

**ONE YEAR LATER...MILITARY JUSTICE SYSTEM HAS BEEN DEMONSTRABLY
PROVEN TO REMAIN BROKEN, CONTINUES TO FAIL OUR HEROES IN
UNIFORM AND WEAKEN OUR MILITARY**

***Top Reasons Why the Broadly Bipartisan Military Justice Improvement Act Is Still Needed to
Finally Give Our Brave Men and Women Serving Our Country a Fair Shot at Justice***

Flashback:

“A majority of the Senate of the United States expressed a lack of confidence in our ability to solve this ourselves...we are currently on the clock if you will...the President of the United States said to us in December, you know what, you’ve got about a year to review this thing and show me you can make a difference... we understand that just because Senator Gillibrand’s vote was defeated yesterday doesn’t mean that a year from now it may not be reintroduced and if we haven’t been able to demonstrate we’re making a difference, you know, then we deserve to be held to the scrutiny and standard.” – Chairman of the Joint Chiefs of Staff, General Martin Dempsey on PBS NewsHour (March 8, 2014)

Flashforward:

14th Military Police Command Sergeant Major at Fort Leonard Wood: “If any more sexual assault cases come forward” the whole company of soldiers won't graduate. – witness testimony at court-martial of former Fort Leonard Wood Drill Sergeant Angel Sanchez, who was found guilty on multiple counts of sexually assaulting female trainees (September 23, 2014)

Year in Review:

1) THE DATA IN FY2013 SAPRO REPORT WAS DEEPLY TROUBLING:

The reforms passed in last year’s National Defense Authorization Act only benefit the two in ten survivors who come forward to file unrestricted reports and do not address the heart of the problem of vast underreporting. Survivors of military sexual assault have consistently and independently of each other said the number one barrier to reporting was a lack of trust in the chain of command. This view was validated by the former **Commandant of the Marine Corps, General James F. Amos**, who stated in April of last year, "Why wouldn't female Marines come forward? Because they don't trust us. They don't trust the command. They don't trust the leadership." Any package of reforms that does not directly address this irreparably broken trust in the system is incomplete at best.

The Department of Defense has stated it believes current reforms are working and should be allowed to continue before exploring further reforms. The increase in reported sexual assaults in the FY2013 SAPRO Report was widely touted as proof of success in the effort. However, a closer look at the data clearly does not support this assessment, which cannot be reasonably concluded as a factual statement.

First, without prevalence data (*i.e.*, an estimated total number of unwanted sexual contacts) it is impossible to draw any conclusions on the rate of reporting when only one data point of two was made available (number of actual reports / prevalence data = rate of reporting). In fact, the previous FY2012 report also showed an increase in the number of reports, but the increase in the estimated total number of unwanted sexual contacts was even greater showing **there was an actual drop in the rate of reporting** that year.

Even more concerning, the latest data from the FY2013 SAPRO report shows:

- **The percentage of unrestricted reports went down from the previous year while the percentage of RESTRICTED reports went up.** It does not show an increased trust in the system if more service members do not feel safe to file a report with their name attached to it seeking justice. Restricted reports also cannot help to get predators out of the military where they do not belong.
- **The percentage of reported cases upon which the command could act¹ went down from 51% in FY2012 to 42% in FY2013.** Although there were 5,061 reports, command action was only considered on 2,149, because others were restricted, allegations were not founded by the Military Criminal Investigating Offices, or the military did not have jurisdiction. This suggests that while there may be an increase in confidence in the system of care, there was no corresponding increase of confidence in the current military justice system.²
- Despite an increase of 1,687 total reports, there was an increase of only 244 cases in which charges were filed from the previous year. This means that despite an increase in overall reporting, there was actually a decrease in the rate of cases in which charges were filed from 17.6% to 16%. When more service members come forward to file reports, but fewer cases result in charges being filed, it could further reduce trust in the system and serve as a disincentive to report.³
- There was essentially no increase in the percentage of cases that proceeded to trial. In FY13, only 484 cases proceeded to trial up from an anemic 302 the previous year – that’s only a 0.6% difference in the rate of prosecutions when compared to total reporting. **So while raw reporting numbers went up 50% in FY13- prosecution AND conviction rates remained the same when compared to FY12.** There were only 376 convictions in FY2013, compared to 238 in FY2012, for a 7% rate of all reported cases in each year.⁴

¹ Cases in which command action considered were calculated in the SAPRO reports as all subjects from unrestricted reports (FY13 and from prior FYs) minus subjects against whom allegations were unfounded by Military Criminal Investigative Organizations; civilian, foreign, unknown or deserter subjects; and service members under civilian jurisdiction.

² Department of Defense Sexual Assault Prevention and Response, Department of Defense Annual Report on Sexual Assault in the Military (SAPRO Report) Fiscal Year 2013, Exhibit 1: Reports of Sexual Assault and Investigations Completed in FY13, p. 67; and Exhibit 9: FY13 Subjects Outside DoD Legal Authority, p. 76. AND Department of Defense Sexual Assault Prevention and Response, Department of Defense Annual Report on Sexual Assault in the Military Fiscal (SAPRO Report) Year 2012, Exhibit 1: Reports of Sexual Assault and Investigations Completed in FY12, p. 57; and Exhibit 9: FY12 Subjects Outside DoD Legal Authority, p. 66.

³ SAPRO Report FY 2013, Exhibit 1: Reports of Sexual Assault and Investigations Completed in FY13, p. 67; and Exhibit 12: Dispositions of Subjects Against Whom Sexual Assault Courts-Martial Charges Were Preferred, FY13, p. 83. AND SAPRO Report FY2012, Exhibit 1: Reports of Sexual Assault and Investigations Completed in FY12, p. 57; and Exhibit 12: Dispositions of Subjects Against Whom Sexual Assault Courts-Martial Charges Were Preferred, FY12, p. 73.

⁴ SAPRO Report FY2013, Exhibit 12: Dispositions of Subjects Against Whom Sexual Assault Courts-Martial Charges Were Preferred, FY13, p. 83. AND SAPRO FY2012, Exhibit 12: Dispositions of Subjects Against Whom Sexual Assault Courts-Martial Charges Were Preferred, FY12, p. 73.

Category	FY2013 ⁵	FY2012 ⁶	FY2011 ⁷
Total Estimated Cases	N/A	26,000	N/A
Total Reports	5,061 (NA)*	3,374 (12.9%)*	3,192 (N/A)*
Unrestricted	3,768 (74.5%)**	2,558 (75.8%)**	2,439 (76.4%)**
Restricted	1,293 (25.5%)**	816 (24.2%)**	753 (23.6%)**

* Percentage of estimated cases reported

** Percentage of total reports

2) NEW STAGGERING CASES CONTINUE TO COME TO LIGHT:

Over 20 years after then-Secretary of Defense Dick Cheney said, “We have a zero tolerance policy” for sexual assault, General Martin Dempsey admitted, “I took my eye off the ball a bit in the commands I had,” and Secretary of the Army John McHugh conceded, “We have failed” when it comes to dealing with sexual assault. The military brass’ argument boils down to essentially, “We really mean it this time.” However, since the March vote on the Military Justice Improvement Act, the military has failed to get its house in order.

Some recent examples:

1. A Fort Leonard Wood, **Missouri** Army drill sergeant sexually assaulted and abused eight female soldiers that he was responsible for training. Survivors testified that he forced sexual favors from young trainees in the bathroom of the female barracks, in a stairwell, a closet, and in an office he shared with other drill sergeants. During the court-martial, one of the reported survivors stated that the battalion commander told her company of trainees several months ago not to report allegations of sexual assault. The woman, now serving as a military police officer, stated, “I have issues of trusting those who are in charge of me” especially after the battalion commander “told [us] not to make any more allegations.” A second female witness who today serves as a National Guardsman in Maryland testified that the battalion’s Command Sergeant Major told her company that “If any more sexual assault cases come forward” the whole company of soldiers would not graduate from advanced individual training.⁸
2. In April, the *Washington Post* reported that a two-star Army general in Japan had been suspended because he had failed to notify criminal investigators, as required, of a sexual-assault complaint against a colonel with whom he worked closely.⁹
3. A Marine staff sergeant convicted of raping a civilian will go free because of unlawful command influence created by the comments of the former Commandant of the Marine Corps speaking against military sexual assault. Staff Sergeant Stephen Howell was

⁵ SAPRO Report FY2013, p. 2.

⁶ SAPRO Report FY2012, Volume I. 26,000 from p. 13; all other data from p. 57.

⁷ Department of Defense Sexual Assault Prevention and Response Office, Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2011, p. 32.

⁸ Bogan, Jesse. “Guardsman: Superior Said Sex Assault Reports Could Threaten Graduation.” *St. Louis Post-Dispatch*, September 24, 2014.

⁹ Whitlock, Craig. “Army General disciplined over mishandling of sexual assault case in Japan.” *Washington Post*, April 22, 2014.

originally sentenced to 18 years in October 2012 after being found guilty of sexually assaulting the mother of a prospective recruit at Parris Island, **South Carolina**.¹⁰

4. In *U.S. v. Johnson*, Navy Commander Judge Marcus Fulton, based in **Hawaii**, ruled that statements made against sexual assault by President Obama constitute apparent unlawful command influence and as a result defendants could not receive a punitive discharge if found guilty. According to the *Marine Corps Times*, at least 80 motions have been filed in sexual assault cases alleging unlawful command influence.¹¹
5. For weeks, a high-profile embarrassment for military justice played out very publicly and ultimately the military was forced to offer a plea to Brig. Gen. Jeffrey A. Sinclair who admitted to having inappropriate relationships with subordinates under his direct command after a judge in **North Carolina** found evidence that political pressures may have influenced the case. Sinclair ultimately got a slap on the wrist.¹²
6. In national news, the Navy acknowledged it had reassigned the former commander of its elite **Florida**-based Blue Angels flight squadron after it received a complaint that he had tolerated sexual harassment, hazing and lewd behavior.¹³
7. **Alaska**'s Adjutant General, the commander of its National Guard, resigned after a report was released that found that victims do not trust the system because of a lack of confidence in the command. The report found allegations of sexual assault, corruption, cover ups and fear of reprisal that had eroded trust and confidence in the leadership.¹⁴
8. According to news reports, the West Point football team wooed recruits with an alcohol-fueled party, a dinner date with female cadets in **New York** and **New Jersey**, cash from boosters and VIP treatment on a party bus complete with cheerleaders and a police escort. West Point's investigation found that Army football recruiters use female cadets to help sell West Point. West Point's director of football operations, Lt. Col. Chad Davis, recruited cheerleaders and members of the academy's women's basketball and volleyball teams to act as dinner dates for recruits. Davis, who still works for the team, told the women, "We want recruits to see that there are pretty girls that go here," and "There are not just masculine women that attend West Point."¹⁵
9. In October, media reported that a two-star Army general who was fired from his job in Djibouti last year after allegedly groping a senior female adviser was allowed to retire quietly with a demotion in rank at the same time that the sexual assault case against Brigadier General Sinclair received international attention.¹⁶

10 Barrouquere, Brett. "Marine's Sexual Assault Conviction Overturned." Associated Press, June 5, 2014.

11 Lamothe, Dan and Harkins, Gina. "Commandant's actions in scout sniper cases eyed by sex assault Defense Attorneys." *Marine Corp Times*, August 4, 2013.

12 Zoroya, Gregg. "General avoids jail time in case involving affair with subordinate." *USA Today*, March 20, 2014.

13 Whitlock, Craig. "Navy investigates ex-Blue Angels commander after complaint he allowed sexual harassment." *Washington Post*, April 23, 2014.

14 Burke, Jill. "General resigns as Parnell assails 'culture of mistrust' in Alaska National Guard." *Alaska Dispatch News*, September 4, 2014.

15 Roeder, Tom. "West Point football team recruited high school athletes with booze, women." *The Gazette*, October 26, 2014.

16 Lamothe, Dan. "Army general, accused of sexual assault by senior adviser, retired quietly with demotion." *The Washington Post*, October 1, 2014.

10. In November, Special Forces Colonel Jeffrey Pounding – an officer that had been on the fast track to becoming a general and had been offered command of the prestigious 19th Special Forces Group, one of only two Special Forces commands in the National Guard – faced an Article 32 hearing for adultery and exposing the woman with whom he was having an affair to HIV. The victim testified that they met in 2009 in **Texas** and that over the course of their affair the colonel never mentioned that he was HIV-positive.¹⁷

3) DON'T LIKE THE ANSWER? CHANGE THE QUESTION: THIS YEAR'S CLIMATE SURVEY WAS SUDDENLY OUTSOURCED TO RAND CORP.

Unfortunately, we will not have an apples-to-apples comparison of the prevalence of sexual assault in the military from this year to last because the Department of Defense changed the survey instrument. A survey by the Defense Manpower Data Center (DMDC) found that there were approximately 26,000 victims of unwanted sexual conduct toward active duty military in FY2012 – almost ten times the number of reported assaults.

The DMDC was supposed to carry out another survey this year, but the Department of Defense decided that after years of the DMDC handling this survey, RAND Corporation would conduct it this year instead. Changing how the survey is fielded, and the questions that are asked, raises significant methodological concerns, because it will be difficult to compare past survey statistical results to the upcoming one. According to an analysis by Protect our Defenders, a survivors advocacy group, who obtained a copy of the RAND survey:

“In previous years, the survey used a single, global question to determine if a service member has experienced a probable sexual assault. Under this methodology, survey respondents were asked to provide a “Yes/No,” or “forced-choice,” response; if they answered affirmatively, they were considered to have experienced a probable sexual offense, and received follow-up questions. If they answered, “No,” they were not considered to be victims of USC [unwanted sexual contact].

“RAND, in contrast, appears to have developed a new set of questions that comprise a three-stage “weeding out” process. Under this new process, respondents are asked a series of questions, each requiring a “forced-choice” response: first, respondents are asked whether an unwanted sexual experience occurred, **followed by a question about the perpetrator’s intent**, and, finally, a question about circumstances related to consent. Only if a respondent answers affirmatively to each question will they have an opportunity to answer the next set of questions, and only if a respondent answers affirmatively in all three sets of questions is the event considered a probable sexual assault.

“Specifically, the second stage of RAND’s three-step measure asks:

- Was this unwanted experience abusive or humiliating, or intended to be abusive or humiliating?

¹⁷ Siegel, Jacob. “Commando Colonel Accused of Exposing his Lover to HIV.” *The Daily Beast*, November 19, 2014.

- Did the person do it for a sexual reason? For example, they were sexually aroused or acting on sexual urges.

“Critically, based on Protect Our Defenders understanding of other surveys and our extensive experience with survivors, the inclusion and placement of the intent questions raise some concern about the ability to obtain an accurate estimate of sexual assault.

“First, no other large-scale survey of sexual violence asks about perpetrator intent as an independent factor...Neither RAND nor DoD has provided rationale, citations, or testing to prove that victims can answer this new intent question meaningfully, and in a way that does not skew results. Further, according to one survey expert we consulted, when survey respondents are uncertain about how to answer a question, they tend to err on the side of answering “No” in a forced-choice (Yes or No) context, potentially cutting out sexual assault survivors. Consequently, the uncertain impact that this step may have on survey response is troubling.

“Second, the addition of this new intent measurement is particularly worrying given the order of the questions, with intent presenting the second stage of the three-step screening process described above.

“In general, surveys of sexual assault attempt to address two primary issues—did sexual contact occur and, if so, was it consensual? While RAND measures both of these elements, in this new survey, consent is measured last, only after and if a victim has answered affirmatively to the intent portion of the survey. In order to even report that they were unconscious or force was used, victims must first provide an affirmative response to perpetrator intent. As we understand it, if a victim fails to respond affirmatively to the intent section, they will not have an opportunity to indicate a lack of consent before being directed out of the measure of probable sexual offenses.”

Command Influence on the Survey:

As a result of an expected low response rate, the service chiefs all posted letters asking service members to fill out the survey. **The following quotes, which were included in two of the letters, seem to encourage service members to downplay the reporting of sexual assaults in the survey so that the Congress will not impose “bad” policies:**

“For the survey results to be valid, it needs to represent every Sailor’s experience, including yours. Without your participation, DoD and Congress may draw the wrong conclusions about the environment our Sailors serve in, which could lead to bad policies that affect all of us.” -- Admiral Jonathan Greenert, Chief of Naval Operations

“For the survey results to be valid, it needs to represent every Coast Guardman’s experience, including yours. Without your participation, Department of Defense (DoD) and Congress may draw the wrong conclusions about the dangers to which service members are exposed, which could lead to bad policies that affect all of us.” -- Admiral Paul Zukunft, Commandant of the U.S. Coast Guard

4) SPECIAL VICTIMS' COUNSEL HAVE NO LEGAL STANDING IN COURTS-MARTIAL, ARE RETALIATED AGAINST AND POWERLESS TO HELP THEIR CLIENTS NAVIGATE A BROKEN SYSTEM

As part of last year's efforts to address the crisis of sexual assault in the military, Congress created the Special Victims' Counsel (SVC) Program -- a flagship reform that has rightly been characterized as an important step in changing the culture to protect victims. Yet this flagship program is deeply flawed and SVCs are facing the same broken system that victims face.

- **Some Military Criminal Investigating Offices continue to contact and interrogate victims directly instead of through their Special Victims' Counsel.** SVCs are intended to help survivors navigate the military justice system, and yet there are reports of MCIO investigators interrogating survivors without their SVCs. They are asking the survivors about their sexual background – which is barred under the rape-shield rule – and causing many survivors to decide that they do not want to participate in the investigation and court-martial. Some investigators have also convinced survivors that they should waive their rights to privileged communications with the therapist that is treating them for the sexual assault, and this privileged information then is being shared irresponsibly.
- **The SVCs are limited in their ability to protect survivors during Article 32 hearings and courts-martial.** Special Victims' Counsel have insufficient recourse to enforce their clients' privacy rights and ensure that they not be excluded from judicial proceedings. As it currently stands, if an Article 32 Investigation Officer or military judge rules to admit evidence regarding a victim's sexual background, privileged communications with a therapist, or to exclude a victim witness or their SVC – decisions which occur with depressing frequency – the victim has no recourse to appeal and overturn the decision-maker's negative decision in a timely fashion.
- **Some SVCs have been retaliated against because of their zealous advocacy on behalf of their clients; others are convinced they cannot prevent their victims from being retaliated against.**
- **SVCs feel that they may not help survivors with claims or complaints against the military**, such as: Congressional inquiries, Employment Opportunity (EO) complaints, Inspector General (IG) complaints, and Freedom of Information Act (FOIA) requests.
- **SVCs cannot help with criminal/adverse administrative actions**, such as courts-martial, non-judicial punishment, and adverse administrative actions, such as administrative chapters or letters of reprimand. Survivors have expressed a desire to be represented in criminal and adverse administrative actions by the attorney with whom they have already shared their personal situation and built a relationship, *i.e.*, their SVC.

5) HISTORICAL NOTE: SUPREME COURT PRECEDENT EXISTS FOR REMOVING CONVENING AUTHORITY FROM CHAIN OF COMMAND

Contrary to the claim that removing convening authority for serious non-military crimes is a radical approach, America has already had an 18-year period where that was exactly the case.

Under Chief Justice Warren Burger, the U.S. Supreme Court ruled in the 1969 case *O'Callahan v. Parker*, that unless the military could establish a “service connection” showing that an offense had direct bearing on military order and discipline, a court-martial lacked jurisdiction to try the case.¹⁸

This decision was rooted in recognition of the potential for command influence to cloud independent judgment and a corresponding desire to limit command-driven justice to as narrow a domain as possible. In support of this position, the Court cited the Fifth Amendment, which predicates court-martial jurisdiction on the military nature of the offense rather than the military status of the offender, as well as the documented suspicion of broad court-martial powers prevailing at the time of the Framers.¹⁹

Two years later, in *Relford v. Commandant*, the Court addressed more specifically the factors to be taken into account when determining whether cases are service-connected, focusing upon the place of the crime’s commission, the character of the crime, and the military duties involved.²⁰ With this guidance in place, the dual-track system for military and non-military offenses outlined in *O'Callahan* remained in effect throughout the 1970s and 1980s, ending only when a differently constituted Supreme Court overturned its earlier ruling in *Solorio v. United States* (1987).²¹

¹⁸ *O'Callahan v. Parker*, 395 U.S. 258, 273-74 (1969).

¹⁹ *O'Callahan v. Parker*, 395 U.S. 258, 261-274 (1969).

²⁰ *Relford v. Commandant, U. S. Disciplinary Barracks, Ft. Leavenworth*, 401 U.S. 355, 365 (1971).

²¹ *Solorio v. United States*, 483 U.S. 435, 450-51 (1987); See *O'Callahan*, 395 U.S. at 274.