

SEXUAL VIOLENCE IN THE U.S. MILITARY

Submission to the United Nations Universal Periodic Review of
the United States of America

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Submitted by
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Cornell Law School's Gender Justice Clinic works on cases and projects that contribute to local, global, and transnational efforts to combat gender violence and discrimination. Members of the clinic provide legal advice and representation to victims, conduct fact-finding, participate in training magistrates and lawyers, draft or analyze proposed legislation, litigate before regional or international human rights bodies, and contribute to community education initiatives.

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UPR Submission

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I. SUMMARY

1. At the 2015 Universal Periodic Review of the United States (Second Cycle), two states called upon the United States to take action to address the problem of sexual violence in the U.S. military. Slovenia recommended that the United States “redouble its efforts to prevent sexual violence in the military and ensure effective prosecution of offenders and redress for victims.”¹ Denmark recommended that the U.S. “improve access to justice, including due process and redress, for victims of sexual violence in the military; this would include removing from the chain of command the decision about whether to prosecute cases of alleged assault.”²
2. The United States has systematically failed to implement these recommendations. It has not taken adequate measures to prevent military sexual violence, to ensure impartial prosecution of offenders, or to ensure that service members are afforded their rights to due process and redress. Servicewomen and men are still frequently subjected to retaliation and may be discharged as a result of the sexual abuse they suffered. In addition, service members are barred from seeking civil or constitutional remedies in federal civilian courts against the military for its failure to adequately prevent and prosecute the sexual violence they experienced.
3. This submission discusses developments since the 2015 UPR on issues surrounding military sexual assault, highlighting the ways in which the United States has failed to implement the relevant recommendations. It also addresses several related issues, including survivors’ lack of access to veterans’ benefits and sexual violence and discrimination against LGBTQ+ service members.

II. U.S. FAILURE TO IMPLEMENT THE 2015 UPR RECOMMENDATIONS ON SEXUAL VIOLENCE IN THE U.S. MILITARY

A. The United States Has Failed to End the Cycle of Sexual Violence and Impunity in the U.S. Military.

4. Since the 2015 Report of the Working Group on the Universal Periodic Review was issued, the situation for military service members has not substantially improved. The United States' failure to implement effective preventative measures and to eradicate a culture that promotes unacceptable traits of power and control and fosters impunity has led to a consistently high prevalence of sexual violence in the U.S. military and to systemic underreporting. As a result, in its 2018 Report on Sexual Assault in the Military, the Department of Defense (DoD) estimated that 20,500 service members, representing 13,000 women and 7,500 men, were subjected to sexual violence in fiscal year 2018, a 38% increase from 2016.³ While rates of sexual assaults against men did not increase, rates of sexual assault against women increased by 47%, with one in sixteen military women reporting being sexually assaulted in the past year.⁴ At the same time, only 30% of service members who experienced sexual assault reported their assault, a slight decrease in reporting from 2016.⁵ A separate study reported that the number of sexual assaults in U.S. military academies increased by 47% between 2016 and 2018, while reporting remained at the same low rates.⁶
5. Many factors contribute to the high prevalence rates and systemic underreporting of sexual violence in the U.S. military, with each factor exacerbating the others. In its most recent report, the DoD has recognized the contribution of "unhealthy workplace climates" on the prevalence of sexual assault, noting that sexual harassment and gender discrimination substantially contribute to the risk of sexual assault in a unit.⁷ The report further indicates that rates of sexual harassment increased in 2018.⁸ The report on military academies similarly notes that young officers in training programs are exposed to a culture in which sexual harassment, discrimination, and violence are prevalent and unlikely to result in adverse consequences.⁹ Although the DoD has adopted programs designed to prevent sexual assault,¹⁰ the statistics discussed above ..demonstrate that these programs have been unsuccessful in reducing rates of military sexual violence.

6. A culture of impunity also contributes to high prevalence rates and underreporting. While rates of reported sexual violence have increased, rates of prosecution and conviction remain extremely low.¹¹ About one quarter of the 2018 reports of sexual assault were made and handled confidentially through the military's restricted reporting system, which does not provide for investigation and a judicial remedy.¹² Of those reports handled by the unrestricted system, which allows for investigation and possible prosecution, disciplinary action was taken in 65% cases, a slight increase from the previous year.¹³ However, "disciplinary action" is a very broad category, and includes such minor punishments as a verbal reprimand, which fail to afford meaningful redress to survivors of violence. In 2018, only 307 sexual assault cases proceeded to trial within the military justice system, and only 203 cases resulted in convictions.¹⁴ Inadequate responses to sexual assault deny justice to survivors and create an expectation of impunity that signals that sexual assault and harassment are not serious offenses. As discussed below, the United States' failure to address structural impediments to justice for survivors – including the chain of command system, lack of access to civilian courts, and retaliation – impedes its ability to end this cycle of sexual violence and impunity within the U.S. military.

B. The Chain of Command Structure within the U.S. Military Justice System Continues to Impede Survivors of Sexual Violence from Obtaining Redress.

7. As recognized by Denmark at the United States' 2015 UPR, the command-driven structure of the military contributes to the perpetuation of military sexual assault and prevents survivors from receiving due process and redress. The U.S. military justice system is a closed system that investigates, prosecutes, and punishes criminal allegations by and against its members. Survivors may report incidents of sexual violence to their unit leadership or to certain individuals outside of their unit. As noted above, reports are processed either through the restricted reporting system, which ensures confidentiality but does not provide for investigation and a judicial remedy, or through the unrestricted reporting system, which allows for investigation and possible prosecution. Although unrestricted reports are referred to military law enforcement for investigation, the accused's unit supervisor, or "commander," plays a significant role in determining how a case is resolved.

8. As in 2015, the military justice system continues to provide that the accused's commander retains the authority to make initial disposition determinations of unrestricted reports. This includes deciding whether to refer a case for prosecution, or, for some types of sexual assault, to impose non-judicial or administrative punishment. When commanders refer cases to the military justice system, they become the convening authority with responsibility for key decisions, from appointing jury members to adding or dismissing charges to approving or rejecting plea deals.¹⁵ While legislative changes have removed commanders' authority to reverse convictions for sexual assault, commanders still retain authority to modify sentences in certain circumstances.¹⁶
9. The discretion commanders are given in sexual assault proceedings impedes survivors' access to justice. Commanders are not impartial. They may have close working and personal relationships with the accused, and in some cases supervise both the accused and the survivor.¹⁷ Commanders are not attorneys, generally have no substantial legal training in handling sexual violence cases,¹⁸ and may be unable to devote adequate attention to sexual violence complaints. Additionally, commanders face a tension between their duty to carry out justice, their responsibility for preserving unit cohesion,¹⁹ and their interest in avoiding potential negative consequences to their own careers.²⁰ As recognized by Denmark in 2015, commanders' inherent conflict of interest and partiality compromises the military's ability to afford meaningful access to justice, including due process and redress, for survivors of military sexual assault.
10. In its 2018 report on sexual assault in the military, the DoD recognized that a prevalence of sexual harassment and gender discrimination increases the probability of sexual assault in a unit and noted that "[t]he odds of sexual assault were also higher for members indicating their command took less responsibility for preventing sexual assault, encouraging reporting, or creating a climate based on mutual respect."²¹ These findings imply that commanders who create hostile environments have higher rates of sexual violence within their ranks, and therefore are likely to oversee more sexual violence proceedings. Providing commanders who cultivate both a culture tolerant of sexual harassment and a culture of impunity with the power to make key decisions in cases of reported sexual violence only perpetuates the problem and restricts access to impartial justice.

C. The United States Continues to Deny Survivors of Military Sexual Violence Access to Civilian Courts.

11. Survivors of military sexual assault continue to be denied the ability to seek redress in civilian courts, compounding their lack of access to justice. Legislative changes adopted in 2015 required the DoD to establish a process for consulting with survivors to solicit their preference regarding whether the offense is prosecuted by a military or civilian court.²² However, the survivors' preference is not binding on a commander in making a disposition determination.²³ Also, in practice, most survivors are not informed about their right to be consulted, do not have an opportunity to share their views, and are not even aware that some cases may be brought before a civilian judge.²⁴
12. Not only are survivors effectively restricted to seeking redress within a biased military justice system, they are also barred by judicial doctrine from bringing civil rights or personal injury claims against the military or military officials in civilian federal courts.²⁵ Sexual assault survivors who were unable to achieve redress through the military and who find their rights violated by the system that was supposed to protect them thus find themselves once again denied a meaningful remedy.

D. The United States Has Not Taken Adequate Steps to Address Retaliation Against Survivors of Military Sexual Violence.

13. After filing a report with the military, many survivors face retaliation, ranging from threats to their safety and life, physical assault, ostracism, and harassment to various forms of professional retaliation such as lost privileges and opportunities, disciplinary action, and even discharge.²⁶ Survivors who report may face punishment for minor "collateral misconduct," such as underage drinking or conduct unbecoming an officer, which only came to the military's attention because of the victim's report of sexual assault.²⁷
14. Although the DoD has adopted a plan to address, prevent, and respond to retaliation,²⁸ rates of retaliation remain high. The 2017 DoD report on military sexual assault found that 40% of respondents to a 2016-2017 Military Investigation and Justice Experience Survey reported retaliation-like behavior,²⁹ and the 2018 DoD report estimates that 21% of female service members who reported sexual violence experienced circumstances meeting the much

narrower category of retaliatory behavior prohibited by military law.³⁰ Additionally, a report by Human Rights Watch found that service members who report are 12 times as likely to experience retaliation as to see their abuser convicted of a sexual offense.³¹

15. As with sexual violence, there continues to be impunity for retaliatory behavior. According to one author, low rates of military action against individuals charged with retaliation presents a barrier to survivors' reporting, and "[r]etribution is a key element in sexual assault cases."³² Without real consequences for retaliatory behavior, a culture of impunity for retaliation is fostered, and the culture of impunity for sexual violence is reinforced. Further, retaliation often takes the form of sexual harassment, increasing the probability of additional sexual violence in a unit. In essence, each of the issues outlined above contributes to the others, perpetuating and exacerbating military sexual violence.

III. OTHER RELEVANT ISSUES

A. The United States Continues to Deny Survivors of Military Sexual Violence Equal Access to Disability Benefits.

16. Since 2015, survivors have continued to face discrimination and injustices after they leave the military, particularly as they seek access to veterans' benefits. A recent survey by the Service Women's Action Network identified "military sexual trauma (MST) as the number one factor negatively affecting [survivors'] mental wellness."³³ Research also suggests that "VA [Veterans' Affairs] patients who screen positive for military sexual trauma have a higher risk of dying by suicide than those who don't."³⁴ While survivors are entitled to receive disability compensation for Post-Traumatic Stress Disorder based on MST, they are often denied these benefits.
17. Despite MST being a high-impact issue, survivors continue to face barriers when accessing related services and resources. Survivors who have been less-than-honorably discharged due to retaliation or for conduct associated with the sexual assault they experienced, are often ineligible for disability and other veterans' benefits.³⁵ Additionally, survivors face particular challenges in reporting and documenting assault when it occurs, so they may not be able to produce the evidence usually required to support a benefits claim, despite its merits.³⁶ This

is compounded by the fact that the Department of Veterans' Affairs (VA) uses a higher evidentiary standard to evaluate claims for benefits stemming from MST.³⁷

18. Survivors have also faced barriers to receiving benefits due to mishandling of claims and inappropriate denials by the Veterans Benefits Administration (VBA). Although the VBA has provided guidance to ensure a “liberal approach” to evidence in MST cases, a 2018 VA Inspector General report found that nearly half of the denied MST-related claims – an estimated 1,300 in 2017 – were improperly handled on the bases of failure to order appropriate medical exams, failure to obtain necessary supporting records, and failure to properly take into account contradictory evidence.³⁸ In response, the VBA agreed to review MST benefits claims that were denied from October 2016 to June 2018.³⁹ However, the United States must also put institutional reforms into place to prevent a recurrence of these errors and to ensure that veterans have equal access to the benefits to which they are entitled.

B. Sexual Violence and Discrimination Against LGBTQ+ Service Members

19. Another related issue is the heightened risk of sexual violence that LGBTQ+ service members face. Notably, the DoD has never reported on the rates of sexual violence against LGBTQ+ service members. According to independent surveys, however, sexual violence is disproportionately experienced by service members who identify as lesbian, gay, bisexual, or transgender.⁴⁰ Additionally, independent studies and personal anecdotes reveal that there are greater rates of sexual harassment targeted at this community,⁴¹ which, by the DoD's own assessment, puts LGBTQ+ service members at greater risk of experiencing sexual violence.
20. The increased risk of sexual harassment and violence against the LGBTQ+ community is likely the result of the hyper-masculine culture in the military and a history of discrimination, including the banning of LGBTQ+ individuals from the military, the “Don't Ask, Don't Tell” policy, and the most recent targeted ban on transgender service members.⁴² These discriminatory policies violate the human rights of LGBTQ+ service members, including but not limited to the right to work and the right to equality and nondiscrimination. The policies further contribute to an expectation that harassment and assault will not be addressed when this community is targeted. Finally, they contribute to service members' fears of disclosing

their sexual identity due to the risk that they will be subjected to sexual harassment, sexual assault, or retaliation.⁴³

IV. LEGAL FRAMEWORK

21. As recognized by Denmark and Slovakia at the 2015 UPR of the United States, the United States' failure to prevent sexual violence in the military and to afford impartial due process and meaningful redress violate its obligations under international human rights law.⁴⁴ Other UN human rights bodies and experts, including the Committee Against Torture,⁴⁵ the Human Rights Committee,⁴⁶ and the Special Rapporteur on Violence against Women,⁴⁷ have expressed concern about sexual violence in the U.S. military and called upon the United States to take meaningful action to prevent and respond to this violence.

V. CONCLUSION AND RECOMMENDATIONS

22. The United States has not taken adequate measures to implement the recommendations on military sexual violence that were made at its 2015 UPR. It continues to foster a cycle of sexual violence and impunity within the military and to deny survivors access to justice.
23. In response to these ongoing issues, the United States should be called on to:
 - (a) undertake all necessary measures to prevent sexual violence in the U.S. military and to ensure a safe working environment;
 - (b) ensure impartial and effective investigation, prosecution, and redress of sexual violence allegations by removing authority over case dispositions, adjudication, and punishment from the chain of command;
 - (c) provide access to U.S. federal courts so that survivors of sexual assault may seek effective remedies when the military violates their rights;
 - (d) effectively implement the prohibition of retaliation against service members who report unwanted sexual conduct and hold violators accountable;

(e) ensure that survivors who experience PTSD related to military sexual violence have meaningful access to the treatment and support they need and are not denied benefits because of unreasonable evidentiary burdens or institutional problems; and

(f) address the disproportionate impact of military sexual harassment and violence on LGBTQ+ service members, including by tracking the impact through the annual DoD reports and by removing discriminatory policies that perpetuate a hostile culture such as the ban on transgender service members.

ENDNOTES

¹ Human Rights Council, Report of the Working Group on the Universal Periodic Review: United States of America, U.N. Doc. A/HRC/30/12, ¶¶ 176.258, 176.289 (July 20, 2015), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/159/71/PDF/G1515971.pdf?>.

² *Id.* ¶ 176.289.

³ Department of Defense, *Fiscal Year 2018 Department of Defense Annual Report on Sexual Assault in the Military*, 3 (2019) [hereinafter, *2018 DoD Military Sexual Assault Report*], available at https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf

⁴ *Id.*

⁵ *Id.* at 4.

⁶ See Tara Copp, *Academy Sex Assaults Up 47% Since 2016, DoD Estimates*, Military Times, Jan. 31, 2019, available at <https://www.militarytimes.com/news/your-military/2019/01/31/dod-estimate-academy-sex-assaults-up-47-since-2016/>; Jim Garamone, *Survey Shows ‘Frustrating’ Increase in Academy Sexual Misconduct*, U.S. Department of Defense, Jan. 31, 2019, available at <https://www.defense.gov/Newsroom/News/Article/Article/1745481/survey-shows-frustrating-increase-in-academy-sexual-misconduct/>

⁷ *2018 DoD Military Sexual Assault Report*, *supra* note 3, at 7, 11-12.

⁸ *Id.*

⁹ See Leo Shane III, *As Sexual Assault Cases Rise, Service Academy Superintendents Struggle for Solution*, Military Times, Feb. 13, 2019, available at <https://www.militarytimes.com/news/pentagon-congress/2019/02/13/as-sexual-assault-cases-rise-service-academy-superintendents-struggle-for-solutions/>

¹⁰ See *2018 DoD Military Sexual Assault Report*, *supra* note 3, at 13-14; United States Department of Defense Sexual Assault Prevention and Response, *2019-2023 Prevention Plan of Action*, available at <https://www.sapr.mil/prevention>.

¹¹ Service Women’s Action Network, *SWAN Responds to Pentagon’s Report on Sexual Assault in the Military*, May 5, 2019, <https://www.servicewomen.org/press-releases/2019-pentagons-report-on-sexual-assault-in-the-military/>.

¹² United States Department of Defense Sexual Assault Prevention and Response, *2019-2023 Prevention Plan of Action*, available at <https://www.sapr.mil/prevention>; *2018 DoD Military Sexual Assault Report*, *supra* note 3, at 6. Of the 7,623 reports made in 2018, 31% were initially filed through the restricted reporting system, although 23% of these were later converted to unrestricted reports, leaving 24% overall number of reports within the unrestricted system. *Id.*

¹³ *Id.* Disciplinary action was taken in 62% of cases in 2017. *Id.*

¹⁴ *2018 DoD Military Sexual Assault Report*, *supra* note 3, Appendix B, at 22, 24, available at https://www.sapr.mil/sites/default/files/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf; see also Service Women’s Action Network, *supra* note 11; Dave Phillipps, *‘This is Unacceptable.’ Military Reports a Surge of Sexual Assaults in the Ranks*, NY Times, May 2, 2019, available at <https://www.nytimes.com/2019/05/02/us/military-sexual-assault.html>.

¹⁵ Protect Our Defenders, *Nine Roadblocks to Justice* (last updated 2018), <https://www.protectourdefenders.com/roadblocks-to-justice/>;

¹⁶ *Id.*; David Vergun, *Legislation Changes UCMJ for Victims of Sexual Assault*, Army News Service, Jan. 7, 2015, available at https://www.army.mil/article/140807/legislation_changes_ucmj_for_victims_of_sexual_assault

¹⁷ See Service Women’s Action Network (SWAN), *Briefing Paper: Department of Defense (DoD) Annual Report on Sexual Assault in the Military, Fiscal Year (FY) 2011*, at 2 (Apr. 13, 2012) (hereinafter *SWAN Briefing Paper*) available at http://www.ncdsv.org/images/SWAN_BriefingPaper-DODAnnualReportOnSexualAssaultInTheMilitaryFY2011_4-13-2012.pdf.

¹⁸ Protect Our Defenders, *supra* note 15; Protect Our Defenders, *Policy Statement*, <https://www.protectourdefenders.com/policy-statement/> (last visited Sept. 20, 2019).

¹⁹ *SWAN Briefing Paper*, *supra* note 17, at 2.

²⁰ *Id.*

²¹ *2018 DoD Military Sexual Assault Report*, *supra* note 3, at 12.

²² 10 U.S.C. § 1044e; see Vergun, *supra* note 16.

²³ 10 U.S.C. § 1044e.

²⁴ See Tom Vanden Brook, *Military Fails to Advise Victims of Sexual Assault of Civilian Court Option*, *Advocates Say*, USA Today (June 10, 2018), available at <https://www.usatoday.com/story/news/politics/2018/06/10/military-sex-assault-victims-not-told-right-civilian-trial/686503002>.

²⁵ *Feres v. United States*, 340 U.S. 135, 146 (1950); *United States v. Stanley*, 483 U.S. 669, 693 (1987); *Cioca v. Rumsfeld*, 11-CV-00151 (E.D. Va. Dec. 9, 2011); *Cioca v. Rumsfeld*, 720 F. 3d 505 (4th Cir. 2013); *Klay v. Panetta*, 924 F. Supp. 2d 8 (D.D.C. 2013); *Klay v. Panetta*, No. 13-5081 (D.C. Cir. 2014).

²⁶ Human Rights Watch, *EMBATTLED: Retaliation Against Sexual Assault Survivors in the U.S. Military*, 36 (May 2015), available at <https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military#>.

²⁷ *Id.*

²⁸ 2018 DoD Military Sexual Assault Report, *supra* note 3, 6 (discussing implementation of the Retaliation Prevention and Response Implementation Plan).

²⁹ Department of Defense, *Fiscal Year 2017 Department of Defense Annual Report on Sexual Assault in the Military*, 4 (2018), available at https://www.sapr.mil/sites/default/files/FY17_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

³⁰ 2018 DoD Military Sexual Assault Report, *supra* note 3, at 9.

³¹ Human Rights Watch, *supra* note 26

³² Lolita C. Baldor, *Pentagon: Claims of Retaliation for Sexual Offense Complaints on Rise*, *Military*, May 1, 2018, available at <https://www.military.com/daily-news/2018/05/01/pentagon-claims-retaliation-sexual-offense-complaints-rise.html>

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³⁴ David Gorn, *Why So Many Military Women Think About Suicide*, *RAND*, available at <https://www.rand.org/multimedia/podcasts/veterans-in-america/why-so-many-military-women-think-about-suicide.html>.

³⁵ See Veteran Benefits Administration, *Applying for Veterans Benefits and Your Character of Discharge*, https://www.benefits.va.gov/benefits/character_of_discharge.asp (last visited Sept. 20, 2019); Human Rights Watch, *Booted: Lack of Recourse for Wrongfully Discharged U.S. Military Rape Survivors* 4-5 (May 19, 2016), available at <https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors>; Protect Our Defenders, *Defense Department Ordered to Turn Over Documents on Military Sexual Assault*, July 16, 2019, <https://www.protectourdefenders.com/defense-department-ordered-to-turn-over-documents-on-military-sexual-assault/>.

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⁴⁴ Human Rights Council, *supra* note 1, ¶¶ 176.258, 176.289, 176.289.

⁴⁵ Committee Against Torture, *Concluding Observations on the Third to Fifth Periodic Reports of the United States of America*, ¶ 30, CAT/C/USA/CO/3-5 (Dec. 19, 2014), <https://www.undocs.org/CAT/C/USA/CO/3-5>.

⁴⁶ UN Human Rights Committee, *List of issues prior to submission of the fifth periodic report of the United States of America*, ¶ 10, CCPR/C/USA/QPR/5 (Apr. 18, 2019), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fQPR%2f5&Lang=en

⁴⁷ See UN Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Rashida Manjoo - Addendum - Mission to the United States of America*, ¶ 27, A/HRC/17/26/Add.5 (June 6, 2011).