

Spring 2015

Silence Of The Lambs: Giving Voice To The Problem Of Rape And Sexual Assault In The United States Armed Forces

Alexandra Lohman

Recommended Citation

Alexandra Lohman, *Silence Of The Lambs: Giving Voice To The Problem Of Rape And Sexual Assault In The United States Armed Forces*, 10 *Nw. J. L. & Soc. POL'Y*. 230 (2015).
<http://scholarlycommons.law.northwestern.edu/njlsp/vol10/iss1/5>

This Note or Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized administrator of Northwestern University School of Law Scholarly Commons.

SILENCE OF THE LAMBS: GIVING VOICE TO THE PROBLEM OF RAPE AND SEXUAL ASSAULT IN THE UNITED STATES ARMED FORCES

*Alexandra Lohman**

| | |
|--|-----|
| INTRODUCTION: SEXUAL VIOLENCE, A FEATURE OF MILITARY SERVICE | 231 |
| I. THE HISTORY OF COMMANDED SILENCE IN THE AMERICAN ARMED FORCES | 239 |
| <i>A. And Aberdeen, Too: Previous Scandals in the Military</i> | 239 |
| <i>B. Seeking Justice: Rape and Assault in the Military Courts</i> | 241 |
| <i>C. Statutory Interpretation of the Uniform Code of Military Justice (UCMJ) Definition of Rape</i> | 243 |
| <i>D. The “Blissful” Ignorance of the Bureaucracy: Responses of Military Leadership and the Federal Government</i> | 247 |
| 1. Beyond Reporting Reform | 249 |
| 2. Congressional “Outcries” | 251 |
| II. THE CURRENT RAMPAGE OF RAPE..... | 255 |
| <i>A. Beyond the Assault: Consequences & Current Calls for Action</i> | 255 |
| <i>B. The New Gender Panic: Prompting New Resolutions for Reform</i> | 259 |

* J.D., Northwestern Law, 2014. B.A., Political Science, California State University, Long Beach, 2011. I would like to thank the editorial staff (2013-2015) of the Northwestern Law Journal of Law and Social Policy for their commitment to making this article excellent, both in substance and in style. I would also like to thank Ms. Jessica A. Martinez, Esq. for her continued support and insight throughout the writing process.

1. Consent Standards and Methods of Reporting Consent Standards259

2. Removing Commander Discretion261

3. Reforming the UCMJ263

III. GIVING VOICE TO SILENCED CLAIMS264

A. Hurdles to adjudication: Unit and Administrative Bias264

 1. Unit Retaliation264

 2. Administrative Bias265

B. Necessary Steps: Protection for Victims who Report269

C. Modeling after 10 U.S.C. §1034: Subordination and Retaliation272

IV. ALARM: ADVANCING THE LACKLAND ANTI-SEXUAL VIOLENCE RIGHTS MODEL273

CONCLUSION: *SOUNDING THE ALARM*279

INTRODUCTION: SEXUAL VIOLENCE, A FEATURE OF MILITARY SERVICE

In a recent report released by the Pentagon, an estimated 19,000 incidents of “unwanted sexual contact” occurred within the United States military in 2014.¹ However, only 191 service members² were

¹ See Stav Ziv, *Report on Sexual Assault in the Military Draws Criticism*, NEWSWEEK (Dec. 8, 2014, 4:39 PM), <http://www.newsweek.com/report-sexual-assault-military-draws-criticism-290173>; *Military Sex Assault Reports Up 8 Percent*, CHI. SUN TIMES (Dec. 4, 2014, 7:37 AM), <http://politics.suntimes.com/article/washington/ap-sources-military-sex-assault-reports-8-percent/thu-12042014-726am>.

² See Naomi Wolf, *Rape in the Military a Culture of Coverup*, READER SUPPORTED NEWS (June 15, 2012), <http://readersupportednews.org/opinion2/273-40/11931-rape-in-the-military-a-culture-of-coverup>. Generally, only 17% of rape allegations are prosecuted within the military; this is low in comparison to the national average of 37% of rapes being prosecuted in the general public. Amy Sullivan, *Why Won't the Military Take Troop-on-Troop Rape Seriously?*, NEW REPUBLIC (Oct. 24, 2012), <http://www.newrepublic.com/blog/plank/109083/why-wont-the-military-take-troop-troop-rape-seriously>. This means that roughly 6% of

convicted of such crimes at courts-martial.³ Since the Department of Defense (DOD) began recording data on reported incidents of rape and sexual assault in 2004, the number of reported assaults has increased from 1,700 to 3,374 reported incidents.⁴ Unwanted sexual contact—terminology used to encompass both rape and sexual assault—is a prevalent feature of military service in the United States.

Rape and sexual assault against service members in the U.S. Armed Forces is a well-documented, historical problem that is being critically examined by the public and the U.S. Government. In 2012, the discussion surrounding the “silent epidemic”⁵ of rape and sexual

all incidents were tried and successfully prosecuted. *Id.* The DOD estimates that 19,000 sexual assaults occur each year within the military services. *Id.* In 2011, only 3,192 cases were actually reported. *See* Wolf, *supra* note 2. Furthermore, only 1,518 of these incidences were recommended for any form of disciplinary action. *Id.* A 2012 DOD study similarly concluded that “only 8% of sexual assailants were referred to military court, compared to 40% of similar offenders being prosecuted in the civilian court system.” Josh Levs & Ashley Frantz, *Military Rape Victims: Stop Blaming Us*, CNN (Mar. 14, 2013, 6:22 PM), <http://www.cnn.com/2013/03/13/us/military-sexual-assault/index.html>.

³ A court-martial is defined as:

Military court for hearing charges brought against members of the armed forces or others within its jurisdiction; also, the legal proceeding of such a court. . . . Courts-martial are generally convened as ad hoc courts to try one or more cases referred by some high military authority. The convening officer chooses officers, and sometimes enlisted personnel, from his or her command to sit on the court, determine guilt or innocence, and hand down sentences.

Court-Martial, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/court-martial> (last visited Nov. 20, 2014).

⁴ U.S. COMM’N ON CIVIL RIGHTS, SEXUAL ASSAULT IN THE MILITARY 5 (2013), *available at* http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf. Fiscal Year 2012 is the most recent fiscal year included in this report.

⁵ The silent epidemic presents the troubling predicament of victims of rape and sexual assault within the military. The epidemic is rooted in a victim’s

assault in the U.S. military was reignited with an emerging scandal at Lackland Air Force Base (Lackland AFB).⁶ As the training camp for all new Air Force enlistees, Lackland AFB provides opportunity for sexual misconduct.⁷ At Lackland AFB, all enlistees go through boot camp where every aspect of their lives is controlled.⁸ Enlistees vest

compelled choice to remain silent, as filing a complaint or report may endanger their career, retirement, and reputation. Alexa M. Poteet, *The Military's Rape Problem*, NAT'L INTEREST (Sept. 19, 2012), <http://nationalinterest.org/blog/the-buzz/the-militarys-rape-problem-7492>.

⁶ Molly O'Toole, *As Lackland Air Force Base Scandal Widens, Tailhook Whistleblower to Demand Hearing*, HUFFINGTON POST (Aug. 2, 2012, 3:05 PM), http://www.huffingtonpost.com/2012/08/02/lackland-air-force-base-tailhook_n_1732874.html.

⁷ Lackland AFB produces nearly 36,000 new privates and enlisted members annually. Paul J. Weber, *Lackland Air Force Base Rocked By Sex Scandal*, HUFFINGTON POST (Aug. 25, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/06/25/lackland-air-force-base-sex-scandal_n_1626206.html.

⁸ Rank and superiority of one officer can allow them to effectively control another lower-ranked individual within the military. For example, allegations made against Brigadier General Jeffrey Sinclair included rape and sexual assault. His victim, a three-year Captain of the Army, alleged that aside from making threats against her life, he also told her how much water she could drink and how often and when she could use the restroom. Katie J.M. Baker, *'Godlike' Army General Allegedly Threatened to Kill Woman if She Reported Sex Crimes*, JEZEBEL (Nov. 7, 2012, 1:40 PM), <http://jezebel.com/5958548/godlike-army-general-charged-with-sex-crimes-allegedly-threatened-to-kill-woman-if-she-spilled-the-beans>.

When the chips are down and our subordinates have accepted us as their leader, we don't need any superior to tell us; we see it in their eyes and in their faces, in the barracks, on the field, and on the battle line. And on that final day when we must be ruthlessly demanding, cruel and heartless, they will rise as one to do our bidding, knowing full well that it may be their last act in this life.

Alexander N. Pickands, *Reveille for Congress: A Challenge to Revise Rape Law in the Military*, 45 WM. & MARY L. REV. 2425, 2425 (2004). (quoting U.S. Dept of Army, Field Manual 22-100, Army Leadership: Be, Know, Do 1-15 (31 Aug. 1999) (quoting Colonel ("COL") Albert G. Jenkins, CSA)).

complete trust in their leaders,⁹ and as a result, a unique relationship between enlisted members and military leadership develops.¹⁰ This relationship is necessary in a military setting because in combat leaders may be compelled to command their subordinates to put life and liberty on the line for their country.¹¹ However, while this unique relationship may be required for combat, it also lays the foundation for an environment conducive for sexual violence to take place.

In order to create this unique relationship, the military employs the “break and build” technique while training new enlistees at boot camp.¹² This training technique refers to the “break down” of an enlistee’s mental state by the enlistee’s superiors.¹³ These superiors intend to replace the enlistee’s old mental state with one better suited for service in the armed forces.¹⁴ Break and build exemplifies military structures intended to sustain the unique power structure between superiors and subordinates. Such power structures attempt to give superiors automatic and complete control within combat situations. However, this also gives superiors a blank check of authority over subordinates, potentially leaving these individuals vulnerable to abuse.¹⁵ This level of control of a superior over an employee (enlistee) is unmatched by any other organization.¹⁶

⁹ Pickands, *supra* note 8, at 2425-26.

¹⁰ *Id.*

¹¹ *Id.*

¹² The “break and build” mentality has been described as a “frequently employed training strategy that some superiors have taken too far.” See Eryn Sepp, *Service, Not Subservience: The U.S. Military’s Sexual- Violence Problem*, DAILY BEAST (Mar. 8, 2012), <http://www.thedailybeast.com/articles/2013/03/08/service-not-subservience-the-u-s-military-s-sexual-violence-problem.html>; see also Emily Badger, *How the Military Can Change Personalities, Slightly*, PAC. STANDARD (Feb. 24, 2012), <http://www.psmag.com/blogs/the-idea-lobby/how-the-military-can-change-personalities-slightly-40069/>.

¹³ See Badger, *supra* note 12.

¹⁴ See *id.*

¹⁵ See Sepp, *supra* note 12.

¹⁶ *Id.*

The current dialogue surrounding the silent epidemic is unique with respect to the individuals who stand accused of these crimes.¹⁷ Victims of sexual violence continue to make reports against high-ranking officers,¹⁸ despite the fact that pressing charges against such individuals can result in extreme forms of retaliation. A number of high-ranking officials recently pled guilty to such charges.¹⁹ Victims'

¹⁷ While this relationship is problematic for both male and female trainees alike, the most recent line of high profile cases emerging from the American Armed Forces is focused on sexual violence against women specifically. As the Lackland scandal demonstrates, the stringent conditions of boot camp, coupled with psychological reformation, lead women in the armed forces to be frequently commanded into situations that lead to rape and sexual assault. LINDSAY ROSENTHAL & LAWRENCE KORB, *TWICE BETRAYED: BRINGING JUSTICE TO THE U.S. MILITARY'S SEXUAL ASSAULT PROBLEM* 14 (Nov. 2013), *available at* <http://cdn.americanprogress.org/wp-content/uploads/2013/11/MilitarySexualAssaultsReport.pdf> (detailing the level of rape and sexual assault allegations stemming from abusive conduct from a victim's superior within the chain of command); *see also* THE INVISIBLE WAR (Docurama Films 2012) (portraying cases of servicewomen who were commanded into situations that eventually lead to alleged incidents of rape and sexual assault).

¹⁸ For example, Brigadier General Jeffrey Sinclair faces multiple charges of forced sex, wrongful sexual conduct, violating an order, among other charges. Michael Biesecker & Lolita C. Baldor, *Jeffrey A. Sinclair, U.S. Army General, Charged with Forcible Sodomy, Adultery*, HUFFINGTON POST (Nov. 26, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/09/26/jeffrey-sinclair-arrested_n_1916919.html. An investigation against Lt. Col. Joseph Morse, the Army's top sexual assault prosecutor, on allegations of making unwanted sexual advances towards a lawyer in the Army JAG Corps, were confirmed in March of 2014. The nature of the charges against this high-ranking individual underscores the magnitude of the problem. *See* Lisa Mascaro, *Senate Rejects Stronger Military Sexual Assault Bill*, L.A. TIMES (Mar. 6, 2013 5:23 PM), <http://www.latimes.com/nation/la-na-military-sexual-assault-20140307,0,6330638.story#axzz2vUscF7i9>.

¹⁹ For example, Army Brig. Gen. Jeffrey A. Sinclair, plead guilty to charges including have an illicit affair, impeding an investigation and pressuring female officers to send nude photos. Mascaro, *supra* note 18. However, he pled not guilty to the most serious charges alleged against him. *Id.* These charges include forcing a female captain to perform oral sex, groping her, committing sodomy, engaging in public sex, and threatening to kill her and her family if she went public with the three-year affair. *Id.* Ultimately, he was not convicted of the most serious charges

reports, along with these pleas entered by the accused, highlight poor attempts by the U.S. Armed Forces to curtail the sexual violence epidemic.²⁰

In a survey regarding sexual assault reports amongst reserve members of the armed forces, 67% of women and 87% of men did not report their alleged incidents of rape or sexual assault.²¹ Reasons for lack of reporting included fear of negative responses from the chain of command, the alleged attacker, and friends of the alleged attacker.²² Often individuals who report their attacks after being raped or sexually assaulted are not encouraged to seek legal or social help, but

and was fined \$20,000 as his ultimate punishment from the court-martial. *See* Gregg Zoroya, *General Avoids Jail Time in Case Involving Affair with Subordinate*, USA TODAY (Mar. 20, 2014, 4:24 PM),

<http://www.usatoday.com/story/news/nation/2014/03/20/sinclair-general-affair-subordinate-army-sexual-assault/6557033/>. Advocates for military justice reform called the imposed sentence “a mockery of military justice.” *Id.*

²⁰ *See* Henry Cunningham, *Military Focuses on Mission to Bring Justice for Sexual Assaults*, FAYETTEVILLE OBSERVER (Oct. 22, 2012, 8:08 AM), http://www.fayobserver.com/military/article_72f6836a-0ed9-53e0-858f-591174945da2.html. The military’s failure to curb the epidemic of sexual assault is particularly disturbing given the lack of any kind of repercussions for perpetrators the commit particularly grisly crimes. For example, a female soldier of the Army alleged that a fellow soldier raped her and beat her to the point of fracturing her skull. Another time, the same soldier tied her to a tree, and raped her again. Her claim was met with stern resistance from her chain of command. The advice she was given was “not to ‘open this can of worms’” by going forward in pressing charges against her attacker. Drew Brooks, *Lawsuit Says Military Created ‘Pervasive Threat’ to Its Own Troops*, FAYETTEVILLE OBSERVER (Oct. 15, 2012), http://m.fayobserver.com/military/lawsuit-says-military-created-pervasive-threat-to-its-own-troops/article_265a9d78-62cf-553d-a621-87c5fefa75f7.html?mode=jqm.

²¹ It was found that 67% of women and 78% of men did not report these instances of unwanted sexual behavior for fear of being labeled by others as a troublemaker and for fear of retaliation from others, among other reasons. Jessica L. Cornett, *The U.S. Military Responds to Rape: Will Recent Changes Be Enough?*, 29 WOMEN’S RTS. L. REP. 99, 109 (2008) (citing RACHEL LIPARI, ET AL., DEF. MANPOWER DATA CTR., DMDC REPORT NO. 2005-010, 2004 SEXUAL HARASSMENT SURVEY OF RESERVE COMPONENT MEMBERS v (2005)).

²² *Id.*

are punished through intimidation or isolation.²³ Victims are also commonly threatened with or actually dishonorably discharged from service.²⁴

This Note will address the present type of retaliation in the form of professional disciplinary action against rape sexual assault victims in the American military. This Note recommends a new infrastructure for responding to allegations of professional retaliation in these circumstances. This new infrastructure, described infra, would provide enough time for the alleging individual to seek out the assistance of criminal investigation units and Judge Advocate Generals (JAG), giving alleging individuals access to the criminal justice system before professional retaliation and discharge occur. While progress is being made in both the executive and legislative branches regarding reporting mechanisms, this form of protection is currently lacking within the military justice system at large.

Part I of this Note explores the history of the rape and sexual assault epidemic within the American military and the jurisprudence of military courts charged with adjudicating such claims. The jurisprudence of the military courts demonstrates that when rape and sexual assault cases are properly allocated to military tribunals,

²³ Jesse Ellison, *Service Members Sue Defense Secretary Over Alleged Military Rapes*, DAILY BEAST (Sept. 28, 2012), <http://www.thedailybeast.com/articles/2012/09/28/service-members-sue-defense-secretary-over-alleged-military-rapes.html>.

²⁴ However,

The federal Servicemember Mental Health Review Act, currently under bicameral consideration as H.R. 975 and S. 628, seeks to expand review of disability determinations of veterans discharged with a personality disorder or adjustment disorder. If enacted, this legislation will require that an expanded Physical Disability Board of Review include at least one psychologist and one psychiatrist independent from the military. Further, the Board would have the authority to review discharges of veterans who did not request review, upon the veterans' consent.

military courts are willing to impose harsh penalties on service members that perpetuate rape and sexual assault. Unfortunately, the military authority has yet to apply such precedence on its own without judicial interference. This section includes an overview of military leadership and federal government responses to military victims' claims of sexual assault. These responses highlight the improper treatment of victims and the victims' need for access to courts-martial adjudication.

Part II assesses the problem of rape and sexual assault within the U.S. Armed Forces currently. This section explores new issues arising from the harsh treatment of victims while examining contemporary calls for reform.

Part III introduces "ALARM," a model framework for deterring harsh professional retaliation in response to rape and sexual assault reports filed in the military. The Military Whistleblower Protection Act of 1988 (MWPA), revised in 1998, serves as a guide from which an effective model framework can be constructed.²⁵ The ALARM model framework differs from current legislation introduced in Congress, like the Military Justice Improvement Act (MJIA) and amendments to the U.S. military personnel policy, passed in 2013.²⁶ While both the MJIA and personnel policy changes advocate for similar results, ALARM calls for a more active role for the JAG Corps in fielding complaints and further stresses the need to protect service members from harsh personnel action and retaliation as these acts can have serious consequences even after being dismissed from the military. Additionally, ALARM is a progressive model that

²⁵ See 10 U.S.C. § 1034 (2012).

²⁶ See Ed O'Keefe, *Congress Approves Reforms to Address Sexual Assault, Rape in Military*, WASH. POST (Dec. 19, 2013), http://www.washingtonpost.com/politics/congress-poised-to-approve-reforms-to-address-sexual-assault-rape-in-military/2013/12/19/bbd34afa-68c9-11e3-a0b9-249bbb34602c_story.html.

protects the interests of military service members while paying necessary deference to command leadership.²⁷

This Note will end by presenting general conclusions about the culture of rape and sexual assault in the American Armed Forces and the urgent need for reform.

I. THE HISTORY OF COMMANDED SILENCE IN THE AMERICAN ARMED FORCES

The Lackland AFB scandal is not the first of its kind. The American military has endured a number of similar high profile scandals throughout the years in almost every military branch and academy.²⁸ A review of this troubled history indicates that these scandals are prevalent in recent U.S. military history and are often ignored.

A. *And Aberdeen, Too*: Previous Scandals in the Military

In 1991, officials discovered the gravity of what is now remembered as the Tailhook Incident of the Navy.²⁹ At the Tailhook Convention—a professional convention for Navy aviators hosted in Las Vegas—officers sexually assaulted more than eighty women.³⁰ Senior leadership implicated 117 officers of the U.S. Navy for sexual misdeeds and conduct unbecoming of an officer.³¹

²⁷ This balance is especially important given the harsh criticism of Senator Gilibrand's approach to this issue. In her attempts to uproot jurisdiction of military leadership in these issues, her legislation, the MJIA, ultimately failed when voted upon in Congress. *See Mascaro, supra* note 18. Many cited her lack of deference to command leadership as the main source of its failure.

²⁸ *See, e.g., 117 Faulted in Tailhook Scandal*, CHI. TRIB. (Apr. 23, 1993), http://articles.chicagotribune.com/1993-04-23/news/9304240066_1_convention-in-las-vegas-operations-for-air-warfare-frank-kelso.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Five years later, at the Army's Aberdeen Proving Grounds, dozens of female trainees were sexually harassed. Allegations included accusations of forcible rape and sodomy over long periods of time.³² Investigations revealed a "rape ring"³³ that consisted of Army officers who raped trainees at the training camp.³⁴

Preceding the current scandal at Lackland AFB, the Air Force Academy endured a similar widespread scandal. In 2003, investigations of the Academy unveiled several dozen incidents of sexual assault.³⁵ While the investigation revealed that most of the claims made by cadets had been appropriately discarded by the Academy,³⁶ internal reviews produced by the Pentagon also revealed that widespread ignorance to the severity of the problem contributed to the enduring situation within the Academy.³⁷ In retrospect, it seems as if the Academy did not take victims' allegations of rape seriously until the government began to scrutinize the increasing number of rape and sexual assault claims.³⁸

³² Kingsley R. Browne, *Military Sex Scandals from Tailhook to the Present: The Cure Can Be Worse than the Disease*, 14 DUKE J. GENDER L. & POL'Y, 749, 771 (2007).

³³ Conduct within the rape ring included rape, sodomy, and sexual assault of multiple women by a single commanding authority. Delmar Simpson, one officer alleged to have been involved in the widespread sexual harassment at Aberdeen, was charged with "forcible sodomy, indecent acts . . . indecent assault, and maltreatment of a subordinate." *Army Charges Aberdeen Drill Sergeant with New Rape Counts*, CNN (Dec. 20, 1996, 7:10 PM), http://articles.cnn.com/1997-01-03/us/9612_20_briefs.pm_army.rape_1_sexual-assault-indecent-assault-sexual-harassment?s=PM:US.

³⁴ Newsweek Staff, *Rape In The Ranks*, NEWSWEEK (Nov. 24, 1996, 7:00 PM), <http://www.newsweek.com/rape-ranks-176260>.

³⁵ Browne, *supra* note 32, at 777-78.

³⁶ *Id.* at 778.

³⁷ Mark Mazzetti, *Air Force Officials Blamed in Sexual Assault Scandal*, L.A. TIMES (Dec. 8, 2004), <http://articles.latimes.com/2004/dec/08/nation/na-airforce8>.

³⁸ See Diana Jean Schemo, *Rate of Rape at Academy Is Put at 12% in Survey*, N.Y. TIMES (Aug. 29, 2003), <http://www.nytimes.com/2003/08/29/us/rate-of-rape-at-academy-is-put-at-12-in-survey.html> ("After initially playing down the complaints of rape victims as the result of a few 'bad apples,' Air Force officials gradually concluded that the problem was more serious.").

Statistics dating back to 1995 corroborate the narratives provided above. In a report released by SAPRO for the 2012 Fiscal Year (FY2012), “an estimated 26,000 cases of unwanted sexual contact and sexual assaults occurred in FY2012, a 37% increase from FY2011.”³⁹ Within that same report, 50% of female service members indicated that they did not report their alleged assault in the belief that no one would help them and nothing would be gained from it.⁴⁰ Additionally, in a 2004 DOD survey, 19% of female service members and 3% of male service members reported experiencing behavior that constituted sexual harassment.⁴¹ The survey indicated 67% of women and 78% of men did not report these instances of unwanted sexual behavior out of fear of being labeled as troublemakers. They believed the behavior was not important enough to report or they indicated that they handled the situation themselves.⁴² Individuals also remained silent out of fear of retaliation.⁴³ Such fears are not unfounded. Individuals who report their attacks after being raped or sexually assaulted are commonly punished through the use of intimidation, isolation, and retaliation.⁴⁴

B. Seeking Justice: Rape and Assault in the Military Courts

The rhetoric surrounding sexual assault in the military justice system differs significantly from civilian rhetoric. Military regulation of consensual relationships reflects values that minimize the

³⁹ *Comprehensive Resource Center for the Military Justice Improvement Act*, OFF. SENATOR GILLIBRAND, <http://www.gillibrand.senate.gov/mjia> (last visited Jan. 30, 2015).

⁴⁰ *Id.*

⁴¹ RACHEL LIPARI, ET AL., 2004 SEXUAL HARASSMENT SURVEY OF RESERVE COMPONENT MEMBERS iv (2005), available at <http://www.sapr.mil/public/docs/research/2004-Sexual-Harassment-Survey-of-Reserve-Component-Members.pdf>.

⁴² *Id.* at v.

⁴³ *Id.*

⁴⁴ Ellison, *supra* note 23.

protection of service members' sexual autonomy.⁴⁵ The Uniform Code of Military Justice (UCMJ), which governs acts of consensual sexual conduct, codifies these values. UCMJ regulations include bans on adultery and fraternization.⁴⁶ Consequently, charges of sexual assault and rape are frequently lumped together with cases involving adultery and fraternization, potentially couching more violent crimes as lesser charges.⁴⁷ For example, the way in which the military regulates the professional and personal lives of service members can result in an alleged rapist being placed into the same category as an adulterer.⁴⁸ This distracts public attention from the real issue of sexual violence against another. Furthermore, the conflation of consensual and coercive acts generates large amounts of skepticism regarding the veracity of victims' claims.⁴⁹ The manner in which the military is structured, coupled with the manner in which the military regulates itself, commonly leaves victims and perpetrators of sexual assault on the wrong side of justice.

However, a victim whose case is adjudicated in a military tribunal does not face the same diminishment of rights. Adjudication of sex crimes within the military is distinct from civilian prosecution of the same crimes. The American military is judicially unique, with a distinct system of courts, criminal law, and criminal procedure.⁵⁰ Review of military courts' precedent suggests that the military judiciary does not diminish the rights of rape and sexual assault victims. Rather, adjudicators in cases that are prosecuted in military courts show surprising deference to victims of rape and sexual assault in their reasoning and holdings. In FY2012, the DOD reported 3,374

⁴⁵ Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 360 (1998).

⁴⁶ *See id.*

⁴⁷ *Id.* at 320.

⁴⁸ *Id.*

⁴⁹ *Id.* at 321.

⁵⁰ *See* 10 U.S.C. §§ 801-946 (2012).

sexual assaults in the military.⁵¹ Though only 8% (approximately 255) of the alleged perpetrators were eventually prosecuted, in 191 (74.9%) cases the court ruled in favor of the victim.⁵² Of the 191 perpetrators who were convicted, 122 were discharged from the military, and 148 were sentenced to jail.⁵³

C. Statutory Interpretation of the Uniform Code of Military Justice (UCMJ) Definition of Rape

Rape, as defined by the UCMJ, requires that the act was committed by force and without consent.⁵⁴ The exact statutory language of the UCMJ provides:

- (a) **Rape.** Any person subject to this chapter who commits a sexual act upon another person by—
- (1) using unlawful force against that other person;
 - (2) using force causing or likely to cause death or grievous bodily harm to any person;
 - (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
 - (4) first rendering that other person unconscious; or

⁵¹ DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2012 58 (2013), available at http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-Volume_One.pdf.

⁵² See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 4, at 77 (“91 subjects convicted on a sexual assault charge at court martial; 12 subjects convicted of some other misconduct charge at court martial”).

⁵³ *Rape, Sexual Assault and Sexual Harassment in the Military*, SERVICE WOMEN'S ACTION NETWORK (July 2012), <http://servicewomen.org/wp-content/uploads/2012/10/Final-RSASH-10.8.2012.pdf>.

⁵⁴ See 10 U.S.C. § 920(a) (2012).

- (5) administering to that other person by force or threat of force, or without knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.⁵⁵

Within the context of the statute, force can be understood in its traditional sense: the physical exercise of control over the dominion of another, and demonstration of a struggle or lack of will by the victim. Military courts have held that resistance of a victim must be determined on a case-by-case basis.⁵⁶ While the plain language of the statute implies that a perpetrator must use actual physical force against his victim to be found culpable, military courts find that that a perpetrator who employs constructive force may also be found culpable under the statute.⁵⁷

A finding of constructive force is generally determined by the specific circumstances in each case.⁵⁸ An assailant uses constructive

⁵⁵ *Id.*

⁵⁶ Pickands, *supra* note 8, at 2431-35. In describing the various contexts in which resistance by a victim can be interpreted by a court-martial, Pickands notes:

Although the Manual for Courts-Martial (MCM) states that a victim's failure to "make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances" can give rise to an inference that the victim actually consented, the courts have stated that resistance is not the only means to show lack of consent.

Id. at 2432 (citations omitted).

⁵⁷ See *United States v. Hicks*, 24 M.J. 3, 6 (C.M.A. 1987) (citations omitted).

⁵⁸ "All the surrounding circumstances should be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm." *Id.* (citing MCM, *supra* note 54, at ¶199(a) (1967)).

force where a victim could reasonably conclude that further resistance would not benefit her and could, in fact, lead to grievous harm.⁵⁹ In determining whether a victim has been subjected to constructive force, courts consider an alleged perpetrator's authority, among other factors.⁶⁰ Courts also look to whether the alleged victim had a reasonable belief of death or bodily harm.⁶¹ The analysis is conducted on a case-by-case basis, requiring an examination of the totality of the circumstances in order to properly deduce whether constructive force was at play. In concluding that constructive force can be used against victims, courts have refused to accept certain defenses at face value, such as the contention that lack of actual physical force is indicative of consent. Similarly, courts have also refused to accept "passive acquiescence" as indicative of consent.⁶² Further, courts have held

⁵⁹ *Id.*

⁶⁰ *Id.* The specific holding in *Hicks* was made with respect to the unique relationship between a Noncommissioned Officer (NCO) and trainees. However, similar logic has been applied to other cases where a perpetrator's rank has been above that of the victim. See *United States v. Clark*, 35 M.J. 432, 436 (C.M.A. 1992); *United States v. Bradley*, 28 M.J. 197, 200 (C.M.A. 1989) ("We hold . . . that this military relationship . . . created a unique situation of dominance and control where explicitly threats and displace of force by the military superior were not necessary."). Other findings include:

- (1) the appellant's physically imposing size;
- (2) his reputation in the unit for being tough and mean;
- (3) his position as a noncommissioned officer;
- (4) his actual and apparent authority over each of the victims in matters other than sexual contact;
- (5) the location and timing of the assaults, including his use of his official office and other areas within the barracks in which the trainees were required to live;
- (6) his refusal to accept verbal and physical indications that his victims were not willing participants;
- and (7) the relatively diminutive size and youth of his victims, and their lack of military experience.

United States v. Simpson, 55 M.J. 674, 707 (A. Ct. Crim. App. 2001)_aff'd, 58 M.J. 368 (C.A.A.F. 2003).

⁶¹ See *Simpson*, 58 M.J. at 378–79.

⁶² *Id.* at 377.

that such passive acquiescence, created by an accused's superior rank, cannot be used to force an individual into sexual acts in lieu of actual force; if a victim "fear[s] for her life...fear[s] grievous bodily injury, and [] believe[s] that resistance would be futile," the constructive force doctrine would apply.⁶³ Such use of rank over the victim, in lieu of actual force, cannot act as a recusal to the crime of rape or sexual assault.⁶⁴

The courts' willingness to engage in this intense case-by-case analysis, demonstrates that the military judiciary recognizes that a plain assessment of actual, physical force is insufficient to adequately assess rape and sexual assault within the U.S. Armed Forces. Given the unique power dynamic of superior and inferior officers and soldiers, it is clear that force cannot be limited to the physical restraint of another. Extending this reasoning, the adoption of constructive force in military jurisprudence suggests that courts have initiated their own battle against this behavior, and in "slowly and methodically eliminat[ing] the requirement for force," military judges have arrived at a more flexible, consent-based standard.⁶⁵ Courts rely upon Article 120 of the UCMJ, which in no part explicitly provides for a finding of constructive force.⁶⁶ Rather, courts read constructive force into the language of the statute *sua sponte*.

Once convicted by courts-martial, sentencing for convicted service members can be substantial and can include jail time, discharge, reductions in rank, and forfeiture of pay and benefits.⁶⁷ The

⁶³ See *Clark*, 35 M.J. at 436.

⁶⁴ *Id.*

⁶⁵ Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Track*, ARMY LAW. 1, 14 (Aug. 2007).

⁶⁶ 10 U.S.C. § 920 (2012). Courts also rely upon the following articles: *id.* § 892 ("Failure to Obey Order or Regulation"); *id.* § 925 ("Forcible Sodomy; Bestiality"); *id.* § 927 ("Extortion"); and *id.* § 928 ("Assault").

⁶⁷ Sentences from military courts include: (1) ten years confinement, partial forfeitures of pay, reduction in rank, and dishonorable discharge, *United States v. Williamson*, 24 M.J. 32, 32 (C.M.A. 1987); (2) dishonorable discharge, confinement for twenty-five years, total forfeitures, and reduction in rank, *United States v.*

courts' willingness to make findings of constructive force coupled with the courts' willingness to impose stiff penalties on offenders suggests a victim-friendly judicial temperament. Unfortunately, even with this temperament, the culture of rape and sexual assault in the military still remains a prevalent and disturbing issue.

D. The "Blissful" Ignorance of the Bureaucracy: Responses of Military Leadership and the Federal Government

Some suggest that the position of military leadership on the issue of sexual violence in the military is one of deliberate ignorance.⁶⁸ This position has compelled the DOD to institute a new method for victims to report such allegations. This reform includes two forms of reporting rape and sexual assault: restricted reporting and unrestricted reporting.⁶⁹

Restricted reporting, also known as the "confidential reporting option," allows a victim to make a report of sexual assault or rape without disclosing his or her identity.⁷⁰ While this allows the victim to receive services available to sexual assault victims, the military will not notify authorities of the complaint; there will be no investigation into the allegations.⁷¹ This reporting policy ensures that victims who would otherwise be dissuaded from reporting incidents for fear of exposure will still receive necessary medical and social services.⁷² In contrast, unrestricted reporting requires a victim to reveal his or her

Simpson, 58 M.J. 368, 370 (C.A.A.F. 2003); (3) confinement for thirty years, forfeiture of all pay, reduction in rank and a dishonorable discharge, *United States v. Hicks*, 24 M.J. 3, 4 (C.M.A. 1987); (4) confinement for seven years, reduction to lowest enlisted rank and a dishonorable discharge, *United States v. Clark*, 35 M.J. 432, 433 (C.M.A. 1992); and (5) eight years confinement, total forfeitures, reduction in rank and a dishonorable discharge, *United States v. Bradley*, 28 M.J. 197, 198 (C.M.A. 1989).

⁶⁸ See O'Keefe, *supra* note 26.

⁶⁹ See Cornett, *supra* note 22, at 110.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

identity in the event that military authorities are contacted to conduct an investigation into the victim's allegations.⁷³

In addition to reformed reporting mechanisms, the U.S. Armed Forces published guidelines and suggestions for conduct between military personnel. While seemingly dated, these methods were put forth to all those serving in the military in hopes of achieving a safer culture for male and female service members alike. For example, the military has generally recommended that male recruits stay away from female recruits in their unit, warning men that women could ruin their career.⁷⁴ Other policies implemented by military leadership include the "buddy system." Under this approach, male recruits may only speak with female recruits if an additional female is present.⁷⁵

Additionally, Congress has made attempts to make this military problem, once limited to the ranks of the military, known to the general public. The Defense Authorization Act for Fiscal Year 2005 requires the DOD to report incidents of sexual assault to Congress.⁷⁶ This Act was the first time the legislature required the DOD to report incidences of sexual assault, intended to serve as a method of accountability.⁷⁷ Under this legislation, the DOD must report the number of assaults (of those that are actually reported), whether action was taken against the offender, and if no action was taken, what reasoning was given for not doing so.⁷⁸ Since 2005, the number

⁷³ It is interesting to note that of the literature produced by military aid groups, such as the Military Rape Crisis Center, a significant portion of the literature is dedicated to the benefits of restricted reporting and prohibiting the identification of the victim. Restricting reporting and prohibiting identification make the victim invisible from the criminal justice and administrative perspective, making it seem like the rape or assault never occurred. Additionally, literature provided to victims does not thoroughly discuss benefits of unrestricted reporting. *See, e.g., Reporting Option*, MIL. RAPE CRISIS CENTER, <http://www.militaryrapecrisiscenter.org/for-active-duty.html> (last visited Jan. 23, 2015).

⁷⁴ Chamallas, *supra* note 45, at 316-17.

⁷⁵ *Id.* at 317.

⁷⁶ *See* Cornett, *supra* note 22, at 104.

⁷⁷ *Id.*

⁷⁸ *Id.*

of sexual assaults reported within the military has increased annually.⁷⁹

1. Beyond Reporting Reform

The ineffectiveness of the aforementioned measures implemented became apparent to the DOD in light of the new allegations at Lackland AFB. Thus, in 2012, Secretary of Defense Leon Panetta issued multiple reports urging military leaders to take a firm stance against rape and sexual assault within the armed forces.⁸⁰

Of the many policy changes Secretary Panetta made during his tenure at the DOD, one of the most proactive resolutions he proposed was the immediate transfer of female service members that had suffered a sexual assault.⁸¹ Secretary Panetta also stated that the most senior commanders within the unit should handle reports of rape and sexual assault. He stated that the senior commanders will “exercise greater responsibility in bringing [the perpetrator] to justice.”⁸²

However, any hope of continued progress from the DOD is unlikely. Secretary Panetta stepped down from his post in early February 2013.⁸³ After leaving, Panetta criticized the military’s

⁷⁹ See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 4, at 5.

⁸⁰ See Karen Parrish, *Panetta: Leaders Must Stand Against Sexual Assault*, AM. FORCES PRESS SERVICES (Sept. 28, 2012), <http://www.defense.gov/news/newsarticle.aspx?id=118042>.

⁸¹ *Id.* With the emphasis placed upon female service members, it is unclear as to whether this transfer provision would apply to all victims of rape and sexual assault, including men.

⁸² *Id.* It should be noted, however, that in the case of Brigadier General Sinclair, one of his victims specifically requested a unit transfer from one of *the most senior* commanders within the Army—Sinclair himself. His response was to expose himself to her, demand oral sex, and listen to her cry throughout the entire assault. Baker, *supra* note 8.

⁸³ *Panetta Steps Down After Four Decades in Politics*, EURONEWS (Feb. 9, 2013, 8:46 AM), <http://www.euronews.com/2013/02/09/panetta-steps-down-after-four-decades-in-politics/>.

lackluster approach to rape and sexual violence.⁸⁴ He stated that military leadership continuously “looked the other way,” rather than actually pursuing convictions.⁸⁵ His successor, Chuck Hagel, applied a number of responses in order to address the culture of rape and sexual assault.⁸⁶ Such responses have involved, “including the examination of gender-responsive and appropriate military culture, a review of alcohol policies and sales, the evaluation and improvement of sexual-assault prevention and response training for commanders, and encouraging more male victims to report sexual assaults.”⁸⁷ But, with Secretary Hagel’s departure from the DOD,⁸⁸ the future of positive reform from the government is currently being debated as the Obama Administration works to appoint its fourth Defense Secretary. Nominee Ashton Carter successfully received approval from the Senate Armed Services Committee,⁸⁹ during which he vowed to combat the sexual assault crisis within the military.⁹⁰ In response to

⁸⁴ Former Secretary Panetta has spoken about the larger issue of rape and sexual assault on multiple occasions. However, in this instance, he specifically cited the most recent case of Jeremy Goulet. Hayes Brown, *Panetta: Military ‘Looked the Other Way’ in Rape Case*, THINKPROGRESS (Mar. 11, 2013, 8:18 AM), <http://thinkprogress.org/security/2013/03/08/1692661/panetta-military-rape/?mobile=nc>.

⁸⁵ *Id.*

⁸⁶ Mary F. Calvert, *Photos: Women Who Risked Everything to Expose Sexual Assault in the Military*, MOTHER JONES (Sept. 8, 2014, 5:15 AM), <http://www.motherjones.com/politics/2014/09/sexual-violence-american-military-photos>.

⁸⁷ *Id.*

⁸⁸ Craig Whitlock & Missy Ryan, *Defense Secretary Hagel, Under Pressure, Submits Resignation*, WASH. POST (Nov. 24, 2014), http://www.washingtonpost.com/world/national-security/defense-secretary-hagel-under-pressure-submits-resignation/2014/11/24/77e75422-73e4-11e4-a5b2-e1217af6b33d_story.html.

⁸⁹ Bill Chappell, *Senate Panel Approves Carter’s Nomination as Defense Chief*, NPR (Feb. 10, 2015, 10:09 AM), <http://www.npr.org/blogs/thetwo-way/2015/02/10/385181377/senate-panel-approves-carter-s-nomination-as-defense-chief>.

⁹⁰ Lisa Lambert, *Obama Defense Nominee Vows to Fight Sexual Assault in the Military*, REUTERS (Feb. 4, 2015, 3:26 PM),

questioning from Senator Gillibrand, Carter stated, “. . . the idea that victims are retaliated against, not only by the hierarchy above them but by their peers, is something that is unacceptable and is something that we need to combat.”⁹¹

2. Congressional “Outcries”

Congress also responded to the drastic increase, often characterized as an epidemic, of rape and sexual assault in the military.⁹² In November 2012, the United States Senate voted to require that any service member convicted of rape, sexual assault, or forcible sodomy who did not receive a sentence that ordered punitive dismissal be administratively discharged.⁹³ Imposing this requirement would affirm the military’s commitment to punishing sexual assault without burdening the military courts because it would be a matter of administrative law rather than judicial review.⁹⁴

Other proposed additions to the congressional regulation of the U.S. Armed Forces include mandating that rape, sexual assault, and

<http://www.reuters.com/article/2015/02/04/us-usa-pentagon-carter-sexual-assault-idUSKBNOL82F820150204>.

⁹¹ *Id.*

⁹² See, e.g., Jackie Speier, *Why Rapists in Military Get Away With It*, CNN (June 21, 2012, 8:19 AM), <http://www.cnn.com/2012/06/21/opinion/speier-military-rape/> (“These disturbing statistics illustrate an ongoing epidemic of rape and sexual assault in the military that Secretary of Defense Leon Panetta believes amounted to 19,000 incidents in just 2010.”); THE INVISIBLE WAR, *supra* note 17.

⁹³ Rick Maze, *Senate Cracks Down on Sex Assaults in Military*, AIR FORCE TIMES (Nov. 28, 2012, 5:37 PM), <http://www.airforcetimes.com/news/2012/11/military-sex-assaults-senate-troops-discharged-112812w/>.

⁹⁴ *Id.* Such individuals would not be automatically discharged based on their conviction. The individual service member would receive due process before administrative discharge. The overall intent of the amendment is to decrease the amount of cases in which service members are punished with a fine or reduction in rank. Heidi Evans, *Pols: Oust Sex Sickos in Military*, N.Y. DAILY NEWS (Dec. 3, 2012, 11:17 PM), <http://www.nydailynews.com/news/national/pols-oust-sex-sickos-military-article-1.1212821?localLinksEnabled=false>.

forcible sodomy be considered through courts-martial only, limiting the disposition of these allegations to the purview of military courts. Another recommendation would lower the standard of proof for victims who attempt to gain any form of benefits from Veterans Affairs.⁹⁵

Congress proposed multiple pieces of legislation in an attempt to regulate the military's treatment of these issues. In 2012, the United States House of Representatives introduced the Sexual Assault Training Oversight and Prevention Act (STOP Act).⁹⁶ Among other provisions, the STOP Act is intended to integrate civilian personnel into oversight committees to provide greater transparency when adjudicating these claims.⁹⁷ The 113th Congress failed to pass the

⁹⁵ Maze, *supra* note 93.

⁹⁶ Sexual Assault Training Oversight and Prevention Act, H.R. 3435, 112th Cong. (2012).

⁹⁷ According to a summary of the STOP Act, the following are the principal goals of the Act:

- Establish an autonomous office, the Sexual Assault Oversight and Response Office (SAPRO), that would be staffed by both military and civilian personnel in order to take the reporting process out of the chain of command.
- Create a SAPRO Council within the DOD to advise SAPRO and to report to Congress; the Council will consist of two former military judges, a member of the Department of Justice (DOJ), a known advocate for sexual assault victims in the military and one expert working in civilian sexual assault cases.
- Establish the Director of Military Prosecutions to oversee all sexual assault prosecutions and to decide whether to appeal cases within DOD or the Department of Justice.
- Create a new method of reporting rather than having the report go through the Chain of Command (COC); this will also deter the use of non-judicial punishment against the alleged perpetrator and make sure the case is accurately and fully assessed by SAPRO.
- Create a sexual assault database for the Military where the DOD can collect and maintain data regarding sexual assault in the military.

Sexual Assault Training Oversight and Prevention Act Summary, CONGRESSWOMAN

STOP Act;⁹⁸ the bill will have to be reintroduced in the 114th Congress to be further considered.

Additionally, Senator Kristen Gillibrand proposed the Military Justice Improvement Act (MJIA).⁹⁹ The MJIA focuses on decreasing the amount of discretion the chain of command has in deciding whether to investigate and prosecute claims.¹⁰⁰ Under the MJIA, individuals in the chain of command would not have the discretion to set aside findings of guilt against an individual service member.¹⁰¹ The MJIA also seeks to remove bias from proceedings at court-martial by redefining who can initiate these proceedings. Most importantly, the MJIA would require that allegations received by an officer from a member of their chain of command be referred to the proper criminal investigatory authority immediately.¹⁰² The ultimate goal of these changes is to remove as much discretion from commanding officers as possible. In support of this, Senator Gilibrand noted “25% of women and 27% of men who received unwanted sexual contact indicated the offender was someone in their military chain of command.”¹⁰³

Senator Claire McCaskill proposed amendments to the U.S. personnel policy guidelines that did not dispense of commander

JACKIE SPEIER, <http://www.speier.house.gov/images/stopactsummary.pdf> (last visited Nov. 15, 2014) [hereinafter *Sexual Assault Training Oversight and Prevention Act Summary*]; see also *The STOP Act: Sexual Assault in the Military*, BOS. AREA RAPE CRISIS CENTER, (Nov. 30, 2011), <http://www.barcc.org/blog/details/the-stop-act-sexual-assault-in-the-military>

⁹⁸ See *H.R. 1593 – STOP Act*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/1593/actions> (last visited Feb. 1, 2015).

⁹⁹ Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Comprehensive Resource Center for the Military Justice Improvement Act*, *supra* note 39.

discretion in the same way the MJIA proposed.¹⁰⁴ Under Senator McCaskill's proposal, the victim would decide whether to prosecute his or her case in a civilian or military jurisdiction.¹⁰⁵ Additionally, victims can use confidential means to challenge any separation or discharge that results from reporting a sexual assault claim.¹⁰⁶

In the end, the MJIA's evisceration of commander discretion was its downfall. In March 2014, the MJIA failed to pass through the Senate.¹⁰⁷ Senator Gillibrand's reform lost by ten votes (55-45), even in light of the recent revelations. While many hope that this will only be a first step in Senator Gillibrand's efforts, congressional resistance to such reform is strong.

Senator Claire McCaskill's competing reforms did pass in March of 2014.¹⁰⁸ However, the effectiveness of Senator McCaskill's proposals was recently called into question as statistics released from the DOD for the 2013 Fiscal Year show little progress in deterring rape and sexual assault.¹⁰⁹ As of December 2014, Senator Gillibrand

¹⁰⁴ See Better Enforcement for Sexual Assault Free Environments Act of 2013, S. 1032, 113th Cong. (2013). Further, "McCaskill also included provisions in the 2012 and 2013 National Defense Authorization Acts designed to improve the military's response to sexual assault and encourage the services to adopt training for sexual assault investigators developed at the Army's Military Police School at Fort Leonard Wood." Claire McCaskill, *McCaskill Calls for Action is Dismissed Sexual Assault Conviction*, PULASKI COUNTY MIRROR (Mar. 5, 2014, 4:05 PM), http://www.pulaskiountymirror.com/missouri_news/article_65eebb82-85e0-11e2-9b53-001a4bcf6878.html; Press Release, United States Senator Claire McCaskill, McCaskill Drafts Legislation in Response to Air Force Sexual Assault Case (Mar. 13, 2013), available at <http://www.mccaskill.senate.gov/media-center/news-releases/mccaskill-drafts-legislation-in-response-to-air-force-sexual-assault-case>.

¹⁰⁵ Darren Samuelsohn, *Claire McCaskill's Sexual Assault Bill Passes*, POLITICO (March 10, 2014, 6:30 PM), <http://www.politico.com/story/2014/03/claire-mccaskill-military-sexual-assault-bill-104499.html>.

¹⁰⁶ *Id.*

¹⁰⁷ Mascaro, *supra* note 18.

¹⁰⁸ See Samuelsohn, *supra* note 105.

¹⁰⁹ Press Release, Senator Kristein Gillibrand, Gillibrand Statement on New Disappointing Military Sexual Assault Data—Nearly Two-Thirds of Those Who Reported an Assault Say Faced Retaliation Despite Reforms Made Making Retaliation a Crime (Dec. 3, 2014), available at

reignited her campaign to aggressively reform military justice in light of new reports indicating an increase in rape and sexual assault released by the DOD for the 2013 fiscal year.¹¹⁰

II. THE CURRENT RAMPAGE OF RAPE

The growing number of allegations at Lackland AFB defines the new wave of the sexual assault epidemic. Because of the scale and gravity of this recent scandal, investigations are ongoing at other military bases. The Lackland AFB scandal prompted investigations into the conduct of high-ranking military officials. Investigations of such stature are a new and key characteristic of the current wave of the sexual assault epidemic.

An effective review of the current problem of rape and sexual assault within the military is not limited to just these current scandals. Emerging consequences of the lack of deterrence of such conduct should also be assessed in order to fully understand the gravity of this epidemic.

A. *Beyond the Assault: Consequences & Current Calls for Action*

The current military statistics on rape and sexual assault and the lack of prosecution are alarming.¹¹¹ The prevalence of Military Sexual Trauma (MST) is even more sobering. MST refers to the trauma experienced by victims of sexual assault or repeated threatening acts of sexual harassment.¹¹² Sufferers of MST are more

http://www.gillibrand.senate.gov/newsroom/press/release/gillibrand-statement-on-new-disappointing-military-sexual-assault-data_nearly-two-thirds-of-those-who-reported-an-assault-say-faced-retaliation-despite-reforms-made-making-retaliation-a-crime.

¹¹⁰ *Id.*

¹¹¹ See Samuelsohn *supra* note 105; see also *supra* text accompanying note 4.

¹¹² *Military Sexual Trauma*, U.S. DEP'T. OF VETERANS AFF. (Oct. 2014), http://www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf.

likely to suffer from Post Traumatic Stress Disorder (PTSD).¹¹³ In fact, victims of sexual assault are more likely to suffer from PTSD caused by MST compared to PTSD caused by experiences on the battlefield.¹¹⁴

While victims of MST need both physical and psychological care, these victims are discouraged from seeking help from Veterans Affairs.¹¹⁵ Veterans Affairs has a well-documented history of denying benefits to individuals who suffer from MST.¹¹⁶ Many victims seeking help from Veterans Affairs have reported feeling as if they have undergone a “second victimization” by seeking out such help.¹¹⁷ Rejection of claims often triggers a victim’s sense of hopelessness and betrayal.¹¹⁸ Such treatment often furthers the trauma sustained by the reporting victim and worsens potential depression and mental illness stemming from the incident of sexual assault, both of which

¹¹³ PTSD is defined as a mental health condition triggered by a terrifying event. Those who suffer from PTSD generally experience difficulty adjusting and coping with the event. In some cases, PTSD can worsen over time, sometimes resulting a complete upheaval of a person’s life. See Mayo Clinic Staff, *Post Traumatic Stress Disorder (PTSD)*, MAYO CLINIC (Apr. 15, 2014), <http://www.mayoclinic.com/health/post-traumatic-stress-disorder/DS00246>; e.g., Wolf, *supra* note 2.

¹¹⁴ See Wolf, *supra* note 2.

¹¹⁵ Brittany L. Stalsburg, *Military Sexual Trauma: The Facts*, SERVICE WOMEN’S ACTION NETWORK, <http://servicewomen.org/wp-content/uploads/2011/01/SWAN-MST-fact-sheet1.pdf>.

¹¹⁶ The Ruth Moore Act of 2013 seeks to address this issue. The goal presents two essential reforms: (1) to improve the claims process and (2) to lower the standards of evidence by “tying an applicant’s mental health state to an assault.” See Molly O’Toole, *Ruth Moore Act of 2013, Military Sexual Assault Bill, Highlights Survivors’ Struggle for Benefits*, HUFFINGTON POST (Feb. 13, 2013, 5:14 PM), http://www.huffingtonpost.com/2013/02/13/ruth-moore-act-of-2013-military-sexual-assault_n_2674606.html. However, the Act only stands a 3% chance of passing through the House of Representatives Veterans’ Affairs Committee. Sepp, *supra* note 12.

¹¹⁷ See, e.g., Wolf, *supra* note 2.

¹¹⁸ Stalsburg, *supra* note 115.

further the trauma and mental illness sustained by the reporting victim.¹¹⁹

Calls for reform have emerged from differing political and legal organizations. Many called upon Congress to conduct further investigations. In July of 2012, Paula Coughlin-Puopolo, the most prominent victim of the Tailhook Scandal, unveiled a petition calling for the House Armed Services Committee to fully investigate the scandal at Lackland AFB.¹²⁰

The U.S. Senate Armed Services Committee held a hearing in March 2013, addressing rape and sexual assault.¹²¹ The Committee heard from victims and experts, including the Director of the Service Women's Action Network (SWAN) and former Marine, Anu Bhagwati. Ms. Bhagwati called on Congress to grant "authority over criminal cases to trained, professional, disinterested prosecutors"¹²² and for military victims to have access to civil courts.¹²³

Outside of Congress, the legal community is also mobilizing. Eight current and former female U.S. service members filed suit against the current and former Defense Secretaries, Navy Secretaries, and Marine commanders.¹²⁴ These service members allege that the DOD allowed for the development of a military culture that fails to adequately prevent or address rape and sexual assault.¹²⁵ Plaintiffs

¹¹⁹ *Id.*

¹²⁰ *Sign Paula's Petition: Demand Congress Investigates Sexual Assaults at Lackland Air Force Base*, PROTECT THE DEFENDERS, http://action.protectourdefenders.com/p/dia/action/public/?action_KEY=8040 (last visited Feb. 1, 2015).

¹²¹ *Testimony on Sexual Assault in the Military Before the Subcomm. on Personnel of the Senate Committee on Armed Services*, 113th Cong. (2013).

¹²² Levs & Frantz, *supra* note 2.

¹²³ *Id.*

¹²⁴ Stacey Samuel, *Female Service Members Sue U.S. Military for Alleged Rape, Sexual Assault*, CNN (Mar. 7, 2012, 10:41 AM), http://articles.cnn.com/2012-03-06/us/us_military-sex-assaults-lawsuit_1_sexual-assault-service-members-marine-corps?_s=PM:US; see *Klay et al v. Panetta et al*, AAUW, <http://www.aauw.org/resource/klay-et-al-v-panetta-et-al/> (last visited Dec. 15, 2014).

¹²⁵ Ashley Parker, *Lawsuit Says Military is Rife with Sexual Abuse*, N.Y. TIMES (Feb. 15, 2011), <http://www.nytimes.com/2011/02/16/us/16military.html>.

assert that the DOD's failure to act against this culture is a violation of their constitutional rights because Congress provided the military with a clear mandate pertaining to the regulation and maintenance of rape and sexual assault cases.¹²⁶

Similarly, nineteen other service members, veterans and active-duty alike, filed a suit against Panetta and other former Defense Secretaries, claiming they suffered civil rights violations stemming from institutional disregard of their claims of rape and sexual assault.¹²⁷ These plaintiffs allege that the civil rights violations occurred as a result of the Secretaries' inability to protect service members from sexual assault.¹²⁸ Plaintiffs further allege that the DOD "presided over dysfunctional systems," where only "a tiny fraction of sexual assault charges are investigated."¹²⁹ Making matters worse, plaintiffs allege that in light of these issues, the DOD "repeatedly refused to do anything to fix the problem."¹³⁰

The suit brought by attorney Susan L. Burke¹³¹ alleges that former Secretaries of Defense (Panetta, Gates, and Rumsfeld) knew the military was violating the constitutional rights of men and women who sought to report rape and sexual assault.¹³² Plaintiffs allege that the former Secretaries presided over a dysfunctional system in which a small percentage of reports were actually investigated.¹³³ Plaintiffs

¹²⁶ *Id.*; Jesse Ellison, *Panetta, Gates, Rumsfeld Face New Suit Over U.S. Military Rape 'Epidemic,'* DAILY BEAST (Mar. 6, 2012), <http://www.thedailybeast.com/articles/2012/03/06/panetta-gates-rumsfeld-face-new-suit-over-u-s-military-rape-epidemic.html>.

¹²⁷ Ellison, *supra* note 23.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Susan Burke is currently the leading litigator on the issue of rape and sexual assault within the military. She is spearheading a series of lawsuits designed to "reform the manner in which the military prosecutes rape and sexual assault." *Susan L. Burke*, BURKE PLLC, <http://burkepllc.com/attorneys/susan-l-burke/> (last visited Nov. 15, 2014).

¹³² Ellison, *supra* note 126.

¹³³ *Id.*

further allege that because military leaders failed to enact more preventive measures, they refused to fix the problem; by refusing to actively and effectively address the prevalence of sexual harassment and assault in the military, the American military leadership violated the constitutional rights of sexual assault victims.¹³⁴

B. *The New Gender Panic*: Prompting New Resolutions for Reform

The prevalence of sexual assault in the military is commonly referred to as “the new gender panic.”¹³⁵ This panic prompted literature—authored by both service members and civilian academics—assesses the prevalence of rape and sexual assault within the military. Such literature has proposed various legislative and systemic reforms aimed at deterring such conduct. This Part will review some of these proposed resolutions. A review of these resolutions is important to establish an understanding of the differing institutional facets comprising the regulation of service members. However, a critical assessment of each proposal demonstrates their overall inefficacy. In order to provide justice to victims of sexual assault and rape, a new, dramatic resolution is necessary.

1. Consent Standards and Methods of Reporting Consent Standards

A variety of proposed reform measures attempt to respond to the inadequacies of current preventative measures. Such reforms include calls for the UCMJ to adopt an affirmative consent standard wherein affirmative consent of all participating parties would be required before penetration occurs.¹³⁶ Proponents contend that this

¹³⁴ *Id.*

¹³⁵ *See, e.g.*, Chamallas, *supra* note 45, at 316.

¹³⁶ “Women must directly and explicitly express their sexual desire or agreement to have intercourse in a given situation, and men must respond accordingly. Instead of assuming a woman’s sexual ambivalence indicates consent, the law should assume that sexual ambivalence means no.” Knies, *supra* note 65, at

provides a clear standard that would prevent miscommunication while maintaining good order and discipline within the military.¹³⁷ This bright line rule is consistent with consent standards in other areas of the law.¹³⁸ Supporters contend that this resolution presents a promising means “to establish a culture of respect and responsible sexual interaction among members of the armed forces.”¹³⁹

However, the unique features of the command-subordinate relationship between recruits and commanding officers¹⁴⁰ renders an affirmative consent standard inadequate. Further, military leaders generally deny the existence of rape and sexual assault within the ranks.¹⁴¹ An affirmative consent standard would be ineffective in practice because of the military leadership’s willing ignorance with respect reports brought to their attention.

a. Methods of Reporting

The power relationship of commanding officers and recruits speaks directly to the lack of transparency regarding over these

8 (quoting Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 485 (2005)).

¹³⁷ *Id.* at 3; see *In re M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (“Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.”). The California Senate recently passed an affirmative consent law to address the crisis of sexual assault in higher education. The Bill, known as the “Yes Means Yes” Bill, places the consent burden on both parties to affirmatively consent to sexual intercourse instead of one party waiting for another to indicate they do not want to engage in intercourse. The Bill, which has received criticism throughout the state, also requires consent to be ongoing throughout sexual intercourse. Eyder Peralta, *California Lawmakers Pass ‘Affirmative Consent’ Sexual Assault Bill*, NPR (Aug. 29, 2014, 10:19 AM), <http://www.npr.org/blogs/thetwo-way/2014/08/29/344230662/california-passes-affirmative-consent-sexual-assault-bill>.

¹³⁸ Knies, *supra* note 65, at 9.

¹³⁹ *Id.* at 33.

¹⁴⁰ See Pickands, *supra* note 8, at 2425.

¹⁴¹ Cornett, *supra* note 22, at 105.

claims.¹⁴² In the current system of reporting, the unit commander receives the initial report from the victim.¹⁴³ The unit commander then decides whether the case is given to investigating authorities.¹⁴⁴ This step is determinative of whether the case is prosecuted.¹⁴⁵ If the commander chooses not to give the case to the investigating authorities the allegation stops with the initial report.¹⁴⁶

This ambiguity in the process of reporting and prosecuting a claim served as the genesis to the STOP Act, the overarching goal of which is to include a greater amount of transparency in the reporting process.¹⁴⁷ However, it is too soon to determine the effectiveness of the STOP Act in remedying this issue.

2. Removing Commander Discretion

Some argue that the military's male-dominated population creates a pervasive paternalistic culture.¹⁴⁸ This paternalistic culture manifests as a bias against victims that report incidences of sexual assault. Proponents of this theory suggest that by providing commanders with objective rules and procedures, discretion is removed from the equation, thereby minimizing commander bias.¹⁴⁹ Additionally, removing this discretion would create uniformity throughout the process of reporting, furthering the ultimate goal of "increas[ing] victim confidence in reporting procedures."¹⁵⁰

¹⁴² Molly O'Toole, *Military Sexual Assault Epidemic Continues to Claim Victims As Defense Department Fails Females*, WORLD POST (May 20, 2013, 6:10 PM), http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department_n_1834196.html.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See *Sexual Assault Training Oversight and Prevention Act Summary*, *supra* note 97.

¹⁴⁸ See, e.g., Cornett, *supra* note 22, at 110, 112.

¹⁴⁹ *Id.* at 110.

¹⁵⁰ *Id.*

This line of thinking is particularly salient amongst congressional proponents for reform. For example, in March 2013, during a hearing of the Senate Armed Services Committee's Subcommittee on Personnel, Anu Bhagwati of SWAN pointed out, "Commanding officers cannot make truly impartial decisions because of their professional affiliation with the accused, and oftentimes with the victim as well."¹⁵¹

However, objective rules and procedures do not sweep broadly enough to encompass the entirety of the problem; rules and procedures ignore the reality of the military leadership's willful ignorance. First, in addressing the breadth of such a reform, the issue of commander discretion requires not only the elimination of bias through the implementation of transparent methods of reporting, but also the elimination of its residual effects. Second, implementing objective standards for military leadership does not adequately address the lack of transparency. The significant lack of transparency currently present in the reporting infrastructure, evidenced by SAPRO reports, greatly contributes to the issue of bias stemming from commander discretion.¹⁵² While the SAPRO reports demonstrate that there is a problem pertaining to rape and sexual assault, these reports are largely incomplete. For example, many of these reports lack information regarding the types of incidents reported.¹⁵³

Asking commanders to follow a list of objective standards, and failing to change incomplete reporting processes, unsuccessfully address the lack of transparency. Sexual assault victims and the rest of society cannot trust commanders to implement reform in their own command practice while these same commanders willfully ignore the sexual assault epidemic.

¹⁵¹ Levs & Frantz, *supra* note 2.

¹⁵² Cornett, *supra* note 22, at 112.

¹⁵³ For example, in 2005, sexual assault data collected indicated that 43% of the investigations were classified as "unsubstantiated claims, insufficient evidence, victim recantation or death of the alleged offender." *Id.*

3. Reforming the UCMJ

A wealth of literature exists on reforming the definitions of rape and sexual assault within the UCMJ. Suggested reforms range from adopting judicial interpretations and innovations of existing legal concepts, such as constructive force, to adopting affirmative consent standards within the language of Article 120 itself.

While courts typically read constructive force into the definition of force in Article 120, some contend that this reading is a form of judicial activism that has no relevance to the elements of forcible rape.¹⁵⁴ One author contends that this should be an indication for Congress to revisit the definition of rape.¹⁵⁵ The assertion is that until Congress acts, military law must recognize that nonviolent, coercive sexual imposition is not rape, and therefore, military law must criminalize constructive force as a separate offense.¹⁵⁶ As discussed previously, some have also called for the inclusion of an affirmative consent standard within the language of Article 120 in order to provide a bright-line standard for military courts and service members to follow.¹⁵⁷

These proposals rely on the assumption that unrestricted reports made by victims actually go to court. However, too many alleged assaults fail to make it past the initial reporting phase because of detrimental commander discretion.¹⁵⁸ Furthermore, many victims do not report incidences of sexual assault for fear of retaliation.¹⁵⁹ SAPRO reported that in one year, of the estimated 19,000 incidences of assault, only 3,192 cases of sexual assault were actually reported.¹⁶⁰ Out of the cases that were reported, 1,518 of these reports were

¹⁵⁴ Pickands, *supra* note 8, at 2427.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2427, 2454.

¹⁵⁷ See *supra* Part II.B.1 (discussing consent standards and methods of reporting).

¹⁵⁸ See O'Toole, *supra* note 142.

¹⁵⁹ Cornett, *supra* note 22, at 109-10.

¹⁶⁰ O'Toole, *supra* note 142.

referred for possible disciplinary action.¹⁶¹ Ultimately, only 191 service members were convicted of such crimes at courts-martial.¹⁶²

UCMJ reform will not be effective if the military cannot successfully encourage victims to make initial reports of rape and sexual assault. Unless a victim can make an initial report that is openly received and subject to minimal bias, it is difficult and illogical to focus on the adjudicative process.

III. GIVING VOICE TO SILENCED CLAIMS

Proposed resolutions generally consider complex gender problems and some have gone as far as to call for more civilian oversight, as is apparent in the STOP Act and in changes made to U.S. personnel policy in FY2013. Yet, these resolutions fail to address the central issue that perpetuates the epidemic of rape and sexual assault by making the assumption that the adjudication system, and not the reporting system, is the epicenter of the problem.

A. *Hurdles to adjudication: Unit and Administrative Bias*

Institutional bias against rape and sexual assault victims runs throughout the military reporting and investigation processes.¹⁶³ As discussed previously, in most cases, victims of rape and sexual assault are pressured to not report assault incidents.¹⁶⁴

1. Unit Retaliation

The possibility of retaliation is a reality all rape and sexual assault victims must face. Most victims within the military who report their claims face retaliation in the form of a dishonorable discharge. For example, a petty officer of the Navy who was raped received

¹⁶¹ Wolf, *supra* note 2.

¹⁶² *Id.*

¹⁶³ See, e.g., O'Toole, *supra* note 142.

¹⁶⁴ THE INVISIBLE WAR, *supra* note 17.

dishonorable discharge forms shortly after deciding to terminate the resultant pregnancy per the recommendation of her unit leadership.¹⁶⁵ Many women discharged after being deemed “psychologically unfit” were raped or sexually assaulted during their service.¹⁶⁶ Many of these victims were denied much-needed benefits by Veterans’ Affairs because of their dishonorable discharge status.¹⁶⁷

2. Administrative Bias

Administrative bias is evident both in the disregard the military leadership shows toward reports of rape and sexual assault in the military and in the inefficacy of discharge review boards. All branches of the military maintain discharge review boards.¹⁶⁸ These boards are granted the authority to correct, modify, or change a discharge or dismissal from the military.¹⁶⁹ Victims who are wrongly discharged for reporting their claim who then choose to petition for

¹⁶⁵ Kelly Gustafson, *Measure Aims to Help Raped Servicewomen*, UNITED PRESS INT’L (Nov. 9, 2012, 8:18 AM), http://www.upi.com/Top_News/Special/2012/11/09/Measure-aims-to-help-raped-servicewomen/UPI-44161352467088/.

¹⁶⁶ David S. Martin, *Rape Victims Say Military Labels Them ‘Crazy,’* CNN (Apr. 14, 2012, 12:29 PM), <http://www.cnn.com/2012/04/14/health/military-sexual-assaults-personality-disorder/>.

¹⁶⁷ Some of these victims were discharged just months before they could have left the service with benefits. *See, e.g.,* THE INVISIBLE WAR, *supra* note 17; O’Toole, *supra* note 116.

¹⁶⁸ *See, e.g.,* ARMY REV. BOARDS AGENCY, <http://arba.army.pentagon.mil> (last visited July 28, 2014); *Air Force Review Boards Agency*, U.S. AIR FORCE, <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104511/air-force-review-boards-agency.aspx> (last visited July 28, 2014); SECRETARY OF THE NAVY’S COUNCIL OF REVIEW BOARDS, <http://www.public.navy.mil/asnmra/corb/PEB/Pages/SECNAV%20CORB%20Home.aspx> (last visited July 28, 2014); *Board for Correction of Military Records*, U.S. COAST GUARD, <http://www.uscg.mil/Legal/BCMR.asp> (last visited July 28, 2014).

¹⁶⁹ *Discharge Review Boards*, MILITARY.COM, <http://www.military.com/benefits/records-and-forms/discharge-review.html> (last visited Oct. 12, 2012); *Applying for a Discharge Upgrade*, REAL WARRIORS (Nov. 16, 2014), <http://www.realwarriors.net/veterans/discharge/upgrade.php>.

review of their discharge or termination of benefits face an uphill battle. These victims are unlikely to even receive a review much less a favorable ruling.¹⁷⁰ Furthermore, boards generally affirm the discharge of these types of victims.¹⁷¹

Veterans who have or have had disabilities that intensified during active military duty may qualify for medical or related benefits, regardless of their discharge characterization.¹⁷² While the VA asserts that MST victims have the right to access healthcare like any other veteran, the hurdles to accessing such care in MST cases are exceedingly more difficult.¹⁷³ Many legislators and veterans groups argue that the standards are stacked against victims in these proceedings.¹⁷⁴ Currently, MST victims are required to show proof of the sexual assault or harassment alleged, that the assault or harassment lead to a diagnosis of a recognized health problem such as PTSD, and that the disability benefit request is related to sexual trauma.¹⁷⁵ Further, many review boards elect to treat cases of rape and sexual assault independent of a victim's service. That is, the effects of rape and sexual assault are not considered aggravated disabilities incurred during a victim's time in the armed forces, even if the assault

¹⁷⁰ Demonstrative of this is the case of Kori Cioca who was discharged just months before she would have honorably left the Coast Guard with full benefits. She continues to fight administrative review boards and Veterans Affairs for coverage of a surgery to fix disks in her lower jaw. This damage resulted from being forcibly raped while serving her county. Her attacker punched her across the face, breaking her jaw, causing permanent damage to the disks in the back of her jaw. *THE INVISIBLE WAR*, *supra* note 17.

¹⁷¹ *Id.*

¹⁷² Discharge characterization is determined on a case-by-case basis. *See Discharge Review Boards*, *supra* note 169.

¹⁷³ Kevin Freking, *Military Sexual Assault Victims Seek Help From Veterans Affairs*, AP (May 20, 2013, 9:49 AM), http://www.huffingtonpost.com/2013/05/20/military-sexual-assault_n_3306295.html.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* Critics of this standard argue that victims filing for benefits should be allowed to make their case on the assertion of rape alone, followed by an assessment of their health condition conducted by a VA examiner.

or rape occurred while the victim was serving. Thus, many rape and sexual assault victims that receive honorable discharges after being found to be psychologically unfit for service are barred from receiving any benefits or treatment from the Veterans Affairs (VA).¹⁷⁶

¹⁷⁶ Types of discharge from the U.S. Armed forces include:

Honorable Discharge

If a military service member received a good or excellent rating for their service time, by exceeding standards for performance and personal conduct, they will be discharged from the military honorably. An honorable military discharge is a form of administrative discharge.

General Discharge

If a service member's performance is satisfactory but the individual failed to meet all expectations of conduct for military members, the discharge is considered a general discharge. To receive a general discharge from the military there has to be some form of nonjudicial punishment to correct unacceptable military behavior. A general military discharge is a form of administrative discharge.

Other Than Honorable Conditions Discharge

The most severe type of military administrative discharge is the Other Than Honorable Conditions. Some examples of actions that could lead to an Other Than Honorable Discharge include security violations, use of violence, conviction by a civilian court with a sentence including prison time, or being found guilty of adultery in a divorce hearing (this list is not a definitive list; these are only examples). In most cases, veterans who receive an Other Than Honorable Discharge cannot re-enlist in the Armed Forces or reserves, except under very rare circumstances. Veteran's benefits are not usually available to those discharged through this type of discharge....

Dishonorable Discharge

If the military considers a service members actions to be reprehensible, the general court-martial can determine a dishonorable discharge is in order. Murder and sexual assault are examples of situations which would result in a dishonorable discharge. If someone is dishonorably discharged from the military they are not allowed to own firearms according to US federal law. Military members who receive a Dishonorable

In order to appeal the decision of military review board in a civilian forum, a claimant must file suit under the Tucker Act¹⁷⁷ and the Administrative Procedure Act (APA).¹⁷⁸ Under the APA, claimants must persuade a court to “hold unlawful and set aside agency action, findings, and conclusions” because they are,

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence...or (F) unwarranted by the facts....¹⁷⁹

This highly deferential standard in favor of the agency or governmental action limits a claimant’s chance of success.¹⁸⁰

Discharge forfeit all military and veterans benefits and may have a difficult time finding work in the civilian sector.

Ryan Guina, *Types of Military Discharge*, MIL. WALLET (Jan. 26, 2015), <http://themilitarywallet.com/types-of-military-discharges/>.

¹⁷⁷ The Tucker Act exposes the government to liability for certain claims, because the U.S. waived its sovereign immunity with respect to these claims. The Tucker Act authorizes claims against the U.S. under the following three circumstances: (1) contractual claims, (2) non- contractual claims in which the plaintiff seeks to be refunded money paid to the government and (3) non-contractual claims in which the plaintiff asserts that they are entitled to payment by the U.S. government. 28 U.S.C. § 1346(a) (2013); 28 U.S.C. § 1491(a) (2011).

¹⁷⁸ Applying to both federal executive departments and to independent agencies, the APA establishes procedures and regulations to allow for review of agency decisions by the federal courts. *See* 5 U.S.C. § 706 (2012).

¹⁷⁹ *Id* at § 706(2).

¹⁸⁰ *See* *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 114 (1st Cir. 2009) (“Accordingly, our review under section 706(2)(A) is highly deferential, and the agency’s actions are presumed to be valid.”).

Additionally, civilian courts are generally reluctant to review and change the decisions of military leadership and military courts.¹⁸¹

B. Necessary Steps: Protection for Victims who Report

For many victims, actions responding to the problems of bias and retaliation are often too late to remedy the harm.¹⁸² An effective resolution must secure protection for reporting victims before bias manifests and retaliation occurs.

An effective resolution to the problem of retaliation could be derived from the Military Whistleblower Protection Act (MWPA).¹⁸³ A rape and sexual assault whistleblower protection statute that looks to 10 U.S.C. § 1034 (“Protected communications; prohibition of retaliatory personnel actions”) could be an effective solution, as it would give the same protections to victims of sexual assault as whistleblowers.

¹⁸¹ The deferential posture of the judiciary with respect to the military is entrenched within this country’s legal history. Deference justified the position of the court in several Supreme Court cases. *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding that deference must be afforded to the military tribunals in deciding the guilt of German war criminals whose due process rights had been suspended); *Korematsu v. United States*, 323 U.S. 214 (1944) (refusing to reject military judgment as being unfounded and further allotting deference to the “war-making branches of the Government”); *Prize Cases*, 67 U.S. 635 (1862) (holding that even without express constitutional authorization, in times of war, the president must confront and meet an eminent threat and should not wait for congressional or constitutional sanction). While these cases specifically dealt with the wartime power of the executive branch, language from these opinions accurately reflects the judiciary’s deferential posture.

¹⁸² Many of the cases highlighted in *The Invisible War* are demonstrative of how quickly personnel action can be taken against a reporting individual, undermining most methods of redress currently available. *See THE INVISIBLE WAR, supra* note 17.

¹⁸³ *See* 10 U.S.C. § 1034 (2012).

10 U.S.C. § 1034: A Legislative Model

Protection against rape, sexual assault, and retaliation does not exist within the military.¹⁸⁴ Further, there is no specific provision within the UCMJ's sexual misconduct articles that provides for the protection of victims who choose to report their assaults.¹⁸⁵

The MWPA could be used as a model for reform. The MWPA protects communications among service members, members of Congress, and Investigating Generals of the DOD.¹⁸⁶ Under the

¹⁸⁴ See generally *Feres v. United States*, 340 U.S. 135 (1950) (holding that the United States is not liable for injuries sustained to service members, through the negligence of another, while on duty within the meaning of the Federal Tort Claims Act).

¹⁸⁵ See, e.g., 10 U.S.C. § 920 (2012); *id.* at § 925; *id.* at § 927.

¹⁸⁶ *Id.* § 1034:

- (a) Restricting communications with Members of Congress and Inspector General prohibited.—(1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.
- (2) Paragraph (1) does not apply to a communication that is unlawful.
- (b) Prohibition of retaliatory personnel actions.—(1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing—
 - (A) a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted; or
 - (B) a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to—
 - (i) a Member of Congress;
 - (ii) an Inspector General (as defined in subsection (i)) or any other Inspector

MWPA, communications between service members and members of Congress shall not be deterred in any way.¹⁸⁷ No adverse personnel action may be taken against the individual in response to these protected communications.¹⁸⁸

General criticisms of whistleblower protection in the military, before and after the enactment of the MWPA, direct public attention to the integrity of whistleblowing protection in this sphere of military-Congress communication.¹⁸⁹ The call for reform of whistleblower protections, in conjunction with the increased focus on the current epidemic of rape and sexual assault, creates a hospitable environment for analogous protection for reporting victims. Protections similar to those outlined in the MWPA should be afforded to victims of rape and sexual assault if the American military hopes to increase the number of victims who report assault.

As discussed *supra*, while restricted reports can be viewed as the resolution to retaliatory action, victims must forfeit all hope of

General appointed under the Inspector General Act of 1978;

(iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization;

(iv) any person or organization in the chain of command; or

(v) any other person or organization designated pursuant to regulations or other established administrative procedures for such communications.

(2) Any action prohibited by paragraph (1) (including the threat to take any unfavorable action and the withholding or threat to withhold any favorable action) shall be considered for the purposes of this section to be a personnel action prohibited by this subsection.

Id.

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See, e.g.*, Nick Schwellenbach, *Why Military Whistleblowers Fear Reprisal*, TIME (Oct. 20, 2011), <http://nation.time.com/2011/10/20/why-military-whistleblowers-fear-reprisal/>.

prosecutorial justice in order to insulate themselves from retaliation. Use of restricted reports forces victims to choose between personal dignity and professional survival. Restricted reports, by themselves, are not a sufficient resolution. Restricted reporting, coupled with whistleblower protection, is a more effective approach.

C. Modeling after 10 U.S.C. §1034: Subordination and Retaliation

The current military culture needs to be reformed.¹⁹⁰ Providing more protection for reporting victims would undercut the systemic underpinnings of misogyny in the military.

An effective statute must include protection against efforts to subordinate and retaliate against reporting victims. Thus, the following proposed model statute first focuses on subordination of individuals through the use of sexual violence. This portion of the model statute reflects the military courts' willingness to sanction constructive force as sufficient evidence of force in rape and sexual assault cases. In addition, evidence must show that sexual misconduct and violence has been used for the purpose of subordinating another service member. This can be proven with circumstantial evidence. Second, the model statute defines the necessary elements of retaliation in order for a victim to seek protection.¹⁹¹ In seeking protection from further personnel action, an individual must show one or both of following: (1) sexual misconduct and/or violence was used for the purpose of subordinating the victim; and (2) personnel action

¹⁹⁰ Chamallas, *supra* note 45, at 305 (“The military is regarded as one of the last bastions of male culture. . . .”).

¹⁹¹ This Note will not address remedies beyond injunctive relief that may be available to an individual who successfully alleges one or both of the elements of this model statute. While it is certainly possible that the statute could be incorporated into a larger criminal regulatory scheme or into a larger punishment scheme for the maintenance of good order within the Armed Forces, this Note specifically focuses on preventing these actions. The goal of this proposed statute is to foster an environment in which individuals are freer to make reports of rape and sexual assault.

has been taken against the reporting individual, sufficient to make a prima facie case for retaliation.

IV. ALARM: ADVANCING THE LACKLAND ANTI-SEXUAL VIOLENCE RIGHTS MODEL

The following is a suggested model statute, entitled “Advancing the Lackland Anti-Sexual Violence Rights Model” (ALARM). This statute closely reflects the structure of the MWPA and introduces new substantive protections for reporting individuals.

“Advancing the Lackland Anti-Sexual Violence Rights Model” (ALARM)

(a) Individual Subordination. No service member, officer or enlisted, may, against another service member, officer or enlisted:

- (1) Threaten the use of or actually use sexual misconduct, including, but not limited to:
 - (A) Unwanted Sexual Attention, such as unwanted sexual touching or fondling,
 - (B) Sexual Coercion, such as instances of quid pro quo agreements in which any subsequent employment action, beneficial or detrimental, is conditioned on sexual cooperation,
 - (C) Sexual Assault, as defined by UCMJ Article 128,
 - (D) Rape, as defined by UCMJ Article 120;
- (2) Through the use of actual or constructive force;
- (2) Without the express consent of the other service member;
- (3) With explicit or implicit intent;
- (4) In an attempt to relegate the other service member to a subordinate position, actual or constructive, to the aggressor;

(A) Relegating another service member to a subordinate position to that of the aggressor can be achieved with the express intent of the aggressor or impliedly through the use of emotional, physical, or psychological force in the course of threatening or using sexual misconduct against the other service member.¹⁹²

(b) Retaliation. No person may take, or threaten to take, an unfavorable personnel action or withhold, or threaten to withhold, a favorable personnel action, as reprisal against a member of the armed forces for:

- (1) Reporting an instance of sexual misconduct, sexual coercion, sexual assault, or rape to the proper authority in a given jurisdiction; or
- (2) Attempting to press charges against an individual or individuals for sexual misconduct, sexual coercion, sexual assault, or rape in both civilian and military jurisdictions; or
- (3) Pressing charges against an individual or individuals for sexual misconduct, sexual coercion, sexual assault, or rape in both civilian and military jurisdictions.

(c) Duty to Assist. If a member of the armed forces reports to an intervening authority,¹⁹³ such as a criminal investigation unit or a superior officer of a different unit, that personnel

¹⁹² “The elements required for rape may be absent, yet the pressures exerted can be equally destructive of human dignity and personal autonomy.” Pickands, *supra* note 8, at 2426.

¹⁹³ Within the text of the statute, some examples are given as to what is meant by intervening authority. An intervening authority is intended to include any individual of superior rank, within or outside of the unit of the alleging victim, who learns of the sexual subordination of a service member or of the use of retaliation against that individual. “Intervening authority” is left intentionally broad as to not preclude individuals, (individuals of a higher rank, for example) from seeking help from an intervening authority.

action prohibited by Subsections (b)(1)-(3) has been threatened or taken against the reporting individual, the intervening authority or officer shall take all appropriate action;

(1) Appropriate action includes, but is not limited to, aiding the service member in reporting the violation to the office of the Judge Advocate General (JAG) of the respective branch of the military;

(1) Upon a sufficient showing of circumstantial evidence of retaliation, the JAG shall request for a military protective order or a condition on liberty, prohibiting the use of official action against the individual reporting the claim of retaliation.

(d) Military Protective Orders (MPOs).¹⁹⁴ Upon a showing of circumstantial evidence of retaliation, the court hearing the petition may enforce one of the following remedies in order to protect the reporting individual from any harmful official action and to prevent any disclosure of the pending case to nonparties¹⁹⁵:

¹⁹⁴ Unit commanders can issue military protective orders (MPOs) to active duty service members to protect a domestic abuse victim. *Military Protective Orders*, WOMENSLAW.ORG (Apr. 18, 2011), http://www.womenslaw.org/laws_state_type.php?id=10866&state_code=US. The victim must be a spouse, former spouse, current or former intimate partner, or have a child with the abuser. *Id.* In just 2004 the DOD established MPO-use for the protection of victims of domestic violence and child abuse. Memorandum from David S.C. Chu, Dep't of Def. to Secretaries of the Military Departments, *Military Protective Orders (MPOs)* (Mar. 10, 2004), *available at* <http://www.ncdsv.org/images/MilitaryProtectiveOrders.pdf>. Extending the use of MPOs to victims of rape, sexual assault and further, professional subordination and retaliation seems highly reasonable.

¹⁹⁵ The intent of excluding nonparties from coming into contact with a potential claim is to protect an individual who may seek aid from another unit. Additionally, it also is intended to protect the reporting individual who may seek to transfer units from further harassment and retaliation.

- (1) Short-term Order: Upon a finding of need, the court may order a short-term military protective order for a period of thirty days; or
- (2) Long-Term Order: Upon a finding of need, the court may order a long-term protective order for a period of sixty days; or
- (3) The court may also order a protective order for a different period of time, not to exceed one year, for the protection of the reporting individual;
- (4) Protective orders may be renewed as is afforded for by military law and procedure.

Litigating the Lackland Rights Model: An Analysis of ALARM

ALARM defers to military courts in making findings of retaliation and subordination. This deference serves two purposes. First, the concept of subordination is a subjective term and often dependent upon the specific circumstances of an individual claim. Second, providing a specific factual definition of the terms subordination and retaliation would run the risk of preemptively negating claims for many victims. Such claims may be sufficient for one judge, but may not comport with an enumerated definition of subordination and/or retaliation.

The inclusion of the subordination claim, which encompasses the idea of relegating a service member to a position inferior to the aggressor, reflects the notion that sexual violence creates an environment ripe for retaliation. Once an aggressor has used emotional, physical, or psychological warfare against the victim, that aggressor is more likely to succeed in deterring his victim or victims from reporting the rape or sexual assault. Individuals continue to be

deterred from filing reports or seeing those reports through to criminal investigation because of the use of coercion.¹⁹⁶

ALARM also prohibits the use of retaliation against the reporting individual.¹⁹⁷ The language and structure of the retaliation claim is closely modeled after the MWPA, providing protection to individuals who do report. However, ALARM takes whistleblowing a step further with the imposition of a duty to report upon intervening authorities. Such a duty is necessary in order to ensure compliance with the statute.

Imposing this duty on intervening authorities distinguishes this model legislation from the failed effort of the MJIA and from the perceived weaknesses of Senator McCaskill's approach. First, imposing the duty to report on intervening authorities does not remove commander authority entirely. It simply imposes a duty upon individuals receiving information to report that information to appropriate authorities, such as JAG or the commanding authority in question.

This is in contrast to Senator McCaskill's approach, which does not mandate reporting at all; any reporting is discretionary.¹⁹⁸ Senator McCaskill stresses that under her approach, individual victims may choose to report incidences of sexual assault or rape to either the chain of command or to a JAG officer. Her proposal, while theoretically sound, fails to account for the reality that many victims face. Senator McCaskill's approach ignores the real likelihood that

¹⁹⁶ Other cases include individuals who have testified that the threat or use of sexual violence, which had a lasting emotional, physical, and psychological impact (including MST and PTSD), made them feel powerless and subordinate to their attacker. This powerlessness has deterred individual victims from reporting their claim. See *THE INVISIBLE WAR*, *supra* note 17. "The elements required for rape may be absent, yet the pressures exerted can be equally destructive of human dignity and personal autonomy." Pickands, *supra* note 8, at 2426.

¹⁹⁷ Another means of removing bias against rape and sexual assault victims also exists at the trial level in encouraging the use of implied bias challenges to jury members and court under Rules for Court Martial 912(f)(1)(N). The full extent of this argument is beyond the scope of this Note.

¹⁹⁸ See Mascaro, *supra* note 18.

the choice may not be available in practice. When an individual is raped or assaulted by a person in their chain of command, the choice to go outside of that avenue to report is unlikely, given the well-documented problem with coercion and retaliation. By imposing a duty to report on intervening authorities, a victim's relative position of power is strengthened because a response to an allegation, formally or informally made, is mandatory.

Requiring intervening authorities to report allegations of rape and sexual assault assures that military leadership may not take a position of willful ignorance. If an intervening authority fails to report, his failure to report will come to light in the course of the reporting process. If one superior officer fails to report allegations of rape or sexual assault to the appropriate authority (such as a criminal investigation unit, a commanding officer, or a JAG officer), another will. The duty to report these claims avails military leadership of liability for not taking action.¹⁹⁹ The duty to report introduces a much-needed element of compulsion that the current reporting system lacks.

The most innovative and crucial feature of ALARM is the use of military protective orders (MPOs) to protect reporting individuals. Through the process of obtaining an MPO, victims have the opportunity to prove their cases by using circumstantial evidence before harmful personnel action is taken against them.

Harmful personnel action includes harassment, threats, professional punishment, violent action, and professional discharge.²⁰⁰ This list is not exhaustive. Almost all victims who wish to report an attack are under the authority of a commanding officer. This commanding officer may ignore the allegations or even take retaliatory action against the victim.²⁰¹ In such situations, the victim is

¹⁹⁹ This Note will not explore the forms of liability that an officer would be exposed to for failing to comply with this statute as it is beyond the central focus of the argument.

²⁰⁰ See, e.g., Wolf, *supra* note 2.

²⁰¹ A plethora of cases emerging at Lackland AFB, the conduct of Brigadier General Jeffery Sinclair, and the conduct of many of the alleged attackers demonstrate this point. See THE INVISIBLE WAR, *supra* note 17.

often powerless because she may be subject to harmful personnel action. Such conduct, more often than not, has the desired effect; victims are forced into positions of submission.

Under ALARM, the victim can request an MPO to prevent commanding authorities from retaliating against them. As discussed supra, harmful personnel action can ultimately mean the end of an individual's career in the military and could prevent victims from accessing much-needed veteran benefits in the future. Courts may issue a short-term or long-term protective order; a MPO can remain in effect for up to one year. The one-year limitation recognizes that individuals cannot seek indefinite protection from commanding authorities, which could undercut the structure of unit cohesion and command. However, the ALARM MPO provision contains an elasticity clause that allows the tribunal to extend an MPO beyond a year in specific, compelling situations.

The substantive provisions of ALARM are unprecedented within the regulatory scheme of the military. ALARM stretches beyond the conservative resolutions proposed to address rape and sexual assault in the U.S. Armed Forces. Victims of rape and sexual assault in the military have been overlooked, suppressed, and muted for far too long. ALARM sounds the alarm and gives voice to victims where military policy silences victims of rape and sexual assault.

CONCLUSION: *SOUNDING THE ALARM*

By reforming the reporting infrastructure, the military can deter the widespread problem of rape and sexual assault spanning over a period of thirty years. Meaningful and effective resolutions, such as ALARM, better protect and support victims who report their claims compared to conventional remedies. In presenting an innovative resolution to undercut the problems of bias, subordination, and lack of transparency, effective reform can provide a voice to coerced victims of rape and sexual assault. A voice can finally be given to the silenced lambs.