] *See generally* JSC-SAS APPENDICES K, N, O (summarizing jurisdiction information for Bronx, NY; Austin, TX; and Arlington, VA); *see also id.*, app. M (Philadelphia, PA); *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP).

[754] *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP).

[755] In accordance with the victim advocate-victim privilege found in Military Rule of Evidence 514(a) ,"[a] victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating advice or supportive assistance to the alleged victim." 2012 MCM, *supra* note 79, M.R.E. 514. However, the rule provides an exception that there is no privilege under the rule "when admission or disclosure of a communication is constitutionally required." *Id.*, M.R.E. 514(d)(6). If the victim advocate and prosecutor are co-located and have such a close working relationship, the victim advocate may be associated as part of the prosecutor team, in which case the prosecutor has a duty to turn over any exculpatory evidence as a constitutional right of the accused. Therefore, to avoid possible litigation of this issue, it is necessary to build a Chinese wall between the victim advocate and prosecutor. *Cf.* The Joint Service Committee's analysis indicates "constitutionally required" exception would be satisfied only in extraordinary circumstances, where the accused could show harm of constitutional magnitude if such communication was not disclosed." The JSC states,

> In drafting the "constitutionally required" exception, the Committee intended that the communication covered by the privilege would be released only in the narrow circumstances where the accused could show harm of constitutional magnitude if such communication was not disclosed. In practice, this relatively high standard of release is not intended to invite a fishing expedition for possible statements made by the victim, nor is it intended to be an exception that effectively renders the privilege meaningless.

[756] *Transcript of RSP Comparative Systems Subcommittee Meeting* 275-83 (Nov. 19, 2013) (testimony of Sue Rotolo, Ph.D., former SAFE Coordinator, INOVA Fairfax Hospital, Fairfax, Virginia).

[757] FY14 NDAA, *supra* note 4, § 1725.

[758] DoDI 6495.02 encl. 7. Healthcare providers conducting a forensic exam must be trained in accordance with the current version of the National Protocol of the Office on Violence Against Women of the Department of Justice. *See* OVW PROTOCOL, *supra* note 323. Victims can choose to have a SAFE kit conducted regardless of whether they choose restricted or unrestricted reporting. The National Protocol identifies a number of clinical and educational programs through which medical providers can be qualified to conduct forensic examinations. *Id.*

[759] DTM 14-003, at 12, *supra* note 328.

[760] *Id.* (defining covered offenses as "[t]he designated criminal offenses of sexual assault, domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm, and child abuse involving sexual assault and/or aggravated assault with grievous bodily harm, in accordance with the UCMJ").

[761] *See* DTM 14-003 . *supra* note 328 at 6.

[762] *See, e.g.*, OVW PROTOCOL, *supra* note 323 at 51 ("Some victims . . . are unable to make a decision about whether they want to report or be involved in the criminal justice system in the immediate aftermath of an assault. Pressuring these victims to report may discourage their future involvement. Yet, they can benefit from support and advocacy, treatment, and information that focuses on their well-being. . . . Victims who are recipients of compassionate and appropriate care at the time of the exam are more likely to cooperate with law enforcement and prosecution in the future.").

[763] *See id.* at 3.

[764] *See* FY13 NDAA, PUB. L. NO. 112-239, § 573(f), 126 Stat. 1632 (2013).

[765] DoD SPECIAL VICTIM CAPABILITIES REPORT, *supra* note 469, at 10.

[766] *See Transcript of RSP Public Meeting* 133-34 (Dec. 11, 2013) (testimony of Major Ryan Oakley, U.S. Air Force, Deputy Director, Office of Legal Policy, Office of the Undersecretary of Defense for Personnel and Readiness); *see also* DoD and Services' Responses to RSP Request for Information 50 (Nov. 21, 2013); DTM 14-003, *supra* note 328 at 9.

[767] DTM 14-003, *supra* note 328 at 9.

[768] *Written Statement of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army, to RSP* (Dec. 11, 2013).

[769] Jakob Rodgers, "Air Force Program Puts Lawyer in Victim's Corner," [Colo. Springs] Gazette (Mar. 25, 2013).

[770] *See id.*

[771] *See Transcript of RSP Public Meeting* 292 (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, Trial Defense Service, U.S. Army) ("The mission of the U.S. Army Trial Defense Service is to provide independent, professional, and ethical defense services to soldiers."); *id.* at 305 (testimony of Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps Defense Services Organization, U.S. Marine Corps) ("The Marine Corps Defense Services Organization provides zealous, ethical, and effective defense counsel services to Marines and sailors who are facing administrative, nonjudicial, and judicial actions in order to protect and promote due process, statutory and constitutional rights, thereby ensuring the military justice system is both fair and just."); *id.* at 310-11 (testimony of Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency, U.S. Air Force) ("Our charge is to further the Air Force's mission by providing America's airmen with independent, world-class representation in a zealous, ethical, and professional manner."); *see also* Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System,* The Champion (June 2012) (noting that roles of military defense attorney and public defender are critical to ensure accused's "Sixth Amendment right to counsel . . . [and that] the procedural protections which exist on paper, are actually applied"); *Transcript of RSP Public Meeting* 313 (Nov. 8, 2013) (testimony of Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency) (noting that military defense counsel, in particular, ensure the fair administration of the military justice system, which assists in maintaining good order and discipline and ultimately strengthens national security).

[772] Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service,* Army Lawyer 1 (Mar. 2001); *see also* U.S. Courts of Appeals for the Armed Forces, "Military Justice Personnel: Defense Function: Detailed Military Counsel," *available at* http://www.armfor.uscourts.gov/newcaaf/digest/IIA4.htm; *see also* 10 U.S.C. § 827 (UCMJ art. 27).

[773] *See Transcript of RSP Public Meeting* 311-12 (Nov. 8, 2013) (testimony of Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency, U.S. Air Force).

[774] DoD did not establish defense capabilities analogous to the Special Victim Capability in the military trial defense organizations.

[775] *See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and JBLM* (Feb. 5, 2014) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (same).

[776] *See generally* JSC-SAS Appendices, *supra* note 361, apps. C-P; Charles D. Stimson, "Sexual Assault in the Military: Understanding the Problem and How to Fix It" (Nov. 6, 2013) (noting "the best public defender offices in the country have full-time criminal investigators") [hereinafter Stimson]; *Transcript of RSP Comparative Systems Subcommittee Meeting* 230 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, former President, National Association of Criminal Defense Lawyers) ("I don't know a lawyer in the country that does sex offenses without an investigator, except in the military. Really, there is no such thing.").

[777] A public defender from the Washington, D.C. Public Defender's Office told the RSP:

> But as far as investigators are concerned, some lawyers share an investigator with just one other lawyer or some have their own specific investigator. And I was lucky enough to have my own specific investigator for awhile. I share one now. But it makes it much easier in terms of being able to defend our clients finding out that you could throw away all your kind of subjective beliefs about your client's guilt or innocence and then you do investigation and you investigate no matter how much bad evidence there seemingly is. You find out that there are some things – sometimes complainants do not tell the truth. So, you know, one word I kind of bristle at when I hear it all the time from I guess panels that are supposedly objective is the word "victim." When we talk about pre- trial matters that have not resulted in conviction or that have not resulted in the guilty plea, we deal with complainants, because a lot of times we understand that alleged victims aren't victims at all when we investigate and even the government finds out before we do that things have been made up. So I think that just reemphasizes the importance of having investigators and having all the different aspects of the case, whether or not it's legal or on the field, done in order to have a decent – not only a decent, but a zealous defense.

Transcript of RSP Public Meeting 380-81 (Dec. 12, 2013) (testimony of Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia).

[778] Stimson, *supra* note 776, at 18-19.

[779] *Transcript of RSP Public Meeting* 377-82 (Dec. 12, 2013) (testimony of Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia).

[780] *See* Transcript of RSP Public Meeting, 324, 393-95 (Nov. 8 2013) (testimony of Mr. David Court, attorney-at-law, Court and Carpenter, Stutgart, Germany); *see also id.* at 393-95 (Testimony of Captain Charles N. Purnell, Commanding Officer, Defense Service Office Southeast); *Transcript of RSP Comparative Systems Subcommittee Meeting* 229-235 (Jan. 7, 2014)(testimony of Ms. Lisa Wayne, National Association of Criminal Defense Lawyers).

[781] *Transcript of RSP Public Meeting* 326-27 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program (DCAP), Marine Corps Defense Services Organization, U.S. Marine Corps); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 221-30 (Mar. 11, 2014)

[782] *See generally* JSC-SAS Report, Appendix C-P (Sept. 2013) (on file at RSP); Charles D. Stimson, "Sexual Assault in the Military: Understanding the Problem and How to Fix It" (Nov. 6, 2013) (noting "the best public defender offices in the country have full-time criminal investigators"); *Transcript of RSP Comparative Systems Subcommittee Meeting* 230 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, NACDL) ("I don't know a lawyer in the country that does sex offenses without an investigator, except in the military. Really, there is no such thing.").

[783] *Id.* at 326-27 (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, DCAP, Marine Corps Defense Services Organization, U.S. Marine Corps).

[784] *Transcript of RSP Comparative Systems Subcommittee Meeting* 220-23 (Mar. 11, 2014) (comments of Colonel (Ret.) Lawrence Morris, Subcommittee Member).

[785] *Id.* at 222.

[786] *Id.* at 229 (comments of Mr. Russ Strand, Subcommittee Member).

[787] *Id.* at 222 (comments of Colonel (Ret.) Lawrence Morris, Subcommittee Member). Civilian defense investigators have a variety of backgrounds and training; most have criminal justice training or education. *See generally* JSC-SAS Appendices, *supra* note 361, apps. C-P. Others have a law enforcement background or are former private investigators. But this is not always the case. *Id.* For example, the Bronx Public Defenders office, as a matter of policy, does not hire former police officers as investigators. *Id.*, app. K. Defense attorneys sometimes find that police detectives are more intimidating and not as approachable for defendants, their families, or other witnesses as others who do not possess a law enforcement background. *Id.*

[788] *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 342-43 (Nov. 19, 2013) (testimony of Major Martin Bartness, Baltimore Police Department).

[789] *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish County Sheriff's Office); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 341-42 (Nov. 19, 2013) (testimony of Major Martin Bartness, Baltimore Police Department).

[790] *See, e.g., Transcript of RSP Public Meeting* 212 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, U.S. Army Criminal Investigation Command (Army CID)).

[791] *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 82-84 (Nov. 19, 2013) (testimony of Ms. Donna Ferguson, U.S. Army Military Police School (USAMPS)); *id.* at 123-24 (testimony of Mr. Kevin Poorman, Associate Director for Criminal Investigations, U.S. Air Force Office of Special Investigation (AFOSI)).

[792] Cassia Spohn and Katharine Tellis, *Justice Denied?: The Exceptional Clearance of Rape Cases in Los Angeles*, 74(2) Alb. L. Rev. 1381 (2011).

[793] PERF, *supra* note 501.

[794] End Violence Against Women International (EVAWI), "Effective Report Writing: Using the Language of Non-Consensual Sex," *available at* http://olti.evawintl.org/Courses.aspx.

[795] *See, e.g., Transcript of RSP Public Meeting* 278 (Dec. 11, 2013) (testimony of Sergeant Liz Donegan, Austin Police Department).

[796] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 487 (Jan. 7, 2014) (testimony of Ms. Claudia Bayliff, Attorney at Law).

[797] *See e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 103 (Nov. 19, 2013) (testimony of Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, Army CID).

[798] Army's Response to RSP Request for Information 134 (Apr. 14, 2014).

[799] Services' Responses to RSP Request for Information 134 (Apr. 14, 2014).

[800] FY14 NDAA, *supra* note 4, § 1725(b); *see also* OVW Protocol, *supra* note 323.

[801] *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Ms. Paula Newman-Skomski, SAFE Coordinator, Dawson Place).

[802] *See* CSS Report to RSP, Annex, *infra*, at 116 n.435.

[803] *See, e.g., Transcript of RSP Public Meeting* 432 (Dec. 12, 2013) (testimony of Ms. Martha Bashford, Chief, Sex Crimes Unit, New York County District Attorney's Office) ("The very, very minimal amount of experience is three years, and normally our entry level is at five or six years of prosecuting statements. . . . I want to know how many statements you've taken from defendants, how many search warrants have you done, how many DNA cases have you put on, how many fingerprint experts have you put on, how many defendants have you cross-examined, how many jury trials have you had, how many judge trials you've had[.]"); *see also id.* at 460 (testimony of Ms. Kelly Higashi, Assistant United States Attorney, Chief, Sex Offense and Domestic Violence Section, U.S. Attorney's Office for the District of Columbia) ("Similar to what Martha just said, we have the same type of system where in order to get into that unit, people have to wait for a vacancy. They have to apply. We review their experience, we review their experience similar to what Martha said with DNA, with vulnerable victims.").

[804] *Transcript of RSP Public Meeting* 414, 416 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, Trial Counsel Assistance Program (TCAP), U.S. Army); *see also* Army's Response to RSP Request for Information 75(b),(c) (Dec. 19, 2013); Army's Response to RSP Request for Information 1(d) (Nov. 1, 2013).

[805] For an in-depth discussion on counsel training and experience, see Appendix G to CSS Report to RSP, Annex, *infra*.

[806] Army's Response to RSP Request for Information 75(c) (Dec. 19, 2013).

[807] Air Force's Response to RSP Request for Information 1(d) (Nov. 1, 2013); Air Force's Response to Request for Information 75(c) (Dec. 19, 2013); *see also Transcript of RSP Public Meeting* 404-08 (Dec. 12, 2013) (testimony of Colonel Don Christensen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force).

[808] See Air Force's Response to Request for Information 1(d) (Nov. 1, 2013). These courses include Trial and Defense Advocacy (Air Force); Advanced Trial Advocacy (Air Force); Advanced Sexual Assault Litigation (Air Force); Prosecuting Complex Cases (Navy); Intermediate Trial Advocacy (Department of Justice); Criminal Law Advocacy Course/Prosecuting Sexual Assaults (Army); Special Victims Unit Course (Army); Sex Crimes Investigation Training Program (Air Force); Prosecuting Alcohol-Fueled Sexual Assaults (Navy); and National District Attorneys Association Sexual Assault Prosecution. *Id.*

[809] Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security, and the Secretaries of the Army, Navy, and Air Force Pursuant to the Uniform Code of Military Justice for the Period October 1, 2012 to September 30, 2013 [hereinafter CAAF FY13 Report], at 77-78 (Annual Report of the Judge Advocate General of the Navy), *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY11AnnualReport.pdf.

[810] Navy's Response to RSP Request for Information 1(d) (Nov. 1, 2013); Navy's Response to Request for Information 75(c) (Dec. 19, 2013).

[811] *Transcript of RSP Public Meeting* 412-14 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, TCAP, U.S. Army).

[812] For additional information regarding the Services' TCAPs, see Appendix G to CSS Report to RSP, Annex, *infra*.

[813] *Transcript of RSP Public Meeting* 412-14 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, TCAP, U.S. Army).

[814] *Id.* at 412.

[815] *But see* Air Force's Response to RSP Request for Information 146 (Apr. 11, 2014) (discussing figures in context).

[816] *Transcript of RSP Public Meeting* 427-30 (Dec. 12, 2013) (testimony of Major Mark Sameit, Branch Head, TCAP, U.S. Marine Corps).

[817] *Id.*

[818] Marine Corps' Response to RSP Request for Information 1(d) (Nov. 1, 2013).

[819] *Id.*

[820] For a more in-depth analysis of the Navy's MJLCT, see Appendix G to CSS Report to RSP, Annex, *infra*.

[821] *Transcript of RSP Public Meeting* 304-35 (Dec. 12, 2013) (testimony of Lieutenant Colonel Fansu Ku, Chief, DCAP, Trial Defense Service U.S. Army, Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force, Commander Don King, Director, DCAP, U.S. Navy, testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, DCAP, Marine Corps Defense Services Organization, U.S. Marine Corps).

[822] *Id.*

[823] For an in-depth discussion on counsel training and experience, see Appendix G to CSS Report to RSP, Annex, *infra*.

[824] *Transcript of RSP Public Meeting* 314-19 (Dec. 12, 2013) (testimony of Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force).

[825] *Id.*

[826] *Id.*

[827] Navy's Response to RSP Request for Information 1(d) (Nov. 1, 2013).

[828] *Transcript of RSP Public Meeting* 304-09 (Dec. 12, 2013) (testimony of Commander Don King, Director, DCAP, U.S. Navy).

[829] *Id.*

[830] *Id.* at 319-35 (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, DCAP, Marine Corps Defense Services Organization, U.S. Marine Corps U.S. Marine Corps).

[831] *Id.*; *Transcript of RSP Comparative Systems Subcommittee Meeting* 426 (Jan. 7, 2014) (testimony of Ms. Kate Coyne, Highly Qualified Expert and Deputy Public Defender, San Diego County).

[832] *See* MCO P5800.16A, *supra* note 378, ch. 2.

[833] Coast Guard's Response to RSP Request for Information 1(d) (Nov. 1, 2013); Coast Guard's Response to RSP Request for Information 75(c) (Dec. 19, 2013).

[834] *Id.*

[835] *See, e.g., Transcript of RSP Public Meeting* 310-12 (Dec. 12, 2013) (testimony of Lieutenant Colonel Fansu Ku, Chief, DCAP, Trial Defense Service U.S. Army).

[836] Services' Responses to RSP Request for Information 1(d) (Nov. 1, 2013); Services' Responses to RSP Request for Information 75(c) (Dec. 19, 2013).

[837] Counsel interviewed stated that defense counsel tour lengths may range from 12 to 24 months. *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP) (interviews of defense counsel); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Norfolk, VA* (Feb. 20, 2013) (on file at RSP); *Transcript of RSP Comparative Systems Subcommittee Meeting* 426-27 (Jan. 7, 2014) (testimony of Kate Coyne, Highly Qualified Expert and Deputy Public Defender, San Diego County); *Transcript of RSP Public Meeting* 321, 325 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, DCAP, Marine Corps Defense Services Organization, U.S. Marine Corps); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP).

[838] *See generally, id.*

[839] For an in-depth discussion on counsel training and experience, see Appendix G to CSS Report to RSP, Annex, *infra*.

[840] In this report, the term "highly qualified expert" is used to refer to highly experienced civilian personnel employed to support litigation efforts.

[841] *Transcript of RSP Public Meeting* 312 (Dec. 12, 2013) (testimony of Lieutenant Colonel Fansu Ku, Chief, DCAP, U.S. Army Trial Defense Service).

[842] CAAF FY13 Report, *supra* note 809, at 68 (Annual Report of the Judge Advocate General of the Navy).

[843] *Id.*

[844] *Id.*

[845] *Transcript of RSP Public Meeting* 319-35 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, DCAP, Marine Corps Defense Services Organization, U.S. Marine Corps).

[846] *Id.*

[847] *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 353-58 (Jan. 7, 2014) (testimony of Colonel Kenneth M. Theurer, Commandant, Air Force Judge Advocate General's School, U.S. Air Force); *id.* at 355-56 (testimony of Lieutenant Commander Justin R. McEwan, Head, Military Justice Department, Naval Justice School, U.S. Navy).

[848] Navy's Response to RSP Request for Information 1(d) (Nov. 1, 2013).

[849] *See, e.g., id.* at 374, 382 (Dec. 12, 2013) (testimony of Mr. Barry G. Porter, Attorney and Statewide Trainer, New Mexico Public Defender Department; and Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia).

[850] *See, e.g., id.* at 374, 382 (testimony of Mr. Barry G. Porter, Attorney and Statewide Trainer, New Mexico Public Defender Department; and Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for District of Columbia).

[851] *Id.* at 329-31 (testimony of Captain Scott (Russ) Shinn, U.S. Marine Corps); *Transcript of RSP Comparative Systems Subcommittee Meeting* 437-39 (Jan. 7, 2014) (testimony of Ms. Kate Coyne, Highly Qualified Expert and former Deputy Public Defender, San Diego County); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP) (interviews of defense counsel).

[852] *Id.*

[853] *Transcript of RSP Comparative Systems Subcommittee Meeting* 437-39 (Jan. 7, 2014) (testimony of Ms. Kate Coyne, Highly Qualified Expert and former Deputy Public Defender, San Diego County); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP) (interviews of defense counsel).

[854] CAAF FY13 Report, *supra* note 809, at 55, 68 (Annual Report of the Judge Advocate General of the Navy); *see also, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 411 (Jan. 7, 2014) (testimony of Mr. Neal Puckett, Highly Qualified Expert, DCAP, U.S. Navy).

[855] Army's Response to RSP Request for Information 147 (Apr. 11, 2014).

[856] *Id.*

[857] *Id.*

[858] *Id.*

[859] *Id.*

[860] *Id.*

[861] *See Transcript of RSP Public Meeting* 237 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, Army CID); *see also id.* at 245 (Dec. 11, 2013) (testimony of Mr. Darrell Gillard, Deputy Assistant Director, NCIS).

[862] *See id.* at 90 (testimony of Mr. Russell Strand, Chief, Behavioral Sciences Education and Training Division, U.S. Army Military Police School).

[863] For example, the Army obtained eighteen authorizations for SVPs beginning in 2009. *See Transcript of RSP Public Meeting* 181 (Dec. 11, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army). The Air Force maintained sixteen Senior Trial Counsel worldwide – ten of these designated as Senior Trial Counsel-Special Victim Units to comply with the Congressional SVC mandate. *Id.* at 158 (testimony of Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force). The Navy established its career litigation track in 2007, which enabled it to meet the SVC requirement for specialized prosecutors. *Id.* at 148-50 (testimony of Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy). In 2012, the Marine Corps completely reorganized its legal community into regional Complex Trial Teams. *Id.* at 146 (testimony of Captain Jason Brown, Military Justice Officer, Marine Corps Headquarters, U.S. Marine Corps).

[864] RoC Subcommittee Report to RSP, Annex, *infra*, at 94-97.

[865] RoC Subcommittee Report to RSP, Annex, *infra*, at 101-06.

[866] *Id.* at 104-05.

[867] *Id.* at 105-06.

[868] For further discussion on barriers to reporting, *see* Chapter Two, *supra*, at Part A.

[869] RoC Subcommittee Report to RSP, Annex, *infra* at 113-14; *see* Memorandum from RoC Subcommittee to RSP on Review of Allied Military Justice Systems and Reporting Trends for Sexual Assault Crimes (Nov. 6, 2013), *reprinted in* RoC Subcommittee Report to RSP, Annex, *infra*, at app. F.

[870] *Id.*

[871] RoC Subcommittee Report to RSP, Annex, *infra*, at 113.

[872] *Id.*; *see Transcript of RSP Public Meeting* 198-290 (Nov. 8, 2013).

[873] White House Report, *supra* note 16, at 5.

[874] *Id.* at 17 ("One study indicated that two-thirds of survivors have had their legal cases dismissed, and more than 80% of the time, this contradicted [their] desire to prosecute. According to another study of 526 cases in two large cities where sexual assault arrests were made, only about half were prosecuted.") (footnote omitted).

[875] *Id.*

[876] RoC Subcommittee Report to RSP, Annex, *infra*, at 88.

[877] *Id.*

[878] RoC Subcommittee Report to RSP, Annex, *infra*, at 113; *see also Transcript of RSP Public Meeting* 135-36 (Jan. 30, 2014) (testimony of General (Retired) Roger A. Brady, U.S. Air Force).

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

[880] RoC Subcommittee Report to RSP, Annex, *infra*, at 114.

[881] *See, e.g., Transcript of RSP Public Meeting* 325-26 (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Out Defenders); *Transcript of SASC Hearing, supra* note 34, at 122 (testimony of Ms. Parrish); *Transcript of RSP Role of the Commander Subcommittee Meeting* 45-48 (Jan. 8, 2014) (testimony of Rear Admiral (Retired) Marty Evans, U.S. Navy); *id.* at 100 (testimony of Ms. K. Denise Rucker Krepp, former Chief Counsel, U.S. Maritime Administration).

[882] RoC Subcommittee Report to RSP, Annex, *infra*, at 113.

[883] *See* H.R. 1593, 113th Cong., Sexual Assault Training Oversight and Prevision Act (2013) [hereinafter H.R. 1593]; S. 1752, 113th Cong., Military Justice Improvement Act of 2013 (2013) [hereinafter S. 1752]; S. 1917, 113th Congress, Victims Protection Act of 2014 (2014) [hereinafter S. 1917]. The "Fair Military Act" or "Furthering Accountability and Individual Rights within the Military Act of 2014," H.R. 4485, 113th Cong., was filed in the House of Representatives by Representatives Michael Turner (R-OH) and Niki Tsongas (D-MA) on April 10, 2014. The Act, which contains five provisions from the Victims Protection Act of 2014, was referred to Committee and is not discussed separately in this report.

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

[885] *See* FY14 NDAA, *supra* note 4, § 1744, discussed, *supra*, at Chapter 8, Part C.

[886] *Id.* at § 1744(c)(d); S. 1917 § 2.

[887] *See* Chapter 8, *supra*, at Part C.

[888] *Id.* at § 3(b). In addition, Section 3(a) would add to the responsibilities of special victim counsel the requirement to advise victims of the advantages and disadvantages of prosecution by courts-martial versus in a civilian jurisdiction.

[889] There may be a misperception surrounding the manner by which character evidence can be introduced in courts-martial. Civilian and military rules about introducing character evidence in criminal trials are nearly identical, and both permit admission of relevant character evidence at trial. Consistently, military courts have broadly interpreted the evidentiary rule to permit a Service member to seek to admit good military character evidence as part of his or her defense.

[890] S. 1917 at § 3(g); CSS Report to RSP, Annex, *infra*, at 196-200.

[891] H.R. 1593, at § 5.

[892] S. 1752, at § 2. The UCMJ does not classify offenses as misdemeanors or felonies.

[893] H.R. 3435, 112th Cong., Sexual Assault Training Oversight and Prevention Act (2012).

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

[895] *Id.* at § 4.

[896] *Id.* at § 3.

[897] *Id.* at § 5. Under the STOP Act, sexual-related offenses include rape, sexual assault, aggravated sexual contact, abusive sexual contact, indecent assault, nonconsensual sodomy, "any other sexual-related offense the Secretary of Defense determines should be covered," and attempts to commit these offenses. *Id.*

[898] Library of Congress, "Summary: H.R. 1593 – 113th Congress (2013-2014)," *available at* http://beta.congress.gov/bill/113th-congress/house-bill/1593?q=%7B%22search%22%3A%5B%22Speier%22%5D%7D.

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

[900] S. 1197, § 552, amend. no. 2099 (2013).

[901] *See* Senator Kirsten E. Gillibrand, "Floor Speech on Technical Issues," *available at* http://www.gillibrand.senate.gov/mjia/technical-fixes.

[902] S. 1752 at § 2(a)(2).

[903] *Id.* § 2(a)(3).

[904] *Id.* at § 3.

[905] *Id.* at § 3(c).

[906] *Id.* at § 3(a).

[907] RoC Subcommittee Report to RSP, Annex, *infra*, at 42-43; *see* S. 1752, § 4.

[908] *See, supra*, this chapter at Section A.

Appendix A:
LEGISLATION ESTABLISHING THE PANEL AND CHARTER

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013

SECTION 576. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) INDEPENDENT REVIEWS AND ASSESSMENTS REQUIRED.—

(1) RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES.—
The Secretary of Defense shall establish a panel to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.

(2) JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS.— The Secretary of Defense shall establish a panel to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the H. R. 4310—128 amendments made to the Uniform Code of Military Justice by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81; 125
Stat. 1404) for the purpose of developing recommendations for improvements to such proceedings.

(b) ESTABLISHMENT OF INDEPENDENT REVIEW PANELS.—

(1) COMPOSITION.—
(A) RESPONSE SYSTEMS PANEL.—The panel required by subsection (a)(1) shall be composed of nine members, five of whom are appointed by the Secretary of Defense and one member each appointed by the chairman and ranking member of the Committees on Armed Services of the Senate and the House of Representatives.
(B) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall be appointed by the Secretary of Defense and consist of five members, two of whom must have also served on the panel established under subsection (a)(1).

(2) QUALIFICATIONS.—The members of each panel shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes.

(3) CHAIR.—The chair of each panel shall be appointed by the Secretary of Defense from among the members of the panel.

(4) PERIOD OF APPOINTMENT; VACANCIES.—Members shall be appointed for the life of the panel. Any vacancy in a panel shall be filled in the same manner as the original appointment.

(5) DEADLINE FOR APPOINTMENTS.—
(A) RESPONSE SYSTEMS PANEL.—All original appointments to the panel required by subsection (a)(1) shall be made not later than 120 days after the date of the enactment of this Act.
(B) JUDICIAL PROCEEDINGS PANEL.—All original appointments to the panel required by subsection (a)(2) shall be made before the termination date of the panel established under subsection (a)(1), but no later than 30 days before the termination date.

(6) MEETINGS.—A panel shall meet at the call of the chair.

(7) FIRST MEETING.—The chair shall call the first meeting of a panel not later than 60 days after the date of the appointment of all the members of the panel.

(c) REPORTS AND DURATION.—

(1) RESPONSE SYSTEMS PANEL.—The panel established under subsection (a)(1) shall terminate upon the earlier of the following:
(A) Thirty days after the panel has submitted a report of its findings and recommendations, through the Secretary of Defense, to the Committees on Armed Services of the Senate and the House of Representatives.
(B) Eighteen months after the first meeting of the panel, by which date the panel is expected to have made its report.

(2) JUDICIAL PROCEEDINGS PANEL.—
(A) FIRST REPORT.—The panel established under subsection (a)(2) shall submit a first report, including any proposals for legislative or administrative changes the panel considers appropriate, to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives not later than 180 days after the first meeting of the panel.
(B) SUBSEQUENT REPORTS.—The panel established under subsection (a)(2) shall submit subsequent reports during fiscal years 2014 through 2017.
(C) TERMINATION.—The panel established under subsection (a)(2) shall terminate on September 30, 2017.

(d) DUTIES OF PANELS.—

(1) RESPONSE SYSTEMS PANEL.—In conducting a systemic review and assessment, the panel required by subsection (a)(1) shall provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice). The review shall include the following:
(A) Using criteria the panel considers appropriate, an assessment of the strengths and weaknesses of the systems, including the administration of the Uniform Code of the Military Justice, and the investigation, prosecution, and adjudication, of adult sexual assault crimes during the period 2007 through 2011.

(B) A comparison of military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes. This comparison shall include an assessment of differences in providing support and protection to victims and the identification of civilian best practices that may be incorporated into any phase of the military system.
(C) An assessment of advisory sentencing guidelines used in civilian courts in adult sexual assault cases and whether it would be advisable to promulgate sentencing guidelines for use in courts-martial.
(D) An assessment of the training level of military defense and trial counsel, including their experience in defending or prosecuting adult sexual assault crimes and related offenses, as compared to prosecution and defense counsel for similar cases in the Federal and State court systems.
(E) An assessment and comparison of military court-martial conviction rates with those in the Federal and State courts and the reasons for any differences.
(F) An assessment of the roles and effectiveness of commanders at all levels in preventing sexual assaults and responding to reports of sexual assault.
(G) An assessment of the strengths and weakness of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.
(H) An assessment of the adequacy of the systems and procedures to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes, including whether victims are provided the rights afforded by section 3771 of title 18, United States Code, Department of Defense Directive 1030.1, and Department of Defense Instruction 1030.2.
(I) Such other matters and materials the panel considers appropriate.

(2) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall perform the following duties:
(A) Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice that were enacted by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112- 81; 125 Stat. 1404).
(B) Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.
(C) Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.
(D) Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report required by subsection (c)(2) and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.
(E) Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice),and any instances in which prior sexual conduct was determined to be inadmissible.
(F) Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.

(G) Building on the data compiled as a result of paragraph (1)(D), assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.
(H) Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by section 573 of this Act.
(I) Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases.
(J) Consider such other matters and materials as the panel considers appropriate for purposes of the reports.

(3) UTILIZATION OF OTHER STUDIES.—In conducting reviews and assessments and preparing reports, a panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies.

(e) AUTHORITY OF PANELS.—

(1) HEARINGS.—A panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the panel considers appropriate to carry out its duties under this section.

(2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of a panel, a department or agency of the Federal Government shall provide information that the panel considers necessary to carry out its duties under this section.

(f) PERSONNEL MATTERS.—

(1) PAY OF MEMBERS.—Members of a panel shall serve without pay by reason of their work on the panel.

(2) TRAVEL EXPENSES.—The members of a panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance or services for the panel.

(3) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the panels, except that the Secretary may not assign primary responsibility for such staffing and resources to the Sexual Assault Prevention and Response Office.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

SECTION 1722. ADVANCEMENT OF SUBMITTAL DEADLINE FOR REPORT OF INDEPENDENT PANEL ON ASSESSMENT OF MILITARY RESPONSE SYSTEMS TO SEXUAL ASSAULT.

SECTION 576(C)(1)(B) OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013 (PUBLIC LAW 112-239; 126 STAT. 1759) IS AMENDED BY STRIKING "EIGHTEEN MONTHS" AND INSERTING "TWELVE MONTHS".

SEC. 1731. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) ADDITIONAL DUTIES FOR RESPONSE SYSTEMS PANEL.—

(1) ADDITIONAL ASSESSMENTS SPECIFIED.—The independent panel established by the Secretary of Defense under subsection (a)(1) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1758), known as the "response systems panel", shall conduct the following:

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

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

(C) An assessment of the feasibility and appropriateness of extending to victims of crimes covered by chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), the right afforded a crime victim in civilian criminal legal proceedings under subsection (a)(4) of section 3771 of title 18, United States Code, and the legal standing to seek enforcement of crime victim rights provided by subsection (d) of such section.

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

(E) As part of the comparison of military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes, as required by subsection (d)(1)(B) of section 576 of the National Defense Authorization Act for Fiscal Year 2013, an assessment of the opportunities for clemency provided in the military and civilian systems, the appropriateness of clemency proceedings in the military system, the manner in which clemency is used in the

military system, and whether clemency in the military justice system could be reserved until the end of the military appeals process.

(F) An assessment of whether the Department of Defense should promulgate, and ensure the understanding of and compliance with, a formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response, as a means of addressing those issues within the Armed Forces. If the response systems panel recommends such a formal statement, the response systems panel shall provide key elements or principles that should be included in the formal statement.

(2) SUBMISSION OF RESULTS.—The response systems panel shall include the results of the assessments required by paragraph (1) in the report required by subsection (c)(1) of section 576 of the National Defense Authorization Act for Fiscal Year 2013, as amended by section 1722.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

GENERAL COUNSEL

SEP - 4 2013

The Honorable Barbara S. Jones
Chair, Response Systems Panel
Response Systems Panel

Dear Judge Jones:

Once again, I would like to thank you and the other members of the Response Systems Panel for assisting the Department in addressing the problem of sexual assault in the military. I understand from my staff that the Panel's work is well underway and that resources are being provided to assist the Panel with this very important endeavor.

On behalf of the Secretary of Defense, I am writing to request that the Response Systems Panel, in addition to its statutory requirement to evaluate sentencing guidelines, study the advisability of adopting mandatory minimum sentences for the most serious sexual assault offenses, including rape and sodomy. Additionally, the Department requests that the Panel assess the possible collateral consequences of such mandatory minimum sentences (including likely effects on sexual assault reporting, the ratio of guilty pleas to contested cases, and conviction rates). Finally, if the Panel proposes mandatory minimum sentences, I request that the Panel also address whether Congress should establish such mandatory minimums itself or should authorize the President to do so.

Please let me know if there are any additional resources the Panel needs to ensure it can accomplish its taskings.

Sincerely,

Robert S. Taylor
Acting

Charter
Response Systems to Adult Sexual Assault Crimes Panel

1. Committee's Official Designation: The Committee shall be known as the Response Systems to Adult Sexual Assault Crimes Panel ("the Response Systems Panel").

2. Authority: The Secretary of Defense, as required by Section 576(a)(1) of the National Defense Authorization Act for Fiscal Year 2013 ("the FY 2013 NDAA") (Public Law 112-239) and in accordance with the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended) and 41 C.F.R. § 102-3.50(a), established the Response Systems Panel.

3. Objectives and Scope of Activities: The Response Systems Panel will conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses, under 10 U.S.C. § 920 (Article 120, Uniform Code of Military Justice (UCMJ)), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.

4. Description of Duties: Section 576(d)(1) of the FY 2013 NDAA provides that in conducting a systems review and assessment, the Response Systems Panel shall provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. § 920 (Article 120 of the UCMJ). Additionally, Section 1731(a) of the National Defense Authorization Act for Fiscal Year 2014 ("the FY 2014 NDAA") (Public Law 113-66) established additional tasks. The Response Systems Panel's review shall include the following:

   a. Using criteria the Response Systems Panel considers appropriate, an assessment of the strengths and weaknesses of the systems, including the administration of the UCMJ, and the investigation, prosecution, and adjudication of adult sexual assault crimes during the period 2007 through 2011.

   b. A comparison of military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes. This comparison shall include an assessment of differences in providing support and protection to victims, and the identification of civilian best practices that may be incorporated into any phase of the military system. It shall also include an assessment of the opportunities for clemency provided in the military and civilian systems, the appropriateness of clemency proceedings in the military system, the manner in which clemency is used in the military system, and whether clemency in the military justice system could be reserved until the end of the military appeals process.

   c. An assessment of advisory sentencing guidelines used in civilian courts in adult sexual assault cases and whether it would be advisable to promulgate sentencing guidelines for use in courts-martial. Such assessment should include a study of the advisability of adopting mandatory minimum sentences for the most serious sexual assault offenses, including rape and sodomy, and the possible collateral consequences of such mandatory minimum sentences (including likely effects on sexual assault reporting, the ratio of guilty pleas to contested cases, and conviction rates). If the Response Systems Panel proposes mandatory minimum sentences, it should address whether Congress should establish such mandatory minimums itself or authorize the President to do so.

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Response Systems to Adult Sexual Assault Crimes Panel

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

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

f. An assessment of the roles and effectiveness of commanders, at all levels, in preventing sexual assaults and responding to reports of sexual assault, including the role of a commander under Article 60, UCMJ.

g. An assessment of the strengths and weaknesses of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.

h. An assessment of the adequacy of the systems and proceedings to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes, including whether victims are provided the rights afforded by 18 U.S.C. § 3771, Department of Defense (DoD) Directive 1030.1, and DoD Instruction 1030.2.

i. An assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under the UCMJ would have on overall reporting and prosecution of sexual assault cases.

j. An assessment regarding whether the roles, responsibilities, and authorities of Special Victims' Counsel to provide legal assistance under 10 U.S.C. § 1044e, as added by Section 1716 of the FY 2014 NDAA, to victims of alleged sex-related offenses should be expanded to include legal standing to represent the victim during investigative and military justice proceedings in connection with the prosecution of the offense.

k. An assessment of the feasibility and appropriateness of extending to victims of crimes covered by the UCMJ, the rights afforded a crime victim in civilian criminal legal proceedings under 18 U.S.C. § 3771(a)(4), and the legal standing to seek enforcement of crime victim rights provided by 18 U.S.C. § 3771(d).

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

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Response Systems to Adult Sexual Assault Crimes Panel

m. An assessment of whether the DoD should promulgate, and ensure the understanding of and compliance with, a formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response, as a means of addressing those issues within the Armed Forces. If the Response Systems Panel recommends such a formal statement, the Response Systems Panel shall provide key elements or principles that should be included in the formal statement.

n. Such other matters and materials the Response Systems Panel considers appropriate.

In conducting reviews and assessments and preparing reports, the Response Systems Panel may review and incorporate, as appropriate, the dates and findings of applicable ongoing and completed studies. The Response Systems Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Response Systems Panel considers appropriate to carry out its duties. Upon request by the Chair of the Response Systems Panel, a department or agency of the Federal Government shall provide information that the Response Systems Panel considers necessary to carry out its duties.

5. Agency or Official to Whom the Committee Reports: The Response Systems Panel shall provide the Committees on the Armed Services of the Senate and the House of Representatives, through the General Counsel of the Department of Defense and the Secretary of Defense, a report of its findings and recommendations.

6. Support: The DoD, through the DoD Office of the General Counsel, the Washington Headquarters Services, and the Office of the Under Secretary of Defense for Personnel and Readiness, shall provide staffing and resources as deemed necessary for the performance of the Response Systems Panel's functions, and shall ensure compliance with the requirements of the FACA, the Government in the Sunshine Act of 1976 ("the Sunshine Act"), and governing Federal regulations and the DoD policies and procedures.

7. Estimated Annual Operating Costs and Staff Years: The estimated annual operating cost, to include travel, meetings, and contract support, is approximately $4,000,000 and 15 full-time equivalents.

8. Designated Federal Officer: The Response Systems Panel's Designated Federal Officer (DFO), pursuant to DoD policy, shall be a full-time or permanent part-time the DoD employee, and shall be appointed, in accordance with governing DoD policies and procedures.

In addition, the Response Systems Panel's DFO is required to be in attendance at all meetings of the Response Systems Panel and its subcommittees for the entire duration of each and every meeting. However, in the absence of the Response Systems Panel's DFO, a properly approved Alternate DFO, duly appointed to the Response Systems Panel, according to DoD policies and procedures, shall attend the entire duration of the Response Systems Panel and its subcommittee meetings.

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Response Systems to Adult Sexual Assault Crimes Panel

The DFO, or the Alternate DFO, shall approve the meeting of the Response Systems Panel and its subcommittees called by the Chair; prepare and approve all meeting agendas; and adjourn any meeting when the DFO or the Alternate DFO determines adjournment to be in the public interest or required by governing regulations or the DoD policies and procedures.

9. Estimated Number and Frequency of Meetings: Consistent with Sections 576(b)(6) and (7) of the FY 2013 NDAA, the Response Systems Panel shall meet at the call of the Chair, and the Chair shall call the first meeting of the Response Systems Panel not later than 60 days after the date of the appointment of all the members of the Response Systems Panel. The Committee shall meet, at a minimum, once per year.

10. Duration: The duration of the Response Systems Panel shall not exceed 12 months after the first meeting of the panel.

11. Termination: According to Section 576(c)(1) of the FY 2013 NDAA, as amended by Section 1722 of the FY 2014 NDAA, the Response Systems Panel shall terminate upon the earlier of the following:

    a. Thirty days after the Response Systems Panel has submitted a report of its findings and recommendations, through the DoD General Counsel and the Secretary of Defense, to the Committees on Armed Services of the Senate and the House of Representatives.

    b. Twelve months after the first meeting of the Response Systems Panel, by which date the Response Systems Panel is expected to have made its report.

12. Membership and Designation: Pursuant to Section 576(b)(1)(A) of the FY 2013 NDAA, the Response Systems Panel shall be comprised of nine members, five of whom are appointed by the Secretary of Defense and one member each appointed by the Chairmen and Ranking Members of the Committees on Armed Services of the Senate and the House of Representatives, respectively. Appointments shall be made not later than 120 days after the date of the enactment of the FY 2013 NDAA.

    The members shall be selected from among private United States citizens, who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in Federal and State criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes. The Chair shall be appointed by the Secretary of Defense from among the members of the Response Systems Panel. Members shall be appointed for the life of the Response Systems Panel. Any vacancy in the Response Systems Panel shall be filled in the same manner as the original appointment. Members of the Response Systems Panel, who were appointed by the Secretary of Defense, shall be appointed as experts or consultants, under the authority of 5 U.S.C. § 3109, to serve as special government employee (SGE) members. With the exception of travel and per diem for official travel, Response Systems Panel members shall serve without compensation.

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Response Systems to Adult Sexual Assault Crimes Panel

The DoD General Counsel, according to DoD policies and procedures, may select experts and consultants as subject matter experts, under the authority of 5 U.S.C. § 3109, to advise the Response Systems Panel or its subcommittees; these individuals do not count toward the Response Systems Panel's total membership nor do they have voting privileges. In addition, these subject matter experts, when appointed, shall not participate in any discussions dealing with the substantive matters before the Response Systems Panel or its subcommittees.

13. Subcommittees: The DoD, when necessary and consistent with the Response Systems Panel's mission and DoD policies and procedures, may establish subcommittees, task forces, or working groups to support the Response Systems Panel. Establishment of subcommittees will be based upon a written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD General Counsel as the DoD Sponsor.

    These subcommittees shall not work independently of the Response Systems Panel and shall report all of their recommendations and advice to the Response Systems Panel for full deliberation and discussion. Subcommittees, task forces, or working groups have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Response Systems Panel. No subcommittee or any of its members can update or report, verbally or in writing, on behalf of the Response Systems Panel directly to the DoD or any Federal officer or employee.

    The Secretary of Defense shall appoint subcommittee members even if the member in question is already a member of the Response Systems Panel. Such individuals, if not full-time or part-time government personnel, shall be appointed as experts or consultants, under the authority of 5 U.S.C. § 3109, to serve as SGE members. Subcommittee members shall serve for the life of the subcommittee. With the exception of travel and per diem for official travel related to the Response Systems Panel or its subcommittees, subcommittee members shall serve without compensation.

    All subcommittees operate pursuant to the provisions of FACA, the Sunshine Act, governing Federal statutes and regulations, and established DoD policies and procedures.

14. Recordkeeping: The records of the Response Systems Panel and its subcommittees shall be handled according to Section 2, General Records Schedule 26, and governing DoD policies and procedures. These records shall be available for public inspection and copying, subject to the Freedom of Information Act of 1966 (5 U.S.C. § 552, as amended).

15. Filing Date: April 29, 2013
    Modified:

Appendix B:
PANEL MEMBER BIOGRAPHIES

HONORABLE BARBARA S. JONES, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (RETIRED)

Judge Jones is a partner at Zuckerman Spaeder, LLP (law firm). She served as a judge in the U.S. District Court for the Southern District of New York for 16 years, and heard a wide range of cases relating to accounting and securities fraud, antitrust, fraud and corruption involving city contracts and federal loan programs, labor racketeering and terrorism. Prior to her nomination to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County. In that role she supervised community affairs, public information and oversaw the work of the Homicide Investigation Unit. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an assistant U.S. Attorney, as chief of the General Crimes Unit and chief of the Organized Crime Unit in the Southern District of New York.

FORMER REP. ELIZABETH HOLTZMAN

Rep. Holtzman is counsel with Herrick Feinstein, LLP, (law firm). Rep. Holtzman served for eight years as a U.S. Congresswoman (D-NY, 1973-81) and while in office she authored the Rape Privacy Act. She subsequently served for eight years as the Kings County, New York (Brooklyn) District Attorney (the 4th largest DA's office in the country) from 1981-89, where she helped change rape laws, improved standards and methods for prosecution, and developed programs to train police and medical personnel. Rep. Holtzman was also elected Comptroller of New York City, the only woman to be elected to this position. Rep. Holtzman graduated from Radcliffe College, magna cum laude, and received her law degree from Harvard Law School.

VICE ADMIRAL JAMES HOUCK, U.S. NAVY (RETIRED)

Vice Admiral (Retired) Houck serves as Interim Dean and Distinguished Scholar in Residence at the Dickinson School of Law, Penn State University. Admiral Houck joined Dickenson after retiring as the 41st Judge Advocate General (JAG) of the U.S. Navy, where he served as the principal military legal counsel to the Secretary of the Navy and Chief of Naval Operations and led more than 2,000 attorneys, enlisted legal staff, and civilian employees of the worldwide Navy JAG Corps. He also oversaw the Department of the Navy's military justice system.

BRIGADIER GENERAL MALINDA DUNN, U.S. ARMY (RETIRED)

Brigadier General (Retired) Malinda Dunn is Executive Director of the American Inns of Court. Previously, BG Dunn served 28 years in the U.S. Army as a judge advocate, including assignments as Assistant Judge Advocate General for Military Law and Operations, Commander of the U.S. Army Legal Services Agency, and Chief Judge of the Army Court of Criminal Appeals. While serving as Staff Judge Advocate of XVIII Airborne Corps, she served tours of duty in both Afghanistan and Iraq. During her career with the Army, BG Dunn performed some groundbreaking assignments. She was the first female staff judge advocate of the 82nd Airborne Division, with which she did two tours. She was also the first female chief of personnel for the Army JAG Corps, the first female staff judge advocate of the XVIII Airborne Corps, and the first woman selected as a general officer in the active duty Army Judge Advocate General's Corps.

BRIGADIER GENERAL COLLEEN MCGUIRE, U.S. ARMY (RETIRED)

Brigadier General (Retired) Colleen McGuire is the 7th Executive Director of Delta Gamma Fraternity. In August 2012, BG McGuire retired from the United States Army after having served over 32 years, including deployments to Somalia and Iraq. She last served at the Pentagon as Director of Manpower and Personnel on The Joint Staff. As a military police officer, BG McGuire is the first woman in the history of the U.S. Army to hold the highest law enforcement office, Provost Marshal General of the Army; first woman to command the U.S. Army's premier felony investigative organization, Criminal Investigations Command; and the first woman to command the Department of Defense all-male maximum security prison at Fort Leavenworth, Kansas. BG McGuire also served as the director of the Army's Suicide Prevention Task Force.

COLONEL HOLLY COOK, U.S. ARMY (RETIRED)

Colonel (Retired) Holly Cook is the Director, American Bar Association D.C. Operations, Washington, D.C. Previously, COL Cook served 23 years in the U.S. Army as a judge advocate, including assignments as Chief of the Administrative Law Division in the Office of the Judge Advocate General, Chief, Investigations and Legislative Division, Staff Judge Advocate to the 1st Cavalry Division, Deputy Staff Judge Advocate to Multinational Division North, Bosnia, Chief, Criminal Law Division, U.S. Forces Korea, and as Trial Counsel at the U.S. Army Garrison, Fort Huachuca, Arizona.

DEAN ELIZABETH HILLMAN, UC HASTINGS COLLEGE OF LAW

Elizabeth Hillman is Provost & Academic Dean and Professor of Law, University of California Hastings College of the Law. Her scholarship focuses on military law and legal history, and she has taught at UC Hastings, Rutgers University School of Law-Camden, Yale University, and the U.S. Air Force Academy. She has published two books, Military Justice Cases and Materials (2d ed. 2012, LexisNexis, with Eugene R. Fidell and Dwight H. Sullivan) and Defending America: Military Culture and the Cold War Court-Martial (Princeton University Press, 2005), and many articles addressing military law and culture. She is a Director of the National Institute for Military Justice, a non-profit dedicated to promoting fairness in and public understanding of military justice worldwide, and Co-Legal Director of the Palm Center, a think tank that seeks to inform public policy on issues of gender, sexuality, and the military. Dean Hillman attended Duke University on an Air Force ROTC scholarship, earned a degree in electrical engineering, and served as a space operations officer and orbital analyst in Cheyenne Mountain Air Force Base, Colorado Springs.

HARVEY BRYANT, FORMER COMMONWEALTH'S ATTORNEY, CITY OF VIRGINIA BEACH

For almost 14 years Harvey Bryant led a 90 member office prosecuting approximately 16,000 criminal charges per year in Virginia's largest city. He retired at the end of 2013. Since his election as Commonwealth's Attorney in Virginia Beach, he has served as Virginia Association of Commonwealth's Attorneys' president, Commonwealth's Attorneys' Services Council chairman, and served on the board of directors of both organizations for 13 years, representing the Second Congressional District. He has served as chairman of the Criminal Law Section of the Virginia State Bar Association and represented Virginia on the National District Attorneys' Association board of directors. He is a gubernatorial appointee to Virginia's Criminal Sentencing Commission and serves on the board of directors for the Virginia Criminal Justice Foundation. He served as chairman of the Governor's task force on asset forfeiture in 2012 and on Virginia's Attorney General's advisory committee on restoration of civil rights in 2013.He was awarded the Human Rights Award for Achievement in Government by the Virginia Beach Human Rights Commission in 2013. From 1987-2000 he was a supervisor in the Criminal Division of the U.S. Attorney's Office, Eastern District of Virginia, Norfolk and Newport News Divisions, which duties included supervising Special Assistant United States Attorneys from every branch of the service. After graduating from the College of William and Mary, he served in the U.S. Army for three years followed by five years in the Army Reserves. He graduated from the University Of Richmond School Of Law, was in private practice for nine years and was a prosecutor for over 30 years.

MAI FERNANDEZ, EXECUTIVE DIRECTOR, NATIONAL CENTER FOR VICTIMS OF CRIME

Mai Fernandez has been Executive Director of the National Center for Victims of Crime since June 2010. Ms. Fernandez has had a distinguished 25-year career in the criminal justice, nonprofit, and policy arenas. She has served as the acting executive director of the Latin American Youth Center, a DC-based nonprofit organization that provides multicultural, underserved youth with education, social, and job training services. Ms. Fernandez has spent the last 13 years managing programs that serve victims of child abuse, sex trafficking, and gang violence. Before joining the Latin American Youth Center, Fernandez served as Assistant District Attorney for New York County, helping victims navigate the criminal justice system and pleading their cases before the court. She also developed policy for victims of domestic and youth violence at the U.S. Department of Justice, Office of Justice Programs, and served as a Congressional aide to U.S. Representatives Mickey Leland and Jim Florio.

Appendix C:
SUBCOMMITTEES AND STAFF LIST

ROLE OF THE COMMANDER SUBCOMMITTEE

Honorable Barbara S. Jones, U.S. District Court for the Southern District of New York (Retired), Chair

Former Rep. Elizabeth Holtzman

Vice Admiral James Houck, U.S. Navy (Retired)

Dean Elizabeth Hillman, UC Hastings College of Law

Major General John D. Altenburg, Jr., U.S. Army (Retired)

General Carter F. Ham, U.S. Army (Retired)

Colonel Lisa Turner, U.S. Air Force

Professor Geoffrey Corn, South Texas College of Law (Lieutenant Colonel, U.S. Army (Retired))

Joye E. Frost, Director of the Office for Victims of Crime, Department of Justice

COMPARATIVE SYSTEMS SUBCOMMITTEE

Dean Elizabeth Hillman, UC Hastings College of Law, Chair

Honorable Barbara S. Jones, U.S. District Court for the Southern District of New York (Retired)

Brigadier General Malinda Dunn, U.S. Army (Retired)

Harvey Bryant, Former Commonwealth's Attorney, City of Virginia Beach

General John Cooke, U.S. Army (Retired)

Colonel Stephen Henley, U.S. Army (Retired)

Colonel Dawn Scholz, U.S. Air Force (Retired)

Colonel Larry Morris, U.S. Army (Retired)

Rhonnie Jaus, Former Division Chief, Sex Crimes/ Crimes Against Children Division, Kings County District Attorney's Office

Russell W. Strand, Chief of the U.S. Army Military Police Behavioral Sciences Education & Training Division

VICTIM SERVICES SUBCOMMITTEE

Mai Fernandez, Executive Director, National Center for Victims of Crime, Chair

Honorable Barbara S. Jones, U.S. District Court for the Southern District of New York (Retired)

Former Rep. Elizabeth Holtzman

Brigadier General Colleen McGuire, U.S. Army (Retired)

Michelle J. Anderson, Dean and Professor of Law, CUNY School of Law

Colonel Lisa M. Schenck, Associate Dean for Academic Affairs, The George Washington University Law School, U.S. Army (Retired)

Judge Christel E. Marquardt, Kansas Court of Appeals, Topeka, Kansas

Meg Garvin, Executive Director of the National Crime Victim Law Institute (NCVLI) and clinical professor of law at Lewis & Clark Law School

William E. Cassara, Attorney at Law, U.S. Army (Retired)

DESIGNATED FEDERAL OFFICERS

Ms. Maria Fried, Designated Federal Officer

Mr. William Sprance, Alternate Designated Federal Officer

Lieutenant Colonel Candace Hunstiger, U.S. Air Force, Alternate Designated Federal Officer

RSP STAFF

Colonel Patricia Ham, U.S. Army, Staff Director

Ms. Terri Saunders, Deputy Staff Director

Mr. Dale Trexler, Chief of Staff

Mr. Roger Capretta, Supervising Paralegal

Ms. Sharon Zahn, Senior Paralegal

Ms. Shannon Green, Legislative Analyst

Lieutenant Colonel Kyle Green, U.S. Air Force, Role of the Commander Branch Chief

Lieutenant Colonel Kelly McGovern, U.S. Army, Comparative Systems Branch Chief

Commander Sherry King, U.S. Navy, Victim Services Branch Chief

Ms. Julie Carson, Attorney

Ms. Janice Chayt, Investigator

Major Ranae Doser-Pascual, U.S. Air Force, Attorney

Mr. Dillon Fishman, Attorney

Ms. Joanne Gordon, Attorney

Ms. Rachel Landsee, Attorney

Ms. Kristin McGrory, Attorney

Mr. Douglas Nelson, Attorney

Lieutenant Benjamin Voce-Gardner, U.S. Navy, Attorney

Ms. Amy Grace Peele, Technical Editor

Ms. Laurel Prucha Moran, Graphic Designer

Appendix D:
PANEL METHODOLOGY

To conduct its required assessments and reviews, the Response Systems Panel and its subcommittees used a variety of methods to gather information for Panel consideration. The Panel and its subcommittees held meetings to hear witnesses; conducted site visits at military installations and civilian agencies; requested information from the Department of Defense (DoD), the Services, and victim advocacy organizations; and reviewed publicly available information, data, and articles, in accordance with the Federal Advisory Committee Act of 1972.[1]

A designated federal officer, appointed by the Acting General Counsel of the DoD, attended all Panel and subcommittee meetings and ensured Panel activities complied with statutory mandates, governing regulations, and Department of Defense policies and procedures.

SUBCOMMITTEE FORMATION

To assist the Panel in completing its task in the twelve months allotted by Congress, the Secretary of Defense, at the Panel Chair's request, established three subcommittees: Role of the Commander; Comparative Systems; and Victim Services. Each subcommittee was comprised of at least four members of the Panel and five additional members. The Secretary of Defense charged the subcommittees with investigating and assessing certain objectives and preparing a report with findings and recommendations for the full Panel.

MEETINGS

Since June 2013, the Panel has held 14 days of public meetings to hear from 154 witnesses with different perspectives, experiences, and expertise on topics tasked to the Panel for consideration.[2] Information provided by crime victim rights advocates and organizations, sexual assault victim advocacy groups, military and civilian victim advocates, military sexual assault response coordinators (SARCs), and survivors of sexual assault[3] informed the Panel's understanding of victims' perspectives. Seasoned criminal justice experts such as military and civilian criminal investigators, civilian prosecutors, defense counsel, and victims' counsel as well as medical professionals such as sexual assault nurse examiners (SANE) and other first responders provided technical information and their professional perspectives to the Panel. A variety of social science professors, law professors, statisticians, criminologists, and behavioral health professionals provided independent academic assessments. Current and former commanders (both active duty and retired); current, former, or retired military justice practitioners; Judge Advocates General from each of the Services; and current United States Senators shared their perspectives on sexual assault prevention and response in the military, command, the maintenance of good order and discipline, operational requirements and perspectives, and the military justice system.

Panel members heard testimony from witnesses and asked questions. Many witnesses provided additional documents, studies, and other materials for the Panel's consideration. In accordance with Federal Advisory

Committee Act requirements, the Panel also considered written submissions from members of the public and heard public comments at each meeting.

In addition to public meetings, Panel members attended 65 subcommittee meetings and preparatory sessions. During these meetings and sessions, the members heard from more than 456 witnesses on issues related to the individual objectives of the subcommittees.

SITE VISITS

Panel and subcommittee members visited military installations and civilian agencies to speak with local personnel involved in sexual assault prevention and response efforts and programs. Several site visits used a non-attribution environment to foster candor on the part of participants. This non-attribution environment allowed participants to provide honest, candid, and unguarded opinions about their experiences, their impressions of victim services, military prosecutions, sexual assault response measures, and other relevant topics.

The Role of the Commander, Victims Services, and Comparative Systems Subcommittees visited Fort Hood and Joint Base San Antonio in Texas. Each of the subcommittees used these site visits to gather information related to their assigned objectives. The Comparative Systems Subcommittee also visited the Defense Forensic Science Center/United States Army Criminal Investigation Laboratory and Georgia Bureau of Investigation Lab in Atlanta, Georgia; Naval Base Kitsap, Bremerton and Joint Base Lewis-McChord in Washington; Dawson Place in Everett, Washington; Naval Station Norfolk, Virginia; the Philadelphia Sexual Assault Response Center in Philadelphia, Pennsylvania; and Marine Corps Base Quantico, Virginia. Additional information about the subcommittees' site visits is available in their respective subcommittee reports to the Panel, provided in the annex to this report.

REQUESTS FOR INFORMATION

In addition to meetings, the Panel Chair sent letters with more than 150 requests for information relevant to the duties of the Panel and objectives of the subcommittees to the Secretary of Defense and the Secretaries of the Military Services. In response, the Department of Defense and the Services submitted almost 15,000 pages of narrative responses and attached documents including policies, procedures, statistics, correspondence, and surveys.

The Panel also sent letters to eighteen victim advocacy organizations around the country, including organizations working specifically with military sexual assault, soliciting their input to assist the Panel and subcommittees in their review. Protect Our Defenders, Service Women's Action Network, Rape, Abuse, and Incest National Network, the National Organization for Victim Assistance, and the National Alliance to End Sexual Violence provided information to the Panel.

PUBLIC DOCUMENT REVIEW AND RESEARCH

The Panel also completed a comprehensive review of publicly available information. Panel members and staff reviewed government reports, transcripts of hearing testimony, policy memoranda, official correspondence, statistical data, training aids and videos, and planning documents. One particular source, the data collected by the Joint Service Committee Sexual Assault Subcommittee, provided the Comparative Systems Subcommittee with recent information about investigation, prosecution, defense, and adjudication in civilian jurisdictions.[4]

Additionally, the Panel and subcommittee members conducted legal research including reviewing federal and state court opinions related to the Crime Victims' Rights Act, case law and articles on victim's rights in the military justice system, military case law, and law review articles. General research focused on historical texts on the role of the commander in the military justice system and the legislative history of the UCMJ and other federal statutes.

SUBCOMMITTEE REPORTS TO THE PANEL

When finished with gathering evidence, each subcommittee held a series of meetings to discuss the content of their individual reports and to deliberate on its findings and recommendations. The subcommittee members developed their reports, including their findings and recommendations, based on the evidence collected during Subcommittee meetings and site visits as well as the extensive documentary evidence received from the Services, guided by the terms of reference set forth by the Secretary of Defense.

Once the subcommittees completed their reports, each subcommittee chair presented their findings and recommendations to the full Panel. During these presentations, the subcommittee chairs explained the evidentiary and factual basis for the subcommittee's findings and recommendations. Members of the Panel thoroughly questioned the subcommittee chairs and members on issues and conclusions in their reports. In total, the subcommittees presented 154 recommendations to the Panel for consideration.

PANEL DELIBERATION AND FINAL REPORT OF THE PANEL

Panel members deliberated on each subcommittee recommendation, holding six days of public deliberative hearings to discuss and finalize the Panel's recommendations based on the subcommittees' reports and evidence presented. Ultimately, the Panel approved 132 recommendations consistent with the Panel's statutory responsibilities and issues referred to it for consideration and assessment.

The Panel developed its final report based on the wealth of information gathered over the course of its assessment. The Panel's report responds to its statutory responsibilities and summarizes the information gathered throughout the Panel's study leading to its recommendations.

The reports from the Panel's subcommittees are included as an annex to the Panel's report.

1 5 U.S.C. App. (1972) *as amended*; 41 C.F.R. § 102-3.50(a).

2 A complete list of meetings, preparatory sessions, and site visits conducted by the Response Systems Panel and Subcommittees including witnesses is provided at Appendix E of this report. Agendas, transcripts, and materials for all Panel and subcommittee meetings are available at the Response Systems Panel website, http://responsesystemspanel.whs.mil/.

3 Survivors were afforded the opportunity to keep their identities and Service affiliation confidential. Those who chose to do so are referred to throughout the report by only their initials.

4 The JSC-SAS traveled to eighteen civilian jurisdictions in 2013, gathering information and conducting interviews of law enforcement, prosecutors, public defenders, victims' attorneys, and victim advocates for comparative analysis. *See generally* JSC-SAS Report, Appendices (Sept. 2013) (on file at RSP).

Appendix E:

PANEL AND SUBCOMMITTEE SESSIONS AND PRESENTERS

DATE	RESPONSE SYSTEMS PANEL SESSIONS	PRESENTERS
May 17, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Teleconference/ Administrative matters/ Planning session
June 5, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Teleconference/Administrative matters/ Planning session
June 14, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Teleconference Colonel Patricia A. Ham, Staff Director, Response Systems Panel Basic overview of the military justice process
June 27, 2013	Public Meeting of the RSP U.S. District Court for the District of Columbia, Washington, D.C.	Dr. Lynn Addington, Associate Professor, American University Department of Justice, Law, & Society Ms. Delilah Rumburg, Pennsylvania Coalition Against Rape Major General Gary S. Patton, Director, DoD Sexual Assault Prevention and Response Office (SAPRO) Dr. Nathan W. Galbreath, Senior Executive Advisor, DoD SAPRO. Mr. Fred Borch, Army JAG Corps Regimental Historian Captain Robert Crow, U.S. Navy, Joint Service Committee Representative
July 16, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Teleconference/ Administrative matters/ Planning session
July 18, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Teleconference/ Administrative matters/ Planning session
July 22, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Teleconference/ Administrative matters/ Planning session

Aug. 1, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO Major General Margaret Woodward, Director, Air Force Sexual Assault Prevention & Response (SAPR) Office Ms. Carolyn Collins, Director, Army Sexual Harassment/Assault Response & Prevention (SHARP) Office Rear Admiral Sean Buck, Director, Navy 21st Century Sailor Office Brigadier General Russell Sanborn, Director, Marine & Family Programs Ms. Shawn Wren, SAPR Program Manager, U.S. Coast Guard Colonel Don Christiansen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force Lieutenant Colonel Brian Thompson, Deputy Chief, Government Trial and Appellate Counsel Division, U.S. Air Force Lieutenant Colonel Jay Morse, Chief, Army Trial Counsel Assistance Program Major Jaclyn Grieser, Army Special Victim Prosecutor Commander Aaron Rugh, Director, Navy Trial Counsel Assistance Program Lieutenant Colonel Derek Brostek, Branch Head, U.S. Marine Corps Military Justice Branch Mr. Guy Surian, Deputy G-3 for Investigative Operations & Intelligence, U.S. Army Criminal Investigation Command Special Agent Kevin Poorman, Associate Director for Criminal Investigations, Headquarters, Air Force Office of Special Investigations Special Agent Maureen Evans, Division Chief, Family & Sexual Violence, Naval Criminal Investigative Service Mr. Marty Martinez, U.S. Coast Guard Investigative Service (CGIS) Assistant Director Special Agent Beverly Vogel, CGIS Sex Crimes Program Manager Professor Margaret Garvin, Executive Director, National Crime Victim Law Institute, Lewis & Clark Law School, Portland, Oregon

Aug. 5, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Professor Geoffrey Corn, South Texas College of Law Professor Chris Behan, Southern Illinois University School of Law Professor Michel Drapeau, University of Ottawa Professor Eugene Fidell, Yale Law School *(telephonic)* Professor Victor Hansen, New England School of Law Professor Rachel VanLandingham, Stetson University College of Law Brigadier (Retired) Anthony Paphiti, former Brigadier Prosecutions, Army Prosecuting Authority, British Army *(telephonic)* Major General William Mayville, Jr., U.S. Army Colonel Dan Brookhart, U.S. Army Colonel Jeannie Leavitt, U.S. Air Force Lieutenant Colonel Debra Luker, U.S. Air Force Rear Admiral Dixon Smith, U.S. Navy Captain David Harrison, U.S. Navy Commander Frank Hutchison, U.S. Navy Major General Steven Busby, U.S. Marine Corps Lieutenant Colonel Kevin Harris, U.S. Marine Corps Rear Admiral William Baumgartner, U.S. Coast Guard Captain P.J. McGuire, U.S. Coast Guard Air Commodore Cronan, Director General, Australia Defence Force Legal Service *(telephonic)*
Aug. 6, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Lieutenant Colonel Kelly McGovern, Joint Service Committee Subcommittee on Sexual Assault (JSC-SAS) Dr. David Lisak, Professor, University of Massachusetts-Boston *(telephonic)* Dr. Cassia Spohn, Professor, Arizona State University School of Criminology and Criminal Justice Dr. Jim Lynch, former Director of the Bureau of Justice Statistics and current Chair, Department of Criminology and Criminal Justice, University of Maryland

Sept. 24, 2013	Public Meeting of the RSP U.S. District Court for the District of Columbia, Washington, D.C.	Professor Geoffrey Corn, South Texas College of Law Professor Chris Behan, Southern Illinois University School of Law Professor Michel Drapeau, University of Ottawa Professor Eugene Fidell, Yale Law School *(telephonic)* Professor Victor Hansen, New England School of Law Professor Rachel VanLandingham, Stetson University College of Law Lord Martin Thomas of Gresford QC, Chair, Association of Military Advocates (UK) Professor Amos Guiora, University of Utah College of Law Major General Blaise Cathcart, Judge Advocate General of the Canadian Armed Forces Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service Commodore Andrei Spence, Commodore Naval Legal Services, Royal Navy, United Kingdom Brigadier (Ret.) Anthony Paphiti, former Brigadier Prosecutions, Army Prosecuting Authority, British Army Senator Kirsten Gillibrand (New York) Senator Claire McCaskill (Missouri)
Sept. 25, 2013	Public Meeting of the RSP U.S. District Court for the District of Columbia, Washington, D.C.	Lieutenant General Michael Linnington, U.S. Army Colonel Corey Bradley, U.S. Army Rear Admiral Dixon Smith, U.S. Navy Captain David Harrison, U.S. Navy Commander Frank Hutchison, U.S. Navy General Edward Rice, U.S. Air Force Colonel Polly S. Kenny, U.S. Air Force Major General Steven Busby, U.S. Marine Corps Lieutenant Colonel Kevin Harris, U.S. Marine Corps Rear Admiral Thomas Ostebo, U.S. Coast Guard Commander William Dwyer, U.S. Coast Guard Brigadier General Richard C. Gross, Legal Counsel to the Chairman of the Joint Chiefs of Staff Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army Vice Admiral Nanette M. DeRenzi, Judge Advocate General, U.S. Navy Lieutenant General Richard C. Harding, The Judge Advocate General, U.S. Air Force Major General Vaughn A. Ary, Staff Judge Advocate to the Commandant of the Marine Corps Rear Admiral Frederick J. Kenney, Judge Advocate General and Chief Counsel, U.S. Coast Guard Ms. Miranda Peterson (Public Comment)

Nov. 7, 2013	Public Meeting of the RSP U.S. District Court for the District of Columbia, Washington, D.C.	Major General Gary S. Patton, Director, DoD SAPRO Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO Major General Margaret Woodward, Director, Air Force SAPR Office Rear Admiral Maura Dollymore, Director of Health, Safety and Work-Life, U.S. Coast Guard Ms. Shawn Wren, SAPR Program Manager, U.S. Coast Guard Rear Admiral Sean Buck, Director, Navy 21st Century Sailor Office Brigadier General Russell Sanborn, Director, Marine & Family Programs Dr. Christine Altendorf, Director, U.S. Army Sexual Harassment/ Assault Response & Prevention Office Master Sergeant Carol Chapman, SHARP Program Manager, 7th Infantry Division, U.S. Army Ms. Christa Thompson, Victim Witness Liaison, Fort Carson, Colorado Dr. Kimberly Dickman, Sexual Assault Response Coordinator, National Capitol Region, U.S. Air Force Master Sergeant Stacia Rountree, Victim Advocate, National Capitol Region, U.S. Air Force Ms. Liz Blanc, U.S. Navy Sexual Assault Response Coordinator, National Capitol Region Ms. Torie Camp, Deputy Director, Texas Association Against Sex Assault Ms. Gail Reid, Director of Victim Advocacy Services, Baltimore, Maryland Ms. Autumn Jones, Director, Victim/Witness Program, Arlington County & City of Falls Church, Virginia Ms. Ashley Ivey, Victim Advocate Coordinator, Athens, Georgia Ms. Nancy Parrish, President, Protect our Defenders Ms. Miranda Peterson, Program and Policy Director, Protect our Defenders Mr. Greg Jacob, Policy Director, Service Women's Action Network Mr. Scott Berkowitz, President, Rape, Assault, and Incest Network Dr. Will Marling, Executive Director, National Organization for Victim Assistance Ms. Donna Adams (Public Comment)

Nov. 8, 2013	Public Meeting of the RSP U.S. District Court for the District of Columbia, Washington, D.C.	Mr. Brian Lewis Ms. BriGette McCoy Ms. Ayana Harrell Ms. Sarah Plummer Ms. Marti Ribeiro Command Sergeant Major Julie Guerra, U.S. Army Colonel James McKee, Special Victims' Advocate Program, U.S. Army Colonel Carol Joyce, Officer in Charge, Victims' Legal Counsel Organization, U.S. Marine Corps Captain Karen Fischer-Anderson, Chief of Staff, Victims' Legal Counsel, U.S. Navy Captain Sloan Tyler, Director, Office of Special Victims' Counsel, U.S. Coast Guard Colonel Dawn Hankins, Chief, Special Victims' Counsel Division, U.S. Air Force Mr. Chris Mallios, Attorney Advisor for AEquitas, Washington, D.C. Ms. Theo Stamos, Commonwealth Attorney, Arlington, Virginia Ms. Marjory Fisher, Chief, Special Victims Unit, Queens, New York Ms. Keli Luther, Deputy County Attorney, Maricopa County, Arizona Mr. Mike Andrews, Managing Attorney, D.C. Crime Victims Resource Center Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps, Defense Services Organization Captain Charles Purnell, US. Navy Defense Service Office Colonel Dan Higgins, Chief, Trial Defense Division, U.S. Air Force Commander Ted Fowles, Deputy, Office of Legal and Defense Services, U.S. Coast Guard Mr. David Court of Court and Carpenter, Stuttgart, Germany Mr. Jack Zimmermann of Lavine, Zimmermann and Sampson, P.C., Houston, Texas Ms. Bridget Wilson, Attorney, San Diego, California

Dec. 11, 2013	Public Meeting of the RSP University of Texas - Austin, Austin, Texas	Mr. Russ Strand, Chief, Behavioral Sciences Education and Training Division, U.S. Army Military Police School Major Ryan Oakley, U.S. Air Force, Deputy Director, Office of Legal Policy, Office of the Under Secretary of Defense (Personnel & Readiness) Dr. Cara J. Krulewitch, Director, Women's Health, Medical Ethics and Patient Advocacy Clinical and Policy Programs, Office of the Assistant Secretary of Defense (Health Affairs) Captain Jason Brown, Military Justice Branch, Judge Advocate Division, U.S. Marine Corps Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army Mr. Darrell Gilliard, Deputy Assistant Director, Naval Criminal Investigative Service Mr. Neal Marzloff, Special Agent in Charge, Central Region, U.S. Coast Guard Criminal Investigative Service Mr. Kevin Poorman, Associate Director for Criminal Investigations, U.S. Air Force Office of Special Investigation Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, U.S. Army Criminal Investigation Command Deputy Chief Kirk Albanese, Los Angeles Police Department, Chief of Detectives, Detective Bureau Sergeant Liz Donegan, Austin Police Department, Sex Offender Apprehension and Registration Unit Deputy Chief Corey Falls, Ashland (OR) Police Department, Deputy Chief of Police Sergeant Jason Staniszewski, Austin Police Department, Sex Crimes Unit Ms. Joanne Archambault, Executive Director of End Violence Against Women International and President and Training Director for Sexual Assault Training and Investigations Dr. Noël Busch-Armendariz, Professor, School of Social Work at The University of Texas at Austin, and Associate Dean of Research Dr. Kim Lonsway, Director of Research for End Violence Against Women International Major Melissa Brown, Texas National Guard (Public Comment) Mr. Daniel Ross, Attorney, Chairman of the Advisory Committee, Institute on Domestic Violence and Sexual Assault (Public Comment)

Dec. 12, 2013	Public Meeting of the RSP University of Texas - Austin, Austin, Texas	Ms. Martha Bashford, Chief, Sex Crimes Unit, New York County District Attorney's Office Mr. Lane Borg, Executive Director, Metropolitan Public Defenders, Portland, Oregon Captain Jason Brown, Military Justice Branch (JAM), Judge Advocate Division, Headquarters U.S. Marine Corps Colonel Don Christensen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy Ms. Kelly Higashi, Assistant United States Attorney, Chief, Sex Offense and Domestic Violence Section, U.S. Attorney's Office, District of Columbia Ms. Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender Commander Don King, Director, Defense Counsel Assistance Program, U.S. Navy Lieutenant Colonel Fansu Ku, Chief, Defense Counsel Assistance Program, Army Trial Defense Service Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force Ms. Janet Mansfield, Attorney, Sexual Assault Policy, Office of The Judge Advocate General, U.S. Army Captain Stephen McCleary, Chief, Office of Legal Policy and Program Development, U.S. Coast Guard Mr. Bill Montgomery, Maricopa County Attorney, Maricopa County, Arizona Lieutenant Colonel Jay Morse, Chief, U.S. Army Trial Counsel Assistance Program Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army Ms. Anne Munch, Owner, Anne Munch Consulting, Inc. Ms. Amy Muth, Attorney-at-Law, The Law Office of Amy Muth Ms. Wendy Patrick, Deputy District Attorney, Sex Crimes and Stalking Division, San Diego County District Attorney's Office Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force Mr. Barry G. Porter, Attorney & Statewide Trainer, New Mexico Public Defender Department Commander Aaron Rugh, Director, Navy Trial Counsel Assistance Program Major Mark Sameit, Branch Head, Trial Counsel Assistance Program, U.S. Marine Corps Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia Lieutenant Colonel Devin Winklosky, U.S. Marine Corps, Vice Chair and Professor, Criminal Law Department, The U.S. Army Judge Advocate General's Legal Center and School

Jan 30, 2014	Public Meeting of the RSP The George Washington University Law School, Washington, D.C.	Major General (Retired) Martha Rainville, U.S. Air Force *(telephonic)* Brigadier General (Retired) Pat Foote, U.S. Army Rear Admiral (Retired) Marty Evans, U.S. Navy *(telephonic)* Rear Admiral (Retired) Harold Robinson, U.S. Navy Captain (Retired) Lory Manning, U.S. Navy Colonel (Retired) Paul McHale, U.S. Marine Corps *(telephonic)* Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG & former Chief Counsel, U.S. Maritime Administration General (Retired) Ann Dunwoody, U.S. Army General (Retired) Roger Brady, U.S. Air Force Vice Admiral (Retired) Mike Vitale, U.S. Navy *(telephonic)* Lieutenant General (Retired) James Campbell, U.S. Army Lieutenant General (Retired) Ralph Jodice II, U.S. Air Force *(telephonic)* Rear Admiral (Retired) William Baumgartner, U.S. Coast Guard Ms. Melissa Davis (Public Comment) Ms. Ginny Lee (Public Comment) Ms. Sarah Zak (Public Comment)
May 5, 2014	Public Meeting of the RSP The George Washington University Law School, Washington, D.C.	Major General Jeffrey J. Snow, Director, DoD, SAPRO Panel Deliberations
May 6, 2014	Public Meeting of the RSP The George Washington University Law School, Washington, D.C.	Panel Deliberations Ms. Ginny Lee (Public Comment) Not a Veteran (Public Comment) *(telephonic)*
May 16, 2014	Public Meeting of the RSP U.S. District Court for the District of Columbia, Washington, D.C.	Panel Deliberations Ms. Jen McClendon (Public Comment)
May 29, 2014	Public Meeting of the RSP U.S. District Court for the Southern District of New York	Panel Deliberations
May 30, 2014	Public Meeting of the RSP U.S. District Court for the Southern District of New York	Panel Deliberations Ms. Monisha Rios (Public Comment)
June 16, 2014	Public Meeting of the RSP U.S. District Court for the Southern District of New York	Panel Deliberations Ms. Caprice Nicolette Manos (Public Comment)

DATE	ROLE OF THE COMMANDER SUBCOMMITTEE	PRESENTERS
Oct. 23, 2013	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Colonel Alan Metzler, Deputy Chief, DoD SAPRO Dr. Nathan W. Galbreath, Senior Executive Advisor, DoD SAPRO Dr. Elise Van Winkle, Branch Chief of Research, Defense Manpower Data Center
Nov. 5, 2013	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Nov. 13, 2013	Subcommittee Meeting One Liberty Center, Arlington, Virginia	Brigadier General Charles Pede, U.S. Army Senator Claire McCaskill (Missouri)
Nov. 20, 2013	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Professor Eugene Fidell, Yale Law School *(telephonic)* Mr. James Love, Acting Director, Military Equal Opportunity & DEOMI Liaison, DoD Office of Diversity Management & Equal Opportunity Dr. Dan McDonald, Defense Equal Opportunity Management Institute Lieutenant Colonel Kay Emerson, U.S. Army, Office of Diversity & Leadership (MEO) Mr. George Bradshaw, U.S. Navy, 21st Century Sailor Office (MEO) Colonel T.V. Johnson, U.S. Marine Corps, Diversity & Equal Opportunity Office Master Gunnery Sergeant Lester Poole, U.S. Marine Corps, Diversity & Equal Opportunity Office Mr. Cyrus Salazar, U.S. Air Force Equal Opportunity Program Mr. James Ellison, U.S. Coast Guard, Civil Rights Directorate Lieutenant General Howard Bromberg, U.S. Army, Deputy Chief of Staff, G1 Captain Steve Deal, Deputy Director, U.S. Navy 21st Century Sailor Division Colonel Robin Gallant, Commanding Officer, U.S. Marine Corps, Headquarters & Services Battalion Brigadier General Gina Grosso, U.S. Air Force, Director of Force Management Policy, AF/A1 Rear Admiral Daniel Neptun, U.S. Coast Guard, Assistant Commandant for Human Resources
Dec. 10, 2013	Site Visit Role of the Commander Subcommittee Fort Hood, Texas	General Courts-Martial Convening Authorities Special Courts-Martial Convening Authorities and Subordinate Commanders Senior Enlisted Leaders Defense Counsel
Dec. 13, 2013	Site Visit Role of the Commander Subcommittee Joint Base San Antonio - Lackland, Texas	Basic Military Training Commanders and Training Instructors Basic Military Training Trainees Special Courts-Martial Convening Authorities and Subordinate Commanders Senior Enlisted Leaders Defense Counsel

Jan. 8, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Lieutenant General (Retired) Claudia Kennedy, U.S. Army *(telephonic)* Major General (Retired) Martha Rainville, U.S. Air Force Brigadier General (Retired) Loree Sutton, U.S. Army Rear Admiral (Retired) Harold Robinson, U.S. Navy Rear Admiral (Retired) Marty Evans, U.S. Navy Colonel (Retired) Paul McHale, U.S. Marine Corps Captain (Retired) Lory Manning, U.S. Navy Honorable Patrick Murphy, former congressman and U.S. Army JAG Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG & former Chief Counsel, U.S. Maritime Administration General (Retired) Fred Franks, U.S. Army *(telephonic)* General (Retired) Roger Brady, U.S. Air Force *(telephonic)* Lieutenant General (Retired) Mike Gould, U.S. Air Force Lieutenant General (Retired) Tom Metz, U.S. Army Lieutenant General (Retired) John Sattler, U.S. Marine Corps Vice Admiral (Retired) Scott Van Buskirk, U.S. Navy Major General (Retired) K.C. McClain, U.S. Air Force *(telephonic)* Major General (Retired) Mary Kay Hertog, U.S. Air Force *(telephonic)*
Jan. 13 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Jan 24, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Jan 28, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session

Feb. 12, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Dr. Andra Tharp, Center for Disease Control and Prevention *(telephonic)* Dr. Kathleen Basile, Center for Disease Control and Prevention *(telephonic)* Dr. Sarah DeGue, Center for Disease Control and Prevention *(telephonic)* Ms. Beth Reimels, Center for Disease Control and Prevention *(telephonic)* Ms. Kelly Ziemann, Education and Prevention Coordinator, Iowa Coalition Against Sexual Assault Mr. Benje Douglas, Project Manager, National Sexual Violence Resource Center Dr. Victoria Banyard, Co-director, Prevention Innovations and Professor of Psychology, University of New Hampshire Dr. Sharyn Potter, Co-director, Prevention Innovations and Associate Professor of Sociology, University of New Hampshire Dr. Jackson Katz, Co-founder, Mentors in Violence Prevention Program *(telephonic)* Colonel Alan Metzler, Deputy Director, DoD SAPRO Colonel Litonya Wilson, Chief of Prevention, DoD SAPRO Dr. Nathan W. Galbreath, Senior Executive Advisor, DoD SAPRO Colonel Karen Gibson, U.S. Army Colonel David Maxwell, U.S. Marine Corps Colonel Trent Edwards, U.S. Air Force Captain Steven Andersen, U.S. Coast Guard Captain Peter Nette, U.S. Navy Command Sergeant Major Pamela Williams, U.S. Army Sergeant Major Mark Byrd, U.S. Marine Corps Command Master Chief Marilyn Kennard, U.S. Navy Senior Master Sergeant Patricia Granan, U.S. Air Force
Mar. 12, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Colonel (Retired) Denise K. Vowell, Former Chief Trial Judge of the Army Mr. Robert Reed, former DoD Assoc. Dep. General Counsel (Military Justice and Personnel Policy)
Apr. 8, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Apr. 16, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Apr. 17, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Apr. 21, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Apr. 25, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session

DATE	VICTIM SERVICES SUBCOMMITTEE	PRESENTERS
Nov. 21, 2013	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Ms. Shawn Wren, Director, U.S. Coast Guard Sexual Assault and Prevention Office Ms. Tanya Rogers, Program Analyst, US Navy Sexual Assault and Prevention Office Lieutenant Colonel Mike Lewis, Victim Witness Liaison Ms. Peggy Cuevas, Director US Marine Corps, MARFORRES, Sexual Assault Response Coordinator Ms. Carolyn Collins, U.S. Army Ms. Bette Stebbins Inch, Senior Victim Services Advisor, Department of Defense Sexual Assault Response and Prevention Office Lieutenant Colonel Michael Lewis, U.S. Air Force, Joint Services Committee on the UCMJ Commander Sherry King, U.S. Navy, Joint Service Committee Subcommittee on Sexual Assault (JSC-SAS) Captain Nicholas Carter, U.S. Air Force, Joint Service Committee Subcommittee on Sexual Assault (JSC-SAS)
Dec. 10, 2013	Site Visit Victim Services Subcommittee Fort Hood, Texas	Military Justice Personnel Behavior Health Personnel Representatives from the Family Advocacy Program Sexual Assault Response Coordinator Victim Advocates Representatives from the Victim Witness Assistance Program Special Victim Counsel
Dec. 13, 2013	Site Visit Victim Services Subcommittee Joint Base San Antonio - Lackland, Texas	Basic Military Training Instructors Basic Military Training Trainees Members of the Special Victim Counsel Office Sexual Assault Response Coordinators Victim Advocates Victim Witness Liaisons
Jan. 9, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Professor Doug Beloof, Lewis and Clark Law School Mr. Russell Butler, Executive Director, Maryland Crime Victims' Resource Center Mr. Jonathan Jeffress, Assistant Federal Public Defender, Washington D.C. Major Ryan Oakley, U.S. Air Force, Department of Defense
Jan. 23, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/Preparatory and Planning Session
Jan. 29, 2014	Victim Services Subcommittee Meeting The George Washington University Law School, Washington, DC	Phone Conference/Preparatory and Planning Session

Feb. 26, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Captain Mike Colston, M.D., U.S. Navy, Director, Mental Health Program, Clinical and Program Policy, Office of the Assistant Secretary of Defense Captain John A. Ralph, Assistant Deputy Chief, Wounded, Ill, and Injured, Navy Bureau of Medicine and Surgery Colonel Marie Colasanti, U.S. Air Force, Chief, Family Advocacy Program, Lackland-Kelly AFB. Colonel Tracy Neal-Walden, Deputy Director, Psychological Health, Air Force Medical Support Agency Lieutenant Colonel Todd Yosick, U.S. Army, Behavioral Health Strategic Integrator and Liaison to the Department of Defense and Veterans Administration. Commander Kristie Robson, Department Head, Clinical Programs, Navy Bureau of Medicine and Surgery Mr. Scott Berkowitz, Founder and President, Rape, Abuse and Incest National Network Ms. Crystel Griffen, U.S. Navy, Family Advocacy Program Ms. Patricia Haist, Director of Clinical Services, YWCA West Central Michigan Ms. Paulette Hubbert, PhD, LCSW, ADC II, USMC (Retired) Ms. Katherine Robertson, DoD, Service Family Advocacy Program Ms. Jacqueline Richardson, U.S. Army, Family Advocacy Program
Mar. 13, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Military Sexual Assault Survivors Subcommittee Deliberation/Report Planning
Mar. 20, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Planning
Mar. 27, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Planning
Apr. 3, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Review
Apr. 10, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Review
Apr. 16, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Review
Apr. 18, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Review

Apr. 24, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Review
Apr. 25, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Review
DATE	**COMPARATIVE SYSTEMS SUBCOMMITTEE**	**PRESENTERS**
Oct. 21, 2013	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Preparatory Session
Nov. 14, 2013	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Defense Forensic Science Center (DFSC)/U.S. Army Criminal Investigation Laboratory (USACIL), Atlanta, Georgia	Dr. Jeff Salyards, Exec. Director, DFSC Mr. Robert Abernathy, Chief of Staff, DFSC Ms. Lauren Reed, Dir. USACIL Mr. Mike Hill, Operations Officer, USACIL Mr. Scott Larson, Chief, Security, Plans and Operations Ms. Jennifer Coursey, Supervisory Biologist-DNA Branch Ms. Debra E. Glidewell, Chief, DNA-Branch Ms. Anece l. Baxter-White, Attorney Advisor Ms. Donna Ioannidis, DNA Examiner Ms. Elizabeth D. Johnson, CODIS Dr. Kim E. Mooney, Acting Chief, Trace Evidence Mr. Michael A. Villarreal, Trace Evidence Examiner Mr. William G. Doyne, Technical leader, Latent Prints Ms. Monica Garcia, Latent Print Examiner Mr. Garold Warner, Office of the Chief Scientist Dr. Brigid F. O'Brien, Research Physical Scientist
Nov. 14, 2013	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Georgia Bureau of Investigation (GBI) Lab, Atlanta, Georgia	Mr. Mark R. Maycock, Assistant Deputy Director, GBI Ms. Kathryn P. Lee, Assistant Deputy Director, GBI Mr. Cleveland Miles, Forensic Biology Manager, GBI Ms. Tammy Jergovich, Trace Evidence Manager, GBI Mr. Jim Sebestyn, Forensic Biology, GBI

Nov. 19, 2013	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Mr. Scott Russell, Director of the Violent Crime Division, DoD Inspector General Mr. Guy Surian, HQ, US Army Criminal Investigation Command Ms. Donna Ferguson, US Army Military Police School Mr. Kevin Poorman, Office of Special Investigations, US Air Force, Quantico Headquarters Mr. Robert Vance, Programs and Policy, Naval Criminal Investigative Service Chief Warrant Officer Five Shannon Wilson, Marine Corps Investigator MAC Amy Pearson, Naval Investigator Commander Kristie Robson, Department Head of Clinical Programs and Sexual Assault Medical, Program Manager, US Navy Bureau of Medicine and Surgery Colonel Todd Poindexter, Chief of Clinical Operations, Air Force Medical Support Agency, Office of The Surgeon General Ms. Carol Haig, Army Sexual Assault Clinical Provider, Office of the Surgeon General Major Gwendolyn Foster, U.S. Air Force, SAFE, Andrews Air Force Base Dr. Sue Rotolo, Ph.D., SANE, Inova Fairfax Hospital Major Martin Bartness, Baltimore City Police Department Detective Lanis Geluso, Virginia Beach Police Department Lieutenant Joe Carter, Falls Church City Police Department Detective Missy Elliott, Falls Church City Police Department Lieutenant Paul Thompson, Assistant Commander, Major Crimes Division, Fairfax County Police Department Lieutenant Mark Kidd, Sex Squad, Fairfax County Police Department Detective Stephen Wallace, Sex Squad, Fairfax County Police Department Detective Greg Sloan, Arlington Police Department
Dec. 10, 2013	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Fort Hood, Texas	General Courts-Martial Convening Authorities Special Courts-Martial Convening Authorities and Subordinate Commanders Senior Enlisted Leaders Defense Counsel Trial Counsel/ Special Victim Prosecutors Medical Personnel Law Enforcement Agencies
Dec. 13, 2013	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Joint Base-San Antonio, Lackland Air Force Base, Texas	Defense Counsel Staff Judge Advocates Medical Personnel Law Enforcement Personnel

Jan. 7, 2013	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Colonel (Retired) Francis Gilligan, Director of Training for of Military Commission Prosecutors Ms. Candace Mosley, Director of Programs, National District Attorneys Association Ms. Viktoria Kristiansson, AEquitas Ms. Lisa Wayne, former President, NACDL and Training Director of Colorado State Public Defender System Ms. Yvonne Younis, Defender Association of Philadelphia Lieutenant Colonel Matthew Calarco, Chair, Criminal Law Department, U.S. Army Colonel Vance Spath, Director, Training and Readiness, U.S. Air Force Lieutenant Commander Justin McEwen, Military Justice Department Head, Naval Justice School Lieutenant Colonel George Cadwalader, Executive Officer, Naval Justice School Ms. Bridget Ryan, Highly Qualified Expert, U.S. Army, Trial Counsel Assistance Program Ms. Sandra Tullius, Highly Qualified Expert, U.S. Army, Trial Counsel Assistance Program Mr. Ron White, Subject Matter Expert, consultant U.S. Army Trial Defense Services Mr. Edward O'Brien, DCAP Colonel Ken Theurer, Commandant, Air Force Judge Advocate General's School Mr. David M. Houghland, Chief of Education & Training Development, Training and Readiness Directorate, HQ USAF/JAI Mr. Neal Puckett, Highly Qualified Expert, Naval Defense Counsel Assistance Program Ms. Teresa Scalzo, Deputy Director, Navy Judge Advocate General, Trial Counsel Assistance Program (TCAP) Ms. Kathleen Coyne, USMC, Highly Qualified Expert-Defense Ms. Claudia Bayliff, Attorney at Law
Jan. 15, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Planning and Deliberation Session.
Jan. 31, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Planning and Deliberation Session
Feb. 5, 2014	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Naval Base Kitsap and Joint Base Lewis-McChord, Washington	Commanders Defense Counsel Civilian Prosecutors Staff Judge Advocate Law Enforcement Personnel Victim Services Personnel

Feb. 6 2014	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Everett, Washington	Ms. Brittany Blancarte - CAP Therapist, Compass Health Ms. Linda Lasz - CAP Supervisor, Compass Health Ms. Heidi Scott - Child Interview Specialist, Dawson Place Child Advocacy Center Ms. Lisa Paul - Lead Deputy Prosecuting Attorney, Snohomish County Prosecutor's Office Sergeant. Rob Barnett -SIU Supervisor, Snohomish County Sheriff's Office Ms. Lori Vanderburg - Director, Dawson Place & CAP Manager, Compass Health Ms. Paula Newman-Skomski - ARNP, Providence Intervention Center for Assault & Abuse Ms. Alicia Coragiulo - Advocate Specialist, Providence Intervention Center for Assault & Abuse Ms. Kristine Petereit - Fund Development Coordinator, Dawson Place Child Advocacy Center Mr. Mark Roe - County Prosecutor, Snohomish County Prosecutor's Office Ms. Annette Tupper - Victim Advocate, Snohomish County Prosecutor's Office Ms. Vicki Steffen - Office Manager II, Dawson Place Child Advocacy Center
Feb. 11 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Colonel (Retired) Francis Gilligan, Office of Military Commission Colonel (Retired) Steve Andraschko, Army Clemency & Parole Board Colonel John Baker, U.S. Marine Corps Mr. Mark Bergstrom, Pennsylvania State Sentencing Commission Mr. Bruce Brown, Air Force Clemency & Parole Board Mr. L. Russell Burress, U.S. Sentencing Commission Ms. Annette Burrhus-Clay, National Alliance to End Sexual Violence (NAESV) Lieutenant Colonel Craig Burton, U.S. Air Force Captain Robert Crow, U.S. Navy Ms. Meredith Farrar-Owens, Virginia State Sentencing Commission Ms. Molly Gill, Families Again Mandatory Minimums (FAMM) Lieutenant Commander Stuart Kirkby, U.S. Navy Mr. A.J. Kramer, Civilian Defense Counsel Mr. Michael LoGrande, Air Force Review Boards Agency Colonel Michael Mulligan, U.S. Army Mr. Michael Nachmanoff, Civilian Defense Counsel Mr. Jonathan Wroblewski, U.S. Department of Justice
Feb. 20, 2014	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Norfolk, Virginia	Commanders Defense Counsel Trial Counsel Staff Judge Advocates Victim Legal Counsel Victim Services Personnel Law Enforcement Personnel

Feb. 20, 2014	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Philadelphia, Pennsylvania	Mr. Michael Boyle, PSARC Director Captain Johan Darby, Commanding Officer, SVU Philadelphia PD Dr. Ralph Riviello, Drexel University College of Medicine Ms. Pat Roussell, Sexual Assault Nurse Examiner (SANE) Ms. Erin O'Brien, Assistant District Attorney, Family Violence & Sexual Assault Section
Feb. 25, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Dr. Robin Wilson, Ph.D. ABPP Mr. David Prescott. LICSW LTC David Johnson, U.S. Army, M.D. Program Director, Center for Forensic Behavioral Sciences (CFBS) Dr. Jennifer Yeaw, Psy.D. CFBS *(telephonic)*
Mar. 5, 2014	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Quantico Marine Corps Base, Quantico, Virginia	Commanders Defense Counsel Civilian Prosecutors Staff Judge Advocate Law Enforcement Personnel Victim Services Personnel
Mar. 11, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session.
Mar. 25, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session.
Apr. 11, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Dr. Jim Lynch, former Director, Bureau of Justice Statistics (BJS), Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland Dr. Bill Sabol, Acting Director BJS Dr. Allen Beck, BJS, Senior Statistical Advisor
Apr. 24, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Conference Call/ Deliberation Session
Apr. 25, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Conference Call/ Deliberation Session
Apr. 29, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Conference Call/ Deliberation Session
May 2, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Conference Call/ Deliberation Session

Appendix F:
SOURCES CONSULTED

1. U.S. CONSTITUTION

2. LEGISLATIVE SOURCES

a. Enacted Statutes

5 U.S.C. App §§ 1-16 (Federal Advisory Committee Act)

10 U.S.C. § 654 (repealed Dec 22, 2010) ("Don't Ask, Don't Tell")

10 U.S.C. §§ 801-946 (2012) (Uniform Code of Military Justice)

18 U.S.C. § 3771 (2012) (Crime Victims' Rights Act)

28 U.S.C. §§ 991-998 (2012) (United States Sentencing Commission)

Consolidated Appropriations Act for Fiscal Year 2014, PUB. L. NO. 113-76, 128 Stat. 5 (2014)

National Defense Authorization Act for Fiscal Year 2004, PUB. L. No. 108-136, 117 Stat. 1466 (2003)

National Defense Authorization Act for Fiscal Year 2005, PUB. L. NO. 108-375, 118 Stat. 1811 (2004)

National Defense Authorization Act for Fiscal Year 2006, PUB. L. NO. 109-163, 119 Stat. 3134 (2006)

National Defense Authorization Act for Fiscal Year 2011, PUB. L. NO.111-383, 124 Stat. 4137 (2011)

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)

ARIZ. REV. STAT. § 13-4426.01 (amend. 2003) (Sentencing; victims' right to be heard)

IOWA CODE § 915.21.3 (amend. 2002) Victim impact statement)

N.H. REV. STAT. ANN. § 21-M:8-k (amend. 2007) (NH Victim Bill of Rights)

TEX. CODE CRIM. PROC. ANN. § 37.07(2)(b) (2007)

b. Proposed Statutes

S. 967, 113th Cong. (2013); S. 1197, amend. no. 2099 (2013); S. 1752, 113th Cong. (2013), Military Justice Improvement Act of 2013

S. 1917, 113th Cong. (2014), Victims Protection Act of 2014

H.R. 3435, 112th Cong. (2011); H.R. 1593, 113th Cong. (2013), Sexual Assault Training Oversight and Prevention Act

H.R. 4435, 113th Cong. (2014), Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015

H.R. 4485, 113th Cong., § 4 (2014), Furthering Accountability and Individual Rights within the Military Act of 2014

S.2410, 113th Cong. (2014), Carl Levin National Defense Authorization Act for Fiscal Year 2015

c. Reports of Congress

House Report No. 81-491 (1949), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/report_01.pdf

House Report No. 98-549 (1983), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/HR-98-549.pdf

Senate Report No. 98-53 (1983), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/SR-98-53.pdf

Senate Report No. 113-44 (2013), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-113srpt44/pdf/CRPT-113srpt44.pdf

3. JUDICIAL DECISIONS

a. U.S. Supreme Court

Heath v. Alabama, 474 U.S. 82 (1985)

Jackson v. Taylor, 353 U.S. 569 (1957)

Setser v. United States, 132 S. Ct. 1463 (2012)

b. U.S. Court of Appeals for the Armed Forces

L.R.M. v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013)

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

United States v. Bartlett, 66 M.J. 426 (C.A.A.F. 2008)

United States v. Delarosa, 67 M.J. 318 (C.A.A.F. 2009)

United States v. Gutierrez, 11 M.J. 122 (C.M.A. 1981)

United States v. Medina, 69 M.J. 462 (C.A.A.F. 2011)

United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011)

United States v. Roland, 50 M.J. 66 (C.A.A.F. 1999)

United States v. Weymouth, 43 M.J. 329 (C.A.A.F. 1995)

c. State Courts

Michael v. State, Nos. A-7890, 4665 (Alaska Ct. App. 2003)

4. RULES AND REGULATIONS

a. Congress

Senate Rule XXII, *available at* http://www.rules.senate.gov/public/index.cfm?p=RuleXXII

b. Executive Orders

Federal Rules of Criminal Procedure

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951), *available at* 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

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1984.pdf

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/manual-2005.pdf

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2008.pdf

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf

c. Department of Defense

DOD DIRECTIVE 1030.01, VICTIM AND WITNESS ASSISTANCE (Apr. 23, 2007), *available at* http://www.dtic.mil/whs/directives/corres/pdf/103001p.pdf

DOD 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

DOD DIRECTIVE 6400.1, FAMILY ADVOCACY PROGRAM (Aug 23, 2004), *available at* http://www.dtic.mil/whs/directives/corres/pdf/640001p.pdf

DOD DIRECTIVE 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM (Oct. 6, 2005), *available at* https://whsddpubs.dtic.mil/corres/cancelled/649501_06oct2005.pdf

DOD 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

DOD INSTRUCTION 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES (June 4, 2004), *available at* http://www.dtic.mil/whs/directives/corres/pdf/103002p.pdf

DOD 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

DOD INSTRUCTION 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE (Jan. 24, 2013) (Change 1, May 1, 2013), *available at* http://www.dtic.mil/whs/directives/corres/pdf/550518p.pdf

DOD INSTRUCTION 6400.07, STANDARDS FOR VICTIM ASSISTANCE SERVICES IN THE MILITARY COMMUNITY (Nov. 25, 2013), *available at* http://www.dtic.mil/whs/directives/corres/pdf/640007p.pdf

DoD Instruction 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures (Mar. 28, 2013)(Change 1, Feb. 12, 2014), *available at* http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf

d. Services

Coast Guard Commandant Instruction M1000.6A (including changes 1-36), Coast Guard Personnel Manual (Jan. 8, 1988), *available at* http://isddc.dot.gov/OLPFiles/USCG/010564.pdf

Department of the Air Force Instruction 36-2406, Officer and Enlisted Evaluation Systems (Jan. 2, 2013) (Change 1 effective July 1, 2014), *available at* http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2406/afi36-2406.pdf

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

Department of the Army, Regulation 190-45, Law Enforcement Reporting (Mar. 30, 2007), *available at* http://www.apd.army.mil/pdffiles/r190_45.pdf

Department of the Army, Regulation 190-53, Interception of Wire, Electronic, and Oral Communications for Law Enforcement Purposes (Nov. 3, 1986)

Department of the Army, Regulation 600-20, Army Command Policy (Sep. 20, 2012), *available at* http://www.apd.army.mil/pdffiles/r600_20.pdf

Department of the Air Force, Air Force Instruction 51-201, Administration of Military Justice (June 6, 2013) (Change 1, Nov. 25, 2013), *available at* 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

Department of the Navy, MILPERSMAN 1611-020, Officer Detachment For Cause (Mar. 30, 2007), *available at* http://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1600Performance/Documents/1611-020.pdf

Marine Corps, Order P1610.7F ch. 2, Performance Evaluation System (Nov. 19, 2010), *available at* http://www.marines.mil/Portals/59/Publications/MCO P1610.7F W CH 1-2.pdf.pdf

5. MEETINGS AND HEARINGS[1]

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)

1 Materials pertaining to meetings of the Response Systems Panel and its subcommittees are currently available at http://responsesystemspanel.whs.mil/index.php/meetings.

Transcript of RSP Public Meeting (Dec. 11, 2013)

Transcript of RSP Public Meeting (Dec. 12, 2013)

Transcript of RSP Public Meeting (Jan. 30, 2014)

Transcript of RSP Public Meeting (May 5, 2014

Transcript of RSP Public Meeting (May 6, 2014)

Transcript of RSP Public Meeting (May 16, 2014)

Transcript of RSP Public Meeting (May 29, 2014)

Transcript of RSP Public Meeting (May 30, 2014)

Transcript of RSP Public Meeting (Jun. 16, 2014)

PowerPoint Presentation of Captain Robert Crow, "Military Justice Overview" (June 27, 2013)

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

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 Statement of Colonel Michael Mulligan, Office of The Judge Advocate General, U.S. Army (Dec. 12, 2013)

PowerPoint Presentation of Dr. Cassia Spohn, Arizona State University, "Statistical Analysis of Waterfall Slides" (Dec. 12, 2013)

b. Meetings of the Response Systems Panel Subcommittees

Transcript of Role of the Commander Subcommittee Meeting (Oct. 23, 2013)

Transcript of Role of the Commander Subcommittee Meeting (Nov. 13, 2013)

Transcript of Comparative Systems Subcommittee Meeting (Nov. 19, 2013)

Transcript of Role of the Commander Subcommittee Meeting (Nov. 20, 2013)

Transcript of Victim Services Subcommittee Meeting (Nov 21, 2013)

Transcript of Comparative Systems Subcommittee Meeting (Jan. 7, 2014)

Transcript of Role of the Commander Subcommittee Meeting (Jan. 8, 2014)

Transcript of Victim Services Subcommittee Meeting (Jan 9, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Jan. 15, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Feb. 11, 2014)

Transcript of Role of the Commander Subcommittee Meeting (Feb. 12, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Feb. 25, 2014)

Transcript of Victim Services Subcommittee Meeting (Feb 26, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Mar. 11, 2014)

Transcript of Role of the Commander Subcommittee Meeting (Mar. 12, 2014)

Transcript of Victim Services Subcommittee Meeting (Mar 13, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Mar. 25, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Apr. 11, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Apr. 24, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Apr. 25, 2014)

Transcript of Comparative Systems Subcommittee Meeting (May 2, 2014)

PowerPoint Presentation of DoD SAPRO (Oct. 23, 2013)

David A. Schlueter, "A White Paper on the Proposed Amendments to the Uniform Code of Military Justice" (Nov. 2013)

PowerPoint Presentation of Ms. Meredith Farrar-Owens, Virginia State Sentencing Commission, "Virginia Criminal Sentencing Commission, Overview of State Sentencing Guidelines and Sentencing Guidelines for Sexual Assault Offenses in VA" (Feb. 11, 2014)

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)

PowerPoint Presentation of James P. Lynch, "Measuring Rape and Sexual Assault in Self-Report Surveys" (Apr. 11, 2014)

PowerPoint Presentation of Dr. William J. Sabol and Allen Beck, Bureau of Justice Statistics, "Appearance before the Comparative Systems Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel" (Apr. 11, 2014)

c. Preparatory Sessions (on file with the Response Systems Panel)

Minutes of Comparative Systems Subcommittee Preparatory Session, Defense Forensic Science Center (DFSC) / U.S. Army Criminal Investigation Laboratory (USACIL) (Nov. 14, 2013)

Minutes of Comparative Systems Subcommittee Preparatory Session, Georgia Bureau of Investigation (GBI) (Nov. 14, 2013)

Minutes of Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013)

Minutes of Comparative Systems Subcommittee Preparatory Session, Joint Base San Antonio (JBSA) (Dec. 13, 2013)

Minutes of Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and Joint Base Lewis-McChord (JBLM) (Feb. 5, 2014)

Minutes of Comparative Systems Subcommittee Preparatory Session, Everett, WA (Feb. 6, 2014)

Minutes of Comparative Systems Subcommittee Preparatory Session, Philadelphia Sexual Assault Response Center (PSARC) (Feb. 20, 2014)

Minutes of Comparative Systems Subcommittee Preparatory Session, Norfolk, VA (Feb. 20, 2014)

Minutes of Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico (Mar. 5, 2014)

d. Other Hearings

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

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 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, Directive-type Memorandum 14-003, DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support (Feb. 12, 2014), *available at* http://www.dtic.mil/whs/directives/corres/pdf/DTM-14-003.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

Department of Defense, 2014-2016 Sexual Assault Prevention Strategy (Apr. 30, 2014), *available at* http://sapr.mil/public/docs/prevention/DoD_SAPR_Prevention_Strategy_2014-2016.pdf

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Appendix G:

SUMMARY OF LEGISLATION PASSED IN NATIONAL DEFENSE AUTHORIZATION ACTS FOR FISCAL YEARS 2004 – 2014

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2004[1]

Section 526. Secretary of Defense to establish defense task force on sexual harassment and violence at the military service academies.

- Note: Section 576 of the FY05 NDAA renamed the task force to the Defense Task Force on Sexual Assault in the Military Services and extended its life for the broader purpose of examining sexual assault in the Armed Forces.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2005[2]

Section 571. Review of the manner in which sex-related offenses are handled under the Uniform Code of Military Justice and the Manual for Courts-Martial to determine what changes are needed to create a system that more closely aligns with other Federal laws addressing sex-related offenses.

Section 576. Examination of sexual assault in the Armed Forces by the Defense Task Force established to examine sexual harassment and violence at the military service academies. Changed the name of the task force to Defense Task Force of Sexual Assault in the Military Services (DTF-SAMS); extended task force for an additional 18 months; and added to the task force the responsibility of examining matters related to sexual assault involving members of the Armed Forces.

Section 577. No later than January 1, 2005, Secretary of Defense to develop comprehensive policy for the Department of Defense on the prevention and response to sexual assaults involving members of the Armed Forces. Policy should be based on recommendations from the Department of Defense Task Force on Care for Victims of Sexual Assault, and on other matters as the Secretary of Defense considers appropriate. Also requires annual report on sexual assaults no later than January 15 of each year.

Section 591. Protection of Armed Forces personnel from retaliatory actions for communications made through the chain of command.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006[3]

Section 552. Comprehensive revision to Article 120 under the Uniform Code of Military Justice into a far more expansive punitive article.

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1 National Defense Authorization Act for Fiscal Year 2004, PUB. L. No. 108-136, 117 Stat. 1466 (2003).

2 National Defense Authorization Act for Fiscal Year 2005, PUB. L. No. 108-375, 118 Stat. 1811 (2004).

3 National Defense Authorization Act for Fiscal Year 2006, PUB. L. No. 109-163, 119 Stat. 3136 (2006).

Section 553. Amends Article 43 under the Uniform Code of Military Justice to make clear that no statute of limitations apply to murder, rape, and child abuse offenses.

Section 596. Improvement to Department of Defense capacity to respond to sexual assault affecting members of the Armed Forces.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2007[4]

Section 532. Revision and clarification of requirements with respect to surveys and reports concerning sexual harassment and sexual violence at the service academies.

Section 583. Inclusion in annual Department of Defense report on sexual assaults of information on results of disciplinary actions.

Section 701. TRICARE coverage for forensic examination following sexual assault or domestic violence.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008[5]

Section 716. Review of gender and ethnic group specific mental health services and treatment for members of the Armed Forces. Comprehensive review to include, among other elements, the availability of gender and ethnic group specific services and treatment for members of the Armed Forces who experienced sexual assault or abuse.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2009[6]

Section 563. Implementation of information database on sexual assault incidents in the Armed Forces. Database must be available for use by SAPRO; and must be used to develop and implement Congressional reports.

4 National Defense Authorization Act for Fiscal Year 2007, PUB. L. No. 109-364, 120 Stat. 2083 (2006).

5 National Defense Authorization Act for Fiscal Year 2008, PUB. L. No. 110-181, 122 Stat. 3 (2008).

6 National Defense Authorization Act for Fiscal Year 2009, PUB. L. No. 110-417, 122 Stat. 4356 (2008).

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010[7]

Section 566. Deadline for report on sexual assault in the Armed Forces by DTF-SAMS.

Section 567. Improved prevention and response to allegations of sexual assault involving members of the Armed Forces.

(a) Submit report with revised plan for implementation of the policies aimed at preventing and responding effectively to sexual assaults involving members of the Armed Forces.
(b) Sexual Assault Medical Forensic Examinations.
  (1) Submit report evaluating the protocols and capabilities of the Armed Forces to conduct sexual assault medical forensic examinations in combat zones.
  (2) Submit report on progress made to implement requirement from FY2007 NDAA pertaining to Tricare coverage for forensic medical examinations following sexual assaults.
(c) Military Protective Orders.
  (1) Military Protective Order information to be included in annual SAPRO report to Congress. Required information includes that pertaining to orders issued in cases involving the victim or alleged perpetrator of a sexual assault; and whether order was violated in the course of substantiated incidents of sexual assaults against members of the Armed Forces.
  (2) Submit report with measures taken to ensure member protected by order is informed of option to request a transfer from the command.
(d) Comptroller General report on each Service's ability to timely and effectively investigate and adjudicate allegations of sexual assault against members of the Armed Forces. This report should refer to and incorporate recommendations from the DTF-SAMS report.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011

Section 1601. Definition of Department of Defense sexual assault prevention and response program and other definitions.

Section 1602. Comprehensive Department of Defense policy on sexual assault prevention and response program.

Section 1611. Sexual Assault Prevention and Response Office established.

Section 1612. Oversight and evaluation standards.

Section 1613. Report and plan for completion of acquisition of centralized Department of Defense sexual assault database.

Section 1614. Restricted reporting of sexual assaults. Secretary of Defense to clarify limitations on restricted reports and circumstances under which information contained in such reports may no longer be confidential.

Section 1621. Improved protocols for providing medical care for victims of sexual assault.

Section 1622. Sexual assault victims access to victim advocate services.

7 National Defense Authorization Act for Fiscal Year 2010, PUB. L. No. 111-84, 123 Stat. 2190 (2009).

Section 1631. Annual report regarding sexual assaults involving members of the Armed Forces and improvement to sexual assault prevention and response program.

Section 1632. Additional reports.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012

Section 541. Reform of offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice. Article 120 to cover only adult offenses; separates stalking, child offenses, and other sexual misconduct, into separate punitive articles.

Section 542. Authority to compel production of documentary evidence.

- Article 47 (refusal to appear or testify) was expanded to include the case of a subpoena *duces tecum* for an Article 32 investigation.

Section 581. Access of sexual assault victims to legal assistance and services of Sexual Assault Response Coordinators and Sexual Assault Victim Advocates.

Section 582. Consideration of application for permanent change of station or unit transfer based on humanitarian conditions for victim of sexual assault or related offense.

Section 583. Director of Sexual Assault Prevention and Response Office.

Section 584. Sexual Assault Response Coordinators and Sexual Assault Victim Advocates.

Section 585. Training and education programs for sexual assault prevention and response program.

Section 586. Department of Defense policy and procedures on retention and access to evidence and records relating to sexual assaults involving members of the Armed Forces.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013

Section 570. Armed Forces Workplace and Gender Relations Surveys.

Section 571. Authority to retain or recall to active duty reserve component members who are victims of sexual assault while on active duty.

Section 572. Additional elements in comprehensive Department of Defense policy on sexual assault prevention and response.

Section 572(a)(1). Requires tracking unrestricted reports, to include whether disposition by court-martial, non-judicial punishment or other administrative action.

Section 572(a)(2). Requires administrative discharge if convicted of a covered offense (rape or sexual assault under Article 120, forcible sodomy under Article 125, or an attempt to commit one of these offenses under Article 80) and not punitively discharged.

Section 572(a)(3). Requires commander to conduct climate assessments within 120 days after commander assumes command and annually thereafter so long as in command.

Section 572(a)(4). Requirement to post and widely disseminate information about resources available to report and respond to sexual assaults, including establishment of hotline numbers and Internet sites.

Section 572(a)(5). Requires an education campaign to clearly inform members about authorities available to correct military records if a member experiences a retaliatory personnel action for making a report of sexual assault or sexual harassment.

Section 573. Establishment of special victim capabilities within the military departments to respond to allegations of certain special victim offenses.

Section 574. Enhancement to training and education for sexual assault prevention and response.

Section 575. Added additional reporting requirements to the case synopses portion of the annual SAPR report.

Section 576. Independent reviews and assessments of Uniform Code of Military Justice and judicial proceedings of sexual assault cases.

Section 577. Retention of certain forms (for 50 years) in connection with restricted reports on sexual assault at request of the member of the Armed Forces making the report.

- *The FY14 NDAA requires retention for 50 years.*

Section 578. General or flag officer review of and concurrence in separation of members of the Armed Forces making an Unrestricted Report of sexual assault.

Section 579. Department of Defense policy and plan for prevention and response to sexual harassment in the Armed Forces.

Section 579(a). Required the Secretary of Defense to develop a comprehensive policy to prevent and respond to sexual harassment in the Armed Forces.

Section 579(b). Requires a plan to collect data on substantiated incidents of sexual harassment involving members of the armed forces for the purpose of identifying cases in which a member is accused of multiple incidents of sexual harassment.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

Section 1701. Extension of crime victims' rights to victims of offenses under the Uniform Code of Military Justice.

- *December 26, 2014, Secretary of Defense to recommend to President changes to the Manual for Courts-Martial for implementation; and the Secretary of Defense and Secretary of Homeland Security shall prescribe appropriate regulations to implement.*

Section 1702(a). Revises Article 32, Uniform Code of Military Justice, narrowing the Article 32 to a preliminary hearing for the narrow purpose of determining whether probable cause exists to believe a crime has been committed and that the accused committed the crime; whether the convening authority has court-martial jurisdiction over the offense and the accused; considering the form of the charges; and recommending the disposition that should be made in the case.

- *Effective December 26, 2014 (one year after enactment of the Act).*

Section 1702(b). Revises Article 60, Uniform Code of Military Justice, to curtail a convening authority's ability to alter findings and sentences post-trial.

- *Effective June 24, 2014 (180 days after enactment of the Act).*

Section 1703. Eliminates five-year statute of limitations on trial by court-martial for additional offenses involving sex-related crimes.

Section 1704. Upon notice by trial counsel to defense counsel of the name of an alleged victim of a sex-related offense who trial counsel intends to call to testify at a preliminary hearing under Article 32 or a court-martial, defense counsel must make request to interview victim through trial counsel; and the interview of victim must take place in presence of trial counsel, counsel for the victim, or a Sexual Assault Victim Advocate.

Section 1705(a). Discharge or dismissal for certain sex-related offenses.

Section 1705(b). Jurisdiction limited to general courts-martial for certain sex-related offenses.

- *Effective June 24, 2014 (180 days after enactment of the Act).*

Section 1706. Participation by victim in clemency phase of courts-martial process.

- *Effective June 24, 2014 (180 days after enactment of the Act).*

Section 1707. Repeal of the offense of consensual sodomy under the Uniform Code of Military Justice.

Section 1708. Modification of Manual for Courts-Martial to eliminate factor relating to character and military service of the accused in rule on initial disposition of offenses.

- *By June 24, 2014 (180 days after enactment of the Act) the discussion pertaining to Rule 306 of the Manual for Courts-Martial shall be amended to reflect this change.*

Section 1709. Requires the Secretary of Defense to proscribe regulations that prohibits retaliation against members of the Armed Forces for reporting a criminal offense.

- *Regulations required by April 25, 2014 (120 days after enactment of the Act).*
- *Report to Congress due June 24, 2014 (180 days after enactment of the Act) regarding whether a new punitive article is required to prohibit retaliation against an alleged victim or other member of the Armed Forces who reports a criminal offense.*

Section 1711. Prohibition on service in the Armed Forces by individuals who have been convicted of certain sexual offenses.

Section 1712. Issuance of regulations applicable to the Coast Guard regarding consideration of request for permanent change of station or unit transfer by victim of sexual assault.

Section 1713. Temporary administrative reassignment or removal of a member of the Armed Forces on active duty who is accused of committing a sexual assault or related offense.

Section 1714. Expansion and enhancement of authorities relating to protected communications of members of the Armed Forces and prohibited retaliatory actions.

Section 1715. Inspector General investigation of allegations of retaliatory personnel actions taken in response to making protected communications regarding sexual assault.

Section 1716. Requires Special Victims' Counsel be made available to sexual assault victims.

- *Implementation required by June 24, 2014 (180 days after enactment of the Act).*

Section 1721. Tracking of compliance of commanding officers in conducting organizational climate assessments for purposes of preventing and responding to sexual assaults.

Section 1722. Advancement of submittal deadline for report of independent panel on assessment of military response systems to sexual assault (from 18 months to 12 months).

Section 1723. Retention of certain forms in connection with Restricted Reports and Unrestricted Reports on sexual assault involving members of the Armed Forces.

Section 1724. Timely access to Sexual Assault Response Coordinators by members of the National Guard and Reserves.

Section 1725. Qualifications and selection of Department of Defense sexual assault prevention and response personnel and required availability of Sexual Assault Nurse Examiners.

Section 1726. Additional responsibilities of Sexual Assault Prevention and Response Office for Department of Defense sexual assault prevention and response program.

Section 1731. Independent reviews and assessments of Uniform Code of Military Justice and judicial proceedings of sexual assault cases.

(a) additional duties for the Response Systems Panel
(b) additional duties to the Judicial Proceedings Panel.

Section 1731(a)(1)(A). An assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under the UCMJ would have on overall reporting and prosecution of sexual assault cases.

Section 1731(a)(1)(B). An assessment regarding whether the roles, responsibilities, and authorities of Special Victims' Counsel to provide legal assistance to victims of alleged sex-related offenses should be expanded to include legal standing to represent the victim during investigative and military justice proceedings in connection with the prosecution of the offense.

Section 1731(a)(1)(C). An assessment of the feasibility and appropriateness of extending to victims of crimes covered by the UCMJ the right afforded a crime victim in civilian criminal proceedings and the legal standing to seek enforcement of crime victims' rights.

Section 1731(a)(1)(D). An assessment of the means by which the name, if known, and other necessary identifying information of an alleged offender that is collected as part of a restricted report of a sexual assault could be compiled into a protected, searchable database accessible only to military criminal investigators, Sexual Assault Response Coordinators, or other appropriate personnel.

Section 1731(a)(1)(E). An assessment of the clemency opportunities provided in the military and civilian systems, appropriateness of clemency proceedings in the military system, and whether clemency in the military could be reserved until the end of the military appeals process.

Section 1731(a)(1)(F). An assessment of whether the Department of Defense should promulgate a formal statement of accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response.

Section 1731(b)(1)(A). An assessment of the likely consequences of amending the definition of rape and sexual assault under Article 120, UCMJ, to expressly cover a situation in which a person subject to the UCMJ commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.

Section 1731(b)(1)(B). An assessment of the implementation and effect of section 1716 requirement for Special Victims Counsel, and make recommendations for modification of such section as the judicial proceedings panel considers appropriate.

Section 1731(b)(1)(C). An assessment of the implementation and effect of the mandatory minimum sentences established by section 1705, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under the UCMJ.

Section 1731(b)(1)(D). An assessment of the adequacy of the provision of compensation and restitution for victims of offenses under the UCMJ and develop recommendations on expanding such compensation and restitution.

Section 1732. Requires the Secretary of Defense to review practices of MCIOs in response to allegations of Uniform Code of Military Justice violations and develop policy regarding use of case determinations to record results of MCIO investigations, similar to uniform crime report if feasible.

- *Review completed no later than June 24, 2014 (180 days after enactment of the Act).*

Section 1733. Review of training and education provided members of the Armed Forces on sexual assault prevention and response.

- *Report due no later than April 25, 2014 (120 days after enactment of the Act).*

Section 1734. Report on implementation of Department of Defense policy on the retention of and access to evidence and records relating to sexual assaults involving members of the Armed Forces.

- *Report due no later than June 24, 2014 (180 days after enactment of the Act).*

Section 1735. Review of the Office of Diversity Management and Equal Opportunity role in sexual harassment cases.

Section 1741. Enhanced protections for prospective members and new members of the Armed Forces during entry-level processing and training.

- *Secretary of Defense to submit report to Congress no later than April 25, 2014, to assess whether a new punitive article is needed for prohibition of inappropriate senior-subordinate relationships with entry-level personnel.*

Section 1742. Commanding officer action on reports on sexual offenses involving members of the Armed Forces.

Section 1743. Eight-day incident reporting requirement in response to unrestricted report of sexual assault in which the victim is a member of the Armed Forces

- *Requires the Secretary of Defense to prescribe regulations to carry out this section by June 24, 2014.*

Section 1744. Review of decisions not to refer charges of certain sex-related offenses for trial by court-martial.

Section 1745. Inclusion and command review of information on sex-related offenses in personnel service records of members of the Armed Forces.

Section 1746. Prevention of sexual assault at military service academies (within 14 days of arriving at school).

Section 1747. Required notification whenever members of the Armed Forces are completing Standard Form 86 of the Questionnaire for National Security Positions.

Section 1751. Sense of Congress on commanding officer responsibility for command climate free of retaliation.

Section 1752. Sense of Congress on disposition of charges involving certain sexual misconduct offenses under the Uniform Code of Military Justice through courts-martial.

Section 1753. Sense of Congress on the discharge in lieu of court-martial of members of the Armed Forces who commit sex-related offenses.

PENDING LEGISLATION

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

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

S. 1917, 113th Cong., Victims Protection Act of 2014 (2014).

H.R. 4485, 113th Cong., Fair Military Act (2014).

H.R. 4435, 113th Cong., Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (2014).

S. 2410, 113th Cong., Carl Levin National Defense Authorization Act for Fiscal Year 2015 (2014).

Appendix H:
COMPARISON OF CRIME VICTIM RIGHTS UNDER FEDERAL LAW, DEPARTMENT OF DEFENSE POLICY, AND RECENTLY ENACTED CHANGES TO THE UNIFORM CODE OF MILITARY JUSTICE

COMPARISON OF VICTIM RIGHTS: THE NDAA, THE CVRA, AND DOD POLICY

CVRA Rights Granted	DoD Rights Granted (prior to FY14 NDAA)	NDAA Rights Granted
18 U.S.C. § 3771 CVRA	DoD Directive 1030.01 Victim and Witness Assistance	FY14 NDAA §1701
1. The right to be reasonably protected from the accused	1. The right to be reasonably protected from the accused	1. The right to be reasonably protected from the accused
2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused	2. The right to be notified of court proceedings and to be provided information about the conviction, sentencing, imprisonment, and release of the offender.	2. The right to reasonable, accurate, and timely notice of any of the following: (A) A hearing on confinement of accused prior to trial (B) An Article 32 hearing relating to the offense (C) A court-martial relating to the offense (D) Service clemency and parole board relating to the offense (E) The release or escape of the accused, unless such notice may endanger the safety of any person
3. The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.	3. The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.	3. The right not to be excluded from any public hearing or proceeding described above unless the military judge or investigating officer, after receiving clear and convincing evidence, determines that testimony by the victim of an offense would be materially altered if the victim heard other testimony at that hearing or proceeding.

CVRA Rights Granted (con't)	DoD Rights Granted (con't)	FY14 NDAA Rights Granted (con't)
4. The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.	4. No similar provision.	4. The right to be reasonably heard at any of the following: (A) A public hearing concerning the continuation of confinement prior to trial of the accused (B) A sentencing hearing relating to the offense (C) A public proceeding of the service clemency and parole board relating to the offense
5. The reasonable right to confer with the attorney for the Government in the case.	5. The right to confer with the attorney for the Government in the case.	5. The reasonable right to confer with the counsel representing the Government in any of the above listed proceedings.
6. The right to full and timely restitution as provided in law.	6. The right to receive available restitution.	6. The right to receive restitution as provided in law.
7. The right to proceedings free from unreasonable delay.	7. No similar provision.	7. The right to proceedings free from unreasonable delay.
8. The right to be treated with fairness and with respect for the victim's dignity and privacy.	8. The right to be treated with fairness and respect for the victim's dignity and privacy.	8. The right to be treated with fairness and with respect for the dignity and privacy of the victim.
CVRA Implementation	**DoD Implementation**	**FY14 NDAA Implementation**
In general. In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described above. Before making a determination to exclude the victim from a public proceeding, the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.	No similar provision	Not later than one year after the date of enactment of this act, the SECDEF and CCG must implement mechanisms for ensuring that victims are notified of, and accorded, the rights specified in UCMJ Article 6(b). §1701(b)(2)
CVRA Definition of Victim	**DoD Definition of Victim**	**NDAA Definition of Victim**
The term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia	Victim. A person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime committed in violation of the Uniform Code of Military Justice	The term victim means a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the Uniform Code of Military Justice

CVRA Enforcement	DoD Enforcement	NDAA Enforcement
The rights described above shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals will decide the motion within 72 hours. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.	No similar provision	Not later than one year after the date of enactment of this act, the SECDEF and CCG must implement mechanisms for the enforcement of the rights specified in UCMJ Article 6(b), including for application for such rights and for consideration and disposition of applications for such rights. §1701(b)(2)

Procedures to Promote Compliance	Procedures to Promote Compliance	Procedures to Promote Compliance
The Department of Justice Regulation will designate an administrative authority within the DOJ to receive and investigate complaints relating to the provision or violation of the rights of a crime victim; require a course of training for employees and offices of the DOJ that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims; contain disciplinary sanctions, including suspension or termination from employment, for DOJ employees who willfully or wantonly fail to comply with provisions of Federal Law pertaining to the treatment of crime victims; and provide that the Attorney General, or his designee, shall be the final arbiter of the complaint.	No similar provision	Not later than one year after the date of enactment of this act, the SECDEF and CCG must implement mechanisms to ensure that Service Members and civilian employees of DoD and USCG make their best efforts to ensure that victims are notified of, and accorded, the rights specified in this Act; the designation of an authority within each Armed Force to receive and investigate complaints relating to violation or provision of such rights; and disciplinary sanctions for Service Members and civilian employees who willfully or wantonly fail to comply with requirements relating to such rights. §1701(b)(2)
Limitations	**Limitations**	**Limitations**
The failure to afford a right under the CVRA will not provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if the victim asserted the right to be heard before or during the proceeding at issue and such right was denied; the victim petitions the court of appeals for a writ of mandamus within 14 days; and, in the case of a plea, the accused has not pled to the highest offense charged. The CVRA creates no cause of action for damages and does not create, enlarge, or imply any duty or obligation to any victim or other person for the breach of which the United States, or any of its officers or employees, could be held liable in damages. Nothing in the CVRA is construed to impair the prosecutorial discretion of the Attorney General or any officer under his or her direction.	No similar provision	Nothing in this section shall be construed- (1) to authorize a cause of action for damages; or (2) to create, to enlarge, or to imply any duty or obligation to any victim of an offense under this chapter or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. §1701(a)"(d)

	USARMY	USAF	USNAV	USMC	USCG
Governing Policy or Regulation	AR 600-20 Chapters 7 and 8 (20 Sep 2012)	AFI 36-6001, Sexual Assault Prevention And Response (SAPR) Program, 14 October 2010, paragraph 2.3.	SECNAVINST 1752.4B Sexual Assault Prevention and Response (Aug 8, 2013)	MCO 1752.5B, MFB, 1 March 2013, Sexual Assault Prevention and Response Program	The SAPR Program released the SAPR Program policy in April 2012
Military USARC/UVA eligibility criteria	Recommended by chain of command Outstanding duty performance evaluation reports Demonstrate stability in personal affairs USARC - (SFC or higher) or (MAJ/CW3 or higher) UVA - (SSG or higher) or (1LT/CW2 or higher)	UVAs all volunteer completed application, interview, criminal background check and mental health background check. USARC (Capt or higher) UVA - (E-4 or higher) or (O-2 or higher)	Selected by commanders - good moral character, professional abilities and willingness to perform the duties. SARC: no rank requirement VA: no rank requirements	No adverse fitness reports in grade Good communication skills, empathetic Discreet, able to maintain confidentiality SARC: (Maj/CWO3-5) VA: (Sgt)	UVAs - level of emotional maturity of the candidate to maintain the necessary confidentiality. VAs must also have at least one year left at their unit, and possess a desire to assist victims. No military SARCs UVAs - no rank requirement
Civilian SARC/SAPR VA -eligibility criteria	SARC - civilian (GS-11 or higher). UVA - civilian (GS-9 or higher).	SARC - civilian (GS-12) must possess a social science degree SAVA - civilian: must possess knowledge of a wide range of generally accepted practices and procedures associated with victim advocacy	SARC - civilian (GS-9): minimum of one year experience working with victims of sexual assault or working in victim advocacy.	SARC - civilian (GS-9): four-year degree in behavioral health or social science and three years of experience.	SARCs - all civilian (GS-12) bachelor's or master's degree in a behavioral science and are often mental health professionals. No civilian VAs
SARC/SAPR VA - Numbers	281 VAs at brigade level, full-time 10,496 VAs (*as of end of FY13) 307 SARCs at brigade level, full-time 1,214 Credentialed SARCS	2,237 (military) volunteer VAs, deployable. 46 (military) full-time SARCS - deployable 75 (civilian) full-time SARCs - non deployable	4,402 UVAs (military) deployable, part time 77 VAs (civilian) 5 military SARCS - not deployable 81 civilian SARCs - deployable (66 full-time SARCs and VAs at brigade level)	1510 -UVAs - (military) deployable, part time 21 VAs (civilian) full-time 40 SARCS (military) - deployable, part time 6 SARCs (civilian) - not deployable, part-time 40 SARCs (civilian) - not deployable, full time	1000 UVAs (military) volunteer, part-time. No military SARCs 1 full-time civilian SARC - not deployable 44 part-time civilian SARCs - not deployable
Victim Advocacy Program	**In Garrison - 3 echelons of VAs:** 1. **Installation SARC** - (civilian) Responsible for coordinating local implementation of SAPR. Works for FAPM, reports directly to installation commander. 2. **Installation VAs (IVA)** (civilian) Work directly with Installation SARC, victims, UVAs, and other installation response agencies 3. **Unit VAs (UVAs) -** (mil. or civ.) - provide limited victim advocacy as collateral duty **Deployed Environment 2 echelons of VAs:** 1. **Deployable SARC** (mil or civ) coordinate SAPR program as collateral duty. 1 at each brigade level and higher. 2. **UVAs** (mil or civ) collateral duty. 2 UVAs for each battalion-sized unit.	**MAJCOM SARC -** Administers SAPR program w/in that MAJCOM and provides functional oversight and guidance for Installation SARCs **Installation SARC -** Reports directly to the installation WG/CV. Is installation's single point of contact for integrating and coord. SA victim care services. Tracks status of SA cases in AOR & updates WG/CV. **Installation SARC Admin Assist. -** performs clerical duties to directly support the SARC and installation's SAPR program. **VAs - (military or civilian).** All are volunteers. **Deployed Environment:** Can be trained military SARC or civilian SARCs who volunteer. Normally, each AEW will warrant at least 1 SARC. For smaller deployments, cdrs must provide a sexual assault response capability.	**Installation SARC -** (civilian or military) Provides local management of SAVI program **SAVI Command POC -** responsible for facilitating awareness and prevention training and oversight of command compliance with SAVI program requirements. **Command Data Collection Coordinator (DCC) -** responsible for obtaining data on sexual assault incidents to meet reporting requirements **Installation VAs** **Uniformed VAs -** (military) respond to victims whenever sexual assault occurs in locations where installation VAs not available (e.g., when deployed).	**Command SARC** - (civilian or military) **Installation SARC** - (civilian) Full-time **Uniformed VAs** - (military) a minimum of 2 appointed at each battalion, squadron or equivalent level - garrison or deployed. Each region, MCD, recruiting station, and MARFORRES site must have a minimum of 1 UVA. UVAs report to Command and Installation SARC for SA duties. The Marine reg sometimes lists UVA and sometimes UVA/VA, indicating that there can be civilian VAs though the civilian VA is never defined or specifically referred to in the reg.	**Employee Assistance Program Coordinator(EAPC)/SARC** (military or civilian). If a dedicated SARC is not co-located, serves as central POC at the Command or within a geographic area to conduct SAPR awareness, prevention and response training. **Family Advocacy Specialist (FAS)** (military or civilian). Handle cases of family violence within FAP. May also act as a SARC if needed and trained. **VAs** - (military) COs/OICs should designate command member(s) as VAs. Commands are strongly encouraged to have at least one VA especially on afloat units.

	FY14 NDAA	USARMY	USAF	USNAV	USMC	USCG
Number of SVCs and Locations	Not Addressed in FY14 NDAA	91 Active Counsel 47 ARNG 70 Reserve 32 installations world-wide SVC Program Manager (PM) may allocate assets as needed	24 SVCs and 10 paralegals Will add 5 SVCs in 2014 22 locations world-wide.	18 active component JAs assigned 11 reservists are assigned 23 Installations At or near Fleet & Family Service Centers. 8 are located near or with SARC/VAs.	15 active duty counsel, 9 paralegals (civ) Includes 4 regional VLCs (O-4) 3 part-time active duty auxiliary VLC Regional VLC offices established	17 active duty part time JAs (currently) (will be 8 full-time active duty JAs) Located at various Coast Guard units across the U.S.
Caseload	Not Addressed in FY14 NDAA	11/1/13 - 2/14/14 536 victims received SVC services 1,587 counseling sessions with victims 393 interviews attended with victims 49 appearances at courts-martial	1/28/13 - 2/21/14 712 victims received SVC services 112 courts-martial attended 125 Article 32 hearings attended 973 interviews attended with victims	11/1/13 - 4/4/14 300 victims received VLC services 360 educational briefs given to 8,400+ personnel	11/1/13 - 2/21/14 227 victims received VLC services Includes 15 minors. Majority of cases were sexual assault and domestic violence.	7/12/13 - 3/8/14 56 victims received SVC services
SVC - Reporting Structure	Service TJAGS are responsible for the establishment and supervision of individuals designated as Special Victims' Counsel. §1716(a)(1)(e)	SVC reports directly to Chief of Legal Assistance within the command. SVC Program manager (PM) has technical supervision over all Army SVCs.	SVC Reports directly to the HDQ (O-6) Division Chief. Deputy Chief is a GS-14. Under independent chain of command in AFLOA, Special Victims' Counsel Division	VLC reports to Commander, Naval Legal Service Command through the Chief of Staff, VLC. Program is an independent line of operation separate from the prosecution and the convening authority.	VLC reports to Officer in Charge VLCO (OIC). OIC reports to SJA to the Commandant of the Marine Corps. VLCO supervisory and reporting chain is independent of convening authorities, OICs, and staff judge advocates.	To be led by GS-15 civilian attorney within the Office of Member Advocacy and Legal Assistance. (Currently a reserve O-6 JA and O-3 SVC Coordinator run program)
SVC - Screening and Selection Process	SVC must meet the qualifications specified in 10 U.S.C. 1044(d)(2); and be certified as competent to be designated as a Special Victims' Counsel by theT JAG of the armed force in which the JA is a member or by which the civilian attorney is employed. § 1716(a)(1)(d)	Active duty JAs selected by SJAs based on military justice experience, sound judgment, and maturity.	Active duty JAs hand-selected by TJAG. Experience level same as JAGs entering Area Defense Counsel (ADC) positions.	Active duty JAs. TJAG personally approves candidates. Must have prior court-room experience.	Active duty JAs. OIC, VLCO reviews each nominee. Must have at least six months of military justice experience, unless waived.	All Coast Guard SVCs are certified, Active Duty JAs.
SVC Training	Services must implement in-depth and advanced training for all military and civilian attorneys providing legal assistance to support victims of alleged sex-related offenses. § 1716(b)	Sexual Assault Expert Symposium: 3-day training. Classes are taught by some of the leading experts in their fields.	4 Day training at AF JAG School in May and October 2013.	Navy is developing a 2-day course in Newport, RI for newly-reported VLC.	Marine Corps VLC attorneys attend training conducted by the Air Force.	The Coast Guard does not have an independent SVC training program.

Service data found in RSP RFI #4 (Nov 8, 2013) and Department of Defense Report on Implementation of Section 1716 of the National Defense Authorization Act for Fiscal Year 2014 (Apr 4, 2014).

	FY14 NDAA §1716	USARMY	USAF	USNAV	USMC	USCG
SVC–Mission & Scope of representation	The Secretary concerned shall designate legal counsel (to be known as 'Special Victims' Counsel') for the purpose of providing legal assistance to military victims of sexual assault.	Represents victim's best interests even if not aligned with those of the U. S. or the accused. May advocate a victim's interests to civilian prosecutors and others, but not in civilian court. Cannot advocate to the Dept of Veterans Affairs or represent a victim in the disability evaluation system.	Help victim understand investigation and military justice processes; protect victim's rights under the UCMJ; empower victim; assist with state and federal victim compensation and restitution; advocate a victim's interests to civilian prosecutors and others, but not in civilian court.	Provide independent legal counsel to eligible sexual assault victims; to represent them during investigation and military justice process; advocate on behalf of victim to authorities; protect victims' rights; assist with personal civil legal matters and obtaining benefits.	Assist eligible victims of crime; advise victims of their rights under the UCMJ; represent victims at military justice proceedings.	The SVC assists the member in negotiating the legal process and ensures the victim understands their rights and feels respected and included in the process.
SVC–Who is eligible for services?	Service Secretaries shall designate legal counsel (to be known as 'Special Victims' Counsel') for the purpose of providing legal assistance to an individual eligible for military legal assistance under 10 U.S.C. §1044 who is the victim of an alleged sex-related offense, regardless of whether the report of that offense is restricted or unrestricted.	All active duty, Army Reserve, ARNG sexual assault victims and adult dependents. Victims in other Services (and dependents) only if perpetrator is Army member.	All active duty, AF Reserve sexual assault victims and adult dependents. Victims in other Services (and dependents) only if perpetrator is AF member.	All active duty and Navy Reserve sexual assault victims. Adult dependents, retirees and other Service members only if perpetrator is Navy member. By 6/24/14 will include child victims.	All active duty, MC Reserve, adult and child dependents. Available to victims of ALL crimes under the UCMJ, not limited to sexual assault.	All active duty CG and Reserve members and adult dependents who are victims of sexual assault.
When is a victim eligible for an SVC?	Upon report of an alleged sex-related offense or at the time the victim seeks assistance from a SARC, SAPR VA, MCIO, VWL, a trial counsel, a healthcare provider, or any other personnel designated by the Secretary concerned for purposes of this subsection.	At first contact, SARC, VA, FAP, MCIO, VWL, or legal office personnel must inform victim of the availability of SVC services. SVC must consult with victim within 24 hours of victim's request.	At first contact, SARC, VA, FAP, MCIO, VWL, or legal office personnel must inform the victim of the availability of SVC services. Victims may contact SVC offices directly. SJA or SARC/FAP must provide SVC contact info to victim w/in 48 hours of initial request.	Victim must be informed by SARC, VA, VWL, MCIO or trial counsel that they have a right to a VLC.	Upon seeking assistance from a SARC, VA, FAP, MCIO, VWL, or trial counsel, all eligible persons who are victims of sexual assault must be informed of and given the opportunity to consult with a VLC.	When victim of sexual assault makes a report, they are notified through the SARC that they are eligible for a SVC. SVC contact info will be provided to the victim by the SARC and victim may initiate contact.
SVC–Duration of Relationship	Not addressed in FY14 NDAA	Representation ends at initial action by the General Court-Martial Convening Authority (GCMCA) or when client determines services are no-longer required. Transfer of counsel coordinated by SJA. Victim will be consulted throughout the process.	SVC-client relationship terminates when case disposition is complete. SVC remains the counsel for all matters relating to the sexual assault, unless released by the victim.	The VLC-client relationship continues until victim releases the VLC; the legal aspects are concluded (after a disposition decision is made); after action is taken on the findings and sentence by the Convening Authority; or one of the parties transfers to a new duty station or terminates military service.	Complete when the convening authority has taken action in the case; unless the case is resolved sooner. Ends if VLC reassigned or discharged/retired (new VLC will be assigned)	Information not provided to RSP
SVC–Post-trial Role	Authorized to provide legal consultation in any proceedings of the military justice process in which a victim can participate as a witness or other party.	Assist the victim with post-trial submissions to include victim impact statements.	Post-Trial - matters submitted to CA; Clemency and Parole Boards; assist with victim impact statements	Response not provided to RSP	Post-trial assistance will be evaluated on a case-by-case basis.	Response not provided to RSP
SVC–Collateral Misconduct	Authorized to provide legal consultation regarding collateral misconduct related to the SA and the victim's right to seek military defense services.	SVC will refer the victim to the U.S. Army Trial Defense Service (TDS).	An SVC may represent an AF victim for collateral misconduct if it has a direct nexus to the sexual assault, with the victim's consent.	VLC provides limited personal representation advice. May advocate on the victim's behalf to military authorities and with the defense counsel to protect the victim's rights and interests.	VLC will refer victims to defense services. VLC may advise victim on legal options such as seeking testimonial or transactional immunity.	Response not provided to RSP

Service data found in RSP RFI #4 (Nov 8, 2014); Department of Defense Report on Implementation of Section 1716 of the National Defense Authorization Act for Fiscal Year 2014 (Apr 4, 2014); and NDAA for Fiscal Year 2014.

Appendix L:
GLOSSARY AND LIST OF ACRONYMS

A

ADA: assistant district attorney

AFOSI: Air Force Office of Special Investigations

AOUSC: Administrative Office of the U.S. Courts

ASALC: Advanced Sexual Assault Litigation Course

ATAC: Advanced Trial Advocacy Course

B

BJS: Bureau of Justice Statistics

C

CA: convening authority

CAAF: United States Court of Appeals for the Armed Services

CAPE: Center for the Army Profession and Ethic

CAPE: Cost Assessment and Program Evaluation

CDC: Centers for Disease Control and Prevention

CGIS: Coast Guard Investigative Service

CID: Army Criminal Investigation Command

CM: court-martial

CMA: Court of Military Appeals

CNSTAT: National Research Council Committee on National Statistics

CO: commanding officer

CSS: Comparative Systems Subcommittee

CTT: complex trial team

CVRA: Crime Victims' Rights Act

CY: calendar year

D

DA: district attorney

DAVA: domestic abuse victim advocate

DC: defense counsel

DCAP: Defense Counsel Assistance Program

DD Form: Department of Defense Form

DEOCS: Defense Equal Opportunity Climate Survey

DEOMI: Defense Equal Opportunity Management Institute

DIBRS: Defense Incident-Based Reporting System

DFSC: Defense Forensic Science Center

DMDC: Defense Manpower Data Center

DoD: Department of Defense

DoDD: Department of Defense Directive

DoDI: Department of Defense Instruction

DODM: Department of Defense Manual

DOJ: Department of Justice

D-SAACP: DoD Sexual Assault Advocate Certification Program

DSAID: Defense Sexual Assault Incident Database

DSO: Defense Service Office

DTFSAMS: Defense Task Force on Sexual Assault in the Military Services

DTM: Directive-Type Memorandum

E

EVAWI: End Violence Against Women International

F

FAP: Family Advocacy Program

FBI: Federal Bureau of Investigation

FSC: Family Support Center

FY: fiscal year

G

GCM: general court-martial

GCMCA: general court-martial convening authority

H

HQE: highly qualified expert

I

IDA: initial disposition authority

J

JAG: judge advocate general

JBSA: Joint Base San Antonio

JBLM: Joint Base Lewis-McChord

JPP: Judicial Proceedings Panel

JSC: Joint Service Committee on Military Justice

JSC-SAS: Joint Service Committee-Sexual Assault Subcommittee

L

LCSW: licensed clinical social worker

LDT: leadership development training

LL.M.: Master of Laws

M

MARADMIN: Marine Corps Administrative Message

MCIO: military criminal investigative organization

MCM: Manual for Courts-Martial

MCO: Marine Corps Order

MEPS: Military Entrance Processing Station

MJIA: Military Justice Improvement Act of 2013

MJLCT: Military Justice Litigation Career Track

MRE: Military Rules of Evidence

MTF: medical treatment facility

N

NACP: National Advocate Credentialing Program

NAS: National Academy of Sciences

NAVADMIN: Navy Administrative Message

NCIS: Naval Criminal Investigative Service

NCO: noncommissioned officer

NCPVAW: National Center for the Prosecution of Violence Against Women

NCVS: National Crime Victim Survey

NDAA: National Defense Appropriations Act

NISVS: National Intimate Partner and Sexual Violence Survey

NJP: nonjudicial punishment

NJS: Naval Justice School

NOVA: National Organization of Victim Advocates

NSVRC: National Sexual Violence Resource Center

P

PD: police department

PERF: Police Executive Research Forum

PME: professional military education

POD: Protect Our Defenders

PSARC: Philadelphia Sexual Assault Response Center

PSR: presentence report

R

RAINN: Rape, Abuse and Incest National Network

RCM: Rules for Courts-Martial

RoC: Role of the Commander

RSP: Response Systems to Adult Sexual Assault Crimes Panel

S

SAFE: sexual assault forensic exam

SAFE: sexual assault forensic examiner

SAMFE: sexual assault medical forensic examiner

SANE: sexual assault nurse examiner

SAPR: Sexual Assault Prevention and Response

SAPRO: Sexual Assault Prevention and Response Office

SARC: sexual assault response coordinator

SART: sexual assault response team

SASC: Senate Armed Services Committee

SCMCA: summary court-martial convening authority

SHARP: Sexual Harassment/Assault Response and Prevention

SJA: staff judge advocate

SPCMCA: special court-martial convening authority

STC: senior trial counsel

STOP Act: Sexual Assault Training Oversight and Prevention Act

SVC: special victim counsel

SVC: Special Victim Capability

SVP: special victim prosecutor

SVTC: special victim qualified trial counsel

SVU: special victim unit

SVUI: special victim unit investigator

SWAN: Service Women's Action Network

T

TCAP: Trial Counsel Assistance Program

TDAC: Trial and Defense Advocacy Course

TJAG: The Judge Advocate General

TJAGLCS: The Judge Advocate General's Legal Center and School

U

UCI: unlawful command influence

UCMJ: Uniform Code of Military Justice

UCR: Uniform Crime Reporting

USACIL: United States Army Criminal Investigation Laboratory

USAMPS: United States Army Military Police School

USC: United States Code

V

VA: victim advocate

VLC: victim legal counsel

VPA: Victims Protection Act of 2014

VSS: Victim Services Subcommittee

VWAP: Victim Witness Assistance Program

VWL: victim witness liaison

W

WGRA: Workplace and Gender Relations Survey of Active Duty Members

WGRR: Workplace and Gender Relations Survey of Reserve Component Members

WGRS: Workplace Gender Relations Survey

WOAR: Women Organized Against Rape

Y

YWCA: Young Women's Christian Association

TERMS

Accessions training: Training that a Service member receives upon initial entry into military service through basic military training.

Administrative separation: Early termination of military service based upon conduct on the part of the Service member.

Armed Forces of the United States: A term used to denote collectively all components of the Army, Marine Corps, Navy, Air Force, and Coast Guard (when mobilized under Title 10, United States Code, to augment the Navy).

Base: An area or locality containing installations which provide logistic or other support.

Chain of command: The succession of commanding officers from a superior to a subordinate through which command is exercised.

Collateral misconduct: Victim misconduct that might be in time, place, or circumstance associated with the victim's sexual assault incident. Collateral misconduct by the victim of a sexual assault is one of the most significant barriers to reporting assault because of the victim's fear of punishment. Some reported sexual assaults involve circumstances where the victim may have engaged in some form of misconduct (e.g., underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders). *See* DoDI 6495.02.

Command: (1) The authority that a commander in the Armed Forces lawfully exercises over subordinates by virtue of rank or assignment; (2) an order given by a commander; that is, the will of the commander expressed for the purpose of bringing about a particular action; or (3) a unit (or units), an organization, or an area under the command of one individual.

Commander: A commissioned officer or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a DoD organization or prescribed territorial area.

Confidential reporting: For the purposes of the policies and procedures of the SAPR Program, confidential reporting is restricted reporting that allows a Service member to report or disclose to specified officials that he or she has been the victim of a sexual assault. This reporting option gives the member access to medical care, counseling, and victim advocacy, without requiring those specific officials to automatically report the matter to law enforcement or initiate an official investigation.

Convening authority: Unless otherwise limited, general or special courts-martial may be convened by persons occupying positions designated in Article 22(a) or Article 23(a) of the UCMJ, respectively, and by any commander designated by the Secretary concerned or empowered by the President. The power to convene courts-martial may not be delegated. The authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions. *See* Rule for Courts-Martial 504(b) and discussion.

Criminal intelligence: Information compiled and analyzed in an effort to anticipate, prevent, or monitor possible or potential criminal activity. *See* DoDI 5525.18, AR 195-2, p. 41.

Defense Forensic Science Center: Department of Defense forensic science center of excellence, delivering full-spectrum, forensic services around the globe and across the entire range of military operations, providing training and conducting research to further forensic science.

Defense Incident-Based Reporting System: Department of Defense crime reporting system designed to collect statistical information on criminal incidents in the Department of Defense

Defense Sexual Assault Incident Database (DSAID): A DoD database that captures uniform data provided by the Military Services and maintains all sexual assault data collected by the Military Services. *See* DoDD 6495.01.

Domestic abuse victim advocate: DAVAs are victim advocates in the Family Advocacy Program. They are civilians with a bachelor's or master's degree in social work or a related field, who provide assistance to victims of spousal or intimate partner domestic abuse, including sexual abuse, as well as child victims of abuse, sexual violence, or neglect.

Family Advocacy Program: A program designed to address prevention, identification, evaluation, treatment, rehabilitation, follow-up, and reporting of family violence. The Family Advocacy Programs across the Services consist of coordinated efforts designed to prevent and intervene in cases of family distress, and to promote healthy family life. *See* DoDD 6400.1.

Flag officer: An officer of the Navy or Coast Guard serving in or having the grade of admiral, vice admiral, rear admiral, or commodore.

General court-martial: A court-martial consisting of a military judge and usually at least five members and having authority to impose a sentence of up to dishonorable discharge or death.

General officer: An officer of the Army, Air Force, or Marine Corps serving in or having the grade of general, lieutenant general, major general, or brigadier general.

Grade: A step or degree, in a graduated scale of office or military rank that is established and designated as a grade by law or regulation.

Healthcare provider: Those individuals who are employed or assigned as healthcare professionals, or are credentialed to provide healthcare services at a military treatment facility, or who provide such care at a deployed location or otherwise in an official capacity.

Installation: A base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, or Department of Homeland Security in the case of the Coast Guard, including any leased facility. It does not include any facility used primarily for civil works, rivers and harbors projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense, or Department of Homeland Security in the case of the Coast Guard.

Joint basing: A location at which the 2005 Base Closure and Realignment Committee directed that installation management functions be consolidated between two or more Military Services operating at two or more locations within close proximity.

Judge advocate: A military attorney who is an officer of the Judge Advocate General's Corps of the Army, Air Force, Marine Corps, Navy, and the United States Coast Guard who is designated as a judge advocate.

Judge Advocates General: Severally, the Judge Advocates General of the Army, Navy, and Air Force, and, except when the Coast Guard is operating as a service in the Navy, an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security.

Law enforcement: Includes all DoD law enforcement units, security forces, and military criminal investigative organizations.

Military criminal investigative organization (MCIO): Refers to the Army Criminal Investigation Command (CID), the Naval Criminal Investigative Service (NCIS), and the Air Force Office of Special Investigations (AFOSI). The Coast Guard Investigative Service (CGIS) is not formally considered an MCIO, because it falls under the Department of Homeland Security, but it provides the same function and capability. For purposes of this report, CGIS is treated as an MCIO.

Military department: One of the departments within the Department of Defense created by the National Security Act of 1947, which are the Department of the Army, the Department of the Navy, and the Department of the Air Force.

Military judge: The presiding officer of a general or special court-martial detailed in accordance with Article 26 of the UCMJ to the court-martial to which charges in a case have been referred for trial.

Military training: Structured training to enhance the capacity of Service members to understand issues and concepts, as well as to perform specific tasks.

National Incident Based Reporting System: Incident-based reporting system in which agencies collect data on each crime occurrence. Data comes from local, state, and federal automated systems.

Panel: Military equivalent of a jury; short for court-martial panel or members panel. Also used to identify the Response Systems to Adult Sexual Assault Crimes Panel in this report.

Permanent change of station (PCS): To permanently move from an assignment at one military installation to an assignment at another installation.

Preferral: Comparable to a civilian indictment, preferral is the formal act of signing and swearing allegations of offenses against a person who is subject to the UCMJ. Preferred charges and specifications must be signed under oath before a commissioned officer of the Armed Forces authorized to administer oaths. *See* Rule for Courts-Martial 307.

Rank: The order of precedence among members of the Armed Forces.

Referral: The order of a convening authority that charges against an accused will be tried by a specified court-martial. Referral requires three elements: (1) a convening authority who is authorized to convene the court-martial and not disqualified, (2) preferred charges which have been received by the convening authority for disposition, and (3) a court-martial convened by that convening authority or a predecessor. *See* Rule for Court-Martial 601(a) and discussion.

Reprisal: Taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, or any other act of retaliation, against a Service member for making, preparing, or receiving a communication. *See* DODI 6495.02.

Reserve Component: Reserve Components of the Armed Forces of the United States, including the National Guard (Army and Air Force) and Reserves (Army, Air Force, Navy, Marine Corps, and Coast Guard).

Responders: Includes first responders, generally composed of personnel in the following disciplines or positions: SARCs, SAPR victim advocates, healthcare personnel, law enforcement, and MCIOs. Other responders are judge advocates, chaplains, and commanders, but they are usually not first responders. *See* DoDI 6495.02.

Restricted reporting: A process used by a Service Member to report or disclose that he or she is the victim of a sexual assault to specified officials on a requested confidential basis. Under these circumstances, the victim's report and any details provided to healthcare personnel, the SARC, or a VA will not be reported to law enforcement to initiate the official investigative process unless the victim consents or an established exception is exercised under DODD 6495.01. Restricted reporting applies to Service members and their military dependents 18 years of age or older.

Re-victimization: Process by which a victim experiences acts of violence, power, or control imposed by systems, professionals, peers, or others, causing the victim to be traumatized after the original incident. Also used to describe a pattern wherein the victim of abuse or crime has a statistically higher tendency to be victimized again, either shortly thereafter or much later in adulthood in the case of abuse of a child. The latter pattern is particularly notable in cases of sexual abuse.

SAFE kit: The medical and forensic examination of a sexual assault victim under circumstances and controlled procedures to ensure the physical examination process and the collection, handling, analysis, testing, and safekeeping of any bodily specimens and evidence meet the requirements necessary for use as evidence in criminal proceedings. *See* DoDD 6495.01.

SAPR victim advocate (VA): A person who, as a victim advocate, shall provide non-clinical crisis intervention, referral, and ongoing non-clinical support to adult sexual assault victims. Support will include providing information on available options and resources to victims. Provides liaison assistance with other organizations on victim care matters and reports directly to the SARC when performing victim advocate duties.

Service: A branch of the Armed Forces of the United States, established by act of Congress, which are: the Army, Marine Corps, Navy, Air Force, and Coast Guard.

Service Secretaries: The Secretary of the Army, with respect to matters concerning the Army; the Secretary of the Navy, with respect to matters concerning the Navy, Marine Corps, and the Coast Guard when it is operating as a service in the Navy; the Secretary of the Air Force, with respect to matters concerning the Air Force; The Secretary of Homeland Security, with respect to matters concerning the Coast Guard, when it is not operating as a service in the Navy.

Sexual assault: Intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. Sexual assault includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive, or wrongful (to include unwanted and inappropriate sexual contact), or attempts to commit these acts. "Consent" means words or overt acts indicating a freely given agreement to the sexual conduct as issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct as issue shall not constitute consent.

Sexual assault forensic examination (SAFE): The medical examination of a sexual assault victim under circumstances and controlled procedures to ensure the physical examination process, and the collection, handling, analysis, testing, and safekeeping of any bodily specimens meet the requirements necessary for use as evidence in criminal proceedings.

Sexual assault forensic examiner/sexual assault medical forensic examiner (SAFE/SAMFE): Medical personnel who are clinically trained to perform a sexual assault exam, and who have obtained an additional forensic certification to collect forensic evidence from sexual assault victims. Often, the SAMFE is a SANE nurse who has completed the forensic certification. *See* A National Protocol for Sexual Assault Medical Forensic Examinations (2d Ed; April 2013).

Sexual assault nurse examiner (SANE): A registered nurse who receives specialized education and fulfills clinical requirements to perform the sexual assault medical forensic exam. *See* A National Protocol for Sexual Assault Medical Forensic Examinations (2d Ed; April 2013).

Sexual Assault Prevention and Response (SAPR) Program: A DoD program for the Military Departments and the DoD Components that establishes SAPR policies to be implemented worldwide. The program objective is an environment and military community intolerant of sexual assault. *See* DoDD 6495.01.

Sexual Assault Prevention and Response Office (DoD SAPRO): Serves as the DoD's single point of authority, accountability, and oversight for the SAPR program, except for legal processes and criminal investigative matters that are the responsibility of the Judge Advocates General of the Military Departments and the Inspectors General, respectively.

Sexual assault response coordinator (SARC): The single point of contact at an installation or within a geographic area who oversees sexual assault awareness, prevention, and response training; coordinates medical treatment, including emergency care, for victims of sexual assault; tracks the services provided to a victim of sexual assault from the initial report through final disposition and resolution. *See* DoDD 6495.01.

Sexual assault response team (SART): A multidisciplinary team that provides specialized immediate response to victims of recent sexual assault. The team typically includes health care personnel, law enforcement representatives, victim advocates, prosecutors (usually available on-call to consult with first responders, although some may be more actively involved at this stage), and forensic lab personnel (typically available to consult with examiners, law enforcement, or prosecutors, but not actively involved at this stage). *See* A National Protocol for Sexual Assault Medical Forensic Examinations (2d Ed; April 2013).

Sexual harassment: A form of discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that create an intimidating, hostile, or offensive environment.

Sexual violence: A term without a specific federal legal meaning, but widely used to denote sexual acts of force against the will of victims.

Special court-martial: A court-martial that consists of at least three officers, a military judge, a trial counsel, and a defense counsel and that has authority to impose a limited sentence and hear only noncapital cases.

Special Victim Capability: A distinct, recognizable group of appropriately skilled professionals, including MCIO investigators, judge advocates, victim witness assistance personnel, and administrative paralegal support personnel, who work collaboratively to (1) investigate and prosecute allegations of child abuse (involving sexual assault and/or aggravated assault with grievous bodily harm), domestic violence (involving sexual assault and/or aggravated assault with grievous bodily harm), and adult sexual assault (not involving domestic offenses) and to (2) provide support for the victims of such offenses. *See* DoDI 6495.02.

Special Victim Counsel Program and special victim counsel: The Special Victim Counsel (SVC) Program was created by the Services and mandated by Congress to support victims of sexual assault and enhance their rights within the military justice system while neither causing unreasonable delay nor infringing upon the rights of an accused.

An SVC's primary duty is to represent the clients' rights and interests during the investigation and court-martial process. In general, SVC services include, but are not limited to, accompanying and advising the victim during interviews, examinations and hearings, advocating to government counsel and commanders on behalf of the victim, and advising the victim on collateral civil matters which stem from the alleged sexual assault. SVC are also able to advise a victim on the difference between a restricted and unrestricted report and on what to expect if they decide to make an unrestricted report and their case is referred to court-martial. SVC may coordinate with the Sexual Assault Response and Victim Witness Assistance personnel on available resources. *See* United States Army Special Victim Counsel Handbook & U.S. Air Force Special Victim Counsel Rules of Practice and Procedure.

Specification: A specification is a plain, concise, and definite statement of the essential facts of the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. *See* Rule for Courts-Martial 307(c)(3).

Staff judge advocate (SJA): A judge advocate so designated in the Army, Air Force, or Marine Corps, and the principal legal advisor of a Navy, Coast Guard, or joint force command who is a judge advocate.

Status-of-forces agreement: A bilateral or multilateral agreement that defines the legal position of a visiting military force deployed in the territory of a friendly state.

Subordinate command: A command consisting of the commander and all those individuals, units, detachments, organizations, or installations that have been placed under the command by the authority establishing the subordinate command.

Summary court-martial: Lowest level court-martial in terms of punishment authority. The court-martial is composed of one commissioned officer who need not be an attorney. A Service member can be represented by a civilian attorney but has no right to representation by a military counsel.

Titling: Placing the name, and other identifying data, of an individual or entity on the subject block of an investigative report and central index, for the potential retrieval and analysis for law enforcement and security purposes.

Trial defense counsel: A judge advocate who represents a Service member in any adverse action, such as a court-martial, administrative separation, or nonjudicial punishment proceedings.

Unfounded: False or baseless.

Unit: Any military element whose structure is prescribed by competent authority or an organization title of a subdivision of a group in a task force.

Unitary sentencing: In a court-martial, the sentencing authority (military judge or court-martial members) adjudges a single sentence for all the offenses of which the accused was found guilty. A court-martial may not impose separate sentences for each finding of guilt, but may impose only a single, unitary sentence covering all of the guilty findings in their entirety, no matter how many such findings there may be.

Unrestricted reporting: A process a Service member uses to disclose, without requesting confidentiality or restricted reporting, that he or she is the victim of a sexual assault. Under these circumstances, the victim's report and any details provided to healthcare personnel, the SARC, a victim advocate, command authorities, or persons are reportable to law enforcement and may be used to initiate the official investigative process.

US Army Criminal Investigation Laboratory (USACIL): Located within the Defense Forensic Science Center at Fort Gillem, Georgia, provides forensic laboratory services to DoD investigative agencies and other federal law enforcement agencies.

Victim: A person who asserts direct physical, emotional, or pecuniary harm as a result of the commission of a sexual assault. *See* DoDD 6495.01.

Victim Witness Assistance Program (VWAP): A program designed to coordinate efforts and ensure that systems are in place at the installation level to provide information to victims and witnesses on available benefits and services and to provide assistance in obtaining those benefits and services. The program ensures that victims and witnesses are informed on the military justice process and available medical and social services. *See* DoDD 1030.2.

Victim witness liaison (VWL): Coordinates efforts to ensure systems are in place at the installation level to provide information on available benefits and services; assists victims and witnesses in obtaining those benefits and services; and may delegate duties as appropriate but retains responsibility to coordinate the delivery of required services.

Sexual Assault Accountability and Investigation Task Force

April 30, 2019

We, the appointed leads of the Task Force on Sexual Assault Accountability and Investigation, hereby submit the results of our findings and recommendations.

Dr. Elizabeth P. Van Winkle
Executive Director, Force Resiliency

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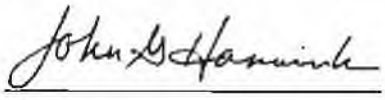
Lieutenant General, U.S. Anny
The Judge Advocate General



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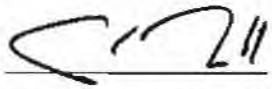

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Executive Summary

Background

At the request of Senator Martha McSally during the Senate Armed Services Committee hearing on March 14, 2019, Acting Secretary of Defense Patrick Shanahan pledged to form a team of experts to take a fresh look at specific issues involving sexual assault, with a focus on the investigative and accountability processes. To this end, the Department of Defense (DoD) established the Sexual Assault Accountability and Investigation Task Force (SAAITF) to identify, evaluate, and recommend immediate and significant actions to improve the accountability process, specific to the investigation and disposition of cases in which members of the Armed Forces are either victims or alleged offenders of sexual assault, while ensuring due process for both.

The SAAITF recognizes the significant military justice reform the Department has gone through since 2006 and, most recently, with the Military Justice Act of 2016 (MJA 16), fully implemented earlier this year. These reforms mark some of the most significant changes to the military justice system since the Uniform Code of Military Justice (UCMJ) was enacted in 1950, including new punitive articles, changes to pre-referral authorities and plea agreements, an additional court-martial forum, changes to court-martial panel sizes, sentencing reform, enhanced changes to post-trial procedures and appellate rights, and mandatory training on the UCMJ. These changes enhanced the system's fairness – for victims and accused alike – while maintaining the system's usefulness as a tool to maintain military discipline.

In light of recent reforms, the charge of the SAAITF was to develop bold recommendations for improvements to the military justice system in the areas of accountability, in particular commander and military justice practitioner responsibilities and authorities, comprehensive support to victims, and protection of rights for both the victim and the accused. The end result is specific and significant recommendations to help Commanders set command/organizational climate, enhance victim support, and ensure fair and just support for the accused, to include:

- Improving the ability of the commander to set appropriate command climate by identifying sexual harassment as a "stand alone" military crime vice being addressed under broader charges that do not highlight the severity of these behaviors
- Improving support to the victim by providing additional information and assistance throughout the process, including more consistent and regular updates and notifications
- Providing a dedicated investigation capability for defense counsel to help them defend accused Service members

Overview

The military justice system must provide a fair criminal justice forum recognized by Service members and the American public as such. It must also help military Commanders maintain the good order and discipline necessary for our armed forces to fight and win wars. The Commander stands at the center of the military justice system, and, regardless of Service, is responsible for the health, welfare, and discipline of every Service member in his or her Command. This responsibility and authority are vital to units' accomplishment of their assigned missions. There is no equivalent role in the civilian world that comes close to having this impact on the general population. The military justice system is therefore quite unique in that it treats behaviors counter

to good order and discipline as crimes, while providing comprehensive support to victims throughout the process.

Because of this ultimate and unique responsibility of the Commander, authority for determining the proper disposition of allegations of misconduct under the UCMJ, including serious crimes like sexual assault and other forms of sexual misconduct, rests with the Commander. Commanders, however, do not make military justice decisions in isolation. Every Commander is informed and advised by qualified, professional judge advocates throughout the life of a case and at each key stage of the process, from report and investigation to disposition and adjudication. Therefore, the military justice system requires a process by which there is both *accountability* for the Commander and *support* for the victim.

Reforms to the military justice system towards this end have been unparalleled in any other jurisdiction. Reforms have consistently focused on improving the accountability of the process, such as the role and responsibility of the Commander, and the support the military provides to victims of sexual assault, such as the establishment of confidential reporting options and the special victims' counsel/victims' legal counsel program. Both the accountability of the system and the support provided by the system are unique to the military. Unlike a lawyer-focused civilian system, the military needs a Commander-driven, lawyer-supported, victim-supportive system to drive cultural change and enforce discipline required on the battlefield. While the military system is unique in this regard, and necessarily so, the system deserves rigorous attention and evaluation to ensure the process continues to provide support, upholds fairness, and maintains accountability throughout the lifecycle of a sexual assault case.

Based on this, the SAAITF reviewed each step along the military justice process – from initial reporting experiences, to investigations and forensic capabilities, to the prosecutorial system, to sentencing, and to assessment of the victims' experiences throughout the process – to ensure accountability and support, and to identify ongoing improvements of the system. The report details significant recommendations for improvement: adding a specific criminal offense of sexual harassment to make a strong military-wide statement about the seriousness of these behaviors and the military's zero tolerance for them; thoroughly-updated training and education of all military justice practitioners; enhanced capabilities to ensure the Department has state-of-the-art 21st century forensic capabilities, which will enhance both the accuracy and timeliness of the investigative process and military justice system; providing defense counsel with their own investigators to promote due process for the accused; sentencing guidelines to promote consistency in punishments; and Commander-assigned responsibilities to ensure the victim has consistent up-to-date information throughout the investigation and military justice process, and to enhance the Commander's role, responsibility, and accountability throughout the process.

Not only will these recommendations improve the governing military law and the Department's policies, but they will send a strong, clear message to all Service members and their unit commanders: The Department will ensure the Commander has all available tools, authorities, information, and guidance to hold offenders appropriately accountable and support the victim, while protecting the rights of the victim and the accused throughout the military justice process. The Department will use whatever resources are required and bring the full weight of the

Department of Defense to eliminate the scourge of sexual assault in our ranks and encourage more Service members to come forward and report sexual assault and sexual harassment so Commanders can hold offenders appropriately accountable and ensure good order and discipline.

Task Force Structure and Process

The SAAITF was co-led by the Executive Director of the DoD Office of Force Resiliency, the Judge Advocates General of the Military Departments (TJAGs), and the Staff Judge Advocate (SJA) to the Commandant of the Marine Corps (CMC). Task Force members also included leaders from the Military Criminal Investigative Organizations (MCIOs), the Director of the DoD Sexual Assault Prevention and Response Office (SAPRO), a senior representative from the Office of DoD General Counsel (DoD OGC), and the Military Deputy for the Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)). Additional members were senior staff from the Office of the Under Secretary of Defense for Personnel and Readiness, Office of the Assistant Secretary of Defense for Legislative Affairs, the Office of DoD Inspector General (observation role only), each Service's respective sexual assault prevention and response (SAPR) office, senior leaders from the Joint Staff and National Guard Bureau, the Judge Advocate General of the Coast Guard, and a Senior Enlisted Advisor.

Before the establishment of the SAAITF, each Military Service was working to identify potential gaps or areas of improvement in the military justice system as it relates to sexual crimes. During its initial deliberations, the SAAITF reviewed all pending efforts to improve and enhance the military justice system's processing of sexual assault cases, as well as those that remained under consideration by the Military Services. The SAAITF determined where efforts should be standardized across the Department. Additional information was identified and reviewed by members of the Task Force, including: recommendations from prior internal and external Task Forces and Federal Advisory Committees, with specific focus on the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD); data from the *Workplace and Gender Relations Surveys* (WGRs); and data from the *Military Investigation and Justice Experience Survey* (MIJES).

To ensure a comprehensive review, members of the Task Force received briefings from sexual assault survivors; a retired Service member accused while on active duty of a sexual assault (an allegation later determined by a civil jury to be false); special victims' counsel and support staff; a defense counsel; and Commanders at the two-star level.

Specific Recommendations

Accountability Recommendations

The following recommendations provide significant actions and reforms to increase and enhance the authority, integrity, and transparency of Commanders and the military justice system through the entire lifecycle of a sexual assault case.

Recommendation 1.1. Establish a Specific Criminal Offense of Sexual Harassment

1.1. DoD OGC will direct the Joint Service Committee on Military Justice (JSC) to draft a proposal for a specific offense of "sexual harassment" to be added to the Manual for Courts-Martial. The Services may maintain their respective sexual harassment resolution processes as an option to address minor misconduct.

Recommendation 1.2. Advance Sentencing Reform and Guidelines

1.2. DoD OGC will direct the JSC to draft a proposal for adoption of non-binding sentencing guidelines based on the sentencing data collected by the Military Justice Review Panel (MJRP) to provide the sentencing authority with the range of confinement that will generally be appropriate for a violation of each of the offenses criminalized under the UCMJ.

Recommendation 1.3. Enhance 21st Century Forensic and Investigative Capabilities

1.3.1. The Department will develop a long-term storage solution for evidence taken in sexual assault cases.

1.3.2. The Department will establish a first-ever dedicated analytical capability to support the on-going research needs of the MCIOs and share findings with the prevention community and law enforcement community.

1.3.3. The Department will increase the number of MCIO digital evidence examiners to meet the increasing demand for forensic digital evidence processing and timely return of victim electronics, when legally possible, in sexual assault cases.

1.3.4. The Department will seek transfers and reprogrammings of current funding for Special Victims Programs to allow for procurement to support advanced forensic capabilities.

Recommendation 1.4. Expand Judicial Authorities

1.4. DoD OGC will direct the JSC to draft a proposal to expand authorities for Military Judges and Magistrates, particularly before a case has been referred to a court-martial.

Recommendation 1.5. Establish and Enhance Roles and Responsibilities for Commanders

1.5.1. The Department will direct the Military Services to require Sexual Assault Initial Disposition Authorities (SAIDAs) to ensure that victim preference on choice of venue is documented prior to making any decisions on allegations. The Department will direct the Commander of a victim to ensure documentation of periodic notification of the key and significant events during the military justice process has occurred. In addition, the Military Services will ensure Commander's compliance with these documentation requirements using established Inspector General inspection processes.

1.5.2. The Department will establish training objectives for all aspects of a Commander's role in processing sexual assault cases through a comprehensive review of best practices in military justice, victim assistance, promotion of healthy command climates, and ensuring the accused is afforded due process rights. These training and education requirements will be standardized and institutionalized across the Military Services' respective training commands. Training will enhance Commander and command team knowledge and skill through improved leadership preparation that emphasizes various critical elements provided in the full report.

1.5.3. The Department will direct formalized training requirements for Commanders exercising SAIDA, and determine minimum training objectives, including a focus on not only the handling of alleged penetrative sexual assault offenses, but also related collateral misconduct alleged against the accused or victim. Training requirements will be standardized and institutionalized across the Military Services' respective training commands.

Recommendation 1.6. Enhance the Military Justice System's Transparency with the Public

1.6. The Department will continue to support the enactment of legislation promoting public access to military justice documents by excepting from the purview of the Privacy Act the public release of court-martial dockets, filings, and records, while adopting measures to protect against the inappropriate release of personal information.

Recommendation 1.7. Extend the DAC-IPAD

1.7. The Secretary will extend the DAC-IPAD beyond its current termination date to continue to assess the effectiveness of the military justice system for sexual crimes.

Support Recommendations

The SAAITF also focused military justice reform recommendations to enhance the protections and support of the victim while protecting the due process rights of both the victim and the accused. Specific recommendations were formulated as follows:

Recommendation 2.1. Enhance the Integrated Multi-Disciplinary Special Victim Investigation and Prosecution (SVIP) Capability

2.1. Multiple initiatives include:

- The Department will, in collaboration with the Military Services, conduct a compliance review of the SVIP capability across all military justice practitioners, including investigators, trial counsel, support staff, and victim assistance personnel. This review will include identification of areas of improvement to support this capability within the military justice system.
- Based on the above compliance review, the Department will revise applicable instructions, as required, to enhance SVIP collaboration, integration, and synchronization involving victim assistance personnel, criminal investigators, and military prosecutors any time a sexual assault event is reported throughout the entire military justice process.
- The Department will direct the Military Services to identify the appropriate delegated official within the SVIP to provide and document notifications per Recommendation 1.5.1 in order to ensure regular and consistent updates to the victim as to the progress of the case.
- The Department will modify applicable instructions to incorporate SVIP capability within the investigative process. SVIP-qualified prosecutors will work closely with the MCIOs when developing the investigative plan. Ultimately, all federal law enforcement investigative processes and final investigative decisions must remain with the lead MCIO.
- The Judge Advocates General and the SJA to CMC will enhance training requirements for military justice practitioners, including Special Victims' Counsel/Victims' Legal Counsel (SVCs/VLCs), defense counsel, and trial counsel. They will also coordinate to determine minimum training objectives, and the Military Services will standardize and institutionalize the training requirements across their respective training commands. Training will focus on not only the handling of alleged penetrative sexual assault offenses, but also related collateral misconduct alleged against the victim.

- The MCIOs will establish training requirements for investigators supporting SVIP. They will also coordinate to determine minimum training objectives.

- The Department will field the MIJES in years opposite the *Workplace and Gender Relations Survey of the Active Duty* (*WGRA*), and adjust if need be to minimize burden on victims. In addition, the MIJES will require additional publicity and support from response system professionals to encourage greater participation rates.

Recommendation 2.2. Develop Policy to Enhance Protection for Victim Preference in Restricted Reporting

2.2. The Department will develop a policy that would more fully protect the victim's ability to file a Restricted Report, as well as provide victims a confidentiality option should the victim's sexual assault allegation be inadvertently disclosed or a third-party report arise, in appropriate circumstances.

Recommendation 2.3. Protect Information Used in the CATCH Program

2.3. The Department will make clear that information used in the CATCH a Serial Offender (CATCH) Program will be protected under the Restricted Report protections and will not be subject to disclosure under the Freedom of Information Act (FOIA).

Recommendation 2.4. Develop Defense Investigator Capability

2.4. The Department will direct the Services to develop an appropriate defense investigator capability on a trial basis for a three-year term. Following the conclusion of the pilot program, the program will be reassessed to determine whether the defense investigator capability enhanced the administration of justice.

Introduction

Sexual assault is beyond mere criminal conduct within the military; it is a reprehensible act that harms those who have volunteered to serve in our Armed Forces. Not only does sexual assault contravene our moral commitment to the basic dignity and respect of every individual, it also damages the trust and cohesion that are critical foundations of military unit effectiveness and lethality. That, fundamentally, makes sexual assault a readiness issue for the Department of Defense (Department). Addressing this scourge is an operational imperative necessary to ensure our ability to defeat any enemy, anywhere in the world.

Recent reforms to the military justice system, particularly in the area of victim support, have been unparalleled in any other jurisdiction. These reforms have consistently focused on improving the accountability of the process, such as the role and responsibility of the Commander, and the support the military provides to victims of sexual assault, such as the establishment of confidential reporting options and the special victims' counsel/victims' legal counsel program. Both the accountability of the military justice process and practitioners, and the support of the victim, are unique to the military. Unlike a lawyer-focused civilian system, the military needs a Commander-driven, lawyer-supported, victim-supportive system to drive cultural change and enforce discipline required on the battlefield. While the military system is unique in this regard, and necessarily so, the system deserves rigorous attention and evaluation to ensure the process continues to provide support, ensures fairness, and maintains accountability throughout the entire lifecycle of a sexual assault case. At the same time, reforms must uphold – and ideally enhance – Commanders' ability to establish an appropriate command climate that fosters unit cohesion, esprit de corps, and mission readiness.

In regard to sexual assault, the Department tracks trends within the response system and sexual assault programs using two primary metrics: past-year prevalence of the crime and the percent of Service members who report the crime to military officials. Outcomes of the military justice system are most directly connected to the latter. That is, the good order and discipline achieved through the military justice system is largely reliant upon the percent of individuals who opt into the system by making a report. Over the last 15 years, as the Department expanded its military justice system support to Service members, prevalence of sexual assault decreased by half and reporting increased four-fold. In 2006, the Department estimated only 7 percent of those who experienced a sexual assault came forward to report the incident to the military. In 2018, this rate was approximately 30 percent. While the Department encourages greater reporting by Service members, the majority of victims, an estimated 70 percent, do not come forward to report. Thus, we must redouble our efforts, sustain important progress, and produce new and innovative solutions to solve the problem. The Department must maintain a clear-eyed, impartial, and consistent approach to evaluation of all elements of the investigative and military justice system. Our military members must likewise have faith and confidence in this system so the world's most disciplined, ready, and lethal fighting force can protect the Nation and always be ready to fight and win wars.

At the request of Senator Martha McSally during the Senate Armed Services Committee hearing on March 14, 2019, Acting Secretary of Defense Patrick Shanahan pledged to form a team of experts to take a fresh look at specific issues involving sexual assault, with a focus on the

investigative and accountability processes. To this end, the Department established the SAAITF to identify, evaluate, and recommend immediate and significant actions to improve the accountability process, specific to the investigation and disposition of cases in which members of the Armed Forces are either victims or alleged perpetrators of sexual assault, while ensuring due process for both (Appendix A). With a focus on accountability and investigation, the SAAITF complements the ongoing work in separate, co-aligned efforts focused on prevention and includes senior representation from the Office of Force Resiliency, the Judge Advocates General (TJAGs) and the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC), and the leads of the Military Criminal Investigative Organizations (MCIOs) (Appendix B for full membership).

Background of the Military Justice System and Historical Reforms

The military justice system is designed to enhance good order and discipline while protecting the rights of the accused and the victim. These concepts are enshrined in the Preamble of the Manual for Courts-Martial (MCM): "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." Like any complex system, it requires constant refinement. Since the UCMJ's enactment, Congress has amended it numerous times and the President has promulgated periodic revisions to the MCM to refine the procedures related to courts-martial.

Starting in 2006, Congress enacted a series of modifications to the UCMJ focused on improving the handling of sexual assault cases. These revisions to the military justice system continued at a steady pace with significant legislative changes incorporated in the National Defense Authorization Acts (NDAA) for Fiscal Years (FY) 2014, 2015, and 2016. These changes were created in response to the deep concern of Congress and the Department with the problem of sexual assault in the military. A summary of the changes to the military justice system during this time, many of which provided additional rights and services for victims, is provided in Appendix C.

Section 576 of FY13 NDAA established the Response Systems Panel (RSP) to conduct a 12-month review of the effectiveness of the systems used to investigate, prosecute, and adjudicate sexual assault offenses, including the role of the Commander in the military justice system. After holding 14 public meetings, hearing from 154 witnesses, and reviewing thousands of pages of documents, the RSP issued its report in June 2014 making 132 recommendations. The RSP included a recommendation to retain the Commander's role in exercising disposition discretion. The RSP concluded that the Department, the Services, and senior leaders must ensure Commanders understand their responsibility and that they be held accountable, and fairly evaluated, on their execution of these critical responsibilities. Overall, the Department approved the vast majority of the RSP recommendations.

Section 576 of FY13 NDAA created the Judicial Proceedings Panel (JPP) for a three-year term to review the operation of the court-martial process with respect to sexual assault offenses. The JPP held 32 public meetings between August 2014 and July 2017, and heard testimony from many witnesses, including military leaders, sexual assault victims, sexual assault advocacy groups, DoD and civilian victim services personnel, military and civilian prosecutors, defense counsel, victims'

counsel, academic and subject matter experts, members of the public, and members of Congress. The JPP received and reviewed thousands of pages of documents. The JPP issued 11 reports and made 63 recommendations, many of which have been enacted by Congress, or implemented by the Department and the Services, on the topics of Article 120, UCMJ; restitution and compensation of victims of sexual assault; retaliation against those who report sexual assault; military defense counsel resources and experience; victims' appellate rights; sexual assault investigators; and concerns regarding the fair administration of military justice in sexual assault cases.

On October 18, 2013, Secretary of Defense Chuck Hagel directed a comprehensive review of the UCMJ and the MCM. In response to this direction, the Military Justice Review Group (MJRG), led by the Honorable Andrew Effron, former Chief Judge of the United States Court of Appeals for the Armed Forces, conducted a comprehensive review of the military justice system and submitted its findings to the Department. The Department, with the Office of Management and Budget's approval, submitted the MJRG's report to Congress in December 2015, which in large measure formed the basis for the Military Justice Act of 2016 (MJA 16), most of which became effective on January 1, 2019. The late Senator John McCain, then-Chairman of the Senate Armed Services Committee, characterized these changes in the MJA 16 as "the most significant reforms to the Uniform Code of Military Justice since it was enacted six decades ago." A side-by-side comparison of the former military justice system and the system as systematically reformed by the MJA 16 is provided in Appendix D, along with a list of changes enacted after the MJA 16 at Appendix E.

The Department established the DAC-IPAD in February 2016 pursuant to section 546 of the FY15 NDAA, as amended. The mission of the DAC-IPAD, the successor to the JPP, is to advise the Department on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces. The DAC-IPAD is required to submit an annual report to the Department and Congress no later than March 30 of each year. It is now scheduled to terminate in February 2021.

Role of the Commander in the Military Justice System

The Commander stands at the center of the military justice system. The Commander, regardless of Service, is responsible for the health, welfare, and discipline of every Service member in his or her Command. This responsibility and authority promote the unit's accomplishment of its assigned missions. Because of this ultimate responsibility, authority for determining the proper disposition of allegations of misconduct under the UCMJ, including serious crimes like sexual assault, rests with the Commander. Commanders, however, do not make military justice decisions in isolation. Every Commander is informed and advised by qualified, professional judge advocates throughout the life of a case and at each key stage of the process, from report and investigation to disposition and adjudication.

As the Department has worked with Congress to combat sexual assault, the role of the Commander has undergone tremendous scrutiny and study. Some theorize that a Commander's role at the center of the military justice system hampers the Department's ability to hold alleged offenders appropriately accountable or to care for victims. External oversight entities tasked with reviewing this issue arrived at a different conclusion that does not support the aforementioned theory. As an

example, the role of the Commander was studied by the RSP in 2014. The RSP determined that removing the Commander's authority within the military justice system would not improve the quality of investigations and prosecutions, or the Department's response to sexual assault. Further, in its March 2019 report, the DAC-IPAD "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," and "that there is no systemic problem with command decision-making regarding preferral of charges for penetrative sexual assaults."

While there remains much work to be done, objective measures demonstrate that the Commander's role in the military justice system does not hinder the Department's response to sexual assault. Moreover, because of the vital role Commanders play in establishing the climate of their units, and achieving culture change where necessary, sexual assault is a Commanders' issue. Therefore, if Commanders were to be removed from their central role in the military justice system, they would lose their most powerful tool available to drive home the message that sexual assault has no place in the United States Armed Forces.

Task Force Membership

The SAAITF was co-led by the Executive Director of the DoD Office of Force Resiliency, the Judge Advocates General of the Military Departments, and the SJA to CMC. Task Force members included leaders from the MCIOs, the Director of DoD SAPRO, a senior representative from the DoD OGC, and the Military Deputy for the OUSD(P&R). Additional members were senior staff from the OUSD(P&R), Office of the Assistant Secretary of Defense for Legislative Affairs, DoD OGC, DoD Office of the Inspector General (observation role only), each Service's respective SAPR offices, senior leaders from the Joint Staff and National Guard Bureau, and a Senior Enlisted Advisor.

While the SAAITF is a DoD-led initiative, many of the recommendations directly affect the Coast Guard. This is especially true for recommendations to revise the UCMJ, and other proposals to reform the military justice system. Pursuant to 10 U.S.C. § 101 and 14 U.S.C. § 101, the Coast Guard is a military service and a branch of the Armed Forces of the United States at all times. Coast Guard officers and enlisted members are subject to the UCMJ pursuant to 10 U.S.C. § 802 (Article 2), and the Coast Guard is part of the military justice system as implemented in the MCM (2019 ed.). Therefore, the SAAITF also included representation from the Coast Guard and this report will be shared with the Department of Homeland Security. A comprehensive list of SAAITF members is provided at Appendix B.

Task Force Process

Initial Deliberations Before the establishment of the SAAITF, each of the Military Services was working to identify potential gaps or areas of improvement in the military justice system as it relates to sexual crimes. During its initial deliberations, the SAAITF reviewed all pending efforts to improve and enhance the military justice's processing of sexual assault cases, as well as those that remained under consideration by the Military Services. The SAAITF determined where efforts should be standardized across the Department.

Data Review and Analysis Additional information was identified and reviewed by members of the Task Force including:

- Recommendations from prior internal and external Task Forces and Federal Advisory Committees, with specific focus on the DAC-IPAD. More details on considered reports are included in Appendix F.
- Data from the WGRs as well as the MIJES.

Additional Data and Information To ensure a comprehensive review, members of the Task Force received briefings from sexual assault survivors; a retired Service member accused while on active duty of a sexual assault (an allegation later determined by a civil jury to be false); special victims' counsel and support staff; a defense counsel; and Commanders at the two-star level.

Recommendation Formulation The SAAITF developed recommendations through an informed process with a focus on increasing the authority, integrity, transparency, and support of the military justice system through the entire lifecycle of a sexual assault case and ensuring the system is appropriately supportive of all who interact with it.

Overview

Assumptions

1. The SAAITF formulated recommendations agnostic of current policies, regulations, laws, or legislative limitations.
2. The SAAITF did not limit its review to one aspect of the military justice system; rather the SAAITF evaluated the entire lifecycle of the military justice process.
3. The SAAITF focused recommendations on the military justice system as it pertains to the investigation and judicial processes for sexual assault crimes specifically, though many recommendations will improve the military justice process writ large.
4. While the SAAITF focused primarily on response aspects, namely investigation and adjudication, the SAAITF recognizes the profound and holistic impacts that these response efforts have on overall prevention efforts.
5. The SAAITF Report references "victim" and "accused" throughout. Reference to "victim" includes any Service member who reports a sexual assault to a military official, either through restricted or unrestricted channels, as well as Service members whom others report as being the victim of a sexual assault. Reference to the "accused" includes any Service member who is named as the alleged perpetrator of the reported sexual assault. These references in no way presuppose guilt or innocence of the accused, nor do they presuppose a founded or unfounded allegation on behalf of the victim.

Task Force Lines of Effort and Overview of Recommendations

The Task Force leveraged the critical reforms from the MJA 16 and identified additional areas of improvement and reform with a focus on two primary lines of effort outlined below.

Accountability: The ability of the military to maintain a ready and lethal force fundamentally depends on the role and authority of Commanders, including their role within the military justice system. Recommendations in this line of effort focused on increasing the authority, integrity, and

transparency of Commanders and the military justice system through the entire lifecycle of a sexual assault case. Specific recommendations were formulated as follows:

- The Commander is integral to military justice and good order and discipline.
    - *Recommendations include: Clarified roles and responsibilities of the Commander, requirements for Commanders to ensure victims are informed throughout the military justice process, established training objectives for all Commanders involved in processing sexual assault cases, and the creation of Department-wide training requirements for Commanders exercising SAIDA.*
- The Commander must make decisions based on the most accurate and timely information from appropriately-trained investigators, robust forensic capabilities, and unbiased legal guidance.
    - *Recommendations include: Increased forensic and analytic capability to provide the most accurate and valid evidence.*
- The Commander must make informed, swift, and appropriate decisions using all authorities granted to him/her.
    - *Recommendations include: Introduction of a specific criminal offense of sexual harassment, sentencing guidelines to help guide the sentencing authority and to promote sentencing consistency, and expansion of judicial authorities.*
- Commanders' decisions should be transparent and the Commander should be held accountable for ensuring procedures that are within his or her responsibility are applied appropriately.
    - *Recommendations include: Requirements for the Services to ensure Commander compliance with roles and responsibilities for ensuring victims are updated throughout the investigation and military justice process.*

All recommendations within this line of effort improve the following areas of focus:

- Commander Responsibility and Authority
- Process Timelines and Accuracy
- Fairness and Due Process
- System Credibility and Transparency

Support: The SAAITF focused military justice reform recommendations to enhance the protections and support of the victim while protecting due process for both the accused and the victim. Specific recommendations in this line of effort were formulated as follows:

- The military justice system must reflect a comprehensive, standardized, experienced, and collaborative approach to investigating and prosecuting sexual assault crimes.
    - *Recommendations include: Revitalization of SVIP Capability with enhanced training and education for all practitioners within the SVIP.*
- The rights of the victim and the accused must be protected throughout all aspects of the military justice process.

- *Recommendations include: Ability of victims to maintain restricted reports; protection of data for victims who use the CATCH program; documentation and tracking of victim jurisdictional preference; notification of case progress and outcome; standardized survey of victim experiences, attitudes, and satisfaction after going through the system; defense investigator capability.*

All recommendations within this line of effort improve the following areas of focus:

- Victim/Accused Support and Experience
- Integration and Synchronization of Services
- Training and Education

Section 1. Accountability Recommendations

The following recommendations provide significant actions and reforms to increase and enhance the authority, integrity, and transparency of Commanders and the military justice system through the entire lifecycle of a sexual assault case.

Recommendation 1.1. Establish a Specific Criminal Offense of Sexual Harassment

Background:

Sexual harassment is not merely immoral, but also damages the teamwork that is necessary to the successful accomplishment of military missions. Additionally, from our Department-wide surveys and research, the Department recognizes that personnel within commands with heightened sexual harassment prevalence are also at increased risk for sexual assault. Deterring and effectively responding to sexual harassment is one of many initiatives that may, in combination, drive down sexual assault prevalence.

While civilian laws prohibit sexual harassment, they do not make sexual harassment itself a crime. Rather, U.S. civilian law characterizes sexual harassment as a civil wrong. In some other countries, on the other hand, sexual harassment is a crime.[1]

The Services have programs in place to resolve complaints of sexual harassment and allegations of a hostile work environment administratively. An informal resolution process can be used to address conduct that creates a hostile work environment such as inappropriate jokes, innuendo, or discussions in the workplace. The informal resolution process resolves the minor misconduct outside of the military justice process while maintaining good order and discipline in the unit.

The military has both the ability and the imperative to criminalize some behavior that is not criminal in civilian society. As discussed previously, good order and discipline is a critical necessity to a ready and lethal force. Good order and discipline is inherently the responsibility of the Commander, and the military justice system is responsible for providing him or her with the authorities and tools to succeed in this regard. Currently, a military member can be held criminally

[1] See, for example, L. Camile Hebert, *Dignity and Discrimination in Sexual Harassment Law: A French Case Study*, 25 Wash. & Lee J. Civil Rts. & Soc. Just. 4 (2018) (discussing France's criminalization of sexual harassment); Karen Musalo, *El Salvador – A Peace Worse than War: Violence, Gender and a Failed Legal Response*, 30 Yale J.L. & Feminism 3, 44 (2018) (discussing El Salvador's criminalization of sexual harassment by a superior).

accountable for sexual harassment and similar conduct under the UCMJ by charging the alleged offender with committing a general disorder (Article 134) or failing to obey an order or regulation (Article 92). However, the military justice system does not have a specific punitive article or enumerated Article 134 offense addressing sexual harassment.

The civilian system chiefly penalizes sexual harassment within the workplace. However, Service members live and work in very close quarters where such behavior can become even more disruptive. Consequently, a specific "sexual harassment" offense for the military should encompass misconduct that occurs not only in the workplace, but also anywhere Service members live, work, train, and socialize together.

Creating a specific "sexual harassment" offense under military law would be beneficial for multiple reasons. Among them is it would more firmly reinforce the Department's view that such conduct is immoral and unacceptable. It would give Commanders another tool to help them influence the behavior of their subordinates. Additionally, creating a specific sexual harassment offense would facilitate data collection and analysis of incidence and reporting of this crime as the Department could gauge specific alleged violations of this criminal charge.

Task Force Priority Areas:

- System Credibility and Transparency
- Commander Responsibility and Authority

Data Sources:

- WGRAs
- 2014 RAND Military Workplace Survey
- Manual for Courts-Martial, United States (2019 ed.)
- Briefings to the SAAITF
- National Discussion on Sexual Assault and Sexual Harassment at America's Colleges, Universities, and Service Academies

Findings:

Based on surveys conducted by the Department, there is a strong positive correlation between the occurrence of sexual harassment within military units and the occurrence of sexual assault. Commands and installations with greater occurrence of sexual harassment often have higher rates of sexual assault. This connection, and the importance of the Department's focus on eliminating sexual harassment from the ranks, was reiterated by briefings to the SAAITF and by panel briefers at the 2019 National Discussion on Sexual Assault and Sexual Harassment at America's Colleges, Universities, and Service Academies.

While sexual harassment can currently be prosecuted in the military justice system, there is no stand-alone offense of "sexual harassment." Feedback from Commanders reflected the importance of the tools available to them to send strong messages about expected conduct, with the UCMJ as the primary tool of authority.

Recommendation:

DoD OGC will direct the JSC to draft a proposal for a specific offense of "sexual harassment" to be added to the Manual for Courts-Martial. The Services may maintain their respective sexual harassment resolution processes as an option to address minor misconduct.

Estimated Resource Implications: None.

Recommendation 1.2. Advance Sentencing Reform and Guidelines

Background:

The UCMJ provides mandatory minimum sentences for a very limited class of offenses.[2] For most offenses, the sentencing authority is free to adjudge any sentence from no punishment to the maximum authorized punishments for all of the offenses resulting in a conviction combined. In a rape case, for example, while the sentence must include a punitive discharge, the sentencing authority may sentence a convicted Service member to any period of confinement ranging from none to life without eligibility for parole. The sentencing authority is given very little guidance concerning how to exercise discretion within that broad range.

The MJRG carefully analyzed the historical background, contemporary practice, and the purpose and operation of Federal civilian sentencing guidelines. The MJRG concluded that several reforms to military sentencing were necessary:

- Eliminate the possibility of sentencing by members in non-capital cases, reserving the sentencing function to military judges.
- Provide that military judges will impose a separate term of confinement for each offense that resulted in a conviction and make a determination as to whether the sentences will run consecutively or concurrently.
- Establish non-binding sentencing parameters and criteria to provide guidance to Military Judges in determining an appropriate sentence in a manner similar to the Federal Sentencing Guidelines in federal districts.

These proposed reforms were included in the draft Military Justice Act the Department transmitted to Congress. Congress, however, chose to retain the possibility of member sentencing in some non-capital cases and removed the provisions concerning sentencing parameters and criteria.

Task Force Priority Areas:

- System Credibility and Transparency
- Process Timeliness and Accuracy
- Fairness and Due Process

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[2] Article 56 prescribes minimum punishments for rape, sexual assault, rape of a child, sexual assault of a child, and attempt or conspiracy to commit any of these sex offenses. Additionally, a mandatory minimum sentence of confinement for life applies to premeditated murder and felony murder.

Data Sources:

- Report of the Military Justice Review Group, Part I (UCMJ Recommendations), 22 Dec 2015, pp. 501–15
- Section 5521 of the FY17 NDAA modified Article 146, UCMJ to create the MJRP

Findings:

The lack of sentencing guidelines leaves the sentencing authority with tremendous discretion regarding how much confinement to adjudge, while providing little guidance concerning the exercise of that discretion. As a result, court-martial sentences for similar offenses often vary widely.

Recommendation:

DoD OGC will direct the JSC to draft a proposal for adoption of non-binding sentencing guidelines based on the sentencing data to be collected by the MJRP to provide the sentencing authority with the range of confinement that will generally be appropriate for a violation of each of the offenses criminalized under the UCMJ.

Estimated Resource Implications: Minimal.

Recommendation 1.3. Enhance 21st Century Forensic and Investigative Capabilities

The SAAITF identified four areas of reform and enhancement on the Department's forensic and investigative capabilities.

Recommendation 1.3.1. Long-Term Storage Solution for Evidence Taken in Sexual Assault Cases

Background:

The Sexual Assault Forensic Evidence Reporting (SAFER) Act (2013) led to national best-practice recommendations for retention of sexual assault evidence. Recommendations call for 50-year retention in uncharged or unsolved cases and 20-year retention for sexual assault kits taken in restricted reporting cases. DoDI 5505.18, Investigation of Adult Sexual Assault in the Department of Defense, change 2, effective January 31, 2019, requires "all [sexual assault] physical and forensic evidence must be retained for a period of at least 20 years from the date of seizure of the evidence."

"Physical and forensic evidence" collected in sexual assault cases frequently accumulates to several cubic feet of material, such as clothing items, bed coverings, and carpeting, per case. MCIOs investigate more than 5,000 sexual assault cases per year and most cases involve the collection of some type of physical or forensic (including digital) evidence.

Task Force Priority Areas:

- Process Timelines and Accuracy

Data Sources:

- DoDI 5505.18, Investigation of Adult Sexual Assault in the Department of Defense, change 2, effective January 31, 2019
- SAFER Act of 2013
- Survivors' Bill of Rights Act of 2016 (Public Law 114-236) 18 U.S.C. § 3772a

Findings:

MCIO field units are located in typical office facilities on military installations. MCIO offices do not have sufficient space to store evidence for 20 years, per policy requirements. It is not feasible to arrange for local storage solutions at more than 200 MCIO field units.

Recommendation:

The Department will develop a long-term storage solution for evidence taken in sexual assault cases.

Estimated Resource Implication: Extensive

- Manning: Central storage facility = approximately five full time personnel ($300,056)
- Space: 85,000 square feet
- Facility cost: TBD

Recommendation 1.3.2. Establish a First-Ever Dedicated Analytical Capability

Background:

The MCIOs have made significant progress in incorporating research-informed best-practices, such as looking into the background of offenders for past similar conduct, utilizing cognitive interviewing techniques, and providing investigators with training on the impact cognitive biases can have in investigations. Currently, little research data exist about repeat offenders in sexual assaults involving acquaintances or co-workers. Most sexual assaults in the military involve acquaintances; less than 15 percent of Service members indicate experiencing sexual assault at the hands of a complete stranger.

The MCIOs collectively conduct over 5,000 sexual assault investigations per year. As a result of improved investigator training and agency oversight, MCIO investigations completed in the last few years contain substantially more qualitative and quantitative information. This rich source of data needs to be analyzed to assess if the improvements the MCIOs have made are leading to quality investigative outcomes. The data also offer better insights into repeat offenders and their methods of operation in reported cases, as well as insights to help better identify possible past victims of repeat offenders.

Task Force Priority Areas:

- Process Timelines and Accuracy

Data Sources:

- MCIO case management and timeliness data

- WGRs

Findings:

MCIOs do not possess sufficient dedicated analytical support to research data from investigative case files to assess the efficacy of adjustments they have recently made to training and investigative techniques or patterns of offending critical to future investigations. MCIOs, and the sexual assault prevention community, would benefit from a deeper understanding of repeat offenders in reported military sexual assault cases, an understanding not currently available in existing research.

Recommendation:

The Department will establish a first-ever dedicated analytical capability to support the on-going research needs of the MCIOs and share findings with the prevention community and law enforcement community.

Estimated Resource Implication: Extensive

- Manning: Six full-time employee (FTE) analysts
- Funding: Approximately $2M annually
- Space and Equipment: Working space and computer support for six analysts

Recommendation 1.3.3. Enhance the Number of MCIO Digital Evidence Investigators

Background:

Most sexual assault incidents in the military involve individuals who know each other. In reported cases, the parties often agree sexual activity took place but contest matters of consent. In cases with these fact patterns, digital evidence can be the most probative, as records of electronic communications provide important insight into issues surrounding consent.

Most criminal investigations conducted today involve the need to analyze computers, laptops, cell phones, internet-connected home assistants, digital data stored in vehicles, etc. Digital devices almost always contain relevant evidence (e.g., emails, texts, photographs, internet search logs, geo-location data, social media uploads/downloads), evidence particularly helpful in sexual assault cases and associated crimes (e.g., stalking). Rapidly increasing data storage capacity, as well as "cloud" storage, is adding to the challenge. More time is needed to analyze each device and address procedures required for legally accessing remotely stored digital data.

MCIOs collectively saw a 14 percent increase (up by 695 cases) in unrestricted sexual assault reports in 2018 over 2017. This increase resulted in more digital evidence needing to be collected and analyzed. In fact, in 2018, the MCIOs processed 20 percent more terabytes of data than in 2017. The increased time it takes MCIOs to process digital evidence is now the main contributor to case timeliness challenges. In 2018, the average time it took to publish a sexual assault investigative report rose to 123 days, up from 119 days in 2017. This upward trend is expected to continue due in large part to increased need for digital evidence analysis. In addition, as digital devices become increasingly integrated into daily life, victims of sexual assault become quite concerned about the loss of their primary means of communication. Recent changes in analysis procedures attempt to minimize the amount of time a victim goes without his or her cell phone.

However, further reducing processing time and timely return of victims' cell phones whenever legally possible diminishes the potential for negative experiences associated with participation in the military justice process.

Task Force Priority Areas:

- Process Timelines and Accuracy
- Victim/Accused Support and Experience

Data Sources:

- Various studies, including: *Digital Evidence and the U.S. Criminal Justice System: Identifying Technology and Other Needs to More Effectively Acquire and Utilize Digital Evidence*, a RAND Corporation study (2015) for the National Institute of Justice
- Workplace and Gender Relations Surveys
- MIJES

Findings:

The combination of increasing caseloads, the increasing number of digital devices requiring forensic processing, and the ever-increasing data storage capacity of digital devices is significantly impacting overall investigative timeliness. The MCIOs need to meet the growing demand for digital forensic evidence processing in sexual assault investigations.

Recommendation:

The Department will increase the number of MCIO digital evidence examiners to meet the increasing demand for forensic digital evidence processing and timely return of victim electronics, when legally possible, in sexual assault cases.

Estimated Resource Implication: Extensive

- Manning: Each MCIO requires 10 (30 total) additional digital forensic examiners to meet the demand for digital evidence processing in the field
- Funding: Salary: GS 12/13 at $165K each (salary and benefits) = ~$5M
- Initial training and equipment costs: $25K each = $750K

Recommendation 1.3.4. Expand Forensic Science Technology

Background:

Additional Operations and Maintenance (O&M) funding authority has been provided within Consolidated Appropriations Bills historically from FY14 through FY19 for Special Victims Programs.

The additional funds are made available for transfer to the Army, Air Force, Navy, and Marine Corps, and Army and Air National Guard to continue support and expansion of the Special Victims programs. The Special Victim program includes SVCs/VLCs, which provide covered sexual assault victims their own attorney, as well as the SVIP Capability, which is comprised of specially trained military investigators, judge advocates, paralegals, and victim witness

assistance personnel who investigate, prosecute, and support victims of covered offenses of child abuse, serious domestic violence, or sexual offenses.

Task Force Priority Areas:

- Process Timelines and Accuracy

Data Source:

- Past DoD SAPRO efforts to try to approve procurement of equipment that would provide enhanced forensics capability

Findings:

Existing additional funding is provided as O&M dollars, with plus-ups in funding ($35M in FY19) from the House Appropriations Committee – Defense (HAC-D) and Senate Appropriations Committee – Defense (SAC-D) for Special Victims Programming is O&M funding (current year only). However, funds are not able to be transferred to the Department of the Army for U.S. Army Criminal Investigation Laboratory (USACIL) investment accounts to procure equipment to support advanced forensic technologies.

Recommendation:

The Department will seek transfers and reprogrammings of current funding for Special Victims Programs to allow for procurement to support advanced forensic capabilities.

Estimated Resource Implications: None.

Recommendation 1.4. Expand Judicial Authorities

Background:

Under the current system, Military Judges are not involved in the judicial process until after referral of charges, with a limited exception for certain matters such as the issuance of investigative subpoenas and requests for orders or warrants for stored communications. Otherwise, the Convening Authority retains responsibility for making many quasi-judicial decisions which may later be reviewed by the detailed Military Judge once the case has been referred to a court-martial. This results in unnecessary delays and duplication of effort.

Task Force Priority Areas:

- System Credibility and Transparency
- Process Timeliness and Accuracy
- Fairness and Due Process

Data Sources:

- Report of the Military Justice Review Group, Part I, pp. 301-06
- Report of the Response Systems to Adult Sexual Assault Crimes Panel, pp. 49-50

Findings:

Military Judges have the authority to conduct certain hearings before referral of charges and the Services have processes in place to facilitate the judiciary's involvement early on in the process. Congress assigned Military Judges this authority based upon a recommendation by the MJRG with the purpose of aligning practice in courts-martial more closely to civilian Federal courts. Judges in civilian Federal courts hold hearings on a number of pre-trial issues in addition to the issuance of compulsory process.

Legal proceedings would benefit from a pre-referral review by a Military Judge or Magistrate, thereby streamlining the military justice process and reducing duplication of effort. Early judicial involvement would be beneficial for matters including, but not limited to: pretrial confinement hearings, inquiries into an accused's mental capacity or responsibility, and requests for Individual Military Counsel, or issuance of protection orders. Post-trial proceedings could also benefit from expanded judicial authority.

Recommendation:

DoD OGC will direct the JSC to formulate a proposal to expand authorities for Military Judges and Magistrates.

Estimated Resource Implications: Minimal.

Manning: Additional Military Judges and/or Magistrates might be necessary to handle these additional hearings.

Recommendation 1.5. Establish and Enhance Roles and Responsibilities for Commanders

The SAAITF strongly believes the ability of the military to maintain a ready and lethal force fundamentally depends on the role and authority of the Commander. However, the SAAITF found two areas where it recommends reform and enhancement of the roles and responsibilities of the Commander.

Recommendation 1.5.1. Role of the Commander to Keep Victims Informed

Background:

Congress, the President, the Secretary of Defense, the Secretaries of the Military Departments, and senior leaders in the Military Services have adopted numerous protections for victims in the military justice system. Some of these are innovative programs that provide protections far beyond those available in civilian criminal justice systems, such as the special victims' counsel/victims' legal counsel programs.

Crime victims, as defined in Article 6b(b), UCMJ, are afforded certain statutory rights in accordance with Article 6b. Among those rights, a crime victim has the right to timely notice of specified military justice proceedings involving the accused, (as well as the ability to be reasonably heard at some proceedings) – to include: pretrial confinement proceedings under RCM 305(i); preliminary hearings pursuant to Article 32, UCMJ; court-martial proceedings; public sentencing hearings relating to the offense; and public hearings before any clemency and parole board.

Article 6b affords the victim the right to confer with the attorney for the U.S. Government in the case, including the right to confer at any proceeding identified in Article 6b. R.C.M. 306 requires the Secretaries of the Military Departments and, in the case of the Coast Guard, the Secretary of Homeland Security, to prescribe regulations that provide a victim of a sexual assault crime the ability to express their views as to the disposition of the case to the responsible convening authority. Moreover, the convening authority must consider the victim's jurisdictional preference – whether that preference is to have the case adjudicated at a court-martial or a civilian court.

In addition to rights of a victim, there are responsibilities for Commanders, and there are a variety of Commanders who play a role in the process. Rule for Courts-Martial 306 provides that "[t]he Commander, and if charges are preferred, the convening authority, shall consider such views as to the victim's preference for jurisdiction, if available." In this context, the "Commander" refers to the SAIDA or the convening authority. There is no statutory requirement for any Commander to document this preference.

Likewise, there is no statutory requirement for any Commander to notify the victim of the disposition decision personally, and it is appropriate for the Commander to direct a victim-witness assistance specialist or another appropriate individual to make the notification rather than doing so personally. However, Department policy requires the victim's Commander provide sexual assault victims filing an Unrestricted Report with monthly updates regarding the current status of any ongoing investigative, medical, or legal issues impacting the case, as well as command proceedings regarding the sexual assault case until the final disposition. The Chair of the Monthly Case Management Group meeting, typically an installation Commander, is required to ensure that case dispositions are communicated to the sexual assault victim, to the extent authorized by law, within 2 business days of the final decision. There is currently no standardized approach documenting such victim notification has been accomplished

Requiring documentation of compliance with victims' rights, and clarifying the responsibilities of the various Commanders in the process, would serve at least two laudable goals. First, it would promote compliance with the requirements, while providing a means to identify and remedy any failures. Second, the resulting documentation would provide those entities that assess the military justice system with helpful data to inform their analysis.

Task Force Priority Areas:

- Commander Responsibility and Authority
- Victim/Accused Support and Experience

Data Sources:

- Article 6b, UCMJ (10 U.S.C. § 806b)
- R.C.M. 306 (M.C.M. 2019 ed.)
- DoDI 6400.07, "Standards for Victim Assistance Services in the Military Community," July 6, 2018
- DoDI 6495.02, "Sexual Assault Prevention and Response (SAPR) Program Procedures," incorporating Change 3, May 24, 2017
- 2016-2017 Military Investigation and Justice Experience Survey

- Briefings to the SAAITF

Findings:

Article 6b and R.C.M. 306 afford a victim of an alleged sexual assault the right to express a preference as to military or civilian prosecution to the responsible convening authority. Currently, there is no statutory requirement that the victim receive notification of a convening authority's disposition decision. There is also no uniform practice across the Services as to how victims of alleged sexual assaults are notified of the disposition decision of the convening authority, nor is there a requirement that this notification be in writing.

While DoDI 6400.07, enclosure 2, para. 3b, broadly discusses victim interaction with the military justice system, there is no specific provision that mandates notification of the victim of disposition decisions by a convening authority. DoDI 6495.02, enclosure 5, para. g2, requires a victim's commanding officer to notify victims who made an Unrestricted Report of updates relating to case progress following monthly Case Management Group meetings. DoDI 6495.02, enclosure 5, para. b3, requires the Chair of the Case Management Group meeting to ensure that case dispositions are communicated to the sexual assault victim, to the extent authorized by law, within 2 business days of the final disposition decision.

Statutes, executive orders, DoD issuances, and Military Department/Service regulations accord extensive rights and procedural protections to victims in the military justice system. However, documentation of compliance with those protections has been inconsistent. Requiring documentation of compliance with victims' rights, procedural protections, and fulfilment of Commander notification responsibilities would promote compliance with those requirements.

In addition, surveys conducted by the Department found that victims' rated survey items regarding updates on the case as lowest in terms of satisfaction with services provided to them (2016-2017 MIJES). The surveys found – and briefings to the SAAITF also raised concern about – victims' perceptions that their Commander was not knowledgeable about the case.

Recommendation:

The Department will direct the Military Services to require SAIDAs to ensure that victim preference on choice of venue is documented prior to making any decisions on disposition of sexual assault allegations. The Department will direct the Commander of a victim to ensure documentation of periodic notification to victims of sexual assault of the key and significant events during the military justice process has occurred. In addition, the Military Services will ensure Commander's compliance with these documentation requirements using established Inspector General inspection processes.

Estimated Resource Implications: None

Recommendation 1.5.2. Training and Education of the Commander at All Levels

Background:

The considerable progress against sexual assault in the military over the past decade highlights important lessons:

- Leadership emphasis across the enterprise is a necessary, but not sufficient, factor to advance sexual assault prevention and response.
- Problematic command climate factors highly correlate with sexual assault.
- Command leadership team preparation and a Commander's responsibility and accountability for the climate of the command play essential roles in promoting healthy climates.
- Service members respond when they perceive sincere leadership support, respect for confidentiality, and sufficient value in the response process.

At the end of the March 6, 2019, Senate Armed Services Subcommittee on Personnel hearing with representatives from the Office of the Secretary of Defense and the Judge Advocates General of the Military Departments, Chairman Tillis stated he desired greater standardization of best practices by Commanders related to their involvement in sexual assault cases.

Task Force Priority Areas:

- Commander Responsibility and Authority
- Victim/Accused Support and Experience

Data Sources:

- DoD SAPRO, Military Services, and Congressional input
- 2016-2017 Military Investigation and Justice Experience Survey
- Senate Armed Services Sub-Committee on Personnel Hearing on Military Services' Prevention of and Response to Sexual Assault (March 7, 2019)

Findings:

The Department has oversight responsibility and each Military Service's training command has the capability to carry out and institutionalize this task in Commanders' professional military education (PME) courses and other educational opportunities. Further, precedent establishes the Department's ability to establish minimum standards to be implemented by the respective Service training commands in training objectives across a variety of PME courses.

Recommendation:

The Department will establish training objectives for all aspects of a Commander's role in processing sexual assault cases through a comprehensive review of best practices in military justice, victim assistance, promotion of healthy command climates, and ensuring the accused is afforded due process rights. These training requirements will be standardized and institutionalized across the Military Services' respective training commands. Training will enhance Commander and command team knowledge and skill through improved leadership preparation that emphasizes:

- Expectations of professional conduct for Commanders and their command leadership team and how to promote healthy unit climates and prevent incidents of retaliation against victims, victims' family members, bystanders, witnesses, and first responders.
- Improved competency in skillfully addressing applied leadership challenges such as sexual assault, domestic violence, and child abuse.

- Guidance for commanders on how to explain to their subordinates in their unit the appropriate, professional response by peers to a victim and an alleged offender when a sexual assault is reported in a unit; and to explain that incidents of retaliation, reprisal, ostracism, or maltreatment violate good order and discipline, erode unit cohesion, and may deter reporting of sexual assault incidents.

Estimated Resource Implications: Minimal

Funding: Costs associated with curriculum development, assessment, and oversight of these efforts.

Recommendation 1.5.3. Develop and Enhance Training and Education of Sexual Assault Initial Disposition Authorities

Background:

The training and education of military justice practitioners, Commanders, and convening authorities directly impact the experiences of the victims and the accused.

A Secretary of Defense memorandum of April 20, 2012, withheld initial disposition authority (IDA) for all penetrative sexual assault offenses and attempts thereof from all Commanders who are not at least special court-martial convening authorities (SPCMCA) in the grade of O-6 or above. This restriction applies to all other alleged offenses arising from or relating to the same incident, whether committed by the subject or the victim ("collateral misconduct"). The March 2019 report of the DAC-IPAD determined that "there is no systemic problem with command decision-making regarding preferral of charges for penetrative sexual assaults." DAC-IPAD also found that Commanders' disposition decisions were reasonable in 95% of reviewed cases from FY17. However, the Secretary's memorandum does not specify what training or other formal qualifications these SAIDAs must possess. The Secretary's memorandum requires the SAIDA to consult with a judge advocate in making the initial disposition decision. Formal SAIDA training will further enhance Commander capability in this area.

Task Force Priority Areas:

- Training and Education
- Victim/Accused Support and Experience
- Integration and Synchronization of Services

Data Sources:

- 2016-2017 MIJES
- Secretary of Defense Memo ("Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases") of April 20, 2012
- DAC-IPAD Third Annual Report, March 2019

Findings:

There is no Department-wide consistent specific training requirement for Commanders exercising SAIDA. While Commanders continue to successfully execute decision-making authority as

SAIDAs, more formalized training requirements will enhance Commander capability in this area, while promoting trust and confidence in the military justice system.

Recommendation:

The Department will direct formalized training requirements for Commanders exercising SAIDA, and determine minimum training objectives, including a focus on not only the handling of alleged penetrative sexual assault offenses, but also related collateral misconduct alleged against the accused or victim. Training will also focus on reducing retaliatory behavior relating to sexual assault cases and sexual harassment complaints. Training requirements will be standardized and institutionalized across the Military Services' respective training commands.

Estimated Resourcing Implications: Minimal

Recommendation 1.6. Enhance the Military Justice System's Transparency with the Public

Background:

The public, including the media, has far less accessibility to court-martial filings than it does to court records from the federal and state criminal justice systems. In the federal system, the Public Access to Court Electronic Records (PACER) internet site generally makes court filings available as soon as they are filed. For those state systems that do not have comparable internet-accessible systems, most documents can be obtained as soon as they are filed through the clerk of court's office. In the military justice system, however, court filings are generally not made available to the public without a FOIA request, and then only once the case has concluded. That can lead to delays of weeks or months before, for example, a military judge's ruling on a motion is made available to the public. The resulting lack of transparency impedes public knowledge about the court-martial system. The military operates a sophisticated, professional criminal justice system. The Department welcomes public scrutiny of the military justice system.

Because of Privacy Act concerns associated with the release of records maintained by the Military Departments (which, unlike Article III courts, are subject to the Privacy Act), the Military Departments must carefully review court filings for information potentially protected by the Privacy Act before making them publicly available. In the federal civilian criminal justice system, the courts rely on the attorney making a filing to redact any personally identifiable information or other information that would be inappropriate to release.

Task Force Priority Areas:

System Credibility and Transparency

Data Sources:

- MJRG report
- Article 140a, UCMJ, (10 U.S.C. Section 940a)
- The Secretary of Defense memorandum: Uniform Standards and Criteria Required by Article 140a, UCMJ
- Legislative Proposal to except from the purview of the Privacy Act the public release of certain records

Findings:

In the federal civilian court system, the vast majority of court filings are made available to the public immediately upon filing through the PACER internet site. In the military justice system, court-martial filings are generally made available only after a FOIA request has been submitted and only once the court-martial case is complete. The Department has proposed, with OMB's approval, the enactment of legislation to remove from the purview of the Privacy Act the public release of most military court dockets, records, and filings so that such information may be made available to the public more promptly while protecting sensitive information from release in the same manner as in the federal civilian court system.

Recommendation:

The Department will continue to support the enactment of legislation promoting public access to military justice documents by excepting from the purview of the Privacy Act the public release of court-martial dockets, filings, and records. The Department will adopt measures to protect against the inappropriate release of personal information.

Estimated Resource Implications: None

Recommendation 1.7. Extend the DAC-IPAD

Background:

The DAC-IPAD evaluates, among other things, the preferral or non-preferral decisions of convening authorities in adult sexual assault investigative files involving penetrative offenses. Under the existing statutory framework, the DAC-IPAD is scheduled to terminate in February 2021. However, the Secretary of Defense may continue the DAC-IPAD after its current termination date if the Secretary determines its continuation after that date is advisable and appropriate. If the Secretary decides to continue the DAC-IPAD after that date, the Secretary must submit to the President and the House and Senate Armed Services Committees a report describing the reasons for that decision and specifying the new termination date for the DAC-IPAD.

Task Force Priority Areas:

System Credibility and Transparency

Data Sources:

- Section 546 of FY15 NDAA (Public Law 113-291)

Findings:

The DAC-IPAD is a Congressionally-mandated Federal Advisory Committee that assesses the effectiveness of the military justice system as related to adult sexual assault cases and makes recommendations for improvements to the system. Under the existing statutory framework, the DAC-IPAD is scheduled to terminate in February 2021, but the Secretary of Defense has the authority to extend the DAC-IPAD. To extend the DAC-IPAD, the Secretary must submit a report to the President and the House and Senate Armed Services Committees describing the reasons that the extension is advisable and appropriate and specifying the new termination date.

Recommendation:

The Secretary will extend the DAC-IPAD beyond its current termination date to continue to assess the effectiveness of the military justice system for sexual crimes.

Estimated Resource Implications: Minimal

Continued resourcing of DAC-IPAD staff, facilities, and travel budgets.

Section 2. Support Recommendations

The SAAITF focused military justice reform recommendations to enhance the protections and support of the victim while protecting the due process rights of the accused. Specific recommendations were formulated as followed:

Recommendation 2.1. Enhance the Integrated Multi-Disciplinary Special Victim Investigation and Prosecution (SVIP) Capability

Background:

In 2009, based on widespread use of multi-disciplinary teams (MDT) in the civilian community, the Congressionally mandated Defense Task Force on Sexual Assault in the Military Services (DTF-SAMS) recommended that "[t]he Secretary of Defense establish two installation-level sexual assault management groups: a Sexual Assault Response Team, responsible for overseeing unrestricted reported cases, and a Sexual Assault Review Board, responsible for installation-level systemic issues." While DoDI 6495.02 subsequently established monthly Case Management Groups to address the DTF-SAMS recommendations, the policy did not fully address what could be done to more fully coordinate and optimize investigative and prosecutorial resources.

In 2015, the Secretary established requirements for the SVIP capability in DoDI 5505.19, and the Services have seen the benefits of the increased capability of key participants in the military justice process, such as the MCIOs and judge advocates.

Over the past 10 years, each of the Services has benefited from integrating specially trained and designated personnel during case processing from report to investigation and adjudication. Integration and synchronization of services and personnel have been demonstrated to increase support for the victim throughout the process; improve the timeliness, efficacy, and quality of investigation; and facilitate offender accountability when appropriate. While the efforts to integrate assets may not be uniform across the Services to account for Service-specific missions, maximizing integration efforts to harness SVIP capabilities is a proven concept.

Part of an effective SVIP capability is timely investigations. DoDI 5505.18, Investigation of Adult Sexual Assault in the Department of Defense, requires MCIOs to initiate a criminal investigation in response to all allegations of adult sexual assault of which they become aware that occur within their jurisdiction, and to investigate them thoroughly. This has led to situations where unnecessary investigative activities are undertaken for the sole purpose of compliance with policy and not towards an investigative purpose, leading to inefficiencies and delays in investigations and processing.

Recently, DAC-IPAD Committee members observed that nearly all the case files they reviewed included the same series of investigative actions. The members believed that in some cases, these investigative tasks appeared to have no probative value and were extraneous and unnecessary given the specific facts of the case.

The Committee's observations were reinforced by testimony received from MCIO investigators, many of whom commented that they have little discretion in determining what steps to take when conducting sexual assault investigations. One investigator noted that investigators have "less control" when conducting investigations than they previously had, adding, "There's almost a checklist and people feel very required to do absolutely everything that is on the checklist." Another noted that investigators have to do the same amount of work for cases that are unlikely to be prosecuted as for cases in which a felony trial is likely. However, the investigators explained that some of the seemingly extraneous investigative steps did serve specific purposes. For example, they told the Committee members that the reason they conduct interviews of a subject's co-workers in a sexual assault case is to detect predatory behavior and identify other potential victims of sexual assault or harassment.

The March 2019 DAC-IPAD Annual Report cites Committee members' concerns "...about the investigators' lack of discretion in how they conduct investigations in sexual assault cases. The Committee noted that the military is treating the investigators as if they were untrained and not fully capable, without giving any credence to their experience and professionalism.... [However] at the same time, the Committee is reluctant to recommend that investigators adopt civilian standards or omit certain investigative tasks, recognizing that what seems extraneous may end up being useful in certain investigations."

Finally, it is critical the members of the SVIP capability are evaluated to ensure effectiveness. In support of the *Report to the President of the United States on Sexual Assault Prevention and Response in the Military*, the Department initiated a number of approaches to assess victims' experiences with response services and the military justice process. The Department conducted separate surveys that assessed victims' initial experiences with services provided and then victims' overall experience with the military justice process. This survey proved invaluable to gauging victim experience throughout the military justice process.

Task Force Priority Areas:

- Integration and Synchronization of Services
- Victim/Accused Support and Experience
- System Credibility and Transparency
- Process Timeliness and Accuracy

Data Sources:

- The Report of the Defense Task Force on Sexual Assault in the Military Services (2009)
- The National District Attorneys' Association, *National Sexual Assault Investigation and Prosecution Best Practices Guide (White Paper)* (2018)
- Office of Justice Programs, *SART Toolkit, Resources for Sexual Assault Response Teams* (2017)

- DoDI 5505.19, *Establishment of Special Victim Investigation and Prosecution (SVIP) Capability within the Military Criminal Investigative Organizations (MCIOs)*, March 23, 2017
- DoDI 6595.02, "Sexual Assault Prevention and Response Program Procedures," incorporating Change 3, May 24, 2017
- Reports by the MCIOs
- DAC-IPAD, Third Annual Report, March 2019, Finding 13, recommends a balance be found to accommodate instances where there is an unrestricted report but the victim does not want an investigation to proceed
- DoDI 5505.18, Investigation of Adult Sexual Assault in the Department of Defense
- DoDI 5505.03, Initiation of Investigations by Defense Criminal Investigative Organizations, February 13, 2017
- DoDI 5505.16, Investigations by DoD Components, June 23, 2017
- 2016-2017 MIJES

Findings:

Many valuable resources are being expended in our efforts to effectively respond to incidents of sexual assault. These efforts are focused primarily across three lines of effort – victim care (advocacy, medical, SVC), criminal investigations, and offender accountability (UCMJ prosecution, when appropriate). While DoDI 5505.19 lays out a requirement for collaboration among special victim responders, the focus of the DoDI is on collaboration of separate entities, and may not result in full integration of capabilities.

The training and education of all military justice practitioners within the SVIP directly impacts the experiences of the victims. This was further supported by the *2016-2017 MIJES* and briefings to the SAAITF. It is imperative that SVIP personnel, including investigators, trial counsel, and all those involved, have appropriate training on the military justice process, expectations, and trauma-informed communications to ensure the victim is treated fairly, and with empathy.

In addition, there is also a need for increased training of investigators. Sexual assault cases comprise well over a third of the MCIOs' 14,000 + cases initiated per year. Since 2012, MCIOs have focused on providing additional, enhanced sexual assault training to field investigators. While this training has significantly improved the MCIOs' handling of sexual assault cases, as evidenced by recent DoD IG investigation sufficiency review results, the training has essentially been "catch up" training; training for investigators already working in field units.

Further, while MCIOs are required to fully investigate all allegations of adult sexual assault without any professional discretion, there are inefficiencies in the investigative phase leading to long case processing timelines. A collaborative forum between DoD IG and the MCIOs on potential clarifications to policy will most certainly increase the accuracy and credibility of the investigative process.

Finally, data from the 2016-2017 MIJES proved invaluable in the DoD's ability to assess compliance with policies and regulations, determine areas of improvement, and gauge the experiences of victims in the military justice system. The DoD is committed to continuing its assessment of the military justice system to ensure an unparalleled supportive and accountable system is in place.

Recommendations:

1. The Department will, in collaboration with the Military Services, conduct a compliance review of the SVIP capability across all military justice practitioners including investigators, trial counsel, and victim services personnel. This review will include identification of areas of improvement to support this capability within the military justice system.
2. Based on the above compliance review, the Department will revise applicable instructions, as required, to enhance SVIP collaboration, integration, and synchronization involving victim services personnel, criminal investigators, and military prosecutors any time a sexual assault event is reported throughout the entire military justice process.
3. The Department will direct the Military Services to identify the appropriate delegated official within the SVIP to provide and document notifications per Recommendation 1.5.1 in order to ensure regular and consistent updates to the victim as to the progress of the case.
4. The Department will modify applicable instructions to incorporate SVIP capability within the investigative process. SVIP-qualified prosecutors will work closely with the MCIOs when developing the investigative plan. Ultimately, all federal law enforcement investigative processes and final investigative decisions must remain with the lead MCIO.
5. The Judge Advocates General and the SJA to CMC will enhance training requirements for military justice practitioners, including SVC/VLC, defense counsel, and trial counsel. They will also coordinate to determine minimum training objectives, and the Military Services will standardize and institutionalize the training requirements across their respective training commands. Training will focus on not only the handling of alleged penetrative sexual assault offenses, but also related collateral misconduct alleged against the victim.
6. The MCIOs will establish training requirements for investigators. They will also coordinate to determine minimum training objectives.
7. The Department will field the *Military Investigation and Justice Experience Surveys* in years opposite the *Workplace and Gender Relations Survey of the Active Duty*, and less if need be to minimize burden on victims. In addition, the MIJES will require additional publicity and support from response system professionals to encourage greater participation rates.

Estimated Resource Implications: Minimal

Manning: None – MIJES is conducted by Office of People Analytics

Funding: Approximately $250,000 per administration of the MIJES; additional training costs

Recommendation 2.2. Develop Policy to Enhance Protection for Victim Preference in Restricted Reporting

Background:

DoD policy limits the ability to make restricted reports, and also requires restricted reports be made prior to the Sexual Assault Response Coordinator's notification of the initiation of a criminal investigation. Victims making a disclosure to someone without a privilege of confidentiality to receive such reports oftentimes forfeit their option to make such restricted reports when, in turn, an MCIO is notified of the event. DoD has several years of experience with the restricted reporting process. This experience, together with the evolution of survivor services, specifically the availability of legal counsel services, presents the opportunity to reassess and revise DoD restricted reporting policy to give victims more control over how their disclosures are handled, while still balancing victims' interests with those of society and those accused.

Task Force Priority Areas:

- Victim/Accused Support and Experience

Data Sources:

- DAC-IPAD, Third Annual Report, March 2019
- Briefings to the SAAITF

Findings:

DAC-IPAD findings appearing in its March 2019 annual report, as follows:

- 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 30)
- 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 31)
- 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 33)

In addition, at least one briefing to the panel reflected concerns when a victim inadvertently discloses to a mandatory reporter resulting in an automatic conversion to an unrestricted report despite the victim's expressed wishes to remain restricted.

Recommendation:

The Department will develop a policy that would more fully protect the victim's ability to file a Restricted Report, as well as provide victims a confidentiality option should the victim's sexual assault allegation be inadvertently disclosed or a third-party report arise, in appropriate circumstances.

Estimated Resource Implication: None

Recommendation 2.3. Protect Information Used in the CATCH Program

Background:

Section 543 of the Carl Levin and Howard P. "Buck" McKeon FY15 NDAA required DoD to develop a plan that would allow an adult victim who elected to make a restricted report to disclose suspect or incident information to investigators to enable them to determine if separate sexual assaults may have been committed by the same perpetrator. Under 10 U.S.C. § 1565b, persons authorized to receive restricted reports are sexual assault coordinators, victim advocates, or healthcare professionals. To ensure the restricted reporting status is not compromised by reporting details of the alleged incident as part of the CATCH program, persons authorized to accept a restricted report should include those receiving information as part of the CATCH program. Thus, a victim can be assured that he or she can confidentially disclose the details of the alleged incident without initiating an investigation of the allegation except when disclosure is necessary to prevent or mitigate a serious and imminent threat to the health or safety of an individual.

Task Force Priority Areas:

- Victim/Accused Support and Experience

Data Sources:

- Section 543 of the Carl Levin and Howard P. "Buck" McKeon NDAA for FY15
- DoD and Service Sexual Assault Prevention and Response Offices

Findings:

Protecting information provided as part of the CATCH program increases confidence in the system, and will further the Department's efforts to hold offenders appropriately accountable.

Recommendation:

The Department will make clear that information used in the CATCH program will be protected under the restricted report protections and will not be subject to disclosure under FOIA.

Estimated Resource Implications: None

Recommendation 2.4. Develop Defense Investigator Capability

Background:

Defense investigators are a common capability in civilian practice. Federal public defender offices have, *on average*, one defense investigator for every three defense attorneys. Defense investigators are also often found in state public defender offices. Defense investigators assist defense counsel by locating and interviewing potential witnesses and evidence, identifying experts, and helping defense counsel prepare for trial. The Supreme Court has recognized that the right to counsel is, at its heart, the right to counsel's assistance in both investigating the case and preparing and presenting a legal defense. Because of ethical limitations, counsel are generally prohibited from testifying at trial when they are serving as advocates; those ethical limitations create obstacles to the defense's right to investigate, as often the investigator must testify to what he or she was told or what he or she saw. More importantly, defense counsel are not investigators; they are legal experts. Like the government counsel, who benefit from law enforcement's investigation, the defense counsel should be focused on preparing the case for trial, not investigating the underpinnings of a case.

For these reasons, defense investigators are common in the civilian bar. Almost every federal public defender's office has defense investigators. The creation of civilian defense investigators in the Military Services was strongly supported by two congressionally mandated commissions, one stating that investigators "enable defense counsel to properly prepare their cases."

Finally, defense investigators make it more likely that the system as a whole will function more effectively and efficiently. Our adversarial system depends on both sides being fully prepared to present their cases so that the fact finder has all the relevant information, which is less likely to happen when the defense lacks this asset. In addition, a defense counsel who is armed with the relevant facts can, if he or she chooses, ensure the Government is aware of those facts, and if they change the case's disposition, the Government can evaluate the best course of action in light of the victim's, the accused's, the unit's, and society's interests.

Military defense investigators, or defense litigation support specialists, would operate under the same restrictions on contacting the victim and witnesses that apply to defense counsel. In addition, defense litigation support specialists could identify and interview new witnesses at the direction of defense counsel. However, witnesses already identified and interviewed by the government would be interviewed only by the defense counsel.

Task Force Priority Areas:

- System Credibility and Transparency
- Process Timeliness and Accuracy
- Fairness and Due Process

Data Sources:

- The report of the JPP
- The report of the RSP

- Briefings to the SAAITF

Findings:

Providing defense counsel with defense investigators is an additional tool they can use to effectively represent their clients. By ensuring that both sides are fully prepared for trial, defense investigators will help make the military justice system more effective in determining the truth. In addition, by allowing the defense to identify and bring new evidence to the Government's attention, investigators will help to ensure that the system is more fair and efficient. Defense investigators operate under the same legal constraints on seeking to speak with the victim that apply to defense counsel.

Defense Investigators were strongly supported by the RSP and JPP, and were supported by briefings to the panel.

Article 6b protections currently state "counsel for the accused will make a request to interview the victim through the Special Victim's Counsel, or other counsel for the victim, if applicable." Consequently, there is a gap in protections where the victim does not have an SVC/VLC. Article 6b(f)(1) should be amended to read: "counsel for the accused will make a request to interview the victim through the Special Victim's Counsel, or other counsel for the victim, if applicable. *If the victim does not have a special victim's counsel, or other counsel, then the request to interview the victim should be made through trial counsel.*" Also recommend expanding Article 6b(f)(1) protections to include prosecution witnesses, as well.

Recommendation:

The Department will direct the Services to develop an appropriate defense investigator capability on a trial basis for a three-year term. Following the conclusion of the pilot program, the program will be reassessed to ensure that the defense investigators enhanced the administration of justice and did not have the unintended consequence of deterring reporting or participation of witnesses in justice actions. The Department will assess expanding Article 6b(f)(1) protections to witnesses and explicitly require notification to trial counsel when the victim does not have an SVC/VLC.

Estimated Resource Implications: Extensive

Manning: End-strength; the Navy currently tracks the total cost of its eight DLSS at $1.3M/year, which reflects salary, benefits, PCS travel, and housing/COLA

Funding: Money (both start-up and operating), training, and travel and expense budgets for Trial Defense Service; the Navy budgeted for FY19 $187,000 for travel expenses, $9,000 for access to the TransUnion Investigator Database, and $45,900 for supplies and materials

Task Force Way Forward

The delivery of this report does not mark the termination of the Task Force. In fact, the SAAITF and the Secretary of Defense recognize the critical importance of the group to ensure ongoing collaborations among military justice practitioners, policy, and prevention experts towards enhancement of the accountability and support of the military justice system.

The SAAITF will, upon delivery of this report and official approval and tasking by the Secretary of Defense, develop and deliver a second report on the implementation and integration of the SAAITF Recommendations. This report will detail the specific steps required for the Department to comply with the approved recommendations.

Once this second report is delivered, while the official duties of the SAAITF will terminate, members of the Task Force will continue to meet as an executive council and continue to share data, best-practices, lessons-learned, and additional collaborative information to ensure ongoing evaluations and assessments of the military justice system writ-large continue. To this end, the Task Force has already identified areas of continued concern that require additional data and information prior to determining a way forward. This includes:

1. Data Tracking and Management System. While each Military Service has its own data tracking system, and will comply with the standardized data elements detailed pursuant to Article 140a, all Services are interested in determining whether efficiencies might come from a DoD-wide data management system and the potential expansion of data elements to assist with transparency. The Task Force would like to explore the feasibility and limitations of such a system.
2. Support for the Accused. During briefings to the SAAITF, concerns were raised about the impact of the military justice process on accused and/or their families. The Task Force would like to explore further the need for this support and the feasibility of utilizing existing resources, or establishing new resources, to mitigate this potential concern.
3. Additional Sentencing Reform. The SAAITF considered recommending that court-martial be permitted to impose administrative discharges. However, the Task Force would like to explore this issue further.

In addition to the continued efforts of the Task Force, the Department looks forward to continuing to partner with the Senate and House Armed Services Committees to promote an effective response to the scourge of sexual assault in our ranks. While the SAAITF's recommended initiatives focus on solutions that can be implemented within the Executive Branch, Congress may choose to enshrine some of those solutions in law. Congress has played a leading role in protecting the rights of victims in the military justice system, a role the Department applauds and anticipates will continue. The Constitution entrusts Congress with making rules and regulations for our military. The Department stands ready to assist Congress as it exercises that authority. Lastly, the SAAITF will continue to review new and proposed legislation, as well as feedback from internal and external oversight committees, to determine effectiveness of proposed initiatives and potential benefit towards improving the military justice system.

Appendix A

Establishment of the Sexual Assault Accountability and Investigation Task Force.

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAR 27 2019

MEMORANDUM FOR CHIEF MANAGEMENT OFFICER OF THE DEPARTMENT OF DEFENSE
SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
CHIEF OF THE NATIONAL GUARD BUREAU
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF COST ASSESSMENT AND PROGRAM EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF OPERATIONAL TEST AND EVALUATION
CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS
DIRECTOR OF NET ASSESSMENT
DIRECTORS OF DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Establishment of the Sexual Assault Accountability and Investigation Task Force

The results of the 2018 Report on Sexual Assault and Harassment in the Military Academies are unacceptable, and I am resolved that we will do all we can as a Department to address sexual assault in our military. In my testimony during the FY 2020 Posture Hearing before the Senate Armed Services Committee on March 19, 2019 and in my direct engagement with Senator Martha McSally, I pledged to do more, and I intend to carry out this commitment. To that end, I am directing a full review of the investigative and accountability processes involved in sexual assault cases. Further, effective immediately, I am establishing the Sexual Assault Accountability and Investigation Task Force (SAAITF). The SAAITF will undertake this review and make recommendations that will improve existing processes to address sexual assault, while ensuring our formations, our communities, the rights of the victim and the accused, and the integrity of the legal process are protected. Our approach to eliminate sexual assault is holistic and includes efforts to prevent this crime, support and care for our victims, and ensure a robust and comprehensive military justice process. While the immediate focus of the SAAITF will be on reforms and improvements to the military justice process, the Department will continue its steadfast efforts to prevent this crime and support our victims.

I am also very mindful of the many prior DoD/Congressional Panels that have contributed to our current efforts – and the ongoing five-year effort of the Defense Advisory

OSD002676-19/CMD003572-19

Committee on the Investigation, Prosecution and Defense of Sexual Assault in the Armed Forces (DACIPAD). We will ensure the efforts and work of the SAAITF complements the important work of the DACIPAD.

Sexual assault impacts the entire force across all Military Services. None of us are immune to this crime and all of us are responsible. As such, the SAAITF will be co-led by Dr. Elizabeth P. Van Winkle, Executive Director of the Office of Force Resiliency, the Judge Advocates General of the Military Departments, and the Staff Judge Advocate to the Commandant of the Marine Corps. They will report directly to me on task force progress and recommendations.

The SAAITF shall be further comprised of senior level or equivalents of the Military Criminal Investigative Organizations, a representative from the Office of the DoD General Counsel, and the Director of the DoD Sexual Assault Prevention and Response Office. Additional members of this task force shall be considered as required. All task force members shall be full-time or permanent part-time civilian personnel of the U.S. Government or military members.

I expect the SAAITF to identify, evaluate, and recommend immediate and significant actions to improve the accountability process, specific to the investigation and disposition of cases in which members of the Armed Forces are either victims or alleged offenders of sexual assault, while ensuring due process for both. Recommendations shall consider findings of similar previous reviews by experts internal and external to the Department, but must explore new opportunities to enhance the military justice system.

The SAAITF will provide me an interim progress report and, not later than April 30, 2019, will provide a final report that captures key recommendations addressing the investigation and disposition of sexual assault, including potential changes to policy and/or law. The Department will submit a report to Senator McSally and other members of the Armed Services Committees, identifying the initiatives the Department will undertake based on the recommendations provided by the SAAITF.

The importance of this work cannot be overstated. We have an opportunity to underscore the integrity of our military justice system and advance our capability to address sexual misconduct against the men and women of our Armed Forces, while improving the readiness and lethality of the DoD. Only through diligence and innovation will we eliminate this reprehensible crime from our ranks.

Thank you for your support.

Patrick M. Shanahan
Acting

Appendix B

Task Force Membership

Task Force Leadership		
OSD	Dr. Elizabeth Van Winkle	Executive Director, DoD Force Resiliency
Navy	VADM John Hannink	The Judge Advocate General, US Navy
Army	LTG Charles Pede	The Judge Advocate General, US Army
Air Force	Lt Gen Jeffrey Rockwell	The Judge Advocate General, US Air Force
USMC	MajGen Daniel Lecce	Staff Judge Advocate to Commandant USMC
Task Force Membership		
OSD	RADM Ann Burkhardt	Director, DoD SAPRO
OSD	Mr. Dwight Sullivan	Office of General Counsel
OSD	LtGen Stacy Clardy	Military Deputy, OUSD(P&R)
NCIS	Mr. Andrew Traver	Director, NCIS
Army CID	MG David Glaser	Army Criminal Investigation Command
SAF- IG	Lt Gen Sami Said	Inspector General of US Air Force
Additional Advisors / Consultants		
OSD	Ms. Julie Blanks	Acting Chief of Staff, OUSD(P&R)
OSD	Lt Col Erin Hancock	OSD Legislative Affairs
OSD	Ms. Lynn McCormick	Director, Investigative Oversight, DoD Office of Inspector General (observation only)
Navy	Ms. Melissa Cohen	DoN SAPRO
Air Force	Brig Gen Michael Martin	USAF SAPRO
Army	Dr. James Helis	Army SHARP and Resiliency
USMC	Ms. Marie Balocki	Deputy Director, Marine and Family Programs
NGB	Col. Roxanne "Rox" Toy	Chief, NGB SAPR
OCJCS	SMSgt LaTisha Tippins	Superintendent, AF Personnel Management, J-1
OCJCS	RDML Sara Joyner	Director for Manpower and Personnel, J-1
USCG	RADM Steven Andersen	Judge Advocate General of the Coast Guard

Appendix C

Military Justice Reform – Legislative Changes in FY14-FY16

Beginning with the National Defense Authorization Act (NDAA) FY14, Congress implemented significant reform to the military justice system. These changes were primarily focused on the issues surrounding sexual assault. The changes continued with FY15 and FY16 NDAAs.

FY 14 NDAA

Article 6b, UCMJ, Enacted to Give Victim Rights under UCMJ

Article 6b is created to codify victims' rights such as: (1) right to be protected from the accused; (2) right to timely notice of a pre-trial confinement hearing, an Article 32 preliminary hearing, a court-martial, clemency or parole hearing, or the accused's release from confinement; (3) the right not to be excluded from a public hearing; (4) the right to be reasonably heard at a pre-trial confinement hearing, sentencing hearing, and public clemency/parole hearing; (5) the right to confer with government counsel; (6) the right to receive restitution as provided in the law; (7) the right to proceedings free from unreasonable delay; and (8) the right to be treated with fairness, respect, and dignity.

New Article 32, UCMJ Hearing Procedures

Article 32 hearings changed significantly from "investigations" to "preliminary hearings." The purpose of the Article 32 preliminary hearing is limited to (1) determining if there is probable cause to believe an offense was committed and the accused committed it; (2) assessing whether the convening authority has jurisdiction over the accused and the offense; (3) considering the form of the charges and (4) recommending the appropriate disposition of the charges.

Victims Are Given the Right Not to Testify at Article 32, UCMJ Preliminary Hearings

Victims are not required to provide testimony at preliminary hearings, even if the victim is on active duty in the military. A victim is permitted to decline an invitation to testify and to then be deemed unavailable. (Before this change, civilians – including victims – could not be required to appear at an Article 32 proceeding, but Service members – including victims – could.)

Sexual Assault/Child Sexual Assault Statute of Limitations Removed

Article 43(a), UCMJ, is amended to add sexual assault and sexual assault of a child to the list of crimes that can be "tried and punished at any time without limitation."

Defense Counsel Required to Make Requests for Interviews of Sexual Assault Victims Via Trial Counsel

Article 46, UCMJ, now requires defense counsel to make requests to interview victims of sexual assault offenses through trial counsel; and, at the request of the victim, requires trial counsel, victim's legal counsel, or a victim advocate to be present during the defense interview. This was further amended in FY15 NDAA to remove "Trial Counsel" and insert "Special Victims' Counsel."

Consensual Sodomy Decriminalized

Article 125, UCMJ, is revised to remove the offense of consensual sodomy. Forcible sodomy and bestiality remain offenses under Article 125 and issues such as orders violations (sexual relations onboard a ship) and fraternization under Articles 92 and 134, respectively, remain viable charges independent of the nature of the sexual conduct.

Sexual Assault Offense Notification to Military Criminal Investigative Organization

While already required by DoDI 6495.02, the FY14 NDAA mandates that unit Commanders who receive unrestricted reports of sexual assault must refer the matter to the servicing Military Criminal Investigative Organization (e.g., NCIS).

Mandatory Review of Decisions Not to Refer Charges in Sexual Assault Cases

Establishes two systems for reviewing a decision not to refer charges in cases involving Articles 120(a), 120(b), 125 and attempts to commit those offenses under Article 80. Where the SJA recommends referral and the convening authority declines to refer any charges, the Secretary of the Military Department must review the case. Where the SJA recommends NOT referring charges and the convening authority agrees, the case must be reviewed by the next superior Commander authorized to exercise general court-martial convening authority.

Service Record Notation of Sex-Related Offenses

Requires a notation be placed in a member's service record if they are convicted of a "sex-related offense" by court-martial, or if they receive NJP or administrative action for a sex-related offense.

Clemency Authority for Convening Authorities Limited for Other than Qualifying Offenses

The convening authority's clemency powers significantly limited. Specifically, the convening authority is no longer permitted to set aside a finding of guilty for any offense other than a "qualifying offense." A qualifying offense is defined as: (1) an offense where the maximum sentence of confinement that may be adjudged does not exceed two years; and (2) the sentence adjudged does not include confinement greater than six months or a punitive discharge. In addition, a qualifying offense does not include any violation of Article 120(a), 120(b), 120b, and 125. Additionally, the convening authority is no longer permitted to disapprove, commute, or suspend portions of a sentence that provide for a punitive discharge or confinement in excess of six month.

Victim Participation in Clemency Process

A victim must be afforded the right to submit matters to the convening authority for consideration during the clemency process.

Mandatory Minimum Punishments Established for Sex-Related Offenses

The mandatory minimum for a violation of rape (Article 120(a)), sexual assault (Article 120(b)), rape of a child (Article 120b(a)), sexual assault of a child (Article 120b(b)), forcible sodomy (Article 125), or any attempt thereof is a dishonorable discharge or dismissal.

SECDEF Required to Prescribe Regulations to Prohibit Retaliation Against Victim When Reporting a Criminal Offense

SECDEF is required to implement regulations to ensure the Military Services do not take adverse action against a person who reports a criminal offense. In addition, SECDEF is directed to submit a proposal for a separate punitive article to address this issue.

Victims' Legal Counsel Established

Secretaries of the Military Departments are directed to designate legal counsel for the purposes of providing legal assistance to a victim of an alleged sex-related offense, regardless of whether the report is restricted or unrestricted.

FY 15 NDAA

Access to Victims' Legal Counsel Expanded to Reservists

A member of a reserve component who reports a sex offense that occurred while on active duty, inactive training, or full-time National Guard is eligible for representation by a Victims' Legal Counsel.

Consultation with Victim Regarding Preference in Prosecution Venue

SECDEF is required to establish a process to ensure consultation with every victim of an alleged sexual assault in the United States to determine that victim's preference regarding whether the offense should be tried by civilians or at a court-martial. That preference must be communicated to the convening authority prior to making a disposition decision.

Military Character No Longer a Defense for Certain Crimes

Congress required the modification of M.R.E. 404(a) to prevent the admission of evidence of general military character for the purpose of showing the probability of innocence of the accused of specific offenses, including rape, sexual assault, abusive sexual contact, stalking, child sex offenses, forcible sodomy, and any attempt or conspiracy to commit any of these offenses.

Modification to the Patient-Psychotherapist Rule (M.R.E. 513)

Congress required the modification of M.R.E. 513 to: (1) remove the enumerated constitutional exception, and (2) establish a clearer standard the party seeking the records must meet before the records can be released or for an *in camera* review to be conducted.

Victims May Petition CCA for Violation of Rights under Military Rules of Evidence (M.R.E.).

Article 6b, UCMJ is amended to allow victims to petition the Court of Criminal Appeals (CCA) for a writ of mandamus if the victim believes a ruling violates the victim's rights afforded by the Military Rules of Evidence, specifically M.R.E. 412 or 513.

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) is established.

FY16 NDAA

Victims' Rights to Petition CCA Are Expanded

Article 6b, UCMJ is amended to allow victims to petition the Court of Criminal Appeals (CCA) for a writ of mandamus regarding an Article 32 preliminary hearing order, court-martial ruling, or deposition order. This writ petition right specifically applies with respect to the protections afforded in Article 6b, Article 32, and M.R.E. 412, 513, 514, and 615. Such writs will be forwarded directly to the CCA and given priority over all other proceedings before the court.

Victims' Legal Counsel Powers Expanded

10 U.S.C. § 1044e is amended to expressly authorize SVC/VLC to assist victims in (1) any complaint against the Government, including allegations under review by an inspector general and a complaint regarding equal employment opportunities; (2) any request to the Government for information (e.g., FOIA); and (3) any communications with Congress. The following additional changes were made specific to SVC/VLC rights:

- 10 U.S.C. § 1044e(a)(2) is amended to allow civilian employees within the DoD to have access to an SVC/VLC.
- 10 U.S.C. §§ 1044e and 1565b are amended to require notice of eligibility to have an SVC/VLC to eligible victims prior to being interviewed by military investigators or trial counsel, subject to such exceptions for exigent circumstances as SECDEF may prescribe.
- 10 U.S.C. § 1044e is amended to require SECDEF to standardize the time period within which SVC/VLC receive training and to establish the baseline training requirements for SVC/VLC. The amendment also requires SECDEF to establish guiding principles and performance measures for the SVC/VLC program to ensure that (1) SVC/VLC are assigned locations that maximize the opportunity for face-to-face communication with their clients; (2) effective means of communication are available when face-to-face communication is not feasible; and (3) performance measures and standards are put in place to measure the effectiveness of the program.

SECDEF to Establish a Strategy to Prevent Retaliation Against Members Who Report or Intervene on Behalf of the Victim of an Alleged Sex-Related Offense

SECDEF must establish a strategy that promotes bystander intervention, protects bystanders who intervene, and provides for training for Commanders on methods to combat attitudes and beliefs that result in retaliation.

Appendix D

Side-by-side comparison of MJA 16 Changes

Below is a summary of the changes to the military justice system that were recently implemented on 1 January 2019 as part of the Military Justice Act 2016.

Pre-Military Justice Act (Prior to 1 Jan 19)	**Post-Military Justice Act (As of 1 Jan 19)**
Punitive Articles	**Punitive Articles**
	Four new offenses: - Art 93a: Prohibited activities with military recruit or trainee - Art 121a: Fraudulent use of credit cards - Art 123: Offenses concerning Government computers - Art 132: Retaliation
Pre-referral Authorities	**Pre-referral Authorities**
Military judges have little authority to act in courts-martial prior to referral	Judges empowered to rule/act on the following pre-referral: - Subpoenas - Warrants/orders for electronic communications, records, other information - Motions to quash/modify compulsory process - Matters referred by an appellate court - Appointment of individuals to assume rights for certain victims, and violation of victims' Article 6b
Subpoena duces tecum authority available only post preferral to compel evidence for Art 32	New investigative *subpoena duces tecum* authority available from the inception of a criminal investigation
Pre-trial Agreements	**Plea Agreements**
Parties can agree to a limit on the maximum punishment	Parties can agree to a minimum punishment, maximum punishment, or both a maximum and minimum, e.g., a range

Pre-Military Justice Act (Prior to 1 Jan 19)	Post-Military Justice Act (As of 1 Jan 19)
Two-part agreements where the military judge is unaware of the agreed upon maximum punishment until after sentence announcement	Military judge is aware of the entire agreement, including any sentence limitations, before the plea is accepted
Court-Martial Forums	**Court-Martial Forums**
GCM w/ members; GCM w/ MJ alone SPCM w/ members; SPCM w/ MJ alone; SPCM w/ members and no military judge	All the same forums still except for the SPCM w/members and no military judge; and additional forum created: Military Judge Alone SPCM - Limited to 6 months' confinement, forfeitures/fine, reduction in grade, reprimand - No punitive discharge authorized
Art 32	**Art 32**
Report does not require analysis of preliminary hearing officer's conclusions	More detailed report requiring PHO to provide analysis w/in 24 hours of closure of the PH, parties may submit supplemental materials to inform the disposition decision
Pre-Trial Advice	**Pre-Trial Advice**
Required SJA to state charges are warranted by the evidence in the Article 32 report	Requires SJA to state there is probable cause to believe accused committed the offense and make a recommendation as to the disposition of the case made in the interest of justice and discipline
Court-Martial Panel Size	**Court-Martial Panel Size (Fixed Number)**
0 – Special, Judge Alone; Min 3 – Special (no max) Min 5 – General (non-capital) (no max) Min 12 – General (capital) members (no max)	0 – Special, Judge Alone; 4 – Special; 8 – General (non-capital); or 12 – General (capital) members. *Alternate members if authorized by CA *New randomization process for impanelment

Pre-Military Justice Act (Prior to 1 Jan 19)	Post-Military Justice Act (As of 1 Jan 19)
Votes Required for Findings and Sentencing	**Votes Required for Findings and Sentencing**
2/3 majority (For <10 yrs confinement and portions of sentence other than confinement or death) 3/4 majority (For >10 yrs confinement) Unanimous (Capital)	3/4 majority (Non-Capital) Unanimous (Capital)
Sentencing	**Sentencing**
Default: If MJ Alone – MJ determines sentence If panel on findings – panel determines sentence and unitary sentence for all charges and specifications Accused may appeal the sentence as either illegal or inappropriate	Default: - MJ sentencing authority; unless accused elects to be sentenced by members, which the accused may do only if members adjudicated the findings or the accused pleads guilty - If MJ sentences accused, MJ will segment confinement and fines for each specification and determine whether confinement will run consecutively or concurrently - If panel sentences accused, one unitary sentence will be given for all charges and specifications - Government, as well as the accused, may appeal a sentence as illegal or plainly unreasonable
Victim Rights	**Victim Rights**
Limited to certain types of crime victim	Expanded protections to victims of all crimes and increased opportunities to be heard and submit matters
Post-Trial	**Post-Trial**
Record of trial authenticated by military judge only after written transcript produced, then accused/victim submits matters, convening authority takes action	New sequence: 1) MJ Produces statement of trial results; 2) Court-martial record produced; 3) accused/victim submit matters; 4) CA takes action; 5) MJ enters judgment onto record all while written transcript being

Pre-Military Justice Act (Prior to 1 Jan 19)	Post-Military Justice Act (As of 1 Jan 19)
	produced. Final step is when court reporter certifies the record
UCMJ Training for Service members	**UCMJ Training for Service members**
Enlisted members must have certain UCMJ articles carefully explained upon entry into service	- Officers and enlisted members must have certain UCMJ articles carefully explained upon entry into service - Commanders will receive periodic training regarding the purpose and administration of the UCMJ
UCMJ Jurisdiction	**UCMJ Jurisdiction**
Members of the reserve component subject to the UCMJ while on inactive duty training (IDT)	Members of the reserve component subject to the UCMJ: - When traveling to and from IDT - During intervals between consecutive periods of IDT - During intervals between IDT on consecutive days pursuant to orders or regulations

Appendix E

Changes to the Military Justice System After the Enactment of MJA 16

FY18 NDAA

Victim's Writ of Mandamus. Article 6b, UCMJ is amended to expand the enforcement mechanism of victims' rights by providing jurisdiction to the Court of Appeals for the Armed Forces (CAAF) to hear writ appeals for Court of Criminal Appeals (CCA) rulings arising from victims' petitions for writs of mandamus. Jurisdiction to review victims' petitions for writs of mandamus was previously limited to the CCAs. Article 6b also provides for expedited review of victims' petitions for writs of mandamus at both the CCAs and CAAF. Articles 6b and 30a are amended to authorize a military judge to review pre-referral claims that the victims' rights were violated, and to designate individuals to assume the rights for underage, incompetent, incapacitated, or deceased victims. (MJA16).

New Punitive Article. Article 117a (Wrongful broadcast or distribution of intimate images) is new. The NDAA provision prohibits distribution or broadcast of an intimate visual image if: (1) the accused knowingly and wrongfully broadcasted or distributed a visual image; (2) the visual image is an intimate visual image of another person or an image of sexually explicit conduct involving another person; (3) the person depicted in the visual image is an adult who is identifiable from the visual image itself or from information displayed in connection with the visual image, and the depicted person does not explicitly consent to the broadcast or distribution of the visual image by the accused; (4) the accused knew or reasonably should have known that the visual image was made under circumstances in which the person depicted retained a reasonable expectation of privacy regarding any broadcast or distribution of the visual image by the accused; (5) the accused knew or reasonably should have known that the broadcast or distribution is (a) likely to cause harm, harassment, intimidation, emotional distress, or financial loss to the person depicted in the image, or (b) harms substantially the depicted person's health, safety, business, calling, career, financial condition, reputation, or personal relationships; and (6) the conduct of the accused, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment. (effective immediately).

FY19 NDAA

Punitive Articles Changed to Address Strangulation and Domestic Violence

Article 128, UCMJ, Aggravated Assault, is modified to include strangulation and suffocation as means to commit aggravated assault.

Article 128b – Domestic Violence is created as an additional punitive article.

Uniformity in Handling Certain Cases

Sec 535. Uniform command action form on disposition of unrestricted sexual assault cases involving members of the Armed Forces. This section requires the SECDEF to create a uniform form to report the disposition of unrestricted sexual assault cases across all Services.

Sec. 536. Standardization of policies related to expedited transfer in cases of sexual assault or domestic violence. This section requires the SECDEF to create standard procedures for expedited transfers in sexual assault and domestic violence cases.

New Administrative Requirements

Sec 542. Security clearance reinvestigation of certain personnel who commit certain offenses. This section amends 10 U.S.C. 1564 by creating a section for the reinvestigation or readjudication of certain individuals. The reinvestigation or readjudication of a security clearance occurs when a flag officer, a general officer, or an employee of the DoD in the Senior Executive Service is convicted in a court of competent jurisdiction of (1) sexual assault; (2) sexual harassment; (3) fraud against the U.S.; or (4) any other violation that the Secretary determines renders that individual susceptible to blackmail or raises serious concern regarding the ability of that individual to hold a security clearance; or a commanding officer determines that a flag officer, a general officer or an employee of the DoD in the Senior Executive Service has committed an offense described above. This section requires the Secretary to also ensure relevant information of this conviction or determination is reported into Federal law enforcement records and security clearance databases and transmitted to other Federal agencies.

Sec. 543. Development of oversight plan for implementation of Department of Defense harassment prevention and response policy. This section requires the Secretary of Defense to submit to the Committees on Armed Services of the Senate and House a report on the Department's plan to implement DoDI 1020.03 – "Harassment Prevention and Response in the Armed Forces."

Sec. 544. Oversight of registered sex offender management program. This section requires that SECDEF create a position within the Office of SECDEF with the principal responsibility of providing oversight of the registered sex offender management program throughout the DoD. This official/entity will collect data from the Services to determine compliance with the DODI 5525.20 and collect data on Service members convicted of a qualifying sex offense.

Sec. 545. Development of resource guides regarding sexual assault for the military service academies. This section requires that the Superintendent of each military service academy develop a guide for all students regarding sexual assault.

Appendix F
Associated Reports

Judicial Proceedings Panel

The Secretary of Defense, as required by Section 576(a)(1) of the NDAA for Fiscal Year 2013 (Public Law 112-239) and in accordance with the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended) and 41 C.F.R. Section 102-3.50(a), established the Judicial Proceedings Panel.

The Judicial Proceedings Panel conducted an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the amendments made to the Uniform Code of Military Justice by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81; 125 Stat. 1404) for the purpose of developing recommendations for improvements to such proceedings.

Eleven reports of the Judicial Proceedings Panel are available at http://jpp.whs.mil/.

Response Systems to Adult Sexual Assault Crimes Panel

The Secretary of Defense, as required by Section 576(a)(1) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239) and in accordance with the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended) and 41 C.F.R. Section 102-3.50(a), established the Response Systems Panel.
The Response Systems Panel conducted 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, U.S.C. (Article 120, Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.

The Final Report and Annex to Final Report of the Response Systems Panel are available at http://responsesystemspanel.whs.mil/.

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)

The Secretary of Defense, pursuant to Section 546 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 ("FY 2015 NDAA") (Public Law 113-291), as modified by Section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), and in accordance with the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended) and 41 C.F.R. § 102-3.50(a), established this non-discretionary Committee.

The Committee, pursuant to Section 546(c)(1) of the FY2015 NDAA, will advise the Secretary of Defense and the Deputy 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.

The following reports from the DAC IPAD are available at https://dacipad.whs.mil/:

- Initial Report - March 2017
- Annual Report - March 2018
- Annual Report - March 2019

Military Justice Review Group

In August 2013, the Joint Chiefs of Staff recommended that the Secretary of Defense direct a comprehensive and holistic review of the Uniform Code of Military Justice (UCMJ) to ensure that the military justice system most effectively and efficiently does justice consistent with due process and good order and discipline. In October 2013, the Secretary of Defense approved the recommendation and directed DoD OGC to conduct a comprehensive review of the UCMJ and the military justice system with support from experts provided by the military Services.

The Military Justice Review Group report is available at http://ogc.osd.mil/mjrg.html.

(b)(6) **CIV OSD OGC (US)**

From: Caroline Fredrickson <(b)(6)
Sent: Tuesday, May 27, 2014 2:46 PM
To: OSD Pentagon OGC Mailbox Military Justice Reform
Subject: ACS Military Justice System Materials
Attachments: ACS Military Justice System Blog.pdf

Dear Military Justice Review Group members,

As per the Department of Defense's invitation, the American Constitution Society is providing some material for consideration of improving the military justice system.

Please find the attached blog post written by one of our staff members that highlights the work of Yale Law School's Eugene R. Fidell. Within that post are several links to Mr. Fidell's works which can also be found here for your convenience:

http://globalmjreform.blogspot.com/
└ Homepage

http://globalmjreform.blogspot.com/2014/05/what-is-to-be-done-herewith-proposed.html
└ Post of proposed Ansell-Hodson Military Justice Act of 2014 w/explanatory note.

http://globalmjreform.blogspot.com/2014/04/is-it-time-to-sunset-us-court-of.html
└ Printed + attached

http://globalmjreform.blogspot.com/2014/04/military-justice-review-group_29.html
└ Printed + attached

We thank you for the opportunity to share this material. Please do not hesitate to reach out to us in the future.

Sincerely,

Caroline Fredrickson

President, American Constitution Society

Caroline Fredrickson

President

American Constitution Society for Law & Policy

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Washington DC 20005

office: (b)(6)

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Global Military Justice Reform Blogpost

Wednesday, April 30, 2014

Is it time to sunset the U.S. Court of Appeals for the Armed Forces?

The Defense Department's establishment of the Military Justice Review Group affords an opportunity to re-evaluate basic aspects of the architecture of American military justice. One is whether the U.S. Court of Appeals for the Armed Forces ought to be preserved or its jurisdiction transferred to another court. (This is not a new issue; it was briefly raised by the DoD General Counsel during the Carter administration, in a discourse that was informed by a study of Reform of the Court of Military Appeals (also known as "the Rainbow Book" due to its pastel-colored chapters) prepared in 1979 by then-DoD attorney Andrew S. Effron. Decades later, and after distinguished service with the Senate Armed Services Committee and on the Court of Appeals, he now heads the Review Group.)

What, if any, changes ought to be made in the military appellate process involves several component issues, and what, if anything, ought to be done with respect to the Court of Appeals cannot intelligently be examined in a vacuum. With that important caveat, can a case be made that, as part of a larger overhaul of the military justice system, the court's jurisdiction should be transferred (presumably with some changes) to the U.S. Court of Appeals for the District of Columbia Circuit? Here are some thoughts to kick off the discussion:

1. The court decides about 40 cases per term on full opinion. That is less than one per judge per month. (It may well be that the current rate of grants is about right or even a bit high in terms of whether the UCMJ-required "good cause" has been shown. But whether more petitions for review should be granted -- on which access to the Supreme Court turns -- is not the issue for present purposes; the numbers are what they are.)

2. The court denies review in several hundred cases each year. These are decided without plenary briefing and oral argument. (Many petitioners for review cite no errors (the so-called "merits cases")). If court-martial appellate jurisdiction were transferred to an Article III court of appeals, these cases would almost certainly be summarily affirmed if not dismissed.

3. The court's FY15 budget is $13,723,000.

4. A review of the court's opinions reveals that few cases turn on issues truly peculiar to the military, and that even those that do could readily be adjudicated, given competent appellate advocacy, by judges without specialized knowledge. The uniformed military legal experience of the judges has varied widely, ranging from zero to very considerable but in any event rarely of recent vintage. Moreover, Congress has provided for generalist Article III judges to sit on the court by designation. Judges of the geographical circuits unquestionably deal with matters at least as arcane as military justice.

5. Having a specialized court with a small plenary docket caseload encourages attention to minutiae.

6. A number of common law countries that -- like the United States -- retain courts-martial, such as the UK, Canada, Australia, New Zealand, and Ireland, rely in whole or in major part on non-specialist judges of the regular appellate courts for the adjudication of court-martial appeals.

7. Sunsetting the court would imply no adverse judgment on its work. In 1950, there was a task to be performed in breathing life into what was, in important respects, a new system of criminal justice (even if critical elements such as the role of the commander were anything but new). That function has been performed, so despite ups and downs, Mission Accomplished (not intended ironically) may be a fair way of characterizing the court's six-decade-long trajectory. Additionally, the process of integration into the normal landscape of civilian federal criminal justice has proven inexorable, including the assimilation of the Federal Rules of Evidence through the Military Rules of Evidence and the availability of direct Supreme Court review (albeit for only about one court-martial in 10).

8. Development of a military trial bench since 1968, including in two branches a nod in the direction of fixed terms of office, makes appellate paternalism both less appropriate in principle and less necessary in fact. If paternalism ever was a proper institutional stance, it no longer plays a significant role in the court's jurisprudence and hence nothing of significance would be lost from this perspective if military appellate jurisdiction were transferred to the D.C. Circuit. Even if it were possible to compare the overall defense-friendliness of the two courts, that is not a principled basis for assigning appellate jurisdiction. If the D.C. Circuit can be trusted to dispense justice to civilian federal criminal defendants and military commission accuseds, it can be trusted to do so for court-martial accuseds.

9. If military commission accuseds are entitled (as they are) to appellate review by judges enjoying Article III protection, court-martial accuseds should be as well, but Congress has shown no recent

interest in conferring Article III status on the judges of the Court of Appeals for the Armed Forces and there is no reason to expect that to change.

10. To the extent that Congress was particularly concerned about rooting out unlawful command influence when it enacted the UCMJ and created the Court of Military Appeals, doctrine on that subject is now highly developed and can be administered and further elaborated as effectively by an Article III court as by the Court of Appeals for the Armed Forces.

11. Is the D.C. Circuit the right court to which to transfer military appellate jurisdiction? Opinions on this may differ, but that court, in contrast with, for example, the U.S. Court of Appeals for the Federal Circuit, regularly hears criminal appeals from district court.

12. Federal courts are not immortal. Consider the Court of Claims (1855-1982), U.S. Court for China (1906-43); Commerce Court (1910-13), U.S. Court of Customs and Patent Appeals (1910-82), U.S. District Court for the Canal Zone (1912-82), Emergency Court of Appeals (1942-62), U.S. Court for Berlin (1955-90); Temporary Emergency Court of Appeals (1971-93), Special Court under the Regional Rail Reorganization Act of 1973 (1973-96), and Special Division of the D.C. Circuit (1978-88).

Over.

Posted by Eugene R. Fidell at 6:48 AM

1 comment:

Frank RosenblattApril 30, 2014 at 8:51 PM:

William Generous wrote in his history of the CMA that nothing would make the court more upset than to uproot them from their stately digs and replant them in the Pentagon. His point is that they've always been a military court trying to not be a military court. I can't disagree with any of your points, or find any military advantage of keeping this in Art I.

Global Military Justice Reform Blogpost

Tuesday, April 29, 2014

Military Justice Review Group

Suggestions to the Pentagon's Military Justice Review Group for improvements in the military justice system can now be emailed to OSD.UCMJ@mail.mil. The Office of General Counsel has recommended that comments be submitted by July 1, 2014.

Here are some personal suggestions to kick off the conversation:

Basket 1, Jurisdiction

1.1 Impose a statutory service-connection requirement (less petty offense and overseas exceptions) and overturn the Court of Military Appeals' decision regarding dependent-victim cases in United States v. Solorio, 21 M.J. 251 (C.M.A. 1986), aff'd, 483 U.S. 435 (1987)

1.2 Repeal the Graham Amendment to Art. 2(a), UCMJ, on personal jurisdiction over civilians serving with or accompany an armed force in the field in time of declared war or a contingency operation or, if it is retained, provide for civilian representation on courts-martial of civilians

1.3 Amend the Military Extraterritorial Jurisdiction Act to remove the exemption for host-state nationals

Basket 2, Courts-Martial

2.1 Abolish summary courts-martial

2.2 Create standing special and general courts-martial

Basket 3, Convening Authority and the Prosecution Function

3.1 Abolish convening authorities

3.2 Create an independent Chief Trial Counsel in each branch with disposition power for all offenses other than minor disciplinary offenses

3.3 Require disposition decisions to be made in accordance with Justice Department standards for the prosecution of criminal cases in the district courts

3.4 Create an independent court-martial administrator in each branch to select court members

Basket 4, Military Judges

4.1 Institute nonrenewable 10-year terms for trial and appellate military judges

4.2 Military judge implementation of pretrial agreements

4.3 Judge sentencing (including the power to suspend) except in capital cases

Basket 5, Appellate and Collateral Review

5.1 Abolish the service courts of criminal appeals

5.2 Abolish CAAF and transfer its jurisdiction to the D.C. Circuit (and if not, (a) repeal the political balance requirement, (b) make terms nonrenewable, and (c) repeal the 7-year-cooling-off-period modification of the Joe Baum Act)

5.3 Appeal as of right as to findings and sentence (including sentence appropriateness) for all courts-martial

5.4 Abolish TJAGs' power to certify cases

5.5 Subject all CAAF decisions to potential U.S. Supreme Court review by writ of certiorari, making it clear in the process that all issues are reviewable, not simply those on which CAAF has granted review

5.6 Organic act for collateral review of courts-martial

Basket 6, Nonjudicial Punishment

6.1 Require proof beyond a reasonable doubt

6.2 Make clear that Art. 15, UCMJ, "vessel exception" cannot be enlarged by deeming personnel to continue within its scope even after they have as a practical matter been transferred off vessel

Basket 7, Punitive Articles

7.1 Restrict Art. 134(2), UCMJ, to the original (Articles of War) intent

Basket 8, Transparency

8.1 Mandate prompt public/media access to trial and appellate case documents via the federal courts' PACER system

Basket 9, Rule making

9.1 Transfer the service secretaries' and TJAGs' military justice rule making powers to the President or Secretary of Defense

9.2 Require a single set of uniform rules of trial procedure and professional and judicial conduct

Basket 10, Economy/Austerity Measures

10.1 End Project Outreach

10.2 Abolish the Code Committee

10.3 Consolidate service law schools

What are your suggestions? Use the comment function below. No anonymous comments, please.

Posted by Eugene R. Fidell at 10:54 PM

4 comments:

Christopher ChaiApril 30, 2014 at 1:13 AM

Hello Everyone,

Please share in this comment section of the blog whatever suggestions you send out to OSD.UCMJ@mail.mil. - so that other viewers can track on it as well. Your feedback and comments help students like myself (social workers & therapists) to better understand the legal aspect of the military justice system.

Thanks!

Gilles LetourneauApril 30, 2014 at 10:52 AM

I agree with many of the suggestions made and will make the extent of my agreement known. However before I do I would like to say that many of the problems encountered would be avoided if ordinary criminal law offences committed by members of the Forces were tried by ordinary civilian criminal courts. The military justice system should be confined to disciplinary proceedings for disciplinary offences like conduct prejudicial to discipline, insubordination, away without leave, etc. Criminal offences like assault, theft, arson, criminal negligence, murder, fraud manslaughter, etc. should be prosecuted before criminal courts. It does not matter if the victim is a member of the military or the goods belong to the military. The civilian prosecutions before civilian criminal courts would not preempt disciplinary proceedings before military tribunals.

I suspect this is asking too much at this time although countries respectful of human rights and an accused's fundamental, substantive and procedural rights have either abolished military tribunals in peacetime or deprived them of their jurisdiction over ordinary criminal law offences and civilians.

I entirely support:

1. The requirement of a military nexus

2. The elimination of the military courts' jurisdiction over civilians

3. The restructuration of summary trials and the limitation of their jurisdiction to purely disciplinary offences

4. The creation of a standing court martial as opposed to "ad hoc courts". Canada still has not done that. As the Court Martial Appeal Court of Canada said in one of its decision, the only thing that is standing about the Standing Court Martial is the fact that the Court is not standing.

5. The creation of an independent court-martial administrator. In Canada, panel members of a General Court Martial are selected at random and the presiding judge is assigned to the case by the Chief Military Judge.

6. If military judges are appointed on terms, these terms should not be renewable for the reasons given by the CMAC in Leblanc v. Her Majesty The Queen 2011 CMAC 2. Security of tenure is essential to both actual and apparent justice.

7. Broaden the spectrum of sentences so as to eliminate as far as possible the disparities between the range of sentences available to civilian judges and those available to military judges,

8. Provide a right of appeal equivalent to the right of appeal available to an accused prosecuted before an ordinary criminal court. Equality of rights, justice and fairness require no less than that.

9. Finally I agree that, in relation to ordinary criminal law offences, the burden of proof on the prosecution must be one beyond reasonable doubt.

Frank RosenblattApril 30, 2014 at 9:07 PM

Scrap the Code Committee in its current form, but you need something to replace it since military justice statutes tend to remain stuck.

Principle No. 20 of Draft Principles Governing the Administration of Justice Through Military Tribunals (UN Human Rights Commission): "Codes of military justice should be subject to periodic systematic review, conducted in an independent and transparent manner, so as to ensure that the authroity of military tribunals corresponds to strict functional necessity, without encroaching on the jurisdiction that can and should belong to ordinary civil courts."

Eugene R. FidellMay 24, 2014 at 8:55 AM

Editor's Note: we were unable to post one worthwhile comment because the author did not give his or her name. If you are that person, please resubmit your comment, but show your name, as this blog does not accept anonymous or pseudonymous comments or posts. Thanks!

(b)(6) **CIV OSD OGC (US)**

From: One Two <(b)(6)
Sent: Tuesday, July 01, 2014 1:15 AM
To: OSD Pentagon OGC Mailbox Military Justice Reform
Subject: Military Justice Review Group

I am requesting review/changes of Article 69 (a) of the UCMJ to allow for anyone convicted at a general court martial the right to an automatic appeal to where they do not have to get approval from the TJAG. Article 69 (a) states the following and is applicable for individuals who are confined for 12 months or less -

(a) The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66 <http://usmilitary.about.com/library/milinfo/ucmj/blart-66.htm>) shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61 <http://usmilitary.about.com/library/milinfo/ucmj/blart-61.htm>). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings of sentence or both.

Rationale is as follows - One may receive punishment less than the maximum sentence for ie. fraternization and/or adultery (military only crimes under Article 134 of the UCMJ) yet you have a federal conviction. A federal conviction effects the rest of your life yet you are not afforded the opportunity of an automatic appeal?

(b)(6) **OSD OGC (US)**

From: william ise <(b)(6)>
Sent: Wednesday, July 02, 2014 6:54 AM
To: OSD Pentagon OGC Mailbox Military Justice Reform
Subject: Comments on Military Justice System

The taking away of authority from the convening authorities was a very bad step. No doubt the result of blatant political correctness by the politicians and those pandering to them.

Having been a staff judge advocate to two general courts-martial convening authorities and former military judge, my experience has shown that the convening authorities are important in the military justice system, and that included their power to reverse jury verdicts that contained errors or were not justified by the evidence. For example, in one case, the military judge made an error by failing to give the jury a cautionary instruction. The Convening Authority on advice and consultation with his sja, determined that the case surely would have been reversed on appeal by higher authority. So he decided to reverse the military judge and sent the case back for a new trial. A guilty plea followed. To take away the convening authority's power is a huge mistake in my opinion. This is the military, not a civilian system of justice. Military considerations are involved and should be recognized by the politicians and civilian bureaucrats looking over the system.
Stop the political correctness.

My experience also was that convening authorities did everything to protect the rights of alleged victims of sexual misconduct. The politicians were not justified in eroding the authority of convening authorities. The politicians are making the military justice system more and more convoluted and complex without due and appropriate justification!

Additionally, giving a free lawyer to victims of alleged sexual assault is another example of political correctness run amok. Sometimes the alleged victim is an out and out liar. I saw this happen in a recent case in Minnesota. Giving the victim a free lawyer paid for by the taxpayers is going to interfere with the prosecutor's, trial counsel's ability to talk freely with the alleged victim. Likewise as to the defense counsel. The government is really making a mess of what was a fine system of military justice --just so the politicians can crow and crow about how responsive they are. Now alleged victims will be coached by their free attorney at taxpayer expense--severely interfering with the trial counsel's ability to evaluate the case and the alleged victim's story and credibility.

I understand that the free attorney for victims only applies in cases of alleged sexual misconduct. What about the Equal Protection of the Law? Why shouldn't all alleged victims get a free attorney if you are giving it to one class of alleged victims?

The military justice system was fine the way it was. The politicians should not be allowed to insert politics and lack of rationality into the system.

Another point --- the Rules of Engagement for our troops are way too complex and burdensome. No doubt costing lives of our brave troops. The politicians are making waging war unnecessarily difficult for our troops in harm's way!

William H. Ise'
CDR JAGC USN (Ret.)
Vietnam Combat Veteran
Attorney at Law
Proctor in Admiralty
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(b)(6)

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(b)(6)

June 30, 2014
Military Justice Review Group
OSD.UCMJ@mail.mil
Washington, D.C.

RE: Submission to the Military Justice Review Group Related to Sexual Assault Investigation, Adjudication, and Response

To the Members of the Military Justice Review Group:

This submission from Columbia Law School's Sexuality and Gender Law Clinic, by its Director, Professor Suzanne B. Goldberg, responds to the May 16, 2014 invitation of Paul S. Koffsky, Deputy General Counsel of the Department of Defense, for submit comments related to the Military Justice Review Group (MJRG)'s review of the military justice system. It focuses particularly on aspects of military structure, policy and practice that interfere with effective response to sexual assault within the ranks. It also proposes strategies for addressing these structural and procedural challenges.[1]

The discussion begins by examining how commander discretion impedes the military justice system from developing an effective response to sexual assault by service members. The essential point here is that the primary aims served by commander discretion – to promote order and cohesion – are often at odds with the provision of meaningful protection. Appropriate investigation and punishment of sexual assault can be disruptive within a unit; as a result, the discretion structure gives rise to a flawed set of incentives for commanders, who are required to balance serious response to sexual assault with their overarching goal of maintaining unit order and cohesion. Some move toward moderate limitations on commander discretion, such as those adopted in the United Kingdom and Canada, may be helpful, at least as an interim step on this issue.

[1] The Clinic is grateful to the work of Columbia law students Kimber Hargrove '14, Sara Nies '14, A.J. Garcia '14, and Jacqueline Rios '14 for their earlier work on this analysis.

Point 2 addresses the lack of thorough prosecutorial and sentencing guidelines for sexual assault and the harmful consequences that flow from that gap in the military justice system. The main focus of this discussion is on how this absence results in injustice in particular cases, because even a rape conviction does not come with a minimum sentence, and, more generally, undermines the legitimacy of the system. This point also offers brief suggestions about how DOD might go about creating and implementing guidelines.

Point 3 turns to issues associated with the evidentiary rules that currently govern the military justice system's handling of sexual assault. The discussion here identifies problems with the existing rules' implementation by military judges; treatment of service member-therapist confidentiality; and appeal rights and defenses under the rules.

Point 4 addresses the serious procedural flaws associated with the Board of Corrections of Military Records, to which survivors can apply for correction of mistakes or injustices that resulted from their sexual assault, such as retaliation affecting promotions. The Board process suffers from serious procedural failures that are likely caused by the lack of professional members and the exclusive reliance on volunteers whose full-time responsibilities lie elsewhere. To correct these systemic problems, we recommend that the Department of Defense professionalize the Board to the extent possible. Yet while this change is important, its effect is likely to be limited because of broader problems related to sexual assault investigations and prosecutions.

Point 5 addresses the related problem of the Department of Veterans Affairs (VA) imposing a more difficult benefits-qualification standard for survivors of military sexual assault who suffer from Post Traumatic Stress Disorder (PTSD) than for other veterans who have suffered trauma as a result of combat, being held as a prisoner of war, or being subjected to fear and terror. Although the MJRG's focus is on the military justice system, justice cannot be had for survivors of military sexual assault unless this issue with VA policy is also corrected. Further, the VA's formal policies, which maintain this higher standard of proof, are also inconsistent with the agency's informal policies, which espouse a different, more lenient standard. This submission recommends that the DOD encourage the VA to update its formal policies and thereby enabling more survivors of sexual assault to access benefits.

Point 6 provides brief discussion of the limits on survivors' remedies in the civil justice system. Because service members are effectively barred from bringing a civil suit either against the military or against other service members by longstanding and entrenched judicial doctrine, the need for meaningful redress of sexual assault within the military is all the more important.

It goes without saying that continued efforts to improve training are essential to addressing the points raised here and any others. We would welcome the opportunity to address broader issues related to the scope of training and related issues in the future.

Suzanne B. Goldberg
Herbert and Doris Wechsler Clinical Professor of Law
Director, Sexuality and Gender Law Clinic, and Director,
Center for Gender & Sexuality Law
Columbia Law School

Submission of Professor Suzanne B. Goldberg
Columbia Law School Sexuality and Gender Law Clinic
June 30, 2014

Submission to the Military Justice Review Group
From Suzanne B. Goldberg,
Director, Columbia Law School Sexuality and Gender Law Clinic

Introduction

The military criminal justice system has the potential to have an important impact on the problem of sexual assault within the military. While adjustments to the system will not eliminate or perhaps even substantially reduce perpetration of sexual assault by service members, a combination of consistent attention and changed policy and practice will help serve both victims and those who are accused of violations. Over time, an improved criminal justice system may also help with some of the much-needed environmental change so that the serious treatment given to sexual assault by high-ranking officials carries over to lower-ranking officers, JAGs, and enlisted service members.[2]

This submission highlights specific issues and suggests potential solutions regarding:

- Commander discretion
- Prosecutorial and sentencing guidelines
- Evidentiary rules
- Board of Corrections of Military Records
- Department of Veterans Affairs (DVA) benefits/remedies
- Civil justice remedies

The Columbia Sexuality and Gender Law Clinic and its director, Professor Suzanne B. Goldberg, will be happy to elaborate any of these points, should that be useful to the Military Justice Review Group.

1. Modifications to Commander Discretion, for the Protection of Both Victims and those Accused as Perpetrators.

While the design of the military justice system serves many of the military's unique needs related to unit cohesion and mission focus, the current command-and-control structure functions as a barrier to effective sexual assault response. In particular, while commander responsibility is centrally important to achieving cohesion and focus,[3] some modifications are essential, at a minimum, if sexual assault within the military is to be addressed meaningfully.[4]

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[2] For a troubling illustration of a service environment in which sexual assault was tolerated and worse, see, e.g. Klay v. Panetta, 124 F. Supp.2d 8, 10 (D.D.C. 2013), and Complaint, Klay v. Panetta, No. 1:12-cv-00350 (D.D.C. Mar. 6, 2012).

[3] Lieutenant Colonel James B. Roan & Captain Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. Rev. 185, 191-92 (2002).

[4] Others have demonstrated why fully "removing cases from the chain of command is a necessary step" and "critical to reduce sexual violence and hold predators in the armed forces accountable." Lindsay Rosenthal and Lawrence Korb, *Twice Betrayed: Bringing Justice to the Military's Sexual Assault Problem* 6 (Nov. 2013), available at http://cdn.americanprogress.org/wp-content/uploads/2013/11/MilitarySexualAssaults.pdf. This submission strongly commends *Twice Betrayed* for the Review Group's consideration. This submission also recommends that the Review Group give serious consideration to the recommendations of Protect Our Defenders, including particularly the organization's 2014-15 Policy Priorities, which can be found at http://fip.protectourdefenders.com/downloads/POD_2014-2015_Policy_Priorities.pdf.

As is well known, the multiple sources of authority governing military justice, including the Uniform Code of Military Justice (UCMJ), the Manual for Courts-Martial, and case law, together grant commanders discretion at nearly every step when a service member in their unit is accused of a crime, including sexual assault.

Also well known is the data from the Sexual Assault Prevention and Response Office (SAPRO) reports. This set of comments will not duplicate what is readily available there;[5] the essential points, for purposes here, are: 1) thousands of accusations of sexual assault are made each year against service members who are subject to military law and commander discretion; 2) many thousands more go unreported, including nearly all assaults perpetrated against men; 3) a high percentage of service member-perpetrators are in the victims' chain of command; 4) no disciplinary action is taken in response to nearly a quarter of sexual assault accusations against service members (24% in FY 2013);[6] 5) a substantial percentage of service members who warrant discipline for sexual assault do not face court-martial (charges were preferred for 71% of this group in FY 2013).[7]

The changes brought about by the 2014 National Defense Authorization Act will go some way toward limiting commander discretion, although much of their effectiveness will depend on effective implementation and oversight (discussed further below).

What might explain why this system is not working as effectively as it ought to? One possibility is that commanders find it less disruptive to handle an accusation informally if the survivor of military sexual assault is not deemed integral to the unit's mission, relative to the accused. Relatedly, because the majority of reported sexual assault victims are low-ranking young women,[8] a commander may prioritize his unit over a single low-ranking member. A third is that non-judicial sanctions remain a substantial part of the response framework, as discussed below, even for service members who are found to have committed sexual assault or other sexual misconduct. In addition, there are numerous specific rules and practices related to the adjudication process, also discussed below, that are deeply flawed and likely discourage victims from seeking redress.

While the newest procedural changes that impose oversight on commander discretion are important, they continue to allow for significant commander control over the process. And, of course, the new measures will be only as good as their implementation. The Inspector General's extended evaluation last year concluded that implementation of earlier training programs and other efforts was uneven across and within the Army, Navy and Air Force.[9] Most fundamentally, in an environment that continues to leave discretion with commanders, any new mandates to be open to reporting and to pursue reports vigorously pursue may be at odds with a commanding officer's sense of what is best to maintain unit order and cohesion.

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[5] *See, e.g.*, Department of Defense Annual Report on Sexual Assault in the Military, FY 2013 (April 22, 2014), available at http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.
[6] *Id.* at 78.
[7] *Id.* at 79.
[8] *Id.* at 90.
[9] Inspector General, United States Department of Defense, Evaluation of the Military Criminal Investigative Organizations' Sexual Assault Investigation Training, Report No. DODIG-2013-043 (Feb. 28, 2013).

As the Review Group is surely aware, cases in the United Kingdom and Canada prompted substantial changes in commander discretion in those countries' respective military justice systems.[10] In both countries, courts found that presiding military judges were insufficiently impartial and service members were not receiving fair trials. The legislatures responded with reforms that decreased the amount of commander discretion over the entirety of the prosecution.[11] More specifically, after the Canadian Supreme Court decided *R v. Generoux*,[12] the Canadian legislature: (1) granted the military police authority to investigate cases independent of commander discretion; (2) created a Director of Military Prosecutions, responsible for preferring all of the charges against a service member; and (3) changed the discretion of the commander so that he or she might choose not to prosecute but could no longer dismiss a case.[13]

The United Kingdom's Parliament reacted similarly after the European Court of Human Rights found that the military judge was neither impartial nor independent, so that service members did not receive a fair trial.[14] Legislators created three tiers of command responsible for cases. First, the commander refers a case to a "higher authority." The higher authority then decides if the case should be dismissed or referred to prosecuting authorities who then make the ultimate decision on whether to prosecute. If prosecution does move forward, court administration establishes all elements of the trial. There is also a reviewing authority, rather than confirmation of the sentence by the commanding officer.[15]

To be sure, the United States military justice system is not identical to the pre-reform systems in the United Kingdom and Canada because of the relatively greater independence of American military judges.[16] Still, both examples, while also imperfect in implementation, demonstrate that removal of commander discretion can be consistent with the unique needs of the military justice system.

2. Prosecutorial and sentencing guidelines as essential guidance for commanding officers and others.

Prosecutorial guidelines issued by the Department of Defense (DOD) would also provide substantial assistance in creating more consistent punishment for reported sexual assaults. The

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[10] Other military services among our U.S. allies, including France and Israel, have likewise restricted commander discretion within their military justice system. *See http://www.loc.gov:8081/law/help/militaryjustice/france.php?loclr=bloglaw; http://www.loc.gov/law/help/militaryjustice/israel.php; see generally http://blogs.loc.gov/law/2013/11/report-on-the-adjudication-of-sexual-offenses-in-foreign-military-justice-systems/.*

[11] *See* Rachel Natelson, *In Military Justice System, an All-Powerful Arbiter*, (June 29, 2012, 4:37 PM), http://atwar.blogs.nytimes.com/2012/06/29/in-military-justice-system-an-all-powerful-arbiter.

[12] (1992) 1 S.C.R. 259.

[13] 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, 437 (Spring 2008).

[14] *Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221 (1997).

[15] Hansen at 441-42.

[16] The Supreme Court observed in *Weiss v. United States*, 510 U.S. 163, 179 (1994) two decades ago that American military judges are sufficiently independent from the chain of command because they report to the Judge Advocate General and not the officer who convened a particular court martial that the decisions of military judges do not implicate due process concerns.

Department of Justice already does something similar, distributing prosecutorial guidelines to U.S. Attorneys,[17] and has done so for many years.

The current absence of thorough guidelines results in disparate sentences among cases and across installations, further undermining confidence in the justice system. In addition, the absence of minimum sentences means that even panel members considering the most serious crimes will be instructed that they can opt for no punishment or for minor punishments such as a fine or reprimand. Further, because judges tell panel members first to consider the least punitive of potential punishments, the sentencing process is subjected to further skewing.

At a minimum, for more egregious forms of sexual assault, including—but not limited to—rape, the guidelines should strongly recommend stricter punishments. For all sexual violence, guidelines can also reinforce that administrative actions are discouraged or impermissible, and harsher punishments are appropriate absent unusual circumstances. With thorough guidelines, DOD and the Commander in Chief would send a clear message to the chain of command regarding the need for meaningful punishment in cases of sexual assault, even if the commanding officers retain some discretion. Guidelines would also be important for any review of a commander's decisions concerning the sentence of the accused.

To prepare thorough guidelines, we encourage DOD to work with the Joint Chiefs of Staff, officers, and enlisted service members as well as advocates for victims and for the accused. At a minimum, even if DOD remains committed to substantial commander discretion, a "directive-type memorandum" similar to those issued regarding collateral claims in sexual assault cases, could be a basis for issuing thorough guidelines.

3. Shifts in the Enforcement, Coverage, and Appeal Rights Related to Evidentiary Rules as Necessary Protection for a Fair and Accurate Process.

Serious problems remain with evidentiary rules that can and should be corrected promptly. The first relates to implementation: Our understanding is that judges throughout the military are not complying with existing rules to protect victim privacy. Most specifically, Military Rule of Evidence (MRE) 513, which protects against disclosure of confidential communications between a patient and therapist, is often breached by judges. DOD can issue a memorandum reinforcing the need to comply with this and related rules.

A second problem relates to appeal rights: To provide further correction to the misapplication of evidentiary rules in sexual violence cases, DOD can support a right to interlocutory appeal where violations of MRE 513 and MRE 412 (the rape shield) rules may have occurred. Interlocutory appeals are critically important in these circumstances because substantial harm occurs and the contested issue may become moot when a court reviews or turns over the records improperly to the accused.

A third problem relates to the rules' coverage. MRE 513 does not currently give communications between patients and mental health professional the same protection as rules

[17] See USAM 9-27.000 Principles of Federal Prosecution, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.

governing attorney-client, penitent-clergy, and spousal relationships. It is difficult to understand why this would be the case. Inadequate protection for these records provides another means for an accused perpetrator to harass his victim and further undermines the ability of those victimized to have confidence in the system that is designed to protect them. Further, these records are developed in the course of a patient trying to understand and assimilate their experience of a traumatic event. The focus, in other words, is on the patient's processing of the experience for mental health purposes, not on setting out facts for purposes of establishing the perpetrator's actions. The clash of purposes, while obvious to psychiatric experts,[18] seems to have eluded many military judges up to this point and warrants immediate redress.

A fourth relates to the defenses available under the evidentiary rules. It is still the case that defendants can rely on MRE 404 to claim "Good Military Character" as a defense to charges related to sexual assault. While the Victims Protection Act of 2014 remains pending, it would be important for DOD to do all that it can to make clear its view that good military character is not acceptable as a defense to any charge of violent conduct against another person.

4. Improvements to the Staffing and Practices of The Boards of Corrections of Military Records.

As the Review Group knows, the Board of Correction of Military Records (the Board) in each military branch may, pursuant to 10 U.S.C. § 1552, correct any military record in that department and can upgrade a discharge and provide back pay. The Army Board, for example, states that its mission is "to correct errors in or remove injustices from Army military records."[19] If a service member receives an adverse decision from the Board, he or she must pursue the claim in civil court; the military offers no further relief. As this Group also knows, and as is noted briefly below, pursuit of a claim in civilian court is generally fruitless.

These Boards are relevant for service members who have experienced certain forms of retaliation following sexual assault in the past, such as punitive discharge, that affected their status. If these service members can amass sufficient evidence, they may be able to access the records correction, discharge upgrade, and back pay the Board is able to authorize. Service members might also have an interest in upgrading their discharge for their own personal satisfaction, even if they do not seek or receive back pay.

There are numerous structural problems associated with the Boards, however, which are likely to impede records correction for service members who have been sexually assaulted.[20] One is that Board members are volunteers and, other than in the Coast Guard, which seeks legally trained members, lack backgrounds that prepare them for their "quasi-judicial service."[21] In addition, the

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[18] *See, e.g.*, "Mental Health Records Should Remain Off-Limits," http://www.washingtonpost.com/opinions/mental-health-records-should-remain-off-limits/2014/02/17/cecfa094-972d 11e3-ae45-458927cccdb6_story.html.
[19] *See, e.g.*, Army Review Boards Agency, http://arba.army.pentagon.mil/abcmr-overview.cfm.
[20] Please note that these comments are based primarily on information in responses to 2009 FOIA requests. Should practices have changed since that time, these comments should be considered in light of the current situation.
[21] Board for Correction of Military Record, *Memorandum for Board Members and Army Board for Correction of Military Record Staff*, Feb. 29, 2009, available at http://www.rjtlaw.net/ABCMR%20FOIA%20Responses.pdf.

Boards typically review cases quickly, with no advance preparation, other than in the Coast Guard.[22] Also, Boards handle each case individually, meaning they do not typically rely on previous decisions for precedent or guidance. Needless to say, this structure impedes consistency, enables arbitrariness, and risks illegitimacy since two applicants with similar facts who seek the same relief from the Board can receive opposite rulings.

Another paradigmatic example of retaliatory action against a sexual assault survivor that might be the subject of a records-correction effort would be non-promotion as a result of a commander viewing a service member who filed a report as a "troublemaker." Also possibility is that service members who experienced Post-Traumatic Stress Disorder (PTSD) or other health consequences as a result of being assaulted received a lower grade of discharge that might warrant correction.

But the Board's structure makes presentation of these types of claims more difficult than it needs to be. Boards do not publish the criteria they use to make decisions, nor offer any guidance about what evidence is accepted or credible. The only available instruction regarding submission of evidence is the requirement of service records. Both of these issues, as well as the issue of non-expert volunteers, warrant adjustment. In addition, training regarding the circumstances of sexual assault survivors that relate to records correction, particularly while the military is transitioning from a period of concededly inadequate oversight, would be appropriate and helpful.

5. VA Policy Related to PTSD Coverage as an Important Aspect of Military Justice for Sexual Assault Survivors.

Although the Review Group's task is to focus on the criminal justice system, it is necessary to raise the related issue of Department of Veterans Affairs (VA) policy regarding PTSD experienced by survivors of sexual assault. Here, the issue is that different and more burdensome rules remain in place for sexual assault survivors than for other service members who suffer from combat-related PTSD. These problems are well reviewed elsewhere, including in a pending petition before the US Court of Appeals for the Federal Circuit, *Service Women's Action Network and Vietnam Veterans of America v. Shinseki.*[23] The reason for flagging them here is that actions to address the criminal justice process will be limited in their success if veterans who have suffered sexual assault are treated worse than others. Indeed, the difference is even more striking after the 2010 rule change that enabled a presumption of PTSD for veterans stationed in combat areas[24] yet no similar

[22] Freedom of Information Act Response from Army Review Boards Agency to Raymond Toney at 2, 6 (July 30, 2009), available at http://www.rjtlaw.net/ABCMR%20FOIA%20Responses.pdf; Freedom of Information Act Response from Department of the Air Force to Raymond Toney at 2 (July 28, 2009), available at http://www.rjtlaw.net/Air%20Force%20FOIA%20Responses.pdf; Freedom of Information Act Response from Department of the Navy to Raymond Toney at 4 (July 18, 2009), available at http://www.rjtlaw.net/BCNR%20FOIA%20Responses.pdf.

[23] The petition is available at http://servicewomen.org/wp-content/uploads/2011/01/SWAN-VVA-Lawsuit-4.30.14-Filing.pdf.

[24] Ed O'Keefe, *Rules Eased for Filing PTSD Claims*, The Washington Post (July 9, 2010); http://www.washingtonpost.com/wp-dyn/content/article/2010/07/08/AR2010070806109.html; *see also* 38 C.F.R. §§3.304(f)(1), (2).

presumption related to military sexual assault, which many, including the VA, consider a primary cause of PTSD in female veterans.[25]

Under the applicable rule, veterans who seek sexual assault-related compensation for PTSD have a particularly difficult task in proving that there is a "nexus" between their PTSD and the sexual assault.[26] The reason is straightforward: survivors of sexual assault often lack a paper trail similar to what others with PTSD can produce. Sexual assault can happen anywhere, and survivors often will not report an assault or will choose to file a restricted report. When filing a restricted report, the survivor has the right to have an official record of the incident created through SAPRO, a crucial step for receiving VA benefits should she experience PTSD. However, the Veterans' Benefits Administration manuals do not reference a policy for obtaining the official reports from SAPRO, leading to denial of PTSD benefits due to lack of corroboration.[27]

Although the VA does not absolutely require a paper trail to establish that PTSD was connected to sexual assault,[28] a lack of time and resources mean that, in practice, veteran benefits administrators often deny those claims that are not supported by documentation other than service records, and have even denied claims supported by a psychotherapist's statement.[29] This remains the case even when the VA's own training material states that "a qualified examiner's opinion *can* be considered credible supporting evidence for occurrence of the MST stressor."[30]

But internal inconsistencies in documentation requirements further complicate the regulations for sexual assault-related PTSD benefits. Until the official policy is changed to reflect the more flexible standards the Veterans' Benefits Administration's letters espouse, veterans and VA officers alike will likely remain confused as to who should receive compensation. Inconsistencies are likely exacerbated by administrators' workload, although the VA, as of 2010, had "not fully assessed to what extent [military sexual trauma]-related cases affect its current workload or if there are differences in rate of awards or denials for [military sexual trauma]-related claims."[31]

Still, given the staggering statistics regarding underreporting of military sexual assault, the VA might more accurately distribute benefits if they accept as true the testimony of service members

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[25] *See* Women, Trauma and PTSD, http://www.ptsd.va.gov/public/PTSD-overview/women/women-trauma-and-ptsd.asp.

[26] 38 C.F.R. § 3.304(f)(5).

[27] *Healing the Wounds: Evaluating Military Sexual Trauma Issues Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. On Veterans' Affairs*, 111th Cong. 10 (statement of Joy J. Ilem, Deputy National Legislative Director, Disabled American Veterans), available at http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg75614/html/CHRG-112hhrg75614.htm.

[28] 38 C.F.R. §3.304(f)(5) "examples of such evidence include, but are not limited to. . . ."

[29] *See, e.g., Menegassi v. Shinseki*, 638 F.3d 1379 (Fed. Cir. 2011) (unsuccessful appeal from a denial of a claim for PTSD coverage related to sexual assault).

[30] Dep't of Veterans Affairs, *Adjudicating Posttraumatic Stress Disorder Claims Based on Military Sexual Trauma*, attachment to training letter 11-05, emphasis in original (Dec. 2, 2011) (available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDMQFjAA&url=http://www.vfwilserviceoffice.com/upload/TL%201105%20PTSD%20MST%20attachment.doc&ei=xqW8UMfvH8mw0AGb7oDYBg&usg=AFQjCNGqXp9ZXW4gGoSw4sUSjhXwCnhjQQ&sig2=2MyNlflERm2zJcdFrcBfAA&cad=rja.

[31] VA Office of Inspector General, Review of Combat Stress in Women Veterans Receiving VA Health Care and Disability Benefits 69 (December 16, 2010), available at http://www.va.gov/oig/52/reports/2011/VAOIG-10-01640-45.pdf.

who claim sexual assault unless it is refuted by "clear and convincing evidence to the contrary"[32] as it already does for fear and terror-based PTSD. Reinforcement by DOD of the need for clarity and repeated guidance to VA administrators could help here.

6. The Absence of Civil Remedies for Survivors of Military Sexual Assault as an Underlying Factor Reinforcing the Need for DOD Leadership.

Given long-standing Supreme Court doctrine barring active-duty service members from suing the military or officers in the military in civil courts,[33] it is all the more important that DOD exercise leadership in every possible domain on this issue. Indeed, a number of significant cases that reinforced the broad prohibition against civil remedies, including *Stubbs v. United States*, have arisen as a result of sexual assault victims' efforts to seek civil relief following their inability to obtain an adequate response from with the military.[34]

In *Stubbs*, a female service member's superior officer told her that he would make her life miserable unless she had sex with him. This incident occurred immediately before the service member left the base for a short period of Christmas leave. Stubbs, who had been raped in the past, killed herself at the end of her leave rather than return to the base to face the threat of rape. The Eighth Circuit ruled that, because Stubbs' superior officer harassed her on the military base and because Stubbs was an active-duty service member, the harassment and resultant suicide were incident to her military service.

In short, this doctrine, which turns centrally on an assumption that the military will handle its discipline adequately and in light of its needs, further amplifies the harms that result from inadequate legal protection within the military for sexual assault survivors.

[32] 38 C.F.R. §3.304 (f)(3) (2010).
[33] *Feres v. United States*, 340 U.S. 135, 146 (1950).
[34] *Stubbs v. United States*, 744 F.2d 58 (8th Cir. 1984).

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Recommendations to the Military Justice Review Group on Ways to Improve the Military Justice System

COMMITTEE ON MILITARY AFFAIRS & JUSTICE

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NEW YORK CITY BAR ASSOCIATION
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RECOMMENDATIONS TO THE MILITARY JUSTICE REVIEW GROUP ON WAYS TO IMPROVE THE MILITARY JUSTICE SYSTEM

The military justice system must modernize in a way that prevents the problems that have spurred the current review--especially those related to the handling of sexual assault cases. To accomplish this, the role of the Convening Authority ("CA"), while integral in many respects, must be appropriately cabined to prevent the exercising of that power in ways that hinder, rather than promote, justice. If the recent deterioration of public confidence in the military justice system is any indication, the military's standards of justice--while unique and separate for good reason in many respects--must become more aligned with civilian definitions of justice. Ultimately, the military is run by civilians and subject to legislation and administrative regulations created and enforced by civilians.

When civilians' discontent with the military justice system coincides with many military members' own discontent--as it has in the area of sexual assaults--then strong pressure to prevent further injustices is not only warranted, but appropriate as a fundamental check upon the insular nature of the military and its justice system. Undoubtedly, the need for a CA to exercise his/her full complement of powers may be at its zenith during forward-deployed combat operations, but outside of that sphere, when that need is much less acute, it is the demands of justice that approach their zenith. Certainly, if the President of the United States, the Commander-in-Chief of all the armed forces, has additional latitude to exercise his military power during wartime (and thus less power during peacetime),[1] it should not be any different for the President's subordinate officers.

We note that the mission of military lawyers is the creation and maintenance of "a military justice process that is, and is perceived to be, just."[2] That perception of justice is critical to the proper functioning of any justice system. For the military, there is a twofold scrutiny, with two different lenses through which its actions are judged: first, the system needs to be perceived as just by servicemen and servicewomen subject to that system; second, it must be perceived as just through the lens of the civilian justice system. Thus, the metric by which military justice is judged is not simply whether the adjudication of justice is or is not proper. The metric is also whether or not such adjudication appears improper, both in its results and in its procedures. This standard should come as no surprise to members of the military, whose core principles always have included the tenet that all servicemen's and servicewomen's behavior be "above reproach" and "beyond the appearance of impropriety." The military has fallen short of meeting this standard with respect to its military justice system. It is time to make changes to address those shortcomings.

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[1] For a discussion of this issue, *see e.g.,* http://www.law.umn.edu/uploads/wE/aa/wEaa1g7XB6j0QyoOhoFpYw/Presidential_Powers_exchange_Paulsen_Kitrosser_Carpenter.pdf (last accessed June 26, 2014) and http://www.utexas.edu/law/wp/wp-content/uploads/centers/clbe/howell_war_time_judgements.pdf (last accessed June 26, 2014).

[2] *See* JAGINST 1150.2C, *Military Justice Litigation Career Track,* dtd Sept. 16, 2013, at http://www.jag.navy.mil/library/instructions/11150.2C.pdf (last accessed June 18, 2014).

Although media and other public commentary on sexual assault cases have focused almost entirely on the rights of the alleged victim, the rights of the accused also deserve attention. Given the high profile of sexual assault claims and the official emphasis on responding to them, some CA's might convene courts martial in response to such claims, even when the evidence does not support such charges (and would likely not result in a prosecution if the charges were unrelated to sexual assault).[3] An independent and more professionalized process for responding to allegations of sexual assault might well protect the accused from inappropriate decisions to prosecute in response to public and higher level pressure.

The 2014 National Defense Authorization Act ("NDAA") made great strides towards righting the ship of military justice. Those efforts are to be commended. Recently, we expressed our support for the proposed Military Justice Improvement Act because it removed commanders' CA power for "serious crimes that are not uniquely military in nature."[4] Instead, we support placing that power in the hands of Staff Judge Advocate ("SJA") prosecutors that are independent of the chains of command of both the alleged perpetrator and the victim. This revision would place legal decisions in the hands of experienced legal practitioners--a practice that already has been successfully implemented in the militaries of our staunchest historical allies, with no evidence of any decline in unit readiness or cohesion.[5] Such a change would also bring increased legitimacy to--and confidence in--a system criticized internally and externally on both issues. As the Commandant of the Marine Corps recently stated, sexual assault victims "don't trust the chain of command," meaning they do not trust CAs to properly investigate and adjudicate their claims.[6] This change would not only bring the United States in line with other modern military justice systems in dealing with serious crimes,[7] but would still allow CAs to retain their power over non-serious crimes, as well as serious exclusively-military offenses.

Further to that endorsement, we make additional recommendations below. Some of these recommendations include specific limits on the power of CAs--these are recommended only in the event that CA power is not categorically removed for all serious crimes that are not uniquely military in nature. Other recommendations do not involve CA power and are recommended regardless of how the issue of CA power is ultimately resolved.

Recommendation 1: All unrestricted[8] reports of sexual assault should automatically be forwarded to, and investigated by, each military branch's independent investigation service.

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[3] For examples of commanders seeking to prosecute alleged sexual offenders despite a lack of evidence, *see* Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, at http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it (last accessed June 18, 2014).

[4] *See* http://www2.nycbar.org/pdf/report/uploads/MilitaryJusticeImprovementSexLaw.COMAJReportFINAL 2.11.14.pdf (last accessed June 26, 2014).

[5] *Id.*

[6] *See id.*

[7] *Id.*

The investigation is arguably the most critical and important phase of the entire military justice process. The investigation is where the facts are developed, and the existence or non-existence of these facts will ultimately determine an accused's guilt or innocence. Nowhere is this principle more important than in the investigation of sexual assault crimes. From the proper collection and analysis of physical evidence, to the taking of victim statements, investigations into sexual assault require years of highly specialized training and experience. It is imperative that these investigations be conducted with true independence to the greatest extent possible, free from direct and indirect, conscious and unconscious, command influence

Currently, unit commanders have a significant amount of influence and/or discretion on how sexual assaults are investigated within the military. Commanders decide who investigates the alleged offense, decide how much time will be spent investigating, and even control many aspects of how the investigation is conducted--to include what "leads" are followed and what resources are (or are not) allocated to the investigation. Commanders appoint Investigating Officers ("IOs") to conduct the investigation, and the IO can investigate only matters that the commander decides are within the scope of the investigation. The IO reports directly--and only--to the commander, the same commander who will later write that IO's Fitness Report, rank that IO among his/her peers, and ultimately influence whether the IO is promoted or passed over.

Additionally, the vast majority of IOs do not have any specialized training or consistent experience investigating serious crimes--especially crimes as complex and sensitive as sexual assault. Many are assigned to be an IO as a secondary duty, to be completed in addition to their regular tasks. While the IO's main focus is supposed to be the investigation, practically speaking, many IOs are still required to complete their normal duties, which hampers their ability to conduct a detailed and thorough investigation. Further, the investigatory report itself is prepared for a commander--not for a prosecutor--and this critical distinction can have real effects at a later trial. In short, an IO is typically armed with the training to effectuate the completion of a report, but not to prepare the foundation for a criminal trial.

Each service branch, however, has its own specialized, highly trained, amply equipped, and vastly more experienced criminal investigation service. The Navy has the Naval Criminal Investigative Service ("NCIS"); the Air Force has the Office of Special Investigations ("AFOSI"); and the Army has its Criminal Investigation Command ("Army CID"). These agents, analogous to an FBI for each branch, were created for the purpose of investigating serious crimes, with the specific intent of preparing cases for criminal prosecution (if warranted). These agencies have a deep knowledge of the military and how it works, and are accustomed to working with commanders. They also have special training in interviewing sexual assault victims. But, while

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[8] Victims of sexual assault can report the crime along one of two different tracks: "restricted" and "unrestricted." Unrestricted reports are forwarded to the victim's chain of command for investigation, along with the details of the crime, including the victim's identity. Restricted reports, however, are confidential, and the chain of command will be notified only that "an assault has occurred and provide[d] details that will not identify the victim." Victims receive medical care, counseling and other support services under both tracks. The restricted reporting track is designed to increase reporting of sexual assaults in cases where the victim "desire[s] only medical, legal, advocate, and support services [but] no command or law enforcement involvement." *See* http://www.preventsexualassault.army.mil/policy_restricted_unrestricted_reporting.cfm (last accessed June 26, 2014).

commanders have voiced that they use these investigatory agencies for *some* sexual assault cases, they are not used in *all* sexual assault cases.

The Department of Defense should mandate that these agencies investigate every unrestricted report of sexual assault, not only because the agencies are better equipped to handle these cases, but also because the agencies are not part of anyone's chain of command. While the agents still work with the commanders, they can, if need be, elevate concerns to their true boss--the Service Secretary--while remaining insulated from retaliation by the command. Thus, using the investigatory agencies instead of IOs will increase the actual quality and independence of investigations, while also increasing public confidence in the military's handling of sexual assault cases.

But, *increased funding needs to be given to these agencies.* There were an estimated 26,000 sexual assault victims last year alone, although only about 14% reported the crime.[9] However, those reporting statistics appear to be climbing, as more and more sexual assault victims feel comfortable reporting these crimes (FY 2012 saw a 37% increase in reported sexual assaults from FY 2010). NCIS, for example, is already experiencing budgetary and staffing problems, as a result of the increased number of sexual assault investigations it conducts.[10] The Department of Defense should be petitioning Congress for increased funding based upon this increased mission--the military's sexual assault victims deserve nothing less than a completely competent, independent investigation. And an increase in these agencies' budget is a necessary step to giving them the justice they deserve.

Recommendation 2: All sexual assault investigations should automatically include investigation of potential retaliation against the accuser.

The perceived threat of retaliation was cited by 47% of military sexual assault victims as a reason why they never reported a sexual assault against them.[11] When combined with the fact that approximately 86% of the estimated 26,000 sexual assault victims never reported the assault at all,[12] that means approximately 10,500 more sexual assault victims might have reported their assault if the fear of retaliation was sufficiently removed.

The 2014 NDAA made it a crime to retaliate against sexual assault accusers,[13] which was a positive step. However, while the threat of prosecution may prevent some retaliation from occurring, there are no policies in place to discover whether this retaliation is still occurring. In order to truly combat retaliation, potentially retaliatory acts need to be rooted out early. The

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[9] Johanna Lee, *The Quest for Military Sexual Assault Reform*, Harvard Political Review, Apr. 26, 2014 at http://harvardpolitics.com/united-states/quest-military-sexual-assault-reform/ (last accessed June 18, 2014).

[10] *See* http://www.airforcetimes.com/article/20131218/NEWS/312180010/NCIS-struggling-sex-assault-caseload (last accessed June 18, 2014).

[11] *See supra*, n. 9.

[12] *Id.*

[13] *Id.*

investigator therefore should be required, as a mandatory part of the investigation, to inquire into potential retaliation against the victim. Further, even after the investigation is complete, the victim's Special Victims Counsel ("SVC")[14] should follow up with the victim twice per year, for at least one year, to give the victim another opportunity to safely report retaliation to a trusted advisor outside the victim's chain of command, who is already familiar with the victim's case. It is critical that the victim be made to feel that the service actually wants to pursue retaliation claims, and following up with the victim to ensure that he/she has reported all potentially retaliatory actions is a key part of that process. This is also an additional reason why NCIS, AFOSI, or Army CID should be investigating each and every sexual assault claim--because they are best suited to provide the command independence that is necessary for these victims to report retaliation.

Recommendation 3: The decision whether to proceed to a General Court Martial after an Article 32 hearing is a decision to prosecute at a federal criminal trial, based upon whether or not there is probable cause to prosecute.[15] The post-Article 32 determination of whether or not there is probable cause to prosecute a defendant should lie with a neutral and detached magistrate, not the CA or the SJA prosecutor.

Currently, at the completion of the Article 32 hearing, the Article 32 IO prepares a report for the CA, which details the evidence for and against the accused and determines whether or not there is probable cause to proceed to a General Court Martial ("GCM").[16] The 2014 NDAA requirement that the Article 32 IO be an SJA (wherever practicable), reflects the necessity of a trained lawyer to be involved with the process of determining whether or not probable cause exists. This requirement injects a great deal of credibility and specialized legal training into the process; however, it does not create procedural safeguards to ensure that probable cause determinations are made by neutral and detached persons. The United States Supreme Court already has determined that civilian prosecutors, like police officers, cannot make probable cause determinations.[17] Prosecutors' duties are those of law enforcement, and allowing them to decide for themselves when they have met their burden of establishing probable cause is anathema to core principles of justice. As noted above, this concern relates both to the rights of the victim to have charges taken seriously, and the rights of the accused not to be subjected to unwarranted prosecution.

In the context of Article 32 hearings, the CA sits in the role of chief prosecutor--it is the CA's responsibility and duty to prosecute those cases that merit prosecution and to decline to prosecute those that do not. Because of his/her prosecutorial role, the CA should not be the one making probable cause decisions, for the same reason that prosecutors do not make them--the risk of bias

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[14] While every service branch has incorporated the SVC program, there may be differences between the branches' programs. *See* http://www.msnbc.com/msnbc/military-sex-assault-svc-program (last accessed June 18, 2014). To the extent that any branch does not automatically assign a trained SVC to every alleged sexual assault victim, the branches should immediately incorporate this minimum standard.

[15] *See* http://www.hqmc.marines.mil/Portals/135/MJFACTSHTS%5B1%5D.html (last accessed June 18, 2014).

[16] *See* MCM, Rule 406.

[17] *See Gerstein v. Pugh*, 420 U.S. 103 (1975).

that can factor into the decision. This problem is magnified by the fact that the CA can also play the role of police chief during the initial investigation phase--coordinating and directing the investigation, with broad power to decide the who, what, when and where of the investigation.[18] Thus, when the CA steps into the role of prosecutor, the CA embodies both arms of law enforcement, and cannot be considered--in any realistic terms--to be neutral or detached. It is precisely because of this involvement that a neutral and detached magistrate, a military judge, should make the ultimate determination of whether probable cause exists after an Article 32 hearing.

The same report that is prepared by the IO, should now be forwarded to a military judge, for a neutral and detached legal determination of probable cause. If the judge determines that there is probable cause, then the case should proceed to a GCM. If the judge determines that there is not sufficient probable cause to proceed to a GCM, the CA can decide whether to adjudicate the matter using a lower level of court martial, a Non-Judicial Punishment ("NJP"), an Administrative Separation ("AdSep"), or a dismissal of the charges. The CA can also decide to conduct further investigation to develop facts that can support probable cause. If, however, the CA disagrees with the military judge's legal determination that there is no probable cause, the CA should be able to appoint a prosecutor and appeal the decision to the CAAF.[19] This still allows the CA to exercise tremendous power and autonomy in adjudicating offenses, while limiting only the CA's ability to prosecute *felony* cases without probable cause.

This approach will prevent the very real problem of CAs prosecuting cases that they know lack probable cause, simply to prevent the CA, his/her command, branch, or the military in general, from looking like they are "soft" on crime.[20] It makes sense that the accused in these situations will take the court martial to a verdict, rather than enter a plea--and the military is experiencing a dramatic rise in the number of contested courts martial.[21] Further, as one retired JAG officer notes, the acquittals that almost inevitably result from these prosecutions can embolden potential offenders.[22] This change seeks to prevent the negative effects of improper prosecutions, while still affording the CA a tremendous amount of flexibility and autonomy to craft both judicial and non-judicial punishments for accused service members.

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[18] This is another reason why the services' special investigation agencies should be investigating these crimes.

[19] This is in line with MCM Rule 908(b), where interlocutory appeals halt any further judicial action until the CAAF renders its decision on the subject motion or order.

[20] *See* Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecution: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173, 174; *see also* Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, at http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it (last accessed June 18, 2014).

[21] *See e.g.*, *Marine Corps Military Justice Report Fiscal Year 2013*, at http://www.hqmc.marines.mil/Portals/135/Docs/JAI/USMC%20MilJus%20Report%20FY2013.pdf (last accessed June 18, 2014).

[22] Conversation with Robert "Butch" Bracknell, Retired USMC JAG Officer, Currently Staff Legal Advisor-International Law at Headquarters, Supreme Allied Command Transformation. His comments are his personal opinions, based upon his education and years of experience in the Marine Corps; they are not representative of the Marine Corps' or NATO's position on any subject.

Recommendation 3 (Alternate): If Recommendation 3 is not accepted, then the following recommendation is provided in the alternative: CAs who do not follow the Article 32 IO's determination of probable cause should have all such decisions subject to a standard system of review.

Currently,[23] when a CA does not follow the advice of the Article 32 IO, and either proceeds or does not proceed to a GCM (against the recommendation of the IO), he/she will have that decision reviewed by a higher authority only if the case was a sexual assault case. If the case did not involve sexual assault, the CA's decision is not reviewed, and the CA does not even have to provide a justification for that decision (much less a justification based solely on the specific facts presented at the Article 32 hearing).

The 2014 NDAA recognized the need for CAs to have accountability for these decisions. While the NDAA specifically addressed sexual assault cases, the principles that require such accountability are not limited to sexual assault cases. Besides sexual assault crimes, many other high-level crimes are equally susceptible to improper CA action. These crimes should be treated the same as sexual assault cases, with a review by the appropriate higher authority--the Secretary of the Service for felonies that were determined to have probable cause, but did not proceed to a GCM, and the next higher echelon for felonies that were found to lack probable cause, but still proceeded to a GCM.

Recommendation 4: Article 32 IOs should be required to be an SJA "unless a SJA is unavailable."

The 2014 NDAA included the following change to which types of officers could serve as Article 32 IOs: "where practicable, you will have a judge advocate conduct the Article 32 investigation."[24] The policy chief of the Army's Criminal Law Division, Col. John Kiel, Jr., has interpreted the "where practicable" language to allow the Army to substitute infantry line officers for SJAs if the Army wanted the Article 32 IO to be able to "put [him/herself] in the shoes of the accused."[25] Or, if the case involved a "complex [temporary duty] fraud," the Army "might want to have a finance officer as the IO."[26]

As discussed *supra*, the ultimate function of the Article 32 IO is to provide a determination of whether or not there is probable cause to proceed to a GCM. That determination is a legal question, and CAs should not be appointing an Article 32 IO because that IO can "put [him/herself] in the shoes of the accused." This standard injects an entirely subjective element into the determination of whether probable cause exists. Putting oneself in the shoes of the accused is more appropriate for sentencing recommendations, not probable cause determinations.

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[23] "Currently" means post-2014 NDAA (which may not be entirely phased in, but will be phased in over the coming months).

[24] David Vergun, *New Law Brings Changes to Uniform Code of Military Justice*, ARMY NEWS SERVICE, Jan. 8, 2014, located at http://www.defense.gov/news/newsarticle.aspx?id=121444 (last accessed June 18, 2014).

[25] *Id.*

[26] *Id.*

Furthermore, if the concern is giving sufficient protection to the accused at the Article 32 hearing, defendants already have heightened protections, which flow from the nature of the Article 32 hearing itself (as compared to a grand jury hearing, for example). Principally, these protections include the ability to be represented by defense counsel and cross-examine the witnesses at the hearing. In fact, the Navy, Marine Corps and Air Force already routinely used SJAs as Article 32 IOs; it was only the Army that did not, and it was the Army that lobbied for this language change, "largely because" it did not have enough SJAs.

While the 2014 NDAA's language recognizes the need for flexibility in cases where a SJA is not available, the Army's interpretation of "where practicable" frustrates the underlying purpose of the 2014 NDAA's change--that SJAs are best-suited to make determinations of probable cause, and SJAs should be used if they are available.

Thus, we urge that the "where practicable" language be interpreted so that an SJA should be used if available. We also recommend that the 2014 NDAA language be amended to read as follows: "You will have a judge advocate conduct the Article 32 investigation, unless a judge advocate is unavailable." To be clear, this proposal is not an indictment of the Army; it is simply a recognition that the language creates a loophole which makes it susceptible to being interpreted by all the service branches in a more expanded way than the rationale for the 2014 amendment justifies.

Recommendation 5: The authority to enter into a pre-trial agreement ("PTA") for sex crimes or felony offenses should be vested solely with the SJA, not with the CA.

The 2014 NDAA removed all CAs' ability to set aside the verdict from a court martial and/or change the punishment awarded in sex crime cases. Prior to the 2014 NDAA, a CA could, after a court martial found a defendant guilty of rape, completely override that finding and declare the person innocent, or merely guilty of a lesser-included offense. The CA could adjust the sentence awarded by the court as well. After cases like that of Lt. Col. James Wilkerson--who was convicted by a jury[27] of aggravated sexual assault, but was then unilaterally acquitted by a three star general because the general did not believe the victim's story--Congress amended Article 60 of the UCMJ to ensure that these types of situations do not happen again. Specifically, CAs are no longer allowed to change a court martial's finding of guilt or innocence for any sex crime, and CAs cannot adjust a finding of guilt for a felony offense if the sentence is more than six months, or results in a discharge.

Unfortunately, Article 60 still allows CAs the ability to accomplish the same result by exercising their pre-trial powers, which were left unchanged. CA's have unfettered power to enter into PTAs with defendants, setting not only what crime the defendant will be found guilty of, but also the maximum punishment the defendant can receive.[28] In other words, the CA can effectively

[27] A jury is called a "panel" in the military.

[28] When a PTA is involved, the trial proceeds in two phases. In the first phase, guilt is adjudicated for the offense to which the defendant pleaded. In the second phase, the court imposes a sentence on the defendant, then compares it to the maximum sentence allowed under the PTA; if the PTA's maximum sentence is lower than that awarded by the court, the defendant receives the lower sentence.

bypass the 2014 NDAA changes to achieve the same result. In a post-2014 NDAA iteration of the Lt. Col. Wilkerson case, the CA would now be incentivized to enter into a PTA with the defendant, allowing him to plead guilty to a much lower offense with a much lighter sentence. While a complete acquittal is taken off the table, the ability of a CA to usurp justice with virtual impunity is not.

To rectify this problem, PTAs for sex crimes and felony crimes should be made by the SJA, not the CA. The CA can--and should--give his/her recommendation on whether or not a PTA should be offered, and what the PTA should include, but the ultimate decision of whether or not to accept a plea to a felony or sex crime should rest with the prosecutor. The CA will still retain the unilateral power to enter into PTAs for non-felony offenses and other non-sex crimes (which includes all "good order and discipline" offenses). However, the CA would lose the ability to change before trial what he/she is no longer allowed to change after trial.

Recommendation 6: The Department of Defense should mirror the federal judiciary's public filing and tracking system for court documents.

While GCMs and Special Courts Martial ("SpCMs") are federal criminal trials, the court filings generated before, during and after these federal trials are not publicly available. The non-military federal courts across the country use a single system which allows attorneys and clerks (and judges through their clerks) to electronically file, store, and remotely access all court documents. This system, called the Public Access to Court Electronic Records ("PACER") system, is also publicly accessible, giving the federal judiciary the public oversight it needs to remain accountable for its actions.

Although military courts lack this capability, they desperately need it. Civilian federal courts are "standing" courts, meaning that the courts themselves are essentially permanently-created institutions. Military courts, however, are largely[29] "convened" courts, meaning that the court is created (convened) when it is needed (the reason the military still uses a "convening authority"). It is precisely for this reason that a centralized filing system would be advantageous for the military; the lack of standing courts only exacerbates the need for a standing filing system, common across all branches and the rest of the federal government, that follows the case from cradle to grave. The flexibility that would be afforded by remote filing and remote access cannot be understated for an ever-moving military. Of course, confidential and classified information would be redacted before being entered into the system.

There are additional benefits to implementing the PACER system, namely, adding transparency into the system and reducing the added workload the military currently faces by requiring court documents to be released only upon a filing of a Freedom of Information Act ("FOIA") request. Opening the system to enhanced public review will give the public a deeper understanding of the military justice system.[30] This is a much-needed--and timely--reform, because "[t]he first

[29] The CAAF, however, is a standing court.

[30] Summary Report, *Global Seminar on Military Justice Reform*, Yale Law School, Oct. 18-19, 2013, p. 9, located at http://responsesystemspanel.whs.mil/public/docs/Public_Comment_Unrelated/06-Dec-13/04_GlobSeminar_MJReform_2013_Report.pdf (last accessed June 18, 2014).

casualty of [the military justice system's] lack of transparency is public confidence in the military justice system."[31] It should not take a FOIA request to make available documents from a court martial absent compelling reasons specific to each case.

Practically speaking, the military is run by civilians (*e.g.*, the Commander-in-Chief, the Secretary of Defense, each Service's Secretary) for the very reason that public oversight of the military is a necessary component of our American system of government. This public/civilian oversight is also integrally linked to the First Amendment and the oversight of the free press. It is the ability of the press to report on issues, both good and bad, that inform the public and provide the level of oversight contemplated in the Constitution. The "sunlight" of the press and public is necessary to help the military justice system shed its image as insular and subject to cronyism, and to increase confidence both inside and outside the military that the problems that led to the review of the military justice system are being addressed effectively and that true reforms are being made.

Moreover, this system will make it easier for the Department of Defense, Congress, the Service Secretaries, and the military community--active, reserve and retired--to better monitor, track, and study the military justice system. This will allow them to identify and correct weak links more efficiently--hopefully reducing the current improprieties that are giving the military justice system its bad reputation. Part of that solution depends on there being documents to review, in addition to having easier access to those documents. Too often, there is no accessible record of documents for anyone to review, military or civilian. And when records are delayed or denied after a FOIA request, this causes the ironic result that it is currently harder to access certain court martial records than it is to access the records from a Guantanamo Bay commission.[32]

Recommendation 7: Remove the CA's power to select the members of the panel in a court martial, unless the CA can prove that such authority is necessary for operational concerns.

Currently, CA's have essentially unilateral ability to select which service members will sit on a panel for a particular case. The members the CA selects are subject to *voir dire*, but the prosecutor and defense have only one peremptory challenge each.[33] Thus, the CA is able to select which people will sit in judgment of the defendant. We recognize that this power has deep historical roots and still retains an element of necessity in the forward-deployed, wartime theatre, where the number of potential panel members is severely limited. Thus, we propose that CAs should have the ability to select only the *pool* of potential panel members, with the prosecutors and defense attorneys selecting the actual panel members through *voir dire* and peremptory challenges. This will allow the CA to retain significant power in peacetime, and his/her full complement of powers in wartime.

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[31] *Id.*

[32] *Id.*

[33] *See* http://jurylaw.typepad.com/deliberations/2013/09/member-jury-selection-in-general-courts-martial.html (last accessed June 18, 2014).

Outside of the wartime context, the needs of the military justice system to ensure actual and perceived fairness outweigh the CA's need to select the personnel on the panel itself. Our recommendation would still allow the CA to ensure the members of the panel meet the UCMJ's minimum requirements, while mitigating any perceived undue influence. Justification for this recommendation starts with the UCMJ itself, which only requires that panel members have sufficient "age, education, training, experience, length of service, and judicial temperament."[34] These criteria are not rigorous--and would seem to include most officers, Staff NCOs, and potentially senior NCOs in the command.[35] Further, the requirements themselves appear to follow a balancing test, since a lower-ranked person could be qualified by virtue of his/her training, experience, and/or even temperament, rather than a particularly high rank.

Allowing the CA to actively select the individual panel members, rather than disqualifying personnel who do not meet the UCMJ's requirements, increases the risk of creating a biased panel. That risk is magnified by the fact that the typical panel only requires *five* members, and does not have to be unanimous to render a verdict. Thus, every panel member the CA appoints has an inordinately large effect on the outcome of the trial.[36] This presents a serious risk of potential bias, and where operational concerns are not involved, the need to avoid the possibility of biased or influenced panel members should take priority.

That risk of potential bias is both real and significant. Retired JAG officers note that it is not uncommon to hear CAs seeking to find "hammers" to serve on the panel--service members who are more likely to find defendants guilty and/or recommend harsher punishments if the defendant is found guilty.[37] When this happens, the CA is seeking these personnel specifically because they do not have the proper "judicial temperament" required by the UCMJ. And even though the CA is not directly influencing the verdict, the CA can nonetheless indirectly influence the verdict. By choosing panel members, CAs can influence how the panel interprets the words "reasonable doubt," how likely the panel is to ignore evidentiary limiting instructions, or how likely panel members are to use their rank to influence other panel members. This creates the potential for both wrongful convictions and unnecessary acquittals.

Bias is a pervasive concern because it can be both conscious and unconscious. Unconscious bias played a major role in most of the wrongful convictions later overturned through DNA evidence.[38] But it is not just the unconscious bias of the CAs that must be mitigated: several convictions (including convictions for rape) have recently been overturned by the United States Court of Appeals for the Armed Forces ("CAAF") because of Unlawful Command Influence

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[34] UCMJ art. 25(d)(2).

[35] Assuming the defendant is enlisted and requested enlisted members on the panel.

[36] Because the verdict is not unanimous, a single "holdout" juror cannot prevent a conviction. This means that the CA only needs to appoint/influence two-thirds of the panel, rather than every member, to gain a conviction.

[37] *See supra*, n. 22.

[38] *See* http://www.innocenceproject.org/understand/# (last accessed June 18, 2014); in-depth examinations of the case profiles and exoneration trends clearly indicate that unconscious bias affects victims, police, crime labs technicians, expert witnesses, lawyers and judges alike.

("UCI") stemming from comments made by the President of the United States and the Commandant of the Marine Corps.[39] Military service members at all levels, while hoped to be completely unbiased, are arguably more susceptible to unconscious bias because of the ingrained aspects of "good order and discipline" and increased allegiance to authority.

Even military judges are susceptible to conscious and unconscious bias. Recently, a military judge stated that if a defendant has made it past the Article 32 hearing, and is now at a GCM, that defendant is guilty--and it is up to the prosecutor to confirm that guilt.[40] This is not an uncommon perspective for CAs to possess, either.[41] Thus, restricting the CA's ability to select the panel members reduces the CA's potential influence on the trial before that trial even begins. We recommend that CAs be limited to selecting members of a larger pool of potential panel members, unless that power is necessary due to operational restrictions. Practically speaking, the CA would ensure that the entire pool meets UCMJ Article 25(d)(2)'s requirements by disqualifying those personnel the CA feels do not meet its standards. The prosecutors and defense attorneys then select the panel from that pool through *voir dire* and peremptory challenges. However, because the attorneys will now be selecting the panel from a larger pool, both the prosecutor and defense counsel need to receive an increased number of peremptory challenges, as well.

Recommendation 7 (Alternative): If Recommendation 7 is not accepted, then the following recommendation is provided in the alternative: defense counsel should receive three times the number of peremptory challenges, in order to serve as a counterbalance against the selection power of the CA. If the CA selects a truly independent panel, then the challenges will not be necessary; however, if they are necessary, they should be available to discharge potentially biased panel members. This will prevent later appeals for UCI--and later re-trials if that appeal is successful.[42]

Recommendation 8: The Department of Defense should mandate the creation of a dedicated litigation career track in each branch, as well as mandate the creation of a Special Victims Prosecutor program in each branch.

It is an unfortunate fact that the level of complex trial expertise in the military is often insufficient to properly litigate complex or sensitive trials involving expert witnesses, cutting-edge scientific evidence, or financial fraud crimes.[43] Across the services, military prosecutors with only a few months' experience are being assigned complex rape prosecutions that, in the

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[39] *See* http://www.jag.navy.mil/courts/documents/archive/2014/HOWELL-201200264-UNPUB.pdf (last accessed June 18, 2014); Erik Slavin, *Judge: Obama sex assault comments 'unlawful command influence'*, STARS AND STRIPES, June 13, 2013, located at http://www.stripes.com/judge-obama-sex-assault-comments-unlawful-command-influence-1.225974 (last accessed June 18, 2014).

[40] *See* http://www.jag.navy.mil/courts/documents/archive/2014/HOWELL-201200264-UNPUB.pdf (last accessed June 18, 2014)

[41] *See supra*, n. 22.

[42] *See supra*, n. 39.

[43] *See supra*, n. 22.

civilian sector, would be tried only by senior prosecutors with years of experience litigating similar cases.[44] The military owes its service members, and especially its sexual assault victims, more than a prosecutor--it owes them an experienced and trial-hardened prosecutor (especially since defendants can hire outside counsel with decades of experience handling complex trials). It is with that fact in mind that the Navy instituted the Military Justice Litigation Career Track, which was designed to "identify and cultivate judge advocates with the requisite education, training, experience, and aptitude to litigate and [later] preside over complex cases."[45] This need is even more acute, since the number of complex, contested courts martial, especially sexual assault courts martial, is exploding.[46] The Army possesses a somewhat similar program to the Navy, while the Air Force and Coast Guard have no such programs.[47]

An additional program that all the Services should implement is the Army's Special Victim Prosecutor ("SVP") program. SVPs are "dispersed across the Army. . . [and] focus exclusively on litigation and training, with an emphasis on sexual assault and family violence," including child abuse cases.[48] SVPs are "individually selected from the Army's most experienced trial lawyers . . . to serve not only the installation at which they are located, but also their geographic area of responsibility. Special Victim Prosecutors assignments are three-year assignments . . . not subject to deployment without approval from The Assistant Judge Advocate General for Military Law and Operations."[49] Further, "SVPs undergo specialized training at military and civilian courses, and spend two weeks with a civilian District Attorney's Office observing how civilian Special Victim Prosecutor/Sexual Assault units function."[50] This program, or a Service-specific version of it, should be required in every branch.

Recommendation 9: The Department of Defense should--when especially experienced trial counsel is needed, but unavailable--encourage the use of Administrative Separations in order to allow prosecution by the local United States Attorney's Office.

Unfortunately, even if Recommendation 8 is accepted, it will take years, if not decades, for the JAG programs to distribute experienced litigators sufficiently across the world. Practically speaking, however, not every duty station can be staffed with an experienced litigator. There will be instances where a complex trial will occur, but the base will lack a JAG attorney with sufficient experience. In such cases, commanders should be encouraged to work with civilian

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[44] *Id.*

[45] *See supra*, n. 2; http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q76.pdf (last accessed June 18, 2014).

[46] *See supra*, n. 21.

[47] *See supra*, n. 45.

[48] *Id.*

[49] *Id.*

[50] *Id.*

federal prosecutors to have the military member administratively separated[51] and then prosecuted by the local US Attorney's Office--especially where the crime occurred off-base, or the victim is a civilian. This option has been used successfully in the past at recruiting commands,[52] and smaller bases, despite the fact that the crime happened on-base and between two military members.[53] To be clear, however, this method should be used only in cases where the commander would administratively separate the alleged offender even if he/she was found not guilty at the trial/court martial.

An additional benefit of administratively separating such serious offenders is that their pay and benefits will terminate upon discharge. This procedure can prevent situations like that of Major Nidal Hasan, the Fort Hood shooter, who received nearly $300,000 in pay while awaiting a military trial.[54] Commands also routinely resort to sending sexual assault suspects to other installations in an effort to separate them from their alleged victims, despite the fact that the accused will be administratively separated, even if a court martial does not result in a discharge. The costs of such orders can be inordinate upon the command, and may create another situation where it is better to discharge the offender for civilian prosecution, rather than keep him/her in the service awaiting trial and/or appeal.

Recommendation 10: When the death penalty is sought, those cases should be litigated by the Department of Justice, unless operational concerns necessitate otherwise.

Capital crimes are rare in the military, and thus the military lacks both prosecutors and defense attorneys with the requisite experience.[55] This presents persons convicted of a capital crime with a potentially successful appeal on the grounds of malpractice or ineffective assistance of counsel. Further, the costs of prosecuting and defending a capital case can easily accrue to hundreds of thousands of dollars, where learned counsel is involved.[56] This money comes out of the command's budget, and may provide an incentive to not seek top-level charges or punishments because that money cannot then be spent on training or equipment. Because of this combination of problems, these cases should be given to experienced Department of Justice prosecutors. Once the case is given to the Department of Justice, the defendant will gain access to free federal capital defense attorneys who specialize in defending federal capital cases.

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[51] If there is probable cause to refer a case to a GCM after an Article 32 hearing, there is sufficient basis to administratively separate the service member. Further, the crime will often be accompanied by inappropriate conduct that independently warrants an administrative separation.

[52] *See e.g.*, http://www.newsday.com/long-island/nassau/new-charges-added-in-marine-s-fatal-hit-and-run-case-1.1629466 (last accessed June 18, 2014).

[53] *See* http://www.washingtonpost.com/local/crime/ex-marine-scheduled-to-formally-join-death-row/2014/05/29/0b9784d6-e68b-11e3-afc6-a1dd9407abcf_story.html (last accessed June 18, 2014).

[54] *See http://www.nbcdfw.com/investigations/Accused-Fort-Hood-Shooter-Paid-278000-While-Awaiting-Trial-208230691.html* (last accessed June 18, 2014).

[55] *See supra*, n. 22.

[56] *Id.*

Recommendation 11: Defense counsel should be able to submit all defense witnesses (including expert witnesses) directly to the military judge (*ex parte*).

Currently, defense counsel has to request to subpoena his/her witnesses through the prosecutor (who forwards the request to the CA). This results in the defense telegraphing major aspects of its defense strategy in advance, and gives the prosecutor the opportunity not only to influence the witness, but also to convince the CA not to produce the witness.[57] Prosecutors, however, do not have to submit their witnesses through the defense. This problem is unique to courts martial--because even the defense counsel for the alleged terrorists undergoing military commissions at Guantanamo Bay do not have to submit their witness lists through the prosecution. Thus, the requirement that defense counsel for military members request their witnesses through the prosecution places a unique, undue and unjust burden upon the defense.

If the military judge orders the production of a witness, and the CA refuses to produce that witness, the issue should be appealed to the CAAF, and the proceeding should be stayed automatically until the decision is finalized.

Recommendation 12: The Department of Defense should allow all court martial convictions to have one appeal, with the ability to waive that appeal in a PTA.

Under present law, only certain convictions by court martial have the right to an appeal/review (*i.e.*, if a defendant is awarded a sentence that includes death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more).[58] Thus, every conviction at a SpCM (a misdemeanor federal conviction), and any non-qualifying conviction at a GCM (a felony federal conviction) are ineligible for an appeal.

As a result, there are a multitude of unreviewable cases with potentially egregious legal or factual errors. Further, these convictions are far from minor, and can result in serious collateral consequences, such as deportation, sex offender registration, or the inability to own/use a firearm (which will cause the person to become ineligible for continued military service). Thus, Article 66 of the UCMJ should be modified to allow an appeal of any court martial conviction. However, in the interests of efficiency, defendants should be allowed to waive this right as part of a PTA.

June, 2014

[57] *Id.*

[58] UCMJ Art. 66(b)(1).

(b)(6) **CIV OSD OGC (US)**

From: Jack Nevin <(b)(6)
Sent: Wednesday, June 11, 2014 4:37 PM
To: OSD Pentagon OGC Mailbox Military Justice Reform
Cc: Clark, Annette; 'Holland, Paul'
Subject: Inquiry to Seattle University School of Law regarding improvements in the military justice system

To OSD Counsel: I am responding to your correspondence dated 23 May 2014 addressed to the Seattle University School of Law regarding proposed improvements to the military justice system.

By way of background, I am a retired Brigadier General in the Judge Advocate General's Corps. In my last duty position I served as the Chief Judge (IMA) of the US Army Court of Criminal Appeals, and also as the Commanding General of the US Army Reserve Legal Command (Provisional). I currently serve on the Board of Advisors of the National Institute of Military Justice, where I advise on proposed legislation and serve as a trial observer at military commissions in Guantanamo Cuba. In my civilian capacity I am a general jurisdiction trial court judge in the state of Washington, and I also serve as an adjunct professor of both military law and trial advocacy at Seattle University School of Law.

Dean Annette Clark and Assistant Dean Paul Holland have asked me to respond to your inquiry. The following shall serve as my response.

The first area that calls for re-evaluation is the role of the Convening Authority. I understand that the Uniformed Judge Advocates General have apparently agreed that the post trial clemency role of the Convening Authority should be at least modified. That notwithstanding I will offer the following comments. While I have great respect for my fellow General Officers, I believe as currently configured the post trial clemency authority has the potential to undercut our court martial process in the military. As a practical matter, court martial panels, just like civilian juries typically render decisions based upon the facts and evidence, devoid of personal feelings. One might argue that court martial panels composed of sophisticated senior leaders, are even more reliable than civilian juries, and, after 18 years as a trial judge, I believe that civilian juries for the most part are very reliable. For any system of justice to maintain its credibility it must be perceived as predictable, reliable and certain. The post trial clemency procedure as it's currently crafted, I believe undercuts those propositions.

The next area of convening authority concerns the authority to authorize expenditures for defense expert witnesses. Currently a convening authority has the authority to decline or approve defense requests for expert witnesses, or consultants. These are decisions best left to the Military Judge. Certainly, in the civilian sector, the assigned trial judge, either state or federal would have that role. Moreover, that the convening authority who also approves plea agreements, conducts post trial review, and is advised by the Staff Judge Advocate, can decide defense expenditures, and require the defense to justify their request at the very least creates an appearance of unfairness. Last, requiring the defense to justify their requests, causes them the Hobson's choice of revealing their case theory in order to justify a defense expert. Military judges of all services are more than capable of deciding these issues.

04 Art 32 Investigations

The next area that cries out for change are the rules concerning the Article 32 investigation. As you are no doubt aware the military rules of evidence do not apply in a preliminary hearing such as an Article 32. Certainly this is consistent with the Federal Rules of Evidence, which do not apply in preliminary matters. It is also consistent for the most part with the interpretations of states with evidence rules based on the federal rules. However, in sexual assault cases we see counsel allowed an unlimited breadth in seeking to impeach the complaining witness. This has a chilling effect on the witness and their willingness to testify. Certainly, counsel are allowed a wide breadth in Article 32 hearings, but it was never the intent of the drafters that this should be used a means to chill the testimony of a witness, making them unwilling to participate in a hearing. I acknowledge that what I'm describing is very challenging, and must in the final analysis, pass constitutional muster, easier said than done. However, the bottom line is that the process must have some limits to the inquiry. Civil and criminal discovery must necessarily seek that which would lead to the discovery of relevant evidence. Anecdotes from courts martial in the last few years suggests that the current process allows for questions that go far beyond a search for evidence that would lead to the discovery of relevant evidence. I am aware of suggestions that there be an amendment allowing for the absence of the complaining witness at the Article 32 hearing. Given the current breadth allowed counsel in cross examination, I can appreciate why victim's advocates would advocate such a change. However, I believe that doing so would create Sixth Amendment Confrontation Clause issues which might not pass appellate review.

05 Legislative Changes

I also appreciate why there are proposals to change military law specifically in the area of Sexual Assault, including Article 120. However, I strongly encourage that these proposed changes be approached with great caution. There are numerous anecdotes about well intended legislation not meeting appellate criteria and resulting in reversals of convictions. One such example is the evolution of Article 120. Approximately six years ago Article 120 was changed to place a burden upon the accused to show consent of the victim, in those cases where consent was the defense. This "burden shifting" was contrary to most states, and federal law. It ultimately was found unconstitutional by the Air Force Court of Criminal Appeals, and I believe by CAAF. In 2010 I wrote an article on the problems associated with this change. It is titled "Neither a Model of Clarity nor a Model Statute": An Analysis of the History, Challenges and Suggested Changes to the "New" Article 120" . This is found in Vol 67 of the Air Force Law Review 2011. I point this out only as an example of how legislation and changes in military law can unintentionally creat consitutional issues which lead to results diametrically opposed to the intent of the legislation itself.

I most certainly appreciate why Senators Gillabrand and McKaskell have offered their proposals. But I would urge you to tred carefully. Military appellate law continues to be for lack of a better phrase "paternalistic". As such the changes adopted will be subject to an appellate standard known to be much harsher than that of the civilian apellate courts.

06 Unlawful Command Influence

Next I strongly suggest efforts to clarify the paremeters of the offense of Unlawful Command Influence. There is no question but that we need the requirements of Article 37. However, to suggest that the drafters intended that the doctrine of command influence was probably never intended to extend to comments by the President of the United States at a commencment address. That the CINC believes that sexual assault in the military is a problem, and that if proven it should be treated harshly, is hardly a surprise to any citizen in the United States, let alone the commanders and senior commanders who sit on court martial panels. Yet, the current elements allow for a conclusion causing military judges to conclude that it consitutes Unlawful Command Influence. Obviously, other acts in the news are consistent with the doctrine and the conduct it was intended to prevent. This cries out for clarification.

Special Victim's Counsel

Likewise, the role of the Special Victim's Counsel (realizing that the services describe this function with different titles) should be clarified if possible. The recent CAAF case of LRH v Kastenberg is helpful but only begins to touch on the potential issues of the standing of the SVC. Certainly, a SVC should be allowed to correspond with the Convening Authority on behalf of the victim without running the risk of creating an issue of Unlawful Command Influence. I use this as an example, as the issue presented itself in the recent court martial of BG Sinclair at Fort Bragg.

Thank you very much for allowing Seattle Univeristy the opportyunity to provide input on these important issues. Please feel free to contact me at any of the addresses listed below.

Very Truly Yours

BG Jack Nevin USA Ret.

Pierce County Superior Court

Tacoma WA

Adjunct Professor Seattle University School of Law

(b)(6)

(b)(6) **CIV OSD OGC (US)**

From: Schlueter, David <(b)(6)
Sent: Wednesday, July 02, 2014 9:43 AM
To: Summers, Robert; OSD Pentagon OGC Mailbox Military Justice Reform
Cc: Sheppard, Stephen; Addicott, Jeffrey; David Schlueter (b)(6)
Subject: RE: Military Justice Review Group

Thanks Bob.

From: Summers, Robert
Sent: Tuesday, July 01, 2014 11:56 AM
To: Schlueter, David; OSD.UCMJ@mail.mil
Cc: Sheppard, Stephen; Addicott, Jeffrey; David Schlueter (b)(6)
Subject: RE: Military Justice Review Group

Thanks David...Great job!!

Bob

From: Schlueter, David
Sent: Tuesday, July 01, 2014 11:22 AM
To: OSD.UCMJ@mail.mil
Cc: Sheppard, Stephen; Summers, Robert; Addicott, Jeffrey; David Schlueter (b)(6)
Subject: Military Justice Review Group

Re: Military Justice Review Group.

Dear Judge Effron:

This email responds to a letter from Mr. Paul S. Koffsky, Deputy General Counsel, regarding suggestions for improving the military justice systems.

Despite the recent attention to the handing of sexual assault cases in the military and calls for fundamental changes, the American military justice system is structurally sound. Thus, in addition to considering changes to the system, it is also important to use this process to reaffirm certain aspects of the system.

1. Address the Purpose of the Military Justice System.

The Uniform Code of Military Justice should indicate clearly that the primary purpose of the military justice system is to maintain good order and discipline in the armed forces. The following statement, which is a revised version of what currently appears in the Manual for Courts-Martial, could be added to Article 1, U.C.M.J.:

The purpose of military law is to assist in maintaining good order and discipline in the armed forces, to provide due process of law, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

In addition, the foregoing language should be substituted for the language currently in the Preamble for the Manual for Courts-Martial. The reasons for addressing this important issue, which informs consideration of any changes to the military justice system, are set out in Schlueter, The Military Justice Conundrum: Justice or Discipline?, 215 Mil. L. Rev. 1 (2013), available at https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW. <https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.>

2. Maintain and Strengthen The Critical Role of The Commander in the Military Justice System.

During recent congressional consideration of proposed amendment to the U.C.M.J., in the context of sexual assault offenses, a common theme in the discussions was the move to limit or completely eliminate powers vested in commanders and convening authorities. Those discussions were grounded on a distrust of commanders. In the end, those proposals, affected a commander's initial decision to prosecute certain offenses and restricted the ability of the commander to grant post-trial clemency to a convicted service member. A common proposal was to shift most of the prosecutorial decisions to a centralized command or office.

Any similar proposals during this review process should be rejected. Reasons supporting rejection of those proposals are set out in the attached White Paper, which was originally prepared for Congress in 2013.

3. Reject Any Attempts to Adopt a "Service Connection" Requirement for Subject Matter Jurisdiction.

The reference to the concept of "service connection" should be deleted from the Discussion following R.C.M. 201(a)(2). That language seems to suggest that the service connection requirement is still applicable, and is thus inconsistent with the Discussion for R.C.M. 203. At least one commentator has recently suggested a revival of the long-rejected "service connection" requirement for subject matter jurisdiction. http://globalmjreform.blogspot.com/2014/05/what-is-to-be-done-herewith-proposed.html <http://globalmjreform.blogspot.com/2014/05/what-is-to-be-done-herewith-proposed.html> . The proposal is apparently grounded on first, a belief that it is wise to mirror similar requirements that have been adopted by other countries, second, on a lack of confidence in the military justice system, and third, a distrust of commanders. For those of us who practiced military justice during the O'Callahan-Relford era, 1969-1987, it is clear that that template for determining whether a court-martial had subject matter jurisdiction was unworkable. See Schlueter, Military Criminal Justice: Practice and Procedure, § 4-11 (8th ed. 2012). Law review articles discussing the service connection requirement are annotated at § 4-17 in that text. The Supreme Court settled that issue in United States v. Solorio, 483 U.S. 487 (1987), and there is no need to reinstitute that requirement.

Although the attached White Paper does not directly address the issue of service connection, it does address the problem of attempting to differentiate the prosecution of military and common law offenses.

4. Revise the List of Special Defenses to Conform to Contemporary Practice.

Currently the Manual lists a number of defenses as "special defenses." The Discussion accompanying R.C.M. 916 notes that special defenses are also referred to as affirmative defenses — a term used in federal and state practice. To avoid any confusion, R.C.M. should be amended to use the term affirmative defenses. In addition, the Manual does not include defenses that have been recognized by the military courts, e.g., duress, involuntary intoxication, Nuremburg Defense, parental discipline, prevention of crime, and resisting restraint. See generally Schlueter, Rose, Hansen & Behan, Military Crimes and Defenses § 3-4 (2d ed. 2012) (discussing defenses). In the alternative, the Manual should clearly state that the list of defenses in the Manual is nonexhaustive and that military case law may recognize other defenses.

5. Address the Issue of Post-Trial and Appellate Delay.

A continuing and intractable problem in the military justice system is the issue of post-trial and appellate delay. The Manual should be amended to adopt some form of a speedy post-trial and appellate rule, similar to the speedy trial rule in R.C.M. 707.

6. Make Provision for Student Attorneys to Represent Service Members.

I recommend that Article 27, UCMJ be amended to authorize the Service Secretaries to promulgate regulations, which would provide for student attorneys representing military accused. Some states currently make provision for such representation in both criminal and civil trials and administrative hearings. And for some time, as you know, the United

States Court of Appeals for the Armed Services has permitted students to write and argue as amicus before that court. On two occasions students from St. Mary's University School of Law prepared written amicus briefs and present oral arguments when that court visited the law school. Making provision for student attorneys in the UCMJ would provide a wonderful opportunity for both students and military attorneys, who could use assistance, for example, in conducting legal research, preparing legal briefs and memos, and assisting in trying courts-martial — as assistant trial counsel or assistant defense counsel.

A similar amendment should be made to Article 70, UCMJ, which deals with appellate counsel.

If I can provide any other assistance please feel free to call on me.

Best regards,

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(b)(6)

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