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# The Enemy Within: Sexual Assault and Rape in the US Armed Forces

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## The Enemy Within: Sexual Assault and Rape in the US Armed Forces

In May 2013, the Department of Defense released a report to the American public estimating a sharp increase in the number of personnel in the armed forces who had been sexually assaulted in 2012 as compared to a previous study in 2010.<sup>i</sup> These findings caused a firestorm in the media which continues to grab public attention even months later because of the devastating revelation it makes about the culture of the armed forces. May 2013 also marked the beginning of my Judge Advocate Corps internship with US Army Special Operations Aviation Command and the 82<sup>nd</sup> Airborne Division Office of the Staff Judge Advocate at Fort Bragg, North Carolina. As an Army ROTC cadet entering into my third year in the program, my knowledge of this issue in the military, its legal consequences, and the lifelong ramifications of sexual assault and harassment was limited to say the least. Given the timing of the release of the Pentagon's findings on sexual assault in the armed forces and my internship, I found myself drawn to the topic, and I was able to focus some of my work as an intern on this aspect of military law. For this reason, my paper places emphasis on this topic and is written in a less formal format so as to demonstrate the development of my knowledge over time.

One of the first questions I needed to answer related to the actual punitive regulations regarding rape and sexual assault in the Uniform Code of Military Justice (UCMJ), the governing code of laws which help to maintain order and discipline among all of the armed services. After obtaining the text, it was easy to locate Article 120, the portion of the UCMJ governing "Rape and sexual assault generally." According to this article, rape is defined in the following terms:

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

## The Enemy Within: Sexual Assault and Rape in the US Armed Forces

- (1) using unlawful force against that other person;
- (2) using force causing or likely to cause death of 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. <sup>ii</sup>

This definition of rape confused me at first because I had expected to find the qualification of threatening the position or livelihood of the other person in order to accomplish the rape. However, upon further reading, this particular aspect falls under the code relating to Sexual Assault. It is as follows:

(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;

## The Enemy Within: Sexual Assault and Rape in the US Armed Forces

(C) making a fraudulent representation that the sexual act serves a professional purpose;

(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 consent 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.

After reading this code (which also includes qualifications for aggravated sexual assault, abusive sexual contact, and proof of threat,) the question remained of the process through which such a court-martial is conducted and the possible punishments faced by the perpetrator when found guilty.

## The Enemy Within: Sexual Assault and Rape in the US Armed Forces

Before a case appears before a military judge, a lengthy process must be undertaken as described in Part II of the UCMJ. In simpler terms, necessary evidence of the commission of a crime punishable under the UCMJ must be collected and processed. All parties in the event are interviewed and provided legal counsel or given the option to seek their own counsel. Once all written statements and evidence has been collected, the case file is reviewed by the Staff Judge Advocate of the convening authority (the command which holds jurisdiction over the case) and is either recommended for courts-martial or often sent back to the persons bringing the case for issues in the evidence or written statements. In addition, preliminary hearings referred to as Article 32 hearings are conducted to ascertain more information about the case. Finally, once the case has been approved to appear before a court-martial, both the parties and their counsels appear at a time and place set by the military judge. The jury, like in civilian courts, is made up of twelve members, six of whom are officers and six of whom are non-commissioned officers. From there, the trial proceeds in a scripted manner based off the rules for courts-martial in the UCMJ. Once the guilt or innocence of the accused has been established by the jury, the judge passes sentence or allows the accused to go free if found innocent.

According to the maximum punishments listed in Appendix 12 of the UCMJ, a person in the armed forces found guilty of rape may face the maximum punishment of “death, dishonorable discharge, bad conduct discharge, life in confinement, and total forfeiture of pay.”<sup>iii</sup> A person found guilty of aggravated sexual assault may face the maximum punishment of “dishonorable discharge, bad conduct discharge, thirty years in confinement, and total forfeiture of pay.” A military judge may use these maximums as the limit on the punishment; often such punishments as death are not proscribed.

## The Enemy Within: Sexual Assault and Rape in the US Armed Forces

After becoming better informed as to the actual codes relating to sexual assault and rape, my understanding of the grievances of Congress, the President, military commanders, and the civilian population improved. However, my knowledge of the history of sexual assault and rape in the armed forces as a whole remained limited, except for in the cases that I read and witnessed while at Fort Bragg and those which had been produced recently by the media. As to the cases which I read and witnessed as an intern, it would be inappropriate and unlawful for me to describe them in any specific terms. For the purposes of this paper, I will refer to cases already available to the public and will relate the overarching themes of the total collection of cases which I read.

One very recent case reported by the *The Guardian* and other news agencies occurred at Fort Hood, Texas and involved female US Army soldiers who were recruited into a prostitution ring. According to the testimony of the soldiers, the ring had been set up by a non-commissioned officer (a sergeant) who was also involved with the sexual assault and harassment program on post.<sup>iv</sup> The main focus of this particular article was another sergeant who is accused of participating in the ring and committing adultery, offenses punishable under the UCMJ in Articles 82 and 134<sup>v</sup>. The case readily demonstrates the use of position in the military to gain sexual advantage. The female soldiers were all lower in rank than the NCOs running the ring and therefore obligated by law to follow orders. Also, they may have been afraid to go to their higher chain of command and had no way to seek help from the sexual assault and rape prevention program since one of the men involved in the ring worked in that program. Such a situation makes it very difficult for a victim to come forward and speak about what happened. Cases like this demonstrate one of the many grievances which the American public currently has with the armed services.

## The Enemy Within: Sexual Assault and Rape in the US Armed Forces

In another case involving a sailor in the US Navy, the reality that sexual assault does not just affect women in the military is publically acknowledged.<sup>vi</sup> According to the sailor, he was threatened by a more senior sailor bearing a knife and was sodomized after a dinner in Guam. After the sexual assault was reported, a senior officer urged the victim to not cooperate with the naval personnel charged with investigating the crime. Both the crime and the urging of the officer to not report the crime fully are two further problems recognized by the US government and the American populace.

The focus on female service members as the main group of victims causes a number of problems. One is that the male victims of sexual assault are overlooked and often do not receive the help they need after experiencing the assault. Though counseling programs in the services exist, the focus on female victims leaves them less prepared to deal with male victims. In addition, there is a conjecture that some parts of American military culture promote an idea of masculine strength as a key part of being a Soldier, Sailor, Airmen, or Marine. This idea does not leave room for the possibility that a man could be abused sexually by another man without having some weakness. Another problem also relates to the heavy focus on female service members as victims. Women who serve alongside their brothers in arms now face a separation and a stigma that any joke or not well thought out comment will turn into a sexual harassment investigation. With this stigma, female service members find themselves deprived of the bonds necessary to the cohesion and development of military units.

In yet another case, the issue of Article 32 hearings and the commander's right to overturn jury convictions are demonstrated. A female midshipman at the US Naval Academy allegedly was sexually assaulted by three players on the Academy's football teams at a party with other midshipmen.<sup>vii</sup> She reported the assault a year after the fact during the firestorm of

## The Enemy Within: Sexual Assault and Rape in the US Armed Forces

press surrounding the release of the Department of Defense study finding the dramatic increase in sexual assaults in the military between 2010 and 2012. Her Article 32 hearing lasted more than twenty hours and included personal details which seemed to have little bearing to the criminal investigation.

In addition, the head of the Naval Academy, Vice Admiral Michael H. Miller, has been called into question for exerting a large amount of command influence on this case by dismissing the courts-martial against one of the accused and recommending the other two accused for courts-martial. Such a decision caused controversy because it went against both the judge and the legal advisor at the Article 32 hearing. Other cases have mirrored this however this particular case and issue unfolded in front of the full view of the American public.

Currently, Congress is taking steps to remedy the problems that the press and Department of Defense reports have revealed in the judicial system governing sexual assault and rape cases. One Congresswoman, Kirsten Gillibrand from New York, has proposed a plan to allow service members who have been raped or sexually assaulted to go around their immediate chain of command and therefore remove the power of commander's in determining the case. The main criticism of this plan is that it takes away a necessary command power in other aspects than just sexual assault and rape cases. In the recent budget plan that has passed the House of Representatives, a version of her idea remains in that commanders would be unable to overturn jury convictions. In addition, the budget plan proposes that Article 32 hearings would be limited in the type of questioning allowed. This change directly relates to the controversy sparked by the intense questioning of the Naval Academy midshipman previously mentioned. Under the bill, service members convicted of sexual assault face dismissal or even dishonorable discharge, the statute of limitations will no longer exist in these types of crimes, victims will be guaranteed

## The Enemy Within: Sexual Assault and Rape in the US Armed Forces

legal counsel, and any retaliation against a service member who reports this crime will be criminalized.<sup>viii</sup>

If this bill passes the Senate and is signed by President Obama into law, it could dramatically change the way sexual assault and rape cases are dealt with in military courts. For proponents of such drastic changes, these proposals could not come soon enough. Yet for those who see the possible negative consequences of taking away command power or limiting the type of questioning in Article 32 hearings, these changes are coming far too fast and are a reflection of the power of the 24/7 media as well as a reactionary public.

As I continued my research into this problem, I began to look at studies completed in the 1990s relating to sexual assault in the military and the costs of such to the force and the American public. One study, “Estimating the Organizational Costs of Sexual Harassment: The Case of the U.S. Army”, published in the *Journal of Business and Psychology* created a mathematical formula for how much a sexual assault can cost taxpayers.<sup>ix</sup> The formula was based upon the impact of absenteeism, productivity reduction, and replacement on the total costs of the military as a result of sexual assault. In 1994, the total cost of sexual harassment to the US Army was \$250,898,939 and was divided by gender to \$167,785,928 million for males and \$81,123,011 million for females. These costs, though perhaps not completely accurate with today, act as a reminder that events like sexual assault have an impact on the entire community and even the American public as a whole. The time and effort spent in the training of one service member is lost when that service member decides to leave the military after experiencing a sexual assault or is ordered to leave after committing a sexual assault. Such costs further necessitate solutions for the problem so as to become a more efficient and cohesive force.

## The Enemy Within: Sexual Assault and Rape in the US Armed Forces

In another study published in the Duke Law Journal in 1996, the author explores the “relationship between sexual assault, combat, and military organizations” through a side-by-side comparison with civilian rates of sexual assault.<sup>x</sup> After the analysis of this information, the author also offers suggestions for reducing the incidence of this crime across the military. One suggestion is to change the cultural gender norms in the military by integrating males and females in all roles. This particular study, written in 1996, has yet to see the fruits of such a suggestion in a full manner. Some combat arms branches such as Field Artillery have begun to integrate women into roles traditionally only open to men. In the last year, a mandate has been passed ordering all branches to integrate no later than 2016. In branches such as Infantry, such a tradition will be difficult as questions of physical standards and expectations remain. Should the Infantry lower its physical standards or create a separate standard for female service members? These questions must be answered before integration may occur fully because of the importance of combat readiness to the armed services as a whole.

By researching this topic from a variety of sources (including discussions with the Judge Advocates and paralegals in the offices where I worked) I was able to gain an understanding of the situation and the thought being put into solving it. Also, my experience at Fort Bragg this summer working among Judge Advocates and their parallels allowed me an inside look into what the military faces with regards to sexual assault and rape.

One of the most common influences on the occurrence of sexual assault and rape was the present of alcohol. Many of the cases I reviewed, both old and new, mentioned that the victim, the perpetrator, or both had been drinking before the incident occurred.

## The Enemy Within: Sexual Assault and Rape in the US Armed Forces

In addition, the use of a person's character as a measure of honesty and integrity weighed heavily in some cases, especially when the accused or the victim had many character witnesses who were willing to give depositions. Although this did not outweigh the body of evidence, it did play a very obvious role in the decisions made by juries and judges.

Furthermore, the willingness of victims to come forward was continually hampered by a fear of retaliation or by someone close to that person (either in the chain of command or not) encouraging the victim to not report. The longer the victim waited to report, the more likely that the case would become a case of pointing fingers across the aisle due to the lack of evidence.

However, my experience also demonstrated the commitment of the many Judge Advocates with whom I worked to doing their job effectively and justly. Part of this job included staying current with the feelings of the American people, the Department of Defense, the government, and the higher chain of command. Discussions occurred daily relating to the outcry about the Department of Defense sexual assault findings and how the problems raised might be fixed within the UCMJ and within the system as a whole. In fact, changes have been made to the UCMJ on the matter of sex assault and rape as recent as June 2012, thereby reflecting the proactive nature of the JAG Corps as a whole in trying to remedy the problem in a legal sense.<sup>xi</sup>

Though my role as an intern was limited to watching and to listening, I found myself engaged with this issue long after I returned to the university to continue my studies. When issues of sexual assault and rape played on the television in the cadet lounge or were mentioned in class, my knowledge of this issue allowed me to discuss it properly with fellow cadets and to even provide insights into the real costs of any form of sexual harassment or assault in our military community.

## The Enemy Within: Sexual Assault and Rape in the US Armed Forces

Working as an intern and learning about the legal ramifications and process involving sexual assault and rape also gives me an advantage as an Honors student at the university by providing me with real world experience in the issue. Providing students with the opportunity to complete a capstone class such as this off-campus and in a not totally academic environment broadened my worldview and allowed me to use the writing and presenting skills developed in the Honors program in front of high ranking officers and non-commissioned officers. I was able to build contacts and network in organizations for which I may someday be able to work. For these reasons, I wrote this essay to follow the way in which I experienced this issue as both an intern and a student. Although it does not follow the traditional format of an essay, this work does provide the reader with an approach to this issue not commonly found. Although I am as yet an outsider to the military, I do have some views from the inside because of my training. My training through my major, History, provided me with an understanding of how such a perspective may prove useful to a topic such as this.

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<sup>i</sup> Jennifer Steinhauer, *Sexual Assaults in Military Raise Alarm in Washington*, The New York Times, May 7, 2013.

<sup>ii</sup> Article 120, Part IV: Punitive Articles, Uniform Code of Military Justice, Edition 2012, Joint Service Committee on Military Justice.

<sup>iii</sup> Appendix 12, UCMJ.

<sup>iv</sup> Associated Press in Fort Hood, *Female Fort Hood soldiers recruited for prostitution ring, trial hears*, The Guardian, December 3 2013.

<sup>v</sup> Article 82 and 134, UCMJ.

<sup>vi</sup> Matthew Hay Brown, *Military sexual assault victims break the silence*, The Baltimore Sun, December 15, 2013.

<sup>vii</sup> Anny Shin, *Naval Academy head must testify about his court-martial decision in alleged rape case*, Washington Post,

<sup>viii</sup> Donna Cassata, *Military Sexual Assault Bill Passes the House With Overwhelming Support*, The Huffington Post, December 12, 2013.

<sup>ix</sup> Robert H. Faley, Deborah Erdos Knapp, Gary A. Kustis and Cathy L.Z. Dubois, *Estimating the Organizational Costs of Sexual Harassment: The Case of the U.S. Army*, Journal of Business and Psychology, Vol. 13, No. 4, December 1999.

<sup>x</sup> Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, Duke Law Journal, Vol. 45, No. 4. February 1996.

<sup>xi</sup> Appendices 27 and 28, UCMJ.

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