

## Special Victim Units—Not a Prosecution Program but a Justice Program

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### Introduction

*In the criminal justice system sexually based offenses are considered especially heinous. In New York City the dedicated detectives who investigate these vicious felonies are members of an elite squad known as the Special Victims Unit.*<sup>1</sup>

Many large cities such as Chicago,<sup>2</sup> New York City,<sup>3</sup> Seattle,<sup>4</sup> and Atlanta,<sup>5</sup> to name just a few, have a special division or unit set up to handle the investigations and prosecutions of sexual assault crimes. In March 2009, the Department of the Army followed the path of these civilian agencies when it authorized additional assets to the Office of The Judge Advocate General (OTJAG) and the U.S. Army Criminal Investigation Command (CID) “to support the investigation and prosecution of sexual assault cases and expand their efforts regarding sexual assault prevention.”<sup>6</sup>

<sup>1</sup> *Law and Order—Special Victim's Unit* (NBC 2009).

<sup>2</sup> About the Cook County State's Attorney's Office, [http://www.statesattorney.org/index2/about\\_the\\_office.html](http://www.statesattorney.org/index2/about_the_office.html) (last visited Oct. 28, 2009). The Cook County State's Attorney's Office is the second largest prosecutor's office in the nation, with the prosecutor's office in Los Angeles being the largest. *Id.* Chicago, Illinois is within Cook County. The Cook County's State's Attorney's Office is divided into seven bureaus; within the Criminal Prosecutions Bureau is a division solely for sexual crimes. *Id.*

<sup>3</sup> New York County District Attorney's Office, <http://manhattanda.org/organization/trial/> (last visited on Oct. 28, 2009). The New York Sex Crimes Prosecution Unit was established in 1974. *Id.* “It was the first unit in the country dedicated to the investigation and prosecution of sexual assault.” *Id.* Forty senior Assistant District Attorney's who staff the unit were selected for their experience, as well as their sensitivity to the issues unique to survivors of these crimes. *Id.* Other cities around the country have used the New York Sex Crimes Unit as a model. *Id.*

<sup>4</sup> King County Prosecuting Attorney's Office, Criminal Division Overview, <http://www.kingcounty.gov/prosecutor/criminaloverview.aspx/predator> (last visited Oct. 28, 2009). The King County Prosecutor's Office has a specialized unit to deal exclusively with cases involving sexual offenses against children and adults. *Id.* The prosecutors are specially trained to deal with the “complex and sensitive nature of these cases.” *Id.* The King County Prosecutor's Office Special Assault Unit works with law enforcement, Child Protective Services, and local advocacy groups. *Id.*

<sup>5</sup> Fulton County District Attorney's Office, Trial / Special Prosecution Units, <http://www.atlantada.org/officeoverview/trial/index.htm> (last visited Oct. 28, 2009). In 1997, to overcome the firmly entrenched belief that the Fulton County District Attorney was unwilling or uninterested in prosecuting sexual assault and child abuse crimes, the District Attorney created the “Crimes Against Women & Children Unit.” *Id.* This unit took a new approach to the prosecution of sexual assaults and child abuse. *Id.*

<sup>6</sup> Message, ALARACT 075/2009, 191404Z Mar 09, DA Washington DC/DAPE-HRPD, subject: Sexual Harassment/Assault Response and Prevention (SHARP) Initiatives [hereinafter SHARP Initiatives Message].

The additional resources for OTJAG include seven highly qualified experts (HQEs) and fifteen additional authorizations for judge advocates who will focus primarily on sexual assault litigation and training during a three-year tour.<sup>7</sup> The Department of the Army authorized CID seven HQEs, thirty additional special civilian investigators, and more than thirty additional laboratory examiners.<sup>8</sup> The special civilian investigators and laboratory examiners will be selected based upon their extensive backgrounds and experience in the investigation of sexual assaults and domestic violence.<sup>9</sup>

This article begins by examining the circumstances which led to the authorization of the hiring of the HQEs and other experts involved in the investigation and prosecution of sexual assaults. Specifically this section addresses the circumstances behind the creation of the Sexual Assault Prevention and Response (SAPR) program. It also discusses the unique difficulties in investigating and prosecuting a sexual assault case. Next, this article examines the implementation and incorporation of the HQEs and special victim prosecutors (SVPs). This section identifies the role of the HQE and the SVP, as well as, the training and experience these individuals will bring to other judge advocates. The Army CID has also received additional resources and personnel to assist in sexual assault investigations. This section provides an overview of the new training their investigators receive in addition to identifying the resources that will also assist judge advocates in the litigation of sexual assault cases. Finally, this article discusses how judge advocates should best utilize these assets both as trial counsel and as defense counsel.

### Background

From 16 through 18 November 2003, the *Denver Post* published a series that focused on women who had been sexually assaulted in the military.<sup>10</sup> This report, based on a

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* “The investigators will be located at those installations with higher reports of sexual assault, while the examiners will increase the capabilities and turn-around time of evidence examinations at the laboratory.” *Id.*

<sup>9</sup> Colby Hauser, *Special Sexual Assault Investigators Deploy Army Wide*, United States Army Criminal Investigation Command, Sept. 28, 2009, available at [http://www.cid.army.mil/documents/Sexual%20Assault%20Investigators%20Deploy%20Army%20Wide%20\(2\).pdf](http://www.cid.army.mil/documents/Sexual%20Assault%20Investigators%20Deploy%20Army%20Wide%20(2).pdf)

<sup>10</sup> Amy Herdy & Miles Mofeit, *Betrayal in the Ranks*, DENV. POST, Nov. 16–18, 2003, available at [http://extras.denverpost.com/justice/tdp\\_betray](http://extras.denverpost.com/justice/tdp_betray)

nine-month investigation, argued that the military was failing in its care for victims of sexual assault.<sup>11</sup> Additionally, in early 2003 the U.S. Air Force Academy made headlines over a sexual assault scandal that resulted in the removal of the Academy's four top senior officers.<sup>12</sup> These combined incidents caught the attention of the public and of Congress. In January 2004 the Secretary of Defense, Donald Rumsfeld ordered the Department of Defense (DoD) to review how the armed services handle the "treatment of and care for victims of sexual assault, with particular attention to any special issues that may arise from the circumstances of a combat theater."<sup>13</sup> Shortly after the initiation of the DoD review, the Army formed a task force to review its own policies on reporting and how it addresses allegations of sexual assault.<sup>14</sup> Both the DoD and the Army task force made several recommendations concerning policy, training, prevention, and response to sexual assaults in the military.<sup>15</sup> Dr. David Chu, then the Under Secretary of Defense for Personnel & Readiness, issued eleven directive memoranda to the Services based on the findings and recommendations of the DoD Care for Victims of Sexual Assault Task Force. These directives have been incorporated into DoD Directive 6495.01, *Sexual Assault Prevention and Response Program*<sup>16</sup> and DoD Instruction 6495.02, *Sexual Assault Prevention and Response Program*.<sup>17</sup>

In October 2005, the DoD issued a directive formally implementing the SAPR.<sup>18</sup> The Army soon followed with its own SAPR program, which incorporated the

requirements set forth in the DoD SAPR program.<sup>19</sup> During the initial implementation of the SAPR program, the DoD's emphasis was on the response element—putting into place measures that focused on the victim's needs. Such measures included creating a civilian Sexual Assault Response Coordinator position at each installation and requiring battalion-size units to appoint victim advocates.<sup>20</sup> Significantly, the new DoD SAPR program provided servicemember victims the opportunity to make a confidential (restricted) report of sexual assault.<sup>21</sup> A restricted report of sexual assault does not trigger an investigation or notification of the victim's command but does enable the victim to receive medical and counseling care.<sup>22</sup> Servicemember victims also have the option of making an unrestricted report which will trigger a criminal investigation and notification to his or her command.<sup>23</sup> The SAPR program seeks to give victims confidence in the military system to encourage them to report if they are victims of a sexual assault. The overall goal of the response portion of the SAPR program is to ensure victims receive the assistance they need to include medical and mental health care.<sup>24</sup>

On 9 September 2008, the Secretary of the Army (SecArmy) launched a campaign plan to eliminate sexual harassment and sexual assault from the Army and to make the program a model for the nation.<sup>25</sup> The Army leadership felt that new measures put in place to respond to sexual assaults were working but that they could do more by placing additional emphasis on the prevention piece of SAPR. The campaign plan has four phases: Phase One requires the Army leadership to commit to taking steps to eliminate sexual assault in the Army. Phase One provides top-down guidance and training on the best practices and ideas designed to allow leaders at all levels to develop their own command prevention action plan.<sup>26</sup> Phase Two expands on Phase One and requires an Army-wide conviction to eliminate sexual assault. Phase Two targets all Soldiers and provides them with the education and training to ensure "they understand their moral responsibility to intervene to stop sexual assault and sexual harassment, and to protect

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<sup>11</sup> *Id.*

<sup>12</sup> Diana Jean Schemo & Michael Moss, *Criminal Charges Possible in Air Force Rape Scandal*, N.Y. TIMES, Mar. 27, 2003, at A17, available at <http://www.nytimes.com/2003/03/27/us/criminal-charges-possible-in-air-force-rape-scandal.html?pagewanted=1>.

<sup>13</sup> Memorandum from the Sec'y of Def., to the Under Sec'y of Def. (Personnel and Readiness), subject: Department of Defense Care for Victims of Sexual Assaults (5 Feb. 2004) [hereinafter DoD Care for Victims of Sexual Assaults Memo]. One such report was a news series in the *Denver Post*.

<sup>14</sup> U.S. DEP'T OF ARMY, THE ACTING SECRETARY OF THE ARMY'S TASK FORCE REPORT ON SEXUAL ASSAULT POLICIES (27 May 2004).

<sup>15</sup> See U.S. DEP'T OF DEF. CARE FOR VICTIMS OF SEXUAL ASSAULTS TASK FORCE, REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT (Apr. 2004) and U.S. DEP'T OF ARMY, THE ACTING SECRETARY OF THE ARMY'S TASK FORCE REPORT ON SEXUAL ASSAULT POLICIES (May 27, 2004).

<sup>16</sup> U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM (7 Nov. 2008) [hereinafter DoDD 6495.01].

<sup>17</sup> U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM (13 Nov. 2008) [hereinafter DoDI 6495.02].

<sup>18</sup> DoDD 6495.01, *supra* note 16, and DoDI 6495.02, *supra* note 17.

<sup>19</sup> See U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ch. 8 (11 Feb. 2009) [hereinafter AR 600-20] (SAPR Program).

<sup>20</sup> *Id.* para. 8-5o(10), 8-5p.

<sup>21</sup> *Id.* app. H and para. 8-5o.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 8-1.

<sup>25</sup> U.S. DEP'T OF THE ARMY, ARMY SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM ANNUAL REPORT—FISCAL YEAR 2008, at 8-9 (1 Dec. 2009) [hereinafter ARMY SAPR ANNUAL REPORT FY 2008].

<sup>26</sup> *Id.*

their fellow Soldiers.”<sup>27</sup> Phase Two also emphasizes holding those who commit sexual assaults accountable for their actions.<sup>28</sup> Phase Three is the culmination of Phase One and Phase Two. In Phase Three, the Army achieves a cultural change which creates an environment that drives sexual assault and harassment from the Army altogether.<sup>29</sup> The final phase, Phase Four consists of sustainment, refinement, and sharing and will incorporate measures to ensure that, once sexual assault and harassment are eliminated from the Army, they stay eliminated.<sup>30</sup> The Army has achieved Phase One of the campaign and has moved into Phase Two. To meet one of the Phase Two objectives, holding those who commit sexual assaults accountable, it is critical that criminal investigators have the training and resources to successfully investigate reports of sexual assault and that the Army judge advocates have the training and resources to litigate the founded cases. The Army JAG Corps continuously strives to ensure a balance of justice.<sup>31</sup> Above all, the JAG Corps must ensure due process and a strict adherence to the rule of law under the Uniform Code of Military Justice (UCMJ).<sup>32</sup> To fulfill this mission, trial counsel and defense counsel must be properly trained.

In 2008, The Judge Advocate General of the Army (TJAG) recommended, and the SecArmy approved, more resources and training of judge advocates in the litigation of sexual assault cases.<sup>33</sup> The SecArmy similarly approved more resources for and training of military investigators. The Fiscal Year 2008 SAPR report assisted in providing support for the request and approval of the additional resources.<sup>34</sup> For example, in Fiscal Year 2008, the length of time to complete a sexual assault criminal investigation averaged eighty-nine days.<sup>35</sup> Moreover, the numbers seemed to suggest that only a small percentage of reported sexual assaults resulted in court-martial convictions.<sup>36</sup> The report does not take into consideration why a case may take several weeks to investigate or why it may not make it to

court-martial. The reasons are varied and are case-specific. For example, a case may not make it to court-martial because of a lack of evidence, inability to identify a suspect, or even lack of victim cooperation.

The report states that of 1086 servicemembers investigated for sexual assault, administrative or disciplinary action was taken against 280 of them.<sup>37</sup> Of those 280, 56 were court-martialed, 102 received non-judicial punishment, 19 were discharged in-lieu of court-martial, 21 were discharged in lieu of disciplinary action,<sup>38</sup> and 82 received administrative or other actions.<sup>39</sup> The report also stated that action against 463 of the 1086 subjects was not taken due to unfounded allegations or insufficient evidence.<sup>40</sup> The raw numbers may be deceiving and may suggest that the Army’s prosecution rate is too low, but “at worst, the Army prosecutes at a comparable rate to civilian jurisdictions.”<sup>41</sup> However, that does not mean that the Army should not strive to do better. The hiring of HQEs and the addition of judge advocates, investigators, and laboratory examiners demonstrate the Army’s intent “to exemplify the best practices and effort associated with the investigation and prosecution of the more challenging class of cases.”<sup>42</sup> A thoroughly investigated case helps ensure that cases that should go forward to a court-martial do go forward.<sup>43</sup>

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Telephone Interview with Colonel (Retired) Lawrence J. Morris, Chief of Advocacy, Office of The Judge Advocate General, U.S. Army in Wash., D.C. (Oct. 28, 2009) [hereinafter Morris Interview].

<sup>32</sup> See E-mail from Lieutenant Colonel Eric S. Krauss, Chief, Pol’y Branch, Office of The Judge Advocate General, U.S. Army (Jan. 22, 2010, 1439 EST) [hereinafter Krauss e-mail] (on file with author).

<sup>33</sup> *Id.*

<sup>34</sup> ARMY SAPR ANNUAL REPORT FY 2008, *supra* note 25, at 23, 24.

<sup>35</sup> *Id.* at 20.

<sup>36</sup> This is true not just for the military but across the nation as a whole. Krauss e-mail, *supra* note 32.

<sup>37</sup> ARMY SAPR ANNUAL REPORT FY 2008, *supra* note 25, at 21. In Fiscal Year 2008, 999 investigations were completed, and 1086 subjects were investigated. Of the 1086 subjects, 1011 were Soldiers. Of those 1011 cases, 548 were substantiated by CID for some type of sexual offense. At the time of the report, of the 548 cases, 268 were pending commander action; commanders disposed of the remaining 280 through some type of administrative adverse action. *Id.* See also Krauss e-mail, *supra* note 32.

<sup>38</sup> An enlisted Soldier, who has had charges preferred against him or her for an offense for which the punishment under the UCMJ and the 2008 *Manual for Courts-Martial* includes a bad conduct or dishonorable discharge, may request from the general court-martial convening authority an administrative discharge in lieu of trial by court-martial. U.S. DEP’T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 10-1 (17 Dec. 2009).

<sup>39</sup> ARMY SAPR ANNUAL REPORT FY 2008, *supra* note 25, at 21.

<sup>40</sup> *Id.*

<sup>41</sup> Krauss e-mail, *supra* note 32.

<sup>42</sup> *Id.*

<sup>43</sup> “Sexual assault carries with it the misperception that a high number of cases are falsely reported.” Anne Munch, Address at the Army Sexual Assault Prevention and Risk Reduction Training Summit: Naming the Unnamed Conspirator: Examining Myth and Incorporating Truth into the Investigative and Prosecutorial Process 7 (Sept. 9, 2008), [hereinafter Munch Speech] (unpublished article) (on file with author). Three different independent studies show that only eight percent of sexual assaults are false allegations. *Id.* Unfortunately, both investigators and prosecutors arbitrarily believe that false allegations outnumber honest reports and fail to conduct a full investigation. *Id.* “No case should be characterized as false without a full evidence based investigation of the offender and the crime.” *Id.*

These statistics demonstrate the difficulty of prosecuting sexual assault crimes. Many unique factors, such as societal attitudes and victim responses, make such cases especially challenging. Accordingly, just results will be difficult to achieve unless investigators and judge advocates have the necessary training to understand how sexual assault cases differ from other criminal cases.<sup>44</sup> Specific training is necessary to understand and address society's perception of victims, victims' counterintuitive responses, and the methods used by sexual assault predators.

Society, including those members who sit on panels and juries, are often influenced by societal biases.<sup>45</sup> As a result of societal biases about sex, some panel members in sexual assault cases focus on the victim instead of the "criminal behavior of the offender."<sup>46</sup> One study showed that in acquaintance rape cases where there was one perpetrator and one victim who knew each other, and where the assault did not involve any weapons or physical injury, the jurors would define rape in terms of "assumption of risk."<sup>47</sup> The more risk the victim assumed, the less likely they were to convict. A victim's assumption of risk increased if she engaged in risky behavior. Risky behavior included actions such as going to a bar, drinking alcohol, or going willingly to the accused's apartment.<sup>48</sup> In such cases, the jurors focused on the actions of the victim rather than those of the accused. The study found that this is significantly less true of other offenses.<sup>49</sup> A panel usually does not take the behavior of victims into account for other crimes, such as robbery or even murder, when determining whether the accused is guilty. Even more damning for a victim is if she consented to some level of sexual contact before the assault.<sup>50</sup> In these

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<sup>44</sup> Morris Interview, *supra* note 31. Justice does not mean that the prosecution wins all its cases. It means that an allegation is fully and properly investigated and, if the evidence warrants, that the allegation proceeds to further disposition, such as a court-martial at which both the Government and defense present all relevant evidence to an impartial party for a resolution. *Id.*

<sup>45</sup> Munch Speech, *supra* note 43.

<sup>46</sup> *Id.* at 2.

<sup>47</sup> *Id.* Ms. Munch's article discussed several studies. The first of these studies was conducted by Harry Kalven and Hans Zeisil in the mid-1960s. *Id.* Mr. Kalven and Mr. Zeisil contacted 3500 judges; 550 subsequently participated in the study. *Id.* One interesting finding was that of forty-two cases of acquaintance rape, only three resulted in convictions. *Id.* Almost thirty years later, another study, conducted by Gary LaFree, made similar findings. Gary LaFree, a Sociology professor from the University of New Mexico conducted the survey in 1989 in Indianapolis, Indiana. *Id.* His researchers conducted face-to-face ninety-minute interviews with 331 jurors who sat on rape cases. *Id.* His study found that jurors were more concerned about making a moral judgment about the victims. *Id.* "Jurors were less likely to hold offenders accountable when the victim drank or used drugs, was acquainted with the defendant or engaged in sex outside the marriage." *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 3.

cases, the victim is often viewed as having "asked for it" or having consented because "she should have known what was going to happen."<sup>51</sup>

Investigators and prosecutors need to be aware of how societal influences affect panel members as well as witnesses.<sup>52</sup> Not only does society tend to scrutinize a victim of sexual assault more closely, but many sexual assault victims react to the assault in a counterintuitive manner.<sup>53</sup> People unfamiliar with the psychology of sexual assault, including panel members, often do not understand these counterintuitive reactions. For example, most people can understand why a victim may shower immediately after an assault or may wash important pieces of evidence, such as bed sheets or clothes, that may contain forensic evidence. A panel understands because the victim's actions make sense: The victim wishes to wash the attack away. In contrast, what about a victim who delays reporting an assault for a week, a month, or a year; or a victim who gives inconsistent statements to friends and investigators; or a victim who interacts with her attacker after the assault; or a victim who has sexual relations with others shortly after the attack? These examples of counterintuitive reactions are by no means exhaustive but are a sampling of the more common ones. Without training, investigators and judge advocates could easily misunderstand these behaviors and discount a victim's credibility because of them.

Societal attitudes and biases also affect the victim and often shape her response to an assault.<sup>54</sup> In the case of acquaintance rape, "[m]any victims may not understand initially that what they experienced was a sexual assault, but with the passage of time, the reality may settle in."<sup>55</sup> Victims, who are a product of society, may initially believe that because they engaged in "risky behavior," such as kissing the accused or going with the accused to his room, those actions gave the accused consent.<sup>56</sup> Couple these feeling of self-blame with the feelings of shame, embarrassment, and a fear that no one will believe them, along with the shock and trauma of the assault itself, victims can react in ways that do not make sense to untrained

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<sup>51</sup> *Id.* Ms. Munch provides several examples in the article demonstrating the double standard society applies victims of sexual assault. *Id.* at 2-3. Especially notable is the double standard applied to crime victims who drink alcohol. *Id.* at 3. If a victim of sexual assault is under the influence of alcohol, the victim is often criticized or condemned. *Id.* Victims of other crimes who are under the influence of alcohol are not held to this standard. *Id.* Furthermore, the sex offenders who drink are often excused in whole or in part because they had been drinking. *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 9.

<sup>54</sup> *Id.* at 5.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

observers.<sup>57</sup> A proper sexual assault investigation and prosecution must take all of these factors into account and find ways to explain them to the panel.

Another factor that plays into the difficulty of sexual assault prosecutions is the lack of understanding of the perpetrator. Research has established that many of the more serious sexual crimes are committed by men who are serial offenders.<sup>58</sup> Fortunately, “these serial offenders comprise a very small proportion of any community.”<sup>59</sup> Dr. David Lisak, Ph.D. has spent decades researching the causes and consequences of interpersonal violence.<sup>60</sup> Specifically, he has studied the motives and characteristics of “undetected” rapists, men who commit rape but have never been caught. His research and the research of others found that sexual assaults committed by serial offenders often share some common characteristics and is one tool that investigators can use in the investigation of sexual assaults.<sup>61</sup> First an offender is rarely a stranger to the victim.<sup>62</sup> In fact, an offender often selects a potential victim because he knows enough about her to identify her as vulnerable in some way.<sup>63</sup> The offender then grooms the victim by encouraging friendship, by gaining her trust, or by persuading her to accompany him to a place that ultimately places her in jeopardy.<sup>64</sup> The offender then increases the victim’s vulnerability by playing on her insecurities, giving her alcohol, or slipping drugs into her drink.<sup>65</sup> Next the offender

will isolate the victim from friends or others to whom she might otherwise reach out for assistance.<sup>66</sup> Another element common to acquaintance rapes is the offender’s use of only enough force to compel submission.<sup>67</sup> The offender will rarely use a weapon, such as a knife or gun, but will instead use intimidation, threats, or physical force.<sup>68</sup> As a result, victims often manifest minimal physical or visible injuries.<sup>69</sup>

One cannot identify a serial rapist by appearance or through conversation. They are often personable, well-liked, successful, charming, popular and skilled at manipulating those around them.<sup>70</sup> All of these traits are assets that allow offenders to identify and exploit vulnerable victims in a manner that rarely leads to any official report.

These unique factors are what motivated the DoD to adopt measures to ensure judge advocates and investigators receive the training needed to tackle these difficult, challenging cases. The DoD SAPR program requires law enforcement personnel and judge advocates to receive specific training in various areas of sexual assault investigations and prosecutions.<sup>71</sup> Specifically, investigators must receive training in victim care, crime scene management, and victimology.<sup>72</sup> Judge advocates must receive training in victimology, sex offenders, recantations, and false information, among other topics.<sup>73</sup> The Army has supplemented this training by providing experts and resources to both the Army CID and Army JAG Corps.

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<sup>57</sup> *Id.*

<sup>58</sup> Dr. David Lisak, Address at the Army Sexual Assault Prevention and Risk Reduction Training Summit: Confronting Sexual Violence, Moral Obligation, and Moral Leadership (Sept. 9, 2008) [hereinafter Lisak Speech].

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* Dr. Lisak’s biography was provided to the summit attendees and is on file with the author. Dr. Lisak’s research has been published in leading journals in psychology, trauma, and violence. He is the founding editor of the journal *Psychology of Men and Masculinity*. Dr. Lisak consults frequently with law enforcement and prosecutors on sexual violence and has provided consultation and training to the U.S. military.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; Munch Speech, *supra* note 43.

<sup>63</sup> Lisak Speech, *supra* note 58. During his lecture, Dr. Lisak, as an example, described a vulnerable individual as being someone new to the unit, who allows the predator to begin rumors about her and to question her reputation for chastity or for truthfulness. A vulnerable person could also be an individual that already has a negative reputation. *Id.*

<sup>64</sup> *Id.* Dr. Lisak provided an example of a predator inviting the “target” to a party that he has billed as one where only a select few have been invited. A predator may also invite a “target” to his room for a quick drink; may pretend he needs to retrieve keys, money, or identification from his room; or may encourage a “target” to get into his car by using an excuse such as “parking will be hard, let’s go in my car.” *Id.*

<sup>65</sup> *Id.* A predator may provide the “target” with drinks with are stronger than normal, may add drugs to a drink, or may pressure an individual into drinking or engaging in an act with which she is not comfortable. *Id.*

## Implementation of the HQEs and SVPs

The additional experts and resources funded by the Department of the Army demonstrate the Army’s commitment to preventing sexual assault.<sup>74</sup> Recognizing the

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<sup>66</sup> *Id.* In addition, offenders who commit repeated sexual assaults may often distort the facts to justify their actions to themselves. *Id.* In one interview conducted by Dr. Lisak, the predator explained the victim was “pissing him off, or she has done this 1,000 times before or she was plastered, maybe that’s why she agreed.” *Id.* The predator made these statements after initially describing the victim as someone who was young, inexperienced, and naive. *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* Dr. Lisak stated that for many predators, a weapon is a concept: It compels submission and it equals power. *Id.*

<sup>69</sup> *Id.* Dr. Lisak explained that sexual predators often do not cause physical injury because it lessens the chance of a victim reporting the crime. *Id.*

<sup>70</sup> Munch Speech, *supra* note 43, at 5.

<sup>71</sup> DoDI 6495.02, *supra* note 17, at E6.3.4, E6.3.6.

<sup>72</sup> *Id.* at E6.3.4

<sup>73</sup> *Id.* at E6.3.6

<sup>74</sup> *Preventing Sexual Assault in the Military: Before the H. Armed Services Comm.*, 111th Cong. (2009), available at <http://armedservices.house.gov/>

need for specialized training, both the Army JAG Corps and CID has taken full advantage of the additional personnel allotted for HQEs and SVPs.<sup>75</sup> The Army JAG Corps has hired seven HQEs and has added fifteen special prosecutors to “focus exclusively on litigation and training” of sexual assault cases during three-year tours.<sup>76</sup>

This is the first time the Army has designated “prosecutors for a specific crime.”<sup>77</sup> Until now, an Army judge advocate has been a “generalist, not specialist.”<sup>78</sup> The Army JAG Corps trains its attorneys to a baseline level for prosecution, which include sexual assault cases.<sup>79</sup> The creation of an SVP will bring a higher level of training and experience to the Army’s arsenal in eliminating sexual assault from the Army.

An SVP is an experienced judge advocate with a strong background in criminal law.<sup>80</sup> In addition to a strong criminal law background, SVPs undergo extensive training specific to sexual assault prosecutions. To gain practical experience, SVPs often receive two to three weeks of on-the-job training with a large city sex crimes unit.<sup>81</sup> During this training, the SVPs shadows sex crimes unit prosecutors throughout their trial preparation.<sup>82</sup> The SVPs attend trial planning strategy meetings, participate in victim and witness interviews, and meet with investigators and experts involved in the various cases.<sup>83</sup> In addition to on-the-job training, the SVPs also attend the National District Attorney’s Career Prosecutors Course and receive the Department of Justice Sexual Assault Response Training, as well as the Department of Justice Sexual Assault Nurses Training.<sup>84</sup>

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pdfs/MP030609/Collins\_Testimony030609.pdf (written statement of Carolyn R. Collins, Sexual Harassment/Assault Response & Prevention Program Manager, Office of the Deputy Chief of Staff, G1, U.S. Army) [hereinafter Collins SHARP House Statement].

<sup>75</sup> SHARP Initiatives Message, *supra* note 6.

<sup>76</sup> *Id.*

<sup>77</sup> Jeff Schogol, *Army Names Special Prosecutors for Assault Cases*, STARS & STRIPES (Jan. 28, 2009), available at <http://www.stripes.com/article.asp?section=104&article=60280> (citing Lieutenant General Scott C. Black, U.S. Army Judge Advocate General).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Policy Memorandum 10-8, Office of The Judge Advocate General, subject: Special Victim Prosecutors (29 Jan. 2010) [hereinafter TJAG Policy Memo 10-8].

<sup>81</sup> Telephone Interview with Major Robert C. Stelle, Special Victim Prosecutor, XVIII Airborne Corps and Fort Bragg in Fort Bragg, N.C. (Oct. 23, 2009) [hereinafter Stelle Interview].

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

Once their training is complete the SVPs head to the field. The Army JAG Corps selected nine experienced judge advocates for specialized training in sexual assault and domestic violence prosecution and has already sent them to the field.<sup>85</sup> The remaining six have been identified and are currently undergoing training.<sup>86</sup>

The SVPs have been assigned geographic areas of responsibility.<sup>87</sup> The SVPs are physically located at installations that traditionally have a high number of sexual assault cases.<sup>88</sup> They are also responsible for traveling to all the installations within their area of responsibility as often as they are needed.<sup>89</sup> All installations fall within one of the SVP’s areas of responsibility.<sup>90</sup> The chart in the Appendix lists the physical location of SVPs and their areas of responsibility.

The Judge Advocate General provided guidance for the program in policy memorandum 10-8 and, specifically directed that “the SVP’s primary mission is to develop and litigate special victim cases within their geographic areas of responsibility.”<sup>91</sup> Special victim cases are those cases involving an allegation of sexual assault or family violence.<sup>92</sup> The staff judge advocate (SJA) within an SVP’s area of responsibility is responsible for providing the SVP’s logistical support.<sup>93</sup> The Judge Advocate General expects SVPs to try cases and to train and develop junior trial counsel.<sup>94</sup> However, SVPs do not have to prosecute every special victim case, but they should make themselves available to support these cases to the extent professionally practicable.<sup>95</sup> The SVPs should also work closely with chiefs of military justice because part of the SVP’s role is to mentor and guide the trial counsel through the prosecution of

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<sup>85</sup> Colonel Norman F. Allen, III, Chief, Government Appellate Division & Lieutenant Colonel Jan E. Aldykiewicz, Chief Trial Counsel Assistance Program, Special Victim Prosecutor Implementation Focus Group, World Wide Continuing Legal Education Course 2009 (Oct. 8, 2009) [hereinafter Allen & Aldykiewicz SVP Focus Group].

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* The SVP’s secondary mission is to “develop a sexual assault and family violence training program for the investigators and trial counsel in their area of responsibility using local, state, and federal resources in conjunction with information provided by TCAP, the CLD, and TJAGLCS.” *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* Logistical support includes but is not limited to paralegal, trial counsel, office space, and equipment, to include remote connectivity. *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

sexual assault cases, not to usurp the chiefs of military justice authority.<sup>96</sup> Both SVPs and chiefs of military justice have the same goal: to ensure trial counsel receive the necessary training, mentoring, and trial experience to ensure the justice system works fairly.<sup>97</sup> The experience trial counsel receive working with SVPs should assist them in the litigation of non-sexual assault or domestic violence offenses, as well as provide critical experience for future assignments in jobs including defense counsel and chiefs of military justice.<sup>98</sup> To further emphasize that the role of the SVP is to assist and mentor trial counsel, the SVP does not ordinarily interact with commanders.<sup>99</sup> Furthermore, as a general rule, the SVP will act as the second chair at trial, giving the junior trial counsel the opportunity to learn by doing.<sup>100</sup>

Since the “SVPs are part of an Army-wide effort to provide even greater expertise to the investigation and proper disposition of allegations of sexual assault and family violence” they are assigned to the U.S. Army Legal Services Agency (USALSA).<sup>101</sup> To maintain the correct balance between the needs of the local OSJA and the needs of the Army, the SVP’s rating chain contains both an installation supervisor and an OTJAG-level supervisor.<sup>102</sup>

To further provide the necessary experience, guidance, and expertise to both trial and defense counsel, the Army has hired seven HQEs to assist judge advocates. The HQEs have expertise in the fields of special victim and sexual assault prosecution and were hired to augment OTJAG’s training.<sup>103</sup> The OTJAG training base is not limited to just the prosecution. The goal of military justice is to ensure that the system operates fairly to achieve a just result.<sup>104</sup> Even though HQEs and SVPs have a strong prosecutorial focus,

justice will not prevail unless both trial counsel and defense counsel receive the training and resources necessary to fully investigate and prepare their cases.<sup>105</sup>

The Army has invested considerable resources into better preparation, investigation, and disposition of sexual misconduct, and has also focused on attitudinal changes among the ranks. Defense counsel must zealously defend all clients, and in doing so they help to ensure not only that their client receives a fair trial, but that the system, even one that seems to have awakened to place special emphasis on a certain type of crime and special solicitude toward certain victims, dispenses justice according to the procedures and rights guaranteed by the Constitution and the UCMJ. Defense training, then, will focus on areas that ensure due process and fairness for their clients, including the accuracy of forensic testing; the formation, reliability and suggestibility of memory; how to cross-examine alleged victims, and other sensitive witnesses; navigating the rules of evidence, especially MRE’s 412 and 413; how to evaluate, respond to, and offer expert testimony, and sentencing advocacy, among other areas. The government’s commitment to justice must include a guarantee that the accused Soldier receives the best possible defense—ensuring not only good order and discipline in the ranks, but continued high trust in the military justice system by the rank and file.<sup>106</sup>

To keep balance in the system, three HQEs are assigned to the Trial Counsel Assistance Program (TCAP); two are assigned to the Defense Counsel Assistance Program (DCAP) (one of which has not yet been filled); one is assigned to OTJAG; and the remaining position is assigned to The Judge Advocate General’s Legal Center and School.<sup>107</sup> The HQE position is a five-year position.<sup>108</sup> The JAG Corps does not anticipate needing the services of HQEs after five years because the JAG Corps’s long established

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<sup>96</sup> Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81.

<sup>97</sup> Morris Interview, *supra* note 31.

<sup>98</sup> *Id.*; Stelle Interview, *supra* note 81.

<sup>99</sup> TJAG Policy Memo 10-8, *supra* note 80.

<sup>100</sup> Allen & Aldykiewicz SVP Focus Group, *supra* note 85; Stelle Interview, *supra* note 81. “Appropriate cases are opportunities to Train/Coach/Mentor/Professionally Develop other Judge Advocates.” Allen & Aldykiewicz SVP Focus Group, *supra* note 85.

<sup>101</sup> TJAG Policy Memo 10-8, *supra* note 80; Allen & Aldykiewicz SVP Focus Group, *supra* note 85.

<sup>102</sup> TJAG Policy Memo 10-8, *supra* note 80. For SVPs that are captains and majors, the rater is the Chief, Trial Counsel Assistance Program, and the senior rater is the SJA of the office serving as their primary place of duty. *Id.* For SVPs that are lieutenant colonels, the rater is the SJA of the office serving as their primary place of duty and the senior rater is the Assistant Judge Advocate General for Military Law and Operations (AJAG(MLO)) or the Deputy Judge Advocate General. *Id.*

<sup>103</sup> SHARP Initiatives Message, *supra* note 6.

<sup>104</sup> Morris Interview, *supra* note 31.

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<sup>105</sup> *Id.*

<sup>106</sup> E-mail from Colonel (Retired) Lawrence J. Morris, Chief of Advocacy, Office of The Judge Advocate General, U.S. Army, to author (Jan. 19, 2010, 11:10 EST) [hereinafter Morris e-mail] (on file with author).

<sup>107</sup> Morris Interview, *supra* note 31. The three HQEs assigned to TCAP may be contacted at (703) 588-5277; the two HQEs assigned to DCAP may be contacted at (703) 588-2571. The Chief of Advocacy who oversees the HQE program can be reached at (703) 588-6409. *Id.*

<sup>108</sup> Morris Interview, *supra* note 31.

training institutions will then have the experience necessary to carry on the training mission after that time.<sup>109</sup> These institutions include senior trial counsel, chiefs of military justice, and senior defense counsel (SDC), as well as TCAP and DCAP. With the focused assistance of the HQEs, these institutions will have the experience, expertise, and resources to continue training after the departure of the HQEs.<sup>110</sup>

All judge advocates should benefit from the SVP and HQE program even though they are not currently assigned as trial counsel. First, the program has already provided training not only to trial counsel but also to defense counsel.<sup>111</sup> Defense counsel have had opportunities to receive some of the same training as the SVPs, in addition to training provided through the U.S. Army Trial Defense Services (TDS).<sup>112</sup> Second, trial counsel typically move to other positions, including defense counsel, and can apply the skills, experience, and knowledge they gained litigating sexual assault cases to future assignments. The SVPs who train them will also move to other leadership positions where they can apply the experience and expertise they gained as SVPs. Having experts in place to train and guide counsel is just one element of ensuring justice.

Another key element to ensuring justice involves working with other agencies to respond to sexual assault or domestic violence crimes.<sup>113</sup> The SVPs are responsible for coordinating with their local CID office to establish an SVU at the installations in their areas of responsibility.<sup>114</sup> These SVUs are designed to meet the physical, medical, spiritual, and emotional needs of sexual assault victims.<sup>115</sup> The SVUs are comprised of judge advocates, investigators, and “[a]ppropriate personnel to provide victims with medical, emotional, and spiritual services.”<sup>116</sup> As seen, another critical piece to effectively address crimes of sexual assault is to properly train investigators.

The Army CID has hired seven HQEs of regional and often national renown credentials in sexual assault investigations and prosecutions.<sup>117</sup> These experts mentor

and train CID agents on investigative techniques, including forensics and victim and witness interviews, and assist with complex sexual assault cases.<sup>118</sup> In addition, CID recently graduated twenty-two new sexual assault investigators from the SVU Course at the U.S. Army Military Police School at Fort Leonard Wood, Missouri.<sup>119</sup>

The SVU Course at Fort Leonard Wood, Missouri is a new course instituted by the USACIC.<sup>120</sup> The intensive two-week course is conducted by the staff of the USACIC, U.S. Army Military Police School, and the seven HQEs in the fields of sexual assault, forensics, medical, and sex crimes prosecution.<sup>121</sup> The HQEs spent their careers focusing on sexual assault and sexual predator crimes and it is with this expertise that they train Army criminal investigators.<sup>122</sup> The graduates of the course are assigned to Army installations throughout the United States, Germany, and Korea.<sup>123</sup> Once at their installations, these specially trained investigators are responsible for taking the lead in forming their installation’s special victims investigative unit.<sup>124</sup> These investigators come with prior civilian or military experience in investigations and who are respected by their peers, and motivated and dedicated to undertake the difficult cases of sexual assaults.<sup>125</sup> They are also responsible for leading sexual assault investigations teams “to better address the conduct of sexual assault investigations.”<sup>126</sup>

As part of the Army effort to address sexual assault, CID also increased its crime lab personnel. The U.S. Army Criminal Investigation Laboratory (USACIL) is the DoD’s major crime lab.<sup>127</sup> To support the effort to fully investigate allegations of sexual assault, USACIL hired thirty-two additional forensic examiners and specialists to handle the projected increased workload and instituted additional “robotics and automation enhancements for DNA forensic work, and a new laboratory information management system (LIMS), which increases the capabilities of the examiners yielding quicker response times to evidence processing.”<sup>128</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> TJAG Policy Memo, 10-8 *supra* note 80; Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81.

<sup>114</sup> TJAG Policy Memo, 10-8, *supra* note 80.

<sup>115</sup> Allen & Aldykiewicz SVP Focus Group, *supra* note 85.

<sup>116</sup> TJAG Policy Memo, 10-8, *supra* note 80.

<sup>117</sup> E-mail from Special Agent Guy Surian, Deputy for Investigations and Intelligence, U.S. Army Criminal Investigations Command, to author (Oct. 27, 2009, 13:36 EST) [hereinafter Surian e-mail] (on file with author).

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<sup>118</sup> *Id.*

<sup>119</sup> Hauser, *supra* note 9.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Surian e-mail, *supra* note 117.

<sup>126</sup> Collins SHARP House Statement, *supra* note 74.

<sup>127</sup> U.S. ARMY CRIMINAL INVESTIGATION COMMAND, U.S. ARMY CRIMINAL INVESTIGATION LABORATORY HISTORY, <http://www.cid.army.mil/usacil2.html>

<sup>128</sup> *Id.*

The CID is highly selective about whom it selects to receive sexual assault investigator training. Qualified individuals must demonstrate motivation, leadership, and perseverance, and must have experience investigating a broad range of criminal offenses or have specialized expertise in sexual assault or child abuse cases.<sup>129</sup> For installations that do not yet have their own SVU, CID has created centers of excellence at various installations which can provide resources to help agents improve their skills at investigating sexual assaults.<sup>130</sup>

The field has responded positively to these additional assets.<sup>131</sup> Installation military justice offices and CID offices appreciate the experience and expertise these specially trained prosecutors and investigators bring to these difficult cases.<sup>132</sup> Now that the resources are in place, young judge advocates are eager and willing to undergo new training to better themselves as judge advocates.<sup>133</sup>

### Advice to Judge Advocates from the SVPs and HQEs

Teamwork is the key element in sexual assault investigations and prosecutions.<sup>134</sup> Judge advocates must build solid relationships with the investigators, forensic scientists, and other experts, such as experts on victim behavior, ideally before their first case.<sup>135</sup> This is true for any type of case but especially so for sexual assault and domestic violence cases due to the unique issues. Judge advocates should reach out early to the CID agent investigating the case, as well as other professionals—including medical and forensics personnel—involved.<sup>136</sup> Early involvement allows judge advocates to identify issues in the case long before they prefer charges. Early involvement also allows judge advocates to identify potential witnesses and establish early contact with the alleged victim. In addition, many investigators and experts are open to input from the judge advocates, especially those who have built relationships with them, and judge advocate

guidance can be useful in uncovering evidence early on in the investigative process.<sup>137</sup>

The SVPs and HQEs can assist trial counsel in preparing for victim and witness interviews. They can demonstrate effective interview techniques and questions appropriate for the crucial victim interview.<sup>138</sup> The SVPs and HQEs mentor judge advocates during case preparation. They train them to identify which experts they should consult, when they should involve an expert, and, most importantly, why they should consult a particular expert.<sup>139</sup> The JAG Corps has provided a variety of resources for training, mentoring, and consulting judge advocates. It is up to the judge advocate to take advantage of the resources, especially the SVPs and HQEs.<sup>140</sup>

Since the HQE are only funded for five years, chiefs of military justice and SDCs should plan for the continued training and development of their counsel.<sup>141</sup> By taking advantage of the training that is available now, new experts in sexual assault and domestic violence can be “home grown” and help ensure that justice prevails in future cases.<sup>142</sup>

### Conclusion

Sexual assaults and domestic violence are crimes that often involve unique psychological and evidentiary issues. With the help of SVPs and HQEs, judge advocates can develop the expertise necessary to ensure that these cases are properly investigated and competently litigated. The skills they develop should aid them not just in dealing with these crimes but in all aspects of their careers. The additional resources will aid victims of these crimes and enable justice to prevail.

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<sup>129</sup> Surian e-mail, *supra* note 117.

<sup>130</sup> Hauser, *supra* note 9.

<sup>131</sup> See Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81; and Surian e-mail, *supra* note 117.

<sup>132</sup> See Stelle Interview, *supra* note 81; Surian e-mail, *supra* note 117.

<sup>133</sup> Morris Interview, *supra* note 31.

<sup>134</sup> See Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81; Surian e-mail, *supra* note 117.

<sup>135</sup> See Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81; Surian e-mail, *supra* note 117.

<sup>136</sup> See Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81; Surian e-mail, *supra* note 117.

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<sup>137</sup> Stelle Interview, *supra* note 81.

<sup>138</sup> Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81.

<sup>139</sup> Stelle Interview, *supra* note 81.

<sup>140</sup> Morris Interview, *supra* note 31.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

**Appendix<sup>144</sup>**

<b>SVP Physical Location</b>	<b>SVP Area of Additional Responsibility</b>
Fort Lewis, WA	Presidio & Fort Irwin, CA
	Forts Wainwright, Greeley, Richardson, AK
Fort Bliss, TX	Fort Huachuca, AZ
	White Sands Missile Base, NM
Fort Carson, CO	Fort Sill, OK
Fort Hood, TX	Fort Sam Houston
Fort Riley, KS	Fort Leavenworth, KS
Fort Campbell, KY	Fort Leonard Wood, MO
Fort Benning, GA	Fort Polk, LA
	Fort Rucker, Fort McClellan & Redstone Arsenal, AL
	Fort McPherson, GA
Fort Stewart, GA	Fort Gordon, GA
	Fort Jackson, SC
Fort Bragg, NC	Fort Knox, KY
Military District of Washington	Fort Lee, Fort Belvoir, & Fort Eustis, VA
	Fort Detrick, Fort Meade, & Aberdeen Proving Ground, MD
Fort Drum, NY	Fort Dix & Fort Monmouth, NJ
	USMC / Westpoint, NY
Fort Shafter, HI	All installations in Hawaii
Campbell Barracks, Heidelberg GE	All installations in Europe
Korea (TBD)	All installations in Korea and Japan

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<sup>144</sup> Allen & Aldykiewicz SVP Focus Group, *supra* note 85. The area of responsibility has not yet been formally decided for the fifteenth SVP. *Id.*