



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



PERSONNEL AND
READINESS

SEP 29 2005

The Honorable John W. Warner
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510-6050

Dear Mr. Chairman:

I am forwarding the Department of Defense's comments on the Defense Task Force Report on Sexual Harassment and Violence at the Military Service Academies as required in Section 526(d)(3), of Public Law 108-136, of the National Defense Authorization Act for Fiscal Year 2004 (NDAA FY04). In addition, I am forwarding to you the acting Secretary of the Air Force's assessment of corrective actions being taken at the United States Air Force Academy (USAFA) to address sexual assault and harassment. This simultaneous submission complies with Section 526(e) of the NDAA FY04.

I commend the Defense Task Force for conducting a comprehensive review of the issues related to sexual harassment and violence at the United States Military and Naval Academies. The report validates the direction and focus of our most recent efforts. The Department of Defense (DoD) established comprehensive sexual assault policies prior to the report's completion. For example, the Department instituted a collateral misconduct provision, a common survey that measures the effectiveness of sexual assault and harassment prevention programs at the service academies is in effect, and DoD proposed to Congress an offense for stalking earlier this year (see enclosure (1)(d) for specific comments).

Of note, the Department has implemented a comprehensive confidential reporting policy throughout DoD to include the Service academies. Effective since June, this provision permits victims to report sexual assaults to victim advocates, healthcare providers, and other specified individuals and receive medical care and counseling without prompting a criminal investigation. These new policies will undoubtedly enable more victims to receive medical treatment as well as provide the initial support needed to foster a climate of confidence. Increased confidence could lead to victims openly reporting their assaults to law enforcement and seeking criminal investigations.

In regard to the acting Secretary of the Air Force's assessment of corrective actions being taken at USAFA to address sexual assault and harassment, the leaders at Headquarters Air Force and USAFA remain fully committed to ensuring that all cadets enjoy an environment free of sexual assault and harassment. They have vigorously implemented policies and programs to address the findings and recommendations of several internal and external studies.

Of note, the Office of the Secretary of the Air Force now includes a permanent position to assist with USAFA oversight and a new office within the Deputy Chief of Staff of Personnel



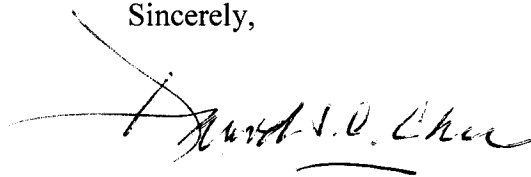
for operational support and policy development. Additional oversight consists of the Executive Steering Group, a 4-Star committee under the chairmanship of the Vice Chief of Staff; a General Officer Steering Committee, consisting of major generals; and a reinvigorated Board of Visitors under the leadership of the Honorable Jim Gilmore, former Governor of Virginia.

The DoD has worked closely with the Air Force to ensure the seamless implementation of our new comprehensive sexual assault prevention and response policy. In addition, DoD policy development has benefited greatly from the lessons learned at USAFA.

The Department's commitment to this issue is unwavering. We will continue our efforts to ensure that all our Service members, to include cadets and midshipmen, enjoy an environment free of sexual assault, harassment and other related criminal acts. I have established a permanent DoD Sexual Assault Prevention and Response Office to provide policy guidance, oversight and to work closely with the Military Departments as they vigorously implement their prevention and response programs.

I am sending a similar letter and the Department's reports to the Chairman and Ranking Member of the House Committee on Armed Services.

Sincerely,

A handwritten signature in black ink, appearing to read "David S. C. Chu", with a horizontal line underneath the name.

David S. C. Chu

Enclosures:

- (1) Department of Defense Comments on the Report of the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies
- (2) Acting Secretary of the Air Force's Assessment of Corrective Actions Taken at USAFA Regarding Sexual Assault and Harassment (NDAA FY04, Section 526(e)), dated August 29, 2005

cc:

The Honorable Carl Levin
Ranking Member

Department of Defense Comments

Report of the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies

1. **Background:** The Secretary of Defense established the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies (DTF) pursuant to Section 526 of Public Law 108-136, the National Defense Act for Fiscal Year 2004. Congress directed the DTF to assess and make recommendation “by which the Department of Defense and the Department of the Army and the Department of the Navy may more effectively address matters relating to sexual harassment and violence at the United States Military Academy and the United States Naval Academy.”

2. **Findings and Recommendations:** The DTF conducted a comprehensive review that focused on service academy culture; victims’ rights and support; offender accountability; data collection and case management tracking; training and education; prevention; and coordination between military and civilian communities. Based on site visits, interviews, consultations with subject matter experts, and an extensive review of academy and military department policies, records, and reports, the DTF made 44 findings and 43 recommendations.

3. **Comments:** The DTF conducted its review while the Department of Defense (DoD) was establishing a sexual assault policy framework. We are pleased that the DTF report largely validates core DoD concepts. The report’s key findings and recommendations identify issues addressed in the Department’s new sexual assault policy or currently targeted in Service-level sexual assault and harassment programs. For example, the DTF emphasized the need for confidentiality, prevention, increased reporting avenues, deferring collateral misconduct determinations, specialized training for investigators and prosecutors, and increased coordination with civilian communities. In each case DoD has an existing policy in place and, just as important, the Military Departments have already taken action to ensure their implementation in the active force, Reserve Components and the Service academies.

a. **General:** In the aggregate, the findings and recommendations identify shortcomings or deficiencies in the sexual assault and harassment programs at the United States Military and Naval Academies. Some refer to issues that do not fall within the purview of sexual assault and harassment prevention but can affect the success of these two programs. The Department conceptually concurs with most of the findings and recommendations, differing in some cases only in terms of degree or the particulars of recommended responsive actions.

b. **Confidentiality:** The DTF correctly emphasized in its report the need for a confidentiality policy and devoted an entire chapter to the concept. DoD similarly recognized the importance of permitting victims of sexual assault to obtain healthcare

services without triggering a criminal investigation. DoD announced a limited confidentiality policy in March 2005 with a June 14, 2005, effective date to ensure that commanders, service members, and sexual assault responders had sufficient opportunity to fully understand the new policy.

Confidentiality represents a marked departure from DoD's previous policy of mandatory reporting and investigation of sexual assaults. The Department's goal is to ensure all victims receive care and support, to obtain a clearer understanding of the actual prevalence of sexual assault within the military, and to create an environment of confidence that will lead to greater numbers of victims seeking criminal investigations.

Accordingly, this policy allows an active duty sexual assault victim, on a confidential basis, to disclose the details of his/her assault to specifically identified individuals—Sexual Assault Response Coordinators (SARCs), Victim Advocates (VAs), healthcare providers (HCPs), and chaplains—and receive medical treatment and counseling, without prompting the official investigative process. Installation commanders will be notified of the assault but receive only non-personal identifying information about the victim.

Confidentiality essentially empowers the victim. The policy provides a victim additional time and increased control over the release and management of his/her personal information, and empowers him/her to seek relevant information and support to make more informed decisions about participating in a criminal investigation. A victim who receives appropriate care and treatment, and is provided an opportunity to make an informed decision about reporting the assault, is more likely to develop increased trust that his/her needs are of primary concern to the command and may eventually decide to report the sexual assault to law enforcement. Even if the victim chooses not to report the sexual assault to law enforcement, this additional reporting avenue gives commanders a clearer picture of the sexual violence within their command, and enhances a commander's ability to provide an environment which is safe and contributes to the well-being and mission-readiness of all of its members.

Initial data from the Services indicate that the policy is on track. Additional victims have come forward under confidentiality to make restricted reports and receive medical care, treatment, and counseling. Moreover, some victims subsequently changed their reporting option from restricted to unrestricted in a matter of weeks, thereby permitting the initiation of criminal investigations. DoD believes that this trend will continue.

Confidentiality, carefully formulated after extensive consultation with the Military Departments, therapists and surveys of individual military members, did not require congressional legislation or the expansion of privileged communications to SARCs, VAs, and HCPs as recommended in the DTF report. DoD policy protects communications between the victim and the above specified responders through confidentiality, with narrowly limited exceptions we believe are necessary to meet the unique requirements of an effective military force. We recognize that it is difficult to

have absolute answers to this very complex issue of privileged communications, particularly as it relates to federal and state law and the unique needs of a military environment, but we will continue to closely examine these issues and make appropriate modifications that are in the best interests of the individual military service member and the armed forces.

Extending privilege beyond chaplains and therapists will not enhance DoD's confidentiality policy and could negatively affect the Department. The Military has unique needs that have prompted the U. S. Supreme Court to recognize it as a specialized society. The Department believes that the existing policy balances the need to protect the privacy of victims and provide treatment with the need for commanders to maintain good order and discipline within the "specialized society of the military" while also addressing military readiness and national security.

This does not mean that the Department believes no further refinements in sexual assault policy will be called for in the future. We have introduced sweeping policy that made numerous, significant changes in how we meet the needs of sexual assault victims and address sexual assault and misconduct. Changes in this policy prior to the Department capturing meaningful statistical data that would provide an objective basis for further actions might cause more harm than good. Rest assured that if the data in the coming year indicates that the policy is failing to meet its objectives, we stand ready to promptly address such deficiencies. To overlay a new legislative framework for confidentiality on top of the global administrative program and policy that was only recently implemented, would cause confusion across the military.

DoD will closely monitor implementation of the new confidentiality policy to ensure that it is, in fact, providing multiple reporting channels, protecting victim identities, and improving access to services.

c. **Sexual Assault Response Coordinators (SARC)**: DoD is concerned that the DTF did not fully understand the critical role SARCs perform in ensuring an effective installation sexual assault prevention and response program. Strikingly, the report mentions the SARC only in one recommendation (9B) and advocates restrictions that would reduce that position's effectiveness.

DoD considers the SARC to be the center of gravity for each installation's sexual assault prevention and response program. SARCs serve as the single point of contact to coordinate sexual assault victim care and to track the services provided to the victim from initial report of a sexual assault through disposition and resolution of the victim's health and well-being. These duties may include coordination with other facilities should the victim deploy overseas or be reassigned to another installation.

Recommendation 9B proposes that SARCs not have access to identifying information from a restricted report. This proposal not only prevents a SARC from coordinating victim care and supervising or providing guidance to his/her VAs; it conflicts with DoD and Military Service policies that responders immediately contact the

SARC whenever a restricted or unrestricted report is made. The suggestion would also prevent SARCs from later informing VAs of the actions taken or maintaining confidential files and other documentation.

Experience to date has provided no data that SARC access to identifying information from a restricted report has been detrimental to any victim. Rather, anecdotal reports indicate that the current policy is effective and contributing to the rapid implementation of DoD's sexual assault prevention and response policy.

d. **Offender Accountability:** DoD agrees with the DTF report (page 15) "that virtually all sexual misconduct can be charged under the current code [of military justice]." The one exception is stalking. To correct this, the Department submitted a legislative proposal to Congress to add that crime to the Uniform Code of Military Justice (UCMJ); the Department will prepare corresponding amendments to the Manual for Courts-Martial (MCM).

The Department also concurs with the DTF that "not all sexual offenses are easily prosecutable." However, the difficulty in prosecuting many cases is not due to the UCMJ or the MCM. Civilian jurisdictions encounter the same problem, which stems from the very nature of most sexual assaults: no third party witnesses and evidence that verifies only that a sexual act occurred but not the circumstances.

The Department's previously proposed amendments to the UCMJ and MCM provide a better representation of categories or types of sexual assaults; enable a more meaningful comparison of military offenses with the provisions of other jurisdictions; and reflect the range of commonly-encountered contemporary sex crimes.

The Department's combined UCMJ and MCM proposals provide a compilation of varying degrees of behavior constituting sexual assaults with graduated punishments reflective of their varying degrees of gravity. For example, DoD's proposal specifically enumerates eight categories of "force," including having sexual intercourse with someone who is substantially incapacitated, substantially incapable, or legally incapable of appraising the nature of the act, declining participation in the act, or communicating unwillingness to engage in the act. "Force" also includes administering any drug, intoxicant, or other substance to an unknowing victim to overcome or prevent the victim's resistance or substantially impair the victim's ability to appraise or control the victim's conduct. Actual violence and threats of violence remain covered as forms of "force." No accompanying physical injury or harm is required. These changes obviate the need to create an offense of "date or acquaintance rape" or labeling rape only for "the most forceful acts of penetration," (Recommendation 16).

DoD disagrees with Recommendation 16 to delete "force" from the elements of sexual assault crimes and rely on the element of the victim's "lack of consent." This change would place the focus of the trial and litigation on the victim's conduct rather than on the perpetrator's misconduct. This recommendation contradicts the objective of DoD recently-proposed legislation which has been to eliminate the "without consent"

requirement from the current offense of rape (Article 120, UCMJ). By returning the focus to the consent issue, the recommendation would provide defense counsel no recourse but to challenge the accusation by challenging the victim's account and veracity, thereby "put[ting] the victim on trial." Instead, the current DoD legislative proposal focuses the trial on the perpetrator's misconduct, not the victim's consent or conduct.

e. **Amend Article 32 to explicitly permit commanders to close the hearing:** The Department understands the intent of Recommendation 18 that Congress amend Article 32 to permit commanders to close the proceedings to protect the privacy of victims and alleged offenders. Rule for Court-Martial 405(h)(3), MCM, currently provides that "access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer." However, the ability to close the proceedings is not absolute, and the United States Court of Appeals for the Armed Forces (USCAAF) decision in *ABC, Inc. v. Powell*, 47 M.J. 363 (1997) may limit the ability to enact legislation on this issue.

In *ABC, Inc. v. Powell*, USCAAF granted the request of reporters that a writ of mandamus be issued to a convening authority commander to withdraw his previous order to close an Article 32 investigative hearing. The commander's order was designed, in part, to protect the alleged victims of sexual assault and harassment. The Court held that the commander's stated justification was insufficient and ruled that "the determination [to close the hearing] must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis whether closure in a case is necessary to protect the welfare of a victim or alleged victim of sexual assault." In reaching its decision, USCAAF also referenced civilian cases and observed that overly broad, blanket rules of closure, for privacy concerns, for the testimony of child sexual-assault victims had been held unconstitutional.

f. **Collateral Misconduct:** DoD agrees that commanders must have the discretion to handle victim misconduct and addressed this issue in Directive-Type Memorandum (DTM) (JTF-SAPR-001), *Collateral Misconduct in Sexual Assault Cases*. Consistent with the DTM, this policy also rejects blanket amnesty, and it balances the victim's interests with the commander's responsibilities and authority under the RCM 306 policy that "Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition."

However, the Department disagrees that victims should have the option of deciding when to have their offenses adjudicated. A blanket provision that postpones or defers appropriate discipline based solely upon a victim's choice is inconsistent with RCM 306 and would adversely affect a commander's discretion and responsibility for enforcing good order and discipline. A commander's discretion in this area should be preserved and not abdicated to the victim's choice. A victim's preference should be considered, but should not be absolute or totally controlling.

g. **Statutory limitation on the use of indexing information:** Recommendation 23 requests that indexed information not be used later for official purposes other than law

enforcement, citing a 1999 report of the National Academy of Public Administration (NAPA). However, no examples of misuse were provided.

DoD respectfully disagrees with both Finding 23 and Recommendation 23. The NAPA report, "*Adapting Military Sex Crime Investigations to Changing Times*," recommended changing the standard for indexing to probable cause. Further, the DTF report does not reference the Deputy Secretary of Defense memorandum to the Secretaries of the Military Departments regarding the 1999 NAPA report recommendations, or the Secretary of Defense comments to the Congress on August 24, 1999, addressing the NAPA recommendations. The Secretary advised that DoD "non-concurred" with the NAPA recommendations regarding "titling" and referenced an ongoing review of the process by the DoD Inspector General. Significantly, the NAPA report did not cite any examples of misuse.

DoD Instruction 5505.7, *Titling and Indexing Subjects of Criminal Investigations in the Department of Defense*, provides a uniform standard for titling and indexing subjects of criminal investigations. Mechanisms are already in place to limit the use of the files for law enforcement and security purposes. The Instruction provides for "investigative organizations to title and index individuals who are subjects of criminal investigations when credible information exists that the subject committed a criminal offense." Further, the Instruction establishes a review process for the appropriateness of a titling/indexing decision as well as an appeal process for any individual who believes they were wrongly titled or indexed. Therefore, further evaluation of this issue is necessary before seeking statutory, as opposed to regulatory, remedies or stricter controls.