

Path Least Taken No More: More Sex Assault Cases Take Court-Martial Route

By J.E. Yancey Ellis

Earlier this year, 17 active duty and veteran service members sued top Pentagon officials for allegedly failing to adequately address sexual assault in the military. The plaintiffs in the case – including 15 women and two men – alleged Secretary of Defense Robert M. Gates and his predecessor, Donald H. Rumsfeld did not “take reasonable steps to prevent plaintiffs from being repeatedly raped, sexually assaulted and sexually harassed by federal military personnel.”

The suit, which was filed in a federal district court in Virginia, seems to question the effectiveness of the U.S. Department of Defense’s years-long effort to crack down on sexual assault in the military. However, some reports suggest otherwise. In fact, a Defense Department report issued a month after the filing of the suit shows that military is making headway in its fight against sexual assault, particularly in regard to bringing court-martial charges against alleged offenders.

The military received 3,158 reports of sexual assault involving service members in the 2010 fiscal year, representing a 2 percent drop from the previous fiscal year, according to the Defense Department’s 2010 Annual Report

on Sexual Assault in the Military. Even though the Defense Department acknowledged that only 20 percent of incidents of unwanted sexual contact are reported to military or civilian authorities, it attributed 2010’s reporting reduction to the work of prevention initiatives, which are primarily led by its Sexual Assault Prevention and Response Office (SAPRO). Additionally, the Defense Department’s efforts to improve the prosecution of alleged sexual assault offenders are showing promising results.

Subjects of sexual assault investigations are increasingly ending up in military courts, where many are facing charges under Article 120 of the Uniform Code of Military Justice (UCMJ). This article covers rape, sexual assault and other sexual misconduct offenses. Out of the 3,158 reports of sexual abuse in the 2010 fiscal year, military units took command action against 1,025 subjects. Court-martial charges were initiated against 529, or 51 percent, of those subjects. This court-martial charge initiation rate is far higher than the 2008 fiscal year’s rate of 30 percent.

This jump in sexual assault-related courts-martial charges represents a dramatic change in the treatment of alleged sexual assault offenders by military commanders. Whereas administrative actions or discharges used to be the top command action taken against subjects of completed sexual investigations – representing 36 percent of all command actions for completed sexual assault investigations in the 2007 fiscal year – it is now the action least taken, with a rate of 23 percent. Non-judicial punishments under Article 15 of the UCMJ have experienced a similar decline and represented only 25 percent of the command actions taken

against subjects of completed sexual assault investigations, according to the Defense Department report.

The higher rate initiating court-martial charges appears to be the result of the military's tougher no-tolerance policy toward sexual assault. Many factors have influenced this shift toward court-martial charges for sexual assault offenders. One factor might have been Gates' 2008 fiscal year directive to all secretaries of military departments to bolster the ability of investigators and attorneys to investigate and try sexual assault cases. During the same year, military prosecutors' options for charging sexual assault were broadened through the enactment of revisions to Article 120.

Regardless of cause, this growing preference for court-martial charges for subjects of sexual assault investigations carries grave consequences. The punishments for Article 120 offenses are severe, with each type of offense carrying a maximum punishment of dishonorable or bad conduct discharge and total forfeitures. The death penalty is also application in cases involving rape or rape of a child. Aggravated forms of sexual assault, abuse and contact carry maximum confinement sentences of 20 years whereas wrongful sexual contact and indecent exposure can each land a service member in confinement for up to one year.

Even though judge advocates are facing off against more subjects of sexual assault investigations, this does not mean all of the accused are getting convicted. Slightly more than half (53 percent) of the subjects against whom courts-martial charges were initiated received convictions. Nineteen percent of them were acquitted and 22 percent had their charges dismissed, according the report. Six percent were discharged or resigned in lieu of courts-martial (RILO).

It is important that SAPRO continue its important mission of encouraging service members to come forward and make either restricted or non-restricted reports of sexual assault. The men and women who become victims of sexual assault while serving our country can benefit from the healthcare benefits and protections that such reporting affords them. However, with two in five sexual assault court-martial cases either being dismissed or ending with acquittals, it is equally important for military personnel charged with Article 120 violations to contact a military law attorney.

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