



WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

“Sexual Assault in the Military”

**Submitted to the Subcommittee on Personnel
of the U.S. Senate Committee on Armed Services**

March 13, 2013

ACLU Washington Legislative Office
Laura W. Murphy, Director
Vania Leveille, Senior Legislative Counsel

On behalf of the American Civil Liberties Union (“ACLU”) and its more than a half million members, countless additional supporters and activists, and 53 affiliates nationwide, we commend the Senate Armed Services Personnel Subcommittee for its leadership in convening this hearing to examine the continuing problem of sexual assault in our armed forces.

For decades, the ACLU has worked not only to end discriminatory treatment within our military,¹ but also to prevent and respond to gender-based violence and harassment in the workplace. The ACLU also works to hold governments, employers and other institutional actors accountable so as to ensure that women and men can lead lives free from violence.

Over the last several years, Congress and the Department of Defense have grappled with the scourge of sexual harassment, sexual assault and rape within the military. Although a variety of proposals have been implemented and some progress has been made to prevent and respond to sexual assault, sexual harassment and rape in the military, the problem is deeply-rooted and persists. More than 3,100 reports of sexual assault were made in FY 2011², but we know that the incidence of sexual assault is significantly underreported. The Department estimated that more than 19,000 incidents of sexual assault occurred in 2010 alone.³ While such statistics alone are alarming, the problem of military sexual assault is compounded by the perception and the reality of a military justice system that fails to mete out actual justice when sexual assault, harassment or rape is alleged. Adding insult to injury, service members who leave the service find that the trauma they experienced as a result of sexual assault is not adequately recognized by the Department of Veterans Affairs. Congress must address these issues.

1. Re-examining the Military Justice System

A. Command Authority and Discretion

There has been renewed attention on the adequacy and effectiveness of the military justice system, as outlined in the Uniform Code of Military Justice, in achieving real justice for service members who allege sexual assault, sexual harassment and rape.⁴ The statistics reported by the Pentagon’s Sexual Assault Prevention and Response Office— on prosecutions, punishments, and service members’ unwillingness to report criminal activity— suggest that heightened scrutiny is appropriate and necessary.⁵ Indeed, Congress recently instructed the Department of Defense to conduct a review

¹ Most recently, In November 2012, the ACLU initiated a lawsuit, on behalf of the Service Women Action Network and other plaintiffs, against the Department of Defense challenging the ground combat exclusion. Over the years, we have also successfully challenged military recruitment standards and military academy admissions policies that discriminated against women; fought for servicewomen to receive the same military benefits as their male counterparts; and defended the rights of pregnant servicewomen; and advocated for servicewomen’s access to reproductive health care.

² DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2011, 33 (2012), *available at* http://www.sapr.mil/media/pdf/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

³ DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2010, 90 (2011), *available at* http://www.sapr.mil/media/pdf/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

⁴ *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-579, MILITARY JUSTICE: OVERSIGHT AND BETTER COLLABORATION NEEDED FOR SEXUAL ASSAULT INVESTIGATIONS AND ADJUDICATIONS (2011), *available at* <http://www.gao.gov/new.items/d11579.pdf>; Editorial, *Sexual Assaults and Military Justice*, N.Y. TIMES, March 12, 2013, at A24; Nancy Montgomery, *Hagel orders review of UCMJ after Wilkerson sex assault case*, STARS & STRIPES, March 11, 2013.

⁵ In 2011, 3,192 sexual assaults were reported in the military. Of these reports, 1,518 were reviewed for possible disciplinary action, with only 240 cases being preferred to courts-martial by commanders. From these cases, 191 subjects were convicted. In 47 cases,

and assessment of the systems used to investigate, prosecute and adjudicate crimes involving sexual assault and to develop recommendations for improving the systems.⁶

One element of the military justice system that Congress must probe is the scope of command authority and discretion. This central feature of military law derives from the oft-stated paramount need for discipline and order in the armed forces.⁷ Under the military system, the commander controls many of the levers of justice and has broad power and discretion to prosecute and dispose of allegations and findings of criminal activity. Such power, it is asserted, is necessary to maintain unit cohesion and operational readiness, the core elements in combat capability.

While command authority may well be a bedrock principle of military justice, it is also clear that the breadth of the problem of military sexual assault, the unwillingness of service members to engage commanders when assaults have taken place (at times because the commander is the perpetrator), and the perceived and actual misadministration of justice erodes confidence in the chain of command, undermines unit cohesion and readiness, and damages the military justice system. Instead, Congress should consider establishing an independent prosecutorial authority outside the chain of command. Doing so could help both the victim and the accused achieve justice and restore the notion of fundamental fairness and legitimacy that is essential to sustaining any justice system.

B. Access to Civil Remedies

Congress should act so as to allow service members to seek redress in civil courts. In the civilian world, victims of sexual assault in the workplace have access to two different systems: the criminal justice system, which centers on punishing the perpetrator and the civil justice system, which focuses on protecting and compensating the victim and holding the employer accountable for its failures to address and prevent violence in the workplace. Beyond the problems with the military justice system, service members who experience sexual assault face unique barriers to civil justice.

Service members have virtually none of the civil remedies that are available to civilians whose employers are aware of sexual assault or harassment on the job. The U.S. Supreme Court decision, *Feres v. United States*,⁸ shields the federal government from suits by service members when they are injured in the performance of their duties. The Court later ruled that constitutional claims are similarly foreclosed under *Feres*,⁹ leading some lower courts to dismiss constitutional lawsuits brought against the government by service members who were sexually assaulted.¹⁰

The Supreme Court, however, has not ruled on whether service members may bring claims under Title VII of the Civil Rights Act of 1964,¹¹ one of the primary civil rights laws governing

commanders declined to take any action. DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2011, 42 (2012).

⁶ See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632, 1758-62 (2013).

⁷ See DEPARTMENT OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES, I-1 (2012) (“The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”).

⁸ 340 U.S. 135 (1950) (no claim under Federal Tort Claims Act).

⁹ *Chappell v. Wallace*, 462 U.S. 296 (1983) (barring servicemember’s claim of race discrimination in evaluations and promotion).

¹⁰ See *Cioca v. Rumsfeld*, No. 1:11-cv-00151 (E.D. Va. Dec. 9, 2011); *Klay v. Panetta*, No. 12-0350(ABJ) (D.D.C. Feb. 7, 2013).

¹¹ Title VI prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e et seq.

employment discrimination. Yet, the Equal Employment Opportunity Commission does not accept complaints from service members, and lower courts have held that *Feres* also forecloses Title VII claims.¹² This is especially unjust because civilian employees of the military, who often work alongside service members, have the same right as other federal employees to pursue Title VII remedies for sexual harassment and violence.¹³

Title VII is the key federal law addressing the rights of employees who experience sexual harassment and violence, and its protections have special salience in the military sexual assault context. First, Title VII holds employers appropriately responsible for hostile work environments. If an employee who has been sexually assaulted or harassed on the job by a supervisor is fired or some other adverse action is taken against her, the employer may be found liable.¹⁴ If there is no adverse employment action against the employee victim, the employer can still be held liable for the hostile work environment, but can avoid liability by showing that it exercised reasonable care to prevent and correct the situation and that the employee failed to take advantage of protective measures available to her.¹⁵ Employer accountability is particularly important in the military context, where commanders have broad authority to determine the fate of both the victim and perpetrator. Without a civil remedy, the victim has no legal means outside the chain of command to ensure she receives protection, or that policies and practices are changed within her unit.

Second, Title VII prohibits retaliation against employees who bring forward claims of discrimination. It is well-documented that military sexual assault victims often remain silent about violence due to fear that they will be further harassed or targeted if they report the crime. Anti-retaliation protection would enable more victims to step forward without fear of retribution.

The Court's precedents foreclosing tort and constitutional claims brought by service members has rested on deference to the military in its personnel decisions.¹⁶ For a typical discrimination claim, such as a failure to promote, such deference may well be warranted, as the command is often best positioned to determine whether one service member is more qualified than others for a promotion, or whether one person experienced discrimination based on membership in a protected class. In most types of discrimination cases, Title VII involves an analysis of employer's justifications, by allowing an employer to provide a legitimate, non-discriminatory reason for its action once an employee makes out a prima facie case of discrimination. If the employer meets its burden, the employee must establish that the proffered reason is pretext for discrimination.¹⁷ It is reasonable that courts are reluctant to assess the military's justifications, as well as whether such reasons are pre-textual, when the military has greater expertise in its staffing needs. In the sexual harassment context, however, courts have recognized that an employer's justifications for the hostile work environment are irrelevant. The analysis instead focuses on the inherent inappropriateness of sexual harassment.¹⁸ Sexual violence and harassment have nothing to do with job responsibilities. Thus, courts have greater ability to fairly assess Title VII claims brought by service members when they

¹² See, e.g., *Fisher v. Peters*, 249 F.3d 433 (6th Cir. 2001); *Urie v. Roche*, 209 F. Supp. 2d 412 (D.N.J. 2002).

¹³ See, e.g., *Yamaguchi v. U.S. Dept. of the Air Force*, 109 F.3d 1475, 1484 (9th Cir. 1997) (finding that civilian Air Force employee's Title VII sexual harassment claim was justiciable).

¹⁴ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

¹⁵ *Id.*

¹⁶ See *Chappell*, 462 U.S. 296; *Feres*, 340 U.S. 135.

¹⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹⁸ *Burlington Indus.*, 524 U.S. 742.

are based on sexual harassment and violence and can bring deep expertise on the issue when considering claims.

For these reasons, we urge Congress to clarify that Title VII protections are available to service members who are sexually assaulted. Providing access to civil remedies in these instances can play a critical role in holding institutions, like the military, accountable and to transform the policies and practices that have allowed sexual assault to be committed far too often within the ranks.

2. Disability Claims for Sexual Assaulted-related PTSD Claims

Veterans who were sexually assaulted during their service in our armed forces, and who now seek disability benefits for conditions such as post-traumatic stress disorder (PTSD) and depression, face enormous barriers. Data obtained through a FOIA lawsuit, filed in 2010 by the ACLU and the Service Women's Action Network against the Department of Veterans Affairs ("VA") and the Department of Defense, shows that only 32 percent of PTSD disability claims based on military sexual trauma were approved by the Veterans Benefits Administration, compared to an approval rate of 54 percent of all other PTSD claims from 2008-2010. Moreover, of those sexual assault survivors who were approved for benefits, women were more likely to receive a lower disability rating than men, therefore qualifying for less compensation.

The Department of Veterans Affairs' regulations explicitly treat veterans who suffer from PTSD based on sexual trauma differently from those whose PTSD arose from combat. Even when a veteran can establish a diagnosis of PTSD and his or her mental health provider connects the PTSD to sexual assault during service, the VA requires additional evidence, such as law enforcement reports, that generally does not exist. As the Department of Defense itself acknowledges, the vast majority of service members who are raped do not report the assault, because of the retaliation they are likely to face.

The harsh treatment of VA disability claims filed by sexual assault survivors is especially disturbing given that veterans cannot access other remedies available to civilian survivors. Civilians who are sexually assaulted on the job can file civil claims against their employer under state or federal laws like Title VII, receive compensation for their injuries, and seek to change the way their employer responds to sexual violence. As discussed above, service members, however, are barred from pursuing these remedies.

The ACLU supports the Ruth Moore Act of 2013 (S. 294/H.R. 671), which would remove the current barriers to disability compensation. Congress should act quickly to enact this legislation.

Should you have any questions, please don't hesitate to contact Senior Legislative Counsel Vania Leveille at 202-715-0806 or vleveille@dcacclu.org.