

COMPARATIVE SYSTEMS SUBCOMMITTEE

INTERIM REPORT: RECOMMENDATIONS AND FINDINGS

I. SURVEYING SEXUAL ASSAULT AND THE USE OF THOSE STATISTICS

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.

- **Finding 1-1:** The Department of Defense (DoD) Workplace and Gender Relations Survey of Active Duty Personnel (WGRA) is an unbounded, prevalence survey that utilizes a public health methodological approach. The National Crime Victimization Survey (NCVS) is a bounded, incidence survey that takes a justice system response methodological approach. The two surveys cannot be accurately compared.

Recommendation 2: 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.

- **Finding 2-1:** 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.
- **Finding 2-2:** The DoD SAPRO evaluates the scope of unreported sex offenses by contrasting data of unwanted sexual contact extrapolated from the WGRA with reported sexual assault incidents and sexually based crimes under the UCMJ. The disparities 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.
- **Finding 2-3:** 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.

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Recommendation 3: Congress and the Secretary of Defense rely on 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.

- **Finding 3-1:** 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 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 seeks to measure the scope of unreported sexual offenses.
- **Finding 3-2:** The DoD WGRA is a valuable public health survey, but it is not intended to, and does not accurately measure the incidence of criminal acts committed against Service members.

Recommendation 4: The Secretary of Defense 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.

- **Finding 4-1:** In 2012, the Defense Manpower and Data Center (DMDC) sent the WGRA to 108,000 active duty Service members. Approximately 23,000 survey recipients, or 24 percent, responded. 24 percent is considered a low response rate when compared to the 67-75 percentages at Service Academies and rates of other civilian public health surveys. When the response rate is below 80 percent, the Office of Management and Budget (OMB) requires an agency to conduct an analysis of nonresponse bias. As a result, the WGRA data is at greater risk for bias in the sampling and, therefore, less reliable. One of the reasons for the low response rate may be survey fatigue.

Recommendation 5: The Secretary of Defense direct that raw data collected from all surveys 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.

- **Finding 5-1:** The 2012 WGRA collected a large amount of data that is useful as 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.

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- **Finding 5-2:** 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 the DoD. NISVS includes a random sample of active duty women and female spouses of active duty members. The CDC reported 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.

Recommendation 6: 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 (CNSTAT) to consult with RAND, selected to develop and administer the 2014 WGRA, and any other agencies or contractors that develop future surveys of crime victimization or workplace environments, to ensure effective survey design.

- **Finding 6-1:** RAND Corporation will develop, administer, collect, and analyze data for the 2014 WGRA. RAND has partnered with Westat, the same company the Bureau of Justice Statistics uses, for survey expertise assistance.

II. SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS

Organizational Structure of MCIOs and Special Victim Units

Recommendation 7: The Secretary of Defense direct Commanders and directors of the Military Criminal Investigative Organizations (MCIOs) to require non-Special Victim Unit (SVU) agents coordinate with an SVU agent on all sexual assault cases.

- **Finding 7-1:** Large civilian police agencies and MCIOs have SVUs comprised of specially trained agents experienced in responding to sexual assaults. 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.

Selection and Experience

Recommendation 8: The Secretary of Defense direct MCIO Commanders and directors to carefully select and train military agents assigned as investigators for SVUs, and whenever possible, utilize civilians as supervisory agents. MCIO Commanders and directors ensure that military personnel assigned to an SVU have the competence and commitment to investigate sexual assault cases.

- **Finding 8-1:** A best practice in civilian investigative agencies with SVUs is careful interview and selection of applicants in an effort to ensure those investigators with biases

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or a lack of interest in investigating sexual assault cases are not assigned, and those who experience “burn out” are reassigned.

- **Finding 8-2:** A best practice in the military is the assignment of civilian agents to supervise the SVU enhancing the continuity of investigations and coordination with other agencies involved in responding to sexual assault cases.
- **Finding 8-3:** Military requirements and flexibility in personnel assignments may result in an agent who did not volunteer being assigned to support a SVU or act as the lead agent on a sexual assault investigation.
- **Finding 8-4:** Both military and civilian agencies recognize the possibility of bias in their officers and investigators.

Investigator Training

Recommendation 9-A: Congress appropriate centralized funds for training of sexual assault investigations. The Secretary of Defense 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 a sufficient number of SVU agents.

Recommendation 9-B: The Secretary of Defense 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. The Secretary of Defense direct the MCIOs to also train agents against the use of language that inaccurately or inappropriately implies consent of the victim in reports.

- **Finding 9-1:** Military investigators have more robust and specialized training in sexual assault investigations compared to their civilian counterparts. The Military Services require agents assigned to SVUs to have advanced training, but the courses vary in content and emphasis.
- **Finding 9-2:** 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 agents to effectively respond to and investigate sexual assault.
- **Finding 9-3:** The MCIOs face a continual challenge of ensuring adequate funding is available to send investigators to advanced sexual assault investigation training courses.
- **Finding 9-4:** The MCIOs have a working group for sexual assault training issues.
- **Finding 9-5:** In civilian and military law enforcement communities, sometimes, bias in the terms used in documenting sexual assaults that inappropriately or inaccurately imply consent of the victim in the assault can be possible.

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Comparing Policies, Procedures, Protocols, & Oversight

MCIO Response to Sexual Assault

Recommendation 10: The Secretary of Defense direct Commanders of Military Police and Security Forces to continue to limit the role of patrol officers to protecting the crime scene, ensuring the safety and well-being of victims, and reporting all sexual assault incidents to the MCIO.

- **Finding 10-1:** Unlike patrol officers in many civilian jurisdictions, military patrol officers (military police) have no discretion regarding the handling of sexual assault reports. Military police must immediately report all incidents of sexual assault to the MCIO.

Recommendation 11: The Secretary of Defense direct the Commanders and directors of the MCIOs to authorize the utilization of Marine Corps Criminal Investigation Division (CID), military police investigators, or Security Forces investigators to assist in the investigation of some non-penetrative sexual assault cases under the direct supervision of an SVU investigator to retain oversight.

- **Finding 11-1:** DoD policy now requires that specially trained and selected MCIO investigators be assigned as the lead agents for all sexual assault cases, which has substantially increased the MCIOs' case loads. As a result, Marine Corps CID agents cannot handle any sexual assaults in violation of Article 120 of the UCMJ, including those involving an allegation of an unwanted touching with no intent to satisfy a sexual desire.

Recommendation 12: The Secretary of Defense direct the DoD Inspector General (IG) and the DoD Office of General Counsel to review the Military Services' procedures for approving MCIO agent requests to conduct pretext phone calls and text messages as well as establish a standardized procedure to facilitate MCIOs' use of this investigative technique, in accordance with law.

- **Finding 12-1:** Numerous civilian police agencies indicated that the timely use of pretext phone calls and texts were a valuable tool in sexual assault investigations, and while procedures vary, obtaining approval was not, with few exceptions, difficult or time-consuming.
- **Finding 12-2:** Civilian and military investigators and prosecutors stated that the use of pretext calls and texts were a valuable investigative tool. Each Service, however, requires different procedures to approve recorded pretext phone calls and text messages, based on

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differing interpretations of the legal standards for pretext calls. The military procedures can take several days to receive approval and the tactic becomes untimely.

Recommendation 13-A: The Secretary of Defense direct the standardization of policy regarding the requirement for MCIO agents 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 policy, that complies with law, throughout the Services.

Recommendation 13-B: The Secretary of Defense establish a procedure that grants victims immunity from military prosecution for minor collateral misconduct leading up to, or associated with, a sexual assault incident, and promulgate a list of qualifying minor offenses..

Recommendation 13-C: The Secretary of Defense direct the Joint Services Committee on Military Justice to examine whether: (a) Congress should amend Article 31(b) of the UCMJ to add an exemption to the requirement for rights advisement to a Service member who, as a result of a report of a sexual assault, is suspected of minor collateral misconduct and provide a list of what violations would qualify for this exception, (b) a definition or procedure for granting limited immunity should be implemented in the future, or (c) other legislation or policy should be adopted to address the issue of collateral misconduct by military victims of sexual assault.

- **Finding 13-1:** The majority of the civilian police agencies contacted reported they did not routinely pursue action for minor criminal behavior on the part of a victim reporting a sexual assault. They do not interrupt a victim interview to advise the victim of his or her rights for minor offenses.
- **Finding 13-2:** The Secretary of Defense acknowledges that a victim's fear of punishment for collateral misconduct is a significant barrier to reporting in the policy regarding collateral misconduct. MCIO agents interviewed reported that the requirement to stop a victim interview to advise the victim of his or her rights under Article 31(b) of the UCMJ for minor misconduct collateral to the alleged sexual assault can make the victim reluctant to continue the interview and may hinder investigation of a reported sexual assault.
- **Finding 13-3:** Under current DoD policy, Commanders have discretion to defer action on victims' collateral misconduct until final disposition of the case, bearing in mind any potential speedy trial and statute of limitations concerns, while also taking into account the trauma to the victim and responding appropriately, so as to encourage reporting of sexual assault and continued victim cooperation.
- **Finding 13-4:** All of the MCIOs document information on the misconduct in the case file which is provided to the victim's commander for action. However, the MCIOs do not follow the same practices regarding the legal requirement to advise Service members of their rights for minor collateral misconduct discussed during an interview. NCIS agents

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do not read victims reporting a sexual assault their rights for minor collateral misconduct, because NCIS only investigates felony level crimes.

- **Finding 13-5:** For the last ten years, DoD policy documents use the following list of offenses to illustrate the most common collateral misconduct in many reported sexual assaults: “underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders.”
- **Finding 13-6:** The Military Services do not support automatic immunity for minor collateral misconduct because it may create a plausible argument the victim had a motive to fabricate the allegation and could detract from good order and discipline within the unit.

Recommendation 14: The Secretary of Defense should exempt DNA examiners, and other examiners at the Defense Forensic Science Center (DFSC), from future furloughs, to the extent allowed by law.

- **Finding 14-1:** DNA and other examiners at the DDFSC/United States Army Criminal Investigation Laboratory (USACIL) were not exempted from Federal government furloughs in 2013, which resulted in delays processing evidence and conducting DNA analysis in sexual assault cases.

Reporting Information to Law Enforcement

Recommendation 15: The Secretary of Defense direct SAPRO to develop policy and procedures for Sexual Assault Response Coordinators (SARCs) to input information into the Defense Sexual Assault Incident Database (DSAID) 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 MCIOs when there is credible information the offender is identified or suspected in another sexual assault.

- **Finding 15-1:** DoD has a sexual assault case management database, DSAID, but does not currently input data on alleged offenders identified by the victim making a restricted report, as current policy prohibits collecting and storing that information. This database has the capability of obtaining information from restricted reports that could be used to identify allegations against repeat offenders.

Recommendation 16: The Secretary of Defense direct DoD SAPRO, in coordination with the Services and the DoD IG, to change restricted reporting policy to allow a victim who has made a restricted report to provide information to an MCIO agent, with a victim advocate and/or special victim counsel 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 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

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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.

- **Finding 16-1:** Some civilian police agencies allow a police officer or detective to contact a sexual assault victim without automatically triggering an investigation. The report is only investigated if the victim chooses an investigation following a discussion with the detective.
- **Finding 16-2:** DoD policy currently provides that a victim who makes a restricted report of sexual assault cannot provide information to an MCIO investigator without the report becoming unrestricted.

Oversight and Review of Sexual Assault Investigations

Recommendation 17: The Secretary of Defense direct an audit of sexual assault investigations by persons or entities outside DoD specifically qualified to conduct such audits.

- **Finding 17-1:** Outside agencies conduct audits of investigations in several civilian police agencies the Subcommittee examined as a means to ensure transparency and confidence in the police response to sexual assault.
- **Finding 17-2:** There is currently no procedure for an entity outside DoD to review sexual assault investigations to ensure cases are appropriately investigated and classified.

Milestones in the Investigative Process including Case Determinations and Reports

Recommendation 18: The Secretary of Defense direct MCIOs to standardize their procedures and coordinate cases with the trial counsel (prosecutor) to review evidence in cases to ensure all appropriate investigation has taken place before issuing a report to the appropriate commander for a disposition decision. Neither the trial counsel nor the MCIO agent should opine on whether there is probable cause the suspect committed the offense.

- **Finding 18-1:** 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 FY12, the trial counsel, acting in coordination with CID, determined that 25 percent 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.

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- **Finding 18-2:** 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.

Recommendation 19-A: The Secretary of Defense direct Commanders and the directors of the MCIOs to adopt Uniform Crime Reporting (UCR) case determination standards. Only those reports determined to be false or baseless should be unfounded.

Recommendation 19-B: The Secretary of Defense direct the Secretaries of the Military Services to shift the decision to unfound allegations from the commander to the MCIOs, who should coordinate with trial counsel and apply the UCR standard for case determination.

- **Finding 19-1:** While DoD uses the same definition to unfound an allegation of sexual assault as the FBI's UCR Handbook, used by all civilian law enforcement agencies, the Subcommittee heard evidence that the MCIOs incorrectly apply the standard and the Military Services use different definitions.
- **Finding 19-2:** The Army Criminal Investigation Command (CID) unfounds an allegation of sexual assault by determining there is no probable cause to believe the offender committed the offense, in consultation with the trial counsel, prior to providing the investigation to a commander for action. In the Navy, Coast Guard, and Air Force, the Commander decides to unfound an allegation.

Sexual Assault Forensic Examinations

Recommendation 20: The Secretaries of the Military Services direct their Surgeons General to review the National Defense Authorization Act for Fiscal Year 2014 (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) and provide recommendations on the most effective way to provide Sexual Assault Forensic Examinations (SAFE) at their facilities.

- **Finding 20-1:** In civilian jurisdictions, specially trained nurses or other trained health care providers perform SAFE. 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.
- **Finding 20-2:** The provisions of the FY14 NDAA which require all military treatment facilities with a 24 hour, seven days a week emergency room capability maintain a SANE, is overly prescriptive. Depending on the location, many civilian medical facilities

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have more experienced SANEs than are typically located on a military installation and also serve as the community's center of excellence for SAFEs.

Recommendation 21: The Secretary of Defense direct the appropriate agency to eliminate the requirement to collect plucked hair samples from sexual assault victims as part of a SAFE.

- **Finding 21-1:** Many civilian agencies no longer collect plucked hairs as part of a SAFE kit as there is little, if any, probative value to that material. The Director of DFSC/USACIL agrees there is no need to collect these samples.

Recommendation 22: The Secretary of Defense direct the Military 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.

- **Finding 22-1:** The Department of Justice national guidelines form the basis for SAFE training in the military and civilian communities; however, the Military Services instituted different programs and developed guidelines independently.

III. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

Civilian Prosecutor Training and Experience and Overall Assessment of Military Counsel Training

Recommendation 23: 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 adult sexual assault cases. The working group should produce a concise written report, delivered to the Service TJAGs at least annually, for the next five calendar years.

The working group should identify best practices, strive to eliminate redundancy, consider consolidated training, and monitor training and experience throughout the Military Services. The working group should review training programs such as: the Army's Special Victim Prosecutor (SVP) program; the Navy's 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.

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- **Finding 23:** Currently, all the Military Services send members to training courses and JAG schools of the other Services. This enables counsel to share successful tactics, strategies, and approaches.

Recommendation 24: The Service Judge Advocates General (TJAGs) and the Staff Judge Advocate to the Commandant of the Marine Corps sustain or increase funding for training of judge advocates in order to maintain the expertise necessary to litigate adult sexual assault cases in spite of the turnover created by personnel rotations within the Judge Advocate Generals (JAG) Corps of each Military Service.

- **Finding 24-1:** 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.
- **Finding 24-2:** Civilian sex crimes prosecutors usually have at least three years of prosecution experience, 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.
- **Finding 24-3:** All the Military 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 Military Services are also trained; many previously served as trial counsel.

Advanced and Specialized Training of Military Prosecutors

Recommendation 25-A: The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps study the Navy's Military Justice Litigation Career Track (MJLCT) 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.

Recommendation 25-B: 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 adult sexual assault crimes.

- **Finding 25-1:** Trial counsel in all the Military Services generally have more standardized and extensive training experience, but fewer years of prosecution and trial experience, than some of their civilian counterparts. The Military Services all use a combination of

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experienced supervising attorneys, systematic sexual assault training, and smaller caseloads to address experience disparities. Additionally, the Navy has developed the MJLCT for its attorneys.

- **Finding 25-2:** The Military Services informally share resources, personnel, and lessons for training, and do collaborate on some training.

Military Defense Counsel Advanced/Specific Sexual Assault Training

Recommendation 26: The Secretaries of the Military Services direct that current training efforts and programs be sustained to ensure that military defense counsel are competent, prepared, and equipped.

- **Finding 26-1:** Defense counsel handling adult sexual assault cases in all the Military Services receive specialized training.

Recommendation 27: The Secretary of Defense direct the Service TJAGs and Staff Judge Advocate to the Commandant of the Marine Corps permit only counsel with litigation experience to serve as defense counsel as well as set the minimum tour length of defense counsel at two years or more so that defense counsel can develop experience and expertise in defending complex adult sexual assault cases.

- **Finding 27-1:** Defense experience is difficult to develop due to tour lengths, which are as short as 12-18 months, and the relatively low number of courts-martial in the military today.
- **Finding 27-2:** Not all military defense counsel possess trial experience prior to assuming the role of defense counsel.

Recommendation 28: The Service TJAGs 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.

- **Finding 28-1:** Some defense counsel told the Response Systems Panel and the Subcommittee that because they do not have independent budgets, their training opportunities were insufficient and unequal to those of their trial counsel counterparts.

Best Practices in Training Prosecution and Defense Counsel

Recommendation 29: The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps continue to fund and expand programs that provide a permanent civilian

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presence in the training structure for both trial and defense counsel. The Military Services should continue to leverage experienced military Reservists and civilian attorneys for training, expertise, and experience to assist the defense bar with complex cases.

- **Finding 29-1:** 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 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.

Recommendation 30: The Service TJAGs and Staff Judge Advocate to the Commandant of the Marine Corps consider implementing a system similar to the Navy’s quarterly evaluations of counsel’s advocacy to ensure effective training of counsel.

- **Finding 30-1:** 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 Trial Counsel Assistance Program (TCAP) for use in training plans. The other Military Services do not similarly measure and assess performance following advanced training.

Training of Military Judges

Recommendation 31: 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.

- **Finding 31-1:** Military judges participate in joint training at the Army’s The Judge Advocate General’s Legal Center and School. The recommendations for an enhanced role of military judges noted elsewhere in this report may necessitate increased funding for training of judges.

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IV. PROSECUTION AND DEFENSE OF SEXUAL ASSAULT CASES

A. Organization of Prosecution Offices and the Multidisciplinary Approach

Co-locating Prosecutors, Investigators, and Victim Support Personnel

Recommendation 32-A: The Secretaries of the Military Services direct that the TJAGs 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 Subcommittee does not recommend that the SARC, victim advocate, Special Victim Counsel or other victim support personnel be merged into the offices of prosecutors and investigators.

Recommendation 32-B: The Secretary of Defense 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.

- **Finding 32-1:** The 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 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.
- **Finding 32-2:** 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 pierce privileges for military victim advocates or cause other perception problems.

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Special Prosecutors in the Military's Special Victim Capability

Recommendation 33-A: 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.

Recommendation 33-B: The Secretary of Defense and Service Secretaries should not require special victim prosecutors to handle every sexual assault case regardless of where the offense falls along the continuum of sexual assault severity or complexity. 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.

Recommendation 33-C: The Secretary of Defense should direct the Directive Type Manual (DTM) 14-003, the policy document that addresses the Special Victim Capability, be revised so that definitions of “covered offenses” accurately reflect specific offenses currently listed in Article 120 of the UCMJ.

Recommendation 33-D: The Secretary of Defense require standardization of Special Victim Capability duty titles to reduce confusion and enable comparability of Service programs, while permitting the Secretaries of the Military Services to structure the capability itself in a manner that fits each Service's organizational structure.

- **Finding 33-1:** The Military Services have implemented the Special Victim Capability (SVC) Congress mandated in the NDAA FY13 and the Subcommittee is optimistic about this approach.
- **Finding 33-2:** Using the definitions in the UCMJ will clarify responsibilities and improve resource allocation. The generic terms in the DTM could be interpreted to exclude some current offenses that should be counted as sexual assaults or include conduct that is not a specific offense in the UCMJ.

Sustaining the Special Victim Prosecutor Capability

Recommendation 34: 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.

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- **Finding 34-1:** DoD has dedicated an immense amount of 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.
- **Finding 34-2:** The Military Services fully fund special prosecutors' case preparation requirements.

Recommendation 35: 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 to include measurements such as the victim “drop out” rate, rather than conviction rates, as a measure of success. Congress should consider more than conviction rates to measure the effectiveness of military prosecution of sexual assault cases, which often pose inherent challenges.

- **Finding 35-1:** DoD established 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.” The DoD evaluation criteria include:
 - Percentage of SVC 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 SVC 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 SVC topic areas; and
 - Victim feedback on the effectiveness of SVC prosecution and legal support services and recommendations for possible improvements

In addition to the DoD criteria, the Army uses the victim “drop out” rate to also measure the effectiveness of the SVP program. Since the Army established the SVP 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.

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Prosecutors' Initial Involvement in Sexual Assault Cases

Recommendation 36: The Secretary of Defense maintain the requirement for an investigator to notify the legal office of an unrestricted sexual assault report within 24 hours, and for the special prosecutor to consult with the investigator within 48 hours, and monthly, thereafter. Milestones should be established early in the process to insert the prosecutor into the investigative 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.

- **Finding 36-1:** 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.
- **Finding 36-2:** Military special prosecutors told the Subcommittee they 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.

B. Defense Counsel Organizational Structure

Military Trial Defense Structure and Budget

Recommendation 37-A: The Service Secretaries ensure military defense counsel organizations are adequately resourced in funding and personnel, including defense supervisory personnel with experience comparable to their prosecution counterparts, and direct the Services assess whether that is the case.

Recommendation 37-B: The Military Services continue to provide experienced defense counsel through regional defense organizations and from personnel with extensive trial experience and expertise in the Reserve component.

- **Finding 37-1:** 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.
- **Finding 37-2:** DoD did not establish defense capabilities analogous to the Special Victim Capability in the military trial defense organizations.
- **Finding 37-3:** Unlike many civilian public defender offices, military defense counsel organizations generally do not maintain their own budget and instead, receive funding from the convening authority, their Service legal commands, or other sources.

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- **Finding 37-4:** 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 Military Services' regionally organized trial defense systems meet the demand for competent and independent legal representation of Service members accused of sexual assault.

Defense Investigators

Recommendation 38: 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.

- **Finding 38-1:** Many civilian public defender offices have investigators on their staffs, and consider them critical to the defense function. 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.
- **Finding 38-2:** Military defense counsel need independent, deployable defense investigators in order to zealously represent their clients and correct an obvious imbalance of resources. Defense investigators are such a basic and critical defense resource, the Subcommittee finds they are required for all types of cases, not just sexual assault cases.

Measuring the Effectiveness of Military Defense Counsel

Recommendation 39: The Secretary of Defense direct the Services to assess military defense counsel's performance in sexual assault cases and identify areas that may need improvement.

- **Finding 39-1:** There are currently no requirements for the Military Services to measure military defense counsel's performance trying sexual assault cases; the Subcommittee is unaware of any effort on the Services' part to do so.

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C. Victims' Rights and Special Victim Counsel Impact on the Judicial Process

Trial Counsel Role in Ensuring Military Crime Victim Rights

Recommendation 40: 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 court-martial, requiring military judges to inquire, on the record, whether trial counsel complied with statutory and policy requirements.

- **Finding 40-1:** Congress and the Military Services established the right of military crime victims to confer or consult with trial counsel at several points in the judicial process. 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.

Assessment of Special Victim Counsel Interaction with Trial and Defense Counsel

Recommendation 41: In addition to assessing victim satisfaction with Special Victim Counsel, the Service Secretaries direct assessments by Staff Judge Advocates, prosecutors, defense counsel, and investigators in order to evaluate the effects of the Special Victim Counsel Program on the administration of military justice.

- **Finding 41-1:** Military trial and defense counsel, SARCs, and victim advocate personnel reported to the Subcommittee that they have positive working relationships with Special Victim Counsel. Some counsel, however, foresee potential issues, such as privilege, confidentiality, or delays, when the government and victim's interests do not align.

Victims Protection Act (VPA) of 2014, Section 3(b)

Recommendation 42: Congress should not enact Section 3(b) of the VPA.

- **Finding 42-1:** The decision whether civilian or military authorities will prosecute a particular case when they share jurisdiction is routinely negotiated. The Subcommittee 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.
- **Finding 42-2:** The Victims Protection Act of 2014, Section 3(b), would provide the victim the opportunity to express a preference, which should be afforded great weight in the determination whether to prosecute an offense by court-martial or by a civilian court. If

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the civilian jurisdiction declines to prosecute, the victim must be informed. Jurisdiction, however, is based on legal authority, not necessarily the victim's preferences.

D. Initial Disposition and Charging Decisions

The Scope of Article 120 of the UCMJ

Recommendation 43: The Judicial Proceedings Panel 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.

- **Finding 43-1:** Military and civilian jurisdictions categorize crimes referred to generically as “sexual assault” in different ways. Criminal sexual conduct under Article 120 of the UCMJ spans a broad spectrum 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. In contrast, ‘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.

Charging Discretion in Sexual Assault Cases

Findings 44

- **Finding 44-1:** Both civilian and military prosecutors exercise broad discretion in drafting sexual assault charges. Although in military sexual assault cases, special or general court-martial convening authorities determine how to dispose of an allegation, military prosecutors determine the proper charges, draft the charges for the commander, and recommend appropriate disposition.
- **Finding 44-2:** Civilian prosecutors face the same initial disposition decisions as trial counsel and military commanders. The Department of Justice United States Attorney’s Manual requires that in cases where the prosecutor has probable cause to believe that a person committed a Federal offense within his or her jurisdiction, the prosecutor should consider whether to request further investigation, commence prosecution, or decline prosecution with or without alternate dispositions. Similarly, the trial counsel advises the commander who considers whether to request further investigation, commence or decline prosecution, or pursue an alternate disposition in the case.
- **Finding 44-3:** If a special or general court-martial convening authority consults with his or her legal advisor and decides that a sexual assault allegation does not warrant trial by court-martial because there is insufficient evidence or the act does not constitute a sexual assault, there are numerous adverse action options available to hold offenders appropriately accountable, such as nonjudicial punishment, separation from the Service,

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or letters of reprimand. Commanders very rarely choose nonjudicial punishment or other administrative adverse actions to dispose of penetrative sexual assault offenses. The misperception that commanders use options other than courts-martial to dispose of allegations of penetrative offenses may be due to the breadth of conduct categorized as “sexual assault” under the UCMJ.

E. The Military Judge’s Role in the Military Justice System

Comparing Military and Civilian Judges’ Pretrial Role

Recommendation 45-A: Military judges should be involved in the military justice process from preferral of charges or imposition of pretrial confinement, whichever is earlier, to rule on motions regarding witnesses, experts, victims’ rights issues, and other pre-trial matters. The Secretary of Defense recommend the Congress enact legislation to amend the UCMJ, the President enact changes to the Manual for Courts-Martial, and Service Secretaries implement appropriate regulations to increase the authority of military judges over the pre-trial process to enhance fairness, efficiency, and public confidence.

Recommendation 45-B: Military judges rule on defense requests for witnesses, experts, documents or other evidence, such as testing of evidence, or other pre-trial matters. The defense counsel would no longer be required to request witnesses or other evidence through the trial counsel or convening authority and would allow an *ex parte* procedure in appropriate circumstances.

Recommendation 45-C: The Secretary of Defense propose amendments to the Manual for Courts-Martial (MCM) and the UCMJ to authorize the military judge to issue subpoenas to secure witnesses, documents, evidence, or other assistance to effectively carry out additional duties recommended with *ex parte* procedures as appropriate that will allow the defense the opportunity to subpoena witnesses through the military judge, without disclosing information to the trial counsel or convening authority to the President and Congress, accordingly.

Recommendation 45-D: The Secretary of Defense propose amendments to the MCM and UCMJ to increase the authority of the military judge over the Article 32 preliminary hearing to the President and Congress, accordingly. Military judges should preside over preliminary hearings in their capacity as military judges, not as hearing officers. The military judge’s finding that the government failed to establish probable cause should be binding and result in dismissal of charges without prejudice. A finding that the government established probable cause should be forwarded to the appropriate convening authority for his or her decision on an appropriate disposition of the charges.

Recommendation 45-E: 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.

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Recommendation 45-F: The Secretaries of the Military Services assess additional resources necessary to carry out the changes increasing the authority of the military judge, including whether a cadre of designated magistrates or judges should perform these functions.

The Judge's Role

- **Finding 45-1:** 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.
- **Finding 45-2:** Giving military judges an enhanced role in pre-trial proceedings would affect the prosecution of all cases, not only sexual assaults.

Defense Requests for Witnesses, Evidence or Other Matters

- **Finding 45-3:** Military defense counsel are currently required to 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.
- **Finding 45-4:** This practice requires defense counsel to disclose more information to the trial counsel sooner than their civilian counterparts in public defender offices, requires them to reveal confidential information about defense witnesses and theory of the case in order to justify the requests, and stymies defense counsel's duty and ability to provide constitutionally effective representation to their clients.
- **Finding 45-5:** 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.

Subpoena power

- **Finding 45-6:** Some public defenders have subpoena power. Military defense counsel do not have subpoena power. In contrast, military trial counsel have nationwide subpoena power with rare judicial oversight.

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Changes to the Pretrial Investigation under Article 32 of the UCMJ

- **Finding 45-7:** In Section 1702 of the FY14 NDAA, Congress enacted substantial changes to the Article 32 pretrial investigation, transforming it, in some respects, 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.
- **Finding 45-8:** Subcommittee site visits revealed varying approaches to victim testimony before trial in civilian jurisdictions. 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.

F. Referral

Review of Referral Decisions

Recommendation 46-A: Congress repeal FY14 NDAA, Section 1744, which requires a Convening Authority's decision *not* to refer certain sexual assault cases be reviewed by a higher GCMCA 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.

Recommendation 46-B: Congress not enact Section 2 of the VPA, which would 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 one of these sexual assault cases. The SJA is the GCMCA'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

- **Finding 46-1:** FY14 NDAA, Section 1744, and pending language in the Victim's Protection Act (VPA), may place inappropriate or illegal pressure to aggressively prosecute sexual assault cases by requiring the higher GCMCA, or in some cases, the Service Secretary review the convening authority's decision not to refer a case with an allegation of rape, sexual assault, forcible sodomy, or attempts to commit those offenses. 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 will review the case file; (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 would review the case file. The VPA, Section 2, adds to this elevated review by requiring 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 one of these sexual assault cases.

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- **Finding 46-2:** The likely impact of establishing an elevated review of the convening authority's decision not to refer certain sexual assault cases is deterring the convening authority from exercising his/her independent professional judgment when making the decision whether to refer a case. The elevated review may 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 prosecutorial decisions because they have the advice of their SJA, 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 GCMCA or Service Secretary. The Service Secretaries lack both an established criminal law support structure and the experience and training to make these difficult prosecutorial decisions.

Written Declination Procedures

Recommendation 47: If Congress does not repeal FY14 NDAA Section 1744, 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 Department of Defense 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.

- **Finding 47-1:** 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 FY14 NDAA requires a superior authority review of the non-referral decision by examining the case file, which must include a written statement explaining the convening authority's decision not to refer any charges for trial by court-martial. DoD has not published any guidance to date as to what that declination memorandum must contain or who must write the letter.
- **Finding 47-2:** 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. When civilian government offices decline to prosecute a case, there usually is no other alternate disposition or adverse action taken against the suspect.
- **Finding 47-3:** There are no formal requirements for military investigators, judge advocates, or commanders to provide written opinions or justifications when declining to pursue criminal cases in the military, including allegations of sexual assault, at any stage in the trial process. Staff Judge Advocates provide written advice to the convening

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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.

G. Plea Negotiations

Recommendation 48: CSS is considering whether to suggest a change or further study. The Subcommittee is still considering whether to recommend a change to, or further study of, the military plea bargaining process, which departs from civilian practices and may undermine victim confidence in the sentencing process. Final recommendation will be provided in the CSS written report.

- **Finding 48-1:** In civilian jurisdictions, most plea agreements between the prosecutor and defendant are for an agreed upon sentence and the military judge accepts or rejects that agreement in entirety. There are some jurisdictions where the plea deal consists of an agreement to a sentence within a range; the judge then determines the exact sentence within that range.
- **Finding 48-2:** 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. Historically, this practice developed based on the special nature of the role of the convening authority and clemency opportunities. Other changes in the system may raise the question of whether the plea agreement process should be tailored to be more similar to the majority of civilian jurisdictions.
- **Finding 48-3:** In most military sexual assault cases, the accused pleads not guilty due to both evidentiary challenges or issues in proving sexual assault beyond a reasonable doubt and the requirement to register as a sex offender if convicted. In fiscal year (FY) 2013, the accused pled not guilty in 70% of the Army’s sexual assault cases and 77% of the Navy’s sexual assault cases.
- **Finding 48-4:** 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.

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H. Military Panel Selection & Voir Dire

Recommendation 49-A: 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 (military jurors) nor present inaccurate legal information.

Recommendation 49-B: The military judiciary ensure that military judges continue to appropriately control the line of questioning during voir dire to decrease the difficulty in seating panels. Military judges should continue to exercise their authority to control the scope of questioning during voir dire, which both allows counsel to gain the information required to exercise challenges intelligently and the court to seat a fair and impartial panel. By taking a more active role, the military judge can ensure there are no preconceived notions, prejudices, impressions or misleading questions from counsel.

- **Finding 49-1:** Evidence presented to the Subcommittee reveals that 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.

I. Character Evidence

Recommendation 50: Enacting Section 3(g) of the VPA may increase victim confidence. Further changes to the military rules of evidence regarding character evidence are not necessary at this time.

- **Finding 50-1:** 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 as a pertinent character trait.
- **Finding 50-2:** There may be a misperception surrounding the manner by which character evidence may be introduced in courts-martial. The use of character evidence in courts-martial has led to implications that a well-decorated military member will be given deference due to his or her military medals and career.
- **Finding 50-3:** Congress attempted to eliminate the consideration of the accused's military service by adjusting the factors Commanders should consider when making disposition decisions. Section 1708 of the FY14 NDAA ordered a non-binding provision in the Manual for Courts-Martial amended to "strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense," but it does not actually prohibit the commander from considering this factor.

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The change may not affect charging or disposition decisions in sexual assault or other cases.

- **Finding 50-4:** Section 3(g) of the VPA proposes to modify Military Rule of Evidence 404(a), regarding the character of the accused. The provision attempts to prevent the use of the accused’s general military character from being admissible to show the probability of the accused’s innocence. However, the proposal exempts evidence of military character when relevant to an element of an offense for which the accused has been charged, and relevant character evidence will continue to be admissible as long as the attorneys lay the proper foundation. While Section 3(g) of the VPA may increase victim confidence by attempting to eliminate the “Good Soldier Defense,” the Subcommittee does not anticipate that it will result in any significant change to current practice at trial.

J. Prosecution and Conviction Rates

Data Currently Collected and Reported by the Military Serves

Recommendation 51-A: The Secretary of Defense direct the Service Secretaries to use a single, standardized methodology to calculate prosecution and conviction rates. The Subcommittee 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. The chart below illustrates the Subcommittee’s suggested methodology.

Recommendation 51-B: Once the Military Services standardize definitions, procedures, and calculations for reporting prosecution and conviction rates in sexual assault cases, the Secretary of Defense direct a study of prosecutorial decision making in sexual assault cases by a highly qualified expert in the field.

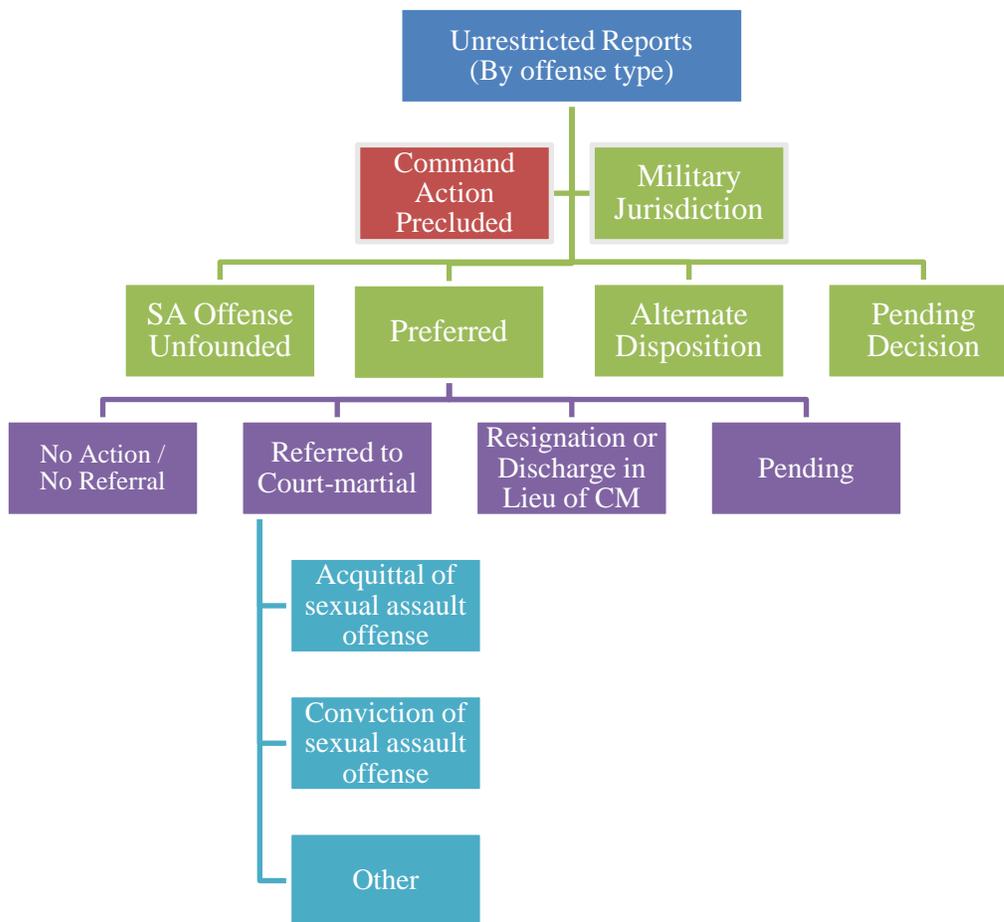
The Secretary of Defense direct the study to assess the following:

- the rate at which the Services unfound sexual assault reports using the Uniform Crime Reporting definition and the characteristics of such cases in order to determine whether any additional changes to policies or procedures are warranted;
- the rate at which referral of cases to courts-martial against the advice of the Article 32 investigating or hearing officer resulted in acquittal or conviction (unless and until our recommendation to make the Article 32 decision-maker a military judge whose probable cause decision is binding is implemented); 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.

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- Finding 51-1:** There are no standardized methods that DoD and the Military Services currently use to calculate prosecution or conviction rates in sexual assault or other cases. The Military Services use different procedures and definitions, making meaningful comparisons of prosecution and conviction rates for sexual assault across the Military 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.

The CSS recommended methodology is:



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“Substantiated” Sexual Assault Cases in Military Service Reports to Congress

Recommendation 52: Congress enact legislation to amend Section 1631(b)(3) of the NDAA FY11 and the related provisions in NDAA FY12 and NDAA FY13 to require the Service Secretaries provide the number of “unfounded cases,” 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.

- **Finding 52-1:** DoD and the Military 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.
- **Finding 52-2:** Section 1631 of the NDAA FY11 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.

Comparing Military and Civilian Prosecution Statistics

Recommendation 53: Congress and the Secretary of Defense should not measure success solely by comparing military and civilian prosecution and conviction rates.

- **Finding 53-1:** Civilian and military prosecution rates are not comparable because of differences in the systems 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.
- **Finding 53-2:** National data collection in the UCR 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 also collects data and 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.

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V. Sentencing and Clemency Draft Findings and Recommendations

Sentencing Data

Recommendation 54: 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, in order to: (1) conduct periodic assessments, (2) identify sentencing trends or disparities, or (3) address other relevant issues. This information should also be available to the public.

- **Finding 54-1:** 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 DSAIDS, for example) are modified to include sentencing information, it would not be overly burdensome for the Services to provide this data to DoD.

Recommendation 55: The Secretary of Defense direct the Military Services to release sentencing outcomes on a monthly basis to increase transparency and promote confidence in the system.

- **Finding 55-1:** 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.

Sentencing by Panel Members

Recommendation 56: The Secretary of Defense recommend amendments to the MCM, the UCMJ, and Service regulations to make military judges the sole sentencing authority in sexual assault and other cases in the military justice system to the President, Congress, and Service Secretaries, respectively.

- **Finding 56-1:** 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.

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Sentencing Guidelines

Recommendation 57: The Subcommittee does not recommend the military adopt sentencing guidelines in sexual assault or other cases at this time. Rather, the Subcommittee recommends enhancing the military judge’s role in the military justice system, including in sentencing decisions.

- **Finding 57-1:** There are no sentencing guidelines in the military justice system for sexual assault or any other offense. Instead, the President, exercising his authority under the UCMJ, establishes 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.
- **Finding 57-2:** 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. These agencies are long standing because they are critical to managing the sentencing guidelines.
- **Finding 57-3:** 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.
- **Finding 57-4:** A proper assessment of whether the military should adopt some form of sentencing guidelines in sexual assault or other cases requires in depth study beyond the time and resources of the Subcommittee.
- **Finding 57-5:** The Subcommittee 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 Subcommittee 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.

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- **Finding 57-6:** 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 voluntariness 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.

Mandatory Minimum Sentences

Recommendation 58: Congress not enact further mandatory minimum sentences in sexual assault cases at this time.

- **Finding 58-1:** Mandatory minimum sentences remain controversial. Testimony and other evidence the Subcommittee gathered from civilian prosecutors, civilian defense counsel, and two victim advocacy organizations demonstrates that mandatory minimum sentences do not prevent or deter adult sexual assault crimes, increase victim confidence, or increase victim reporting. On the other hand, victim groups in certain jurisdictions, such as New York, support mandatory minimums for felony level sexual assaults and seek to increase current mandatory minimums.
- **Finding 58-2:** 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.

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- **Finding 58-3:** 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.”

Clemency Opportunities and Changes to Article 60

Recommendation 59: 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 adjudged forfeitures.

- **Finding 59-1:** 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.
- **Finding 59-2:** The impact of the changes to Article 60 of the UCMJ are not fully known at this time. However, one potential unintended consequence may be that the convening authority may no longer provide relief from forfeitures of pay to dependents of convicted Service members. Another unclear application of the amendments 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 the sentence.
- **Finding 59-3:** Post-trial relief may be effectively foreclosed for convicted Service members who do not receive punitive discharges or confinement for more than one year. Those Service members have limited access to appellate review, with the only avenue a review by the Office of The Judge Advocate General pursuant to Article 69 of the UCMJ.

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Unitary Sentencing Practice

Recommendation 60: The Secretary of Defense 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.

- **Finding 60-1:** 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. However, the FY 14 NDAA changes to Article 60 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, UCMJ even though convictions for these offenses often occur with convictions for other non-sexual offenses. Thus, the practice of awarding a sentence as a total, rather than specified by each offense of conviction, makes the convening authority's ability to act on these additional specifications unclear, obscures the punitive consequences of specified offenses, and makes accountability for sexual assault difficult to ascertain.