

Sexual Assault in the Military

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EXECUTIVE SUMMARY

The U.S. Commission on Civil Rights chose to focus on sexual assault in the U.S. military for its annual 2013 Statutory Enforcement Report. This report examines how the Department of Defense and its Armed Services—the Army, Navy, Marine Corps, and Air Force (the Services)—respond to Service members who report having been sexually assaulted (“victims”) and how it investigates and disciplines Service members accused of perpetrating sexual assault (“perpetrators”). This report also reviews how the military educates Service members and trains military criminal investigators and military lawyers about sexual assault offenses. The topic is both relevant and timely, as Congress is currently considering ways to address this issue.

The Commission has authority to examine questions related to sexual assault in the military because the issues involve both sex discrimination and the denial of equal protection in the administration of justice. The issue of sex discrimination involves female Service members, who represent 14 percent of the military population, but are disproportionately likely to be victims at a rate five times that of their male counterparts. The questions related to a possible denial of equal protection in the administration of justice led the Commission to examine cases in which sexual assault victims, as well as Service members accused of sexual assault, claim unfair treatment in the military justice system.

Through this report, the Commission sheds light on the scope, response, investigation, and discipline of sexual assault in the U.S. military. The Commission held a briefing on January 11, 2013 to hear the testimony of military officials, scholars, advocacy groups, and practitioners on the topic of sexual assault in the military. In response to written questions from the Commission, the Department of Defense and its Armed Services provided documents and other materials, including data on investigated sexual assault allegations, which the Commission analyzed. The results of these efforts are memorialized in this report.

The report reveals that the Department of Defense may benefit from greater data collection to better understand trends in sexual assault cases and to implement improvements in future initiatives. Although the Department of Defense has already implemented policies to reduce sexual and sexist material from the military workplace in an effort to reduce sexual harassment, the effects of such recent efforts have yet to be measured. The Department of Defense also has a plan to standardize sexual assault response and prevention training across the Services to promote best practices. There will be a need to track the success of such policies over time. Greater commander accountability for leadership failures to implement such policies, especially in cases where victims claim sexual assault at the hands of superiors within the chain of command, should also be considered. Without increased data collection, however, it is difficult to measure the effects of any new changes the military chooses to implement.

CHAPTER 1: INTRODUCTION AND SCOPE OF THE PROBLEM

This report examines how the Department of Defense (DoD) and its Armed Services—the Army, Navy, Marine Corps, and Air Force (the Services)—respond to Service members who report having been sexually assaulted (“victims”) and investigate and discipline Service members accused of perpetrating sexual assault (“perpetrators”). It also reviews how the military educates Service members and trains military criminal investigators and military lawyers about sexual assault offenses.¹

It has been 50 years since the Commission has examined civil rights in the military.² The Commission has authority to examine questions related to sexual assault in the military because the issues involve both sex discrimination and the denial of equal protection in the administration of justice.³ The issue of sex discrimination involves female Service members, who represent 14 percent of the military population, and the likelihood that they are over five times more likely to experience some form of sexual assault, as defined by the DoD, than their male counterparts.⁴ The questions related to a possible denial of equal protection in the administration of justice led the Commission to examine reports of many cases in which sexual assault victims, as well as Service members accused of sexual assault, claim that they are not treated fairly in the military justice system.

This chapter addresses the scope of the problem of sexual assault in the military and how it compares to sexual assault in other populations. Chapter Two discusses the DoD’s on-going efforts to prevent sexual assault. Chapter Three addresses military response to victims and barriers to reporting. Chapter Four describes the consequences for victims who report. Chapter Five addresses military investigations of sexual assaults, specialized training for criminal investigators and judge advocates, and trends in investigations revealed by DoD’s data. Chapter

¹ For purposes of this report, the term “military” refers to the Armed Services.

² See U.S. COMM’N ON CIVIL RIGHTS, FAMILY HOUSING AND THE NEGRO SERVICEMAN (1963).

³ See 42 U.S.C. § 1975a(2)(A) (2013) (The Commission has a duty to “study and collect[] information” concerning “discrimination or denials of equal protection of the laws under the Constitution of the United States because of . . . sex . . . or in the administration of justice.”). See also 110 CONG. REC. 12714 (1964) (statement of Sen. Hubert H. Humphrey) (explaining that the Commission has jurisdiction over, among other things, “denials of equal protection in the administration of justice, whether or not related to [a protected class].”).

⁴ See DEP’T OF DEFENSE SEXUAL ASSAULT PREVENTION AND RESPONSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2012, VOLUME I, 81 (2013) [hereinafter *DoD FY12 Annual Report on Sexual Assault, Vol. I*], available at http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf (6.1 percent of female and 1.2 percent of male Service members indicate that they experienced some form of sexual assault, as defined by DoD policy, while on active duty within the past year).

Six examines how perpetrators are disciplined and reviews the broad discretion afforded to commanders.⁵

Background

The issue of sexual assault among Service members first garnered national attention during the Navy Tailhook scandal in 1991. Ninety Service members alleged that they were sexually assaulted or harassed by 119 Naval officers and 21 Marine Corps officers during a convention in Las Vegas.⁶ Reports of sexual assault at Aberdeen Proving Ground in 1996 and the Air Force Academy in 2003 created more public awareness of the issue.⁷ Most recently, the scandal at Lackland Air Force Base resulted in six drill sergeants being convicted of sexual misconduct, two others receiving administrative punishment, and nine trials still pending as of February 2013.⁸ Efforts to address this issue by the military are being investigated by Congress.

Sexual assault in the military imposes significant costs and impairs mission readiness as a whole. According to a U.S. Department of Justice (DOJ) report, rape has the highest annual

⁵ Throughout this report, the term “commander” refers to a commander with disposition authority for sexual assault allegations. While the term usually refers to the commanding officer of a unit (such as a company commander, battalion commander, or brigade commander), in April 2012, the Secretary of Defense withheld disposition authority for allegations of completed or attempted rape, sexual assault, and forcible sodomy from all commanders who do not possess at least Special court-martial convening authority and who are not in the grade of O-6 (i.e., colonel or Navy captain) or higher. Memorandum from the Secretary of Defense, Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012), available at http://www.dod.gov/dodgc/images/withhold_authority.pdf, effective by June 28, 2012.

⁶ See OFF. OF THE INSPECTOR GEN., THE TAILHOOK REPORT: THE OFFICIAL INQUIRY INTO THE EVENTS OF TAILHOOK ‘91 (1993). The website for the 1996 PBS Frontline special, *The Navy Blues*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/navy/tailhook/>, details the experience of 83 women and 7 men who were found to have been sexually harassed and/or assaulted by their peers at a Las Vegas convention in 1991. A total of 119 Navy and 21 Marine Corps officers were cited for incidents of indecent assault, indecent exposure, conduct unbecoming an officer, or failure to act in a proper leadership capacity while at the 35th Annual Tailhook Symposium in 1991. Critics of the handling of Tailhook, including former Navy Secretary James Webb, argued that members of Congress and the Navy overreacted, resulting in mismanaged investigations and violations of due process. See James Webb, *Witch Hunt in the Navy*, N.Y. TIMES, Oct. 6, 1992, at A23.

⁷ See Art Pine, *Army Reacts Quickly to Sex Harassment Charges*, L.A. TIMES, Nov. 8, 1996, available at http://articles.latimes.com/1996-11-08/news/mn-62470_1_sexual-harassment (describing charges of sexual harassment and rape of over a dozen female recruits at an Army training base by superiors); see also Cathy Booth Thomas/Tucson, *Conduct Unbecoming*, TIME, Mar. 6, 2003, available at <http://www.time.com/time/magazine/article/0,9171,428045,00.html> (stating over 20 women, who were either former cadets or enrolled in the Air Force Academy, charged officials with failing to investigate sexual assaults, discouraging reporting, and retaliating against those who reported assaults).

⁸ Molly Hennessy-Fiske, *Air Force Defends Handling of Sex Scandal*, L.A. TIMES, Jan. 23, 2013, available at <http://articles.latimes.com/2013/jan/23/nation/la-na-lackland-hearing-20130124>.

victim cost of any non-fatal crime.⁹ The costs include short-term medical care, long-term and short-term mental health services, lost productivity, and pain and suffering.

Military sexual assault also impairs military readiness and disrupts unit cohesion. Data indicates that 55 percent of female victims and 38 percent of male victims are sexually harassed and stalked by the perpetrator who sexually assaults them.¹⁰ When a victim is sexually assaulted at a military installation, the victim's job performance is impaired and mission readiness is hurt.¹¹

Definition of “Sexual Assault”

The Uniform Code of Military Justice (UCMJ) criminalizes various forms of unwanted sexual contact and includes a broader range of conduct than is generally understood in common usage of the term “sexual assault” or as typically used in civilian criminal statutes.¹² The term “sexual assault,” as defined by the DoD, incorporates sexual contact offenses, as well as sexual penetration offenses. Current DoD policy defines “Sexual Assault” as:

Intentional sexual contact characterized by use of force, threats, intimidation, or 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

⁹ TED R. MILLER ET AL., U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, NAT'L INST. OF JUST., VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 1, 9 (Jan. 1996), available at www.ncjrs.gov/pdffiles/viccost.pdf (noting that the majority of these costs are related to medical and mental healthcare, and “if rape's effect on the victim's quality of life is quantified, the average rape costs \$87,000—many times greater than the cost of prison”); see Christine Hansen & Kate B. Summers, *A Considerable Sacrifice: The Costs of Sexual Violence in the U.S. Armed Forces*, Yale Manifesta 1, 38, 42 (2005).

¹⁰ See LINDSAY M. ROCK ET AL., DEF. MANPOWER DATA CTR. (DMDC), 2010 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: OVERVIEW REPORT ON SEXUAL ASSAULT 30 (2011) [hereinafter *2010 DoD Gender Relations Survey*], available at http://servicewomen.org/SAPRO_Reports/DMDC_2010_WGRA_Overview_Report_of_Sexual_Assault.pdf.

¹¹ Sixty-seven percent of female and 73 percent of male Service members who experienced unwanted sexual contact said the most serious incident occurred at a military installation; 41 percent of females and 49 percent of males said it occurred during duty hours; and 58 percent of females and 35 percent of males thought that, as a result, their work performance decreased. DMDC, 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: OVERVIEW REPORT ON SEXUAL ASSAULT 21-22, 67 (2013) [hereinafter *2012 DoD Gender Relations Survey*], available at http://www.sapr.mil/public/docs/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf. See also Capt. Megan N. Schmid, U.S. Air Force, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 503-4 (2010).

¹² UCMJ Arts. 120 & 125; 10 U.S.C. §§ 920, 925 (2012). These statutes and others relevant to sexual assault in the military are listed in [Appendix A](#) to this report.

contact, forcible sodomy (forced oral or anal sex), or attempts to commit these acts.¹³

“Sexual contact” is defined in Article 120 of the UCMJ as:

(A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.¹⁴

Throughout this report, the term “sexual assault” will be used as defined by DoD, unless otherwise indicated.

DoD’s sexual assault prevention and response (SAPR) policies do *not* address stalking, indecent exposure, and indecent conduct (which does not include physical contact), although the UCMJ criminalizes such actions.¹⁵ DoD may consider these types of behaviors as sexual harassment and addresses them under separate policies.¹⁶

¹³ DoD DIRECTIVE 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 18 (Jan. 23, 2012, Incorporating Change 1, Apr. 30, 2013), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf>. The legal definitions of the various forms of sexual offenses are found in Articles 120 and 125 of the UCMJ and are listed in [Appendix A](#) to this report. The DoD Directives are overseen directly by the Secretary of Defense and exclusively establish policy, assign responsibilities, and delegate authority to different defense components without addressing procedures. *See* OVERVIEW OF DEP’T OF DEF. ISSUANCES, DOD WASHINGTON HEADQUARTERS SERVICES, *available at* http://www.dtic.mil/whs/directives/corres/writing/DoD_Issuances.ppt. In comparison, DoD Instructions contain implementation of directives and can include overarching procedures. *See id.*

¹⁴ UCMJ Art. 120; 10 U.S.C. §§ 920 (2012).

¹⁵ Before June 2012, stalking, indecent exposure, and indecent conduct were included in UCMJ Article 120—the article that defines sexual assault—but such conduct was not included in the SAPR policies. *See* UCMJ Art. 120a; 10 U.S.C. § 920 (2012).

¹⁶ *See* DoD DIRECTIVE 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (MEO) PROGRAM (Aug. 18, 1995, Incorporating Change 1, May 7, 1997, Certified Current as of Nov. 21, 2003), *available at* http://www.uscg.mil/hq/cg00/cg00h/History_files/DOD_EO_Manual.pdf. *See also* Army Regulation (AR) 600-20, Army Command Policy (Sept. 20, 2012), Chapter 7, Prevention of Sexual Harassment, and Appendix D, Equal Opportunity/Sexual Harassment Complaint Processing System; SECRETARY OF THE NAVY INSTRUCTION (SECNAVINST) 5300.26D, DEPARTMENT OF THE NAVY (DON) POLICY ON SEXUAL HARASSMENT (Jan. 3, 2006); SECNAVINST 5354.1, POLICY ON MILITARY EQUAL OPPORTUNITY COMPLAINT PROCESSING (JAN. 2, 1997); MARINE CORPS ORDER (MCO) 1000.9A, SEXUAL HARASSMENT (MAY 30, 2006); MCO P5354.1D WITH CHANGE 1, MARINE CORPS EQUAL OPPORTUNITY (EO) MANUAL (Apr. 14, 2003); and AIR FORCE INSTRUCTION (AFI) 36-2706, MILITARY EQUAL OPPORTUNITY PROGRAM (Oct. 5, 2011).

Prevalence of Sexual Assault in the Military

The Department of Defense's Annual Reports

Since DoD began maintaining data on reported sexual assaults, the number of reported sexual assaults has increased from 1,700 in calendar year 2004 to 3,374 in fiscal year (FY) 2012.¹⁷ Since sexual assault is an underreported crime, it is difficult to determine whether a variation in reports of sexual assault correlates to a variation in the actual number of incidents of sexual assault. That being said, the number of reports reflects how comfortable victims feel coming forward. According to some, "If the SAPRO is truly accomplishing its goals, one should see increased initial reporting as victims feel more comfortable and then a decrease in rates of reported victimization over time."¹⁸

In fiscal years 2011 and 2012, information was available on three-quarters of the sexual assault reports because these reports were unrestricted.¹⁹ The vast majority of Service member and civilian victims who made an unrestricted report of sexual assault were women (88 percent).²⁰ The vast majority of those accused were men (90 percent in FY 2012; 89 percent in FY 2011).²¹ It is worth noting that the military is approximately 86 percent male and 14 percent female.²²

Approximately half of those accused of sexual assault were junior enlisted Service members (grades E-1 to E-4); approximately a quarter were enlisted members with supervisory duties (grades E-5 to E-9); and four percent were officers.²³ Service members were victims in 77 percent of the unrestricted reports investigated in 2012 and 76 percent of those investigated in

¹⁷ See *DoD FY12 Annual Report on Sexual Assault, Vol.*, at 58-59. The number of reports has increased each year, except for a small decrease in 2007 and 2010. *Id.*

¹⁸ Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future*, 15:4 AGGRESSION AND VIOLENT BEHAV. 267, 274 (2010).

¹⁹ See Chapter 3, *infra*, at 15 for a discussion about restricted versus unrestricted reporting options.

²⁰ *DoD FY12 Annual Report on Sexual Assault, Vol. 1* at 81; See DEP'T OF DEF., DEPARTMENT OF DEFENSE FISCAL YEAR 2011 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 53 (2012) [hereinafter *DoD FY11 Annual Report on Sexual Assault*], available at http://www.sapr.mil/public/docs/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

²¹ *DoD FY12 Annual Report on Sexual Assault, Vol. 1* at 83; *DoD FY11 Annual Report on Sexual Assault* at 54.

²² See DOD, ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (Sept. 30, 2012), available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg1209.pdf>; DOD, ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (Sept. 30, 2012) (Women Only), available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg1209f.pdf>.

²³ *DoD FY12 Annual Report on Sexual Assault, Vol. 1* at 84; *DoD FY11 Annual Report on Sexual Assault* at 53-55. The remaining 15 percent of perpetrators in FY 2012 and 23 percent in FY 2011 were either unidentified or not Service members.

2011.²⁴ The majority (61 percent in 2012, 68 percent in 2011) of the reported sexual offenses involved a completed, penetration-type offense—rape, aggravated sexual assault, and forcible sodomy. Over a third (39 percent in 2012, 32 percent in 2011) involved sexual contact offenses (i.e., non-penetration type sexual offenses).²⁵

The remaining 816 reports in FY 2012 and 753 reports in FY 2011 were restricted, confidential, and not investigated, thus no additional information is known about these incidents.

The Department of Defense’s Anonymous Surveys of Active-Duty Service Members

Since 1988, the DoD has conducted periodic anonymous surveys asking active-duty Service members about a variety of types of unwanted sexual contact and unwanted gender-related behaviors, such as sexual harassment.²⁶ It is difficult to compare earlier surveys to more current ones due to differences in survey methodology, changes in the military’s mission and the surges in forces and military climate changes due to the wars in Afghanistan and Iraq. Beginning in 2006, the anonymous surveys asked about “unwanted sexual contact” while on active duty within the past year.²⁷ The 2006 survey marked the first time that male Service members were asked about sexual assault. The anonymous surveys captured data related to both reported and unreported sexual assaults.

The most recent survey, conducted in 2012, indicated that 6.1 percent of female Service members and 1.2 percent of male Service members reported being the victim of some form of unwanted sexual contact within the past year.²⁸ According to the DoD:

For women, the rate was statistically significantly higher in 2012 than in 2010 (6.1% vs. 4.4%); there was no statistically significant difference between 2012 and 2006 (6.1% vs. 6.8%). There was no statistically significant difference for

²⁴ *DoD FY12 Annual Report on Sexual Assault, Vol. 1* at 82; *DoD FY11 Annual Report on Sexual Assault* at 38.

²⁵ *DoD FY12 Annual Report on Sexual Assault, Vol. 1* at 62; *DoD FY11 Annual Report on Sexual Assault* at 38. The remaining incidents (less than 1 percent) involved an attempt to commit a sexual offense.

²⁶ See DMDC, 1995 SEXUAL HARASSMENT SURVEY (1996), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA323942> (includes 1998 and 1995 survey results); DMDC, ARMED FORCES 2002 SEXUAL HARASSMENT SURVEY (2003), available at <http://www.defense.gov/news/Feb2004/d20040227shs1.pdf>. These earlier surveys indicate a decrease in the rate of sexual assault between 1988 and 2002.

²⁷ *2010 DoD Gender Relations Survey* at 1-2 (“Unwanted sexual contact refers to a range of activities that the Uniform Code of Military Justice (UCMJ) prohibits . . .”).

²⁸ *2012 DoD Gender Relations Survey* at 2

men in the overall rate between 2012 and 2010 and 2006 (1.2% vs. 0.9% and 1.8%).²⁹

The 2012 survey also indicated that 23 percent of women and 4 percent of men reported experiencing unwanted sexual contact since enlistment.³⁰ Because approximately 85 percent of military personnel are male,³¹ the total number of men who have experienced unwanted sexual contact is estimated to be equal to or greater than the number of women who have experienced such contact.³² Based on this survey, the DoD estimates that approximately 26,000 Service members experienced some form of unwanted sexual contact, ranging from sexual contact crimes such as groping, to rape in 2012.³³

The anonymous survey data from 2012 also revealed that many victims were being targeted by a Service member with superior rank and about half were targeted by a co-worker.³⁴ Ninety-four percent of the female victims stated their perpetrator was male.³⁵ In contrast, male victims indicated that their perpetrator was slightly more likely to be female (40 percent) than male (35 percent) in the 2010 survey, as results were not reportable for male victims in 2012.³⁶

²⁹ *Id.*

³⁰ *Id.* at 137-38.

³¹ The active-duty military population in the DoD (including cadets and midshipmen in the Service academies) is approximately 1.4 million members, 15 percent of whom are women. Of the approximately 237,000 military officers, 16 percent are women. See DEP'T OF DEF., ACTIVE DUTY MILITARY STRENGTH REPORT FOR FEB. 28, 2013, available at http://siadapp.dmdc.osd.mil/personnel/MILITARY/ms1_1302.pdf.

³² See James Dao, *In Debate Over Military Sexual Assault, Men Are Overlooked Victims*, N.Y. TIMES, Jun. 23, 2013 (describing that although women are more likely to be sexually assaulted and file a formal complaint, the majority of victims are thought to be men), available at http://www.nytimes.com/2013/06/24/us/in-debate-over-military-sexual-assault-men-are-overlooked-victims.html?pagewanted=all&_r=0.

³³ See Courtney Kube and Jim Miklaszewski, *Pentagon's Annual Report on Sexual Assault Shows Alarming Rise*, NBC NEWS (May 6, 2013), available at <http://usnews.nbcnews.com/news/2013/05/06/18090415-pentagons-annual-report-on-sexual-assault-shows-alarming-rise?lite>. The DoD estimated 19,000 incidents annually based on the 2010 survey data. See also Panetta: Could be 19,000 military sex assaults each year, NBC NEWS (Jan. 18, 2012), <http://usnews.nbcnews.com/news/2012/01/18/10184222-panetta-could-be-19000-military-sex-assaults-each-year?lite>.

³⁴ 2012 DoD Gender Relations Survey at 37-38 (In 2012, 25 percent of female victims and 27 percent of male victims who experienced unwanted sexual contact said they were victimized by someone in their chain of command; 38 percent of female victims and 17 percent of male victims said they were victimized by someone of a higher rank; and 57 percent of female victims and 52 percent of male victims said there were victimized by a military co-worker); see also 2010 DoD Gender Relations Survey at 21-22 (In 2010, 23 percent of female victims and 26 percent of male victims said they were victimized by someone in their chain of command; 39 percent of females and 25 percent of males said they were victimized by someone of a higher rank.).

³⁵ 2012 DoD Gender Relations Survey at 32.

³⁶ 2010 DoD Gender Relations Survey at 18. The 2012 DoD Gender Relations Survey did not provide this information as it was "not reportable." See 2012 DoD Gender Relations Survey at 32-35.

Of the active-duty Service members who stated that they had experienced unwanted sexual contact in the past year, 34 percent of women and 24 percent of men indicated they reported the incident to a military and/or civilian authority on the survey in 2012,³⁷ in contrast to the 2010 survey which revealed that only 29 percent of female victims and 14 percent of male victims reported.³⁸ In both surveys, over half of the female victims said they had been the victim of completed or attempted penetration (57 percent in 2012 and 58 percent in 2010).³⁹ In addition, 15 percent of the male victims in 2012 and 31 percent in 2010 stated they had been the victim of completed or attempted penetration.⁴⁰ Of those who stated they had experienced unwanted sexual contact, 34 percent of men and 10 percent of women declined to specify the form of unwanted sexual contact they experienced.⁴¹ Compared this to the number of reported incidents, this data suggests that Service members are more likely to report penetration-type sexual offenses than sexual contact offenses.

Prevalence of Sexual Assault in the Military Compared to Other Populations

The Commission received testimony that 18- to 24-year-olds are at maximum risk for sexual assault.⁴² Thus, any community or institution, like the military or any college, that brings together high concentrations of young people is arguably likely to have higher rates of sexual assault than the general population.⁴³

³⁷ 2012 DoD Gender Relations Survey at 79. There is no way to know how many unreported incidents would have been substantiated if they had been investigated.

³⁸ 2010 DoD Gender Relations Survey at 35-36. In a 2010 Air Force Survey, 17 percent of women and 6 percent of men who had experienced sexual assault said they formally reported it. DARBY MILLER ET AL., GALLUP GOV'T, FINDINGS FROM THE 2010 PREVALENCE/INCIDENCE SURVEY OF SEXUAL ASSAULT IN THE AIR FORCE 34 (2010).

³⁹ 2012 DoD Gender Relations Survey at 14; 2010 DoD Gender Relations Survey at 13.

⁴⁰ 2012 DoD Gender Relations Survey at 15; 2010 DoD Gender Relations Survey at 13.

⁴¹ 2012 DoD Gender Relations Survey at 14-15; 2010 DoD Gender Relations Survey at 13.

⁴² David Lisak, Ph.D., testimony, *Briefing Before the U.S. Commission on Civil Rights*, Washington, D.C., Jan. 11, 2013 [hereinafter *Briefing Transcript*], at 102, available at <http://www.eusccr.com/msa1.htm>.

⁴³ See Statement of Dr. Nathan W. Galbreath, Senior Executive Advisor, Accountability and Assessment, DoD, Sexual Assault Prevention & Response Office (SAPRO), submitted to the U.S. Commission on Civil Rights 4 [hereinafter *Galbreath Statement*], available at <http://www.eusccr.com/msa1.htm>. Cf. Antonia Abbey, *Alcohol-Related Sexual Assault: A Common Problem Among College Students*, 14 J. STUD. ON ALCOHOL SUPPL. 118, 119 (2002); Antonia Abbey et al., *The Relationship Between the Quantity of Alcohol Consumed and the Severity of Sexual Assaults Committed by College Men*, 18:7 J. INTERPERSONAL VIOLENCE 813 (2003); see also DARBY MILLER ET AL., GALLUP GOV'T, FINDINGS FROM THE 2010 PREVALENCE/INCIDENCE SURVEY OF SEXUAL ASSAULT IN THE AIR FORCE 4-7 (2010). Young adults attending military academies also cite alcohol as a significant factor in a majority of sexual assaults on campus. See DMDC, 2011 SERVICE ACADEMY GENDER RELATIONS FOCUS GROUPS 7-11, 44-47, 85-86, 138-39 (2011), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA551683>. Recent studies have shown that military academy students' perceptions of the

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The military environment is unlike college/university settings and even other civilian settings for a variety of reasons. For example, Service members tend to live in an insular environment and are required to live and work with people not of their own choosing. Additionally, the military environment fosters an expectation of group cohesion and loyalty. As a result, these expectations and cultural norms can hamper the ability of military personnel to transfer out of their unit if they are feeling harassed or if they have been victims of assault. In contrast, college students may have greater ability to remove themselves from their environment, either temporarily or permanently. Also for Service members, attempts to transfer out of their unit may be denied and leaving their military unit without permission may lead to criminal penalties for being absent without leave (AWOL) or for insubordination.

Another challenge in comparing military sexual assault rates to those researched in other young populations, such as colleges or universities, lies in the fact that various available studies use different definitions for the term “sexual assault” and also implement different study methodologies.⁴⁴ Therefore, available data does not provide a meaningful comparison. For example, a large study of sexual assault on college campuses, conducted by the National Institute of Justice in 1997, estimated that the victimization rate was 4.9 percent for a one-year period.⁴⁵ However, there has not been a study focused on college and university women that would provide insight into whether sexual assault rates in that population have changed over the past 15 years. In addition, the DoD includes a wider range of sexual contact crimes, such as groping, in its definition of sexual assault.⁴⁶ Nationally, the DOJ reported a decline in the sexual assault rate against women in the general population from a peak of 5 per 1,000 women (0.5 percent) in 1995 to 2.1 per 1,000 women (0.21 percent) in 2005, and remained unchanged from 2005 to 2010.⁴⁷

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rate of sexual assault have shifted. See DMDC, 2011 SERVICE ACADEMY GENDER RELATIONS FOCUS GROUPS 11, 49, 94, 141 (in comparison to the previous 2008 survey, fewer students in 2010 at West Point, the Naval Academy, the Air Force Academy, and the Coast Guard Academy perceived that the military academies had lower sexual assault incident rates than civilian colleges/universities or were safer in that respect).

⁴⁴ See Galbreath Statement at 8; see also Tim Hoyt et al., *Military Sexual Trauma in Men: A Review of Reported Rates*, 12:3 J. TRAUMA & DISSOCIATION 244 (2011) (noting inconsistencies in definition and assessment of military sexual assault in various studies).

⁴⁵ See BONNIE S. FISHER ET AL., U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATISTICS, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 3 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

⁴⁶ *Id.*

⁴⁷ MICHAEL PLANTY ET AL., U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATISTICS, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 at 1 (2013), available at <http://bjs.gov/content/pub/pdf/fvsv9410.pdf>.

While the military does a better job than many college campuses in educating its members about and responding to sexual assault, military leaders have said that more can be done. As Pentagon spokesman George Little stated, “[It is] not good enough to compare [the military] to the rest of society . . . We must hold [the military] to a higher standard, and that’s what the American people demand.”⁴⁸

⁴⁸ Austin Wright & Tim Mak, *DoD’s Top Spokesman Rebukes Air Force Chief*, POLITICO, May 16, 2013, available at <http://www.politico.com/morningdefense/0513/morningdefense10695.html>.

CHAPTER 2: MILITARY EFFORTS TO PREVENT SEXUAL ASSAULT

For over two decades, the military has been trying to address the issue of sexual assault. When measured effectively, prevention efforts have increased significantly in recent years. However, it is too soon to evaluate fully and properly the long-term effects of these new efforts.

Sexual Harassment and Sexual Assault

DoD and its Services understand the connection between sexual harassment and sexual assault. In response to sexual assaults at the Naval Tailhook convention in 1991, and the investigation that followed, Acting Navy Secretary Sean O’Keefe said, “We get it. . . . We know that the larger issue is a cultural problem which has allowed demeaning behavior and attitudes towards women to exist”¹ In 2009, a Defense Task Force similarly stated that “culture change is essential for the Military Services to improve how they prevent and address sexual assault.”² Chairman of the Joint Chiefs of Staff Martin Dempsey stated that the ban on women in combat created a two-tiered military culture that fostered tolerance of sexual harassment and sexual assault.³ In a public speech on April 2, 2013, Defense Secretary Chuck Hagel stated that “[c]reating a culture free of the scourge of sexual assault requires establishing an environment where dignity and respect is afforded to all, and where diversity is celebrated as one of our greatest assets as a force.”⁴

At the Commission’s briefing, Psychologist David Lisak, a frequent consultant to the military on its sexual assault prevention efforts, testified: “Research has shown that a climate in which

¹ Melissa Healy, *Pentagon Blasts Tailhook Probe, Two Admirals Resign*, L.A. TIMES, reprinted in THE TECH (Sept. . 25, 1992), <http://tech.mit.edu/V112/N44/tailhook.44w.html>. Former Navy Secretary and later Senator James Webb took issue with O’Keefe’s statement. See James Webb, *Witch Hunt in the Navy*, N.Y. TIMES, Oct. 6, 1992.

² DoD, REPORT OF THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES at ES-1 (2009) [hereinafter *Report of the Defense Task Force*], available at http://www.ncdsv.org/images/SAPR_DTFSAMS_Report_Dec_2009.pdf.

³ J.K. Trotter, *Highest-ranking Military Officer Ties Ban on Women to Sexual Assault*, THE ATLANTIC WIRE, Jan. 24, 2013, <http://www.theatlanticwire.com/politics/2013/01/highest-ranking-military-officer-says-combat-ban-women-tied-sexual-assault/61386/>. See also HELEN BENEDICT, THE LONELY SOLDIER: THE PRIVATE WAR OF WOMEN SERVING IN IRAQ 227 (2009) (“Many women believe that such recognition [of their service in combat] will win them more respect and so reduce sexual violence.”); *id.* at 4-5, 135-136, 172, 227-229 (describing how women have, in fact, been serving in combat situations during the wars in Iraq and Afghanistan).

⁴ Secretary of Defense Chuck Hagel, Message on Sexual Assault Awareness and Prevention Month (Apr. 2, 2013), available at <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1763>.

sexual harassment is perceived to be permissible conduct is one in which sexual harassment is more likely to occur. Further, when sexual harassment is more common, sexual assault is more common.”⁵ Dr. Lisak explained to the Commission that the military has the power to create a “climate [that] can either help to curtail a rapist’s behavior, or it can facilitate and camouflage his behavior”⁶

Bystander Intervention Training

In order to address climates that may facilitate or camouflage sexual assault, the military recently implemented a method of sexual assault prevention training known as “bystander intervention training.” This method encourages people to intervene safely when they see situations at risk for sexual assault.⁷ The training is based on the understanding that most sexual assaults occur between people who know each other, and that behavior leading to a sexual assault usually begins in a social setting. Every Service branch now incorporates this bystander intervention through SAPR training.⁸ The goals of the program are to educate the military community about the reality of sexual violence, to identify the times and places where sexual assaults are occurring, and to equip members of the community with the skills they need to intervene in high-risk situations.

Psychologist David Lisak stated that the military’s implementation of bystander intervention training is of a magnitude never seen before: “Bystander education programs have been

⁵ Statement of David Lisak, Ph.D. submitted to the U.S. Commission on Civil Rights 3 [hereinafter *Lisak Statement*], available at <http://www.eusccr.com/msa1.htm>. An internal study by the Department of Veterans Affairs reported that “officers who permitted sexual harassment saw four times the level of rapes in their units.” Anne G. Sadler et al., *Factors Associated with Women’s Risk of Rape in the Military Environment*, AMER. J. INDUS. MED., 43:3, 262–73 (2003) (finding that increased rates of reported rape were associated with environmental factors such as officers allowing others to make demeaning remarks or gestures about women); Melanie S. Harned et al., *Sexual Assault and Other Types of Sexual Harassment by Workplace Personnel: A Comparison of Antecedents and Consequences*, 7 J. OCCUPATIONAL HEALTH PSYCHOL. 174, 180 (2002) (finding that, of military women who had been sexually assaulted, 99.7 percent had also been sexually harassed within the last 12 months with the definition of sexual harassment, consistent with the majority of social science literature on the topic, being “used throughout [the] article in a behavioral rather than a legal sense.”)

⁶ *Lisak Statement* at 3.

⁷ *Galbreath Statement* at 12-13. It also encourages Service members to express disapproval of language and jokes that demean women. See Training videos and materials produced by DoD and the Services to the U.S. Commission on Civil Rights (on file with Commission).

⁸ The military also uses a variety of other prevention interventions, including those that focus on obtaining consent, having healthy adult relationships, and encouraging responsible alcohol use. *Galbreath Statement* at 12-13.

partially implemented in many universities, but nowhere with the commitment of the U.S. Air Force. Virtually every member of the Air Force is or will be trained in bystander intervention.”⁹

Dr. Galbreath, a psychologist in the DoD’s Sexual Assault Prevention and Response Office (SAPRO), told the Commission that bystander intervention training seems to be having a positive impact: “There are a number of interventions that demonstrate short and long term improvements in knowledge, skills, behavioral intention, confidence, and victim empathy.”¹⁰ He stated the military’s perspective is that, by “reinforcing these initiatives,” the military “can produce a shift in its culture” so that “sexual assault prevention is understood as being one more way of looking out for your comrades in arms.”¹¹

In the DoD’s 2012 survey, nearly all Service members thought the sexual assault training they received provided a good understanding of what actions are considered sexual assault, explained how sexual assault is a mission readiness problem, and taught them how to intervene when they witness a situation that poses a risk for sexual assault involving a Service member.¹²

Command Training and Efforts to Address Sexual Assault

The military recognizes that commanders set the climate in their units and should be held accountable if they allow environments that foster sexual harassment or sexual assault.¹³ Therefore, in addition to the bystander intervention training that all Service members will receive, the military provides commanders with additional training aimed at preventing and responding to sexual assault. Legislation passed in 2013 established mandatory SAPR training requirements for new and prospective commanders. Pursuant to the legislation, the Secretary of Defense is required to include SAPR training for new or prospective commanders at all levels, which is tailored to the command position’s responsibilities and leadership.¹⁴ The legislation

⁹ *Lisak Statement* at 4.

¹⁰ *Galbreath Statement* at 13-14.

¹¹ *Id.*

¹² *2012 DoD Gender Relations Survey* at 230-31.

¹³ See Testimony of Gen. Raymond T. Odierno, Chief of Staff of the Army, Gen. James F. Amos, Commandant of the Marine Corp, Adm. Jonathan Greenert, Chief of Naval Operations, Adm. Robert J. Papp, Jr., Commandant of the Coast Guard, *Hearing of the Senate Armed Services Committee*, June 4, 2013, at time markers 1:33-1:39, 2:24-2:30, <http://www.senate.gov/isvp/?type=live&comm=armed&filename=armed060413>.

¹⁴ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 574. DoD policy provides that Commanders should meet with the unit’s Sexual Assault Response Coordinator (SARC) for one-on-one training within 30 days of taking command. DOD INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES 32 (Mar. 28, 2013), available at <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>.

also requires annual unit climate assessment surveys to assist commanders with improving prevention and response to sexual assaults.¹⁵ Commanders also are required to receive training to help guide their decisions related to the needs of a sexual assault victim and the rights of the accused.¹⁶

The DoD is also directing its leadership to remove sexual and sexist material from the military workplace. In December 2012, under the leadership of General Mark Welsh, the Air Force conducted a sweep of pornography, military song books with offensive lyrics, and other military paraphernalia with images demeaning to women.¹⁷ In May 2013, Secretary of Defense Chuck Hagel directed the other Services to follow suit.¹⁸ It is too soon to know what effect these efforts will have.¹⁹

Commanders also may help eliminate sexual harassment through the performance evaluation process. For example, the Army has a regulation that encourages commanders and supervisors to discuss, during performance evaluations, their objectives and expectations related to the Equal Opportunity Programs and to document deviations from those programs.²⁰ Military leaders testified to the Senate Armed Services Committee that commanders are evaluated for

¹⁵ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 572.

¹⁶ See, e.g., DOD INSTRUCTION 6495.02 at Enclosure 10; DOD. SAPRO, EVALUATION OF PRE-COMMAND SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING, available at http://www.sapr.mil/public/docs/news/PreCommand_Training_Evaluation_Final_Report.pdf.

¹⁷ Kristin Davis, *Welsh Battles Culture of Disrespect for Women*, AIR FORCE TIMES, Dec. 10, 2012. A January 2013 inspection found 33,216 items offensive or inappropriate in Air Force installations, including items specific to military history such as patches, coins, log books, and song books. U.S. Air Force, *Air Force Releases Results of Health and Welfare Inspection*, Jan. 18, 2013, <http://www.af.mil/News/ArticleDisplay/tabid/223/Article/109840/air-force-releases-results-of-health-and-welfare-inspection.aspx>.

¹⁸ Memorandum from the Secretary of Defense, Sexual Assault Prevention and Response, 2 (May 6, 2013), available at <http://usarmy.vo.llnwd.net/e2/c/downloads/294405.pdf>.

¹⁹ Nancy J. Parrish, President of Protect Our Defenders, argued that Gen. Welsh's sweep of offensive material did not go far enough. Because the sweep was announced ahead of time, Parrish argues that it gave Service members the opportunity to hide offensive material. Furthermore, the sweep did not extend to individual desks, cabinets, lockers, or military-issued computer hard drives, where much of the offensive content is located. See Statement of Nancy J. Parrish submitted to the U.S. Commission on Civil Rights 2 [hereinafter *Parrish Statement*], available at <http://www.eusccr.com/msa1.htm>. See also Jennifer Hlad, *Does Social Media Add Fuel to Degrading Actions?*, STARS AND STRIPES, May 20, 2013, available at <http://www.military.com/daily-news/2013/05/20/does-social-media-add-fuel-to-degrading-actions.html?comp=7000024213943&rank=1>, (describing cyber-sexual harassment perpetrated by Service members and social media websites popular with Service members that contain jokes about rape and domestic violence).

²⁰ AR 600-20, Army Command Policy, Ch. 6-11a (Mar. 18, 2008).

their “command climate,” which would include a tolerance of sexual harassment, but sexual harassment in the unit is not an explicit factor in their evaluations.²¹

Critiques of the Military’s Efforts

Even in light of the military’s recently-increased efforts to prevent sexual assault, some critics argue that more needs to be done to curtail sexual assault.²² Victim advocacy groups argue that the issue needs to be addressed in the same way that integration of African Americans in the military was addressed, with stiff rules against sex-based bias and requirements that commanders uphold those rules or face dismissal.²³

Professor and former military attorney, Victor Hansen, argues that the military is not going far enough:

There exists within the military a culture against fully investigating and clearly identifying the command failings which may have contributed to the under-detection of these sexual assault crimes. The failure to fully investigate and identify these command failings sends a mixed message both to the Service members and to other commanders. They are left to wonder what further actions could or should be taken to detect, prevent, and suppress these crimes. . . . If, as the military claims, the solution to these problems rests with the military leadership, then that leadership must be much clearer in addressing command failings. The leadership culture must change.²⁴

Other critics argue that sexual harassment and sexual assault would decrease if there were more women in key leadership positions.²⁵ The DoD’s January 2013 decision to lift the ban on

²¹ See *Hearing of the Senate Armed Services Committee*, June 4, 2013, at time markers 1:33 to 1:39, <http://www.senate.gov/isvp/?type=live&comm=armed&filename=armed060413>.

²² See HELEN BENEDICT, *THE LONELY SOLDIER: THE PRIVATE WAR OF WOMEN SERVING IN IRAQ* 50 (2009) (comparing rules that now prohibit drill instructors from using racial epithets, but they may still denigrate recruits by using words like “girl” or “fairy”); see also MIC HUNTER, *HONOR BETRAYED: SEXUAL ABUSE IN AMERICA’S MILITARY* 40-41 (2007) (describing the inherent misogyny of comparing weak male performers to a “bunch of girls” or “lady boys”, which must be battled at an institutional level similar to the earlier battles against racism).

²³ *Parrish Statement* at 11.

²⁴ Statement of Victor Hansen, Professor, New England School of Law, submitted to the U.S. Commission on Civil Rights 2 [hereinafter *Hansen Statement*], available at <http://www.eusccr.com/msa1.htm>.

²⁵ Capt. Megan N. Schmid, U.S. Air Force, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 498-99 (2010) (recommending that women’s token presence in the military needs to change, including increasing the number of women in key leadership positions, to transform the culture and end sexual assault).

women serving in combat may allow this theory to be tested in coming years by opening new paths for women to achieve positions at higher levels of authority.²⁶

In sum, the DoD and the Services recognize that sexual harassment and negative views of women correlate with an increased rate of sexual assault.²⁷ They have attempted to remedy the problem by training commanders, beginning to purge sexually offensive material from the workplace, and educating Service members to become more active in protecting their colleagues through bystander intervention. While some critics argue this is still insufficient, the existing efforts have not been in place long enough to evaluate their effectiveness.

²⁶ See Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. OF GENDER L. & POL'Y 1011, 1053 (2007) ("America needs a policy that assigns both men and women to positions for which they are qualified, with no limiting exclusions—based on physical and intellectual capabilities—leadership skills, and aptitude.").

²⁷ See Anne G. Sadler et al., *Factors Associated with Women's Risk of Rape in the Military Environment*, AMER. J. INDUS. MED., 43:3, 262–73 (2003) (finding that increased rates of reported rape were associated with environmental factors such as officers allowing others to make demeaning remarks or gestures about women); Melanie S. Harned et al., *Sexual Assault and Other Types of Sexual Harassment by Workplace Personnel: A Comparison of Antecedents and Consequences*, 7 J. OCCUPATIONAL HEALTH PSYCHOL. 174, 180 (2002) (finding that, of military women who had been sexually assaulted, 99.7 percent had also been sexually harassed within the last 12 months with the definition of sexual harassment, consistent with the majority of social science literature on the topic, being "used throughout [the] article in a behavioral rather than a legal sense."); see also HELEN BENEDICT, *THE LONELY SOLDIER: THE PRIVATE WAR OF WOMEN SERVING IN IRAQ* 50 (2009).

CHAPTER 3: MILITARY RESPONSE TO VICTIMS

The DoD has established a sexual assault response system that requires a wide variety of military personnel to respond to victims, including Victim Advocates, Sexual Assault Response Coordinators (SARCs), physicians, nurses, mental healthcare providers, and chaplains.

The Department of Defense's Sexual Assault Prevention and Response Office

The DoD established a Victim and Witness Assistance Program in 1994 to address victims of all crimes.¹ In October 2005, the DoD established the Sexual Assault Prevention and Response Office (SAPRO). In the FY11 National Defense Authorization Act, SAPRO's mission was codified to "serve[] as the single point of authority, accountability, and oversight for the sexual assault prevention and response (SAPR) program; and provide[] oversight to ensure that the military departments comply with SAPR program policy."² SAPRO's mission is limited to policy and data collection. It does not provide services to victims or hold offenders accountable. It does not have authority to intervene or advocate on behalf of a victim in any sexual assault investigation or case.³ The Services are responsible for providing training, investigating incidents of sexual assault, holding offenders accountable, and providing victim services.⁴

Reporting Options

According to DoD's 2012 Workplace and Gender Relations survey, of the 67 percent of female Service members who did not report unwanted sexual contact to a military authority, 48 percent indicated that they did not report the unwanted sexual contact because the incidents were not

¹ DoD INSTRUCTION 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES (Dec. 23, 1994, superceded by revised DoD Instruction 1030.2 on June 4, 2004), available at <http://www.dtic.mil/whs/directives/corres/pdf/103002p.pdf>.

² Statement of Major General Gary S. Patton submitted to the U.S. Commission on Civil Rights 3 [hereinafter *Patton Statement*], available at <http://www.eusccr.com/msa1.htm>. However, medical care, legal processes, and criminal investigations remained the responsibility of other offices. *DoD FY11 Annual Report on Sexual Assault* at 68. SAPRO Headquarters currently consists of 11 civilian personnel and seven uniformed personnel: the Director, the Deputy Director, a Training Officer, and a Victim Assistance Officer.

³ DoD Response to the U.S. Commission on Civil Rights' Interrogatory No. 50.

⁴ DoD Inspector General comments to U.S. Commission on Civil Rights 3, June 14, 2013, in response to affected agency review.

serious enough to report.⁵ Service member victims of sexual assault have two reporting options: unrestricted or restricted.⁶ The unrestricted reporting option initiates a criminal investigation in which command and law enforcement are provided details of the incident.⁷ A Service member who makes an unrestricted report of sexual assault may access healthcare and may request a protective order or transfer to avoid ongoing contact with the accused.

The restricted reporting option allows Service members, and their dependents 18 years of age and older who are victims of sexual assault,⁸ to access medical and mental healthcare through the military confidentially and without triggering an investigation or revealing the identity of the perpetrator.⁹ The purpose behind restricted reporting is to allow and encourage victims to report and seek services and medical treatment without making an official complaint for investigation. However, there are limitations to this option: victims cannot obtain an expedited transfer or protective order;¹⁰ commanders receive limited information about the incident, and they are not informed of the victim's identity.¹¹ Only healthcare providers, Victim Advocates,

⁵ 2012 DoD Gender Relations Survey at 106.

⁶ DOD DIRECTIVE 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 4 (Jan. 23, 2012, Incorporating Change 1, Apr. 30, 2013), available at <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf>. With the assistance of the SARC or Victim Advocate, the victim completes Defense Department (DD) Form 2910, *Victim Reporting Preference Statement*, which explains the benefits and limitations of each reporting option. See *DoD FY11 Annual Report on Sexual Assault* at 71. Before 2005, the restricted reporting option was not available to sexual assault victims; victims had no way to obtain military-sponsored medical or psychological treatment without triggering a criminal investigation. See *Report of the Defense Task Force* at 2.

⁷ DOD DIRECTIVE 6495.01, *supra* note 6, at 18.

⁸ The restricted reporting option is only available to active duty Service members, not to military dependents or to civilian DoD employees even though they, like Service members, may have to access medical and psychological care through the military, in general. Lt. Commander Ann M. Vallandingham JAGC, USN, *Department of Defense's Sexual Assault Policy: Recommendations for a More Comprehensive and Uniform Policy*, 54 NAVAL L. REV. 205, 228-232 (2007) (arguing that the restricted reporting option should be available to civilian DoD employees and military dependents).

⁹ Sexual assault victims who seek medical care or sexual assault forensic exams in the state of California, however, cannot make a restricted report because state law mandates reporting by healthcare providers. See Cal. Penal Code § 11160. Victims in Arizona also may be subject to California's reporting law if the nearest military treatment facility is in California. *DoD FY11 Annual Report* at 70.

¹⁰ See DOD INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES 25 (Mar. 28, 2013), available at <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>; DoD, SAPRO, Reporting Options – Restricted Reporting, <http://www.myduty.mil/index.php/reporting-options/restricted-reporting>; DOD DIRECTIVE TYPE MEMORANDUM 11-063, *infra* note 18, at page 19.

¹¹ *DoD FY11 Annual Report on Sexual Assault* at 70. SARCs are required to give non-identifying information of a restricted report to a “senior commander,” but each of the Services defines this differently. See Lt. Commander Ann M. Vallandingham, JAGC, USN, *Department of Defense's Sexual Assault Policy: Recommendations for a More Comprehensive and Uniform Policy*, 54 NAVAL L. REV. 205-206 (2007).

and SARCs are authorized to receive restricted reports.¹² Victims are eligible for legal assistance whether they file restricted or unrestricted reports.¹³

It is important to note that if a victim tells an officer or non-commissioned officer in his or her chain of command, or DoD law enforcement about the assault s/he loses the restricted reporting option,¹⁴ but if a victim tells a roommate, friend, or family member, this does not in and of itself, prevent the victim from later electing to make a restricted report.¹⁵ Victims may voluntarily convert a report from restricted to unrestricted and initiate an investigation at any time.¹⁶ If a commander or law enforcement officer learns of a sexual assault, independent of a victim's restricted report, DoD policy mandates an investigation be initiated.¹⁷

Expedited Transfers and Protective Orders

For unrestricted reports, the DoD implemented an expedited transfer policy in 2011 to allow victims to request an immediate transfer from a unit or base.¹⁸ The request must be decided

¹² DOD DIRECTIVE 6495.01, *supra* note 6, at 5; DoD, SAPRO, Reporting Options – Restricted Reporting, <http://www.myduty.mil/index.php/reporting-options/restricted-reporting>.

¹³ U.S. Air Force Office of The Judge Advocate General comments to U.S. Commission on Civil Rights at 1, June 7, 2013, in response to affected agency review.

¹⁴ DOD INSTRUCTION 6495.02, *supra* note 10, at 27.

¹⁵ *Id.* At the outset, however, these communications are “NOT confidential and do not receive the protections of restricted reporting.”

¹⁶ *DoD FY11 Annual Report on Sexual Assault* at 70.

¹⁷ DOD INSTRUCTION 6495.02, *supra* note 10 at 27; *DoD FY11 Annual Report on Sexual Assault* at 70-71.

¹⁸ DOD DIRECTIVE TYPE MEMORANDUM 11-063, EXPEDITED TRANSFER OF MILITARY SERVICE MEMBERS WHO FILE UNRESTRICTED REPORTS OF SEXUAL ASSAULT (Dec. 16, 2011, Incorporating Change, 2 Dec. 7, 2012), available at <http://www.afpc.af.mil/shared/media/document/AFD-130416-051.pdf> (Note: Directive-Type Memorandum 11-063 was incorporated into reissued DoDI 6495.02 published on March 28, 2013). The need for an expedited transfer policy was illustrated by the tragic situation of Marine Corps Lance Corporal Maria Lauterbach. Although a verbal protective order was imposed on the Marine whom Lauterbach reported for raping her, Lauterbach was physically attacked, her car was vandalized after she reported, and the Marine she accused of rape ultimately murdered her. See DoD, OIG, REVIEW OF MATTERS RELATED TO THE SEXUAL ASSAULT OF LANCE CORPORAL MARIA LAUTERBACH, U.S. MARINE CORPS 2-3, 22 (Oct. 18, 2011), available at [http://www.dodig.mil/Inspections/IPO/reports/LauterbachFR_\(redacted\).pdf](http://www.dodig.mil/Inspections/IPO/reports/LauterbachFR_(redacted).pdf). The need for expedited transfer also was demonstrated by Army Specialist Suzanne Swift who was court-martialed in 2006 for desertion, demoted, and incarcerated for a month for refusing to redeploy under the command of a sergeant whom she had reported for repeatedly raping her. See Donna St. George, *From Victim To Accused Army Deserter*, WASH. POST, Sept. 19, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/18/AR2006091801506.html>. Similarly, Marine Corps Corporal Sarah Albertson alleged that her Command forced her to interact repeatedly with her rapist for two years and eventually required her to report to him after his promotion. *Cioca v. Rumsfeld*, Case No. 1:11-cv-00151(LO/TCB) (E.D. Va.), Compl. filed Feb. 15, 2011, para. 61-66, available at <http://www.plainsite.org/flashlight/case.html?id=1758304>.

upon within 72 hours, and, if it is denied, the victim may appeal to the first general or flag officer in his or her chain of command.¹⁹

According to the testimony of one advocate, this transfer policy was not always followed.²⁰ It is not possible to say with any accuracy how often transfer requests were granted, delayed, or denied in the past because data was not maintained. Federal law now requires DoD to collect data on transfer requests.²¹ According to data from FY 2012, nearly all requests for expedited transfers were granted.²²

Additionally, commanders may issue a military protective order to prohibit an alleged perpetrator from having contact with the victim.²³ While military protective orders are enforceable on military installations, these orders are not enforceable by civilian courts and law enforcement. As a result, victims are advised to seek a civilian protective order.²⁴

¹⁹ *Patton Statement* at 5; DoD Directive-Type Memorandum 11-063, *supra* note 18.

²⁰ “Frequently victims are told that their [transfer] papers are lost, they don’t qualify [for a transfer], or are placed on ‘med[ical]-hold’ under false pretenses.” *Parrish Statement* at 8; *see also* Karisa King, *Assault Victims Struggle to Transfer to Other Posts*, SAN ANTONIO EXPRESS-NEWS, May 20, 2013, available at <http://www.mysanantonio.com/twice-betrayed/article/Assault-victims-struggle-to-transfer-to-other-4532717.php#ixzz2U2VBcvEO>.

²¹ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, § 582.

²² In their 2012 Annual Reports on Sexual assault (attached to *DoD FY12 Annual Report on Sexual Assault, Vol. I*), the Army stated that it granted 86 and denied three requests for expedited transfers in FY 2012; the Navy granted 43 and denied none; the Marine Corps granted 34 and denied none; and the Air Force granted 48 and denied none.

²³ *See* DoD INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES 40-41 (Mar. 28, 2013), available at <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>; DD FORM 2873, MILITARY PROTECTIVE ORDER (July 2004); AR 600-20, Army Command Policy 73 (Sept. 20, 2012). Federal law requires the military to maintain data on these protective orders. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190 § 567(c), 10 U.S.C. § 1561 (Historical and Statutory Notes). In their 2012 Annual Report on Sexual assault, the Army stated that it issued 201 military protective orders in FY 2012, none of which were violated; the Navy issued none; the Marine Corps issued 248, nine of which were violated by the accused; and the Air Force issued 127, two of which were violated by the accused and seven by the victim. *DoD FY12 Annual Report on Sexual Assault, Vol. I*.

²⁴ U.S. Air Force Office of The Judge Advocate General comments to U.S. Commission on Civil Rights at 1, June 7, 2013, in response to affected agency review.

Victim Assistance

Sexual Assault Response Coordinators and Victim Advocates

Every military installation has a Sexual Assault Response Coordinator (SARC) and at least one Victim Advocate.²⁵ SARCs and Victim Advocates are responsible for connecting victims with appropriate resources and services, assisting them with the reporting process, and addressing concerns of physical safety and retaliation.²⁶ If a victim obtains a transfer, s/he is assigned a new SARC and Victim Advocate at the new installation.²⁷

SARCs manage an installation's SAPR program. They serve as the single point of contact to coordinate victim care and track services provided to each victim.²⁸ In an unrestricted report case, the SARC is required to keep the victim updated on the status of the investigation and whether charges are referred to court-martial.²⁹ In non-deployed settings, the SARC can be a Service member, DoD civilian employee, or National Guard Technician.³⁰ In deployed settings, a certified SARC is provided according to each Service's guidelines and operational commitments.³¹

Victim Advocates provide direct assistance to victims and help them navigate the military's response system.³² They are trained to be attentive listeners and to support victims.³³ Both

²⁵ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 § 572; *DoD FY11 Annual Report on Sexual Assault* at 71.

²⁶ *DoD FY11 Annual Report on Sexual Assault* at 71-72.

²⁷ U.S. Marine Corps SAPRO Response to Interrogatory No. 57; DoD SAPRO Response to Interrogatory 143.

²⁸ *DoD FY11 Annual Report on Sexual Assault* at 72. Commanders also are required to provide victims with monthly updates on the status of their case. See DOD INSTRUCTION 6495.02, *supra* note 23 at 33.

²⁹ *DoD FY11 Annual Report on Sexual Assault* at 71-72.

³⁰ DOD DIRECTIVE 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 10 (Jan. 23, 2012, Incorporating Change 1, Apr. 30, 2013), available at <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf>. For the Army, a SARC is a full-time position. Dep't of the Army Response to Interrogatory No. 79. In the Navy, it is predominantly a full-time permanent position, but it also may be a collateral duty based on the needs of the command and the installation. Chief of Naval Operations' Response to Interrogatory No. 79. The Marine Corps has both full-time, permanent position and collateral duty SARCs, who may be uniformed or civilian. U.S. Marine Corps Response to Interrogatory No. 79. See also Nonappropriated Fund Position Description, Job Title: Sexual Assault Response Coordinator, Job Code: 093134. The victim advocacy group, Protect Our Defenders, argues that it is preferable for trained civilians, rather than Service members, to be SARCs because they are less susceptible to being influenced by the victim's or the accused's commander. See *Parrish Statement* at 9.

³¹ DoD SAPRO comments to the U.S. Commission on Civil Rights at 8, June 12, 2013, in response to affected agency review. See, e.g., AR 600-20, Army Command Policy 75 (Mar. 18, 2008) (SARC position is assumed by military personnel as a collateral duty).

³² Victims of all crimes in the military are assigned a victim liaison to support them through the Victim and Witness Assistance Program, but "Victim Advocates" are specific to the SAPR program. In the Army's SAPR

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uniformed and civilian employees serve as Victim Advocates. In the past, unit Service members served as Victim Advocates as a collateral duty to their other responsibilities.³⁴ Current law requires all locations (installations and deployed areas) to have a Victim Advocate available 24 hours, seven days per week.³⁵ For some civilians, it is a full-time duty; for others, it is a voluntary collateral duty, depending on the Service.³⁶

Victim Advocates are not “advocates” in the manner of an attorney. Nonetheless, communications they have with victims, such as providing advice or support, are privileged from disclosure.³⁷ Thus, a Victim Advocate cannot be compelled in court-martial proceedings to disclose communications with a victim.

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program, in addition to the Installation (military base) SARC, there are (1) installation Victim Advocates who work directly with the installation SARC, victims of sexual assault, unit Victim Advocates, and other installation response agencies, and (2) unit Victim Advocates who are soldiers trained to provide limited victim advocacy as a collateral duty. In a deployed environment, there is one deployable SARC at each brigade (ranging from 2,500 to 4,000 personnel) or unit of action who is a soldier trained and responsible for coordinating the SAPR Program as a collateral duty, and two unit Victim Advocates for each battalion-sized unit who are soldiers trained to provide victim advocacy as a collateral duty. AR 600–20, para. 8-3a and 8-3b.

³³ DoD FY11 Annual Report on Sexual Assault at 71-72.

³⁴ DD FORM 2909, VICTIM ADVOCATE AND SUPERVISOR STATEMENT OF UNDERSTANDING (June 2006). Victim advocates and their supervisors sign a Statement of Understanding in which the Victim Advocate agrees, among other things, to maintain victim confidentiality, report directly to the SARC for all Victim Advocate duties, and attend monthly case management meetings. Notably, the Statement of Understanding does not indicate any duties of the Victim Advocate’s regular supervisor or provide any guidance as to how to resolve situations where Victim Advocate duties may compete for time, energy, or an otherwise conflict with his/her regular duties. The unit commander is supposed to consult with the SARC to resolve conflicts between a Victim Advocate’s primary duty and advocacy responsibilities. See DoD INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES at Enclosure 5 (Mar. 28, 2013), available at <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>. The Marine Corps has an order providing that, once a victim is assigned to a uniformed Victim Advocate, the victim is the Victim Advocate’s primary responsibility. MCO 1752.5A, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 5-2 (Feb. 5, 2008); U.S. Marine Corps Response to Interrogatory No. 66.

³⁵ See DoD INSTRUCTION 6495.02, *supra* note 34 at 4; National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 § 581, 584.

³⁶ The Army reports that it is currently hiring over 300 civilian Victim Advocates. The Marine Corps has 42 full-time civilian Victim Advocates, but they support the Family Advocacy Program, not the SAPR program. In FY 2013, the Marine Corps plans to hire 22 full-time civilian Victim Advocates whose duties are entirely dedicated to the SAPR program. Both civilian and uniformed Victim Advocates in the Navy and Air Force are volunteers. DoD SAPRO Response to Interrogatory No. 146; U.S. Marine Corps Response to Interrogatory No. 75. See also Nonappropriated Fund Position Description, Job Title: Victim Advocate Program Specialist, Job Code: 090159. Until recently, the Navy only utilized uniformed Victim Advocates, but it hired civilians for the job pursuant to requirements of recent legislation. Chief of Naval Operations’ Response to Interrogatory No. 68-69.

³⁷ Military Rule of Evidence 514. Generally, information communicated to chaplains during spiritual counseling is also privileged and, therefore, kept confidential. See Military Rule of Evidence 503.

Selection and Training of Victim Advocates

DoD's policy requires each Service to "establish standardized criteria for selection and training" of Victim Advocates.³⁸ There has been considerable variation in how Victim Advocates are selected among the Services.

Army policy requires that Victim Advocates be recommended by their chain of command and, among other things, have outstanding duty performance, demonstrate stability in their personal affairs, and have no history of domestic violence, significant indebtedness, excessive use of alcohol, or use of illegal drugs.³⁹ They also must have at least one year of military service left to complete.⁴⁰

The Marine Corps has requirements similar to the Army's, but the Marine Corps discourages executive officers, the lowest-level supervisors, legal officers, equal opportunity representatives, and law enforcement personnel from being Victim Advocates, as those positions might pose a conflict of interest.⁴¹

In contrast, the Navy and Air Force have no expressed guidelines for selecting Victim Advocates. The Navy simply requires SARCs to screen Victim Advocates.⁴² The Air Force relies on volunteers who are recruited, screened, and selected by SARCs.⁴³

Currently, all Victim Advocates must obtain certification through the DoD Sexual Assault Advocate Certification Program by October 2013.⁴⁴

³⁸ DOD INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM PROCEDURES 16 (June 23, 2006, Incorporating Change 1, Nov. 13, 2008) (on file with the Commission). This policy was reissued on March 28, 2013. The new version states, "standardized criteria for the selection and training of SARCs and [Victim Advocates] shall comply with specific Military Service guidelines and certification requirements, when implemented by SAPRO," and "all DoD sexual assault responders shall receive the same baseline training." DOD INSTRUCTION 6495.02, *supra* note 34, at 33, 66.

³⁹ AR 600-20, Army Command Policy 77 (Sept. 20, 2012).

⁴⁰ *Id.*

⁴¹ MCO 1752.5A, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 4-1 (Feb. 5, 2008). The Marine Corps policy also expressly states that Victim Advocates should be approachable, non-judgmental, good communicators, comfortable with sensitive topics, and have the ability to listen to all persons regardless of rank or position. *Id.* at M-1.

⁴² DoD SAPRO and the Services' Consolidated Response to Interrogatory No. 139.

⁴³ *Id.*; AFI 36-6001, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) POLICY 13 (Sept. 29, 2008, Incorporating Change 1, Sept. 30, 2009, Certified Current Oct. 14, 2010).

⁴⁴ DOD INSTRUCTION 6495.02, *supra* note 38 at 65; *Patton Statement* at 6.

Victim Witness Assistance Programs and Special Victims Capabilities

Many installations have a Victim Witness Assistance Program separate from the SAPR program.⁴⁵ While a case is being investigated and prosecuted, personnel in the Victim Witness Assistance Program may help victims to understand their legal rights, to understand and participate in the military criminal justice process, and to obtain resources.⁴⁶ Such duties partially overlap those of a Victim Advocate.⁴⁷

In 2012, Secretary of Defense Leon Panetta mandated the creation of Special Victims Capabilities in each Service, which is comprised of investigators and prosecutors specially trained to handle sexual assault cases.⁴⁸ Prosecutors in these Special Victims Capabilities also may provide some of the same services that Victim Advocates provide, such as educating victims about the court-martial process and referring victims to resources for physical and emotional support.⁴⁹

Prosecutors and investigators in Special Victims Capabilities may have specialized training but, as some advocacy groups note, their priorities and interests may not necessarily align with those of victims.⁵⁰

Safe Helpline

In 2011, DoD contracted with the non-profit organization Rape, Abuse & Incest National Network (RAINN) to operate a Safe Helpline, which is an anonymous and confidential crisis support service.⁵¹ It is available 24 hours a day, seven days a week, worldwide via telephone,

⁴⁵ See DoD DIRECTIVE 1030.01, VICTIM AND WITNESS ASSISTANCE (Certified Current as of Apr. 23, 2007); DoD INSTRUCTION 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES (June 4, 2004), available at <http://www.dtic.mil/whs/directives/corres/pdf/103002p.pdf>.

⁴⁶ DoD FY11 Annual Report on Sexual Assault at 72.

⁴⁷ Victim liaisons in the Victim Witness Assistance Programs provide information about where the victim can obtain medical care and social services, arrange for the victim to receive “reasonable protection” from an accused, and keep the victim informed of the status of the investigation and any court-martial proceedings or plea bargain negotiations. AFI 51-201, ADMINISTRATIVE MILITARY JUSTICE 102-104 (Oct. 25, 2012).

⁴⁸ DoD FY11 Annual Report on Sexual Assault at 72.

⁴⁹ Dep’t of the Army Response to Interrogatory No. 60.

⁵⁰ See Statement of Rachel Natelson to the U.S. Commission on Civil Rights 1, [hereinafter *Natelson Statement*] available at <http://www.eusccr.com/msa1.htm>. Prosecutors and investigators in the Special Victims Capabilities represent the government, not the victim; their ethical duty is to the government. DoD SAPRO comments to the U.S. Commission on Civil Rights at 10, June 12, 2013, in response to affected agency review.

⁵¹ DoD FY11 Report on Sexual Assault at 12.

text, or online.⁵² There is now a Safe Helpline Mobile Application for smartphones, as well as a Safe HelpRoom (a moderated and secure chat room for survivors of sexual assault).⁵³

Healthcare for Victims

Military physicians, physician assistants, and nurses are responsible for treating the physical injuries of Service members who are sexually assaulted. Service members may receive treatment for sexually transmitted diseases as well as emergency contraception.⁵⁴ Military psychiatrists, psychologists, social workers, and other professionals assist victims with their mental healthcare needs.

DoD has made efforts to improve mental healthcare for sexual assault victims. The Office of the Assistant Secretary of Defense for Health Affairs established the Health Affairs Sexual Assault Integrated Product Team in October 2009 to facilitate effective and efficient coordination of sexual assault response in the DoD medical community.⁵⁵ The Center for Deployment Psychology at the Uniformed Services University of Health Sciences includes sexual assault and SAPR Program information in its training program for deploying mental health providers, nurses, and chaplains. This information includes instruction on working with the SAPR Program in a deployed clinical setting with the intent to improve access to quality mental healthcare for sexual assault victims in deployed environments.⁵⁶ The DoD also coordinates and collaborates with civilian medical facilities for DoD-reimbursable healthcare, including psychological care, through Memoranda of Understanding (MOU) and Memoranda of Agreement (MOA) to ensure adequate victim care is available.⁵⁷

Despite these efforts, some victims have criticized the available psychological care as inadequate.⁵⁸ The Government Accountability Office (GAO) recently found that medical and

⁵² *DoD FY12 Report on Sexual Assault, Vol. 1* at 30. In June 2012, the Safe Helpline was expanded to help the transition of victims separated from military service to begin care with the Department of Veterans Affairs. *Patton Statement* at 8.

⁵³ *DoD FY11 Report on Sexual Assault* at 30, 37. See <https://www.safehelpline.org/>.

⁵⁴ Military women have access to comprehensive healthcare through the TRICARE program (<https://www.tricare.mil/>), which covers emergency contraception. Kelsey Holt, et al., *Unintended Pregnancy and Contraceptive Use Among Women in the U.S. Military: A Systematic Literature Review*, 176 *MILITARY MED.* 8 (Sept. 1, 2011).

⁵⁵ *DoD FY 2011 Annual Report on Sexual Assault* at 14.

⁵⁶ *Id.*

⁵⁷ DOD INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES 14 (Mar. 28, 2013), available at <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>.

⁵⁸ One veteran explained that the psychiatrists “basically throw you sleeping pills [and] anti-depressants, and send you back to continue what you were doing.” Irina Sadovich Gillett, et al., *Female Veterans and Military Sexual* (cont'd)

mental healthcare services for victims are not always available in deployed environments.⁵⁹ It further found that victims did not always receive adequate or consistent medical care, healthcare providers did not have a consistent understanding of their responsibilities in caring for victims who made restricted reports, and SARCs and Victim Advocates were not always aware of the healthcare services available to victims at their respective locations.⁶⁰

Legal Assistance for Victims

All Service members have access to some types of *general* legal counsel provided by the military.⁶¹ Legislation passed in 2012 mandated that sexual assault victims be provided legal counsel, but the law did not explain how it was intended to expand the existing legal services.⁶² As a result, application of the law may be inconsistent.⁶³

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Trauma, 3 J. DIVERSE SOCIAL WORK 50 (Spring 2012). Some male victims only had the option for treatment at a women's health clinic. *Report of the Defense Task Force* at 73; see also DEP'T OF VETERANS AFFAIRS, MILITARY SEXUAL TRAUMA/SEXUAL TRAUMA RESIDENTIAL TREATMENT RESOURCES, http://www.ncdsv.org/images/VAMHS_MST-SexualTraumaResidentialTreatmentResources_10-2010.pdf (noting that there is only one all-male facility for military sexual assault victims).

⁵⁹ GAO, MILITARY PERSONNEL: DoD HAS TAKEN STEPS TO MEET THE HEALTH NEEDS OF DEPLOYED SERVICEWOMEN, BUT ACTIONS ARE NEEDED TO ENHANCE CARE FOR SEXUAL ASSAULT VICTIMS 17 (2013), available at <http://www.gao.gov/assets/660/651624.pdf>.

⁶⁰ *Id.* at 9-22. Additionally, often DoD rules on Restricted reporting are in apparent conflict with instructions issued by each Service for labeling forensic evidence and keeping the victim's chain of command informed, as meetings between GAO and senior medical personnel from the command "confirmed that provisions in their medical policy conflicted with other command policy and had created confusion for healthcare providers regarding the extent of their responsibility to maintain the confidentiality of victims who choose to make a restricted report of sexual assault." *Id.* at 21.

⁶¹ For example, legal assistance attorneys help Service members with civil matters such as will preparation, taxes, family law, and consumer finance issues. See, e.g., 10 U.S.C. § 1044; DEP'T OF NAVY, JUDGE ADVOCATE GENERAL (JAG) INSTRUCTION 5800.7E, THE MANUAL OF THE JUDGE ADVOCATE GENERAL 7-1 – 7-11 (June 26, 2012), available at <http://www.jag.navy.mil/library/instructions/JAGMAN2012.pdf>. Military defense counsel are appointed when a Service member is investigated and/or charged with a violation of the UCMJ. UCMJ, Art. 38(b)(1), 10 U.S.C. § 838(b)(1) (2000); MANUAL FOR COURTS-MARTIAL, R. 506, at II-50 (Joint Service Committee on Military Justice 2012) [hereinafter *MCM*], available at http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf. The DoD took the position that legal services to sexual assault victims could be provided within the parameters of pre-existing legislation. See Memorandum from the Under Secretary of Defense for Personnel and Readiness, Legal Assistance for Victims of Crime (Oct. 17, 2011).

⁶² National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 § 581.

⁶³ For example, the victim advocacy group, Protect Our Defenders, reported that some victims in the Air Force had been unable to get legal assistance to protect their privacy rights when their confidential communications with psychotherapists or other medical personnel had been inappropriately disclosed. *Parrish Statement* at 8.

Prior to 2012 legislation, victims had access to legal assistance attorneys within Victim and Witness Assistance Programs.⁶⁴ But, depending on the Service, different types of military attorneys (judge advocates) assisted victims with the various negative consequences of reporting. Army legal assistance attorneys assisted victims with rebuttals to adverse evaluations or reprimands.⁶⁵ In the Navy, personal representation attorneys assisted victims with the professional or administrative consequences of reporting.⁶⁶ In the Air Force, area defense counsel and special victims' counsel assisted victims with disciplinary action that may have resulted from collateral misconduct and associated adverse evaluations or reprimands.⁶⁷ If an enlisted Service member was being separated involuntarily from the Service, such as via an administrative discharge based on a psychological diagnosis⁶⁸ or for unsatisfactory performance, a defense attorney provided representation.⁶⁹ Also, victims who were involved in collateral misconduct at the time they were sexually assaulted had the right to defense counsel.⁷⁰

In January 2013, the Air Force began a new initiative called the Special Victims' Counsel Program to provide Air Force victims with a personal attorney.⁷¹ The Air Force Judge Advocate General, Lieutenant General Richard C. Harding, testified to the Commission that providing victims with this additional legal counsel may encourage more victims to participate in the military justice system and, therefore, increase the likelihood that more perpetrators are

⁶⁴ The Victim and Witness Assistance Program provides support to all crime victims and witnesses. See 10 U.S.C. § 1044; JAG INSTRUCTION 5800.7E, the MANUAL OF THE JUDGE ADVOCATE GENERAL; MARINE CORPS, LEGAL ASSISTANCE PRACTICE ADVISORY 7-11 (July 26, 2011); DoD INSTRUCTION 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES 45, (June 4, 2004), available at <http://www.dtic.mil/whs/directives/corres/pdf/103002p.pdf>. See also NAVAL OPERATIONS (OPNAV) INSTRUCTION 5800.7A, VICTIM AND WITNESS ASSISTANCE PROGRAM (VWAP) (Mar. 4, 2008); MCO P5800.16A, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION, Chapter 6; Navy Memorandum from James W. Houck, Notification to Crime Victims of Available Legal Assistance Services (Sept. 9, 2011).

⁶⁵ DoD SAPRO Response to the U.S. Commission on Civil Rights' Interrogatory No. 144.

⁶⁶ DoD SAPRO Response to the U.S. Commission on Civil Rights' Interrogatory No. 145. The Marine Corps presumably follows the same policies as the Navy.

⁶⁷ U.S. Air Force Office of The Judge Advocate General comments to U.S. Commission on Civil Rights at 2, June 7, 2013, in response to affected agency review.

⁶⁸ For a discussion on victims' administrative discharges based on psychological diagnoses, see Chapter 4.

⁶⁹ DoD SAPRO Response to the U.S. Commission on Civil Rights' Interrogatory No. 144; AR 635-200, Active Duty Enlisted Administrative Separations 55-56 (July 6, 2005 and revised on Sept. 6, 2011).

⁷⁰ Uniform Code of Military Justice, Art. 27, 10 U.S.C. § 827.

⁷¹ Harding testimony, *Briefing Transcript*, at 168-69.

punished.⁷² As discussed in Chapter 5, investigation and prosecution of some of the sexual assault cases in all the Services in FY 2011 ended when the victim declined to continue participating in the criminal justice process.

Confidentiality Concerns

Although confidential restricted reporting has been available since 2005, victims are still wary of using this option. In the DoD's 2010 anonymous survey of active-duty Service members, 60 percent of women and 36 percent of men who experienced unwanted sexual contact and did not report to a military authority, stated they did not report because they believed the report would not be kept confidential.⁷³

After a Service member makes either a restricted or an unrestricted report, Commanders are required to keep information regarding reports on a need-to-know basis.⁷⁴ Maintaining confidentiality, even with a restricted report, may be difficult in deployed environments and on smaller installations.⁷⁵ Also, there are concerns that commanders may try to breach the confidentiality of a restricted report because they prefer to know the details of criminal offenses that occurred in their units.⁷⁶

When applying for updated security clearances, seeking either re-enlistment or a promotion, Service members must disclose whether they have received psychological counseling.⁷⁷

⁷² *Id.* Gen. Harding informed the Commission that, in FY 2011, 96 Air Force sexual assault victims (29 percent) made an unrestricted report, and originally agreed to participate in the prosecution of their alleged offender but later changed their minds. *Id.*

⁷³ 2010 DoD Gender Relations Survey at 43. In the DoD's 2012 anonymous survey, 51 percent of women stated they did not report their sexual assault for fear their information would not remain confidential; the relatively small number of male Service members who participated in the 2012 survey may have contributed to a lack of statistically significant response numbers for this question on the survey questionnaire. See DoD 2012 Gender Relations Survey at 106-7; DoD FY12 Annual Report on Sexual Assault, Vol. 1 at 18.

⁷⁴ DoD INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES 4 (Mar. 28, 2013), available at <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>; see, e.g., AR 600-20, Army Command Policy 72 (Mar. 18, 2008).

⁷⁵ See Report of the Defense Task Force at 35 (“[R]estricted reporting is more challenging in deployed environments... Commanders may . . . want a detailed justification for airlifting Service Members out of the area [for a forensic examination or for medical care] because doing so creates risks and constrains resources. Military personnel have limited privacy on smaller bases: people may make assumptions when they see someone meeting with the [deployed Victim Advocate or SARC].”)

⁷⁶ *Id.* at 23; Emily Hansen, *Carry that Weight: Victim Privacy within the Military Sexual Assault Reporting Methods*, 28 J. MARSHALL J. COMPUTER & INFO. L. 551, 579 (2011).

⁷⁷ See OFFICE OF PERSONNEL MANAGEMENT, STANDARD FORM 86, QUESTIONNAIRE FOR NATIONAL SECURITY POSITIONS, at 84, available at http://www.opm.gov/forms/pdf_fill/sf86.pdf.

Although an exception for disclosing combat-related mental health counseling existed previously, victims of sexual assault who sought counseling were not afforded a similar exception until April 2013.⁷⁸ Prior to that date, some victims may have avoided seeking treatment for fear that psychological counseling could affect their abilities to receive a security clearance or job promotion.⁷⁹

Additional Barriers to Reporting

Even with the option of restricted reporting, only a fraction of victims report.⁸⁰ Fear of negative consequences is a significant factor in many victims' decision not to report.⁸¹ Lack of confidence in the military justice system also may contribute to victims' reluctance to report sexual assault. Participants in focus groups conducted by the Defense Task Force on Sexual Assault expressed the view that it was "difficult to report sexual assault if the perpetrator was of higher rank and/or in the victim's chain of command...[P]articipants felt they would face reprisal for reporting or that senior leaders would protect the accused."⁸²

⁷⁸ Office of the Director of National Intelligence, Press Briefing, New Interim Guidance Question 21 on the Standard Form 86, Questionnaire for National Security Positions, 4 (Apr. 5, 2013), available at <http://www.fas.org/irp/news/2013/04/dni-clearance.pdf>.

⁷⁹ See Service Women's Action Network, Director of National Intelligence Issues Security Clearance Change for Military Sexual Assault Survivors Seeking Counseling (Apr. 5, 2013), available at <http://servicewomen.org/wp-content/uploads/2013/04/4.5.2013-Victory-for-Survivors.pdf> ("From numerous calls we receive on our Helpline, we know that Question 21 has kept survivors from seeking the critical mental health services they have needed to heal in the aftermath of sexual assault."). Air Force Technical Sergeant Jennifer Norris contends that her military career ended because she refused to release to a security clearance investigator records of her psychological counseling for PTSD due to military sexual assault. James Kitfield, *The Enemy Within*, NATIONAL JOURNAL, Sept. 13, 2012, http://www.nationaljournal.com/magazine/the-military-s-rape-problem-20120913?mrefid=site_search&page=1.

⁸⁰ See 2012 DoD Gender Relations Survey at 106-9 (67 percent of women and 81 percent of men who had experienced unwanted sexual contact in the past year stated they did not report it); see also 2010 DoD Gender Relations Survey at 35-36 (71 percent of women and 85 percent of men who had experienced unwanted sexual contact in the past year stated they did not report it).

⁸¹ 2010 DoD Gender Relations Survey at 43 (54 percent of women and 27 percent of men did not report because they feared retaliation; 47 percent of women and 20 percent of men did not report because they had heard other victims had a negative experience after reporting). See also Technical Sergeant Jennifer Norris, USAF (Ret.), written testimony, *Hearing of the U.S. House Armed Services Committee*, Jan. 23, 2012, http://armedservices.house.gov/index.cfm/files/serve?File_id=f1febb51-8d17-4148-8146-e5df227d4a50 (explaining that she did not initially report being raped because she witnessed the negativity against another Service member after reporting sexual harassment).

⁸² *Report of the Defense Task Force* at 31.

CHAPTER 4: CONSEQUENCES OF REPORTING

The DoD's Whistleblower Protection policy prohibits retaliation or "reprisal" against those who report sexual assault.¹ The Services also have similar policies prohibiting retaliation.² The DoD Office of the Inspector General (OIG) and the Services' Inspector General offices investigate allegations of reprisal for reporting sexual assault.

Nevertheless, 60 percent of women who reported unwanted sexual contact believed they experienced negative social, professional, or administrative consequences.³ A witness at the Commission's briefing testified to the significant, long-term effect such negative consequences may cause, including limiting or precluding access to veterans' benefits.⁴

Types of Consequences

The testimony of Rachel Natelson, Legal Director of Service Women's Advocacy Network, before the Commission indicated that many victims are retaliated against after they report, but many commanders also assist in alleviating such retaliation.⁵ Because the DoD does not track victims, the Commission cannot determine how many victims have experienced retaliation.⁶

¹ DoD DIRECTIVE 7050.06, MILITARY WHISTLEBLOWER PROTECTION (July 23, 2007), available at <http://www.dtic.mil/whs/directives/corres/pdf/705006p.pdf>. "Reprisal" is defined as "[t]aking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, for making or preparing a protected communication." *Id.* at 12. Title 10 United States Code section 1034, "Protected Communication; prohibition of retaliatory personnel actions," prohibits reprisal against a member of the armed forces for communicating a violation of law or regulation to, among other things, a member of a DoD law enforcement organization or any organization designated for receiving such communications. Because sexual assault is clearly a violation of law or regulation, reporting alleged sexual assaults to law enforcement or to a SARC is a protected communication under 10 U.S.C. 1034, as well as DoD Directive 7050.06, "Military Whistleblower Protection."

² See, e.g. SECNAINST 5370.7C, MILITARY WHISTLEBLOWER REPRISAL PROTECTION (May 18, 2008); AR 600-20, Army Command Policy 46 (Mar. 18, 2008) ("Commanders and supervisors are prohibited from initiating any type of disciplinary or adverse action against any Soldier or civilian employee because the individual registered a complaint."); *id.* at 48-49 (implementing the DoD's Whistleblower Protection policy); *id.* at 64 ("Do not allow Soldiers to be retaliated against for filing complaints."). See also 10 USC § 1034 (defining protected communications).

³ 2010 DoD Gender Relations Survey at 42.

⁴ Natelson testimony, *Briefing Transcript*, at 59-60.

⁵ See Natelson Statement at 4. For example, one victim told DoD researchers, "The Marines in my office and in my chain of command took great care of me. . . . [M]y chain of command and the surrounding units were very adamant about getting me the help and assistance I needed, while punishing the [accused] Marine for his individual actions." Nevertheless, she also told researchers, "After my incident, many of my peers and the peers of my assaulter looked at me . . . like I wore the scarlet letter, when in fact I was the victim. No Marine wants to accept that one of their own would do something like that to another person. So I think, they all just assumed I was

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According to victim advocacy groups, the process of appealing professional or administrative retaliation is “daunting.”⁷ To allege reprisal for reporting sexual assault, a Service member must first file a complaint petition with the DoD Inspector General’s Office.⁸ Only if the Inspector General’s Office substantiates the petition may the Service member petition his/her Service’s Board for the Correction of Military Records (Board) for redress.⁹ If the Board makes an unfavorable outcome that is accepted by the Military Service Secretary, the Service member may appeal the decision to the Secretary of Defense.¹⁰

Statistically, a majority of appeals are not investigated fully, and most that are investigated are not substantiated. According to a recent study by the GAO, the Inspector General’s Office fully investigated an average of 29 percent of all reprisal complaints between fiscal years 2006 and 2011, and it substantiated 25 of those investigated complaints.¹¹ Thus, six percent of all complaints between fiscal years 2006 and 2011 were substantiated and could be considered by a Board.¹²

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lying, making it up, wanted attention, or I was mad at him.” Afterwards, however, the victim’s Battalion began bi-annual classes on sexual harassment and sexual assault. *Report of the Defense Task Force* at F-10.

⁶ The only statistics available are from the DoD’s anonymous surveys of the military population as a whole.

⁷ *Natelson Statement* at 3. The National Defense Authorization Act for FY 2013, Public Law No. 112-239, §572, contains a requirement for a general education campaign to notify Service members of the right to seek the correction of military records when a Service member experiences any retaliatory personnel action for making a report of sexual assault or sexual harassment.

⁸ A Service member is instructed to submit a complaint to the DoD’s OIG or to an Inspector General within a Military Department for investigation within 60 days of the date the member became aware of the alleged reprisal. DOD DIRECTIVE 7050.06, MILITARY WHISTLEBLOWER PROTECTION 14 (July 23, 2007), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/705006p.pdf>. If more than 60 days have passed since the Service member became aware of the personnel action that is the subject of the alleged reprisal, the Inspector General may nevertheless consider the complaint for investigation “based on compelling reasons for the delay in submission or the strength of the evidence submitted.” *Id.* The DoD’s Inspector General should conduct an investigation within 180 days. *Id.* at 6.

⁹ *Natelson Statement* at 3. *See also* DOD DIRECTIVE 7050.06, *supra* note 8 at 6-7 (the Board is supposed to review the Inspector General’s report; gather additional evidence, if necessary; receive oral arguments; examine and cross-examine witnesses; take depositions as necessary; and, if appropriate, conduct a hearing). If the Board “determines that a personnel action was in reprisal . . . , it may recommend to the Secretary of the Military Department concerned that disciplinary action be taken against the individual(s) responsible for such personnel action.” *Id.* at 7.

¹⁰ DOD DIRECTIVE 7050.06, *supra* note 8 at 15-16.

¹¹ GAO, ACTIONS NEEDED TO IMPROVE DOD’S MILITARY WHISTLEBLOWER REPRISAL PROGRAM 64 (Jan. 2012), *available at* <http://www.gao.gov/assets/590/588784.pdf>.

¹² *Id.*

The Boards are not staffed by judges or attorneys, but rather, civilian DoD employees who convene on an *ad hoc* basis in addition to other full-time duties.¹³ Board members need not undergo extensive or specialized training in military law, nor are they bound by the judicial doctrine of precedent, but their decisions are reviewed by an attorney prior to a recommendation being submitted to the Secretary of the Military Service.¹⁴ Data indicates that the Army and Navy Board members devote an average of 3.72 and 6.73 minutes, respectively, to deciding each case.¹⁵

Professional and Administrative Consequences

Professional and administrative consequences include adverse actions by commanders in the victim's chain of command such as "plac[ing the victim] on a medical or legal hold, denial of promotion, job assignments that are not career enhancing, [and] denial of requests for training."¹⁶ It also includes efforts to remove the victim from military service. Service members may be removed from the military through an involuntary administrative discharge initiated by their command.¹⁷ The basis of such an administrative discharge may be a psychological diagnosis.

Psychological Diagnoses

The diagnosis of an "adjustment disorder" or "personality disorder" based on psychological symptoms after a sexual assault, if incorrect, may be the most troubling consequence of reporting.¹⁸ Military criminal defense attorney, Major Bridget Wilson, testified that a

¹³ Natelson Statement at 4.

¹⁴ DoD SAPRO comments to the U.S. Commission on Civil Rights at 14, June 12, 2013, in response to affected agency review.

¹⁵ See Raymond J. Toney, Remarks at State Bar of Texas Annual Meeting: Military Record Correction Boards and Their Judicial Review 3 (June 11, 2010), available at http://www.texasbar.com/flashdrive/materials/military_law/militarylaw_toney_militaryrecord_finalarticle.pdf.

¹⁶ 2010 DoD Gender Relations Survey at 41. Veteran BriGette McCoy testified to the Senate Armed Services Committee that she was "put on extra duties that conflicted with [her] medical profiles" after she reported sexual harassment. BriGette McCoy, written testimony, *Hearing Before the U.S. Senate Armed Services Committee*, Mar. 13, 2013, available at http://www.armed-services.senate.gov/statemnt/2013/03_March/McCoy_03-13-13.pdf.

¹⁷ DOD INSTRUCTION 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS 12 (Aug. 28, 2008, Incorporating Change 3, Sept. 30, 2011), available at <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>.

¹⁸ See Karisa King, *In the Military, Sex Assault Victims Labeled as Mentally Ill and Forced Out*, SAN ANTONIO EXPRESS-NEWS, May 18, 2013, available at <http://www.mysanantonio.com/news/military/article/In-the-military-sex-assault-victims-labeled-as-4526251.php#ixzz2U2R7EDvk>; David S. Martin, *Rape Victims Say Military Labels Them 'Crazy'*, CNN.com, Apr. 14, 2012, <http://www.cnn.com/2012/04/14/health/military-sexual-assaults->

“personality disorder” or “adjustment disorder” is “the fastest and easiest way to get rid of someone” in the military.¹⁹

Post-traumatic stress disorder (PTSD) is a mental health condition that is triggered by a traumatic or stressful event.²⁰ PTSD justifies a service-related medical discharge if the traumatic event occurred during military service.²¹ A service-related medical discharge entitles a veteran to disability benefits and access to ongoing healthcare. According to victim advocacy groups, although PTSD is a likely consequence of sexual assault, “commanders can and do dismiss victims as merely presenting an attitude problem.”²²

Unlike PTSD, which is a response to a traumatic event, an “adjustment disorder” is a response to a distressing life event (such as sudden job loss) or a life challenge (such as leaving home for the first time) which typically lasts no longer than six months after the stressful situation or life event has been resolved;²³ and a “personality disorder” is a pre-existing condition originating during the early developmental years.²⁴ Neither an “adjustment disorder” nor a “personality

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[personality-disorder/index.html](#). According to Major Wilson, she handled a case where a woman was diagnosed with a “personality disorder” and the Navy sought to discharge her on that basis after she complained that her supervisor was viewing pornography on his computer all day. Wilson testimony, *Briefing Transcript*, at 57.

¹⁹ Wilson testimony, *Briefing Transcript*, at 57.

²⁰ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Am. Psychiatric Ass'n 5th ed. 2013)(defining PTSD as a trauma- and stressor-related disorder resulting from exposure to actual or threatened death, serious injury or sexual violation, and causes impairment, is not a consequence of another mental disorder or the physiological effect of a substance, and includes symptoms divided into four clusters: intrusion, avoidance, negative alterations in cognitions and mood, and alterations in arousal and reactivity) (Prior to May 2013, the Manual's definition of PTSD did not include sexual assault specifically.).

²¹ See DEP'T OF VETERANS AFFAIRS, NEW REGULATIONS ON PTSD CLAIMS (July 12, 2010), available at http://www.va.gov/ptsd_qa.pdf; Combat-Related Special Compensation, 10 U.S.C. § 1413a (2013).

²² Natelson Statement at 5.

²³ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 286-87 (Am. Psychiatric Ass'n 5th ed. 2013)(Chronic adjustment disorder may persist for longer than six months.). The current definition of an adjustment disorder does not reflect the definition used by DoD to diagnose adjustment disorders for administrative discharges prior to May of 2013, although both definitions are similar and share most criteria. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS TR 679-80 (Am. Psychiatric Ass'n 4th ed. 2000)(defining an adjustment disorder as the development of emotional or behavioral symptoms in response to an identifiable stressor, occurring within three months of the stressful event, persisting no longer than six months, and reflecting marked distress in excess of what would be expected from exposure to the stressor or significant impairment in either social or occupational functioning); see also DOD INSTRUCTION 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS 6 (Aug. 28, 2008, Incorporating Change 3, Sept. 30, 2011), available at <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf> (instructing DoD components to use the current edition of the Diagnostic and Statistical Manual of Mental Disorders).

²⁴ “A personality disorder is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.” AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL

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disorder” qualifies for a service-related medical discharge but instead may be the basis for an administrative discharge.²⁵ An administrative discharge may limit a Service member’s access to disability benefits and ongoing treatment for the sexual trauma after discharge if the symptoms are labeled as not service-related or the result of a pre-existing condition.²⁶ A Service member should not be administratively discharged based on a “personality disorder” or “adjustment disorder” if a service-related PTSD is also diagnosed, as the PTSD would qualify for a disability discharge—not an administrative discharge.²⁷ Service members recommended for an administrative discharge with a behavioral condition and who served in an imminent danger pay area are now screened for PTSD and Traumatic Brain Injury as a precautionary measure.²⁸

The Armed Forces Health Surveillance Center found “adjustment disorder” diagnoses to be disproportionately applied to women and 10 times more prevalent than PTSD diagnoses among

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MANUAL OF MENTAL DISORDERS 645 (Am. Psychiatric Ass’n 5th ed. 2013)(emphasis in original). DoD considers personality disorders a preexisting condition, and Service members discharged on that basis cannot receive disability benefits or other benefits, including healthcare, for symptoms that are considered part of their personality disorder. DOD INSTRUCTION 1332.14, *supra* note 23 at 13. The current definition of a personality disorder does not reflect the definition used by DoD to diagnose personality disorders for administrative discharges prior to May of 2013, although both definitions are similar and share most criteria. *See* AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS TR 685-86 (Am. Psychiatric Ass’n 4th ed. 2000)(defining a personality disorder as an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture that is pervasive and inflexible, leads to impairment, has an onset in adolescence or early adulthood, is stable over time, is not a consequence of another mental disorder or the physiological effect of a substance, and is manifested in at least two of the following areas: cognition, affectivity, interpersonal functioning, or impulse control).

²⁵ DoD Office of Clinical & Program Policy Response to Request for Documents No. 5 (on file with the U.S. Commission on Civil Rights). *See also* AR 635-200, Active Duty Enlisted Administrative Separations 58 (July 6, 2005 and revised on Sept. 6, 2011) (A “personality disorder” is a “deeply ingrained maladaptive pattern of behavior of long duration.”); James Kitfield, *The Enemy Within*, NATIONAL JOURNAL, Sept. 13, 2012, at 3, http://www.nationaljournal.com/magazine/the-military-s-rape-problem-20120913?mrefid=site_search&page=1 (“[A] personality disorder is a long-standing pattern of maladaptive behavior, not something caused by a recent . . . condition such as sexual trauma.”). In the Diagnostic and Statistical Manual of Mental Disorders, personality disorder is characterized as an Axis II disorder, whereas PTSD is an Axis I disorder. *See also* VIETNAM VETERANS OF AM., CASTING TROOPS ASIDE: THE UNITED STATES MILITARY’S ILLEGAL PERSONALITY DISORDER DISCHARGE PROBLEM (2012), available at <http://www.vva.org/PPD-Documents/WhitePaper.pdf>.

²⁶ Veterans’ benefits are available only for a pre-existing condition if the condition was aggravated by military service and there is no finding that the aggravation is due to the natural progress of the disease or disability. 38 C.F.R. § 3.303(a) 38 C.F.R. § 3.306.

²⁷ DOD INSTRUCTION 1332.14, *supra* note 23 at 13. *See also id.* at para. 3(a)8.3, p. 12; AR 635-200, Active Duty Enlisted Administrative Separations 58 (July 6, 2005 and revised on Sept. 6, 2011) (“A Soldier will not be processed for administrative separation [based on a personality disorder diagnosis] if PTSD, [traumatic brain injury], and/or other comorbid mental illness are significant factors to a diagnosis of personality disorder, but will be evaluated under the physical disability system.”).

²⁸ DOD INSTRUCTION 1332.14, *supra* note 23, at 8-9.

female Service members.²⁹ On the other hand, women in the general U.S. population are diagnosed for adjustment disorders twice as often as men.³⁰ Without specific data indicating how many sexual assault victims are discharged for personality or adjustment disorders in the military, the Commission cannot assess whether these female Service members are discharged as a result of experiencing or reporting a sexual assault.

Although the issue of personality disorder discharges received public attention in recent years,³¹ which led to a reduction in such diagnoses and related discharges,³² some military healthcare providers simply may have substituted the use of “adjustment disorders” as an alternative to a medical discharge of PTSD for military sexual assault victims.³³ The long-term effect is the same—such diagnoses limit or precludes veterans from receiving disability benefits because the psychological symptoms are deemed not to be service-related.

Health benefits through the Veterans Health Administration also are affected by the character of a Service member’s discharge. Any discharge that is not under honorable conditions precludes access to healthcare with the Veterans Health Administration, unless a Service member obtains an administrative ruling by the Veterans Benefits Administration.³⁴ Some

²⁹ Armed Forces Health Surveillance Ctr., *Mental Disorders and Mental Health Problems, Active Component, U.S. Armed Forces, 2000-2011*, MED. SURVEILLANCE MONTHLY REPORT 11 (June 2012), available at http://www.afhsc.mil/viewMSMR?file=2012/v19_n06.pdf. “Figures . . . indicate that the armed services are disproportionately applying [personality disorder] diagnoses to women. Women make up 21 percent of the Air Force but account for 35 percent of the personality-disorder discharges; they’re 16 percent of the Army but 24 percent of such discharges; they’re 17 percent of the Navy but 26 percent of discharges for personality disorder; and they’re 7 percent of the Marines but 14 percent of such discharges.” James Kitfield, *The Enemy Within*, NATIONAL JOURNAL, Sept. 13, 2012, <http://www.nationaljournal.com/magazine/the-military-s-rape-problem-20120913>.

³⁰ MAYO CLINIC, ADJUSTMENT DISORDERS: CAUSES (Mar. 2011), available at <http://www.mayoclinic.com/health/adjustment-disorders/DS00584/DSECTION=causes>. Conversely, men are three times more likely to be diagnosed with antisocial personality disorder than women across the globe. WORLD HEALTH ORG., GENDER AND WOMEN’S MENTAL HEALTH, available at http://www.who.int/mental_health/prevention/genderwomen/en/.

³¹ See GAO, DEFENSE HEALTH CARE, ADDITIONAL EFFORTS NEEDED TO ENSURE COMPLIANCE WITH PERSONALITY DISORDER SEPARATION REQUIREMENTS (Oct. 2008), available at <http://www.gao.gov/assets/290/283014.pdf>.

³² In 2008, the GAO found that the Services were not fully compliant with DoD’s personality disorder separation guidance in DoD Instruction 1332.14. See *Id.* See also GAO, DEFENSE HEALTHCARE STATUS OF EFFORTS TO ADDRESS LACK OF COMPLIANCE WITH PERSONALITY DISORDER SEPARATION REQUIREMENTS (Sept. 15, 2010). Since then, DoD has required the Services to audit personality disorder separation files annually. See Memorandum of the Under Secretary of Defense for Personnel and Readiness, Continued Compliance Reporting on Personality Disorder Separations (Sept. 10, 2010).

³³ *Natelson Statement* at 4. Major Bridget Wilson agreed that “adjustment disorder has become the substitute for personality disorder.” Wilson testimony, *Briefing Transcript*, at 57.

³⁴ If discharged under a category that is not honorable, Service members are precluded from all healthcare benefits, but may appeal to the Veterans Benefits Administration. Veterans Health Administration’s Response to U.S.

victims diagnosed with a “personality disorder” or “adjustment disorder” and discharged without honorable conditions have claimed that that diagnosis and discharge operate hand in hand to deny them treatment.³⁵

Procedural Safeguards for Service Members Facing Administrative Discharges Based on Psychological Diagnoses

The DoD’s Whistleblower Protection policy prohibits commanders from using mental health evaluations as a means of retaliation.³⁶ The fact that a Service member experienced a sexual assault does not, in and of itself, mean that the Service member automatically meets the threshold criteria for a command-directed mental health evaluation.³⁷

On August 28, 1997, the DoD issued a policy stating the requirements for mental health evaluations.³⁸ Under that policy, before a commander could refer a Service member for a

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Commission on Civil Rights Report: “Sexual Assault in the Military” at 1-2, June 3, 2013, in response to affected agency review.

³⁵ Several of the military sexual assault victims who brought civil lawsuits were separated from the military “under Other Than Honorable Conditions” or with a bad-conduct discharge, which they allege was retaliatory. *Cioca v. Rumsfeld*, Case No. 1:11-cv-00151 (LO/TCB) (E.D. Va.), Compl. filed Feb. 15, 2011, para. 26, 74, 125, 148; *Klay v. Panetta*, Case No. 12-0350 (ABJ) (D.D.C.), Compl. filed Mar. 6, 2012, para. 37; *Marquet v. Gates*, Case No. 12 cv 3117 (S.D.N.Y.), Compl. filed Apr. 20, 2012, at para. 34. The complaints in all three cases are available at <http://www.protectourdefenders.com/military-sexual-assault-litigations>. See also *Natelson Statement* at 5. Moreover, a “personality disorder” or “adjustment disorder” diagnosis may limit a veteran’s civilian employment opportunities. *Id.*

³⁶ DOD DIRECTIVE 7050.06, MILITARY WHISTLEBLOWER PROTECTION 12 (July 23, 2007), available at <http://www.dtic.mil/whs/directives/corres/pdf/705006p.pdf> (“Personnel action,” includes “referral for mental health evaluations.”). DOD DIRECTIVE 6490.1, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES 4 (Oct. 1, 1997), available at <http://biotech.law.lsu.edu/blaw/dodd/corres/pdf2/d64901p.pdf> (“No person may refer a Service member for mental health evaluation as a reprisal for making or preparing a lawful communication to a Member of Congress, any appropriate authority in the chain of command of the Service member, an IG or a member of a DoD audit, inspection, investigation or law enforcement organization.”). See also Army Medical Command Regulation 40-38, Command-Directed Behavior Health Evaluations 5-7; AR 600-8-24, Officer Transfers and Discharges 9; AR 635-200, Active Duty Enlisted Administrative Separations 22, 23 (July 6, 2005 and revised on Sept. 6, 2011); SECNAVINST 6320.24A, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES 16 (Feb. 16, 1999); SECNAVINST 5370.7C, MILITARY WHISTLEBLOWER REPRISAL PROTECTION 3-5 (Oct. 14, 2005); AFI 44-109, MENTAL HEALTH, CONFIDENTIALITY, AND MILITARY LAW para. 4.9.3 (Mar. 1, 2000).

³⁷ DoD Office of Clinical & Program Policy Response to the U.S. Commission on Civil Rights’ Interrogatory No. 42. Proper criteria for a mental health evaluation include situation where the Service member is likely to cause serious injury to him or herself or to others, or when the commanding officer believes that the Service member may be suffering from a severe mental disorder. DoD Office of Clinical & Program Policy Response to the U.S. Commission on Civil Rights’ Interrogatory No. 42.

³⁸ DOD INSTRUCTION 6490.4, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES 5 (Aug. 28, 1997) (on file with the U.S. Commission on Civil Rights).

mental health evaluation, s/he had to consult with a mental healthcare provider,³⁹ submit a formal written request, and provide the Service member with written justification.⁴⁰ If the mental healthcare provider discovered a procedural violation or an indication of retaliation, s/he was required to report it.⁴¹

This policy was subsequently updated and reissued on March 4, 2013.⁴² The previous procedural safeguards were removed from the 2013 updated version of the policy, in accordance with a statutory change removing these requirements.⁴³ The 2013 policy simply states that if a Service member believes a command-directed psychological evaluation is retaliatory, s/he may file a complaint with the Inspector General.⁴⁴ Nevertheless, if a psychiatrist or Ph.D.-level psychologist makes a requisite diagnosis for a personality disorder and recommends administrative discharge for a Service member serving in an imminent danger pay area, the Military Service's Surgeon General must approve it before a commander can initiate discharge.⁴⁵ The diagnosis must address PTSD, and a majority of cases are referred to a medical evaluation board for PTSD before discharge.⁴⁶ Further, Service members may not be discharged based on a "personality disorder" if personnel records indicate misconduct or unsatisfactory performance, even if a "personality disorder" exists.⁴⁷

Since the National Defense Authorization Act of 2013, victims of sexual assault who are involuntarily discharged (including those with a "personality disorder" or "adjustment disorder" diagnosis) may seek another level of review to determine whether a discharge was

³⁹ A "mental health provider" is a "psychiatrist, doctoral-level clinical psychologist or doctoral-level clinical social worker with necessary and appropriate professional credentials who is privileged to conduct mental health evaluations for DoD Components." DOD DIRECTIVE 6490.1, *supra* note 36 at 12.

⁴⁰ DOD INSTRUCTION 6490.4, *supra* note 38 at 4. *See also id.* at 23.

⁴¹ *Id.* at 7.

⁴² *Id.* at 6.

⁴³ 10 U.S.C. § 1090a, National Defense Authorization Act for Fiscal Year 2012, Public Law 112-81 § 711(b); DOD INSTRUCTION 6490.4, *supra* note 38 at 9-10.

⁴⁴ DOD INSTRUCTION 6490.4, *supra* note 38 at 14.

⁴⁵ DOD INSTRUCTION 1332, ENLISTED ADMINISTRATIVE SEPARATIONS 13 (Aug. 28, 2008, Incorporating Change 3, Sept. 30, 2011); DOD DIRECTIVE 6490.1, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES 6 (Oct. 1, 1997, Certified Current as of Nov. 24, 2003), *available at* <http://biotech.law.lsu.edu/blaw/dodd/corres/pdf2/d64901p.pdf>.

⁴⁶ DoD SAPRO comments to the U.S. Commission on Civil Rights at 18, June 12, 2013, in response to affected agency review (Additionally, in the Army, a Service member may choose to go before the Army Board for Corrections of Military Records without going to the Inspector General to challenge a personality disorder administrative discharge.); DOD INSTRUCTION 1332, *supra* note 45 at 13.

⁴⁷ *Id.*; DOD INSTRUCTION 1332, *supra* note 45 at 13.

retaliation for reporting sexual assault.⁴⁸ Prior to this Act, the DoD Inspector General's Office would first investigate and recommend action *before* a Service member could seek a hearing before a Board for Correction of Military Records.⁴⁹

Victims' Inability to Seek Recovery in Civil Proceedings

Victims of sexual assault perpetrated by a Service member have no recourse against the U.S. government in civil proceedings.⁵⁰ The *Feres* doctrine, first articulated in *Feres v. United States*,⁵¹ bars tort claims brought "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."⁵² The doctrine rests on three grounds: "(1) the distinctly federal nature of the relationship between the government and members of its armed forces; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure."⁵³

In *Shearer v. United States*, the Supreme Court confirmed that the most important rationale for upholding the *Feres* doctrine was the potential disruption of military discipline by civil suits.⁵⁴ Thus, in addition to the three rationales outlined in the original *Feres* holding, the doctrine bars suits where (1) a civilian court may second-guess military decisions or (2) the plaintiff's activities directly implicate the need to safeguard military discipline.⁵⁵ Military leadership remains supportive of the current doctrine.⁵⁶ Even those who would prefer limits to the broader

⁴⁸ Legislation enacted in 2013 requires DoD to create a policy that a general officer or flag officer must review the circumstances of, and grounds for, the proposed involuntary separation of any member of the Armed Forces who (1) made an Unrestricted Report of a sexual assault; (2) within one year after making the Unrestricted Report of a sexual assault, is recommended for involuntary separation from the Armed Forces; and (3) requests review on the grounds that the member believes the recommendation for involuntary separation from the Armed Forces was initiated as reprisal for making the report. The general officer or flag officer must concur in the proposed involuntary separation of the member in order to separate the member. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 § 578.

⁴⁹ DoD DIRECTIVE 7050.06, MILITARY WHISTLEBLOWER PROTECTION 7 (July 23, 2007), available at <http://www.dtic.mil/whs/directives/corres/pdf/705006p.pdf> (emphasis added).

⁵⁰ This does not preclude criminal proceedings against perpetrators in civilian court. See Chapter 5, *infra*, at 46-47 for a discussion about civilian law enforcement action and prosecution.

⁵¹ 340 U.S. 135, 71 S.Ct. 153 (1950).

⁵² *Feres v. U.S.*, 340 U.S. 135, 146 (1950).

⁵³ *Madsen v. U.S. ex rel. U.S. Army Corps of Engineers*, 841 F.2d 1011, 1013 (10th Cir.1987) (quotation omitted).

⁵⁴ *United States v. Shearer*, 473 U.S. 52 (1985).

⁵⁵ Jeffrey R. Simmons, *Military Medical Malpractice*, ARIZ. B.J., Feb. /Mar. 1988, at 22, 25.

⁵⁶ The *Feres* Doctrine: An Examination of This Military Exception to the Federal Tort Claims Act, 107th Cong., S. Hrg. 107-977, 43 (2002) (response to written questions by RADM Christopher Weaver, Commandant, Naval
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application of the *Feres* doctrine acknowledge that military decision making often requires leaders to make decisions based on a limited amount of information and time. Civil suits could open the door to Service members second-guessing the decisions of their leaders and threaten the military command structure.⁵⁷

The Commission heard testimony from Attorney Rachel Natelson criticizing the *Feres* doctrine as applied to sexual assault victims.⁵⁸ Attorney Bridget Wilson testified that the tradeoff for Service members is the “alternative compensation system,”⁵⁹ i.e., the “ability to have military disability and veterans’ disability [benefits] related to their injuries” through the Veterans Administration.⁶⁰ Wilson acknowledged, however, that it may not be a fair trade-off and that “there may be some overriding policy issues that would merit change.”⁶¹

Broad application of the *Feres* doctrine continues to be debated. Arguably, Congress did not intend access to veterans’ benefits to be a tradeoff or the exclusive remedy for Service members. In a dissenting opinion of a subsequent Supreme Court case, *United States v. Johnson*, Justice Scalia criticized the Court’s reliance on the existence of veterans’ benefits, arguing that the Court had held in the past that veterans’ benefits were not an exclusive remedy.⁶² Furthermore, because veterans’ benefits are generally less extensive and more easily terminable than typical worker’s compensation benefits, Justice Scalia stated that the presence of veterans’ benefits as an alternative compensation system did not justify broad application of the *Feres* doctrine.⁶³ To date, however, Congress has not clarified its intentions with respect to whether Service members can bring civil claims against the military, and the *Feres* doctrine remains binding authority.

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District Washington) available at <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg88833/pdf/CHRG-107shrg88833.pdf>.

⁵⁷ Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 55 (2007); see also Robert Cooley, *Method to This Madness: Acknowledging the Legitimate Rationale Behind the Feres Doctrine*, 68 B.U. L. REV. 981, 991 (1988).

⁵⁸ Natelson Statement at 2-3.

⁵⁹ *Madsen v. United States ex rel. United States Army Corps of Engineers*, 841 F.2d 1011, 1013 (10th Cir.1987).

⁶⁰ Wilson testimony, *Briefing Transcript*, at 77-78.

⁶¹ *Id.*

⁶² *United States v. Johnson*, 481 U.S. 681, 697-98 (1987) (Scalia, J., dissenting). See also *Pringle v. U.S.*, 208 F.3d 1220, 1223-24 (10th Cir. 2000) (noting that courts have broadened *Feres* to bar any claim even slightly related to a plaintiff’s status as a military member, even if the claim does not appear to relate to military decisions). Joining Justice Scalia in dissent were Justices Brennan, Marshall, and Stevens.

⁶³ *Id.* at 698.

Impact on Victims' Access to Veterans' Benefits

Because veterans' benefits are currently the exclusive remedy available to victims of military sexual assault, access to benefits is crucial. However, for some victims the negative consequence of reporting has resulted in a loss of benefits.

Veterans Health Administration facilities are required to screen all patients for military-related sexual trauma.⁶⁴ According to the officials within the Veterans Health Administration, all Service members who were discharged under Honorable conditions are entitled to treatment for military sexual trauma.⁶⁵ However, as discussed above, victims who are discharged under conditions that are not Honorable may be ineligible for care through the Veterans Health Administration.⁶⁶

Officials within the Veterans Health Administration also state a victim's testimony is sufficient to obtain care for military sexual trauma.⁶⁷ Legislation has been proposed to loosen the evidentiary requirements so that victims who did not report may prove that their symptoms are due to military sexual assault.⁶⁸ Prior to FY 2013, Service members who did report also

⁶⁴ VETERANS HEALTH ADMINISTRATION DIRECTIVE 2010-033, MILITARY SEXUAL TRAUMA (MST) PROGRAMMING 3 (July 14, 2010), available at http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2272. See also Rachel Kimerling, Ph.D., et al., *The Veterans Health Administration and Military Sexual Trauma*, 97:12 AM. JOURNAL OF PUB. HEALTH, 2160, 2161 (2007).

⁶⁵ Susan McCutcheon, National Mental Health Director, Family Svc/Women's MH/MST, VA Central Office, Washington, DC; Margret Bell, VA Mental Health Services, national MST Support Team; Rachel E. Kimerling, VA Mental Health Services, national MST Support Team and the National Center for Posttraumatic Stress Disorder, telephone interview [hereinafter *VHA Officials Interviews*], Nov. 26, 2012.

⁶⁶ Discharges under Other Than Honorable Conditions are not unusual among military sexual assault victims for a variety of reasons. Symptoms of PTSD and of sexual trauma, as well as psychotropic medications prescribed by military doctors to victims, may interfere with a Service member's ability to do his or her job, resulting in poor performance evaluations and even disciplinary action. Nancy J. Parrish, President, Protect Our Defenders, telephone interview, Nov. 28, 2012. See also Galbreath testimony, *Briefing Transcript*, at 185-86 (DoD Psychologist Nate Galbreath testified that some victims' performance level falls when they are recovering from a sexual assault).

⁶⁷ *VHA Officials Interviews*. This is especially important for female veterans who live below the poverty line or are homeless and previously experienced military sexual trauma, as the Veterans Health Administration may be their primary access to healthcare. The GAO has noted that "Military sexual trauma (MST) has been linked to homelessness among women veterans." GAO, HOMELESS WOMEN VETERANS, ACTIONS NEEDED TO ENSURE SAFE AND APPROPRIATE HOUSING 1 (2011), available at <http://www.gao.gov/assets/590/587334.pdf>.

⁶⁸ H.R. 671, 113th Cong. (2013); S. 294, 113th Cong. (2013); H.R. 930, 112th Cong. (2012); S. 1391, 112th Cong. (2012).

encountered difficulty due to the military's destruction of evidence of assault after one year.⁶⁹ New legislation now requires evidence of sexual assault to be maintained for 50 years.⁷⁰

Access to Discharge Upgrades

Each Service branch permits veterans who receive discharges with any designation other than "Honorable" to seek upgrades in their discharge classification by appealing to a Discharge Review Board.⁷¹ Any veteran may request a discharge upgrade within 15 years of his or her discharge by completing the very brief DD Form 293, *Application for the Review of Discharge or Dismissal from the Armed Forces of the United States*. This form allows filers to choose to appear at their hearings if they wish to do so "at no expense to the government."⁷² Veterans who seek upgrades more than 15 years after discharge must file instead for Correction of Military Records.⁷³

Veterans who request discharge upgrades or corrections of their military records do not obtain relief a majority of the time:

In the last several years, overall success rates in discharge upgrade cases at the Navy Discharge Review Board have run around 4%. The Army DRB success rate in upgrades is 41%. The Air Force rate is 19%; (that breaks down to 15% for upgrade applicants who don't have a personal appearance and 45% for those who have an appearance). The Coast Guard DRB has a success rate of only 1%.

The Board for Correction of Naval Records upgrades approximately 15-20% of cases, while the Army Board for Correction of Military Records (BCMR) upgrades 10-15% and the Air Force BCMR upgrades 20%. Coast Guard BCMR rates are 15-20%.⁷⁴

⁶⁹ *FY11 DoD Annual Report on Sexual Assault* at 70 ("[M]ilitary law enforcement holds the evidence under an anonymous alphanumeric identifier for one year" in the context of a restricted report.).

⁷⁰ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 § 577.

⁷¹ 10 U.S.C. § 1553.

⁷² DD FORM 293, APPLICATION FOR THE REVIEW OF DISCHARGE FROM THE ARMED FORCES OF THE UNITED STATES (Nov. 2012), available at <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0293.pdf>.

⁷³ See, e.g., United States Army Trial Defense Service Region V, Fort Lewis Field Office, *What You Should Know About How to Upgrade Your Military Discharge*, available at http://www.monterey.army.mil/legal/trial_defense/how_to_upgrade_your_discharge.pdf (last updated May 9, 2011)

⁷⁴ Kathleen Gilberd, *Upgrading Less-Than-Fully-Honorable Discharges*, THE AMERICAN VETERANS AND SERVICEMEMBERS SURVIVAL GUIDE 324 (2008), available at <http://www.veteransforamerica.org/wp-content/uploads/2008/11/15-Discharge-Upgrades.pdf>.

Veterans who seek discharge upgrades bear the burden of all costs involved, such as attorneys' fees. The costs associated with seeking discharge upgrades, especially when understood in the context of the low success rates, may serve as a barrier to relief for veterans who were sexually assaulted while in the military and discharged without honorable conditions.

The federal Servicemember Mental Health Review Act, currently under bicameral consideration as H.R. 975 and S. 628, seeks to expand review of disability determinations of veterans discharged with a personality disorder or adjustment disorder. If enacted, this legislation will require that an expanded Physical Disability Board of Review include at least one psychologist and one psychiatrist independent from the military. Further, the Board would have the authority to review discharges of veterans who did not request review, upon the veterans' consent.⁷⁵

Command Accountability

DoD Policy states that commanders and others engaged in retaliation are subject to punishment.⁷⁶ Some military personnel and researchers have called for the Services to go further by punishing commanders who impede the goals of the SAPR programs or interfere with those who report sexual harassment or sexual assault.⁷⁷ Professor Victor Hansen advocates for holding commanders criminally liable for failing to respond appropriately to sexual assault in their ranks.⁷⁸

DoD psychologist Nate Galbreath testified that, in his experience as an Air Force clinical psychologist, he has tried to educate commanders about how persons suffering from sexual trauma and other mental health problems might comport themselves, and how he encourages commanders not to simply discipline a victim for performance problems.⁷⁹

⁷⁵ See, e.g., <http://www.govtrack.us/congress/bills/113/hr975>, <http://www.govtrack.us/congress/bills/113/s628>.

⁷⁶ 10 U.S.C. § 892; DoD DIRECTIVE 6490.1, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES 3-4 (Oct. 1, 1997), available at <http://biotech.law.lsu.edu/blaw/dodd/corres/pdf2/d64901p.pdf>.

⁷⁷ See, e.g., Capt. Megan N. Schmid, U.S. Air Force, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 505 (2010); HELEN BENEDICT, *THE LONELY SOLDIER: THE PRIVATE WAR OF WOMEN SERVING IN IRAQ* 227 (2009) (recommending increased command accountability).

⁷⁸ *Hansen Statement* at 3.

⁷⁹ Galbreath testimony, *Briefing Transcript*, at 186.

CHAPTER 5: INVESTIGATIONS — TRAINING AND PROCEDURES

The DoD has dedicated resources to the training of investigators and judge advocates to properly handle sexual assault cases. New procedures have been implemented to address the growing concern of protecting the rights of both victims and alleged perpetrators. Congress passed legislation in 2013 requiring the Secretary of Defense to establish a panel to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault for the purpose of developing recommendations regarding how to improve them.¹

Training – Investigators and Judge Advocates

Dr. David Lisak, a guest instructor at the Army's advance sexual assault training course, testified about the need to train investigators and judge advocates because of the unique nature of sexual offenses:

[T]he men and women in the military's investigative agencies in the JAG Corps, must receive the specialized training that is required to competently handle non-stranger rape cases. These cases are marked by complexities and challenges unseen in any other type of violent crime, and these challenges can and very often still do derail these cases and prevent them from being successfully prosecuted. The specialized training should include interviewing skills that increase trust and disclosure in victims and that do not intimidate and shut down victims, skills that incorporate neuroscience research on the impact of trauma on memory formation and memory retrieval, recognition of the unique evidence needed to effectively prosecute sexual assault cases in which the issue of consent will be central, in-depth training on victim privacy issues and ways to safeguard victims from undue trampling of their privacy rights. Some of this advanced training is already under way, but it must become more widespread and crucially, it must be sustained.²

Investigator Training and Coordination

Although all Services operate under the common standard of the UCMJ, historically each Service developed its own training for investigators for all categories of crime, including sexual assaults.³ Due to the growing awareness in recent years of the pervasive problem of sexual

¹ National Defense Authorization Act for FY 2013, Pub. L. No. 112-239, 126 Stat. 1632 § 576.

² Lisak testimony, *Briefing Transcript*, at 105-6.

³ GAO, MILITARY JUSTICE: OVERSIGHT AND BETTER COLLABORATION NEEDED FOR SEXUAL ASSAULT INVESTIGATIONS AND ADJUDICATIONS 18 (2011), available at <http://www.gao.gov/new.items/d11579.pdf>

(cont'd)

assaults attempted or perpetrated on military installations, DoD has established a common policy objective to achieve consistency across the Services, including training for investigators.⁴

In 2012, an evaluation by the DoD's Inspector General revealed that the Services' Military Criminal Investigation Organizations (MCIOs)⁵ did not have common, minimum standards for improved basic, refresher, or advanced sexual assault investigative training.⁶ Although the MCIOs addressed the required topics, the evaluation found that the number of hours varied, and refresher training could be improved by measurement guidelines.

Judge Advocate Training

Every Service's Judge Advocate General (JAG) Corps includes attorneys responsible for both prosecuting and defending military Service members. While Service members may be represented by private defense counsel instead of a judge advocate, the prosecutor must be a member of the JAG Corps.

The Army's Military Police School administers a course for Criminal Investigators and for judge advocates from all the Services, as well as the Coast Guard.⁷ In the Navy, the JAG Corps

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(providing examples of different military divisions' training such as the Naval Criminal Investigative Service (NCIS) sending 42 investigators to an advanced family and sexual violence training course in FY 2010, the Naval Justice School offering courses for prosecutors handling complex sexual assault cases, and the Army JAG conducting seven conferences led by experts who trained prosecutors on litigation of sexual assault cases).

⁴ See DoD INSTRUCTION 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE (Jan. 25, 2013, Incorporating Change 1, May 1, 2013), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/550518p.pdf>; GAO, MILITARY JUSTICE: OVERSIGHT AND BETTER COLLABORATION NEEDED FOR SEXUAL ASSAULT INVESTIGATIONS AND ADJUDICATIONS, *supra* note 3, at 17-18. As early as 2008, the DoD identified investigator training and resourcing, trial counsel training and resourcing, and commander training as priorities in SAPR programming. See DEP'T OF DEFENSE FISCAL YEAR 2009 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 13 (2010) [hereinafter *DoD FY09 Annual Report on Sexual Assault*], *available at* http://www.sapr.mil/public/docs/reports/fy09_annual_report.pdf.

⁵ The MCIOs consist of the U.S. Army Criminal Investigation Command (CID), the NCIS, and the Air Force Office of Special Investigations (AFOSI). DoD INSTRUCTION 5505.3, INITIATION OF INVESTIGATIONS BY DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS (June 21, 2002, replaced by DoD Instruction 5505.03 on Mar. 24, 2011), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/550503p.pdf>.

⁶ DoD OIG Response to the U.S. Commission on Civil Rights' Interrogatory 137. The Inspector General recommended a working group be tasked with developing such minimum guidelines, but the Army Commander of CID opposed the recommendation for a working group to review periodic refresher sexual assault investigation training to establish common criteria and minimum requirements to refine methods for measuring effectiveness. DoD, OIG, EVALUATION OF THE MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS' SEXUAL ASSAULT INVESTIGATION TRAINING i (2013), *available at* <http://www.dodig.mil/pubs/documents/DODIG-2013-043.pdf>.

⁷ In addition, Army CID sends its senior sexual assault investigators to an annual conference to receive continuing training and expertise in sexual assault investigations. See Dep't of the Army Response to the U.S. Commission on
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trains judge advocates through a Military Justice Litigation Career Track.⁸ By creating a specialized group of litigators who are assigned to “progressive . . . litigation billets,” Navy JAG Corps ensured this group of attorneys would remain sharp in developing and maintaining military justice litigation skills.⁹ In January of 2012, the Marine Corps held two training events for JAG Corps prosecutors at Marine Corps bases in the Pacific region.¹⁰

Investigative Procedures

General Investigations

Victims may initiate an investigation by reporting a sexual assault directly to law enforcement or to an MCIO.¹¹ A victim also may report a sexual assault to a commander, who is required to refer the matter to an MCIO. It is DoD policy that all sexual assaults reported to an MCIO be investigated and that no approval from the victim’s or the accused’s commander is necessary.¹² Further, it is DoD policy that “investigations are conducted entirely independent from the military chain of command.”¹³ Once an MCIO begins an investigation after a victim reports, only the Secretary of a military department may direct an MCIO to delay, suspend, or terminate the investigation, and such a decision must then be promptly reported to the DoD IG.¹⁴ Commanders are not permitted to impede or limit an investigation.¹⁵

In the past, the accused’s commander may have conducted a preliminary investigation into a sexual assault allegation. However, since the issuance of DoD Instruction 6495.02 in 2006 (and re-issued in March 2013), DoD policy requires that commanders immediately refer all sexual

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Civil Rights’ Interrogatory Nos. 59 & 87. The Coast Guard reports to the Department of Homeland Security during peacetime and to the DoD (by way of the Navy) during wartime. See DoD, *Military Service Branches*, <http://www.todaysmilitary.com/service-branches>.

⁸U.S. Navy, Navy JAG Corps’ Military Justice Litigation Career Track (document produced by the Navy, on file with the U.S. Commission on Civil Rights) at 1.

⁹ *Id.* at 2.

¹⁰ U.S. Marine Corps Response to the U.S. Commission on Civil Rights’ Interrogatory No. 87.

¹¹ Nate Galbreath, during in-person meeting with DoD officials, Alexandria, VA, Nov. 29, 2012.

¹² DOD INSTRUCTION 5505.3, INITIATION OF INVESTIGATIONS BY DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS 1 (June 21, 2002, replaced by DoD Instruction 5505.03 on Mar. 24, 2011), available at <http://www.dtic.mil/whs/directives/corres/pdf/550503p.pdf>.

¹³ *Patton Statement* at 11.

¹⁴ DOD INSTRUCTION 5505.3, *supra* note 12 at 5.

¹⁵ *Id.* at 6.

assault reports to an MCIO for investigation.¹⁶ When a sexual assault perpetrated by a Service member occurs off base within the United States, local law enforcement agencies “may defer prosecution to the [military] or they may not.”¹⁷ Regardless of civilian law enforcement action, an MCIO conducts an investigation. For sexual assaults that occur off base in a foreign country, the MCIO “normally conducts joint or collateral investigations with local foreign law enforcement agencies.”¹⁸ Even if civilian or foreign law enforcement takes responsibility for conducting the investigation but then fails to complete it, the MCIO may make an independent decision to conduct further investigation.¹⁹

MCIO investigators are required to track and report developments in each case.²⁰ Supervisory agents review investigative case files for approval,²¹ and criminal investigators also coordinate with the prosecutor handling the case.²² While a Service member is under investigation for a criminal offense, his/her records are supposed to be flagged and all favorable actions suspended.²³

A victim who is sexually assaulted within the United States²⁴ also has the option to initiate a criminal investigation with civilian authorities. Professor Dwight Sullivan testified:

¹⁶ Telephonic meeting with Nathan Galbreath, Ph.D., DoD SAPRO, June 10, 2013; DoD INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES 17 (Mar. 28, 2013), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>; MCM, R. 303, at II-19.

¹⁷ Dep’t of the Army Response to the U.S. Commission on Civil Rights’ Interrogatory No.105.

¹⁸ *Id.*

¹⁹ Dep’t of the Army Response to the U.S. Commission on Civil Rights’ Interrogatory No.105 (referencing AR 195-2, Criminal Investigation Activities 8 (May 15, 2009), *available at* <http://www.fas.org/irp/doddir/army/ar195-2.pdf>. See also 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 5-12 (June 18, 2007), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/552507p.pdf>.

²⁰ DoD OIG, REVIEW OF MATTERS RELATED TO THE SEXUAL ASSAULT OF LANCE CORPORAL MARIA LAUTERBACH, U.S. MARINE CORPS 10 (Oct. 18, 2011), *available at* [http://www.dodig.mil/Inspections/IPO/reports/LauterbachFR_\(redacted\).pdf](http://www.dodig.mil/Inspections/IPO/reports/LauterbachFR_(redacted).pdf) (describing Marine Corps tracking procedures).

²¹ *Id.* at 11.

²² See, e.g., Criminal Investigative Division Regulation 195-1, Section 15-1 at 5 (on file with the U.S. Commission on Civil Rights).

²³ See, e.g., AR 600-8-2, Suspension of Favorable Personnel Actions (Flag) 2-3 (Oct. 23, 2012), *available at* http://www.apd.army.mil/pdffiles/r600_8_2.pdf.

²⁴ On the other hand, according to DoD’s Annual Report, there were 239 reported sexual assaults in combat areas (i.e., outside the United States) in FY 2012 and 261 such reports in FY 2011. This represents 8.1 percent of the total reports in FY 2012 and 9.6 percent of reports in FY 2011. These numbers do not include reports made in non-combat areas outside the United States. *DoD FY12 Annual Report on Sexual Assault, Vol. 1* at 85.

[A]ny sex offense committed by a military member in the United States can be prosecuted either by the . . . military criminal justice system, or by a state court or in federal district court, and in the case of state courts, the same case can actually be prosecuted in both the military justice system and the state court because you don't have the double jeopardy bar there with different sovereigns.

...

[I]f we allow military commanders to exercise their prosecutorial discretion while also allowing civilian authorities to exercise their prosecutorial discretion, we end up with a combination of more convictions than we would have if either one of those was the sole prosecutorial discretion authority.²⁵

If a sexual assault victim is dissatisfied with how the investigation into his/her allegations is being conducted, the victim may file a complaint with DoD's OIG.²⁶ In 2011, the GAO found that DoD's OIG had not been performing its responsibilities of overseeing sexual assault investigations and was "not monitoring or evaluating the [S]ervice [branches'] investigations of sexual assault."²⁷ However, in 2012, the OIG evaluated closed cases of MCIOs' sexual assault investigations, as in prior years, and released a comprehensive report in July 2013.²⁸ The report investigated 501 closed sexual assault investigations from 2010 and found that 56 (or 11 percent) of these closed cases had significant deficiencies, and that 31 of the 56 closed investigations were reopened by the respective Service.²⁹

Forensic Examinations

If a victim makes either a restricted or an unrestricted sexual assault report within one week of the assault (or longer if circumstances dictate), s/he has the opportunity to undergo a forensic examination during which a healthcare provider collects evidence from the victim's body.³⁰ In

²⁵ Sullivan testimony, *Briefing Transcript*, at 86-87. *See also id.* at 134-35.

²⁶ DoD Instruction 6495.02 specifies that the DoD Inspector General's Office shall oversee sexual assault investigations. DoD INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES 15 (Mar. 28, 2013), available at <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>.

²⁷ GAO, MILITARY JUSTICE: OVERSIGHT AND BETTER COLLABORATION NEEDED FOR SEXUAL ASSAULT INVESTIGATIONS AND ADJUDICATIONS 9, 13 (2011), available at <http://www.gao.gov/new.items/d11579.pdf>. The GAO found no evidence of Inspector General oversight at the service level for any of the 2,594 sexual assault investigations that DoD reported completed by the services in FY 2010. *Id.* at 13-14.

²⁸ DoD OIG Response to the U.S. Commission on Civil Rights' Interrogatory 137.

²⁹ DoD OIG, EVALUATION OF THE MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS SEXUAL ASSAULT INVESTIGATIONS 5 (2013), available at <http://www.dodig.mil/pubs/documents/DODIG-2013-091.pdf>.

³⁰ *See* DoD DIRECTIVE 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 3-5 (Jan. 23, 2012, Incorporating Change 1, Apr. 30, 2013), available at <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf>; DoD INSTRUCTION 6495.02, *supra* note 26 at 54.

the civilian context, this is called a “rape kit.”³¹ The DoD refers to it as a Sexual Assault Forensic Examination or “SAFE.”³²

In FY 2011, DoD’s Sexual Assault Prevention and Response Office (SAPRO) revised and reissued its policy on SAFE³³ and its accompanying instructions for victims and subjects.³⁴ The revised policy clarified procedures, provided detailed instructions for evidence collection, and improved procedures for the examination of victims.³⁵ The DoD’s goals were to provide comprehensive guidance to military healthcare practitioners conducting the exam,³⁶ and to emphasize military-wide best practices for the collection and maintenance of forensic evidence.³⁷

If the victim’s military installation does not have the capability to perform this forensic exam, DoD policy requires that the victim be transported to a military facility or a local, non-military facility that has the capability.³⁸ Additionally, the Navy has been selected to participate in a Sexual Assault Forensic Examination (SAFE) Telemedicine Center Pilot Project with the DOJ, Office of Crimes of Violence, Department of Navy Sexual Assault and Response Office, Navy Bureau of Medicine and Surgery, and Massachusetts Department of Health. This project allows Naval healthcare providers performing a forensic medical exam to get remote assistance from experts via audiovisual technology.³⁹

³¹ See Rape, Abuse & Incest National Network, *What is a Rape Kit?*, <http://www.rainn.org/get-information/sexual-assault-recovery/rape-kit>.

³² DOD DIRECTIVE 6495.01, *supra* note 30, at 14.

³³ DD FORM 2911, DOD SEXUAL ASSAULT FORENSIC EXAMINATION REPORT (Sept. 2011), *available at* http://www.sapr.mil/public/docs/miscellaneous/toolkit/DD_Form_2911.pdf.

³⁴ *DoD FY11 Annual Report on Sexual Assault* at 13.

³⁵ *Id.*

³⁶ *Id.*

³⁷ DoD OIG Response to the U.S. Commission on Civil Rights’ Interrogatory 103. Forensic evidence is of special significance, as it is often the most concrete, scientific evidence that a sexual assault occurred, and it is essential to keep such evidence safe to facilitate prosecution. See GAO, *MILITARY PERSONNEL: DoD HAS TAKEN STEPS TO MEET THE HEALTH NEEDS OF DEPLOYED SERVICEWOMEN, BUT ACTIONS ARE NEEDED TO ENHANCE CARE FOR SEXUAL ASSAULT VICTIMS* 21-22 (2013), *available at* <http://www.gao.gov/assets/660/651624.pdf>.

³⁸ DOD INSTRUCTION 6495.02, *SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM PROCEDURES* 51, 54 (Mar. 28, 2013), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>. (In cases where the military facility lacks capability, DoD has signed memoranda of understanding/agreements with local non-military facilities to perform the exams.)

³⁹ Navy SAPRO Response to the U.S. Commission on Civil Rights’ Interrogatory No. 85, p. 7.

A recent study by the GAO found that military sexual assault victims did not always receive timely and confidential forensic exams,⁴⁰ but in 2012, DoD's OIG began evaluating DNA collection requirements for criminal investigations. The findings and accompanying report have yet to be released.⁴¹

Analysis of Investigation Outcomes in FY 2011

The DoD provided data to the U.S. Commission on Civil Rights covering unrestricted sexual assault reports with completed investigations for FY 2011 (the most recent year for which data was available).⁴²

Sufficient Evidence to Support Command Action

In the civilian context, a prosecutor determines whether a charge is “substantiated” by determining if the allegations are supported sufficiently or verified by corroborating information to justify further action. However, in the military justice system, the decision of whether to proceed to trial rests in the accused's chain of command. Authority for initial disposition was recently raised from the subject's immediate commander to the first commander in the chain of command who is an O-6 *and* who is a Special Court-Martial Convening Authority.⁴³

For the initial disposition of any alleged crime, including sexual assault charges, the discussion portion of the Rule for Courts-Martial 306 states that in deciding how an offense should be disposed of, factors the command should consider, to the extent they are known, include the

⁴⁰ GAO, MILITARY PERSONNEL: DOD HAS TAKEN STEPS TO MEET THE HEALTH NEEDS OF DEPLOYED SERVICEWOMEN, BUT ACTIONS ARE NEEDED TO ENHANCE CARE FOR SEXUAL ASSAULT VICTIMS, *supra* note 37 at 19-22 (finding that “Sexual Assault Response Coordinators, Victim Advocates, and healthcare personnel differed in their understanding as to where to take a sexual assault victim for a forensic examination—a potentially problematic issue, given that the quality of forensic evidence diminishes the later it is collected following a sexual assault.”). *See also Report of the Defense Task Force* at 74 (“Most military medical clinics and hospitals do not perform SAFEs because their staffs are not trained in performing these exams or do not perform these exams frequently enough to maintain their proficiency.”); *Id.* at 77 (“The Task Force found DOD's procedures for collecting and documenting data about military sexual assault incidents lacking in accuracy, reliability, and validity.”) For example, Navy Petty Officer 3rd Class Jenny McClendon contends she was unable to get a SAFE aboard the ship where she was raped, and, therefore, never received one. James Kitfield, *The Enemy Within*, NATIONAL JOURNAL, Sept. 13, 2012, http://www.nationaljournal.com/magazine/the-military-s-rape-problem-20120913?mrefid=site_search&page=1.

⁴¹ DoD OIG Response to the U.S. Commission on Civil Rights' Interrogatory No. 137.

⁴² For a description of the data DoD produced, *see* [Appendix B](#).

⁴³ DoD, OFF. OF THE SEC'Y OF DEF., INITIATIVES TO COMBAT SEXUAL ASSAULT IN THE MILITARY (2012), available at <http://www.defense.gov/news/DoDSexualAssault.pdf> (emphasis added).

availability and admissibility of evidence, and the character and military service of the accused.⁴⁴ Thus, commanders working with their judge advocate advisor may make disposition decisions that appear to be inconsistent for similar charges across commands.

As reflected in [Figure 5.1](#) below, among the 941 known Service member investigations for penetration offenses (rape, aggravated sexual assault, and forcible sodomy) in FY 2011,⁴⁵ 412 (or 43.8 percent) had sufficient evidence to support command action for a sexual assault charge.⁴⁶ [Figure 5.1](#) also shows that of the 577 Service member subjects investigated for sexual contact offenses and attempts to commit a sexual offense (including attempted penetration offenses), 378 (or 65.5 percent) had sufficient evidence to support command action for a sexual assault charge.

⁴⁴ *MCM* 306(b). Actions available to the commander include: no action; administrative action; nonjudicial punishment; disposition (preferral) of charges; or forwarding for disposition (to a higher command level with greater authority for a more severe disposition). *Id.*

⁴⁵ This figure does not include investigations where the identity of the perpetrator was unknown or where the perpetrator was a civilian or foreign national. It also excludes 110 Service members who were investigated and prosecuted by civilian authorities and seven who deserted or were deceased. Also, this figure does not include perpetrators identified as civilians or foreign nationals who had a military pay-grade.

⁴⁶ The subject records indicate the most serious sexual offense investigated. They do not indicate the offense for which there was insufficient evidence to support command action.

Figure 5.1

Subjects with sexual assault investigations the command reviewed for possible action by penetration offenses versus sexual contact and attempted sexual offenses, FY 2011

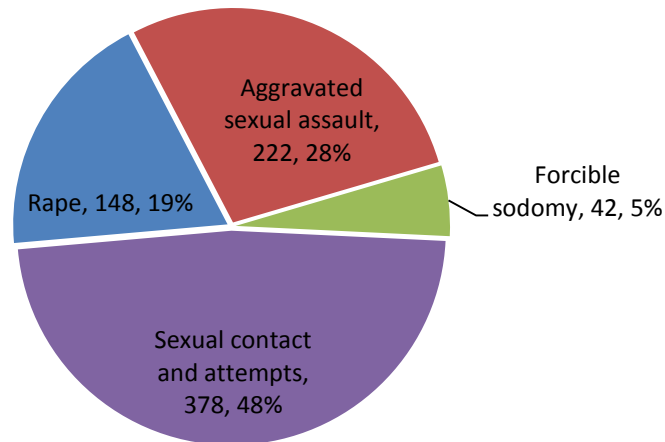
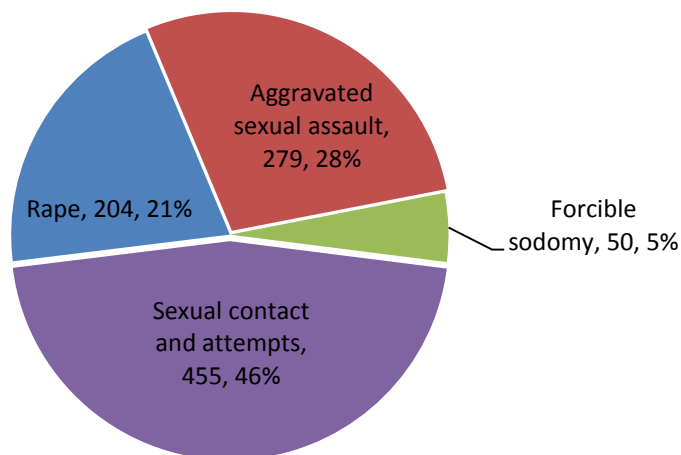
Case Disposition	Penetration Offenses	Sexual Contact and Attempts	Total
Command Action Precluded	368	115	483
Victim declined to participate in military justice action	153	31	184
Insufficient evidence of any offense	213	82	295
Statute of limitations has expired	2	2	4
Victim died	0	0	0
Action Declined by Commander	40	7	47
Case unfounded by Command	40	7	47
Evidence for commander action for sexual assault charge	412	378	790
Court-Martial Charge Preferred	362	126	488
Nonjudicial punishments (Article 15 UCMJ)	22	165	187
Administrative discharge	17	31	48
Adverse administrative action	11	56	67
Evidence for commander action for other criminal offenses	121	77	198
Probable cause for only non-sexual assault offense	121	77	198
Total	941	577	1518

Source: Compiled by USCCR from DOD FY 2011 sexual assault data.

As seen above, for FY 2011, victims declined to continue participating in the investigation or the prosecution against 153 of the 941 Service members investigated for penetration offenses (16.3 percent). For Service members investigated for sexual contact offenses and attempted sexual offenses, victims discontinued participation in 31 of 577 investigations (5.4 percent).

Depicted in [Figure 5.2](#) below, among those cases that were sufficiently supported to merit command action for a sexual offense (although not necessarily for the most serious sexual offense investigated), 52 percent included investigations for penetration-type offenses.⁴⁷ The remaining 48 percent were investigated for a sexual contact offense or an attempted sexual offense.

⁴⁷ [Figure 5.2](#) includes 10 subjects who were not designated as Service members but nevertheless received adverse administrative action for a sexual offense. It also includes four subjects, also not designated as Service members, who were deemed to have enough evidence against them to support command action for a non-sexual offense.

Figure 5.2**Offenses investigated with evidence for commander action, FY 2011****Subject records with evidence for
Commander action, sexual offense****Subject records with evidence for
Commander action, any offense**

Source: Compiled by USSCR from DOD FY 2011 sexual assault data.

Because a commander has a broader range of options for disposition than a civilian prosecutor, any comparisons between the disposition of sexual assault allegations in the military and those handled in the civilian justice system is inherently unreliable.⁴⁸

Victims' Decisions to Cease Prosecution

The willingness of the victim to maintain his or her participation in the judicial process until a final disposition of the case is another category of relevant data.

As is also true in a civilian criminal proceeding, if at any point the victim decides to stop cooperating with military investigators and prosecutors, the continued investigation or prosecution may end based on lack of evidence to support continued efforts. Nevertheless, even though the DoD's 2011 Annual Report on Sexual Assault categorized cases where the victim declined to participate as "Command Action Precluded,"⁴⁹ it is still within the Services' discretion to continue even without victim participation. According to the Navy,

In most situations, the commanders will not move forward with the case if the victim does not want to participate because there will not be enough evidence with[out] the victim's statement to proceed. [But] if there is enough evidence to proceed and that evidence is admissible under the Military Rules of Evidence, then the determination to proceed will be made on a case-by-case basis and with the advice of a judge advocate.⁵⁰

Likewise, according to the Army, "Commanders can and do take actions in some cases against offenders [even] when the victim declines to cooperate in the military justice proceeding."⁵¹ In FY 2011, 184 subjects accused of perpetrating sexual assault did not receive any form of corrective action or discipline because their alleged victims declined to participate in the military justice process. However, in other cases where the victim refused to cooperate with a military justice proceeding, 10 subjects were administratively discharged, and two were given non-judicial punishment. Moreover, in four cases where the victim's lack of cooperation

⁴⁸ To provide some context, however, it has been estimated that in the civilian system "14% to 18% of all reported sexual assaults are prosecuted." Rebecca Campbell et al., *Systems Change Analysis of SANE Programs: Identifying the Mediating Mechanisms of Criminal Justice System Impact*, Research Report Submitted to the U.S. Department of Justice, Jan. 23, 2009, at 1 (citing Campbell, R. (2008), *The psychological impact of rape victims' experiences with the legal, medical, and mental health systems*, AMERICAN PSYCHOLOGIST, 68, 702-717; Spohn, C. (2008), *The criminal justice system's response to sexual violence*, Paper presented at the National Institute of Justice Sexual Violence Research Workshop, Washington, DC.), available at www.ncjrs.gov/pdffiles1/nij/grants/226497.pdf.

⁴⁹ DoD FY11 Annual Report on Sexual Assault at 32, Exhibit 1, Point O.

⁵⁰ Dep't of the Navy, Chief of Naval Operations Response to the U.S. Commission on Civil Rights' Interrogatory No. 101.

⁵¹ Dep't of the Army Response to the U.S. Commission on Civil Rights' Interrogatory No. 101.

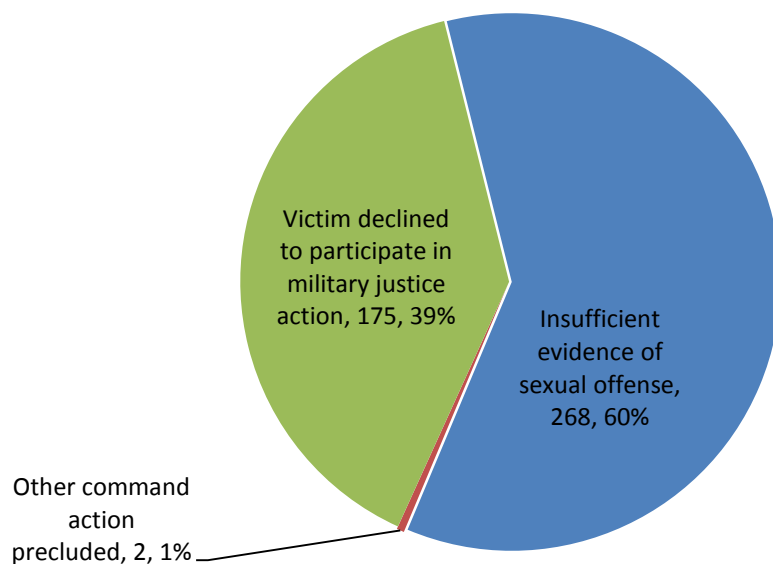
resulted in findings of insufficient probable cause for the sexual offense, the subjects received other adverse administrative actions based on a concurrent non-sexual assault charge.⁵²

Further, as depicted in [Figure 5.3](#), female victims were more than twice as likely as male victims to cease participating in an ongoing investigation. Among the records with a sole female victim, where there was not enough evidence to support commander action, the victim ceased cooperating in 39 percent of the cases. For records with a sole male victim that ended with insufficient evidence to support commander action, the victim ceased participating in 16 percent of cases.⁵³ The motives of those victims who ceased participating in the investigation are unknown.

Figure 5.3

Reasons command action was precluded, by victim gender—subject records with disposition indicating that command action was precluded, FY 2011

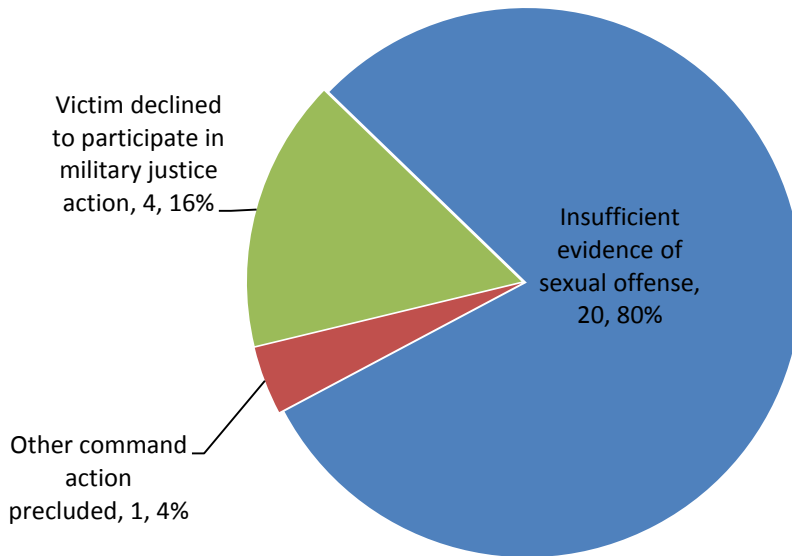
Subject records when command action was precluded for sole female victims



⁵² DoD FY11 Annual Report on Sexual Assault at 35-36, Enclosure 1 (Army Annual Report on Sexual Assault).

⁵³ It should be noted, however, that sole male victims constituted only 25 disposition records, and therefore this statistic may not be reflective of a trend over time.

Subject records when command action was precluded for sole male victims



Source: Compiled by USCCR from DOD FY 2011 sexual assault data.

In recent years, DoD and the Services have focused on improving training for investigators and judge advocates, and have recognized the benefits of standardized training and processes. The Secretary of Defense has issued an updated strategic plan to continue with these efforts, and pledged to devote the necessary resources.⁵⁴ Thus, DoD now has a proposal to implement best practices across Services; to expand, improve, and standardize training; and to ensure oversight by the DoD OIG. The efficacy of such renewed efforts is yet to be determined.

⁵⁴ SEC'Y OF DEF., 2013 DEPARTMENT OF DEFENSE SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) STRATEGIC PLAN (2013), *available at* http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Atch_06052013.pdf.

CHAPTER 6: DISCIPLINE AND COMMANDER DISCRETION

The prosecution and imposition of discipline must be seen as fair by military personnel in order to protect the credibility of the military command structure. In addition, uniform and equitable standards safeguard the interests of both victims and alleged perpetrators.

Disciplinary Procedures

After an investigation is complete, the accused's commander¹ consults with legal counsel and decides the "initial case disposition" of alleged criminal offenses.² The disposition options available to a commander are: (1) taking no action, (2) taking administrative action, (3) imposing a nonjudicial punishment (known as "Article 15"³), or (4) referring the case to court-martial. Administrative action includes corrective measures such as admonition or reprimand. Adverse administrative actions and nonjudicial punishment are more severe and may include fines, forfeitures, reduction in grade, and even administrative discharge.⁴ If the commander

¹ As explained in the Introduction, the term "commander," as used in this report, refers to a commander with disposition authority for sexual assault allegations. In April 2012, the Secretary of Defense withheld disposition authority for allegations of completed or attempted rape, sexual assault, and forcible sodomy from all commanders who do not possess at least Special court-martial convening authority and who are not in the grade of O-6 (i.e., colonel or Navy captain) or higher. Memorandum of Secretary of Defense, Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012), available at http://www.dod.gov/dodgc/images/withhold_authority.pdf, effective by June 28, 2012.

² *MCM*, R. 306, at II-25. Navy commanders are required to send a Special Incident Report or Operations Report upon receiving an unrestricted sexual assault report and to file monthly updates until final resolution of the case. See NAVY OPERATIONS INSTRUCTION (NAVINST) F3100.6J, SPECIAL INCIDENT REPORTING (OPREP-3 PINNACLE, OPREP-3 NAVY BLUE, AND OPREP-3 NAVY UNIT SITREP) PROCEDURES (Oct. 4, 2011); OPNAVINST 1752.1B, SEXUAL ASSAULT VICTIM INTERVENTION (SAVI) PROGRAM (Dec. 29, 2006), available at http://doni.daps.dla.mil/Directives/01000_Military_Personnel_Support/01-700_Morale_Community_and_Religious_Services/1752.1B.PDF.

³ A commander's authority to impose nonjudicial punishment arises from Article 15 of the UCMJ.

⁴ See *DoD FY11 Annual Report on Sexual Assault* at 47. The severity of nonjudicial punishment that a commander may impose is based on the rank of an accused and the rank of a commander. *MCM* PART V, at V-4 – V-5; JAG INSTRUCTION 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL Section 0111 (June 26, 2012), available at <http://www.jag.navy.mil/library/instructions/JAGMAN2012.pdf>. "Conditions that subject soldiers to discharge" include a pattern of minor disciplinary infractions as well as commission of a serious military or civil offense. See, e.g., AR 635-200, Active Duty Enlisted Separations 102 (July 6, 2005 and revised on Sept. 6, 2011).

believes more severe punishment is appropriate, s/he “refers” the case to court-martial (also called “preferring” court-martial charges).⁵

There are three types of courts-martial: (1) Summary, (2) Special, or (3) General. Summary court-martial is available only to resolve charges against enlisted Service members. It consists of one commissioned officer who is charged with “thoroughly and impartially inquir[ing] into both sides of the matter and . . . ensur[ing] that the interest of both the Government and the accused are safeguarded and that justice is done.”⁶ Special and General courts-martial consist of a military judge, military prosecutor (or “trial counsel”), defense counsel, and court-martial members who perform functions similar to a civilian jury, but with important distinctions.⁷ There are at least three officers in a Special court-martial and at least five officers in a General court-martial. An accused before a Special or General court-martial is entitled to free legal representation by military defense counsel, or civilian counsel at his/her own expense.⁸

Before referring a case to a General court-martial, a commander must appoint an officer to conduct a fact-finding investigation, known as an Article 32 hearing, to determine whether reasonable grounds exist to believe an accused committed an offense and, if so, to recommend the appropriate court-martial level.⁹ The commander retains full discretion in deciding whether to refer the case to trial, regardless of the investigating officer’s recommendation.¹⁰

⁵ “Referral” is the order of a convening authority for an accused Service member to be tried by court-martial. The commander must have “reasonable grounds” to refer or “prefer” court-martial charges. U.S. Marine Corps SAPR Response to Request for Documents No. 8.; *MCM R.* 601, at II-52.

⁶ *MCM R.* 1301, at II-179-180. The maximum punishment a Summary court-martial may impose is limited and varies with an accused’s grade. For grade E-4 and below, the maximum sentence is 30 days of confinement (incarceration), reduction in rank to E-1, and restriction for 60 days. A Summary court-martial cannot sentence an accused of the rank of E-5 or higher to confinement, nor can it reduce the accused’s rank by more than one grade. *See Id.*

⁷ *MCM R.* 501, at II-42 & R. 805(b), at II-79-80. An accused may request trial by judge alone. If there are court-martial members, an accused may request that it be composed of at least one-third enlisted personnel. *MCM R.* 501(a)(1), at II-42 & R. 503(a)(2), at II-46-47. A Special court-martial sentence is limited to no more than forfeiture of two-thirds basic pay per month for one year, and for enlisted personnel, no more than one year of confinement and/or a bad-conduct discharge. *MCM R.* 1003, at II-126-128. General court-martial allows for the maximum punishment set for each offense, including death (for certain offenses), confinement, a dishonorable or bad-conduct discharge for enlisted personnel, or a dismissal for officers. *MCM R.* 1003, at II-126-128. General court-martial sentences also may include any of the less severe punishments available in a Summary or Special court-martial. *See DoD FY11 Annual Report on Sexual Assault* at 45.

⁸ *MCM R.* 506, at II-50.

⁹ 10 U.S.C. § 832, UCMJ, Art. 32. An Article 32 hearing affords an accused more rights than a preliminary hearing or a Grand Jury proceeding in the civilian context. An accused has the right to be present, have counsel appointed and present, cross-examine witnesses, call witnesses of his or her own, and make a statement. *Id.*

¹⁰ *MCM R.* 401, at II-31-32.

After pre-trial discovery,¹¹ the commander selects the court-martial members.¹² The parties may contest the selections through peremptory challenges.¹³ Once the court-martial member selection is complete, the trial proceeds. As in civilian cases, the trial counsel (prosecutor) presents evidence on the charges and the accused may confront the evidence, cross-examine any witnesses, and present his/her own evidence. The Military Rules of Evidence closely resemble the Federal Rules of Evidence used by U.S. District Courts in civilian cases, and the military has a version of the “rape shield law” to protect a victim’s previous sexual behavior or predisposition.¹⁴

However, unlike civilian criminal cases, military court-martial members need not reach a unanimous decision. Only a two-thirds majority is needed to convict.¹⁵ If the accused is found guilty, the court-martial members determine the sentence.¹⁶ The accused’s commander approves or disapproves the court-martial members’ findings of guilt and either approves or reduces the sentence.¹⁷ “The [commander] may for any reason or no reason disapprove the legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased.”¹⁸ Service members convicted of a sexual offense also may be required to register as sex offenders, depending on the charge upon which the conviction was obtained and whether the sentence included confinement.¹⁹

¹¹ See *MCM R.* 701, 702, 703, at II-56-65.

¹² *MCM R.* 502, at II-42-43.

¹³ *MCM R.* 912, at II-103-6.

¹⁴ *MCM R.* 412, at III-21.

¹⁵ *MCM R.* 921(c)(B), at II-119.

¹⁶ *MCM R.* 502, at II-42; *MCM R.* 1001, at II-122; *MCM R.* 1002, at II-125.

¹⁷ *MCM R.* 1107(b)(1), at II-152 (“The action to be taken on the findings and sentence is within the sole discretion of the convening authority . . . [and] is a matter of command prerogative.”).

¹⁸ *MCM R.* 1107(d)(1), at II-153; see *MCM R.* 1101(c), at II-138. Commanders have access to judge advocates who advise them regarding the final disposition, including the sentence, for a criminal offense and who is required to forward a recommendation to the commander. *MCM R.* 1106, at II-149-151.

¹⁹ See DOD INSTRUCTION 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY 78-82 (Mar. 11, 2013), available at <http://www.dtic.mil/whs/directives/corres/pdf/132507p.pdf>. See also OPNAVINST 1752.3, POLICY FOR SEX OFFENDER TRACKING, ASSIGNMENT AND ACCESS RESTRICTIONS WITHIN THE NAVY (May 27, 2009), available at http://doni.documentservices.dla.mil/Directives/01000_Military_Personnel_Support/01-700_MoraleCommunity_and_Religious_Services/1752.3.pdf; NAVAL MILITARY PERSONNEL MANUAL (MPM) 1910-233. MANDATORY SEPARATION PROCESSING (Oct. 18, 2010); MPM 1910-142, SEPARATION BY REASON OF MISCONDUCT – COMMISSION OF A SERIOUS OFFENSE (Nov. 10, 2009). However, according to Professor Dwight Sullivan, if a Service member receives confinement for “any offense that has the word ‘indecent’ in it,” there is

(cont'd)

Characterization of Discharge of Service Members Accused of Sexual Assault

As discussed above, commanders may impose an administrative discharge as a form of adverse administrative action. A Service member facing court-martial for a sexual assault may seek to be administratively discharged in lieu of a court-martial.²⁰ It is also military service policy that commanders initiate administrative discharges for Service members whose courts-martial or civilian court convictions for sexual assault are final, but are not punitively discharged in connection with such conviction.²¹

When a Service member is administratively discharged, the characterization of discharge is listed as one of three options: (1) Honorable discharge, (2) General discharge under Honorable conditions, or (3) General discharge under Other Than Honorable Conditions.²² An Honorable

(cont'd from previous page)

“mandatory notification to both state and local [sex offender] registration officials.” Sullivan testimony, *Briefing Transcript*, at 145-46.

²⁰ For example, Marine Corps policy provides that a Marine may be separated upon his or her request in lieu of trial court-martial, if it is determined that the Marine is unqualified for further military service. MCO P1900.16F, MARINE CORPS SEPARATION AND RETIREMENT MANUAL, ¶¶4104.4 & 6419. The request for discharge in lieu of court-martial must include an acknowledgement of guilt and a summary of the evidence. *Id.* at ¶¶ 4104.4.b. & 6419.3.e. See also AFI 36-3207, SEPARATING COMMISSIONED OFFICERS, para 2.2(July 2004); AFI 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN, Chapter 4 (July 9, 2004); AR 600-8-24, Officer Transfers and Discharges 49 (Apr.12, 2006); AR 635-200, Active Duty Enlisted Separations 81 (July 6, 2005 and revised on Sept. 6, 2011).

²¹ Col. Alan Metzler, in-person interview, Alexandria, VA, Nov. 29, 2012. See also SECNAVINST 1920.6C, ADMINISTRATIVE SEPARATION OF OFFICERS (Sept. 20, 2011), Enclosure (8) page 12; OPNAVINST 1752.3, *supra* note 19 at para. 3.D (“Navy members who are convicted of a sex offense while on active duty, or in a reserve status, and who are not punitively discharged, shall be processed for administrative separation”); MARINE ADMINISTRATIVE MESSAGE (MARADMIN) 317/09, POLICY FOR SEX OFFENDER DISCHARGES (May 20, 2009), available at <http://www.marines.mil/News/Messages/MessagesDisplay/tabid/13286/Article/112596/policy-for-sex-offender-discharges.aspx> (providing that the Marine Corps will process an administrative separation for any Marine who, while on active duty or in a reserve status, is convicted of a sex crime as defined by the Sex Offender Registration and Notification Act, whether in a civilian criminal court or a court-martial); AR 600-20, para. 8-5o(34) and 635-200, chapter 14-12c(2)(b)(3) (requiring unit commanders to process for administrative separation all soldiers convicted of sexual assault in any type of court proceeding); MPM 1910-233, MANDATORY SEPARATION PROCESSING (Oct. 18, 2010) para. 1.a.; MPM 1910-142, SEPARATION BY REASON OF MISCONDUCT – COMMISSION OF A SERIOUS OFFENSE (Nov. 10, 2009) para. 3.d. Despite the pre-existing policy, Congress recently mandated that all Service members convicted of sexual assault be discharged. See National Defense Authorization Act for Fiscal Year 2013, 10 USCA § 1561 (NOTE), Pub. L. No. 112-239, § 572(a)(2).

²² Only a court-martial can impose a bad-conduct discharge or a dishonorable discharge. MCM R. 1003, at II-127-28

discharge and a General discharge under Honorable conditions entitle a veteran to nearly all benefits; benefits may be limited or precluded for other characterizations of discharge.²³

Substantiated allegations of sexual assault against a Service member, or even a court-martial conviction for a sex offense, do not necessarily result in a discharge under Other Than Honorable Conditions. The Services' regulations provide conflicting guidance as to when it is appropriate for an administrative discharge based on sexual misconduct to be characterized as under Honorable conditions.²⁴

The military does not maintain data that tracks the characterizations of discharges for Service members accused of sexual assault.²⁵ Therefore, it is impossible to know how often Service members accused of sexual assault were given an Honorable discharge or a General discharge under Honorable conditions either as nonjudicial punishment, in lieu of a court-martial, or after a court-martial conviction for sexual assault.

²³ For example, to be eligible for the Post-9/11 GI Bill, a discharge must be Honorable, and not simply a General discharge under Honorable Conditions. U.S. Air Force Office of The Judge Advocate General comments to U.S. Commission on Civil Rights at 5, June 7, 2013, in response to affected agency review.

²⁴ The separation of an Army officer, for example, will generally be under honorable conditions when the officer "(1) Submits an unqualified resignation . . . under circumstances involving misconduct [or] (2) [i]s separated based on misconduct, including misconduct for which punishment was imposed, which renders the officer unsuitable for further service . . ." AR 600-8-24, Officer Transfers and Discharges para. 1-22b (Apr. 12, 2006). However, "[a]n Army officer will normally receive an 'Under Other Than Honorable Conditions' [characterization of a General discharge] when they [sic] – (1) Resign for the good of the service . . . (3) Are involuntarily separated due to misconduct, moral or professional dereliction . . . [or] (4) Are discharged following conviction by civilian authorities." *Id.* at para. 1-22c. *See also* AR 635-200, Active Duty Enlisted Separations, para. 3-7a(2)(b)-(c), para. 10-8a, para. 3-7a(2)(d) (July 6, 2005 and revised on Sept. 6, 2011) (providing guidance regarding characterization of administrative discharge of Soldiers); MCO P1900.16F, MARINE CORPS SEPARATION AND RETIREMENT MANUAL, para. 1004, 1004.3 (a Marine may receive an Honorable characterization of discharge or a general discharge under Honorable conditions even when separated in lieu of trial by court-martial "if the Marine's service is otherwise so meritorious that any other characterization would clearly be inappropriate."); MCO P1900.16F, para. 1004.2.a(2) and 1004.2.b(2); SECNAVINST 1920.6C, ADMINISTRATIVE SEPARATION OF OFFICERS (Sept. 20, 2011), Enclosure (3) page 7, Enclosure (5) pages 1-2; MPM 1910-302, GENERAL CONSIDERATIONS ON CHARACTERIZATION OF SERVICE (June 2, 2008); MPM 1910-304, DESCRIPTION OF CHARACTERIZATION OF SERVICE (June 30, 2008); AFI 36-3206, ADMINISTRATIVE DISCHARGE PROCEDURES FOR COMMISSIONED OFFICERS (June 9, 2004); AFI 36-3207, SEPARATING COMMISSIONED OFFICERS (July 9, 2004); AFI 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN (July 9, 2004); AFI 51-201, ADMINISTRATIVE MILITARY JUSTICE (Oct. 25, 2012).

²⁵ The Navy explained that it cannot determine how many of its service members were administratively discharged due to a sexual assault because it uses the same Navy Separation Code (SPD Code) for all sexual misconduct, including non-contact offenses, such as viewing pornography. Chief of Naval Operations' Response to the U.S. Commission on Civil Rights' Interrogatory No. 120a.

Commander Discretion

The accused's commander has full discretion in deciding the dispositions of criminal offenses and the punishments imposed.²⁶ No policy guidance exists specifying that "allegations must be disposed of in a particular manner, [which] predetermined types or amounts of punishments are appropriate, or [if] adverse action is required in all cases or in a particular case."²⁷ The commander must obtain advice from a judge advocate, but the commander is not obligated to act upon that advice.²⁸ DoD policy lacks a clear standard for corrective or disciplinary action against commanders making discretionary determinations of whether there is sufficient evidence to support command action. In FY 2011, nearly half of the reported penetration-type sexual offenses, and nearly one-third of reported sexual contact offenses and attempted sexual offenses, were determined to have insufficient evidence to support command action.²⁹

A superior officer may not limit the commander's discretion in exercising authority.³⁰ On the other hand, a superior officer may withhold disposition authority.³¹

A commander with disposition or convening authority "is singularly powerful with respect to his influence over the military justice system."³² He/she has the power to conduct direct investigations before the case is referred to court-martial, authorize probable cause searches, refer cases to court-martial, grant witnesses immunity, negotiate and approve pretrial

²⁶ MCM R. 306(a), at II-25. See Memorandum of the Secretary of Defense, Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012), available at http://www.dod.gov/dodgc/images/withhold_authority.pdf, effective by June 28, 2012.

²⁷ Dep't of the Army's Response to Request for Document No. 10.

²⁸ UCMJ App. 2, Sec. 834, Art. 24 ("Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice.").

²⁹ Analysis of the U.S. Commission on Civil Rights. See [Figure 5.1](#), *supra* Chapter 5, at 48. A comparison to civilian contexts is difficult because, in the military, substantiated allegations of criminal conduct may be punished without being prosecuted, as discussed in this chapter.

³⁰ MCM R. 306(a), at II-25.

³¹ Memorandum of the Secretary of Defense, *supra* note 26 (withholding disposition authority from all commanders below the grade of O-6). The Marine Corps expanded this withholding of disposition authority to include sexual contact offenses. MARADMINS 372/12, WITHHOLD OF INITIAL DISPOSITION AUTHORITY IN CERTAIN SEXUAL ASSAULT CASES (July 13, 2012), available at <http://www.marines.mil/News/Messages/MessagesDisplay/tabid/13286/Article/110494/withhold-of-initial-disposition-authority-in-certain-sexual-assault-cases.aspx>.

³² Lindsay Nicole Alleman, *Who Is In Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. OF COMP. & INT'L L. 169, 170 (2006).

agreements, select court-martial members, approve sentences, grant clemency, and grant funding to the prosecution and defense counsel for retaining expert witnesses.³³

The Manual for Courts-Martial (MCM) directs commanders to dispose of criminal allegations at the *lowest* appropriate level.³⁴ The only written guidance for deciding the appropriate level states that commanders should consider several factors, including the accused's "character and military service."³⁵ The MCM establishes the *maximum* penalty for each offense in the UCMJ, but it provides no *minimum* penalty.³⁶ Therefore, commanders have various factors to consider, along with the advice of a judge advocate, to guide decisions.³⁷

A commander may not refer a case to a General court-martial for trial without having been advised by a judge advocate that adequate evidence supports the allegation.³⁸ However, a commander is free to forego any disciplinary action even if a judge advocate recommends

³³ MCM R. 303, 315(d), 407(a), 502(a)(1), 703(d), 704(c), 705, 1107(d)(1), 1107(d)(2), at II-19, II-41, II-42, II-63, II-66, II-68, II-153, III-14, III-15. The commander does not, however, have the power to change an acquittal to a conviction or to increase a sentence. MCM R. 1107(d)(2), at II-153.

³⁴ MCM R. 306(b), at II-25 (emphasis added).

³⁵ MCM R. 306(b), at II-25-26 (Other factors include the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline; when applicable, the views of the victim as to disposition; existence of jurisdiction over the accused and the offense; availability and admissibility of evidence; the willingness of the victim or others to testify; cooperation of the accused in the apprehension or conviction of others; possible improper motives or biases of the person(s) making the allegation(s); availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction; and, appropriateness of the authorized punishment to the particular accused or offense; and other likely issues.). Military leadership informed the Senate Armed Services Committee that they support removing "military service" as a consideration in the disposition of a sexual offense. *Hearing of the Senate Armed Services Committee*, June 4, 2013, at time marker 1:51-1:54, <http://www.senate.gov/isvp/?type=live&comm=armed&filename=armed060413>.

³⁶ See MCM, APPENDIX 12, at A12-1-7 (emphasis added). All sexual assault offenses have a maximum punishment of a dishonorable discharge or bad-conduct discharge and confinement terms ranging from one year for wrongful sexual contact to life for rape and forcible sodomy. *Id.*

³⁷ The Navy's Staff Judge Advocates are instructed to review a list of factors to evaluate sexual assault cases, which are enumerated in a newsmailer (OFFICE OF THE JAG CRIMINAL LAW DIVISION NEWSMAILER 2010-02, GUIDANCE AND TRAINING FOR SJA/TC ON CONSULTING WITH CONVENING AUTHORITIES IN SEXUAL ASSAULT CASES (Feb. 16, 2010)) and in a Sexual Assault Disposition Brief on a secure website accessible to Navy personnel. Chief of Naval Operations' Request for Documents Nos. 8-11.

³⁸ UCMJ App. 2, Sec. 834, Art. 24(a). The standard of proof applied in a staff judge advocate's advice is probable cause. MCM R. 406(b)(2), at II-40.

otherwise.³⁹ There is no mechanism currently in place to ensure that justice is administered consistently.⁴⁰

Concerns with the Current System

Some social scientists have noted that considering the “character and military service of the accused” when deciding the disposition of a sexual assault allegation may be based on false beliefs about who perpetrates sexual assault.⁴¹ They argue that sexual predators are adept at being likeable to authority figures and are “such masters of the ‘hidden persona’ . . . that their colleagues and commanders are often happy to offer positive character testimony to investigators and courts-martial.”⁴² Further, it may be difficult for a commander to be objective due to his or her relationship with the accused or the victim. In a public comment to the Commission, one retired commander explained, “The military is an experience that can create bonds within the ranks—up and down—in extraordinary ways and in extraordinary situations. Each of their lives is in the hands of [the] other, and they can become deeply indebted, consciously or unconsciously, for a lifetime.”⁴³

Retired Army psychiatrist, Brigadier General Lorree Sutton, believes that more than a decade of war has led military leaders to value achievement in combat above all other characteristics, and that this has created a situation where commanders tend to overlook or tolerate sexually-abusive conduct among subordinates.⁴⁴ Also, there may be a disincentive for a commander to uncover these problems if promotion potential or performance evaluations depend upon the

³⁹ DoD’s Office of Legal Policy’s Response to the U.S. Commission on Civil Rights’ Interrogatory No. 118 (citing Nonjudicial Punishment Procedure (Art. 15, UCMJ) Guidance in Part V, *MCM*, at V-1-9); DoD’s Office of Legal Policy’s Response to the U.S. Commission on Civil Rights’ Interrogatory No. 112.

⁴⁰ *Report of the Defense Task Force* at 85 (citing as an example, “Service Members from different Services jointly engaging in the same criminal activity may receive disparate treatment from convening authorities from different Services.”) See also Chief of Naval Operations’ Request for Documents Nos. 8-11.

⁴¹ See Kristen Houser, *Analysis and Implications of the Omission of Offenders in the DoD Care for Victims of Sexual Assault Task Force Report*, 13 VIOLENCE AGAINST WOMEN 961, 961-70 (2007).

⁴² James Kitfield, *The Enemy Within*, NATIONAL JOURNAL, Sept. 13, 2012, http://www.nationaljournal.com/magazine/the-military-s-rape-problem-20120913?mrefid=site_search&page=1 (quoting Russell Strand); Tim Madigan, *Q&A with Russell Strand, Retired Criminal Investigator*, STAR-TELEGRAM, Aug. 20, 2012, <http://www.star-telegram.com/2012/08/17/4188015/qa-with-russell-strand-retired.html>.

⁴³ Comment submitted by Lt. Col. Terry Moore, USAF (ret.) to the U.S. Commission on Civil Rights (Feb. 5, 2013).

⁴⁴ Gen. Lorree Sutton, telephone interview, Nov. 27, 2012. See also *Report of the Defense Task Force* at 34 (“[S]ome military personnel indicated that predators may believe they will not be held accountable for their misconduct during deployment because commanders’ focus on the mission overshadows other concerns.”).

conduct and performance of subordinates.⁴⁵ A commander might want to paint the most benign picture of his unit, without the negativity of sexual harassment or sexual assault in his or her ranks.

Many victims and victim advocacy groups insist that the disposition of sexual assault reports should be removed from the chain of command and instead be handled by an independent civilian authority.⁴⁶ Military law expert, Professor Elizabeth Hillman, and retired General Sutton support such fundamental change.⁴⁷ Professor Hillman argued military sexual assault should be prosecuted in civilian courts in order to “help to break the link between war, military service, and sexual violence.”⁴⁸ Some commanders agree that they are insufficiently trained to make complex legal decisions and that eliminating this responsibility would free them to focus on day-to-day operations.⁴⁹

Professor Eugene Fidell, a military law expert at Yale Law School, agrees that disposition authority must be taken outside the chain of command for all criminal offenses, not just sexual offenses, as is the case in Canada, the United Kingdom, and Israel. He advocates for a single, permanent military convening authority.⁵⁰ Professor Hillman agrees with Professor Fidell that a central prosecutorial authority would help to ensure consistency in all military criminal

⁴⁵ Jackie Speier, *Rapes of Women in Military ‘A National Disgrace’*, SFGATE (Apr. 16, 2011), <http://www.sfgate.com/opinion/article/Rapes-of-women-in-military-a-national-disgrace-2374845.php>. Professor Hillman also testified that the current system fails to protect the rights of minorities within the Armed Forces:

From the civil rights perspective then, the current system of prosecution within the military fails to protect the rights of many vulnerable minorities, including survivors of rape and sexual assault who suffer disability as a result of those experiences, women whose professional opportunities are limited by the prevalence of sexual assault, men, especially African-American men, who have too often been unfairly singled out for prosecution for these crimes, and gay men and lesbians, historically perceived as sexually deviant and therefore less deserving of protection, whether they have been the targets of or accused of the criminal misconduct themselves.

Elizabeth Hillman testimony, *Briefing Transcript*, at 88.

⁴⁶ Jim Forsyth, *House Committee Hearing to Address Sexual Assault in Military*, REUTERS, Jan. 23, 2013, <http://www.reuters.com/article/2013/01/23/us-usa-military-sex-hearing-idUSBRE90M09620130123>.

⁴⁷ Garry Trudeau and Lorree Sutton, *Breaking the Cycle of Sexual Assault in the Military*, WASH. POST, June 29, 2012, http://articles.washingtonpost.com/2012-06-29/opinions/35461103_1_military-sexual-assault-military-culture-trust; Hillman testimony, *Briefing Transcript*, at 92-94.

⁴⁸ Statement of Elizabeth L. Hillman, Professor, University of California, Hastings, School of Law, submitted to the U.S. Commission on Civil Rights 5 [hereinafter *Hillman Statement*], available at <http://www.eusccr.com/msa1.htm>.

⁴⁹ Comment submitted by Lt. Col. Terry Moore, USAF (ret.) to the U.S. Commission on Civil Rights (Feb. 5, 2013).

⁵⁰ Comment of Professor Eugene R. Fidell submitted to the U.S. Commission on Civil Rights (Dec. 11, 2012).

prosecutions.⁵¹ Both Fidell and Hillman argue that the military justice system is “opaque” because of its “decentralized character” in which a different commander controls the course of prosecution in each case.⁵² They argue that greater consistency and transparency would equal greater legitimacy.⁵³

In April 2013, Secretary of Defense Chuck Hagel asked Congress to amend the UCMJ to limit commanders’ discretion in overturning court-martial convictions.⁵⁴ The leadership of each of the Services has publicly agreed with this suggestion.⁵⁵

Arguments for Maintaining, and Ways to Strengthen, the Current System

The military’s position is that the disposition of sexual assault reports must be handled within the chain of command in order for the commander to maintain “good order and discipline.”⁵⁶ Vice Admiral Nanette M. DeRenzi, Judge Advocate General of the Navy, testified:

[C]ommanding officers are responsible for the safety, the welfare and the good order and discipline within their command. They have difficult leadership decisions to make and ... [have] experienced judge advocates to advise them in making them, and they make those decisions case by case, day in and day out, on the specific facts and circumstances of each case, and they try to do what’s right in each case, not what’s easy, not what’s expedient, and not what is a perception of what’s expected of them.⁵⁷

General Gary S. Patton, Director of DoD’s Sexual Assault Prevention and Response Office, testified, “Commanders are going to have to fix this problem, and we need to keep commanders involved in the problem, not less involved.”⁵⁸ He argued that “[r]emoving a commander from the administration of justice among his or her troops would undercut a commander’s authority,

⁵¹ *Hillman Statement* at 4.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Craig Whitlock, *Hagel Seeks Changes to Military Code After Outcry Over Handling of Sex-Assault Cases*, WASH. POST (Apr. 8, 2013), available at http://www.washingtonpost.com/world/national-security/hagel-seeks-changes-to-military-code-after-outcry-over-handling-of-sex-assault-cases/2013/04/08/5552b8d6-a08a-11e2-ac00-8ef7caef5e00_story.html.

⁵⁵ *Hearing of the Senate Armed Services Committee*, June 4, 2013, at time marker 1:42, <http://www.senate.gov/isvp/?type=live&comm=armed&filename=armed060413>.

⁵⁶ *Patton Statement* at 4, 12; see also Statement of Dwight H. Sullivan submitted to the U.S. Commission on Civil Rights 4 [hereinafter *Sullivan Statement*], available at <http://www.eusccr.com/msa1.htm>; Patton testimony, *Briefing Transcript*, at 206-9.

⁵⁷ DeRenzi testimony, *Briefing Transcript*, at 224-25.

⁵⁸ Patton testimony, *Briefing Transcript*, at 207-8.

especially in combat.”⁵⁹ Lieutenant General Dana Chipman, Judge Advocate General of the Army, added, “The commander’s ability to punish quickly, visibly, and locally is essential to maintaining discipline in units. The Uniform Code of Military Justice ensures that commanders can maintain good order and discipline in the force.”⁶⁰

Military criminal defense attorney, Major Wilson, also advised against giving a civilian authority the responsibility of determining the disposition of military sexual assault cases. She testified, “I think that the people within this institution have to own it . . . for the process to have credibility. The people in this institution have to be the people who make that change . . . [I]t has to be command driven.”⁶¹

Professor and defense counsel, Dwight H. Sullivan, also cautioned that changes to the UCMJ may have unforeseen and unintended consequences, as altering the military justice system from the outside may raise constitutional questions.⁶² He noted that, when Congress amended the UCMJ’s sexual assault statute in 2006, it unconstitutionally shifted the burden of one element of the offense to the defendant, which resulted in some convictions being overturned. The 2006 amendments were so problematic that Congress had to overhaul them again in 2011.⁶³ He also argued that Congress should wait to make any further changes until it has time to evaluate the effectiveness of revisions to the military’s sex crime statutes pursuant to the National Defense Authorization Act of 2013.⁶⁴

⁵⁹ *Patton Statement* at 4. Professor Hillman disagreed: “I consider the imperative to protect commanders’ authority to prosecute a Pyrrhic victory at best, because it leaves commanders liable to the scrutiny of the public, to criticism no matter what they do, and it leaves their troops vulnerable to a problem that so far our military has gained little traction over, despite two decades of what I think are serious and comprehensive efforts to address it.” Hillman testimony, *Briefing Transcript*, at 91.

⁶⁰ Statement of Lt. Gen. Dana K. Chipman, Judge Advocate General of the Army, Submitted to the U.S. Commission on Civil Rights 2, available at <http://euscrr.com/msa1>.

⁶¹ Wilson testimony, *Briefing Transcript*, at 36-37. Congressman Michael R. Turner and Congresswoman Niki Tsongas, who have been outspoken on the need to fully address military sexual assault, agree that altering military culture requires buy-in from the Pentagon, and they support waiting to see how recent changes in law and policy work before taking the issue away from the chain of command. See Emily Cadei and Megan Scully, *Grappling With an Epidemic of Assault*, CONG. Q., Oct. 27, 2012, <http://public.cq.com/docs/weeklyreport/weeklyreport-000004169541.html>.

⁶² *Sullivan Statement* at 1-3. Professor Sullivan also noted that Australia’s High Court overturned that country’s military justice system after it was amended, which caused significant disruption. Sullivan testimony, *Briefing Transcript*, at 124-26, 129; see also *Weiss v. U.S.*, 510 U.S. 163 (1994) (finding that military judges who already had been commissioned officers before being assigned to serve as judges did not have to receive a second appointment before assuming their judicial duties).

⁶³ *Sullivan Statement* at 1-3. See also *U.S. v. Prather*, 69 M.J. 338, 339-340 (C.A.A.F. 2011).

⁶⁴ *Sullivan Statement* at 3-4; Sullivan testimony, *Briefing Transcript*, at 84-86.

In order to increase consistency across the Services and provide more guidance to commanders, DoD could provide sentencing guidelines with mandatory minimum sentences.⁶⁵ While the MCM sets forth *maximum* punishments for each criminal infraction,⁶⁶ there are no *minimum* penalties.⁶⁷ The Navy agrees: “Anecdotal insights suggest a potential value for minimum sentencing guidelines for sex crimes under the Uniform Code of Military Justice.”⁶⁸

Military law expert, Professor Victor Hansen, also advocates strengthening the current system through greater command accountability. Currently, “dereliction of duty” under UCMJ Article 92 is the primary statutory mechanism to hold a commander accountable for his or her command failings.⁶⁹ Hansen argues that this mechanism is inadequate because it merely requires a commander “to avoid willful failures and achieve a level of competency that is somewhere above simple negligence or culpable inefficiency.”⁷⁰ In order to create adequate “legal incentives to aggressively prevent and suppress [sexual] misconduct,” Hansen testified that the UCMJ should include a doctrine that exists in international law known as “command responsibility.”⁷¹ Under this doctrine, a commander would be required “to do all that is reasonable within his power and authority to investigate, prevent and suppress sexual assault crimes within the ranks.”⁷² Hansen argues that holding commanders to this higher standard would help identify the command failings that have contributed to the under-detection of sexual assault.⁷³

⁶⁵ Major General Vaughn Ary, Staff Judge Advocate to the Commandant of the Marine Corps, informed the Commission that the appearance of light sentences may, in part, be due to the fact that court-martial members who vote to acquit, but are outnumbered, still play a role in deciding the sentence. Ary testimony, *Briefing Transcript*, at 222.

⁶⁶ See *MCM*, APPENDIX 12, at A12-1-7.

⁶⁷ In comparison, for example, civilian federal sentencing guidelines require a minimum sentence of five years imprisonment for criminal sexual abuse. 18 U.S.C. §§ 2241, 3553; 3559(a)(1); U.S. Sentencing Guidelines §5D1.2(a)(1).

⁶⁸ Dep’t of the Navy, SAPRO, Response to the U.S. Commission on Civil Rights’ Interrogatory No. 127. See also Hansen testimony, *Briefing Transcript*, at 147-48; Parrish testimony, *Briefing Transcript*, at 68.

⁶⁹ *Hansen Statement* at 3.

⁷⁰ *Id.*

⁷¹ *Id.* at 2.

⁷² *Id.*

⁷³ *Id.* See also Diane H. Mazur, Capt. U.S. Air Force (Ret.), *Military Values in Law*, 14 DUKE J. GENDER L. & POL’Y 977, 1004 (“If Congress, the military, or critics of military policy are dissatisfied with the performance of military leaders in punishing and preventing sexual assault, they need to hold them accountable for failures of leadership in the same manner in which they would hold them accountable in situations not involving violence against women. The answer is not to . . . relieve military commanders of the obligation to protect the people they lead.”) Professor Hillman agreed that “[m]ore robust theories of accountability for higher-ranking officers who neglect or condone military sexual violence would also advance the prosecution of military sexual violence.”

(cont'd)

Another way to strengthen the current system is to have a policy encouraging commanders to disclose the dispositions of sexual assault incidents. Commanders generally do not communicate the outcomes of sexual assault reports to members of their command despite a recommendation by the Defense Task Force that they do so in order to control rumors, clarify misperceptions, and reinforce the commander's zero tolerance stance.⁷⁴ Similarly, Dr. Lisak testified that he sees "enormous prevention opportunities" in informing Service members of the disciplinary outcomes of sexual assault investigations in their units.⁷⁵ Professor Hansen made a similar recommendation that senior military leadership should communicate clearly when there has been a command failure with respect to preventing or responding to sexual assault.⁷⁶

Unlawful Command Influence

As discussed above, the accused's commander has full discretion to decide the disposition and ultimate punishment in all criminal cases. Unlawful command influence occurs when a superior office improperly attempts to direct or influence a subordinate commander's decision or improperly interfere with a criminal investigation or prosecution.⁷⁷ Unlawful command influence also may take other forms such as intimidating witnesses, humiliating the accused, or

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Hillman Statement at 4. See also Statement of Cindy McNally, Chief Master Sergeant, U.S. Air Force (Ret.) to House Armed Services Committee Hearing on the Review of Sexual Misconduct by Basic Training Instructors at Lackland Air Force Base (Jan. 23, 2009), <http://docs.house.gov/meetings/AS/AS00/20130123/100231/HHRG-113-AS00-Wstate-McNallyC-20130123.pdf> ("[H]olding our leaders responsible and legally liable for the welfare of their troops is an absolute must.").

⁷⁴ *Report of the Defense Task Force* at 82.

⁷⁵ Lisak testimony, *Briefing Transcript*, at 142-43.

⁷⁶ Professor Hansen testified, "[O]ftentimes the messaging is very inconsistent and there is a cultural unwillingness to broadcast those consequences in a clear way so that the soldiers, the service members understand, and so that other commanders understand specifically what . . . were the command failings, and there's a huge cultural resistance within the military to do that, and I think that needs to change." Hanson testimony, *Briefing Transcript*, at 143-44.

⁷⁷ Unlawfully influencing the action of a court is prohibited by Article 37, UCMJ. At a subordinate commander's request, however, a superior commander lawfully may consult with a subordinate about judicial decisions. DoD's Office of Legal Policy's Response to the U.S. Commission on Civil Rights' Interrogatory No. 112. The SAPR training for all Navy leaders includes training on the need to avoid unlawful command influence. The "suggested script" for facilitators of such training includes the following: "Sexual assault cases can be incredibly complicated, and as we've discussed, command leaders must limit their involvement in the cases and simply 'support – report – and initiate an official NCIS investigation.'" Chief of Naval Operations' Response to the U.S. Commission on Civil Rights' Interrogatory No. 105 (citing Navy SAPR-L Facilitation Guide (Fiscal Year 2012)). At the pre-trial stages, the commander lawfully may exercise command control when gathering evidence against members of his or her command, who are suspected of violating the UCMJ, but not once court-martial charges are referred or "preferred." *Id.*

publicly drawing conclusions as to guilt or innocence.⁷⁸ A superior commander may, however, lawfully elect to remove or withhold the authority from a subordinate commander to act in a particular case or types of cases.

Some military criminal defense attorneys believe there is unlawful command influence prejudicing those accused of sexual assault.⁷⁹ They believe that this, in part, is due to political pressure to increase the number of sexual assault cases referred to court-martial and to increase conviction rates.⁸⁰ In some cases, military judges have concurred. After General James Amos, Commandant of the Marine Corps, publically demanded tougher punishment for those accused of sexual misconduct, some military judges found that his statements presented the appearance of unlawful command influence.⁸¹

Concerns of Diminished Rights of the Accused and Over-Prosecution

Attorneys (judge advocates) who represent the accused in military sexual assault cases believe that political pressure and unlawful command influence are diminishing their clients' ability to mount an adequate defense and causing over-prosecution.

First, alleged perpetrators and their attorneys are concerned that there is a growing disparity in the resources the military provides to criminal defendants and those provided to the prosecution. Professor Sullivan explained,

The sexual assault prevention legislation has earmarked funds for the prosecution of these offenses, and so we are pumping more money into the prosecution side And you don't have a mirror image on the defense side, and the whole idea of the military justice system . . . is that there is supposed to

⁷⁸ See Statement of Phillip D. Cave to the U.S. Commission on Civil Rights 13-14 [hereinafter *Cave Statement*], available at <http://www.eusccr.com/msa1.htm>.

⁷⁹ *Cave Statement* at 13-14; *Sullivan Statement* at 6-7; Statement of Bridget Wilson submitted to the U.S. Commission on Civil Rights 1-2 [hereinafter *Wilson Statement*], available at <http://www.eusccr.com/msa1.htm>; Wilson & Cave testimonies, *Briefing Transcript*, at 31-32, 44-46, respectively.

⁸⁰ Wilson testimony, *Briefing Transcript*, at 30-32.

⁸¹ Michael Doyle, *Tough Talk by Marine Commandant James Amos Complicates Sexual-Assault Cases*, MCCLATCHY NEWSPAPERS, Sept. 13, 2012, <http://www.mcclatchydc.com/2012/09/13/168410/tough-talk-by-marine-commandant.html>. In response to criticism that he was exerting unlawful command influence, Gen. Amos wrote a White Letter in which he stated, "My intent is not to influence the outcome or response in any particular case, but rather to positively influence the behavior of Marines across our Corps. As senior leaders, we have the inherent responsibility to ensure the sanctity of our justice system, this includes the presumption of innocence unless proven otherwise. . . . I expect all Marines involved in the military justice process – from convening authorities, to members, to witnesses – to make their own independent assessment of the facts and circumstances of each case." White Letter No. 3-12 from the Commandant of the Marine Corps on Leadership (July 12, 2012).

be an equality of resources on both sides. And again I think because of the politicization of this issue, you see earmarks going exclusively to the prosecution side.

. . .

[T]he fact [is] that the defense counsel don't even have investigators. I mean, literally something that would be taken for granted in most public defender's offices . . . military defense counsel don't have.⁸²

Furthermore, alleged perpetrators are sometimes denied the benefit of an expert because there is insufficient funding or the commander does not believe the defense has provided sufficient justification.⁸³ Military defense attorney, Philip Cave, explained, "Such an imbalance in resources further negates the actual and perceived fairness of the military justice system."⁸⁴ He did acknowledge, however, that "[t]he Services have hired highly qualified experts for the defense in the same manner they are hired for the prosecution."⁸⁵

Second, in defense attorney Major Wilson's opinion, there is concern that the Services' "strategic goal"⁸⁶ to increase sexual assault reporting rates may motivate some commanders to take action based on ambiguous information. She explained,

The military way is that if the command wants more reports, they will get those reports, one way or another even if those reports are not accurate. No institution is more single minded in its pursuit of a goal than the armed forces. . . . When those in charge express the "desire" to see something done, it will be done, often without regard for the collateral damage. That is the current approach that we are seeing with regard to sexual assault in the military. Those who would rather not report are being pressured to do so. A junior enlisted woman is lectured by a senior noncommissioned officer that the events of the drunken party were a rape regardless of the misgivings of the woman.⁸⁷

⁸² Sullivan testimony, *Briefing Transcript*, at 149-50.

⁸³ *Cave Statement* at 13.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Wilson Statement* at 1 (citing the Army's FY 2010 report to DoD's Sexual Assault Prevention and Response Office).

⁸⁷ *Wilson Statement* at 1.

The increase, since FY 2009, in the percentage of sexual assault reports determined by military criminal investigators to be “unfounded” indicates that concern may be warranted.⁸⁸

Third, some defense attorneys believe the zeal to punish sexual assaulters makes commanders and judge advocates blind to those who intentionally make false accusations.⁸⁹ Professor Sullivan argued that “[p]oliticization of the issue of sexual assault in the military threatens [the] goal [of] . . . fairly and accurately distinguish[ing] those Service members who are innocent from those who are guilty.”⁹⁰ Mr. Cave argued, “Over the last five to seven years it has been increasingly apparent to an accused going into a sexual assault case that he is presumed guilty, that he must prove his innocence, and that background politics play an important role in how the case is to be resolved.”⁹¹

While acknowledging that false accusations are relatively rare,⁹² Mr. Cave provided the Commission with an example of a situation where he believed military prosecutors disregarded evidence that allegations were false.⁹³ He noted a variety of reasons one might make a false accusation, including the desire to obtain an expedited transfer;⁹⁴ the hope of delaying punishment for misconduct;⁹⁵ or, simply for revenge.⁹⁶ Before the ban on gays and lesbians was

⁸⁸ The percentage of cases determined by a MCIO to be unfounded has risen from 5.2 percent in FY 2009 to 10.7 percent in FY 2010, to 11.9 percent in FY 2011, and to 13.6 percent in FY 2012. *DoD FY09 Annual Report on Sexual Assault in the Military* at 64; DoD, DEPARTMENT OF DEFENSE FISCAL YEAR 2010 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 64 (2011) [hereinafter *DoD FY10 Annual Report on Sexual Assault*], available at http://www.sapr.mil/media/pdf/reports/fy10_annual_report.pdf; *DoD FY11 Annual Report on Sexual Assault* at 32; *DoD FY12 Annual Report on Sexual Assault, Vol. 1* at 68.

⁸⁹ *Cave Statement* at 3-8; *Sullivan Statement* at 6.

⁹⁰ *Sullivan Statement* at 6.

⁹¹ *Cave Statement* at 1-2. *See also id.* at 10.

⁹² *Cave Statement* at 3. *See also Wilson Statement* at 2. According to Dr. David Lisak, social science research estimates that 2-10 percent of rape allegations are false. *Lisak Statement* at 3. Mr. Cave did not dispute this statistic. *Cave testimony, Briefing Transcript*, at 51. According to a DoD Task Force,

[Service members] may overestimate the number of false reports for several reasons: the victim may recount the incident differently during the course of the investigation; the case may not have gone to trial due to insufficient evidence; the case may have resulted in an acquittal, or the results of the investigation, trial, or final consequences may not have been published or shared. The distinction between a false report and an unsubstantiated report is usually not obvious.

Report of the Defense Task Force at 33. *See also* Bruce Gross, Ph.D., JD, MBA *False Rape Allegations: An Assault On Justice*, THE FORENSIC EXAMINER, Sept. 15, 2012, available at <http://www.theforensicexaminer.com/archive/spring09/15/> (describing the difficulties in estimating the rate of false rape allegations).

⁹³ *Cave Statement* at 5-6.

⁹⁴ *Id.*, *see also Wilson Statement* at 2.

⁹⁵ The military has a policy of delaying the investigation and disposition of collateral misconduct committed by the Service member who alleges sexual assault until after final disposition of the sexual assault allegation. DoD (cont'd)

repealed in 2011, some Service members caught engaging in consensual same-sex sexual conduct may have had an incentive to make a false accusation in an attempt to avoid being discharged on the basis of homosexuality.⁹⁷

A final concern of military defense attorneys (judge advocates) and their clients is that sexual assault cases are being referred to court-martial even when the evidence is weak. They expressed the view that, rather than looking critically at the evidence, prosecutors presume the accused to be guilty.⁹⁸ According to Mr. Cave, “the perception today, if not the reality is that a sexual assault case is more likely to go to trial despite . . . recommendations from an [investigating officer not to pursue prosecution].”⁹⁹ Professor Sullivan agreed with Mr. Cave.¹⁰⁰

In response, Lieutenant General Richard C. Harding, the Judge Advocate General for the Air Force, noted that “commanders are asked to take an oath before they prefer a charge . . . that based on their personal knowledge or personal investigation of the case, . . . they believe, honestly believe that the charges are true to the best of their knowledge and belief.”¹⁰¹

While some military prosecutors agree they prosecute sexual assault cases that civilian district court attorneys (DAs) would not, this does not necessarily mean there is over-prosecution.¹⁰² The UCMJ criminalizes all forms of nonconsensual, sexual touching in order to preserve “good

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INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM PROCEDURE 41-42 (Mar. 28, 2012). Collateral misconduct may include offenses such as underage drinking, fraternization, engaging in consensual sex in the barracks or on a military vessel (a criminal offense under the UCMJ), or adultery in which the victim had engaged at the time of the sexual assault. Bridget Wilson, in-person conversation, Jan. 11, 2013, Washington D.C.; *Cave Statement* at 4. In focus group studies, many male service members expressed the belief that women accused men of sexual assault to avoid discipline for collateral misconduct, but reviews of unrestricted sexual assault reports did not support this belief. See Sarah Jane Brubaker, *Sexual Assault Prevalence, Reporting and Policies: Comparing College and University Campuses and Military Service Academies*, 22 SECURITY J. 56, 67 (2009). Consequently, according to Wilson, the military is now less likely to delay discipline for collateral misconduct so as to avoid giving the appearance that the victim has an incentive to give false testimony. Bridget Wilson, in-person conversation, Jan. 11, 2013, Washington D.C.

⁹⁶ Cave testimony, *Briefing Transcript*, at 18-20.

⁹⁷ *Wilson Statement* at 2.

⁹⁸ *Cave Statement* at 1.

⁹⁹ *Id.*

¹⁰⁰ Sullivan testimony, *Briefing Transcript*, at 87.

¹⁰¹ Harding testimony, *Briefing Transcript*, at 220.

¹⁰² *Report of the Defense Task Force* at 81 (quoting a staff judge advocate as stating that Judge Advocates prosecute a lot of cases that their civilian counterparts would not, saying they “ethically could not prosecute because they have serious reservations that enough facts exist to support all elements of the allegation.”).

order and discipline”—conduct that civilian authorities may not consider severe enough to devote resources to investigating and prosecuting.

Further, as Major General Vaughn Ary, Staff Judge Advocate to the Commandant of the Marine Corps, noted, DAs must seek re-election based, in part, on conviction records,¹⁰³ and as such, this may influence the decision whether to prosecute more challenging cases. Also, civilian prosecutors need a unanimous jury to get a conviction, whereas military prosecutors need only two-thirds to convict.¹⁰⁴

Lt. Gen. Chipman, Judge Advocate General of the Army, added that the public holds the military to a higher standard than civilian law enforcement, and that Americans have higher expectations that the military will protect their sons and daughters from sexual assault within the ranks.¹⁰⁵

Nevertheless, a lack of confidence in the military justice system undermines the entire effort to address the problem of sexual assault, as defense attorney Major Wilson explained:

The good intention of addressing sexual assault in the military is being buried by a campaign that now lacks credibility in the ranks. There is an increasing perception that the deck is stacked against someone accused of a sexual assault.

...

The prosecution of sexual assault now is privately being dismissed by many in the armed forces as a political witch hunt, something that will damage the cause of protecting victims for years to come. It will damage the status of women in the institution for years to come. It will give rapists a cover for years to come.¹⁰⁶

Thus, some Service members accused of sexual assault and the attorneys who represent them are concerned that the heightened attention to the issue is tilting the scales of justice away from the accused.

¹⁰³ Ary testimony, *Briefing Transcript*, at 222.

¹⁰⁴ *Id.*

¹⁰⁵ Chipman testimony, *Briefing Transcript*, at 223-24. See also *Hansen Statement* at 1 (“Our military has a unique mission and we ask a great deal of our service members. We have a special and critical obligation to protect all of them from these crimes in exchange for the selfless sacrifice that we ask of them.”).

¹⁰⁶ *Wilson Statement* at 1. Nancy Parrish, President of Protect Our Defenders, agreed that “Command bias that convicts the innocent is as bad as command bias that wreaks retribution on the victim and ignores the crime.” Parrish testimony, *Briefing Transcript*, at 41.

Trends in the Department of Defense's Data on Prosecution and Discipline

Overall, DoD's Annual Reports on Sexual Assault indicate that commanders have been referring more cases to court-martial over the past four years. Of the military subjects whose cases were given to their commander by the MCIO for possible action, the commander referred 21 percent of these cases to court-martial in FY 2009, 27 percent in FY 2010, 32 percent in FY 2011, and 35 percent in FY 2012.¹⁰⁷ For those cases in which commanders decided there was sufficient evidence to take action, court-martial charges accounted for 42 percent of disciplinary actions in FY 2009, 52 percent of disciplinary actions in FY 2010, 62 percent of disciplinary actions in FY 2011, and 68 percent of disciplinary actions in FY 2012.¹⁰⁸

Of the subjects referred to court-martial whose cases were completed during the listed fiscal year, 72 percent proceeded to trial in FY 2009, 67 percent in FY 2010, 65 percent in FY 2011, and 66 percent in FY 2012. The others either were dismissed due to lack of evidence (18 percent in FY 2009, 23 percent in FY 2010, 24.6 percent in FY 2011, and 19 percent in FY 2012) or the subject was permitted to resign or be discharged in lieu of court-martial (10 percent in FY 2009 and FY 2010, 10.5 percent in FY 2011, and 15 percent in FY 2012).¹⁰⁹

The Commission's analysis revealed that, of all the investigations that gathered sufficient evidence to support commander action in FY 2011, just over one-fifth (203 of 989) led to court-martial convictions (191 subjects convicted on a sexual assault charge at court-martial; 12 subjects convicted of some other misconduct charge at court-martial). These convictions represented just over 10% (203 of 2,004) of the total sexual assault subjects with case dispositions reached in FY 2011; however, 486 of these 2,004 subjects were either unidentified

¹⁰⁷ *DoD FY09 Annual Report on Sexual Assault* at 64 (of 1,935 subjects reviewed for commander action where the commander made a decision within the fiscal year, 410 had courts-martial charges preferred); *DoD FY10 Annual Report on Sexual Assault* at 71 (of 1,980 subjects reviewed for commander action where the commander made a decision within the fiscal year, 529 had courts-martial charges preferred); *DoD FY11 Annual Report on Sexual Assault* at 32 (of 1,516 subjects reviewed for commander action, 489 had court-martial charges preferred); *DoD FY12 Annual Report on Sexual Assault, Vol. 1* at 68 (of 1,714 subjects reviewed for commander action, 594 had court-martial charges preferred).

¹⁰⁸ *DoD FY09 Annual Report on Sexual Assault* at 64 (of 983 subjects whose commander took action, 410 had courts-martial charges preferred); *DoD FY10 Annual Report on Sexual Assault* at 71 (of 1,025 subjects whose commander took action, 529 had courts-martial charges preferred); *DoD FY11 Annual Report on Sexual Assault* at 32 (of 989 subjects whose commander took action, 489 had court-martial charges preferred); *DoD FY12 Annual Report on Sexual Assault, Vol. 1* at 68 (of 880 subjects whose commander took action, 594 had court-martial charges preferred).

¹⁰⁹ *DoD FY11 Annual Report on Sexual Assault* at 45, 82, 78; *DoD FY12 Annual Report on Sexual Assault, Vol. 1* at 73. Notably, some of the subjects whose court-martial charges were dismissed received nonjudicial punishment based on evidence discovered during the sexual assault investigation. *DoD FY10 Annual Report on Sexual Assault* at 76; *DoD FY11 Annual Report on Sexual Assault* at 45; *DoD FY12 Annual Report on Sexual Assault, Vol. 1* at 73.

or outside the legal authority of the DoD as shown in [Figure 6.1](#) below. Evidence supported nonjudicial punishment for nearly 16% of subjects for a sexual offense (156 of 989); 4.9% of subjects (49 of 989) were acquitted of court-martial charges; and 9.2% of subjects (91 of 989) had court-martial charges dismissed. The rest were still pending at the close of the fiscal year.

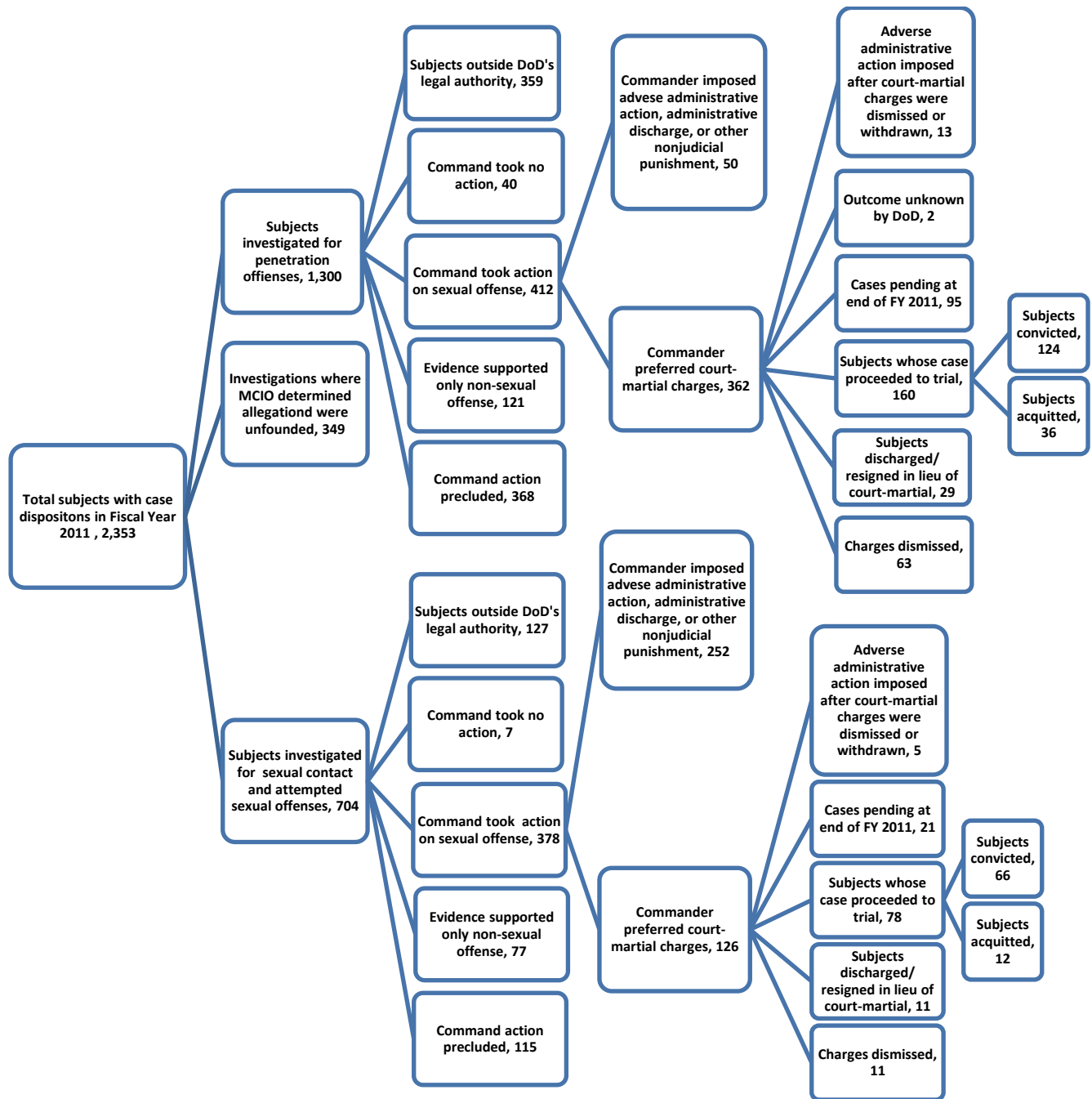
Figure 6.1

Subject records in investigations of sexual offenses that led to court cases or Article 15, by case disposition and outcome, FY 2011

case disposition	Court Case or Article 15 Outcome							Total records	Records with Court Case or Art. 15 Outcomes
	None	Discharge or Resignation in Lieu of Court Martial	Acquittal	Article 15 punishment imposed	Conviction	Dismissal	Pending adjudication		
Subject outside DOD's legal authority	479		2	3		1	1	486	7
Command Action Precluded	476			1		6		483	7
Action Declined by Commander	47							47	0
Evidence for commander action for sexual assault charge	137	43	58	166	191	74	121	790	653
Court-Martial Charge Preferred	2	40	48	18	190	74	116	488	486
Nonjudicial punishments (Article 15 UCMJ) or adverse administrative action	91		10	148			5	254	163
Administrative discharge	44	3			1			48	4
Evidence for commander action for other criminal offenses	113			80	5			198	85
Probable cause for only non-sexual assault offense	113			80	5			198	85
Total	1252	43	60	250	196	81	122	2004	752
Percents of records...									
All subjects	62.5%	2.1%	3.0%	12.5%	9.8%	4.0%	6.1%	100.0%	37.5%
Those with evidence for commander action, any offense	25.3%	4.4%	5.9%	24.9%	19.8%	7.5%	12.2%	100.0%	74.7%
Those with evidence for commander action, sexual offense	17.3%	5.4%	7.3%	21.0%	24.2%	9.4%	15.3%	100.0%	82.7%

Source: Compiled by USCCR from DOD FY 2011 sexual assault data.

[Figure 6.2](#) below illustrates all unrestricted sexual assault reports that reached final disposition in FY 2011, separating penetration offenses from sexual contact and attempted sexual offenses.

Figure 6.2**All unrestricted sexual assault reports reaching final disposition, FY 2011**

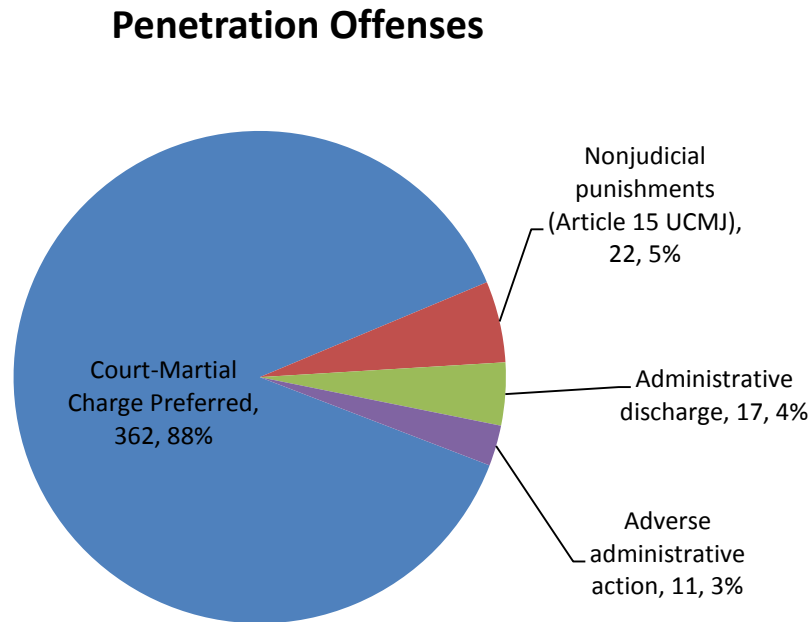
Source: DoD 2011 Annual Report on Sexual Assault in the Military and analysis by U.S. Commission on Civil Rights using DoD FY 2011 sexual assault data.

Figure 6.3 differentiates the number of reported allegations of penetration offenses (rape, forcible sodomy, and aggravated sexual assault), which would justify the most severe punishments, from reports of sexual contact offenses or attempted offenses (which might

justify less severe punishments).¹¹⁰ Of the reported allegations of penetration offenses with sufficient evidence to support commander action for a sexual offense, 88 percent were referred to court-martial. Of the reported allegations of sexual contact offenses and attempted sexual offenses with evidence to support commander action for a sexual offense, 33 percent were referred to court-martial.

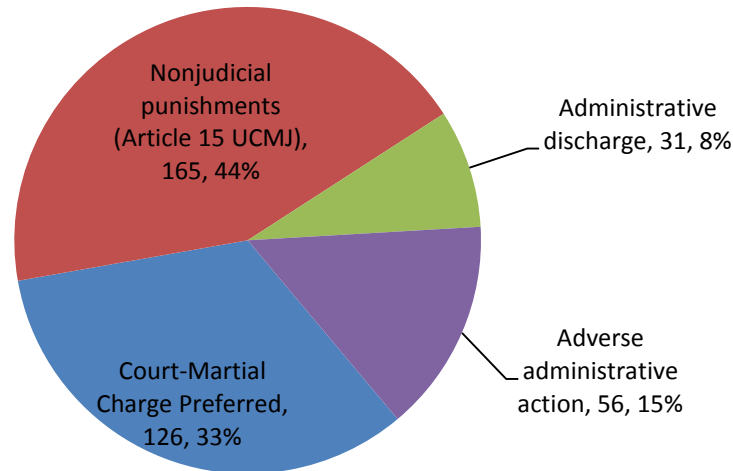
Figure 6.3

Case dispositions for records with evidence for commander action for sexual assault offense, FY 2011



¹¹⁰ Note that DoD's data only provides the most serious sexual offense alleged in the criminal investigation, which is not necessarily the most serious offense for which the subject is charged ultimately and/or convicted.

Sexual Contact and Attempted Sexual Offenses



Source: Compiled by USSCR from DOD FY 2011 sexual assault data.

The DoD's data indicates that penetration sexual offenses are more likely to be prosecuted than sexual contact and attempted sexual offenses. But, whether the prosecution rates are appropriate cannot be ascertained from the DoD's data. Professor Sullivan expressed the view that the military "is more willing to prosecute sexual assault cases than are state criminal justice systems; the military not infrequently tries off-base sexual assault allegations that state prosecutors declined to prosecute."¹¹¹ A comparison to data of civilian prosecution rates suggests that military prosecution rates for penetration offenses are similar, but the Commission's research did not uncover data from the civilian context that would allow an exact comparison.¹¹² Comparisons to civilian prosecution rates also are complicated by the fact that Service members can be disciplined for criminal offenses through the use of nonjudicial punishments or adverse administrative actions without being prosecuted in court.

¹¹¹ *Sullivan Statement* at 6.

¹¹² See, e.g., ERICA L. SMITH ET AL., U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATISTICS, STATE COURT PROCESSING OF DOMESTIC VIOLENCE CASES (2008), available at <http://www.ovw.usdoj.gov/docs/bjs-specialreport.pdf> (comparing prosecution rates of sexual assault cases where the defendant was a member of the victim's family or household or the victim's intimate partner to those where the defendant did not have such a relationship with the victim; finding 89 percent and 73 percent prosecution rates, respectively).