

Staff summary of reading materials for JPP members in preparation for the November 14, 2014 Public Meeting

A. Establishment of the Military Special Victim's Counsel (SVC) Program

1. Secretary of Defense Memorandum: Sexual Assault Prevention and Response (August 14, 2013)

Requires Service Secretaries to establish SVC Programs best suited for each Service that provides legal advice and representation to the victim throughout the military justice process. Each Service will identify and periodically share best practices, and will establish an initial operating capability not later than November 1, 2013, and a fully operational program by January 1, 2014.

2. FY14 NDAA Section 1716 – Designation and Availability of Special Victims' Counsel

Establishes the statutory basis for the SVC Program. Requires the Service Secretaries to designate legal counsel for the purpose of providing legal assistance to an individual eligible for legal assistance who is the victim of an alleged sex-related offense, regardless of whether the report of that offense is restricted or unrestricted.

B. Previous Assessments of the SVC Program

3. Report on Implementation of Section 1716 of the National Defense Authorization Act for Fiscal Year 2014 (April 4, 2014)

This DoD Report to Congress was required by section 1716(c) of the FY14 NDAA to be submitted no later than 90 days after the date of enactment of the FY14 NDAA. It describes the Armed Forces' implementation of the SVC program in 10 U.S.C. 1044e.

4. Air Force Special Victims' Counsel Program Victim Impact Survey (March 2013)

This survey was based on a 2012 RAND Corporation impact evaluation of the National Crime Victim Law Institute's (NCVLI) Victims' Rights Clinics, so that comparisons could be drawn between the Air Force SVC Program and the NCVLI clinics. Survey responses from AF victims were overwhelmingly positive about the SVC Program.

5. Summary of the SVC Program-Related Recommendations from the RSP Report, pgs. 104-106 (June 27, 2014)

This summary, prepared by the JPP staff, provides the relevant findings and recommendations of the Response Systems Panel (RSP) after review of the Victim Services Subcommittee May 2014 Report. The RSP recommendations identify issues at the inception of the SVC program and relate directly to the JPP task(s) in the FY14 NDAA.

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C. Military Victim Rights and Access to Information

6. FY14 NDAA Section 1701 – Extension of Crime Victims’ Rights to Victims of Offenses Under the Uniform Code of Military Justice

Codifies victim rights in the UCMJ and requires that not later than one year after the date of enactment of the Act, the Secretaries of Defense and Homeland Security shall recommend to the President changes to the MCM to implement UCMJ Article 6(b) and shall prescribe such regulations as each Secretary considers appropriate to implement these rights (deadline: December 26, 2014).

7. Summary of the Crime Victim Rights-Related Recommendations from the RSP Report, pgs. 134-137 (June 27, 2014)

This summary, prepared by the JPP staff, provides the findings and recommendations of the Response Systems Panel (RSP) related to crime victims’ rights after review of the Victim Services Subcommittee May 2014 Report. Notably, RSP Recommendation 45 referred the following matter to the JPP: “review and clarify” the extent of a victim’s right to access information.

8. LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013)

Court of Appeals of the Armed Forces case regarding (1) whether appellate courts have jurisdiction to hear a (nonparty) victim’s petition for relief and (2) whether the victim was denied her right to be heard through counsel at trial. HELD:

- The alleged victim [LRM] has limited standing to be heard through counsel in hearings related to MRE 412 (“rape shield”) and MRE 513 (psychotherapist-patient privilege) based on the language of the Military Rules of Evidence. (“[LRM’s] position as a nonparty to the courts-martial does not preclude standing...as there is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege.”).
- The Service Courts of Appeal have jurisdiction to hear LRM’s case under the All Writs Act and MREs 412 and 513, because it could affect the findings and sentence at trial.
- The right to be heard through counsel is subject to reasonable limitations. The military judge retains appropriate discretion to limit the exercise of that right. Furthermore the MREs do not create a right to counsel or a right to appeal an adverse evidentiary ruling.

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9. U.S. DOJ, Office of Legal Counsel Opinion Re: “The Availability of Crime Victims’ Rights Under the Crime Victim Rights Act of 2004,” (December 17, 2010)

This document provides a basis to compare the DOJ interpretation of the reach of the CVRA and DoD’s implementation of the CVRA in UCMJ Article 6b. The OLC opinion addresses whether the CVRA applies during investigation, prior to the filing of charges.

- The rights provided by the CVRA are guaranteed from the time that criminal proceedings are initiated (by complaint, information, or indictment), not beforehand.
- The rights provided by the CVRA cease to be available if all charges are dismissed, or if the Government declines to bring formal charges.
- The Act provides several avenues for protection of enumerated rights
- This document provides statutory interpretation only and does not comment on what “should” or “could” be implemented beyond the requirements of the CVRA.

10. Army TJAG Policy Memorandum 14-09, Disclosure of Information to Crime Victims (October 1, 2014)

Provides guidance for Army prosecutors on the information that crime victims are entitled to receive from the prosecution without request by the victim or counsel:

- A copy of all statements and documentary evidence provided by the victim;
- An excerpt of the charge sheet containing specifications pertaining to that victim;
- The date, time, location of pretrial confinement reviews and preliminary hearings;
- A summarized transcript of the victim’s testimony at a preliminary hearing;
- An excerpt of the charge sheet setting forth the referred specifications pertaining to that victim;
- Docket requests, as well as docketing or scheduling orders, including deadlines for filing motions and the date, time, and location for any session of trial;
- A copy of any motion or responsive pleadings that may limit a victim’s ability to participate in the court-martial, affect the victim’s possessory rights in any property, concern the victim’s privileged communications or private medical information, or involve the victim’s right to be heard; and
- Any request to interview the victim received from the defense counsel.

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D. Additional SVC Program Resource Material

11. Victim Services Subcommittee of the RSP (VSS) Preparatory Session Minutes from the December 10, 2013 visit to Fort Hood Army Installation.

Two members of the VSS and three staff members met with a panel of SVCs at Fort Hood to survey their experiences with clients to gauge the response from clients and their own concerns as counsel. The SVCs reported that clients are most interested in understanding the military justice process. SVCs reported that they wanted to see the following changes:

- More physical space – they do not all have private spaces to meet with clients.
- Better protection of victims before trial and greater access to information.
- Depositions for victims rather than testifying at Article 32 (this was prior to the FY14 NDAA provision allowing victims to not testify at Art. 32).
- The ability to seek an interlocutory appeal from a judge’s MRE 412 ruling. They felt that many judges do not have recent trial experience and that is impacting their decisions on MRE 412 motions.
- Return of evidence confiscated from victims (e.g., cell phones).

12. Victim Services Subcommittee of the Response Systems Panel Preparatory Session Minutes from the December 14, 2013 visit to Joint Base San Antonio.

Four VSS members and three staff members met with a panel of two SVCs, a program paralegal and a SARC. The SVCs reported that most of their work consists of helping the victim determine whether they want to file a restricted or unrestricted report. The SVCs had the following recommendations:

- Provide victims a mechanism to “turn off” an investigation once it has started. They compared this to local law enforcement practice to stop investigating if victim does not want to pursue case.
- Establish the ability and funding mechanism to call expert witnesses (e.g., psychologists) at MRE 412 or other hearings.
- Victims have reported to them that they have been pressured by investigators to waive their right to seek a victim advocate or mental health counseling by investigators who want to get on with the investigation and interview. SVCs wanted a policy for investigators that prohibits them from asking a victim to waive any rights prior to contacting an SVC.
- Expedited transfers for restricted cases. They suggested having the legal office review these requests to evaluate the need/eligibility for transfer.
- Misconduct amnesty provisions for a subset of UCMJ crimes if the sexual assault is reported first.