

# Will Military Sexual Assault Survivors Find Justice? (Issue Advisory)

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*The U.S. Senate turned back legislation offered by Sen. Kirsten Gillibrand that would assign sexual assault cases to specially trained military prosecutors, removing them from the chain of command. Gillibrand's bill, The Military Justice Improvement Act – S. 1752, had the support of 55 senators, but not the 60 votes needed to overcome a filibuster. The Defense Department lobbied intensively against the bill, but Sen. Gillibrand says that she is not giving up. Several similar bills are pending in the House but whether the Republican leadership – which generally supports the defense establishment — will let these come forward is another question.*

*We commend Sen. Gillibrand in her commitment to address sexual assault in the military and believe her efforts have increased public awareness of the larger cultural problem of rape and sexual assault. A report from the newly formed White House Task Force To Protect Students from Sexual Assault recognizes that rape is a deep and pervasive form of violence against women. Studies indicate that one in five women is a survivor of an attempted or completed act of sexual violence while in college. Men as well, both in the military and in college, experience sexual assault at rates higher than in the general population.*

*In the wake of defeat of Sen. Gillibrand's measure, the question remains whether the recent changes to military law and policy to address rape and sexual assault will be sufficient to help the tens of thousands of victims each year in the military.*

**A Long-Running and Costly Epidemic** – The Defense Department's Sexual Assault Prevention and Response Office (SAPRO) reports that while military sexual assault affects men as well as women, the latter are disproportionately affected. One in three military women has been sexually assaulted, compared to one in 86 military men and one in six civilian women. During fiscal year 2012, 26,000 cases of unwanted sexual contact were reported in an anonymous Defense Department survey – just 3,374 cases were officially reported but only 302 were prosecuted.

Victims – both men and women – fear retaliation or harm to their careers if they formally report incidents – thus, the military's rape culture has been permitted to continue for decades. More than 85,000 veterans were treated in 2012 for injuries or illness stemming from sexual abuse in the military, and 4,000 sought disability benefits. It has been estimated that a half million members of the Armed Forces have been victims of rape, sexual assault or unwanted sexual touching over the last 25 years. For 2012, the cost for dealing with sexual assault for just that year was estimated to be \$3.6 billion.

**Survivors' Stories Reveal Trauma** - Many of us watched the award-winning 2012 documentary, **The Invisible War**, which tells the emotional stories of men and women veterans who were brutally assaulted by fellow military service members, but found their commanding officers *unwilling* to go forward with prosecution of the accused.

Their experiences reflected similar themes of retaliation against the survivors with no consequences for the accused, a failure to provide adequate emotional and physical care, the unhindered advancement of perpetrators' careers and the involuntary expulsion of survivors from service. Their stories often did not end with their military service but continued with post-traumatic stress disorder, marked by depression, trouble sleeping, physical and emotional pain, difficulty feeling safe and other debilitating conditions. Some survivors sought help from the Veterans Administration, but were denied assistance.

**Most Want Independent Prosecutor** – Since the film's release and headline-grabbing reports of increased incidents of rape and sexual assault in the military– including a shocking attempted assault by the head of the Air Force's SAPRO unit — the public has become more aware of this long-running and widespread problem. Many advocates believe that reforming the military justice system to require an independent, trained prosecutor to handle sexual assault cases is the best approach. According to an ABC/Washington Post poll in November, 59 percent of respondents (including 53 percent of Republicans) support having independent prosecutors – outside the chain of command – take over the authority to prosecute in sexual assault cases.

## **CASES THAT CAUGHT THE HEADLINES**

**Chaotic Prosecution Record Found** – In a devastating revelation of what it termed a “chaotic military sex abuse record” the Associated Press (AP) recently reported that an examination of more than 1,000 records of sex abuse cases, dating from 2005 to 2013, at U.S. military bases in Japan showed that even seemingly strong cases were often reduced to lesser charges, and even when found guilty most perpetrators did not go to prison. The AP's analysis reveals a pattern of random and inconsistent judgments across the services. Of 124 sex crimes reported in the Air Force, the only punishment was a letter of reprimand; of the Navy's 203 cases, 70 were court-martialed and only 15 were sentenced to time behind bars; and, out of 270 cases, the Marines sent just 53 to prison.

**Zero Tolerance Policy A Failure** – It is a national disgrace that for more than three decades commanders in the Army, Navy, Air Force, Marines, and Coast Guard have been unable to curb sexual violence. What is, in fact, criminal behavior has persisted on a broad scale despite repeated promises of a “zero tolerance” policy for rape and sexual assault by successive Defense secretaries going back to Secretary Dick Cheney following the notorious 1991 Tailhook Navy scandal. In that shocking incident occurring over three days, Navy and Marine Corps aviation officers – 83 women and seven men — were sexually groped and their clothes ripped off while forced to run a gauntlet of intoxicated and raucous officers at a meeting of the Tailhook Association in a Las Vegas hotel. Many senior level officers were aware of what was happening, but did nothing. Other offenses

included exposing genitals, biting of buttocks, and using strippers and prostitutes in hospitality suites. Several military sources indicated that this kind of behavior had gone on for many years previous to the 1991 events and was essentially condoned.

Not one of the 140 accused was ever punished criminally. One commander commented later to a victim, “that’s what you get when you meet a bunch of drunken pilots.” The eventual fallout of the scandal included the forced resignation of the secretary of the Navy, the censure of several admirals who later resigned or were demoted in rank, and the careers of another dozen admirals and 300 naval aviators were scuttled or damaged by Tailhook. Several critics said that the Clinton administration over-reacted in its response to Tailhook, but the scandal prompted the enactment of a modest reform agenda which contained the “zero tolerance” policy.

**Army Gets a Wake-Up Call** – In 1996, 17 female soldiers stationed at the Aberdeen Proving Ground’s Ordnance Center in Maryland told investigators that they were raped or sexually harassed. Ultimately, nearly 50 women came forward to report sexual assault, including 26 incidents of rape. The Army brought charges against 12 commissioned and non-commissioned male officers for sexual assault on female trainees under their command.

Staff Sergeant Vernell Robinson Jr., was accused of 19 counts involving the abuse of five women under his command, including sodomy, adultery, communicating a threat, obstructing justice and disobeying orders. Robinson was sentenced to six months in prison, demoted to private, lost all benefits and was discharged. His sentence was reduced to just four months in prison after he pleaded guilty to some of the offenses.

Another of the accused, Sergeant Delmar Simpson was found guilty of 18 counts of rape against six women and 29 other offenses. He was sentenced to 25 years in a military prison. Of the 12 charged, 11 were court-martialed or punished administratively.

At the time, the Army set up a hotline to take reports of sexual harassment or assault in the military and made available resources for soldiers who were harassed or assaulted. Some 2,000 calls were soon logged in. The Army also clarified a policy against romantic relationships between trainers and the soldiers they train.

**Air Force Instructors Molested Teenage Recruits** - One of the worst incidents of mass sexual assault occurred in 2012 at Lackland Air Force Base in Texas where 32 instructors sexually assaulted 59 teen-age recruits. At least two of the instructors allegedly had sexual encounters with 10 different recruits each. The teenaged recruits had already been told to obey any orders from their instructors and in some cases the recruits were ordered by instructors to go to a closet where they were then molested by the instructors, according to a New York Times article. Only a few of the 59 victims came forward to report the assaults.

Gen. Mark A. Welsh III, Air Force chief of staff, later told House Armed Services Committee members that there was poor oversight of instructors and a climate of fear

among female personnel which led to the Lackland scandal. The Air Force later conducted an inspection of all of its bases and found widespread evidence that pornographic and other inappropriate materials were on display in work spaces throughout the service.

**High-Ranking Officers Not Immune** – A more recent headline-grabbing case involved Lt. Col. Jeffrey Krusinski, chief of the Air Force’s sexual assault and prevention program, who was arrested in May, 2013, for groping the breasts and buttocks of a woman in a parking lot in Arlington, Va. The victim fought off Krusinski leaving scratch marks on his face. Krusinski was arrested, charged with sexual battery and removed from his post, but prosecutors later reduced the charges to assault and battery and Krusinski was acquitted.

**Highest Officer Ever Charged** – Believed to be the highest-ranking U.S. military officer to be charged with sexual assault, Brig. Gen. Jeffrey Sinclair was initially to be charged with eight criminal counts including forcible sodomy, indecent acts, violating orders and conduct unbecoming an officer. Once considered a rising star in the Army, Sinclair was deputy commander of the 82<sup>nd</sup> Airborne, overseeing 22,000 troops in Afghanistan. Currently relieved of his command and undergoing trial at Ft. Bragg, N.C., Sinclair has secured a plea deal that included the dropping of sexual assault counts and two other charges that may have required him to register as a sex offender. Sinclair’s attorneys are negotiating with prosecutors over sentencing, but the terms have not been disclosed. Reportedly, the punishment will be far less than the more than 25 years in prisons and dismissal from the Army, with a possible loss in pension and other benefits, specified in the military code. The military judge will decide on Sinclair’s punishment at the end of the sentencing hearing this week, but the new plea agreement places a cap on his punishment.

The general is accused of physically forcing a female captain under his command to perform oral sex and carrying on a three-year affair with a junior officer. Prosecutors also allege that Sinclair, married with two children, had inappropriate contact with other women, including female officers who said that he asked them to provide nude photos of themselves. Testimony was offered about Sinclair’s abusive treatment of his mistress and other female officers, including vulgar and sexually-explicit insults directed at women. The case is being closely watched and reported on in the national press in this current environment of heightened awareness of military sexual assault and how military prosecutors are handling cases.

## **WILKERSON CASE A TIPPING POINT**

**Conviction is Overturned** – A tipping point occurred in 2013 when Air Force Lt. Gen. Craig Franklin, commander of the Third Air Force at Ramstein Air Base in Germany, overturned the conviction and sentence of Lt. Col. James Wilkerson, a former inspector general at Aviano Air Base in Italy. A jury of five military officers had found Wilkerson guilty of aggravated sexual assault against a female civilian physician’s assistant at the air base, and sentenced him to a year in prison and dismissal from the service. Lt. Gen.

Franklin's reversal of his conviction created a small firestorm in Congress and prompted members to speak out against allowing commanders to overturn convictions.

**Women Members Take the Lead** – Sen. Claire McCaskill (D-Mo.) wrote to Air Force Secretary Michael B. Donley and Air Force Chief of Staff Gen. Mark A. Welsh III asking them to review Lt. Gen. Franklin's decision and to consider removing Franklin from his leadership position. Rep. Jackie Speier, (D-Calif.), a member of the House Armed Services Committee who is sponsoring legislation to limit commander discretion in sexual assault cases, agreed with Sen. McCaskill, a senior member of the Senate Armed Services Committee, that the Wilkerson case could be the "tipping point," according to a Stars and Stripes article.

Sens. Barbara Boxer (D-Calif.) and Jean Shaheen (D-N.H.) asked Defense Secretary Chuck Hagel to review the case. Hagel reported back that the Wilkerson case raises the question of whether it is necessary or appropriate "to place the convening authority in the position of having the responsibility to review findings and sentence of a court-martial," particularly when military law allows for a rigorous appeals process. Hagel asked the services to examine that question and determine if changes to military law are necessary. He also asked for a review of the rules pertaining to sexual assault convictions.

Under further pressure from Congress, in January, Lt. Gen. Franklin stepped down from his position as commander of the Third Air Force, ending a 37 year career. But the widely-publicized incident motivated a number of members of Congress to introduce legislation that would limit commander discretion as well as reform a host of other practices in the military which have, in effect, exacerbated rather than curbing rape culture in the military.

**Best Solution: Remove Prosecution from Chain of Command** – There is a determined movement by a majority of the Senate to make an important change in the Uniform Code of Military Justice (UCMJ) that would place in the hands of high-ranking, experienced military prosecutors the decision whether a sexual assault or other serious criminal case should go to a military court. Offenses which are uniquely military in nature, such as disobeying a command or being absent without leave, would remain within the chain of command. It is this critical change that women's groups, domestic and sexual violence victim advocates, survivor and veterans' organizations and others overwhelmingly support.

## **MILITARY ACADEMIES A PERSISTENT CONCERN**

The military academies have come under increased scrutiny as well. The academies are where future officers are trained and where attitudes and behaviors about sex and power can be reinforced or altered. Unfortunately, sexual harassment and sexual assault at the military academies have been a fact of life for both women and men cadets for decades, although women are the primary targets. Those problems were so severe at the Air Force

Academy in Colorado Springs, Co, that Congress directed in 2003 that an independent inquiry be undertaken. Between 1993 and 2003, there were 142 formal reports of sexual assault over that period, but the inquiry revealed that over 80 percent of women who experienced sexual assault never filed a report. At the same time, one in five male cadets responding to a survey said that they did not believe that women belonged at the academy. Air Force Academy officials instituted new sexual assault reporting procedures and training programs addressing military culture. However, high profile incidents involving the Air Force Academy have continued.

Then Defense Secretary Leon Panetta in late 2012 called for “a strong and immediate response” after a Defense Department report indicated that sexual harassment and sexual assault remained persistent problems at military academies. The annual report for academic year 2011-2012 cited 80 cases of sexual assault, but the Defense department calculated the actual number to be about 520. For the 2012-2013 academic year a total of 70 reports of unwanted sexual contact (covering everything from groping to rape) involving midshipmen and cadets, declining numbers were reported for the U.S. Military Academy at West Point and the Air Force Academy, but increasing for the Naval Academy in Annapolis, MD. Victims are mostly female.

Initiatives based on focus groups and site visits to improve program effectiveness and to expand alcohol policies to improve safety have been adopted. Excessive alcohol consumption figured in 59 percent of the cases in 2012. The Annual Report on Sexual Harassment and Violence at the United States Military Academies for the academic year of 2012-2013 released in early January reported that students at the military academies often believe that they have to put up with sexist and offensive behavior and that a culture of disrespect permeates the school and their sports teams and fuels reports of sexual harassment and assaults.

The report called attention to scandals involving sports teams at all three academies during that period. Recent press reports of incidents at the academies include the secret videotaping by a highly-decorated sergeant of female cadets in the showers at the West Point academy and three Naval Academy football players who were charged with sexual assault (charges were later dropped against two of them; the third is currently on trial). Rep. Speier, who has made the military academies a special focus, recently stated that “the case has been mishandled from top to bottom and is a case study in what is wrong with the military justice system.” Speier said in a January 10 press release:

“A botched investigation made the most compelling evidence inadmissible, a convening authority with a clear conflict of interest and no legal training has decided not to move forward with the case, and an abusive preliminary hearing punished the victim while the accused won’t even face his day in court. The invasive attack on the victim at pre-trial and the continued mishandling of this case will almost certainly have a chilling effect on the military academy students watching this miscarriage of justice.”

Rep. Speier was particularly outraged by the Article 32 hearing in the Naval academy case where the female midshipman was questioned for 30 hours over several days and

was repeatedly asked demeaning and invasive questions that had nothing to do with the assault. Speier and Rep. Patrick Meehan (R-Penn.) offered legislation that would restrict the Article 32 hearing process to focus on whether there was probable cause that a crime was committed. News reports of the midshipmen's ongoing trial have focused on extensive testimony of the victim's alleged intoxication, seen by some as an extension of the Article 32 hearing-type abuse of victims.

## **PERFECT CLIMATE FOR PREDATORS**

Observers say that the existing power structure creates a perfect climate for predatory behavior when commanders can decide whether or not to prosecute, can reverse convictions and unjustifiably drive victims out of the service. We know that ingrained sexist attitudes die hard and no doubt some in the U.S. military are still not accepting of women in military roles even though women have been integrated since 1948. Whether the fact that women can now be assigned to combat positions will change these attitudes remains to be seen.

**They Asked For It** – The failure of military brass to take meaningful and effective action against sexual predators within their ranks raised the question whether they really understand what rape and sexual assault are all about. From remarks of commanders quoted in the press, it appears that some believe that rape and sexual assault are the natural expression of lustful or combat-stressed men, or that women have somehow enticed men into these acts. One of the women in documentary **The Invisible War** said the third woman in the span of one week to report a rape in her unit was asked, "You girls think this is a game; are you all in cahoots?" A male survivor of rape said that men are still viewed as having wanted it or being homosexual. In civilian life, the reality is well-understood that rape and sexual assault are a violent exercise of power driven by a desire to inflict injury on someone perceived as a subordinate. If commanders don't get it, they should not be deciding whether, when or whom to prosecute for these crimes.

**Very Few Prosecutions** - The SAPRO survey released in early 2013 reported the number of sexual assault and unwanted sexual contact incidents to be as high as 26,000 in FY 2012 – an increase over the previous year of 35 percent. That comes to 70 incidents per day! During that same period, just 3,374 formal complaints were made; of that number 2,558 were actionable reports, but only 302 cases were prosecuted resulting 238 convictions. Those numbers alone provide ample evidence that the chain of command-oriented system has failed.

The remaining 22,000 incidents were not formally reported. This is reflective of the fact that the vast majority of victims either believe that nothing would come of their complaint or that there would be retaliation – from the alleged assailant or the commander.

**Majority Suffered Retaliation** – The 2012 SAPRO report shows that of the 26,000 reports of unwanted sexual contact, 61 percent were for rape, aggravated sexual assault or non-consensual sodomy. In addition, of that same 26,000, 62 percent of victims said that

they had already been retaliated against – more evidence that the command structure is not seeking to protect victims.

Sexual assault is defined as rape, sodomy and other unwanted sexual contact, including touching of private body parts — but not including sexual harassment.

Late in 2013, it was reported that the number of sexual assault complaints had increased by 50 percent (3,553 for the first three quarters, October 2012 to June, 2013) to more than 5,000 filed during fiscal year ending September 3. The numbers included complaints involving civilians, either as victims or the accused. Military sources attributed the rise to more confidence by survivors in having their complaints taken seriously. The Pentagon and the services recently established new training programs that target rank and file service members as well as top commanders and officers, aimed at encouraging service members to be more vigilant, and to “look out for each other and intercede if they saw a bad situation developing.”

**Women Affected More** – According to the military’s data for 2012, women comprise 15 percent of active duty forces, but are 47 percent of victims or 12,100 of the 203,000 women in uniform. Men constitute a larger percentage of the victims (at 53 percent or 13,000), but a much smaller proportion of the 1.2 million men serving in the military. Seventy-five percent of women who were sexually assaulted did not report the attack; 62 percent of victims who reported sexual assault experienced retaliation; 37 percent of women veterans reported being raped at least twice and 14 percent of women reported being gang raped; 79 percent of women serving in the military over 40 years report persistent experiences of sexual harassment. Sixty-two percent of military women report social, professional or administrative retaliation after they were brave enough to report a sexual assault.

**Military Sexual Trauma Help Sought** – According to the Associated Press, the Department of Veterans Affairs (VA) reported that more than 85,000 veterans were treated in 2012 for injuries or illness stemming from sexual abuse in the military, and 4,000 sought disability benefits. Sexual assault or repeated sexual harassment can trigger – even years later — a variety of health problems, including post-traumatic stress disorder and depression. The VA said that while women are more likely to be victims, men made up nearly 40 percent of patients that VA treated for military sexual trauma and related stress disorders.

Getting treatment is easier than receiving disability compensation because the burden of proof for the latter is on the victim, according to Anu Bhagwati of the Service Women’s Action Network (SWAN). Still, many women who leave the military following a sexual assault and later find themselves suffering from post-traumatic stress disorders are often not able to get appropriate treatment. Spokespersons for the VA have said that any sexual assault victims will be helped, but in fact the VA routinely denies treatment if an incident of sexual assault is not formally reported and in the victim’s record.

**Cost of Sexual Assault Estimated at \$3.6 Billion** – The toll that the military’s rape culture takes, not only on the lives of hundreds of thousands of victims but also on military morale and discipline, is profound. All totaled, perhaps as many 500,000 service members — women and men — over the last 25 years have been the victims of rape, sexual assault or unwanted sexual touching. The cost of military sexual assault has been estimated at a staggering \$3.6 billion for 2012 according to a report by the Rand Corporation, which includes a calculation of the cost of medical and mental health services that victims are likely to seek as well as missed earnings amounting to \$104.5 million annually.

## **FOCUS ON COMMANDER’S ROLE**

**The Retaliation Problem** - The reason given most often by military officials for retaining the commanders’ authority is that the commander is responsible for maintaining “good order and discipline” within his unit. But many find that response inadequate. Good order and discipline can only be maintained if the rank and file perceive that commanders are forthright in addressing criminal behavior. The wide discretion reserved to commanders offers multiple opportunities to protect the accused and punish the victim.

To wit: if a victim who is married reports a sexual assault, military codes allow for punishment (of the victim) for adultery. Persons reporting an assault might face court martial or a charge of “conduct unbecoming an officer,” may lose rank and may be accused of “having set up” the perpetrator. It is a system designed for commander abuse.

Victims’ testimonies and other sources reveal:

- There is a built-in conflict interest for a commander when both the victim and accused are in their same unit. That commander will likely exercise his or her bias in favor of or against one of the parties — bias that often results in no prosecution of the crime and drumming the victim out of the service.
- The inclination to disbelieve victims – especially when they are accusing a superior – is strong; about one-quarter of sexual abuse incidents involve the ranking officer as the accused and fully one-third of incidents involve the victim’s ranking officer’s friend.
- Another strong incentive for commanders to disbelieve and dismiss complaints is that incidents of sexual violence reflect poorly on the commander, suggesting a failure on his or her part to properly lead and discipline the troops.
- Perpetrators may be well-regarded members in their assigned military capacities and are valued by their commanders who may be more than willing to stick up for them.
- And, it should be said, military perpetrators, like many in civilian life, may be sociopathic predators with a talent for manipulation and deception that can fool even the smartest person. Among these types of perpetrators are serial rapists who reportedly account for a substantial number of the assaults – these repeat offenders have often escaped the attention of commanders.

A particularly ugly form of retaliation and intimidation against victims is to diagnose them as having a mental disorder. A seven-month examination by the San Antonio Express, involving a survey of 1,200 service members who sought help at the Military Rape Crisis Center, found that 90 percent of victims were involuntarily discharged and diagnosed with mental disorders. The Government Accountability Office, the research arm of Congress, has issued two separate reports about military branches' lack of compliance with personality disorder separation standards.

Legislation sponsored by Reps. Speier and Meehan was adopted by the House Armed Services Committee addressing this problem. The bill asked for \$65 million for the DoD to review thousands of cases where the victim was involuntarily discharged because of a false psychological diagnosis.

## **POWER OF THE PENTAGON**

**Stacked Panel Opposes Independent Prosecutor-** In spite of all of the evidence over more than 20 years, top Pentagon officials continue to cling to the current role of the commander in prosecuting rape and sexual assault. On January 30, the Independent Response Systems to Adult Sexual Assault Crimes Panel accepted a subcommittee's finding that senior officers should maintain oversight of sexual assault cases within the chain of command. Judge Barbara S. Jones, chair of the Role of the Commander Subcommittee, reported that:

“Based on all information considered to this point, a strong majority of the subcommittee members agrees that ”the evidence does not support a conclusion that removing the authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault or increase reporting of sexual assaults in the armed forces.”

That answer was not surprising: the panel was stacked with supporters of the status quo and purposely timed to be announced just before the Senate vote on Sen. Gillibrand's bill, according to Hill sources. At the June, 2013 Armed Services Committee hearing when members were considering Sen. Gillibrand's bill and other reform proposals, all but two of 20 witnesses supported keeping the prosecution authority within the chain of command. Other official commissions and panels have been similarly weighted in favor of the Pentagon's position.

**Military Brass Lobbying Congress** – One of the problems with advocating for a significant reform of the Uniform Code of Military Justice is that the views of military brass wield an outsized influence on Capitol Hill. Reportedly, the Pentagon has been sending representatives of each branch around to lobby key members of Congress for retaining commanders' control of sexual assault prosecutions and against legislation that would change that system. Additionally, military “liaison” staff — usually retired military officers— are positioned in nearly every Congressional office and have a direct line to officials at the Pentagon whenever the member of Congress needs assistance. (The question could reasonably be asked, “Where are the liaison staffers for victims?”)

**President Requests a Report** – President Obama, who has called the recent sexual assault scandals “shameful and disgraceful,” ordered a review in December of the military’s response to sexual assault in the armed forces to be reported back to him in a year. The president said that if he doesn’t see progress, he will consider further reforms to “eliminate this crime from our military ranks.”

Obama told a gathering of the White House Council on Women and Girls, “It’s been going on too long, and we have an obligation to protect the men and women who put their lives on the line to protect us. And Secretary Hagel and [Joint Chiefs Chairman Army Gen. Martin E. Dempsey] have already taken steps to reduce violence and support those who have been harmed. But I’ve made it clear I expect significant progress in the year ahead. These crimes have no place in the greatest military on Earth.

### **A MORE JUST SYSTEM NEEDED**

Women members of Congress have distinguished themselves in taking the lead to promote a number of bills that would better address military sexual assault. Several provide for a different path for the investigation and prosecution of rape and sexual assault.

**Senators Advance Improvements** – Sens. Claire McCaskill and Kelly Ayotte (R-N.H.), along with Sens. Lisa Murkowski (R-Ak.), Deb Fischer (R-Neb.) and Amy Klobuchar (D-Minn.), introduced several bills earlier in 2013. Many elements of those bills were incorporated in the National Defense Authorization Act for FY 14. Provisions include:

- Stripping the high-ranking commander’s ability to overturn jury convictions of those under their command;
- Prohibiting commanders from reducing guilty findings to guilty of a lesser offense
- Establishing minimum sentencing guidelines for those found guilty of sex-related offenses;
- Requiring personnel records to now include information on sex-related offenses
- Allowing victims of sexual assault to apply for a permanent change of station or unit transfer while providing for commanders to remove or temporarily assign servicemembers who are the alleged perpetrators of sexual assault;
- Requiring provision of victims’ counsels who are specially trained lawyers in each of the services;
- Adding rape, sexual assault or other sexual misconduct to the protected communications of servicemembers with a member of Congress or the Inspector General;
- Eliminating the five year statute of limitations on rape and sexual assault;
- Reforming the Article 32 process to avoid “destructive fishing expeditions” (that are often intended to discredit the victim’s allegations) and properly focus the questioning on probable cause
- Installs a civilian review to study instances in which prosecution was not pursued, mandates harsher punishments in the form of dishonorable discharges

for anyone convicted, eliminates the five year statute of limitation in sexual assaults and, for the first time, criminalizes retaliation against individuals reporting themselves as the victim of a sexual assault.

Additional provisions ensure that the military has the authority to move an individual accused of sexual assault from a unit to protect a victim from unwanted contact with their alleged attacker as well as requiring a commander to provide a written justification for any modifications made to a sentence.

Importantly, the new provisions provide for a study of the military's ability to create a database of information regarding those accused by victims in restricted military reports so that serial offenders can be identified and their victims encouraged to make unrestricted reports that allow for prosecution. Regrettably, the McCaskill legislation retained the current system that places the decision to proceed with prosecution within the chain of command.

**Support for an Independent Prosecutor** – In addition to removing prosecution of sex crimes from the chain of command, Sen. Gillibrand's Military Justice Improvement Act (S. 1752) would:

- Provide the offices of the military chiefs of staff with discretionary authority to establish courts, empanel juries and choose judges to hear cases (convening authority).
- Ensure commanders retain the authority to punish alleged perpetrators through other means such as non-judicial punishment if a military prosecutor determines there is insufficient evidence to take a case to a court-martial.
- Call for an independent panel established by the DOD secretary to monitor and assess the implementation of the act and its amendments.

Despite Sen. Gillibrand's determined effort to gain support for her legislation, S. 1752 failed to gain the 60 votes necessary to overcome a filibuster. The Senate, instead, unanimously supported S. 1917 – The Victims' Protection Act, offered by Sen. Claire McCaskill which contains improvements to protect MSA survivors, including a prohibition against allowing a perpetrator's "Good Military Character" to be used to reduce penalties following a conviction. It would also require a civilian review if there were a disagreement over litigating a sexual assault case. McCaskill's bill now goes to the House where observers say several military sexual assault bills may be approved as part of the fiscal year 2015 Department of Defense authorization legislation. The companion measure to Sen. Gillibrand's MJIA, H.R. 2016, sponsored by Reps. Tulsi Gabbard (D-Hawaii) and Dan Benishek (R-Mich.) with 71 co-sponsors, including 31 Republicans, could be among those bills to be considered.

## **SUPPORT FOR INDEPENDENT PROSECUTOR**

**DACOWITS Recommends Independent Prosecutor** – The Defense Advisory Committee on Women in the Service (DACOWITS) which is composed of civilian

women and men who are appointed by the Secretary of Defense to provide advice and recommendations on key policies affecting women in the service is backing a professionalized, independent approach. The DACOWITS statement notes that “because a commander often supervises both the victim and the accused perpetrator, this decision-making poses an inherent conflict of interest.”

Their recommendation:

DoD should support legislation to remove from the chain of command the prosecution of military cases involving serious crimes.... Instead the decisions to prosecute, to determine the kind of court martial to convene, to detail the judges and members of the court martial, and to decide the extent of punishment, should be placed in the hands of the military personnel with legal expertise and experience and who are outside the chain of command of the victim and the accused.

**Other Nations Have Separate Systems** – Key U.S. allies have adopted similar reforms. United Kingdom military trial decisions for all crimes are made by trained prosecutors in the Service Prosecuting Authority, part of Britain’s Ministry of Defense. Canada, Australia, Israel and other nations have removed the sexual assault reporting system from the chain of command. These countries have found that a command-driven system – like the U.S. military has — may violate a defendant’s right to a fair and impartial trial. Military superior officers in many cases are not trained to deal with serious crime and should not be in the role of deciding whether to prosecute.

Supporters of retaining the prosecution decision in the chain of command criticize this approach by saying that it does not properly protect victims. While other nations’ systems may not be perfect, moving to an independent prosecutor trained in sexual assault crimes, combined with the many reforms and new services offered victims, will undoubtedly produce a higher quality military justice system, which survivors of sexual assault deserve.

**Commanders Could Still Discipline Troops** – Many activists who have worked on this issue remain mystified as to why the military brass insists that the power to determine whether a case should be prosecuted needs to remain within the chain of command. Would it not be easier on the commanders to turn this matter over to an independent, specially trained prosecutor allowing the commanders to concentrate on their traditional duties unrelated to sexual assault? The question has been asked many times of military spokesmen and the answer is always that the authority is necessary for commanders to retain “good order and discipline.” However, commanders will still be able to enforce non-judicial punishment. They are still fully responsible and in control of their troops and will retain authority to prosecute the 37 crimes that are unique to the military, such as AWOL or insubordination, as well as all misdemeanor crimes under Article 15 of the UCMJ.

**PENTAGON INITIATIVES: POSITIVE STEPS**

Defense Secretary Chuck Hagel issued in mid-2013, a package of initiatives designed to improve programs and processes to handle rape and sexual assault. Among the changes are the following:

- Requiring the Secretary of Defense to conduct a comprehensive review of the adequacy of training for members of the armed forces on sexual assault prevention and response.
- Requiring an automatic high-level review of any decision by a commander not to prosecute a sexual assault allegation.
- Requiring the Secretary of Defense or service secretaries to clarify, by creating regulations, that retaliation against an alleged victim or other member of the Armed Forces who reports a criminal offense is punishable under the Uniform Code of Military Justice (UCMJ).
- Requiring the Secretary of Defense to recommend to the president modifications to the Manual for Courts-Martial and to prescribe regulations to enforce the rights of victims of military crimes.
- Amending the Uniform Code of Military Justice to limit commanders' authority to modify the findings of a court-martial.
- Holding commanding officers accountable for maintaining a command climate in which sexual assault allegations are properly managed and fairly evaluated and where victims can report criminal activity, including sexual assault, without fear of retaliation.
- Eliminating the elements of character and military service of the accused from the factors a commander should consider in deciding penalties in sexual assault cases.
- Requiring commanding officers to immediately refer to the appropriate military criminal investigation organization reports of sexual-related offenses involving service members in the commander's chain of command.
- Requiring service secretaries to provide a Special Victims' Counsel to provide legal advice and assistance to service members who are victims of a sexual assault.
- Requiring the Secretary of Defense to report on whether legislative action is required to modify the Uniform Code of Military Justice to prohibit sexual acts and contacts between military instructors and their trainees.
- Requiring prompt access to a Sexual Assault Response Coordinator for members of the National Guard or Reserve who are victims of sexual assault.
- Requiring the DOD to conduct a comprehensive review of civilian law enforcement best practices in sexual assault prevention and response.
- Directing the Secretary of Defense to ensure that health care providers are appropriately trained, accredited, and located as necessary to properly manage sexual assault victims' medical needs.

## **REFORMS NOW ADOPTED**

The **National Defense Authorization for fiscal year 2014 (H.R. 3304)**, passed in late 2013, includes over 30 provisions to the Uniform Code of Military Justice related to

combating sexual assault in the military. Some of the more important provisions including:

- Stripping commanders of their authority to dismiss a finding by a court-martial;
- Prohibiting commanders from reducing guilty findings to guilt of a lesser offense;
- Establishing minimum sentencing guidelines for sexual assault-related offenses;
- Allowing victims of sexual assault to apply for a permanent change of station or unit transfer while providing for the commander to remove or temporarily reassign service members who are the alleged perpetrators of sexual assault;
- Providing for victims' counsels, qualified and specially-trained lawyers;
- Adding rape, sexual assault and other sexual misconduct to the protected communications of service members, with a member of Congress or the Inspector General;
- Eliminating the five year statute of limitations on rape and sexual assault;
- Reforming the Article 32 process to avoid demeaning and unrelated questioning and restricting the focus to determining probable cause of whether a crime has been committed; and
- Adding a number of victims' rights policies in law, plus numerous other changes in military law and policy.

Additional reforms and more detailed information can be found at: [United States Senate Armed Services Committee](#) and [National Defense Authorization Act](#).

## **FURTHER INFORMATION ON MILITARY SEXUAL ASSAULT**

[Sen. Kirsten Gillibrand's Comprehensive Resource Center for the Military Justice Improvement Act](#)

[Sexual Assault Prevention and Response, Program Foundation and Initiatives, Department of Defense](#)

[Legacy of Tailhook, New York Times video by Christopher Buck](#)

[Stories of Sexual Assault Survivors](#)

[50 Facts About the Injustice of Sexual Assault in the U.S. Military](#)

[The Invisible War](#)