

The Innocent Warrior Project
Military Justice Mailer – June 2013

Sex Assault Hysteria and Grandstanding Politicians Undermine Military Justice

In the spirit of the politician's idea, "You never want a serious crisis to go to waste," Maureen Dowd penned a column on 8 May in the New York Times titled "[The Military Injustice System](http://www.nytimes.com/2013/05/08/opinion/dowd-americas-military-injustice.html?_r=1&.)" (Ms. Dowd asks us to believe that an "epidemic" of sexual assaults in the military has reached crisis proportions which "demand" wholesale changes to the military justice system.

Let us put aside for a moment that Ms. Dowd clearly knows nothing about the fragile balance which Congress established in the Uniform Code of Military Justice to ensure all Service Members – innocent and guilty – are treated fairly under the law. Over the past twenty years, the military justice system has experienced a steady erosion of fairness in case of alleged sexual misconduct by Service Members. The rules governing courts-martial have been "relaxed" to make prosecutions easier, and a well-financed "victims' advocate" bureaucracy has been created within the Department of Defense that reaches every post, base, and station. This "sex re-education" program has increasingly shifted training time from combat readiness to mandatory "Sex Assault Awareness Training." Unfortunate Service Members are bombarded with questionable statistics ("87% of all allegations of sexual assault are true") to prejudice potential military jurors, law enforcement, and Commanders.

"No humane person finds sexual abuse of any kind tolerable, just as no humane person believes an innocent person should be convicted of something they didn't do."

We formed [The Innocent Warrior Project](http://www.innocentwarrior.org) (www.innocentwarrior.org) to fight the progressive erosion of fairness in the military justice system, especially in the case of alleged sex crimes. Although we regularly take the military services to task, particularly the Service JAG bureaucracies and their in-house trial defense services, we think they – and our Service Members – are getting a bum rap. Our mission is to make it harder to convict innocent Service Members.

What is alarming to those of us in [The Innocent Warrior Project](http://www.innocentwarrior.org) is that Ms. Dowd and her political fellow-travelers are fighting, purely on ideological grounds, to *further* imbalance the scales of justice for Service Members facing accusations of sexual misconduct.

Ms. Dowd claims

[Military leaders' reported insensitivity to sex crimes] was especially jarring in light of the release of a stunning Pentagon study estimating that 26,000 men and women in the military were sexually assaulted in the 2012 fiscal year, a 37 percent increase from the same period the year before. Only a small number of incidents — 3,374 — were reported, showing that victims are still afraid of payback or perverted justice. And a mere 238 assailants were convicted.

The referenced study can be found at <http://www.sapr.mil/index.php/annual-reports>. The report discussed prevalence of “Unwanted Sexual Contact,” not “sexual assaults.” The data comes from the 2012 Workplace and Gender Relations Survey of Active Duty Members (WGRA).

The 26,000 number has some basis in reality, but the whole picture is complicated. It is true that in the study 6.1% of Active Duty females and 1.2% of Active males “indicated they experienced some kind of USC [Unwanted Sexual Contact] in the 12 months prior to being surveyed.” But the study continued with this

This estimate suggests that there may have been approximately 7,000 more Service members who experienced some kind of USC in 2012 than in 2010 [the source of Ms. Dowd’s “37% increase”! claim], but also suggests that there may have been approximately 11,000 fewer Service members who experienced some form of USC in 2012 than there were in 2006.

Fair-minded people take dramatic changes in statistical *sampling* (e.g., 34,000 in 2006, 19,300 in 2010 and 26,000 in 2012) as grounds to question the methodology by which the numbers were collected. To put it another way, her headline could easily have read, “DoD Report Indicates 32% Drop in Unwanted Sexual Contact Amongst Active Duty Service Members from 2006 to 2012.”

Equally troubling, by the terms of the study “Unwanted Sexual Contact” include actions which no reasonable person would consider crimes. If a Sailor aboard ship passes another Sailor – back to back – in a passageway and their buttocks brush (unwanted touching of “sexually-related” areas of the body), that could be reported as USC ... by both. If a female Airman drunkenly tries to stick a finger in the mouth of a male Marine at a Christmas party (attempted oral penetration with any part of the body), that could also be reported as USC.

The office that conducted the study, The Department of Defense Sexual Assault Prevention and Response Office, is part of a giant DoD bureaucracy whose very existence depends on exaggerating the rate of sexual offenses in the military—a statistic that is directly linked to its own importance and funding. This office’s credibility was further called into question last year when it was caught funneling 95% of the money that had been appropriated for training of Judge Advocates in sexual offense litigation exclusively to prosecutors, short-changing training for in-house military defense counsel and further undermining its own credibility.

Let’s put those statistics in another, less sensationalistic, way: In 2012, we can say with certainty that 93.9% of female Active Duty Service Members and 98.8% of their male counterparts reported no attempt to touch them in a way that they could possibly interpret as sexual. And as for those “shocking” 3,374 “incidents” that were “reported” in 2012, the report admits what Ms. Dowd conceals: “[t]hese reports involved one or more Service members as either the victim or subject (alleged perpetrator) of an investigation.”

The reality is that of “26,000” (estimated) victims of Unwanted Sexual Contact in the 2012 WGRA, only 3,374 came forward. Relatively few potential victims coming forward could show

(a) a culture of military carelessness and impunity that flies in the face of the tens of millions the military has invested in creating a giant “victim’s assistance” bureaucracy at every level of the military, its constant “re-education” of Service Members in mandatory “sensitivity” training, and its wholesale changes to military trial rules *or*

(b) it *could* show that respondents answered a broad question broadly, and that people are far more likely to anonymously report one annoying instance in a year than point a finger at a person for a crime that could land that person in Leavenworth for life.

We do know that 308 sex cases – about 10% of all cases reported – were solid enough to go to court-martial. In a system with a 95%+ conviction rate, in courts-martial involving allegations of unwanted sexual contact only 79% (238) of those Accused were convicted of one or more of the alleged offenses and 21% (64) were completely acquitted. Shockingly, those 64 acquittals represented 33.7% of all courts-martial acquittals in the Department of Defense for 2012.

As for all cases reported, one in three of all cases when law enforcement resources were actually applied are lumped together in the report as “either outside the legal authority of the Department or a military criminal investigative agency determined the allegations were unfounded (false or baseless).” Since the 3,374 cases reported to law enforcement include all cases that include a DoD-related victim *or* the accused, this statistic means 33.3% of all cases include either non-military perpetrators or cases that law enforcement review found completely baseless despite their best efforts.

Given the real negative career consequences of appearing “hostile to women,” the reality is that Commanders and military law enforcement are sending every borderline case forward to court-martial. Senior Commanders read newspapers, too. When they see Air Force Lt. Gen. Sue Helms’ promotion is being held up by an irate Senate for granting clemency as a Commander and Major General Michael Harrison is relieved four days before the end of his 32-month command for “not prosecuting” an alleged sex crime “vigorously enough,” Commanders get the message: There is no downside to making it the jury’s problem, but exercising discretion in the interests of justice will be punished. This type of “unlawful command influence” violates the plain language of the UCMJ and has been described by military appellate courts as “the mortal enemy of military justice.”

The shocking statistic buried in the Department of Defense Sexual Assault Prevention and Response Office report is that Commanders only exercised their discretion to find a case baseless in 4.5% of all sex cases sent to them. And yet, when all of those cases went forward, military panels *completely* acquitted 21% in a system that has a 95%+ conviction rate. The system is harsh enough already. In reality, Commanders are sending forward every case in which there is even a possibility of guilt, no matter how slight; and when faced with those cases military juries acquit at a rate more than 400% greater than in other courts-martial.

The ever-increasing pressure being applied against the free exercise of command discretion – along with changes already made to the military justice system – has created a “two-tier” system of justice in which allegations of sexual misconduct are put on a “fast-track” to court-martial. The system is breaking down, and innocent Service Members are being sent to Leavenworth.

Ms. Dowd and her ilk argue that military juries and Commanders are sending rapists back into the communities in which juror's and Commanders' own families live, which is absurd. Their proposed solution is to undermine Commanders' ability to exercise discretion, an important safeguard in the "team-first" military, and end the ancient right of Service Members to enjoy trial by jury of their peers, a right countless thousands Service Members have died defending.

The radical fringe for whom Ms. Dowd faithfully serves as tribune wants us to believe that no woman ever makes false allegations and every man, especially those who serve in our military, is a sexual predator. The sad consequence of Ms. Dowd's desired agenda, if adopted, would be a system that is *more* unfair to Accused Service Members, *more* imbalanced, *more* unjust.

No humane person finds sexual abuse of any kind tolerable, just as no humane person believes an innocent person should be convicted of something they didn't do. It is past time to acknowledge a reality that Ms. Dowd is desperate to avoid: Large-scale mixing of female and male service members at every unit level inevitably results in more sex crimes *and* more false allegations. It is the price Service Members will continue to pay for using the military as a social engineering platform to achieve some post-gender utopia.

Biological and behavioral differences between males and females exist, regardless of the new dogma that males and females are interchangeable. The largest cause of rotating females out of combat deployments early is ... pregnancy, regardless of the havoc to small unit integrity this wreaks on combat platoons. Similarly, the idea that military leaders are insensitive to the plight of female victims is demonstrably false. Military leaders and jurors consistently show a deep-seated solicitude toward females which causes them to treat alleged perpetrators more, rather than less, harshly. Female Commanders and military jurors are reliably less naïve about suspicious allegations, which may explain Lt. Gen. Helms' exercise of discretion.

Biology can be more powerful than military discipline; and, as long as the military can't stop sex and lying, a messy balance will have to prevail. This may bother those who have the luxury of not getting shot at; sadly, their ignorance, hysteria, and grandstanding pose a threat to our Service Members more insidious than our declared enemies.

God bless our Warriors. They deserve better than Maureen Dowd.