SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAY 2 6 2016

The Honorable Kirsten Gillibrand
United States Senate
Washington, DC 20510

Dear Senator Gillibrand:

I write on behalf of the President in response to your April 19, 2016, letter regarding sexual assault cases prosecuted by the military and in response to your April 27, 2016, letter to me. The Department takes allegations of sexual assault seriously, and we are committed to ensuring that Service members who commit sexual assault are held accountable. I believe that there is a clear message emanating from the Department: We, from the most junior enlisted Service member to the most senior commander, do not, and will not, tolerate such behavior. It is unacceptable to the individuals who selflessly serve our country and a detriment to our military readiness. I deeply appreciate your leadership in this vital matter and your continued commitment to eliminating this scourge.

As I stated in my testimony before the Senate Armed Services Committee (SASC) on April 28, 2016, I asked my staff to review the issues raised by the Protect Our Defenders report and the Associated Press article about the sexual assault cases discussed by Admiral Winnefeld in his testimony before the SASC on July 18, 2013 and a July 23, 2013 letter. I know Admiral Winnefeld personally, and he is a man of the highest integrity. He served his country admirably and would never intend to mislead Congress. I also know he cared deeply about ensuring that sexual assault in the military was addressed.

The review that was conducted pursuant to your concerns, which I have enclosed, shows that the central issues raised in the report and article are based on certain misunderstandings of how the military justice system works, lack of access to information contained in the full case files, or a disagreement on what "counts" as a sexual assault case. The Department is prepared to provide briefings on the review upon request.[1]

Over the past several years, the Department has made significant advances in addressing sexual assault. Since 2012, Secretary Panetta, Secretary Hagel, and I have directed a total of 54 initiatives to address different aspects of the sexual assault prevention and response system. These initiatives have fundamentally changed the way the Department confronts sexual assault.

In 2015 alone, the Department issued three separate policy documents[2] implementing more than seventy sections of law contained in National Defense Authorization Acts (NDAA)

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[1] Because the underlying case files include sensitive personal identifying information, particularly about victims of sexual assault, the Department is able to discuss information in case files with Committee members and cleared staff only upon a request of a Chairman of a Committee with jurisdiction over this matter.

[2] DoDD 6495.01, "Sexual Assault Prevention and Response (SAPR) Program", Change 2 (20 January 2015); DoDI 6495.02, "Sexual Assault Prevention and Response (SAPR) Program Procedures", Change 2 (7 July 2015); and DoDI 6495.03, "Defense Sexual Assault Advocate Certification Program (D-SAACP)" (10 September 2015).

since Fiscal Year 2012. Many of the Fiscal Year 2013 NDAA provisions were featured in Secretary Panetta's legislative proposal to Congress, the Leadership, Education, Accountability and Discipline on Sexual Assault Prevention Act of 2012, known as the LEAD Act. The most far-reaching LEAD Act reform required the establishment of a Special Victims Investigation and Prosecution Capability by each Service, with a force of specially-trained military investigators, prosecutors, and other legal personnel to work adult sexual assault, child abuse, and domestic violence cases. In addition to these legislative changes, the Department is working to implement nearly 200 recommendations from other bodies, including the Government Accountability Office, Defense Task Forces, and the Response Systems to Adult Sexual Assault Crimes Panel.

The Department has enhanced our response system to provide more effective support to sexual assault survivors. We established the Victim Assistance Leadership Council to implement uniform victim assistance policies and procedures throughout the Department. We have implemented a tailored campaign to address male victimization and provide gender-specific treatments. Our 24/7 global operation of the Safe Helpline continues to provide confidential and immediate support for all Service Members in crisis.

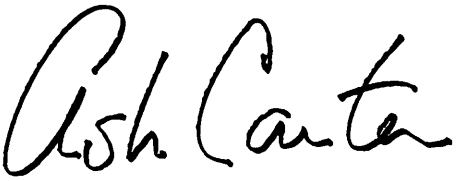
The Services conduct regular command climate surveys and performance evaluations that include ratings on sexual assault prevention and response. We are taking steps to assess more effectively and combat retaliation against victims and others who report sexual assault, or any other misconduct. For example, the Safe Helpline now gives victims an option to anonymously report retaliation over the phone or through a secure web form at safehelpline.org. We are also leveraging the monthly meetings held by each installation commander to ask about retaliation experienced by victims and first responders.

Finally, we are improving our data collection and reporting to give us the clearest possible picture of the issues we face and our progress. For example, Defense Digital Services is partnering with SAPRO to ensure more streamlined, timely, and accurate reporting. One aspect of this collaboration includes synchronizing SAPR and Family Advocacy Program data to portray sexual assault cases more holistically.

As always, the Department stands ready to work with Congress on this and other issues to ensure that our Service members are fully supported. Thank you for your continued support of our uniformed men and women.

A copy of this letter has also been sent to Senators Grassley, Shaheen, Heinrich, Boxer, Blumenthal, Paul, Heller, and Hirono.

Sincerely,



Enclosure:
As stated

Review of Issues Raised by the Protect Our Defenders Report and Associated Press Article Regarding Military Sexual Assault Cases

On April 18, 2016, Protect Our Defenders, a non-governmental organization, released a report entitled, *Debunked: Fact-Checking the Pentagon's Claims Regarding Military Justice*,[1] which sought to analyze data provided by the Services relating to sexual assault cases prosecuted in the military justice system but not by civilian authorities. The same day, the Associated Press published an article that described the report and added anecdotes and quotations about specific cases.[2] Both the report and the article claim the Department of Defense misled Congress in 2013 by overstating the number of sexual assault cases brought by the military following declination of those cases by civilian authorities, overstating the sexual assault conviction rate in such cases, and conflating cases declined by civilian law enforcement authorities with cases declined by civilian prosecutorial authorities.

Both the report and the article claim that misrepresentations of sexual assault case data occurred in testimony by and a letter from ADM James A. Winnefeld. On July 18, 2013, ADM Winnefeld testified before the Senate Armed Services Committee (SASC) regarding his reconfirmation as Vice Chairman of the Joint Chiefs of Staff. During this testimony, SASC members asked questions about military convening authorities' exercise of jurisdiction over sexual assault cases that civilian authorities had declined to pursue. In a follow up letter to Chairman Levin on July 23, 2013 ("July 23rd letter"), ADM Winnefeld provided more information.

Although it was not the primary topic of his reconfirmation hearing, sexual assault prosecutions by the military were the subject of intense debate within Congress at the time and in the four months prior to ADM Winnefeld's hearing, the Senate Armed Services Committee had held two hearings on the matter on March 13, 2013, and June 4, 2013. After those hearings, Congress passed Title XVII of the National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66 (2013), which legislated major reforms to the Uniform Code of Military Justice for sexual assault allegations. The legislation included 16 substantive revisions of the military justice system, including enhancing victims' rights and constraining convening authorities' power and discretion.

A review of the material provided to Protect Our Defenders as well as the case files underlying that material reflects that many of the issues raised in the report and the article are based on a misunderstanding of certain statements or how prosecutions are conducted under the Uniform Code of Military Justice or a disagreement on what constitutes a nonconsensual sexual act. Additionally, the data utilized by Protect our Defenders and the Associated Press resulted in

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[1] Protect Our Defenders, *Debunked: Fact-Checking the Pentagon's Claims Regarding Military Justice* (April 18, 2016), available at http://www.protectourdefenders.com/debunked/ (hereinafter, "Debunked").

[2] Richard Lardner, Associated Press, *Pentagon misled lawmakers on military sexual assault cases* (April 18, 2016), available at http://bigstory.ap.org/article/23aed8a571f64a9d9c81271f0c6ae2fa/pentagon-misled-lawmakers-military-sexual-assault-cases (hereinafter, the "AP article").

an incomplete picture of many of the cases which may have had an effect on the conclusions drawn by both organizations.[3]

This white paper reviews five key issues raised in the report and the article.

Analysis

Issue #1: "Deferred" Versus "Declined" Cases

Protect Our Defenders takes issue with the term "declination" to describe those cases in which military and not civilian authorities ultimately pursued a prosecution of a sexual assault case. While Protect Our Defenders' attempt to make a distinction between a "declination" and a "deferral" may have some utility, it is not a distinction that is recognized in the military justice system and would be difficult to determine consistently, as discussed below.

In many instances, both civilian and military authorities have jurisdiction over offenses committed by uniformed military members. When an alleged offense occurs in an area subject to the jurisdiction of a State, military and State officials generally must negotiate which authority will exercise jurisdiction over the allegation, and the exact nature of how this negotiation plays out is dependent upon the individuals involved.

In its report, Protect Our Defenders attempted to distinguish between cases where civilian authorities *would not* ("declined") bring a case in a civilian court, and cases where civilian authorities *voluntarily allowed* ("deferred") the case to be brought in a military court, even if the civilian authorities may have believed they would have been able to bring a case. The military has not historically kept records attempting to distinguish cases that are "declined" or "deferred" in this manner, and based on the data available, it would be difficult to make those assessments retroactively. Rather, in the military, when a civilian authority does not take a case, it is commonly referred to as a "declination" or "civilian declination," although on occasion, the phrase "deferred" and "declined" are used interchangeably.[4] This terminology is used regardless

[3] Protect Our Defenders submitted FOIA requests seeking documents pertaining to the testimony of ADM Winnefeld. In response, the Army provided all of the documents that had been provided to the Office of the Vice Chairman of the Joint Chiefs of Staff in preparation for the testimony. The documents included narrative summaries of the cases upon which the data relied and associated court-martial documents reflecting the charges, findings, and sentence in all completed cases, but did not provide full case files. The Marine Corps also provided summaries of the cases upon which their data had relied, but did not interpret the FOIA request to request full case files, and therefore did not provide full case files. The Air Force and Navy did not provide documents responsive to the FOIA requests. According to those Services, the Air Force did not respond to the FOIA request because of how Protect Our Defenders addressed the request, and it was never received by an office with FOIA or military justice roles and responsibilities. The Navy's response was due to the absence of a system of records responsive to the request.

[4] For example, the Manual of the Judge Advocate General of the Navy states: "When, following referral of a case to a civilian Federal investigative agency for investigation, the cognizant U.S. Attorney declines prosecution, the investigation normally will be resumed by NCIS and the command may then commence court-martial proceedings as soon as the circumstances warrant." JAGINST 5800.7F, at ¶ 0125.c(2) (June 26, 2012). Similarly, the Air Force's Administration of Military Justice regulation states: "If civilian or foreign authorities decline or waive the right to exercise jurisdiction, the Air Force may proceed with military justice action, whether court-martial or nonjudicial punishment." AFI 51-201, at ¶ 2.6.2 (July 30, 2015).

of the underlying reason for civilian authorities' decision not to pursue a case, whether for lack of evidence, a determination that one venue has a preferable punishment, the availability of charges, resource constraints, or other reasons.

Furthermore, making an accurate distinction between "deferred" and "declined" cases would be difficult even with perfect data. This is due to the various factors considered by military and civilian authorities in their negotiations as well as the stage in an investigation or prosecution at which decisions are made. For example, a civilian authority may *voluntarily* allow the military to take a case in an early stage of an investigation, but had the civilian authorities pursued the case, they may at a later stage in the prosecution have decided *not to pursue* the case because of evidentiary or other issues that arise during an investigation and trial.

The underlying case files also contain information inconsistent with the AP's reporting. For example, the AP article quotes a civilian prosecutor who stated that his office would not have declined to prosecute the case at issue. The case file includes a letter from an assistant district attorney in that prosecutor's office stating that the charge in that case "was declined by our office [a]s a Felony offense." An investigation report concerning the case states that civilian prosecutorial authorities declined the case after the alleged offender passed an independent third-party polygraph examination. An Army convening authority subsequently referred that case for trial by court-martial, at which the accused was convicted of the Article 120 offense of abusive sexual contact with a child and sentenced to confinement for 30 days and a dismissal.

In another example, the AP article stated that there was insufficient information to verify whether a particular case had been declined by civilian authorities. The article stated that four civilian prosecutors' offices were contacted in the area of the military installation, and none had a record of the case. The underlying case files include the name of the prosecutor who declined prosecution and the date on which that information was orally conveyed to a military Special Victim Prosecutor. Following the civilian declination, an Army convening authority referred that case for trial by court-martial, resulting in a conviction for rape of a child and sodomy with a child under the age of 12 and a sentence that included confinement for 35 years and a dishonorable discharge.

Issue #2: What Constitutes a Sexual Assault Case

The Protect Our Defenders report adopts a different approach for determining what constitutes a "sexual assault case" than do the Services. This approach seems to have led Protect Our Defenders to interpret the same underlying data differently than do the Services.

Protect Our Defenders notes that some of the sexual assault cases summarized by the Services and cited in testimony and the letter "were not prosecuted for sexual assault."[5] However, this assessment misses important context of the cases and is not reflective of how sexual assault data is collected or how sexual assault cases are tried. The Department officially tracks cases involving allegations of sexual assault as "sexual assault cases" even when the

[5] "Debunked" at 9; see also *id*. at 10.

charges filed may be for an alternate or collateral offense, as noted most recently the *Department of Defense Fiscal Year 2015 Annual Report on Sexual Assault in the Military.*[6] Because in both the civilian and military justice system, a determination must be made on a case-by-case basis as to which charges are supported by sufficient evidence, it is possible in both systems to bring an array of charges and not solely charges for sexual assault. In certain cases, the availability of non-sexual assault offenses in the military justice system (such as conduct unbecoming of an officer) led to convictions that would not have been possible in the civilian criminal justice system.[7]

Protect Our Defenders notes that some of the charges were for "indecent acts or possession of child pornography—offenses that, while often reprehensible, are not nonconsensual sexual acts." This description is not an accurate characterization of those types of cases, and disregards important charges and tools for military prosecutors.

For example, in one case involving child pornography provided to Protect Our Defenders,[8] the accused service member had a sexual relationship with a minor under the age of 16, but in the jurisdiction where he resided, the sexual relationship was not considered to be statutory rape. The individual was found guilty of an attempt to possess child pornography, indecent conduct for sending a photo of his genitalia to a child under the age of 16, and possession of child pornography. While a charge alleging nonconsensual sexual abuse was not brought, the underlying sexual acts raise questions about the consensual nature of the sexual relationship, given the age of the victim and the ability of a minor to consent to sex or to being a participant in pornography.

Similarly, prior to changes to the UCMJ in 2012, indecent acts charges provided an option for the government to pursue a sexual assault charge where consent of the victim would not have been a defense. That is, a charge for indecent acts does not indicate that the nature of the act was consensual or non-consensual; instead, it could be used to charge a case where proving lack of consent would have been difficult.

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[6] See *Department of Defense Fiscal Year 2015 Annual Report on Sexual Assault in the Military* (2016), available at http://sapr.mil/public/docs/reports/FY15_Annual/FY15_Annual_Report_on_Sexual_Assault_in_the_Military.pdf, at 49 (noting that "accountability actions [were] taken against the 2,013 subjects receiving command action this year involved sexual assault offenses" but that while "1,437 subjects received action for a sexual assault offense . . .[t]he remaining 576 subjects received action on a non-sexual assault offense, such as a false official statement, adultery, or assault.")

[7] As an example of a sexual assault case that did not ultimately result in sexual assault convictions for all of the defendants involved, the July 23rd letter described one case where two soldiers engaged in sexual intercourse with a victim who was substantially incapacitated by alcohol. The letter noted that after civilian investigators found that there were victim credibility issues, "military investigators … discovered evidence indicating that the soldiers had conspired to obstruct justice." While one individual was ultimately convicted by court-martial for abusive sexual conduct as well as collateral misconduct, the other was convicted only for conspiracy to obstruct justice, making a false statement, and absence without leave. Although one of the individuals was not convicted of sexual assault, the July 23rd letter appropriately used this as an example of a "sexual assault case."

[8] "Debunked" at page B35 (discussing U.S. v. PFC Uribe).

With respect to cases relied on in the July 23rd letter, each of the 32 completed cases referred to court-martial identified by the Army involved underlying allegations of sexual assault in which the accused was charged with one or more sexual assault charges, meaning a case involving a charge under Article 120, 120b, 125 for forcible sodomy, or Article 80 for an attempt to commit such an offense. In the Marine Corps cases, 27 of the 28 cases involved a prosecution or investigation for one or more sexual assault offenses or allegations of nonconsensual sexual conduct.[9] The final case, which was charged under Article 120 as a case of sexual misconduct, included an indecent exposure charge involving a Marine who was engaging in public masturbation. Although not examined in the Protect Our Defenders report, four of the six Navy cases involved prosecutions at courts-martial for sexual assault offenses. Sexual assault charges were dismissed in the two remaining Navy cases after the Article 32 investigating officers recommended against referral. As discussed below, because the attorney who selected the 10 Air Force cases has died, the Air Force has been unable to determine with certainty to which cases the letter refers and cannot provide an assessment of them.

Additionally, in both civilian and military judicial systems, defendants are often tried for "collateral misconduct" charges, such as lying to an investigator, in addition to an underlying crime. In both the military and civilian systems, it is sometimes difficult to obtain a conviction for sexual assault.[10] It is a common practice for prosecutors to attempt to obtain convictions for collateral charges as well, which provide additional methods of holding an individual responsible for his or her acts in the event of an acquittal for the charge of sexual assault.

The military justice system has additional collateral misconduct charges that would not be available in a civilian criminal justice setting, such as conduct unbecoming an officer, adultery, and orders violations. The military also has a range of disciplinary and other tools available that have no civilian counterpart, such as non-judicial punishment and administrative discharges. Accordingly, in sexual assault cases, it is common that charges other than, or in addition to, a charge specifically for sexual assault may be pursued as a means of increasing the likelihood that the accused is ultimately held accountable. [11]

Issue #3: Conviction Rates for Sexual Assault Cases

Protect Our Defenders applies different criteria to determine which cases to consider in assessing conviction rates than do the Services, which resulted in different calculations of conviction rates associated with sexual assault cases brought by the military. Following are the key differences.

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[9] One of the cases involved an allegation that a Marine attempted to engage in online sexual conversations with, and sent pornographic imagery to, an individual he believed to be a fourteen year old. The other 26 involved a prosecution or investigation for one or more sexual assault offenses.

[10] See, e.g., Rape, Abuse & Incest National Network, *Reporting Rates*, available at https://www.rainn.org/get-information/statistics/reporting-rates (last accessed May 19, 2016).

[11] The "Debunked" report also states, "In contrast to claims in Adm. Winnefeld's testimony, two cases did not involve a prosecution but, instead, discharge in lieu of court-martial." "Debunked" at 12 n.7. ADM Winnefeld's July 23rd letter expressly stated that two of the accused in Army cases "were administratively discharged in lieu of trial by court-martial under other than honorable conditions."

First, Protect Our Defenders includes in its calculation those cases declined by prosecutors *but not* those cases declined by other law enforcement officials.[12] Because it did not count cases declined by other law enforcement officials, the report did not account for at least three Marine Corps cases and eight Army cases declined by law enforcement. Second, Protect Our Defenders did not count an additional nine Army cases because the organization could not determine whether the declination was by a prosecutor or law enforcement. In contrast, the Services, as reflected in the July 23rd letter, specifically included both types of declinations.[13] Third, Protect Our Defenders counts only cases where the actual conviction fell within a narrow definition of "sexual assault offenses" whereas, as discussed above, the Services included all sexual assault cases – that is, all cases involving sexual assault allegations even if the charge brought was for other violations, such as indecent conduct (which, as explained above, is an important tool for the government to hold individuals accountable for nonconsensual sexual conduct). Finally, Protect Our Defenders excluded cases it determined were "deferred" instead of declined, which as discussed above, is a difficult determination to make and the organization's assessments in this matter may have been incorrect, based on other information contained in the files.

The underlying case files support the calculations set forth in the July 23rd letter. The July 23rd letter stated that there were 32 civilian declination cases in the Army referred to court-martial resulting in 26 convictions for an 81% conviction rate.[14] The case files support the 81% conviction rate stated in that letter when using the standards that the Department generally uses. The letter also stated that the Marine Corps had tried 28 civilian declination cases resulting in 16 convictions for a 57% conviction rate. At the time, the case files contained information that showed that 17 cases had resulted in a conviction; in addition, one of the 28 case was pending court-martial, and subsequently resulted in findings of guilt to non-sexual assault offenses. Thus the conviction rate among the cases at that time was 17/27, or 63%, higher than what the letter stated. The Navy statistics referred to in the July 23rd letter were correct. One out of three cases that were referred to court-martial had resulted in a conviction at the time of the letter.

Finally, the July 23rd letter also discussed 10 Air Force cases over a two-year period. Because the attorney who selected those cases died, the Department has been unable to determine with certainty to which Air Force cases the letter refers.[15] Similar to this data,

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[12] Protect Our Defenders also criticizes ADM Winnefeld's testimony for his failure to distinguish between cases declined by civilian prosecutors rather than by civilian law enforcement officials. His July 23rd letter accurately stated that "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."

[13] One of these cases did not involve a "declination." In that case, a civilian prosecution for an alleged sexual assault offense resulted in an acquittal. After the acquittal, an Army court-martial was brought for that same sexual assault offense, resulting in a conviction. (The Army court-martial also involved a second alleged sexual assault that resulted in an acquittal.)

[14] The report also notes several duplicates from the Army. It is unclear why the FOIA included duplicates, but the cases, as provided to the Joint Staff from the Army, did not include those duplicates and it did not affect the accuracy of the July 23rd letter.

[15] Responding to a request from Senator Gillibrand in the same time period, the Air Force provided a non-exhaustive sampling of 10 cases in which civilian authorities waived jurisdiction to the Air Force and the cases were

however, is a statement made by Col Don Christensen,[16] then-Chief of the Air Force Government Trial and Appellate Counsel Division, about the Air Force's prosecution of 15 sexual assault cases that civilian authorities declined to prosecute. As *Stars and Stripes* reported on January 9, 2013, "the Air Force prosecuted 96 sexual assault cases last year, including 15 cases in which civilian jurisdictions where the off-base assaults occurred declined the cases as unwinnable. Of those 15, 'so far, we have eight convictions,' Christensen said. 'We don't shy away from a tough case.'"[17]

Issue #4: Role of Commanders and Staff Judge Advocates in Prosecutions

Protect Our Defenders criticizes the Department for failing "to provide a single example of a commander 'insisting' a case be prosecuted," noting that, "[c]rucially, the military did not identify a single case where a commander sent a case to trial after a military prosecutor refused to prosecute."[18] These statements misunderstand the process.

The commander has the statutory authority and responsibility to make the ultimate decision regarding referral of a case to trial, but he or she does not make that decision in a vacuum. In the military justice system, a convening authority—the commander—may refer a charge for trial by a general court-martial *only if* the staff judge advocate concludes that (1) the specification alleges an offense, (2) the specification is warranted by the evidence, and (3) a court-martial would have jurisdiction over the offense. This conclusion is made in an Article 34 advice letter. The staff judge advocate's conclusions as to those matters are binding on the convening authority, and a military commander would not be able to overrule such a decision. Because it is not possible for a convening authority to overrule a staff judge advocate's determination that there is not, for example, sufficient evidence or jurisdiction, Protect Our Defenders' conclusion that there was no instance of a convening authority overruling a military lawyer who opposed bringing charges is misleading.

Of note, in the Article 34 advice letter, a staff judge advocate is also required to make a non-binding recommendation as to disposition, such as whether the charges *should not* be referred for trial by court-martial, even if the evidence is sufficient. The documents Protect Our Defenders reviewed did not include these letters.

Since the National Defense Authorization Act for Fiscal Year 2014 enacted review procedures for certain non-referral decisions there has not been a single instance in which a

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referred to trial by court-martial. In those 10 cases, eight of the accused were convicted of sexual assault offenses; one was convicted of non-sexual assault offenses; and one was acquitted, for a 90% conviction rate overall and an 80% conviction rate for sexual assault offenses.

[16] Col Christensen is currently President of Protect our Defenders as well as the lead author of the "Debunked" report.

[17] Nancy Montgomery, Stars and Stripes, *Air Force Strengthens Sex Assault Prosecutions with New Measures* (January 9, 2013), *available at* http://www.stripes.com/news/air-force-strengthens-sex-assault-prosecutions-with-new-measures-1.203291.

[18] "Debunked" at 2.

general court-martial convening authority has declined to refer a sexual assault case, as defined in Article 120(b) (as well as rape cases charged under Article 120(a) and forcible sodomy cases charged under Article 125 and attempts to commit any of those offenses charged under Article 80), for trial by court-martial where the staff judge advocate's article 34 advice letter recommended such referral. On the other hand, in some rare instances, general court-martial convening authorities have referred cases for trial contrary to the article 34 advice letter's recommendation against such referral.

Issue #5: Sentencing

The Protect Our Defenders report states that "[s]entencing decisions were arbitrary and unpredictable, potentially undermining the deterrence effect of the military justice system."[19] Disparity in sentencing is an issue in both the civilian and military justice systems. The Department has acknowledged that there have been cases of sentencing disparity in the court-martial system and has offered a detailed legislative proposal to address those concerns.

On December 28, 2015, the Assistant Secretary of Defense for Legislative Affairs transmitted to both the President of the Senate and the Speaker of the House the report of the Military Justice Review Group (MJRG)[20] along with the proposed Military Justice Act of 2016, which would enact the MJRG's recommendations. One of the major reform proposals in the bill was the adoption of judge-alone sentencing informed by sentencing parameters and criteria, which would provide sentencing guidance to military judges. While the parameters would not be binding, a military judge must explain a departure above or below the relevant parameter and such departures would be subject to appellate review. Unlike the current military justice system—in which court-martial members (the equivalent of jurors) also adjudge the sentence if they decide guilt or innocence—the Military Justice Act of 2016 would vest sentencing authority in the military judge in all non-capital cases.

The MJRG explained that these proposals were designed to "limit inappropriate disparity" in court-martial sentences while "maintain[ing] individualized sentencing and judicial discretion in sentencing."[21] Section 801 of the Military Justice Act of 2016 as proposed by DoD would accomplish this goal.

[19] "Debunked" at 4.

[20] Military Justice Review Group, *Report of the Military Justice Review Group* (December 22, 2015), available at http://www.dod.gov/dodgc/images/report_part1.pdf (hereinafter "MJRG Report").

[21] MJRG Report at 32.