

FY 13 NDAA Federal Advisory Committee Summaries

Response Systems Panel - June 27, 2014 report addressed 7 topic areas:

1. Measuring the Scope of Sexual Assault in the Military and Civilian Communities.

▪ Services should use a single, standardized methodology to track sexual assault dispositions and to “unfound” cases.

▪ A crime victimization survey is needed in the military to obtain realistic data on the number of unreported sexual assaults per year. The WRGA survey currently used by the military is a public health survey. It is useful, but not for determining number of sexual assaults.

▪ A comparison between the military and civilian conviction rates cannot be made because 1) Article 120 includes a much wider range of conduct than is prosecuted in civilian jurisdictions; 2) few civilian jurisdictions maintain or publish prosecution data by specific offenses, and where done, often only serious felonies are tracked; 3) civilian law enforcement often “unfound” cases on their own thereby eliminating those reports from possible prosecution, whereas the military identifies and counts every sexual assault report, whether founded or not and whether reported to law enforcement or not.

2. Assessing the Role of the Commander: Commander Responsibility and Accountability, Sexual Assault Prevention, and the Commander as Convening Authority.

▪ A commander’s success or failure in fulfilling the responsibilities of sexual assault prevention and response should be considered in performance evaluation and promotion decisions as these directly reflect the quality of a commander’s leadership and effectiveness.

▪ Subordinate leaders, non-commissioned officers and civilian supervisors must receive adequate training and also be held accountable and evaluated on their sexual assault prevention and response efforts.

▪ DoD’s sexual assault policies adopted since 2012 reflect the input of national experts and resources and the use of best practices.

▪ Specific areas for increased attention and prevention training are male-on-male sexual assault, prior victimization, alcohol mitigation and ensuring that bystander intervention programs do not rely on common misconceptions but focus on more subtle attitudes and behaviors that increase the potential for sexual assault.

▪ Congress should not further limit the authority of convening authorities to refer charges for sexual assault crimes because there is no evidence that this would reduce sexual assaults, increase reporting, or improve quality of investigations and there are other substantial policy changes and new programs that should be fully implemented and assessed before advising changes involving convening authorities.

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3. Strengthening the Special Victim Counsel Program, Victim Rights, Support, and Services.

- The military uses best practices in its support of victims and its response systems compare favorably with civilian systems.
- The SVC program goes far beyond anything available to crime victims in the civilian system.
- Victims should have access to SVC representation so long as a right of the victim exists and is at issue.
- The Manual for Courts-Martial should clarify that a victim's right to be heard includes the right to be heard through counsel on legal issues.
- There should be a specific mechanism by which a trial counsel must convey the victim's concerns and preferences about case disposition to the convening authority – this provides a right analogous to a victim's right to confer with the prosecutor under the CVRA.
- Victims should have the right to be heard regarding pretrial agreements or plea negotiations and the right to make unsworn victim impact statements at sentencing.
- Trial counsel should be required to verify, on the record, that victim's rights have been complied with.
- SecDef should direct an expedited study of low-level collateral misconduct to evaluate whether limited immunity should be implemented for victims.
- Victims should be able to speak with investigators and still retain the ability to make a restricted report.
- When victims make restricted reports, the names of alleged offenders should be tracked to identify serial offenders and re-engage victims.
- Victims who make restricted reports should be able to request expedited transfers.

4. Ensuring Fairness and Due Process to those Suspected of Accused of Sexual Assault.

- Military defendants should be represented by adequately trained military defense counsel with experienced supervisory oversight.
- The Services should provide independent, deployable defense investigators to assist the defense in the fair administration of justice.

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- Military defense counsel organizations must be adequately resourced with funding, training and personnel comparable to that provided to prosecution counterparts.

- Training programs must be careful and conscious not to create perceptions among Service members (and potential jurors) that commanders expect particular outcomes or sentences.

5. Improving Military Justice Procedures.

- Courts-martial should not impose unitary sentences, but should instead impose sentences for each convicted offense, similar to most civilian jurisdictions.

- The Panel recommended against adoption of sentencing guidelines in sexual assault or other cases and that Congress not enact further mandatory minimum sentences for sexual assault.

- The Panel's sense was that the military judge should be involved in the process before referral to court-martial to better protect rights of victims and accused and facilitate access to documents and witnesses.

6. Sustaining and Adequately Funding Promising Department of Defense Programs and Initiatives.

- Congress should appropriate and Services allocate sufficient funds and personnel authorizations annually to ensure the SVC program and the training of investigators and judge advocates remains robust in spite of personnel rotations.

7. Conducting Independent Audits and Assessments

- DoD should assess the roles and responsibilities of victim services personnel to ensure effective operation and best use of resources.

- DoD should seek external reviews of sexual assault prevention and response programs and performance.

- SecDef should establish an advisory panel of civilians external to DoD to advise and provide feedback on the effectiveness of sexual assault programs.

8. Topics Directed to the JPP for Further Study:

- **Separating penetrative from non-penetrative offenses under UCMJ (*Recommendation 113*)**
- **Victim's right to access information (*Recommendation 45*)**
- **Use of depositions in lieu of victim testimony at Article 32 (*Recommendation 115*)**
- **Military plea-bargaining process revision (*Recommendation 117*)**

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Judicial Proceedings Panel – Tasked by Congress to address 9 topic areas:

1. Article 120

▪ **Implementation of 2012 Reforms:** Assess implementation of 2012 Article 120 Reforms enacted by § 541 of FY 12 NDAA and recommend improvements (FY 13 NDAA).

▪ **Including Abuse of Power in Definition of Rape:** Assess possible consequences of extending the definition of rape under Article 120 to include situations where a Service member commits a sexual act upon another person by abusing one's position in the chain of command to gain access to or coerce the other person. (FY 14 NDAA).

2. Trends and Statistics of Courts-Martial

• **Withholding Disposition Authority for Sexual Assault to Senior Commanders:** Assess implementation of 2012 SecDef Memo withholding disposition authority to senior commanders (O-6 or above) in certain sexual assault cases. (FY 13 NDAA).

• **Trends in Sexual Assault Punishments:** Identify the number of sexual assault punishments by type (NJP, administrative actions, summary, special, general courts-martial), and the consistency and appropriateness of each based on the facts of the individual case. (FY 13 NDAA).

• **Comparison of Military, Federal and State Court Punishments:** Compare military and civilian sexual assault punishments based on number of punishments by type, consistency of punishments, and based on the facts of each case. (FY 13 NDAA).

• **Sentences Reduced or Set Aside on Appeal:** Review military sexual assault convictions in most recent JPP report and identify and describe instances when punishments were reduced or set aside on appeal and those where defendant appealed following a plea agreement. (FY 13 NDAA).

3. Training/Experience of Prosecutor & Defense Counsel

▪ **Impact of Prosecutor and Defense Counsel Training on Sexual Assault Cases:** Building on RSP compiled data, assess trends in training and experience levels of military defense and trial counsel and compare to trends in prosecution and adjudication of cases over same period (FY 13 NDAA).

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4. Mandatory Minimum Sentences

- **Implementation and Effect of Mandatory Dismissal or Dishonorable Discharge for Sexual Assault:** Assess implementation of the mandatory dismissal or dishonorable discharge statutory requirement for conviction of rape (120(a)), sexual assault (120(b)), rape or sexual assault of a child (120b(a),(b)), forcible sodomy (125), or attempts to commit these offenses (80). Also assess whether additional offenses should be included. (FY 14 NDAA).

5. Special Victim Capability

- **Monitor Special Victim Capability Trends:** Monitor trends in the development, utilization, and effectiveness of the special victims capabilities as required by § 573 of (FY 13 NDAA).

6. Special Victim Counsel Program

- **Implementation of Effect of Special Victim Counsel Program:** Assess implementation of SVC program as required by § 1716 of FY 13 NDAA and recommend appropriate modifications. (FY 14 NDAA).

7. Victim's Past Sexual Conduct (MRE 412)

- **Evidence of Victim Prior Sexual Conduct at Article 32 Hearing:** Review and assess instances where victim prior sexual conduct was considered in Article 32 hearing and those where it was determined to be inadmissible. (FY 13 NDAA).

- **Evidence of Victim Prior Sexual Conduct at Court-Martial:** Review and assess instances where evidence of victim prior sexual conduct was admitted in court-martial and what impact it had on case. (FY 13 NDAA).

8. (Proposed) Victim's Mental Health Records

- **Use of Victim Mental Health Records by Defense:** Examine the use of mental health records by the defense during preliminary hearings and courts-martial, compare to the similar use in civilian criminal legal proceedings, and identify any substantial differences.

9. Compensation & Restitution

- **Adequacy of Compensation and Restitution for Crime Victims Under UCMJ:** Assess adequacy of current provision of compensation and restitution for victims of offenses under the UCMJ and make recommendations for expansion. (FY 14 NDAA).

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- **Evaluate 3 Options Proposed by Congress:** assess the following options for expanding victim compensation and restitution under the UCMJ:
- Providing Forfeited Wages of incarcerated members of the Armed Forces to victims of offenses as compensation.
- Including bodily harm among the injuries meriting compensation for redress under § 939 of UCMJ.
- Allowing restitution to be directed at court-martial, requiring members of the Armed Forces to pay restitution to victims of their offenses upon direction of a court-martial.

10. Other Matters Identified by the Panel

- **Separating Penetrative from Non-penetrative Offenses Under UCMJ:** Consider whether to recommend legislation that would either split sexual assault offenses under Article 120 into different articles that separate penetrative and contact offenses from other offenses or narrow the breadth of conduct currently criminalized under Article 120. (*RSP Recommendation 113*).

- **Victim's Right to Access Information:** Review and clarify the extent of a victim's right to access information that is relevant to the assertion of a particular right. (*RSP Recommendation 45*).

- **Use of Depositions:** Assess the use of depositions in light of changes to the Article 32 proceeding, and determine whether to recommend changes to the deposition process, including whether military judges should serve as deposition officers. (*RSP Recommendation 115*).

- **Military Plea-Bargaining:** Study whether the military plea-bargaining process should be modified. (*RSP Recommendation 117*).

- **Any Additional Matters Identified by the Panel.**