



Sexual Assault Accountability and Investigation Task Force

April 30, 2019

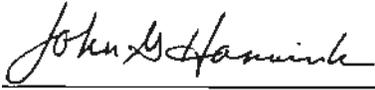
We, the appointed leads of the Task Force on Sexual Assault Accountability and Investigation, hereby submit the results of our findings and recommendations.



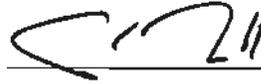
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Executive Summary

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 ongoing 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. Camille 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

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 fulfillment 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



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.

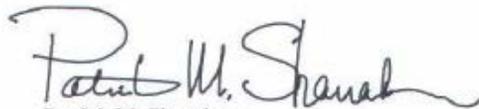
The SAAITF shall be further comprised of senior level or equivalents of the Military Criminal Investigative Organizations, a representative from the Office of the DoD General Counsel, and the Director of the DoD Sexual Assault Prevention and Response Office. Additional members of this task force shall 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 NDAA's.

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
	<p>Four new offenses:</p> <ul style="list-style-type: none"> - 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	<p>Judges empowered to rule/act on the following pre-referral:</p> <ul style="list-style-type: none"> - 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
<i>Subpoena duces tecum</i> authority available only post referral to compel evidence for Art 32	New investigative <i>subpoena duces tecum</i> 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
<p>2/3 majority (For <10 yrs confinement and portions of sentence other than confinement or death)</p> <p>3/4 majority (For >10 yrs confinement)</p> <p>Unanimous (Capital)</p>	<p>3/4 majority (Non-Capital)</p> <p>Unanimous (Capital)</p>
Sentencing	Sentencing
<p>Default:</p> <p>If MJ Alone – MJ determines sentence</p> <p>If panel on findings – panel determines sentence and unitary sentence for all charges and specifications</p> <p>Accused may appeal the sentence as either illegal or inappropriate</p>	<p>Default:</p> <ul style="list-style-type: none"> - 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	<ul style="list-style-type: none"> - 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)	<p>Members of the reserve component subject to the UCMJ:</p> <ul style="list-style-type: none"> - 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>.