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Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?

Lisa M. Schenck*

*[A] female soldier in Iraq is more likely to be raped by a fellow soldier than killed by enemy fire.*¹

—Representative Jane Harmon, March 8, 2010

*Sexual assault . . . strikes at the core of the military. “This department may be nearing a stage where the frequency of this crime and the perception that there is tolerance of it could very well undermine our ability to effectively carry out the mission and to recruit and retain the good people we need,” [Secretary of Defense] Hagel said. Pentagon estimates of how many troops are sexually assaulted show the numbers increased by 35% since 2010, from 19,300 service members believed to be victims that year to 26,000 in 2012, according to a Defense Department survey released Tuesday*²

—Secretary of Defense Hagel, May 7, 2013

You are all familiar with the troubling statistics the Department of Defense (DoD) estimates that there are about 19,000 rapes a year in our military forces. That’s over fifty a day, and that is unacceptable. A [s]olider today, even in a time of war,

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¹ Nancy Gibb, *Sexual Assaults on Female Soldiers: Don’t Ask, Don’t Tell*, TIME, (Mar. 8, 2010), <http://www.time.com/time/magazine/article/0,9171,1968110,00.html>, (quoting Representative Jane Harmon); see also, Megan Chuchmach, *Female Soldiers More Likely to Be Raped than Killed in Action, Says Rep.*, ABC NEWS (Sep. 8, 2008), <http://abcnews.go.com/Blotter/story?id=5760295&page=1>.

² Gregg Zoroya & Tom Vanden Brook, *Report Comes On the Heels of Air Force Chief Sexual Assault Prevention Officer’s Arrest for Allegedly Groping a Woman*, USA TODAY (May 7, 2013), <http://www.usatoday.com/story/news/nation/2013/05/07/military-sexual-assaults/2140835/>.

*is more likely to be sexually assaulted than to be killed or wounded by hostile forces. And yet we also know that less than twenty percent of sexual assaults are reported. Why is that? It is because victims do not believe they will get justice, and criminals do not believe they will be punished. I know that we have confirmed these numbers through countless surveys, studies and anecdotal evidence.*³

— Representative Loretta Sanchez, 41st Hodson Lecture, April 30, 2013

*“The bottom line is, I have no tolerance for this,” [President] Obama said in answer to a question about the survey. “If we find out somebody’s engaging in this stuff, they’ve got to be held accountable, prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period.”*⁴

— Commander-in-Chief, President Barack Obama, May 7, 2013

I. INTRODUCTION

The quotes above depict the misperceptions of members of Congress, the Secretary of Defense, and the President, regarding the magnitude of sexual abuse in the military. The President and Secretary of Defense base their outrage on the DoD’s own extrapolation that 26,000 military service members were victims of sexual assault during Fiscal Year [FY] 2012. Other commentators further criticize how the military handles sexual assault cases, contending that the military justice process is less effective at holding perpetrators accountable than its civilian counterparts.⁵

³ Loretta Sanchez, *The Forty-First Kenneth J. Hodson Lecture in Criminal Law*, 218 MIL. L. REV. 265, 267–68 (2013) (citations omitted).

⁴ Jennifer Steinhauer, *Sexual Assaults in Military Raise Alarm in Washington*, THE NEW YORK TIMES, (May 7, 2013), http://www.nytimes.com/2013/05/08/us/politics/pentagon-study-sees-sharp-rise-in-sexual-assaults.html?pagewanted=all&_r=0.

⁵ See Laurenne Wallman, *Legislation Aims to Remove Rape Accusations from Military “Chain of Command”*, THE DAILY CALLER (Nov. 11, 2011), <http://dailycaller.com/2011/11/18/legislation-aims-to-remove-rape-accusations-from-military-chain-of-command/> (“just eight percent of sexual assailants in the military were referred to military court, compared with 40 percent of similar offenders prosecuted in the civilian justice system.”); Beth Scott, *STOP Act Aims to End Sexual Assault in the Military*, AAUW (Apr. 24, 2013), <http://www.aauw.org/article/stop-act-aims-to-end-sexual-assault-in-the-military/>; but see Gail Heriot, *Harassing the Military—There is No Sexual Assault Crisis*, 18-41 THE WEEKLY STANDARD (July 8, 2013), http://www.weeklystandard.com/articles/harassing-military_738058.html (“Prosecution rate comparisons are difficult, since civilian jurisdictions are not required to publish statistics. Even if they were, they would be of little use, since for service members, reporting a sexual assault to military authorities is as much like reporting it to an employer as it is like reporting it to the police. The statistics would not be comparable. Insofar as there is evidence, however, it suggests that the military is now more aggressive in prosecuting sexual assaults than civilian jurisdictions. For example, when a rape involving military personnel occurs off-post, civilian and military authorities both have jurisdiction. On those occasions in fiscal year 2011 on which the civilian jurisdiction took the lead, prosecution rates were 11 percent. In contrast, the military’s prosecution rate was 55 percent.”); see also *infra* note 205.

Using inflammatory language and misleading statistics⁶ some attack the prosecution and conviction rates in the military services⁷ without realizing that

⁶ See, e.g., *The Military's Sexual Assault Epidemic*, THE WEEK (Mar. 31, 2013), <http://theweek.com/article/index/242066/the-militarys-sexual-assault-epidemic>, stating:

How rife is sexual crime in the services?

It has become a grave concern, particularly as uniformed women take on more roles. Military sexual trauma, which encompasses everything from sexual harassment to rape, is now the leading cause of post-traumatic stress disorder among women in the U.S. military. Female soldiers today are 180 times more likely to be sexually assaulted by a fellow soldier than killed by an enemy. Sufferers often spiral downward into alcohol and substance abuse, depression, and homelessness. "It just pulls the skin off you," said one former Army Reserve officer, who retreated to a mobile home deep in the woods after she was assaulted. But sexual abuse often goes unreported. In 2011, there were around 3,000 official cases of military sexual assault, but a report commissioned by then Defense Secretary Leon Panetta put the actual annual number at 19,000 or more. An anonymous survey of more than 1,100 women who served in Afghanistan and Iraq, conducted last year by the Department of Veterans Affairs, found that almost half said they had been sexually harassed, and nearly one quarter said they'd been sexually assaulted.

What happens when an incident is reported?

Too often, nothing at all. A shocking 92 percent of reported assaults never come before a military court. First responders frequently fail to collect forensic evidence of an assault within the 72-hour deadline stipulated by current guidelines, and more often than not, the victim's superior decides against proceeding to court-martial anyway. Last year, two thirds of all reported cases were either summarily dismissed as unfounded, or resolved by the perpetrators simply being given extra duties or having their pay docked. Of the few defendants referred to court-martial, a tenth opt to resign instead: by admitting their guilt and accepting the perceived punishment of leaving the military, they can avoid prosecution—civilian or military—altogether.

Some criticize the sample survey methods the DoD employed to arrive at the 26,000 extrapolation, and those criticisms are well taken, especially DoD's failure to take into account that 75% of survey respondents failed to answer a sufficient number of questions and DoD elected to reject those surveys from their analysis. 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS 1, 6 (2013), http://www.sapr.mil/public/docs/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf [hereinafter 2012 WGRA REPORT] ("Completed surveys (defined as 50% or more of the survey questions asked of all participants are answered, including a valid response on the unwanted sexual contact question) were received from 22,792 eligible respondents."). A survey respondent, who was not a victim of sexual assault, is probably going to be less likely to complete such a lengthy survey than someone who was not the victim of a sexual assault. See Lindsay L. Rodman, *The Pentagon's Bad Math on Sexual Assault: Potential Recruits Need to Know that Serving in the Military Doesn't Turn a Woman Into a Victim*, WALL STREET JOURNAL (May 19, 2013), <http://online.wsj.com/news/articles/SB10001424127887323582904578484941173658754>.

⁷ The terms "military," "military services," and "Armed Forces" will be used interchangeably in this Article. Although Congress focuses on the DoD's sexual assault prevention and response policies, DoD is the civilian organization that oversees the military services. The DoD provides:

The military forces needed to deter war and protect the security of the United States (U.S.). The major elements of these forces are the Army, Navy, Air Force, and Marine Corps. The President is the Commander-in-Chief, while the Secretary of Defense exercises authority, direction, and control over the Department. This includes the Office of the Secretary of Defense, Organization of the Chairman of the Joint Chiefs of Staff, the three Military Departments, the Combatant Commands, the Office of the Inspector General, 17 Defense Agencies, 10 [DoD] Field Activities, and other organizations, such

other prosecution entities such as the Department of Justice [DoJ], the Department of Education [DoE], and the three largest states by population do not use survey data to calculate such rates.⁸ When the same criteria are used for calculation of prosecution and conviction rates, the military justice system's rates are comparable to major civilian prosecution entities for the same types of offenses.⁹

Moreover, some commentators have proposed dramatic changes in the military justice system, such as removing the convening authority's power to punish military personnel who commit sex crimes,¹⁰ without considering what the Supreme Court recognized forty years ago—"the military is, by necessity, a specialized society separate from civilian society . . . [and] that the military has, . . . by necessity, developed laws and traditions of its own during its long history."¹¹ These critics fail to understand the crucial role of convening authorities in the maintenance of good order and discipline, the allocation of resources in the prosecution of cases, and the important prosecutorial element that military cases

as the National Guard Bureau (NGB) and the Joint Improvised Explosive Device Defeat Organization (JIEDDO).

Office of the Secretary of Defense, *Organizations and Functions of the Department of Defense*, OFFICE OF THE DIRECTOR OF ADMINISTRATION AND MANAGEMENT, <http://odam.defense.gov/OMP/Functions/OrganizationalPortfolios/OrganizationandFunctionsGuidebook.aspx>.

⁸ The author was unable to locate any articles where the DoE, DoJ, or a state prosecution or law enforcement authority compared victim surveys and arrest, prosecution or conviction rates. See Candace Kruttschmitt et. al, *Estimating the Incidence of Rape and Sexual Assault*, 1 NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES (Prepublication Copy), Nov. 19, 2013 [hereinafter 2013 National Academies Report] ("There are two quite different perspectives for the measurement of rape and sexual assault—the criminal justice perspective and the public health perspective. These different perspectives have led to methodological differences in designing and implementing surveys, which, in turn, have resulted in different estimates of the incidence rates. The NCVS [National Crime Victimization Survey] reflects the criminal justice perspective, and its purpose is to measure criminal victimization or 'point-on-point' events that are judged to be criminal."); see, e.g., *infra* notes 161 (DoJ), 142 (DoE), 172 (DoE), 189 (DoJ), 220 (DoJ), 240 (Texas), 247 (New York), 250 (Florida).

⁹ See *infra* notes 195–249 and accompanying text.

¹⁰ Ruth Rosen, *The Invisible War Against Rape in the U.S. Military*, HISTORY NEWS NETWORK (Mar. 24, 2014), <http://hnn.us/article/155049> (Senator "Gillibrand's legislation would have taken the prosecution of sexual assault cases out of the military chain of command and given it to the independent Judge Advocates General Corps."); Helene Cooper, *Senate Rejects Blocking Military Commanders From Sexual Assault Cases*, N.Y. TIMES (Mar. 6, 2014), http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?_r=0 (fifty-five Senators voted to take away the commander's authority to refer sex crimes to courts-martial); *Military Rape & Sexual Assault*, WEBSITE OF CONGRESSWOMAN JACKIE SPEIER (D-CA) (citing "Sexual Assault Training Oversight and Prevention Act 'STOP Act'"), http://speier.house.gov/index.php?option=com_content&view=article&id=205&Itemid=47. H.R. 1593, the STOP Act, has 152 cosponsors in the 113th Congress. CONGRESS.GOV, <http://beta.congress.gov/bill/113th-congress/house-bill/1593> (last visited April 22, 2014); but see *infra* note 311 (military commanders and lawyers opposing removal of commanders from making disposition decisions on sex crimes).

¹¹ *Parker v. Levy*, 417 U.S. 733, 743 (1973) (citations omitted).

have legitimacy with military juries, which includes the chain of command's support.

This Article argues that the DoD should change its annual sexual assault report metrics; separate the sexual harassment report from the sex crimes report; employ Bureau of Justice [BoJ] personnel and standards to include 15,000 active duty personnel in its major crime and victimization survey, the National Crime Victimization Survey [NCVS]; report "forcible rape" statistics based on the Uniform Crime Report [UCR] criteria; and, increase specificity and transparency of victim and military justice reports by posting them on the internet. Additionally, in assessing the military response to sexual assaults, critics should first understand and consider issues specifically faced by the military and not by its civilian counterparts and recognize that statistics-based comparisons currently are not possible because of different statistical methods used to count sexual assault offenses and dispositions in the DoJ and the DoD.

This Article begins with a historical review of the DoD's media battles and Congressional mandates to establish task forces and panels to study the problem of sexual assault in the military services. The Article then describes the problems and issues involved with the DoD's reporting of military sexual assaults—a report which includes the entire spectrum of sexual assault and reports taken from service members who receive training encouraging them to report any inappropriate sexual contact.¹² Effective training about the responsibility of victims to report perpetrators could result in increased reports of inappropriate conduct. This section also explains how the DoD's 2012 extrapolation of 26,000 sexual assault victims is based on the type of surveys that the DoJ, the DoE, and the four largest states have elected not to use for comparison to prosecution or conviction rates in their official reports.

This Article argues that the DoD is its own worst enemy in the context of generating adverse and misleading publicity, which at a minimum, may result in discouraging females from joining the military.¹³ The Secretary of Defense cited a

¹² The DoD has emphasized training on sexual assault issues. 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *infra* note 67, at 2–4, 9–11. Surveys have indicated almost universal receipt of sexual assault training in DoD. *Id.* at 13 (“Ninety-six percent of Active Duty women and 97 percent of Active Duty men indicated they received sexual assault training in the past year. When asked to rate aspects of the training: 94 percent of women and men agreed the SAPR training provided a good understanding of what actions are considered a sexual assault (for women and men, the 2012 percentage is significantly higher than 2010)”).

¹³ Bill Briggs, *McCain: Cannot Give 'Unqualified Support' for Women Joining the Military Until Crisis Resolved*, NBCNEWS.COM (June 6, 2013), http://usnews.nbcnews.com/_news/2013/06/04/18729878-mccain-cannot-give-unqualified-support-for-women-joining-the-military-until-crisis-resolved?lite. (“Senator John McCain, (R-Ariz) told a panel including the Chiefs of Staff and senior military lawyers at a hearing of the Senate Armed Services Committee, ‘Just last night, a woman came to me and said her daughter wanted to join the military and could I give my unqualified support for her doing so. I could not . . . I cannot overstate my disgust and disappointment over continued reports of sexual misconduct in our military. We’ve been talking about this issue for years and talk is insufficient.’”).

survey, based on methods that extrapolated 26,000 DoD military-on-military¹⁴ sexual assault victims.¹⁵ The Defense Manpower Data Center collected information for the DoD about unwanted sexual contacts [USCs] and lacked verification interviews of survey respondents. The 26,000 extrapolation invited unflattering comparisons with the DoD prosecution and conviction rates, which were subsequently linked to allegations of ineffective convening authority actions and calls to remove convening authority powers with respect to sex crimes.¹⁶ The 26,000 extrapolation includes, for example, unwanted sexual activity consented to after repeated requests which does not constitute a crime.¹⁷ The survey failed to distinguish criminal offenses from inappropriate conduct.¹⁸ Furthermore, the DoD's emphasis on the extrapolated number of 26,000 victims causes Presidential, Congressional, Secretarial, command, and media interest.¹⁹

The DoD report lacked important statistics in many cases and did not include disposition of sex crimes—or at a minimum, did not provide an easy to identify number of convictions for each type of sex crime.²⁰ This author recommends that the DoD report a minimum of five categories of sex crimes: forcible rape, forcible sodomy, sexual assault, aggravated sexual contact, and abusive sexual contact that were: (1) reported to law enforcement; (2) referred by law enforcement to prosecution authorities as substantiated; (3) arraigned by court-martial; (4) convicted; (5) sentenced to incarceration for one year or less; and (6) sentenced to incarceration for more than one year. The DoD report should also include separate tables indicating cases referred to civilian and military prosecution authorities. The DoD report should provide this information for the current year and the previous four years for trend analysis. These same statistics should be presented for military-on-military offenses and military-on-civilian victims. Proposed

¹⁴ The term “military-on-military” describes cases where an active duty Service subject or suspect is alleged to have assaulted an active duty Service person.

¹⁵ See *infra* note 131 and accompanying text.

¹⁶ See *U.S. Senator Kirsten Gillibrand (D-NY), Will Introduce Legislation Next Week to Reform the Military Justice System, Increase Accountability by Removing Decision Making for These Crimes Outside of the Chain of Command*, WEBSITE OF SENATOR KRISTEN GILLIBRAND (D-NY) (May 7, 2013), <http://www.gillibrand.senate.gov/newsroom/press/release/gillibrand-reacts-to-new-defense-department-report-showing-26000-sexual-assaults-in-the-military-in-fy-12>; Erin Maxton, *Procedural Vote Blocks Gillibrand's Military Sexual Assault Bill*, RH REALITY CHECK (Mar. 6, 2014), <http://rhrealitycheck.org/article/2014/03/06/procedural-vote-blocks-gillibrands-military-sexual-assault-bill/> (“The Military Justice Improvement Act (S. 1752), sponsored by Sen. Kristen Gillibrand (D-NY), would remove the chain of command from the adjudication process for military sexual assault.”); *Military Rape & Sexual Assault*, WEBSITE OF CONGRESSWOMAN JACKIE SPEIER (D-CA), *supra* note 10.

¹⁷ See *infra* notes 120, 132, 148, 172, 173, and accompanying text.

¹⁸ *Id.*

¹⁹ See *supra* notes 2, 4, 16.

²⁰ See *infra* notes 85–87, 107–09, and accompanying text.

legislation is included at Appendix A which would require the DoD to present these statistics and will allow for some comparisons with civilian jurisdictions.²¹

In 2013, Congress increased requirements for sex offense records retention in the DoD;²² however, these records will generally not be available to the public or to victims which will protect the personal privacy of sex crimes suspects.²³ To provide further transparency regarding resolution of military sexual assault offenses, to deter offenders, and to eliminate the public and victim misperception that cases are not effectively prosecuted, the author recommends extensive disclosure by posting on the internet information about individual cases, and disposition statistics by general court-martial jurisdiction, military service, and the DoD.²⁴

This Article recommends that Congress amend 28 U.S.C. § 534 and 42 U.S.C. § 3732 to require the Bureau of Justice Statistics [BJS] to include at least 15,000 active duty military men and women in the same manner as other participants in the NCVS to obtain more reliable extrapolations of the numbers of military sexual assault victims. The DoJ established the UCR and NCVS as the nation's premier,

²¹ See *infra* notes 94–334 and accompanying text.

²² In the 2013 National Defense Authorization Act [NDAA] Congress required collection of disposition records of unrestricted reports of sexual assault, including court-martial, non-judicial punishment, or other administrative action. The disposition file is required to contain all documentary information collected regarding the case (not just investigators' reports), and a list of the records required is included in 2013 NDAA § 572. Disposition records must be maintained for a period of at least twenty years, and some reports will be maintained for fifty years. Section 575 requires DoD to include greater detail in annual reports on sexual assaults, including reasons for any dismissal of charges, character of discharge where an accused is administratively discharged or allowed to resign, any prior offense or admission to the service on a waiver for a sexual offense, branch of service of accused, involvement of alcohol in the offense, and specific punishment given for nonjudicial punishments. However, the 2013 NDAA does not describe how much of this information is required to be disclosed to the public or to sex crime victims.

²³ Absent a waiver from victims, their names and other personal identification information should be redacted from information released to the public. See The Privacy Act of 1974, 5 U.S.C. § 552a; DoD Directive 5400.11, *DOD Privacy Program* (Sept. 1, 2011), <http://www.dtic.mil/whs/directives/corres/pdf/540011p.pdf>.

²⁴ See *infra* Appendix A; see also Barrie Barber, *32 Sexual Assaults Reported at Wright-Patt AFB in 4-year Period*, DAYTON DAILY NEWS (Mar. 26, 2014), <http://www.daytondailynews.com/news/news/32-sexual-assaults-reported-at-wright-patt-afb-in-ndLRm/> ("U.S. Sen. Kirsten Gillibrand, D-N.Y., has asked Defense Secretary Chuck Hagel to release information about sexual assaults at the largest bases in each military branch The sweeping request for the past five years includes 'all reports and allegations of rape, forcible sodomy, sexual assault, sex in the barracks, adultery and attempts, conspiracies or solicitations to commit these crimes,' Gillibrand wrote in her Feb. 10 letter to Hagel."). This Article recommends that general courts-martial convening authorities provide specific information about individual cases and population statistics to enable an assessment of convening authority performance of their military justice responsibilities.

complementary systems for generating crime and victimization statistics.²⁵ The BJS should also be required to provide to the DoD the names and contact information of active duty sex crime victims so that the DoD may ensure all victims' cases are appropriately investigated.²⁶ The BJS-NCVS report of military sex crime victimization would have greater credibility than any DoD survey because it would be conducted by a federal entity outside of the DoD; the NCVS is the largest, best-resourced crime-victimization survey in the United States; and most importantly, it would allow credible comparisons regarding the extent of sex-crime victimization in the military and civilian communities.

Lastly, the Article describes prosecutorial discretion factors existing in the military services, which civilian prosecutors may not face, such as availability of alternative disposition and punishment options, involvement from the chain of command up to and including Presidential, Congressional, and Secretarial influence, and military operations and readiness concerns. This Article describes how these factors should be considered before criticizing how the military handles sexual assault cases. Critics should understand that the focus should not be on prosecution rates when the facts involving the particular offense at issue are unknown. If Congress requires convening authorities to routinely post charge sheets and other supporting documentation on the internet, the general public and victims may better assess whether justice was fairly and effectively applied. When a convening authority chooses an alternative disposition, one other than a court-martial, a redacted file should be posted on the internet, and that decision may be considered on its merits, including any issues of military operational readiness.²⁷

II. A BRIEF HISTORICAL REVIEW OF DOD'S RESPONSE TO SEXUAL ASSAULT IN THE MILITARY SERVICES

Historically, the media highlights the issue of sexual assault in the military by focusing on high profile cases. These cases result in public outrage and the military in turn focuses its efforts on the issue of sexual assault. The issue of sexual assault in the military services drew nationwide attention in the early 1990s and with each high profile case, more media attention has caused the DoD's self-reflection and Congressional directives.

²⁵ U.S. Dep't of Justice, Federal Bureau of Investigation [FBI], *The Nation's Two Crimes Measures*, UNIFORM CRIME REPORT STATISTICS, <http://www.ucrdatatool.gov/twomeasures.cfm> (last visited April 22, 2014).

²⁶ See *infra* Appendix A.

²⁷ See *infra* notes 314–318 and accompanying text (discussing operational readiness concerns).

A. *The DoD's Battles Regarding Sexual Assault in the Military Services Are Highlighted in the Media*

Media coverage of military sexual assault cases draws attention to the Armed Forces, which in turn, leads to a perception that the military is a male-dominated culture that fosters a climate where sexual assaults are prevalent.²⁸ While the military wants to ensure public confidence and transparency by providing the public with information, high-profile sexual assault cases have led to public criticism regarding prosecution and punishment for sexual assault in the military services.²⁹ In reporting these cases, one must consider the following questions: do the vast majority of military sexual assault cases receive proper investigation and adequate disposition through the military justice system? Are the cases featured in the media anomalies of an otherwise effective system, or are they examples of how the military justice system is less effective than its civilian counterparts?

1. High-Profile Military Sexual Assault Cases in the 1990s

Each military service faced media scrutiny in the 1990s, resulting in sexual assault becoming an issue for the DoD to address. In 1993, the DoD Inspector General issued a report, which revealed that during the 35th Annual Tailhook Association Symposium (September 1991), a three-day convention for Naval aviators in Las Vegas, eighty-three women and seven men were assaulted.³⁰ The Army soon followed. In 1996, drill sergeants, among others, at Aberdeen Proving Ground, a training installation in Maryland, engaged in consensual and nonconsensual sex offenses against young enlisted women trainees.³¹ Eventually, the Army charged twelve commissioned and noncommissioned officers with sexual assault against female trainees.³² While Aberdeen Providing Ground

²⁸ Diane H. Mazur, *Women, Responsibility, and the Military*, 74 NOTRE DAME L. REV. 1, 4 (2011) (footnote omitted) (“Although the military is a very separate and little understood community, it is currently subject to enormous public scrutiny with respect to its treatment of women.”); see Megan N. Schmid, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475 (2010).

²⁹ See John Haydon, *The List: Military Scandals*, WASH. TIMES (Jan. 8, 2011), <http://www.washingtontimes.com/news/2011/jan/8/list-military-scandals/>.

³⁰ *The Investigation*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/navy/tailhook/index.html> (last visited April 22, 2014).

³¹ See Sonja Barisic, *Rape, Harassment Charges Leveled at Aberdeen Officers*, THE DAILY RECORD 23 (Nov. 8, 1996) (“In what could prove to be the Army’s Tailhook, a captain and two drill sergeants were charged yesterday with raping or sexually harassing more than a dozen women recruits.”).

³² Over fifty female recruits made official complaints of sexual harassment and abuse against eleven drill sergeants (responsible for the women’s training) and one officer. Dana Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today’s Army*, 30 HARV. J.L. & GENDER 151, 159 (Winter 2007); see, e.g., *United States v. Simpson*, 58 M.J. 368

attracted most of the media attention, two other Army installations actually had more trainee sexual abuse cases: Fort Leonard Wood, Missouri and Fort Jackson, South Carolina.³³

Further drawing attention to this issue, sexual misconduct cases came to light that involved members of the highest levels of the Army, such as the Sergeant Major of the Army Gene McKinney and Major General David Hale, who were both tried by courts-martial.³⁴ Sergeant Major of the Army McKinney, the Army's top ranking enlisted soldier, was charged and tried by court-martial for sexual assaults and obstruction of justice.³⁵ The most senior Army officer to be tried by court-martial in more than fifty years, Major General Hale, was convicted of sexual misconduct, fined, and administratively reduced to brigadier general.³⁶

(C.A.A.F. 2003) (convicted of eighteen specifications of rape, among other offenses, and sentenced to a dishonorable discharge, confinement for twenty-five years, total forfeitures, and reduction to Private E1); *United States v. Brown*, 2006 CCA LEXIS 397 (Army Ct. Crim. App. 2006) (drill sergeant sentenced to a dishonorable discharge, confinement for five years, total forfeitures, and reduction to the grade of Private E1 for engaging in sexual intercourse with two trainees).

³³ From 2000 to 2008, Fort Leonard Wood had the most courts-martial for sexual misconduct by drill sergeants, and Fort Jackson was second in this category. Gina Cavallaro, *Sex, Lies and Basic Training: Leonard Wood Cases Top List of Trainee Abuse by Instructors*, ARMY TIMES (Dec. 15, 2008), <http://www.military-quotes.com/forum/sex-lies-basic-training-t70246.html> (noting twelve Fort Leonard Wood drill sergeants and instructors were found guilty over the previous twelve months and describing the circumstances of the cases). There were "27 cases of sexual misconduct on [Fort Jackson in 1997]; 17 of those cases involved drill sergeants." Karen E. Quinones-Miller, *Drill Sergeants' Job Gets New Attention Amid Sex Scandals They Are Powerful Figures To Recruits That Can Create Trust, and Temptation*, PHILLY.COM (Nov. 21, 1996), http://articles.philly.com/1996-11-21/news/25650098_1_drill-sergeants-sexual-misconduct-female-soldiers. In one week after the Aberdeen Proving Ground scandal broke, "more than 4,000 women had called a hotline to complain of inappropriate sexual conduct." *Id.*; see, e.g., *United States v. Ford*, 2005 CCA LEXIS 461 (Army Ct. Crim. App. 2005) (Fort Leonard Wood drill sergeant sentenced to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to Private E1); *United States v. Wheeler*, 56 M.J. 919, 928 (Army Ct. Crim. App. 2002) (Fort Leonard Wood drill sergeant who engaged in sexual intercourse with three trainees was sentenced to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to Private E1).

³⁴ Mark Thompson, *Sex, The Army and a Double Standard*, TIME (May 4, 1998), <http://www.cnn.com/ALLPOLITICS/1998/04/27/time/pentagon.html>; *McKinney Sentenced to Reduction in Rank and Reprimand*, CNN.COM (Mar. 16, 1998), <http://europe.cnn.com/US/9803/16/mckinney.sentence/>.

³⁵ Six female military personnel alleged that McKinney sexually assaulted them, and he was charged with eighteen specifications of sexual misconduct and obstruction of justice. *McKinney v. White*, 291 F.3d 851, 852 (D.C. Cir. 2002). In March 1998, a military jury acquitted him of the eighteen sex offenses and convicted him of one obstruction of justice specification. *Id.* The jury sentenced him to a reprimand and a reduction in grade from Army sergeant major to master sergeant. *Id.*; see also Jane Gross, *Sergeant Major Gets One-Step Demotion But No Time in Jail*, N.Y. TIMES (Mar. 17, 1998), <http://www.nytimes.com/1998/03/17/us/sergeant-major-gets-one-step-demotion-but-no-time-in-jail.html>.

³⁶ In March 1999, Major General Hale pleaded guilty to eight specifications of misconduct including adultery with the spouses of subordinates and lying to his superiors about his sexual affairs, which he committed shortly before his retirement, but was subsequently tried by court-martial when he was in retirement status. He was ordered to pay \$22,000 in fines. Elizabeth Becker, *Army*

That same year, the Army demoted Major General John J. Maher, III, two ranks to colonel for having adulterous affairs with the wives of two of his subordinates and attempted fraternization, after being found guilty of conduct unbecoming an officer in an administrative hearing.³⁷ He received the maximum punishment: the loss of half his monthly pay for two months and a letter of reprimand.³⁸

2. Military Sexual Assault High Profile Cases 2000–2013

The media attention on high profile cases, including incidences at the military academies, has continued into the twenty-first century. After female cadets reported to the Department of the Air Force and the DoD Inspector General that sexual assaults were occurring at the U.S. Air Force Academy and victims were suffering from retaliation for reporting, Congress and the Department of the Air Force initiated investigations.³⁹

More recently, in the wake of the announcement of the extrapolation of 26,000 military sexual assault cases, relatively minor sexual abuse cases have received national publicity. On May 5, 2013, Lieutenant Colonel Jeffrey Krusinski, Chief of the Air Force's Sexual Assault Prevention and Response [SAPR] Program, was charged with sexual battery and removed from his position with the SAPR Program.⁴⁰ Also, the Army is investigating Sergeant First Class

Demotes Retired NATO Commander Who Admitted Affairs With Wives of Subordinates, N.Y. TIMES (Sept. 3, 1999), <http://www.nytimes.com/1999/09/03/us/army-demotes-retired-nato-commander-who-admitted-affairs-with-wives-subordinates.html>. Prior to the trial of Major General Hale, the most recent court-martial of a flag officer was the trial of Rear Admiral Hooper in 1957. See Hooper v. Laird, 41 C.M.R. 329 (C.M.A. 1970).

³⁷ Elizabeth Becker, *General Is Demoted 2 Ranks and Made to Retire in Sex Case*, N.Y. TIMES (Nov. 17, 1999), <http://www.nytimes.com/1999/11/17/us/general-is-demoted-2-ranks-and-made-to-retire-in-sex-case.html>.

³⁸ *Id.*

³⁹ See Tillie K. Fowler, REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY (Sept. 2003); HQ, U.S. AIR FORCE, REPORT OF THE WORKING GROUP CONCERNING THE DETERRENCE OF AND RESPONSE TO INCIDENTS OF SEXUAL ASSAULT AT THE U.S. AIR FORCE ACADEMY (June 2003); Colleen Dalton, Note, *The Sexual Assault Crisis in the United States Air Force Academy*, 11 CARDOZO WOMEN'S L.J. 177 (Fall 2004); Marlene Higgins, Note, *The Air Force Academy Scandal: Will the "Agenda for Change" Counteract the Academy's Legal and Social Deterrents to Reporting Sexual Harassment and Assault?*, 26 WOMEN'S RIGHTS L. REP. 121 (Spring/Summer 2005).

⁴⁰ Spencer Ackerman, *Air Force Chief of Sexual-Assault Prevention Arrested on Sexual Battery Charges*, WIRED (May 6, 2013), <http://www.wired.com/dangerroom/2013/05/air-force-sexual-assault/>. A police report alleged that Krusinski "approached a female victim in a parking lot and grabbed her breasts and buttocks." Andrew Zajac, *Air Force Sex Abuse Chief's Trial Set in Sex Assault Case*, BLOOMBERG (May 9, 2013), <http://www.bloomberg.com/news/2013-05-09/air-force-sex-abuse-chief-s-trial-set-in-sex-assault-case.html>. After a review the civilian prosecutor dropped the sexual assault and replaced it with a misdemeanor assault and battery charge. Matthew Barakat, *Sexual Battery Charge Dropped For Jeffrey Krusinski, Leader Of Military Sexual Assault Response Unit*, HUFFINGTON POST (July 18, 2013), http://www.huffingtonpost.com/2013/07/18/jeffrey-krusinski-charge-dropped_n_3618658.html; Kristin Davis, *Officer's Trial on Groping Charge Set for Nov. 12*, AIR FORCE TIMES (Aug. 27, 2013),

Gregory McQueen, a Fort Hood SAPR Program coordinator in Texas, for persuading a female private first class to become a prostitute, who then sold sex to other soldiers, and for sexual assault of another private first class.⁴¹

Recently, the Navy faced media criticism due to a rape allegation involving three Naval Academy midshipmen (football players), a case generating nationwide headlines.⁴² According to media reports, in April 2012, a Naval Academy junior attended an off-post party in a “football house” where she consumed so much alcohol that she had no memory of engaging in sexual activity with three football players, one with whom she had a previous sexual relationship, and then the next morning had consensual sexual activity with a fourth Navy football player.⁴³ She did not report or fully support prosecution of the offenses until nine months after the assaults.⁴⁴ The Article 32 hearing focused on the degree of intoxication of the

<http://www.airforcetimes.com/article/20130827/NEWS06/308270033/Officer-s-trial-groping-charge-set-Nov-12>. Ultimately, an Arlington, Virginia jury acquitted Lieutenant Colonel Krusinski of all charges. Jay Korff, *Jeffrey Krusinski Acquitted of Assault and Battery*, WJLATV (Nov. 13, 2013), <http://www.wjla.com/articles/2013/11/jeffrey-krusinski-air-force-groping-trial-day-two-96795.html#ixzz2omcevKqg>.

⁴¹ Tom Vanden Brook, *Suspect in Fort Hood Prostitution Ring Identified*, USA TODAY (May 16, 2013), <http://www.usatoday.com/story/news/nation/2013/05/15/mcqueen-suspect-fort-hood-prostitution-ring/2163045/>. Although Sergeant First Class McQueen has not been tried, on December 3, 2013, Master Sergeant Brad Grimes was found guilty by a Fort Hood jury of conspiring to patronize a prostitute and solicitation of adultery. He engaged in this activity with a female private and Grimes, a seventeen-year Army veteran, was acquitted of adultery and patronizing a prostitute. He was sentenced to a reprimand and a reduction from E8 to E7. Karen Graham, *Ft. Hood Soldier Reprimanded and Demoted in Prostitution Case*, DIGITAL JOURNAL (Dec. 4, 2013), <http://digitaljournal.com/article/363357>; Dan Solomon, *Can a Female Soldier Really Be “Recruited” into Prostitution by a Superior?*, TEXAS MONTHLY (Dec. 5, 2013), <http://www.care2.com/causes/military-prostitution-ring-run-by-sexual-assault-prevention-officer.html#ixzz2omgGw6XM>; Associated Press, *Fort Hood Soldier Charged in Prostitution Case*, THE BAYLOR LARIAT (Mar. 20, 2014), <http://baylorldariat.com/2014/03/20/fort-hood-soldier-charged-in-prostitution-case/> (On March 7, 2014, McQueen was charged with “21 counts related to pandering, conspiracy, maltreatment of a subordinate, abusive sexual contact, and adultery and conduct of a nature to bring discredit to the armed forces.”).

⁴² Crimesider Staff, *Navy Football Rape Case: Phone Recording Played at U.S. Naval Academy Sex Assault Hearing*, CBS NEWS (Aug. 29, 2013), http://www.cbsnews.com/8301-504083_162-57600686-504083/navy-football-rape-case-phone-recording-played-at-u.s-naval-academy-sex-assault-hearing/; Phil Stewart, *U.S. Naval Academy Football Players Investigated for Sexual Assault*, REUTERS (May 31, 2013), <http://www.reuters.com/article/2013/05/31/us-usa-military-sexualassault-idUSBRE94U17520130531>; Mark Thompson, *The Military’s Latest Rape-Case Mess*, TIME (Sept. 16, 2013), <http://content.time.com/time/magazine/article/0,9171,2151156,00.html>.

⁴³ Crimesider Staff, *supra* note 42.

⁴⁴ The offenses occurred in April 2012 and were reported and pursued by the victim to officials in February 2013. Steven Nelson, *3 Naval Academy Football Players Will Reportedly Face Rape Charges*, U.S. NEWS AND WORLD REPORT (June 18, 2013), <http://www.usnews.com/news/newsgram/articles/2013/06/18/3-naval-academy-football-players-will-reportedly-face-rape-charges>; see also Michael Hoffman, *Two Navy Football Players Referred in Rape Case* (Oct 10, 2013), MILITARYNEWS.COM, <http://www.military.com/daily-news/2013/10/10/two-navy-football-players-referred-in-rape-case.html> (“The female midshipman reported the case in April 2012, but the investigation done by the Naval Criminal Investigative

victim and attacking her credibility.⁴⁵ In a substantial percentage of the sexual assault cases, the victim is intoxicated when he or she is sexually assaulted.⁴⁶ Under military law, the focus is on the accused's perceptions of the victim's level of intoxication, which is likely to be based on the accused's self-serving description of the victim's conduct.⁴⁷ The lengthy, aggressive, and what some would describe as abusive, cross examination of the victim at the Article 32 investigation incited critics to call for change in the investigations, to make them more like civilian grand jury proceedings.⁴⁸ Critics asserted that the Naval

Service took many twists and turns. In fact, the investigation was closed in November 2012—in the midst of the Navy football season—before it was reopened in January 2013 after the alleged victim sought legal representation.”).

⁴⁵ Ali Weinberg, “*Substantially incapacitated*”: *Alleged Victim’s Ability to Consent Key as Naval Academy Sexual Assault Hearing Ends*, NBC NEWS (Sept. 4, 2013), http://usnews.nbcnews.com/_news/2013/09/04/20315381-substantially-incapacitated-alleged-victims-ability-to-consent-key-as-naval-academy-sexual-assault-hearing-ends?lite.

⁴⁶ FY SAPR Statistical Report Data Call for Sexual Assaults in the Military: United States Navy, 11, found at 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *infra* note 69, at 452 (“According to the victims, one or both of the parties involved in the sexual assault consumed alcohol prior to the incident in 25% of the investigations; . . . 23% of victims also reported that they were incapacitated from the alcohol at the time of the incident . . . [and] 61% the victim and subject were alone at the time of the sexual assault incident; . . . this reiterates the fact that sexual assaults are challenging to investigate and prosecute due to lack of evidence such as corroborating witnesses.”).

⁴⁷ See Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, nn.63–98 and accompanying text (2014) (explaining how military law could be changed to improve protections for victims, and especially intoxicated victims, from being sexual assaulted when they are unable to consent to sexual activity); see, e.g., *United States v. Bruguier*, 2013 U.S. App. LEXIS 22422, 735 F.3d 754 (8th Cir. 2013) (en banc) (discussing necessity that defendant have actual knowledge of victim’s intoxication to prove offense of aggravated sexual abuse under 18 U.S.C. § 2242(2)).

⁴⁸ Meredith Clark, *Naval Academy Sexual Assault Hearing Underscores Flaws in System*, MSNBC (Sept. 4, 2013), <http://tv.msnbc.com/2013/09/04/naval-academy-sexual-assault-hearing-underscores-flaws-in-system/>; Eugene R. Fidell, *The Naval Academy Sexual Assault Hearing Should Be the Last of Its Kind*, THE BALTIMORE SUN (Sept. 16, 2013), http://articles.baltimoresun.com/2013-09-16/news/bs-ed-naval-academy-case-20130916_1_sexual-assault-military-personnel-football-team. On December 26, 2013, President Barack Obama signed H.R. 3304, the 2014 NDAA into law. The White House, Statement by the President on H.R. 3304 (Dec. 26, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304>; H.R. 3004, 113th Cong., (1st Sess. 2013), <http://beta.congress.gov/113/bills/hr3304/BILLS-113hr3304enr.pdf>. “[T]he NDAA reforms the Article 32 process to avoid destructive fishing expeditions and properly focus on probable cause.” H.R. ARMED SERVICE COMM., *Fact Sheet: FY14 NDAA Summary Highlights of the National Defense Authorization Act for Fiscal Year 2014* (Dec. 9, 2013), http://armedservices.house.gov/index.cfm/files/serve?File_id=127E1D4B-DD70-4B69-80DC-A036DA7B3519 (last visited Dec. 23, 2013). Under the NDAA § 1702, the investigatory or defense discovery purpose for Article 32 investigations was replaced with a requirement for “a preliminary hearing” which “shall be conducted by an impartial judge advocate.” *Id.* at § 1702. “A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.” *Id.* at § 1702(d)(3). The Article 32

Academy Superintendent should be disqualified from making the referral decision, because he may be biased to support former members of the Naval Academy football team.⁴⁹ The cases for two of the three Naval Academy accused have been dismissed—one at the recommendation of the Article 32 investigating officer and one after the military trial judge suppressed incriminating statements made by the accused—inciting more public criticism.⁵⁰ The remaining Naval Academy accused was acquitted by a military judge of all sex assault-related charges.⁵¹

B. *The DoD “Task Force” Response—or Congressional Mandate?*

Following these high-profile cases involving sexual assault, Congress has responded by directing the Secretary of Defense to establish various panels, reports, and surveys to evaluate specific issues involved in the military services’ sexual assault case prevention, response, training, investigation, and disposition.⁵²

1. Defense Task Force on Care for Sexual Assault Victims 2004

In 2004, “Secretary of Defense Donald Rumsfeld directed the Under Secretary of Defense for Personnel and Readiness . . . to undertake a 90-day review of all sexual assault policies and programs among the Services and DoD, and recommend changes necessary to increase prevention, promote reporting, enhance the quality and support provided to victims, especially within combat theaters, and improve accountability for offender actions.”⁵³

preliminary hearing shall be recorded, and “[t]he victim may request the recording and shall have access to the recording as prescribed by the Manual for Courts-Martial.” *Id.* at § 1702(e).

⁴⁹ See Meredith Clark, *Naval Academy Sexual Assault Hearing Underscores Flaws in System*, MSNBC.COM (Sept. 4, 2013), <http://www.msnbc.com/melissa-harris-perry/naval-academy-sexual-assault-hearing-0>. The victim sued the Naval Academy Superintendent in federal court asserting bias. Annys Shin, *Alleged Rape Victim Files Suit to Remove U.S. Naval Academy Superintendent From Case*, WASH. POST (Sept 5, 2013), http://articles.washingtonpost.com/2013-09-05/local/41790457_1_alleged-victim-military-chain-article-32-hearing.

⁵⁰ Annys Shin, *In Rape Case at Navy, a Reversal*, WASH. POST (Jan. 11, 2014), http://www.washingtonpost.com/local/sexual-assault-charges-dropped-against-second-former-navy-football-player/2014/01/10/2b54e65c-7a15-11e3-8963-b4b654bcc9b2_story.html.

⁵¹ Annys Shin, *Judge Finds Midshipman Not Guilty in Naval Academy Sex Assault Case* WASH. POST (Mar. 20, 2014), http://www.washingtonpost.com/local/judge-to-rule-in-naval-academy-sexual-assault-case-after-hearing-closing-arguments/2014/03/20/d9211394-b040-11e3-b8b3-44b1d1cd4c1f_story.html. The accused was acquitted of sexual assault; however, he submitted his resignation from the Naval Academy and the charge of false statement was withdrawn. *Id.*

⁵² See DoD TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT (Apr. 2004) [hereinafter DTF CARE FOR SA VICTIMS REPORT 2004] at Appendix C (Chronology of Surveys, Reports, and Hearings [Regarding Sexual Misconduct in the Military Services] 1988–2004), <http://www.sapr.mil/public/docs/research/Task-Force-Report-for-Care-of-Victims-of-SA-2004.pdf>.

⁵³ *Id.* at vii.

2. DoD Task Force on Sexual Harassment & Violence at the Military Service Academies

Congress, pursuant to the NDAA for FY 2004,⁵⁴ subsequently directed that a DoD Task Force assess “and make recommendations concerning how the Departments of the Army and the Navy may more effectively address sexual harassment and assault at the United States Military Academy and the United States Naval Academy.”⁵⁵ The Task Force analyzed sexual assault reports and demographic data, and assessed service-wide policies.⁵⁶ It noted as one of its thirty-five findings that DoD policies focused on sexual harassment, not sexual assault, and further noted concern that the military sexual assault policies lacked integration for effective prevention and response—problems the Task Force recommended that the DoD resolve by establishing a sexual assault prevention program to include evaluation and oversight mechanisms.⁵⁷

3. Defense Task Force on Sexual Assault in the Military Services [DTFSAMS]⁵⁸

Congress again directed the DoD to review sexual assault in the military services in the NDAA for FY 2005,⁵⁹ where by the DTFSAMS was directed to examine “matters relating to sexual assault in which members of the Armed Forces [were] either victims or commit[ed] acts of sexual assault.”⁶⁰ The DTFSAMS subsequently issued a report in December 2009 and recommended that the DoD review the effectiveness of the 2007 revision to Article 120, the UCMJ punitive article for sexual assault offenses.⁶¹ The report noted that judge advocates

⁵⁴ National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, § 526, 117 Stat. 1392.

⁵⁵ REPORT OF THE DEFENSE TASK FORCE, SEXUAL HARASSMENT & VIOLENCE AT THE MILITARY SERVICE ACADEMIES ES 1 (June 2005) [hereinafter DTF ON SEXUAL HARASSMENT & VIOLENCE REPORT], http://www.sapr.mil/public/docs/research/High_GPO_RRC_tx.pdf.

⁵⁶ *Id.* at ES 2–3.

⁵⁷ *Id.*

⁵⁸ The author of this Article was the Senior Advisor to the DTFSAMS.

⁵⁹ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 576, 118 Stat. 1181.

⁶⁰ REPORT OF THE DEFENSE TASK FORCE, SEXUAL ASSAULT IN THE MILITARY SERVICES ES 1 (Dec. 2009) [hereinafter DTFSAMS REPORT 2009], http://www.sapr.mil/public/docs/research/DTFSAMS-Rept_Dec09.pdf.

⁶¹ *Id.* See also, U.S. DEP’T OF DEFENSE, DEP’T OF DEFENSE SEXUAL ASSAULT REPORT: FISCAL YEAR 2010 28 (2010), http://www.sapr.mil/media/pdf/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf [hereinafter 2010 DoD SEXUAL ASSAULT REPORT]; U.S. GOV’T

indicated the 2007 revised Article 120 was cumbersome and confusing and may be leading to acquittals.⁶²

4. Independent Review Panel

In accordance with the NDAA for FY 2013, Secretary of Defense Hagel established a “panel to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving sexual assault and related offenses under the Uniform Code of Military Justice . . . [and to] develop recommendations to improve the effectiveness of those systems.”⁶³ The “Response Systems to Adult Sexual Assault Crimes Panel” is required to compare conviction rates for military and civilian sexual assault offenses; consider sentencing guidelines; compare training of military defense counsel and prosecutors with their civilian equivalents; and evaluate proposals to revise the commander’s role in military sexual assault cases.⁶⁴ Secretary Hagel appointed a separate, follow-up panel to study and review “judicial proceedings conducted under Article 120 as revised by the NDAA for FY 2012, which applies to offenses committed on or after 28 June 2012.”⁶⁵

5. Secretary of Defense’s Initial Changes

On August 15, 2013, in response to media and public scrutiny, Secretary Hagel announced the following improvements for sexual assault victims: (1) sexual assault victim legal representation; (2) judge advocates as Article 32, UCMJ investigative hearing officers; (3) increased command options to transfer service member sexual assault suspects or accused persons to eliminate continued contact with victims; (4) timely follow-up reports on sexual assault incidents and responses to the first general or flag officer within the chain of command; (5) DoD

ACCOUNTABILITY OFFICE, GAO-11-579, Report to the Subcomm. on Military Personnel, Comm. on Armed Services, *Military Justice: Oversight and Better Collaboration Needed for Sexual Assault Investigations and Adjudications* 22 (June 2011), <http://www.gao.gov/products/GAO-11-579>.

⁶² DTFSAMS REPORT 2009, *supra* note 60.

⁶³ Staff, *Hagel Meets With Sexual Assault Response Systems Review Panel*, AMERICAN FORCES PRESS SERVICE (June 27, 2013), <http://www.defense.gov/news/newsarticle.aspx?id=120375>; Dwight Sullivan, *NDAA for FY 2013’s Sexual Assault Provisions*, NAT’L INST. OF MILITARY JUSTICE BLOG-CAAFFLOG (Dec. 25, 2012), <http://www.caaflog.com/2012/12/25/ndaa-for-fy-2013s-sexual-assault-provisions/>. The Judicial Proceedings Panel is an “independent panel established by the Secretary of Defense under subsection (a)(2) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239, 126 Stat. 1758).” *See* 2014 NDAA, *supra* note 48, § 1731(b). The panel is required “to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses . . . for the purpose of developing recommendations for improvements to such proceedings.” 2013 NDAA, Public Law 112–239, § 576, 126 Stat. 1758.

⁶⁴ 2013 National Defense Authorization Act, § 576, Pub. L. 112–239, 126 Stat. 1758.

⁶⁵ *See* Sullivan, *supra* note 63.

inspector general regular assessment of closed sexual assault investigations; (6) standardized prohibitions on improper conduct between recruiters and recruits, as well as trainers and their trainees; and (7) proposed Manual for Courts-Martial changes providing victims greater input during the sentencing phase of courts-martial.⁶⁶

III. PROBLEMATIC MILITARY SEXUAL ASSAULT REPORTING

In addition to Congressional directives to the DoD to review, assess, and report about sexual assault, the DoD, in an effort to provide transparency, publishes an annual report describing cases, adjudications, related training, and policies. On April 15, 2013, the DoD released a two-volume, 1,494-page report on sexual assaults involving the Armed Forces in 2012 [2012 DOD SEXUAL ASSAULT REPORT],⁶⁷ a publication that cost \$514,000 to prepare.⁶⁸ The 309-page 2012 Workplace and Gender Relations Survey of Active Duty Members [2012 WGRA REPORT] undergirded the 2012 DOD SEXUAL ASSAULT REPORT, which contained statistics regarding sexual assault reports, investigations, and dispositions of sex offense allegations.⁶⁹

Besides being overly complicated, the 2012 DOD SEXUAL ASSAULT REPORT lacked a reliable extrapolation regarding the scope of the military sexual assault problem and a clear measurement of the disposition of serious sex crimes. The DoD attempted to explain the SAPR Program's effectiveness by including the overall number of USCs, reported sexual assaults, and disposition of offenses.⁷⁰ The DoD also published a misleading extrapolation estimating 26,000 military victims suffered USCs—an estimation based on web-based questionnaires but

⁶⁶ U.S. Dep't of Defense, Office of the Assistant Secretary of Defense (Public Affairs), *Secretary Hagel's Statement on New Sexual Assault Prevention and Response Measures*, DEPARTMENT OF DEFENSE (Aug. 15, 2013), <http://www.defense.gov/releases/release.aspx?releaseid=16205>.

⁶⁷ U.S. DEP'T OF DEFENSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012, Vol. I (April 15, 2013), http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf [hereinafter 2012 DOD SEXUAL ASSAULT REPORT, VOL. I], U.S. DEP'T OF DEFENSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012, VOL. II (April 15, 2013), http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_TWO.pdf [hereinafter 2012 DOD SEXUAL ASSAULT REPORT, VOL. II].

⁶⁸ 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at cover page.

⁶⁹ *Id.* at Annex A, 1–302.

⁷⁰ *See id.* at 3, *Executive Summary*. The DoD has spent millions of dollars to reduce sexual misconduct in the military, and generation of the FY 2012 report alone cost approximately \$514,000. *Id.* at *Cover Page*.

lacking interviews⁷¹—generating public outrage and calls for drastic changes in the UCMJ.⁷²

Initially, Congress required the DoD to develop metrics to assess effectiveness in reducing the number of sexual assaults in 2011, directing the Secretary of Defense to:

issue standards to assess and evaluate the effectiveness of the sexual assault prevention and response program of each Armed Force in reducing the number of sexual assaults involving members of the Armed Forces and in improving the response of the [D]epartment to reports of sexual assaults involving members of the Armed Forces, whether members of the Armed Forces are the victim, alleged assailant, or both.^[73]

Further, the Secretary of Defense was required to develop and implement an evaluation plan for assessing the effectiveness of this program.⁷⁴ Congress specified reporting elements pertaining to data collection and case tracking to be included in the Annual Report to evaluate the effectiveness of the SAPR Program, as reflected in the annual DoD Sexual Assault Reports for FY 2009–2012.⁷⁵ Each subsequent year, Congress enacted legislation requiring more reports and assessments from the DoD.

The DoD launched the Sexual Assault Incident Database [DSAID] and used surveys to incorporate additional performance indicators.⁷⁶ Consistent with Congressional requirements established from 2011 to 2012, the DoD continues to

⁷¹ See *infra* notes 147–50 and accompanying text.

⁷² Emphasizing that in 2012, DoD estimated 26,000 military sexual assaults; commanders referred fewer than 500 cases to trial; and only 200 convictions resulted. Sen. Kirsten Gillibrand (D-N.Y.) is aggressively seeking passage of a bill that would strip convening authorities of their authority to refer charges of serious crimes, including sex crimes, to courts-martial, and to transfer that referral authority to military prosecutors. Lauren Fox, *Gillibrand Versus McCaskill and Levin: The War to Solve Military Sexual Assaults Heats Up*, U.S. NEWS AND WORLD REPORT (July 29, 2013), <http://www.usnews.com/news/articles/2013/07/29/gillibrand-versus-mccaskill-and-levin-the-war-to-solve-military-sexual-assaults-heats-up>. Senator McCaskill (D-Mo.) is leading the effort to retain convening authority responsibility for addressing military sex crimes. Shushannah Walshe, *McCaskill, Gillibrand Collide on How to Stem Military Sex Assaults*, ABC NEWS (July 25, 2013), <http://abcnews.go.com/blogs/politics/2013/07/mccaskill-gillibrand-collide-on-how-to-stem-military-sex-assaults/>. The convening authority's role is discussed in more detail *infra*, at pp. 651–54.

⁷³ Ike Skeleton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §1612(a), 124 Stat. 4137 (2011).

⁷⁴ *Id.*

⁷⁵ NDAA for Fiscal Year 2010, Pub. L. No. 111-84, §567, 123 Stat. 2190 (2009). NDAA for Fiscal Year 2006, Pub. L. No. 109-163, §596, 119 Stat. 3136 (2006); see 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 69, at 6.

⁷⁶ 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 41–42 (describing implementation of DSAID).

identify metrics for the military services to report annually to better provide an atmosphere of prevention, ensuring the safest and most secure living and working environments.⁷⁷

The DoD annual report of military sexual assaults includes minor USCs, an all-inclusive reporting definition.⁷⁸ The services also implemented required training briefings that may encourage reporting of any inappropriate sexual contact.⁷⁹ These components of the DoD's sexual assault prevention program may lead to increased sexual assault reports. Additionally, in April 2013, the DoD not only reported an extrapolated number of 26,000 victims based on surveys without follow-up interviews, but also pinpointed only 302 sexual assault courts-martial, resulting in 238 convictions.⁸⁰ This caused the perception that commanders are not referring cases to trial or perpetrators are not being effectively prosecuted. The press responded by focusing on these numbers, calculating a conviction rate of less than one percent (238 convictions in 26,000 reported incidents),⁸¹ and then criticized the military, without understanding that these numbers are misleading.⁸² Critics should be mindful that, as the Judge Advocate General of the Army stated:

[a]ny collective discussion of disposition data ignores the fact that at one end of the spectrum of misconduct, administrative or nonjudicial punishments are likely appropriate, while at the other end of the spectrum, courts-martial should be considered. Statistics garnered from the Annual Report that place the number of convictions over the total number of reports are misleading and of no value in measuring our success.⁸³

Moreover, the author has been unable to locate any federal or state prosecution jurisdiction that compares extrapolated estimates of victims determined from survey responses to arrests, prosecutions, or convictions to determine disposition rates.⁸⁴

⁷⁷ *Id.* at 39, 45.

⁷⁸ *See infra* notes 182–183 and accompanying text (defining USC and providing some survey questions used to determine whether interviewee was a victim of USC).

⁷⁹ 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 2–4, 9–10.

⁸⁰ *Id.* at 12–13, 25, 71.

⁸¹ *See infra* note 111 and accompanying text.

⁸² *See supra* notes 1–6 and accompanying text.

⁸³ 159 CONG. REC. 36, 189 (daily ed. March 13, 2013) (The Judge Advocate General, U.S. Army); *Hearing on Sexual Assault in the Military: Before the Subcomm. on Personnel Hearing of the S. Comm. on Armed Forces*, 113th Cong. 17 (2013) (statement of Lieutenant General Dana Chipman), http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/policy-pub-stmts-proposed-leg/stmts-senate-armed-svcs-cmte-20130313/USA_Chipman_20130313.pdf [hereinafter 2013 LTG Chipman Senate Statement].

⁸⁴ *See supra* note 8.

The 2012 DoD SEXUAL ASSAULT REPORT includes hundreds of statistics and numerous charts and graphs; however, any useful information for policy makers in assessing whether DoD is reducing crime and increasing effective prosecution of sexual assault offenses is difficult to locate and assess. The DoD's statistics are confusing. For example, statistics are provided for investigations opened previously and completed in FY 2012, investigations opened in FY 2012 and completed in FY 2012 with disposition in FY 2012, investigations opened in FY 2012 and not completed, and investigations opened in FY 2012 with disposition not completed.⁸⁵ Case synopses or summaries for hundreds of cases are included with each service report; however, the rationale for including a particular case synopsis is not specified, and the report does not include a synopsis for every reported case in FY 2012.⁸⁶ The different categories and combinations of victims and subjects are also confusing.⁸⁷

Some victims who have been sexually assaulted by military personnel are suspicious of the chain of command and the DoD, accusing the military of protecting sex offenders by covering up sex crimes because they tarnish the image of the military.⁸⁸ Transparency is essential to restore the credibility of the military justice system. A baseline and subsequent annual report of sex offenses per thousand active duty personnel based on each type of offense must be established through collection of reported sex crimes and disposition information. Such reports should be provided for the military services, for general courts-martial

⁸⁵ The 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, provides the criteria for the statistics; *id.* at 52–57, as well as numerous statistics, graphs, and tables; *id.* at 58–92.

⁸⁶ The Army, for example, provides almost 862 case summaries; however, there were 1,249 unrestricted Army reports in FY 2012. 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 39–40, *Army Annual Report on Sexual Assaults for Fiscal Year 2012*; see also *id.* at 7–89, *Fiscal Year 2012 Summary of Unrestricted Sexual Assault Reports of Army Annual Report on Sexual Assaults for Fiscal Year 2012*.

⁸⁷ For the crime of rape in the Army, there are eight categories: (1) service member on service member prior to FY 2012 (38), (2) service member on non-service member prior to FY 2012 (11), (3) non-service member on service member prior to FY 2012 (1), (4) unidentified subject on service member prior to FY 2012 (19), (5) service member on service member in FY 2012 (74), (6) service member on non-service member in FY 2012 (66), (7) non-service member on service member in FY 2012 (2), (8) unidentified subject on service member in FY 2012 (32). 2012 DoD SEXUAL ASSAULT REPORT, Vol. I, *supra* note 67, *Fiscal Year 2012 Summary of Unrestricted Sexual Assault Reports of Army Annual Report on Sexual Assaults for Fiscal Year 2012* at 7–89. Figure 2 of the Army report indicates there were 166 cases of service member victims of rape, and 77 cases of Non-service member victims of rape. 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, *Army Annual Report on Sexual Assaults for Fiscal Year 2012* at 39. Figure 3 shows 189 cases of service member offenders of rape, 3 cases of non-service member offenders of rape, and 51 cases of Unidentified Offenders of rape in FY 2012. *Id.* at 40. The numbers for non-service member offenders of rape at 3 seems low, and it is possible that some rape information was not collected when the subjects were civilians.

⁸⁸ See, e.g., *Protect Our Defenders 2013 Media Report*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/protect-our-defenders-2013-media-report/> (last visited April 22, 2014); *Protect Our Defenders Survivor Stories*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/the-johnson-family-story/> (last visited April 22, 2014).

jurisdictions, and for the DoD overall. Reports to Congress must simply and clearly show whether the number of a specific crime has increased or decreased each year, as well as the conviction and sentencing information.⁸⁹ Statistics should be published on the internet by each general court-martial jurisdiction to provide transparency, particularly for victims, and so that the commanding general and the command's legal advisor can be held accountable for taking or not taking appropriate action against sex offenders. The DoD should collect and provide, to Congress and the public, statistics for each general court-martial conviction, for each of the services, and for the DoD overall. Congress could accomplish these goals by enacting a statute as suggested in Appendix A.⁹⁰

Unlike the DoD, the DoJ began collecting data in 1930 and now generates annual reports of nationwide crime statistics, including prosecution, and conviction statistics.⁹¹ In 2007, the DoJ ended the practice of listing federal sex offense statistics in their annual report; however, there are state felony conviction statistics for rape and "other sexual offense" categories for 2006.⁹² The DoD should use the same methods as the DoJ to collect similar data, and Congress should expand the NCVS to ensure consistency of survey collection methods and enhance credibility of reports relating military personnel victimization.

⁸⁹ Reporting rates per thousand allows comparison of reports from groups of different sizes and it facilitates year-after-year comparisons, even when the total number of people in a group has changed. 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 60. Victim reporting rates for the last six years are as follows: FY 2007 (1.6), FY 2008 (1.7), FY 2009 (1.9), FY 2010 (1.8), FY 2011 (1.9), and FY 2012 (2.1). *Id.* at 60. Rates are calculated using the number of service member victims in unrestricted and restricted reports and active duty military service end strength for each year on record with Defense Manpower Data Center [DMDC]. *Id.* On September 30, 2012, the total DoD active duty population was 1,387,488, the female population on active duty was 204,309 and the male population on active duty was 1,183,179. DOD PERSONNEL AND PROCUREMENT STATISTICS, <http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm>. The military reporting rate per thousand for females in FY 2012 was 12.7 (2,595 divided by 204,309 times 1,000), and the rate per thousand for males in FY 2012 was 0.30 (354 divided by 1,183,179 times 1,000). *See infra* notes 140–41. A DoD active duty female is 43 times more likely to report being sexually assaulted than a DoD active duty male. Congress requires the DoD to provide data about the number of sexual assault reports and the disposition of the allegations made against each subject. 2012 DoD SEXUAL ASSAULT REPORT, Vol. I, *supra* note 67, at 1, 4; *see supra* notes 22, 73–77 and accompanying text. With a total active duty population of 1,387,488 and an extrapolated 26,000 victims, the extrapolated rate per 1,000 is 18.6.

⁹⁰ The DoD could accomplish the same objectives without legislation. No statute prohibits the DoJ's BJS from including 15,000 active duty personnel in the NCVS and issuing the suggested report; the Secretary of Defense could change the DoD report criteria and include more precise investigation and disposition information. However, adding this information will require additional effort, and Congressional support for these actions as shown by legislation will improve the credibility of the results and ensure that these initiatives continue.

⁹¹ The crime statistics are collected from 18,000 law enforcement agencies, including the military. FBI, UNIFORM CRIME REPORTS, <http://www.fbi.gov/about-us/cjis/ucr/ucr> (last visited April 22, 2014).

⁹² SEAN ROSENMERKEL, U.S. DEP'T OF JUSTICE, NAT'L JUDICIAL REPORTING PROGRAM, NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006–STATISTICAL TABLES (Dec. 30, 2009), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse&sid=28>.

The DoJ is in the process of studying how to establish the ideal survey process to assess the magnitude of sex crimes, and has acknowledged that the various surveys and extrapolations show a vast variation in the numbers of reported sexual assaults, stating:

[e]ven when the surveys use comparable definitions, however, the methodology used to elicit reports of these events can differ dramatically and produce very different estimates of the incidence of these crimes. A number of discussions have taken place regarding the desirability of various survey design features, including sample design, screening strategy, reference period, bounding, cueing strategy, types of cues, context, and respondent selection. In addition, differing interviewing modes have been discussed, including telephone interviews in [National Violence Against Women Survey], in-person interviews as in the NCVS, and more private, Audio Computer Assisted Self-Interview (ACASI) options like those used in the [Bureau of Justice Statistics]-sponsored National Inmate Surveys of sexual violence among correctional populations. The differences that arise from using different methodologies and surveying different populations have resulted in debate over the ideal method for collecting self-report data on rape and sexual assault. In addition, these differences have resulted in confusion among stakeholders as to which estimates are more accurate. This debate has had the negative consequence of raising doubts about the self-report methodology itself.⁹³

Another survey made a similar observation:

surveys employing diverse methodologies (e.g. different sampling techniques, different questions to uncover victimization) and different definitions of violence have resulted in tremendously diverse estimates, especially for small populations like American Indian and Alaska Natives. For example, for the general population of women, survey estimates of how many women experience violence by an intimate partner annually range from 9.3 per 1,000 women to 116 per 1,000

⁹³ The BJS has an ongoing effort to improve their statistical reports. An expert panel from the National Research Council's Committee on National Statistics [CNSTAT] is reviewing concepts and methods of surveys on rape and sexual assault with the goal of recommending to the BJS the best methods for obtaining such statistics on an ongoing basis. A poster describing the effort is available. BUREAU OF JUSTICE STATISTICS, BJS ACTIVITIES ON MEASURING RAPE AND SEXUAL ASSAULT, http://bjs.gov/content/pub/pdf/bjs_amrsa_poster.pdf (last visited April 22, 2014) [hereinafter BJS POSTER]. The 2013 National Academies Report, *supra* note 8, discusses and compares the different methodologies used for criminal justice reports and public health reports.

women. Further, the methodological differences across survey methodologies often preclude direct comparison across studies.⁹⁴

The BJS, explaining the “public health versus criminal justice approaches to measuring rape and sexual assault,” considered seven primary differences as follows: context, populations, definitions of target events differ, reference periods, focus and structure of screeners, and identification and classification of events.⁹⁵ Despite these differences, Congress and the public compared the public-health surveys with courts-martial statistics, when such statistics are not compared in the state criminal justice systems or in U.S. District Courts.⁹⁶

A. *The FY 2012 DoD Report on Sexual Assault in the Military*

As mentioned previously, the DoD annual report causes misperceptions, and incites questions and criticisms. The same was true when the DoD published the FY 2012 report indicating 3,374 sexual assault reports involving military victims or subjects.⁹⁷ This overall number is somewhat inflated after analyzing the DoD’s categories of the sexual assault incidents. The DoD’s initial total sexual assault report numbers include cases that are not within the purview of military prosecutors, such as restricted reports and cases involving civilian offenders, unknown offenders, unfounded cases, and victims who refused to testify.⁹⁸

Of the 3,374 reports, only 2,558 were unrestricted reports, subject to initial investigation—unlike restricted reports, which remain confidential and cannot be investigated.⁹⁹ This further reduced the number of reports where the DoD could

⁹⁴ RONET BACHMAN ET. AL, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 28–29 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf> [hereinafter 2008 BACHMAN REPORT] (citing RONET BACHMAN, A COMPARISON OF ESTIMATES OF VIOLENCE AGAINST WOMEN FROM THE NATIONAL CRIME VICTIMIZATION SURVEY AND THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 839–67 (2000), available at <http://vaw.sagepub.com/content/6/8/839.full.pdf+html>).

⁹⁵ BJS Poster, *supra* note 93.

⁹⁶ See *supra* notes 5, 8.

⁹⁷ 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 3 (“In FY12, there were 3,374 reports of sexual assault involving service members. These reports involved one or more service members as either the victim or subject (alleged perpetrator) of an investigation.”).

⁹⁸ See *infra* notes 99, 103–106 and accompanying text.

⁹⁹ The DoD could not prosecute “unidentifiable offenders, civilians or foreign nationals, military subjects being prosecuted by a civilian or foreign authority, or subjects who died or deserted before the conclusion of the investigation and/or disciplinary action.” 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 4; see also *supra* notes 13, 59, 64. The Military Criminal Investigative Organizations [MCIOs] decide whether cases are “founded” against individuals, whereas, DoJ statistics track cases based on *arrests*, which require a *probable cause* determination. The report also lists total sexual assault offenses including civilian victims, if the subject is military, for rape (26% or 676 in FY 2012), aggravated sexual assault and sexual assault (30% or 724 in FY 2012), and abusive and wrongful sexual contact (35% or 888 in FY 2012). *Id.* at 55–56, 63 n.71, 64. In FY 2012, the DoD reported the cases of 2,661 military personnel were resolved (1,315 FY 2012

take action. Of these 2,558 cases, some involved military victims who were assaulted by civilians or foreign nationals, and the military lacked jurisdiction.¹⁰⁰ Other cases involved military subjects who were prosecuted by foreign or U.S. civilian prosecution authorities (district attorneys and assistant U.S. attorneys).¹⁰¹ Sometimes military suspects could not be prosecuted for various reasons such as their death or desertion.¹⁰² In still other cases, the offense could not be proven, or the victim refused to cooperate in the prosecution.¹⁰³

Moreover, in FY 2012, the DoD could not take action against 947 subjects because the DoD lacked jurisdiction (civilian subjects), the cases involved unidentified subjects, or they resulted in unfounded sexual assault allegations.¹⁰⁴ Commanders decided that adverse action was not possible in 509 cases because in 196 cases the victim declined to participate, 307 cases resulted in insufficient evidence, and in six cases the statute of limitations barred prosecution.¹⁰⁵

In reality, cases involving 1,714 military subjects were presented to military commanders for consideration of disciplinary action. After deducting the 192 cases where the military lacked jurisdiction (leaving 1,522 cases), and 134 cases where a decision on the disciplinary action was pending at the end of the fiscal

investigations and 1,346 pre-FY 2012 investigation) and commanders took no adverse action against 584 of these cases, citing unknown offender (250), civilian subjects (131), civilians prosecute case (192), and subject died or deserted (11). *Id.* at 66.

¹⁰⁰ *Id.* at 60 (“In FY12, there were 2,558 unrestricted reports of sexual assault involving Service members as either the subject or victim of a sexual assault; 1,985 (76 percent) of the 2,558 unrestricted reports involved service members as victims. Because some incidents involved multiple victims, 2,166 Service member victims were involved in these 1,985 Unrestricted Reports Each year, the majority of sexual assault reports received by the [Military Criminal Investigative Organizations] involve the victimization of Service members by other Service members. In FY12, 1,590 of the 2,558 Unrestricted Reports (62 percent) involved allegations of Service member-on-Service member sexual assault.”). The 2012 DOD SEXUAL ASSAULT REPORT includes the number of unrestricted reports of service member-on-service member by offense type in the individual service sections and the overall numbers for the Services by gender for victim and offender. *Id.* at 191 (Army), 479 (Navy), 534 (Marine Corps), 635 (Air Force). The information for restricted reports is much less specific. *Id.* at 195 (Army), 483 (Navy), 537 (Marine Corps), 639 (Air Force).

¹⁰¹ *See infra* note 104

¹⁰² *See supra* note 94.

¹⁰³ The victim refused to participate in the military justice action in cases involving 196 subjects, and the commander determined there was insufficient evidence of any offense to prosecute in cases involving 307 subjects. *Id.* at 68; *see also infra* note 106.

¹⁰⁴ *Id.* at 66; *see also id.* at 53–54 (explaining jurisdiction), 67 (“584 subjects of DoD investigations fell outside its authority for disciplinary action: There were 250 subjects who remained unidentified despite a criminal investigation (Exhibit 9, Point L). The Department could not take action against 131 civilians or foreign nationals because they were not subject to military law (Exhibit 9, Point M). A civilian authority or foreign government asserted its authority over 192 service members (Exhibit 9, Point N). Eleven subjects died or deserted before disciplinary action could be taken against them (Exhibit 9, Point O).”).

¹⁰⁵ 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 68.

year (leaving 1,388 cases), 302 were tried by courts-martial, and 238 were convicted.¹⁰⁶

In FY 2012, there were 2,949 service member victims initiating 2,166 unrestricted reports and 783 restricted reports (which cannot be investigated), involving both military and civilian subjects.¹⁰⁷ The 2012 DOD SEXUAL ASSAULT REPORT does not divide the offenses by gender of victim. The numbers for specific offenses tried by courts-martial are not indicated. Instead, the 2012 DOD SEXUAL ASSAULT REPORT consolidates the dispositions for the crimes of rape, sexual assault, aggravated sexual contact, abusive sexual contact, nonconsensual sodomy, and attempts to commit these acts into the category “sexual assault.”¹⁰⁸

The 2012 DOD SEXUAL ASSAULT REPORT includes the unrestricted reports of sexual assault by type of offense originally alleged and the military status of the victim as follows:

¹⁰⁶ *Id.* at 4 provides:

Of the 1,714 military subjects, commanders could not take action against 509 due to evidentiary problems. Eighty-one of the 1,714 military subjects received no disciplinary action because commanders determined the criminal allegations were unfounded (false or baseless). Commanders had sufficient evidence to take disciplinary action against 1,124 of the 1,714 military subjects. Of the 1,124 subjects, sexual assault charges were substantiated for 880 subjects for whom it was determined a sexual assault offense warranted discipline. For the remaining 244 subjects, evidence supported command action for other misconduct discovered during the sexual assault investigation (such as making a false official statement, adultery, underage drinking, or other crimes under the UCMJ), but not a sexual assault charge. Command actions for sexual assault charges and other misconduct charges included court-martial charge preferrals, nonjudicial punishment, administrative discharges, or other adverse administrative actions. Sixty-eight percent of subjects receiving disciplinary action for a sexual assault had court-martial charges preferred against them.

Five-hundred ninety-four of the 880 military subjects were charged. *Id.* at 68. Three-hundred twenty-eight of the 594 cases involved investigations opened the previous year, and 266 of the cases involved investigations opened in 2012. *Id.* Four-hundred sixty of the 594 cases were completed by the end of FY 2012: (1) court-martial charges were dismissed in 88 cases, (2) 70 received a discharge or resignation, and (3) 302 cases proceeded to trial with 238 (79%) convictions and 64 (21%) acquittals. *Id.* at 71. For FY 2012, DoD reported that the number of sexual assault reports (3,374 reports) increased from FY 2011 (3,192 reports) by 6%. *Id.* at 2. The FY 2012 report was an increase over the FY 2008 reports (2,908) by 466 or 16%. U. S. DEP'T OF DEFENSE, REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2008 (2009), <http://www.sapr.mil/contents/references/2007%20Annual%20Report.pdf>.

¹⁰⁷ 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 3, 25, 58–60. Victims making unrestricted reports trigger a criminal investigation and notification to the command about the allegation. *Id.* at 101. Victims making restricted reports may receive medical or counseling services without triggering an investigation, and the command receives limited information about the allegation. *Id.* at 87. No disciplinary action may be taken against a perpetrator based on a restricted report because of the DoD's promise to protect the victim's confidentiality.

¹⁰⁸ The 2012 DOD SEXUAL ASSAULT REPORT provides percentages of original allegations in unrestricted reports as follows: abusive and wrongful sexual contact (35%), aggravated sexual assault and sexual assault (28%), rape (27%), non-consensual sodomy (6%), aggravated sexual contact (4%), indecent assault (less than 1%), and attempts (less than one 1%). *Id.* at 62.

Unrestricted Reports of Offenses in FY 2012¹⁰⁹			
Most Serious Offense Alleged in Report	Reports with non-service member victims	Reports with service member victims	Total Reports
Rape	209	467	676
Aggravated Sexual Assault and Sexual Assault	151	573	724
Aggravated Sexual Contact	22	70	92
Abusive Sexual Contact	56	252	308
Wrongful Sexual Contact	102	478	580
Indecent Assault	0	6	6
Nonconsensual Sodomy	33	129	162
Attempts to Commit Offenses	0	10	10
Total	573	1,985	2,558

Further confusing matters, the 2012 DOD SEXUAL ASSAULT REPORT announced a misleading raw total number of extrapolated 26,000 military sexual assault victims.¹¹⁰ Even more misleading, some commentators compared the extrapolated number of sexual assault victims (26,000) with the number of court-martial convictions (238), and asserted the conviction rate for FY 2012 was less than one percent.¹¹¹ If the same type of extrapolation were used for college campuses, the military conviction rate for sexual offenses would be 20 times as high as the conviction rate on college campuses, a similarly misleading figure.¹¹²

¹⁰⁹ *Id.* at 64.

¹¹⁰ *Id.* at 1; 4 n.12; 52–53; 55–56; 65.

¹¹¹ See Press Release from Rep. Suzanne Bonamici, U.S. House of Reps., Bonamici Backs Bill to Strengthen Prosecution of Military Sexual Assault (May 17, 2013), *available at* <http://bonamici.house.gov/press-release/bonamici-backs-bill-strengthen-prosecution-military-sexual-assault> (“Although the number of perpetrators convicted of committing sexual assault increased from 191 in 2011 to 238 in 2012, the conviction rate dropped from 1 percent in 2011 to 0.9 percent in 2012.”).

¹¹² For example, a 2000 study found “2.8 percent of the sample (4,446) had experienced either a completed rape (1.7 percent) or an attempted rape incident (1.1 percent). The victimization rate was 27.7 rapes per 1,000 female students.” BONNIE FISHER, FRANCIS CULLEN, & MICHAEL TURNER, U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE AND BUREAU OF JUSTICE STATISTICS, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 3, 10, 40, (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf> [hereinafter 2000 FISHER STUDY]. Using the number of females attending college that year, the extrapolation is 406,749

Notably, the DoE and DoJ do not use such methods to generate extrapolations for comparison to reports of arrests, prosecutions, or convictions.¹¹³ Furthermore, the DoD should report a separate category of forcible rape, the only sexual offense in the FBI's UCR.

1. Jurisdictional and Evidentiary Limitations

As Lieutenant General Chipman asserted to the Senate “when one looks at the most serious penetrative offenses, rape and aggravated sexual assault, in which there is a completed disposition and jurisdiction over the offender, the Army’s rate of prosecution is strong and compares favorably with any other jurisdiction—civilian or military.”¹¹⁴ Sexual assault offenses occurring within the United States on military installations are within the criminal jurisdiction of at least two sovereigns, depending on where the assault occurs. The military services may not take jurisdiction over some cases where other authorities have concurrent jurisdiction.¹¹⁵ Offenses on a military installation in areas of exclusive federal legislative jurisdiction may be prosecuted by the U.S. Attorney’s Office in U.S. District Court or by military prosecutors in courts-martial; offenses occurring outside the military installation, or on areas of concurrent legislative jurisdiction within military installations, may be prosecuted in state courts or by military prosecutors in courts-martial.¹¹⁶ Moreover, military prosecutors may not have the option to prosecute offenders, yet those cases are included in the DoD’s total reported cases.

Those who want to compare military and civilian prosecution rates of sexual assault offenses might compare prosecution rates of military personnel alleged to have committed sex offenses on military installations (primarily exclusive federal jurisdiction) with prosecutions of military personnel for offenses that occur near

rapes or attempted rapes on college campuses; *see also infra* notes 169–172 (explaining how extrapolation is done). That year, 1,842 rapes were reported to campus authorities or one in 221. *Id.* Typically one in four rapes reported to police result in an arrest, and one in nine rapes reported to police result in a conviction. FBI UNIFORM CRIME REPORTS: 2006–2010, DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES: AVERAGE OF 2002–2006. Under this analysis only one out of 1,981 rapes result in convictions or .05 percent of rapes or attempted rapes of college women result in a felony conviction.

¹¹³ *See supra* note 8.

¹¹⁴ 2013 LTG Chipman Senate Statement, *supra* note 83, at 16–17.

¹¹⁵ “The Department of Justice and the Department of Defense have entered into a memorandum of understanding, reprinted in Appendix 3 of the *Manual for Courts-Martial*, that establishes a presumption that service members will be tried in courts-martial rather than federal district court for crimes usually prosecuted under the UCMJ. The Fifth Amendment’s prohibition against Double Jeopardy prevents a service member from being tried by both a federal district court and a court-martial.” GREGORY MAGGS & LISA SCHENCK, *MODERN MILITARY JUSTICE: CASES AND MATERIALS* 46 (2012). Various military installations throughout the United States negotiate for jurisdiction of offenses with local district attorneys.

¹¹⁶ *See* Major Stephen E. Castlen & Lieutenant Colonel Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113 (1997).

the military installation in the civilian community, where a state, county, or municipality may prosecute service members anytime they commit an offense within its jurisdiction. Jurisdiction over offenses that occur in the civilian community is joint—both the civilian and military authority have jurisdiction over the offense and the offender.¹¹⁷ Jurisdiction is typically decided on a case-by-case and jurisdiction-by-jurisdiction basis.¹¹⁸

In 2011, the DoD reported that Military Criminal Investigative Organizations [MCIO] did not consistently generate collateral reports of investigations of military personnel involved in civilian (primarily off-post local police investigations) sexual assault investigations, or regularly collect disposition information for military subjects.¹¹⁹ Of the information available, in FY09–FY11, 70%, 38%, and 84%, respectively, of military subjects under a civilian or foreign authority received no legal action.¹²⁰ The DoD lacked jurisdiction to take action against 131

¹¹⁷ See Federal Assimilative Crimes Act, 18 U.S.C. § 13; *Loving v. United States*, 517 U.S. 748, 752–55 (1996) (describing the history of court-martial jurisdiction); *Solario v. United States*, 483 U.S. 435, 439 (1987) (holding that personal jurisdiction depends on the accused’s “status” as a person subject to the UCMJ and not on the “service connection” of the offense charged—military may prosecute cases that occur outside of military installations); Rule for Courts-Martial [RCM] 202, Persons subject to the jurisdiction of courts-martial; RCM 203, Jurisdiction over the offense; Department of Defense Directive 5525.7, Memorandum of Understanding between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes, Jan. 22, 1985, reproduced in Appendix 3 of the Manual for Courts-Martial. See U.S. DEP’T OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES app. 3 (2012), available at http://www.loc.gov/frd/Military_Law/pdf/MCM-2012.pdf.

¹¹⁸ 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 53–54. Similarly, for offenses occurring outside the United States, for example, in Germany, South Korea, or Okinawa, the host nation has the ability to prosecute a service member, if the offense is committed against a local national; however, in general, the military has primary jurisdiction for offenses committed against U.S. citizens. Prosecution jurisdiction is based on Status of Forces Agreements [SOFA] between the United States and the foreign government; and jurisdiction under the various SOFAs is different from country to country. *Id.* at 54.

¹¹⁹ SEXUAL ASSAULT RESPONSE AND PREVENTION, U.S. DEP’T OF DEFENSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2011 51 (2012), http://www.sapr.mil/public/docs/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf [hereinafter 2011 DoD SEXUAL ASSAULT REPORT].

¹²⁰ *Id.* at 51 (“A review of the dispositions that were reported and completed for the past three FYs disclosed that there was not enough information reported to do a meaningful analysis, as no foreign or civilian subject disposition data was available for the majority of these subjects in FY09 and FY10. In FY11, the DoD IG drafted policy to address the complete reporting of dispositions of all subjects investigated by MCIOs. Once this policy is issued, it is expected that dispositions for civilian and foreign nationals will be better documented in forthcoming years.”) Actually, the information could have been collected by the local judge advocate or MCIO contacting the pertinent civilian prosecution authority to ask for the disposition information pertaining to each subject. In FY 2011, the sex offense cases of only eighty-two FY11 military subjects and forty-seven pre-FY11 military subjects were resolved by civilian authorities. *Id.* at 32; see also SEXUAL ASSAULT RESPONSE AND PREVENTION, U.S. DEP’T OF DEFENSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2010 71 (2011), http://servicewomen.org/SAPRO%20Reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf (“A Civilian/Foreign Authority Is Prosecuting: 79 Subjects (32 FY10

civilians or foreign nationals who sexually assaulted military personnel because they were not subject to military law, and a civilian authority or foreign government asserted its authority over 192 military personnel, limiting the DoD's ability to try these individuals.¹²¹

The DoD's reported cases also initially included "unfounded" cases. Under current procedures, the DoD's MCIOs use an evidentiary standard lower than the DoJ's "arrest" standard employed in the UCRs.¹²² Under the UCMJ, probable cause to believe an offense has been committed is a prerequisite for apprehension (arrest), pretrial restraint, and for the staff judge advocate to recommend referral of charges to court-martial.¹²³ While the federal and state jurisdictions use "arrested, or charged with the commission of the offense and turned over to the court for prosecution" as the basis for sexual assault cases and prosecution rates,¹²⁴ the DoD counts all reports in their number of reported cases and only later indicates "unfounded" cases.¹²⁵

2. Restricted Reporting Option Leads to Cases Reported But Not Disposed of Under the Military Justice System

Service members may use restricted reporting, which allows victims to confidentially report sexual assaults without permitting investigation or prosecution of offenses. A service member:

Subjects + 47 Pre-FY10) Subjects"; however this report does not indicate whether any legal action was taken.).

¹²¹ 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 63. Cases where the military services do not have jurisdiction, a civilian legal authority assumes jurisdiction over a military subject, there is no known subject, or there is not probable cause to believe a subject committed an offense are not counted in civilian conviction rates and they should not count in assessing military court-martial conviction rates. The DoJ reports two percentages: (1) 53.4% (FY 2007, sexual abuse cases referred to U.S. attorney offices that are prosecuted); and (2) 86.8% (FY 2007, sexual abuse cases tried resulting in conviction). *See infra* notes 220–226 and accompanying text. The percentage of cases referred to U.S. Attorney Offices that result in convictions is 46% (obtained by multiplying .534 times .868). Moreover, the military conviction rate for sexual assault offenses in FY 2012 was 52% (238 convictions divided by 460 cases with preferred charges that were completed by the end of the FY 2012); *see also* 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 71, 73 ("Of the 302 subjects whose cases proceeded to trial: 238 subjects (79 percent) were convicted.").

¹²² *See infra* notes 275–283 and accompanying text.

¹²³ MANUAL FOR COURTS-MARTIAL, *supra* note 117, at Rules 302(c) II-18, 304(c) II-20, 406(b)(2) II-40. Probable cause means "there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it." *Id.* at 302(c) II-18.

¹²⁴ *See* MARK MOTIVANS, FEDERAL JUSTICE STATISTICS 2009, NCJ 234184 (Dec. 2011), <http://bjs.gov/content/pub/pdf/fjs09.pdf> [hereinafter 2009 FEDERAL JUSTICE STATISTICS]; U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2008, NCJ 231822 (Nov. 2010), <http://bjs.gov/content/pub/html/fjsst/2008/fjs08st.pdf> [hereinafter 2008 FEDERAL JUSTICE STATISTICS].

¹²⁵ 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 66–69, 79–80.

who is sexually assaulted may report a sexual assault without initiating an investigation, and with some confidentiality, using the restricted reporting policy. This “allows . . . a sexual assault victim, on a confidential basis, to disclose the details of his/her assault to specifically identified individuals and receive medical treatment and counseling without triggering the investigative process.” She can make a restricted report . . . to the “sexual assault response coordinator [SARC], victim advocate, chaplain, or a healthcare provider.”¹²⁶

Without adequate investigation and disclosure to military investigators and prosecutors, these sexual assaults cannot result in appropriate disposition or adverse action taken against offenders.

3. DoD’s Sexual Assault Prevention and Response Program Training May Result in Increased Reporting

The DoD’s program requires sexual assault awareness training throughout the military services that may lead to increased reporting. Service members receive extensive training regarding sexual assault reporting and response. This awareness training sensitizes and encourages young service members to report sexual abuse.¹²⁷ The DoD asserts that the number of reported sexual assaults in the military is a positive development, arguing that this shows an increased climate of victim confidence associated with reporting sexual abuse.¹²⁸ In cases within the purview of civilian authorities, many victims (unlike military victims who are encouraged to report) may not report minor wrongful sexual contact or prosecutors may decide not to go forward with prosecuting such conduct.¹²⁹

Victims of sexual assault cases under civilian jurisdiction may not have the option to report using restricted reporting procedures, which allow victims to confidentially report without law enforcement investigation. Civilian law

¹²⁶ Major Katherine A. Krul, *The Sexual Assault Prevention and Response (SAPR) Program— in Need of More Prevention*, THE ARMY LAWYER, Nov. 2008, at 41, 45–46 (footnotes omitted); see also, Emily Hansen, Comment, *Carry that Weight: Victim Privacy Within the Military Sexual Assault Reporting Methods*, 28 J. MARSHALL J. COMPUTER & INFO. L. 551 (2011). Others assert that military prosecutors take on more difficult sexual assault cases than civilian prosecutors. See 2013 LTG Chipman Senate Statement, *supra* note 83 (“[T]he Army often prosecutes sexual assault allegations involving an incapacitated or intoxicated victim. In my experience, civilian authorities often decline to prosecute these types of cases, especially when the accused has no prior criminal record The statistics on the number of sexual assault prosecutions in the Army reflect a healthy military justice system focused on these difficult cases.”).

¹²⁷ See 2011 DoD SEXUAL ASSAULT REPORT, *supra* note 79; see also, DTF ON SEXUAL HARASSMENT & VIOLENCE REPORT, *supra* note 33, at iii.

¹²⁸ 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 2.

¹²⁹ See CASSIA C. SPOHN ET AL., PROSECUTORS’ CHARGING DECISIONS IN SEXUAL ASSAULT CASES: A MULTI-SITE STUDY, FINAL REPORT (2001), <https://www.ncjrs.gov/pdffiles1/nij/grants/197048.pdf>.

enforcement report sex offenses to the Bureau of Crime Statistics as part of the UCRs system upon arrest or an incident report being made to law enforcement, which by definition would not include confidential reports of crime by victims.¹³⁰ Also, minor sexual touching may go unreported and unaccounted for in the civilian sector—resulting in a lower incident rate of sexual misconduct.

B. The 2012 DOD SEXUAL ASSAULT REPORT'S extrapolation of 26,000 military victims is misleading

Inciting nationwide media coverage, the DoD announced that most sexual assaults in the military go unreported and the actual number of sexual assaults upon military victims was nine times as high as the actual number of reported victimizations (2,949 reported military victims) or 26,000 victims.¹³¹ The DoD extrapolation concluded 12,463 women (6.1% of active duty women) and 14,205 men (1.2% of active duty men) were the victims of sexual assault in FY 2012.¹³² The DoD further reported that the 26,000 military victims amounted to a 35 percent increase in just one year from 19,000 in FY 2011; the basis for the 26,000 extrapolation was the DMDC 2012 WGRA REPORT.¹³³

¹³⁰ Compare U.S. DEP'T. OF JUSTICE, *Uniform Crime Reporting Program, About the UCR Program*, http://www2.fbi.gov/ucr/05cius/about/about_ucr.html, with SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67 (“Restricted Reporting allows victims to confidentially access medical care and advocacy services without initiating an official investigation or command notification. When a victim makes an Unrestricted Report, they can receive the same healthcare, counseling, and advocacy services. However, the report is also referred to a Military Criminal Investigation Organization (MCIO) for investigation and command is notified.”).

¹³¹ Twenty-six thousand divided by 2,949 equals 8.8, which is rounded up to nine. 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 12 (“Estimates derived from the rates of [unwanted sexual contact (USC)] USC in the 2012 WGRA suggest that there may have been approximately 26,000 service members who experienced some form of USC in the year prior to being surveyed.”). “USC involves intentional sexual contact that was against a person’s will or occurred when the person did not or could not consent. The term describes completed and attempted oral, anal, and vaginal penetration with any body part or object, and the unwanted touching of genitalia and other sexually related areas of the body.” *Id.* at 12 n. 22. “This estimate is computed using weighted population estimates of the 6.1 percent of Active Duty women and 1.2 percent of Active Duty men who indicated they experienced an incident of unwanted sexual contact in the 12 months prior to the 2012 WGRA.” *Id.* at 13 n.3; *see also id.* at 61 (showing the number of unrestricted reports of military-on-military sexual offenses for 2012 to be 1,590 cases).

¹³² 6.1% of 204,309 (female active duty population) is 12,463; and 1.2% of 1,183,719 (male active duty population) is 14,205. 12,463 plus 14,205 is 26,667. *See supra* note 89; 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 25–26. The 26,000 number is an approximation. *Id.* The percentage of victims by gender is determined by dividing 14,205 (male victims) by 26,667 (total victims) to equal 53%, and the percentage of female victims is determined by dividing 12,463 (female victims) by 26,667 (total victims) to equal 47%.

¹³³ *Id.* at 25. The 2012 DoD SEXUAL ASSAULT REPORT raises the issue, among others, of the accuracy and magnitude of male-on-male sexual abuse among active duty personnel. The DoD reported the gender of sexual assault perpetrators on females, as “94% indicated the offender(s) were male only; 1% indicated the offender(s) were female only; and 5% indicated the offenders were both males and females (all unchanged from 2006 and 2010).” 2012 WGRA REPORT, *supra* note 6. The

The DoD's extrapolation is misleading and based on imprecise survey data. The 2012 WGRA REPORT's extrapolation is not reliable; for example, the report extrapolated that in 2012, 2,699 male service members reported to authorities that they were sexually assaulted.¹³⁴ In fact, only approximately 371 males reported to military authorities that they were sexually assaulted, indicating that the 2012 WGRA REPORT results were over seven times higher.¹³⁵

Survey questions, types of sexual conduct reported, and collection methods for sampling data drastically impact the overall total number of sexual assault reports. Nevertheless, the DoD's use of extrapolated numbers to report sexual assault victims in the military results in an exaggeration and is not useful in preventing sexual assault or improving disposition of sexual offenses. The shockingly high number—26,000 sexual assault victims—elicited outrage from the President, Secretary of Defense, and various members of Congress about these unacceptably high levels of sexual assault.¹³⁶ Such extrapolations should be greeted with deep skepticism, rather than outraged commentary by the press, members of Congress, the Secretary of Defense, and the President.

To arrive at the extrapolated number of 26,000 military victims, the Department primarily relied upon its own 2012 WGRA REPORT,¹³⁷ which used similar survey methods as the 2010 PREVALENCE OF INTIMATE PARTNER VIOLENCE, STALKING, AND SEXUAL VIOLENCE AMONG ACTIVE DUTY WOMEN AND WIVES OF ACTIVE DUTY MEN—COMPARISONS WITH WOMEN IN U.S. GENERAL POPULATION [2010 MILITARY NISVS REPORT]¹³⁸ and the DRUG-

2012 WGRA REPORT did not report the gender of the persons sexually assaulting males. *Id.* at 3–4. The 2012 WGRA REPORT's assertion that such a large number of male military personnel (14,205) were sexually assaulted in FY 2012 seems improbable. *Id.*

¹³⁴ Nineteen percent of the male victims said in their survey responses that they reported the offense to military authorities, raising the expectation that there would be 2,699 reports by male victims to military authorities (19% of 14,205 male active duty victims is 2,699). *Id.* at 4.

¹³⁵ In 2012, 88% of 2,166 military victims making unrestricted reports were female (1,906 females) and 12% were male (269 males). 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 58, 81. In 2012, 79% of 783 military victims making restricted reports were female (619 females), 13% were male (102 males), and 8% did not specify the gender. *Id.* at 58, 88.

¹³⁶ *See supra* notes 1–6 and accompanying text.

¹³⁷ 2012 WGRA REPORT, *supra* note 6. The FY 2013 NDAA, section 570(d)(1) requires an Armed Forces Workplace and Gender Relations Survey to be conducted in 2014 and then every second year thereafter “and the other Armed Forces Workplace and Gender Relations Survey shall be conducted in 2015 and then every second year thereafter, so that one of the two surveys is being conducted each year.”

¹³⁸ The 2012 DoD SEXUAL ASSAULT REPORT, VOL. II, *supra* note 67, at Annex D, 714–64, (including BLACK, M.C. & MERRICK, M.T., NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, CENTERS FOR DISEASE CONTROL [CDC] AND PREVENTION, PREVALENCE OF INTIMATE PARTNER VIOLENCE, STALKING, AND SEXUAL VIOLENCE AMONG ACTIVE DUTY WOMEN AND WIVES OF ACTIVE DUTY MEN – COMPARISONS WITH WOMEN IN U.S. GENERAL POPULATION (2010) [hereinafter 2010 MILITARY NISVS REPORT]). The 2010 MILITARY NISVS REPORT includes information from Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., & Stevens, M.R. (Mar. 2013). NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, CENTERS FOR

FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY [2007 KILPATRICK STUDY].¹³⁹ These studies, in turn, relied upon THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN [2000 FISHER STUDY],¹⁴⁰ a study which extrapolated shockingly high numbers of sexual assaults on college campuses.¹⁴¹ Notably, the DoE's 2001 CAMPUS CRIME REPORT¹⁴² subsequently impeached the 2000 FISHER STUDY results which indicated there were approximately 221 times as many forcible sexual assaults as campus authorities reported to the DoE.¹⁴³ Instead, the DoD should have utilized actual crime statistics similar to those reported in recent DoJ publications.¹⁴⁴

DISEASE CONTROL AND PREVENTION THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT. 68 tbl. 7.1 (2010), *available at* http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [hereinafter 2010 CDC NISVS], and compares that information with information garnered from the military survey.

¹³⁹ DEAN G. KILPATRICK ET. AL., *Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study* 3, 28 (2007), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf> [hereinafter 2007 KILPATRICK STUDY]. The 2007 KILPATRICK STUDY was financed through a federally funded grant; however, it was not “published by the U.S. Department of Justice.” *Id.* at 1. The Report includes the following disclaimer, “Opinions or points of view expressed are those of the author(s) and do not necessarily reflect the official position or policies of the U.S. Department of Justice.” *Id.* The 2007 KILPATRICK STUDY was the cited basis concerning the prevalence of national rape incidents. 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 18 n.31, 53 n.69. The 2007 KILPATRICK STUDY concluded:

[F]inal prevalence estimates of lifetime history of any type of rape were 18.0% for general population women (541 of 3,001) and 11.5% for women in U.S. colleges (230 of 2,000). Because 267 women in the general population sample and 100 women in the college sample provided information about two separate rape incidents (both most recent rape and first rape), [the 2007 KILPATRICK STUDY] measured case characteristics details on a total of 1,119 sexual assault incidents (793 in the general population sample, 326 in the college sample).

2007 KILPATRICK STUDY, *supra* note 139, at 20.

¹⁴⁰ 2000 FISHER STUDY, *supra* note 112, at 10. The 2000 FISHER STUDY acknowledged survey results that eleven times higher than the highly regarded NCVS for completed rapes and six times higher than the NCVS for attempted rapes. *Id.* at 13–14.

¹⁴¹ 2007 KILPATRICK STUDY, *supra* note 139, at 6, 8, 12, 57, 60. Study results can be dramatically affected by the content of questions, method of surveying (interview, questionnaires, a combination of both), survey sample size, and other variables. Six well-known surveys of sexual assault in the United States generated vastly different results. See D.M. Steiger, *U.S. Air Force, Office of Sexual Assault Prevention and Response, Findings From the 2010 Prevalence/Incidence Survey of Sexual Assault in the Air Force*, in 2011 DoD SEXUAL ASSAULT REPORT, *supra* note 67, at 572–76. Essentially, the DoD decided to use survey methods that resulted in very high extrapolations for sexual assault.

¹⁴² DEP'T OF EDUCATION OFFICE OF POSTSECONDARY EDUCATION, THE INCIDENCE OF CRIME ON THE CAMPUSES OF U.S. POSTSECONDARY EDUCATIONAL INSTITUTIONS: A REPORT TO CONGRESS (2001) [2001 CAMPUS CRIME REPORT], *available at* <http://www2.ed.gov/finaid/prof/resources/finresp/ReportToCongress.pdf>.

¹⁴³ See *infra* notes 169–172 and accompanying text.

¹⁴⁴ See *infra* notes 211–224 and accompanying text.

1. The Defense Manpower Data Center 2012 WGRA REPORT

The DoD's 2012 WGRA REPORT survey method entailed providing a web-based questionnaire to 108,478 active duty service members (of those 85,686 surveys were not completed), and 6.1 percent of the active duty female respondents (one in sixteen women or 12,463 women) and 1.2 percent of active duty male respondents (one in eighty-three men or 14,344 men) said they experienced USC in the previous year.¹⁴⁵ The DoD's 2012 WGRA REPORT was used to extrapolate 26,807 victims of military-on-military USC by calculating 6.1 percent of the female population (one in sixteen women or 12,463 women) and 1.2 percent of the male population (one in eighty-three men or 14,344 men).¹⁴⁶

The 2012 WGRA REPORT survey did not involve interviews; instead the survey consisted of web-based questionnaires sent to active duty respondents. If a respondent answered "yes" he or she experienced USC, the WGRA REPORT counted the response as a USC without conducting an interview to determine whether the interviewee was the victim of a sex crime.¹⁴⁷ The DoD e-mailed surveys to 108,478 active duty military members; the "overall weighted response

¹⁴⁵ See *supra* note 132; 2012 WGRA REPORT, *supra* note 6, at 2, 6. This was an increase from the 2011 WGRA, which reported 4.4% of active duty women and 0.9% of active duty men responded that they had been sexually assaulted in the previous year. *Id.* at 2.

¹⁴⁶ 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 2 nn.2 & 3 (citing 2012 WGRA REPORT, *supra* note 6, at 140). On September 30, 2012, the total DoD active duty population was 1,387,488, the female population on active duty was 204,309 and the male population on active duty was 1,183,179. DoD Personnel and Procurement Statistics, <http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm>. The military reporting rate per thousand for females in FY 2012 was 12.7 (2,595 divided by 204,309 times 1,000), and the rate per thousand for males in FY 2012 was 0.30 (354 divided by 1,183,179 times 1,000). See *infra* notes 155–59 and accompanying text.

¹⁴⁷ In the 2012 WGRA REPORT survey recipients were asked the following:

In the past 12 months, have you experienced any of the following sexual contacts that were against your will or occurred when you did not or could not consent where someone:

- Sexually touched you (e.g., intentional touching of genitalia, breasts, or buttocks) or made you sexually touch them?
- Attempted to make you have sexual intercourse, but was not successful?
- Made you have sexual intercourse?
- Attempted to make you perform or receive oral sex, anal sex, or penetration by a finger or object, but was not successful?
- Made you perform or receive oral sex, anal sex, or penetration by a finger or object?

2012 WGRA REPORT, *supra* note 6, at 9.

The wording of the question implies that holding a mental reservation about sexual activity is sufficient without any manifestation of lack of consent. Under such circumstances, USC may not constitute a provable criminal offense. Due to the complexity of the crimes and defenses, careful follow-up interviews by well-trained specialists are crucial for accurate assessments of sex crimes victimization; see also DEFENSE MANPOWER DATA CENTER, 2006 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: REPORT ON SCALES AND MEASURES 31–32 (2008), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA483405> (providing more questions about sexual harassment and fewer questions about sexual assault).

rate for eligibles, corrected for nonproportional sampling, was 24% (male 23%, female 29%); DoD received 22,792 completed surveys.¹⁴⁸ The 85,686 surveys that were not completed were not counted, and the report does not explain how or if any assessment was done to determine whether someone who failed to complete a survey was less likely to have been the victim of a sexual assault in their extrapolation calculation.¹⁴⁹

The overwhelming majority of the 2012 WGRA Survey responses indicated perpetrators were military, or involved a “military-on-military” offense.¹⁵⁰ The 2012 WGRA REPORT indicated that 33% of active duty women (extrapolation: 4,113 women) and 19% of the active duty men (extrapolation: 2,725 men), who experienced USC in the previous twelve months reported that information to a military authority (a total of 6,838 military victims).¹⁵¹ Of the 33% of women who reported to a military authority, 27% filed restricted reports and 72% made unrestricted reports.¹⁵² The 2012 WGRA REPORT did not provide a breakdown of the restricted (which result in no criminal investigation) or the unrestricted reports for the 19% of males, who reported to military authority.¹⁵³ Using the 2012 WGRA survey percentages for active duty military reporting that they were victims of USC results in extrapolations of 4,113 women and 2,725 men for a total of 6,838 military victims reporting USCs to military authorities.

Nevertheless, comparing the actual number of restricted and unrestricted reports to military authority in the 2012 DOD SEXUAL ASSAULT REPORT—2,595

¹⁴⁸ 2012 WGRA REPORT, *supra* note 6, at 1, 6.

¹⁴⁹ *Id.*

¹⁵⁰ The types of offenders for female military victims were military coworker(s) offenders (57%); military offenders (40%); higher ranking military person, not in their chain of command offenders (38%); in their military chain of command offenders (25%); military subordinate(s) offenders (13%); unknown person offenders (10%); person(s) in the local community offenders (8%); spouse/significant other offenders (7%); DoD/Service civilian employee(s) offenders (5%); and the offender was a DoD/Service civilian contractor(s) (4%). 2012 WGRA REPORT, *supra* note 6, at 3, 37. The types of offenders for male victims were: military coworker(s) (52%), another military person (28%), someone in their military chain of command (27%), their military subordinate (21%), another military person(s) of higher rank/grade who was not in their chain of command (17%), DoD/Service civilian contractor(s) offenders (13%), unknown person offenders (13%), spouse/significant other offenders (13%), DoD/Service civilian employee(s) offenders (12%), and person(s) in the local community offenders (9%). *Id.* at 4, 38.

¹⁵¹ *Id.* at 3–4, 80. According to the 2012 WGRA REPORT, 19% of active duty men and 33% of active duty women who said they were victims of sexual assault reported their victimization to authorities. The number of reporting victims is calculated by multiplying 0.19 times 14,344, which equals 2,725 male victims and by multiplying .33 times 12,463, which equals 4,113 female victims.

¹⁵² *Id.* at 3.

¹⁵³ *Id.* at 81–83. For some statistics involving male victims, the 2012 WGRA REPORT noted “NR” for “Not Reportable because it was based on fewer than 15 respondents or the relative standard error was high.” *Id.* at 5. The 2012 WGRA REPORT also found that 31% of the women and 10% of the men said the sexual assault was completed sexual intercourse and anal or oral sex; at the other end of the spectrum for 32% of the women and 51% of the men reported that the sexual abuse described was “unwanted touching.” *Id.* at 17, 19.

women and 354 men reported they were sexually assaulted—calls into question the validity of the 2012 WGRA REPORT’S extrapolations. Inconsistencies in the 2012 WGRA REPORT itself also call into question the report’s extrapolation of 26,000 victims.¹⁵⁴

Using the 2012 WGRA REPORT’S reporting percentages is another way to test the validity of the report’s extrapolation of 26,000 military USC victims. The 2012 WGRA REPORT determined that 33% of the female victims of USC reported their victimization to military authorities, and 19% of the male victims reported their victimization to military authorities, resulting in an extrapolation of 6,838 military victims reporting their victimization.¹⁵⁵ The actual number of military victims reporting their victimization was 2,949.¹⁵⁶ The reporting number for the 2012 WGRA REPORT is 2.32 times the actual number of victims’ reports; the 26,000 extrapolation could be inflated by the same magnitude of 2.32, and an appropriate alternative extrapolation might be approximately 11,000 military victims.¹⁵⁷ The actual ratio of gender for reporting military victims was seven females for each male. The 2012 WGRA REPORT extrapolated a ratio of 1.5 females for each male.¹⁵⁸ This huge difference in proportions significantly detracts from the reliability of the 2012 WGRA REPORT’S extrapolation of 26,000.

The DoD is the source of both the criminal data published in the 2012 DoD SEXUAL ASSAULT REPORT as well as the survey results. The DoD should ensure its published data is accurate prior to making this information public. When a respondent indicates on the WGRA questionnaire that the respondent made an unrestricted report of USC to military authorities, the MCIO should check its records to ensure the allegation was investigated.¹⁵⁹ If the allegation was not investigated, the MCIO should contact the respondent, investigate, and include in the MCIO investigative report the reason the respondent’s case was not

¹⁵⁴ 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 81. “In FY 2012, there were 3,374 reports of sexual assault involving . . . 2,949 Service member[s].” *Id.* at 3. In FY 2012, 12% of victims in completed Investigations of Unrestricted Reports were male and 88% were female. *Id.* at 81. 12% of 2,949 is 354, and 88% of 2,949 is 2,595.

¹⁵⁵ *See supra* note 151 and accompanying text. The 2012 WGRA REPORT extrapolated that 4,113 military women and 2,725 military men would report that they were victims of USC for a combined reported USC total of 6,838 (4,113 plus 2,725). However, the 2012 DoD SEXUAL ASSAULT REPORT indicated combined 2,949 actual sexual assault reports by military victims, with 362 male victims and 2,587 female victims. 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 3–4, 58–59, 81, 88. This is a male to female ratio of seven females for each male (2,587 divided by 362). The 2012 WGRA REPORT’S ratio of males to females is 1.5 females for each male (4,113 divided by 2,725).

¹⁵⁶ *Id.* at 58–59.

¹⁵⁷ *Id.*

¹⁵⁸ The 6,838 extrapolated victims in the 2012 WGRA REPORT, *see supra* note 155, divided by 2,949 reported military victims in the 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *see supra* note 67, at 3, is 2.32. 26,000 divided by 2.32 is 11,213 extrapolated victims.

¹⁵⁹ Perhaps the next WGRA questionnaire should include the follow-up question, “Please provide a telephone number where you can be contacted for an interview.”

investigated previously. When appropriate, disciplinary action should be taken against recipients of reports in cases where military authorities received reports and failed to forward the case to law enforcement for investigation, or investigative personnel failed to investigate the case. This process will provide more accurate information in the DoD database, ensure more perpetrators are brought to justice, and improve investigation and disposition of sexual assault cases in the DoD.

2. The 2007 KILPATRICK STUDY

The DoD indicated in the 2012 DOD SEXUAL ASSAULT REPORT that the extrapolations provided were based on similar reporting in the 2007 KILPATRICK STUDY, stating:

Civilian research indicates victims only report a small fraction of sexual assaults to law enforcement.^[160] For example, of the 1.1 million U.S. civilian women estimated to have experienced nonconsensual vaginal, oral, or anal penetration in 2005,^[161] only about 173,800 (16 percent)

¹⁶⁰ 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67 at 52–53. The DoD relied on one survey in particular in generating the report of large numbers of sexual assaults in the military: 2007 KILPATRICK STUDY, *supra* note 139, at 3, 28. For example, the 2007 KILPATRICK STUDY states:

Estimates are that 673,000 of nearly 6 million women (11.5%) currently attending American colleges have ever been raped. This includes an estimated half-million college women who have been forcibly raped, 160,000 who have experienced drug-facilitated rape, and over 200,000 who have experienced incapacitated rape. During the past year alone, 300,000 college women (5.2%) were raped: nearly 200,000 who have been forcibly raped, nearly 100,000 who have experienced drug-facilitated rape, and over 100,000 who have experienced incapacitated rape.

Id. at 3.

The 2007 KILPATRICK STUDY states, “In the college sample (n = 226), 11.5% reported the incident to police.” *Id.* at 44. The 2007 KILPATRICK STUDY collected information by interviewing, “5,000 U.S. women aged 18–86. Of these, 3,001 comprised a national sample representing all U.S. women and 2,000 comprised a national sample representing women currently attending U.S. colleges and universities.” *Id.* at 1. The 2007 KILPATRICK STUDY found “541 women endorsed one or more types of rape, and provided data on 793 total rape cases. In the college women sample, 230 women endorsed one or more types of rape, and these women provided data on 326 total rape cases” and then the study “multiplied the population percentage by the total number of women in each respective population (112,068,000 for the general population sample and 5,853,000 for the college women sample) to estimate true population numbers of women.” *Id.* at 18–19.

¹⁶¹ A much larger DoJ sanctioned survey indicated the number of “nonconsensual” sexual penetrations, was about seven times too high. See NCVS, *infra* notes 189–205 and accompanying text. In 2005, the NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY [2005 NISVS SURVEY] showed 221,100 (rate of 1.8 per thousand) total female rapes and sexual assaults (including attempted and threatened); and this total includes: 158,700 (1.3 per thousand) completed rapes and sexual assaults, 42,900 (0.3 per thousand) attempted rapes and sexual assaults, and 19,500 (0.2 per thousand) of threatened rape and sexual assaults. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 240655, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 11 (2013), <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> [hereinafter 2013 DOJ FEMALE SEXUAL ASSAULT VICTIMS REPORT]. 1,100,000 divided by 158,700 is 6.9; see also 2010 CDC NISVS, *supra* note 138

said they reported the matter to police.^[162] For the estimated 673,000 U.S. civilian college-aged women who experienced nonconsensual vaginal, oral, or anal penetration, only about 77,395 (11.5 percent) indicated they reported it to the police.^[163] The definition of sexual

and *infra* notes 185, 186, 188, 231, 232, 233, 245, 248, 274 and accompanying text. The 2007 KILPATRICK STUDY explained the disparity between DoJ's NCVS results and the much higher numbers of rape found in the 2007 KILPATRICK STUDY as follows:

This is in contrast to data from the NCVS which indicate that 38.5% of all rapes or sexual assaults experienced by women were reported to police in 2005 (BJS, 2006, Table 93). The BJS estimates are not directly comparable to those from the current study for several reasons including use of a different sampling frame (i.e., age 12 and greater vs age 18 and greater) and the use of forcible rape screening questions in the NCVS that are much less sensitive than those used the current study (e.g., Fisher, Cullen & Turner, 2000; Kilpatrick, 2004). The latter difference is important, and Kilpatrick (2004) has argued that use of less sensitive screening questions results in the NCVS failing to detect a majority of forcible rape cases that occur each year. To the extent that the NCVS is not doing as good a job as it should in detecting rape cases, then the information the NCVS provides on reporting may be flawed because estimates do not include important rape cases that are missed due to inadequate screening.

In any case, the NCVS estimates on reporting rates for rape and sexual assaults have fluctuated wildly over the past 10 years. The percentage of rape and sexual assault cases experienced by female victims reported to police according to Bureau of Justice Statistics NCVS estimates for the years 1996-2005 were respectively 32.4%, 29.5%, 30.5%, 31.5%, 47.6%, 38.0%, 55.8%, 39.5%, 36.9% and 38.5%. The degree of this fluctuation does not inspire confidence that the NCVS is providing an accurate measure of the extent to which sexual assaults and rapes are being reported to police.

See 2007 KILPATRICK STUDY, *supra* note 140, at 60.

¹⁶² The 2007 KILPATRICK STUDY found 541 reports of rape from a survey of college students. *See supra* note 139, at 19, 20, 22. The sample size of the 2007 KILPATRICK STUDY may be too small to extrapolate report percentages as 16% (percent reporting rapes) of 541 (number of rape victims in survey) is eighty-seven (rapes reported to authorities) in his survey. Much larger actual data collection results are available. According to the FBI's UCR, in 2005, "There were an estimated 93,934 forcible rapes reported to law enforcement," and "[t]he rate of forcible rapes in 2005 was estimated at 62.5 offenses per 100,000 female inhabitants." *Forcible Rape – Crime in the United States 2005*, UNIFORM CRIME REPORTING PROGRAM, http://www2.fbi.gov/ucr/05cius/offenses/violent_crime/forcible_rape.html. (last visited April, 22 2014). In 2011, the most recent year available, "[t]here were an estimated 83,425 forcible rapes reported to law enforcement in 2011" and "[t]he rate of forcible rapes in 2011 was estimated at 52.7 per 100,000 female inhabitants." *FBI – Forcible Rapes*, FBI UNIFORM CRIME REPORTS, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/violent-crime/forcible-rape> (last visited April 22, 2014) [hereinafter UCR FORCIBLE RAPE WEBPAGE].

¹⁶³ 2007 KILPATRICK STUDY, *supra* note 139, at 59 ("[T]he [1991 National Women's Study] found that 16% of forcible rape cases were reported to police. The current study found that 18% of such cases had been reported to police. Thus, among two national cohorts of U.S. adult women sampled in 1991 and 2006, there appeared to be a very small increase in the proportion of forcible rape cases that women reported to police. Only 16% of forcible rape cases were reported to police by college women."); *see also* Lisa A. Paul et. al, *College Women's Experiences With Rape Disclosure: A National Study*, SAGE JOURNALS 2, 2 (2013) ("26% of seniors, surveyed in an additional large sample from two universities reported a sexual assault experience (more broadly defined to include rape, attempted rape, and forced touching of a sexual nature) since entering college (Krebs, Lindquist, Warner, Fisher, & Martin, 2007).").

assault used in this college sample refers to penetrating crimes only. Consequently, it captures fewer crimes than the [DoD] definition of sexual assault, which encompasses both penetrating and non-penetrating sexual offenses, and attempts to commit these offenses. This reporting behavior is mirrored in the U.S. Armed Forces. Over the past six years, the Department estimates that fewer than 15 percent of military sexual assault victims report the matter to a military authority.^[164]

The 2007 KILPATRICK STUDY extrapolated that 300,000 U.S. college women (5.2%) were raped, and 12% reported their sexual assaults to law enforcement.¹⁶⁵ Three observations raise questions about the reliability of the 2007 KILPATRICK STUDY'S extrapolations. First, if 12% or 36,000 rapes were reported to law enforcement, those reports should be reflected in the Annual Reports colleges are statutorily required to provide to Congress. In 2007, colleges reported only 3,478 forcible sex offenses in 2007.¹⁶⁶ Second, the 2012 DOD SEXUAL ASSAULT REPORT did not recognize that the 2012 WGRA REPORT'S extrapolations were inflated because the 2007 KILPATRICK STUDY showed significantly higher numbers of sex offenses in colleges, not recognizing that actual crime reports for colleges were a small fraction of the number of sexual offense victims extrapolated in the 2007 KILPATRICK STUDY.¹⁶⁷ The 2007 KILPATRICK STUDY relied on the 2000 FISHER STUDY, a large-scale study of female college students based on survey results and not on arrests, trials, or convictions.¹⁶⁸

The 2000 FISHER STUDY “found thirty-five rapes per 1,000 female students over seven months (rape was defined as “unwanted completed penetration by force or threat of force”), resulting in an extrapolation of 406,749 rapes of college-attending women over a 12-month period.”¹⁶⁹ If the 2000 FISHER STUDY'S extrapolation is accurate, only one in 221 forcible sex offenses was reported to

¹⁶⁴ 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 52–53.

¹⁶⁵ *See supra* note 162.

¹⁶⁶ *See infra* note 172.

¹⁶⁷ *See supra* note 162.

¹⁶⁸ The 2007 KILPATRICK STUDY cited to the 2000 FISHER STUDY five times and includes the 2000 FISHER STUDY in its references. 2007 KILPATRICK STUDY, *supra* note 139, at 6, 8, 12, 57, 60, 67. The 2000 FISHER STUDY was “based on a telephone survey of a randomly selected, national sample of 4,446 women who were attending a 2- or 4-year college or university during fall 1996.” 2000 FISHER STUDY, *supra* note 112, at 3.

¹⁶⁹ 2000 FISHER STUDY, *supra* note 112, at 10–11. The 2000 FISHER STUDY concluded 27.7 women per thousand women college students were victims of rape or attempted rape. *Id.* Some women were victims more than once resulting in a rate per thousand of 35.3. *Id.* Over a 12-month period, the 2000 FISHER STUDY projects 49 rapes per 1,000 female college students. In 1999, there were approximately 8,301,000 female U.S. college students. U.S. DEP'T OF EDUC., NCES 2011-017, NAT'L CENTER FOR EDUC. STATISTICS, PROJECTIONS OF EDUC. STATISTICS TO 2019 62 tbl. 22 (38th Ed. 2011), <http://nces.ed.gov/pubs2011/2011017.pdf>. 8,301,000 times .049 equals 406,749.

college institutions.¹⁷⁰ The forcible sex offenses by the DoE definition do not include attempted rapes or threatened rapes;¹⁷¹ the 2000 FISHER STUDY extrapolation, therefore, is even higher than one in 221 victims reporting their attack to college authorities. The DoE reports over the last several years have been relatively consistent in the number of sex offenses reported by colleges nationwide, and colleges report much smaller rates of victimization than the college student surveys, and lower report rates than the 2012 DOD SEXUAL ASSAULT REPORT.¹⁷²

¹⁷⁰ In 1999, college institutions reported 1,842 forcible and 627 nonforcible sex offenses for all U.S. college campuses combined. 2001 CAMPUS CRIME REPORT, *supra* note 142, at 6. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act [Clery Act] as amended by the Higher Education Opportunity Act [HEOA] and implementing regulations requires colleges to collect and report certain crime data using UCR criteria. *See* 20 U.S.C. § 1001; 34 CFR §§ 668.41, 668.46.

¹⁷¹ Forcible Sex Offenses are:

Any sexual act directed against another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent.

A. Forcible Rape-The carnal knowledge of a person, forcibly and/or against the person's will; or not forcibly or against the person's will where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity (or because of his/her youth).

B. Forcible Sodomy-Oral or anal sexual intercourse with another person, forcibly and/or against that person's will; or not forcibly against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

C. Sexual Assault With An Object-The use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

D. Forcible Fondling-The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will; or, not forcibly or against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental incapacity.

U.S. DEP'T OF EDUC., OFFICE OF POSTSECONDARY EDUC., HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING App. B (2011), <http://www2.ed.gov/admins/lead/safety/handbook.pdf>; 2001 CAMPUS CRIME REPORT, *supra* note 142, at 251.

¹⁷² 2001 CAMPUS CRIME REPORT, *supra* note 142, at 7 (emphasizes "[o]n a per student basis, the national rate of sex offenses was 14.8 per 100,000 students in 1999. This rate is substantially below the overall rate for sex offenses nationally where the rate for rapes alone in 1999 exceeded 32.7 per 100,000 persons.") (emphasis added) (citing tbl. 310, Crimes and Crime Rates, by Type: 1984-1994, Statistical Abstract of the United States, 1996). The 2000 FISHER STUDY's rate per 100,000 is 4,900. 2000 FISHER STUDY, *supra* note 112. The 2007, 2008, and 2009 Clery Act reportable forcible sex offenses were 3,478 in 2007, 3,270 in 2008, and 3,284 in 2009. U.S. DEP'T OF EDUC., DATA ON CAMPUS CRIME 5-6, *available at* <http://www2.ed.gov/admins/lead/safety/criminal2007-09.pdf>. The female student population for those three years was in 2007 (10,432,000), 2008 (10,914,000), and 2009 (11,658,000). NAT'L CENTER FOR EDUC. STATISTICS, *Digest of Education Statistics* (2011), http://nces.ed.gov/programs/digest/d11/tables/dt11_200.asp. The female college student

The 2000 FISHER STUDY included follow-up questions about reports of offenses to authorities.¹⁷³ Of those respondents reporting completed rapes as part of the 2000 FISHER STUDY, 39.5% said they did not report the incident to college authorities because they feared reprisal by the assailant or others.¹⁷⁴

The 2000 FISHER STUDY included questions such as the following:

(3) Since school began in fall 1996, has anyone made or tried to make you have sexual intercourse or sexual contact when you did not want to by making promises of rewards, such as raising a grade, being hired or promoted, being given a ride or class notes, or getting help with coursework from a fellow student if you complied sexually?

(4) Since school began in fall 1996, has anyone made or tried to make you have sexual intercourse or sexual contact when you did not want to by simply being overwhelmed by someone's continual pestering and verbal pressure?¹⁷⁵

With 214,000 women on active duty in the DoD in 2012, if military female service personnel were the victims of rape or attempted rape (only) at a rate of forty-nine per thousand (the rate found in a study of college coeds) we would expect to find 10,486 rapes or attempted rapes of female service personnel in the DoD in a twelve-month period to be disclosed in a survey using similar techniques, which is higher than the estimated 3,700 military-on-military rapes extrapolated by the 2012 WGRA and DOD SEXUAL ASSAULT REPORTS.¹⁷⁶

victimization rate per thousand for forcible sex offenses for those three years was in 2007 (0.33); 2008 (0.30); and 2009 (0.28).

¹⁷³ This report found the following percentages of college women reported their sexual abuse to police: 4.8% of completed rapes; 4.2% of attempted rape; 0% of completed or attempted sexual coercion; 0.8% of completed sexual contact with force or threat of force; 1.5% of completed sexual contact without force; 3% of completed sexual contact with force or threat of force; 0.7% attempted sexual contact without force; 9.5% threat of rape; 10% threat of contact with force or threat of force; 0% threat of penetration without force; and 1.3% threat of contact without force. 2000 FISHER STUDY, *supra* note 112, at 24.

¹⁷⁴ *Id.* at 26. Ninety percent of college women who are victims of rape or attempted rape know their assailant. *Id.* at 17. In order with the most frequent occurrence first, attackers are classmates, friends, boyfriends, ex-boyfriends, or other acquaintances. *Id.* at 19.

¹⁷⁵ *Id.* at 6. Other questions included:

(1) Not counting the types of sexual contact already mentioned, have you experienced any unwanted or uninvited touching of a sexual nature since school began in fall 1996? This includes forced kissing, touching of private parts, grabbing, fondling, and rubbing up against you in a sexual way, even if it is over your clothes.

(2) Since school began in fall 1996, has anyone attempted but not succeeded in unwanted or uninvited touching of a sexual nature?

¹⁷⁶ *See infra* notes 255–256 and accompanying text (explaining the 2012 WGRA REPORT, *supra* note 6, found 9,235 unwanted attempted or completed penetration sex crimes, which include rapes, aggravated sexual assaults, forcible sodomies, sexual assaults, and attempts to commit those

3. The Prevalence of Intimate Partner Violence, Stalking, and Sexual Violence Among Active Duty Women and Wives of Active Duty Men – Comparisons with Women in U.S. General Population, 2010

The 2012 DOD SEXUAL ASSAULT REPORT explicitly relies on the CDC's 2010 MILITARY NISVS REPORT and its comparison with national data in the 2010 NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY [2010 CDC NISVS] to corroborate the 2012 WGRA REPORT's extrapolation, stating, "[This 2010 MILITARY NISVS REPORT, a] CDC-conducted survey provided the DoD with a reliable prevalence estimate for contact sexual violence among [survey respondents that were] Active Duty women and female spouses of military men, which aligned closely to similar findings in the 2010 WGRA."¹⁷⁷ The 2010 CDC NISVS entailed the CDC conducting a telephonic survey using question responses to collect detailed information on sexual and stalking victimization of adult civilian men and women, and separately, of active duty military men and women on past-year and lifetime experiences of sexual violence.¹⁷⁸ The 2010 CDC NISVS included a non-military sample¹⁷⁹ and a military sample involving approximately 2,800 DoD women (1,408 active duty women and 1,428 wives of active duty men).¹⁸⁰ The CDC determined that, "[t]he risk of contact sexual violence for military and civilian women is the same, after controlling for age and marital status differences between these groups."¹⁸¹

The 2010 MILITARY NISVS REPORT includes statistical information about non-criminal, socially inappropriate conduct in their overall numbers, reducing the value of their statistics to compare with the 2012 WGRA REPORT. The 2010 MILITARY NISVS REPORT is used to corroborate and substantiate the WGRA numbers. The 2010 MILITARY NISVS REPORT includes the broad definition of "contact sexual violence" as "completed forced penetration . . . sexual coercion,

four crimes. However, the 2012 WGRA REPORT does not divide these forcible penetration offenses into separate categories of crime. Unrestricted reports of sex crimes were used to estimate the number of military-on-military rapes in the 2012 WGRA REPORT to be 3,700).

¹⁷⁷ 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 44. The 2012 DoD SEXUAL ASSAULT REPORT cites to the similar definitions of "unwanted sexual contact" in the 2012 WGRA REPORT, *supra* note 6, and "contact sexual violence" in the 2010 CDC NISVS to support the alignment of findings. The 2010 MILITARY NISVS REPORT, *supra* note 138, was prepared by Michele C. Black and Melissa T. Merrick and "the Centers for Disease Control and Prevention (CDC) for the DoD as part of an interagency agreement between the National Institute of Justice (NIJ) and the CDC. The interagency agreement set forth multi-agency (NIJ, CDC, DoD) efforts in support of the 2010 National Intimate Partner and Sexual Violence Survey." *Id.* at i.

¹⁷⁸ 2012 DOD SEXUAL ASSAULT REPORT, VOL. II, *supra* note 67, at 714–64.

¹⁷⁹ 2010 CDC NISVS, *supra* note 138, at 9 (stating that the CDC collected data from 16,507 completed and 1,542 partially completed telephone interviews of over a 12-month period.).

¹⁸⁰ 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 16.

¹⁸¹ *Id.*

and other unwanted sexual contact experiences.”¹⁸² One survey question for “contact sexual violence” asks, “[h]ow many people have ever . . . kissed you in a sexual way? Remember, we are only asking about things that you didn’t want to happen.”¹⁸³ Another series of questions ask:

How many people have you had vaginal, oral, or anal sex with after they pressured you by . . . doing things like telling you lies, making promises about the future they knew were untrue, threatening to end your relationship, or threatening to spread rumors about you? [Or by] wearing you down by repeatedly asking for sex, or showing they were unhappy?¹⁸⁴

Some conduct included in this survey, such as an unwanted kiss, and “making promises about the future” to pressure someone for sex may be inappropriate and socially offensive, but may not constitute criminal conduct.

The 2010 CDC NISVS concluded that tens of millions of U.S. women were lifetime victims of sexual assaults and rape, and more than one million are victimized each year.¹⁸⁵ The number of cases law enforcement reported was a fraction of these extrapolations. The CDC determination of the prevalence of

¹⁸² *Id.* at 44 n.68 (“The term ‘contact sexual violence’ (CSV) is the CDC’s survey term for contact sexual crimes between adults. Careful effort was made to align the definition of ‘contact sexual violence’ with the definition of ‘unwanted sexual contact,’ the Department’s survey term for the same behaviors. CSV and USC both involve intentional sexual contact that was against a person’s will or occurred when the person did not or could not consent. The terms describe completed and attempted oral, anal, and vaginal penetration with any body part or object, and the unwanted touching of genitalia and other sexually-related areas of the body.”).

¹⁸³ 2010 MILITARY NISVS REPORT, *supra* note 138, at 23 (Victimization Questions).

¹⁸⁴ *Id.*

¹⁸⁵ 2010 CDC NISVS, *supra* note 138, Executive Summary at 1–2. (“Nearly 1 in 5 women (18.3%) and 1 in 71 men (1.4%) in the United States have been raped at some time in their lives, including completed forced penetration, attempted forced penetration, or alcohol/drug facilitated completed penetration An estimated 13% of women and 6% of men have experienced sexual coercion in their lifetime (i.e., unwanted sexual penetration after being pressured in a nonphysical way); and 27.2% of women and 11.7% of men have experienced unwanted sexual contact.”). The DoD utilized the CDC to conduct telephone surveys, and arrived at “a reliable prevalence estimate for contact sexual violence among Active Duty women and female spouses of military men, which aligned closely to similar findings in the 2010 WGRA.” 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 44. Another primary finding of the survey was that “the risk of lifetime and past-year contact sexual violence is the same for military women and civilian women.” *Id.* The CDC calculated the number of women who are victims of contact sexual violence to be a weighted lifetime percentage of 40.3 and the number of U.S. victims to be 35,396,000. 2012 DoD SEXUAL ASSAULT REPORT, VOL. II, *supra* note 139, at 746, App. B tbl. 1. The results of the CDC survey included the prevalence of contact sexual violence for the 12 months prior to the survey among women aged 18 and 59 years in the general U.S. population with non-intimate partner. *Id.* at 729, 746. The 2010 CDC Technical Report defines “intimate partner” to include “current or former cohabitating or non-cohabitating romantic or sexual partners.” The rate of sexual contacts was 5.2 percent, amounting to 4,598,000 victims. *Id.* at 746.

contact sexual violence for the twelve months prior to the survey among active duty women involving military and civilian perpetrators was 5.6 percent, amounting to 10,000 victims.¹⁸⁶ According to the 2012 DOD SEXUAL ASSAULT REPORT, the number of reported and unreported military victims of sexual assault was 2,949, and although it pertains to 2012, the CDC number is 3.4 times higher.¹⁸⁷

The CDC's survey measurements reflect a huge variation between the different states, which may indicate that the survey was conducted inconsistently or some other explanation exists for these substantial variations as well as huge numbers of victims of sexual violence other than rape.¹⁸⁸

The CDC's method of telephone interviews makes the survey more reliable than the 2012 WGRA REPORT for extrapolation purposes, as interviews make it possible to more thoroughly and carefully assess the sex offense incident. Nevertheless, the CDC survey results seem somewhat inflated because the survey includes noncriminal sexual activity, adding little value in assessing criminal sex offenses in the military services.

4. The DoJ's National Crime Victimization Survey¹⁸⁹ Survey Methods

The DoJ has been conducting the NCVS since 1973. The DoJ states:

NCVS is the Nation's primary source of information on criminal victimization. Each year, data are obtained from a nationally representative sample of about 40,000 households comprising nearly 75,000 persons on the frequency, characteristics and consequences of criminal victimization in the United States. Each household is interviewed twice during the year. The survey enables BJS to estimate

¹⁸⁶ 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 138, App. B; 2010 CDC NISVS, *supra* note 138, at 746, tbl. 1, indicated the 95% confidence interval was 4.2% to 6.9% for the Active Duty women victims. On September 30, 2012, the total DoD active duty population was 1,399,622 and the female population on active duty was 204,309. DOD PERSONNEL AND PROCUREMENT STATISTICS, <http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm>. The product of 5.6% and 204,309 is 11,441.

¹⁸⁷ 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 3.

¹⁸⁸ 2010 CDC NISVS, *supra* note 138, at 3, 67 ("[S]tate-level estimates varied with lifetime estimates for women ranged from 11.4% to 29.2% for rape; 28.9% to 58% for sexual violence other than rape; and 25.3% to 49.1% for rape, physical violence, and/or stalking by an intimate partner. For men, lifetime estimates ranged from 10.8% to 33.7% for sexual violence other than rape; and 17.4% to 41.2% for rape, physical violence, and/or stalking by an intimate partner."). The 2010 CDC NISVS' shows an extrapolation indicating over their lifetimes 18.3% or 21,840,000 U.S. females were rape victims and 40.6% or 53,174,000 U.S. females were victims of sexual violence other than rape. 2010 CDC NISVS, *supra* note 138, at 68, tbl. 7.1.

¹⁸⁹ DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 239437, 2011 CRIMINAL VICTIMIZATION 12 (2012), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4494> [hereinafter 2011 CRIMINAL VICTIMIZATION REPORT].

the likelihood of victimization by rape, sexual assault, robbery, assault, theft, household burglary, and motor vehicle theft for the population as a whole as well as for segments of the population such as women, the elderly, members of various racial groups, city dwellers, or other groups. The NCVS provides the largest national forum for victims to describe the impact of crime and characteristics of violent offenders.^[190]

NCVS interviewers question victims in person about incidents and then categorize the events as various types of offenses. The NCVS notes:

The measurement of rape and sexual assault presents many challenges. Victims may not be willing to reveal or share their experiences with an interviewer. The level and type of sexual violence reported by victims is sensitive to how items are worded, definitions used, data collection mode, and a variety of other factors related to the interview process. In addition, the legal definitions of rape and sexual assault vary across jurisdictions. The NCVS presents one approach to measuring and enumerating these incidents as well as other forms of violence and property crime.¹⁹¹

The DoJ surveyed 143,120 men and women through personal interviews during 2011.¹⁹² The same individuals were interviewed every six months for seven interviews.¹⁹³ The NCVS received a 90% response rate and acknowledged that various survey methods inflate or cause underreporting of survey results.¹⁹⁴ Further, with the NCVS, the DoJ attempts to increase the accuracy of reports by improving interviewer training.¹⁹⁵ The extrapolated rape and sexual assault total for 2002 was 349,810; for 2010 it was 268,570; and for 2011 it was 243,800.¹⁹⁶ The NCVS determined the rape and sexual assault rate per thousand was 1.5 in 2002, 1.0 in 2010, and .9 in 2011.¹⁹⁷ The NCVS indicated the percentage of

¹⁹⁰ *Data Collection: National Crime Victimization Survey*, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=245>.

¹⁹¹ 2013 DOJ FEMALE SEXUAL ASSAULT VICTIMS REPORT, *supra* note 161, at 2.

¹⁹² 2011 CRIMINAL VICTIMIZATION REPORT, *supra* note 189, at 12.

¹⁹³ *Id.* at 12.

¹⁹⁴ *Id.* at 12–14.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 2–3. The 2013 DOJ FEMALE SEXUAL ASSAULT VICTIMS REPORT, *supra* note 161, at 11 provides total female rape and sexual assaults in 2010 by using a 2-year rolling average centered on the most recent year of 269,700, which is 2.1 per thousand. This report provides total male rape and sexual assaults in 2010 by using a 2-year rolling average centered on the most recent year of 17,400, which is .1 per thousand. *Id.* at 12.

¹⁹⁷ 2011 CRIMINAL VICTIMIZATION REPORT, *supra* note 189, at 3. The NCVS used a total U.S. population (age 12 or older) of 231,589,260 in 2002; 255,961,940 in 2010; and 257,542,240 in 2011. *Id.*

rape/sexual assault offenses reported to police in 2010 was 49%, and in 2011, it was 27%.¹⁹⁸ The extrapolated number of military sexual assault victims (26,000) in the 2012 DOD SEXUAL ASSAULT REPORT is twenty times as high as the survey numbers found in the 2011 CRIMINAL VICTIMIZATION REPORT.¹⁹⁹ As indicated previously, the DoD extrapolation of 26,000 seems somewhat unreliable because of DoD survey methods.

The NCVS indicates, based on survey responses (rather than actual reports of the police to the FBI), that an average of 36% of victimizations from 2005 to 2010 were reported to police.²⁰⁰ “[O]f the 283,200 annual average rape or sexual assault victimizations in 2005–10 both reported and not reported to the police, approximately 12% resulted in an arrest.”²⁰¹ From 2006 to 2010, victims said that they did not report the rape or sexual assault for the following reasons:

- 20%—Dealt with in another way/personal matter;
- 6%—Not important enough to victim to report;
- 13%—Police would not or could not help;
- 28%—Fear of reprisal or getting offender in trouble;
- 33%—Other reason or not one most important reason.²⁰²

¹⁹⁸ *Id.* at 8 tbl. 8. The 2011 CRIMINAL VICTIMIZATION REPORT, *supra* note 189, did not explain the dramatic decrease in the report of rape/sexual assault offenses to police.

¹⁹⁹ Using the extrapolated number of 26,000 military victims found in the 2012 DoD SEXUAL ASSAULT REPORT, the extrapolated rate per thousand is 18.6, *see supra* note 89, which is 20 times the rate per thousand for the most recent year available in the 2011 CRIMINAL VICTIMIZATION REPORT.

²⁰⁰ 2013 DOJ FEMALE SEXUAL ASSAULT VICTIMS REPORT, *supra* note 161, at 7. The following percentages of victimizations were reported to police: 2002—55%, 2010—49%, and 2011—27%. 2011 CRIMINAL VICTIMIZATION REPORT, *supra* note 190, at 8 tbl. 8. The surveys indicated that in 84% of the cases reported to the police from 2005 to 2010, the police interviewed the victim, and in 19% of those cases, the police collected evidence. 2013 DOJ FEMALE SEXUAL ASSAULT VICTIMS REPORT, *supra* note 161, at 8.

²⁰¹ 2013 DOJ FEMALE SEXUAL ASSAULT VICTIMS REPORT, *supra* note 161, at 8. In 2005–2010, the offender was armed with a gun, knife, or other weapon in eleven percent of rape or sexual assault victimizations. *Id.* at 1. The percentage of rape or sexual assault victimizations reported to police declined to thirty-five percent in 2010. *Id.* Age of the female victim is a critical factor. From 2005 to 2010, the rate per thousand for females: for age 12–17 is 4.1, for age 18–34 is 3.7, and for age 35–64 is 1.5. *Id.* at 3. Alcohol or drug use at the time of the incident was thirty-nine percent; however, use of alcohol or drugs at the time of the incident was unknown in thirty percent of the cases. *Id.* at 5. Injured female rape and sexual assault victims received treatment in a doctor’s office, hospital emergency room, or hospital in eighty percent of the cases from 2005–2010. *Id.* at 6.

²⁰² DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 238536, 2006–2010 VICTIMIZATIONS NOT REPORTED TO THE POLICE 4 (2012), <http://www.bjs.gov/content/pub/pdf/vnrrp0610.pdf>.

A huge statistical difference exists between the NCVS and the 2000 FISHER STUDY, with completed rapes eleven times greater in the 2000 FISHER STUDY (1.7% versus .16%); attempted rapes six times greater in the 2000 FISHER STUDY (1.1% versus .18%); and threats of rape four times greater in the 2000 FISHER STUDY (.3% versus .07%).²⁰³ The 2000 FISHER STUDY concludes:

the use of graphically worded screen questions in [the FISHER STUDY] likely prompted more women who had experienced a sexual victimization to report this fact to the interviewer [B]ehaviorally specific screen questions are more successful in prompting women who have in fact been sexually victimized to answer in such a way that they are then “skipped into” the incident report by interviewers.^[204]

IV. COMPARISON WITH CIVILIAN SECTOR STATISTICS

Some assert that low conviction rates in the military justice system indicate the system is flawed and corrective action is necessary.²⁰⁵ Military prosecutors insist that they prosecute all types of difficult sexual assault cases (including acquaintance rape cases) that their civilian counterparts decline to prosecute due to lack of evidence.²⁰⁶ To adequately assess whether military prosecutors charge and prosecute sexual assault offenses involving military personnel, some method is

²⁰³ 2013 DOJ FEMALE SEXUAL ASSAULT VICTIMS REPORT, *supra* note 161, at 13.

²⁰⁴ *Id.* at 14. The 2000 FISHER STUDY, *supra* note 112, details verbal sexual victimization of female college students as follows: 54.3% were victims of general sexist remarks with a 7,070 rate per thousand and an average of 13.0 occurrences per victim; 48.2% were victims of cat calls, whistles about appearance, or noises with sexual overtones with a 6,660 rate per thousand and an average of 13.9 occurrences per victim; 21.9% were victims of obscene telephone calls or messages with a rate per thousand of 1,099 and an average of 5.0 occurrences per victim; and 19.0% were victims of being asked questions about sex or romantic life when clearly none of their business with a rate per thousand of 1,055 and an average of 5.6 occurrences per victim. 2013 DOJ FEMALE SEXUAL ASSAULT VICTIMS REPORT, *supra* note 161, at 31–32.

²⁰⁵ “[A]lthough 40% of sex offenders are prosecuted in the civilian world, only 8% of perpetrators are prosecuted in the military.” BRITTANY L. STALSBURG, SERVICE WOMEN’S ACTION NETWORK (SWAN), MILITARY SEXUAL TRAUMA, <http://servicewomen.org/wp-content/uploads/2011/01/SWAN-MST-fact-sheets.pdf> (citing ERIN MULHALL, IRAQ AND AFGHANISTAN VETERANS OF AMERICA, WOMEN WARRIORS: SUPPORTING SHE ‘WHO HAS BORNE THE BATTLE’ (2009)); *see also* Staff, *Sexual Assault in Military ‘Jaw-Dropping’ Lawmaker Says*, CNN, (July 31, 2008), *available at* http://www.cnn.com/2008/US/07/31/military.sexabuse/index.html?eref=rss_topstories (“In 2007, [Congresswoman] Harman said, only 181 out of 2,212 reports of military sexual assaults, or 8 percent, were referred to courts martial. By comparison, she said, 40 percent of those arrested in the civilian world on such charges are prosecuted.” *See* DEP’T OF JUSTICE, NCJ 239808, PRISONERS IN 2011 26–28, tbls. 7–11 (2012), *available at* <http://www.bjs.gov/content/pub/pdf/p11.pdf> (listing number and percentage of sentenced prisoners (federal and states combined) by offense, and gender for rape and other sexual offense for 2008, 2009, and 2010). 2011 CRIMINAL VICTIMIZATION REPORT, *supra* note 189 (listing victimization rates for various state and federal offenses (including threats of sexual) (completed by surveys)).

²⁰⁶ 2013 LTG Chipman Senate Statement, *supra* note 83, at 19 (“[T]he reality [is] that we try the harder cases that many civilian prosecutors will not touch.”).

needed to statistically compare the hundreds of sexual assault cases the military services prosecuted with the thousands of sexual assault cases tried in state and U.S. district courts. The effectiveness of the military justice system in addressing sexual assault offenses cannot be fully assessed using existing statistical methods; the DoD's report should provide more detailed information about why insufficient evidence exists for cases to be prosecuted.²⁰⁷

A. Department of Justice Collection of Criminal Data

The DoJ, FBI UCR Program is the primary source for all crime data throughout the United States (federal and state combined).²⁰⁸ The UCR is valuable to the DoD because the UCR allows for comparisons with other jurisdictions. Most states and some federal entities collect and publish UCR data.²⁰⁹ The UCR includes offense information for eight major crimes;²¹⁰ however, the only reportable sex offense is forcible rape.²¹¹ The UCR defines forcible rape as "the carnal knowledge of a female forcibly and against her will. Attempts or assaults to commit rape by force or threat of force are also included; however, statutory rape (without force) and other sex offenses are excluded."²¹² Nationwide, rapes

²⁰⁷ *Id.* at 15 ("In my view, prosecution and conviction rates do not alone measure a criminal justice system's ability to address the crime of sexual assault. If we pursue challenging cases because we believe that serves victims and our community interests, some defendants will be acquitted. An acquittal in American justice is not failure. Whether there is an acquittal or a conviction is a manifestation of our reliance on the presumption of innocence. We cannot lose sight of this enduring bulwark in our foundation. The real measure or metric is the quality of our training, the arduousness of our counsel in the pursuit of justice, the care we provide victims, and the commitment to equally resourcing our defense bar. These are the metrics, the benchmarks of a healthy justice system. And in each of these categories we strive for excellence.").

²⁰⁸ See *About the UCR Program – Crime in the United States 2005*, *supra* note 162.

²⁰⁹ See, e.g., *supra* note 8 (listing federal reports) and *infra* notes 240 (Texas), 247 (New York), 250 (Florida).

²¹⁰ *Frequently Asked Questions*, FBI UNIFORM CRIME REPORT, http://www.fbi.gov/about-us/cjis/ucr/frequently-asked-questions/ucr_faqs/ ("[T]he UCR Program limits the reporting of offenses known to the eight selected crime classifications because they are the crimes most likely to be reported and most likely to occur with sufficient frequency to provide an adequate basis for comparison.").

²¹¹ On January 6, 2012, U.S. Attorney General Eric Holder announced a revised definition of rape in the UCR. The new, broader definition for rape is more inclusive, better reflects state criminal codes, and focuses on the various forms of sexual penetration understood to be "rape." "The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim" is now defined as rape. Press Release, Dep't of Justice, Attorney General Eric Holder Announces Revisions to the Uniform Crime Report's Definition of Rape: Data Reported on Rape Will Better Reflect State Criminal Codes, Victim Experiences (Jan. 6, 2012), *available at* <http://www.fbi.gov/news/pressrel/press-releases/attorney-general-eric-holder-announces-revisions-to-the-uniform-crime-reports-definition-of-rape>.

²¹² See UCR FORCIBLE RAPE WEBPAGE, *supra* note 162 (stating, "The offense of statutory rape, in which no force is used but the female victim is under the age of consent, is included in the arrest

constitute 93% and attempts constitute 7% of the UCR-forcible rape total.²¹³ The following table indicates the nationwide UCR-reported forcible rapes and rates per thousand of the U.S. population:

United States Forcible Rape UCR Reported Crimes from 2007 to 2012 Number and Rate per 1,000 Population²¹⁴					
	2007	2008	2009	2010	2011
Forcible Rape	92,160	90,750	89,241	85,593	83,425
Rate per 1,000	.306	.298	.291	.277	.268
Population in millions	301.6	304.1	307.0	309.3	311.6

U.S. Attorney Offices have responsibility for prosecuting felony sex crimes involving civilians on U.S. Indian Reservations and exclusive federal jurisdiction military reservations in the United States. Some surveys have shown high levels of rape and sexual assaults, such as on Indian reservations.²¹⁵ Tribal law enforcement agencies reported to the FBI's UCR Program the following forcible rape statistics: 2008—879; 2009—882; and 2010—852.²¹⁶ The number of UCR-defined forcible rapes reported by MCIOs and the FBI to U.S. Attorney Offices, however, is unknown. From 2007 to 2012, the number of adults prosecuted in U.S. District Courts for sexual assault offenses ranged from a low of 87 in 2008 to a high of 125 in 2012, which is a fraction of the number of UCR-reported forcible rape offenses.²¹⁷ The DoJ reports the number and percentage of sentenced

total for the sex offenses category. Sexual attacks on males are counted as aggravated assaults or sex offenses, depending on the circumstances and the extent of any injuries.”).

²¹³ *Id.*

²¹⁴ *Id.* at tbl. 1, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-1> (last visited April 22, 2014).

²¹⁵ PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE & THE CENTERS FOR DISEASE CONTROL & PREVENTION, THE PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE SURVEY AGAINST WOMEN 22 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf> (showing 18.2% lifetime female rape victimization and for Indian females a 34.1% lifetime rape victimization); see also 2008 BACHMAN REPORT, *supra* note 94; STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE 1992–2003 5 (2004), available at http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf (Based on the NCVS, “[o]n average during 1992-2001, American Indians age 12 or older experienced annually an estimated . . . 5,900 rapes or sexual assaults. American Indians were twice as likely to experience a rape/sexual assault (5 per 1,000 persons age 12 or older) compared to all races (2 per 1,000).”).

²¹⁶ STEVEN W. PERRY, DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NCJ 239077, TECHNICAL REPORT, TRIBAL CRIME DATA COLLECTION ACTIVITIES 9 tbl. 7 (2012).

²¹⁷ *Id.* at 1 (in 2010, about 3.5 million (76%) of the 4.6 million people living on American Indian reservations or in Alaska Native villages were not self-identified American Indian and Alaska

prisoners (federal and states combined) by offense, and gender for rape and other sex offenses and also reports victimization rates for various state and federal offenses.²¹⁸

B. Prosecution Rates for Sexual Assault Cases Tried in U.S. District Courts and State Courts²¹⁹

1. Federal Sex Crimes Data

Of the vast civilian federal criminal caseload, the number of sexual assault offenses tried is miniscule. In FY 2007, the U.S. Marshals Service arrested and booked only 358 suspects or 0.2% of the total number of suspects for “sexual abuse,” which “includes only violent sex offenses.”²²⁰ In FY 2007, only 1.7% of the defendants tried were acquitted at trial.²²¹

Native [AIAN] population.). See *infra* note 225 and accompanying Table. Approximately one million AIAN live on Indian Reservations. 2010 U.S. Census Bureau Slides 9, 18 (20.5% of 5,220,000), http://www.census.gov/newsroom/releases/pdf/2012-01-25_aian_slides1.pdf.

²¹⁸ See DEP’T OF JUSTICE, NCJ 239808, PRISONERS IN 2011 26–28 tbls.7–11 (2012) (listing number and percentage of sentenced prisoners (federal and states combined) by offense, and gender for rape and other sexual offense for 2008, 2009, and 2010). 2011 CRIMINAL VICTIMIZATION REPORT, *supra* note 189 (listing victimization rates for various state and federal offenses (including threats of sexual assault) (completed by surveys)). The National Judicial Reporting Program [NJRP] collects data every two years on felony sentences in state courts; however, it excludes courts that do not adjudicate adult felony cases. ROSENMERKEL, *supra* note 92, *Statistical Tables* 1.

²¹⁹ 2013 DOJ FEMALE SEXUAL ASSAULT VICTIMS REPORT, *supra* note 161, at 8. Survey responses from sexual assault victims in the civilian sector describe poor investigative support. One survey indicated that in 81% of the cases reported to civilian police, no physical evidence was collected from the victim, and in 88% of the cases, the police did not arrest anyone. “The percentage of reported rape or sexual assault victimizations against females that resulted in an arrest either at the scene or during a follow-up investigation . . . [was] 31% in 2005-10 Out of the 283,200 annual average rape or sexual assault victimizations in 2005–10 both reported and not reported to the police, approximately 12% resulted in an arrest at the scene or during a follow-up investigation.” *Id.*

²²⁰ See 2008 FEDERAL JUSTICE STATISTICS, *supra* note 124. Sexual abuse is defined as “rape, assault with intent to commit rape, and carnal knowledge of a female under age 16 who is not one’s wife [It] include[es] sexual abuse of a minor and cases of sexual abuse in federal prisons.” *Id.* at 69. In FY 2007, U.S. Attorney Offices received 960 cases of sexual abuse of the 178,570 total or 0.5% of the total suspects. *Id.* at 10 tbl. 2.1. Fifty-four point three percent of cases of sexual abuse referred were prosecuted in U.S. District Court. *Id.* at 12 tbl. 2.2. In FY 2007, 554 trials were completed, and of those convicted, 446 pleaded guilty, 2 pleaded nolo contendere, 30 were convicted after jury trials, and 3 were convicted after bench trials. *Id.* at 18 tbl. 4.2. Of the 73 defendants not convicted, 64 cases were dismissed, 6 were acquitted by juries, and 3 by bench trials. *Id.* The rate of guilty pleas was 93% (446 divided by 481) as compared to 97% of all “convictions in U.S. district court in 2009 were the result of guilty pleas.” Compare *id.*, with DEP’T OF JUSTICE, NCJ 234184, FEDERAL JUSTICE STATISTICS, 2009 12 (2011), <http://bjs.gov/content/pub/pdf/fjs09.pdf>. The DoJ eliminated the category of sexual abuse from their annual statistical report in 2009. *Id.*

²²¹ 2008 FEDERAL JUSTICE STATISTICS, *supra* note 124, at 18 tbl. 4.2 (nine of 541 defendants tried in U.S. District Court were acquitted.).

Of the 892 sexual abuse offenses investigated and concluded by U.S. Attorneys in FY 2008, prosecutors tried 53.4% in U.S. District Court, resolved 3.4% in U.S. Magistrate Court, and declined to prosecute 43.3%.²²² The conviction rate for cases prosecuted in U.S. District Court was 86.8%.²²³ Of the 381 sentenced during this period for sexual abuse, 94.2% were sentenced to incarceration, and the remaining defendants were sentenced to fines or probation.²²⁴

The U.S. Courts Administrative Office posts on the world wide web the workload in each U.S. District Court and sexual assault offenses tried in the U.S. District Courts overall throughout the United States.²²⁵ The following table depicts the sex crime prosecutions in U.S. District Court:

Administrative Office of U.S. Courts ²²⁶						
	2007	2008	2009	2010	2011	2012
Sexual Abuse of Adults	124	87	120	108	137	125
Sexual Abuse of Minors	409	427	562	607	711	689
Sexually Explicit Material	1,544	1,778	1,796	1,739	1,773	1,686
Transportation for Illegal Sexual Activity	230	232	154	190	207	238
Sex Offender Registry	---	284	287	384	641	570
Other Sex Offenses	153	8	6	6	12	7
Total Sex Offenses	2,460	2,816	2,925	3,034	3,481	3,315

The DoJ provides comprehensive web-based statistics on federal crimes such as number of suspects, arrests, defendants charged, pleas, convictions, and appeals. As examples, the following tables reflect the outcomes of cases in FY 2011 for 18 U.S.C. § 2241, aggravated sexual abuse; 18 U.S.C. § 2242, sexual abuse; 18 U.S.C. § 2243, sexual abuse of a minor; and 18 U.S.C. § 2244, abusive sexual contact and disposition of criminal appeals in FY 2010.²²⁷

²²² *Id.* at 12 tbl. 2.2.

²²³ *Id.* at 18 tbl. 4.2.

²²⁴ 2008 FEDERAL JUSTICE STATISTICS, *supra* note 124, at 21 tbl. 5.1.

²²⁵ ADMIN. OFFICE OF U.S. COURTS (Dec. 30, 2012), <http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/december-2012.aspx> (last visited April 22, 2014).

²²⁶ *Id.* at *Criminal Cases Filed By Offense*, 3 tbl. 5.3 (2011), <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2011/Table503.pdf>; *Id.* at 3 tbl. D-2 (Dec. 2012), <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2012/december/D02DDec12.pdf>. Where the numbers in Table 5.3 and D-2 conflict, Table D-2's numbers were selected.

²²⁷ *Federal Criminal Case Processing Statistics*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/fjsrc/> (last visited April 22, 2014).

FY 2011 Outcomes for Defendants in Sexual Abuse Cases Closed					
	Dismissal or nolle prosequi	Acquitted	Guilty Plea	Convicted Not Guilty Plea	Total
18 USC § 2241	12	8	35	17	72
18 USC § 2242	1	1	35	2	39
18 USC § 2243	3	3	44	2	52
18 USC § 2244	4	1	64	1	70
Total	20	13	178	22	233

FY 2010 Disposition of Criminal Appeals for the Offense of Sexual Abuse			
Total Appeals Terminated	Appeals Terminated on the Merits	Affirmed	Remanded or Reversed
151	126	91	14
Partially Affirmed	Dismissed	Other	Procedural Terminations
11	9	1	25

In the DoD, general courts-martial jurisdictions do not publish court-martial statistics on the world wide web. Although the Court of Appeals for the Armed Forces and the various military services publish on the internet an annual report of the total courts-martial prosecutions by level of court for each of the Services,²²⁸ no annual report is published on the internet providing courts-martial prosecution results or appeals information by offense.

2. State Sex Crimes Information: California

The same type of survey mechanism used to generate the extrapolation of 26,000 DoD victims determined, “California has a substantial rape problem, as reflected by our conservative estimate that nearly one out of every six adult women, or over 2 million women in California, ha[ve] been the victim of one or more forcible rapes in her lifetime.”²²⁹ The author deemed these numbers “conservative” as they did not include: (1) female children and adolescents who have been forcibly raped, (2) alcohol or drug facilitated rapes and other types of incapacitated rapes, (3) statutory rapes such as rapes in which no force or threat of

²²⁸ See ANNUAL REPORT SUBMITTED TO THE COMMITTEE ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES AND TO THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE (Sept. 30, 2012), available at <http://www.armfor.uscourts.gov/newcaaf/annual/FY12AnnualReport.pdf>.

²²⁹ DEAN KILPATRICK & KENNETH RUGGIERO, NATIONAL VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CENTER, MEDICAL UNIVERSITY OF SOUTH CAROLINA, RAPE IN CALIFORNIA: A REPORT TO THE STATE 10 (2003), available at http://www.musc.edu/nvcv/grants/50_states_reports/california.pdf.

force was involved but the perpetrator had sex with an underage child or adolescent, (4) attempted rapes, and (5) rapes of males.²³⁰

The 2010 CDC NISVS provides national survey extrapolations for rape and sexual violence other than rape victimization on an annual and lifetime basis, and state-by-state victimization numbers for rape and sexual violence other than rape on a lifetime basis, which are used to determine the annual state victimization for rape and sexual violence other than rape as follows.²³¹

²³⁰ *Id.* at 11.

²³¹ The 2010 MILITARY NISVS REPORT, *supra* note 138, at 18–19, 68–71 includes the number of victims of rape and sexual violence other than rape for each state on a lifetime basis, and the national lifetime and annual number of victims of rape and sexual violence other than rape. The annual numbers for California, Florida, New York, and Texas are assumed to be at the same rates as the national numbers and are determined as follows: (number of state lifetime victims) X (number of national annual victims) ÷ (number of national lifetime victims). The term “NSS” in the table stands for not statistically significant. Numbers are rounded to the nearest thousand. The term “sexual violence is defined as completed forced penetration, attempted forced penetration, completed alcohol- or drug-facilitated penetration, being made to penetrate someone else, sexual coercion, and other unwanted sexual contact experiences.” *Id.*; *see infra* note 274 (defining rape in the 2010 NISVS REPORT and the 2010 CDC REPORT).

	Rape (Lifetime)	Other Sexual Violence (Lifetime)	Rape (Annual)	Other Sexual Violence (Annual)
Total for U.S. (women)	21,840,000	53,174,000	1,270,000	6,646,000
California (women)	2,024,000	5,634,000	121,000	676,000
Florida (women)	1,266,000	3,111,000	76,000	373,000
Texas (women)	1,963,000	4,201,000	118,000	504,000
New York (women)	1,398,000	3,798,000	84,000	456,000
Total for U.S. (men)	1,581,000	25,130,000	NSS	6,027,000
California (men)	NSS	3,015,000	NSS	724,000
Florida (men)	NSS	1,437,000	NSS	345,000
Texas (men)	NSS	1,463,000	NSS	351,000
New York (men)	NSS	2,328,000	NSS	559,000
California (women and men)	2,024,000	8,649,000	121,000	1,400,000
Florida (women and men)	1,266,000	4,548,000	76,000	718,000
Texas (women and men)	1,963,000	5,261,000	118,000	855,000
New York (women and men)	1,398,000	6,529,000	84,000	1,015,000
Total for four states	6,651,000	24,987,000	399,000	3,988,000

The 2010 CDC NISVS indicates that over their lifetimes 14.6% or 2,024,000 California women were victims of rape, and 40.7% or 5,634,000 California women were lifetime victims of sexual violence other than rape.²³² Under the 2010 CDC NISVS criteria, the estimated number of California men and women who are annually the victims of rape is approximately 121,000, and the estimated number of California women and men who are annually victims of sexual violence other than rape is 1,400,000.²³³

²³² 2010 CDC NISVS, *supra* note 138, at 68 tbl. 7.1.

²³³ *Id.* at 18. Table 2.1 provides that 21,840,000 or 18.3% of U.S. women were raped during their lifetimes, and 1,270,000 or 1.1% of U.S. women were raped in the previous 12 months. The 2010 MILITARY NISVS REPORT does not provide the annual numbers of rape victims and victims of sexual violence other than rape for individual states. To determine the estimated number of annual rapes in California, Florida, New York, and Texas, divide 1,270,000 (annual number of rapes of U.S. women) by 21,840,000 (lifetime number of rapes of U.S. women) which equals 0.06. Then for California, multiply 0.06 times 2,024,000 (the number of lifetime rapes of women in California) to determine the estimated annual number of California women raped to be 121,000. *Id.* at tbl. 7.1. This same process is used to calculate the annual victimization rates for the other three states.

Table 2 provides that 53,674,000 or 44.6% of U.S. women were the victims of sexual violence other than rape during their lifetimes, and 6,646,000 or 5.6% of U.S. women were the victims of

California crime statistics for rape and attempted rape are as follows:

sexual violence other than rape in the previous 12 months. 2010 CDC NISVS, *supra* note 138, at 18 tbl. 2. Table 2.2 provides that 25,130,000 or 22.2% of U.S. men were the victims of sexual violence other than rape during their lifetimes, and 6,027,000 or 5.3% of U.S. men were the victims of sexual violence other than rape in the previous 12 months. The total U.S. men and women who were the victims of sexual violence other than rape during their lifetimes is 78,304,000, and the total U.S. men and women who were the victims of sexual violence other than rape in the previous 12 months is 12,673,000. *Id.* at 19 tbl. 2.2.

To determine the estimated number of annual sexual violence other than rape for women in California, Florida, New York, and Texas, divide 6,646,000 by 53,674,000 which equals 0.12. Then for California, multiply 0.12 times 5,634,000 (the number of lifetime sexual violence other than rape victimizations of women in California) to determine the estimated annual number of lifetime sexual violence other than rape victimizations of women in California to be 901,000. *Id.* at 69 tbl. 7.1. Using the same process, the multiplier for sexual violence other than rape for men is 0.24. This process is completed for the three other states. The 2010 CDC NISVS does not explain why there is such a larger disparity between the three categories of victimizations for lifetime and annual rates of victimizations (0.06, 0.12, and 0.24); *see also* 2010 MILITARY NISVS REPORT, *supra* note 138, at 27 tbl. 1. For women ages 18–59, the “Prevalence of Contact Sexual Violence Contact for lifetime [40.3% or 35,396,000], in the 3 Years Prior to the Survey [7.7% or 6,725,000], and in the 12 Months Prior to the Survey [5.2% or 4,598,000] among Women in the General U.S. Population.” The term “sexual violence is defined as completed forced penetration, attempted forced penetration, completed alcohol- or drug-facilitated penetration, being made to penetrate someone else, sexual coercion, and other unwanted sexual contact experiences.” *Id.*

California Sex Crimes on Annual Basis ²³⁴						
2010 CDC NISVS estimated the annual number of men and women in California who are victims of rape to be 121,000.						
2010 CDC NISVS estimated the annual number of men and women in California who are victims of sexual violence other than rape to be 1,400,000.						
California Forcible Rape UCR Reported Crimes from 2007 to 2012						
	2007	2008	2009	2010	2011	2012
Rape by Force	7,931	7,859	7,719	7,408	6,792	6,935
Attempted Rape	1,116	1,047	979	917	886	893
Total	9,047	8,906	8,698	8,325	7,678	7,828
Population in millions	36.6	36.8	37.0	37.3	37.7	38.0
Rate per 1,000	.248	.242	.235	.223	.204	.206
California Forcible Rape Cleared Crimes from 2007 to 2012						
Rape by Force & Attempted Rape	3,925	3,707	3,657	3,326	3,173	3,365
Clearance %	43.4%	41.6%	42.0%	40.0%	41.3%	43.0%
Arrests	2,164	2,103	2,050	1,957	1,758	1,682

The California Attorney General Report merges homicide, forcible rape, robbery, assault, and kidnapping into a single category, which indicated that in 2012 there were 48,118 convictions of violent crimes for a conviction rate for felony arrests of 59.1%.²³⁵ Assuming the overall conviction rate is also accurate for sex offenses, in 2012 about one in eight reports of rape or attempted rape resulted in a conviction in California.²³⁶ In comparison, in 2012, one in 6.4 military sexual assault reports resulted in a conviction.²³⁷

²³⁴ KAMALA D. HARRIS, CRIME IN CALIFORNIA 2012 9 tbl. 5, 15 tbl. 15, 20 tbl. 20 (2012), <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd12/cd12.pdf>. Under UCR criteria, “forcible rape” includes offenses under the following sections of the California Penal Code, “220, 220(a)(1), 220(b), 261, 261(a)(1), 261(a)(2), 261(a)(3), 261(a)(4), 261(a)(4)(a), 261(a)(4)(b), 261(a)(4)(c), 261(a)(4)(d), 261(a)(5), 261(a)(6), 261(a)(7), 262(a)(1), 262(a)(2), 262(a)(3), 262(a)(4), 262(a)(5), 264.1(a), 264.1(b)(1), 264.1(b)(2), 266c, 269(a)(1), 269(a)(2), 288.7(a), 288.7(b), 664/261.” *Id.* at 68. The national UCR Report shows forcible rape in California as follows: 2007–9,013, 2008–8,903, 2009–8,713, 2010–8,331, 2011–7,663, and 2012–7,837. DEP’T OF LAW ENFORCEMENT, INDEX: CRIME IN THE UNITED STATES 1972–2012 40–47, http://www.fdle.state.fl.us/Content/getdoc/98d3a1c0-940d-47ce-bcd8-609596f17d66/fed_ucr-1-.aspx (population data).

²³⁵ HARRIS, *supra* note 234, at 52 tbl. 39.

²³⁶ *Id.* In 2012, 7,828 reports of rape or attempted rape resulted in 1,682 arrests, and about 1,000 convictions (59.1% of 1,682 = 994). The sex crimes statistics probably have a different conviction rate than violent crimes overall.

²³⁷ The 2012 DoD SEXUAL ASSAULT REPORT indicates there were 676 reports of rape; however, the report does not provide the number of rape convictions. *See supra* note 67. The 2012 DoD SEXUAL ASSAULT REPORT indicates 1,522 unrestricted reports of sexual offenses where the

3. State Sex Crimes Information: Texas

The 2010 CDC NISVS indicates that over their lifetimes 21.7% or 1,963,000 Texas women were victims of rape, and 46.5% or 4,201,000 Texas women were victims of sexual violence other than rape.²³⁸ Under the CDC NISVS criteria, the estimated number of Texas women who are annually the victims of rape is approximately 118,000, and the estimated number of Texas women and men who are annually victims of sexual violence other than rape is 855,000.²³⁹ Applying UCR criteria, Texas crime statistics indicate the following statistics for forcible rape:

Texas Forcible Rape Statistics from 2007 to 2011 ²⁴⁰					
2010 CDC NISVS estimated the annual number of men and women in Texas who are victims of rape to be 118,000.					
2010 CDC NISVS estimated the annual number of men and women in Texas who are victims of sexual violence other than rape to be 855,000.					
	2007	2008	2009	2010	2011
Number of Rapes Reported to Police	8,430	8,004	8,286	7,626	7,445
Rate of Offenses Reported to Police per 1,000	.353	.329	.334	.303	.290
Texas Population in Millions	23.9	24.3	24.8	25.1	25.7
Rape Arrests	2,103	2,140	2,025	1,901	1,756
Cases Cleared or Solved	3,709	3,522	3,314	3,355	3,350
Clearance Rate	44%	44%	40%	44%	45%

In 2008, the Texas legislature recognized that collecting forcible rape information was too limiting, did not capture the extent of sex crimes, and required police to produce more sex offense data.²⁴¹ In 2011, there were 18,088 sexual assault incidents involving 19,011 victims and 19,091 offenders.²⁴² Sexual assaults

military had jurisdiction and the allegation was resolved in the current fiscal year, resulting in 238 convictions. *See supra* notes 106–108 and accompanying text.

²³⁸ 2010 CDC NISVS, *supra* note 138, at 69.

²³⁹ *See supra* note 233 and accompanying table.

²⁴⁰ TEX. DEP'T OF PUB. SAFETY, 2011 CRIME IN TEXAS 6, 8, 10, 17 [hereinafter 2011 CRIME IN TEXAS]; TEX. DEP'T OF PUB. SAFETY, 2010 CRIME IN TEXAS 19; TEX. DEP'T OF PUB. SAFETY, 2009 CRIME IN TEXAS 19; TEX. DEP'T OF PUB. SAFETY, 2008 CRIME IN TEXAS 24; TEX. DEP'T OF PUB. SAFETY, 2007 CRIME IN TEXAS 24.

²⁴¹ 2011 CRIME IN TEXAS, *supra* note 240, at 50.

²⁴² *Id.*

were reported in six statutory categories.²⁴³ Twelve percent of the victims were male; 88% of the victims were female; 96% of the suspects were male; and 4% of the suspects were female.²⁴⁴

4. State Sex Crimes Information: New York

The 2010 CDC NISVS states that over their lifetimes 17.7% or 1,398,000 New York women were victims of rape, and 48.25% or 3,798,000 New York women were victims of sexual violence other than rape.²⁴⁵ Under the NISVS criteria, the number of New York men and women who are annually the victims of rape is approximately 84,000, and the estimated number of New York men and women who are annually victims of sexual violence other than rape is 1,015,000.²⁴⁶ Applying UCR criteria, New York crime statistics show the following statistics for forcible rape; however, the New York arrest statistics were for “sex offenses” and not rape:

²⁴³ *Id.* at 52. The six categories and their percentages in 2011 were: (1) continuous sexual abuse of young child or children—2.8%; (2) indecency with a child by contact—25.2%; (3) indecency with a child by exposure—4.5%; (4) sexual assault—44.5%; (5) aggravated sexual assault—22.1%; and (6) sexual performance by a child—9%. *Id.*

²⁴⁴ *Id.* at 51.

²⁴⁵ 2010 CDC NISVS, *supra* note 138, at 69.

²⁴⁶ The 2010 CDC NISVS estimated lifetime rates of victimization for rape and victims of sexual violence other than rape, and in turn, the process in note 233 *supra* was used to calculate the number of annual victimizations for rape and victimizations of sexual violence other than rape.

New York Rape Statistics from 2007 to 2012²⁴⁷						
2010 CDC NISVS estimated the annual number of men and women in New York who are victims of rape to be 84,000.						
2010 CDC NISVS estimated the annual number of men and women in New York who are victims of sexual violence other than rape to be 1,015,000.						
	2007	2008	2009	2010	2011	2012
Number of Rapes Reported to Police	2,925	2,787	2,567	2,765	2,766	2,821
Rate of Reported Offenses per 1,000	.152	.143	.131	.143	.142	.144
New York Population in Millions	19.2	19.5	19.6	19.3	19.5	19.5
Sex Offense Arrests	2,560	2,783	2,657	2,700	2,434	
Sex Offense Court Actions	1,401	1,537	1,442	1,486	1,314	

5. State Sex Crimes Information: Florida

According to the 2010 CDC NISVS, over their lifetime 17.0% or 1,266,000 Florida women were victims of rape, and 41.8% or 3,111,000 Florida women were victims of sexual violence other than rape.²⁴⁸ Under the NISVS criteria, the estimated number each year of Florida men and women who are victims of rape is approximately 76,000, and the estimated number per year of Florida men and women who are victims of sexual violence other than rape is 718,000.²⁴⁹ Florida crime statistics for forcible rape, forcible sodomy, and forcible fondling rates per thousand for the total population are as follows:

²⁴⁷ N.Y. STATE DIV. OF CRIM. JUST. SERV., OFFICE OF JUSTICE RESEARCH AND PERFORMANCE, CRIME IN NEW YORK STATE 2012 FINAL DATA 2012 5 (2013); N.Y. STATE DIV. OF CRIMINAL JUSTICE SERV., OFFICE OF JUSTICE RESEARCH AND PERFORMANCE, NEW YORK STATE VIOLENT FELONY OFFENSE PROCESSING 2011 ANNUAL REPORT 6, 9 (2013). In 2011, of the sex offenses charged 949 were convicted by plea and 125 were convicted after a trial on the merits. *Id.* at 13. *See also* N.Y. STATE DIV. OF CRIMINAL JUSTICE, NEW YORK STATE'S FFY 2007 IMPLEMENTATION PLAN FOR THE S.T.O.P. VIOLENCE AGAINST WOMEN ACT SERVICES 3 ("Police reported 3,158 rapes to the Division of Criminal Justice Services for 2006. Another 10,258 other sex offenses also were reported to the Division for 2006.").

²⁴⁸ 2010 CDC NISVS, *supra* note 138, at 68.

²⁴⁹ *See supra* note 233 and accompanying table.

Florida Statistics from 2007 to 2012 ²⁵⁰						
2010 CDC NISVS estimated the annual number of men and women in Florida who are victims of rape to be 76,000.						
2010 CDC NISVS estimated the annual number of men and women in Florida who are victims of sexual violence other than rape to be 718,000.						
	2007	2008	2009	2010	2011	2012
Florida Population in millions	18.6	18.8	18.8	18.8	18.9	19.0
Rape	6,151	5,972	5,501	5,373	5,274	5,254
Rate per 1,000	.329	.317	.293	.286	.279	.275
Sodomy	1,402	1,301	1,306	1,173	1,265	1,375
Rate per 1,000	.075	.069	.070	.062	.067	.072
Fondling	3,667	3,560	3,427	3,343	3,342	3,516
Rate per 1,000	.196	.189	.183	.178	.177	.184
Rape Arrests	1,793	1,770	1,642	1,546	1,527	1,620
Sodomy Arrests	312	314	336	273	235	262
Fondling Arrests	959	892	899	803	755	829
Total Arrests— Forcible Sex Crimes	3,064	2,976	2,877	2,622	2,517	2,711

Florida provided that the overall percentage of reported crimes that were cleared as 24.2% in 2011 and 24.8% in 2012; however, Florida did not indicate the percentage of cleared forcible sex crimes.²⁵¹

C. Conclusions about Sex Crimes Information

Several years ago, the DoJ and the DoE sponsored surveys using methods similar to those used by the 2012 WGRA REPORT, which resulted in astonishingly high extrapolations of sexual assaults.²⁵² The DoD provided extrapolations of unwanted sexual contacts, based on the 2010 CDC NISVS methodology, as well as the number of sexual assault offenses that are reported and the resulting disciplinary actions. Some observers indicated the military prosecution rate was

²⁵⁰ FLA. DEP'T OF LAW ENFORCEMENT, CRIME IN FLORIDA 1-2 (2013); FLA. DEP'T OF LAW ENFORCEMENT, CRIME IN FLORIDA 1-2 (2011); FLA. DEP'T OF LAW ENFORCEMENT, CRIME IN FLORIDA 1-2 (2009); INDEX DEP'T OF LAW ENFORCEMENT, UCR OFFENSE DATA, CRIME IN THE UNITED STATES, 1972-2011 40-41, 43-46; FLA. DEP'T OF LAW ENFORCEMENT, ARREST TOTALS COMPARATIVE DATA (2012); FLA. DEP'T OF LAW ENFORCEMENT, ARREST TOTALS COMPARATIVE DATA (2008). Rates per thousand are for offenses reported to the police.

²⁵¹ FLA. DEP'T OF LAW ENFORCEMENT, FLORIDA STATEWIDE JUDICIAL CIRCUIT OFFENSE REPORT (2012).

²⁵² 2012 WGRA REPORT, *supra* note 6.

0.9%, which was based on comparing the 26,000 extrapolation of unwanted sexual contact to 238 courts-martial convictions, and they argued that DoD prosecution and conviction rates were shockingly low.²⁵³ The DoD report did not provide the number of forcible rapes in the 26,000 extrapolation or of the 238 courts-martial sexual assault convictions.

The four largest states by population, California, Texas, New York, and Florida, have substantial differences in the amount of sex offense reporting and disposition information they release on the internet. None of those states publish the number of reported forcible rape crimes—the only UCR-reported sex offense actually reported that resulted in convictions.²⁵⁴ Moreover, none of the four states report the 2010 CDC NISVS statistics about lifetime rape or sexual assaults other than rape for comparison with the number of reported crimes.

²⁵³ See *supra* note 81 and accompanying text.

²⁵⁴ Memorandum for Record of Andrew J. Dean, Research Assistant, The George Washington University Law School, (Sept. 13, 2013) [on file with author] (based on communications with state officials of California, Texas, New York, and Florida).

	NISVS Extrapolation of Forcible Rapes	Reported Forcible Rapes	Percent Reported
California	121,000	6,935	5.7%
Texas	118,000	7,445	6.3%
New York	84,000	2,763	3.3%
Florida	76,000	5,254	6.9%
DoD Penetration Offenses ²⁵⁵	9,235	936	10.1% ²⁵⁶
DoD USCs ²⁵⁷	26,000	1,590	6.12%

²⁵⁵ The 2012 WGRA REPORT found that 26% of females surveyed indicated they experienced attempted unwanted sex and 31% indicated they experienced unwanted completed sex. Of the men surveyed 5% indicated they experienced attempted unwanted sex and 10% indicated they experienced completed unwanted sex. 2012 WGRA REPORT, *supra* note 6, at 2. 57% of 12,463 women (6.1% of active duty women) is 7,104 and 15% of 14,205 men (1.2% of active duty men) is 2,131 for a total of 9,235 unwanted attempted or completed sexual penetrations. *See supra* notes 131–132 and accompanying text. The UCR limits forcible rape to female victims. For purposes of this discussion, DoD male and female victims are both counted. Forcible rape is more narrowly defined than USC. *Compare supra* note 212 & *supra* note 131 (defining forcible rape and USC respectively).

²⁵⁶ The 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67 (indicating that in FY 2012 there were the 1,169 unrestricted reports of nonconsensual sexual penetrations of military victims: 467 rapes, 573 aggravated sexual assaults and sexual assaults, and 129 forcible sodomy offenses). 1,590 (unrestricted reports of military-on-military sexual assaults) divided by 1,985 (unrestricted reports of sexual assaults involving military victims) equals 80%. *See supra* note 100. 1,167 (cases of nonconsensual sexual penetrations of military victims) times 80% equals 936 (cases of nonconsensual military-on-military sexual penetrations) divided by 9,235 (unwanted attempted or completed penetrations) equals 10.14%. 467 (unrestricted reports of rapes of military victims) divided by 1,169 (unrestricted reports of nonconsensual sexual penetrations of military victims) equals 40%. 9,235 (estimated WGRA unwanted attempted or completed military-on-military sexual penetrations, *supra* note 255) times 40% equals 3,700 (estimated WGRA military-on-military rapes).

²⁵⁷ The 2012 WGRA REPORT extrapolated 26,000 victims of military-on-military USC. *See supra* note 6, 132 (defining USCs). In FY 2012, DoD received 1,590 unrestricted reports of military-on-military USC. *See supra* note 100.

	Cleared or Arrested	Percent Cleared or Arrested	Estimated Convictions	Percent Convicted
California	1,682	1.4%	1,000	.8%
Texas	1,756	1.5%	1,050	.9%
New York	910 ²⁵⁸	1.1%	550 ²⁵⁹	.7%
Florida	1,620	2.1%	1,220	.8%
DoD Rapes ²⁶⁰	231 ²⁶¹	6.2%	54 ²⁶²	.6%
DoD USCs ²⁶³	990 ²⁶⁴	3.8%	220 ²⁶⁵	.9%

²⁵⁸ New York did not publish the arrest or clearance rate for forcible rape. The arrest rate (arrests divided by offenses reported to police) for California (24%), Florida (31%), and Texas (45%) were averaged to arrive at an arrest rate for New York of 33% or 910.

²⁵⁹ New York and Texas did not publish the conviction rate for forcible rape. California provided a conviction rate of 59.1% of the arrest rate. For New York and Texas, I assumed a conviction rate of 60% of the arrest cases for forcible rapes or 550 for New York and 1,050 for Texas.

²⁶⁰ See *supra* note 255.

²⁶¹ The 2012 DOD SEXUAL ASSAULT REPORT does not indicate the number of military-on-military rapes or the number of rapists who are arrested or cleared by arrest or equivalent. In FY 2012, there were 467 unrestricted reports of rape involving military victims and an estimated 80% or 374 unrestricted reports of military-on-military rapes. See *supra* note 256. The 2012 DOD SEXUAL ASSAULT REPORT provides the overall substantiation rate for investigations closed in FY 2012 at 1,322 divided by 2,142 or 62%. *Id.* at 107. 62% of 374 rapes is 231 substantiated cases of military-on-military rapes. 231 (substantiated cases of military-on-military rapes) divided by 3,700 (estimated WGRA military-on-military rapes, *supra* note 256) is 6.25%.

²⁶² In FY 2012, 1,714 military subjects were alleged to have committed USC in unrestricted reports and 238 were convicted at courts-martial (13.9%). See *supra* note 106. One way to estimate the number of military-on-military rape convictions is to multiply 374 (unrestricted reports of military-on-military rapes, *supra* note 261) times 13.9%, which equals fifty-two military-on-military rape convictions. A review of the summaries at the end of each Service's reports indicated 210 rape allegations were raised either in unrestricted reports or during investigations involving a military-on-military rape offense. Twenty-two cases of military-on-military rape offenses were referred to civilian authorities for disposition, and four civilian cases resulted in convictions or were pending disposition at the end of the fiscal year. Thirty-eight military-on-military cases were pending disposition at the end of the fiscal year. Fifty-four military-on-military rape cases resulted in findings of guilty at courts-martial and four military-on-military rape cases resulted in civilian convictions. The convictions were of some offense, even if not a sex offense, such as false statement or using illegal drugs.

²⁶³ See *supra* note 257 and accompanying table. 62% (see *supra* note 100) times 1,590 (unrestricted reports of military-on-military USC) equals 986 (cleared or arrested).

²⁶⁴ Cases investigators presented to commanders for a disciplinary decision. See *supra* note 104 and accompanying text.

²⁶⁵ The estimated number of USC military-on-military convictions is calculated by multiplying 1,590 times 13.9%, which equals 221 military-on-military USC convictions.

The DoD indicated that civilian and foreign authorities were prosecuting 192 service members accused of a sex crime (64 FY 2012 subjects + 128 Pre-FY 2012 subjects). 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 66. For pre-FY 2012 sex crimes investigations, civilian or

These comparisons between the four largest states by population and the DoD of extrapolated and reported sex crimes, prosecutions and convictions, tend to show that there are no significant differences between these five jurisdictions.

The risk of contact sexual violence for military and civilian women is the same, after controlling for age and marital status differences between these groups. With few exceptions, the past year and lifetime prevalence (occurrence) of [intimate partner violence], sexual violence, and stalking in the civilian and military populations are quite similar, with no statistically significant differences.^[266]

A review of the prosecution and conviction statistics shows that the DoD's prosecution and conviction rates are similar to those of California, New York, Florida, and Texas. The DoD should follow the examples of the DoJ and these four states and refrain from using extrapolations about the amount of sex crimes or USCs committed by active duty personnel in the DoD's annual sex crime report. Except for the statistical information collected as previously described in the statutory proposal, the DoD should apply UCR standards and collect UCR data that can be compared with the data collected by the DoJ, DoE, and selected states.

V. ANALYSIS OF DOD STATISTICS

The gender percentages of victims in restricted and unrestricted reports are 88% female and 12% male, whereas the 2012 WGRA REPORT victimization percentage is 47% female and 53% male.²⁶⁷ Twelve percent of 2,949 military

foreign authorities prosecuted 128 service members, and civilian or foreign authorities were prosecuting thirty-five military-on-military sex crimes. *Id.* at 120. For investigations opened and closed in FY 2012, civilian or foreign authorities were prosecuting twenty-two military-on-military offenses. *Id.* Accordingly, fifty-seven cases were military-on-military sex crimes; however, it is unclear how many were rape cases, how many resulted in civilian or foreign convictions. A review of synopsis category "Civilian or Foreign Prosecution of Person Subject to UCMJ" indicates no adverse action or the charge dismissed for five military-on-military rape cases and fourteen non-rape sex crimes: Army-54; Army-56; Army-58; Army-68; Army-287; Army-343; Army-345; Army-350; Army-395; Army-400; Army-402; Army-403; Army-449; Air Force-680; Air Force-684; Air Force-685; Navy-506; Marine-45; and Marine-46; and other synopses indicate nine military-on-military rape cases and ten military-on-military non-rape sex crimes were "referred" to civilian prosecutors, but did not indicate any prosecutorial intention of prosecuting the military-on-military alleged sex crime: Army-59; Army-67; Army-69; Army-75; Army-78; Army-344; Army-351; Army-416; Army-422; Army-439; Army-443; Army-446; Army-461; Army-462; Air Force-461; Air Force-462; Navy-504; Marine-150; and Marine-151. Requiring the general court-martial convening authority to sign the annual report will encourage greater accuracy and more complete reports on disposition.

²⁶⁶ 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 16.

²⁶⁷ See 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 81 (12% male and 88% female in unrestricted reports), 88 (13% male, 79% female, and 8% unavailable in restricted reports). The percentage and number of male victims extrapolated in the 2012 WGRA REPORT is 53% (14,205) and female victims is 47% (12,463). See *supra* note 6.

victim reports is 354 male victims. Three hundred and fifty-four (354) male victims compared to the 2012 WGRA REPORT's extrapolated 14,205 male victims means only one in forty male victims reported their victimization.

Ninety percent of the subjects in unrestricted reports are male.²⁶⁸ Ninety percent of 14,205 male victims (the WGRA's extrapolated number of male victims) is 12,784. The extrapolation of 12,784 military male-on-male assaults seems inflated. The number of male-on-male investigations is 160 or 10% of the total number of investigations (1,590).²⁶⁹ The number of male-on-male court-martial prosecutions is not indicated in the 2012 DoD Report; however, in all likelihood the number was not more than about 10%.

The extrapolated number of military victims of sexual assault (26,000) in the 2012 DoD Report is twenty times as high as the survey numbers found in the 2011 CRIMINAL VICTIMIZATION REPORT.²⁷⁰ However, the DoD extrapolation and survey did not involve trust and reliability-building interviews. The 2012 WGRA REPORT did not involve repeated interviews of the same respondents. The 2007 KILPATRICK STUDY extrapolated a college female rape victimization percentage more than three times higher than the 2012 WGRA REPORT rape extrapolation of female active duty women.²⁷¹

The basis for DoD's extrapolation of 26,000 was the DMDC's 2012 WGRA REPORT. The 2012 WGRA REPORT used the results from the CDC's 2010 MILITARY NISVS REPORT to support the 26,000 extrapolation. The 2010 MILITARY NISVS REPORT mixed non-criminal sexual misbehavior into their interview questions which may have confused respondents and caused inflated results, a process known as cuing. The 2012 DOD SEXUAL ASSAULT REPORT also

²⁶⁸ 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 83 (In unrestricted reports in FY 2012, 90% of the subjects were male, 8% of the subjects were unidentified, and 2% of the subjects were female.).

²⁶⁹ The FY 2012 DoD number of unrestricted reports of male-on-male sexual assaults was 160. 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 8 appx. 1b (Army-85), 479 (Navy-37), 534 (Marine Corps-23), 635 (Air Force-15). 1,590 unrestricted reports involved allegations of service member-on-service member sexual assault. *Id.* at 61. Unrestricted reports result in criminal investigations. *See supra* note 107.

²⁷⁰ Using the total DoD active duty population of 1,388,028 and the extrapolated number of 26,000 military victims found in the 2012 DoD Report, the extrapolated rate per thousand is 18.7, which is twenty times the rate per thousand for the most recent year available in the 2011 CRIMINAL VICTIMIZATION REPORT, *supra* note 189. Reporting rates per thousand allow comparison of reports from groups of different sizes and it facilitates year-after-year comparisons, even when the total number of people in a group has changed. 2012 DOD REPORT, VOL. I, *supra* note 67, at 60. Actual victim reporting rates for the last six years are as follows: FY 2007 (1.6); FY 2008 (1.7); FY 2009 (1.9); FY 2010 (1.8); FY 2011 (1.9), and FY 2012 (2.1). *Id.* at 60. Rates are calculated using the number of service member victims in unrestricted and restricted reports and active duty military service end strength for each year on record with DMDC. *Id.*

²⁷¹ 2007 KILPATRICK STUDY, *supra* note 160, at 3. The 2012 DOD SEXUAL ASSAULT REPORT provides 27% of the unrestricted reports of USC were rapes. 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 62. 27% times 6.1% is 1.65%. The annual college rape percentage is 3.15 times as high as the military rape percentage.

relies on the CDC's comparison of the 2010 MILITARY NISVS REPORT and with national data in the 2010 CDC NISVS, to support the 2012 WGRA REPORT's extrapolation. The 2010 CDC NISVS found vast variations in sexual victimizations between different states.²⁷² Absent a credible explanation for the different state results, the CDC survey results should be viewed with skepticism and assessed as too unreliable to support the 2012 WGRA REPORT's extrapolation of 26,000 victims.

The 2012 DOD SEXUAL ASSAULT REPORT seeks to compare its statistics with the 2010 CDC NISVS, a report that tends to inflate the sex crimes in the United States and is sponsored by the National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, rather than utilizing UCR statistics from the FBI, a division of the DoJ and the NCVS.²⁷³

The DoJ's various NCVS Reports are based on a much larger survey of crime victims than the studies used in 2012 DoD SEXUAL ASSAULT REPORT, and it should be used to survey and extrapolate the amount of sexual assault in the military.²⁷⁴ The FBI's UCRs are used to generate national, federal, and state crime statistics.²⁷⁵ The DoD's contributions to the UCR database were not cited in the 2012 DoD SEXUAL ASSAULT REPORT.

²⁷² See, e.g., Virginia (11.4%) and California (14.6%) were less than half the rates for lifetime rape of Michigan (25.6%) and Alaska (29.2%). 2010 CDC NISVS, *supra* note 138, at 68–69 tbl. 7.1.

²⁷³ See 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 1 n.5 and accompanying text (citing 2010 MILITARY NISVS REPORT, *supra* note 138).

²⁷⁴ The 2010 CDC NISVS defines rape as follows:

Rape is defined as any completed or attempted unwanted vaginal (for women), oral, or anal penetration through the use of physical force (such as being pinned or held down, or by the use of violence) or threats to physically harm and includes times when the victim was drunk, high, drugged, or passed out and unable to consent. Rape is separated into three types, completed forced penetration, attempted forced penetration, and completed alcohol or drug facilitated penetration.

—Among women, rape includes vaginal, oral, or anal penetration by a male using his penis. It also includes vaginal or anal penetration by a male or female using their fingers or an object.

—Among men, rape includes oral or anal penetration by a male using his penis. It also includes anal penetration by a male or female using their fingers or an object.

2010 CDC NISVS, *supra* note 138, at 17.

²⁷⁵ See The Uniform Federal Crime Reporting Act of 1988, 28 U.S.C. § 534; National Incident Based Reporting System [NIBRS]; FBI UNIFORM CRIME REPORT, *supra* note 162. The DoJ explains the interrelationship between the UCR and NCVS as follows:

[The UCR and NCVS] were designed to complement each other. The UCR Program's primary objective is to provide a reliable set of criminal justice statistics for law enforcement administration, operation, and management, as well as to indicate fluctuations in the level of crime in America. The NCVS was established to obtain and provide previously unavailable information about victims, offenders, and crime (including crime not reported to the police). While the two programs employ different methodologies, they measure a similar subset of serious crimes.

Uniform Crime Reporting Summary System Frequently Asked Questions, Answer 11, FEDERAL BUREAU OF INVESTIGATION 5, <http://nvrepository.state.nv.us/ucr/forms/FAQsforUCR.pdf> [hereinafter UCR FAQ].

The DoJ and BJS attempt to standardize and collect statistics from law enforcement throughout the United States. Ideally, it would be possible to compare military law enforcement statistics and methods with similar civilian jurisdictions, and then the military could adopt the best practices. The DoD uses two different terminologies for assessing the evidentiary strength of the allegations, and DoJ uses a third standard in the collection of law enforcement crime statistics.

Under current procedures, the DoD's MCIOs use an evidentiary standard lower than the DoJ's "arrest" standard employed in the UCRs. DoD MCIOs categorize an offense as "founded" when the MCIO determines "credible information exists that would cause a trained criminal investigator to presume that the person . . . committed a criminal offense."²⁷⁶ The term "credible information" is defined as "[i]nformation disclosed or obtained by a criminal investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead a trained criminal investigator to presume that the fact or facts in question are true."²⁷⁷ In the annual report sent to Congress, the DoD uses the standard of "founded" for assessing whether a subject committed an offense without mentioning the credibility or believability of a victim's allegations:

f. Report Unfounded by MCIO. Determination by the MCIO that the allegations made against the alleged offender did not occur nor were attempted. These cases are either false or baseless . . .

(1) **False Cases.** Evidence obtained through an MCIO investigation shows that an offense was not committed nor attempted by the subject of the investigation.

(2) **Baseless Cases.** Evidence obtained through an investigation shows that alleged offense did not meet at least one of the required elements of a UCMJ offense constituting the SAPR definition of sexual assault or was improperly reported as a sexual assault.²⁷⁸

In FYs 2011 and 2012, DoD MCIOs and commanders determined that 17% (840 cases over the two years) of the unrestricted reports of sex crimes were

²⁷⁶ See Department of Defense Instruction No. 5505.07, *Titling and Indexing Subjects of Criminal Investigations in the Department of Defense*, at Glossary (Jan. 27, 2012).

²⁷⁷ *Id.*

²⁷⁸ Department of Defense Instruction 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures* 84, App. to Encl. 12, ¶ F (Mar. 28, 2013).

“unfounded.”²⁷⁹ Section 1732 of the 2014 NDAA requires a review of these different evidentiary case determinations, stating:

(a) REVIEW—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall conduct a review of the practices of the military criminal investigative organizations (Army Criminal Investigation Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigation) in response to an allegation that a member of the Armed Forces has committed an offense under the Uniform Code of Military Justice, including the extent to which the military criminal investigative organizations make a recommendation regarding whether an allegation appears founded or unfounded.

(b) POLICY—After conducting the review required by subsection (a), the Secretary of Defense shall develop a uniform policy for the Armed Forces, to the extent practicable, regarding the use of case determinations to record the results of the investigation of an alleged violation of the Uniform Code of Military Justice. In developing the policy, the Secretary shall consider the feasibility of adopting case determination methods, such as the uniform crime report, used by nonmilitary law enforcement agencies.²⁸⁰

Under UCR procedures, “[a]n offense is ‘cleared by arrest’ or solved for crime reporting purposes when at least one person is (1) arrested, or (2) charged with the commission of the offense and turned over to the court for prosecution (whether following arrest, court summons, or police notice).”²⁸¹ The 2012 DOD

²⁷⁹ 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 80 (“In FY11, 396 (17%) of the 2,353 subjects in reported dispositions had unfounded allegations.” MCIOS unfounded 15% and commanders unfounded 2% of the reports. “In FY12, 444 (17%) of the 2,661 subjects in reported dispositions had unfounded allegations.” *Id.* MCIOS unfounded 14% and commands unfounded 3% of the reports. *Id.*).

²⁸⁰ 2014 NDAA, *supra* note 48, at § 1732.

²⁸¹ UCR FAQ, *supra* note 275, at Answer 17 (citing UCR HANDBOOK, 41–42). Law enforcement may under “exceptional circumstances” clear a case without an arrest when the following criteria have been met:

[A]ll leads have been exhausted, and everything possible has been done in order to obtain a clearance. For crime reporting purposes, if the following questions can all be answered ‘yes,’ the offense can then be cleared ‘exceptionally.’

1. Has the investigation definitely established the identity of the offender?
2. Is there enough information to support an arrest, charge, and turning over to the court for prosecution?
3. Is the exact location of the offender known so that the subject could be taken into custody now?
4. Is there some reason outside law enforcement control that precludes arresting, charging, and prosecuting the offender?

Id. at Answer 18.

SEXUAL ASSAULT REPORT does not include statistics showing how many military personnel were titled for committing a particular sex crime, let alone the particular general court-martial jurisdiction where the titled military person was assigned.

Thus, it is not possible for the public to assess the effectiveness of MCIO investigations in any particular general court-martial jurisdiction. The 2014 NDAA Section 1732 requires the Secretary of Defense to consider the feasibility of adopting nonmilitary law enforcement case determination methods, such as the uniform crime report.²⁸² If UCR procedures are adopted in lieu of the current titling process, MCIOs would be encouraged to shift their focus from titling subjects to gathering sufficient information to support an arrest, charges, or equivalent.

Federal and state prosecution statistics are provided in numerous DoJ publications. Previously in this Article, the DoJ, BJS's 2008 FEDERAL JUSTICE STATISTICS,²⁸³ and 2013 DOJ FEMALE SEXUAL ASSAULT VICTIMS REPORT²⁸⁴ are briefly compared with the DoD prosecution statistics. The DoD should abandon use of the inflammatory multipliers and extrapolations, collect and use survey results from the NCVS, and only use the overall nation-wide prosecution statistics from DoJ in the UCR for the most serious sex offenses to compare prosecutions rates. The NCVS and the UCR are products of different divisions of the DoJ. A special DoD section in the UCR and NCVS would allow correlation, comparison, and context for sexual assault reports.

VI. FACTORS SPECIFIC TO THE MILITARY THAT AFFECT REPORTING AND PROSECUTION RATES

In addition to eliminating the confusing annual report and misleading extrapolations provided to the public, the DoD also should inform the public about factors impacting prosecutorial discretion that exist in the military services that civilian prosecutors may not face, such as extensive options for alternative disposition, involvement from the chain of command up to and including the

"Examples of exceptional clearances include, but are not limited to, the death of the offender (e.g., suicide or justifiably killed by police or citizen); the victim's refusal to cooperate with the prosecution after the offender has been identified; or the denial of extradition because the offender committed a crime in another jurisdiction and is being prosecuted for that offense." FBI UNIFORM CRIME REPORT, *supra* note 162. The DoD incorporated the UCR standards on May 10, 2013, publishing Change 1 to the Defense Incident-Based Reporting System [DIBRS] Manual. Congress should simply require the DoD to report the cases "cleared by arrest or arrest equivalent" as reported under the DIBRS system. DIBRS Manual Number 7730.47-M, vol. 2 (Dec. 7, 2010) incorporating change 1 (May 10, 2013), Enclosure 3, tbl. 10 at Item 11 [DIBRS Manual 7730.47-M]. The DIBRS Manual contains numerous entries pertaining to sex offenses. DIBRS statistics are available for detailed analysis of the effectiveness of programs to reduce sexual assaults.

²⁸² 2014 NDAA, *supra* note 48.

²⁸³ 2011 CRIMINAL VICTIMIZATION REPORT, *supra* note 189, at 12; 2009 FEDERAL JUSTICE STATISTICS, *supra* note 124; 2008 FEDERAL JUSTICE STATISTICS, *supra* note 124.

²⁸⁴ 2013 DOJ FEMALE SEXUAL ASSAULT VICTIMS REPORT, *supra* note 161, at 11.

Secretarial influence, and military operations and readiness issues such as unit cohesion.²⁸⁵ Military commanders may dispose of sexual assault offenses by using alternative methods aside from prosecution that exist in the military such as Article 15, non-judicial punishment or adverse administrative action. Prior to the enactment of the 2014 NDAA, the Manual for Courts-Martial did not provide mandatory minimum sentencing for sex crimes; as a result, an accused convicted of a serious sex crime may not receive any confinement or a discharge from the service.

A. Availability of Alternative Disposition and Punishment Options for the Military

Unlike civilian prosecutors, military trial counsel and commanders have other punitive or administrative options besides trial by court-martial such as non-judicial punishment (Article 15, UCMJ), letters of reprimand, and administrative separations (discharges from military service, including adverse characterizations of service, such as a dishonorable or bad-conduct discharge) pursuant to Service regulations.²⁸⁶ Military sex offenses have no minimum confinement requirements until the recent enactment of the 2014 NDAA; 2014 NDAA Section 1731(a)(1)(C) requires the Judicial Proceedings Panel²⁸⁷ to assess “the implementation and effect of the mandatory minimum sentences” added in to the UCMJ in Section 1705 of the 2014 NDAA.²⁸⁸ With the addition of mandatory minimum sentences for sex offenses, a military accused may have even less motivation to plead guilty to a sexual assault offense at a court-martial than a civilian or service member being tried in U.S. District Court for the same conduct. Consequently, prosecutors may work with commanders to use alternate disposition options.

The Manual for Courts-Martial directs commanders to dispose of criminal allegations in a timely manner at the lowest appropriate level of disposition.²⁸⁹ Commanders may: (1) take no action; (2) take adverse administrative action, such as counseling, admonition or warning, reprimand, extra military instruction, or

²⁸⁵ See Mitsie Smith, *Adding Force Behind Military Sexual Assault Reform: The Role of Prosecutorial Discretion in Ending Intra-Military Sexual Assault*, 19 BUFF. J. GENDER L. & SOC. POL'Y 147 (2010–11); Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. SUPP. 643 (2002).

²⁸⁶ See Major General Jack L. Rives & Major Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213 (2002).

²⁸⁷ See *supra* notes 63–65 and accompanying text.

²⁸⁸ 2014 NDAA, *supra* note 48. Section 1705 mandates that “while a person subject to this chapter who is found guilty” of specified sex crimes “shall be punished as a general court-martial may direct, such punishment must include, at a minimum, dismissal or dishonorable discharge, except as provided for in section 860 of this title (article 60).” The mandatory discharge applies to offenses in violation of the following Articles: 120(a) (rape), 120(b) (sexual assault), 120b(a) (rape of a child), 120b(b) (sexual assault of a child), and 125 (forcible sodomy). “(D) An attempt to commit an offense specified in subparagraph (A), (B), or (C) that is punishable under section 880 of this title (article 80).” *Id.*

²⁸⁹ MANUAL FOR COURTS-MARTIAL, *supra* note 117, at 306(b).

withholding of privileges; (3) impose nonjudicial punishment under Article 15, UCMJ; (4) forward the case to a higher level or return it to a subordinate commander; or (5) prefer charges initiating the court-martial process and forward the charges and case file (with a recommendation as to disposition) to a superior commander who has authority to convene a court-martial.²⁹⁰ The Manual for Courts-Martial provides fourteen factors to consider in disposing of a case.²⁹¹

The annual DoD Sexual Assault Report provides a comprehensive breakdown of the sexual assault reports and their dispositions.²⁹² Statistics taken from this report that merely place the number of convictions over the total number of reports are grossly misleading; a more detailed review is necessary to analyze conviction rates. Conclusions regarding prosecution and conviction rates are limited because the total number of sexual assaults reported includes: (1) unresolved cases and cases pending the completed investigation or disposition;²⁹³ (2) restricted reports, cases that law enforcement cannot investigate, and cases that cannot be tried; (3) cases involving civilians, foreign nationals, or unknown offenders, and the military does not have jurisdiction over these individuals; and, (4) seven separate offenses ranging from minor offensive touching such as unwanted touching over the clothing (which may not be reported or prosecuted in the civilian sector) to rape.²⁹⁴ In addition, such conclusions are limited because critics may not consider cases where commanders take alternate dispositions, which result in offenders being

²⁹⁰ *Id.* at 306(c).

²⁹¹ *Id.* at 306(b) (“(A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense’s effect on morale, health, safety, welfare, and discipline; (B) when applicable, the views of the victim as to disposition; (C) existence of jurisdiction over the accused and the offense; (D) availability and admissibility of evidence; (E) the willingness of the victim or others to testify; (F) cooperation of the accused in the apprehension or conviction of others; (G) possible improper motives or biases of the person(s) making the allegation(s); (H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction; (I) appropriateness of the authorized punishment to the particular accused or offense; (J) the character and military service of the accused; and (K) other likely issues.”). The 2014 NDAA states, “[n]ot later than 180 days after the date of the enactment of this Act, the discussion pertaining to Rule 306 of the Manual for Courts-Martial (relating to policy on initial disposition of offenses) shall be amended to strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense.” See *supra* note 48, at § 1708; see also Schenck, *supra* note 47, at nn.134–52 and accompanying text (explaining how military law could be changed to limit the scope of good military character evidence presented to courts-martial).

²⁹² Of the 594 subjects charged with sexual assault, 460 cases with preferred charges were completed by the end of the FY 2012. 2012 DoD SEXUAL ASSAULT REPORT, *supra* note 67, at 71, 73. “Of the 302 subjects whose cases proceeded to trial, 79% were convicted (238 subjects) and 21% were acquitted (64 subjects), and most convicted military personnel received at least four kinds of punishment: confinement (74%), reduction in rank (76%), fines or forfeitures (66%), and discharge (enlisted) or dismissal (officers) from service (56%).” *Id.*

²⁹³ The report is submitted on the last day of the fiscal year and includes all cases disposed of during that year.

²⁹⁴ 2013 LTG Chipman Senate Statement, *supra* note 83, at 18.

administratively separated from the Service among other adverse action, including possible prosecution by civilian or foreign prosecutors.

B. Chain of Command Concerns: Command Influence—perceived or actual?

Another factor critics should consider in assessing the success rate of the military justice system and commanders in addressing sexual assault is the sensitive and important position commanders have within that system. Commanders play a key role in the military justice system and commanders who are convening authorities must decide whether to address misconduct by the alternative dispositions discussed earlier. The immediate commander may take action or forward the case to the superior commander who may be a convening authority and may convene a court-martial. The immediate commander is required to make an independent decision about the disposition of offense, subject to restrictions a higher commander may impose.²⁹⁵

The Military Justice system rests on two key postulates that are not inherently in conflict, but that may collide in some instances. The first postulate, clearly and concisely articulated by the President in the Manual for Courts-Martial, is: “Commanders are responsible for good order and discipline in their commands.” MCM, pt. V, ¶ 1.d.(1). The second postulate, expressed by Congress directly in the UCMJ, is: “No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof” Article 37, UCMJ, 10 U.S.C. § 837(a).²⁹⁶

Essentially, the UCMJ prohibits command influence including service-wide or unit-wide prosecutorial policies. Commanders must remain fair and impartial and assess each case individually. Yet, commanders and other members of the chain of command have become more interested in the disposition of sexual assault cases. Such command attention may raise assertions of command influence in sexual assault cases. Judge advocates are in the difficult position of ensuring substantiated cases of sexual assault are prosecuted while ensuring that

²⁹⁵ 2012 MCM, Discussion Rule for Courts-Martial 306(a) (“Each commander in the chain of command has independent, yet overlapping discretion to dispose of offenses within the limits of that officer’s authority. Normally, in keeping with the policy in subsection (b) of this rule, the initial disposition decision is made by the official at the lowest echelon with the power to make it. A decision by a commander ordinarily does not bar a different disposition by a superior authority. *See* R.C.M. 401(c); 601(f).”). The Secretary of Defense has imposed limits on the discretion of unit commanders in the disposition of sex offenses. *See infra* note 299 and accompanying text.

²⁹⁶ GREGORY E. MAGGS & LISA M. SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS 50–51 (2012).

commanders and others do not inappropriately influence subordinates or the judicial process itself.

A founded report is different from a substantiated report, which DoD defines as “an Unrestricted Report that was investigated by an MCIO, provided to the appropriate military command for consideration of action, and found to have sufficient evidence to support the command’s action against the subject.”²⁹⁷ Thus, for example, an MCIO could determine that a case was founded; however, if the victim subsequently decided not to cooperate with prosecution, the command could conclude that the case is not founded, and then the case would be labeled in the DoD Report as “unsubstantiated.”²⁹⁸

1. Recent Secretarial Attention

Increased attention from the Department Secretaries accompanied the increased media attention on sexual assault in the military services. Those overseeing the military services have expressed their concern by publishing memoranda directing certain actions take place in sexual assault cases. The Secretary of Defense required that special court-martial convening authorities make the first decision regarding how to dispose of sexual assault cases.²⁹⁹ In 2012, the Secretary of Defense further directed that the military services establish enhanced programs at the Service academies integrating sexual assault and harassment prevention.³⁰⁰ Within the Services other actions have been taken. For example, early this year, the Air Force Chief of Staff directed that commanders conduct an Air Force-wide health and welfare inspection to “look for and remove . . . pornographic, inappropriate or offensive, or unprofessional” materials from workplace areas.³⁰¹

²⁹⁷ 2012 DOD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 40. “In FY12, the Department reached agreement on and codified a standardized definition of the term ‘substantiated,’ addressing a congressional mandate and fulfilling a recommendation from DTF[SAMS.]” *Id.* (citations omitted).

²⁹⁸ See *supra* note 279 and accompanying text.

²⁹⁹ Memorandum from Sec’y of Def. for Sec’ys of the Military Dep’ts, Chairman of the Joint Chiefs of Staff, Commanders of the Combatant Commands, Inspector General of the Dep’t of Def., Subject: Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (withheld to special court-martial convening authorities O-6 and above) (Apr. 20, 2012) (on file with the Dep’t of Def.).

³⁰⁰ Memorandum from Sec’y of Def. for Sec’ys of the Military Dep’ts, Under Sec’y of Def. for Personnel and Readiness, Subject: *Sexual Harassment and Violence at the U.S. Military Service Academies* (Dec. 20, 2012) (on file with the Dep’t of Def.).

³⁰¹ *Air Force Releases Results of Health and Welfare Inspection*, U.S. AIR FORCE (Jan. 18, 2013), <http://www.af.mil/News/ArticleDisplay/tabid/223/Article/109840/air-force-releases-results-of-health-and-welfare-inspection.aspx>; see also *Public Affairs Guidance: Air Force Health and Welfare Inspection*, U.S. AIR FORCE (Dec. 4, 2012), <http://www.local1406.com/files/CSAF-Health-Welfare-Inspection-.pdf>.

2. Role of the Convening Authority

[M]ilitary commanders have been granted unique control over the [military justice] process. This facet of military justice is often referred to as ‘command control.’ In that regard, command control encompasses the ability of commanders to order an investigation into alleged misconduct, evaluate the results of such investigations, refer charges to courts-martial, convene courts-martial, appoint members to courts-martial, and take action on the findings and sentence of courts-martial. Command control aims to provide military commanders with the flexibility necessary to mete out discipline whenever and wherever the need should arise in order to maintain combat-ready units.³⁰²

The convening authority’s clemency power has ancient origins and can be traced from Roman armies through the Vietnam War, to the present, and has been crucial during times of major wars.³⁰³

³⁰² Lieutenant Michael J. Marinello, *Convening Authority Clemency: Is It Really An Accused’s Best Chance of Relief?*, 54 NAVAL L. REV. 169, 172–73 (2007); *see also*, Hayes Brown, *Panetta: Military ‘Looked The Other Way’ In Rape Case*, THINKPROGRESS (Mar. 8, 2013), <http://thinkprogress.org/security/2013/03/08/1692661/panetta-military-rape/> (“Former Secretary of Defense Leon Panetta on Thursday criticized the military’s lackluster approach to sexual violence, saying that some officials ‘looked the other way’ rather than pursuing convictions.”); *Case Dismissed Against IG Convicted of Sexual Assault*, STARS AND STRIPES (Feb. 27, 2013), <http://www.military.com/daily-news/2013/02/27/case-dismissed-against-ig-convicted-of-sex-assault.html?ESRC=eb.nl>; Frank Oliveri, *Senators Blast Military After General Overturns Sexual Assault Verdict*, ROLL CALL (Mar. 5, 2013), http://www.rollcall.com/news/senators_blast_military_after_general_overturns_sexual_assault_verdict-222849-1.html?zkPrintable=true; *see also* *Sexual Assault in the Military: Hearing Before the Subcomm. on Manpower and Pers. of the Senate Armed Serv’s Comm.*, 114th Cong. (2013) (Mar. 13, 2013), available at <http://www.c-spanvideo.org/event/215635>.

³⁰³ Marinello, *supra* note 302, at 173–74. During the Revolutionary War, 137 men were officially convicted of desertion, forty were executed and the rest pardoned. ROBERT FANTINA, *DESERTION AND THE AMERICAN SOLDIER, 1776-2006* 22 (2006). General Washington granted pardons and amnesties on several occasions. *Id.* at 22–26; THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775-1975 13 (1975), available at http://www.loc.gov/rr/frd/Military_Law/pdf/lawyer.pdf (noting General Washington’s compassion to those deserving clemency) [hereinafter JAG HISTORY]. Tens of thousands of military personnel received clemency during and after World War II for military offenses. Mary L. Clark, *Keep Your Hands Off My (Dead) Body: A Critique of the Ways in Which the State Disrupts the Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death*, 58 RUTGERS L. REV. 45, 73 n.93 (2005) (“On Jan. 31, 1945, Hamtramck-born Eddie Slovik was executed by firing squad near the village of Ste-Marie aux Mines for the crime of desertion. Gen. Dwight D. Eisenhower, supreme allied commander, personally ordered Slovik’s execution during the closing days of World War II in order to deter other potential deserters During World War II, 21,049 American military personnel were convicted of desertion, 49 were sentenced to death, but only Pvt. Slovik paid the ultimate price.”); JAG HISTORY, *supra* note 303, at 192–94 (providing more details of Slovik’s case). After World War II, all general court-martial cases where the accused was still in confinement were reviewed, and the sentence was remitted or reduced in 85% of the 27,000 serious cases reviewed. *Id.* at 192. Significant clemency was common to reduce sentences for Vietnam War-era combat zone offenses. Gary D. Solis, *War and the United States Military:*

Some critics question the role of the commanders as convening authorities and their role in sending cases to trial by courts-martial and later, the ability to take clemency by lessening or dismissing the findings and/or sentence of a court-martial. Two recent cases have raised questions about whether convening authorities should have unlimited discretion to set aside convictions and grant clemency to those convicted of sex offenses. In February 2012, Lieutenant General Susan Helms, who in 1993, as a shuttle crewmember, was the first U.S. military woman to travel in space, granted clemency and overturned pilot-Captain Matthew Herrera's aggravated sexual-assault conviction, reducing it to indecent acts, even though her lawyer recommended approval of the jury's findings.³⁰⁴ On February 26, 2013, Lieutenant General Craig Franklin used his clemency authority to set aside the jury verdict finding that Lieutenant Colonel James Wilkerson, an F-16 pilot and former inspector general at Aviano Air Base, Italy, sexually assaulted a houseguest, even though his lawyer recommended against setting aside the conviction.³⁰⁵ Lieutenant General Franklin and the accused flew in the same squadron in Iraq.³⁰⁶

In response, the Secretary of Defense promised to review sexual assault issues.³⁰⁷ The 2014 NDAA amends 10 U.S.C. § 60(c) and places limitations on the convening authority's discretion to grant post-trial clemency, by reducing the charges or sentence after the court-martial.³⁰⁸ For the last several years in the Army, this clemency authority has rarely been used.³⁰⁹ The Senate Armed

Military Justice, Civilian Clemency: The Sentences of Marine Corps War Crimes in South Vietnam, 10 TRANSNAT'L L. & CONTEMP. PROBS. 59 (2000); Myron C. Cramer, *Equalization of Court-Martial Sentences*, THE JUDGE ADVOCATE JOURNAL, Vol. II, No. 2, 7-9 (May 22, 1945), available at http://www.loc.gov/r/frd/Military_Law/pdf/JAG_II-2.pdf (describing reprimand of convening authority for failing to exercise clemency).

³⁰⁴ Craig Whitlock, A.P., *Female Air Force General's Promotion Blocked*, STANDARD-EXAMINER (May 7, 2013), <http://www.standard.net/stories/2013/05/07/female-air-force-generals-promotion-blocked>.

³⁰⁵ Kristin Davis, *Memo Gives Insight Into Sex-Assault Clemency*, AIR FORCE TIMES (Apr. 13, 2013), <http://www.airforcetimes.com/article/20130413/NEWS/304130006/Memo-gives-insight-into-sex-assault-clemency>.

³⁰⁶ *Id.*

³⁰⁷ See Hayes Brown, *Defense Secretary Promises to Examine Military's Policy for Convicting Rapists*, THINK PROGRESS SECURITY (Mar. 11, 2013), available at <http://thinkprogress.org/security/2013/03/11/1700281/hagel-aviano-sexual-assault/?mobile=nc>; Senators Barbara Boxer and Jeanne Shaheen Letter to Sec'y Def., available at <http://www.boxer.senate.gov/en/press/releases/030413.cfm#>; Sec'y of Def. Letter to Senators Barbara Boxer and Jeanne Shaheen (Mar. 7, 2013), http://boxer.senate.gov/en/press/related/Hagel_Response_03_07_13.pdf.

³⁰⁸ 2014 NDAA, *supra* note 48, § 1702(b).

³⁰⁹ The Office of the Clerk of Court for the Army Court of Criminal Appeals indicated the convening authority took action in 6,131 general and special court-martial cases between January 1, 2008 and May 23, 2013. The Clerk's Office disclosed that less than one percent of the 6,131 cases involved a significant reduction in the findings of the court-martial. The majority involved resignations in lieu of trial for officers or discharge in lieu of trial for enlisted personnel or dismissal of minor military specific crimes such as being absent without leave or adultery or multiple charges

Services Committee held a hearing on June 4, 2013 to address the role of the convening authority (especially in granting clemency to the accused) and issues relating to sexual assault in the military services.³¹⁰ The Joint Chiefs of Staff were unanimously opposed to transferring the convening authority's power to refer cases to courts-martial from convening authorities (commanders) to military prosecutors, contending that if commanders lack authority to court-martial sex offenders this reduction in authority will render them unable to enforce good order and discipline, especially in regard to sexual misconduct.³¹¹ The 2014 NDAA

for the same misconduct (i.e., multiplicity). E-mails from Malcolm Squires, Clerk of Court, Army Court of Criminal Appeals to author dated Jan. 16, 2014 discussing data researched by Homan Barzmehri, Mgmt. & Program Analyst, Office of the Clerk of Court [on file with author].

³¹⁰ On May 16, 2013, Senator Kirsten Gillibrand, Democrat-New York, introduced the 2013 Military Justice Improvement Act, which takes the decision-making authority to prosecute sexual assault cases away from convening authorities in the accused's chain of command, and transfers it to the service chiefs of staff. The chiefs of staff would receive the power to create courts and to select judges and juries and refer cases to courts-martial. See Modification of Authority to Determine to Proceed to Trial by Court-Martial on Charges on Offenses with Authorized Maximum Sentence of Confinement of More Than One Year, available at http://cdn.govexec.com/media/gbc/docs/pdfs_edit/051613ksp1.pdf. The Senate Armed Services Committee held hearings on June 4, 2013, "to examine pending legislation regarding sexual assaults in the military." *Daily Digest Committee Meetings/Hearings Schedule*, UNITED STATES SENATE WEBSITE, http://www.senate.gov/pagelayout/committees/b_three_sections_with_teasers/committee_hearings.htm. (last visited April 23, 2014). Senator Gillibrand's proposal was not included in the 2014 NDAA; however, she is continuing her quest to remove command responsibility for enforcing standards and holding military personnel who commit sex crimes accountable. Kathleen Hunter & Tony Capaccio, *Gillibrand Vows to Pursue Military Sexual-Assault Bill*, BLOOMBER.COM (Dec. 11, 2013), available at <http://www.bloomberg.com/news/2013-12-11/gillibrand-vows-to-pursue-military-sexual-assault-bill.html>.

³¹¹ Elliott C. McLaughlin, *Military Chiefs Oppose Removing Commanders from Sexual Assault Probes*, CNN (June 5, 2013), available at <http://www.cnn.com/2013/06/04/politics/senate-hearing-military-sexual-assault/> ("Chiefs of every military branch told a Senate committee Tuesday they opposed letting prosecutors, rather than commanders, handle sexual assault investigations, as one senator has introduced legislation aimed at doing just that."); see also Tom Vanden Brook, *Brass Testify on Bills Aimed at Military Sexual Assaults*, USA TODAY (June 4, 2013), <http://www.13wmaz.com/story/news/military/2013/11/03/3411699/> ("Gen. Raymond Odierno, the Army chief of staff, told the Senate Armed Services Committee . . . [that commanders] need to keep their authority in handling sexual assault cases Removing that authority will make commanders less accountable, affect unit discipline and delay punishment, he said Army Gen. Martin Dempsey, chairman of the Joint Chiefs of Staff, seemed to resist the concept of removing commanders' authority to enforce military law. 'The commander's responsibility to preserve order and discipline is essential to affecting change,' Dempsey said. 'They punish criminals and protect victims when and where no other jurisdiction is capable, or lawfully able to do so. Commanders are accountable for all that goes on in a unit. Ultimately, they are responsible for mission success.'"); Jim Garamone, *Commanders Should Keep Sex Assault Courts-martial Authority*, AMERICAN FORCES PRESS SERVICE (Jan. 30, 2014), <http://www.defense.gov/News/NewsArticle.aspx?ID=121583> ("The independent Response Systems to Adult Sexual Assault Crimes Panel has accepted a subcommittee recommendation that senior military commanders retain authority for referring these crimes to courts-martial. DOD officials have long maintained that the authority is needed to maintain good order and discipline, and that commanders will be integral to ending sexual assault in the ranks."); Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, 149 THE HERITAGE FOUNDATION 1-4 (Nov. 6, 2013), <http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it>; Lorelei Laird, *Military Lawyers Confront Changes as Sexual Assault Becomes*

requires an independent panel³¹² to conduct “[a]n assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under chapter 47 of title 10, United States Code (the UCMJ), would have on overall reporting and prosecution of sexual assault cases.”³¹³

C. Military Operational and Readiness Concerns

Another reason why sexual assault cases are difficult to prosecute is the impact on the unit, since many of these cases occur between members of the same unit. Before rushing to judgment and trial, commanders and judge advocates must consider this factor prior to deciding how to move forward in the judicial process. Nevertheless, sexual assault offenses are viewed as undermining “the core values of the military services and degrad[ing] mission readiness,” and effective and efficient disposition of the cases “is essential to the maintenance of good order and discipline in the armed forces, [] consequently contribut[ing] to the national security of the United States.”³¹⁴ President Obama has echoed this message.³¹⁵

Some critics stress the fact that military-on-military sexual assault is prevalent and female service members must protect themselves from sexual assault perpetrators within their own ranks.³¹⁶ Service members are trained to trust their colleagues and consequently, may place themselves in compromising positions. This may result in an increase of sexual assault cases, especially when alcohol is involved. Many sexual assaults involve members of the same unit, as victims, alleged offenders, or witnesses, and commanders must consider unit cohesion in disposing of offenses.³¹⁷ Commanders face decisions such as who, if anyone,

Big News, ABA JOURNAL (Sep 1, 2013), http://www.abajournal.com/magazine/article/military_lawyers_confront_changes_as_sexual_assault_becomes_big_news/ (“[Major General (Ret.) Altenburg says that ‘good order and discipline’ is another way to say ‘readiness for combat’—one of the most fundamental goals of the military. Part of that is willingness to work together and follow orders, he says, and commanders are responsible for making sure their units do that. ‘Lives are at stake,’ Altenburg says. ‘So it’s important that units work together. That’s why commanders going back hundreds of years have the authority to impose discipline.’ Besides, he says, commanders are trained in this duty and usually follow military prosecutors’ advice.”).

³¹² See *supra* notes 63–65.

³¹³ 2014 NDAA, *supra* note 48, at § 1731(a)(1)(A).

³¹⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-579, MILITARY JUSTICE: OVERSIGHT AND BETTER COLLABORATION NEEDED FOR SEXUAL ASSAULT INVESTIGATIONS AND ADJUDICATIONS 23 (2011).

³¹⁵ See *supra* notes 4, 136 and accompanying text.

³¹⁶ See *Sexual Assault in the Military: Hearing Before the Subcomm. on Nat’l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 1 (2008) (statement of Jane Harman, Cong. Rep.); see also Schmid, *supra* note 16, at 494 (footnote omitted) (“[S]exual assault is a ‘natural part of the [military] institution’ because of the culture.”).

³¹⁷ 2012 WGRA REPORT, *supra* note 6, at 3, 37 (Victims surveyed said in 57% of the cases the offender who engaged in the unwanted sexual contact was a military coworker.).

should be transferred out of the unit pending investigation and how to proceed once the investigation is completed.³¹⁸

The military justice system allows for prosecution of criminal cases during wartime and peace for air, land, and sea units. Many cases involve witnesses within the military unit and control over logistical issues involved in trial may be better handled within the command, with judge advocates advising. Commanders may be able to avoid responsibility if they no longer have decision making authority over sexual assault cases.

VII. CONCLUSION: SUMMARY OF RECOMMENDATIONS FOR DOD REMEDIAL ACTIONS

The two volume 2012 DoD SEXUAL ASSAULT REPORT was 1,494 pages and included very brief summaries of hundreds of cases; however, not every case reported in FY 2012 was summarized. Moreover, the dates cases were disposed of were not always included. Even though cases that went to trial are available to the public, and regulations require generation of charge sheets, results of trial, and promulgating orders, showing clemency and reductions in sentences as a result of pretrial agreements, those documents are not collected and posted on the internet and instead would need to be retrieved from individual records of trial. These courts-martial documents are publicly releasable (with appropriate redactions to protect the privacy of victims), and should be posted on the internet.

The BJS collects data from 143,120 persons every six months and generates the NCVS and various reports about victimization. Congress should require the BJS to include 15,000 active duty military personnel in the sample, and to generate a separate report addressing the same offenses as addressed in the NCVS. This would generate a truly credible vehicle to compare the prevalence of sexual assault in the military.

On January 2, 2013, President Obama signed the 2013 NDAA into law. The 2013 NDAA, Section 572 requires the DoD to collect disposition records of sexual assault unrestricted reports, including court-martial, nonjudicial punishment, or other administrative action. The disposition file is required to contain all documentary information collected regarding the case (not just investigators' reports), and a list of the records required is included in Section 572. Disposition records must be maintained for a period of at least twenty years, and some reports will be maintained for fifty years. Section 575 requires the DoD to include greater

³¹⁸ See Memorandum from Sec'y of Def. to Combatant Commanders, *Subject: Confronting Sexual Assault* (30 Apr. 2004) (on file with the Dep't of Def.); see also SEX CRIMES REPORT TO JSC SEX CRIMES REPORT TO JSC, at 2 ("Rape and sexual abuse have a devastating impact on victims. These offenses also negatively affect morale, good order and discipline and the unit cohesion and combat effectiveness of military personnel and units."); Major Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put it Back on Target*, 2007 ARMY LAW. 1 (Aug. 2007); Melissa Epstein Mills, *Brass-Collar Crime: A Corporate Model for Command Responsibility*, 47 WILLIAMETTE L. REV. 25 (2010).

detail in annual reports on sexual assaults, including reasons for any dismissal of charges, character of discharge when an accused is administratively discharged or allowed to resign, any prior offense or admission to the service on a waiver for a sex offense, branch of service of accused, involvement of alcohol in the offense, and specific punishment given at non-judicial punishments.³¹⁹

Section 573(f) requires the Secretary of Defense to “(1) prescribe the common criteria to be used by the Secretaries of the military departments to measure the effectiveness and impact of the special victim capabilities from the investigative, prosecutorial, and victim’s perspectives; and (2) require the Secretaries of the military departments to collect and report the data used to measure such effectiveness and impact.”³²⁰ Section 575 also requires “[a]n analysis and assessment of trends in the incidence, disposition, and prosecution of sexual assaults by units, commands, and installations during the year covered by the report, including trends relating to prevalence of incidents, prosecution of incidents, and avoidance of incidents.”³²¹

Section 576 requires the Secretary of Defense to establish one panel (Response Panel) to review and assess systems used and to make recommendations for improvements to investigations, prosecutions, and adjudications of adult sexual assault and related offenses. The other panel (Judicial Proceedings Panel) is required to assess sexual assault courts-martial cases, statutes, and procedures, including sentences.

In accordance with Congressional mandates, the DoD has attempted to determine the extent of the problem of sexual assault in the military services. The DoD’s annual report reflects restricted and unrestricted sexual assault reports of military service members, which are provided to military law enforcement agencies for investigation. At the same time, the DoD presents the public with web-based survey results collected by its own DMDC. Those surveys use health-care focused cuing questions, ask anonymous questions, have relatively low response rates, and lack follow-up interviews.

The DMDC provides survey results without a sophisticated analysis or interpretation of that data, for example reviewing demographic variables. The DMDC analysis does not recognize that someone who has been the victim of

³¹⁹ The FY 2013 NDAA also requires records for outcomes of disciplinary and administrative proceedings related to sexual assault to be centrally located and retained for a period of not less than twenty years, which will allow the DoD Sexual Assault and Prevention and Response Office to better track progress in combating sexual assault and help identify potential patterns of misconduct and systemic issues. *Statement of Major Gen. Gary S. Patton, Dir. of U.S. Dep’t of Def. Sexual Assault Prevention & Response Office (SAPRO): Hearing on Sexual Assault in the Military Before the S. Comm. on Armed Servs.: Subcomm. on Pers.*, 113th Cong. 9 (Mar. 13, 2013), available at <http://www.armed-services.senate.gov/statemnt/2013/03%20March/Patton%2003-13-13.pdf>.

³²⁰ See FY 2013 NDAA, *supra* note 64.

³²¹ *Id.* (listing Act Jan. 2, 2013, P.L. 112-239, Div A, Title V, Subtitle H, § 575(a), (b), 126 Stat. 1757 (applicable beginning with the report required to be submitted under § 1631 by 3/1/2014, as provided by § 575(c) of such Act)); see also *id.* at § 1631(b)(8).

sexual assault is more likely to complete the lengthy survey, and DMDC does not count failure to complete a survey as a negative response. The DMDC then purports to provide reliable extrapolations of sex crimes committed by military personnel. Absent interviews of victims, unless the questions used in the survey are significantly changed to narrow the scope of the conduct being reported and reduce the influence of cuing, it is not possible to reliably assess whether they are the victims of crime, sexual harassment, or socially inappropriate conduct. These systemic flaws result in DMDC providing an exaggerated extrapolated number of victims of sex crime. The information provided from the DoD's MCIOs provides factual summaries of each sexual assault case focusing on criminal or administrative disposition of offenses, while the DMDC data reflects responses to broad questions (which focus on collecting information about sexually inappropriate conduct as well as sexual assaults and asking questions relating to a sexually hostile or discriminatory work environment). Furthermore, the DMDC survey focuses more on well-being and health of service members. Although the annual DoD report includes the very brief factual summaries of each reported unrestricted sexual assault focusing on criminal or administrative disposition of offenses, the report does not provide essential detailed factual information about the crime and disposition information which is already available in charge sheets and promulgating orders. The DoD report does not indicate, for example: how many military personnel perpetrators were the subjects of founded or substantiated investigations for rape of military victims, how many of them were charged with rape, how many of those cases were referred to courts-martial, how many were convicted, and the sentences imposed. The report does not give the public the means of assessing whether any particular investigator, prosecutor, or commander was particularly successful in handling sex crimes because the case summaries do not provide the military installation of the offenses.

The DoD should better assess the problem of sexual assault in the military services and present a more accurate picture to the public. If the DoD is going to continue to extrapolate the number of sexual assault victims from surveys, whenever a survey response indicates that the victim reported the offense, if that report is not in the DoD database, that victim should be questioned about the circumstances of the report to authority. The DoD should then determine why the report was not included in the database, and take disciplinary action against the military authority that failed to take action. If the victim indicates that he or she has not reported the offense, then the surveyor should ask the victim to allow the surveyor to report the offense to law enforcement.

Over the last six years, the number of military-on-military reported sex offenses has steadily increased and is now 34% higher than in 2007.³²² During the same six years, the percentage of sexual assault cases with preferred charges

³²² 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 67, at 61 (showing the following military-on-military sexual offenses for FY 2007 to 2012: 2007 (1,184 cases), 2008 (1,158 cases), 2009 (1,338 cases), 2010 (1,358 cases), 2011 (1,366 cases), and 2012 (1,590 cases)).

increased from 36% to 68%.³²³ The Judicial Proceedings Panel should be able to assess whether the increase in prosecutions at courts-martial is based on more offenses or the number of cases has remained about the same, and whether the command is taking a tougher stance against sexual offenses.

Whenever a case of sexual assault does not go to trial, the judge advocate's signed legal advice with the name of the victim and subject redacted should be posted on the internet. If a commander declines to forward a case for court-martial against the legal advice of the judge advocate, the commander should sign a memorandum of explanation and that explanation (with appropriate redactions) should be posted on the internet. The victim should have the option, with the assistance of counsel, of having a statement posted on the internet with the letters explaining why the case did not go to trial.³²⁴ This will provide the transparency necessary to improve the credibility of the military justice system.

³²³ *Id.* at 70 ("once a military subject's commander has found that there is sufficient evidence to take disciplinary action," the trend has been towards preferal of court-martial charges with the percentage of cases with charges preferred being as follows for FY 2007 to 2012: 2007 (30%), 2008 (38%), 2009 (42%), 2010 (52%), 2011 (62%), and 2012 (68%)).

³²⁴ See proposed legislation, *supra* notes 325–34 and accompanying text.

Appendix A

Proposed Statutory Changes

SEC. __. DEPARTMENT OF JUSTICE REPORTING OF STATISTICS OF MILITARY SEXUAL ABUSE

(a) REQUIRED ACTION BY THE DEPARTMENT OF JUSTICE IN THE COLLECTION AND REPORTING OF MILITARY SEXUAL ABUSE STATISTICS—Section 534 of Title 28 U.S. Code, is amended, by adding:

(a)(5) acquire, collect, classify, and separately report statistics of sex-related offense victimization for active duty military sexual assault victims as part of the annual National Crime Victimization Survey, of a sample of at least 15,000 active duty military men and women in the same manner as other samples in the National Crime Victimization Survey, to provide a separate annual report that can be used for more reliable extrapolations of the numbers of military sexual assault victims. The Department of Justice shall provide the Department of Defense the names and contact information of active duty sexual offense victims so that the Department of Defense may ensure all victims' cases are appropriately investigated.

Section 3732 of Title 42 U.S. Code, is amended, by adding (h):

(h) Reports. Not later than one year after the date of enactment of this subsection, and annually thereafter, the Director shall submit to Congress a report describing the data collected and analyzed under this section relating to sex-related offenses involving active duty military victims.

SEC. __. ACCURATE AND TRANSPARENT REPORTING BY THE DEPARTMENT OF DEFENSE OF STATISTICS, STATUS, AND DISPOSITIONS OF ARTICLE 120, UCMJ OFFENSES³²⁵

³²⁵ The goals are: (1) to increase transparency by making it easier for victims to check the official status of their allegations, and determine who is responsible if their case is not prosecuted; (2) require decision makers to justify their decision not to take adverse action against a subject; (3) permit Congress and higher level commands to readily determine the identity of commanders and lawyers who have a pattern of not holding perpetrators accountable; and (4) generate statistics on disposition of serious criminal allegations of sex crimes based on each general court-martial jurisdiction, each service, and the DoD as a whole. When statistics are collected at Service level or DoD level, responsibility for not effectively utilizing the military justice system is simply too diffused, and amounts to almost no possibility of holding individual commanders and lawyers accountable.

(a) ADDITIONAL ELEMENTS IN COMPREHENSIVE DEPARTMENT OF DEFENSE POLICY ON SEXUAL ASSAULT PREVENTION AND RESPONSE.

—(a) POLICY MODIFICATIONS.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall modify the revised comprehensive policy for the Department of Defense sexual assault prevention and response program required by section 1602 of the Ike Skelton National Defense Authorization Act for FY 2011 (Public Law 111–383; 124 Stat. 4430; 10 U.S.C. 1561 note), as further modified in Sec. 572 of the National Defense Authorization Act for FY 2013 to include in the policy the following additional requirements:

(1) A requirement that each general court-martial jurisdiction, Service, and the Department of Defense separately report the following information where action is taken approving the findings of the court-martial during the current Fiscal Year, except as otherwise indicated:³²⁶

(i) number of military victims³²⁷ making restricted, unrestricted, and total reports of sex-related crimes in the current Fiscal Year³²⁸ for each general court-martial jurisdiction,³²⁹ military service, and the Department of Defense overall;

(ii) number of military accused referred to the command for disposition of any sex-related crime;

(iii) number of military accused who are arraigned by a court-martial for sex-related crimes;

(iv) division of sex-related crimes based on the status of victims as active duty military and other victims, and for males and females;

(v) sex-related crimes will be reported in five categories: (a) forcible rape, (b) forcible sodomy, (c) sexual assault, (d) aggravated sexual contact; and (e) abusive sexual contact. Each case will be counted based on the subject and the severity level of the offense. Attempt, conspiracy, and solicitations will be counted in the category as a completed offense;

(vi) number of investigations of military accuseds referred to U.S. civilian prosecution authorities, as well as the number charged and convicted by U.S. civilian prosecution authorities;

³²⁶ The goal is to obtain a snapshot of all completed cases during the fiscal year, and to eliminate confusion about how to count cases started in the previous fiscal year and completed in the current fiscal year, or cases started in the current fiscal year and not yet completed.

³²⁷ Providing separate statistics based on gender of victim or subject is necessary to accurately compare estimates and extrapolations from surveys and to ensure there is no bias in dispositions based on gender. *See supra* note 135.

³²⁸ Different time periods in the 2012 DOD SEXUAL ASSAULT REPORT for dispositions causes confusion. *See supra* note 87. One table showing five offenses for each jurisdiction would meet this requirement for victim reports. *See infra* Appendix B.

³²⁹ The format for the general court-martial convening authority report is at Appendix B.

(vii) for cases involving courts-martial convictions, copies of the charge sheets and promulgating orders (with victim's names redacted), shall be posted on the internet by each general court-martial jurisdiction;

(viii) all active duty victims, who make reports of sex-related crimes, shall receive a case number. Each general court-martial convening authority will place on the command website within thirty days of receipt of an unrestricted report, a summary of the allegation,³³⁰ and the status of the case without listing the name of the victim or alleged perpetrator, unless the military criminal investigative organization certifies that such posting would compromise an ongoing investigation or for other good reason. Within ten days after a commander recommends to prefer or not to prefer charges, or to refer or not to refer the charges to trial by court-martial, the name of the commander will be posted with the case summary and the commander's recommendation. The victim, with the assistance of assigned military counsel, will have the option of posting a signed statement as an attachment to the summary. The allegations will be posted on the general court-martial jurisdiction website for two years after the allegation is first posted;

(ix) Each general court-martial jurisdiction, each military service, and the Department of Defense will post on their websites: the population of the active duty personnel assigned to the general court-martial jurisdiction, Service, and Department of Defense at the end of the Fiscal Year, prosecution rate per thousand assigned active duty personnel, and the conviction rate per thousand for active duty personnel, for sex-related crimes for cases tried to verdict or dismissed for the current Fiscal Year and the previous five Fiscal Years;

(x) Provide the citation for each case where a Service Court of Criminal Appeals or the Court of Appeals for the Armed Forces changed a finding of guilty for a sex-related crime for the previous ten years; and

(xi) The general court-martial convening authority and his or her legal advisor shall personally sign the annual sex crimes report before it is forwarded through the chain of command, and each superior commander in the chain of command and their legal advisor shall personally sign an endorsement forwarding the report to the Secretary of the Service concerned.³³¹

³³⁰ When a victim makes a restricted report, the summary should not include any information that could lead to the identity of the victim. Restricted report information is posted so that a victim will know his or her report was included in reporting.

³³¹ There is no requirement that any particular official sign the installation report. *See* Department of Defense Instruction 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures (Mar. 28, 2013). Although the DoD-level and service-level reports are published on the internet, the installation-level reports are not published on the internet. *Id.* Accuracy, analysis, responsibility, and culpability cannot be assessed and investigators and

(b) PROSECUTION RATE DEFINED—Prosecution rate is defined as the number of cases arraigned at courts-martial, divided by the number of cases cleared by arrest or equivalent by a Military Criminal Investigative Organization using the Federal Bureau of Investigation’s Uniform Crime Report Program criteria³³² for sex-related crimes for each general court-martial jurisdiction, each of the Services, and the Department of Defense overall.

(c) CONVICTION RATE DEFINED—Conviction rate is defined as the number of cases with approved findings of guilty for any offense divided by the number of reported cases arraigned for a sex-related crime for each general court-martial jurisdiction, each of the Services, and for the Department of Defense overall.³³³

(d) SEX-RELATED CRIMES DEFINED³³⁴—In this section, the term “sex-related crimes” includes—

commanders cannot be held accountable for the accuracy of their reports or their investigative or disposition decisions because actions are not attributable to any particular person.

³³² See *supra* notes 258–281 and accompanying text (discussing UCR Program).

³³³ The 2013 NDAA, Section 575(a) requires greater detail in the case synopsis portion of the annual DoD Sexual Assault Report:

(1) If charges are dismissed following an investigation conducted under section 832 of title 10, United States Code (article 32 of the UCMJ), the case synopsis shall include the reason for the dismissal of the charges.

(2) If the case synopsis states that a member of the Armed Forces accused of committing a sexual assault was administratively separated or, in the case of an officer, allowed to resign in lieu of facing a court-martial, the case synopsis shall include the characterization (honorable, general, or other than honorable) given the service of the member upon separation.

(3) The case synopsis shall indicate whether a member of the Armed Forces accused of committing a sexual assault was ever previously accused of a substantiated sexual assault or was admitted to the Armed Forces under a moral waiver granted with respect to prior sexual misconduct.

(4) The case synopsis shall indicate the branch of the Armed Forces of each member accused of committing a sexual assault and the branch of the Armed Forces of each member who is a victim of a sexual assault.

(5) If the case disposition includes non-judicial punishment, the case synopsis shall explicitly state the nature of the punishment.

(6) The case synopsis shall indicate whether alcohol was involved in any way in a substantiated sexual assault incident.

2013 NDAA, Section 575(b) requires “An analysis and assessment of trends in the incidence, disposition, and prosecution of sexual assaults by units, commands, and installations during the year covered by the report, including trends relating to prevalence of incidents, prosecution of incidents, and avoidance of incidents.” It is unclear whether trend information will be specific enough to hold anyone accountable for failures to take appropriate action to punish sex criminals.

³³⁴ The definition of “sex-related crimes” is similar to the definition of “sex-related offenses” in Section 1705(b)(2) of the 2014 NDAA, *supra* note 48, except the offenses of conspiracy and solicitation, 10 U.S.C. §§ 881 and 882 were added. Section 1705(b)(2) defines “sex-related crimes” as:

(1) any offense covered by section 920, 920a, 920b, 920c, or 925 of title 10, United States Code (article 120, 120a, 120b, 120c, or 125 of the Uniform Code of Military Justice);

(2) an attempt to commit an offense specified in a paragraph (1) as punishable under section 880 of such title (article 80 of the Uniform Code of Military Justice);

(3) a conspiracy to commit an offense specified in a paragraph (1) as punishable under section 881 of such title (article 81 of the Uniform Code of Military Justice); or

(4) a solicitation to commit an offense specified in a paragraph (1) as punishable under section 882 of such title (article 82 of the Uniform Code of Military Justice).

(e) **SEVERITY OF SEX-RELATED CRIME**—To avoid double counting any case, the case will be listed under the most serious sex-related crime based on whichever offense has the highest maximum punishments. If two offenses have the same maximum punishment, the offense will be listed which first appears in Part IV of the Manual for Courts-Martial.

(2) Each Service report shall include the reports of all general courts-martial convening authorities in that Service as Appendices to the Service report.

(3) The Department of Defense report shall include the reports of all Services as Appendices to the Department of Defense report.

An offense in violation of subsection (a) or (b) of section 920 of this title (article 120(a) or (b)). (B) Rape and sexual assault of a child under subsection (a) or (b) of section 920b of this title (article 120b). (C) Forcible sodomy under section 925 of this title (article 125). (D) An attempt to commit an offense specified in subparagraph (A), (B), or (C) that is punishable under section 880 of this title (article 80).

Appendix B

Sample General Court-Martial Convening Authority
End of Fiscal Year Report

Restricted and Unrestricted Victim Reports of Sex Crimes Received by DOD in Fiscal Years 2007-2012 (page 1)					
Unrestricted Reports of Offenses	2007	2008	2009	2010	2012
Forcible Rape					
Forcible Sodomy					
Sexual Assault					
Aggravated Sexual Assault					
Abusive Sexual Contact					
Total					
Restricted Reports of Offenses	2007	2008	2009	2010	2012
Forcible Rape					
Forcible Sodomy					
Sexual Assault					
Aggravated Sexual Assault					
Abusive Sexual Contact					
Total					
Total Reports of Offenses	2007	2008	2009	2010	2012
Forcible Rape					
Forcible Sodomy					
Sexual Assault					
Aggravated Sexual Assault					
Abusive Sexual Contact					
Total					
Active Duty Population					
Rate Per Thousand					
Name and Signature of Senior Legal Advisor:					
Name and Signature of Convening Authority:					

Civilian Victim Reports of Sex Crimes Received by DOD in Fiscal Years 2007-2012 (page 2)					
Reports of Offenses	2007	2008	2009	2010	2012
Forcible Rape					
Forcible Sodomy					
Sexual Assault					
Aggravated Sexual Assault					
Abusive Sexual Contact					
Total					
Active Duty Population					
Rate Per Thousand					
Name and Signature of Senior Legal Advisor:					
Name and Signature of Convening Authority:					

Appendix B

Sample General Court-Martial Convening Authority
 End of Fiscal Year Investigation and Disposition Report

Unrestricted Reports of Sex Crimes By Active Duty Personnel With Offense Resolved by DOD in Fiscal Years 2007-2012 (page 1)					
Reports of Sex Crimes Received by Investigators	2007	2008	2009	2010	2012
Forcible Rape					
Rate Per Thousand					
Forcible Sodomy					
Rate Per Thousand					
Sexual Assault					
Rate Per Thousand					
Aggravated Sexual Assault					
Rate Per Thousand					
Abusive Sexual Contact					
Rate Per Thousand					
Total					
Rate Per Thousand					
Sex Crimes Cases Substantiated by Investigators	2007	2008	2009	2010	2012
Forcible Rape					
Rate Per Thousand					
Forcible Sodomy					
Rate Per Thousand					
Sexual Assault					
Rate Per Thousand					
Aggravated Sexual Assault					
Rate Per Thousand					
Abusive Sexual Contact					
Rate Per Thousand					
Total					
Rate Per Thousand					

Unrestricted Reports of Sex Crimes By Active Duty Personnel With Offense Resolved by DOD in Fiscal Years 2007-2012 (Page 2)					
Sex Crimes Cases Arraigned by Court-martial	2007	2008	2009	2010	2012
Forcible Rape					
Rate Per Thousand					
Forcible Sodomy					
Rate Per Thousand					
Sexual Assault					
Rate Per Thousand					
Aggravated Sexual Assault					
Rate Per Thousand					
Abusive Sexual Contact					
Rate Per Thousand					
Total					
Rate Per Thousand					
Sex Crimes Cases with Guilty Findings for Any Offense	2007	2008	2009	2010	2012
Forcible Rape					
Rate Per Thousand					
Forcible Sodomy					
Rate Per Thousand					
Sexual Assault					
Rate Per Thousand					
Aggravated Sexual Assault					
Rate Per Thousand					
Abusive Sexual Contact					
Rate Per Thousand					
Total					
Rate Per Thousand					

Unrestricted Reports of Sex Crimes By Active Duty Personnel With Offense Resolved by DOD in Fiscal Years 2007-2012 (Page 3)					
Sex Crimes Cases with One Year or Less of Confinement	2007	2008	2009	2010	2012
Forcible Rape					
Rate Per Thousand					
Forcible Sodomy					
Rate Per Thousand					
Sexual Assault					
Rate Per Thousand					
Aggravated Sexual Assault					
Rate Per Thousand					
Abusive Sexual Contact					
Rate Per Thousand					
Total					
Rate Per Thousand					
Sex Crimes Cases with more than One Year of Confinement	2007	2008	2009	2010	2012
Forcible Rape					
Rate Per Thousand					
Forcible Sodomy					
Rate Per Thousand					
Sexual Assault					
Rate Per Thousand					
Aggravated Sexual Assault					
Rate Per Thousand					
Abusive Sexual Contact					
Rate Per Thousand					
Total					
Rate Per Thousand					

Unrestricted Reports of Sex Crimes By Active Duty Personnel With Offense Resolved by DOD in Fiscal Years 2007-2012 (Page 4)					
Prosecution Percentage	2007	2008	2009	2010	2012
Forcible Rape					
Forcible Sodomy					
Sexual Assault					
Aggravated Sexual Assault					
Abusive Sexual Contact					
Total					
Conviction Percentage	2007	2008	2009	2010	2012
Forcible Rape					
Forcible Sodomy					
Sexual Assault					
Aggravated Sexual Assault					
Abusive Sexual Contact					
Total					

Sex Crimes By Active Duty Personnel Referred to Civilian Prosecution Authorities in Fiscal Years 2007-2012 (page 5)					
Sex Crime Cases Referred	2007	2008	2009	2010	2012
Forcible Rape					
Forcible Sodomy					
Sexual Assault					
Aggravated Sexual Assault					
Abusive Sexual Contact					
Total					
Sex Crimes Convictions	2007	2008	2009	2010	2012
Forcible Rape					
Forcible Sodomy					
Sexual Assault					
Aggravated Sexual Assault					
Abusive Sexual Contact					
Total					
Prosecution Percentage	2007	2008	2009	2010	2012
Forcible Rape					
Forcible Sodomy					
Sexual Assault					
Aggravated Sexual Assault					
Abusive Sexual Contact					
Total					
Conviction Percentage	2007	2008	2009	2010	2012
Forcible Rape					
Forcible Sodomy					
Sexual Assault					
Aggravated Sexual Assault					
Abusive Sexual Contact					
Total					