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BRIEFING PAPER: DEPARTMENT OF DEFENSE (DOD) ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR (FY) 2011

BACKGROUND: On April 13, 2012, the Sexual Assault Prevention and Response Office (SAPRO) issued the *Department of Defense Annual Report on Sexual Assault in the Military* for FY 2011. Congress requires the Secretary of Defense to issue an annual report to the Committees on the Armed Services on reported sexual assaults as provided by the military services, along with DOD analysis.

In 2005, the DOD established SAPRO to promote prevention, increase reporting and improve the military's response to sexual assaults. SAPRO's mandate encompasses only prevention and reporting; the Department of Defense creates and enforces sexual assault policy. In December of 2009, the DOD adopted the *DOD-wide Sexual Assault Prevention and Response (SAPR) Strategic Plan* that established five priorities for the services:

1. Institutionalize Prevention Strategies in the Military Community
2. Increase Climate of Victim Confidence Associated with Reporting
3. Improve Sexual Assault Response
4. Improve System Accountability
5. Improve Knowledge and Understanding of *SAPR*

FINDINGS: In 2011, there were 3192 reports of sexual assault in the military, a 1% increase over 2010 and a 1.1% decrease from 2009. 2439 reports were unrestricted and 753 reports were restricted. Restricted reports are kept confidential by the services, allowing victims to access needed medical care and counseling, but are not turned over for investigation. Total reporting figures have remained relatively flat since 2009.

YEAR	TOTAL REPORTS	UNRESTRICTED	RESTRICTED
2009	3230	2516	714
2010	3158	2410	748
2011	3192	2439	753

Sexual assaults are notoriously underreported crimes. Last year, the DOD estimated that more than 19,000 assaults occurred in the armed forces. The DOD derived this estimate from its bi-annual *Workplace and Gender Relations Survey of Active Duty Members (WGRA)*. Since the survey was not conducted in 2011, it is difficult to determine the actual number of assaults in 2011.

Of the 3192 sexual assaults reported in 2011, commanders deemed 1518 suitable for possible disciplinary action. Of those, commanders preferred 498 cases to courts martial, with only 240 eventually proceeding to trial. Of the cases that went to trial, 191 subjects were convicted, resulting in 148 offenders serving jail sentences and 122 being discharged. It is worth noting that commanders can choose punishments other than courts martial, and that in 47 cases last year, commanders declined to take any action at all.

ANALYSIS

The DOD has historically handled sexual assault by focusing on prevention and reporting of sex crimes as seen in the *DOD-wide SAPR Strategic Plan*. In 2011, Congress passed much-needed victims' protections in the 2012 National Defense Authorization Act. These provisions included guaranteed confidentiality between victims and victims advocates (VAs), access to legal assistance for survivors, document retention and expedited transfers from military installations if requested by victims. By providing basic protections that are readily available to civilian sexual assault victims, Congress helped DOD establish increased parity with civilian jurisdictions and make positive steps to increase victim confidence in reporting sexual assaults.

The other key component that is currently missing from DOD policy is an emphasis on institutional accountability and prosecution of sex crimes. DOD has not adequately developed a policy that creates a tangible deterrent to service members through consistent prosecutions or other negative consequences to one's military career. In the past, this approach to deterrence has been the model used by the services to effectively deal with drunk driving and drug use, both of which have effectively declined over time. The military must make sexual assault a "showstopper" by ending a convicted offender's career through incarceration and/or dishonorable discharge.

EFFECTIVE PROSECUTIONS

DOD needs to improve the prosecution of sex crimes across the services. To do this, policies regarding case disposition must change so that cases are properly preferred for courts martial. The Manual for Courts Martial (MCM) currently maintains that the officer who determines whether or not a criminal case goes to trial is the immediate commander in the accused service member's chain of command. This obvious conflict of interest prevents the victim as well as the accused from receiving impartial and unbiased treatment from the chain of command. Alternately, in the civilian criminal justice system, cases are brought to trial by independent prosecutors.

There are four basic problems with delegating the authority to make sexual assault case disposition decisions to junior commanders in the chain of command:

- 1) Lower-level commanders are not impartial. They have personal knowledge of, and working or personal relationships with the accused. In some cases, the accused and the victim both work for the commander making the disposition decision.

- 2) Lower-level commanders lack experience. Most commanders are not lawyers, and have no substantial legal training or experience in handling sexual assault cases. Sexual assault cases are complex and involve complicated rules of evidence, confusing or conflicting witness statements, and severely traumatized victims. Most lower-level commanders have not dealt with enough of these cases to render a proper disposition decision.
- 3) Lower-level commanders do not have military lawyers on staff to advise them. Judge advocates are not assigned at the Company (O-3) or Battalion (O-5) levels. In most services, lawyers do not appear on staff until the officer is a Brigade commander (O-6) or General officer (O-7). Without proper legal counsel, commanders cannot be sure they are interpreting investigations or complying with all aspects of military law when making disposition decisions.
- 4) Lower-level commanders are operationally focused. Many times mission requirements, operational tempo, training, workups and deployments can create a situation where commanders are unable to devote the proper time and attention needed to rendering proper disposition decisions.

In 2011, 1518 of the 3192 reported sexual assaults were considered “actionable” by the military, a decrease of 22% from the previous year. Actionable cases are sexual assault allegations that have been investigated by the service’s criminal investigations office and found to be both substantiated and within the jurisdiction of the military’s criminal justice system. Of those 1518 actionable cases, 489 (32%) were preferred for courts martial (CM) by commanders. Since 2009, the percent of reports considered actionable has declined, while percent of reported cases preferred for court action has increased. In 2011, 68% of actionable sexual assault reports were not prosecuted by military courts due to lower-level commander discretion. The report also notes that in 2011, 80% of cases that did proceed to a court martial resulted in a conviction.

YEAR	TOTAL REPORTED	TOTAL CONSIDERED ACTIONABLE	% OF TOTAL REPORTED CONSIDERED ACTIONABLE	TOTAL PREFERRED FOR CM	% OF ACTIONABLE PREFERRED TO CM
2009	3230	1971	61%	410	20%
2010	3158	1925	60%	529	27%
2011	3192	1518	47%	489	32%

APPROPRIATE PUNISHMENT

Once a case goes to trial and results in a conviction, there are four types of punishments that are meted out by military courts: confinement, forfeiture of pay, reduction in rank, and punitive discharge or dismissal. In the past three years, there has been an increase in the following punishments:

YEAR	CONFINEMENT	REDUCTION	FINES/FORFEITURES	DISCHARGES/DISMISSALS
2009	68%	70%	47%	47%
2010	69%	69%	52%	60%
2011	78%	82%	68%	64%

In 2011, only 64% of cases that went to trial and resulted in a conviction ended in a discharge/dismissal. In other words, the military is retaining approximately one out of every three convicted sex offenders. According to the Department of Justice, sex offenders are more likely to commit another sex crime compared to criminals convicted of other offenses such as robbery, assault, or murder. By retaining convicted sex offenders, the military is continuing to put its own troops at risk for further assaults.

DOD policy also permits accused sex offenders to Resign In Lieu of Courts Martial (RILO). This option prevents a case from proceeding to trial as accused service members are given the option to quit their jobs without being held accountable in a court of law. In 2011, 10% of accused sex offenders were allowed to RILO. The percentage of cases ending in a RILO has not decreased in the past three years.

YEAR	PROCEEDED TO CM	CONVICTIONS	DISCHARGES	RILO
2009	290	80%	47%	10%
2010	318	77%	60%	10%
2011	240	80%	64%	10.5%

ADEQUATE DATA COLLECTION

In 2009, Congress mandated that the DOD develop a case-level database for tracking information on sexual assaults. The DOD continues to delay the implementation of that database. It is crucial that detailed relevant information be collected above and beyond what is currently being reported to Congress. It is only through the analysis of data year over year that DOD can measure if the steps being taken to prevent sexual assaults are effective. Proper data collection can also help to formulate strategies and focus on areas that most need improvement. It also provides full transparency to Congress for oversight and accountability.

SWAN has long advocated for the inclusion of installation names and command designations in the SAPRO report. Currently, the services only identify the location of an assault as CONUS (within the 50 states), OCONUS (outside the United States) or in CAI (Combat Areas of Interest.) This limited data does not allow for DOD to find out which installations have the highest rates of offenses, the fewest courts martial, the lowest levels of discharged offenders, etc. Knowing this information would allow the DOD to focus on preventing assaults at the military installations that need it the most. Conversely, knowing which installations and commands are handling sexual assaults effectively allows the services to share best practices and create a safe environment for all service members, not just those assigned to better bases.

CONCLUSION

DOD has recognized that sexual assault has no place in the military. It degrades readiness, undermines cohesion, destroys the lives of the nation's sons and daughters, and goes against the basic American values that the military defends. The DOD's civilian and military leadership has stated they maintain "zero tolerance" towards sexual assault; however, that stated policy is not enough to reduce sexual assaults in the ranks. The DOD must not just focus solely on prevention as a strategy for reducing the numbers of assaults. Sexual assault is a crime both inside the military and in civilian jurisdictions, and must be treated as such with effective prosecutions and appropriate punishments. If that is to happen, the military must change the way that sexual assault cases are routinely handled by ensuring sexual assault case dispositions occur at a much higher level in the chain of command. The DOD must also ensure that the "punishment fits the crime" by not retaining convicted sex offenders in the ranks. Finally, the DOD cannot abdicate its judicial responsibilities and continue to allow 10% of perpetrators to RILO and avoid prosecution simply by quitting their job.

RECOMMENDATIONS:

SWAN's goal in helping to achieve sexual assault policy reform in the military continues to focus on three areas: protecting victims, prosecuting and punishing sex offenders, and providing civil remedies to service members in cases of sexual assault. Civilian jurisdictions deal more effectively with sex crimes by targeting all three of these critical areas; achieving parity between the military system and the civilian system has proven to be an effective strategy for improving the military's handling of sexual assault cases. Based on the the Department of Defense Annual Report on Sexual Assault in the Military for FY 2011, SWAN recommends the following actions:

- Adopt a DOD-wide policy that withholds sexual assault case disposition authority at the O-6 level or higher
- Award punitive discharges to all service members convicted of sexual assaults
- Eliminate the use of RILOs
- Immediately implement the required case-level database, which would include all relevant case-specific data such as installations and commands
- Conduct the *Workplace and Gender Relations Survey of Active Duty Members (WGRA)* annually to determine the actual scope of sexual assault in the military and the underreporting rate

SWAN is a national civil rights organization founded and led by women veterans. SWAN's vision is to transform military culture by securing equal opportunity and the freedom to serve in uniform without threat of harassment, discrimination, intimidation or assault. SWAN also seeks to reform veterans' services on a national scale to guarantee equal access to quality health care, benefits and resources for women veterans and their families.