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My name is Rachel Natelson, and I am the Legal Director at the Service Women's Action Network (SWAN). SWAN's mission is to transform military culture by securing equal opportunity and freedom to serve without discrimination, harassment or assault; and to reform veterans' services to ensure high quality health care and benefits for women veterans and their families.

SWAN effects change for servicewomen and women veterans by educating policy makers and the public; engaging military leadership and veterans' groups; offering training and technical assistance to service providers; and providing advice and assistance to individuals with legal and social service needs.

Through our national helpline, we engage directly with stakeholders, whose individual experiences all too often point to larger patterns of injustice. As widely as the needs of our clients vary with personal circumstances, they stem primarily from the shared challenge of military sexual trauma. Their narratives, moreover, reveal a common arc of betrayal, first by their brothers in arms, then by their command, and finally by the very institutions they fight to protect.

Sexual Assault Victim Rights

While much of the national conversation around military sexual violence has focused on criminal justice, the rights of crime victims exist largely outside of actual criminal proceedings. Under the law, police and prosecutors represent and owe a professional duty to the State, not to individual crime victims, whose interests may or may not align with their priorities. How best to advance these priorities, moreover, is a matter of discretion rather than obligation; there are no legislative or judicial guidelines about charging, and decisions not to investigate or file charges are ordinarily immune from review.

The fact that the government, rather than the crime victim, controls the doors to the courthouse is particularly significant in sexual assault cases. As a general rule, prosecutors attempt to avoid uncertainty by filing charges in cases in which the odds of conviction are good and by rejecting charges in cases for which conviction is unlikely. Sexual assault cases, meanwhile, rarely yield

convictions: 54% result in either a dismissal or an acquittal, and a rape prosecution is more than twice as likely as a murder prosecution to be dismissed.[1]

While victims may play only a limited role in criminal proceedings, civil courts offer a considerably more active forum in which to vindicate their rights and obtain compensation for the harm they have suffered. In cases of workplace crime, victims can pursue a variety of claims for relief, both from perpetrators and from employers. Not only may they sue individual assailants, they can also bring negligence claims against employers who knew or should have known of the potential for crime to occur.

In addition, Title VII of the Civil Rights Act obligates employers to act when employees report threats, harassment or other potentially violent conduct in the workplace. Unless an employer can prove that it exercised reasonable care to prevent and correct harassment or assault, the employer can be held liable for the misconduct of its employees as well as for any retaliation suffered by victims for reporting such incidents. By holding powerful institutions financially accountable for inaction, successful civil suits exercise an important deterrent effect against workplace crime.

From *Feres* to *Chappell*

While these remedies are available to defense contractors and civilian employees of the Department of Defense (DoD), not to mention most other civilian employees, they may not be accessed by uniformed personnel, an injustice stemming from a degree of judicial deference prescribed neither by statute nor by the Constitution.

The foundation of this doctrine of intra-military immunity from civil liability is *Feres v United States*, in which the Supreme Court relieved the U.S. government of liability under the Federal Tort Claims Act for injuries to members of the military that "arise out of or are in the course of activity incident to service."[2] Although the plain language of the Act contains no such limitation, barring only liability on claims arising out of the combatant activities of the military during time of war,[3] the ruling has since been applied to virtually all claims for damages by a military member, including sexual assault.

While the *Feres* decision itself addresses only negligence claims, it ultimately laid the foundation for a far broader doctrine of immunity, barring discrimination claims under both Title VII of the Civil Rights Act and the U.S. Constitution on the premise that, "[t]he special status of the military has required… two systems of justice, to some extent parallel: one for civilians and one for military personnel."[4]

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[1] Majority Staff of the Senate Judiciary Committee, *Violence Against Women: The Response to Rape* (May 1993), available at http://mith.umd.edu/WomensStudies/GenderIssues/Violence+Women/ResponsetoRape/full-text.

[2] 340 U.S. 135 (1950)

[3] *See* 28 USC § 2680(j)

[4] *Chappell v Wallace*, 462 U.S. 296, 304 (1983)

In the wake of *Feres*, a series of federal appeals courts interpreted Title VII to suggest a distinction between the rights of civilian employees of military departments and uniformed members of the armed forces.[5] In extending the reach of the "*Feres* doctrine" to cases of intentional discrimination, however, they notably cited the availability of Constitutional claims to aggrieved service members. While Congress may have implicitly excluded military personnel from the purview of the Civil Rights Act, they argued, it never intended to deprive them altogether of a remedy for discrimination.[6]

Two years later, in *Chappell v Wallace*,[7] the Supreme Court did just that in barring uniformed personnel from bringing Constitutional claims. In denying such relief, the Court pointed to the Boards for the Correction of Military Records (BCMR), an internal office authorized to correct military records in instances of "error or injustice," as a parallel enforcement mechanism for discrimination complaints.[8]

Parallel Justice: Military Grievance Mechanisms

The doctrine of "separate but equal," however, rarely delivers true equality, and the military's civil rights enforcement scheme falls woefully short of its civilian counterpart. While every base maintains an Equal Opportunity (EO) office to review complaints of discrimination or sexual harassment, the office is not intended to serve as an advocate for victims and generally has a greater responsibility to the military than to the individual complainant. Confidentiality is not guaranteed during EO proceedings, and many members who report incidents of sexual violence experience retaliation, particularly when the subject of the complaint is a supervisor.

Appealing such reprisals, which can range from demotion to termination of service, is daunting and access to counsel is erratic at best. While EO or Sexual Assault Response Coordinator (SARC) complainants who suffer retaliation may indeed petition their branch BCMR for redress,[9] they must first file a grievance through the Office of the Inspector General (IG), which often demonstrates more allegiance to the command than to the complainant.

Since IGs may determine at the outset whether or not a complaint merits further attention, remarkably few full investigations occur. According to a recent Government Accountability Office (GAO) study, the IG fully investigated only 29% of all reprisal complaints between 2006 and 2011, and substantiated only a fifth of those investigated.[10] As a result, only 6% of all

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[5] *See, e.g.*, Johnson v. Alexander, 572 F.2d 1219 (8th Cir. 1978); Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981); Gonzalez v. Department of the Army, 718 F.2d 926 (9th Cir. 1983); Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987); Spain v. Ball, 928 F.2d 61 (2d Cir. 1991); Randall v. United States, 95 F.3d 339 (4th Cir. 1996); Hodge v. Dalton, 107 F.3d 705 (9th Cir. 1997).

[6] *See, e.g.*, Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981).

[7] See *supra*, n 4.

[8] *Id*. See also 10 USC § 1552(a)(1).

[9] See *Military Whistleblower Protection*, Department of Defense Directive 7050.6.

[10] United States Government Accountability Office, *Actions Needed to Improve DOD's Military Whistleblower Reprisal Program* (January 2012), available at http://www.gao.gov/assets/590/588784.pdf.

complainants during this time period ultimately obtained the findings necessary to petition the Board for a remedy.

The Boards, moreover, are considerably limited in their authority and capacity. Unlike Article III or Article I judges, BCMR members are not authorized to award damages or to approve settlements. Though adjudicative bodies, they are not actually staffed by judges or even necessarily by attorneys or personnel specialists, but simply by civilian DoD employees who convene on an *ad hoc* basis in addition to their full-time employment duties. Members need not undergo extensive or specialized training in military law, and are not bound by the judicial doctrine of precedent or even required to review case files in advance of convening; in fact, recent FOIA data has found Army and Navy Board members to devote an average of 3.72 and 6.73 minutes respectively to deciding each case.[11] In short, the Boards hardly constitute the guarantor of due process envisioned under *Chappell*.

Reprisals without Remedies

Reprisals, meanwhile, remain widespread among victims who file reports of sexual harassment or assault. According to the Defense Task Force on Sexual Assault in the Military Services, half of those who opt against reporting military harassment or assault do so out of fear of retaliation, either from the perpetrator or from a commanding officer.[12]

Unlike civilian employees, military personnel risk being penalized for collateral misconduct if they complain of harassment or assault. While civilian culture has at least evolved to the point of no longer recognizing the sexual history or drinking habits of victims as a factor in the redress of sexual offenses, military assault victims must balance against the benefits of reporting the likelihood of attendant retribution for such misconduct as underage drinking, adultery, and fraternization between ranks.

Service members suffering the psychological wounds of military sexual trauma routinely contact SWAN for assistance in challenging improper administrative separations alleging either misconduct or behavioral disorders. These accounts are consistent with Armed Forces Health Surveillance Center statistics, which have found adjustment disorder diagnoses to be ten times more prevalent than PTSD diagnoses among women in the military.[13]

While the issue of personality disorder discharges has received public attention in recent years, similar scrutiny has yet to apply to other purported behavioral disorders, allowing commanders simply to substitute one type of administrative separation for another as an alternative to a medical discharge for PTSD. Scientific literature, by contrast, clearly distinguishes between PTSD and adjustment disorder, defining the former as a consequence of life-threatening injury or

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[11] *See* http://www.rjtlaw.net/bcmr_room.htm.

[12] *Report of the Task Force on Sexual Assault in the Military Services* (Dec 2009), available at http://www.ncdsv.org/images/SAPR_DTFSAMS_Report_Dec_2009.pdf.

[13] Medical Surveillance Monthly Report, *Mental Disorders and Mental Health Problems, Active Component, U.S. Armed Forces, 2000-2011* (June 2012), available at www.afhsc.mil/viewMSMR?file=2012/v19_n06.pdf#Page=15.

distress, and the latter as triggered by ordinary or non-catastrophic life stressors.[14] Although these diagnostic criteria point to PTSD as a far more likely consequence of sexual assault, commanders can and do dismiss victims as merely presenting an attitude problem.

Furthermore, while an adjustment disorder separation is not in itself grounds for an other than honorable service characterization, the two often operate hand in hand, leaving MST victims with a discharge status that precludes access to VA benefits and limits their civilian employment opportunities. At the same time, those who attempt to upgrade their discharge characterization or correct the basis for their separation through the BCMR encounter what advocates describe as "near-categorical" rejection.[15]

Deference, Not Abdication

These experiences, however, are by no means inevitable. While courts and legislators alike have pointed to the potential for civil claims to undermine "[t]he need for unhesitating and decisive action by military officers,"[16] history suggests that the enforcement of civil rights is not only compatible with, but, in fact, necessary for mission readiness.

Perhaps the most contested civil rights issue to confront the military in the recent past is the Don't Ask Don't Tell doctrine, which previously barred service members from engaging in consensual homosexual conduct. After years of inaction, courts began to acknowledge that while deference may be due to Congress in exercising authority over military affairs, "deference does not mean abdication," particularly where fundamental civil rights are at stake.[17] If this principle applies to the right to engage in private intimate conduct, then surely it should also apply to the right to be free from unjustified intrusions on bodily security.

Even the most fundamental rights, however, mean little in the absence of a means to enforce them. As daunting as it is for harassment and assault victims to seek redress in the civilian workplace, they can still appeal to the rule of law in the face of institutional barriers. For many service members, the erosion of Don't Ask Don't Tell is merely one step closer to achieving the full range of rights they fight to protect.

In establishing the doctrine of judicial review, Chief Justice John Marshall observed that our government cannot be called a "government of laws and not of men ... if the laws furnish no remedy for the violation of a vested legal right." If service members have a right to be free from sexual violence and discrimination, we can no longer deny them the remedies that go along with it.

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[14] Mauro G Carta, et al, *Adjustment Disorder: Epidemiology, Diagnosis and Treatment*, Clinical Practice and Epidemiology in Mental Health (June 2009), available at www.cpementalhealth.com/content/5/1/15.

[15] *See, e.g., Shepherd v. McHugh*, Proposed Second Amended Complaint, available at http://www.law.yale.edu/documents/pdf/Clinics/ShepMcHughProposed_SACComplaint.pdf

[16] See *supra* n 4.

[17] *See, e,g., Witt v Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008).