Debunked

Fact-Checking the Pentagon's Claims Regarding Military Justice

April 18, 2016

Protect Our Defenders

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Protect Our Defenders (POD) is the only national organization solely dedicated to addressing the epidemic of rape and sexual assault in the military and to combatting a culture of pervasive sexual harassment and retribution against victims. We honor, support and give voice to survivors of military sexual assault – including both service members and civilians assaulted by members of the military.

Protect Our Defenders deploys a multifaceted effort towards reform. Every day, through policy reform, advocacy, public education, and pro bono support, we work to provide those who serve in our military a safe and respectful environment free from harassment and abuse, and to create a justice system that can fairly and effectively adjudicate these crimes.

These efforts are directly informed by our work with survivors, their families, and current and former military members.

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BACKGROUND

In testimony before the Senate Committee on Armed Services (SASC) on July 18, 2013, Admiral James Winnefeld, Vice Chairman of the Joint Chiefs of Staff, argued against fundamental reform of the military justice system. Speaking on behalf of the Pentagon, Adm. Winnefeld claimed that commanders are tougher than prosecutors in sexual assault cases, stating the military would "have fewer prosecutions [of sexual offenders] if we take [prosecution decisions] outside the chain of command." To support this claim, Adm. Winnefeld discussed a handful of sexual assault cases in which civilian prosecutors allegedly "refused" to prosecute, after which a military commander "insisted" that the case go to court-martial.

The Pentagon reiterated these claims in a subsequent letter to Senator Carl Levin, former Chairman of the SASC. Adm. Winnefeld stated that there were 93 total cases over a two-year period which "local civilian authorities refused to prosecute," and which "commanders" had later pursued. Specifically, the letter claimed:

- The Army exercised jurisdiction over 49 such cases (including 34 completed cases), with an 81% conviction rate;
- The Marine Corps exercised jurisdiction over 28 such cases, with a 57% conviction rate;
- The Navy exercised jurisdiction over 6 such cases (including 3 completed cases), with a 33% conviction rate; and
- The Air Force exercised jurisdiction over 10 such cases, with a 90% conviction rate.

The cases described by the Pentagon were cited by those opposing reform and used to argue against the creation of an independent military justice system where military prosecutors – not commanders – decide which cases are sent to court-martial.

Several members of the SASC, including Senator Claire McCaskill (D-MO) and former Senator Carl Levin (D-MI), cited the 93 cases to support an argument that victims would be less likely to see justice without commanders in charge of the justice system. This argument was made during the critical Senate debate over the Military Justice Improvement Act (MJIA). For instance, in an interview with MSNBC, Senator McCaskill stated, "…in just the past two years, we found 93 cases of rape and sexual assault that prosecutors declined to prosecute, which were then referred to court-martial by commanders. That's 93 victims who had their day in court because commanders, not prosecutors, had the ability to refer a case to court-martial."[i]

In order to determine the veracity of the Pentagon's assertions, Protect Our Defenders (POD) submitted a series of Freedom of Information Act (FOIA) requests to Department of Defense requesting documentation related to these 93 cases. Nearly two years after submitting the initial FOIA request, POD received and analyzed 81 case files from the Army and Marine Corps.

The Navy produced no records, stating that they do not maintain such documentation. The Air Force and Coast Guard did not respond to POD's FOIA request.

The case records analyzed by POD paint a categorically different picture from the one put forward by the Pentagon: out of the cases reviewed by POD, over two-thirds were not sexual assault cases declined by civilian prosecutors and later prosecuted by the military. Further, contrary to the rhetoric, the Pentagon was unable to provide a single example of a commander "insisting" a case be prosecuted. Instead, in every case for which such information was provided, either military investigators or military attorneys were the ones to request jurisdiction over the case. Crucially, the military did not identify a single case where a commander sent a case to trial after a military prosecutor refused to prosecute. The facts behind the Pentagon's claims reveal the great lengths they went to in order to distort the data to counter momentum and prevent reform.

These cases provide no evidence to support the argument that empowering trained, independent military prosecutors to decide which cases go forward to trial would lead to fewer victims having "their day in court." In fact, the cases provide no evidence that commanders are tougher than military prosecutors in responding to cases of sexual assault, and they support calls for professional and blind justice.

- **Commanders were not tougher than military attorneys on sexual assault.** In every general court-martial, the Staff Judge Advocate (legal advisor to the commander) advised that the charges were warranted by the evidence. There is also no evidence that a military prosecutor, who is ethically bound to try a case only if they believe in its merits, ever refused to prosecute.

  Among the cases provided to us, **there was not a single example of a commander asking for jurisdiction.** Military attorneys or law enforcement requested jurisdiction in every such case. Overall, military attorneys were just as tough, if not tougher, than commanders in holding perpetrators of sexual assault accountable.

- **The Pentagon provided inaccurate information, which misled Congress and undermined the effort to reform the broken justice system.** Around the time of the July 2013 Senate Armed Services Committee (SASC) hearing, the Senate was considering a bill to remove prosecution decisions from the chain of command. During this time, the Pentagon claimed they had found 93 sexual assault cases that had been declined by civilian prosecutors and then prosecuted by the military, implying that military commanders routinely pursue sexual assault cases that prosecutors refuse. Our analysis of the underlying Army and Marine Corps case records thoroughly debunks these claims.

    - Most cases were not declined by civilian prosecutors, as claimed. **In two-thirds of cases, the defendant was not accused of sexual assault, civilian prosecutors did not decline the case, or the military failed to prosecute the offender for sexual assault.** In fact, less than a third of cases (30% of Marine Corps and 31% of Army cases) involved sexual assaults declined by civilian prosecutors and then prosecuted by the military.

    - **Nearly two-thirds of Marine Corps and Army cases were never declined by civilian prosecutors.** In most cases, civilian police declined the case or civilian authorities deferred to the military based on jurisdictional issues unrelated to the facts of the case—for example, in one deferred case, the accused was deployed in Iraq.

    - Although the Pentagon claimed each case involved sexual assault, **over a quarter of cases did not involve a military sexual assault** prosecution. In fact, 20% of Marine Corps offenders and 14% of Army offenders were never even charged with sexual assault, instead facing charges for offenses such as indecent acts or possession of child pornography–offenses that, while often reprehensible, are not nonconsensual sexual acts.

    - **Conviction rates for sexual assault cases were significantly lower than claimed.** In his follow-up letter to the SASC, Adm. Winnefeld asserted conviction rates of 57% for the Marine Corps and 81% for the Army. However, **out of all Marine Corps and Army cases, only 33% and 52%, respectively, resulted in a conviction for a sexual assault.**

- **Sentencing decisions were arbitrary and unpredictable, potentially undermining the deterrence effect of the military justice system.** In the Army, convicted sex offenders received anywhere from 35 years to only 30 days in jail, with the most lenient sentence going to a Major who had sexually abused a child. In the Marine Corps, one Marine convicted of a penetrative sexual assault received no jail time. Overall, nearly 25% convicted offenders received a year or less of jail time. If sexual predators know that even a rape conviction does not guarantee substantial punishment, the justice system will fail to deter such criminal conduct.

- In isolation, these 93 cases provide a misleading picture of how military and civilian authorities handle sexual assault cases. Despite the implication that the military justice system is "tougher," the military's own numbers show that civilian authorities frequently investigate and prosecute military members accused of sexual assault. **In 2013 alone, there were at least 145 cases where a civilian or foreign authority prosecuted a service member after the military received a report of sexual assault.**

- These 93 cases are not representative of the military's response to sexual assault, and they serve only to distract from the scope of the military sexual assault crisis and the continued failure of the command-based justice system to handle such cases appropriately. **The 93 cases identified by the Pentagon represent less than 1% of the 12,232 unrestricted reports of sexual assault the military received in the same time period.**

- **The military has failed to track criminal cases involving military members in the civilian justice system.** In response to our Freedom of Information Act (FOIA) request, both the Navy and the Marine Corps stated that they do not track civilian criminal proceedings against service members. Only the Army and Marine Corps provided us with responses, and these records were incomplete. In his letter to the SASC, Adm. Winnefeld stated the military does not track cases prosecuted by civilian authorities that the military has declined. As a result, **service members facing civilian criminal action may slip through the cracks in the military, leaving dangerous offenders in the ranks.**

- **Several case examples demonstrate the inaccurate nature of the Pentagon's characterization of these cases, along with the continuing biases of the military justice system.** These cases are included at the end of this report.

Poor FOIA Response Limits Analysis

On July 22, 2013, Protect Our Defenders (POD) submitted a Freedom of Information Act (FOIA) request to the Department of Defense (DoD) requesting documents pertaining to the sexual assault cases discussed by Adm. Winnefeld in his testimony before the Senate Committee on Armed Services (SASC), in which the military allegedly prosecuted the case after civilian authorities declined.

POD requested the following information for cases from 2008 through 2013:

- Any and all documents and data used to support Adm. Winnefeld's claims to the SASC
- All Article 120 cases which were charged by civilian law enforcement
- All Article 120 cases which civilian law enforcement declined to prosecute
- The reason for the civilian law enforcement declination, to include the military's request that civilian authorities withdraw charges
- The ultimate disposition of the aforementioned cases, to include forum, conviction, and sentence awarded, if any

After the DoD denied maintaining such records, we resubmitted our request to every service branch on August 15, 2013. After receiving no response, on June 16, 2014, we sent an additional letter to Adm. Winnefeld requesting assistance with obtaining these documents, although we never received a response from the Admiral himself.

On April 10, 2015, POD received a partial response from the Army, which included only a fraction of the requested materials. Specifically, the Army provided summaries of 54 complete cases and 25 pending cases (in contrast to the 49 total cases described to Congress), results of trial for 30 (55%) of the complete cases and three additional unknown cases, and one civilian declination. It is unclear how these 54 cases relate those discussed by Adm. Winnefeld. Case summaries were not consistent and often excluded key details, such as how the military obtained jurisdiction, charges filed, specifics of a conviction, or sentencing information. Case summaries were also heavily redacted. POD later learned that identical, unredacted case summaries had been provided as a public comment to the Congressionally-established Response Systems to Adult Sexual Crimes Panel on November 6, 2013 by Lt. Gen. Flora Darpino, the Army Judge Advocate General. We used these documents to supplement the limited information provided to us by the Army.

On July 8, 2015, POD received a similarly incomplete response from the Marine Corps (USMC), with summaries of 27 completed and 1 pending case (the full number of cases described to Congress). Summaries were generally consistent and comprehensive, allowing POD to determine the nature of the interaction between civilian and military authorities, charges filed, and case outcome. However, the USMC failed to provide any documentation for these cases or to identity the defendants, a matter of public record.

POD did not receive documentation from the Navy, Air Force, or Coast Guard. Both the Navy and the USMC explicitly stated that they do not have a centralized system for tracking civilian prosecutions of service members.

How We Conducted Our Analysis

The goals of this analysis were: (1) to determine the accuracy of claims made by the Pentagon regarding the 93 cases, and (2) to gain further insight into the military justice process for sexual assault cases. We reviewed 81 completed cases: 54 Army cases and 27 USMC cases.

We defined our study period as 2010-2013. Despite claims by the Pentagon that all cases dated back only two years, court-martial proceedings were in fact held in 2010 for several USMC cases, and we could not identify the year of adjudication for many Army cases. As such, we used a four-year period to more accurately describe the provided cases. Pending cases were excluded due to a lack of comprehensive information on adjudication outcomes and because they likely fell outside of the study period.

To determine whether a particular case was declined by civilian authorities, we examined the full nature of the interaction between military and civilian authorities to the extent possible given the documents received. If information was not provided (as often occurred with Army cases), we relied on the service branch's characterization of the interaction. Further, we did not consider adjudication decisions by the Department of Justice (DOJ) in our analysis, since the DOJ often shares jurisdiction over crimes committed by active-duty service members and typically defers to the military in criminal matters.[1]

Based on the nature of the interaction between civilian authorities and the military, we categorized case transfers, where possible, in the following ways:

1. The military has a policy for "maximizing jurisdiction." In the Air Force, for example, the policy is set out in Air Force Instruction 51-201, paragraph 2.6.1, which requires the Air Force to "foster relationships with local authorities with a view towards maximizing Air Force jurisdiction." It is impossible to tell from the documents provided how many of the 93 case were declined or deferred by civilian authorities merely because the military actively sought out jurisdiction versus an actual refusal of a local prosecutor to bring an allegation to trial. We do not explore this issue in our analysis, but believe it is important to keep in mind when considering the military's requests for jurisdiction.

- A case was considered declined if the civilian jurisdiction chose not to press charges due to qualities inherent to the case, such as insufficient evidence or a victim recanting their allegation.

- A case was considered deferred if, through the process of negotiating with military authorities, the civilian jurisdiction determined the military would be better able to prosecute the case. For instance, acts charged by the military may not have been a crime under state law, or offenders may have been deployed abroad. In these cases, civilian authorities did not make a formal determination on the merits of the evidence in the case.[2]

For some cases, such determinations were not possible. These cases have been marked "other" or "unknown," and explanations of each case are provided in footnotes within the "Findings" section of this report.

When determining the nature of a military prosecution, we defined sexual assault as a non-consensual sex act under Article 120 (Rape and sexual assault generally), Article 120b (Rape and sexual assault of a child), or Article 125 (Forcible sodomy). We further differentiated between being prosecuted for a crime and simply being charged with one—for example, in several cases, all sexual assault charges were eventually dropped, in which case the defendant was prosecuted for other crimes but not the sexual assault offense.

As mentioned above, we frequently did not receive all the information needed to complete a thorough analysis, particularly for Army cases. As a result, we could not always determine whether a defendant was charged, prosecuted, or convicted for sexual assault. Consequently, our estimates of Army sexual assault prosecution and conviction rates may be low. Similarly, rates for civilian declination may be high, since our analysis found that, when full information was provided, cases characterized as "declined" by the military were often more accurately described as "deferred" or "other."

Finally, it should be noted that the Pentagon's claims differed between Adm. Winnefeld's SASC testimony and his follow-up letter, with the most inaccurate claims made during his testimony. For example, Adm. Winnefeld stated that, in every case, "a civilian district attorney (DA) refused to take a sexual assault case." In his follow-up letter, such claims were softened to "sexual assault cases after civilian authorities either did not pursue a full investigation or formally declined to prosecute." Some of the numbers and percentages provided by Adm. Winnefeld also changed.

2. In his letter to the SASC, Adm. Winnefeld himself differentiated this process from declinations, stating, "From time to time, civilian authorities prosecute cases that the military could prosecute, but that is the result of informal discussions regarding which system is better suited to handle the case rather than a result of a service formally declining prosecution."

Adm. Winnefeld's testimony, which took place directly before a critical debate on military justice reform, had a much larger reach than the letter sent several days later. In fact, perhaps because the letter did not indicate that it was intended to clarify any inaccurate comments, his testimony was cited by numerous lawmakers in support of opposition to the Military Justice Improvement Act.[3] In recognition of this disparate impact, we largely rely on Adm. Winnefeld's testimony in analyzing the legitimacy of the Pentagon's claims. However, when comparing specific numbers, we use those in the letter, as these allow for more precise comparison.

3 Lawmakers who cited the 93 cases include Congresswoman Loretta Sanchez (D-CA) and Senators Claire McCaskill (D-MO), Kelly Ayotte (R-NH), Carl Levin (D-MI), and James Inhofe (R-OK). Specific quotes can be found in Appendix A-2.

COMMANDERS WERE NOT TOUGHER THAN MILITARY ATTORNEYS ON SEXUAL ASSAULT

According to the Pentagon, the 93 cases demonstrate that commanders are more willing to prosecute sexual assault, with Adm. Winnefeld stating, "I worry that we are going to have fewer prosecutions if we take [prosecution decisions] outside the chain of command." He later wrote, "I believe these statistics demonstrate the personal ownership commanders take in the discipline of their units — even in the face of often challenging circumstances." These Marine Corps (USMC) and Army cases provide no evidence that commanders are more willing than military attorneys and prosecutors to prosecute sexual assault. In fact, **there was not a single instance where a military prosecutor was less willing than a commander to go forward with a case.**

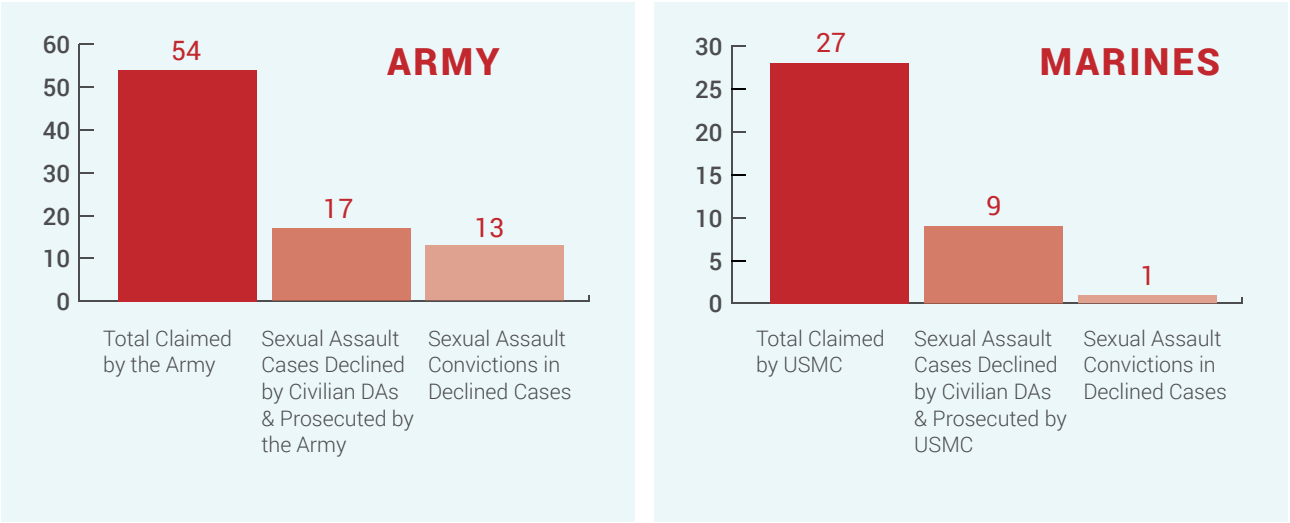
In every case provided by the USMC and the Army involving a prosecution, a military attorney agreed to prosecute the defendant. Commanders cannot refer cases to a general court-martial unless a staff judge advocate (SJA) advises that the charges are warranted by the evidence, though commanders can refuse to press charges against their SJA's advice.[ii] Although a handful of cases were special courts-martial, it is highly unlikely that a commander would call for a prosecution when their SJA cites a lack of evidence. Consequently, the SJA likely supported prosecution in every case that went forward. Similarly, the trial counsel (the military prosecutor) is duty-bound to refuse to try a case if it is not supported by the evidence, and in every one of these cases, a trial counsel prosecuted the case in the courtroom.

There is similarly no evidence that commanders ever sought jurisdiction over a given case. In every Army and USMC case where information was available, a military criminal investigator, trial counsel, or an SJA negotiated with civilian authorities for jurisdiction over the offense. In one case, after a second sexual assault allegation was made against an Army soldier, a military Special Victims Prosecutor personally reached out to an active-duty victim the military had lost touch with in order to initiate the military justice process. Across all cases, military attorneys and prosecutors were just as tough, if not tougher, than commanders in holding the perpetrators of sexual assault accountable.

THE PENTAGON MISCHARACTERIZED THE 93 CASES TO LAWMAKERS

Our analysis shows that the Pentagon provided incorrect and misleading information to the Senate Committee on Armed Services (SASC). In contrast to the Pentagon's claims, our analysis shows that many of the cases cited by Adm. Winnefeld did not include civilian declinations, were not prosecuted for sexual assault, and had much lower conviction rates than were reported to Congress.

Vast Majority of Cases Were Not Sexual Assaults Refused by Civilian Prosecutors and Tried by the Military



Claim: Commanders prosecuted 93 cases after civilian prosecutors refused.
Reality: Many cases were not declined by civilian prosecutors or prosecuted for sexual assault.

In Adm. Winnefeld's testimony before the SASC, he stated that, "a civilian district attorney (DA) refused to take" each sexual assault case he discussed. In a follow-up letter, he softened this claim to indicate that "local civilian authorities" declined each case, rather than just DAs.[4] Adm. Winnefeld also implied that, in each of these cases, the military prosecuted the offender for a sexual assault. For both the USMC and the Army, these claims were found to be false.

Marine Corps

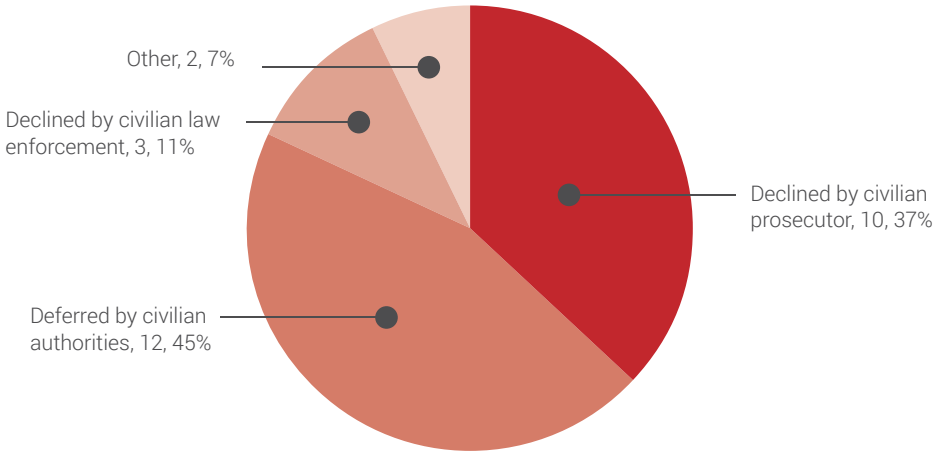
Out of 27 total completed cases, a civilian prosecutor declined to take further action in only 10 (37%) of cases. The USMC obtained the remaining cases in the following ways:

- 3 cases were declined by local law enforcement.
- 12 cases were deferred by civilian authorities.
- 2 cases were transferred in other ways.[5]

4 In this letter, Adm. Winnefeld also stated this list included cases where civilian authorities "failed to pursue a full investigation." This category is vague and a sharp divergence from his testimony before the SASC, and such cases are not considered "declined" in our analysis.

5 In one case, local authorities could not contact the victim, making action impossible. In the second case, local law enforcement completed their investigation, but it is unclear if a prosecution decision was made before the military took over the case.

Most Cases Not Declined by Civilian Prosecutors (USMC)



Among the 13 total cases that were declined by local authorities (prosecutors or law enforcement), 10 defendants were prosecuted by the military for a sexual assault charge. In the other 3 cases, the defendant was never charged with a non-consensual sex offense, or these charges were withdrawn. Similarly, among only civilian prosecutor declinations, just 9 cases were prosecuted for sexual assault (33% of all USMC cases).

Overall, over two-thirds of all USMC cases did not support the Department of Defense's (DoD) characterization of sexual assault cases declined by a civilian DA but prosecuted by the military.

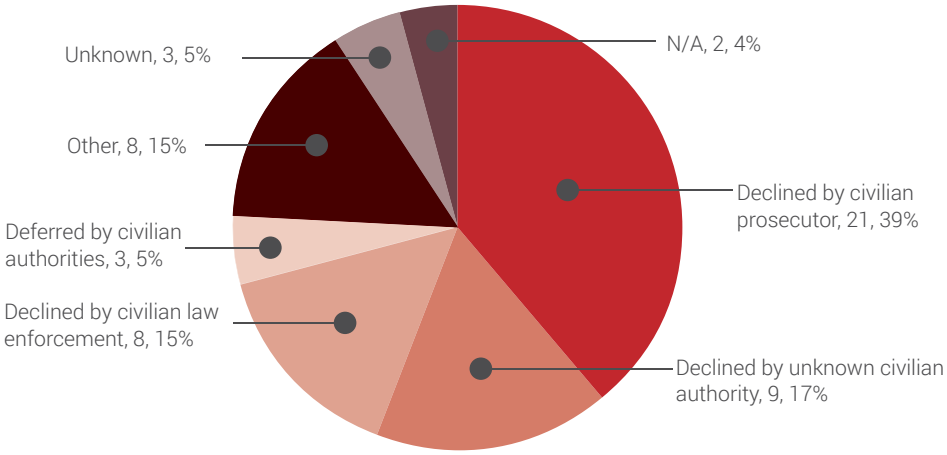
Army

Out of 54 total cases, **a civilian prosecutor declined to take further action in only 21 (39%) of cases.** The Army obtained the remaining cases in the following ways:

- 8 cases were declined by local law enforcement.
- 9 cases were declined by unknown civilian authorities.
- 3 cases were deferred by civilian authorities.

- 8 cases were transferred in other ways.[6]
- In 3 cases, it is unknown how the military came to have jurisdiction, or if civilian authorities were ever aware of the case or took any action.
- In 2 cases, the military never court-martialed the accused, and so we do not consider this a military prosecution.[7]

Most Cases Not Declined by Civilian Prosecutors (Army)



Notably, it is likely that the above over-estimates civilian declinations. Because the Army usually did not provide information on their specific interaction with civilian authorities, it was impossible for us to verify if all cases characterized by the Army as "declinations" were, in fact, declinations.

6 The Army took over "other" cases in the following ways: (1) During the transition from one civilian DA to another, the victim's case was lost. The civilians never formally declined to prosecute. (2) The civilians did prosecute the accused. He was found Not Guilty. The military prosecuted after civilian proceedings completed. (3) The civilians completed their investigation, but it is unclear if any prosecution decision was made before the military took over the investigation. (4) The civilian police department did not transfer the case to their specialized Special Victims Unit during the investigation. It is unclear if they would have prosecuted. (5) The civilians never took jurisdiction over this accused. Based on the limited summary, it appears that two men (one civilian, one Army) were accused of committing a sexual assault. The military investigated and prosecuted the Army defendant; civilian authorities never had the case and never declined to act. Civilian authorities did not prosecute the civilian accused, but it is unknown what factual details specific to that defendant led to that decision. (6) The conduct was not a crime under state law, although it was a crime under the military Uniform Code of Justice. Civilian authorities were unable to prosecute. (7) The Army took over the case during a "sluggish" civilian investigation. Civilian authorities never had the opportunity to make a prosecutorial decision or decline the case. (8) The Army took over the case during what they perceived as a slow investigation. Civilian authorities never had the opportunity to make a prosecutorial decision.

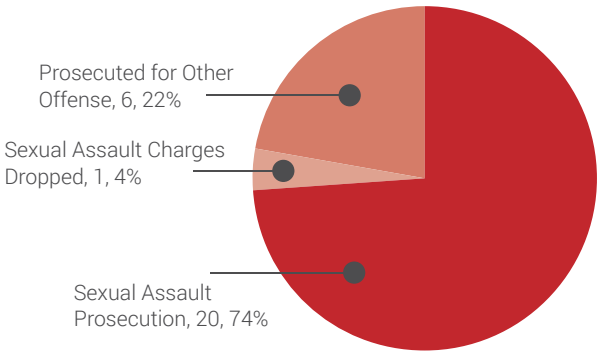
7 In contrast to the claims in Adm. Winnefeld's testimony, two cases did not involve a prosecution but, instead, discharge in lieu of court-martial. In these cases, neither civilian authorities nor the military ever prosecuted the defendant for sexual assault or any other offense.

Where such information was provided, several self-characterized "declinations" were actually better classified as deferrals. Examples of false declinations can be found in "Case Studies" (see next section).

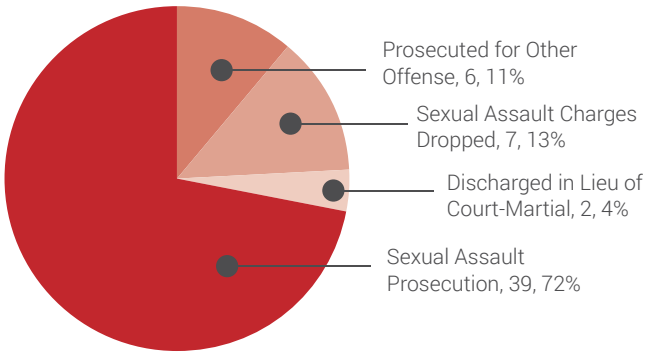
Among the 38 cases that were seemingly declined by local authorities, only 28 were prosecuted by the military for a sexual assault charge. In the other 10 cases, the defendant was never charged with a non-consensual sex offense, or these charges were withdrawn or dismissed. Among cases definitively declined by civilian prosecutors, the number of military sexual assault prosecutions drops to just 17 (31% of all Army cases).

Similar to USMC cases, **over two-thirds of Army cases did not support Adm. Winnefeld's claims** to the SASC about military prosecutions in cases that civilian prosecutors refused.

1 in 4 USMC Cases Never Prosecuted for Sexual Assault



1 in 4 Army Cases Never Prosecuted for Sexual Assault



Claim: Each case involved a sexual assault prosecution.

Reality: Many cases did not involve sexual assault, and the military often failed to prosecute those that did.

Despite the Pentagon's claims that defendants in these cases were prosecuted for sexual assault, a significant portion were in fact never charged for a nonconsensual sex act. Instead, many were charged with acts that may have been consensual (e.g. "indecent act," which often refers to consensual sex in the presence of a third party), child porn possession, or other non-sexual misconduct. While often reprehensible, such acts are not sexual assaults.

In the Marine Corps, out of 27 total cases, 21 offenders (78%) were charged with a sexual assault, while 20 (74%) were actually prosecuted (in one case, that charge was dropped). The numbers

were similar in the Army, where out of 54 cases, 46 offenders (85%) were charged with a sexual assault and 39 were prosecuted (72%). Overall, in over 1 in 4 cases, the offender was never prosecuted for sexual assault.

Claim: The military obtained high conviction rates for sexual assault.
Reality: Conviction rates were significantly lower than reported.

In Adm. Winnefeld's remarks and follow-up letter, the DoD boasted high conviction rates of 81% for the Army and 57% for the Marine Corps, the implication being that these were convictions for sexual assault. These numbers were misleading.

In the Marine Corps, out of 27 cases, only a third were convicted of a sexual assault. In the Army, this rate was higher (28 cases, or 52%), but still significantly lower than what was reported. Among cases civilian authorities actually declined, the discrepancy becomes even larger. In the Army, 50% of these cases (19 out of 38) resulted in conviction for a sexual assault. In the Marine Corps, out of 10 defendants tried for sexual assault, only one was actually convicted.

SENTENCING WAS ARBITRARY AND UNPREDICTABLE

Despite Adm. Winnefeld's claim that those convicted were "no longer walking the street," these files reveal an ongoing pattern of inconsistent and unpredictable sentencing, an issue also identified by the AP and Senator Gillibrand in their investigation of military court-martial records at the four largest U.S. military basis in 2013.[iii]

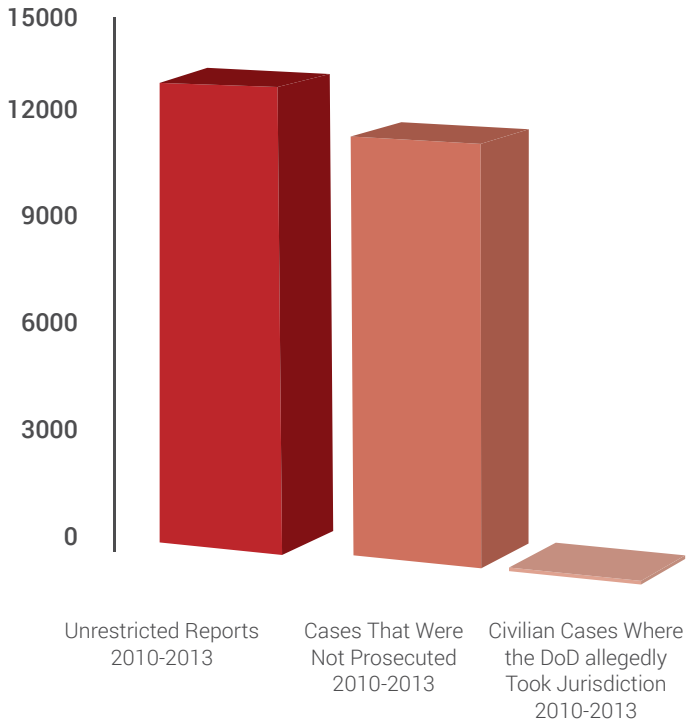
In the Army, convicted sex offenders received anywhere from 35 years to 30 days in jail, with the most lenient sentence going to a Major who had sexually abused a child. In the Marine Corps, punishment for a penetrative sexual assault ranged from 8 years of jail time to no jail time. Overall, approximately 1 in 4 offenders (24%) received a year or less of jail time after a sexual assault conviction. With such arbitrary sentencing, it is unlikely that victims felt that justice was done, or that sexual assault prosecution will have the intended effect of deterring such criminal behavior.

93 CASES VASTLY OUTNUMBERED BY SEXUAL ASSAULT REPORTS AND CASES TRANSFERRED TO CIVILIANS

From 2010 to 2013, the DoD identified 93 cases where civilian authorities allegedly declined to prosecute a sexual assault but the military did prosecute. As our analysis (below) shows, these claims are both incorrect and misleading. However, even if such descriptions were accurate, they represent just a drop in the bucket of military sexual assault cases, and there is no evidence that they are representative of the military justice system's approach to sexual assault.

From 2010 to 2013, the military received a total of 12,232 unrestricted reports of sexual assault committed against adults,[iv] of which just 1,348 (11%) went to trial within that time period.[v] These 93 cases, encompassing assaults against both adults and children, account for **less than 0.8% of sexual assault reports** in this period.

"93 Cases" Vastly Outnumbered by Cases the Military Did Not Prosecute



Meanwhile, in 2013 alone, there were **145 cases** where a civilian or foreign authority exercised jurisdiction over a service member after a military report of sexual assault involving an adult victim.[8,vi] From 2010 to 2013, there were 545 such cases.[vii] The Department of Defense does not release statistics on child victims, but including those, these numbers would likely be even higher. Meanwhile, among the case files provided by the USMC and the Army, 1 in 6 involved child victims. By focusing on these 93 cases, the DoD distracted the conversation from the scope of the military sexual assault crisis and the continued failure of the command-based justice system to handle these cases appropriately.

THE PENTAGON DOES NOT TRACK CIVILIAN CRIMINAL CASES INVOLVING SERVICE MEMBERS

In his letter to the SASC, Adm. Winnefeld states that the DoD does not track cases prosecuted by civilian authorities that the military has declined, making an accurate comparison between the systems impossible. In their Freedom of Information Act (FOIA) responses, the Navy and USMC confirmed that they do not track civilian prosecutions of service members, and we found no evidence to the contrary in any documentation we received.

Last year, the Air Force Times reported on a case where a service member was promoted to the highest enlisted rank (Chief Master Sergeant) after a civilian conviction related to domestic violence.[viii] It was the service member's responsibility to reveal this conviction at every new duty station, and it does not appear that any records from the case or trial were located in a central DoD registry or linked to his personnel file. Without a full tracking system for civilian criminal action against service members, it seems probable that such oversights will continue.

To demonstrate the misleading and inaccurate nature of the Department of Defense's (DoD) claims, it is helpful to explore how specific cases were handled by both civilian and military authorities. While not representative of every case, these four cases illustrate DoD's failure to accurately characterize its dealings with civilians, as well as the negative consequences that occur when military commanders fail to hold their own accountable.

A "Declination" Where Civilian Authorities Lacked Full Jurisdiction

In this Army case, the accused followed the victim out of a bar and got in the back seat of a car with her. As they were driven back to their base, the accused forcibly digitally penetrated the victim despite her protests. The car crossed at least two county lines during the duration of the assault, resulting in the military having sole jurisdiction over the entirety of the offense. Nevertheless, the Army characterized this case as "declined" by local prosecutors. Notably, the accused had previously received non-judicial punishment for sexual harassment but had been allowed to continue serving by his chain of command. After the assault, the accused was tried and convicted of sexual assault and sentenced to 179 days confinement and a bad conduct discharge. In our analysis, Protect Our Defenders (POD) re-characterized this case as "deferred."

An Iraq Case "Declined" By Civilian Authorities

In one Marine Corps case characterized as "declined," a Staff Sergeant was accused of indecent exposure and child pornography. Initially, the Macomb County, MI Sherriff's Office led the investigation. However, this was made difficult when they learned the accused was deployed in Iraq. Given the challenges of a local police department carrying out an international investigation, the Sherriff's Office requested that the Naval Criminal Investigative Service take over the investigation. The accused was ultimately convicted of both charges and sentenced to 18 months confinement (reduced to 12 months by the commander due to a pre-trial agreement) and a bad conduct discharge. In our analysis, POD re-characterized this case as "deferred."

A "Declination" that was Prosecuted by Civilian Authorities

In this Army case, a soldier was accused of strangling and raping a civilian woman. The civilian district attorney did prosecute the case, but the accused was found not guilty. At some point, another victim, a female Army soldier, came forward with a similar report. Civilian authorities were never involved in this second case. The Army combined both reports into one and court-martialed the accused. He was found guilty of sexually and physically assaulting the civilian victim, although not the Army victim, and sentenced to 10 years confinement and a dishonorable discharge. At no point in this case did civilian authorities "decline" or otherwise turn down the case, and POD re-characterized it as "other".

Military Failure to Seriously Punish an Offender Allows for Repeat Offenses

In this Army case, a Staff Sergeant was tried and convicted for child porn possession, but the Army allowed him to remain in the service. The accused then failed to register as a sex offender, placing the community at risk, but the Army failed to check or learn about this issue. Some time later, he was accused of sexually assaulting a child. According to the Army, the local prosecutor declined the case. Ultimately, the accused pled guilty of sexually assaulting the child, child porn possession, obstruction of justice, and other charges, and he was sentenced to 5 years confinement and a bad conduct discharge. This plea deal allowed the accused to avoid the judge's sentence of 8 years confinement.

Military Failure to Prosecute Allows for Repeat Offenses

In this Army case, a soldier raped a fellow service member. The military learned of the crime almost immediately, when military police found the victim outside, partially clothed, after she had escaped from the room where the assault occurred. However, the Army failed to prosecute the offender, claiming they lost contact with the victim—a service member. Three years later, the accused raped another victim, a case that civilian authorities initially held jurisdiction over. A military Special Victims Prosecutor learned of both cases, established contact with both victims, and pushed for charges to be filed. The accused was court-martialed and found guilty of both rapes, resulting in a sentence of 15 years confinement and a dishonorable discharge.

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v. 5. DoD SAPRO. "Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2010." March 2011. < http://www.sapr.mil/public/docs/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf>; DoD SAPRO. "Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2011." April 12, 2012. <

http://www.sapr.mil/public/docs/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf>; DoD SAPRO. "Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012. Volume 1." May 3, 2013. < http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf>; and DoD SAPRO. "Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2013." April 22, 2014. <http://www.sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf>

vi. 6. DoD SAPRO, FY 2013 Report.

vii. 7. DoD SAPRO, FY 2010 Report, FY 2011 Report, FY 2012 Report, FY 2013 Report.

viii. 8. Davis, Kristen. "Tech made chief in 7 years despite 2006 conviction." Air Force Times, October 28, 2014. Accessed January 1, 2016. <http://www.airforcetimes.com/story/military/2014/10/27/tech-made-chief-in-7-years-despite-2006-conviction/1803103

Protect Our Defenders

Debunked: Fact-Checking the Pentagon's Claims Regarding Military Justice

APPENDIX A

Admiral Winnefeld's Testimony and Follow-Up Letter to the Senate Committee on Armed Services

Protect Our Defenders

Excerpted Testimony of Adm. James Winnefeld Before the Senate Committee on Armed Services
July 18, 2013

ADMIRAL JAMES WINNEFELD: I would like to give you a couple of numbers on what the Army has discovered recently, peeling back the numbers on what a so-called objective observer might end up with.

The Army has looked back over the last 2 years and has found 35 cases where a civilian district attorney (DA) refused to take a sexual assault case—refused to take the case. The chain of command in the military insisted that the case be taken inside the military chain of command. Of those 35 cases, there are 14 out there that are not yet resolved. They are still in the court system. There are actually 49. Of the 35 complete, 25 resulted in a court martial conviction. That is a 71 percent conviction rate. The civilian rate is around 18 to 22 percent. So of those 71 percent that were convicted, 24 of the 25 got punitive discharges. They are doing prison time.

If the Army had not taken those 49 cases and the 35 where we have achieved a conviction, those people would be walking the street right now. The victims would not have had the resolution that they deserved in this case. This was done inside the chain of command, the chain of command insisting that a prosecution be pursued, and it was pursued successfully. I worry that if we turn this over to somebody else, whether it is a civilian DA or a non- entity in the military, that they are going to make the same kind of decisions that those civilian prosecutors made. I worry that we are going to have fewer prosecutions if we take it outside the chain of command.

SENATOR CLAIRE MCCASKILL: You mentioned, Admiral Winnefeld, in your testimony earlier that you all have taken a look at prosecutors' decisions in isolation. I have some knowledge of this. There was discipline meted out in my office when I found out that prosecutors in our warrant desk, which was our intake desk, were getting lobbied by some of the trial prosecutors on their decisions because they did not want any losers. They did not want them to take cases that were going to reflect poorly on their won/lost record because when you are a prosecutor, there is a won/lost record. When you take a case to trial, you either win or you lose. So your status among your peers and in some instances your upward mobility in your job could depend on just your conviction rate. When you isolate them with this decision, then there certainly could be instances where you would have a prosecutor that did not want to take a close one, that did not want a "he said/she said".

Do you have additional information that you can share with this committee in terms of numbers of the number of times that civilian prosecutors have said no, military prosecutors have said no, but there are victims out there today that have had justice because the commander said yes?

ADMIRAL WINNEFELD: I do, and I will give you a couple of examples. The Marine Corps has had 28 cases. They have looked back to 2010, 28 cases where civilian prosecutors declined to take the case. Of those, 16 of them the Marine Corps was able to obtain a conviction at court martial, 57 percent. So those are 16 perpetrators that are no longer walking the street and 16 victims who received justice who would not have received it otherwise.

The more startling numbers are from the Army, and I will repeat them. The Army has looked at

49 cases in the last 2 years. Actually 14 of them are still in process. We do not know what is going to happen with those cases. They are still in the trial system. Then 35 of them have been completed. Of those, 25 or 71 percent resulted in a conviction at a court martial. Two additional ones were plea bargained down to a punitive discharge. That takes the number up to 77 percent of these cases that civilian prosecutors would not take that resulted in some serious action taken against a perpetrator. There are some that were acquitted, understandably. Most of the ones who were found guilty have done hard time, are doing hard time, and have been given a punitive discharge from the military. These were all done inside the chain of command.

I would add, Senator McCaskill, some of these are very heinous cases that the DAs would not take. One of them was a 10-year-old autistic girl who was sexually assaulted. We took the case. The commander insisted on it, and a conviction was obtained.

ADMIRAL WINNEFELD: The most important thing—and Senator Gillibrand touched on this—is the command climate that we hold commanders responsible for establishing that makes the likelihood of a sexual assault drop down hopefully to zero. There are a number of aspects. It is about teaching people what a heinous crime this is. It is about re- porting it if you see it. It is about intervening if you see it about to happen, a whole host of measures that commanders must take to establish the climate inside their commands. We need to hold commanders accountable for establishing that climate, and we intend to. That is one of the reasons why the command climate surveys now are going to be seen, which we normally have not done, by the next echelon up in the chain of command. If that next echelon up detects a problem that the climate is not where it needs to be, then action can be taken and it can be even entered into somebody's evaluation as sort of a down strike, as you will.

In keeping with the prevention and the advocacy, investigation, accountability, and assessment pieces of what we are trying to do to take on this pernicious issue, it is absolutely vital that the climate piece of it come to the forefront and that we hold commanders responsible for that.

THE VICE CHAIRMAN OF THE JOINT CHIEFS OF STAFF
WASHINGTON, D.C. 20318-9999

23 July 2013

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

As General Dempsey and I stated during our reconfirmation hearing, the military services have investigated and prosecuted a number of sexual assault cases after civilian authorities either did not pursue a full investigation or formally declined to prosecute. The Army and Marine Corps statistics we cited are below, as well as additional statistics from the Navy and Air Force. The statistics cover the last two years.

U.S. Army. Commanders exercised jurisdiction in 49 sexual assault cases that local civilian authorities declined to pursue.

- 32 of these cases were tried by court-martial, resulting in 26 convictions—an 81% conviction rate
  - 25 of the 26 (96%) convicted were sentenced to confinement and a punitive discharge or dismissal from the military
  - Six accused were acquitted of sexual assault charges
- Two of the accused were administratively discharged in lieu of trial by court-martial under other than honorable conditions
- 15 cases are still in the pre-trial phase of the military justice system

U.S. Marine Corps. Commanders exercised jurisdiction in 28 sexual assault cases that local civilian authorities declined to pursue.

- All 28 cases were tried by court-martial
- 16 cases resulted in convictions—a 57% conviction rate

U.S. Navy. Commanders exercised jurisdiction in six sexual assault cases that local civilian authorities declined to pursue.

- Three cases were tried by court-martial, resulting in one conviction—a 33% conviction rate
- Three cases are still in the pre-trial phase of the military justice system

U.S. Air Force. Commanders exercised jurisdiction in ten sexual assault cases that local civilian authorities declined to pursue.

- All ten cases were tried by court-martial, resulting in nine convictions—a 90% conviction rate

- Seven of the nine (78%) convicted were sentenced to confinement and/or a punitive discharge or dismissal from the military

I believe these statistics demonstrate the personal ownership commanders take in the discipline of their units—even in the face of often challenging circumstances.

In one case, for example, two soldiers engaged in sexual intercourse with a victim who was substantially incapacitated by alcohol. When questioned, both soldiers lied to civilian law enforcement. A civilian investigator accused the victim of lying, and concluded as much in the official report. After local authorities declined to prosecute, military investigators opened a case, located additional victims, and discovered evidence indicating that the soldiers had conspired to obstruct justice. Both soldiers were convicted by a court-martial, sentenced to confinement, and punitively discharged.

Another case involved a soldier's rape and forcible sodomy of his 10-year-old autistic step-daughter. Lacking physical evidence and a statement from the accused, civilian authorities declined to prosecute. Military investigators opened a case and located a key piece of evidence that corroborated the victim's allegations against the soldier. A court-martial convicted the soldier, sentencing him to 35 years confinement and a dishonorable discharge.

In cases like these and others, which independent authorities declined to pursue, commanders recognized the need to hold service members accountable for their crimes both for the sake of justice, and to preserve good order and discipline.

You also asked whether, conversely, civilian authorities have prosecuted cases that the military services did not pursue. The services currently do not track that information. However, after querying the field, the Army, Navy, and Air Force have responded that they have no recollection of cases in which commanders declined to prosecute, or a court-martial ended in an acquittal, and civilian authorities subsequently prosecuted. From time to time, civilian authorities prosecute cases that the military could prosecute, but that is the result of informal discussions regarding which system is better suited to handle the case rather than a result of a service formally declining prosecution.

I appreciate your energetic support for our determined efforts to eliminate the insider threat of sexual assault, and your continued concern for and support of our men and women in uniform.

Sincerely,

JAMES A. WINNEFELD, JR.
Admiral, U.S. Navy

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Senator Claire McCaskill

Most importantly, we've dug into the hard data surrounding these crimes. Supporters of the proposal to strip commanders of their responsibilities promise that their approach will lead to an increase in reporting and prosecutions. But in just the past two years, we found 93 cases of rape and sexual assault that prosecutors declined to prosecute, which were then referred to court martial by commanders. That's 93 victims who had their day in court because commanders, not prosecutors, had the ability to refer cases for court martial. **[USA Today Op-Ed, August 29, 2013]**

It would leave a huge number of victims behind. Over the past two years, there have been at least 93 cases in which prosecutors declined to pursue charges, but in which a commander launched a court martial. And many of those courts-martial resulted in convictions. That's 93 victims who would never have had their day in court if commanders lost the ability to bring a case to court martial. We've also found almost no cases in which a prosecutor wanted to pursue charges but was overruled by a commander. Stripping commanders of the ability to launch courts-martial seeks to solve a problem – commanders refusing to move cases forward – that we just don't have. **[Huffington Post Op-Ed, November 18, 2013]**

On the other hand, over the last two years, 93 separate times has the outside lawyer said, 'you know, this case is too weak... **[Senate Floor Speech, November 20, 2013]**

It would leave victims behind. In two years, there have been at least 93 cases in which civilian prosecutors declined to pursue charges but commanders launched a court-martial (and almost none where a commander overruled a prosecutor who wanted to proceed). That's 93 victims who wouldn't have had their day in court if commanders lost the ability to bring a case to court-martial. **[USA Today Op-Ed by Sen. McCaskill and Sen. Ayotte, December 2, 2013]**

The facts show that commanders send many sexual assault cases forward even when prosecutors independently decline to take cases to trial. Ninety-three cases in just the past two years have been taken to trial in the military when a prosecutor has declined. In a recent case at the United States Naval Academy, the Commander with the convening authority similarly directed that the case proceed to trial even as the prosecutors recommended against. The victims in these cases got their day in court because a commander, not a lawyer had the ability to move a case forward. **[Statement before the Congressionally-established Response Systems to Adult Sexual Assault Crimes Panel, January 30, 2014]**

I know from personal experience that prosecutors are often focused on a "won/loss" ratio, and can be hesitant to pursue charges if there are evidentiary challenges in a case, which often happens in sexual assault cases. In just the past two years, we've identified at least 93 cases of sexual assault in which a prosecutor declined to pursue charges, but in which a commander still launched a court-martial. Those are 93 victims of sexual assault who would never have had their day in court if these cases were left solely to prosecutors. Under the major reforms that recently became law, we have effectively eliminated commanders' ability to abuse their power, but we also retain commanders' ability to do it right—and we substantially increase the ability to hold them accountable if they fail. Under an alternative proposal by my colleague Senator Kirsten Gillibrand which would strip commanders of all responsibilities in these cases, if a prosecutor declines to pursue a court-martial, then the case is over and that victim has no chance at justice.

As I noted above, it would leave a huge number of victims behind (over the past two years, there have been at least 93 cases in which prosecutors declined to pursue charges, but in which a commander launched a court martial—that's 93 victims who would never have had their day in court if commanders lost the ability to bring a case to court-martial). It also hasn't worked where it's been tried—supporters of this alternative point to a number of our allies that have moved to similar military justice systems, but not one of these countries has seen the increase in reporting that proponents promise. **[MSNBC Interview, February 13, 2014]**

Over the past two years, there have been at least 93 cases in which prosecutors declined to pursue charges, but in which commanders launched a court-martial. That's 93 victims who would never have had their day in court if commanders lost the ability to bring cases forward. **[U.S. News and World Report Op-Ed, February 19, 2014]**

Interviewer: On that topic, you have cited **93 cases** that prosecutors wanted to drop, but commanders pushed forward, as evidence that Gillibrand's proposal could diminish prosecutions. She **takes issue with your number**, saying it refers to civilian prosecutors, not military ones, and therefore "says nothing about the willingness of a military prosecutor to prosecute." Who's right?

McCaskill: There were some of both [military and civilian prosecutors] in that number. But this is the point: She is advocating that prosecutors be the only judge as to whether or not a case should go to trial. I saw this firsthand has a prosecutor. Many of these are he-said-she-said cases. Those consent cases are challenging, and there are many prosecutors that think if it's just a he-said-she-said, it's a wash. Let him plead to something little and take a demotion. I want to make sure that we are not going backwards by allowing these cases to go away without any checks and balances on the prosecutor whatsoever. **[New Republic Interview, March 6, 2014]**

This case adds to at least 93 cases in just the past few years in which prosecutors declined to pursue charges, but in which commanders launched a court-martial. That's 93 victims who would never have had their day in court if commanders lost the ability to bring cases forward. And we've found almost no cases in which a commander tried to overrule a prosecutor who wanted to move to trial. **[TIME Op-Ed, March 15, 2014]**

To bolster her position, McCaskill has said that over the past two years military prosecutors have recommended against pursuing charges in 93 sexual assault cases, only to have commanders reverse those decisions. **[Springfield News-Leader, March 19, 2014]**

Sen. Claire McCaskill, a Missouri Democrat who led the filibuster against the Gillibrand bill, argued that the Sinclair verdict supports her view that commanders are in the best position to determine whether a case should go to trial.

The prosecutor was willing to abandon the most serious charges despite believing Gen. Sinclair was guilty, a spokesman from her office said, proving that commanders are more aggressive than prosecutors when it comes to getting justice for the victims.

"The prosecutor believes that, as a tactical matter, the charges of sexual assault should be dropped in part because those charges would be difficult to win at trial," Mrs. McCaskill's office said in a statement. "If commanders could not launch courts-martial, the brigadier general in this case would likely be off the hook for an alleged sexual assault which both military commanders and prosecutors believe occurred." **[Washington Times, March 27, 2014]**

Senator Kelly Ayotte

It would leave victims behind. In two years, there have been at least 93 cases in which civilian prosecutors declined to pursue charges but commanders launched a court-martial (and almost none where a commander overruled a prosecutor who wanted to proceed). That's 93 victims who wouldn't have had their day in court if commanders lost the ability to bring a case to court-martial. **[USA Today Op-Ed by Sen. McCaskill and Sen. Ayotte, December 2, 2013]**

I would also say, if we want justice for victims, what about those 93 victims where the commander said: Bring the case forward, even though the JAG lawyer said no? They would not have gotten justice. So the evidence is the opposite. What would we say to those victims? The evidence shows that actually commanders are bringing cases more frequently than their JAG's lawyers and over their objections. **[Floor Speech, March 6, 2014]**

Ayotte also noted that in the last two years, commanders have used their authority to prosecute 93 cases after civilian prosecutors declined to pursue charges - that's 93 victims who would never have had a chance at justice if the decision to prosecute was left solely with civilians [SIC] prosecutors. Additionally, Ayotte pointed out that America's allies who made this change did so to protect victims, and cannot attribute any rise in reporting of assaults to removing commanders from the process. **[Press Release, March 6, 2014]**

Senator Carl Levin

The Senate's leading Democrat on military issues released two letters from the Pentagon on Wednesday to argue that allowing military commanders to retain their authority over sexual assault cases will protect victims and battle what has been described as a "scourge" of sexual assault across the armed forces.

The senator, Carl Levin of Michigan, chairman of the Armed Services Committee, said Pentagon statistics show that military commanders have pursued 93 sexual assault cases over the past two years after the civilian authorities did not investigate or did not prosecute, but not all have yet reached court martial.

In a conference call with reporters, Mr. Levin said the Armed Services Committee, in rejecting the Gillibrand proposal, "got this thing right" in not removing prosecution authority from commanders. "Fifty defendants were convicted of sometimes horrific crimes who would not have faced justice had commanders not had authority to seek justice," he said. **[New York Times, July 24, 2013]**

The evidence shows that removing this authority from our commanders would weaken, not strengthen, our response to this urgent problem. That is why I believe the bill offered by Senator Gillibrand and others, though offered in the hope that it would strengthen our efforts against sexual assault, will in fact have the opposite effect. In the last year we have learned that in scores of cases during the period study, commanders prosecuted sexual assault cases that civilian attorneys had declined to prosecute. **[Floor Speech, March 6, 2014]**

Senator James (Jim) Inhofe

Commanders are consistently willing to prosecute sexual assault offenders, even when military and civilian prosecutors are not. A recent letter from Admiral Winnefeld, Vice Chairman of the Joint Chiefs of Staff reported our commanders have taken 93 cases that civilian prosecutors declined. To date, 73 have resulted in courts-martial with other cases still in process. There were convictions in 52 cases. These commanders deserve our thanks for taking on these challenging cases! **[Statement, July 26, 2013]**

Congresswoman Loretta Sanchez

Most importantly, we've dug into the hard data surrounding these crimes. Supporters of the proposal to strip commanders of their responsibilities promise that their approach will lead to an increase in reporting and prosecutions. But in just the past two years, we found 93 cases of rape and sexual assault that prosecutors declined to prosecute, which were then referred to court martial by commanders. That's 93 victims who had their day in court because commanders, not prosecutors, had the ability to refer cases for court martial. **[USA Today Op-Ed, August 29, 2013]**

The plan under consideration in the Senate would strip military commanders of their responsibility to decide which sexual assault cases go to criminal trial and create a separate prosecutor's office outside the chain of command. While well-intentioned, this is the wrong option because it is impossible to hold someone accountable for fixing a problem when you relieve them of their responsibility to do so. In fact, removing a commander's ability to move cases forward removes an important tool for protecting victims. Over the past two years, there were 93 cases of rape and sexual assault that prosecutors declined to prosecute, but were referred to court martial by commanders. 93 victims were given their day in court because their commanders were involved. **[U.S. News and World Report Op-Ed, February 19, 2014]**

Protect Our Defenders' Matrix of the "93 Cases" Matrix Key

Case # – Tracking number for the individual cases shared with us by the Army and Marine Corps (USMC). Typically corresponded with the case number provided by the Army or USMC.

Military Case # (Army only) **–** Case number given to the case by the Army in its Freedom of Information Act (FOIA) response.

Civilian Action – How the case was transferred to the military, based on the service branch's description of the interaction with civilian authorities. If information about the interaction was not provided (as often occurred with Army cases), we relied on the service branch's characterization of the interaction. This may over-estimate the true number of civilian declinations.

- **Declined –** The civilian jurisdiction chose not to press charges due to qualities inherent to the case, such as insufficient evidence or a victim recanting their allegation, or the military characterized the case this way without providing further information.
- **Deferred –** Through the process of negotiating with military authorities, the civilian jurisdiction determined the military would be better able to prosecute the case. In these cases, civilian authorities did not make a formal determination based on the merits of the evidence in the case.
- **Other –** Neither declined nor deferred.

We also attempted to determine which civilian actor made the decision to transfer the case to the military (law enforcement, the prosecutor, or unknown). We have marked that information where available.

Military Actor Who Took Case – The military personnel who requested/accepted the case from civilian authorities (typically trial counsel/military prosecutor, military criminal investigator, or a Staff Judge Advocate).

Prosecution of Any Offense – Whether any offense was tried or pled to and, if so, the type of court (typically general or special court-martial)

Charge(s) – What the accused was charged with. Any non-consensual sex act under Article 120 (Rape and sexual assault generally), Article 120b (Rape and sexual assault of a child), or Article 125 (Forcible sodomy) was considered to be "sexual assault."

Military Conviction – Whether the accused was convicted of any offense and, if so, whether this included a sexual assault conviction.

Sentence – The approved sentence or, when that information was not available, the adjudged sentence.

Court-Martial Date – Year in which the court-martial took place.

Offense Date (Army only) – Year in which the alleged offense(s) took place.

Trial Documents (Army only) – Whether the Army provided documentation related to the case (typically the Court-Martial Order or the Report of Result of Trial).

Notes (Army only) – Notable issues with the case (typically whether the accused was discharge in lieu of court-martial or issues with the case records).

Protect Our Defenders' Matrix of the "93 Cases" Army

Case #	Military Case #	Civilian Action	Military Actor Who Took Case	Prosecution of Any Offense	Charge(s)	Military Conviction	Sentence	Court-Martial Date	Offense Date	Trial Documents	Notes
1	1	declined - prosecutor	?	yes - GCM	sexual assault	yes-s.a.	60 days confinement, discharge, rank reduction	?	?	no	
2	2	declined - prosecutor	?	yes - GCM	sexual assault, alcohol to minor	yes-s.a.	2 yrs confinement, discharge, rank reduction, pay forfeiture	2013	2010	yes	
3	3	declined - law enforcement	?	no	N/A	no	N/A	?	?	no	Chapter 10 discharge
N/A - Same as Case #2	4							?	?	no	
5	5	declined - ?	?	yes - GCM	sexual assault, fraternization, conduct unbecoming	yes-not s.a.	1 mo confinement, discharge, pay forefeiture	2013	2012	yes	
6	6	declined - ?	CID	yes - GCM	sexual assault (dismissed), assault, adultery, prohibited relationship	yes-not s.a.	17 mo confinement, discharge	2011	2008, 2009, 2010	yes	
7	7	declined - prosecutor	CID	yes - GCM	sexual assault, indecent act, assault	yes-not s.a.	pay forefeiture, reprimand	2011	2010	yes	
8	8	declined - ?	?	yes - GCM	sexual assault	no		2012	2011	yes	
9	9	declined - ?	CID	yes - GCM	sexual assault (dismissed), assault consummated by battery for unwanted sexual intercourse, false statement	yes-not s.a.	45 days confinement, discharge, rank reduction	2012	2011	yes	
10	10	declined - law enforcement	CID	yes - GCM	sexual assault (dismissed), conspiracy to obstruct justice, false official statement, AWOL	yes-not s.a.	8 mo confinement, discharge, rank reduction	2012	2010	yes	
11	11	declined - law enforcement	CID	yes - GMC	sexual assault, assault, fraternization, others	yes - s.a.	30 mo confinement, discharge, rank reduction	2012	2007, 2008, 2010, 2012	yes	
12	12	declined - ?	?	no	N/A	no	N/A				Chapter 10 discharge
13	13	declined - prosecutor	CID	yes - SCM	sexual assault (dismissed), assault, adultery	yes-not s.a.	120 days confinement, discharge, rank reduction	2012	2010	yes	
14	14	declined - prosecutor	?	yes - GCM	child sexual assault, indecent act, child pornography, obstruction of justice, failure to register as sex offender	yes-s.a.	5 yrs confinement, dishcarge, rank reduction	?	?	no	
15	15	declined - law enforcement	CID	yes - GCM	sexual assault, child pornography, others	yes-s.a.	35 yrs confinement, discharge, rank reduction	2012	2010, 2011	yes	
16	16	declined - law enforcement	?	yes - GCM	sexual assault, broke no-contact order	yes - not s.a.	restriction, rank reduction, pay forfeiture	2012	2011	yes	charge sheet differs from summary
17	17	other (investigation completed, unclear if proseuction decision made)	CID	yes - GCM	child sexual assault	yes-s.a.	4 yrs confinement, discharge forefeiture of pay	2013	2009, 2010	yes	
18	18	other (not crime in CO)	CID	yes-GCM	child pornography, indecent act	yes-not s.a.	20 months confinement, discharge, rank reduction, pay forefeiture	2013	2012	yes	
19	19	?		yes - GCM	sexual assault, conspiracy to commit offense	yes-s.a.	18 mo confinement, discharge, rank reduction, pay forefeiture	2012	2011	yes	
20	20	?		yes - GCM	sexual assault	yes-s.a.	8 mo confinfement, discharge, rank reduction, pay forefeiture	2012	2011	yes	
21	21	?		yes - GCM	sexual assault	no	N/A	2012	2011	yes	
22	22	declined - ?	?	yes - GCM	sexual assault, cocaine use	yes - not s.a.	restriction, rank reduction, pay forefeiture	2012	2010	yes	
23	23	declined - prosecutor	?	yes - GCM	child sexual assault	yes-s.a.	35 yrs confinement, discharge, pay forefeiture	2011	2007, 2008	yes	
24	24	other (civilians prosecuted)	?	yes - GCM	sexual assault, assault	yes-s.a.	10 yrs confinement, discharge, pay forefeiture, rank reduction	2011	2010	yes	
25	25	deferred	?	yes - GCM	sexual assault, sexual harassment, assault	yes-s.a.	179 days confinement, discharge, rank reduction	2013	2012	yes	
26	26	declined - prosecutor	?	yes	?	yes-?	6 yrs confinement, discharge, rank reduction, pay forefeiture	?	?	no	

Protect Our Defenders' Matrix of the "93 Cases" Army (Continued)

Protect Our Defenders

Case #	Military Case #	Civilian Action	Military Actor Who Took Case	Prosecution of Any Offense	Charge(s)	Military Conviction	Sentence	Court-Martial Date	Offense Date	Trial Documents	Notes
27	27	other (didn't refer to police Special Victims Unit)	?	yes	?	yes-?	6 yrs confinement, dishcarge	?	?	no	
28	28	Other (case misplaced between prosecutors)	TC	yes	sexual assault	yes-s.a.	15 yrs confinement, discharge	?	2006, 2009	no	
29	29	declined - prosecutor	?	yes - GCM	child sexual assault	yes - s.a.	30 days confinement, discharge	2013	?	yes	
30	30	declined - law enforcement	CID	yes - GCM	sexual assault, assault	no	N/A	2012 or 2013	2011	yes	
31	31	declined - law enforcement	CID	yes	sexual assault	yes-s.a.	15 months confinement, discharge	?	?	no	
32	32	other (slow investigation)	?	yes	?	no	N/A	?	?	no	
33	33	declined - prosecutor	?	yes	sexual assault	yes-s.a.	125 days confinement, discharge	?	?	no	
34	34	declined - prosecutor	?	yes	sexual assault	yes-s.a.	2 years confinement, discharge	?	?	no	
35	35	declined - law enforcement	CID	yes	sexual assault (dismissed)	yes-not s.a. (assault)	6 mo confinement, discharge, rank reduction	?	?	no	
36	36	other (slow investigation)	?	yes-GCM	sexual assault	yes-s.a.	5 yrs confinement, discharge	?	?	no	
37	37	declined - prosecutor	?	yes - GCM	sexual assault, provide alochol to underage person	yes-s.a.	15 mo confinement, discharge, rank reduction, pay forefeiture	2012	2010	yes	
38	1 (add'l)	declined - prosecutor	CID, SJA	yes	sexual assault, battery, other military offenses	yes-s.a.	33 mo confinement, discharge, rank reduction, pay forefeiture	?	2010, 2011	no	
39	2 (add'l)	declined - ?	?	yes - GCM	child sexual assault, lewd acts	yes-s.a.	6 yrs confinement, discharge, rank reduction	?	2001-2010	no	
40	3 (add'l)	declined - ?	?	yes - SCM	sexual assault	yes-s.a.	60 days confinement, rank reduction	?	?	no	
41	4 (add'l)	declined - ?	?	yes	sexual assault	yes-s.a.	4 yrs confinement, discharge, rank reduction	?	?	no	
N/A - Same as Case #33	5 (add'l)										
N/A - Same as Case #34	6 (add'l)										
42	7 (add'l)	declined - ?	?	yes	?	no	N/A	?	?	no	
43	8 (add'l)	declined - law enforcement	?	yes	sexual assault	yes-s.a.	4 yrs confinement, discharge	?	?	no	
44	9 (add'l)	other (never a civilian case)	?	yes - GCM	sexual assault, false statements	yes - s.a.	6 yrs confinement, discharge	2012	2011, 2012	yes	
45	10 (add'l)	declined - law enforcement	CID	yes - GCM	sexual assault (dismissed), assault, property damage, stealing	yes - not s.a.	8 mo confinement, discharge, pay forefeiture, rank reduction	2012	2010	yes	
46	11 (add'l)	declined - prosecutor	?	yes - GCM	child sexual assault	no	N/A	2012	2007, 2009, 2012	yes	
47	12 (add'l)	declined - prosecutor	?	yes - GCM	sexual assault	no	N/A	2012	2011	yes	
48	13 (add'l)	declined - prosecutor	?	yes - GCM	sexual assault, fraternization	yes-s.a.	4 yrs confinement, discharge	2012	2011	yes	
49	14 (add'l)	declined - prosecutor	?	yes - GCM	sexual assault (dismissed), conspiracy	yes-not s.a. (assault)	6 mo confinement, discharge	2013	2012	yes	
50	15 (add'l)	declined - prosecutor	?	yes	assault consummated by battery	yes-not s.a.	5 mo confinement, discharge	2013	?	no	
51	16 (add'l)	declined - prosecutor	?	yes - GCM	child sexual assault, alcohol to a minor	yes-s.a.	1 yr confinement, discharge	2013	?	yes	
N/A - same as Case #29	17 (add'l)										
52	18 (add'l)	declined - prosecutor	?	yes - GCM	sexual assault	yes-s.a.	4 yrs confinement, discharge	2013	?	yes	
53	19 (add'l)	declined - prosecutor	?	yes	sexual assault	yes-s.a.	7 yrs confinement, discharge, rank reduction, pay forefeiture	?	?	declination email only	
54	20 (add'l)	declined - prosecutor	?	yes	sexual assault	no	N/A	?	?	no	
55	21 (add'l)	declined - law enforcement	?	yes	?	no	N/A	?	?	no	

Protect Our Defenders' Matrix of the "93 Cases" Marines

Case #	Civilian Action	Military Actor Who Took Case	Prosecution of Any Offense	Charge(s)	Military Conviction	Sentence	Court-Martial Date
1	deferred	Trial Counsel (TC), Navy Criminal Investigative Service (NCIS)	yes - general court-martial (GCM)	child sexual assault, adultery	yes - sexual assault (s.a.)	8 yrs confinement, discharge, rank reduction	2013
2	declined - prosecutor	NCIS	yes - special court-martial (SCM)	indecent act, adultery	yes - not s.a.	35 days confinement, 30 days hard labor, pay forefeiture, reprimand, 15 days restriction	2013
3	declined - law enforcement	NCIS	yes - GCM	sexual assault, adultery	no	N/A	2010
4	declined - prosecutor	TC	yes - GCM	child sexual assault, false statement, orders violation	yes - s.a.	18 mo confinement, discharge, pay forefeiture, rank reduction	2011
5	deferred	Staff Judge Advocate (SJA)	yes - GCM	indecent act (withdrawn), conduct unbecoming, disorderly conduct	yes - not s.a.	30 days confinement, discharge	2012
6	deferred	SJA, NCIS	yes - GCM	indecent act, assault, orders violation	yes - not s.a.	12 mo confinement, discharge, rank reduction	2012
7	deferred	SJA, NCIS	yes - SCM	indecent act	yes - not s.a.	90 days confinement, pay forfeiture, rank reduction	2012
8	declined - prosecutor	TC	yes - GCM	child sexual assault	no	N/A	2011
9	deferred	SJA, NCIS	yes - GCM	sexual assault, controlled substance	yes - s.a.	4 yrs confinement, discharge, rank reduction	2012
10	deferred	NCIS	yes - GCM	child sexual assault, child pornography, UA	yes - s.a.	6 yrs confinement, discharge, rank reduction, pay forefeiture	2010
11	deferred	SJA, NCIS	yes - GCM	sexual assault	no	N/A	2013
12	declined - prosecutor	NCIS	yes - SCM	sexual assault, assault, adultery, disorderly conduct	yes - not s.a.	90 days confinement, discharge, pay forefeiture	2011
13	declined - law enforcement	NCIS	yes - SCM	indecent act, adultery	yes - not s.a.	30 days confinement, discharge, 60 days restriction, pay forfeiture	2013
14	deferred	NCIS	yes - GCM	indecent exposure, child pornography	yes - not s.a.	12 mo confinement, discharge, rank reduction, pay forefeiture	2011
15	deferred	NCIS	yes - GCM	child sexual assault, child pornography, orders violation	yes - s.a.	54 mo confinement, discharge, rank reduction	2011
16	N/A - pending case						
17	deferred	SJA, TC	yes - GCM	sexual assault, adultery	yes - s.a.	discharge, rank reduction, pay forefeiture	2013
18	other (couldn't contact victim)	NCIS	yes - GCM	sexual assault, adultery, false official statement	yes - s.a.	42 mo confinement, dischage, rank reduction	2013

Protect Our Defenders' Matrix of the "93 Cases" Marines (Continued)

Case #	Civilian Action	Military Actor Who Took Case	Prosecution of Any Offense	Charge(s)	Military Conviction	Sentence	Court-Martial Date
19	declined - prosecutor	TC	yes - GCM	sexual assault	no	N/A	2010
20	declined - prosecutor	SJA	yes - GCM	child sexual assault, others	no	N/A	2011
21	declined - prosecutor	TC	yes - GCM	sexual assault	no	N/A	2011
22	declined - prosecutor	TC	yes - SCM	sexual assault, orders violation, false statement	yes - not s.a.	5 mo confinement, discharge, rank reduction	2012
23	deferred	TC	yes - GCM	child sexual assault	yes - s.a.	100 days confinement, discharge, rank reduction, pay forefeiture	2011
24	other (further investigation not warranted)	Criminal Investigation Command (CID)	yes - GCM	sexual assault	yes - s.a.	8 yrs confinement, discharge, rank reduction, pay forefeiture	2013
25	declined - law enforcement	NCIS	yes - SCM	sexual assault (withdrawn), assault, orders violation, false statement	no	N/A	2011
26	deferred	SJA, NCIS	yes - GCM	indecent conduct	no	N/A	2013
27	declined - prosecutor	NCIS	yes - GCM	sexual assault, conduct unbecoming	yes - not s.a.	None	2011
28	declined - prosecutor	NCIS	yes - GCM	sexual assault, threat	no	N/A	2013

APPENDIX B

Download Appendix B at:
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