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Twice Betrayed

Bringing Justice to the U.S. Military's Sexual Assault Problem

Lindsay Rosenthal and Lawrence Korb November 2013

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A clear directive from the commander-in-chief

Let's start with the principle that sexual assault is an outrage; it is a crime. That's true for society at large. And if it's happening inside our military, then whoever carries it out is betraying the uniform that they're wearing. And they may consider themselves patriots, but when you engage in this kind of behavior that's not patriotic—it's a crime. And we have to do everything we can to root this out.

…

I have directly spoken to Secretary Hagel already today and indicated to him that we're going to have to not just step up our game, we have to exponentially step up our game, to go at this thing hard.

…

And for those who are in uniform who have experienced sexual assault, I want them to hear directly from their Commander-in-Chief that I've got their backs. I will support them. And we're not going to tolerate this stuff and there will be accountability. If people have engaged in this behavior, they should be prosecuted.

And anybody in the military who has knowledge of this stuff should understand this is not who we are. This is not what the U.S. military is about. And it dishonors the vast majority of men and women in uniform who carry out their responsibilities and obligations with honor and dignity and incredible courage every single day.

So the bottom line is I have no tolerance for this. I have communicated this to the Secretary of Defense. We're going to communicate this again to folks up and down the chain in areas of authority, and I expect consequences.

So I don't want just more speeches or awareness programs or training but, ultimately, folks look the other way. If we find out somebody is engaging in this stuff, they've got to be held accountable—prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period. It's not acceptable.

President Barack Obama
May 7, 2013[1]

Foreword

The U.S. military has struggled with a serious sexual assault problem for more than 25 years. Each time that new scandals such as the ones at Tailhook, Aberdeen, or Lackland become public, the uniformed military forces some senior members to retire early, increases training, and announces a zero-tolerance policy. But despite these steps, the problem continues to get worse. In the past two years alone, the Pentagon estimates that number of people who have been assaulted in the military rose by more than 35 percent, from 19,000 to 26,000.[2]

The issue is not just the magnitude of the problem, but it is also the low number of assaults that are officially reported and what happens to those who report them. Of the 26,000 cases of sexual assault that the Pentagon estimated to have occurred in 2011, only 3,374—less than 12 percent—were actually reported. Moreover, of those who did report, about 1,300—almost 40 percent—experienced some form of retaliation. Finally, the overall reporting rate itself dropped about 10 percent over the past two years, even as the number of assaults went up dramatically.[3]

And it is not difficult to understand why. As the recent Article 32 hearing at the Washington Navy Yard makes clear, if a military member such as a Naval Academy midshipman reports an assault, the ensuing process can become a very public ordeal. The woman who reported the assault was relentlessly and publicly grilled about whether she wore a bra or underpants, her oral sex technique, and how much she had agreed to up to the moment of her assault.[4]

Many political leaders from both parties and from the legislative and executive branches have said "enough is enough" and proposed significant structural changes to the way in which the uniformed military will deal with the situation in the future.[5] In the current Congress, there are around a dozen major pieces of legislation that propose changes, including preventing commanders from reversing convictions or modifying sentences handed down by military juries; making it a criminal offense to retaliate against the victims; removing the cases from the accused's chain of command entirely; and allowing victims to take their cases to a civilian court.

Not surprisingly, many military leaders—despite their claims that they want to stamp out sexual assault in the ranks—have resisted making significant changes to the current system, which keeps the issue within the accused attacker's chain of command. They made this clear on June 4, 2013, when all of the Joint Chiefs of Staff and their lawyers appeared before the Senate for a hearing on the issue. In addition, the armed services have mounted a full court press on the Hill, including meeting with aides and arguing against taking sexual assault out of the chain of command.[6]

After analyzing all the legislative proposals, the directive from President Barack Obama to Secretary of Defense Chuck Hagel, and the experience of our closest allies in handling sexual assault cases, it becomes clear that the problem—which Gen. Raymond Odierno, the Chief of Staff of the Army, called a cancer[7]—will not be solved unless the issue is removed from the chain of command. These cases must be placed in the hands of military lawyers, free of influence or impact by the commanders of units where sexual assaults are alleged to have occurred. In fact, since senior officials in the chain of command not only lack legal training but also have inherent conflicts of interests, the chain of command is the very source of the problem. Removing this authority from commanders keeps with the fair spirit of the Uniform Code of Military Justice.

What this means is that after an allegation is made, the authority to investigate and to prosecute would be made by impartial military prosecutors such as members of the Judge Advocate General, or JAG Corps, who are not assigned to the unit where the assault is alleged to have occurred. Not only will this ensure that these cases will be handled more objectively, but it will also eliminate the conflict of interest that exists between commanders who fear their careers may suffer if sexual assault takes place in their unit.

While some current military leaders and members of Congress argue that removing jurisdiction from the chain of command would undermine military readiness and unit cohesion, there is no empirical evidence to back up that claim, any more than there was when the ban on allowing gay people to serve openly was dropped. Moreover, since our allies in the United Kingdom, Israel, and Canada began prosecuting these cases outside the chain of command, there have been no consequences to military readiness and unit cohesion. Some will argue that these allies are smaller and, as a result, they face far fewer incidents of sexual assault than the U.S. military, so the comparison is not apt. It is important, however, to keep in mind that when we debated whether or not to drop the ban preventing gay service members from serving openly in the military and referred to the experiences of our allies, many made the exact same arguments.

Moreover, if creating an independent judiciary does not stop the spread of this cancer, serious consideration should be given to allow victims to bring their cases to civilian courts, as our French and German allies permit. No doubt many military leaders and some of their civilian supporters will reject these changes and claim that they will make it difficult to execute their missions. But after the broken promises of the past 25 years, these claims should be taken with a grain of salt. The U.S. military has always resisted social change. In fact, each social change that the military has implemented—including integrating, opening up opportunities for women, and allowing gay service members to serve openly—had to be forced by elected and appointed officials responding to changes in American society and their constituencies' opinions. Remember that distinguished five-star Gen. Omar Bradley said that President Harry Truman's 1948 orders to desegregate the military would disrupt the cohesion of the Army;[8] that Gen. Robert Barrow, a former Marine Corps commandant, claimed that putting women in combat units would do what no enemy has done: destroy the Marine Corps;[9] that Gen. Colin Powell, then-chairman of the Joint Chiefs of Staff, claimed in 1993 that allowing gay and lesbian people to serve openly in the military would have the direst consequences;[10] and that Gen. Norman Schwarzkopf, the commander of the forces in the first Persian Gulf War, said that if the ban on gay service members was lifted, American troops would be just like Iraqi troops who sat in the deserts of Kuwait, forced to execute a mission they did not believe in.[11]

President Obama has directed Secretary Hagel to exponentially step up our game to prevent sex crimes in the military. Removing jurisdiction from the chain of command is an urgent, necessary first step, or the problem will continue to get worse. As this report will demonstrate, there are many other steps that must be taken to end what Secretary Hagel has called a scourge.

Lawrence Korb
Senior Fellow
Center for American Progress

Introduction and summary

In June, the entire Joint Chiefs of Staff and Judge Advocates General of each of the military services testified before the Senate Armed Services Committee on various proposals to combat sexual assault in the military. Congress demanded testimony after the Defense Department's, or DOD's, annual report showed that despite the military's recent efforts to ramp up sexual assault prevention programs, rates of sexual assault in the military climbed by 34 percent between 2010 and 2012. A total of 26,000 service members are estimated to have experienced unwanted sexual contact in 2012, compared to 19,300 in 2010.[12] Moreover, fewer than 3 out of every 100 estimated sexual assaults in the military in 2012 were ever prosecuted—a shockingly low percentage that has shown no sign of improvement.[13]

While some military leaders have acknowledged the severity of the military's sexual assault problem, others have engaged in a campaign to convince the public that the problem is exaggerated. They have done so largely by questioning the methodology of the military's own survey instrument on which the Pentagon's prevalence estimates are based.[14] But our recent analysis suggests that the DOD's estimates may substantially underestimate the problem. A significant percentage of cases, for example, are counted each year as a single "incident" but involve multiple perpetrators and/or multiple victims.[15]

In the midst of some military leaders' efforts to claim that the problem of sexual assault in the armed forces is overstated, two recent high-profile cases have raised grave concerns about the credibility of those in charge of the military's sexual assault prevention programs. The head of the Air Force's Sexual Assault Prevention and Response Office, Lt. Col. Jeffrey Krusinski, was arrested for alleged sexual battery of a woman in a parking lot.[16] In another instance, a non-commissioned officer who was tasked with sexual assault prevention at Fort Hood is under investigation for sexually abusing his subordinates.[17] It is far past the

time for military leaders to stop offering service members and their families the same empty words and a new string of band-aid resolutions every time a scandal makes headlines, as they have done for the past 25 years. Real reforms are urgently needed, and the time to act is now.

This report discusses what is known about sexual assault in the military and outlines key reform goals to combat the problem. We argue that removing cases from the chain of command is a necessary step that the military must take to address military sexual assault. Taking the decision to prosecute assault cases out of the chain of command is critical to reduce sexual violence and hold sexual predators in the armed forces accountable. We discuss changes that need to be made, including increasing accountability for perpetrators and military leadership, improving victim services, increasing reporting of sex crimes to military authorities, and improving data collection and transparency related to sexual assault in the armed forces.

Background

History of sexual assault in the military

Sexual assault in the U.S. military is not a new problem. The issue first gained widespread media attention in 1992 after Paula Coughlin, then a Navy lieutenant, came forward about the cover-up of her assault at the 35th Annual Tailhook Symposium the previous year.[18] Her announcement launched an investigation that revealed that 83 women and 7 men had been assaulted in a single weekend at Tailhook, and none of those offenses' perpetrators ever faced criminal prosecution.[19] All the media coverage at the time referenced a deep-seated cultural problem with sexual assault and harassment in the U.S. military that had clearly not been born overnight at Tailhook.

Despite public outrage and a slew of promises by military leaders, very little meaningful action was taken in the decade that followed. A steady stream of scandals continued to make headlines in the wake of Tailhook. In 1996, 12 officers and noncommissioned officers at Aberdeen army base in Maryland were accused of sexually assaulting female trainees under their command.[20] In 2004, the military faced harsh public criticism in the wake of reports that hundreds of female soldiers were assaulted while deployed in Iraq and Afghanistan.[21]

It was not until 2005—more than a decade after the Tailhook scandal and tens of thousands sexual assaults later—that Congress finally ordered the military to establish the Sexual Assault Prevention and Response Office, or SAPRO, which was tasked with developing a comprehensive strategy to address sexual assault in the armed forces.[22] It took at least another three years for the military to actually implement oversight recommendations to make SAPRO fully operational.[23] In its years of operation, SAPRO has had limited success addressing the problem of military sexual assault and has been criticized as a token office with little actual authority in the military organization.[24] Although SAPRO is now led by a two-star general, which gives it more institutional clout, its policymaking functions in relation to the branches remain limited. As mentioned earlier, SAPRO officials

charged with overseeing programs within the branches have been caught up in a number of recent scandals involving sexual crimes. In the first half of this year alone, three separate incidents involving SAPRO officials engaged in sexual misconduct prompted congressional leaders and Secretary Hagel to demand that all SAPRO personnel be retrained and recertified.[25]

According to its annual reports, one of SAPRO's primary achievements is that the office has increased the percentage of military personnel who have received sexual assault prevention training to 95 percent.[26] But serious concerns have been raised by experts in sexual assault prevention programming about the content of military curriculums, which are not standardized across the services and in some cases may emphasize teaching potential victims to reduce their risk of being assaulted rather than training service members to engage in primary prevention techniques.[27] However, as the president mentioned in his remarks on sexual assault, the military's training programs—while important—are simply not enough to curb the problem. The solution is not only better training and the proclamation of a zero-tolerance policy but also actual enforcement of the law. In 2010, SAPRO reported a reduction in the number of estimated sexual assaults in the military from a high of 36,000 in 2006 to 19,300 in 2010.[28] But in 2012, the estimated incidents of sexual assault shot back up to 26,000, and the percentage of both male and female service members who have been sexually assaulted is exactly the same today as it was in 2006.[29] In 2012, the largest scandal in the history of the Air Force became public: 33 basic training instructors at Lackland Air Force base are currently under investigation for allegations of sexual misconduct involving at least 63 students.[30]

In debating the scope of the military's problem with sexual assault, policymakers and the media have recently predominantly focused on crimes perpetrated by service members on other service members. But sexual predators in the armed forces also attack civilian children and adults in the United States and abroad, and there is simply no way to know how many civilians have been affected. We do, however, have evidence of attacks that have occurred overseas. In October 2011, for example, an incident involving the rape and battery of a young South Korean woman by a private in the U.S. military was an international embarrassment for the United States.[31] A year later, in October 2012, the rape of a woman in Okinawa by two U.S. soldiers—which echoed a similar incident in Japan in 1995—drew protests from Japanese civilians and strong criticism from Japanese government officials, who demanded that the United States "take measures that are far more severe than a disciplinary action or something lenient like that."[32] In short, the military's problem with sexual assault has consequences beyond the borders of our military bases and even our country.

Damage to the survivor

The careers of many talented service members have been derailed by military sexual assault. This was amply demonstrated by the recent inquiry into rape allegations against a former Naval Academy football player, who attacked a 21-year-old female midshipman in late August and early September. During the hearing, the victim was forced to spend more than 25 hours—over the course of five days—on the stand and was questioned repeatedly about her attire, her mental health, how she danced, and how she performed oral sex.[33] Given this public ordeal, other victims will have the impression that reporting crimes can lead to public and degrading questioning and open them up to ill will at campuses and military installations.

All too often, victims are forced out of the military as a means of retaliation for reporting the crimes committed against them. Others have left the careers they loved because the military could not or would not protect them from sexual violence at the hands of their peers and superiors. But service members who experience sexual assault may also experience a slew of ramifications to their health and well-being long after they exit the military.

Service women who experience sexual assault in the military are nine times more likely to develop post-traumatic stress disorder, or PTSD, compared to other female veterans.[34] Stress, depression, and other mental health issues associated with surviving rape, sexual assault, and sexual harassment make it more likely that survivors will experience high rates of substance abuse and will have difficulty finding work after discharge from the military.[35]

What's worse, research suggests that service members who have experienced PTSD stemming from military sexual assault are still held to a more stringent standard of proof when applying for benefits through the Department of Veterans Affairs, or VA. Data obtained by the Service Women's Action Network, or SWAN, and the American Civil Liberties Union through a Freedom of Information Act lawsuit confirm that only 32 percent of PTSD claims stemming from military sexual assault are approved, compared to 54 percent of all PTSD claims.[36] The main reason for this is underreporting. Because an overwhelming percentage of sexual assaults go unreported, victims are unable to produce a paper trail that documents the incidents once they seek care from the VA.

Prior to 2010, the wars in Iraq and Afghanistan veterans who had seen combat were routinely denied care for PTSD because they could not produce formal documentation, such as a combat decoration, that validated their combat experiences. The VA eventually relaxed these documentation standards because they were denying too many veterans care based on the paperwork they could produce, as opposed to the experiences they recounted. Unfortunately, neither the VA nor Congress has acted to extend the same decency to service members who have experienced PTSD from sexual assault.

Though the culture of underreporting military sexual assault is problematic in itself, the VA exacerbates this injustice by requiring victims to recount their experiences and produce a paper trail, which—through no fault of the victim—often does not exist.

Damage to military effectiveness

Testifying before the Senate Armed Services Committee in June, Gen. Ray Odierno described the impact of sexual assault on military effectiveness in the following way:

> *Our profession is built on a bedrock of trust—the trust must inherently exist among soldiers, and between soldiers and their leaders to accomplish their mission in the chaos of war. Recent incidents of sexual assault and sexual harassment demonstrate that we have violated that trust.*[37]

It goes without saying that sexual assault and harassment wholly undermine trust and cooperation in any circumstance. But certainly soldiers, who often must rely on each other in life-or-death situations, cannot be expected to execute their duties effectively when they are forced to work alongside—or even salute—a person who has attacked or degraded them.

It should alarm the country that one in four women returning from the wars in Iraq or Afghanistan reported that they were sexually assaulted while they were deployed.[38] On the Workplace Gender Relations Survey, 19 percent of women and 26 percent of men who reported unwanted sexual contact said that the most

serious incident occurred while they were deployed in a combat zone or to an area where they received imminent danger pay.[39] Another 41 percent of women and 49 percent of men who reported unwanted sexual contact said that the most serious incident occurred during workday or duty hours.[40]

Moreover, the drain on military resources because of the Pentagon's failure to deal with this problem is staggering. The VA spends approximately $10,880 on health care costs per military sexual assault survivor. According to SWAN, in 2010 alone, the VA spent about $872 million on sexual assault-related health care expenditures.[41] That figure does not account for the costs associated with maintaining the infrastructure for reporting, investigating, and prosecuting sexual assault cases nor for the personnel costs associated with turnover of qualified and valuable service members who either leave or are forced out of the military because they experienced sexual assault during their service.

Common myths about military sexual assault

Even in the face of decades of scandal, some military leaders have resisted reforms by perpetuating certain myths that deny the nature of the military's sexual assault problem and abdicate sexual predators in the military from accountability.

In January, former Secretary of Defense Leon Panetta lifted the ban on women serving in combat positions, partly in recognition of the fact that women already serve in combat-intensive roles overseas.[42] Some opponents to lifting the military's ban on women in ground-combat positions attribute the rising rates of sexual assault to women's close proximity to combat and men assigned to combat units in Iraq and Afghanistan. Some argue that women's allegations of sexual harassment are based on a misinterpretation of the "rough camaraderie"[43] that male troops engage in to build unit cohesion and that service women should "expect" to be sexually assaulted by their brothers-in-arms.[44]

But these critics have been undermined by the highest-ranking military officer in the United States, who believes that lifting the ban on women in ground combat positions will decrease rates of sexual assault in the military. Gen. Martin E. Dempsey, chairman of the Joint Chiefs of Staff, stated earlier this year:

When you have one part of the population that is designated as 'warriors' and one part that is designated as something else, that disparity begins to establish a psychology that — in some cases — led to that environment [of sexual assault]. I have to believe the more we treat people equally, the more likely they are to treat each other equally.[45]

In other words, because combat roles are the most honored and prestigious roles in the military, excluding women from these roles subjugates them to second-class status among fellow service members and actually contributes to sexual violence within the ranks.

Another reason why allowing women into combat positions is an insufficient explanation of rising rates of sexual assault is the fact that more than half—53 percent—of victims of sexual assault in the military are men.[46] In 2012, of the 26,000 military personnel estimated to have experienced sexual assault, 14,000 were men and 12,000 were women.[47] Because of this, it is even more important that military leaders and members of Congress do not conflate sexual assault with their personal opinions on women serving in the military in combat positions and in battle.

Men are not often considered in the context of military sexual assault victims because they are far less likely to report attacks than their female counterparts. A mere 1 in 10 victims of sexual assault who filed unrestricted reports in 2012 were male, and only 2 out of every 10 victims who filed restricted reports were men.[48] If the data suggest anything, it is that the high rate of sexual assault is a *military* issue, not a *women's* issue.

It is similarly incorrect to believe that the higher number of male victims of sexual assault is a result of the repeal of Don't Ask, Don't Tell, the law that prohibited gay and lesbian military members from serving openly. The data show that the repeal of Don't Ask, Don't Tell has not contributed to an increase of sexual assaults committed against men.[49] Furthermore, the military has reported time and again that the law's repeal has not negatively impacted military readiness or national security.[50]

These claims are not grounded in fact and would not merit discussion, except that they are being touted as reasons to deny the military's problem with sexual assault and resist reform. In the following section, we highlight the true scope of the military's sexual assault problem.

The scope of the military sexual assault problem

High incidence of sexual assault in the armed forces

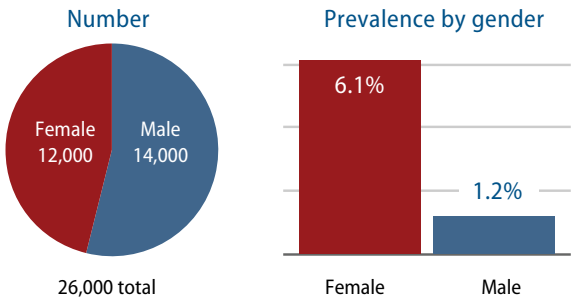
The number of reported attacks by one service member on another has steadily increased since 2007.[51] There was a 34 percent increase in the estimated number of assaults between the 2010 and 2012 surveys. The Pentagon estimates that total of 26,000 service members were sexually assaulted from 2011 to 2012.

Severe underreporting

The Pentagon estimates that only 11 percent of sexual assault victims in the military report the crimes committed against them. As shown in the table below, female service members are more likely to report the crimes committed against them than male service members, but rates of reporting among female service members are still low. Increasing the rate of reporting is necessary to ensure that victims get the services that they need and that the military has an opportunity to hold perpetrators accountable. That is not likely to change, however, until victims are confident that they will be taken seriously and treated with respect when they report, that the military will hold their perpetrators accountable, and that their careers will not suffer as a consequence of reporting.

FIGURE 1

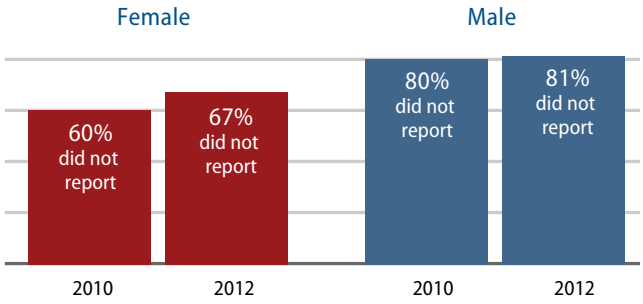
Estimate of unwanted sexual contact involving active-duty armed forces, FY 2012



Source: Sexual Assault Prevention and Response Office, *Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012* (U.S. Department of Defense, 2013).

FIGURE 2

Estimate of service members who did not report being sexually assaulted, FY 2010 and FY 2012



Source: Sexual Assault Prevention and Response Office, *Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012* (U.S. Department of Defense, 2013).

High levels of command abuse

The majority of offenders are their victims' military co-workers, and significant percentages are of a higher rank or within the victims' chain of command. The percentage of those who reported that the perpetrator was in their chain of command has consistently remained at up to 25 percent or higher since 2006, when the military placed this particular metric on the survey.[53] The percentage of those who reported being assaulted by someone of a higher rank has also remained at 63 percent or higher since 2006.[54]

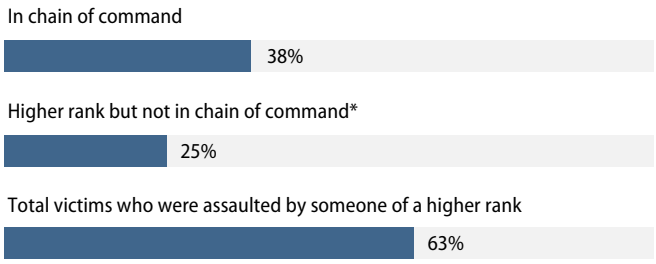
While it is clear from the results that a high percentage of service members are consistently attacked by individuals within their chain of command or by a higher-ranking military officer, the findings presented on the questionnaire should be modified to allow the victim to report the rank for multiple perpetrators, or if the questionnaire already allows the victims of attacks involving multiple perpetrators to report the ranks of each service member involved in their attack, those results should be reported with the rest of the findings from the Workplace and Gender Relations Survey of Active Duty Members, or WGRA.

Chain-of-command obstruction and retaliation[55]

As stated above, the Pentagon's official estimate is that only 11 percent of sexual assault victims report the crimes committed against them.[56] Of the female service members surveyed in the WGRA who reported the crimes against them to military personnel in their chain of com-

FIGURE 3

Percent of active-duty women who reported being assaulted by someone in chain of command or of higher rank, FY 2012



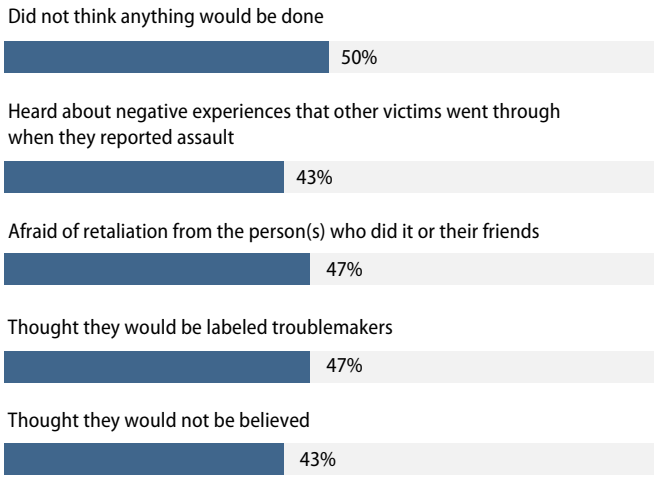
*Note: The question as asked by the Department of Defense was unclear and could be understood to mean sexual contact with "someone in the chain of command" of superior or lower rank, rather than just unwanted sexual contact with a higher ranking member.

Margins of error range from 3 percent to 6 percent

Source: Defense Manpower Data Center, "2012 Workplace and Gender Relations Survey of Active Duty Members" (2013), p. 37, available at http://www.sapr.mil/public/docs/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf.

FIGURE 4

Reasons why service women did not report an assault



Source: Sexual Assault Prevention and Response Office, *Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012* (U.S. Department of Defense, 2013).

mand, about two-thirds reported that they experienced some form of retaliation for reporting.[57] Therefore, it is not surprising that of the victims who did not report the crimes committed against them, 47 percent said they feared retaliation and another 43 percent were aware of the negative experiences of other victims who did report.[58] Moreover, according to the WGRA, fully half of women who did not report sexual crimes committed against them believed that nothing would be done about it.[59]

Lack of accountability

The table below shows that commanders take less than one-third of the actionable sexual assault cases reported each year to court martial. Of those who are referred for court martial, only about half are actually convicted each year; perpetrators are allowed to avoid prosecution by resigning from the armed services, or victims who lack access to legal representation in court become intimidated and drop the charges, as described in Protect Our Defenders' recent report, "Nine Roadblocks to Justice."[60]

Cases that actually go to trial in the military have an 80 percent conviction rate,[61] and while this is a welcome development, the current structure of the military justice system allows most sexual predators in the armed forces to avoid going to trial in the first place. Moreover, even when sexual predators in the military are convicted, they are often allowed to remain in the armed forces: The military retains one in three convicted sex offenders.[62] As we discuss in greater detail below, dramatic reform to the military justice system is necessary to ensure that sexual predators in the armed forces are held accountable and punished.

FIGURE 5

Summary of command disciplinary action, 2009–2012

Year	Total reported	Total considered actionable	Total preferred for courts martial	Percent of actionable preferred to court martial	Number convicted
2009	3,230	1,971	410	20%	290
2010	3,158	1,925	529	27%	318
2011	3,192	1,518	489	32%	240
2012	3,374	1,714	594	35%	238

Source: Service Women's Action Network, "Briefing Paper: Department of Defense (DoD) Annual Report on Sexual Assault in the Military, Fiscal Year (FY) 2011" (2012), available at http://webcache.googleusercontent.com/search?q=cache:2X48la6MA4IJ:servicewomen.org/wp-content/uploads/2012/04/SAPRO-briefing-report-4_17_12.pdf+&cd=1&hl=en&ct=clnk&gl=us&client=firefox-a.

Sexual assault at the service academies

Some of the most high-profile scandals involving military sexual assault were those at military service academies, but—like the case of the three Naval Academy football players who were accused of sexually assaulting a female midshipman at an off-campus party in Annapolis—assaults at the service academies are often left out of the public discussion about the scope of the military sexual assault problem.[63] This is partly because the DOD reports on sexual assault at the academies separately from those committed against active-duty service members. As such, sexual assaults committed at the service academies are not included in the military's oft-recited estimate that 26,000 incidents of sexual assault occurred in 2011 and 2012.[64]

A 1995 Government Accountability Office, or GAO, report revealed that the military service academies have had a long-term, pervasive problem with sexual harassment and assault. The GAO's study found that nearly half of all cadets reported physical harassment of a sexual nature and that up to 22 percent of women at the service academies had experienced harassment in the form quid pro quo.[65] Despite the GAO's report, the problem went unaddressed, as evinced by numerous subsequent scandals involving the service academies, including the very public scandal at the Air Force Academy in 2003, when 22 students came forward about the academy failing to investigate their assaults, actively discouraging reporting, and retaliating against students who reported.[66]

FIGURE 6

Rates of assault by military branch and service academy, FY 2012

Service branch	Military active-duty women	Academy women	Military active-duty men	Academy men
Army	7.1	N/A	0.8	N/A
Navy	7.2	15.1	2.7	2.6
Marine Corps	10.1	15.1	1.1	2.6
Air Force	3.1	11.2	0.5	1.7
Coast Guard	N/A	9.8	N/A	0.7
Overall	**6.1**		**1.2**	

Note: The United States Naval Academy awards commissions to both Naval and Marine officers.

Source: Sexual Assault Prevention and Response Office, *Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012* (U.S. Department of Defense, 2013)

The prevalence of unwanted sexual contact at the service academies is comparable—and in several cases higher—than in the service branches overall. As shown in the table above, the overall prevalence of unwanted sexual contact among service women in 2012 was 6.1 percent, but that same year, the overall prevalence of unwanted sexual contact for female cadets and midshipmen at the Air Force Academy and Naval Academy was 11.2 percent and 15.1 percent, respectively.[68] At the Air Force Academy, the prevalence of sexual assault is more than three times higher than the prevalence for women in the active-duty Air Force. Not only is the overall prevalence of sexual assault higher at the service academies, but a higher proportion of cases in the academies involve attempted and completed rape compared to the proportion in the armed forces overall.

The sexual assault problem at the military service academies is getting worse, not better. The number of sexual assaults reported at the academies has doubled in recent years, and the academies have consistently been out of compliance with many aspects of the DOD's sexual assault prevention policy.[69] Unfortunately, students at the service academies are not currently protected through Title IX, which ensures gender equity in institutions of higher learning.[70] Title IX, which is enforced through the Office of Civil Rights at the Department of Education, gives students a tool to combat sexual violence on college campuses by affirming that sexual violence and sexual harassment on campus deprive female students of their right to equal access to education, Title IX has increasingly been used to successfully hold institutions of higher learning accountable for failure to appropriately respond to the urgent crisis of sexual violence on campuses.[71] The service academies should be included under the umbrella of Title IX so that students at the service academies benefit from the same oversight that protects students at other institutions of higher learning.[72] Students at the service academies are military leaders of the future, and the military's failure to address the problem of sexual assault at the service academies only ensures that the problem will continue to remain an issue.

In June alone—as the Joint Chiefs and their lawyers were preparing to testify before the Senate on the military sexual assault issue—two more high-profile scandals involving the service academies emerged. The Pentagon reported that the U.S. Naval Academy was investigating allegations that three Naval football team members sexually assaulted a female midshipman.[73] Within a week of that announcement, academy officials at West Point disbanded the club rugby team in response to a crude email chain that was both hostile and degrading toward women, including their female classmates.[74] Despite this behavior, many of these young men were recently allowed to walk across the stage and graduate from West Point.[75]

Lack of research and misrepresentation of existing research

As the Joint Chiefs of Staff and Judge Advocates General of the Armed Forces testified before the Senate in June, there was significant confusion among senators and the Joint Chiefs as to whether sexual harassment was included in the DOD's estimates that 26,000 sexual assaults that were committed in the armed forces in 2011 and 2012.[76] Some indicated that if sexual harassment were included in the estimates, the data could potentially overstate the severity of the problem of sexual misconduct in the military.

The military does, indeed, need to improve how it collects data on sexual assaults and sexual misconduct so that we can fully understand the scope of the problem and refine the tools we use to address it. But failing to distinguish between harassment and assault is simply not among the research's shortcomings.

The survey instrument differentiates between two different categories of behavior: unwanted sexual contact and unwanted gender-related behavior. The former captures the crimes of abusive sexual contact, rape, and forcible sodomy and attempts to commit those offenses. The latter captures sexual harassment and other unwanted behavior, such as unwanted sexual comments. The Pentagon's 26,000 figure is based only on the number of service members who reported unwanted sexual contact and not those who reported unwanted gender-related behavior—despite the fact that unwanted gender-related behavior includes some serious behaviors such as sexual coercion and quid pro quo.[77]

Yet some involved in the reform debate have gone on record misrepresenting the data by claiming that "someone looking at you sideways" may have been counted as sexual assault—on par with physical crimes such as rape and nonconsensual sodomy—in the Pentagon's estimates. Just recently, a young Marine officer assigned to the Joint Chiefs of Staff wrote an op-ed arguing that the DOD study exaggerated the problem and that the research was so bad that "no conclusions can be drawn from it." She later stated in an interview that military reform based on the data would only "perpetuate the problem" of sexual assault in the ranks.[78]

Amid these claims that the data are useless or overstate the sexual assault problem, there has been a distinct lack of discussion of the ways that the numbers actually understate the severity of the crisis. It would be irresponsible for military officials and members of Congress to dismiss military sexual assault reform without also considering the ways in which the data fail to capture a number of sexual crimes perpetrated by military offenders.

In a recent analysis, we identified several ways in which the DOD's estimate may actually understate the problem of sexual assault in the military.[79] Claims that the estimate is exaggerated ignore the fact that the estimate does not include assaults committed at military service academies; does not account for the fact that the number of perpetrators in the military may be higher than the number of victims, as 26 percent of service women report that their assault was perpetrated by multiple offenders; and does not capture repeated abuse or multiple attacks against the same victim.[80]

There should be a constructive conversation about the quality of the data the Pentagon collects on sexual assault in the military. We have included recommendations to improve data collection in subsequent sections of this report. But what is unacceptable and disheartening is the way that data are being used by some military personnel and their supporters in Congress and the media to resist meaningful reform despite the wealth of information from several years of data collection and analysis, independent research on military personnel, overwhelming anecdotal evidence from survivors of military sexual assault, and the near-weekly scandals that make headlines.

Recommendations

A critical step to increase accountability for perpetrators is to remove dispositional authority from the chain of command. This step alone, however, is insufficient to address the problem. There are important steps that must be taken to increase accountability, protect victims' rights, and improve data collection to enhance understanding of the problem. In this section, we discuss the key accomplishments that reform efforts have already made, outline critical reforms that are currently under consideration, and make additional reform recommendations.

Increase accountability for perpetrators and leadership

Article 60 of the Uniform Code of Military Justice, or UCMJ, allows commanding officers to overturn convictions and findings and modify sentences post-trial. Another controversial and closely related practice is allowing commanders to consider the character and military service of the accused in the initial disposition of a case. The abuse of these provisions have been discussed in relation to two particularly high-profile cases, including that of Lt. Gen. Craig Franklin setting aside the sexual assault conviction of Lt. Col. Wilkerson at Aviano Air Base and Lt. Gen. Susan Helms overturning a conviction of sexual assault for Capt. Matthew S. Herrera at Vandenberg Air Force Base.[81] In light of these recent scandals, reform efforts have gained rapidly increased support among policymakers.

Congress should modify the manual for court martial to eliminate consideration of character and military service of the accused as a factor in the rule on the initial disposition of offenses under Rule 306 of the Manual for Courts-Martial. This proposal is included in the proposed Military Justice Improvement Act and is addressed in the 2014 National Defense Authorization Act, or NDAA.*[82]

Congress should also remove the Article 60-granted power of a convening authority to grant sentence reductions post-trial or modify conviction findings to a less serious offense in order to mitigate consequences for convicted sex offenders.

The military should also ensure military attorneys' independence from the chain of command. Based on conversations with experts in the military legal systems, some service branch prosecutors' performance evaluations are conducted within the chain of command. In order to ensure the independence of the criminal justice process, all military attorneys should be evaluated through an independent process in the JAG core, without exception. The Military Justice Improvement Act would ensure that all prosecuting attorneys on felony cases are independent of the chain of command. The 2014 NDAA does not address this issue.

Victims' rights and access to legal services

Over the past few years, the military has made significant improvements to ensure that appropriate services are available to victims when they report an assault. But much still needs to be done to ensure that victims have access to the advocacy and protection they need throughout the justice process, especially when it comes to preventing retaliation and harassment.

In August, the military took a major step toward protecting victims' rights during the justice process when Secretary Hagel ordered the service branches to establish a victim's counsel in each branch of the services.[83] The 2014 NDAA would codify this requirement.[84] This reform was inspired by the success of the Air Force's special victims' counsel pilot program, which has helped military sexual assault survivors feel like they have a voice in the criminal justice process. The program gives victims the support they need to go forward with the case—rather than backing out if they experience intimidation—and it ensures that they have an informed advocate who can guide them through the military justice system and support them along the way.[85] Special victims counsel, or SVC, helps victims navigate the process leading up to court martial, attends trials with the victim client, and helps obtain expedited transfers and protective orders, among other things. More than 300 victims in the Air Force have benefitted from the new program, and all but 27 of them of have decided to go forward with prosecution.[86] Victims report that they are highly satisfied with the support that they receive through the program.[87] Expanding this program across the branches will make a tremendous difference for military sexual assault victims once it is implemented.

In another recent victory for victims' rights, Congress required high-level reviews of separation of a service member who reported sexual assault. As discussed above, victims are frequently retaliated against solely for reporting crimes committed against them in the military. The 2013 NDAA required the review of all unrestricted reports of sexual assault by members of the Armed Forces since 2000 to determine the number who were subsequently separated and the grounds for such separation; what reason was provided for separation; whether the member requested an appeal; and for each member separated on the grounds of having a personality disorder, whether the separation was in compliance with DOD instruction.[88] This change will hopefully help to restore a sense of justice to victims who have been retaliated against in recent years.

Criminalize retaliation against victims

The data make clear that the victims of military sexual assault experience retaliation, and fear of retaliation is a primary reason that victims do not come forward to report the crimes committed against them. The 2014 NDAA would make it a crime under Article 92 of the UCMJ to retaliate against victims who report a sexual assault.

Reform the structure of Article 32 hearings and enforce the military's rape shield law

Article 32 hearings are the first opportunity that defense attorneys have to cross-examine a sexual assault victim as part of the investigative process that determines whether a case will be tried through court-martial.[89] Article 32 hearings can be a forum for prolonged and degrading questioning of sexual assault victims about, for example, oral sex technique and clothing, as described in a recent *New York Times* article.[90] Although the military's rape shield rule technically applies during the Article 32 hearing, defense attorneys are frequently allowed to ask questions that violate the shield because of leniency in cross-examining witnesses granted by the rules of court martial in the pre-trial process.[91] In civilian courts, grand jury proceedings do not include the participation of defense attorneys, protecting victims from enduring this type of harassment during the pre-trial process.[92] Numerous legal experts have recommended that the military version of this process be brought in line with the structure of civilian grand jury proceedings.

Some high-level military leaders have tried to eliminate the rape shield law entirely by requesting that the president sign an executive order to eliminate it from the military rules of evidence.[93] The rape shield law is one of the few existing legal protections for victims in the military justice system. It exists to protect victims from slander in court proceedings and unfairly prejudicing their statements about the assault.[94] Repealing the rape shield law would likely have a chilling effect on reporting because it would signal to victims that their sexual history is a free-for-all for defense attorneys in cross-examination.

Congress members and advocates recently called on the president to support the reform of Article 32 hearings, but no legislation has been introduced. The implementation of the special victim counsel and the new requirement that the victims' attorney be present during questioning if the victim requests it may help strengthen protection for victims during this process.

Require that an official notice and written explanation of a decision not to prosecute be provided to the victim

In cases involving sexual assault and other forms of gender-based violence, Congress should require that any prosecutor who discontinues a case of sexual violence provide a written, detailed explanation to the complainant describing why the case was dropped and advising the victim again of any services that are available to them.[95] The victim should be given the right to seek clarification on any details not provided. A copy should also be provided to the victim counsel and victim advocate.

The United Nations Handbook for Legislation on Violence Against Women recommends requiring an explanation for the victims. Its purpose in this context is to increase transparency in communication with victims and victim advocates, offer closure or acknowledgement for victims, and create documentation that could potentially help with the presumption in favor of offering VA benefits to survivors of military sexual assault. The proposed 2014 NDAA includes a requirement that a written justification of the decision not to prosecute is included in the case file but does not require that a copy be provided to the victim.

Tackle sexist attitudes to protect victims through prevention

Developing a strategy to address sexual assault in the military without tackling attitudes about women in the military is like trying to fight a war without an enemy. More than half of the victims of sexual assault in the military are men, but the proportion of attacks against female service members is much higher than those against males. Female service members account for 15 percent of the armed forces, but they were 46 percent of those estimated to have been victims of sexual assault in the military in 2012. Meanwhile, 90 percent of alleged perpetrators were male.[96]

Most service members who are victims of rape and sexual assault in the military have also experienced sexual harassment.[97] In a significant percentage of incidents reported by women on the WGRA, there was behavior—known as indicator crimes—prior to the attack, which, if reported or observed, could have led to intervention that may have prevented the assault. Thirty percent of women who reported unwanted sexual contact, for example, said the offender sexually harassed them before or after the incident but did not stalk them; 8 percent reported the offender stalked them but did not harass them; and 20 percent said the offender both harassed and stalked them.[98]

Military leaders have recognized that they must eradicate sexist attitudes in order to change a culture that in many respects is still hostile to service women and contributes to high rates of sexual assault. Last month, the director of SAPRO, Maj. Gen. Gary Patton, stated that sexism and harassment in the military have created a "permissive environment" in which sexual assaults can occur. But as the president has said, it is time for the military to exponentially step up its game.[99]

Recognizing women's contributions by eliminating the combat exclusion policy was an important first step, but the military must also respond to other sexist behavior such as stalking and harassment.

Improve data collection and reporting

In SAPRO's annual report on military sexual assault, the DOD acknowledges that the military is in a unique position in terms of its ability to collect data and drive evidence-based solutions to sexual assault:

Few organizations in the world have the ability to develop evidence-based curricula, train millions of people, invest substantial resources, and measure outcomes throughout its entire population over time. The U.S. Armed Forces has this capability and leverages it to develop, implement, evaluate, and revise their comprehensive prevention approach. The Department believes that these capabilities will ultimately allow it to model effective solutions for the nation.[100]

While the Armed Forces have made significant improvements to data collection over time, there is a great deal that could still be done to improve data collection and provide more useful information. At present, SAPRO does not have an organized and comprehensive set of metrics to target its prevention efforts, but new tools have been developed that should help improve our understanding of sexual assault in the military.

In October, DOD completed implementation of a case-level incident database that Congress required it to create in the 2009 NDAA.[101] Not only will the database allow for better case management and tracking of sexual assault incidents across the service branches, but it will also allow for standardized data collection that researchers can use to analyze and report on trends based on actual case data rather than survey instruments. The provided information could be invaluable for developing more effective prevention strategies, increasing administrative capability and accountability for the military's handling of sexual assault cases, and tracking offenders to make sure that repeat incidents are recorded so that predators can be held accountable. It could also allow DOD to more effectively track and report aggregate retention rates for victims of military sexual assault after they report an offense and a variety of other valuable information.

Now that the database is operational, analysis based on the case-level data should be publicly reported. At present, there is no public oversight of the case management of sexual assault incidents in the military. Congress required the DOD Inspector General's Office to provide oversight of military sexual assault at the case level, but a recent report from the Government Accountability Office revealed that the Inspector General has taken no steps to provide case-level oversight because "it believes it has other priorities."[102] DOD should be required to utilize the new database to evaluate and report on its performance, including retention rates for victims who report sexual assault.

The 2013 NDAA required the secretary of defense to establish an independent panel to conduct an assessment of UCMJ judicial proceedings that involve sexual assault and related offenses for the purpose of developing potential improvements, such as: sentencing guidelines; punishments or administrative actions taken in response, either by a panel or a judge; overview of court-martial convictions of sexual assault; descriptions of cases in which a defendant's sentence was reduced upon appeal or a plea agreement; the number of cases in which the previous conduct of the victim was considered and whether this was admissible or impacted the case; and the training level of the judge advocate general.[103] Experts on the commission should work to identify which data and analysis would be most useful for the military to collect and report each year and make recommendations to improve research on sexual assault in the military.

Report existing sexual assault data by installation and command designation in the SAPRO Annual Report

SWAN has advocated that SAPRO track and report sexual assault incidents by military installation and command designation.[104] Not only would providing this information allow greater transparency and accountability, but also would allow for the identification of military installations with particularly high or low incidence of sexual assaults in order to identify best practices for prevention programming.

Publicly disclose the questionnaire of the WGRA

Civilian experts, advocates, and policymakers should have the opportunity to review the WGRA and recommend areas for improvement. While DOD reports the results for each survey question annually, it is difficult to ascertain the context of the questions on the survey and identify ways that the survey could be improved to offer more valuable information about the experiences of victims without actually seeing the survey instrument.

Improve sampling of male soldiers in the WGRA

The WGRA's sampling of male service members' experiences is so bad that the data reported are virtually meaningless. Many of the data points reported for male victims suffer from margins of error as high as 17 percent.[105] Collecting data on sexual

violence in general is difficult, but collecting data on male victims of sexual violence is notoriously difficult because the prevalence among men is thought to be substantially lower than among women, so very large samples are required in order to draw enough responses from victims to produce meaningful findings. The Pentagon does not publish the exact ratio of women to men surveyed because the military does not publish a detailed methodology with the survey results. We can infer from the margin of error for male service members, however, that they are likely undersampled and that a much larger sample size is needed. As reflected in the comment from the Pentagon above, military researchers are in a unique position to make that happen compared to civilian researchers and should make an effort to improve data collection on male service members' experiences with sexual assault. Independent research of male service members has found that the prevalence of sexual assault among male service members may be as high as 7 percent[106]—compared to the 1.2 percent currently reported. Advocates have recommended this in the past, but it is unclear whether DOD has taken any action on the recommendation.

The chain-of-command issue

Removing dispositional authority from the chain of command is a critical step to address the military's sexual assault problem and has been at the center of the controversy over how best to address sexual assault in the military.

The military criminal justice system is unique in that it currently allows commanders absolute discretion in decisions that determine whether an offender will be prosecuted for sexual misconduct and the ultimate consequence upon conviction. The Manual for Courts-Martial currently maintains that the officer who determines whether or not a criminal case goes to trial is in the chain of command of the service member accused of assault.[107] Moreover, commanders—who lack legal training and have a conflict of interest—have the authority to overturn, lessen, or modify convictions. In just one example, earlier this year, an Air Force general officer overturned a fighter pilot's sexual assault conviction—which was decided by a panel of six colonels—on the basis that the attacker "adored his wife and 9-year old son."[108] The incident became the center of a national controversy and demonstrated the longstanding flaws in allowing such command discretion in military criminal proceedings and led to the Senate Armed Services Committee voting to remove this authority.

The ability of commanders to maintain order and discipline is critical to the readiness of the armed forces and U.S. military operations' success. Commanders need to know that their troops can carry out directed orders in the most stressful of conditions. But there is a difference between enforcing discipline and addressing criminality. Trained legal and law enforcement professionals should always address criminal behavior; that is the only way to ensure that the victim and defendant's rights to justice and due process are protected. Even if jurisdiction over criminal offenses were removed from commanders, they would still retain authority over minor crimes and authority to enact administrative punishments in order to enforce discipline within their units.

There are four facts that support removing dispositional authority for sexual assault cases from the chain of command.

First, commanding officers and high-ranking military officials are often the perpetrators of sexual offenses in the military. In 2012, the results of the WGRA found that 25 percent of service members who reported unwanted sexual contact said someone in their chain of command assaulted them.[109] Another 38 percent reported that the offender was of a higher rank or pay grade but not in their chain of command.[110] Altogether, this means 63 percent of service members who reported unwanted sexual contact on this year's WGRA survey were attacked by someone who outranks them.

There is a difference between enforcing discipline and addressing criminality.

This statistic has remained consistent over the several years that the WGRA has been administered.[111] According to the *International Handbook of Violence Research*, as far back as 1988, the Pentagon conducted a survey of 20,000 male and female and troops on the subject of sexual harassment.[112]Among female soldiers, 70 percent reported harassment, and among male soldiers, the figure was 36 percent.[113] Surveyed women were twice as likely as men to be harassed by their direct military supervisors, at 21.9 percent versus 11.8 percent of men, or by other high-ranking military personnel, at 18.7 percent versus 8.6 percent.[114]

Second, even when they are not the perpetrators, commanding officers have an inherent conflict of interest when it comes to prosecuting sexual assault cases.[115] Since military commanders are evaluated on their command climate and are rated poorly if sexual assault takes place within their unit, it is not in a commander's best interest to even investigate allegations.[116] No matter how high up in the chain of command one places dispositional authority, this conflict of interest still exists.

Third, even when victims do not fear direct retaliation from their commander, commanders must be given all information about the case in order to decide whether or not to go court martial—including graphic information and details that may negatively impact the victims' career. This discourages victims from reporting the crimes committed against them. Victims want to move on with their military career and maintain as much normalcy in their job duties as possible. Having commanders determine whether or not to prosecute the case means that victims are forced to choose between maintaining their right to privacy from their commander or having the option to pursue justice through the military legal system.

Fourth, an officer's rank does not connote any expertise in legal matters. Trained legal professionals should be handling all criminal cases, particularly sexual assault cases that are exceptionally difficult to prosecute.

In a letter to the chairman of the Senate Armed Services Committee, Adm. James Winnefeld defends keeping sexual assault cases within the chain of command by arguing that commanders prosecute cases more frequently than civilian prosecutors."[117] The letter presents a tally of cases that the military prosecuted—often to a successful conviction—after civilian prosecutors "declined to prosecute."[118] Prosecuting sexual assault and bringing justice to victims is not a race to the bottom; the military should not point to the failure of the civilian justice system to defend its own serious and systemic problems in its response to sexual assault.

In any case, because DOD has not made the supporting documents public, it is difficult to ascertain what the data presented in Adm. Winnefeld's letter actually mean. It is not clear whether the cases Winnefeld references were cases that civilian prosecutors would never have prosecuted. It is also not clear if they were cases involving overlapping jurisdiction between military and civilian prosecutors where authorities mutually agreed that the case should be retained in the military legal system.[119]

Moreover, the question of whether civilian prosecutors decline cases at higher rates than commanders is irrelevant to the chain-of-command issue. No one is proposing placing the authority to prosecute crimes in the hands of civilian prosecutors or removing sexual assault cases from the jurisdiction of the UCMJ. Rather, the debate is over whether the military personnel responsible for prosecuting cases should be within the chain of command or whether the prosecutor should be a legally trained military professional operating in an independent office outside the chain of command. Adm. Winnefeld presented no evidence to suggest that commanders would be more likely to prosecute cases than other military lawyers who are not in the chain of command.

Roger Canaff, a leading expert in prosecuting sexual violence who has provided training to the armed forces on how to prosecute sexual assault made these points:

> *[Some have] asserted "off-post rapes" committed by service members (and thus pursuable by both civilian and military prosecutors), are pursued by military prosecutors at far higher rates. This is a good thing, but not surprising. Off-post sex crimes committed by service people are usually committed against other ser-*

vice people and involve military witnesses. The military is in a better position to pursue those cases and has more interest in doing so. Civilian prosecutors' offices are also notorious for declining to prosecute challenging sexual violence cases (i.e, the vast majority), so no one should be offering them (collectively) as a standard to be emulated. But again, how does a lackluster civilian response translate into the military having no serious issues with its response? Yes, the military prosecutes rape, and increasingly does so aggressively and competently… But first a report must be made. This is a major response issue the military faces… Reporting a crime as a soldier or sailor is more like reporting to an employer than to police. Sex crimes are difficult for anyone to report. Imagine reporting to a superior you work with everyday (while your attacker is in or near the very same environment) and then to a command stream where cohesiveness and unflagging enthusiasm are the most demanded attributes...The efforts of Sen. Kirsten Gillibrand (D-NY) and Rep. Jackie Speier (D-CA), aim at addressing these realities with military lawyers, just outside the chain of command where inherent conflicts exist.[120]

Why increasing checks on command authority will not go far enough

The 2013 NDAA responded to the crisis of military sexual assault by elevating the initial dispositional authority for disciplinary actions on sexual assault cases to the rank of colonel or higher in the chain of command of the accused service member.[121] The goal of the reform is to place accountability for prosecution with higher ranking officers who would theoretically make better decisions than lower ranking commanders about whether or not to proceed to court martial. The proposed 2014 NDAA would go a step further to address accountability by keeping dispositional authority at the elevated command level and adding an additional check on command authority. A proposal from Sen. Carl Levin (D-MI), chairman of the Senate Armed Services Committee, would preserve the 2013 requirement that sexual assaults are referred to an officer of the rank of colonel or higher within the accused service member's chain of command. But in the event of a JAG officer investigating a crime recommended that an alleged perpetrator be tried through general court martial and the commanding officer disagrees with that decision, the case would automatically be referred to the service secretary of the relevant branch for review of command's decision.[122] The intent of the proposal is to create

a substantial deterrent for commanders to go against the advice of the trained JAG in terms of how to proceed with the case while at the same time preserving final authority over the decision within the chain of command.

It is unlikely that a service secretary's review would really effect increasing accountability. The secretary, who may or may not be a lawyer or have any expertise in criminal law, would receive the file prepared by the JAG and commanding officer and likely would not reopen a case, interview witnesses, or otherwise engage in any independent investigation of the alleged offense. It is clear that top military leadership are inclined to support command authority, as evidenced by the Pentagon's adamant defense of maintaining authority within the chain of command.[123] JAGs are aware of this preference on the part of the commanding officer and military leadership and ultimately may not have any real professional independence from the chain of command. The staff judge advocates with whom the commander would confer about whether or not to proceed to court-martial often work for and are evaluated by the commanding officer who is the convening authority rather than through an independent process in the JAG core.[124] Therefore, as the proposal and the performance evaluation process are currently structured, the military prosecutor has a strong disincentive to trigger the automatic review on sexual assault cases, even if we were to assume that the service secretary is an objective and qualified reviewer in making this determination.

The 2014 NDAA will likely make a number of important changes, including addressing the abuse of Article 60 by stripping commanders of their ability to modify findings. It will likely take an important step to protect victims by making it a specific crime under the UCMJ to retaliate against victims. It also includes a number of administrative changes aimed at improving the SAPRO's response to sexual assault, such as asking the armed services to develop specific personnel criteria for SAPRO. But on the key issue of impacting accountability for perpetrators, the proposal included in the 2014 NDAA falls short by failing to entrust professional prosecutors with the crucial decisions about whether or not to prosecute sex offenses rather than officers—regardless of how high ranking they may be—who generally lack any legal training whatsoever and inevitably have a conflict of interest in the matter.

International precedent for military justice outside of the chain of command

There is an established international precedent for taking the authority to prosecute sexual offenses out of the chain of command. Two different models have been implemented in the international community: taking authority out of the military justice system altogether and granting authority to civilian law enforcement and creating an independent criminal justice system within the military itself.

France and Germany are two examples of countries that have placed authority in civilian systems. Canada, the United Kingdom, and Israel have taken prosecutorial authority outside of the chain of command by creating independent judiciaries within their existing military structures. No evidence has been presented that the readiness or unit cohesion of these militaries has declined because commanders are not handling criminal cases. Under our status of forces agreement with Japan and South Korea, these countries can and do prosecute U.S. service personnel who commit crimes off base.

Conclusion

The military expects its members to exhibit conduct that demonstrates discipline and integrity. Such standards are based on high principles of character that reach well beyond the goal of weeding out criminal behavior. Every day, service members can and do conduct themselves in this way; but when it comes to sexual assault, the military's track record is getting steadily worse.

The public should not accept sexual assault in the military simply because assault is also prevalent in other institutions such as college campuses, as some have insinuated.[125] The military is an exceptional institution in every way—both because it has the tools to hold offenders in the military accountable and because service members must be held to the highest standards of conduct given the important responsibilities and privileges we entrust them with.

With military sexual assault numbers on the rise, it is imperative that military leaders and members of Congress leave no option off the table to end this shameful trend. Important changes have been made in recent years, and pending legislation takes important steps toward reform, including improving the experiences of survivors who report the crimes committed against them, improving training for military personnel, and increasing our understanding of the issues through important research. But holding offenders accountable is the key to the kind of drastic change that is necessary. The military has had more than two decades to prove that it can do so within the command structure; but it has failed to do so, at the expense of victims' safety and the integrity of our armed forces. The time has come to remove dispositional authority from within the chain of command and institute a credible and objective justice system.

***Correction, November 6, 2013:** The original version of this report incorrectly stated on page 20 that the Rule 306 proposal was not addressed in the 2014 National Defense Authorization Act. The proposal is, in fact, addressed in NDAA 2014.*

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Dr. Korb served as assistant secretary of defense of manpower, reserve affairs, installations, and logistics from 1981 through 1985. In that position, he administered about 70 percent of the defense budget. For his service in that position, he was awarded the Department of Defense's medal for Distinguished Public Service. Dr. Korb served on active duty for four years as Naval Flight Officer and retired from the Naval Reserve with the rank of captain. He received his Ph.D. in political science from the State University of New York at Albany and has held full-time teaching positions at the University of Dayton, the Coast Guard Academy, and the Naval War College.

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Endnotes

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