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MILITARY SEXUAL ASSAULT: A COMPARATIVE LEGAL ANALYSIS OF THE 2012 DEPARTMENT OF DEFENSE REPORT ON SEXUAL ASSAULT IN THE MILITARY: WHAT IT TELLS US, WHAT IT DOESN'T TELL US, AND HOW INCONSISTENT STATISTIC GATHERING INHIBITS WINNING THE "INVISIBLE WAR"

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INTRODUCTION

In May 2013, the Department of Defense released its 2012 Sexual Assault Prevention and Response Office (SAPRO) report.¹ It is two volumes, totaling 1,494 pages of information related to military sexual assault.² While this seems an overwhelming amount of information, a thorough analysis reveals many inconsistencies, problems in the information gathering, and the absence of many vital statistics. Much of the report is focused on the Department of Defense and individual military branches touting their efforts at eradicating sexual assault, becoming akin to a “show and tell” exhibition rather than providing accurate, rigorous, and useful information.

This Article discusses the numerous flaws in the data gathering and reporting process and how these errors are inhibiting the implementation of effective battle tactics on this front. First, this Article addresses the multiple different definitions used by different gathering organizations, which guarantees that the reports are not comparing the same information. Second, this Article explores how different branches of the military are sharing dissimilar data, making a truly accurate comparison of branch to branch impossible, while also affecting the overall calculations and reporting. Third, this Article explains that the widespread use of the terms “sexual assault” and “military sexual trauma” encompass a greater meaning in the report than in a civilian context, which aids the lack of understanding about the true issue.³ Fourth, this Article details how the report lists the most serious alleged crimes in the findings, though the final findings of the investigation or disciplinary process may not be reflected.⁴ Fifth, this Article clarifies the one crucial statistic that remains unknown: how many victims are not reporting⁵ for fear of retaliation.⁶ Though estimates are made in an attempt to gain an accurate picture of sexual crimes within the military, the estimates are made by a different group using a different definition, which brings the problem back to number one and two.

1. DEP’T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012, Volumes I and II (2013).

2. *Id.*

3. *Id.* at 63 n. 71 (using the term “sexual assault” to refer to a range of crimes, including rape, sexual assault, nonconsensual sodomy, aggravated sexual contact, abusive sexual contact, and attempts to commit these offenses, as defined by the UCMJ).

4. *Id.* at 52.

5. *See id.* at 58 (the Report notes there were 3,374 total reports of sexual assault (restricted and unrestricted) in Fiscal Year [hereinafter FY] 2012), *but see id.* at 12 (the Report *estimates*, however, that 26,000 sexual assaults actually occurred in FY 2012, up 7,000 from FY 2011).

6. *Twice Betrayed*, SAN ANTONIO EXPRESS (May 19, 2013, 1:32 PM), <http://www.mysanantonio.com/news/article/ Twice-Betrayed-4526464.php> [hereinafter *Twice Betrayed*].

Has our military gone rogue where all females are likely to become a victim? Are commanders failing in their leadership by allowing sexual miscreants to walk free? Or, in an institution that prizes honor and character, are there merely a few bad seeds tarnishing the reputation of the masses of heroes in uniform? It is clear that prior to implementing changes to address the problem, the Department of Defense, Congress, and the public need a better understanding of the issue. How else can it be determined if the current laws and policies are a step in the right direction or are merely providing triage for surface issues? Do the implemented changes bring desired reform or do they spread resources too thin, withholding aid from where it is actually needed? Has the confusion over terminology actually clouded the facts and thus impeded efforts at combating this problem?

Andy Stanley sums up the difficulty with this type of approach to problem-solving in the following statement:

It's difficult to solve a problem when you don't know what's wrong to begin with. . . The problem may be that you don't know what the problem may be. And so you have an idea of what the problem may be, but you've been working on it for so long and you've made such little progress. . . it may be that you don't know what the problem may be.⁷

In an effort to determine what the problem may be, and to subsequently solve the problem of sex crimes within the military, this article examines the five primary deficiencies in the report and makes recommendations to ensure a better understanding of the sexual assault climate within the military.

OVERVIEW

It is the topic du jour in the media: military sexual assault. Rarely has a day gone by in the past year where one or more national news headlines does not address this issue; alerting the nation to a new scandal, announcing proposed legislation, or documenting the end of a career for a perpetrator. No one connected to the Armed Forces is immune. The stories include both high ranking⁸ and lower ranking enlisted members,⁹ civilian contractors,¹⁰ officers,¹¹

7. Andy Stanley, *Free: Now You Know*, NORTH POINT COMMUNITY CHURCH (Oct. 21, 2012), <http://northpoint.org/messagesfree/now-you-know/>. While this statement was not made in relation to military sexual assault, it accurately summarizes the challenge in trying to address a problem that is not completely understood.

8. See Paul Purpura, *Louisiana National Guard's top enlisted adviser fired amid sexual harassment allegations*, THE TIMES-PICAYUNE, June 15, 2013, http://www.nola.com/military/index.ssf/2013/06/louisiana_national_guards_top.html (announcing that the Louisiana National Guard's senior enlisted advisor, Sgt. Major Tommy Caillier, had been fired after substantiated allegations of sexual assault).

9. Stacey Thompson, a client of the AMVETS Legal Clinic in Orange, CA, broke her silence about being raped by a fellow marine while she was a Marine Lance Corporal stationed in Okinawa, Japan in an interview with the Associated Press. See Julie Watson, *Stacey Thompson, Military Rape Victim, Says Retaliation Prevalent For Those Who Speak*

chaplains,¹² and heads of the sexual assault response departments.¹³ No branch of the military or military installation is immune as reports emerge from military universities,¹⁴ boot camps,¹⁵ and bases both at home and abroad.¹⁶ No

Out, ASSOCIATED PRESS, May 31, 2013, http://www.huffingtonpost.com/2013/05/31/stacey-thompson-military-rape_n_3365107.html, and Stacey Thompson, *Statement by Stacey Thompson, retired Lance Corporal, U.S. Marines, Advocacy Committee Member, Protect Our Defenders*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/statement-by-stacey-thompson-retired-lance-corporal-u-s-marines-advocacy-committee-member-protect-our-defenders/> (last visited April 9, 2014).

10. Angela Snell, *The Absence Of Justice: Private Military Contractors, Sexual Assault, And The U.S. Government's Policy Of Indifference*, 2011 U. Ill. L. Rev. 1125, 1125-26 (2011) (documenting multiple incidents of military civilian contractors as both victims and perpetrators of sexual assault).

11. See Brian Jones, *The Latest Military Sexual Assault Incident Involves Child Molestation*, BUSINESS INSIDER, June 21, 2013, <http://finance.yahoo.com/news/latest-military-sexual-assault-incident-180501884.html> (reporting the criminal charges faced by Air Force Lt. Col. Reginald W. Kabban, including the assault and molestation of a young girl on multiple occasions between 2005 and 2011. The victim was less than 12 years old when the abuse began).

12. See Richard Sisk, *Army Chaplain Gets Six Months in Sex Case*, MILITARY.COM (June 24, 2013) <http://www.military.com/daily-news/2013/06/24/army-chaplain-gets-six-months-in-sex-case.html> (reporting that Army Major Geoffrey Alleyne, a chaplain and 24-year Army veteran was sentenced by court-martial jury to six months in jail for repeatedly groping a civilian employee at the base).

13. See 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/> (reporting the investigation of Army Sgt. 1st Class Gregory McQueen, Coordinator of the Sexual Assault Prevention Program at Fort Hood, Texas for sexual assault and allegations of forcing women into a prostitution ring). See also *Trial for Air Force Officer Accused of Groping*, ASSOCIATED PRESS, Nov. 13, 2013, <http://nypost.com/2013/11/13/trial-for-air-force-officer-accused-of-groping/> (reporting on the trial of Air Force branch chief for the Sexual Assault Response and Prevention Office, Lt. Col. Jeff Krusinski, who allegedly groped a woman near a strip club located near the Pentagon).

14. See Jim Miklaszewski, Courtney Kube & Elizabeth Chuck, *Naval Academy Files Sex Assault Charges Against Three Football Players*, NBC NEWS (June 19, 2013) http://usnews.nbcnews.com/_news/2013/06/19/19043768-naval-academy-files-sex-assault-charges-against-three-football-players?lite (reporting the charges faced by three male Naval Academy midshipmen for allegedly sexually assaulting a female midshipmen in 2012 and for making a false official statement in connection with the reported incident. Charges include rape, sexual assault and other sexual misconduct). See also Ernesto Londono, *Military Academies Report Increase in Sexual Assaults*, WASH. POST, Dec. 21, 2012, http://articles.washingtonpost.com/2012-12-21/world/36017489_1_sexual-assault-military-academies-defense-department-report (noting the record number of reported sexual assault cases from the U.S.'s three elite military colleges, according to a Dept. of Defense report).

15. See Sig Christenson, *Lackland Trainer on Trial for Abuse Charges*, MY SAN ANTONIO (April 15, 2013), <http://www.mysanantonio.com/news/military/article/Lackland-trainer-on-trial-for-abuse-charges-4435917.php> (reporting details of the sex abuse scandal centered at Joint Base San Antonio-Lackland, which has become the worst in Air Force history with 33 basic training instructors under investigation for allegations of misconduct with 63 recruits and technical training students. Tech Sgt. Bobby Bass is currently on trial for forcing trainees to touch each other in the genital area while naked and committing other misdeeds).

gender is safe as both victims and perpetrators may be male¹⁷ or female,¹⁸ and the crimes range from child molestation¹⁹ to sexual assault and adultery.²⁰ The perpetrators in the armed forces victimize both fellow service members and civilians.²¹

The fallout from military sexual assault includes loss of command positions (for those who have failed to sufficiently address a report of sexual assault),²² ended careers,²³ impeded promotion (for those who have granted

16. At-home assaults are well documented in the cases listed in the previous footnotes. Cf. Kimberly Hefling, *Female Soldiers Raise Alarm on Sexual Assaults – Pentagon Response Include New Trauma Ward, Prevention Strategy*, ASSOCIATED PRESS, July 21, 2008, http://www.nbcnews.com/id/25784465/ns/us_news-military/t/female-soldiers-raise-alarm-sexual-assaults/ (reporting that 15% of women veterans from Iraq and Afghanistan who have gone to a VA facility have screened positive for military sexual trauma (MST)).

17. DEP'T OF DEF., *supra* note 1, at 80 (indicating that approximately 12% of the victims making an unrestricted report were male). *Id.* at 83 (indicating that 90% of the identified perpetrators in unrestricted reports were male). *Id.* at 88 (showing that 13% of the victims making a restricted report were male and 8% were unidentified gender). *Id.* at Encl. 1 Dep't of Army, Executive Summary, at 26 (stating that 1% of male soldiers, both enlisted and officers had been assaulted in the previous 12 months by someone in the Army, either military or civilian).

18. *Id.* at 81 indicates that approximately 88% of the victims making an unrestricted report were female. *Id.* at 83 indicates that 2% of the identified perpetrators in unrestricted reports were female while 8% were unidentified gender. *Id.* at 88 shows that 79% of the victims making a restricted report were female and 8% were unidentified gender). *Id.* at Encl. 1 Dep't of Army, Executive Summary, at 26 states that 2% percent of female soldiers officers and 6% of female enlisted soldiers had been assaulted in the previous twelve months by someone in the Army, either military or civilian.

19. Jones, *supra* note 11.

20. Barbara Starr, *Army Suspends General due to Allegations of Misconduct*, CNN (May 23, 2013), <http://www.cnn.com/2013/05/21/us/army-general-suspended> (reporting that Brig. Gen. Bryan Roberts was relieved of his position as commanding General of the Army training center and Fort Jackson pending investigation of allegations regarding sexual assault and adultery).

21. There are many incidents documented throughout these footnotes relating to both civilians and military members as victims of sexual assault by service members. See Eric Ross, *Investigation continues into sexual misconduct allegations on Fort Carson*, KOAA – COLORADO SPRINGS AND PUEBLO, NBC AFFILIATE (July 26, 2013), http://www.koaa.com/news/investigation-continues-into-sexual-misconduct-allegations-on-fort-carson/#_ (demonstrating the frequency of civilian victims, including 7 members of the US Army who are currently under investigation for sexual assault against underage girls whom they met on an online dating website).

22. See Tom Vanden Brook, *Army Suspends General for handling of Sex Assault Case*, USA TODAY, June 7, 2013, <http://www.usatoday.com/story/news/politics/2013/06/07/general-stripped-of-command-for-failing-to-press-sex-assault-allegation/2402561/> (Army suspended the top commander in Japan, Maj. Gen. Michael Harrison, not for committing a sexual assault, but rather for failing to properly investigate a sexual assault allegation).

23. See, e.g., *Twice Betrayed*, *supra* note 6 (documenting the ended military careers of victims diagnosed with personality disorder after exhibiting signs of PTSD or after being retaliated against for reporting the crime. Perpetrators' careers are often ended with an 'other than honorable' discharge in lieu of court-martial or after a conviction by a court-martial

clemency to a convicted sexual offender),²⁴ and the lifelong tragedy of PTSD (Post-Traumatic Stress Disorder) for victims.²⁵ Even the president is not out of range; a federal court in Hawaii determined that the President's hard line stance on the issue of sexual assault in the ranks of the military constitutes unlawful command influence.²⁶ Such "unlawful command influence" tied the hands of a military tribunal in their punishment of two soldiers on trial for rape,²⁷ and provides a very strong defense tactic for other defendants facing military sexual assault charges within the military.²⁸ As high-ranking officials of the military

jury. The in-depth study referenced in the article documents many of the secondary issues related to military sexual assault that are rarely addressed or understood and how the injury can extend beyond the psychological PTSD).

24. See Craig Whitlock, *General's Promotion Blocked Over Her Dismissal of Sexual Assault Verdict*, WASH. POST (May 6, 2013), http://articles.washingtonpost.com/2013-05-06/world/39060954_1_sexual-assault-jury-commander (documents the blocked nomination of Lt. Gen. Susan J. Helms for the vice commander of the Air Force's space command after Helms overturned the aggravated sexual assault conviction of a captain under her command. This closely resembles a situation a few months previous where Lt. General Craig A. Franklin, commander of the Third Air Force in Europe, overturned a sexual-assault conviction of a star fighter pilot).

25. AMY STREET & JANE STAFFORD, *IRAQ WAR CLINICIAN GUIDE* 66-69 (Dep't of Veterans Affairs and Nat'l Ctr. for PTSD eds., 2nd ed., June 2004), http://permanent.access.gpo.gov/lps76886/iraq_clinician_guide_v2.pdf (documents the psychological responses associated with victims of military sexual trauma).

26. See 10 U.S.C. § 837(a) (2012) (defines Unlawful Command Influence (UCI), the idea that the inherent hierarchy in the command structure of the military may combine with a subordinate's duty to follow the orders of a higher ranking service member, to give a commander or other higher ranking officer untoward influence over the outcome of a case. UCI may interfere with a subordinate's right to a fair and impartial investigation, trial, and/or sentence by following the commander's wishes, either explicitly or covertly. If UCI is found, any legal actions tainted by the UCI can be nullified by the court, including the investigation, verdict, and sentencing/punishment).

27. Eric Slavin, *Judge: Obama Comments 'Unlawful Command Influence' Stars and Stripes* (June 17, 2013), MILITARY.COM, <http://www.military.com/daily-news/2013/06/17/judge-obama-comments-unlawful-command-influence.html>. Navy Judge Cmdr. Marcus Fulton ruled during pretrial hearings in two sexual assault cases - U.S. vs. Johnson and U.S. vs. Fuentes - that comments made by Obama as commander in chief would unduly influence any potential sentencing thereby preventing the military from punitively discharging the defendants if found guilty. This would allow the alleged perpetrators, if found guilty, to remain in the service and retain veterans benefits typically reserved for those with an honorable discharge characterization.

28. See, e.g., Jennifer Steinhauer, *Remark by Obama Complicates Military Sexual Assault Trials*, N.Y. TIMES (July 13, 2013), http://www.nytimes.com/2013/07/14/us/obama-remark-is-complicating-military-trials.html?pagewanted=all&_r=0 (lays out multiple cases where the comments by President Obama have created the effect of "undue command influence." An Army Officer from Shaw Air Force Base in South Carolina had charges of sexual assault dismissed in June 2013; UCI has been cited in the petition to dismiss the court-martial against Jeffrey Sinclair, a Brig. Gen accused of forcing another officer to perform oral sex on him at Fort Bragg, North Carolina in June 2013. A Texas juror was removed from a military jury panel for merely acknowledging that he was aware of the President's remarks. In Virginia, a former defense JAG has used Obama's comments in a motion to dismiss for two additional sexual assault cases against an Army Sergeant and a Navy seaman).

attempt to combat the issue of military sexual assault, they can inadvertently complicate the issue and limit the ability of the military legal system to pursue justice for victims and prevent further criminal acts from occurring.²⁹

Clearly, there is a problem that is affecting our military with no discrimination to rank, gender, or service branch. In May 2012, the Joint Chiefs of Staff implemented their Five Priorities in relation to ending sexual assault in the military.³⁰ In an effort to combat this battle within the military, President Obama signed into law the National Defense Authorization Act 2013 (NDAA 2013) on January 2, 2013.³¹ In this act, eleven chapters³² are devoted to addressing the problem of sexual assault. Advocacy groups hailed this as “a landmark bill with the largest number of sexual violence provisions ever signed into law.”³³ Some of the key provisions implemented strategies for data collection,³⁴ broadened definitions,³⁵ required administrative separation of convicted sex offenders,³⁶ retained restricted reports of sexual assault for fifty

29. Michael Doyle, *Tough Talk by Marine Commandant James Amos Complicates Sexual Assault Cases* MCCLATCHY NEWSPAPERS (September 13, 2012), http://www.mcclatchydc.com/2012/09/13/168410/tough-talk-by-marine-commandant.html#.UfGk_pPn_IU. After the marine commandant indicated that he believed 8/10 sexual assault reports were valid and that he was “very, very disappointed” in court-marital boards that don’t expel those who misbehave sexually, multiple challenges have been raised in Marine Corp defense trials, utilizing the inability to receive a fair trial as a means for obtaining case dismissals, or the requirement for an added step in the case: that of proving beyond a reasonable doubt that undue command influence did not occur prior to proceeding to the criminal trial for the alleged crime.

30. THE JOINT CHIEFS OF STAFF, STRATEGIC DIRECTION TO THE JOINT FORCE ON SEXUAL ASSAULT PREVENTION AND RESPONSE (May 7, 2012), *available at* http://www.sapr.mil/public/docs/directives/Strategic_Direction_on_SAPR.pdf. As stated in DEP’T OF DEF., *supra* note 1, at 2, “DoD SAPRO began to incorporate the 2012 Joint Chiefs of Staff (JCS) Strategic Direction to the Joint Force on Sexual Assault Prevention and Response into an updated DoD-Wide SAPR Strategic Plan” which created the Five Priorities indicated in the SAPRO report.

31. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 [*hereinafter* NDAA].

32. *See id.* § 523, 570-579 (prohibiting waivers for the commission or enlistment in the Armed Forces for any individual convicted of a felony sexual offense in sec. 523 and creating the Improved Sexual Assault Prevention and Response in the Armed Forces in secs. 570-579).

33. NATIONAL ALLIANCE TO END SEXUAL VIOLENCE: NEWS (2013), <http://www.womenscenterc.org/wp-content/uploads/2013-National-Defense-Authorization-Act.pdf>. *See also* SWAN Successfully Urges 2013 National Defense Authorization Act to Include Sexual Assault and Harassment Policies: MOVE TO END VIOLENCE (January 2, 2013) <http://www.movetoendviolence.org/media-room/updates/swan-successfully-urges-2013-national-defense-authorization-act-include-sexual-as>.

34. NDAA, *supra* note 31, at § 570(b), (d).

35. *Id.* at § 570(a).

36. *Id.* at § 572(a)(2).

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years,³⁷ created “special victims capabilities” to aid investigation,³⁸ and required additional command training.³⁹

While any provision signed into law seems to be a step in the right direction, many of these requirements are akin to a dog chasing its tail or the age-old question regarding the chicken and the egg. For example, the NDAA 2013 is written by members of Congress who repeatedly indicate their lack of understanding of the problem by regularly quoting statistics in an inaccurate and/or misleading fashion.⁴⁰ The concern is clear and the outrage is accurate: even one sexual assault in the military is too many as it interferes with unit cohesion, trust, and mission readiness.⁴¹ However, the Department of Defense, the military, and the legislature must put aside the sound bites and political posturing for personal gain. Instead, they must take a hard look at the numbers and understand the nuances of the reported statistics in order to effectively combat the crime of sexual assault and ensure that our military provides the opportunity to serve without threats from within its own ranks.

I. MILITARY SEXUAL ASSAULT DEFINED – COMPARING THE DEFINITIONS USED BY GOVERNMENT AGENCIES, MILITARY SERVICES, THE PUBLIC AND MEDIA, WITH THE CRIMES AS DEFINED BY THE UNIFORM CODE OF MILITARY JUSTICE

The inability to utilize a consistent definition in statistic gathering has contributed to the misinformation that abounds in the media, public opinion, and within the military and political spheres. The wide scope of definitions used has contributed to misunderstanding the extent and nature of sexual crimes within the military and negatively impacted the ability to implement appropriate measures to combat the crime. The myriad of definitions used and how they contribute to the problem are addressed individually below.

A. “Sexual Assault” Is Incorrectly Defined in the Department of Defense 2012 Sexual Assault Prevention and Response Program Report

In order to adequately analyze the issue of military sexual assault, the term must be consistently and clearly defined. This is one of the initial challenges to understanding the matter. The official title of the Department of Defense’s

37. *Id.* at § 577.

38. *Id.* at § 573.

39. *Id.* at § 572.

40. *See generally*, NDAA, *supra* note 31. While this statement contains the author’s commentary, it is proven out throughout the rest of this article with numerous facts and comparisons. *See infra* Part II, Sections B-D.

41. *See* NDAA, *supra* note 32 (the devotion of eleven sections of the NDAA to sexual assault in the military shows a clear stance by Congress regarding the effect of even one sexual assault among the troops). *See also* DEP’T OF DEF., *supra* note 1, at Encl. 2 Dep’t of Navy, Fiscal Year (FY) 2012 Sexual Assault Prevention and Response (SAPR) Program Review Data Call for Sexual Assaults in the Military: Department of the Navy, at 3, 72, 89-90 (acknowledging the importance of addressing these realities).

Sexual Assault Prevention and Response Office 2012 report is, “Department of Defense Annual Report on Sexual Assault in the Military.”⁴² Note that the title includes the term “sexual assault” instead of the broader term “sex crimes.”⁴³ One problem with this approach is that “sexual assault” is a legal term of art.⁴⁴

Sexual assault has a specific definition that determines which actions meet the description of “sexual assault” sufficient for criminal prosecution. According to the Uniform Code of Military Justice (UCMJ), the foundation for all military law, “sexual assault” may be found in the three following situations:

Any person subject to this chapter who:

- 1) commits a sexual act upon another person by (A) threatening or placing that person in fear; (B) causing bodily harm to that other person; (C) making a fraudulent representation that the sexual act serves a professional purpose; or (D) inducing a belief by any artifice, pretense or concealment that person is another person; or
 - 2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or
 - 3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;
- is guilty of sexual assault and shall be punished as a court-martial may direct.⁴⁵

Of extreme importance in correctly understanding this crime is the definition of “sexual act.” The UCMJ defines a “sexual act” as:

- (A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or
- (B) the penetration, however slight, of the vulva or anus or mouth, of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.⁴⁶

42. DEP'T OF DEF., *supra* note 1.

43. *Id.*

44. Uniform Code of Military Justice (2012), Art. 120(b) [*hereinafter* UCMJ]. Note that all references to the UCMJ refer specifically to the 2012 version.

45. *Id.*

46. UCMJ, Art. 120(g)(1).

Though the above definition is the official criminal definition of sexual assault, the Sexual Assault Prevention and Response Office (SAPRO) 2012 report does not limit its statistics to only crimes meeting the above definition.⁴⁷ In fact, the SAPRO report includes issues of unwanted touching, rape, and sexual assault, and refers to them all as “sexual assault.”⁴⁸ “Unwanted touching,” however, is not a crime under the UCMJ,⁴⁹ and rape and sexual assault are separate and distinct crimes under the UCMJ.⁵⁰ For example, careful reading of the definition for sexual act (such that would constitute the crime of sexual assault) shows that in order to have a sexual assault under the UCMJ, there must be a sexual act. In order to have a sexual act, there must be *penetration*.⁵¹ Under the UCMJ, there can be no crime of sexual assault without penetration of the vulva, anus, or mouth.⁵² Additionally, if penetration occurs by a body part other than the penis, a specific inappropriate intent is required in order to be criminally punishable under this UCMJ provision.⁵³

Further confusion occurs when reviewing the reports submitted by each branch that are used to create the final statistics. Each report of a sexual crime is categorized under a specific crime under UCMJ Article 120.⁵⁴ The disposition then indicates whether after investigation it was charged or convicted as the same crime or another crime under Article 120, or a crime under a completely separate UCMJ article.⁵⁵ Reports are not categorized under the broad definition utilized in the report,⁵⁶ causing speculation based on limited synopsis of the facts that are provided in these individual reports by each service branch. Including terms such as “unwanted touching” in a report and combining the reporting of different crimes under the title of “sexual assault” causes a loss of clarity as to the nature of the crimes and inhibits the efforts to end these behaviors within the military.

B. Inclusion of the Workplace and Gender Relations Survey and its use of the Term “Unwanted Sexual Contact” in the Sexual Assault Prevention and Response Office Report is Responsible for the Majority of the Misunderstanding of the Statistics

Within the first few pages of the Sexual Assault Prevention and Response Office 2012 report, the report states:

47. DEP’T OF DEF., *supra* note 1, at 52.

48. *Id.* at 12 n.22, 52.

49. UCMJ, Art. 120 contains the specific sex crimes of Rape, Sexual Assault, Aggravated Sexual Contact, Abusive Sexual Contact, and Forcible Sodomy. Nowhere in the UCMJ is “unwanted touching” listed as a crime.

50. *Id.* at Art. 120(a)-(b).

51. *Id.* at Art. 120(g)(1)(a).

52. *Id.* at Art. 120 (g)(1)(a)-(b).

53. *Id.* at Art. 120(g)(1)(B).

54. DEP’T OF DEF., *supra* note 1, at Encls. 1-4, Service Member Sexual Assault Synopses Reports: Army, Navy, Air Force, National Guard Bureau.

55. *See e.g., Id.* at Encl. 1 Dep’t of the Army, Summary Worksheet, at 34.

56. *Id.*

[T]his year's report assesses the Department's progress in the areas of prevention, reporting, response, and improved knowledge of Sexual Assault Prevention and Response Program using the results of the Defense Manpower Data Center (DMDC) 2012 Workplace and Gender Relations Survey of Active Duty Members (WGRA).⁵⁷

While the Department of Defense is using the WGRA to assess its progress, the WGRA replaces the term "sexual assault" with "unwanted sexual contact," or "USC," for data gathered from service members.⁵⁸ Unwanted sexual contact is defined in the survey to include *all* sexual contact crimes between adults that are prohibited by military law and includes behavior that ranges from rape to abusive sexual contact.⁵⁹ The specific explanation of the term is as follows:

Unwanted sexual contact 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.⁶⁰

This broad definition creates two concerns: one, the WGRA definition of sexual contact does not meet the UCMJ definition of sexual contact,⁶¹ and two, it includes "attempt" crimes though they would not be punishable as a rape, sexual assault, or any other sexual crime under UCMJ Article 120.⁶²

57. DEP'T OF DEF., *supra* note 1, at 1.

58. *Id.* at 2 n.7.

59. *Id.*

60. *Id.*, and *see id.* at 12 n.22.

61. UCMJ, Art. 120(g)(2) defines sexual contact as "(A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body." Further confusion ensues in understanding that under Article 120, there are specific and individual crimes for "abusive sexual contact" and "aggravated sexual contact" which are separate and distinct crimes from sexual assault and have detailed definitions that do not meet the WGRA definitions. This confusion inhibits public understanding of the issue when it seems it is no longer an apples to apples comparison, but so far delineated that is now becomes more akin to an apples to asparagus comparison.

62. UCMJ, Art. 80(a) provides, "An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense"). Further, the explanation in the Manual for Courts Martial states in that voluntary abandonment of the intended crime is a defense to an attempt defense. Manual for Courts Martial United States (2012), Part IV: Punitive Articles, Article 80 – Attempts (4), at IV-5, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf. This further confuses the issue of someone who would likely consider a scenario as imagined under this chapter to be a

The term “unwanted sexual contact” is misleading. It demonstrates how combining multiple crimes into the term “sexual assault” creates a vastly inadequate picture. Though an attempted rape is still traumatizing to a victim, it is not the same as a completed rape (requiring penetration). Additionally, having someone touch a “sexually related area of the body”⁶³ without consent is a violation of autonomy, but is a different issue than rape, attempted rape, or sexual assault as commonly understood and as defined in the UCMJ.⁶⁴ It is important to understand that completed penetration without consent⁶⁵ would likely fall under the definition of a “sexual act” under Article 120 of the UCMJ, but without meeting the additional requirements for sexual assault under the UCMJ, would not be successfully punished as a crime.⁶⁶ Additionally, the term “unwanted touching of genitalia and other sexually related areas of the body” does not become a “sexual contact” sufficient to constitute a crime under the UCMJ unless there is an “intent to abuse, humiliate or degrade any person, or an intent to arouse or gratify the sexual desire of any person.”⁶⁷

At the outset of the fact gathering and reporting, there is a confusion of terms. Sexual assault is a specifically defined crime in the UCMJ, which differs from other sexual crimes.⁶⁸ Though there are multiple distinct crimes, the report now replaces the term “sexual assault” with the expansive term “unwanted sexual contact.”⁶⁹ Such “unwanted sexual contact” has a broad definition and encompasses many separate crimes as defined in the UCMJ.⁷⁰ How then does one dissect the information gathered when the comparison seems to be one of apples to oranges?

The report indicates that there were 3,374 reports of sexual assault involving service members as either victim or alleged perpetrator.⁷¹ These reports involve “a range of crimes prohibited by the Uniform Code of Military Justice (UCMJ), from abusive sexual contact to rape.”⁷² This represents a 6% increase over the 3,192 reports of sexual assault received in Fiscal Year 2011. . . .⁷³ In one sentence, the report contradicts itself regarding the terminology. While it seems as if the Department of Defense is utilizing the over-arching framework of Article 120 of the UCMJ, which is titled, “Rape and Sexual Assault Generally,” the very article they are using as an umbrella breaks down each separate crime of a serious sexual nature, including specific

sexual assault or attempted rape while it may fail to sustain the requirements for criminal prosecution.

63. DEP’T OF DEF., *supra* note 1, at 2 n.7.

64. *See generally*, UCMJ, Art. 120.

65. DEP’T OF DEF., *supra* note 1, at 2 n.7.

66. UCMJ, Art. 120(g)(1)(A)-(B).

67. *Id.* at Art. 120(g)(2)(A)-(B).

68. *Id.* at Art. 120.

69. DEP’T OF DEF., *supra* note 1, at 2 n.7, 12 n.22.

70. DEP’T OF DEF., *supra* note 1, at 2 n.7, 12 n.22, and UCMJ, Art. 120.

71. DEP’T OF DEF., *supra* note 1, at 3.

72. *Id.*

73. *Id.*

definitions of the terms “sexual act,” “sexual contact,” “bodily harm,” “grievous bodily harm,” “force,” “unlawful force,” “threatening or placing the other person in fear,” and “consent.”⁷⁴ Again, these legal terms of art must be proven to convict someone of the crimes of sexual assault, rape, etc. These legal terms, however, are not used in the surveys that gather the reported information.⁷⁵

The Department of Defense report, which utilizes widely varying definitions and relies on external reports that measure different forms of contact, has caused great confusion over what is actually occurring within the military. By utilizing the legal term of art “sexual assault,” and then further clouding understanding by adding terminology such as “unwanted sexual contact,” the Department of Defense has caused confusion and inhibited efforts of those attempting to combat this crime. Without a central definition and uniform collection methods that ensure that similar data and definitions are used while preparing statistics related to military sexual crimes, the military will continue to battle these actions with a limited arsenal. Accurate information is the most important weapon in the fight to end sexual crimes within the military. When lawmakers express frustration over the disposition of reported “sexual assaults,” the broad and overreaching definition of “unwanted sexual contact” becomes significant. Describing events that do not meet the criminal requirements in the report and then wondering why the military prosecution rate is not higher for these “sexual assaults” highlights the depth of misunderstanding that fuels this issue.

C. The Joint Chiefs of Staff are Using a Different Definition of Sexual Assault, Which Means Their Efforts at Eradication of Military Sex Crimes Will Continue to Miss the Mark

To add to the confusion, the Joint Chiefs of Staff “Joint Strategic Direction on Sexual Assault” defines sexual assault as:

[I]ntentional sexual contact, characterized by the use of force, threats, intimidation, abuse of authority or when the victim does not or cannot consent. Sexual assault includes rape, forcible sodomy and other unwanted sexual contact that is aggravated, abusive, or wrongful (to include unwanted and inappropriate sexual contact), or attempts to commit these acts.⁷⁶

This directive, along with the SAPRO 2012 report, is used in the implementation of an updated Department of Defense strategic plan⁷⁷ with a

74. UCMJ, Art. 120(g)(1)-(8)

75. See DEP'T OF DEF., *supra* note 1, at 2 n.7.

76. STRATEGIC DIRECTION, *supra* note 30, at 5 n.2.

77. DEP'T OF DEF., *supra* note 1, at 2.

five-fold approach for eradicating sexual assault in the military.⁷⁸ The definition used in this directive is incredibly broad, including attempt crimes and other crimes that are not encompassed in Article 120 of the UCMJ, representing an expansive definition far beyond the UCMJ, the SAPRO report, and the Workplace and Gender Relations Survey report.⁷⁹

Lawmakers and military officials now work with multiple definitions encompassed under the term of “sexual assault.” The Department of Defense has one definition, the UCMJ has another, the Joint Chiefs utilize a third and distinct definition, and the broadened term of “unwanted sexual contact” is used in the SAPRO report under the same “sexual assault” title. It is expected that the media and lay people would confuse terms. The government, however, is not insulated from such expectation. The branches of government that create such policies and laws for the military should use similar if not identical definitions and compare alike scenarios. With the most advanced military system in the world, why is it so challenging for lawmakers to get on the same page regarding the issue of sexual crimes within the military? Until this occurs, meaningful change will continue to elude service members and governing officials.

D. The Media has Incorrectly Informed the Public with a Confusion of Terms Used Between the Department of Defense, The Joint Chiefs, Victims. . .and the Veteran’s Administration Favored Term of “Military Sexual Trauma”

It is beneficial to reiterate that until the problem is understood, it is difficult to fix. The perception relied on by the public, members of the military, and the legislature is confounded by confusing terminology with vastly different definitions, all coming from the same government. While the left hand and the right hand of the government seem unable to clarify the proper terms, the media and advocacy groups have chosen a “buzz word” that grabs the attention of the public. Here, the term “military sexual trauma” or “MST” has cropped up in media stories, political exchanges, and is used by victims recounting their stories.⁸⁰ This term is often used interchangeably with the chronically misused term “military sexual assault.” However, this adds to the inability to gain a firm grasp on the issue. “Military sexual trauma” has a vastly different definition than sexual assault. The term MST was actually created for use by the Veteran’s Administration (VA) and is completely

78. The five areas of focus are: Prevention, Investigation, Accountability, Victim Assistance (Advocacy), and Assessment. *Id.*

79. STRATEGIC DIRECTION, *supra* note 30, at 5 n.2, and *see id.* at 7.

80. *See Military Sexual Trauma, AFTERDEPLOYMENT, available at* http://afterdeployment.t2.health.mil/sites/default/files/pdfs/library/eLibrary_MST.pdf (published by the military, and commonly uses “sexual trauma” in lieu of the correct terms of “sexual assault” or “harassment” which continue the confusion as the military’s own documents are now inter-changing terms.

separate from the issue within the military justice system.⁸¹ In fact, the term is more applicable to treatment and diagnosis than any specific action. The term comes from 38 USC §1720D titled, “Counseling and treatment for sexual assault” and provides:

The Secretary shall operate a program under which the Secretary provides counseling and appropriate care and services to veterans who the Secretary determines require such counseling and care and services to overcome psychological trauma, which in the judgment of a mental health professional employed by the Department, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty or active duty for training.⁸²

Clearly, the term MST is not indicating an action or crime, but rather a psychological trauma or condition as a result of a sexually linked action or crime by another person.

The US Code seems to carve out MST as a mental health issue related to the victim and would provide a clear separation between the issues of sexual assault and MST. However, the waters become even muddier with the following information provided by the VA:

In more concrete terms, MST includes any sexual activity where you are involved against your will. You may have been pressured into sexual activities. For example, you may have been threatened with negative consequences for refusing to go along. It may have been implied that you would get faster promotions or better treatment in exchange for sex. You may not have been able to consent to sexual activities, for example, if you were intoxicated. You may have been physically forced into sexual activities. Other MST experiences include: Unwanted sexual touching or grabbing; Threatening, offensive remarks about your body or your sexual activities; Threatening and unwelcome sexual advances. If these experiences occurred while you were on active duty or active duty for training, they are considered to be MST.⁸³

While it initially seemed that MST was intended to specifically address a medical or mental health condition that occurred as the result of an unwanted sexual touch or encounter, the VA then states that these incidents *are* MST.⁸⁴

81. See 38 U.S.C. § 1720D(a)(1) (2006), and UCMJ, Art. 120 (which does not use term “military sexual trauma”).

82. 38 U.S.C. § 1720D(a)(1).

83. US Department for Veteran’s Affairs, *Military Sexual Trauma*, NATIONAL CENTER FOR PTSD, <http://www.ptsd.va.gov/public/types/violence/military-sexual-trauma-general.asp> (last updated Jan. 3, 2014).

84. *Id.*

This definition seems to allude to sexual harassment (threatening and unwelcome sexual advances) in addition to all of the Article 120 crimes covered in the SAPRO definition of “sexual assault,” the expansive definition of “unwanted sexual contact” from the Workplace and Gender Relations Survey report, and the additional attempt crimes included in the JCS report’s definition of sexual assault.⁸⁵ The VA’s use of the term military sexual trauma is perplexing in light of the fact that the term, by its very creation, was meant to be limited to a psychological reaction to an event, rather than the event itself.

The VA should have a broader definition of military sexual trauma because their purpose is to provide a wide range of assistance to veterans. Through a more expansive definition, the VA is able to provide treatment to a larger number of victims. However, the term is so broad and overused that it does not correlate to the actual numbers of sexual *crimes*. In fact, one can be a victim of military sexual trauma without having been a victim of rape or sexual assault of any kind. Even victims who *subjectively* believe they have been sexually harassed can suffer from military sexual trauma.⁸⁶ Reliance on the reports of documented military sexual trauma is misplaced and misleading because military sexual trauma and military sexual assault are not the same things. The use of this term by the media and politicians adds to the confusion of the actual problem of military members being victims or perpetrators of sexual crimes.

II. ERADICATION OF SEXUAL ASSAULT REQUIRES THAT SOUND BITES BE PUT ASIDE IN FAVOR OF AN HONEST AND ACCURATE ASSESSMENT OF THE FACTS IN THE REPORTED STATISTICS

In a move that defies logic, the Department of Defense has essentially become their own public relations enemy in this war against sexual assault. In an attempt to address the seriousness of the issue, they have shown themselves more likely to fall on their own sword than to fight to ensure that military branches, lawmakers, and the public have actual facts. The statistics gathering is unnecessarily complex and confusing, with numerous machinations to create a comprehensive report out of unlike data. Once the report is compiled, the information is shared in a way that does not present a true picture of the specific nature of the crime, the overall climate of sexual assault in a given year, or the military status of victims and perpetrators. In order to have comprehensive reform, it is vital to explore the most egregious of the errors made in data gathering and reporting by the Department of Defense and to understand the impact of these errors on effecting lasting change within the military.

85. *Id.* See also DEP’T OF DEF., *supra* note 1, at 52, 2 n.7, and STRATEGIC DIRECTION, *supra* note 30, at 5 n.2.

86. US Department for Veteran’s Affairs, *supra* note 83. The report indicates “service members can experience a range of unwanted sexual behaviors that **they may find** distressing” (emphasis added) indicating that not all actions will be perceived the same by different people, which adds a subjective element to the victim’s experience.

A. *Different Numbers Gathered by Different Organizations Utilizing Different Definitions of Terms Creates Chaos, Not Understanding*

It is unwise to place such emphasis on an issue that cannot be properly defined by the organizations that are purporting to join efforts at eradicating a problem, especially when that problem has yet to be consistently defined or understood. It is critical to dive into the 2012 SAPRO report to look at the specific statistics that have been measured utilizing open-ended and confusing terms. One of the challenges to understanding the report is that while many of the statistics come directly from the military services, others are coming from the Workplace and Gender Relations Survey (WGRA) 2012.⁸⁷

The WGRA survey is not based on the 3,374 reports that were given by victims, but rather is based on a wide spread group of service members in an attempt to gain a broader picture of sexual assault in the military.⁸⁸ As the statistics are dissected, it is important to know that the survey was given to members of the Army, Air Force, Marines, and Navy (excluding National Guard and Reserves) who were under the rank of flag officer and had been in the military at least 6 months.⁸⁹ Terminology is another important item to understand since the numbers may reference a report, a subject, a victim, or a disposition.⁹⁰ Understanding the difference between these terminologies is a key to grasping the most accurate picture.

As stated previously, the numerous definitions used vary widely and cause inconsistencies in the statistics and estimates. Additionally, the WGRA report is based on subjective interpretations of events based on different definitions of what constitutes a sexual assault.⁹¹ Because many of the incidents reported in the WGRA were not reported to the military,⁹² there has been no clarification of terms or ability to characterize these subjectively experienced events into proper categories of sexual harassment, sexual assault, unwanted sexual

87. DEP'T OF DEF., *supra* note 1, at 1.

88. *Id.* at 3, and HUMAN RESOURCES STRATEGIC ASSESSMENT PROGRAM, 2012 *Workplace and Gender Relations Survey of Active Duty Members: Survey Note* (March 15, 2013), at 1, 5-6, [hereinafter WGRA] available at www.sapr.mil/public/docs/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf.

89. WGRA, *supra* note 88, at 5.

90. In the Sexual Assault Prevention and Response Program 2012, many numbers are analyzed together as crimes that occurred in different years may not have a closed investigation until the current reporting years. Or, there may be multiple subjects or perpetrators in one report, victims are not always service-members, and a crime committed in a different year may not be reported until the Fiscal Year being analyzed. Dispositions relate specifically to unrestricted reports (as unrestricted reports remain confidential and are not investigated) but again may include crimes occurring across multiple years, either reported late or the investigation spanned multiple Fiscal Year reports. *See* DEP'T OF DEF., *supra* note 1, at 52-53.

91. WGRA, *supra* note 88, at 1-2.

92. *Id.* at 3 (only 17% of participants indicated they reported the incident to a military authority and only 16% of participants reported it to a civilian and a military authority or organization).

contact, or other criminal category. These numbers are then used to make estimates on the number of “sexual assaults” that have occurred in a fiscal year.⁹³

How does one accurately grasp the nature of sexual crimes within the military when an unwanted touch on the breast outside the clothing and a violent rape by a stranger are being categorized under the same title? How do the powers that be go about trying to change the military structure to eradicate these actions when the actions at issue are so wildly different? Most importantly, if the Department of Defense and military leadership believe that all of the incidents are “sexual assaults,” when they actually encompass a wide variety of behaviors, they will continue to address the problem from a place of chaos, rather than understanding, which will cause efforts to falter.

B. The Media and Political Hysteria being Incited as Military Sexual Assault is Hailed as an Epidemic is not Supported by an Analytical Look at the Statistics

It is frequently called an epidemic⁹⁴ based on the statistics reported. An epidemic is defined as “a rapid development, spread, or growth of something, especially something unpleasant.”⁹⁵ In order to determine if the numbers support this inflammatory description, the first statistic that must be analyzed is the one that has been paid the most lip-service in recent months by the President, Congress, Department of Defense, and the media; namely, the 3,374 reports of sexual assault that were made in 2012 and the estimated 26,000 sexual assaults that occurred in 2012.⁹⁶

There are multiple components of this statistic that should be dissected to aid in the understanding of this issue.⁹⁷ First, it must be understood that the 3,374, includes all reports made, regardless of the year in which the incident occurred.⁹⁸ Additionally, it includes “a range of crimes prohibited by the UCMJ from abusive sexual contact to rape.”⁹⁹ As noted above, this represents a confusing and widely diverse set of possible incidents that would require a

93. *Id.* at 1.

94. A search of the term “military sexual assault epidemic” using Google in February 2014 returns 643,000 hits. *See* Google Search for “military sexual assault epidemic,” GOOGLE, (Feb. 2014), <http://www.google.com> (search “military sexual trauma”).

95. *Epidemic (n) Definition from Collins English Dictionary* (10th ed. 2009), DICTIONARY.COM, <http://dictionary.reference.com/browse/epidemic> (retrieved Aug. 15, 2013).

96. *See* DEP’T OF DEF., *supra* note 1, at 3, 12.

97. In addition to the information that follows this statement, reports of sexual assault are not always reports of an incident that occurred in the reporting fiscal year as a service member may come and make a report at any time subsequent to the incident. There is no statute of limitations. *See* DEP’T OF DEF., *supra* note 1, at 55.

98. *Id.* at 57. The Sexual Assault Prevention and Response Program report indicates that approximately 80% of the reports were related to an incident in Fiscal Year12, 19% were related to an incident in Fiscal Year08-Fiscal Year11, and less than 1% were involving an incident occurring in Fiscal Year07 or prior. *See id.* at 58.

99. *Id.* at 3.

different approach in the eradication, yet are all lumped together and then promulgated as fuel to the media and political frenzy.¹⁰⁰ The definition for “unwanted sexual contact” is utilized in the surveys and places the focus on the victim’s perception rather than the action of the alleged perpetrator.¹⁰¹

Subjective perceptions of a victim widely impact the estimates. Imagine for a moment the situation where a group of male service members are playing a friendly game of football. As typically occurs during sporting events, one member of the team slaps another member of the team on the buttocks after a good play was made. While the likelihood of a sexual intent (or other requirement of the UCMJ to attest this to criminal behavior) is remote on the part of the actor, the recipient of the slap may be sensitive and consider this “unwanted sexual contact,” which then becomes part of the statistic. Consider another scenario where field officers (male and female) are doing an obstacle course and one woman is having difficulty getting over a large wall. In the meantime, a member of her team, who happens to be male, reaches over the wall and grabs whichever body part is most readily accessible and hauls her over the wall. It is plausible that the woman may then file a report or identify herself in the statistic because her male colleague grabbed her breast or buttock in the mad rush to aid her ascent over the wall.¹⁰² While this would fail under the criminal requirements set forth in the UCMJ, the statistic is reported if the reporting party has felt it was a personal violation. How is it determined which of the reported “sexual assaults” are due to an actual criminal behavior that should be punished versus a sensitive “victim”? The numbers, both those estimated and reported, simply do not match the fury that is being spread over an issue inaccurately discussed and the resulting blight on the military is undeserved.

C. 3,374 Service Members Were Not Victims in 2012 Despite the Frequent Reporting of this Number by Media Outlets and Politicians

It is clear that there were not 3,374 sexual assaults that occurred in 2012. But one can assume, at least, that 3,374 service members came forward in 2012 as a victim of sexual assault, right? Wrong. As another victim of the misleading reporting, this number, which is often used to fuel the public perception and political agendas, references the number of reports (both restricted and unrestricted¹⁰³) that included service members as victims or as perpetrators

100. *See supra* Part I.B.

101. WGRA, *supra* note 88, at 1.

102. Officer, United States Armed Forces (The event described here with the female officer, who wishes to remain anonymous, is a true account as heard by the author of this note; The officer was a JAG in the Army, stationed in Guantanamo Bay, Cuba during 2002/2003. The officer in this case did NOT report this incident or consider this an USC, but was aware that others might react differently).

103. An unrestricted report will open an investigation, provide the names of both the perpetrator and victim (if both are service members) to their respective command authority, provide counseling and medical treatment for the victim, collect evidence of the assault, and provide an advocate to the victim. A restricted report allows the victim to receive services,

against a non-service member. This does NOT mean that there were 3,374 service member victims. Nor does it mean that there were 3,374 service member perpetrators. In fact, without further clarification, this number means very little and leads to many faulty assumptions regarding sexual assault. This is another example of how the statistics, which are meant to illuminate the problem of addressing a very real concern over the safety of our service members and civilians at the hands of our service members, are frequently misused and misunderstood.¹⁰⁴

To shed light on the number further and to clarify the number and classification of victims, of the 3,374 reports, there were 3,604¹⁰⁵ total victims involving 2,949 service member victims.¹⁰⁶ This alludes to the idea of 655 non-service member victims who made a report and approximately 2,699 incidents reports that were related to incidents that occurred in 2012.¹⁰⁷ An unrestricted report may involve one or more victims and one or more subjects committing one or more crimes, while a restricted report by design only captures a single victim.¹⁰⁸ In the estimated numbers of the Workplace and Gender Relations Survey 2012 report, the percentage of women who indicated that another service member was the perpetrator was 97%.¹⁰⁹ Actual unrestricted reports made in Fiscal Year 2012 indicate a 62% allegation of service member upon service member sexual assault.¹¹⁰ The remaining 38% is made up of 16% non-service member or unidentified person as the perpetrator and 22% of service members as perpetrators on civilians.¹¹¹ While having a civilian victim does not

but no investigation is pursued and no names are released. A victim may at a later date, choose to turn the restricted report into an unrestricted report for the purposes of investigation and accountability for the alleged perpetrator. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM PROCEDURES, No. 6495.02 (March 28, 2013), available at <http://www.sapr.mil/public/docs/directives/649502p/pdf>. In 2012, there were 2,558 unrestricted reports, 981 restricted reports, 165 converted reports (restricted to unrestricted), leaving 816 reports remaining restricted. DEP'T OF DEF., *supra* note 1, at 3.

104. *See supra* notes 7-33.

105. DEP'T OF DEF., *supra* note 1, at 58. One report may indicate multiple persons as victims in the same incident and again, as indicated above, this number may be a service member victim or a civilian victim. *Id.* at 59.

106. *Id.* at 58. Service member victim does not require that there was a service member offender. Service members often make a report within the military as to a civilian perpetrator which then sees the inclusion of local law enforcement for prosecution. *Id.* at 23. The data captures reports of sexual assault that involves military subject and/or a military victim. *Id.* at 3.

107. *Id.* at 58. *See supra* note 54 for details regarding the percentages related to the years in which the reports are made.

108. *Id.* at 52. This again indicates why it is difficult to get a true picture of the issue when one report may indicate multiple crimes and victims and/or perpetrators.

109. WGRA, *supra* note 88, at 37. 57% indicated the offender was their military coworker(s) and 40% indicated the offender was another military person(s). Though it is important to again note that the WGRA is not reporting on the actual reports made, but on a separate set of survey information gathering.

110. DEP'T OF DEF., *supra* note 1, at 60.

111. DEP'T OF DEF., *supra* note 1, at 61.

lessen the issue of sexual assault within the ranks, it is an important distinction that should be made for the purposes of public and congressional scrutiny.

D. 26,000 Estimated Sexual Assaults in 2012 – A Potentially Misleading Number

While there exists a seemingly simple statistical report of 2,949 sexual assaults in 2012, there is also the widely reported number of 26,000 estimated sexual assaults.¹¹² It is important to understand the dichotomy between these numbers, how the estimate was comprised, and why this estimate further muddies the waters. The 2,949 number from the SAPRO report is used in the Workplace and Gender Relations Survey (WGRA) to come up with the 26,000 estimated number.¹¹³ Frequently, the media reports this as “26,000 incidents of sexual assault”¹¹⁴ instead of quantifying it with the important word “estimated.” Additionally, the WGRA describes the estimate as referring to USC (unwanted sexual contact), which, as described above, is a much broader term than “sexual assault.”¹¹⁵ Utilizing a complicated mathematical formula¹¹⁶, the WGRA estimates¹¹⁷ that the number of service member victim that reported is approximately 11% of the estimated number that may actually have experienced unwanted sexual contact,¹¹⁸ (or 26,000).¹¹⁹ While this will be discussed in more detail below, it is important to note that simply because a report is made, that does not mean that an assault has occurred as these are

112. *Id.* at 3, 12.

113. *Id.* at 12.

114. Richard Lerner, *Sexual Assaults In Military Rose To Over 26,000 In 2012: Pentagon Survey*, HUFFINGTON POST, (May 7, 2013) http://www.huffingtonpost.com/2013/05/07/sexual-assaults-military_n_3229790.html Though the article later distinguishes that 26,000 is an estimate of the number of sexual assaults. The title of the article is clearly misleading. In another article that clearly shows the frequent misuse of this statistic, it states in the opening paragraph, “Last year there were 26,000 reported sexual assaults in the military, a 35% increase over the previous year.” Michael Cain, *26,000 Sexual Assaults in the Military in 2012, But How Many Held Accountable?* POLICYMIC.COM, (May 13, 2013) <http://www.policymic.com/articles/41457/26-000-sexual-assaults-in-the-military-in-2012-but-how-many-held-accountablestates>.

115. DEP’T OF DEF., *supra* note 1, at 12 n.22.

116. This formula is based on the 6.1% of women and the 1.2% of men that reported unwanted sexual contact in the WGRA survey. *Id.* at 12, Fig.5.

117. This estimate is based off the following information: There are approximately 200,000 women in the active duty military. If 6.1% of women experience USC, then approximately 12,000 women could have been victims of USC. There are approximately 1.2 million males in the active duty military. If 1.2% of males experienced USC, then approximately 14,000 males could have been a victim of USC for a total of 26,000 possible cases. Paul Shinkman, *Military Sexual Assaults Skyrocket as Hagel Announces New Plan of Attack*, U.S. NEWS, (May 7, 2013) *available at* <http://www.usnews.com/news/articles/2013/05/07/military-sexual-assaults-skyrocket-as-hagel-announces-new-plan-of-attack>.

118. DEP’T OF DEF., *supra* note 1, at 25.

119. *Id.* at 13.

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based on the subjective interpretation of the encounter from the victim's perspective.¹²⁰

The alternative is also true, however. A report dismissed for lack of evidence does not indicate that an assault did not occur. Attempting to address the matter without truly understanding the numbers is akin to the blind leading the blind. As has been pointed out numerous times, this estimated number is based on an over-arching definition that includes multiple behaviors. In fact, the actual number of crimes that would meet the UCMJ requirement of sexual assault or rape is substantially lower than 26,000, thereby increasing the misleading information presented with this statistic.¹²¹

E. The Risk of Sexual Assault for Women in the Military is No Higher than a Woman Similarly Situated in the Civilian World

In aiming to understand the issue, it is important to understand how the media portrays the matter. For instance, an oft-cited number is that one in three women in the military is a victim of sexual assault.¹²² In fact, according to the

120. *Id.* at 12 n.22.

121. WGRA at 14, 15. Of those who experienced unwanted sexual contact, 31% of the 6.1% of total women that reported, and 10% of the 1.2% of men that reported indicated that they had been a victim of completed intercourse. Under the UCMJ this type of incident could be charged under the crime of sexual assault or rape (depending on other factors), thereby indicating that approximately 1.85% of the 204,309 active female service members and .12% of the 1,195,313 active duty male service members were actual victims of an incident that would qualify as sexual assault or rape under the UCMJ. *See* DEFENSE MANPOWER DATA CENTER, September 2012 Active Duty Military Personnel by Service Rank/Grade and September 2012 Active Duty Military Personnel by Service Rank/Grade (Female Only), available at <https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=milActDutReg>. A quick calculation shows that a better estimate for incident of sexual assault/rape according to the definition most would think of when discussing these crimes is 3,782 women and 1,440 men for a total of 5,222 sexual assault/rape victims, a far cry from the oft reported 26,000 "sexual assaults." Additionally, important to note that for females, this report contains a margin of error of +/- 4-5% while the male report has a margin of error of +/- 8-14% which makes it difficult to ascertain a truly accurate estimate. WGRA at 14, 15.

122. Service Women's Action Network, *Military Sexual Trauma: The Facts*, 1, available at <http://servicewomen.org/wp-content/uploads/2011/01/SWAN-MST-fact-sheet1.pdf>. (last visited March, 29, 2014). The Service Women's Action Network (SWAN) is one of the leading advocacy groups for female veterans and specializes in the issue of military sexual assaults. SWAN organizes conferences and workshops (mainly geared towards survivors of military sexual assault, but also for service providers) and provides referrals for counseling and legal assistance for survivors. *Id.* at 6. However, one of SWAN's central purposes is policy work aimed at "educat[ing] policymakers, the media, health professionals and non-profit organizations about the causes and consequences of Military Sexual Trauma." *Id.* In this same report on page 1, the statistic of 1/3 women is quoted, referring to Sadler et al. *Factors Associated With Women's Risk of Rape in the Military Environment*, 43 AM. J. OF INDUS. MED. 262, 262-73 (2003). This statistic is often quoted in the media. *See* James Risen *Military Has Not Solved Problem of Sexual Assault, Women Say*, New York Times, Nov. 2, 2012 at 2, available at http://www.nytimes.com/2012/11/02/us/women-in-air-force-say-sexual-misconduct-still-rampant.html?pagewanted=all&_r=0 and Molly O'Toole, *Military Sexual Assault Epidemic*

Workplace and Gender Relations Survey 2012 report, the actual number of women who have reported experiencing some sort of unwanted sexual contact since joining the military is 23%, and males are 4%.¹²³ This is a 10% difference in the statistic regarding women.¹²⁴ While even one percent would be unacceptable, it becomes increasingly important to accurately represent the number. The annual number reported in the WGRA 2012 report was 6.1% of woman and 1.2% of men indicated that they had experienced USC in the past 12 months.¹²⁵

Civilian women are often cited as being less at risk for sexual violence than those in the military,¹²⁶ spurring on the war cry to protect our women service members. However, in a comparison of 9,000 civilian woman and 2,800 Department of Defense women (Active Duty and Spouses of Active Duty), the likelihood of sexual violence was the same.¹²⁷ Additionally, the past year and lifetime prevalence of interpersonal violence, sexual violence, and stalking in the civilian and military populations had no statistically significant differences.¹²⁸ Women service members were less likely to experience interpersonal violence in the three years prior to the survey or to experience stalking in their lifetime.¹²⁹ Deployment seems to escalate the experience of interpersonal violence and sexual violence for female service members in the three years immediately following the deployment.¹³⁰ Depending on how you look at the numbers, not only are women in the military less likely to be a victim than their college-bound counterparts¹³¹ or similarly situated civilians,

Continues To Claim Victims As Defense Department Fails Females, WORLD POST (Oct. 6, 2012), available at http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department_n_1834196.html. The “1/3” statistic is from 2003 and is not an accurate portrayal of the current issue as shown in the text above, as well as being misrepresented as 1/3 is equal to 33.33%, not 30% as SWAN misreported from Sadler et al.’s findings.)

123. WGRA, *supra* note 88, at 4.

124. DEP’T OF DEF., *supra* note 1, at 15. Again it is important to note the differing definitions. The WGRA uses “USC” while the SWAN document is reporting a statistic utilizing only the term “sexual assault.” See *supra* notes 88, 122 and accompanying text. There is an even greater disparity than the 10 percent number as reported in the current report as USC is a much broader definition than sexual assault, so logic would show that there were much less than 33% of women falling prey to an actual sexual assault.

125. WGRA, *supra* note 1, at 2.

126. SWAN, *supra* note 122, at 1 (one in six civilian women experience sexual assault).

127. NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISCVS) CENTER FOR DISEASE CONTROL, reported in DEP’T OF DEF., *supra* note 1, at 16. Though the term “contact sexual violence” was used for the civilian information gathering, the definition was standardized to match definitions utilized by the Department of Defense to describe crimes under the UCMJ constituting an adult sexual assault.

128. *Id.*

129. *Id.*

130. *Id.*

131. Rosa Brooks, *Is Sexual Assault Really An Epidemic?* FOREIGN POLICY (July 10, 2013), available at http://www.foreignpolicy.com/articles/2013/07/10/is_sexual_assault_really_an_epidemic. “One major study published by the Justice Department in 2000 found that 3.5 percent of

according to the statistics, 93.9% reported no unwanted sexual contact in 2012. From this view, it seems as if the military is doing a good job dealing with a difficult issue.¹³²

F. Under Reporting of Sexual Crime within the Military is a Substantial Barrier to Accurately Understanding and Eradicating the Issue

One fact that is widely accepted is that incidents of sexual assault are widely underreported both in the civilian and military sector.¹³³ Of the 6.1% of women who indicated they had experienced some form of unwanted sexual contact in the WGRA report, only 33% indicated that they reported the incident to the military.¹³⁴ The 67% that did not report indicated the following reasons: they did not want anyone to know, they felt uncomfortable making a report, and they did not think the report would be kept confidential.¹³⁵ In a striking contrast, only 19% of male victims reported, and the 81% who did not report indicated the following reasons: belief they would be punished for another infraction, not being believed, and belief that evaluations and chance for promotion would suffer.¹³⁶

college women reported a rape or attempted rape, while an additional 15.5 percent of college women reported that they had been 'sexually victimized' in some other way during the academic year in which they were surveyed. Of these 'non-rape' sexual victimizations, 7.7 percent involved physical force. Another 2007 Justice Department study found that '13.7 percent of undergraduate women had been victims of at least one completed sexual assault since entering college.'" Referencing Fisher, Cullen & Turner, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN, U.S. DEPARTMENT OF JUSTICE (2000), and the follow up report Krebs et al, CAMPUS SEXUAL ASSAULT (CSA) STUDY, U.S. DEPARTMENT OF JUSTICE (2007).

132. While it serves the purposes of the politicians and media to use inflammatory numbers, the idea that 6.1% of those surveyed indicated that they experienced sexual assault means that 93.9% of those surveyed indicated no sexual assault. WGRA, *supra* note 88, at 2.

133. DEP'T OF DEF., *supra* note 1, at 18.

134. WGRA, *supra* note 88, at 3. This statistic includes 17% who stated they reported only to the military and 16% who indicated that they reported to the military and a civilian authority.

135. *Id.*

136. *Id.* at 108. Many victims face punishment for secondary infractions (collateral misconduct) such as drug use, fraternization, adultery, underage drinking, drinking on duty, etc. While there is a DOD directive out that requires punishment for these secondary issues is withheld until finalization of the sexual assault investigation and disposition of the report, this remains a key factor for not reporting. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM PROCEDURES, No. 6495.02 (March 28, 2013), *available at* <http://www.sapr.mil/public/docs/directives/649502p/pdf>. "One of the most significant barriers to the reporting of a sexual assault is the victim's fear of punishment for some of the victim's own actions leading up to or associated with the sexual assault incident. Many reported sexual assaults involve circumstances where the victim may have engaged in some form of misconduct (i.e., underage drinking or other related alcohol offenses, adultery, fraternization or other violations of certain regulations or orders)." *Id.* at 41. Such behavior may be considered collateral misconduct, and may be viewed as a contributing factor to the sexual assault. Unit commanders "have authority to determine, in a timely manner, how to best dispose of alleged misconduct, to include making the decision to defer disciplinary actions regarding a victim's collateral misconduct until after the final disposition of the sexual assault case..." *Id.* at 42. Unit commanders should exercise that authority in

Although a significant percentage of victims do not report,¹³⁷ since the Sexual Assault Prevention and Response Program was implemented in 2005, there was a 98% increase in the number of sexual assaults reported within the Department of Defense.¹³⁸ Additionally, there has been a 131% increase in service members accounted for within these reports since 2004.¹³⁹ However, in the statistics referenced above, the Department of Defense estimated that there were 7,000 more incidents of sexual assault in 2012.¹⁴⁰ The problem with this rationale is that in recent years, one of the key focuses in the Department of Defense Sexual Assault Prevention and Response Office was the issue of encouraging open communication and timely reporting.¹⁴¹ How then does one know if the increased reports were a result of more incidents occurring, or an actual success at the goal of encouraging victims to feel safe in reporting? Does the Department of Defense automatically assume that their efforts have been useless, which would lead to serious public concern over their ability to implement any effective changes to the sexual assault issue within the ranks? This flawed logic adds to the confusion regarding sexual crimes within the military structure and furthers the inability to effect true reform.

III. THE FAVORITE STATISTICS REPORT THAT THERE WERE 26,000 ESTIMATED SEXUAL ASSAULTS AND 3,374 REPORTED SEXUAL ASSAULTS IN 2012; BUT THE DEVIL IS IN THE DETAILS

After looking at the overall statistics, it is imperative to dig into the smaller minutia to determine the specific crimes being committed, as the term “sexual assault” has a connotation that widely varies from its actual definition. Are the crimes male on male, female on female, or male to female? Are the victims more likely to be enlisted members or officers? How often are the crimes between an officer and an enlisted member, or a significantly higher-ranking officer? How often is an officer a perpetrator versus a victim? How often are high ranking enlisted members a victim versus a perpetrator? What is

appropriate cases. When considering what corrective actions may be appropriate for the victim's collateral misconduct, commanders and supervisors should keep in mind the critical importance of responding appropriately in order to encourage sexual assault reporting and continued cooperation, while avoiding those actions that may further traumatize the victim. *Id.*

137. WGRA, *supra* note 88, at 3 (indicates that only 33% of the victims of unwanted sexual contact (as defined in the survey) reported the incident to military and/or civilian authorities).

138. DEP'T OF DEF., *supra* note 1, at 23.

139. *Id.* at 23. Of importance to note, and in reference to something previously addressed, in 2004, there were 1275 reports of sexual assault with a military service member as the victim. *Id.* at 24, Fig.8. In 2012, this number increased to 2,949. *Id.* Priority 2 of the Department of Defense directive is to “Increase the Climate of Victim Confidence Associated with Reporting.” *Id.* at 23. Therefore, the question must again be asked, is it possible that the increased number of reports is due to the efforts made under this priority and not an escalation of sexual assaults?

140. *Id.* at 12.

141. STRATEGIC DIRECTION, *supra* note 30, at 5.

the gender breakdown of the victims? How many of the reports are penetration versus non-penetration crimes? How often were substantiated crimes referred to court-martial? How many of the non-judicial punishments were penetration versus non-penetration crimes? How many of the reports were attempt crimes or harassment crimes rather than a completed sexual assault? These are some of the key statistics that need to be addressed before attempting to complete a comprehensive response to the problem.

A. Resources Focused on Ending Military Sexual Crimes Should Focus on the Demographics Linked to Perpetrators and/or Victims: Comparing Reports by Gender, Rank, and Age

Some of these statistics are well documented in the DOD report. For instance, of the 6.1% of women who indicated that they had experienced unwanted sexual contact (USC), 36% indicated that the most serious offense that had been committed against them was unwanted sexual touching only, 26% reported attempted sex, and 31% indicated that they experienced completed sex.¹⁴² Males reported 51% unwanted sexual touching, 5% attempted sex, and 10% completed sex.¹⁴³ Women indicated that 94% of their offenders were male only and 1% of their offenders were female.¹⁴⁴ While women have a higher possibility of being a victim of USC based on the percentage and the number of females in the military,¹⁴⁵ the estimated statistics in the Workplace and Gender Relations Survey show that the number of male victims is higher than the number of female victims each year.¹⁴⁶

According to the SAPRO 2012 statistics from the reported (unrestricted) sexual assaults, females were the victims in 88% of the incidents, with male victims making up the additional 12%.¹⁴⁷ 69% of the victims were between 16 – 24 years old, 25% were between 25 – 34 years old, and the remaining 6% were either over 35 or their age was unavailable.¹⁴⁸ Victim ages are not

142. The data indicated in this section does not always add up to 100% as the information discussed was of the most important and related pieces and doesn't include information about the percentages of information that were unreported, unknown, etc. For instance, some may report sexual assault but then not give the details regarding the nature of the event or the gender of the perpetrator. Sometimes, the perpetrators were groups consisting of male and female or were unknown (when the victim was intoxicated or drugged). Therefore, it was the author's belief that listing only the relevant (majority) of the details in this section was of more importance than the smaller minutia of irrelevant information.

143. WGRA, *supra* note 88, at 2.

144. *Id.* at 3. Data for the gender of the perpetrators against male victims was not indicated in the report.

145. *By the Numbers: Women in the U.S. Military*, (January 24, 2013), <http://www.cnn.com/2013/01/24/us/military-women-glance>.

146. See DEP'T OF DEF., *supra* note 1, at 12, for the calculations regarding the estimate.

147. *Id.* at 81.

148. *Id.* This statistic is not that surprising as the bulk of the members of the military are under the age of 20.

reported in the WGRA 2012, so no comparison can be made. Rank¹⁴⁹ of the victims shows 74% were enlisted at the E1-E4 level, with 12% being enlisted at the E5-E9 level.¹⁵⁰ Less than 4% were officers, with 3% being O1-O3.¹⁵¹ The WGRA utilizes a different set of factors and comes up with the following numbers based on their estimates: of the surveyed individuals, 9.1% of E1-E4's, 3.9% of E5-E9's, 3.9% of O1-O3, and .9% of O4-O10 have experienced unwanted sexual contact in 2012.¹⁵² However, this is a confusing statistic for two reasons. First, it is based on the 6.1% of women who indicated that they had experienced USC in 2012.¹⁵³ Second, the total number of women surveyed is not reported,¹⁵⁴ making it impossible to adequately grasp this information or compare it to the actual numbers given in the Sexual Assault Prevention and Response Program 2012.

After looking at the numbers in the initial reports, it is important to look at the disposition of the investigations. The subjects of the completed investigations were 90% male, 2% female and 8% unidentified.¹⁵⁵ Of these, 41% were under the age of 24, 30% were between the ages of 25-34, 11% were between the ages of 35-49, and 18% were either over 50 years old or their age was unavailable.¹⁵⁶ Ranks of the subjects were overwhelmingly enlisted as 51% were E1-E4 and 28% were E5-E9.¹⁵⁷ 10% of the subjects had an unknown rank,

149. In the military, there are two main classifications of service members; there are enlisted members and officers. The "rank" of the service member determines where they are on the structure of giving and receiving orders. The lower the rank, the less responsibility or authority a service member holds. Officers typically hold a college degree (although there are some exceptions to that) and attend different training and always have more authority than even the highest enlisted member. An enlisted member starts as an E-1 (the numbering system is the same throughout all branches, although each branch may have different titles for the position; for instance, an E-4 in the Marine Corp is a Corporal while an E-4 in the Army can be a Corporal or a Specialist, and in the Navy, an E-4 is a Petty Officer Third Class, and in the Air Force an E-4 is a Senior Airman) and then once meeting certain requirements, can promote up to E-2. A typical promotion schedule from E-1 to E-4 could take from 2-5 years (with the average being 3-4 years). The highest level an enlisted member can receive is E-9. The officer system is similar, but an officer starts at O-1 and can "rank up" to O-10, which also occurs through meeting certain requirements. Therefore, lower level officers and enlisted members are those that have been in the least amount of time and are typically younger than those at a higher rank. While a loss of rank can also occur as a form of punishment in the military system, this is the exception to the rule.

150. WGRA, *supra* note 88, at 12.

151. *Id.*

152. *Id.*

153. *Id.* See also DEP'T OF DEF., *supra* note 1, at 25.

154. See WGRA, *supra* note 88, at 1, 2, 6. The report indicates 108,748 surveys were sent out and 22,792 were received with responses. It indicates that 6.1% of the women who responded indicated they had experienced unwanted sexual contact. The report also indicates that 29% of the surveys sent to women were received (as compared to 24% of the surveys sent to men were received). However, nowhere in the report does it indicate how many of the original 108,748 were sent to women versus men, thereby giving an incomplete statistical picture.

155. DEP'T OF DEF., *supra* note 1, at 83.

156. *Id.*

157. *Id.* at 93.

5% were either civilians or foreign nationals, and only 5% were officers (warrant officers and regular officers).¹⁵⁸ These rank and age specific statistics are important for determining where the main effort is placed when discussing sexual assault prevention. Clearly, the enlisted members are more likely to be both the perpetrators and the victims, thus the majority of the training and prevention efforts should be directed at these persons in order to ensure the most effective change.

B. The Solution for Ending these Criminal Acts Requires an Accurate Understanding of the Types of Crimes Committed

Determining the type of crime committed becomes more challenging when looking at the reports. When a service member makes a report of sexual assault, the most serious crime allegation is listed in the statistical reporting, but it may not reflect the investigator's final findings or the final level of the crime addressed by court-martial or other disciplinary action.¹⁵⁹ Also, in the middle of the reporting Fiscal Year for 2012, there was a change to the UCMJ. This change removed the specific crime of "wrongful sexual contact" from the list of crimes under Article 120 and added the crime of "sexual assault" where previously only the crime of "aggravated sexual assault" was listed.¹⁶⁰ The originally alleged crimes included the following allegations:

. . . 27% of reports alleged rape, 28% alleged either sexual assault or aggravated sexual assault, 35% alleged abusive and wrongful sexual contact¹⁶¹, 6% alleged nonconsensual sodomy, 4% alleged aggravated sexual contact, and less than 2% alleged indecent assault or attempt to commit any of these crimes.¹⁶²

This is in stark contrast to the WGRA report which indicates that attempt crimes made up 26% of the unwanted sexual contact crimes in Fiscal Year 2012 against females and 5% of the crimes against males.¹⁶³ Perhaps attempt crimes are not as widely reported, which may make up for some of the significant difference in the 31% indicated in the WGRA report versus the less than 1% cited in the Sexual Assault Prevention and Response Office 2012 report.¹⁶⁴ While these numbers indicate the crime reported, neither the WGRA nor the Sexual Assault Prevention and Response Office report indicates a

158. *Id.*

159. DEP'T OF DEF., *supra* note 1, at 52.

160. *Id.* at 55-56. The current UCMJ Art.120 lists, rape, sexual assault, aggravated sexual contact, abusive sexual contact, and UCMJ Art. 125 lists sodomy. An attempt to complete any of these crimes is a crime in and of itself under UCMJ Art. 80.

161. DEP'T OF DEF., *supra* note 1, at 55-56, 62, and *see* UCMJ, Art. 120. Wrongful sexual contact was no longer a crime under UCMJ article 120 as of June 28, 2012, and instead has been combined with the crime of abusive sexual contact.

162. DEP'T OF DEF., *supra* note 1, at 62.

163. WGRA *supra* note 88, at 15, 16.

164. DEP'T OF DEF., *supra* note 1, at 62, and *see* WGRA, *supra* note 88, at 15, 16.

synopsis of the nature of the final criminal charge, if any, in the disposition report.¹⁶⁵ Utilizing general numbers regarding criminal charges and disposition fails to provide yet another accurate picture regarding how the military is handling reported sexual assaults.

C. Disposition of the Reports – Why There Will Never Be a 100% Prosecution Rate

Determining the disposition of the reported events becomes another complicated exercise. Of the 3,374 reported sexual assaults in 2012, 2,558 were unrestricted¹⁶⁶ reports.¹⁶⁷ As such, they are the only reports that can be investigated or punished through the military system.¹⁶⁸ At the end of the reporting Fiscal Year, only 1,627 of the 3,374 reports had received a full disposition of the allegations.¹⁶⁹ To add to the confusion of understanding the numbers, there were 2,661 subjects (perpetrators) that had reached a full disposition.¹⁷⁰ However, nearly 1,000 of these subjects were the result of crimes committed pre-Fiscal Year 2012. Of the total subjects reaching disposition in

165. DEP'T OF DEF., *supra* note 1. Individual reports from each service branch indicate: the crime reported, the crime charged, the conviction (if any), final disposition, and ending punishment received on each case. This information is largely ignored in the main report. It would be helpful to indicate that there were X reports of sexual assault. Out of those reports, X were charged as sexual assault, X were charged as wrongful sexual contact, X were charged as drunken or reckless operation, X were charged as rape, and X were dismissed. Of those charged as rape, X were convicted, X were dismissed, X were found guilty of a lesser included charge, etc. A synopsis of this information would be highly beneficial when considering the command discretion issue or removing the charging capabilities from the military (which is the basis of multiple bills currently before Congress). Though this information is included in the enclosures, it is not addressed in the main report and it is highly unlikely that many of the leadership making changes are combing through the entire 729 pages contained within Volume 1 of the report to discern this vital information.

166. As a reminder, the military offers victims two reporting options: unrestricted and restricted. A restricted report allows the victim to make the report and obtain medical and psychological attention, but all physical evidence, including names and any DNA obtained from a rape kit, are kept confidential. The command may learn that a sexual assault was reported, but will not be apprised of the name of the victim, the name of the perpetrator, or any other details, and the assault will not be investigated or prosecuted. An unrestricted report means that the names and evidence are not kept confidential and allows the military branch to pursue the assault with their full resources, to include investigation, punishment, and possible criminal charges for the perpetrator and a full host of medical, psychological, spiritual, and legal services for the victim.

167. DEP'T OF DEF., *supra* note 1, at 57.

168. *Id.* As stated in note 166, a restricted report exists in order to allow a victim to receive medical and mental health treatment and receive additional emotional support. It does not allow an investigation to proceed unless the victim later chooses to convert the restricted report into an unrestricted report.

169. DEP'T OF DEF., *supra* note 1, at 57.

170. *See id.* This number includes subjects from reports made in both Fiscal Year 2012 and pre-Fiscal Year 2012 although the investigations were completed in 2012. The actual number of subjects that were available for disposition for reports made in 2012 was 1,766 for 1,627 completed case investigations. *Id.*

2012, 947 of these subjects were found to be either outside the legal authority of the Department of Defense¹⁷¹ or the military investigation determined the allegation was unfounded (false or baseless).¹⁷² The percentage of unfounded reports has risen at a higher rate than the total reports over the past four years.¹⁷³

Slightly more than sixty-four percent, only 1,714 of the 2,661 subjects reaching disposition in Fiscal Year 2012 (again, not all related to crimes occurring in 2012), were found to have enough substance or a perpetrator under military jurisdiction, thus allowing the case to be referred to their command for disciplinary action.¹⁷⁴ Of these 1,714 referred for discipline, 196 had no punitive resolution due to the victim being unwilling to participate in the military justice process.¹⁷⁵ Commanders in 509 cases determined that there were evidentiary problems such that discipline could not be taken, and 81 received no discipline because the commander determined the claim was unfounded.¹⁷⁶ 1,124 subjects had a sufficient evidentiary basis for discipline.¹⁷⁷ Of this number, 880 received a punishment for a sexual assault offense, while the remaining 244 received discipline for other misconduct discovered during the investigation.¹⁷⁸

171. An unfounded case can be found from lack of evidence or from a victim recounting their story. Subjects outside the Department's legal authority include 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. (DEP'T OF DEF., *supra* note 1, at 4). Roughly 36 percent (947/2661) of the subjects in completed investigations where either unfounded or outside the military jurisdiction. *Id.* This is a huge percentage of cases that cannot be prosecuted for reasons outside of the military's discretion or desire though this is never addressed when discussing the need to strip the military of its discretion in these cases. The broader numbers are often referenced when discussing lack of conviction rate, without acknowledging the numerous valid reasons, completely distinct from abuse of the discretion, that cases are not criminally tried or convicted.

172. *Id.*

173. Rowan Scarborough, *False Reports Outpace Sex Assault in the Military*, Washington Times (May 12, 2013), <http://www.washingtontimes.com/news/2013/may/12/false-reports-outpace-sex-assaults-in-the-military/?page=all>. This article indicates that the number of sexual assault reports has risen 4% from 2009 to 2012, while the number of unfounded allegations rose 35%. Additionally, this article brings to the forefront the issue of how making a sexual assault claim can become a powerful tool in the hands of a service member, and while even an accusation can end a career and reputation, those reports that are unfounded have no bearing on the party making the report. It is important to distinguish a false accusation from one that cannot be proven by the evidence, which is likely where the military's disconnect comes from. It seems plausible that punishing someone for making a report that cannot be substantiated for the purpose of punishment, especially if that allegation is true, would highly discourage true victims from coming forward in an environment when many victims avoid reporting.

174. DEP'T OF DEF., *supra* note 1, at 4.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

To further clarify, once a subject is referred for discipline, punishments may include: court-martial charges, non-judicial punishment (NJP), administrative discharges, and other adverse administrative actions.¹⁷⁹ In Fiscal Year 2012, there were 880 subjects facing punishment for sexual assault charges that had been substantiated.¹⁸⁰ Of the 880 subjects facing penalty, 594 subjects were court-martialed, 158 subjects received non-judicial punishment, 63 subjects received an administrative discharge, and 65 received some other form of adverse administrative action.¹⁸¹ 244 subjects received discipline for some other form of misconduct that either occurred during the reported incident or was discovered during the investigation.¹⁸² Of these 244 subjects, 37 subjects had court-martial proceedings initiated against them, 122 received non-judicial punishment, 26 subjects were administratively discharged and 59 received an adverse administrative action.¹⁸³

At the end of the Fiscal Year 2012 reporting period, of the 594 subjects who had court-martials initiated, 460 had been completed.¹⁸⁴ This number includes the 88 subjects whose court-martials were dismissed.¹⁸⁵ Of those 88 that were dismissed, 86 of them still received a significant punishment, though it would not have included a criminal conviction or jail time.¹⁸⁶ In fact, 16 received a non-judicial punishment and 70 were granted a resignation or discharge.¹⁸⁷ Of the 302 that proceeded to trial, 238 (79%) were convicted and 64 acquitted.¹⁸⁸

The military justice system is limited by the same requirements of a civilian court: that of being able to prove a case beyond a reasonable doubt for a criminal conviction. Sexual crimes are notoriously difficult to prove due to lack of victim involvement, lack of witnesses, lack of physical evidence, the presence of alcohol in the incident, and any prior relationship or involvement between the victim and perpetrator.¹⁸⁹ However, as shown by the 79% conviction rate,¹⁹⁰ when the military does pursue criminal charges against a perpetrator of a sex crime, they have a high rate of success. Deciding when to take a case to trial or allow for other punishment is made with the insight of a

179. *Id.*

180. *Id.* at 68, Exhibit 10. Of these 880 subjects facing punishment, 449 were from reports made in Fiscal Year 2012.

181. *Id.*

182. *Id.*

183. *Id.* Of these 244 subjects, 104 were from Fiscal Year 2012 reports.

184. *Id.* at 71.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. See Madeline Buckley, *Sex Crimes a Challenge for Prosecutors, Advocates*, NECN (Aug. 18, 2013), http://www.necn.com/08/18/13/Sex-crimes-a-challenge-for-prosecutors-a/landing_nation.html?&apID=0312dec68051477093f82392bddfeff1.

190. DEP'T OF DEF., *supra* note 1, at 71.

military lawyer.¹⁹¹ The lawyer assists the commander in understanding the legal challenges and in making the most appropriate decision for disposition of the case.¹⁹²

D. Command Discretion – Though Congress says Otherwise, This is Not The Problem (or the Appropriate Remedy)

As a short aside, since command discretion is currently a hot topic in the media and political spectrum, the numbers indicate that the structure is working. As major changes are being recommended to Congress,¹⁹³ including stripping the command of this discretion,¹⁹⁴ it is important to review the cases where a commander has utilized his/her discretion to determine if this power is being abused or used appropriately. As cited above, commanders in 509 cases determined there were evidentiary problems such that discipline could not be taken, and 81 received no discipline because the commander determined the claim was unfounded.¹⁹⁵ Key to this issue is that these cases were not reviewed by the command until after the investigative process had been completed and the investigator had determined there was enough evidence to warrant the case going to the next level.¹⁹⁶ Additionally, of the 158 referred for non-judicial punishment, 143 were found guilty and issued punishment, while an additional 11 were found not guilty.¹⁹⁷

In the uproar over inappropriate use of this power, the following statistics may shed light on the actions of the command. The Army reported 1,289 allegations of sexual assault¹⁹⁸ with 1,398 victims (not all service members).¹⁹⁹ 424 were disposed of through court-martial.²⁰⁰ 60 were disposed of through involuntary, adverse administrative discharge (with 28 of these receiving

191. THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., *COMMANDER'S LEGAL HANDBOOK* 3, 11, 13 (2013), *available at* <https://www.jagcnet.army.mil/8525799500461E5B/0/A1473A5772D802E385257A5E004587B3/%24FILE/Commanders%20Legal%20HB%202013.pdf>. While this handbook is specific to the Army, the role of the command lawyer or JAG is the same for all branches of the military.

192. *Id.*

193. Donna Cassata, *Bill to Revamp Military Justice Gains Support*, ASSOCIATED PRESS (July 16, 2013), *available at* (LEXIS).

194. Jennifer Hlad, *Military Leaders Argue for Commander Discretion in Sexual Assault Cases*, STARS & STRIPES (June 4, 2013), <http://www.stripes.com/news/military-leaders-argue-for-commanders-discretion-in-sexual-assault-cases-1.224307>.

195. DEP'T OF DEF., *supra* note 1, at 68, Exhibit 10.

196. *Id.* at 79, *and see* Fiscal Year 2012 Army Report, *supra* note 49, at 3.

197. *Id.* at 75. It is typical in these cases that the non-judicial punishment includes a combination of the following punishments: "reduction in rank, a fine or forfeiture of pay, a restriction on their liberty. . . and hard labor. . ." *Id.* Occasionally a non-judicial punishment can contribute to a subsequent administrative discharge depending on the service history of the subject. *See Id.*

198. DEP'T OF DEF., *supra* note 1, *Dep't of Army*, at 41.

199. *Id.*

200. *Id.* at 5.

additional non-judicial punishments).²⁰¹ 117 allegations were disposed of through non-judicial punishment.²⁰² All 117 offenses were *non-penetrative offenses*, the majority being unwanted touch over the clothing.²⁰³ There were zero penetrative offenses that received a non-judicial punishment. The same holds true for the 56 cases that received other adverse administrative actions.²⁰⁴ Only 150 allegations were determined to have insufficient evidence to meet the burden of proof required for military justice actions and 188 could not be prosecuted based on jurisdictional issues, unknown subjects, unwilling victims, deceased or deserted subject, or an expired statute of limitations.²⁰⁵

At this juncture it is imperative to revisit an issue discussed in Part I: how the inconsistent definitions create a problem in understanding the disposition of the reports. If an attempted rape is classified for reporting purposes as a “sexual assault,” but then not prosecuted as a “sexual assault” because there was no penetration, this leads to an outcry over the lack of punishment or an abuse of command discretion, when quite simply, as a matter of law, it does not meet the requirements for prosecution. While it may be successfully prosecuted as “Attempt” under UCMJ Article 80,²⁰⁶ this Article allows for defenses that are not available, specifically the defense of “voluntary abandonment” should one “voluntarily and completely abandon the intended crime, solely because of the person’s own sense that it was wrong, prior to completion of the crime.”²⁰⁷

As a practical example of the reporting versus disposition of the reports, the Navy reported 527 unrestricted and 248 restricted reports in Fiscal Year 2012.²⁰⁸ 332 investigations were completed.²⁰⁹ 28% of the reported cases alleged aggravated sexual assault while 28% alleged rape.²¹⁰ In these completed investigations, there were 356 total victims with 23% alleging aggravated sexual assault, 27% alleging rape, and 28% alleging wrongful sexual contact.²¹¹ The Navy reports 501 dispositions for perpetrators in Fiscal Year 2012.²¹² 315 of those subjects were not prosecuted because they were either unknown, had insufficient evidence, the victim wouldn’t cooperate, or lack of jurisdiction.²¹³

201. *Id.* at 6.

202. DEP’T OF DEF., *supra* note 1, Dep’t of Army, at 41.

203. *Id.*

204. *Id.*

205. *Id.* at 42.

206. UCMJ, Art. 80

207. Manual for Courts Martial United States (2012), Part IV: Punitive Articles, Article 80 – Attempts (4), at IV-5, available at http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf.

208. DEP’T OF DEF., *supra* note 1, at Encl. 2 Dep’t of Navy, Fiscal Year (FY) 2012 Sexual Assault Prevention and Response (SAPR) Program Review Data Call for Sexual Assaults in the Military: Department of the Navy, at 6.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 7.

213. *Id.*

In 64 cases, the allegation was unfounded by the command.²¹⁴ In total, 176 cases were presented for disposition decisions to command.²¹⁵ Where some form of sexual assault was founded, commanders initiated court-martials against 99 subjects, non-judicial punishment against 27, administratively discharged 3, and took administrative action against 8 subjects.²¹⁶ Additionally, for those who received a lesser charge, there were 11 court-martials, 21 non-judicial punishments, 3 administrative discharges, and other adverse administrative action against 4.²¹⁷

A key statistic reported by the Navy was that in 61% of the cases, victim and subject were alone at the time of the incident, further reiterating the difficulty of prosecution due to lack of corroborating evidence or witnesses.²¹⁸ Where evidence supported command action, 27 cases received non-judicial punishment (NJP), and where a non-sexual assault case was the final disposition, there were 21 NJP's given.²¹⁹ The Navy, Marine, and Air Force did not report statistics relating to whether NJP's were given for penetration offenses or only for non-penetration crimes.²²⁰ However, when it comes to command discretion, it seems that the bigger issue is the lack of evidence available for the prosecution of cases, not commanders who are letting sexual perpetrators skate by without punishment. To the contrary, reading the specifics in the enclosures by each service branch show that frequently the punishment is more severe than most would think necessary in the situation.²²¹

It is clear to see that the 3,374 number does not present an accurate picture of the actual criminal behaviors, and yet it is cited over and over again by the

214. *Id.*

215. *Id.*

216. *Id.* at 7-8.

217. *Id.* at 8.

218. *Id.* at 11.

219. *Id.* at 8.

220. See DEP'T OF DEF., *supra* note 1, at Encl. 2 Dep't of Navy, Fiscal Year (FY) 2012 Sexual Assault Prevention and Response (SAPR) Statistical Report Data Call for Sexual Assaults in the Military: United States Navy, at 24; see also DEP'T OF DEF., *supra* note 1, at Encl. 3 Dep't of Air Force, FY12 DoD Sexual Assault (SAPR) On Sexual Assault in the Military Statistical Report: Air Force, at 3.

221. DEP'T OF DEF., *supra* note 1, at Encl. 1 Dep't of Army, Summary Worksheet at 26. For example, in a reported case between a male E2 soldier and a female civilian, "Victim alleged that subject rubbed his genitals against the victim while she was sleeping in his bed. The victim told the subject no, he stopped and the victim left the room." *Id.* It was reported under Article 120, Abusive Sexual Contact. *Id.* It was charged and he was convicted of this crime (through the command, not court-martial). Non-judicial punishment included fines of \$528, 14 days restriction, and an administrative discharge under general conditions. *Id.* Reading between the lines would bring one to assume a civilian in a military barracks was in the bed of the soldier by her own accord. Without knowing the events that led up to her being asleep in the bed with the soldier, his actions had grave consequences that many would likely consider to be over-kill in the scenario. This is a clear indicator that most commanders are not taking these allegations or the climate and reaction to sexual crimes lightly; thus, removing this discretion and ability to effect punishment within their ranks in a way that commanders deem most appropriate for the purposes of good order and discipline seems to be an ineffective step in the battle.

Department of Defense, politicians, victims, and the media. A report of sexual assault does not mean a sexual assault actually occurred. The term “sexual assault” brings to mind all manners of horrific and brutal crimes, when the statistical definition has a much broader coverage. In fact, as indicated by the varying definitions, it could include a complaint of sexual harassment (which can be as minor as offensive language) or rise to the level of a violent rape. While each of these actions is a tragedy in a military system that prides itself on honor, a true vision of the climate must be had before change can be made.

IV. RECOMMENDATIONS

The problem of sexual crimes that occur within the military is a difficult one, and solving it will not be easy. However, the government and military branches would take a large step in the right direction if the decision-makers had a better grasp of the actual issue. Understanding the true nature of sexual assault is the easy part of the large and challenging scourge that hangs over the military. While attempting to gain insight into the true nature of the issue, the Department of Defense would do itself a great service by educating Congress, the military service branches, and the public of the true facts, rather than falling on their swords – thereby exacerbating the negative impression and feeding into a frenzy based on misunderstood and misused statistics.

A. Utilization of Standard Measures in Statistic Gathering Standard Definitions - Use the definitions in the UCMJ

As discussed in Part I, multiple agencies that are involved in the battle to end military sexual assault and provide aid to its victims are using confusing and contradictory definitions.²²² An easy fix to this, which will aid information gathering and public understanding, would be to utilize the definitions of the crimes specified in the UCMJ. More accurate reporting of the crimes will be a huge step forward in informing those who are implementing policy of the specifics and enable the resources to be best focused. This will also aid in the understanding of prosecution rates and will reduce a step in the investigative process. While it is not for a victim to have to determine specific factors that are required for conviction under the UCMJ, such as rape, utilizing UCMJ options in the reporting will open multiple options²²³ to the victim in the

222. *See supra* Part I.B.

223. UCMJ, Articles 93, 120(b), (c), 124, 133, 134. The UCMJ offers a myriad of crimes that are available as options for the punishment of crimes involving undesired sexual encounters. For instance, an officer can be charged with conduct unbecoming an officer and gentlemen. UCMJ, Art. 133. If some form of serious bodily harm occurs they can be prosecuted for maiming. UCMJ, Art. 124. Sexual harassment as traditionally defined that occurs from an officer to a subordinate can be prosecuted under cruelty and maltreatment. UCMJ, Art. 93. Stalking can be prosecuted under Article 120(b) and other sexual misconduct such as peeping, taking pictures or videos of someone in private and/or broadcasting those images, or indecent exposure (such as flashing) can be prosecuted under Article 120(c). Under Article 134, there are additional options for prosecution such as fraternization, adultery, assault with intent to harm, disorderly conduct, and threats. This is

reporting phase. As the Department of Defense plans to have a special victims counsel (lawyer) available for each victim,²²⁴ the lawyer can aid the victim while reporting to ensure the proper crimes are reported. This will also aid in lowering the huge disparity between reported “sexual assault” and the final disposition where very few actual “assaults” are found to have occurred.

For example, a person who wakes up without clothes and finds another unclothed person on top of them would likely make a claim of sexual assault. But as discussed above, this cannot be prosecuted as a sexual assault unless there was a penetration.²²⁵ The individual may make a report of attempted rape, yet rape requires an element of force, fear, threats, rendering of a person unconscious, or giving them a drug or intoxicant. Yet two service members who have had too much to drink and end up in this situation will not meet the legal elements of rape despite the victim’s perception.²²⁶ Standardizing definitions in reporting and data gathering is a simple step towards addressing a complicated problem.

B. Standardized Data Should be Reported

In the Workplace and Gender Relations Survey 2012 report, many of the pieces of data collected are analyzed in a manner that does not mirror the Sexual Assault Prevention and Response Program report, though the Sexual Assault Prevention and Response Program report then utilizes the data.²²⁷ Additionally, the data shared by each service branch of the military that culminates in the 2012 report varies widely. The Army provides the most thorough details, including a breakdown of each report, the final disposition of each report, data regarding when the incidents occurred versus when they were reported, the conversion of restricted to unrestricted reports, and a break-down of each type of punishment in relation to the type of crime accused. As noted above, the Army shares statistics related to how many non-judicial punishments were handed out for penetration crimes. It seems safe to assume that the handing out of a NJP for a penetration crime would be viewed by most citizens to be a grossly inadequate punishment and would aid the argument towards removing the commander’s discretion in punishment. However, the Army

not an exhaustive list but provides an overview of the options available for criminal accountability for crimes often occurring under the guise of “sexual assault.”

224. Memorandum from Secretary of Def. for Secretaries of the Military Departments (Aug. 14, 2013), *available at* http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf.

225. *See supra* Part I.A.

226. Sexual actions that do not adequately meet the criminal definitions may still be punished under other non-judicial punishments available to the command. Similarly, a non-penetrative incident may be punishable under UCMJ, Art. 120(b) or (c) which punish other sexual misconduct. *See* UCMJ, Art. 120(b), (c). However, these incidents should be reported clearly in the statistics as reports of sexual misconduct, or the specific crime, instead of labeling all incidents as “sexual assault.”

227. *See supra* Part II.A. for a more detailed discussion.

statistics show that this occurred exactly zero times,²²⁸ which aids the military's argument in keeping the command discretion in place. However, the other three service branches did not provide this information.

While again pointing to the concern about not solving a problem without understanding it fully, this becomes a glaring challenge in the proposed reform regarding the command discretion. It is impossible to fully analyze whether this is an issue that needs addressing based on fact rather than hysterics when the numbers are not reported. Standardizing the data that is required to be reported will further enlighten the decision makers in their approach to combating the problem.

C. Standardization of Sexual Assault Response Program across the Service Branches

Much of the Sexual Assault Prevention and Response Program 2012 report is spent with each service branch breaking down the 5 priorities defined by the Joint Chiefs and showing how those priorities have been implemented into that service branch. While the Department of Defense sets guidelines, each branch is left to implement the guidelines in the manner it feels best. For instance, the Marine Corps has a requirement for an initial determination on any sexual assault report within 8 days.²²⁹ The other branches do not have this same requirement. Why the disparity? The guidelines should be the same throughout. The Secretary of Defense recently implemented 7 new requirements²³⁰ some of which aim to employ a more standardized approach across each branch, however still leaves much discretion to each of the four services. These new regulations should include standard trainings related to prevention, responses by the command, investigation procedures, and victim advocacy. A standardized approach will not only aid the information gathering but save the tax payers money as one comprehensive program is developed, instead of four separate programs. The American military is an elite fighting force that should learn that fighting together is always more effective than floundering alone.

CONCLUSION

The military service branches, the Department of Defense, and Congress must take a more accurate and comprehensive approach to understanding this problem and educating the public. While even one sexual crime is a scourge on the honorable foundations for which the military prides itself, the misunderstanding of the issue has marred the military's image and distracted from the ability of lawmakers to effectively address the problem. By implementing a uniform system of information gathering within each service

228. DEP'T OF DEF., *supra* note 1, Encl. 1 Dep't of Army, Summary Worksheet, at 26-89.

229. DEP'T OF THE NAVY, DEP'T OF DEF., MARINE CORPS ORDER 1752.5B 1, 28 (Mar. 1, 2013), *available at* http://www.marines.mil/portals/59/MCO%201752_5B.pdf.

230. Secretary of Def. Memorandum, *supra* note 224.

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branch, the Department of Defense will be empowered in creating meaningful statistics for subsequent Sexual Assault annual reports. When working with other agencies to gain a more complete understanding of sexual crimes and unwanted sexual acts within the military, the governing agencies must utilize the same definitions to ensure the most accurate comparisons and estimates of the behaviors that are occurring. Only after the Department of Defense, Congress, and each service branch of the military have an accurate and fully developed understanding of these crimes and behaviors can our nation come together in a focused effort to end the “invisible war” on our service members.