

Sexual Assault in the U.S. Military

Submitted by Dave Kladney

According to the Department of Defense (“DoD”), in FY 2011 there were 3,192 reports¹ of sexual assault² involving Service members. Within these 3,192 reported incidents, there were 3,393 reported victims.³ As is generally the case with incidents of sexual assaults, the number of reported cases is only a fraction of the total number of assaults that occur. A past study by the DoD found that the number of reported cases accounted for less than 14% of the total number of sexual assaults involving Service members.⁴ If the rate of reporting remained the same in FY 2011 as the previous year, more than 22,000 sexual assaults would have taken place in the military.

As is the case in civilian life, women make up the majority of victims of sexual assault involving Service members. According to a study commissioned by the Department of Veterans Affairs (“VA”), “the annual incidence of experiencing sexual assault is 3% among active duty women.”⁵ This figure is much, much higher than the annual incidence of rape/sexual assault found in the National Crime Victimization Survey administered by the Bureau of Justice Statistics.⁶ The VA study, mentioned previously, also found that roughly 22% of female veterans had experienced “severe or threatening forms of sexual harassment [and/or] sexual assault” during their military service.

The Armed Services generally, and the military justice system specifically, may have institutional features that give to this extremely high rate of sexual assault and may also impair the investigation and prosecution of such crimes. Loyalty and self-sacrifice to the group, a usually admirable trait among Service members, can result in an unwillingness of victims to report abuse by fellow Service members. Some Service members may ostracize victims who report their abuse.

¹ Department of Defense, SAPRO. “Fiscal Year 2011 Annual Report on Sexual Assault in the Military.” (Apr. 2012). Available at http://www.sapr.mil/media/pdf/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf

² The DoD defines “sexual assault” as “intentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent. Sexual assault includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive, or wrongful (including unwanted and inappropriate sexual contact), or attempts to commit these acts.”

³ FY 2011 Annual Report, *supra* Note 1.

⁴ *Id.* Unlike previous years, no survey was taken in FY 2011 to estimate the total incidence of sexual assault in the Armed Forces. DoD is currently revising the survey used in FY 2010 for future use. As a result, it is not known what percentage of sexual assaults went unreported in FY 2011. If the

⁵ Rachel Kimerling, Kristian Gima, Mark W. Smith, Amy Street, and Susan Frayne. *The Veterans Health Administration and Military Sexual Trauma*. AM J. PUB. HEALTH, Vol. 97, No. 12, Dec. 2007, available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2089100/>. The study also found that 1% of servicemen experienced sexual assault on an annual basis,

⁶ Jennifer Truman, *Crime Victimization 2010*, Bureau of Justice Statistics, Table 9, (Sept. 2011) available at <http://www.bjs.gov/content/pub/pdf/cv10.pdf> (finding that the annual rate of rape/sexual assault victimization to be roughly 1.3 per 1000 women).

Because victims must report their abuse through their chain of command, the persons to whom they must report may have pre-existing relationships with the victim or abuser—or the officer to whom the victim should report the abuse might be their abuser. There is also the chance that the abuser and victim might continue to serve in the same unit.

Courts-martial do not have jurisdiction over non-military personnel. As a result, abusers who are foreign nationals or civilians cannot be prosecuted in a military court (although a civilian court might have jurisdiction to try the sexual assault). In some instances, abusers are allowed to resign in lieu of courts-martial (RILO), which then puts them outside of the military's jurisdiction.

Even when an officer decides to discipline an abuser, the form of discipline can be non-judicial, such as a reduction in rank, restricted liberty privileges or extra duties. When sexual assault cases are brought before a courts-martial, their conviction rates are much lower than in civilian courts.⁷

In addition to what might be called these standard features of military justice, there have been recent reports of even more troubling treatment of sexual assault victims. For instance, some in the military may be diagnosing sexual assault victims who report their abuse as suffering from a personality disorder.⁸

On December 9, 2011, the class action lawsuit, *Cioca v. Rumsfeld*, was dismissed in the Eastern District of Virginia.⁹ The lawsuit made a *Bivens* claim against former and current Secretaries of Defense for insufficiently preventing and prosecuting sexual assaults and thereby fostered an environment within the Armed Forces where such crimes more frequently occurred. The judge held that:

The “unique disciplinary structure of the military establishment” is a “special factor” that counsels against judicial intrusion. Instead, matters of military discipline should be left to the “political branches.”¹⁰

The political branches have made some recent efforts to better prevent and prosecute instances of sexual assault. Members of Congress of both Parties have introduced legislation to improve the administration of justice in the military with respect to crimes

⁷ The low conviction rate may in part be due to some commanding officers deciding to prosecute cases in which the evidence is weak. *See*, Marisa Taylor & Chris Adams, *Military's Newly Aggressive Rape Prosecution Has Pitfalls*, MCCLATCHY, Nov. 28, 2011, available at www.mcclatchydc.com/2011/11/28/131523/militarys-newly-aggressive-rape.html

⁸ David S. Martin, *Rape Victims Day Military Labels Them 'Crazy'*, CNN, Apr. 14, 2012, available at <http://www.cnn.com/2012/04/14/health/military-sexual-assaults-personality-disorder/index.html> (also noting that female Service members are discharged from the military on the grounds of “personality disorders” at a highly disproportionate rate).

⁹ *Cioca v. Rumsfeld*, 1:11-cv-151-LO-TCB (V.A.E.D. Dec. 9, 2011), available at lawprofessors.typepad.com/files/cioca-dismissal-order.pdf.

¹⁰ *Id.*

of sexual assault.¹¹ Defense Secretary Panetta has also approved a series of initiatives to better address the problem of sexual assaults in the military.¹²

The Commission should investigate these efforts to reduce and address instances of sexual assault in the Armed Forces by examining the DoD's policies and practices concerning sexual assault. The Commission should gather information on how DoD:

- (1) Educates Service members, generally, about DoD's sexual assault policies;
- (2) Educates officers to handle reports of sexual assault;
- (3) Assists sexual assault victims to file reports and receive needed medical/social services;
- (4) Investigates sexual assault reports, including the gathering and retention of evidence;
- (5) Disciplines perpetrators, with a special focus on the process by which officers decide what form(s) of discipline to impose.

As part of the project, the Commission should hold a briefing. Among the invited panelists should be:

- (1) a representative of DoD's Sexual Assault Prevention & Response Office;
- (2) a representatives from the Judge Advocate General's Office from several of the service branches (ensuring that the panel has experience with defense, prosecution & as a judge);
- (3) a representative of an advocacy group that focuses on sexual assault in the military (e.g. Service Women's Action Network);
- (4) veteran(s) who were sexually assaulted during their military service (perhaps some of those interviewed in "The Invisible war").

¹¹ See, e.g., H.R. 1529 (The Defense Sexual Trauma Response Oversight and Good Governance Act); and H.R. 1517 (Holley Lynn James Act).

¹² <http://www.defense.gov/news/DoDSexualAssault.pdf>