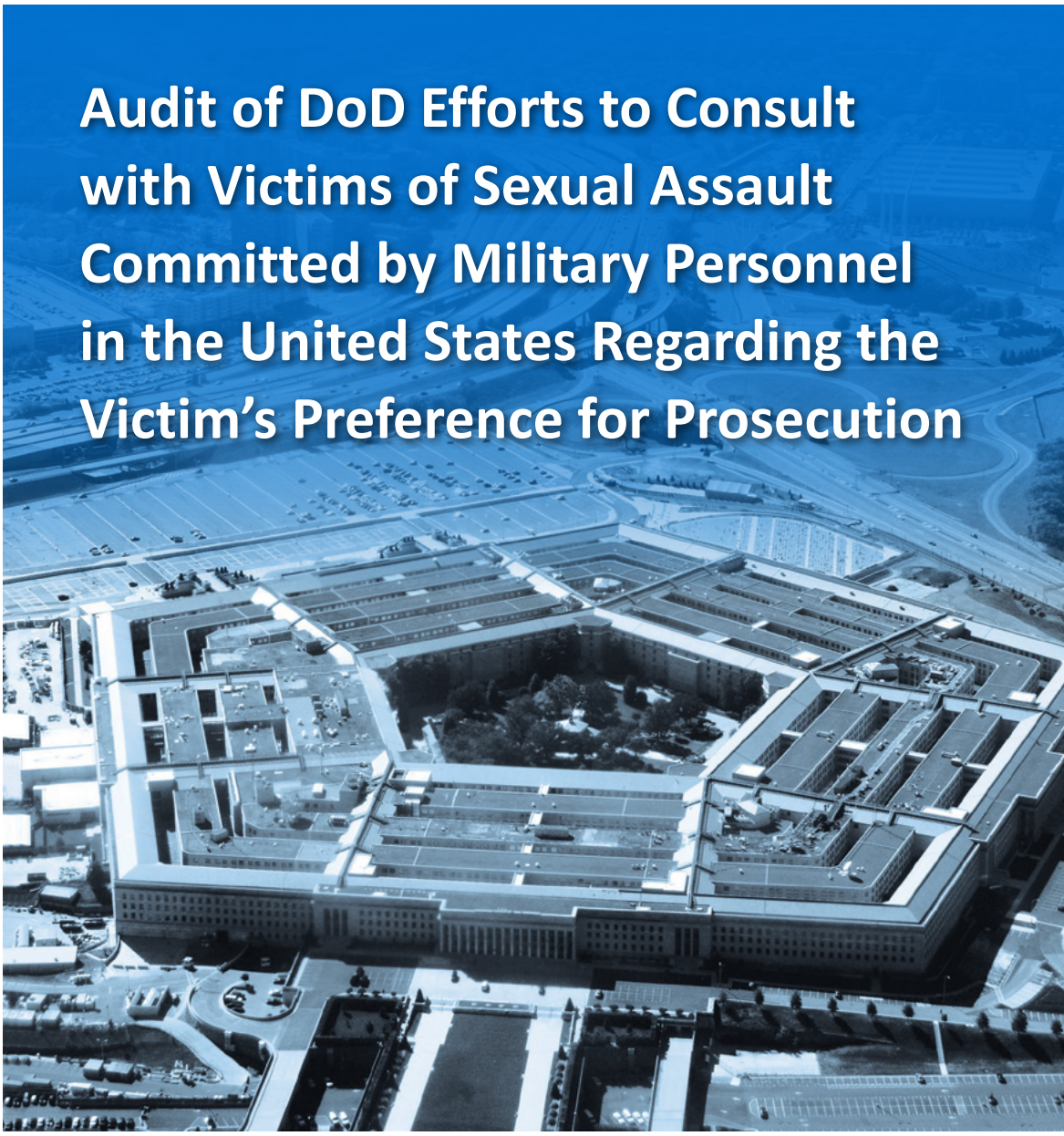
Report No. DODIG-2019-064

INSPECTOR GENERAL

U.S. Department of Defense

MARCH 20, 2019

Audit of DoD Efforts to Consult with Victims of Sexual Assault Committed by Military Personnel in the United States Regarding the Victim's Preference for Prosecution



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Results in Brief

Audit of DoD Efforts to Consult with Victims of Sexual Assault Committed by Military Personnel in the United States Regarding the Victim's Preference for Prosecution

March 20, 2019

Objective

We determined whether victims of sexual assault by military personnel that occurred in the United States were consulted on their preference for prosecuting offenses by court-martial or in a civilian court with jurisdiction over the offense and whether the victims' preference was documented. This audit was initiated in response to requirements in the House Armed Services Committee report that accompanied the Fiscal Year 2019 National Defense Authorization Act. As part of our audit, we reviewed 82 of 173 cases of alleged adult sexual assault or an attempt to commit adult sexual assault between October 1, 2016, and June 30, 2018, at Fort Hood, Texas; Naval Station Norfolk, Virginia; Joint Base San Antonio, Texas; and Marine Corps Base Camp Pendleton, California.

Background

The FY 2015 National Defense Authorization Act requires DoD officials to consult with victims of alleged sexual assaults that occur in the United States. Specifically, DoD officials are required to ask the victims about their preference regarding whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense. DoD officials should consider what the victim wants when deciding whether to prosecute by court-martial or in a civilian court, although they are not required to comply with the victim's preference.

Finding

In 77 of the 82 cases we reviewed, officials at Fort Hood, Naval Station Norfolk, Joint Base San Antonio, and Marine Corps Base Camp Pendleton either did not ask or did not document that they asked victims of sexual assault about their preference for prosecution. Of the 77 cases, the victims in 21 cases were not asked their preference for prosecution. For the remaining 56 of 77 cases, Military Service officials stated that the victims were asked, however they could not provide evidence of what the victims' preference was. This occurred for the following reasons.

- The DoD did not establish a DoD-wide process to ensure that victims of alleged sexual assaults were asked about their preference for prosecution or to ensure that their preference was documented.
- The DoD Sexual Assault Prevention and Response Office does not track whether victims were asked about their preference for prosecution.
- The Military Services issued guidance that required that victims be asked about their preference for prosecution but the policy does not require that the victims' preference be documented.

As a result, victims of sexual assault were denied the opportunity to state their preference for how their cases were prosecuted for 21 of the 77 cases we reviewed. For the remaining 56 cases, Military Service officials provided insufficient documentation showing whether the victims were consulted on their preference for prosecuting offenses.

Recommendations

We recommend that the Under Secretary of Defense for Personnel and Readiness develop and implement guidance requiring the Military Services to document that the victim was asked about the preference for prosecution and when and what the victim's preference was. Such guidance should clearly specify exceptions or state that there are no exceptions to the consultation or documentation requirement.

Results in Brief

Audit of DoD Efforts to Consult with Victims of Sexual Assault Committed by Military Personnel in the United States Regarding the Victim's Preference for Prosecution

Management Comments and Our Response

The Assistant Secretary of Defense for Manpower and Reserve Affairs, responding for the Under Secretary of Defense for Personnel and Readiness, generally agreed with the recommendation, stating that the Office of the Under Secretary of Defense for Personnel and Readiness will consult with the Military Departments to develop and implement guidance requiring the Military Departments to issue regulations mandating documentation of the victims' preference.

Comments from the Assistant Secretary of Defense for Manpower and Reserve Affairs addressed the specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation once we review the guidance to ensure that it requires documentation of the victims' preference and includes either specific exceptions to the consultation and documentation requirement or a statement that there are no exceptions to the consultation or documentation requirement. Please see the Recommendation Table on the next page.

Recommendations Table

Management	Recommendations Unresolved	Recommendations Resolved	Recommendations Closed
Under Secretary of Defense for Personnel and Readiness	None	1	None

Note: The following categories are used to describe agency management's comments to individual recommendations.

- **Unresolved** – Management has not agreed to implement the recommendation or has not proposed actions that will address the recommendation.
- **Resolved** – Management agreed to implement the recommendation or has proposed actions that will address the underlying finding that generated the recommendation.
- **Closed** – OIG verified that the agreed upon corrective actions were implemented.


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March 20, 2019

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS
DIRECTOR, DEFENSE HUMAN RESOURCES ACTIVITY
NAVAL INSPECTOR GENERAL
AUDITOR GENERAL, DEPARTMENT OF THE ARMY
AUDITOR GENERAL, DEPARTMENT OF THE AIR FORCE

SUBJECT: Audit of DoD Efforts to Consult with Victims of Sexual Assault Committed by Military Personnel in the United States Regarding the Victim's Preference for Prosecution (Report No. DODIG-2019-064)

We are providing this report for information and use. We conducted this audit in accordance with generally accepted government auditing standards.

We considered comments from the Under Secretary of Defense for Personnel and Readiness and unsolicited comments from the Department of the Army, Office of the Judge Advocate General, on the draft of this report when preparing the final report. Those comments conformed to the requirements of DoD Instruction 7650.03; therefore, we do not require additional comments.

If you have any questions or would like to meet to discuss the audit, please contact me at (703) 604-8905 (DSN 664-8905). We appreciate the cooperation and assistance received during the audit.

Troy M. Meyer
Principal Assistant Inspector General
For Audit


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Introduction

Objective

We determined whether victims of sexual assault by military personnel that occurred in the United States were consulted on their preference for prosecuting offenses by court-martial or in a civilian court with jurisdiction over the offense and whether the victim's preference was documented. See Appendix A for a discussion of the scope and methodology.

Background

House Armed Services Committee Request for Audit

We initiated this audit based on a requirement from the House Armed Services Committee (HASC) report for the FY 2019 National Defense Authorization Act (NDAA).[1] The report states that the HASC is interested in how the DoD implemented the requirement that victims of alleged sex-related offenses be consulted to solicit their "preference regarding whether the covered offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense."[2]

The DoD Sexual Assault Prevention and Response Office (SAPRO) produces an annual report on sexual assault in the military that is provided to Congress. The report includes statistics on sexual assaults, including "data on penetrating and sexual contact crimes by adults against adults, matters defined in articles 120 and 125 of the Uniform Code of Military Justice (UCMJ) as well as article 80, which governs attempts to commit these offenses."[3,4] However, it is important to note that the HASC report pointed out that the SAPRO annual report contained statistics on the number of cases prosecuted in civilian courts, but the data did not indicate whether the civilian prosecutions were in accordance with wishes of the victim or simply the only option for prosecution of the offenses.

In the committee report, the HASC directed the DoD OIG to review the DoD and Military Service processes for consulting victims in cases in which section 534 applies. Section 534 of the 2015 NDAA applies to sex-related offenses, which include rape

[1] Public Law 115-232, "John S. McCain National Defense Authorization Act for Fiscal Year 2019," August 13, 2018.

[2] Public Law 113-291, "Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015," December 19, 2014.

[3] "Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2017," April 27, 2018.

[4] Appendix B, "Statistical Data on Sexual Assault."

and sexual assault (adult); stalking; rape and sexual assault of a child; other sexual misconduct; forcible sodomy and bestiality; and attempts to commit these offenses in the United States.[5]

According to the HASC report, the DoD OIG report must:

- identify who is responsible for consulting with the victim to ask their preference for prosecution;
- determine whether the Military Services are complying with the notification requirement;[6]
- describe the method used to record the victim's preference and convey the information to the relevant authorities; and
- determine whether the policy is applied consistently across the Military Services.

This audit focused on the Military Services' processes for asking about and documenting victims' preference for prosecution for alleged sexual assaults that are included in the SAPRO annual report because the HASC wanted more information about the forum for prosecution for the types of offenses that SAPRO collects data about and reports on in its annual report. SAPRO reports on adult-on-adult sexual assault but not other offenses that are included in the definition of sex-related offenses (stalking, rape and sexual assault of a child, and other sexual misconduct).

The Military Service processes for asking about and documenting the victims' preference are the same for sexual assaults and sex-related offenses. See Appendix B for the definitions of sex-related offenses and sexual assault.

The DoD provides eligible victims of sexual assault with a special victims' counsel. The Navy and Marine Corps refer to this individual as a victims' legal counsel. The FY 2014 NDAA requires the DoD to offer a special victims' counsel to provide legal assistance to victims of sexual assaults if the victim elects to have a special victims' counsel.[7] The special victims' counsel and the victim have an attorney-client

[5] Sex-related offense is defined in section 1044e, title 10, United States Code (10 U.S.C. § 1044e) as including alleged sex-related offense, defined as any allegation of a violation of 10 U.S.C. § 1044e §§ 920, 920a, 920b, 920c, or 925 (articles 120, 120a, 120b, 120c, or 125 of the Uniform Code of Military Justice); or an attempt to commit any of the offenses above as punishable under 10 U.S.C. § 880 (article 80 of the Uniform Code of Military Justice). The offenses include rape and sexual assault generally (article 120); stalking (article 120a); rape and sexual assault of a child (article 120b); other sexual misconduct (article 120c); forcible sodomy, bestiality (article 125); attempts (article 80).

[6] According to Public Law 113-291, Section 534(b), if a victim expresses a preference for prosecution in a civilian court, the convening authority must ensure that the civilian authority with jurisdiction is notified of the victim's preference for civilian prosecution. If the convening authority learns of any decision by the civilian authority to prosecute or not prosecute the offense in a civilian court, the convening authority is responsible for notifying the victim about that decision.

[7] Public Law 113-66, "National Defense Authorization Act for Fiscal Year 2014," December 26, 2013, Section 1716, "Designation and Availability of Special Victims' Counsel for Victims of Sex-Related Offenses."

relationship.[8] When we discussed obtaining information about the victims' preference and providing that preference to the relevant authorities with the Under Secretary of Defense for Personnel and Readiness (USD[P&R]) Office of Legal Policy, the Deputy Director explained that some of the special victims' counsels may be concerned about violating attorney-client privilege if they disclose the victims' preference to the DoD without a valid waiver of the privilege.

Victims' Preference for Prosecution

According to the FY 2015 NDAA, DoD officials are required to consult "with a victim of an alleged sex-related offense that occurs in the United States to solicit the victim's preference regarding whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense."[9] The FY 2015 NDAA further states the victim's preference for prosecution is not binding on the DoD or on civilian authorities. This means that DoD officials should consider what the victim wants when deciding whether to prosecute by court-martial or in a civilian court, but they are not required to comply with the victim's preference. The convening authority, the individual authorized to convene courts-martial, should consider the victim's preference, even though it is not binding, in determining whether to refer the charges for military prosecution. If a victim expresses a preference for prosecution in a civilian court with jurisdiction over the offense, the convening authority must ensure that the civilian authority with jurisdiction is notified of the victim's preference for civilian prosecution. The FY 2015 NDAA requires that, if the convening authority learns of any decision by the civilian authority to prosecute or not prosecute the offense in a civilian court, the convening authority is responsible for notifying the victim about that decision. The victim can provide his or her preference directly to DoD officials or through an authorized representative. The FY 2015 NDAA does not require the Military Services to document the victims' preference in the case file or in any DoD database.

Jurisdiction Defined

When determining the appropriate forum to try a sexual assault case when the accused is subject to the Uniform Code of Military Justice (UCMJ), jurisdiction must be considered. For offenses committed on a military installation, there are two types of jurisdiction—exclusive Federal jurisdiction and nonexclusive Federal jurisdiction. Exclusive Federal jurisdiction exists where only the Federal government has authority to adjudicate a case to the exclusion of state or local courts. Courts-martial have exclusive jurisdiction over offenses defined in the

[8] 10 U.S.C. § 1044e, paragraph c, "Nature of Relationship." Attorney-client privilege is the right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney.

[9] Public Law 113-291, Section 534(b)(1) and (b)(2).

UCMJ. Nonexclusive, or concurrent, jurisdiction exists when more than one court has the power to adjudicate a case. An act that violates both the UCMJ and local criminal law may be tried by a court-martial, by a civilian court or by both.[10] On a military installation designated as an exclusive Federal jurisdiction, both military courts-martial and the Department of Justice have jurisdiction to prosecute offenses committed by a service member. On a military installation designated as concurrent jurisdiction, both military courts-martial and state and local authorities have jurisdiction to prosecute offenses committed by a service member. Outside of a military installation, both the state and local authorities and military courts-martial could have jurisdiction to prosecute offenses committed by a service member.

For offenses committed on a military installation with exclusive Federal jurisdiction, although the Department of Justice has jurisdiction to prosecute offenses committed by service members, a memorandum of understanding between the DoD and the Department of Justice states that most crimes committed on a military installation will be investigated by the responsible DoD investigative agency and, when committed by a person subject to the UCMJ, prosecuted by the responsible Military Department.[11]

The FY 2015 NDAA states that victims of alleged sexual assault occurring in the United States have to be asked about their preference for prosecution by court-martial or in a civilian court with jurisdiction. The law does not include an exception for cases where:

- the civilian authorities turned down the case before the victim was asked;
- an existing memorandum of agreement between civilian and military authorities set forth factors determining primary jurisdiction in a case;
- the victim had otherwise chosen not to participate in the judicial process; or
- the victim reported the case to a Military Criminal Investigative Organization rather than to civilian authorities.

For alleged sexual assaults occurring in the United States, all victims should be asked about their preference for prosecution.

[10] Manual for Courts-Martial United States (2016 Edition), Part II, "Rules For Courts-Martial," Chapter II, "Jurisdiction," Rule 201. "Jurisdiction in General," paragraph d, "Exclusive and Nonexclusive Jurisdiction."

[11] DoD Instruction 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," June 18, 2007, Enclosure 2, "DoD Supplemental Guidance to the MOU Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes." "Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes."

DoD Sexual Assault Prevention and Response Office

SAPRO provides recommendations to the USD(P&R) for DoD sexual assault policy matters. The SAPRO Director assists the USD(P&R) in developing, administering, and monitoring the effectiveness of sexual assault prevention and response policies and programs, and implements and monitors compliance with DoD sexual assault policy on prevention and response.[12] Even though SAPRO provides recommendations and assists the USD(P&R) with developing DoD sexual assault policy on prevention and response, SAPRO does not monitor the legal processes and criminal investigative matters that are the responsibility of the Military Services and the DoD OIG related to sexual assault. Furthermore, SAPRO policies and programs do not apply when a sexual assault is committed by a spouse or intimate partner, or if the victim of a sexual assault is a military dependent under age 18. These victims receive assistance from the Family Advocacy Program, which provides services to victims of domestic abuse or domestic violence.[13]

Cases Reviewed

In FY 2016 (the most recent data available for military installations in the United States), victims made 5,307 reports of nondomestic abuse-related adult sexual assault at military installations in the United States.[14] Of those 5,307 reports, victims made 3,908 unrestricted reports and 1,399 restricted reports.

- A victim files an unrestricted report to disclose that he or she is the victim of a sexual assault. An unrestricted report is provided to healthcare personnel, the Sexual Assault Response Coordinator, a Sexual Assault Prevention and Response Victim Advocate, command authorities, or other persons. An unrestricted report is provided to law enforcement and may be used to initiate an official investigation.[15]
- A victim files a restricted report to confidentially disclose the assault to specified individuals (Sexual Assault Response Coordinator, a Sexual Assault Prevention and Response Victim Advocate, or healthcare personnel), and receive medical treatment, including emergency care counseling, and assignment of a Sexual Assault Response Coordinator or a Sexual Assault

[12] DoD Directive 6495.01, "Sexual Assault Prevention and Response (SAPR) Program," January 23, 2012, Incorporating Change 3, April 11, 2017, Enclosure 2, "Responsibilities."

[13] DoD Directive 6495.01, paragraph 2, "Applicability," subparagraph b.

[14] SAPRO, "Reports of Sexual Assault Received at Military Installations and Combat Areas of Interest," November 17, 2017.

[15] DoD Directive 6495.01, "Sexual Assault Prevention and Response (SAPR) Program," January 23, 2012, Incorporating Change 3, April 11, 2017, Glossary.

Prevention and Response Victim Advocate. A restricted report will not be reported to law enforcement or to the command to initiate an official investigation unless the victim consents or an exception applies.[16]

For our audit, we selected the installation from each Military Service with the highest number of unrestricted reports in FY 2016—Fort Hood, Texas; Naval Station Norfolk, Virginia; Joint Base San Antonio, Texas; and Marine Corps Base Camp Pendleton, California. For each installation, we reviewed cases with at least one preferred (Navy, Air Force, and Marine Corps) or referred (Army) charge of adult sexual assault or an attempt to commit adult sexual assault in the United States between October 1, 2016, and June 30, 2018.[17] Of the 173 cases at the four selected military installations, we nonstatistically selected 82 cases to determine whether victims were asked about their preference for prosecution. We selected the most recent cases for review at Fort Hood and Marine Corps Base Camp Pendleton where the charges were preferred or referred and all cases in the universe for review at Naval Station Norfolk and Joint Base Antonio. Table 1 summarizes the universe and nonstatistical sample of cases selected for review.

Table 1. Universe and Sample of Cases Selected for Review

Military Installation Reviewed	Universe of Cases	Sample of Cases Reviewed
Fort Hood	55	23
Naval Station Norfolk	27	24
Joint Base San Antonio	14	14
Marine Corps Base Camp Pendleton	77	21
Total	**173**	**82**

Note: We originally requested information on 27 cases at Marine Corps Base Camp Pendleton. However, we eliminated six cases because one alleged assault occurred in Korea: one alleged assault occurred in Okinawa: the victim declined to participate after preferral of charges in one case: charges were dismissed 36 days after charges were preferred in one case; one case was an Article 128; and charges were filed before October 1, 2016, in one case.

Source: The DoD OIG.

[16] DoD Directive 6495.01, Glossary. According to DoD Instruction 6495.02, Enclosure 4, "Reporting Options and Sexual Assault Reporting Procedures," paragraph 5, "Exceptions to Restricted Reporting and Disclosures," subparagraph b, exceptions include when authorized by the victim in writing, when necessary to prevent or mitigate a serious and imminent threat to the health or safety of the victim or another person, when required for fitness for duty or disability determinations, when required for the supervision of coordination of direct victim healthcare or services or when ordered by a military official (e.g., a duly authorized subpoena in a UCMJ case), Federal or state judge, or as required by a Federal or state statute or applicable U.S. international agreement.

[17] According to the Manual for Courts-Martial, Rule 307, preferral of charges is the formal charging of the accused with an offense. According to the Manual for Courts-Martial, Rule 601, referral of charges "is the order of a convening authority that charges against an accused will be tried by a specified court-martial." The Navy, Air Force, and Marine Corps track the preferral of charges and referral of charges dates. The Army tracks only the referral of charges date.

Review of Internal Controls

DoD Instruction 5010.40 requires DoD organizations to implement a comprehensive system of internal controls that provides reasonable assurance that programs are perating as intended and to evaluate the effectiveness of the controls.[18] We identified internal control weaknesses at Fort Hood, Naval Station Norfolk, Joint Base San Antonio, and Marine Corps Base Camp Pendleton. Specifically, officials at those installations either did not ask—as required by the FY 2015 NDAA—or did not document that they asked victims of sexual assault about their preference for prosecution. We will provide a copy of the final report to the senior officials responsible for internal controls in the USD(P&R), Army, Navy, Air Force, and Marine Corps.

[18] DoD Instruction 5010.40, "Managers' Internal Control Program Procedures," May 30, 2013.

Finding

Victims of Sexual Assault Were Not Always Asked About Their Preference for Prosecution

Officials at Fort Hood, Naval Station Norfolk, Joint Base San Antonio, and Marine Corps Base Camp Pendleton either did not ask or did not document that they asked victims of sexual assault about their preference for prosecution in 77 of 82 cases we reviewed. Of the 77 cases, the victims in 21 cases were not asked for their preference for prosecution. For the remaining 56 of the 77 cases, Military Service officials stated that the victims were asked, however they could not provide evidence of what the victim's preference was.

This occurred for the following reasons:

- The DoD did not establish a DoD-wide process to ensure that victims of alleged sexual assaults were asked about their preference for prosecution or to ensure that their preference was documented.[19]
- SAPRO does not track whether victims were asked about their preference for prosecution.
- The Military Services issued guidance that required that victims be asked about their preference for prosecution, but the policy does not require that the victim's preference be documented.[20]

As a result, victims of sexual assault were denied the opportunity to state their preference for how their cases were prosecuted for 21 of the 77 cases we reviewed. For the remaining 56 cases, Military Service officials provided insufficient documentation showing whether the victims were consulted on their preference for prosecuting offenses.

Victim Preference for Prosecution Was Not Always Asked About or Documented

Officials at Fort Hood, Naval Station Norfolk, Joint Base San Antonio, and Marine Corps Base Camp Pendleton either did not ask or did not document that they asked victims of sexual assault about their preference for prosecution in 77 of 82 cases

[19] Secretary of Defense Memorandum, "Implementation of Section 534(b)(1) of the National Defense Authorization Act for FY 2015," April 30, 2015.

[20] Army Regulation 27-10, "Legal Services, Military Justice," May 11, 2016, paragraph 17-10.a(11)(c). Secretary of the Navy message, "New Requirement to Consider a Victims Preference For Prosecution by Court-Martial or Civilian Court," July 31, 2015. Navy Headquarters JAG Office, "Sexual Assault Reporting Toolkit for SJAs," June 25, 2015. Air Force Instruction 51-201, "Administration of Military Justice," December 8, 2017, paragraph. 2.18.2.2. Marine Corps Bulletin 5800, "Military Justice Requirements and Implementation Guidance, May 25, 2017.

we reviewed. Specifically, of the 77 cases, the victims in 21 cases were not asked their preference for prosecution. For the remaining 56 of the 77 cases, Military Service officials stated that the victims were asked; however, they could not provide evidence of what the victim's preference was. For purposes of this audit, documentation included any letters, memorandums for record, forms, e-mail, or notes in the case files prepared at the time the victims were asked about their preference for prosecution or at the time the victims stated what their preference was (if the victim chose to respond).

Fort Hood

Fort Hood 1st Cavalry Division and III Corps Staff Judge Advocate officials either did not ask or did not document that they asked victims about their preference for prosecution in 20 of 23 cases reviewed. For those 20 cases, 1st Cavalry Division and III Corps Staff Judge Advocate officials stated that they:

- asked victims about their preference for prosecution but did not have supporting documentation in 14 cases,
- did not ask the victims in 2 cases because the military had already taken jurisdiction, and
- did not know whether they asked the victims in 4 cases.

All 23 cases were processed in the military system.

According to Chief of the Program Branch, Army Office of the Judge Advocate General (OTJAG) Criminal Law Division, Fort Hood is a military installation with exclusive Federal jurisdiction. Therefore, any offense committed on the installation by a service member is subject to the memorandum of agreement between the DoD and the Department of Justice. In addition, Fort Hood has an existing memorandum of agreement with the district attorneys in both counties surrounding the installation that sets forth criteria for determining which entity would prosecute an offense committed by a service member off-post. The memorandums of agreement do not outline procedures related to sexual assaults.

Officials at Army Headquarters JAG, 1st Cavalry Division, and III Corps Staff Judge Advocate stated that the FY 2015 NDAA does not require Army officials to document that they asked victims about their preference for prosecution. Nevertheless, as a result of the audit, on September 11, 2018, the 1st Cavalry Division Staff Judge Advocate issued guidance requiring trial counsel to document the victims' preference for prosecution using the OT JAG CLD Form 1, "Notification of Rights Under Section 534(b) FY15 NDAA and Election of Jurisdictional Preference," February 2018.[21]

[21] 1st Cavalry Division Staff Judge Advocate Memorandum, "Military Justice Policy on Non-Binding Victim Venue Preference Election for Military or Civilian Prosecutions," September 11, 2018.

Naval Station Norfolk

Naval Station Norfolk officials either did not ask or did not document that they asked victims about their preference for prosecution in all 24 cases reviewed. Specifically, Naval Station Norfolk officials:

- provided screenshots from the Victim and Witness Assistance Program section of the Case Management System showing check marks as the only evidence that they asked victims about their preference in 12 cases. However, they did not have documentation to independently verify that the victim was asked their preference. For each case, the Case Management System did indicate a preference; however, it was unclear whether the preference was what the victim requested or how the case was actually prosecuted. A January 8, 2019, memorandum from the Assistant Judge Advocate General (Military Law), Office of the Judge Advocate General of the Navy, to the audit team stated, "In many instances, entries in [Case Management System] have replaced the maintenance of paper documents and files. Consequently, it does not appear appropriate to equate entries in [Case Management System] as no evidence or documentation of compliance with Section 534." However, we determined that check marks in the Case Management System alone—with no other supporting documentation—are inadequate documentation to support that victims were asked about their preference for prosecution.
- stated that they asked the victim orally but did not document it in 3 cases,
- stated that they did not ask the victims in 4 cases because the military had jurisdiction,
- stated that they did not ask the victim in 2 cases because civilian authorities already turned down the cases and there was no other authority to prosecute the case, and
- stated that they did not know whether they asked the victims in 3 cases.

All 24 cases were processed in the military system.

Joint Base San Antonio

Officials at Joint Base San Antonio either did not ask or did not document that they asked victims about their preference for prosecution in 12 of 14 cases reviewed. The Victim and Witness Policy Chief, Air Force Legal Operations Agency, Joint Base Andrews-Naval Air Facility Washington, stated that, in cases where military members are the accused, the U.S. Attorney's office in San Antonio historically declines prosecution with the exception of child exploitation cases. Specifically, officials with the:

- 502 Installation Support Group/Judge Advocate stated that it did not ask the victims in 9 cases and asked but did not document for 1 case because the military had exclusive jurisdiction over all 10 cases.

- 502 Force Support Group/Judge Advocate stated that it did not ask the victim in one case because the incident occurred on base in an area that is designated as exclusive Federal jurisdiction.
- 502 Security Readiness Group/Judge Advocate stated that the trial counsel asked the victim about her preference for prosecution during an interview for one case, but did not have supporting documentation.

All 14 cases were processed in the military system. The Air Force instruction includes templates for Air Force officials to use to ask about victims' preference for prosecution and for victims to express their preference. However, Air Force headquarters JAG personnel stated that the templates were recommendations for use where applicable and that installation JAG personnel were not required to use them or to document the results of the question if asked.

Marine Corps Base Camp Pendleton

Marine Corps Base Camp Pendleton officials either did not ask or did not document that they asked victims about their preference for prosecution in 21 of 21 cases reviewed. Specifically, Marine Corps Base Camp Pendleton officials stated that they:

- asked the victims about their preference in 18 cases but could not provide documentation supporting the victims' preference for prosecution to the DoD OIG because Camp Pendleton officials believed that providing this documentation would require disclosing information that is protected as attorney work product; and
- did not ask the victim in 3 cases because civilian authorities already turned down the cases and there was no other authority to prosecute the case.

According to the Military Justice Branch Deputy Branch Head, Judge Advocate Division, Headquarters, U.S. Marine Corps, Marine Corps Base Camp Pendleton comprises a broad geographical area that is a mix of exclusive Federal jurisdiction and concurrent jurisdiction. Accordingly, state and local authorities do not always have jurisdiction over offenses that occur on Marine Corps Base Camp Pendleton.

Marine Corps Base Camp Pendleton officials provided information to us about victims' preference. However, the officials explained that the victims' preference information previously provided to the audit team may refer to either preference for prosecution, preference for disposition, or preference for both prosecution and disposition. The officials stated that they did not have the details of any conversation between the trial counsel and the victim or the victim's legal counsel or any other records that could answer our questions. However, this statement is inconsistent with their assertion that providing documentation would violate attorney work product. The preference for disposition allows the victim to express

an opinion on the action the commander may take to close a case once the commander has decided to resolve the case in the military system.[22] All 21 cases were processed in the military system.

The DoD Did Not Establish a DoD-Wide Process to Ask and Document Victim Preference

The DoD did not establish a DoD-wide process to ensure that victims of alleged sexual assaults that occurred in the United States were asked about their preference for prosecution by court-martial or in a civilian court with jurisdiction or to ensure that their preference was documented. In an April 30, 2015, memorandum, the Secretary of Defense directed the Secretaries of the Military Departments to issue regulations implementing the requirement to ask victims about their preference for prosecution within 90 days.[23] The Secretary of Defense did not delegate any authority to the USD(P&R) to develop DoD-wide guidance or to advise the Military Services as they developed guidance. In implementing the guidance outlined in the Secretary of Defense Memorandum, the Military Service officials did not believe they needed to consult the victim if the military had exclusive Federal jurisdiction. However, the April 2015 memorandum did not include any exceptions to the requirement to ask a victim about his or her preference for prosecution, such as when the:

- civilian authorities turned down the case before the victim was asked,
- existing memorandum of agreement between civilian and military authorities set forth factors determining primary jurisdiction in a case, or
- victim had otherwise chosen not to participate in the judicial process.

The USD(P&R) should develop and implement guidance requiring the Military Services to document that the victim was asked about the preference for prosecution and when and what the victim's preference was. Such guidance should clearly specify exceptions or state that there are no exceptions to the consultation or documentation requirement.

SAPRO Does Not Track Whether Victims Are Asked About Their Preference

SAPRO does not track whether victims were asked about their preference for prosecution and, therefore, does not have the information to include in their annual report to Congress on sexual assault in the military. According to DoD policy,

[22] According to the Manual for Courts-Martial United States (2016 Edition), Part II, "Rules For Courts-Martial," Chapter III, "Initiation of Charges; Apprehension: Pretrial Restraint; Related Matters," Rule 306, "Initial disposition," paragraph c, "How Offenses May Be Disposed Of," charges may be disposed of by dismissing them, forwarding them to another commander for disposition, or referring them to a summary, special, or general court-martial.

[23] Secretary of Defense Memorandum, "Implementation of Section 534(b)(1) of the National Defense Authorization Act for FY 2015," April 30, 2015.

SAPRO is responsible for maintaining the Defense Sexual Assault Incident Database (DSAID) and providing annual reports of sexual assaults to Congress.[24] DSAID is a centralized, case-level database that captures data provided by the Military Services and maintains all sexual assault data collected by the Military Services. However, the DSAID does not include data elements to track whether the victim was asked about his or her preference for prosecution or what the desired preference was, if provided.

In a meeting with a SAPRO Senior Victim Assistance Advisor and the Director and Deputy Director of the USD(P&R) Office of Legal Policy, the SAPRO official confirmed that DSAID does not include information on the victims' preference for prosecution. If Congress wants this information to be included in future annual reports, then the DSAID would need to be modified to include new data elements.

The Army, Navy, and Marine Corps have modified their JAG databases to track information related to victims' preference for prosecution.[25]

- In a March 2018 e-mail, the Chief of the Army JAG Headquarters Criminal Law Division notified the Army JAG offices that the Military Justice Online system was updated to include a data element to record the victim's preference for prosecution.
- In June 2018, the Victim and Witness Assistance Program section of the Case Management System used by the Navy and the Marine Corps was modified to include a data element indicating whether the victim was asked about their preference for prosecution and the jurisdiction they preferred, if available.

In December 2018, the DoD Office of General Counsel issued a memorandum providing uniform standards and criteria for the military justice system to be implemented no later than December 23, 2020.[26] The memorandum requires that each Military Service maintains and operates a military justice case processing and management system that is capable of collecting information for the data points listed in the appendix to the memorandum. Each Military Service is responsible for implementing standards to ensure the data entry is complete and accurate. The data points included:

- "Was the victim advised, in accordance with Section 534(b), FY15 NDAA, of victim's right to submit a preference regarding exercise of civilian or military jurisdiction over offenses allegedly committed in the United States?" The choices are yes, no, or not applicable.

[24] DoD Directive 6495.01, Enclosure 2, paragraph 1.f.3 and 1.f.5. DSAID will include information when available, or when not limited by restricted reporting, or otherwise prohibited by law, about the nature of the assault, the victim, the offender, and the disposition of reports associated with the assault. DSAID shall be available to SAPRO and the DoD to develop and implement congressional reporting requirements.

[25] Army Military Justice Online and the Navy Marine Corps Case Management System.

[26] DoD Office of General Counsel Memorandum, "Uniform Standards and Criteria Required by Article 140a, Uniform Code of Military Justice (UCMJ)," December 17, 2018.

- "Victim jurisdiction preference." The choices are military, civilian, or not applicable.

However, the memorandum does not include a requirement for the Military Services to maintain documentation supporting the accuracy of the victims' preference data entered into the systems.

Military Service Guidance Did Not Require Victim Preference to Be Documented

The Military Services issued guidance that required that victims must be asked about their preference for prosecution. However, that guidance did not require that the victim's preference for prosecution be documented.

Army Guidance

Army guidance states that the trial counsel, victim's witness liaison, special victims' counsel, or other Government representative will obtain the victim's preference for prosecution. Specifically, the guidance states, "[t]he convening authority shall consider the victim's preference for jurisdiction [for prosecution], if available, prior to making an initial disposition decision." The convening authority should also take the victim's preference into account until the final disposition of the case.[27] However, the Army guidance does not require Army officials to document the victims' preference.

In a September 2017 e-mail, the Chief of the Program Branch, Army OTJAG Criminal Law Division, provided Army military justice offices with a form, "Notification of Rights Under Section 534(b) FY15 NDAA and Election of Jurisdictional Preference," to assist with documentation of a victim's preference and requested the forms be provided to the OTJAG. In February 2018, the Army started using OT JAG CLD Form 1, "Notification of Rights Under Section 534(b) FY15 NDAA and Election of Jurisdictional Preference." Of the 16 cases referred for military prosecution after September 2017, Fort Hood officials had supporting documentation in only 3 cases.

Navy Guidance

Navy guidance does not require that the victim's preference be documented.[28] While the Secretary of the Navy issued guidance in July 2015 that requires that victims be asked about their preference for prosecution, that guidance does not identify which office is responsible for asking the victims about their preference

[27] Army Regulation 27-10, "Legal Services, Military Justice," May 11, 2016, paragraph 17-10, "Rights of Crime Victims."

[28] Secretary of the Navy message, "New Requirement to Consider a Victims Preference for Prosecution by Court-Martial or Civilian Court," July 31, 2015. Navy Headquarters JAG Office, "Sexual Assault Reporting Toolkit for SJAs," June 25, 2015.

and does not require that the victims' preference be documented.[29] However, in June 2015, the Navy JAG Office provided a toolkit, which states that the staff judge advocates are responsible for ensuring that victims are asked about their preference for prosecution once the investigation is substantially complete.[30] The toolkit does not, however, require that the victim's preference be documented.

Air Force Guidance

Air Force Guidance states that the Special Court-Martial Convening Authority, through the servicing staff judge advocate or designee, requests and considers the victim's preference, if any.[31] Air Force guidance also includes templates for the following notifications.

- "Template Victim Notification of Opportunity to Express Views on Jurisdiction," Attachment 3, Figure A3.1;
- "Staff Judge Advocate Notification to Civilian Authority Regarding Victim Jurisdiction and Venue Preference," Attachment 3, Figure A3.2; and
- "Notification to Victim of Civilian Authority's Response to Victim's Jurisdiction and Venue Preference," Attachment 3, Figure A3.3.

However, Air Force guidance does not state that the victims' preference for prosecution be documented or that use of the templates was mandatory.

Marine Corps Guidance

Marine Corps guidance does not require that the victim's preference be documented. The Marine Corps Judge Advocate Division, located within Headquarters, U.S. Marine Corps, issued a practice advisory in 2015 and guidance in 2017.[32] Both state that the cognizant commander must consider the victim's preference for prosecution before making an initial disposition decision.[33] However, neither the practice advisory nor the guidance specified which office is responsible for asking the victims about their preference for prosecution or require that the victims' preference be documented. In addition, the Judge Advocate Division issued a practice directive in 2018, which states, "Where a victim . . . desires to submit matters for consideration, the

[29] Secretary of the Navy message, "New Requirement to Consider a Victims Preference for Prosecution by Court-Martial or Civilian Court," July 31, 2015.

[30] Navy Headquarters JAG Office, "Sexual Assault Reporting Toolkit for SJAs," June 25, 2015, is designed to help staff judge advocates ensure that command complies with all applicable rules and instructions regarding proper reporting and documentation of alleged sexual assaults. The toolkit includes applicable references, checklists, templates, sample disposition documents, and abbreviated explanatory materials.

[31] Air Force Instruction 51-201, paragraphs 2.18.2.2 and 11.16.2.1.

[32] Practice Advisory No. 3-15, "What to Know About Victims' Rights," February 26, 2015. Maine Corps Bulletin 5800, "Military Justice Requirements and Implementation Guidance," May 25, 2017.

[33] According to Marine Corps Bulletin 5800, Enclosure 1, paragraph 7.d, a cognizant commander means the Sexual Assault Initial Disposition Authority, General Court-Martial Convening Authority, or any other appropriate commander taking action on the case.

[victims' legal counsel] will submit those matters in writing within 10 days of a request for those matters by government counsel."[34] Even though the practice directive does not specifically address documenting the victims' preference for prosecution, the requirement for the victims' legal counsel to submit matters in writing should result in the victims' preference being documented. Also, the Case Analysis Memorandum template provides fields to capture the victim's disposition preference and provides space for trial counsel to include information regarding the victim's preference. The template includes the following statement in a comment box, "Comment as needed on any preferences expressed by the alleged victim. Please note that the victim must be allowed to express a preference for either civilian or military jurisdiction ([Rules for Courts-Martial] 306(e)(2))." However, the Case Analysis Memorandum template does not require that the victim's preference for prosecution be documented on the form.

Recommendation 1, if implemented, should result in the Military Services documenting the victims' preference for prosecution.

Conclusion

Victims of sexual assault were denied the opportunity to state their preference for how their cases were prosecuted for 21 of the 77 cases we reviewed. For the remaining 56 cases, Military Service officials provided insufficient documentation showing where the victims were consulted on their preference for prosecuting offenses. Therefore, victims of sexual assault may have been denied the opportunity to express their preference for prosecution by the military or by civilian authorities. Unless the recommendation is implemented, the DoD will not be able to ensure that sexual assault victims are provided the opportunity to communicate their preference for whether their case is adjudicated by the military or in a civilian court. In addition, the DoD will be unable to provide information to Congress to address its concerns about whether the civilian prosecutions were in accordance with the wishes of the victims or simply the only option for prosecution of the offenses.

[34] Practice Directive 2-18, "Case Analysis Memorandum," March 16, 2018.

Management Comments on the Finding and Our Response

Although not required to comment, the Assistant Judge Advocate General for Military Law and Operations, Army JAG, provided the following comments on the finding. For the full text of the Assistant Judge Advocate General's comments, see the Management Comments section of the report.

Assistant Judge Advocate General for Military Law and Operations, Army JAG, Comments

The Assistant Judge Advocate General for Military Law and Operations, Army JAG, was concerned that requiring victims to express their preference for prosecution by completing forms "would be inconsistent with [the Army's] imperative to treat victims with respect, dignity, and empathy." The Assistant Judge Advocate General stated that they could "fully inform victims of the right to express a preference, but [the victims] are not obliged to complete a form."

The Assistant Judge Advocate General also stated that the report does not accurately represent the Army's efforts at compliance with the law and does not adequately highlight the complications regarding jurisdiction. Specifically, the Assistant Judge Advocate General stated that Section 534(b) is broadly written, and "requires military practitioners to advise a victim of the right to a non-binding preference for jurisdiction even if the conduct is not criminalized by civilian or Federal law." The Assistant Judge Advocate General further stated that Section 534(b) "does not anticipate cases in which civilian authorities have asserted primary jurisdiction over the offense…or cases in which civilian authorities have already declined prosecution by the time military authorities assume jurisdiction of the case."

The Assistant Judge Advocate General also stated that "evidence also shows that even when the form is offered, the victims will frequently choose not to complete it or to express their preference through some other means—e-mails, text messages, and [Special Victims' Counsel] communications."

Our Response

We disagree with the Assistant Judge Advocate General's comments. Our report states that the FY 2015 National Defense Authorization Act does not require the Military Services to document the victims' preference in the case file or in any DoD database, and the DoD did not establish a process to ensure that victims of alleged sexual assaults were asked about their preference for prosecution or ensure that their preference was documented. Therefore, the Army could not support that they

asked victims about their preference for prosecution in 20 of 23 cases we reviewed. Furthermore, with regard to the Army's concerns regarding jurisdiction, our report acknowledges that the victim's preference is not binding on the DoD or civilian authorities. Nevertheless, our recommendation to the USD(P&R), if implemented, should resolve the Army's concerns because the guidance will require the Military Services to document the victims' preference and should clarify whether there are any instances when victims should not be asked about their preference.

In addition, we understand that the Army desires to treat victims with respect, dignity, and empathy and that they could "fully inform victims of the right to express a preference, but [the victims] are not obliged to complete a form." We are not recommending that victims be required to complete forms, but suggesting that the Army should document on the form or through an alternate process, the victim's preference for prosecution to ensure this information is captured. Letters, memorandums for record, forms, e-mail, or notes in the case files—prepared by anyone at the time the victims were asked about their preference or at the time the victims stated what their preference was (if the victim chose to respond), would be acceptable.

Recommendation, Management Comments, and Our Response

Recommendation

We recommend that the Under Secretary of Defense for Personnel and Readiness develop and implement guidance requiring the Military Services to document that the victim was asked about the preference for prosecution and when and what the victim's preference was. Such guidance should clearly specify exceptions or state that there are no exceptions to the consultation or documentation requirement.

Under Secretary of Defense for Personnel and Readiness Comments

The Assistant Secretary of Defense for Manpower and Reserve Affairs, responding for the USD(P&R), generally agreed with the recommendation, stating that USD(P&R) officials will consult with the Military Departments to develop and implement guidance requiring the Military Departments to issue regulations mandating documentation of the victims' preference.

Our Response

Comments from the Assistant Secretary of Defense for Manpower and Reserve Affairs addressed the specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation once we review the guidance to ensure that it requires documentation of the victims' preference and includes either specific exceptions to the consultation and documentation requirement or a statement that there are no exceptions to the consultation or documentation requirement.

Appendix A

Scope and Methodology

We conducted this performance audit from June 2018 through February 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Universe and Sample

In FY 2016 (the most recent data available for military installations in the United States), victims made 5,307 reports of nondomestic abuse-related adult sexual assault at military installations in the United States.[35] Of those 5,307 reports, victims made 3,908 unrestricted reports and 1,399 restricted reports.

- A victim files an unrestricted report to disclose that he or she is the victim of a sexual assault. An unrestricted report is provided to healthcare personnel, the Sexual Assault Response Coordinator, a Sexual Assault Prevention and Response Victim Advocate, command authorities, or other persons. An unrestricted report is provided to law enforcement and may be used to initiate an official investigation.[36]
- A victim files a restricted report to confidentially disclose the assault to specified individuals (Sexual Assault Response Coordinator, a Sexual Assault Prevention and Response Victim Advocate, or healthcare personnel), and receive medical treatment, including emergency care counseling, and assignment of a Sexual Assault Response Coordinator or a Sexual Assault Prevention and Response Victim Advocate. A restricted report will not be reported to law enforcement or to the command to initiate an official investigation unless the victim consents or an exception applies.[37]

For our audit, we selected the installation from each Military Service with the highest number of unrestricted reports in FY 2016. For each installation, we obtained a list of cases from the headquarters Army, Navy, and Air Force JAG offices and Staff Judge Advocate to Commandant of the Marine Corps with at least

[35] SAPRO, "Reports of Sexual Assault Received at Military Installations and Combat Areas of Interest," November 17, 2017.

[36] DoD Directive 6495.01, "Sexual Assault Prevention and Response (SAPR) Program," January 23, 2012 (Incorporating Change 3, April 11, 2017), Glossary.

[37] DoD Directive 6495.01, Glossary. According to DoD Instruction 6495.02, Enclosure 4, " Reporting Options and Sexual Assault Reporting Procedures," paragraph 5, "Exceptions to Restricted Reporting and Disclosures," subparagraph b, exceptions include when authorized by the victim in writing, when necessary to prevent or mitigate a serious and imminent threat to the health or safety of the victim or another person, when required for fitness for duty or disability determinations, when required for the supervision of coordination of direct victim healthcare or services or when ordered by a military official (e.g., a duly authorized subpoena in a UCMJ case), Federal or state judge, or as required by a Federal or state statute or applicable U.S. international agreement.

one preferred (Navy, Air Force, and Marine Corps) or referred (Army) charge of adult sexual or an attempt to commit adult sexual assault in the United States between October 1, 2016, and June 30, 2018.[38] Of the 173 cases at the four selected military installations, we nonstatistically selected 82 cases to determine whether victims were asked about their preference for prosecution. We selected the most recent cases for review at Fort Hood and Marine Corps Base Camp Pendleton where the charges were preferred or referred and all cases in the universe for review at Naval Station Norfolk and Joint Base San Antonio. Table 2 summarizes the universe and nonstatistical sample of cases selected for review.

Table 2. Universe and Sample of Cases Selected for Review

Military Installation Reviewed	Universe of Cases	Sample of Cases Reviewed
Fort Hood	55	23
Naval Station Norfolk	27	24
Joint Base San Antonio	14	14
Marine Corps Base Camp Pendleton	77	21
Total	**173**	**82**

Note: We originally requested information on 27 cases at Marine Corps Base Camp Pendleton. However, we eliminated six cases because one alleged assault occurred in Korea: one alleged assault occurred in Okinawa: the victim declined to participate after preferral of charges in one case: charges were dismissed 36 days after charges were preferred in one case; one case was an Article 128, and charges were filed before October 1, 2016, in one case.

Source: The DoD OIG.

Table 3 summarizes the articles of the UCMJ that the 82 individuals in our sample were charged with violating, according to the DD Form 458, "Charge Sheet."

Table 3. Summary of Alleged Violations of the UCMJ

Military Installation Reviewed	Article 80	Article 120	Article 120a	Article 120b	Article 120c	Article 125
Fort Hood	1	22	0	4	1	0
Naval Station Norfolk	1	24	0	0	3	0
Joint Base San Antonio	2	14	0	1	0	0
Marine Corps Base Camp Pendleton	2	19	0	0	5	0

Note: The number of alleged violations add up to more than the number of cases because an individual can be charged with violating more than one article of the UCMJ.

Source: DD Form 458, "Charge Sheet."

[38] According to the Manual for Courts-Martial, Rule 307, preferral of charges is the formal charging of the accused with an offense. According to the Manual for Courts-Martial, Rule 601, referral of charges "is the order of a convening authority that charges against an accused will be tried by a specified court-martial." The Navy, Air Force, and Marine Corps track the preferral of charges and referral of charges dates. The Army tracks only the referral of charges date.

Work Performed

We collected, reviewed, and analyzed documentation that Military Criminal Investigative Organizations, JAG Corps, Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces; and SAPRO officials provided to us to identify their involvement in and information they have about sexual assault cases.

Site Visits

We visited the following organizations to gain an understanding of the DoD process for investigating, adjudicating, and reporting on allegations of sexual assault and each organization's involvement in that process.

- Under Secretary of Defense for Personnel and Readiness Office of Legal Policy, Arlington, Virginia
- DoD Sexual Assault Prevention and Response Office, Alexandria, Virginia
- Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, Arlington, Virginia
- Army Criminal Investigation Command, Quantico, Virginia
- Naval Criminal Investigative Service, Quantico, Virginia
- Air Force Office of Special Investigations, Quantico, Virginia
- Army Office of the Judge Advocate General, Pentagon, Arlington, Virginia
- Navy Office of the Judge Advocate General, Navy Yard, Washington, D.C.
- Air Force Office of the Judge Advocate General, Joint Base Andrews, Maryland
- Office of the Staff Judge Advocate to the Commandant of the Marine Corps, Pentagon, Arlington, Virginia

We contacted or visited the following installations where we collected, reviewed, and analyzed documentation and information to determine whether officials asked victims of sex-related offenses about their preference for prosecution.

- Fort Hood, Texas
- Naval Station Norfolk, Virginia
- Joint Base San Antonio, Texas
- Marine Corps Base, Camp Pendleton, California

The documentation we reviewed included:

- DD Form 458, "Charge Sheet";
- Article 34 Advice memorandum, "Advice of Staff Judge Advocate and Reference for Trial";

- a form, "Notification of Rights Under Section 534(b) FY15 NDAA and Election of Jurisdictional Preference"; and
- memorandums on victims' preference for disposition.

We used the following criteria as our basis for our analysis:

- Public Law 113-291, "Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015," Section 534, "Enhancement of Victims' Rights in Connection With Prosecution of Certain Sex-related Offenses"
- Secretary of Defense Memorandum, "Implementation of Section 534(b)(1) of the National Defense Authorization Act for FY 2015," April 30, 2015
- Deputy Secretary of Defense Memorandum, "Ensuring Sexual Assault Victim's Rights," August 10, 2018
- Manual for Courts-Martial United States (2016 Edition)
- Army Regulation 27-10, "Legal Services, Military Justice," May 11, 2016
- Secretary of the Navy message, "New Requirement to Consider a Victim[']s Preference for Prosecution by Court-Martial or Civilian Court," July 31, 2015
- Navy Headquarters JAG Office, "Sexual Assault Reporting Toolkit for SJAs [staff judge advocates]," June 25, 2015
- Air Force Instruction 51-201, "Administration of Military Justice," December 8, 2017
- Maine Corps Bulletin 5800, "Military Justice Requirements and Implementation Guidance," May 25, 2017

Use of Computer-Processed Data

We did not use computer-processed data to perform this audit.

Prior Coverage

No prior coverage has been conducted on victims' preference for prosecution or Section 534 of the FY 2015 NDAA during the last 5 years.

Appendix B

Sex-Related Offenses and Sexual Assault Defined

Sex-Related Offense Defined

According to United States Code, an alleged sex-related offense means any allegation of a violation of any of the following:

- Article 120, "Rape and Sexual Assault Generally," (10 U.S.C. § 920 - Rape and Sexual Assault Generally)
  - Article 120(a), "Rape"
  - Article 120(b), "Sexual Assault"
  - Article 120(c), "Aggravated Sexual Contact"
  - Article 120(d), "Abusive Sexual Contact"
- Article 120a, "Stalking" (10 U.S.C. § 920a - Stalking)
- Article 120b, "Rape and Sexual Assault of a Child," (10 U.S.C. § 920b - Rape and Sexual Assault of a Child)
- Article 120c, "Other Sexual Misconduct," (10 U.S.C. § 920c - Other Sexual Misconduct)[39]
- Article 125, "Forcible Sodomy; Bestiality," (10 U.S.C. § 925 - Sodomy)
- Article 80, "Attempts" (10 U.S.C. § 880 - Attempts)

Sexual Assault Defined

DoD guidance on the Sexual Assault Prevention and Response Program defines sexual assault as an:

> [I]ntentional sexual contact characterized by the use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. The term includes a broad category of sexual offenses consisting of the following specific UCMJ offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these offenses.[40]

[39] Article 120c includes indecent viewing, visual recording, or broadcasting; forcible pandering; and indecent exposure.

[40] DoD Directive 6495.01, "Sexual Assault Prevention and Response (SAPR) Program," January 23, 2012, Incorporating Change 3, April 11, 2017.

Management Comments

Under Secretary of Defense for Personnel and Readiness

PERSONNEL AND READINESS

OFFICE OF THE UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

MEMORANDUM FOR DEPUTY INSPECTOR GENERAL (AUDIT)

SUBJECT: Response to Department of Defense Office of the Inspector General Audit of DoD Efforts to Consult with Victims of Sexual Assault Committed by Military Personnel in the United States Regarding the Victim's Preference for Prosecution (Project No. D2018-D000RL-0185.000)

Please accept this response to your memorandum dated February 11, 2019, requesting our review of the Recommendation contained in the draft subject report.

The Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)) concurs generally with the Recommendation. The attachment to this response provides suggested technical comments and corrections, which we request be included in the final report, in order to ensure its accuracy.

In furtherance of the Inspector General recommendation, OUSD(P&R) will consult with the Military Departments to develop and implement guidance, in the next 180 days, requiring the Departments to issue regulations mandating documentation of the solicitation of preference for prosecution of an alleged victim of a sexual offense, and the annotation of the alleged victim's preference.

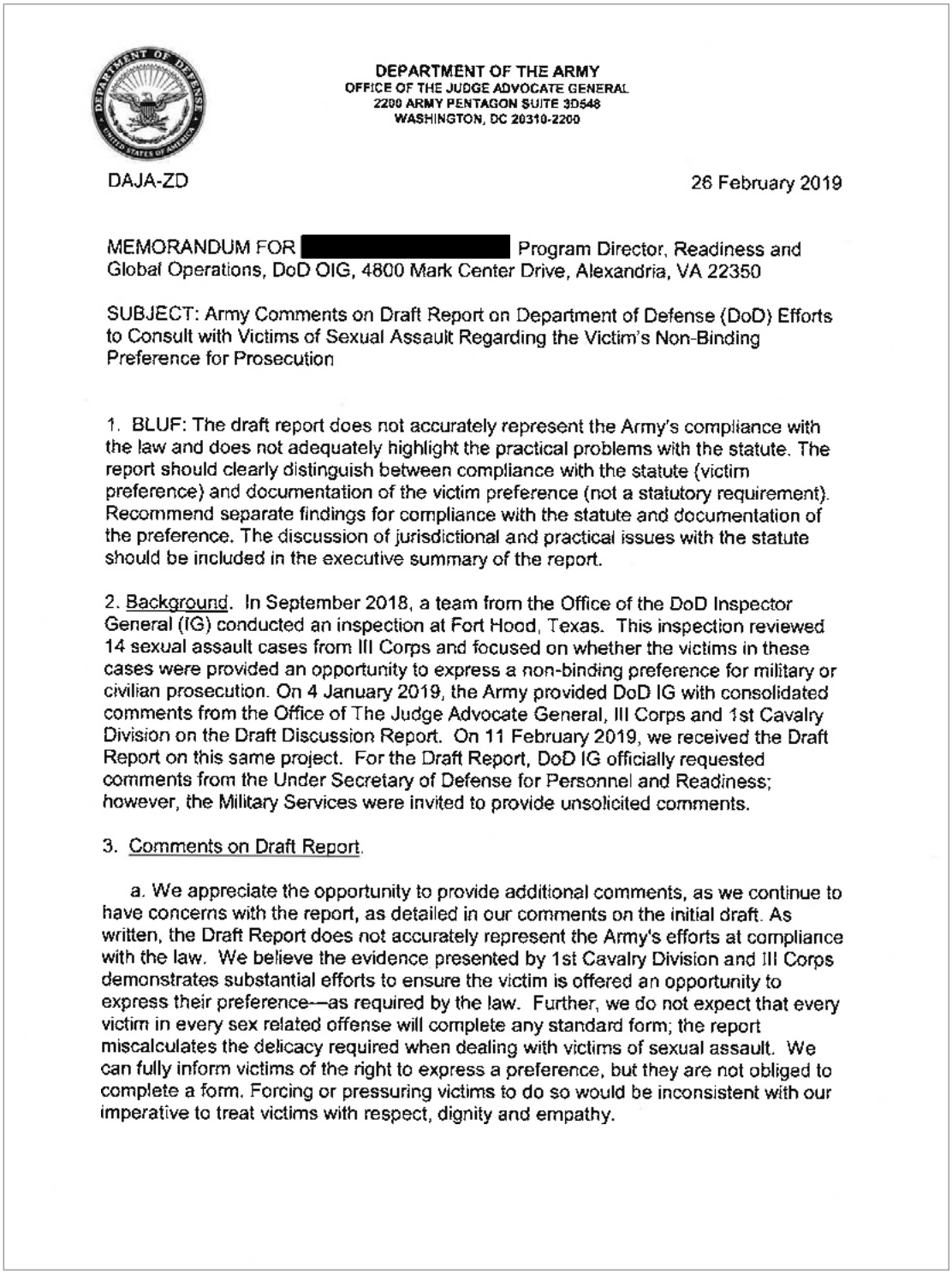
Thank you for the opportunity to review and comment on the draft report. Should you have any questions or concerns, please contact [redacted]

James N. Stewart
Assistant Secretary of Defense for Manpower and Reserve Affairs, Performing the Duties of the Under Secretary of Defense for Personnel and Readiness

Attachment:
As stated

Suggested technical comments and corrections omitted because of length. Copies provided upon request.

Department of the Army, Office of the Judge Advocate General



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON SUITE 3D548
WASHINGTON, DC 20310-2200

DAJA-ZD

26 February 2019

MEMORANDUM FOR [redacted] Program Director, Readiness and Global Operations, DoD OIG, 4800 Mark Center Drive, Alexandria, VA 22350

SUBJECT: Army Comments on Draft Report on Department of Defense (DoD) Efforts to Consult with Victims of Sexual Assault Regarding the Victim's Non-Binding Preference for Prosecution

1. BLUF: The draft report does not accurately represent the Army's compliance with the law and does not adequately highlight the practical problems with the statute. The report should clearly distinguish between compliance with the statute (victim preference) and documentation of the victim preference (not a statutory requirement). Recommend separate findings for compliance with the statute and documentation of the preference. The discussion of jurisdictional and practical issues with the statute should be included in the executive summary of the report.

2. Background. In September 2018, a team from the Office of the DoD Inspector General (IG) conducted an inspection at Fort Hood, Texas. This inspection reviewed 14 sexual assault cases from III Corps and focused on whether the victims in these cases were provided an opportunity to express a non-binding preference for military or civilian prosecution. On 4 January 2019, the Army provided DoD IG with consolidated comments from the Office of The Judge Advocate General, III Corps and 1st Cavalry Division on the Draft Discussion Report. On 11 February 2019, we received the Draft Report on this same project. For the Draft Report, DoD IG officially requested comments from the Under Secretary of Defense for Personnel and Readiness; however, the Military Services were invited to provide unsolicited comments.

3. Comments on Draft Report.

a. We appreciate the opportunity to provide additional comments, as we continue to have concerns with the report, as detailed in our comments on the initial draft. As written, the Draft Report does not accurately represent the Army's efforts at compliance with the law. We believe the evidence presented by 1st Cavalry Division and III Corps demonstrates substantial efforts to ensure the victim is offered an opportunity to express their preference—as required by the law. Further, we do not expect that every victim in every sex related offense will complete any standard form; the report miscalculates the delicacy required when dealing with victims of sexual assault. We can fully inform victims of the right to express a preference, but they are not obliged to complete a form. Forcing or pressuring victims to do so would be inconsistent with our imperative to treat victims with respect, dignity and empathy.

Additional comments omitted because of length. Copies provided upon request.

Department of the Army, Office of the Judge Advocate General (cont'd)

DAJA-ZD

SUBJECT: Army Comments on Draft Report on Department of Defense (DoD) Efforts to Consult with Victims of Sexual Assault Regarding the Victim's Non-Binding Preference for Prosecution

b. The law about victim preferences went into effect in 2015. There is no statutory requirement to document victim preferences and DoD has not promulgated any guidance or standard forms. The Army created and promulgated a form in September of 2017.

(1) There were 14 cases from III Corps reviewed by the DoD IG team. Six of the cases reviewed [redacted] were referred to trial before the Army document was created. For those six cases, we were unable to provide documentation confirming the government's offer to the victim to express a jurisdictional preference.

(2) Of the eight cases that were referred after the form was created the document was completed [redacted] in two cases. In four cases [redacted] the Army form was provided to the victims but they chose to express their prosecutorial preference in another manner; and in two cases [redacted] the form was not provided but the victim was briefed on their options and provided their preference for military prosecution to the trial counsel. The evidence clearly indicates that, in the absence of any DOD guidance, the creation of the Army form refocused efforts on documenting victim jurisdictional preference. However, the evidence also shows that even when the form is offered, the victims will frequently choose not to complete it or to express their preference through some other means—email, text message, SVC communications, etc.

c. Furthermore I recommend the DoD clarify what stage of investigation or adjudication triggers the requirement for the election of preference. The draft report presumes prosecution was possible, based on probable cause analysis, for all the identified cases by both the military and the civilian jurisdictions. In practice, civilian jurisdictions may not have found probable cause for the offense; when the Army prosecutors determine there is no probable cause, the case is closed without a prosecution because no legal grounds exist to prosecute the case. In these cases, III Corps OSJA does not offer victim preference because the allegation is not supported by probable cause and will not go forward to trial.

d. Complications Regarding Jurisdiction.

(1) Section 534(b) of the FY 2015 NDAA does not account for any of the complications regarding jurisdiction and simply states that victims must be consulted on their right to express a non-binding preference for prosecution. Section 534(b) is written so vaguely, that a possible reading of the statute might require military practitioners to advise a victim of the right to a non-binding preference for jurisdiction in cases in which the other entity with jurisdiction, federal or state authorities, are extremely unlikely to prosecute the offense based on existing memoranda of

2

Department of the Army, Office of the Judge Advocate General (cont'd)

DAJA-ZD

SUBJECT: Army Comments on Draft Report on Department of Defense (DoD) Efforts to Consult with Victims of Sexual Assault Regarding the Victim's Non-Binding Preference for Prosecution

understanding or practice. For example, there are no known cases in which the Department of Justice prosecuted a sexual assault committed by a servicemember on active duty on an exclusive federal jurisdiction. In other jurisdictions, memoranda of agreement or standards of practice between military and civilian authorities outline which entity will have a "first right of refusal" to both investigative and prosecutorial jurisdiction.

(2) Similarly, section 534(b) requires military practitioners to advise a victim of the right to a non-binding preference for jurisdiction even if the conduct is not criminalized by civilian or federal law. The UCMJ article criminalizing sexual assault, Article 120, is extensive and encompasses conduct ranging from an unwanted hug or touch over the clothing to forcible rape. Conduct at the lesser end of the spectrum may not be criminalized as a sexual assault in state law and may not rise to the level of prosecution in some jurisdictions.

(3) Finally, section 534(b) does not anticipate cases in which civilian authorities have asserted primary jurisdiction over the offense (and therefore not provided military authorities with access to the victim or evidence) or cases in which civilian authorities have already declined prosecution by the time military authorities assume jurisdiction of the case. Once civilian authorities have declined prosecution, obtaining a victim's non-binding preference is disingenuous as it suggests the victim has a voice when the reality is that their only choice now is military prosecution or no prosecution.

(4) Therefore we recommend highlighting the jurisdictional issues in the EXSUM of the report and recommend a finding that the statute is challenging to implement. Given all of the complications discussed above, the opportunity given to victims to express a non-binding preference is more nuanced than the plain language of the statute and the report suggest, and may set unrealistic expectations for victims.

e. Throughout the report, I recommend you provide separate findings for offering victims an opportunity to express their preference (required by the statute) and documenting any preference expressed (not required by the statute).

4. Attached to this memorandum is the Draft Report with comments embedded.

Encl.

SUSAN K. ESCALLIER
Brigadier General, USA
Assistant Judge Advocate General
for Military Law and Operations

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Acronyms and Abbreviations

DSAID	Defense Sexual Assault Incident Database
JAG	Judge Advocate General
NDAA	National Defense Authorization Act
OTJAG	Office of the Judge Advocate General
SAPRO	DoD Sexual Assault Prevention and Response Office
UCMJ	Uniform Code of Military Justice
USD(P&R)	Under Secretary of Defense for Personnel and Readiness


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