

Excerpts from the
Report by the
Comparative Systems
Subcommittee (CSS)
of the RSP Pertaining
to the SVIP Capability

IV. OVERVIEW OF THE MULTIDISCIPLINARY APPROACH TO RESPOND TO REPORTS OF SEXUAL ASSAULT

A. THE VICTIM CENTRIC MULTIDISCIPLINARY APPROACH

The best practice in both the civilian sector and military community is to take a multidisciplinary approach to responding to incidents of sexual assault. This requires communication and cooperation of law enforcement personnel, medical professionals, victim advocates and victims' counsel, prosecutors, paralegals, and other agencies in the community who provide support to sexual assault victims. Some civilian communities have created a Sexual Assault Response Team made up of various response personnel, including a single coordinator for victim support services, non-profit victim advocates, law enforcement representatives, prosecutors (who may also have victim advocates within their offices), and medical personnel. Figure 1 depicts how the military's response system is centered on the victim. The participants include: (1) the command and unit leadership, (2) the Sexual Assault Response Coordinator (SARC) and victim advocate, (3) the Special Victim Counsel and legal assistance counsel provided by the military, (4) medical care and behavioral health services personnel, chaplains, and social services on and off post, (5) and those who are part of the Special Victim Capability, the Special Victim Unit Investigator, Special Victim Prosecutor, and the Victim Witness Liaison who works in concert with the SJA and prosecutor's office.

Figure 1. The Multidisciplinary Approach to Victim Support¹⁷⁰



170 This diagram is an adaptation from a similar graphic provided by the Marine Corps in response to Request for Information 21. See Marine Corps' Response to Request for Information 21 (Nov. 21, 2013), at 400419, *currently available at* http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q21.pdf.

B. THE SPECIAL VICTIM CAPABILITY IN THE MILITARY

“The [Special Victim Capability (SVC)] represents a multidisciplinary, coordinated approach to victim support and offender accountability.”¹⁷¹ DoD policy states that “[a]t a minimum, the SVC will provide for specially trained prosecutors, victim witness assistance personnel, paralegals, and administrative legal support personnel who will work collaboratively with specially trained MCIO investigators.”¹⁷² It also requires that the “[d]esignated Special Victim Capability personnel will collaborate with local Military Department SARC, sexual assault prevention and response victim advocates (SAPR VAs), family advocacy program managers (FAPMs), and domestic abuse victim advocates (DA VAs) during all stages of the investigative and military justice process to ensure an integrated capability, to the greatest extent possible.”¹⁷³

While funding and requirements are legislated, implementation of Special Victim Capabilities is left for each Service to tailor programs to specific needs of their Service culture. “The Department’s collective capability is presented uniquely in each Military Service,”¹⁷⁴ as established in the table below:¹⁷⁵

Table 6

Army	23 Special Victim Prosecutors dedicated to handling sexual assault and family violence cases. Army SVPs work with CID special investigators and Special Victim Unit (SVU) investigative teams at over 65 installations worldwide to investigate and prosecute special victim offenses. The Army has also retained several Highly Qualified Experts (HQEs) who have served as civilian criminal prosecutors to provide training, mentorship, and advice to judge advocates and CID special investigators across the globe.
Air Force	16 Senior Trial Counsel, including 10 who are members of the SVU, working alongside 24 Air Force Office of Special Investigations (AFOSI) special investigators located at 16 Air Force installations with a high number of reported sexual offenses. The Air Force has also established a reach-back capability situated at Joint Base Andrews, Maryland, which is comprised of the AFOSI Sexual Assault Investigation and Operations Consultant and the JAG Corps SVU Chief of Policy and Coordination, who provide expert assistance for investigators and judge advocates in the field.

171 U.S. DEP’T OF DEF., REPORT TO THE COMMITTEES ON ARMED SERVICES OF THE U.S. SENATE AND U.S. HOUSE OF REPRESENTATIVES, ESTABLISHMENT OF SPECIAL VICTIM CAPABILITIES WITHIN THE MILITARY DEPARTMENTS TO RESPOND TO ALLEGATIONS OF CERTAIN SPECIAL VICTIM OFFENSES 3 (Dec. 2013) [hereinafter DoD SVC REPORT], available at http://www.sapr.mil/public/docs/reports/DoD_SpecialVictimsCapabilities_Report_20131213.pdf

172 U.S. DEP’T OF DEF. DIRECTIVE-TYPE MEMORANDUM [hereinafter DTM] 14-003, DoD IMPLEMENTATION OF SPECIAL VICTIM CAPABILITY (SVC) PROSECUTION AND LEGAL SUPPORT Attachments 3, 4 (Feb. 12, 2014).

173 *Id.*

174 DoD SVC REPORT, *supra* note 171, at 8-9.

175 Data for the chart was provided by the Services. See Services’ Response to Request for Information 50 (Nov. 21, 2013).

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Navy	9 regional-based Senior Trial Counsel who collaborate with Naval Criminal Investigative Service (NCIS) special investigators to investigate, review, and prosecute special victim cases. The Navy has also created a Trial Counsel Assistance Program (TCAP) with case review and prosecution reach-back and support. TCAP attorneys can also be detailed to prosecute complex cases. The Navy also has several civilian and highly qualified expert positions, through which civilian attorneys with extensive prosecution experience provide assistance to trial counsel in complex and sexual assault cases and specialized training.
Marine Corps	Specially qualified, geographically-assigned Complex Trial Teams led by a seasoned Regional Trial Counsel providing the special victim prosecutorial expertise and support. The Marine Corps has also established HQE positions, through which civilian attorneys with extensive litigation and court-martial experience provide assistance to trial counsel in complex and sexual assault litigation. Marine Corps judge advocates will also team with NCIS special investigators in special victim cases. Furthermore, the Marine Corps recently increased the opportunity for its judge advocates to receive graduate-level education in criminal law.

C. THE PERSONNEL WHO PARTICIPATE IN THE RESPONSE SYSTEMS TO SEXUAL ASSAULT

1. The Need for Standardized Terminology

The Subcommittee recognizes the importance of the Services maintaining the discretion to implement the SVC to meet the structure of their force and resource requirements. However, there are fundamental aspects of the system which should be standardized, including nomenclature of personnel positions created by the Special Victim Capability. Like civilian jurisdictions which vary naming conventions from jurisdiction to jurisdiction, each Service uses varied terms to describe its personnel. Naming of victim advocate and support personnel, prosecuting attorneys, attorneys who represent victims in the criminal process, police department sexual assault investigators, and in-house investigators should be standardized across DoD to prevent confusion, redundancy, and inefficiency.

For the purpose of this report, the Subcommittee uses the following nomenclature to refer to civilian and military personnel:

- **SART** – Sexual Assault Response Team. An Interagency team of individuals working to provide services for the community by offering specialized sexual assault intervention services. In the military, this will include the SARC, victim advocate, special victim counsel, and medical personnel to include SANEs.
- **SARC** – Sexual Assault Response Coordinator. The individual who coordinates and refers victims to the appropriate services.
- **SANE** – Sexual Assault Nurse Examiner. SANEs are registered nurses who receive specialized education and fulfill clinical requirements to perform sexual assault exams.¹⁷⁶

¹⁷⁶ See U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS: ADULTS/ADOLESCENTS 59 (Apr. 2013) [hereinafter OVW], available at <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf>. Forensic Nurse Examiners

V. SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS

A. INTRODUCTION

Each of the Military Services has separate police and investigative agencies to respond to crimes committed on military installations and by military members. Police patrols on an installation have a safety, security, and law enforcement mission. MCIOs investigate felony level offenses committed on a military installation or by a Service Member in any jurisdiction. The Service MCIOs are: the Army Criminal Investigation Command (CID); the Naval Criminal Investigative Service (NCIS); and the Air Force Office of Special Investigations (AFOSI). The Coast Guard Investigative Service (CGIS) is not formally considered an MCIO as it falls under the Department of Homeland Security, but does provide the same function and capability. Therefore, for the purposes of this report it is treated as an MCIO.

The MCIOs operate under a separate chain of command from the installation leadership and do not require approval in conducting their investigations from any authority outside their independent chain of command. Commanders are forbidden to impede or interfere with investigations or the investigative process.¹⁸⁰

The Military Services have worked to improve their investigation and law enforcement response to sexual assault following recent reviews of the military's efforts against sexual assault in the military and Service academies.¹⁸¹ The military law enforcement community responded by developing specialized teams to handle sexual assault investigations and advanced training to prepare these investigators for this task.¹⁸² As one civilian expert testified, "DOD ha[s] done an incredible amount of work in a short amount of time combating sexual assault and violence against women . . . We have never seen that kind of change in a civilian community and I just wish more people would recognize that fact."¹⁸³

On January 25, 2013, DoD directed that "MCIOs will initiate investigations of all offenses of adult sexual assault of which they become aware . . . that occur within their jurisdiction, regardless of the severity of the allegation."¹⁸⁴ Specially trained MCIO investigators, not a victim's immediate commander or chain of command,

180 DoDI 5505.13, INITIATION OF INVESTIGATIONS BY DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS ¶ 4 (Mar. 24, 2011).

181 See, e.g., REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT & VIOLENCE AT THE MILITARY SERVICE ACADEMIES (June 2005) [hereinafter DTFMSA], available at http://www.sapr.mil/public/docs/research/High_GPO_RRC_tx.pdf; DTFMSA, *supra* note 130.

182 DTFMSA, *supra* note 130, at 88.

183 Colby T. Hauser, "Army Expert Receives National Recognition for Combating Sexual Assault," at <http://www.army.mil/article/72055> (Jan. 17, 2012) (quoting Joanne Archambault, the executive director of End Violence Against Women International (EVAWI) and a 23-year veteran of the San Diego Police Department).

184 DoDI 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE ¶ 3.a (Jan. 25, 2013).

conduct investigations of every unrestricted sexual assault reported.¹⁸⁵ A commander of a victim or alleged offender may not conduct an internal investigation or delay reporting to the MCIO in order to determine whether the report is credible and must report all allegations to an MCIO upon first learning of the allegation.¹⁸⁶ Investigators must further ensure a SARC is notified as soon as possible to ensure system accountability and the victim's access to services.¹⁸⁷

Allegations of military sexual assault are often subject to investigation and prosecution by more than one jurisdiction, depending on the location of the alleged crime. For example, if a Service member is accused of committing a sexual assault in the civilian community, not on a military installation, civilian law enforcement authorities have primary jurisdiction over the investigation and the MCIO provides assistance, as requested.¹⁸⁸ In other cases, an alleged assault may occur in an area on a military installation where there is both federal and civilian criminal jurisdiction.¹⁸⁹ In these instances, the MCIO must inform the civilian jurisdiction, which may accept investigative responsibility if the MCIO declines, or the civilian agency and the MCIO may conduct the investigation jointly.¹⁹⁰

B. ORGANIZATIONAL STRUCTURE OF MCIOS AND SPECIAL VICTIM UNITS

Recommendation 7: The Secretary of Defense direct commanders and directors of the Military Criminal Investigative Organizations (MCIOs) to require Special Victim investigators not assigned to a dedicated Special Victim Unit (SVU) coordinate with a senior SVU agent on all sexual assault cases.

Finding 7-1: Large civilian police agencies and MCIOs have SVUs¹⁹¹ comprised of specially trained investigators experienced in responding to sexual assaults.¹⁹² Smaller locations without an SVU often have a specially trained detective to investigate sexual assaults and the ability to coordinate with larger offices for assistance and guidance.

Finding 7-2: Unlike patrol officers in many civilian jurisdictions, military patrol officers (military police) have no discretion regarding the handling of sexual assault reports. Military police must immediately report all

185 *Id.* at encl. 2, ¶ 6.

186 DoDI 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES encl. 5, ¶ 3.h(1) (Mar. 28, 2013). DoD policy also requires SARCs to provide all unrestricted reports and notice of restricted reports to the installation commander within 24 hours of the report. See *id.* at encl. 4, ¶ 4.

187 *Id.* at encl. 2, ¶ 1.

188 For offenses committed by a Service Member off a military installation the MCIO will conduct a joint investigation if the local law enforcement allows them to participate.

189 DoDI 5525.07, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE DEPARTMENTS OF JUSTICE (DoJ) AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES encl. 2, ¶ 3b (June 18, 2007). If the offense is committed on a military installation with exclusive federal jurisdiction by individuals not subject to the UCMJ the MCIO will notify the Federal Bureau of Investigation.

190 DoDI 5505.18 ¶ 3.c(3).

191 Special Victim Unit (SVU) is used as a generic term for any unit designated to handle sexual assault and other crimes with a more vulnerable victim, police agencies use a variety of terms for these specialized units.

192 See *infra* Sections C and D.

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incidents of sexual assault to the MCIO. The MCIO assigns cases to investigators who meet specified training requirements.

Finding 7-3: While MCIOs technically follow DoD's requirement to assign sexual assault cases to specially trained investigators, the investigators located at smaller installations, are not dedicated SVU investigators, specializing in sexual assault. There is no requirement for the non-SVU, school trained agent to coordinate with the SVU investigator supporting the Special Victim Capability

Discussion

In many large civilian jurisdictions,¹⁹³ SVUs are organized and detailed to investigate sexual assault.¹⁹⁴ The SVU is typically a specialized unit designated to investigate adult sexual assault crimes, and is normally a subdivision of the detective or major crimes division. These units typically also investigate domestic violence and child abuse cases. In smaller civilian police agencies, there may be too few investigators available to specialize.

Currently, there are SVUs throughout the Services at installations with the highest military populations. NCIS has used Family and Sexual Violence (F&SV) teams at locations with large populations for some time, starting in Norfolk, Virginia, in 1996.¹⁹⁵ Army CID was authorized to hire civilian investigators and began organizing SVUs in 2009, and now has 21 SVU civilian investigators at 19 locations.¹⁹⁶ AFOSI was given the authorization and funding to hire investigators to fill Sexual Assault Investigator positions in 2010, and has 24 investigators assigned to 18 locations.¹⁹⁷ NCIS has 104 investigators dedicated to F&SV at eight locations, recently authorizing the addition of 54 new investigators.¹⁹⁸ Within this cadre of investigators, NCIS has created Adult Sexual Assault Program (ASAP) teams to conduct sexual assault investigations at its four locations with the highest troop density.¹⁹⁹

CGIS does not have designated SVUs because it considers all investigators capable of conducting sexual assault investigations. Fifteen investigators are trained and designated as Family and Sexual Violence

193 Members of the Subcommittee visited several jurisdictions nationwide to assess best practices in investigation and prosecution procedures. Prior to those visits, the Joint Service Committee-Sexual Assault Subcommittee (JSC-SAS) was tasked to identify civilian best practices in the investigation, prosecution, and adjudication of sexual assaults that might be considered for inclusion in the military systems. The report relies on its findings, as well as the Subcommittee's site visits.

194 REPORT OF THE JOINT SERVICE COMMISSION-SEXUAL ASSAULT SUBCOMMITTEE [hereinafter JSC-SAS REPORT] Appendices C-P (Sept. 2013) (on file at RSP).

195 DTFSAAMS, *supra* note 130, at 88; see also Naval Criminal Investigative Service, "Family Et Sexual Violence Program," available at <http://www.ncis.navy.mil/CoreMissions/FI/Pages/FamilySexualViolenceProgram.aspx>.

196 See *Transcript of RSP Public Meeting* 91-92 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, U.S. Army Criminal Investigation Command (CID)); Army's Response to Request for Information 50 (Nov. 21, 2013).

197 Air Force's Response to Request for Information 50 (Nov. 21, 2013).

198 See *Minutes of RSP Preparatory Session, NCIS Headquarters* (Aug. 1, 2013) (on file at RSP) (interview of Ms. Maureen Evans). The 54 new hires will not routinely go to F&SV teams, but will allow for the reassignment of experienced investigators to those teams. Navy's Response to Request for Information 132 (Apr. 11, 2014).

199 See *Transcript of RSP Public Meeting* 184-88 (Dec. 11, 2013) (testimony of Mr. Darrell Gillard, Deputy Assistant Director, Naval Criminal Investigative Service (NCIS)).

Investigators (FSVI), acting as specialists for reports of family and sexual violence. CGIS works closely with local law enforcement agencies, which may respond initially when a CGIS agent is unavailable.²⁰⁰

The military and civilian systems differ on the initial police response to a report of sexual assault. Historically, in many jurisdictions, a civilian police officer responding to a reported sexual assault would determine how to document the call.²⁰¹ There could be no documentation at all, documentation as a nonsexual offense, or documentation as a sexual assault. If the officer did not believe the individual was a victim of a sexual assault, it was not documented as such and no follow-up occurred.²⁰²

In several major cities, the responding officers dismissed a high percentage of incidents reported as sexual assault in 911 calls. In the remaining cases where the responding officer submitted a report of sexual assault to a detective, detectives often dismissed a high percentage of incidents referred to them before presenting the cases to the prosecutor.²⁰³ More recently, some of these structures have changed.

Several civilian agencies have increased their vigilance of initial reports to decrease the mishandling of sexual assault cases.²⁰⁴ In some jurisdictions, patrol officers still retain some discretion, but a supervising officer generally must review their decisions and officers consult with detectives who decide how to classify the complaint.²⁰⁵ For example, in Baltimore, Maryland a patrol officer cannot dismiss a sexual assault complaint without an SVU detective's approval.²⁰⁶ Other civilian agencies have similar, or even more restrictive, protocols.²⁰⁷

Military police patrol officers who receive or respond to a sexual assault report must contact the MCIO.²⁰⁸ Responding military police patrols have a very limited role in sexual assault investigations. A responding patrol officer will remain with the victim, ensure evidence is not destroyed, assess the victim's need of immediate medical attention, and obtain only enough information to determine the identity and location of the alleged assailant, if the victim can identify him or her.²⁰⁹ Patrol officers do not conduct detailed interviews of victims or obtain statements. If possible, patrol officers may identify other witnesses and will document the victim's

200 See *id.* at 192-98 (testimony of Mr. Neal Marzloff, Special Agent in Charge, Central Region, U.S. Coast Guard Investigative Service).

201 See *id.* at 275 (testimony of Sergeant Liz Donegan, Austin Police Department).

202 MARYLAND COALITION AGAINST SEXUAL ASSAULT, BALTIMORE CITY SEXUAL ASSAULT RESPONSE TEAM, ANNUAL REPORT 2 (Oct. 2011) [hereinafter MCASA].

203 *Id.*; see also Joanna Walters, *Investigating Rape in Philadelphia: How One City's Crisis Stands to Help Others*, THE GUARDIAN (July 2, 2013).

204 POLICE EXECUTIVE RESEARCH FORUM, CRITICAL ISSUES IN POLICING SERIES: IMPROVING THE POLICE RESPONSE TO SEXUAL ASSAULT iv (Mar. 2012) [hereinafter PERF], available at http://policeforum.org/library/critical-issues-in-policing-series/SexualAssaulttext_web.pdf

205 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview with Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish County).

206 MCASA, *supra* note 202, at 8.

207 See, e.g., *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish County Sheriff's Office); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Philadelphia Sexual Assault Response Center (PSARC)* (Feb. 20, 2014) (on file at RSP).

208 DoDI 5505.18 ¶ 2.c. Section 1742 of the FY14 NDAA codifies this requirement.

209 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP) (interviews of law enforcement personnel); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Joint Base San Antonio (JBSA)* (Dec. 13, 2013) (same).

emotional and physical condition, which the patrol officer briefs to the responding MCIO investigators. The MCIO agent may direct the patrol officer to provide assistance with scene security, crime scene searches, or other tasks.²¹⁰

At smaller installations where there is no SVU, MCIO investigators may not be as experienced as more seasoned special victim investigators who are imbedded in SVUs at larger, busier jurisdictions. While fully qualified, additional oversight from a senior SVU investigator will ensure that the investigating MCIO agent has thoroughly investigated the allegation, preserved evidence when possible, and safeguarded the rights of both the victim and the accused. Ensuring oversight will likely increase the accuracy, reliability, and completeness of the investigation, resulting in stronger prosecutions and convictions in appropriate cases.

C. SELECTION AND EXPERIENCE

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

Finding 8-1: A best practice in civilian investigative agencies with SVUs is careful interview and selection of applicants in an effort to ensure those investigators with biases or a lack of interest in investigating sexual assault cases are not assigned, as well as reassigning those who experience “burn out.”²¹¹

Finding 8-2: A best practice in the military is the assignment of civilian investigators to supervise the SVU enhancing the continuity of investigations and coordination with other agencies involved in responding to sexual assault cases.

Finding 8-3: Military requirements and flexibility in personnel assignments may result in an agent who did not volunteer being assigned to support a SVU or act as the lead agent on a sexual assault investigation.

Finding 8-4: Both military and civilian agencies recognize the possibility of bias in their officers and investigators.²¹²

Discussion

In both military and civilian investigative agencies the response to a sexual assault can be impaired by the prejudices and biases of the responding police and investigators. This could result in a failure to aggressively follow-up on a complaint or inappropriate disposition of cases. Military and civilian agencies with SVUs

210 Services' Responses to Request for Information 53 (Nov. 21, 2013).

211 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish County Sheriff's Office); see also *Transcript of RSP Comparative Systems Subcommittee Meeting* 341-42 (Nov. 19, 2013) (testimony of Major Martin Bartness, Baltimore Police Department).

212 See, e.g., *Transcript of RSP Comparative Systems Subcommittee Meeting* 83 (Nov. 19, 2013) (testimony of Ms. Donna Ferguson, U.S. Army Military Police School (USAMPS)); see also note 215, *infra*.

recognize detectives assigned to those units should have both the capability and commitment to investigate sexual assaults.²¹³

Ideally, experienced investigators are voluntarily assigned to SVUs.²¹⁴ Military and civilian agencies recognize the need to assign detectives who have a desire to work sexual assault cases to SVUs.²¹⁵ The MCIOs created civilian SVU team chief and investigator positions, and carefully filled them with specifically selected investigators.²¹⁶

On April 17, 2014, the Secretary of Defense directed the DoD Inspector General to “evaluate standards and criteria for screening, selection, training, and as applicable, certifying, of [MCIO] investigators who conduct criminal investigations, to include supporting the DoD Special Victim Capability.”²¹⁷ The Secretary’s directive is intended to ensure the Military Departments are properly screening and selecting military criminal investigative personnel, in addition to other sexual assault response and prevention personnel.²¹⁸ Service recommendations for criteria and standards for screening and selection are due to the Secretary of Defense by May 30, 2014, following publication of this report.

D. INVESTIGATOR TRAINING

Recommendation 9-A: Congress appropriate centralized funds for training of sexual assault investigation personnel. The Secretary of Defense direct the Service Secretaries to program and budget funding, as allowed by law, for the MCIOs to provide advanced training on sexual assault investigations to a sufficient number of SVU investigators.

Recommendation 9-B: The Secretary of Defense direct commanders and directors of the MCIOs to continue training of all levels of law enforcement personnel on potential biases and inaccurate perceptions of victim behavior. The Secretary of Defense direct the MCIOs to also train investigators against the use of language that inaccurately or inappropriately implies consent of the victim in reports.

Finding 9-1: Military investigators have more robust and specialized training in sexual assault investigations compared to their civilian counterparts. The Military Services require investigators assigned to SVUs to have advanced training, but the courses vary in content and emphasis.

213 See, e.g., *id.* at 342 (testimony of Major Martin Bartness, Baltimore Police Department).

214 See, e.g., *id.* at 343.

215 See, e.g., *id.* at 342.

216 See, e.g., *Transcript of RSP Public Meeting 91-92* (Dec. 11, 2013) (testimony of Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, U.S. Army Criminal Investigation Command (CID)).

217 U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Sensitive Position Screening in Support of Sexual Assault Prevention and Response (Apr. 17, 2014).

218 *Id.*

Finding 9-2: A best practice in both military and civilian agencies is to provide training to address potential biases and inaccurate perceptions of victim behavior, preparing officers and investigators to effectively respond to and investigate sexual assault.

Finding 9-3: The MCIOs face a continual challenge of ensuring adequate funding is available to send investigators to advanced sexual assault investigation training courses.

Finding 9-4: The MCIOs have a working group for sexual assault training issues.

Finding 9-5: In civilian and military law enforcement communities, sometimes, bias in the terms used in documenting sexual assaults that inappropriately or inaccurately imply consent of the victim in the assault can be possible.

Discussion

The Subcommittee examined sexual assault investigation training in both the MCIOs and civilian agencies. In general, civilian and military law enforcement investigators receive initial training on skills and knowledge for general crimes; these are transferable to sexual assault investigations. In addition, the MCIOs and a few civilian agencies provide specialized training for sexual assault investigations.

A study by a police research group revealed that 85% of the civilian police agencies responding to a survey indicated they have sexual assault training curricula for investigators or detectives.²¹⁹ A few, like the Los Angeles Police Department (LAPD), also require specialized training for sexual assault detectives.²²⁰ LAPD requires its sexual assault detectives to attend the Major Assault Crimes 40-hour school which has an 8-hour block dedicated to sexual assaults. Further, sexual assault detectives must attend a 40-hour Sexual Assault Investigations course.²²¹ Many civilian police agencies, however, rely instead on “on-the-job” training to teach SVU detectives how to investigate sexual assaults. A number of civilian agencies require new detectives to attend a class to transition them from patrol officers to investigations. These classes train the officers on the administrative requirements of being a detective with little, if any, specialized instruction. Some agencies send their investigators to classes on interviewing victims.²²² A number of the civilian agencies interviewed stated they utilize on-line training²²³ or training events.²²⁴

MCIOs consist of both military and civilian investigators. With the exception of Marine Corps CID investigators working for NCIS, NCIS consists entirely of civilian investigators. Military and civilian agent applicants may attend their Service’s criminal investigations training course without previously graduating

219 PERF, *supra* note 204, at 2.

220 See *Transcript of RSP Public Meeting 264-65* (Dec. 11, 2013) (testimony of Deputy Chief Kirk Albanese, Los Angeles Police Department).

221 *Id.*

222 See, e.g., *Transcript of RSP Comparative Systems Subcommittee Meeting 342* (Nov. 19, 2013) (testimony of Major Martin Bartness, Baltimore Police Department).

223 End Violence Against Women International (EVAWI) developed the OnLine Training Institute (OLTI) to provide training on the criminal justice response to sexual assault.

224 The International Association of Chiefs of Police (IACP) offers Sexual Assault Training to police agencies throughout the United States and worldwide. The IACP offers 3.5-day training courses for senior leaders based and first line supervisors. See IACP, “Violence Against Women - VAW,” at <http://www.theiacp.org/Violence-Against-Women>.

from a police academy. Army and Marine Corps investigators complete the 15-week CID Special Agent course at the United States Army Military Police School as part of their training.²²⁵ Navy, Air Force, and Coast Guard investigators attend the 11-week Criminal Investigator Training Program at the Federal Law Enforcement Training Center (FLETC).²²⁶ After the general course, Navy and Coast Guard investigators attend the NCIS Special Agent Basic Training Program for an additional nine weeks. Similarly, Air Force investigators attend the AFOSI Specific Agent Basic Training Course for an additional eight weeks.²²⁷

These training programs include some sexual assault training in their curriculum. The CID Special Agent course contains 16 hours of training specifically addressing sexual assault.²²⁸ The NCIS add-on course uses a sexual assault case in their “continuing case” practical application of skills scenario.²²⁹ This practical exercise allows the students to apply their investigative skills in every aspect of an investigation. The AFOSI add-on course has a 30-hour sexual assault practical exercise.²³⁰

In 2009, the Army’s Military Police School (USAMPS) developed a Special Victim Unit Investigations Course, which is now 80 hours. MCIO investigators and judge advocates from all of the Military Services attend the course, a major focus of which is the use of the Forensic Experiential Trauma Interview, which is a trauma informed interview technique based on neuroscience research designed specifically for trauma and high stress victims.²³¹ The students review real cases and participate in several videotaped interviews which are critiqued. All CID investigators assigned to an SVU must attend the course. It has been identified as a core requirement for all CID investigators; therefore, all investigators should be scheduled to attend this course at some time early in their career.²³² Investigators at offices with no SVU also attend this course so that trained investigators are available at all locations. Investigators who complete the course are given an identifier as an SVU agent.²³³ CID requires Senior SVU investigators also attend the Domestic Violence Intervention Course, Child Abuse Prevention and Investigation Course, and the Advanced Crime Scene Course before being identified as Senior SVU investigators.²³⁴

NCIS Adult Sexual Assault Program team special investigators and first line supervisors must attend the Advanced Adult Sexual Violence Training Program, a two-week advanced course collaboratively created by NCIS and Army CID.²³⁵

225 See *Transcript of RSP Comparative Systems Subcommittee Meeting 75* (Nov. 19, 2013) (testimony of Ms. Donna Ferguson, USAMPS).

226 See, e.g., *id.* at 120 (testimony of Mr. Kevin Poorman, Associate Director for Criminal Investigations, U.S. Air Force Office of Special Investigation (AFOSI)).

227 See, e.g., *id.*

228 See *id.* at 75 (testimony of Ms. Donna Ferguson, USAMPS).

229 See *id.* at 139-40 (testimony of Mr. Robert Vance, NCIS).

230 See *id.* at 120-22 (testimony of Mr. Kevin Poorman, AFOSI).

231 See *id.* at 86 (testimony of Ms. Donna Ferguson, USAMPS); see also *Transcript of RSP Public Meeting 64-109* (Dec. 11, 2013) (testimony of Mr. Russell Strand, USAMPS). Mr. Strand explained that FETI is a trauma informed interview technique that allows the victim to discuss the incident as a three-dimensional event instead of reducing the narrative to a series of one-dimensional questions.

232 See *Transcript of RSP Public Meeting 210* (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID).

233 Army personnel with specialized training are given skill identifiers indicating their qualifications for assignments

234 See *Transcript of RSP Public Meeting 210* (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID).

235 DoD and Services’ Responses to Request for Information 75 (Nov. 21, 2013).

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AFOSI developed an eight-day Sexual Crimes Investigations Training Program (SCITP) modeled on the Army's Special Victim Unit Investigator's Course.²³⁶ AFOSI also sends its investigators to a ten-day Advanced General Crimes Investigations Course and the five-day Advanced Sexual Assault Litigation Course (ASALC) at the Air Force Judge Advocate General's School which they attend with judge advocates.

The Defense Forensic Science Center also provides training for investigators from all of the Services. It offers a one-week Special Agent Laboratory Training Course in which investigators come to the lab to learn firsthand the capabilities of the various lab divisions. Investigators also learn information to assist in crime scene processing and evidence collection.²³⁷

While advanced sexual assault training courses are available to MCIO investigators, resources are not always available to send a sufficient number of investigators to the training courses given the increased workload and agent turnover.²³⁸ Additionally, Congress has not specifically set aside money for sexual assault investigator training, leading to concerns that with waning resources within the military, the Services may cut money for training.²³⁹ Because this training is essential to the military responses to sexual assault, it is critical that funding be sustained for investigators, who are often the first responders to a report of sexual assault.

In 2012, the DoD Inspector General's Office (IG) conducted an evaluation of the MCIOs' sexual assault investigation training.²⁴⁰ It found that although each MCIO provided initial baseline training, periodic refresher training, and advanced sexual assault investigation training, the training hours varied for each. At the time of the evaluation, AFOSI had not initiated its SCITP. The DoD IG recommended that the MCIOs form a working group to review its baseline, periodic refresher, and advanced training to leverage training resources and expertise. The MCIOs currently have an active working group on sexual assault training.²⁴¹

236 See *Transcript of RSP Comparative Systems Subcommittee Meeting* 123-24 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, AFOSI).

237 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Defense Forensic Science Center (DFSC) / U.S. Army Criminal Investigation Laboratory (USACIL)* (Nov. 14, 2013) (on file at RSP) (interview of Ms. Lauren Reed, Director, USACIL).

238 See *Transcript of RSP Public Meeting* 237 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID); see also *id.* at 245 (Dec. 11, 2013) (testimony of Mr. Darrell Gillard, NCIS).

239 See *id.* at 90 (testimony of Mr. Russell Strand, Chief, Behavioral Sciences Education and Training Division, USAMPS).

240 DoD IG, *EVALUATION OF THE MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS' SEXUAL ASSAULT INVESTIGATION TRAINING* (Feb. 2013), available at <http://www.dodig.mil/pubs/documents/DODIG-2013-043.pdf>.

241 See *Transcript of RSP Public Meeting* 98 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID).

Table 7

AGENCY	Basic Agent Course Location	Follow-on Basic Agent Training*	Advanced SA Training Course	Additional Training for SVUI
Military Investigators				
Army CID	CIDSAC, USAMPS, Fort Leonard Wood, MO (16 weeks)	None	SVUIC, USAMPS (2 weeks)	DVIC, USAMPS CAPIT, USAMPS ACSC, USAMPS
NCIS	CITP, FLETC, Glynco, GA (11 weeks)	NCIS SABTP, FLETC, Glynco, GA (9 weeks)	AASVTP, FLETC (2 weeks)	
AFOSI	CITP, FLETC, Glynco, GA (11 weeks)	AFOSI SABTC FLETC, Glynco, GA (8 weeks)	SCITP, FLETC (8 days)	AGCSC 10 days ASALC, AFJAGS, 5 days
CGCIS	CITP, FLETC, Glynco, GA (11 weeks)	NCIS SABTP, FLETC, Glynco, GA (9 weeks)	SVUIC, USAMPS	
Marine CID	CIDSAC, USAMPS, Fort Leonard Wood, MO (16 weeks)	None, attend MPIC and OJTed before attending CIDSAC	SVUIC	
Civilian Law Enforcement Agencies (CSS Visits/Presentations)				
FBI ²⁴²	FBI Academy, Quantico VA (20 weeks)	NA	NA	NA
Los Angeles, CA PD	Major Assault Crimes (40 hours) **	NA	*** Sexual Assault Investigations (40 hours)	Sexual assault conferences
Fairfax, VA PD	None **	NA	***Shadow experienced Detective	Interview course Webinars Conferences
Philadelphia, PA PD	Detective Course (3 weeks) **	NA	***On the job training (OJT), 2 weeks internal training	Share training opportunities

242 Federal Bureau of Investigation, "New Agent Training," at <http://www.fbi.gov/about-us/training/sat>.

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Arlington, VA PD	**	NA	***	
Falls Church, VA PD	** Investigations training	NA		Interview techniques
Baltimore, MD PD	**Academy has a basic investigators course.	NA	40 hours from external providers. OJT	Brought in external trainers, national conferences, cross-train with partners. Interview schools
Virginia Beach, VA PD	**	NA	*** Check off sheet for OJT	Seek out training, interview techniques, on-line training
Austin, TX PD	**	NA	***OJT internal training	External training opportunities
Ashland, OR PD	**	NA	No info provided	No info provided
Snohomish County, WA Sheriff's Office	**	NA	***teamed with a senior investigator	Interview course
Civilian Law Enforcement Agencies (JSC-SA Visits)²⁴³				
Maricopa County, AZ	**	NA		Interview training
Washington, D.C.	**	NA	Special Training	
Athens, GA	**	NA		Forensic Interviewing, other training
Grand Rapids, MI	**	NA		Forensic Interviewing

*The MCIOs and civilian police agencies have a probationary period ²⁴³

** Will previously have attended and graduated from a police academy.

*** Must have previous detective experience then apply for SVU.

Discussion

Even the best screened, selected, and trained law enforcement personnel sometimes allow personal biases to influence the manner in which they handle sexual assault reports.²⁴⁴ Civilian and military law enforcement agencies recognize the need to address potential biases or factually inaccurate perceptions of victim behavior

243 Only those agencies that commented on training of investigators are listed.

244 Cassia Spohn & Katharine Tellis, *Justice Denied?: The Exceptional Clearance of Rape Cases in Los Angeles*, 74(2) ALB. L. REV. 1381 (2011).

(commonly referred to as “rape myths”) held by their officers and investigators to ensure proper reporting and investigation of sexual assaults.²⁴⁵ One of the primary ways to address this issue is through training.²⁴⁶

For example, some civilian agencies discovered their officers and investigators were using language to describe the incident that could give the inappropriate or inaccurate impression that the acts were consensual.²⁴⁷ Civilian experts report that relatively few law enforcement professionals have sufficient training to write effective reports of sexual assaults.²⁴⁸ One such expert noted, “[w]e use the language of consensual sex all the time to describe assaultive acts. We talk about victims having sex with their perpetrators. We talk about victims performing oral sex on their perpetrators. And we don’t think of the word picture that creates, which does not in any way show the reality of the crime.”²⁴⁹

A prime example of the potential for training to reverse biases and improve law enforcement is Baltimore, Maryland. In 2010, the Baltimore Police Department (BPD) reportedly had the highest rate of unfounded sexual assault cases in the nation.²⁵⁰ As a result, BPD took steps to change the culture of its patrol officers and investigators in responding to and documenting reports of sexual assault.²⁵¹ These steps include sexual assault specific training and oversight by external agencies which periodically review BPD’s sexual assault investigations to ensure they are properly investigated as free from bias as possible.

The MCIOs, too, recognize this concern, and are trying to mitigate potential biases through training and policy.²⁵² Army CID has issued guidance about the use of language that may tend to infer consent and required investigators to completed the End Violence Against Women International (EVAWI) online course entitled “Effective Report Writing: The Language of Non-Consensual Sex” as part of its annual refresher training in FY 2013.²⁵³ The other Services do not have specific policies on this subject, but all stated they train investigators on eliminating bias in investigations, particularly regarding victim behaviors.²⁵⁴

Sexual assault investigations are often factually complex, emotionally charged, and rely on careful preservation of evidence to ensure just and legally defensible convictions. Accordingly, the Services must continue to select, train, and develop highly qualified professional investigators for these cases.

245 See, e.g., *Transcript of RSP Comparative Systems Subcommittee Meeting* 123-24 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, AFOSI).

246 PERF, *supra* note 204, at 2.

247 See, e.g., *Transcript of RSP Public Meeting* 278 (Dec. 11, 2013) (testimony of Sergeant Liz Donegan, Austin Police Department).

248 End Violence Against Women International (EVAWI), “Effective Report Writing: Using the Language of Non-Consensual Sex,” at <http://olti.evawintl.org/Courses.aspx>.

249 See *Transcript of RSP Comparative Systems Subcommittee Meeting* 487 (Jan. 7, 2014) (testimony of Ms. Claudia Bayliff, Attorney at Law).

250 MCASA, *supra* note 202, at 2.

251 *Id.*, Appendix I.

252 See e.g., *Transcript of RSP Comparative Systems Subcommittee Meeting* 103 (Nov. 19, 2013)(Testimony of Mr. Guy Surian, Army CID).

253 Army’s Response to Request for Information 134 (Apr. 14, 2014).

254 Services’ Responses to Request for Information 134 (Apr. 14, 2014).

E. COLLATERAL MISCONDUCT AND VICTIM REPORTING

1. Collateral Misconduct

Recommendation 10-A: The Secretary of Defense direct the standardization of policy regarding the requirement for MCIO investigators to advise victim and witness Service members of their rights under Article 31(b) of the UCMJ for minor misconduct uncovered during the investigation of a felony to ensure there is a clear policy, that complies with law, throughout the Services.

Recommendation 10-B: The Secretary of Defense promulgate a list of qualifying offenses for which victims of sexual assault can receive immunity from military prosecution for minor collateral misconduct leading up to, or associated with, the sexual assault incident.

Recommendation 10-C: Congress and the Secretary of Defense examine whether: (a) Congress should amend Article 31(b) of the UCMJ to add an exemption to the requirement for rights advisement to a Service member who, as a result of a report of a sexual assault, is suspected of minor collateral misconduct and provide a list of what violations should qualify for this exception, (b) a definition or procedure for granting limited immunity should be implemented in the future, or (c) other legislation or policy should be adopted to address the issue of collateral misconduct by military victims of sexual assault.

Finding 10-1: The majority of the civilian police agencies contacted during the Subcommittee’s research reported they did not routinely pursue action for minor criminal behavior on the part of a victim reporting a sexual assault. They do not interrupt a victim interview to advise the victim of his or her constitutional rights for minor offenses.

Finding 10-2: The Secretary of Defense acknowledges that a victim’s fear of punishment for collateral misconduct is a significant barrier to reporting in the policy regarding collateral misconduct. MCIO investigators interviewed reported that the requirement to stop a victim interview to advise the victim of his or her rights under Article 31(b) of the UCMJ for minor misconduct collateral to the alleged sexual assault can make the victim reluctant to continue the interview and may hinder investigation of a reported sexual assault.²⁵⁵

Finding 10-3: Under current DoD policy, commanders have discretion to defer action on victims’ collateral misconduct until final disposition of the case, bearing in mind any potential speedy trial and statute of limitations concerns, while also taking into account the trauma to the victim and responding appropriately, so as to encourage reporting of sexual assault and continued victim cooperation.

Finding 10-4: All of the MCIOs document information on the misconduct in the case file which is provided to the victim’s commander for action. However, the MCIOs do not follow the same practices regarding the legal requirement to advise Service members of their rights under Article 31 of the UCMJ for minor collateral misconduct discussed during an interview. NCIS investigators do not read victims reporting a sexual assault their rights for minor collateral misconduct, because NCIS only investigates felony level crimes.

²⁵⁵ See, e.g., *Transcript of RSP Public Meeting 212* (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID).

Finding 10-5: For the last ten years, DoD policy documents use the following list of offenses to illustrate the most common collateral misconduct in many reported sexual assaults: “underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders.”²⁵⁶

Finding 10-6: The Military Services do not support automatic immunity for minor collateral misconduct because it may create a plausible argument the victim had a motive to fabricate the allegation and could detract from good order and discipline within the unit.

Discussion

“Collateral misconduct by the victim of a sexual assault is one of the most significant barriers to reporting sexual assault because of the victim’s fear of punishment.”²⁵⁷ According to DoD reporting statistics, 23% of respondents who did not report their sexual assaults cited fear that they or others would be punished for collateral misconduct as a reason for not reporting that they were sexually assaulted.²⁵⁸ DoD addressed the issue of “collateral misconduct” in a 2004 directive-type memorandum (DTM), in which “fear of punishment for some of the victim’s own actions leading up to or associated with the sexual assault incident,” was identified as a “significant” barrier to reporting.²⁵⁹ Victim advocates reported to the RSP and Subcommittee that victims are sometimes afraid to report their assault for fear of being punished.²⁶⁰ The president of Protect Our Defenders, a victim’s advocacy group, told the panel that in her experience working with victims, that “[victims] are often inappropriately threatened with collateral misconduct, and if they go forward, [they are] targeted with a barrage of minor infractions as a pretext to force them out of the Service.”²⁶¹ A victim who testified before the RSP confirmed this concern, and relayed her personal story that the threat of being charged with collateral misconduct deterred her from reporting her sexual assault while on active duty.²⁶² Previous studies on sexual assault in the military also cite that the threat of punishment of a victim’s own misconduct is a barrier to reporting.²⁶³

There are two legal principles in military justice that contribute to the artificial barrier to reporting. The first is the statutory requirements of Article 31 of the UCMJ.²⁶⁴ The second is a lack of automatic immunity that

256 DoDI 6495.02 encl. 5, ¶ 7.

257 *Id.* at encl. 5.

258 FY12 SAPRO ANNUAL REPORT, *supra* note 43, Vol. I, Annex A, at 107.

259 U.S. DEP’T OF DEF., DIRECTIVE-TYPE MEMORANDUM 11-063, COLLATERAL MISCONDUCT IN SEXUAL ASSAULT CASES (Nov. 12, 2004) (cancelled by DoD INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES (Mar. 28, 2013)).

260 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and Joint Base Lewis-McChord (JBLM)* (Feb. 5, 2014) (on file at RSP) (interviews of Victim Advocates).

261 *See Transcript of RSP Public Meeting 325-326* (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Our Defenders).

262 *See, e.g., Transcript of RSP Public Meeting 68-71* (Nov. 8, 2013) (testimony of Ms. Marti Ribeiro, who explained that she was warned her report would result in a charge of dereliction of duty for leaving her weapon in a combat zone).

263 *See, e.g., DTFMSA, supra* note 181, at 28; DTFMSAMS, *supra* note 130, at 30; TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 28 (Apr. 2004) [hereinafter TFRVCV], available at <http://www.sapr.mil/public/docs/research/Task-Force-Report-for-Care-of-Victims-of-SA-2004.pdf>.

264 Article 31, UCMJ, states as follows:

- (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
- (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any

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appears in some civilian jurisdictions for minor misconduct in sexual assault cases. Article 31 provides Service members a greater protection from self-incrimination than the U.S. Constitution and civilian case law provide. During an investigator's interview with Service member victims, if at any time the investigator reasonably suspects he or she committed an offense under the UCMJ, the investigator must stop the interview and advise the victim of his or her rights under Article 31(b). Civilian investigators, conversely, have greater discretion than MCIO investigators in deciding whether to advise any crime victim, particularly a sexual assault victim, of his or her rights under the Fifth Amendment.

Civilian law enforcement interviews follow Fifth Amendment law established by *Miranda v. Arizona*,²⁶⁵ which only requires law enforcement personnel to warn an individual of the rights to remain silent and obtain counsel during a custodial interrogation. Military culture, however, is unique. The principles of integrity and obedience to orders that are inherent in military culture create a uniquely coercive environment which has historically supported extension of Article 31 protections to any member suspected of an offense, regardless of the member's custody status. Since most victim interviews are non-custodial, meaning the victim is free to terminate the interview and leave the police station at any time, a *Miranda* warning is not required, even if a civilian law enforcement officer believes the victim may have committed a crime. Under the UCMJ, however, the Article 31 warning is not discretionary – meaning law enforcement officials are legally required to stop an interview and appropriately warn a Service member once the law enforcement official has reasonable suspicion that the Service member committed a UCMJ violation. MCIOs consistently identify that the requirement “to advise victims of their rights for collateral misconduct . . . chill[s] a relationship between the investigator and the victim.”²⁶⁶

Concerns about collateral misconduct are seen as a complication in the investigative process, as well as a barrier to reporting.²⁶⁷ Interrupting an interview for a rights warning can have a negative impact on the investigator's ability to build trust and rapport with the victim and can cause victims to terminate the interview, although special victim counsel -- who are often present at the interviews -- did not report this occurred. NCIS investigators who spoke to the Subcommittee stated that NCIS has an unwritten policy that investigators will not read victims Article 31(b) rights for minor collateral misconduct, regardless of the law's requirements.²⁶⁸ The NCIS investigators justify the policy by noting that minor offenses, such as drinking and fraternization,

statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

10 U.S.C. § 831; see also *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) (applying *Miranda v. Arizona* to military interrogations which added right to counsel to warnings).

265 384 U.S. 436 (1966).

266 *Transcript of RSP Public Meeting 212-13* (Dec. 11, 2013) (testimony of Mr. Guy Surian, U.S. Army CID); see also *Transcript of RSP Comparative Systems Subcommittee Meeting 167* (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, AFOSI); see also *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP) (testimony of investigators); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBSA* (Dec. 13, 2013) (on file at RSP) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBLM* (Feb. 5, 2014) (on file at RSP) (same).

267 DTFAMS, *supra* note 130, at 31, 36.

268 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014); (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap* (Feb. 5, 2014) (same); see Navy's Response to Request for Information 137 (Apr. 11, 2014).

are outside the “felony-level” purview of NCIS.²⁶⁹ However, the Navy provided no empirical evidence that this practice increases reporting; rather, investigators noted anecdotally that the practice improves their ability to establish a rapport and more thoroughly investigate cases from victims who have already chosen to report.

The other legal principle impacting the handling of collateral misconduct is immunity from criminal liability. Civilian police agencies report that their offices routinely take no action for minor violations committed by the reporting victim. For example, in Philadelphia, the District Attorney’s Office policy is to not charge victims for low level drug use or possession or alcohol violations. The District Attorney’s Office will sometimes grant immunity for other offenses, such as prostitution.²⁷⁰ Civilian grants of immunity are normally approved by the prosecutor.²⁷¹ In the military justice system, grants of immunity are processed under Rule for Courts-Martial 704, and while the misconduct could include more serious violations of the UCMJ, typical violations include minor infractions, such as underage drinking, breaking curfew and other military-specific offenses.²⁷²

Under Rule for Courts-Martial 704, only a General Court-Martial Convening Authority can grant immunity from prosecution by court-martial, and the authority to grant immunity may not be delegated.²⁷³ The Services do not support a military-wide immunity policy for victims who may have committed some collateral misconduct.²⁷⁴ The Services argue that granting blanket immunity “could provide defense counsel with further fodder to support tactics to challenge the credibility of victims.”²⁷⁵ A civilian defense attorney told the RSP that, “not prosecuting that collateral misconduct is the best gift any prosecutor or convening authority could ever give me as a defense counsel,” because she would be able to highlight the immunity to impeach a victim’s credibility and the veracity of the report.²⁷⁶ The Services further cited the lack of empirical evidence that the policy would increase reporting and expressed concerns regarding the potential for issues at trial and increased false reporting.²⁷⁷ Previous reports on sexual assault in the military also expressed concern that blanket immunity could undermine discipline and have the unintended consequence of causing alienation of the victim, especially if others are held accountable for similar misconduct.²⁷⁸

269 See Navy’s Response to Request for Information 64 (Nov. 21, 2013). NCIS further stated “In the majority of NCIS sexual assault investigations, the victim’s collateral misconduct does not rise to the felony level. Often, the misconduct is a status offense such as underage drinking or adultery or other minor UCMJ violation. That said, if misconduct is uncovered by the investigator during the course of the investigation, that information will be included in the NCIS investigative report and available for a commander to decide a course of action.” See also *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014); (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap* (Feb. 5, 2014) (same).

270 JSC-SAS Report, Appendix M, at 8 (Sept. 2013) (on file at RSP).

271 See generally *id.*

272 See, e.g., *Transcript of RSP Comparative Systems Subcommittee Meeting 167* (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, AFOSI); see also *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP) (testimony of investigators); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBSA* (Dec. 13, 2013) (on file at RSP) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Joint Base Lewis-McChord (JBLM)* (Feb. 5, 2014) (on file at RSP) (same).

273 See MCM, *supra* note 97, R.C.M. 704(b)(3).

274 DoD and Services’ Responses to Request for Information 141 (Apr. 11, 2014).

275 Army’s Response to Request for Information 141 (Apr. 11, 2014).

276 *Transcript of RSP Public Meeting 357* (Nov. 8, 2013) (testimony of Ms. Bridget Wilson, Attorney, San Diego, California).

277 DoD and Services’ Responses to Request for Information 141 (Apr. 11, 2014).

278 See, e.g., DTFMSA, *supra* note 181, at 28 (June 2005); TFRCV, *supra* note 263, at 28.

2. Gleaning Information from Restricted Reports

Recommendation 11: The Secretary of Defense direct SAPRO to develop policy and procedures for Sexual Assault Response Coordinators (SARCs) to input information into the Defense Sexual Assault Incident Database (DSAID) on alleged sexual assault offenders identified by those victims who opt to make restricted reports. These policies should include procedures on whether to reveal the alleged offender’s personally identifying information to the MCIOs when there is credible information the offender is identified or suspected in another sexual assault.

Finding 11-1: DoD has a sexual assault case management database, DSAID, but does not currently input data on alleged offenders identified by the victim making a restricted report, as current policy prohibits collecting and storing that information. This database has the capability of obtaining information from restricted reports that could be used to identify allegations against repeat offenders.²⁷⁹

Discussion

The FY14 NDAA requires the RSP to make “an assessment of the means by which the name, if known, and other necessary identifying information of an alleged offender that is collected as part of a restricted report of a sexual assault could be compiled into a protected, searchable database accessible only to military criminal investigators.”²⁸⁰ There is a concern that incidents reported through the restricted reporting option may allow possible serial offenders to go undetected. The DoD uses the DSAID, a secure, web-based tool to gather information to compile sexual assault statistics for required reports to Congress and to support Service SAPR program management.²⁸¹ DSAID contains information input by SARCs about both restricted and unrestricted sexual assault reports involving members of the Armed Forces. However, current DoD policy prohibits inputting personal identifying information of the alleged offender in a restricted report.²⁸²

DoD recognizes that gathering criminal intelligence is a “fundamental and essential element” of the duties of law enforcement.²⁸³ The MCIOs have existing databases which track criminal intelligence information not associated with an ongoing investigation. The information in these databases is only accessible to investigators and authorized personnel within the MCIO and may only be shared with authorized law enforcement agencies.²⁸⁴ However, there is a concern that placing information from a restricted report into an MCIO’s criminal intelligence database “could result in proactive or inadvertent actions by investigators searching that database that could jeopardize the confidentiality of a restricted report.”²⁸⁵

DoD policy allows for the release of information from a restricted report when the release is “necessary to prevent or mitigate a serious and imminent threat to the health or safety of the victim or another person; for

279 DoDI 6495.02 encl. 4, ¶ 4.

280 FY14 NDAA, Pub. L. No. 113-66, § 1731, 127 Stat. 672 (2013).

281 DoDD 6495.01 encl. 2, ¶ 1.f(5).

282 DoDI 6495.02 encl. 4, ¶ 4.

283 DoDI 5525.18, Law Enforcement Criminal Intelligence (CRIMINT) in DoD ¶ 3 (Oct. 18, 2013).

284 *Id.*

285 Army’s Response to Request for Information 135 (Apr. 14, 2014).

example, multiple reports involving the same alleged suspect (repeat offender) could meet this criteria.”²⁸⁶ However, the Subcommittee has received no evidence on what, if any, impact this may have on victim confidence in the confidentiality associated with restricted reporting.

3. Changes to Restricted Reporting to Encourage Victims to Speak to MCIO Investigators

Recommendation 12: The Secretary of Defense direct DoD SAPRO, in coordination with the Services and the DoD IG, to change restricted reporting policy to allow a victim who has made a restricted report to provide information to an MCIO agent, with a victim advocate and/or special victim counsel present, without the report automatically becoming unrestricted and triggering a law enforcement investigation. This should be a voluntary decision on the part of the victim. The policy should prohibit MCIOs from using information obtained in this manner to initiate an investigation or title an alleged offender as a subject, unless the victim chooses, or changes, his or her preference to an unrestricted report. The Secretary of Defense should require this information be provided the same safeguards as other criminal intelligence data to protect against misuse of the information.

Finding 12-1: Some civilian police agencies allow a police officer or detective to contact a sexual assault victim without automatically triggering an investigation. The report is only investigated if the victim chooses an investigation following a discussion with the detective.

Finding 12-2: DoD policy currently provides that a victim who makes a restricted report of sexual assault cannot provide information to an MCIO investigator without the report becoming unrestricted.²⁸⁷

Discussion

Sexual assault is one of the most underreported crimes in both the military and civilian sector.²⁸⁸ The DoD and the Services have focused significant effort on increasing sexual assault reporting, because “every report that comes forward is one where a victim can receive the appropriate care and . . . a bridge to accountability where offenders can be held appropriately accountable.”²⁸⁹

One model employed by a civilian police agency which appeared before the RSP permits sexual assault victims to speak with law enforcement personnel without triggering an investigation, allowing investigators to document information for criminal intelligence purposes.²⁹⁰ Ashland, Oregon began a pilot program in January 2013 that provides victims three reporting options to provide information to the police.²⁹¹ They can 1) report

286 DoDI 6495.02 encl. 4, ¶ 5.b(2).

287 *Id.* at encl. 4.

288 *Transcript of RSP Public Meeting 25* (Dec. 11, 2013) (testimony of Mr. Russell Strand, Chief, Behavioral Sciences Education and Training Division, USAMPS); see also PERF, *supra* note 204, at 8.

289 *Transcript of RSP Public Meeting 108-09* (June 27, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO).

290 See *Transcript of RSP Public Meeting 320-21* (Dec. 11, 2013) (testimony of Deputy Chief Corey Falls, Ashland, Oregon Police Department).

291 Vickie Aldous, *Police Want to Hear from Sexual Assault Victims*, ASHLAND DAILY TIDINGS (Dec. 20, 2012). These reporting options were initiated as a pilot project on January 1, 2013. See also *Transcript of RSP Public Meeting 327* (Dec. 11, 2013) (testimony of Deputy Chief Corey Falls, Ashland, Oregon Police Department, that previous changes in reporting practices resulted in a forty percent increase in reported offenses from 2009-2012). Deputy Chief Falls provided anecdotal information that the changes from the pilot

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online anonymously; 2) participate in a partial investigation in which they provide a statement to the police and evidence is collected, but no interviews of witnesses or potential suspect would be accomplished without the victim's consent; or 3) participate in a complete investigation.²⁹² Only in a full investigation would the case be coordinated with the District Attorney's Office or an arrest made.²⁹³

In another model, used in Grand Rapids, Michigan, a sexual assault victim has reporting options in addition to a fully restricted report and a fully unrestricted report. The victim has the following additional options:²⁹⁴

- Direct-Anonymous Reporting – Victim can meet with law enforcement, but not provide name, address, date of birth, or other identifying information. Information about the offender may or may not be provided.
- Indirect-Anonymous Reporting – Victim may file a written report without meeting with law enforcement. The report can include as much or as little information as the victim chooses to share.

Under current DoD policy, a military member or adult dependent of a military member has two options in reporting a sexual assault.²⁹⁵ The victim can file a restricted report, which allows him or her to confidentially disclose the assault to a SARC, VA, or healthcare personnel, and receive healthcare treatment, counseling services, the assignment of a SARC and VA, the assignment of a Special Victim Counsel, and the option to have a SAFE performed. This option maximizes support services available to the victim without requiring him or her to choose between accessing support services or retaining privacy.²⁹⁶ The victim can also file an unrestricted report, which still allows the victim to access all of these services, but triggers a criminal investigation by MCIO investigators and command notification.²⁹⁷ A victim who chooses to file a restricted report may convert his or her report to an unrestricted report at any time; however, a victim who files an unrestricted report may not convert to a restricted report.²⁹⁸

Allowing victims, on a voluntary basis, to talk to investigators without committing to participating in an investigation would give the victim “time to build trust with the law enforcement officer and to consider all of the implications of participating in reporting, investigating, or prosecuting the case *before* making a decision whether to proceed. For the law enforcement agency, this type of reporting can help gain intelligence about the local incidence and perpetration of all sexual violence in the community, as well as build trust and credibility with populations vulnerable to assault.”²⁹⁹ The victim should be offered the opportunity to have his or her SARC, VA, or Special Victim Counsel present during any conversation with the investigator to guard against real or perceived coercion to file or not file an unrestricted report.

program have increased reporting and assisted in identifying serial offenders.

292 See *id.*

293 See *id.*

294 JSC-SAS REPORT, Appendix J, at 7 (Sept. 2013) (on file at RSP).

295 DoDI 6495.02 encl. 4.

296 *Id.*

297 *Id.*

298 *Id.*

299 Sabrina Garcia & Margaret Henderson, *Options for Reporting Sexual Violence, Developments Over the Past Decade*, FBI LAW ENFORCEMENT BULLETIN (May 2010).

F. COMPARING PROCEDURES, POLICIES, PROTOCOLS & OVERSIGHT

1. Milestones in the Investigative Process Including Case Determinations and Reports

Recommendation 13: The Secretary of Defense direct the Service Secretaries to standardize the process for determining a case is unfounded. The decision to unfound reports should shift from the commander to the MCIOs, who in coordination with the trial counsel, apply the Uniform Crime Reporting (UCR) standard to determine if a case should be unfounded. Only those reports determined to be false or baseless should be unfounded.

Finding 13-1: While DoD uses the same definition to unfound an allegation of sexual assault as the FBI's UCR Handbook, used by all civilian law enforcement agencies, the Subcommittee heard evidence that the standard is incorrectly applied and the Military Services use different definitions.

Finding 13-2: The Army Criminal Investigation Command (CID) unfounds an allegation of sexual assault if its investigation determines the report was false or the trial counsel provides an opinion there is no probable cause to believe the subject of the investigation committed the offense, prior to providing the investigation to the Initial Disposition Authority for action. In the Navy, Marines, Coast Guard, and Air Force, the IDA determines whether to unfound an allegation.³⁰⁰

Discussion

Both civilian and military law enforcement agencies issue reports to document investigations and results. The "incident clearance reason"³⁰¹ entered into the Defense Incident-Based Reporting System (DIBRS) and National Incident Based Reporting System (NIBRS) is the last report entered by military investigators and is critical to the collection of accurate data. DIBRS is a repository for information collected electronically from supporting Military Service criminal records management systems for the Services' use.³⁰² Similarly, civilian law enforcement agencies enter incident and arrest information into NIBRS.

Civilian police agencies follow the FBI's UCR incident clearance guidance regarding unfounding a complaint: "Occasionally, an agency will receive a complaint that is determined through investigation to be false or baseless.... The recovery of stolen property, the low value of stolen property, the refusal of the victim to cooperate with prosecution, or the failure to make an arrest does not unfound a legitimate offense. Also, the findings of a coroner, court, jury, or prosecutor do not unfound offenses or attempts that law enforcement investigations establish to be legitimate."³⁰³

300 This information is a summary of the information the Services provided in response to Request for Information 66. See Services' Responses to Request for Information 66 (Nov. 21, 2013), *currently available at* http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q66.pdf.

301 DoD MANUAL [hereinafter DoDM] 7730.47-M-VOLUME 1, DEFENSE INCIDENT-BASED SYSTEM (DIBRS): DATA SEGMENTS AND ELEMENTS 20 (Dec. 7, 2010), *available at* <https://www.dmdc.osd.mil/dwp/docs/DIBRS.pdf>.

302 *Id.*

303 U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING HANDBOOK 77-78 (2004).

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DoD does not use a standard definition for “founded” or “unfounded” as those terms specifically relate to sexual assault offenses.³⁰⁴ DoD policy defines an unfounded case, for purposes of DIBRS, as

a complaint that is determined through investigation to be false or baseless. In other words, no crime occurred. If the investigation shows that no offense occurred nor was attempted, procedures dictate that the reported offense must be coded “unfounded.” The recovery of stolen property, the low value of stolen property, the refusal of the victim to cooperate with prosecution, or the failure to make an arrest DOES NOT unfound a legitimate offense.³⁰⁵

DoD’s Annual SAPRO Report for FY12 uses a different definition of “unfounded.” That report states “When an MCIO makes a determination that available evidence indicates the individual accused of sexual assault did not commit the offense, or the offense was improperly reported or recorded as a sexual assault, the allegations against the subject are considered to be unfounded.”³⁰⁶ While conceptually, the various DoD definitions meet the same intent as the “false or baseless” definition of unfounded used in the UCR, the Services apply the term inconsistently or use additional or different definitions.

The RSP specifically requested that each of the Services provide information regarding Service-specific use of the terms “founded” and “unfounded.” The Air Force, Navy, and Marine Corps all use a “false or baseless” standard to unfound an allegation, allowing the accused’s commander, in consultation with a judge advocate, to make the final determination.³⁰⁷ However, the Navy and Marine Corps consider “false or baseless,” to include any case where the allegations “do not meet all the legal elements of any of the SAPR sexual assault offenses.”³⁰⁸ The Army defines an unfounded offense as, “a determination, made in consultation with the supported prosecutor that a criminal offense did not occur. A lack of evidence to support a complaint or questioning of certain elements of a complaint is not sufficient to categorize an incident as unfounded.”³⁰⁹ Conversely, the Army’s definition of a “founded” offense relies on a probable cause determination³¹⁰ made by the investigating agent and supporting prosecutor that an offense was committed and the accused committed the offense.³¹¹

304 See DoD Response to Request for Information 59, dated Nov. 21, 2013.

305 DoDM 7730.47-M-V1 at 83.

306 FY13 SAPRO ANNUAL REPORT, *supra* note 63, at 66. This report also defines unfounded as “false or baseless.”

307 *Transcript of RSP Public Meeting* 268–69 (Dec. 11, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University); see also Air Force Response to Request for Information 39 (at attached Powerpoint slides) (Nov. 21, 2013); Services’ Responses to Request for Information 59 (Nov. 21, 2013).

308 Navy and Marine Corps’ Responses to Request for Information 59 (Nov. 21, 2013).

309 Army’s Response to Request for Information 58 (Nov. 21, 2013).

310 The Subcommittee notes that as a matter of law, the Army’s process of “founding” an offense through a probable cause determination made by a member subject to the Code prior to even preferral of charges may invade the independent discretion and legal province of both the accuser and the Article 32 investigating officer. When preferring charges, an accuser must swear that he or she has personal knowledge of, or has investigated, the matters set forth, and that they are true to the best of his or her knowledge. See 10 U.S.C. § 832 (UCMJ art. 30). Once charges are preferred and an investigation under Article 32, UCMJ, is ordered, it is the duty of the investigating officer to, in part, determine whether “reasonable grounds exist to believe that the accused committed the offenses alleged.” See MCM, *supra* note 97, R.C.M. 405(j)(2)(H). The Article 32 investigating officer’s conclusion, by definition, is also a probable cause determination. See BLACK’S LAW DICTIONARY (9th ed. 2009) (defining *probable cause*). In civilian practice, a similar probable cause determination is used for issuance of an arrest warrant incident to a prosecutor’s charging decision. While it is unlikely that a “founding” determination has ever influenced the conclusion of an Article 32 investigating officer, the probable cause determination made prior to preferral of charges is, at the very least, premature.

311 Army Response to Request for Information 58, 59, and 66, dated Nov. 21, 2013; See also *Transcript of RSP Public Meeting* 221–

One of the reasons for unfounding military cases may be that the MCIOs must initiate an investigation in all reported sexual assaults. It may not be evident that a case is false or baseless at the time of the report; however, investigation may subsequently reveal the wrong suspect was named, the allegations were fabricated, or the incident does not constitute a criminal offense.³¹²

Recommendation 14-A: The Secretary of Defense direct MCIOs to standardize their procedures to require that MCIO investigators coordinate with the trial counsel to review all of the evidence, and to annotate in the case file, that the trial counsel agrees all appropriate investigation has taken place, before providing a report to the appropriate commander for a disposition decision.

Neither the trial counsel, nor the investigator, should be permitted to make a dispositive opinion whether probable cause exists because the convening authority, a military judge, or the judge advocate at the Article 32 preliminary hearing make that official determination after the referral of charges.³¹³

Recommendation 14-B: To ensure investigators continue to remain responsive to investigative requests after the commander receives the case file, the MCIO commanders and directors should continue to ensure investigators are trained that all sexual assault cases remain open for further investigation until either final disposition of the case or a determination that the allegations are unfounded.

Finding 14-1: The Army follows a different procedure than the other Services. Army trial counsel provide an opinion on whether there is probable cause the suspect committed the offense to the investigating agent prior to presenting a case to the commander for a disposition decision. The trial counsel's opinion as to probable cause is reflected in the case file. In FY12, the trial counsel, acting in coordination with CID, determined that 25 percent of the cases involving sexual assault allegations, 118 out of 476 cases, lacked probable cause and the cases were closed. In contrast, the other Services' MCIOs present all cases to the commanders who consult with the supporting trial counsel to determine the appropriate disposition of each case.

Finding 14-2: Some trial counsel reported that MCIOs are not always responsive to their specific investigative requests and MCIOs do not always coordinate completed investigations with senior trial counsel prior to issuing their final reports.³¹⁴

Discussion

The civilian sector and each of the Military Services follow different procedures for how MCIO investigators interact with trial counsel/special victim prosecutors and commanders to review an investigation and determine the merits of the case. Standardizing the procedure for all the Services will ensure consistency, including the "unfounding" definition described in the recommendation above, and permit effective review

22 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Office of The Judge Advocate General, U.S. Army, discussing role of prosecutor in founding and unfounding offenses).

312 DTFMSA, *supra* note 181, at 16.

313 FY14 NDAA, Pub. L. No. 113-66, § 1702(a)(3), 127 Stat. 672 (2013) ("The preliminary hearing shall be limited to the purpose of determining whether there is probable cause to believe an offense has been committed and whether the accused committed it.")

314 See generally *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap* (Feb. 5, 2014) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBSA* (Dec. 13, 2013) (same).

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of investigative outcomes. The chart below illustrates the disparity in procedure and application among the Services, as well as the Subcommittee’s recommended process:

Table 8

Comparison of Procedures to Review Investigations Prior to a Disposition Decision

Air Force, Navy, Marines, CG	Army	CSS Proposal
Unfounded determinations are not done by AFOSI or NCIS investigators.	Army CID investigators make the determination whether a case is Unfounded, in consultation with a judge advocate, before closing a case.	The MCIO agent, in consultation with a judge advocate, should make the determination whether a case is unfounded. Unfounded is defined as false or baseless.
AFOSI or NCIS investigators do not determine that a case is founded, substantiated, or that probable cause exists. Therefore, no annotation is made in the case file.	Army CID investigators contact a judge advocate, who provides an opinion as to whether or not probable cause exists, prior to presenting the case to the commander. Army CID investigators annotate the judge advocate’s opinion in the case file, and if probable cause exists, the case file is presented to the commander for a disposition decision.	The MCIO agent contact a judge advocate to review the investigation. The judge advocate provides an opinion that appropriate investigation is complete and the MCIO agent reflects that opinion in the case file. The report of investigation is then presented to the commander and judge advocate.
FY12: 100% Cases presented to commander	FY12: 75% Cases presented to commander 25% Cases determined to lack probable cause	Present all cases to commander, unless determined to be unfounded, which means false or baseless

Civilian police departments follow a variety of different procedures to decide whether an offense is unfounded. In some jurisdictions, cases that the detective believes are not strong enough to support prosecution never reach the prosecutor.³¹⁵ Some departments reported the investigator could make that decision with the approval of a supervisor while others require the prosecutor’s approval in any case in which a subject was previously arrested or arraigned for the offense.³¹⁶ Departments may also consider a case closed and the investigation complete when it is referred to the prosecutor.³¹⁷ Cases may be closed or placed in a suspended status if the

315 See *Transcript of RSP Comparative Systems Subcommittee Meeting 357* (Nov. 19, 2013) (testimony of Lieutenant Mark Kidd, Fairfax Police Department).

316 See, e.g., *id.* at 357-58 (testimony of Lieutenant Mark Kidd, Fairfax Police Department, and Detective Lanis Geluso, Virginia Beach Police Department).

317 JSC-SAS REPORT, Appendices C-P (Sept. 2013) (on file at RSP).

victim makes it clear he or she does not want to cooperate further. Likewise, unsolved cases are usually inactive, but not closed.³¹⁸

One best practice in civilian law enforcement agencies requires the detective to remain assigned to the case after the case is transferred to the prosecutor.³¹⁹ For example, in Philadelphia, detectives and investigative staff assigned to the case will continue to be involved after the case goes to the prosecutor and will complete follow-up work the prosecutor requests.³²⁰ Another civilian best practice is for the supervisor of the Special Victim Unit to review all unfounded cases, and if the percentage of cases that are unfounded rises above a certain baseline average, the supervisor takes a closer look at patterns and investigative practices to ensure only those cases that are false or baseless are unfounded.³²¹ For example, the Philadelphia SVU uses nine percent as a benchmark, and does an in depth review if the unfounded rate goes into the double digits.³²² The Baltimore police department adopted a similar practice after discovering “more than 30 percent of the cases investigated each year were determined by officers to be false or baseless. . . five times the national average.”³²³ Both Philadelphia and Baltimore detectives said this required culture change as to how to measure success – they had to accept a lower number of closed, unfounded cases, and adjust to having a higher number of open cases.

In the Army, the commander does not have a role in making the determination to unfound a case because Army CID makes the decision to unfound after coordinating with trial counsel.³²⁴ However, in the Air Force, the Navy, and the Coast Guard the determination to unfound a case is made by the commander, not by the MCIO.³²⁵ AFOSI and NCIS advised that once a case is initiated they do not make any case determination decisions, but instead report their investigative findings to the action commander.³²⁶

MCIO investigators are required to engage in timely and ongoing coordination with the prosecution, the SARC, and the commanders of the offender and victim.³²⁷ In the military, the Special Victim Capability requires initial and continuous coordination with the Special Victim Prosecutor.³²⁸ However, there is no specific requirement for a final coordination for a review of legal sufficiency. While there appears to be initial coordination

318 See *Transcript of RSP Comparative Systems Subcommittee Meeting* 389 (Nov. 19, 2013) (testimony of Detective Lanis Geluso, Virginia Beach Police Department).

319 JSC-SAS REPORT, Appendices C-P (Sept. 2013) (on file at RSP).

320 *Id.*, Appendix M, at 2.

321 See *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, PSARC* (Feb. 20, 2014) (on file at RSP) (interview with Captain John Darby).

322 *Id.*

323 MCASA at 2.

324 See *Transcript of RSP Public Meeting* 221–22 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

325 *Id.* at 180, 245, 250.

326 Services' Responses to Request for Information 58 (Nov. 21, 2013).

327 See generally *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap* (Feb. 5, 2014) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBSA* (Dec. 13, 2013) (same).

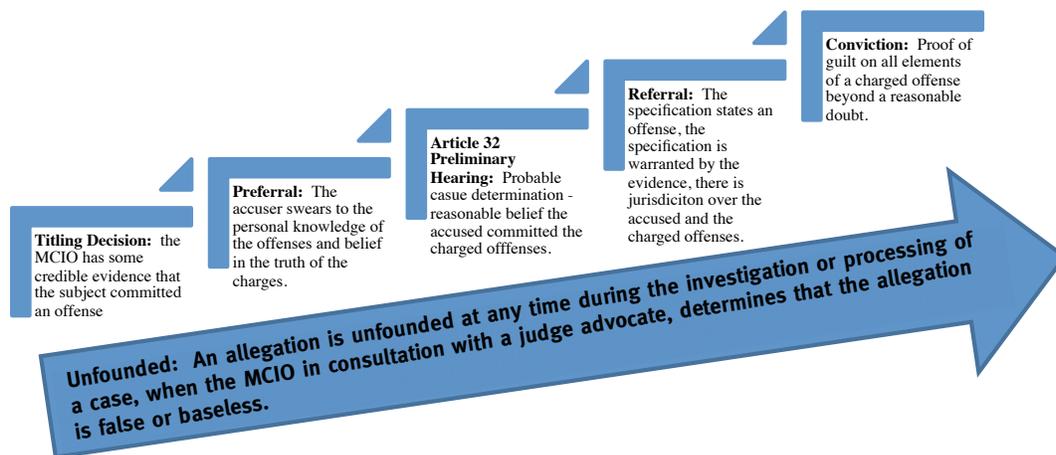
328 U.S. DEP'T OF DEF., DTM 14-002, THE ESTABLISHMENT OF SPECIAL VICTIM CAPABILITY (SVC) WITHIN THE MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS ¶ 2.c (Feb. 11, 2014).

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requirements, procedures and standards differ among the Services for opining about the investigation and presenting the case to the commander for disposition decision.

Army CID is required to coordinate reports of investigation with the trial counsel to determine if: there is probable cause that an offense was committed, that the subject committed the offense, and to determine if there is sufficient evidence to support action.³²⁹ The trial counsel issues an opinion to the investigator/agent which is reflected in the case file.³³⁰ In FY12, the Army trial counsel, acting in coordination with CID, determined that 25 percent of the cases involving sexual assault allegations, 118 out of 476 cases, lacked probable cause and the cases were closed and never reviewed by a commander for a disposition decision. The Subcommittee recommends this communication between trial counsel and the investigator continue, but limiting the trial counsel's official opinion that appears in the case file to whether the investigation has been exhausted and a determination that the case file is ready to present to the commander. This prevents the prosecutor from making a premature probable cause determination and the MCIO from closing cases prior to providing them to a commander to review.

Figure 3



The Subcommittee concluded that neither the trial counsel nor MCIO should be permitted to make a dispositive determination that no probable cause exists, and have that annotated in the investigative case file. The members acknowledge that the prosecutor may opine on its existence. A trial counsel may tell an investigator that further investigation is needed in order for the government to establish probable cause. Also, a commander making the disposition decision may want the trial counsel's opinion whether the prosecutor believes probable cause exists in the case. However, neither the trial counsel nor the investigator should make a dispositive determination of probable cause because that is the purview of either the convening authority, a military judge, or at the Article 32 preliminary hearing.

The other Services do not filter cases for lack of probable cause; instead all cases are presented to commanders, who consult with the supporting trial counsel, to determine the appropriate disposition of each case. However, unlike the Army, there is no requirement that the agent formally coordinate with the trial counsel or annotate

329 See *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP).

330 See Army Response to Request for Information 66 (Nov. 21, 2013).

in the case file that coordination has been completed.³³¹ AFOSI may informally coordinate with trial counsel, but the only written requirement is that AFOSI cannot close a case until the General Court-Martial Convening Authority (GCMCA) provides written notification that he or she is aware of the final disposition in the sexual assault cases.³³²

In cases where MCIOs are the lead investigative agency, DoD policy states that MCIOs may not close a sexual assault investigation without written disposition data from the subject's commander.³³³ The MCIO investigators the Subcommittee spoke to believe the investigators complete thorough investigations, following all logical leads prior to reaching any conclusions.³³⁴ Military prosecutors, however, provided mixed reviews of the quality of MCIO investigations and often felt additional investigation was necessary.³³⁵ Military prosecutors also conveyed that investigations are considered closed when they are passed to the commander for review and it is difficult to "reopen" cases for further investigation. A best practice employed by the Coast Guard in case classification describes cases as "open," "open – pending adjudication," "closed – based on final adjudication." Cases should also be closed if the MCIO in consultation with the SVP/TC determine the report is unfounded because it is false or baseless.

The Subcommittee recommends the following procedures and standards as milestones throughout the investigative process with the channels of communication clearly established and the level of proof incrementally increasing throughout the process:

- MCIO investigators open an investigation upon receipt of an unrestricted report
- MCIO notifies and makes appropriate coordination with the Special Victim Prosecutor, Initial Disposition Authority (IDA) commander (Special Court-Martial Convening Authority in the rank of O-6 or higher), and SARC, in accordance with DoD Special Victim Capability requirements³³⁶
- MCIO titles subject based on some credible information that the subject committed an offense under the UCMJ.
- When an agent believes he/she exhausted the investigation, the agent coordinates with the SVP or trial counsel to review the case file. If the SVP/trial counsel agrees, the SVP/trial counsel issues an opinion that "all appropriate investigation has taken place" which is reflected in the case file.

331 DoD IG, EVALUATION OF THE MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS' SEXUAL ASSAULT INVESTIGATIONS 16 (July 2013) [hereinafter DoD IG July 2013 REPORT], available at <http://www.dodig.mil/pubs/documents/DODIG-2013-091.pdf>.

332 Air Force's Response to Request for Information 67 (Nov. 21, 2013); see also U.S. Dep't of the Air Force, Memorandum from the Undersecretary of the Air Force on General Court-Martial Convening Authority (GCMCA) Review in Certain Sexual Assault Cases (June 17, 2013).

333 DoDI 5505.18 encl. 2, ¶ 5.

334 See generally *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBSA* (Dec. 13, 2013) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and JBLM* (Feb. 5, 2014) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (same).

335 See generally *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP).

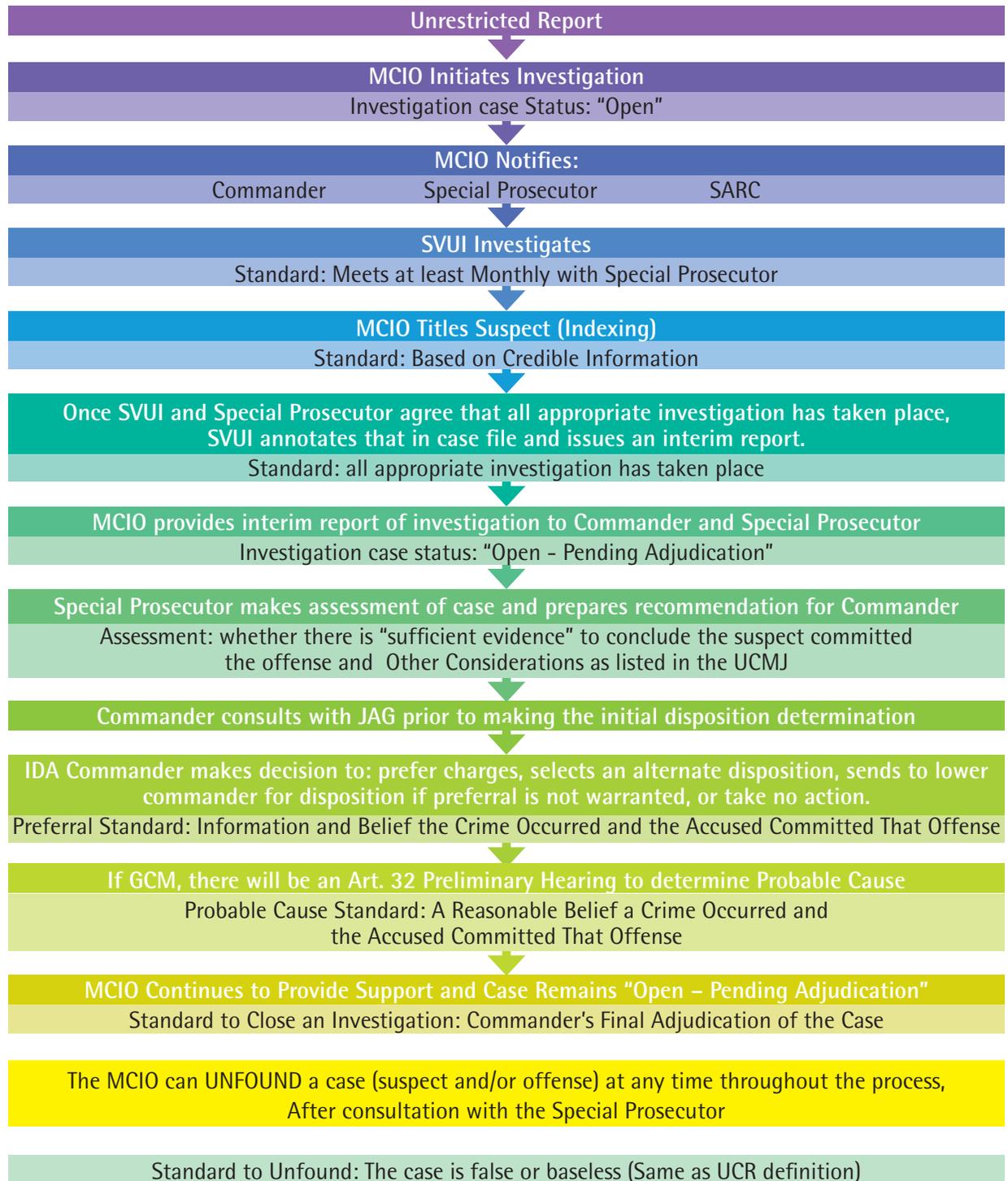
336 DTM 14-003 requires initial notification within 24 hours and consultation within 48 hours.

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- A copy of the case file is provided to the IDA and SVP/trial counsel. The case remains in an “Open – Pending Adjudication” status.
- The SVP or TC assesses evidence in the case and prepares a recommendation for the commander. SVP or TC conducts a legal analysis to determine if there is sufficient evidence to pursue adverse action and then develops a recommendation for appropriate disposition. The IDA consults with the SVP or TC prior to making the initial disposition decision.
- The IDA decides to prefer charges, selects an alternate disposition, sends to lower commander for disposition or takes no action. The standard to prefer charges is personal knowledge and belief in the truth of the charges, that the crime occurred, and the accused committed that offense.
- If appropriate disposition of the case may include a general court-martial, an Article 32 preliminary hearing must occur, one of the purposes of which is to determine whether there is probable cause, which is “a reasonable belief a crime occurred and the accused committed that offense.”³³⁷
- The MCIO will continue to provide support and the case will remain in an “Open – pending adjudication” status. The standard to close an investigation will be the commander’s final adjudication of the case, or a determination by the MCIO in conjunction with the SVP/trial counsel that the case is unfounded, which can occur at any time throughout the investigative process.

337 FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013).

Figure 4



2. MCIO Caseload

Recommendation 15: The Secretary of Defense direct the commanders and directors of the MCIOs to authorize the utilization of Marine Corps Criminal Investigation Division (CID), military police investigators, or Security Forces investigators to assist in the investigation of some non-penetrative sexual assault cases under the direct supervision of an SVU investigator to retain oversight.

Finding 15-1: DoD policy now requires that specially trained and selected MCIO investigators be assigned as the lead investigators for all sexual assault cases, which has substantially increased the MCIOs' case loads.³³⁸ As a result, Marine Corps CID investigators cannot handle any sexual assaults in violation of Article 120 of the UCMJ, including those involving an allegation of an unwanted touching with no intent to satisfy a sexual desire.

Discussion

In January 2013, DoD policy began requiring that all adult sexual assault cases be investigated by the MCIOs.³³⁹ Army CID historically investigated all adult sexual assault cases,³⁴⁰ but NCIS and AFOSI often used Marine Corps CID agents and Air Force Security Forces investigators, respectively, to investigate some of the non-penetrative (e.g., unwanted touching) sexual assault offenses. Since the policy change, the sexual assault cases previously investigated by Marine Corps CID and Air Force Security Forces investigators have shifted to NCIS and AFOSI, significantly increasing their case loads.³⁴¹

Fully accredited Marine Corps CID agents are trained at the MCIO level, and many are SVUIC trained.³⁴² The Marine Corps CID argues its investigators are fully qualified to handle sexual assault investigations, especially the "touching offenses."³⁴³ AFOSI similarly argues that Security Forces investigators, traditionally responsible for investigating non-penetrative cases, could effectively continue to investigate these types of offenses, under the supervision of a trained AFOSI agent.³⁴⁴ AFOSI and NCIS find that the additional caseload has been detrimental to other felony investigations.³⁴⁵

3. Pretext Phone Calls and Text Messages

Recommendation 16: The Secretary of Defense direct the DoD Inspector General (IG) and the DoD Office of General Counsel to review the Military Services' procedures for approving MCIO agent requests to conduct pretext phone calls and text messages as well as establish a standardized procedure to facilitate MCIOs' use of this investigative technique, in accordance with law.

338 See, e.g., *Transcript of RSP Comparative Systems Subcommittee Meeting 137* (Nov. 19, 2013) (testimony of Mr. Robert Vance, NCIS).

339 DoDI 5505.18 ¶ 3.a. Section 1742 of the FY14 NDAA codifies this requirement.

340 See *Transcript of RSP Comparative Systems Subcommittee Meeting 80* (Nov. 19, 2013) (testimony of Mr. Guy Surian, Army CID).

341 See *id.* at 137 (testimony of Mr. Robert Vance, NCIS); see also *id.* at 255 (testimony of Mr. Kevin Poorman, AFOSI).

342 See *id.* at 172-73 (testimony of Chief Warrant Officer 5 Shannon Wilson, U.S. Marine Corps).

343 See *id.* at 173.

344 See *id.* at 256 (testimony of Mr. Kevin Poorman, AFOSI).

345 See, e.g., *id.* at 187.

Finding 16-1: Numerous civilian police agencies indicated that the timely use of pretext phone calls and texts were a valuable tool in sexual assault investigations, and while procedures vary, obtaining approval was not, with few exceptions, difficult or time-consuming.

Finding 16-2: Civilian and military investigators and prosecutors stated that the use of pretext calls and texts were a valuable investigative tool. Each Service, however, requires different procedures to approve recorded pretext phone calls and text messages, based on differing interpretations of the legal standards for pretext calls. The military procedures can take several days to receive approval and the tactic becomes untimely.

Discussion

Pretext phone calls are a commonly used investigative tool in which a victim of an offense calls or texts the alleged offender and attempts to elicit incriminating statements from him or her. Unbeknownst to the suspect, an investigator is present with the victim during the phone call and typically records it.³⁴⁶

A senior civilian with Army CID told the RSP that cumbersome and time consuming requirements to obtain approval of pretext phone calls and text messages hampered sexual assault investigations.³⁴⁷ Some NCIS investigators, on the other hand, told the RSP they obtained approval within a few hours. NCIS has procedures in place which expedites the processing of requests for pretext phone calls.³⁴⁸ An AFOSI representative advised they experienced varying degrees of difficulty in obtaining permission to conduct pretext phone calls and text messages.³⁴⁹

In contrast, a civilian detective in the LAPD who spoke to the RSP did not experience the same difficulty in obtaining permission for pretext calls and texts.³⁵⁰ He and other civilian investigators emphasized the importance of pretext phone calls to corroborate the victim's complaint and potentially lead to incriminating or exculpatory statements by the suspect.³⁵¹

Recommendation 17: The Secretary of Defense should exempt DNA examiners, and other examiners at the Defense Forensic Science Center (DFSC), from future furloughs, to the extent allowed by law.

Finding 17-1: DNA and other examiners at the DDFSC/United States Army Criminal Investigation Laboratory (USACIL) were not exempted from Federal government furloughs in 2013, which resulted in delays processing evidence and conducting DNA analysis in sexual assault cases.

346 Authorization and requirements for use of Interception of Wire, Electronic, and Oral Communications for Law Enforcement are governed by a DoD Instruction that is not publicly available. U.S. DEP'T OF THE ARMY REG. 190-53, INTERCEPTION OF WIRE, ELECTRONIC, AND ORAL COMMUNICATIONS FOR LAW ENFORCEMENT PURPOSES (Nov. 3, 1986) details the requirement for approval of the use of electronic intercept and recording communications.

347 See, e.g., *Transcript of RSP Public Meeting 212* (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID). The Army requires a memorandum through CID Command to the Army General Counsel 48 hours before the interception.

348 See generally *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Station Kitsap* (Feb. 5, 2014) (on file at RSP).

349 See, e.g., *Transcript of RSP Comparative System Subcommittee Meeting 168* (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, AFOSI).

350 See, e.g., *Transcript of RSP Public Meeting 262* (Dec. 11, 2013) (testimony of Deputy Chief Kirk Albanese, Los Angeles Police Department).

351 JSC-SAS REPORT, Appendices C-P (Sept. 2013) (on file at RSP).

Discussion

Some members of the Subcommittee obtained information about crime laboratory operations while visiting DFSC/USACIL and the Headquarters of the Georgia Bureau of Investigations (GBI) laboratory in Atlanta, Georgia. The DFSC/USACIL is a fully accredited facility that provides forensic laboratory services to the MCIOs, other DoD investigative agencies, and other Federal law enforcement agencies. DFSC/USACIL is nationally certified, fully funded, and staffed appropriately to ensure fast turnaround times for DNA analysis and other forensic analysis in sexual assault cases.³⁵²

The “turnaround time” for a laboratory request at DFSC/USACIL-- the time the lab receives evidence until the lab completes its analysis and sends a report to the requesting agent --is currently 77 days.³⁵³ MCIO investigators send all evidence examination requests for a case to the lab at one time; most requests require multiple examinations involving different divisions within the facility.³⁵⁴ Examiners routinely coordinate directly with the case investigators, prosecutors, and defense attorneys to discuss the probative value of requested examinations.³⁵⁵

MCIO investigators, SARCs, VAs, and other sexual assault support personnel were exempt from federal government furloughs in the summer of 2013 and the “government shutdown” in October 2013. This exemption facilitated continued investigation of sexual assault cases. However, DFSC/USACIL leadership informed the Subcommittee that their personnel were not exempt from these furloughs, which created backlogs at the lab and increased the turnaround time for DNA processing.³⁵⁶

The GBI is a fully accredited system of laboratories throughout Georgia, which provides forensic support to law enforcement agencies. Investigators may only submit a limited number of items for processing at the lab at one time.³⁵⁷ If the item submitted does not provide useful information, the investigator may submit a second item for the lab to examine. For example, an investigator may submit the SAFE kit containing DNA samples from the victim and suspect. If the lab does not find any DNA in the kit, the investigator may then submit items of the victim’s clothing. Personnel at GBI informed Subcommittee members that the lab has a 30-day turnaround time. However, this timeframe is only for the lab’s examination of a single forensic process from a piece of evidence, not the total time necessary for numerous examinations in a single case.³⁵⁸

352 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Defense Forensic Science Center (DFSC)* (Nov. 14, 2013) (on file at RSP) (interview of Dr. Jeff Salyards, Executive Director, DFSC).

353 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, DFSC/USACIL* (Nov. 14, 2013) (on file at RSP) (interviews of DFSC/USACIL personnel).

354 *Id.*

355 *Id.*

356 *Id.*

357 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Georgia Bureau of Investigation (GBI)* (Nov. 14, 2013) (on file at RSP) (interviews of GBI personnel).

358 *Id.*

G. SEXUAL ASSAULT FORENSIC EXAMINATIONS

Recommendation 18: The Secretaries of the Military Services direct their Surgeons General to review the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) requirement that all military treatment facilities with a 24-hour, seven-days-a-week emergency room capability maintain a Sexual Assault Nurse Examiner (SANE) and provide recommendations on the most effective way to provide Sexual Assault Forensic Examinations (SAFE) at their facilities.

Finding 18-1: In civilian jurisdictions, specially trained nurses or other trained health care providers perform SAFE. Not all civilian hospitals have a trained provider on staff. In those locations, victims may be transported to a designated location where forensic exams are routinely performed or a provider will respond to the victim's hospital. Having a pool of designated trained professionals who frequently are called to conduct SAFEs increases the level of expertise of those examiners and improves the quality of the exam.

Finding 18-2: The provisions of the FY14 NDAA which require all military treatment facilities with a 24 hour, seven days a week emergency room capability maintain a SANE, is overly prescriptive. Depending on the location, many civilian medical facilities have more experienced SANEs than are typically located on a military installation and also serve as the community's center of excellence for SAFEs.

Discussion

The FY14 NDAA requires every military installation medical treatment facility (MTF) with an emergency department that operates 24 hours per day, seven days a week to have at least one assigned SANE.³⁵⁹ DoD policy requires timely, accessible, and comprehensive healthcare for victims of sexual assault, including a SAFE Kit.³⁶⁰ Healthcare providers conducting a forensic exam must be trained in accordance with the current version of the Department of Justice, Office on Violence Against Women's "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents."³⁶¹ Victims can choose to have a SAFE kit conducted regardless of whether they choose restricted or unrestricted reporting. The National Protocol developed by the Department of Justice identifies a number of clinical and educational programs through which medical providers can be qualified to conduct forensic examinations. Compliance with this protocol should dictate the level of qualification for service providers, and is not limited to SANE certification. The protocol notes:

SANEs are registered nurses who receive specialized education and fulfill clinical requirements to perform these exams. Some nurses have been certified as SANEs-Adult and Adolescent (SANE-A) through the International Association of Forensic Nurses (IAFN). Others are specially educated and fulfill clinical requirements as forensic nurse examiners (FNEs), enabling them to collect forensic evidence for a variety of crimes. The terms [SAFE] and "sexual assault examiner" (SAE) are often used more broadly to denote a health care provider (e.g., a physician, physician assistant, nurse, or nurse practitioner) who has been specially educated and completed clinical requirements to perform this exam.³⁶²

359 FY14 NDAA, Pub. L. No. 113-66, § 1725, 127 Stat. 672 (2013).

360 DoDI 6495.02 encl. 7

361 *Id.*

362 See OVV, *supra* note 176, at 59 (footnote omitted); see also *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Ms. Paula Newman-Skumski, SAFE Coordinator, Dawson Place).

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The Navy established policy to provide forensic exam capabilities around the globe. All Navy medical facilities must be capable of performing SAFEs, or are required to execute memoranda of understanding with local civilian medical facilities to provide the capability.³⁶³ This also encourages relationships and reciprocity between law enforcement agencies and medical centers. In Virginia Beach, detectives coordinate with NCIS and the SANE at the Naval Medical Center Portsmouth. If a victim files a delayed report with civilian authorities in Virginia Beach, detectives know that the local civilian forensic examiners will not collect a SAFE kit after 72 hours has passed. The Naval Medical Center Portsmouth will collect SAFE kits up to six weeks after an alleged assault, and civilian detectives will take victims to that facility for an exam, when necessary.³⁶⁴

The Air Force has a limited number of facilities that conduct SAFEs, but rely on other MTFs in close proximity or civilian providers to supplement the capability.³⁶⁵ While the Army has some military medical facilities with trained SANEs, other facilities have contracts with civilian providers to respond to the base to perform the exams, or rely solely on the same civilian facilities used regionally by the civilians for exams.³⁶⁶ In some cases this may require a drive of 30 minutes or more. Some victims also choose to not be seen in a military medical facility, and prefer to have the exam conducted off a military installation..

SANEs in civilian medical facilities typically have more experience in conducting forensic exams because they see more sexual assault victims over the course of a year than SANEs on most military installations.³⁶⁷ For example, Inova, a hospital in northern Virginia, saw approximately 700 sexual assault victims last year, of which only 12 were military cases.³⁶⁸ Some state laws require a SANE to conduct a specified number of exams annually in order to maintain certification, which is challenging at military facilities given the relatively low volume of exams conducted.³⁶⁹ Regardless of the location or whether the SAFE exam is performed on or off a military installation, all military installations have established protocols and procedures, often supplemented by memoranda of agreement with local hospitals, to ensure eligible personnel can be adequately supported and examined while forensic evidence is preserved.

363 U.S. DEP'T OF THE NAVY, BUREAU OF MEDICINE AND SURGERY, INSTRUCTION (BUMEDINST) 6310.11A CH-1, SEXUAL ASSAULT PREVENTION AND RESPONSE MEDICAL-FORENSIC PROGRAM (Sept. 18, 2013).

364 See *Transcript of RSP Comparative Systems Subcommittee Meeting 386* (Nov. 19, 2013) (testimony of Detective Lanis Geluso, Virginia Beach Police Department).

365 *Id.* at 251 (testimony of Colonel Todd Poindexter, Chief of Clinical Operations, U.S. Air Force).

366 *Id.* at 303-04 (testimony of Ms. Carol L. Haig, Army Sexual Assault Clinical Provider, Officer of the Surgeon General).

367 *Id.* at 275-83 (testimony of Dr. Sue Rotolo, INOVA Hospital).

368 *Id.*

369 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP) (interview of representatives from Scott and White Hospital).

Recommendation 19: The Secretary of Defense direct the appropriate agency to eliminate the requirement to collect plucked hair samples as part of a SAFE.

Finding 19-1: Many civilian agencies no longer collect plucked hairs as part of a SAFE kit because there is little, if any, probative value to that material.³⁷⁰ The Director of DFSC/USACIL agrees there is no need to collect these samples.³⁷¹

Discussion

Interviews with lab personnel and leadership from DFSC/USACIL and GBI reveal the probative value of taking plucked pubic hairs as part of a SAFE examination is negligible. The military and civilian medical forensic examiners interviewed on site visits and who appeared before the Subcommittee overwhelmingly stated the taking of plucked hairs was of little value to the case.³⁷²

Current Department of Justice Protocols for the collection of hair samples from victims and subjects in a sexual assault investigation notes that many jurisdictions do not routinely collect plucked head and pubic references samples. The protocol further suggests that “jurisdictions should evaluate the necessity of routinely collecting hair samples based on discussions of how often such evidence is actually useful or used in the jurisdiction.”³⁷³

Recommendation 20: The Secretary of Defense direct the Military Services to create a working group to coordinate the Services’ efforts, leverage expertise, and consider whether a joint forensic exam course open to all military and DoD practitioners, perhaps at the Joint Medical Education and Training Center, or portable forensic training and jointly designed refresher courses would help to ensure a robust baseline of common training across all Services.

Finding 20-1: The Department of Justice national guidelines form the basis for SAFE training in the military and civilian communities; however, the Military Services instituted different programs and developed guidelines independently.

Discussion

FY14 NDAA requires that the curriculum and other components of the program for certification of Sexual Assault Nurse Examiners-Adult/Adolescent, utilize the most recent guidelines and standards as outlined by the Department of Justice, Office on Violence Against Women, in the National Training Standards for Sexual Assault Medical Forensic Examiners.³⁷⁴ Each Service has established its own programs to implement this common mandate. The Navy’s training protocol consists of a minimum of 14.5 hours of standardized training, including 11.5 hours of DVD training that corresponds with the Department of Justice national protocol for care of adult victims of sexual assault, and three additional hours of Navy training. The Navy

370 *Id.*; see also *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview with Ms. Paula Newman-Skomski, Nurse Practitioner, Providence Intervention Center for Assault and Abuse).

371 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, DFSC/USACIL* (Nov. 14, 2013) (on file at RSP) (interview of Dr. Jeff Salyards, Executive Director, DFSC).

372 See, e.g., *id.*

373 OVV, *supra* note 176, at 71.

374 FY14 NDAA, Pub. L. No. 113-66, § 1725(b), 127 Stat. 672 (2013); see also OVV, *supra* note 176.

is also creating supplemental training video.³⁷⁵ Air Force policy requires healthcare personnel performing forensic examinations to attend a three day forensic sexual assault course and complete one case/mock exam.³⁷⁶ Forensic Nurse Examiner's initial training includes attendance at a five-day course and three cases/mock exams. Refresher training is also required to maintain certification. The Army sexual assault medical forensic examiner training educates health care providers to conduct SAFEs through a 60-hour training program that includes 40 hours of classroom training and 20-plus hours of skilled practicums. The Army is reviewing and updating the needed course content and is considering putting it in a formalized schoolhouse at the Army Medical Department Center and School.³⁷⁷

The International Association of Forensic Nurses has specific requirements to become a SANE or a SAFE. Required initial training is 40 hours of outlined material and clinical requirements. SANE training follows the DOJ national guidelines.³⁷⁸ Not all civilian agencies require their nurses performing forensic examinations be certified as a SANE, but they must have the required training as a forensic examiner. They receive 40 hours of training but are not required to sit for the national exam. They also do 12 hours of continuing education annually.³⁷⁹

Oversight and Review of Sexual Assault Investigations

Recommendation 21: The Secretary of Defense direct an audit of sexual assault investigations by persons or entities outside DoD specifically qualified to conduct such audits.

Finding 21-1: Outside agencies conduct audits of investigations in several civilian police agencies the Subcommittee examined as a means to ensure transparency and confidence in the police response to sexual assault.

Finding 21-2: There is currently no procedure for an entity outside DoD to review sexual assault investigations to ensure cases are appropriately investigated and classified.

Discussion

Several civilian police departments conducted audits of their closed case files to determine whether they were unbounding too many cases after facing criticism of their handling of sexual assault cases.³⁸⁰ Additionally, a criminal justice expert who has written and studied policing and prosecuting sexual assault cases reviewed

375 See *Transcript of RSP Comparative Systems Meeting* 251 (Nov. 19, 2013) (testimony of Commander Kristie Robson, Department Head of Clinical Programs, Bureau of Medicine and Surgery, U.S. Navy).

376 U.S. DEP'T OF THE AIR FORCE, INSTR. 44-102, MEDICAL CARE MANAGEMENT ¶ 16.5.6 (Jan. 20, 2012).

377 See *Transcript of RSP Comparative Systems Subcommittee Meeting* 308 (Nov. 19, 2013) (testimony of Ms. Carol L. Haig, Chief, Women's Health Service).

378 *Id.* at 290 (testimony of Dr. Sue Rotolo, Sexual Assault Nurse Examiner).

379 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Ms. Paula Newman-Skomski, SAFE Coordinator, Dawson Place).

380 MCASA, *supra* note 202; see also Joanna Walters, *Investigating Rape in Philadelphia: How One City's Crisis Stands to Help Others*, THE GUARDIAN (July 2, 2013); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, PSARC* (Feb. 20, 2014) (on file at RSP); *Transcript of RSP Comparative Systems Subcommittee Meeting* 339 (Nov. 19, 2013) (testimony of Major Martin Bartness, Baltimore Police Department).

sexual assault case files from the Los Angeles Police Department and the Los Angeles Sheriff's Office and found that a significant number of cases were inappropriately unfounded or inappropriately closed through clearance by exceptional means.³⁸¹ In the FBI's UCR Program, law enforcement agencies can clear, or close, a case by arrest or exceptional means which is explained as:³⁸²

In certain situations, elements beyond law enforcement's control prevent the agency from arresting and formally charging the offender. When this occurs, the agency can clear the offense exceptionally. Law enforcement agencies must meet the following four conditions in order to clear an offense by exceptional means. The agency must have:

- Identified the offender.
- Gathered enough evidence to support an arrest, make a charge, and turn over the offender to the court for prosecution.
- Identified the offender's exact location so that the suspect could be taken into custody immediately.
- Encountered a circumstance outside the control of law enforcement that prohibits the agency from arresting, charging, and prosecuting the offender.³⁸³

Within civilian police departments, more senior investigators or patrol officers typically review case files. This is also true in the military. Each MCIO also has an internal Inspector General and policies regarding the review of sexual assault cases.³⁸⁴ Additionally, DoD IG reviews MCIO cases on a periodic basis.³⁸⁵

The DoD IG is responsible for developing policy for the MCIOs to oversee sexual assault investigations, and provide oversight of sexual assault training within the DoD investigative community.³⁸⁶ In June 2011, the Government Accounting Office (GAO) completed a review of the extent of DoD IG oversight over the MCIOs' investigation of sexual assault.³⁸⁷ The GAO found that DoD IG had not "performed these responsibilities, primarily because it believes it has other, higher priorities."³⁸⁸ The GAO found "no evidence of Inspector

381 Cassia Spohn & Katherine Tellis, *Policing and Prosecuting Sexual Assault in Los Angeles City and County: A Collaborative Study in Partnership with the Los Angeles Police Department, the Los Angeles County Sheriff's Department, and the Los Angeles County District Attorney's Office* (Feb. 2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf>.

382 See U.S. Department of Justice – Federal Bureau of Investigation, *Crime in the United States, 2010*, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/clearancetopic.pdf> (last visited May 20, 2014) ; see U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTING HANDBOOK 41 (2004), available at http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf.

383 The FBI provided the following examples of exceptional circumstances: death of the offender, victim's refusal to cooperate with the prosecution after the offender has been identified, or denial of extradition because the offender committed a crime in another jurisdiction and is being prosecuted for that offense. *Id.*

384 See, e.g., *Transcript of RSP Comparative System Subcommittee Meeting 188* (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, AFOSI).

385 See, e.g., *id.* at 53 (testimony of Mr. Scott Russell, Director, Violent Crimes Division, DoD IG).

386 DoDI 6495.02 encl. 2, ¶ 5.

387 GOVERNMENT ACCOUNTABILITY OFFICE, *MILITARY JUSTICE: OVERSIGHT AND BETTER COLLABORATION NEEDED FOR SEXUAL ASSAULT INVESTIGATIONS AND ADJUDICATIONS* (June 2011), available at <http://www.gao.gov/assets/320/319962.pdf>.

388 *Id.* at 1.

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General oversight at the Service level for any of the 2,594 sexual assault investigations that DOD reported the Services completed in fiscal year 2010.”³⁸⁹

Following the GAO Report, in 2011 the DoD IG established a Violent Crimes Division to provide recurring investigative training and oversight of violent crimes, such as homicide, suicide, sexual assault, child abuse, and serious domestic violence.³⁹⁰ The objective was to provide regular and recurring oversight to evaluate the quality of violent crime investigations and training and recommend improvements. In July 2013, DoD IG completed an evaluation of MCIO sexual assault investigations.³⁹¹ The evaluation did not apply external standards for case quality but did study the adequacy of MCIO investigations of adult sexual assaults in accordance with DoD, Service, and MCIO policies and procedures.³⁹²

389 *Id.*

390 See, e.g., *Transcript of RSP Comparative System Subcommittee Meeting 8* (Nov. 19, 2013) (testimony of Mr. Scott Russell, Director, Violent Crimes Division, DoD IG).

391 DoD IG JULY 2013 REPORT, *supra* note 331

392 *Id.* at 5.

VII. PROSECUTION AND DEFENSE

A. ORGANIZATION OF PROSECUTION OFFICES AND THE MULTIDISCIPLINARY APPROACH

A victim-centered and offender focused response to the prosecution of sexual assault is predicated on the need to protect the victim's safety, privacy and well-being while holding offenders accountable. The goal of this approach is to decrease re-victimization by ensuring the survivor is treated with compassion and respect. The myths and misinformation surrounding the crime of sexual assault, along with the tendency of the defense and jurors to focus on the victims' actions, present unique challenges in the successful prosecution of the crime of sexual assault.⁶⁷⁵

1. Co-locating Prosecutors, Investigators, and Victim Support Personnel

Recommendation 31-A: The Secretaries of the Military Services direct that TJAGs and MCIOs work together to co-locate prosecutors and investigators who handle sexual assault cases on installations where sufficient caseloads justify consolidation and resources are available. Additionally, locating a forensic exam room with special victims' prosecutors and investigators, where caseloads justify such an arrangement, can help minimize the travel and trauma to victims while maximizing the speed and effectiveness of investigations. Because of the importance of protecting privileged communication with victims, the Subcommittee does not recommend that the SARC, victim advocate, Special Victim Counsel or other victim support personnel be merged with the offices of prosecutors and investigators.

Recommendation 31-B: The Secretary of Defense assess the various strengths and weaknesses of different co-location models at locations throughout the Armed Forces in order to continue to improve the efficiency and effectiveness of investigation and prosecution of sexual assault offenses.

Finding 31-1: The organizational structures of civilian prosecution offices vary. Some civilian prosecutors specialize in sexual assault cases for their entire careers or rotate through sex crime units specializing for a few years, whereas others do not specialize and handle all felony level crimes.⁶⁷⁶ The organizational structure in civilian prosecution offices depends upon the size of the jurisdiction, the resources available, the caseload, as well as the leadership's philosophy for assigning these complex cases.⁶⁷⁷

675 WISCONSIN OFFICE OF JUSTICE ASSISTANCE, VIOLENCE AGAINST WOMEN PROGRAM, WISCONSIN'S PROSECUTOR'S SEXUAL ASSAULT REFERENCE BOOK 91 (2009).

676 See generally JSC-SAS REPORT, Appendix C-P (Sept. 2013) (on file at RSP).

677 See generally *id.*

Finding 31-2: Consolidated facilities can improve communication between prosecutors, investigators, and victims. These facilities may help minimize additional trauma to victims following a sexual assault by locating all of the resources required to respond, support, investigate, and prosecute sexual assault cases in one building. However, these models require substantial resources and the right mix of personnel. Co-locating prosecutors and victim services personnel may also pierce privileges for military victim advocates or cause other perception problems.

Discussion

The organizational structure of civilian prosecution offices varies greatly.⁶⁷⁸ Many of the large, urban offices the Subcommittee studied had sex crime units with attorneys who stay in that unit for several years and develop a specialty for such cases.⁶⁷⁹ There are, however, some large jurisdictions that do not specialize and assign sexual assault cases to attorneys who do several different types of felony cases.⁶⁸⁰ One county prosecutor explained that he requires attorneys to rotate through the sex crimes unit every two to three years to avoid burnout.⁶⁸¹ Most of the prosecutors in medium size and smaller jurisdictions are assigned cases based on their experience level rather than a specific expertise.⁶⁸² Regardless of the structure of the prosecution office or level of specialization, all of the civilian offices studied emphasized the importance of the relationship between the prosecutor's office, the police department, investigators, and victim advocates in sexual assault cases.⁶⁸³

The Subcommittee studied four types of co-location models used in some civilian and military jurisdictions.

678 See generally *id.*

679 See, e.g., *id.*; see also, *Transcript of RSP Comparative Systems Subcommittee Meeting 95-96* (Jan. 7, 2014) (testimony of Ms. Candace Mosley, NDAA). Ms. Mosley testified as follows:

[O]ne of the things that I was asked was the relative level of experience of prosecutors handling these [sexual assault] cases. . . [It] is just so varied. I mean, you would think that, obviously, promising practices would dictate that it would be a more seasoned prosecutor who has had some experience, has a certain number of trials and felonies, had maybe chiefed or supervised somebody in the misdemeanor division before going to a felony. But many offices across the country many people think are large urban offices and they are not. Many of the prosecutors that we have seen that come to training are in two- and three- person offices. There are, obviously, some that are very structured like New York and Houston, and Dallas, and large urban areas. But the majority of prosecutors' offices out there for state and local prosecutors are these smaller offices in rural areas. So, we get technical assistance requests constantly from a person who doesn't have trial experience and they have got the felony.

680 See generally JSC-SAS REPORT, Appendix C-P (Sept. 2013) (on file at RSP).

681 *Transcript of RSP Comparative Systems Subcommittee Meeting 183* (Jan. 7, 2014) (testimony of Mr. Mark Roe, Snohomish County); see also *id.* at 183 (testimony of Ms. Candace Mosley, NDAA) ("There are prosecutors who only want to do sexual assault cases for their entire career and then there are some that shouldn't be in there for a long period of time. It really does, it depends on the individual, their passions."); *id.* at 186 (commentary of Ms. Rhonnie Jaus). Ms. Jaus stated as follows:

I also think it was unrealistic for them to conclude the other prosecutors that there was very little burn [out]. I think that is crazy. I have been doing this as a prosecutor for 30 years. I ran the sex crimes division for like 25. There is burnout. People get burned out. I mean, it is crazy to think they don't. People leave the job. Not everyone stays or else there would never be any movement. But I think that some people are, as Candace [Mosley] is saying, [there are prosecutors who] are incredibly committed and passionate, but there are people who do burn out and I think that it is the same as the military.

682 See generally JSC-SAS REPORT, Appendix C-P (Sept. 2013) (on file at RSP).

683 See generally *id.*; see *supra* Part I (discussing co-location).

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The Dawson Place in Everett, Washington and Joint Base Lewis-McChord (JBLM) model combines all personnel who respond to a sexual assault allegation, including victim advocates, mental health personnel, SANEs, investigators, and prosecutors.⁶⁸⁴

The Philadelphia and Austin model includes: detectives/investigators, SANE and medical personnel, an office for a prosecutor who works there part time, and SVU law enforcement personnel work closely with the local victim advocacy agency.⁶⁸⁵

The Arlington, Virginia and Fort Hood, Texas model either has investigators and prosecutors in the same location⁶⁸⁶ or have the investigators provide an office for the prosecutor to work out of on a routine basis.⁶⁸⁷

The Marine Base Quantico, Virginia model co-locates all victim services support personnel, including the SARC, victim advocate, and special victim counsel in the military.⁶⁸⁸

Figure 5

1. Dawson Place, Everett, WA and JBLM	2. Philadelphia, PA & Austin TX	3. Arlington, VA & Ft. Hood, TX	4. Marine Base Quantico, VA
<ul style="list-style-type: none"> • Victim Advocate • SANE/SAFE Support • Special Victim Counsel (military) • Investigator • Prosecutor • Victim Witness Liaison 	<ul style="list-style-type: none"> • Partnership with Victim Advocate • SANE/SAFE Support • Investigator • Victim Coordinator • Prosecutor 	<ul style="list-style-type: none"> • Investigator • Prosecutor • Victim Witness Liaison 	<ul style="list-style-type: none"> • SARC • Victim Advocate • Special Victim Counsel

The Dawson Place and JBLM model is a “one-stop shop,” providing all necessary resources to respond to a sexual assault victim. This approach coordinates services to avoid victims feeling like they are on a “scavenger

684 Dawson Place; Everett, Washington; and Joint-Base Lewis-McChord share this structure. See JSC-SAS REPORT, Appendix P (Sept. 2013) (on file at RSP); see also *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Joint Base Lewis-McChord (JBLM)* (Feb. 5, 2014) (same).

685 See generally JSC-SAS REPORT, Appendix M (Sept. 2013) (on file at RSP); see also *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, PSARC* (Feb. 20, 2014) (same).

686 See generally JSC-SAS REPORT, Appendix K, N, O (Sept. 2013) (on file at RSP) (summarizing jurisdiction information for Bronx, New York; Austin, Texas; and Arlington, Virginia).

687 *Id.*, Appendix M; see also *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP).

688 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP).

hunt” as they move through the initial investigative process, which includes police interviews, medical examinations, and crisis intervention services.⁶⁸⁹ Members of the Subcommittee visited two of this type of facilities.⁶⁹⁰ One civilian facility, Dawson Place in Everett, Washington, includes investigators, SANEs, and/or victim advocate agencies and mental health personnel in a single location to increase communication among the stakeholders, minimize victim travel, and enhance the multidisciplinary approach in child and young adult sexual assault cases. The Army recently established a similar facility at JBLM in Washington called the Sexual Assault Response Center.⁶⁹¹ It houses the SARC, victim advocates, special victim counsel, IG, special victim investigator and special victim prosecutor. The primary differences between the two facilities are that Dawson Place performs sexual assault forensic exams and its services are mostly offered to children who are sexual abuse victims.

While these models appear to work well, there are potential drawbacks to co-locating these services. Co-locating victim services personnel with law enforcement and prosecution officials could create a misperception that victim services are aligned with, or a part of, the prosecution team – and do not operate independently. This misperception has several potentially deleterious effects: First, although the intent of this consolidation model is to support the victim, these arrangements may actually deter reporting if victims perceive victim services are tied to, or working with, investigators or prosecutors. Second, victim services personnel who work too closely with prosecutors may not be perceived as independent medical providers, but rather as extensions of law enforcement.⁶⁹² And third, the victim advocate-victim privilege, which generally ensures that communications between victims and advocates remain confidential, may be degraded or lost if confidential statements are made in the presence of, or disclosed to prosecutors.⁶⁹³ Accordingly, if larger

689 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP).

690 *Id.*

691 At JBLM, the Army created a consolidated facility with representatives from the CID, SVP, SARC, VA, the special victim counsel, and sexual assault care coordinator. The sexual assault forensic exam takes place at Madigan Army Medical Center located on JBLM. Victims are not required to go to the consolidated facility for services. The facility is arranged so that a victim who makes a restricted report to the SARC or VA will not come into contact with those on the criminal justice side (investigators and prosecutors) unless the victim decides to convert his or her report to an unrestricted one. See *id.*

692 For example, while visiting Dawson Place, Subcommittee members observed a multidisciplinary meeting where both the SANE and victim advocate offered solutions to the prosecutor to deal with a witness cooperation problem in a pending case unrelated to the services they provided to the victim. See *id.*

693 In accordance with the victim advocate-victim privilege found in Military Rule of Evidence 514(a), “[a] victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating advice or supportive assistance to the alleged victim.” MCM, *supra* note 97, M.R.E. 514. However, the rule provides an exception that there is no privilege under the rule “when admission or disclosure of a communication is constitutionally required.” *Id.*, M.R.E. 514(d)(6). If the victim advocate and prosecutor are co-located and have such a close working relationship, the victim advocate may be associated as part of the prosecutor team, in which case the prosecutor has a duty to turn over any exculpatory evidence as a constitutional right of the accused. Therefore, to avoid possible litigation of this issue, it is necessary to build a Chinese wall between the victim advocate and prosecutor. Cf. *Transcript of RSP Public Meeting 231* (Nov. 8, 2013) (testimony of Ms. Marjory Fisher, Chief, Special Victims Bureau, Queens, New York). The Joint Service Committee’s analysis indicates “constitutionally required” exception would be satisfied only in extraordinary circumstances, where the accused could show harm of constitutional magnitude if such communication was not disclosed.” The JSC states,

In drafting the “constitutionally required” exception, the Committee intended that the communication covered by the privilege would be released only in the narrow circumstances where the accused could show harm of constitutional magnitude if such communication was not disclosed. In practice, this relatively high standard of release is not intended to invite a fishing expedition for possible statements made by the victim, nor is it intended to be an exception that effectively renders the privilege meaningless.

See *id.* at A22-46.

VII. PROSECUTION AND DEFENSE

military installations adopt this model, any multidisciplinary meetings between victim services personnel, the prosecutor, and investigator should be limited to topics related to victim support and ensuring the victim remains informed and engaged in the process, but should not include discussions about case details.

The Philadelphia Sexual Assault Response Center (PSARC) in Pennsylvania and the Austin Police Department (PD) Special Victim Unit (SVU) in Texas offer a second model. These investigation facilities provide working space for prosecutors and investigators. Moreover, both the Philadelphia and Austin police departments provide office space for specialized sex crimes prosecutors to work with investigators at least one day per week reviewing cases and assisting with investigations. The District Attorneys' Offices also ensure that a prosecutor is on call to respond to questions about sexual assault cases, as needed.

Both PSARC and Austin PD SVU personnel have gone to great lengths to strengthen their relationships with victim advocate agencies.⁶⁹⁴ PSARC partnered with Women Organized Against Rape (WOAR) and other local victim advocate agencies to gain victim confidence and encourage victims to utilize their resources. Austin PD provides an office for victim advocates from SafePlace – a local rape crisis center – to work at the SVU.

The PSARC facility's capacity to perform SANE exams is unique in that Drexel University provides PSARC's SANE support and other medical assistance to victims, regardless of whether they wish to file a police report.⁶⁹⁵ Austin PD has a SANE Coordinator on-call 24 hours a day to arrange for forensic exams at one of eight local hospitals.

On most, if not all, military installations, a full time SANE would be unnecessary because not enough sexual assaults are reported within the first 96 hours of an incident to require a nurse to be physically located at a consolidated sexual assault center. However, it may be useful to provide appropriate space, supplies and equipment for SANE forensic exams in facilities housing investigators and prosecutors. This would support currently existing arrangements between military installations and civilian forensic examiners who provide SAFE services. Further, such arrangements would increase communication between prosecutors, investigators, and forensic examiners while easing the burden on victims by limiting the need to travel to a military hospital or off base civilian facility. Consequently, the PSARC model may be the best means of increasing communication while avoiding misperceptions or conflicts of interest.

Arlington, Virginia, and Fort Hood, Texas, use a third model of co-location in which Special Victim Unit Investigators (SVUI) and Special Victim Prosecutors (SVP) share the same building.⁶⁹⁶ This model is easier to adopt for medium to small jurisdictions because it requires fewer resources, but yields the positive results associated with investigators and prosecutors working closely together.

The victim support personnel at Marine Base Quantico, Virginia, offered a fourth model that involves co-locating the SARC, victim advocate, and Special Victim Counsel.⁶⁹⁷ The Subcommittee considered this model, but did not look for similar civilian examples because victim support services are outside this

694 In Philadelphia, investigators work with Women Organized Against Rape (WOAR) and in Austin, a representative from the victim advocate agency, SafePlace, has an office at the police department. See JSC-SAS REPORT, Appendix M, N (Sept. 2013) (on file at RSP).

695 *Id.*, Appendix M.

696 See *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP); JSC-SAS REPORT, Appendix O (Sept. 2013) (on file at RSP).

697 See *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP).

Subcommittee's Terms of Reference. However, based on the information received, this is a positive step by the Marine Corps, especially when there are so many resources and service providers offered to sexual assault victims. Victims could find and access all of the different services available to them under one roof.

In general, the Subcommittee determined that it may be helpful for all of the victim service partners to work in a consolidated facility, as the Marine Corps is doing at Quantico, but victim services must remain independent and separate from the investigators and prosecutors.

2. Special Prosecutors in the Military's Special Victim Capability

Recommendation 32-A: The Service Secretaries continue to fully implement the special victim prosecutor programs within the Special Victim Capability and further develop and sustain the expertise of prosecutors, investigators, victim witness liaisons, and paralegals in large jurisdictions or by regions for complex sexual assault cases.

Recommendation 32-B: The Secretary of Defense and Service Secretaries should not require special victim prosecutors to handle every sexual assault under Article 120 of the UCMJ. Due to the resources required, the wide range of conduct that falls within current sexual assault offenses in the UCMJ, and the difficulty of providing the capability in remote locations, a blanket requirement for special prosecutors to handle every case undermines effective prevention, investigation, and prosecution.

Recommendation 32-C: The Secretary of Defense should direct the Directive-Type Memorandum (DTM) 14-003, the policy document that addresses the Special Victim Capability, be revised so that definitions of "covered offenses" accurately reflect specific offenses currently listed in Article 120 of the UCMJ.

Recommendation 32-D: The Secretary of Defense require standardization of Special Victim Capability duty titles to reduce confusion and enable comparability of Service programs, while permitting the Service Secretaries to structure the capability itself in a manner that fits each Service's organizational structure.

Finding 32-1: The Military Services have implemented the Special Victim Capability (SVC) Congress mandated in the FY13 NDAA and the Subcommittee is optimistic about this approach.

Finding 32-2: Using the definitions in the UCMJ will clarify responsibilities and improve resource allocation. The generic terms in the DTM could be interpreted to exclude some current offenses that should be counted as sexual assaults or include conduct that is not a specific offense in the UCMJ.

Discussion

Section 573 of the FY13 NDAA required the Military Services to implement fully a Special Victim Capability (SVC) – e.g., specialized prosecutors, investigators, victim witness liaisons, and paralegals – by January 2014.⁶⁹⁸

Most of the Services established aspects of these capabilities prior to Congress's mandate, which enabled the Services to formalize and fully staff the initiative by the January 2014 deadline. DoD's policy document (DTM

698 FY13 NDAA, Pub. L. No. 112-239, § 573(a), 126 Stat. 1632 (2013).

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14-003) effects Congress’s requirements by including timelines for special prosecutors’ involvement in reported sexual assaults, criteria to measure effectiveness, and other standards.⁶⁹⁹

The SVC strives to provide a level of prosecution expertise through specialization in complex sex-related cases, while recognizing that every Judge Advocate is not a subject matter expert in sexual assault prosecution. Therefore, the Services have established various ways to meet the requirement for a specialized prosecution capability that can assist or take the lead in sexual assault cases. Each Service designed a different approach to meet the SVC requirement based on the resources and structure of the separate Services’ installation legal offices.⁷⁰⁰

However, pursuant to DoD policy, “covered offenses” – which includes “sexual assault, domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm, and child abuse involving sexual assault and/or aggravated assault with grievous bodily harm, in accordance with the UCMJ,”⁷⁰¹ – are required to be resolved using the SVC, including special victim prosecutors. Accordingly, the prosecutors and investigators of the SVC are required to handle cases beyond Article 120 offenses. The Subcommittee recommends changing the definition of “covered offenses” in this new DTM to coincide with offenses in the UCMJ.⁷⁰² The generic list of covered offenses inaccurately represents the cases that the SVC was designed to support. If literally adhered to, the “covered offenses” exclude large categories of sex-related offenses, including rape.

The Army refers to its special prosecutors as Special Victim Prosecutors; the Air Force’s as Special Victims Unit Senior Trial Counsel; the Navy’s as Region Senior Trial Counsel and the Marines Corps’ as Complex Trial Teams. The DTM refers to these positions as specially trained prosecutors. There is no reason for the variation in titles; this Subcommittee recommends standardizing them.

The Military Services provided the details of the various special prosecutor programs within the SVC, depicted below.⁷⁰³

Table 11

Army	<p>Special Victim Prosecutors (SVP):</p> <p>The core of this team now includes 23 SVPs working with 21 Sexual Assault Investigators (SAI) and 28 Special Victim NCOs. They are located at 19 installations across the globe and trained in the unique aspects of investigating and prosecuting sexual assault cases. These teams have geographic areas of responsibility to ensure coverage Army-wide, including all deployed forces in theater.</p>
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699 U.S. DEP’T OF DEF., DTM 14-003, DoD IMPLEMENTATION OF SPECIAL VICTIM CAPABILITY (SVC) PROSECUTION AND LEGAL SUPPORT 12 (Feb. 12, 2014).

700 See DoD and Services’ Responses to Request for Information 50 (Nov. 21, 2013).

701 U.S. DEP’T OF DEF., DTM 14-003, DoD IMPLEMENTATION OF SPECIAL VICTIM CAPABILITY (SVC) PROSECUTION AND LEGAL SUPPORT 12 (Feb. 12, 2014) (defining covered offenses as “[t]he designated criminal offenses of sexual assault, domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm, and child abuse involving sexual assault and/or aggravated assault with grievous bodily harm, in accordance with the UCMJ”).

702 The listing of covered offenses does not accurately reflect offenses under the UCMJ. “Sexual assault” is a specific offense under the UCMJ rather than an omnibus description of offenses. “Domestic violence” and “child abuse” are not specific offenses under the UCMJ; instead, violations commonly referred to by those terms are incorporated into other offenses. See *generally* MCM, *supra* note 97, pt. IV.

703 Information contained in the table is based on DoD and Services’ Responses to Request for Information 50 (Nov. 21, 2013).

Air Force	<p>Special Victims Unit (SVU) Senior Trial Counsel (STC):</p> <p>There are currently 16 STC. Of these 16, an elite team of 10 are part of the Air Force’s SVU, specializing in the prosecution of particularly difficult cases including sexual assault, crimes against children, and homicides. Two of these SVU-STC serve additional roles. One acts as a liaison to the Defense Computer Forensics Laboratory, ensuring expeditious analysis of forensic evidence (particularly in child pornography cases) and providing expert consultation to local trial counsel on issues of digital evidence. The other, the SVU Chief of Policy and Coordination, serves numerous roles: 1) liaison with HQ AFOSI to improve JA-AFOSI teaming at the HQ and local level; 2) expert reach-back capability to local JA offices; and 3) leads training of JAGs worldwide in all aspects of sexual assault prosecution.</p>
Navy	<p>Region Senior Trial Counsel (STC)</p> <p>Each of the nine Region Legal Service Offices (RLSO) is required to have trial counsel trained and certified to prosecute and provide oversight of special victim cases. The core of the prosecution capability is each Region’s STC. These Navy JAG Corps prosecutors are board-selected as Military Justice Litigation Career Track (MJLCT) officers based on their significant litigation experience, aptitude, and training; they are detailed to their positions by the Judge Advocate General. STC either personally prosecute or oversee the prosecution of special victim cases.</p>
Marines	<p>Regional Trial Counsel (RTC) and Complex Trial Teams (CTT)</p> <p>The Marine Corps Special Victim Capability operates through regional Legal Services Support Sections (LSSS) with the goal of having the right counsel detailed to the right case at the right time. The Marine Corps legal community is organized into four LSSSs—National Capital Region, East, West, and Pacific—each responsible for a particular region. The LSSS region in which a joint base is located is responsible for providing legal support to any Marine Corps convening authority at that base. Existing arrangements with the Navy at certain installations allow for Navy personnel to prosecute Marine cases. Each LSSS is supervised by a colonel judge advocate and contains a RTC office with a CTT capability. Each RTC office is supervised by an experienced lieutenant colonel. A highly qualified expert (HQE), an experienced civilian prosecutor, supports the lieutenant colonel in leading two CTT military prosecutors, two experienced military criminal investigators, a legal administrative officer, and paralegal support. The HQEs, resident in the RTC Office, have significant experience in complex criminal litigation as successful trial-level prosecutors on sexual assault cases. A HQE’s primary job is to train trial counsel (TC) to prosecute sexual assault cases. TC must consult with his or her regional HQE within ten days of being detailed to any sexual assault case.</p>

3. Sustaining the Special Victim Prosecutor Capability

Recommendation 33: The Service Secretaries continue to assess and meet the need for well-trained prosecutors to support the Services' Special Victim Capabilities, especially if there is increased reporting.

Finding 33-1: DoD has dedicated an immense amount of resources to combat sexual assault. DoD did not authorize any additional personnel to the individual Services specifically to meet the requirement for special prosecutors within the Special Victim Capability, although the Services may have obtained additional personnel prior to the Congressional mandate.

Finding 33-2: The Military Services fully fund special prosecutors' case preparation requirements.

Discussion

In the years leading up to the Congressional requirement for a SVC, the Services established programs that centralized specially trained prosecutors for complex cases. For example, the Army obtained eighteen authorizations for SVPs beginning in 2009.⁷⁰⁴ The Air Force maintained sixteen STC worldwide – ten of these designated as STC-SVUs to comply with the Congressional SVC mandate.⁷⁰⁵ The Navy established its career litigation track in 2007, which enabled it to meet the SVC requirement for specialized prosecutors,⁷⁰⁶ and in 2012, the Marine Corps completely reorganized its legal community by developing regional Complex Trial Teams.⁷⁰⁷ The FY13 NDAA requirement to establish a SVC within each Service did not significantly impact overall JAG manpower requirements as the Services were already developing these capabilities, and, depending on the Service, may have already received additional authorizations for personnel. A Marine witness told the RSP, that, “while we haven’t increased the numbers of people who are prosecuting these cases, we’ve definitely improved the way that we do business.”⁷⁰⁸

The Subcommittee concluded it is “reasonable to think that in a time of scarce resources, right on the horizon, that it may be difficult to maintain this kind of capability in each of the different Services with the global reach and standardization process that the SVC capability and the NDAA is trying to find.”⁷⁰⁹ Therefore, DoD and the Services need to ensure continued resources dedicated to this capability.

Recommendation 34: The Secretary of Defense assess the Special Victim Capability annually to determine the effectiveness of the multidisciplinary approach and the resources required to sustain the capability, as well as continue to develop metrics to include measurements such as the victim “drop-out” rate, rather than conviction rates, as a measure of success. Congress should consider more than conviction rates to measure the effectiveness of military prosecution of sexual assault cases, which often pose inherent challenges.

704 *Transcript of RSP Public Meeting* 181 (Dec. 11, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

705 *Id.* at 158 (testimony of Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force).

706 *Id.* at 148-50 (testimony of Captain Jason Brown, Military Justice Officer, Marine Corps Headquarters, U.S. Marine Corps).

707 *Id.* at 146.

708 *Id.*

709 *Id.* at 174-75 (comments of Dean Elizabeth Hillman, RSP Member).

Finding 34-1: DoD established five evaluation criteria “to ensure that special victim offense cases are expertly prosecuted, and that victims and witnesses are treated with dignity and respect at all times, have a voice in the process, and that their specific needs are addressed in a competent and sensitive manner by Special Victim Capability personnel.”⁷¹⁰ In addition to the DoD criteria, the Army uses the victim “drop out” rate to also measure the effectiveness of the SVP program. Since the Army established the SVP program in 2009, only 6% of sexual assault victims “dropped out” or were unable to continue to cooperate in the investigation and prosecution of the case.⁷¹¹ In contrast, in 2011, prior to implementing the specially trained prosecutors or victims’ counsel, the Air Force suffered from a 29% victim drop-out rate.

Discussion

The Subcommittee is cautiously optimistic about the success of the SVC to hold offenders appropriately accountable. The Army provided information to demonstrate improvements in its ability to prosecute complex cases since it established the Special Victim Prosecutor program in 2009. Colonel Michael Mulligan, Chief of the Army’s Criminal Law Division, stated, “[s]ince these efforts started, the Army has seen an over 100 percent increase in prosecutions, convictions, and sentences.”⁷¹² In addition, “The program is now being expanded. It will now include dedicated paralegal and Special Victim Witness Liaisons to these prosecutors to better resource them”⁷¹³

The FY13 NDAA required the Secretary of Defense to prescribe common criteria for measuring the effectiveness and impact of the SVC from investigative, prosecutorial, and victim perspectives.⁷¹⁴ The DoD and the Services will assess the SVC by reviewing the following measures:⁷¹⁵

- Percentage of SVC cases preferred, compared to overall number of courts-martial preferred in each fiscal year;
- Percentage of special victim offense courts-martial tried by, or with the direct advice and assistance of, a specially trained prosecutor;
- Compliance with DoD Victim Witness Assistance Program reporting requirements to ensure SVC legal personnel consult with and regularly update victims as required;
- Percentage of specially-trained prosecutors and other legal support personnel who receive additional and advanced training in SVC topic areas; and

710 DoD SVC REPORT, *supra* note 171, at 10.

711 *Written Statement of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army, to RSP* (Dec. 11, 2013).

712 *Transcript of RSP Public Meeting 230-231* (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

713 *Id.* at 231.

714 FY13 NDAA, Pub. L. No. 112-239, § 573(f), 126 Stat. 1632 (2013).

715 See *Transcript of RSP Public Meeting 121-41* (Dec. 11, 2013) (testimony of Major Ryan Oakley, U.S. Air Force, Deputy Director, Office of Legal Policy, Office of the Undersecretary of Defense for Personnel and Readiness); see also DoD and Services’ Responses to Request for Information 50 (Nov. 21, 2013); U.S. DEP’T OF DEF., DTM 14-003, DoD IMPLEMENTATION OF SPECIAL VICTIM CAPABILITY (SVC) PROSECUTION AND LEGAL SUPPORT 9 (Feb. 12, 2014).

- Victim feedback on the effectiveness of SVC prosecution and legal support services and recommendations for possible improvements;⁷¹⁶

Special prosecutors, and now Special Victim Counsel, are trained to prevent victim fatigue and to ensure victims remain informed. Evidence indicates that these programs have thus far been effective. For example, since the Army established its SVP program in 2009, only 6% of the victims in sexual assault cases have dropped out or otherwise stopped cooperating with the prosecution.⁷¹⁷ By comparison, in 2011, the Air Force – which at the time did not have an SVP program – had a 29% victim drop-out rate.⁷¹⁸ Considering the correlation between implementation of the SVP program and a reduced victim drop-out rate, it is reasonable to conclude that SVPs may abrogate a primary cause of victim drop-out: their belief that “the process is very intimidating and the odds of success are very low.”⁷¹⁹ Nonetheless, in order to assess the long-term effectiveness of these programs, the Services should track the percentage of cases in which the victim declines to cooperate after filing an unrestricted report. This additional data could reflect the effectiveness of both the special prosecutor and Special Victim Counsel.

4. Prosecutors' Initial Involvement in Sexual Assault Cases

Recommendation 35: The Secretary of Defense maintain the requirement for an investigator to notify the legal office of an unrestricted sexual assault report within 24 hours, and for the special prosecutor to consult with the investigator within 48 hours, and monthly, thereafter. Milestones should be established early in the process to insert the prosecutor into the investigative process and to ensure that the special victim prosecutor contacts the victim or the victim’s counsel as soon as possible after an unrestricted report.⁷²⁰

Finding 35-1: When prosecutors become involved in sexual assault cases early, including meeting with the victim, there is a greater likelihood the victim will cooperate in the investigation and prosecution of the alleged offender.

Finding 35-2: Military special prosecutors told the Subcommittee they are on call and follow similar procedures as their civilian counterparts in large offices with ride-along programs. DoD established timelines to ensure military prosecutors’ early involvement in sexual assault investigations. MCIOs inform the legal office within 24 hours of learning of a report, and the special prosecutor coordinates with the investigator within 48 hours. There is no current requirement for the prosecutor to meet with the victim as soon as possible.

Discussion

Studies show that the longer prosecutors wait to interview sexual assault victims, the higher the probability that those victims will not cooperate.⁷²¹ Prosecutors in the Manhattan District Attorney’s office stated that it is

716 U.S. DEP’T OF DEF., DTM 14-003, DoD IMPLEMENTATION OF SPECIAL VICTIM CAPABILITY (SVC) PROSECUTION AND LEGAL SUPPORT 9 (Feb. 12, 2014).

717 *Transcript of RSP Public Meeting 230-31* (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

718 Jakob Rodgers, “Air Force Program Puts Lawyer in Victim’s Corner,” [COLO. SPRINGS] GAZETTE (Mar. 25, 2013).

719 *Id.*

720 *See supra* Part IV, Section F(1).

721 *See, e.g.,* OVW, *supra* note 176, at 51 (“Some victims . . . are unable to make a decision about whether they want to report or be

“critical” to involve the prosecutor in the investigation as early as possible.⁷²² They explained that “an attorney who ‘rides’ on a case will take the case from start to finish.”⁷²³ Some of the other large urban prosecution offices have “ride-a-long” programs and established protocols for notifying prosecutors as soon as serious sexual assaults are identified by investigators and for facilitating the investigator through much of the process.⁷²⁴ For instance, the Queens County District Attorney’s Office established one of the first Ride-a-long programs in the Special Victims Bureau.⁷²⁵ There, “a prosecutor will work with officers before probable cause to arrest develops.”⁷²⁶ Police contact the on-call prosecutor who responds to the report of a serious sex offense, such as first degree/forcible rape, crimes against children, etc. This early action assists the Assistant District Attorney in collecting potentially perishable evidence – such as text messages, cell site info, GPS data, phone records, alternative light sources, etc. – early in the investigation. Special Victim police and prosecutors work hand-in-hand and have developed a good working relationship over time.⁷²⁷

In the “Riding Program” model, the prosecutor will arrive at the hospital, meet with the detective, read the detective’s paperwork, obtain background information, and then sit down with the complainant. The prosecutor will work to establish rapport, put the victim at ease, and complete a forensic interview. In non-crisis cases, the strong preference is to complete the interview at the prosecutor’s office. It should be noted that under this model investigators’ initial interviews and the prosecutor’s discussions with victims remain separate in order to preserve the neutrality of the investigative process.

The prosecutor’s early involvement in the case can also facilitate proper understanding by the police of the relevant legal requirements for establishing probable cause. The Subcommittee received evidence that it is critical that an investigator knows the legal definitions and required elements of proof of sexual assault offenses in order to focus the physical evidence collection properly. In addition, the prosecutor can focus investigative efforts on gathering additional corroborating evidence to assist the government in meeting its legal obligation to prove the offense beyond a reasonable doubt.⁷²⁸

SVC affords military prosecutors comparable early access to witnesses and evidence afforded attorneys in ride-along program jurisdictions. DoD policy requires investigators to notify the legal office within 24 hours of an unrestricted sexual assault allegation, and special prosecutors must consult investigators within 48 hours of the report.⁷²⁹ Although there is no specified time for the prosecutor to interview the victim,⁷³⁰ The Subcommittee

involved in the criminal justice system in the immediate aftermath of an assault. Pressuring these victims to report may discourage their future involvement. Yet, they can benefit from support and advocacy, treatment, and information that focuses on their well-being. . . . Victims who are recipients of compassionate and appropriate care at the time of the exam are more likely to cooperate with law enforcement and prosecution in the future.”)

722 See JSC-SAS REPORT, Appendix K (Sept. 2013) (on file at RSP).

723 See *id.*

724 See *id.*

725 See *id.*

726 See *id.*

727 See *id.*

728 JSC-SAS REPORT, Appendix K-3, at 2 (Sept. 2013) (on file at RSP) (stating that through the use of the “riding program,” Manhattan Assistant DAs “will become involved with a case early enough that they can help build the case by working alongside investigators to identify and properly preserve evidence at the beginning of a case”).

729 See U.S. DEP’T OF DEF., DTM 14-003, DoD IMPLEMENTATION OF SPECIAL VICTIM CAPABILITY (SVC) PROSECUTION AND LEGAL SUPPORT (Feb. 12, 2014).

730 See *id.*

found that Army SVPs are on-call and try to interview the victim early in the process. The military special prosecutors appear to follow the same procedures as prosecutors in large offices with well-established programs.

B. DEFENSE COUNSEL ORGANIZATIONAL STRUCTURE & RESOURCE REQUIREMENTS

I urge this panel to look at our clients as people, some of whom stand falsely accused. Our clients, like victims of sexual assault and other crimes, are real people, impacted by decisions and recommendations this panel will make.⁷³¹

“Army defense counsel [play a] critical role in ensuring the integrity and constitutional sufficiency of our military justice system.”⁷³² Defense counsel from the Services informed the RSP that the mission of the Defense Services is to provide independent and world-class representation in a zealous, ethical, and professional manner thereby ensuring the military justice system is both fair and just.⁷³³

With media attention focused on sexual assaults in the military, on college campuses, or in civilian jurisdictions almost every day, victims’ rights are front and center. There is increasing pressure to “hold offenders accountable.” It is crucially important that the military justice system remains balanced and respects the rights of the accused, particularly the presumption of innocence.

As one defense counsel told the RSP:

[I]t’s relatively easy to stand up for beliefs when it’s the popular thing or the in vogue thing. It’s relatively easy to be pro-victim or anti-crime. But it can be quite another to be against the injustice done to accused, especially when they are already considered guilty by society, by the media, by their unit and by their commander, all prior to trial.⁷³⁴

731 *Transcript of RSP Public Meeting 320-21* (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps).

732 *Transcript of RSP Public Meeting 292* (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, Trial Defense Service, U.S. Army).

733 See *id.* at 292 (“The mission of the U.S. Army Trial Defense Service is to provide independent, professional, and ethical defense services to soldier.”); *id.* at 305 (testimony of Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps Defense Services Organization, U.S. Marine Corps) (“The Marine Corps Defense Services Organization provides zealous, ethical, and effective defense counsel services to Marines and sailors who are facing administrative, nonjudicial, and judicial actions in order to protect and promote due process, statutory and constitutional rights, thereby ensuring the military justice system is both fair and just.”); *id.* at 310-11 (testimony of Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency, U.S. Air Force) (“Our charge is to further the Air Force’s mission by providing America’s airmen with independent, world-class representation in a zealous, ethical, and professional manner.”); see also Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, THE CHAMPION (June 2012) (noting that roles of military defense attorney and public defender are critical to ensure accused’s “Sixth Amendment right to counsel . . . [and that] the procedural protections which exist on paper, are actually applied”); *Transcript of RSP Public Meeting 313* (Nov. 8, 2013) (testimony of Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency) (noting that military defense counsel, in particular, ensure the fair administration of the military justice system, which assists in maintaining good order and discipline and ultimately strengthens the national security of the United States).

734 *Transcript of RSP Public Meeting 333* (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps); see also *See Transcript of RSP Public Meeting 303-304* (Nov. 8, 2013) (testimony of Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps Defense Services Organization, U.S. Marine Corps) (“As persons dedicating ourselves to the military, to the law, for the betterment of military law, we must likewise never forget that the Marines and sailors defended by the DSO are not attackers, victimizers, assailants, rapists, or any other