

Military Sexual Assault/Harassment

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Q: What is military sexual assault?

A: The Uniform Code of Military Justice (UCMJ) criminalizes rape, sexual assault, and other sexual offenses in Article 120. Generally, sex offenses in the military are similar to sex offenses in the civilian sector. The UCMJ criminalizes “penetrative” offenses that are gender neutral when done by force, threats of force, fear, or when the victim is incapable of consenting. The UCMJ also similarly prohibits “touching” offenses under these circumstances.

This article was updated in 2012 and defines the following sexual offenses:

Art. 120: Rape is defined as:

(a) *Rape*. Any person subject to this chapter who commits a sexual act upon another person by;

- (1) using unlawful force against that other person;
 - (2) using force causing or likely to cause death or grievous bodily harm to any person;
 - (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
 - (4) first rendering that other person unconscious; or
 - (5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct;
- is guilty of rape and shall be punished as a court-martial may direct.

Art. 120: Sexual Assault is defined as:

(b) *Sexual Assault*. Any person subject to this chapter who—

- (1) commits a sexual act upon another person by—
 - (A) threatening or placing that other 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 the person is another person;
- (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.

Art. 120: Aggravated Sexual Contact is defined as:

(c) *Aggravated Sexual Contact*. Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

Art. 120: Abusive Sexual Contact is defined as:

(d) *Abusive Sexual Contact*. Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to

do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

A sexual act is defined in 2012 UCMJ Article 120(g):

(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.

Sexual contact is defined in 2012 UCMJ Article 120(g) 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.

Q: What is unwanted sexual contact?

A: The Department of Defense (DoD) defines “Unwanted Sexual Contact” (USC) as, “USC involves intentional sexual contact that was against a person’s will or occurred when the person did not or could not consent. The term describes completed and attempted oral, anal, and vaginal penetration with any body part or object, and the unwanted touching of genitalia and other sexually related areas of the body.” Department of Defense Annual Report on Sexual Assault in the Military, (FY 2012), p. 12. This definition includes rape, sexual assault, and other sexual contact offenses as defined by the UCMJ.

Q: How many people suffer sexual assault in the US military each year?

A: According to the Department of Defense (DoD) Report to the President on Sexual Assault Prevention and Response from the RAND Military Workplace Study (FY 2014), 20,000 service members experienced at least one sexual assault which includes either penetrative (often referred to as rape), non-penetrative, and attempted penetrative crimes during 2014.

Q: How many victims are women?

A: According to the DoD report, 1 in 20 women (4.9%) experienced at least one sexual assault in 2014 , or approximately 8,600 women.

Q: How many victims are men?

A: According to the DoD’s report, 1 in 100 (1%) men experienced at least one sexual assault in 2014, or approximately 11,400 men.

Q: Of those, how many people report?

A: According to the DoD report, 3,678 (fewer than 1 in 5) victims reported a sexual assault to law enforcement.

Q: Why is there such a disparity between the number of sexual crimes and the number of reports?

A: Most victims believe their case won’t be taken seriously, or they fear retaliation so they are reluctant to report. They are afraid their personal or professional lives will suffer if they come forward. Unfortunately, according to the DoD’s 2014 SAPR Report, 62% of victims do suffer some kind of reprisal – be it an unwarranted and misdiagnosed mental health disorder, such as a “personality disorder”; or threats of punishment due to collateral misconduct, such as underage drinking; or a hostile work environment. Sometimes, victims try to report and are denied the opportunity or are dissuaded by threats that they may be charged for collateral criminal offenses, such as underage drinking or an orders violation.

Q: What are the reporting options for victims of sexual assault?

A: A victim of sexual assault can make either a “restricted” or “unrestricted” report. The restricted report is made confidentially to a healthcare provider, chaplain, or a Sexual Assault Response Coordinator (SARC). It is made when the victim wants to receive medical treatment and counseling, but does not want to notify other people or pursue prosecution. A restricted report can be turned into an unrestricted report, if the victim tells anyone other than the specified persons above. An unrestricted report is made when the victim reports to his or her Chain of Command, military investigators, the police, a friend, or if the victim desires a restricted report can be reclassified as unrestricted. Unrestricted reports are the only assaults that can be investigated and for which the offender may be criminally charged.

Q: What is a Sexual Assault Response Coordinator (SARC)?

A: A Sexual Assault Response Coordinator (SARC) is a specially trained victims’ counselor. The SARC can be either active duty or a civilian. A victim has a special relationship with his or her SARC, and their conversations are privileged under the Uniform Code of Military Justice (UCMJ). Unfortunately, that privilege does not extend to all situations – including interviews, where third parties are present, such as those with investigators and defense counsel. If a SARC attends those interviews to support the victim, that SARC may later be called to testify against the victim about what was said.

Q: What is the Uniform Code of Military Justice (UCMJ)?

A: The UCMJ is the body of law that governs the military. It was enacted by Congress and became effective on May 31, 1951. Before that time, the Army and Navy operated under laws derived directly from the British Articles of War, which had been in force since before the Revolutionary War. Today, the UCMJ contains most common law crimes such as murder, rape, theft, assault, etc. It also contains military specific crimes such as Unauthorized Absence or Absence Without Leave (UA or AWOL), Orders Violations, Conduct Unbecoming an Officer, etc.

Q: What are military ranks?

A: There are three categories of rank in the military: Enlisted personnel, Warrant Officers, and Commissioned Officers. An officer must be commissioned by the President. An Enlisted person signs into the military via a contract. All commissioned officers out-rank all warrant officers and enlisted members. All warrant officers “outrank” all enlisted members. The ranks rise by number from Enlisted (E) 1-9, Warrant Officer (W) 1-5, and Commissioned Officer (O) 1-10.

Q: What is the Chain of Command?

A: The military functions on a concept called the Chain of Command (CoC). It’s based on a hierarchical structure with the Commander at the top and the lowest grade enlisted persons at the bottom. The ranks go from Enlisted (E-1) to Officer (O-10). Each person reports “up the chain” to the next highest level. It is a tightly controlled structure that typically requires a person report directly to their immediate superior. It is highly unusual and heavily scrutinized for a person to “jump the chain,” meaning to approach a level above their immediate superior without permission. This is particularly true for low ranking enlisted and officers.

Q: What is the Military Justice process?

A: Military Justice is the armed services’ criminal justice system. The system contains both non-judicial and judicial processes for adjudicating allegations of misconduct. **Non-judicial punishment**, or Article 15, is reserved for minor offenses. A military member’s commander determines whether a service member committed the offense and what the punishment should be. A military member may not be sent to confinement through an Article 15. A military member may refuse the process and demand instead the allegations be heard at a court-martial. A court-martial is a criminal trial and functions as the military’s **judicial process**. There are three types of courts-martial: summary, special and general. The summary court is the lowest court, which is usually used for punishing lower ranking enlisted members with a maximum punishment of 30 days of confinement. A special court is akin to a misdemeanor court and can administer punishments with a maximum of one year confinement. The most serious cases are tried by a general court, which is analogous to a felony court.

Q: What is a Convening Authority?

A: A Convening Authority (CA) is the commander who “convenes” a court-martial. By convening a court the CA is sending charges against an accused to be tried at a court-martial. The CA will almost always be in the accused’s chain-of-command. The vast majority

of commanders are not convening authorities. In 2013 there were approximately 14,500 commanders in the DoD. Of those, only 15.5% were special court-martial CAs (misdemeanor equivalent) and only 2.7% were general court-martial CAs (felony equivalent).

CAs are not attorneys or prosecutors. Instead, they are military professionals such as pilots, artillery officers or surface warfare officers. They control the military justice process and the decision on whether to prosecute a sexual offense. This responsibility is plagued by bias and conflict and is a significant reason why victims do not report.

Q: What is a Special Victims Counsel?

A: A Special Victims Counsel (SVC) is a Judge Advocate General Corps (JAGC) attorney assigned to represent the victim in a sexual assault case. The programs are designed for SVCs to represent victims from the investigation phase all the way through courts-martial, in order to protect their statutorily mandated privacy interests – including their private sexual histories and mental health records.

The military justice process is confusing and overwhelming for victims. An attorney is needed to act on behalf of victims to navigate the system, prepare for an Article 32, object in the preliminary hearings, file motions to protect against unwarranted intrusion into mental health and sexual histories, meet with defense counsel, and more.

Q: What is an Article 32 hearing?

A: An Art. 32 hearing is the military justice pre-trial hearing, to determine if there is sufficient evidence in a criminal case to proceed to a general court-martial. A hearing officer presides over the Article 32. The government is represented by counsel, as is the accused. Following recent reforms, an SVC is now also entitled to attend the hearing. The hearing officer oversees the proceeding, and determines which witnesses and evidence will be considered. At the conclusion of the hearing, the hearing officer prepares a report with his or her recommendation on whether to prosecute. That report goes to the General Court-Martial Convening Authority (GCMCA), who ultimately decides whether to convene a trial.

In the past, an Article 32 hearing was a mini-trial that could last days. The victim was routinely forced to testify for hours on end. This was due to wide latitude granted to defense counsel for questioning about all matters even vaguely relevant. The victim was often re-traumatized by lengthy cross-examination that could be designed to intimidate, confuse, exhaust, and/or demoralize him or her. It was not unusual for the victim to decline further participation in the case after such a terrible Article 32 experience.

As a result of hard-fought reforms championed by Protect Our Defenders, a victim can no longer be forced to testify at an Article 32 hearing. Additionally, while in the past Article 32s were structured as an “investigation” that encouraged the defense to engage in lengthy discovery efforts, these reforms altered the proceedings to serve as a preliminary hearing, which will now function solely to determine probable cause for whether the case should be sent to trial.

Q: What is Military Rules of Evidence (MRE) 412?

A: MRE 412 is the military’s “rape shield law” and is designed to protect victims’ privacy. It states that a victim’s sexual history, sexual orientation, and other sexually related details are generally inadmissible as evidence in any military justice proceeding. There are three exceptions to this rule and defense counsels are often given wide latitude to explore the exceptions. The initial questioning of a victim into these matters is procedurally reserved for a closed, MRE 412 hearing – in order to protect the victim from public intrusion. Unfortunately, in practice, this is not always the case and sometimes victims are questioned about these personal and protected details in an open hearing, like the Article 32.

Q: What is Military Rules of Evidence (MRE) 513?

A: MRE 513 is the military’s rule that protects the mental health records and history of a victim. It states that a victim has the right of privacy to confidential communication made to a psychotherapist, which includes mental health records. With the support of Protect Our Defenders, Congress recently strengthened the protections of MRE 513, making it more difficult for military judges to indiscriminately review such evidence to turn over to the defense.

Q: What happens at a Court-Martial?

A: A contested court-martial is a military trial and is similar in many ways to a civilian trial. Generally, the people involved are a military judge, the court-martial panel (the military jury), defense counsel, defendant (called the “accused”), prosecutors, and

witnesses. A military judge is usually an O-5 or O-6, and is always a JAG officer. The military judge rules on objections, admits or denies evidence, instructs the jury, and generally presides over the court-martial. The prosecutors, defense counsel, and witnesses generally hold the same roles as in the civilian sector.

The military jury (called members panel) is slightly different than in the civilian court system. If the accused is enlisted, he or she can select to have the jury comprised of at least 1/3 enlisted members, although all court-martial members must outrank the accused. For a General Court-Martial (GCM) there must be a minimum of 5 members, and for a Special Court-Martial (SPCM) there must be minimum of 3 members. In the military system, a conviction occurs when at least 2/3 of the members vote for a guilty verdict. An acquittal occurs when more than 1/3 of the members vote for a not-guilty verdict. This is called the findings phase of trial.

If the accused is found guilty of any offense, the court-martial immediately moves into the “sentencing” phase. During this proceeding, prosecutors may present matters in “aggravation,” which is evidence that tends to increase punishment, and is an opportunity for a victim to describe in greater details how he or she has suffered. Defense counsel present matters in “extenuation and mitigation,” which is evidence that tends to decrease punishment, and often includes testimony from friends and family. In the military system, the members then vote on what they consider to be an appropriate sentence and the lowest level punishment that can be agreed on, is the punishment awarded. They are able to award a range of punishments, from: no punishment at all, to fines and forfeitures, extra duty, restriction, confinement, and a punitive discharge (Bad Conduct Discharge, Dishonorable Discharge, or Dismissal for Officers). Now sexual offenses under Article 120 carry a mandatory minimum of either a Dishonorable Discharge or a dismissal.

Q: What is Clemency?

A: Clemency is the accused’s effort to reduce his or her punishment after a court-martial conviction and is granted under Article 60, UCMJ. The accused, through defense counsel, submits a clemency package directly to the convening authority. Currently, there are no rules of evidence during clemency and the accused can submit anything he wishes for consideration – to include statements or documents that would not be allowed at trial. Often times this includes character references for the accused, letters of good behavior while in confinement, and/or letters attacking the credibility of the victim. Thanks to efforts by Protect Our Defenders, Congress passed reforms and a convening authority can no longer unilaterally overturn a verdict or reduce a sentence for any reason at all. The CA can only set aside convictions for minor offenses and can no longer free sex offenders.

Q: What happens to the offender after he or she is convicted?

A: It depends on what sentence, if any, was awarded.

At General Court-Martial, an offender can receive various punishments including confinement, punitive discharge – either Bad Conduct Discharge (BCD) or Dishonorable Discharge (DD) for enlisted and Dismissal for officers, fines, forfeitures, restriction, hard labor, and other lawful punishments.

If the accused was sentenced to confinement, then after the court-martial he will typically go straight to the “stockade” or “brig” which are military prisons and exclusively house military personnel. Each prison is different, but all have programs designed to rehabilitate, educate, and reintegrate the accused. These programs can include woodworking, graphic design, computer programming, and other specialized training. Some prisons have expansive recreation facilities to include volleyball pits and soccer fields. All facilities award some type of “good time credit” (GTC) of an offender’s sentence, for good behavior. Many facilities also award additional credit time for completing certain programs, further reducing the total time served. Typically, military offenders serve only a fraction of their adjudged sentence to confinement.

Additionally, many offenders receive some type of pay while confined. In the military an accused forfeits up to 2/3 of his pay at SPCM and up to total forfeitures at GCM. However these sanctions are not always automatic and can sometimes be avoided entirely if the confinement adjudged is short and a punitive discharge is not awarded. It varies, but sometimes people who have been convicted of crimes and sent to jail, still receive some type of pay from the military while confined.

If an offender is not sentenced to confinement, or receives only a short term of confinement; he may return to the unit – which may be the same unit to which the victim or witnesses are assigned. Despite the fact that victims are now eligible for safety transfers, to date there may be administrative reasons that preclude or delay their movement, thereby leaving the victim confronting their attacker within their unit.

Finally, a jury can award “no punishment” as a valid sentence in most cases, but not in rape or sexual assault cases. If this occurs, the offender just walks away from the court-martial with little accountability.

Q: What is Congress' role in addressing military sexual assault?

A: The founders of our country gave our civilian leaders—Congress and our President—ultimate responsibility for oversight of our military. Congress wrote the Uniform Code of Military Justice and they have the power to amend it. Our Senators and Representatives have a constitutional duty to regulate the military and ensure the laws within its system of justice protect the victims of these crimes and lead toward justice.

Q: What is the President's role in addressing military sexual assault?

A: As the Commander in Chief, the President has a duty to protect members of the military and to ensure the rules and regulations proscribed by the Department of Defense adequately address the crisis of rape and sexual assault. The President has the authority of Executive Order, writes and executes the Military Rules of Evidence, and appoints the Pentagon's top leaders. He bears final responsibility for ensuring our military leaders protect victims and create an environment free of sexual harassment and assault. The President must hold our military leaders accountable when they fail to properly achieve this.