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## Carry That Weight: Victim Privacy Within the Military Sexual Assault Reporting Methods, 28 J. Marshall Computer & Info. L. 551 (2011)

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## COMMENT

# CARRY THAT WEIGHT: VICTIM PRIVACY WITHIN THE MILITARY SEXUAL ASSAULT REPORTING METHODS

EMILY HANSEN\*

### INTRODUCTION

“Crazy lying whore.”<sup>1</sup> These are the words yelled at Seaman Panayiota Bertzikis by fellow Coast Guard personnel, after she reported being raped to her command at the Coast Guard base in Burlington, Vermont.<sup>2</sup> Although the circumstances surrounding her report were to remain on a need to know basis, shortly after Bertzikis’ report, her entire unit knew details of the assault, and verbal harassment began.<sup>3</sup> Nicole

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1. *Cioca v. Rumsfeld*, No. 2011cv00151 (E.D. Va. filed Feb. 15, 2011). The Complaint alleges that the rapes were only the beginning, as the victims suffered mentally and physically when they reported the assaults. Essentially, after the plaintiffs and other victims reported the crimes against them, they were retaliated against. *Id.* As of November 28, 2011, the suit is on hold as United States District Court Judge Liam O’Grady will issue his ruling on the government’s motion to dismiss. The government cited Supreme Court cases involving service members who sued senior officials for personal damages, or filed a civil suit against the government seeking monetary damages for service-related injuries. Within those cases, the Supreme Court held against the plaintiffs; Patricia Kane, *Sex Assault Class-Action Lawsuit Still On Hold*, ARMYTIMES (Nov. 18, 2011, 2:53 PM), <http://www.armytimes.com/news/2011/11/military-sex-assault-class-action-lawsuit-rumsfeld-gates-111811w/>.

2. *Cioca*, No. 2011cv00151.

3. ‘Need to Know’ Definition, TELECOM GLOSSARY 2000, [http://www.its.bldrdoc.gov/projects/devglossary/\\_need\\_to\\_know.html](http://www.its.bldrdoc.gov/projects/devglossary/_need_to_know.html) (last visited Sep. 7, 2011).

Curdt, Damage Control Firearm Apprentice for the United States Navy, was sexually assaulted aboard a naval carrier.<sup>4</sup> Curdt confidentially reported the assault to the chaplain aboard the ship.<sup>5</sup> However, the chaplain made an anonymous report to command. The very next day, the man who had assaulted Curdt told her “everyone on the ship was looking for her” because command had ordered the chaplain to produce the source of the complaint.<sup>6</sup> Mary Gallagher, former sergeant in the Air National Guard, claims she was “brutally assaulted” by a fellow sergeant at an air base outside of Baghdad in 2009.<sup>7</sup> When she reported the attack, her commander’s only response was to reassign her assailant, and tell her “this stuff happens.”<sup>8</sup> Corporal Sarah Albertson served in the Marine Corps from 2003 to 2008 and was raped by a fellow Marine on August 27, 2006.<sup>9</sup> When Albertson reported the rape to her command, she and her perpetrator were both charged with “Inappropriate Barracks Conduct.”<sup>10</sup> Shortly after the report, Albertson’s superiors, acting openly with the knowledge, by and through the “support and approval of command, ostracized and harassed her.”<sup>11</sup>

These named victims are a part of a class action suit filed in February 2011 against Secretary of Defense Robert Gates, and former Secretary of Defense Donald Rumsfeld.<sup>12</sup> The suit alleges a systemic failure to curtail sexual assault and/or rape [hereinafter sexual assault] in the military.<sup>13</sup> Specifically, the lawsuit states that the Department of Defense (“DoD”) “ran institutions [where] perpetrators were promoted and where military personnel were openly mocked and flouted the modest Congressionally mandated institutional reforms.”<sup>14</sup> This comment, however, will focus on a sub-issue addressed in the suit, specifically, the privacy con-

4. *Cioca*, No. 2011cv00151.

5. *Id.*

6. *Id.*

7. Michael Isikoff, *Lawsuit Claims Pentagon Turned Blind Eye to Military Rape Victims*, MSNBC (Feb. 15, 2011, 7:09PM), [http://www.msnbc.msn.com/id/41598622/ns/us\\_news-life/](http://www.msnbc.msn.com/id/41598622/ns/us_news-life/).

8. *Id.*

9. *Cioca*, No. 2011cv00151.

10. *Id.*

11. *Id.*

12. Isikoff, *supra* note 7; *Cioca*, No. 2011cv00151.

13. *Cioca*, No. 2011cv00151.

14. *Id.* Author Helen Benedict, stated on November 18, 2011:

One of the most pernicious aspects of rape in the military is the prevailing culture of blaming the victim. Victims are treated as whiners, liars, seducers, and traitors — as everything a soldier should never be. They are mocked, ostracized and even punished for trying to seek justice. Until this culture changes, rapists will continue to be protected in the military, and victims will continue to be denied justice. Proof of this lies in the numbers: According to the Department of Defense, 19,000 incidents of sexual assault occurred in the military in 2010, yet only 13.5 percent of those were reported. Various VA studies show that close to one in three women

cerns surrounding the reporting methods of sexual assault by active military service members.<sup>15</sup> This comment will examine the established reporting methods for military sexual assault and the failure of command units to uphold victims' privacy rights.<sup>16</sup> Ultimately, due to this failure, there is a lack of confidence in the reporting methods, which leaves victims unable to receive appropriate treatment for military sexual assault. Therefore, the existing reporting methods need to be modified to diminish the control of commanders. This will ensure victims are able to maintain their constitutionally protected right to privacy.

Currently, there are two ways a victim can report a sexual assault and/or rape in the military: restricted or unrestricted.<sup>17</sup> Restricted re-

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are sexually assaulted while serving, while fewer than one in five sexual predators in the military are every tried in court.

*Military Bases & the Department of Defense Failure to Curb Military Rape*, KANSAS CITY INFOZINE (Nov. 18, 2011), <http://www.infozine.com/news/stories/op/storiesView/sid/49789/> (citing HELEN BENEDICT, *THE LONELY SOLDIER: THE PRIVATE WAR OF WOMEN SERVING IN IRAQ* (2009)).

15. *Cioca*, No. 2011cv00151. A similar lawsuit was filed on March 21, 2011. See *Smith v. United States*, No. 2011cv00287 (E.D. Va. filed March 21, 2011). This lawsuit, in comparison to *Cioca*, alleges a rape involving a military serviceman and a civilian. Although the victim was different, the Complaint alleges the same problems revolving around reporting military sexual assault. Here, the victim states she was placed in ". . . situations where she was forced to account, again and again, the fact that she had been raped in order to obtain the necessary emergency assistance and medical treatment." Further, "[t]hroughout the investigative and prosecutorial process, Ms. Smith was demeaned and insulted by those who were supposed to be prosecuting her attacker." Finally, the victim alleged that "Defendants' incompetence resulted in Ms. Smith's violent, mentally disturbed, and potentially vengeful attacker Burnsed to be free and able to harm Ms. Smith if he so choose." *Smith*, No. 2011cv00287.

16. A commander is an officer who occupies a position of command authorized by appointment or by assumption of command. DoD Directive 6495.02, Sexual Assault Prevention and Response (SAPR) Program 9 (2008), available at <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>, [hereinafter DoD, Directive 6495.02]. A senior commander is an officer typically in the grade of O-6 or higher, who is the commander of a military installation, base, or post or comparable unit. DoD Directive 6495.01 Sexual Assault Prevention and Response (SAPR) Program 17 (2012), available at <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf>, [hereinafter DoD, Directive 6495.01].

17. DoD, REPORT OF THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES 58 (2009). Department of Defense Directive 6495.01 defines sexual assault as follows:

[I]ntentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent. Sexual assault includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive, or wrongful (including unwanted and inappropriate sexual contact), or attempts to commit these acts.

"Consent" means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previ-

porting allows a sexual assault victim to confidentially disclose the details of his/her assault to specified individuals and receive medical treatment and counseling without triggering the official investigative process.<sup>18</sup> Although restricted reporting seems to ensure confidentiality on paper, in practice, command units ascertain the identity of the victim and/or perpetrator, or demand to know the identity of the parties, as demonstrated above in Curdt's case.<sup>19</sup> Ultimately, commanders violate the victim's right to confidentially report the assault by informing others in the unit of the assault, which frequently results in unrelenting harassment and retaliation of the victim.<sup>20</sup>

On the other hand, a victim may choose the unrestricted reporting method, which begins an official investigation of the crime.<sup>21</sup> Here, a victim uses his/her current reporting channels, specifically chain of command, to notify law enforcement.<sup>22</sup> Once the victim makes an unrestricted report, the details of the assault are on an "official need to know basis."<sup>23</sup> However, in reality, this "need to know basis" opens the floodgates to unpunished harassment by fellow military personnel, as

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ous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. There is no consent where the person is sleeping or incapacitated, such as due to age, alcohol or drugs, or mental capacity.

DoD, Directive 6495.01, *supra* note 16, at 15, 17; DoD, FY 2009 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 7 (2010), available at [http://www.sapr.mil/media/pdf/reports/fy09\\_annual\\_report.pdf](http://www.sapr.mil/media/pdf/reports/fy09_annual_report.pdf).

18. DoD, Directive 6495.01, *supra* note 16, at 16.

19. *Cioca*, No. 2011cv00151. There are exceptions victim confidentiality and restricted reporting. When a victim provides a restricted report, the confidential communications will be suspended if: (1) the victim authorizes the suspension; (2) law enforcement or command officials determined that disclosure is necessary to prevent further harm; (3) disclosure to healthcare personnel for disability retirement determinations; (4) SARC, VA, or healthcare personnel determine that supervision and/or coordination for victim treatment; (5) when disclosure is ordered by military or civilian courts of competent jurisdiction. DoD, Directive 6495.02, *supra* note 16, at 14, 15. Confidential communication is, "[o]ral, written, or electronic communications of personally identifiable information concerning a sexual assault victim and the sexual assault incident provided by the victim to the SARC, SAPR, VA, or healthcare personnel in a Restrict Report." DoD, Directive 6495.01, *supra* note 16, at 14. The SARC, VA and healthcare personnel determine if an exception applies. DoD, Directive 6495.02, *supra* note 16, at 16.

20. *Cioca*, No. 2011cv00151. If the victim reports a sexual assault via a restricted report, and the information is thereafter disclosed to the command from a source that is independent from the report, a formal investigation will be initiated. DoD, Directive 6495.02, *supra* note 16, at 15. An official investigation is "the formal process a commander or law enforcement organization uses to gather evidence and examine the circumstances surrounding the report of sexual assault." DoD, Directive 6495.01, *supra* note 16, at 16.

21. See DoD, Directive 6495.02, *supra* note 16.

22. *Id.* at 13.

23. *Id.*

demonstrated above in Bertzikis' situation.<sup>24</sup> Further, many victims who inform the normal chain of command do not realize that this begins an official report into the incident, and as a result forces the victim into the unrelenting process of an official investigation without first fully understanding their actions.<sup>25</sup>

The Background section will provide a brief overview of sexual assault in the military and move through the response by the DoD, by and through the different reporting methods. It will then address the current issues concerning a commander's role in sexual assault reporting. This section concludes in a discussion regarding the current privacy rights afforded to victims under the reporting methods, and the respective barriers surrounding these said methods. The Analysis section will explore the traditional role of commanders in the context of the issues surrounding the breach of victim privacy. This section will propose changes in policy, specifically the commander's role to address these privacy breaches and reestablish confidence back into the DoD. These proposed changes may successfully combat the embarrassing statistics of military violence, and prevent what happened to Bertzikis, Curdt, Airman First Class Jessica Nicole Hinves, and other active service members.<sup>26</sup>

## BACKGROUND

Sexual assault in the military has been an ignored issue for decades. However, in January 2003, the Secretary of the Air Force and Chief of Staff received allegations of sexual assault at the Air Force Academy.<sup>27</sup> These reports immediately spurred an investigation, which as a result, spurred media frenzy.<sup>28</sup> The media reported that numerous female cadets were sexually assaulted while attending the Air Force Academy, that management generally "covered-up" these crimes, and female cadets were frequently reprimanded for reporting.<sup>29</sup> Then, in February 2004, former Secretary of Defense, Donald Rumsfeld ordered a 90-day review into the DoD's process for treatment of sexual assaults against soldiers; after he declared, "[s]exual assault will not be tolerated in the

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24. *Cioca*, No. 2011cv00151.

25. *See* DoD, *supra* note 17, at 58.

26. *Cioca*, No. 2011cv00151.

27. DoD, OFFICE OF THE INSPECTOR GEN., EVALUATION OF SEXUAL ASSAULT, REPRISAL, AND RELATED LEADERSHIP CHALLENGES AT THE UNITED STATES AIR FORCE ACADEMY 1 (2004).

28. *Id.* at 2.

29. *Id.* The report considered the root of the sexual assault problem at the Air Force Academy the failure of successive chains of commands over the last ten years who did not acknowledge the severity of the problems. Ultimately, it was the chain of command's failure to initiate and monitor any corrective measures to change the culture of the Academy.

Department of Defense.”<sup>30</sup> This review was spurred by claims that female soldiers who reported sexual misconduct were left in their units with their accused perpetrator.<sup>31</sup> The DoD assembled the Care for Victims of Sexual Assault Task Force (“Task Force”) to report back with recommendations.<sup>32</sup> Following this review, the Task Force released a series of recommendations in April 2004.<sup>33</sup> One of the many recommendations included establishing a single point of authority for sexual assault policy within the Department.<sup>34</sup> In October 2004, the DoD created the Defense Task Force on Sexual Assault in the Military Services (“Defense Task Force”).<sup>35</sup> In October 2005, the Defense Task Force transitioned into a permanent office, the Sexual Assault Prevention and Response Office (“SAPRO”).<sup>36</sup>

### A. REPORTING METHODS

In October 2005, the DoD approved the Sexual Assault Prevention and Response Program.<sup>37</sup> For the first time, this policy introduced Re-

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30. DoD, TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 8 (2004), available at <http://www.sapr.mil/media/pdf/research/Task-Force-Report-for-Care-of-Victims-of-SA-2004.pdf>. See also Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1811 (2004) (codified at 10 U.S.C.A. § 113 (2008)) (directing review of UCMJ and Manual for Courts-Martial to improve response to sexual assault). Sexual Assault in the military is not only an embarrassment to the country, but also hinders military readiness. Military readiness is related to the military unit’s ability to accomplish the assigned mission or task. This is in part dependent on the quality and quantity of its personnel. Sexual assault decreases a unit’s readiness because the unit will be short both the victim and the perpetrators due to medical, legal, investigative and administrative matters. Although only two people would be missing, their absences affect unit divisions of labor, productivity, teamwork and cohesion. Further, the victims’ psychological reactions can be unpredictable and prolonged. Victims may be unable to perform their assigned duties due to the medical treatment, or psychological treatment, or even may be relocated from their assigned unit to ensure their safety. All in all, victims who do continue to serve in the same unit with the perpetrator are likely to have diminished abilities to perform their assigned duty, due to concerns of personal safety. DoD., *supra* note 17, at 5-11.

31. Barbara Starr, *Rumsfeld Orders Review of Sexual Assaults*, CNN (Feb. 7, 2004), <http://edition.cnn.com/2004/US/02/06/military.assault/index.html>.

32. 32. *Mission and History*, U.S. DEP’T OF SEXUAL ASSAULT PREVENTION AND RESPONSE, <http://www.sapr.mil/index.php/about/mission-and-history> (last visited Nov. 17, 2011).

33. DoD, *supra* note 30, at xi-xii.

34. *Id.* at xi.

35. 10 U.S.C.A. § 113.

36. U.S. DEP’T OF SEXUAL ASSAULT PREVENTION AND RESPONSE, *supra* note 32. Since the Task Force was established in 2005, the DoD and Military Services have made strides toward improving their capacity to respond to reports of sexual assaults. See generally DoD, *supra* note 17.

37. DoD, Directive 6495.02, *supra* note 16, at 1. The surrounding issues regarding an adequate prevision and response is the difference in protocol between active service mem-

strictive Reporting.<sup>38</sup> Restrictive Reporting is “[a] process used by a Service member to report or disclose that he or she is the victim of a sexual assault to specified officials on a requested *confidential* basis.”<sup>39</sup> Under these circumstances, the victim’s report and any details provided to healthcare personnel, the Sexual Assault Response Coordinator (“SARC”), or a Victim Advocate (“VA”) will not be reported to law enforcement to initiate the official investigative process.<sup>40</sup> Further a victim may also report the assault to the chaplain.<sup>41</sup>

Restricted reporting is intended to give victims additional time and control over the release and management of their personal information.<sup>42</sup> Ultimately, the method seeks to empower victims to seek relevant information and support necessary to make a more informed decision about participating in a criminal investigation.<sup>43</sup> However, various interviews and focus groups reveal the victims often compromise restricted reporting by sharing the information about the assault with a friend, family member, or superior.<sup>44</sup> One SARC explained, “[t]he thing a victim wants to do is tell someone they trust. . . . In the military this is

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bers, service members in the reserves and service members deployed. *See generally* DoD, *supra* note 17.

38. DoD, Directive 6495.02, *supra* note 16, at 4. Although the Task Force made strides in sexual assault awareness, the lack of strategy and ineffective organizational structures has prevented adequate prevention and response to sexual assault victims. The Task Force suggested increasing prevention and response to sexual assault victims; the Department of Defense needs to reduce the amount of inconsistencies among the Service and Joint environment. DoD, *supra* note 17.

39. DoD, Directive 6495.02, *supra* note 16, at 16 (my emphasis).

40. *Id.* at 16. A SARC is, “[m]ilitary personnel, DoD [Department of Defense] employee, or DoD contractor under the senior commander’s supervision.” Further, a SARC “[e]nsures appropriate care is coordinated and provided to victims on sexual assault; and tracking the services provided to a victim of sexual assault from the initial report through the final disposition and resolution.” *Id.* at 17. The SARC is the “single point of contact at an installation or within a geographic area who oversees sexual assault awareness, prevention, and response training.” *Id.* A VA, as referred to above, is a Victim Advocate (also known as a SAPR VA) who is, “[m]ilitary person, DoD civilian employees, DoD contractors, or volunteers who facilitate care for victims of sexual assault under the SAPR Program, and who, on behalf of the sexual assault victim, provide a liaison assistance with other organizations and agencies on victim care matters, and report directly to the SARC when performing victim advocacy duties.” *Id.* at 17.

41. *See generally* DoD, Directive 6495.02, *supra* note 16, at 13. Although communications with chaplains are not privileged under Restricted Reporting, a service member’s communication with a chaplain is protected under the Military Rules of Evidence. *Id.*

42. *Id.* at 4-5, 16.

43. *Id.* The Department of Defense recognizes that the Unrestricted Reporting method “may represent a barrier for victims to access services, when the victim desires no command or law enforcement involvement. . . [there is] a fundamental need to provide a confidential disclosure vehicle via the Restrict Reporting option.” DoD, Directive 6495.01, *supra* note 16, at 5.

44. DoD, *supra* note 17, at 32.

bad. It is really hard to explain to them and have them understand that restricted reporting is only restricted if no one knows.”<sup>45</sup>

Once a victim completes a restricted report, the SARC will report information concerning the sexual assault incident to the command, for the purpose of public safety and command responsibility.<sup>46</sup> The report is compiled without information that could reasonably lead to personal identification of the victim or the alleged assailant.<sup>47</sup> This report is then produced to the senior commander within twenty-four hours of the sexual assault report.<sup>48</sup> The information that is not included in the report includes neither the victim nor the assailant’s identity or any personally identifying information.<sup>49</sup> Neither the senior commander nor law enforcement officials may initiate investigations based on information provided by the SARC.<sup>50</sup> However, while the senior commander may use the

45. *Id.*

46. DoD, Directive 6495.02, *supra* note 16, at 14.

47. *Id.* at 9, 15.

48. *Id.* at 14. This additional reporting avenue gives the senior commander a clearer picture of the sexual violence within the command and enhances the senior commander’s ability to provide a safe environment. *Id.*

49. *Id.* at 16. Personal identifiable information includes the person’s name or other particularly identifying descriptions (e.g. physical characteristics or identity by position, rank, or organization), or other information about the person or the facts and circumstances involved that could reasonably be understood to identify the person (e.g., a female in a particular squadron or barracks when there is only one female assigned). In contrast, non-identifiable personal information includes those facts and circumstances surrounding the sexual assault incident or that are about the individual that enables the identity of the individual to remain anonymous. *Id.*

50. DoD, Directive 6495.02, *supra* note 16, at 15. This information is purely to provide the senior commander with information concerning the number and type of sexual assaults within the particular unit. *Id.* Updated in 2012, Secretaries of the Military Departments shall:

Submit quarterly reports to the USD (P&R) [Department of Defense Personnel and Readiness] that include information regarding all sexual assaults reported during the quarter, until DSAID becomes fully operational for each individual Service. Require confirmation that a multi-disciplinary case management group tracks each open Unrestricted Report and that a multi-disciplinary case management group meetings are held monthly for reviewing all Unrestricted Reports of sexual assaults.

DoD, Directive 6495.01, *supra* note 16, at 11. The DSAID is,

A DoD database that captures uniform data provided by the Military Services and maintains all sexual assault data collected by the Military Services. This database shall be a centralized, case-level database for the uniform collection of data regarding incidence of sexual assaults involving persons covered by this Directive and Reference (c). DSAID will include information when available, or when not limited by Restricted Reporting, or otherwise prohibited by law, about the nature of the assault, the victim, the offender, and the disposition of reports associated with the assault. DSAID shall be available to the SAPRO and the DoD to develop and implement congressional reporting requirements. Unless authorized by law, or needed for internal DoD review or analysis, disclosure of data stored in DSAID will only be granted when disclosure is ordered by a military, Federal, or State

information to enhance preventative measures, he or she cannot use the information for investigative purposes, or in a manner that is likely to reveal the identities of the victim or perpetrator.<sup>51</sup>

When the victim elects a restricted reporting, the SARC, assigned VA, and healthcare personnel may not disclose the verbal, written or electronic communications of personally identifiable information concerning the victim or the alleged assailant that was provided by the victim.<sup>52</sup> One exception to this confidentiality is when command officials determine that disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of the victim or another person.<sup>53</sup> The SARC will evaluate the information provided and determine whether an exception applies.<sup>54</sup>

However, when information about a sexual assault comes to a commander's attention from a source independent of the restricted reporting method avenues, that commander must report the matter to law enforcement, which will result in an official investigation.<sup>55</sup> When the SARC or VA learns of an initiated investigation by such means, he or she will then notify the victim.<sup>56</sup> Moreover, the victim will be warned that if he/she discloses details of the sexual assault to anyone outside of the protected restricted reporting sphere, this may result in the initiation of an official investigation.<sup>57</sup> This disclosed information may subsequently be used in disciplinary proceedings against the offender or victim, even if such communications were improperly disclosed.<sup>58</sup>

Another method of reporting sexual assault in the military is un-

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judge or other officials or entities as required by a law or applicable U.S. international agreement.

*Id.* at 15.

51. DoD, Directive 6495.02, *supra* note 16, at 15.

52. *Id.* Generally, after a sexual assault, healthcare personnel will provide the victim with appropriate care and treatment, and then report the assault to a SARC, instead of commander or law enforcement. The SARC will assign a VA, who will counsel the victim on the reporting methods. At the discretion of the victim, the healthcare personnel will provide a Sexual Assault Forensic Exam ("SAFE") to collect evidence. However, if the particular healthcare personnel is not trained to conduct a SAFE, the victim may need to be transferred to a civilian hospital, which may circumvent a restricted report. *Id.*

53. *Id.* at 14. If a SARC, VA, or healthcare personnel make an unauthorized disclosure of privileged communication, they are instructed not to disclose further information and may face disciplinary action. *Id.* at 15.

54. *Id.*

55. DoD, Directive 6495.02, *supra* note 16, at 16.

56. *Id.* at 15.

57. *Id.* at 16. This includes the victim's friends and family. DEPARTMENT OF DEFENSE, SEXUAL ASSAULT IN MILITARY SERVICES 32 (2009).

58. DoD, Directive 6495.02, *supra* note 16, at 15. The non-identifying information is intended to give the commander with environmental information regarding the unit he or she oversees. The commander should use this information not to conduct his/her own personal investigation, but to enhance prevention measures and training. *Id.*

restricted reporting.<sup>59</sup> If the victim chooses an unrestricted reporting, then an official investigation begins.<sup>60</sup> Unlike restricted reporting, where the victim can only report to a SARC, VA, or chaplain, unrestricted reporting uses the existing reporting channels (e.g., chain of command, law enforcement, or report the incident to the SARC).<sup>61</sup> At the victim's discretion or request, the healthcare provider who is treating the victim shall arrange a Sexual Assault Forensic Examination ("SAFE").<sup>62</sup> The details regarding the incident will be limited to only those personnel who have a legitimate need to know.<sup>63</sup>

To ensure that perpetrators will be held accountable, a command may provide non-judicial punishment, or report the incident to law enforcement personnel.<sup>64</sup> If reported to law enforcement personnel, military investigators will subsequently complete an investigation.<sup>65</sup> Although military prosecutors believe that sexual assault cases are frequently and effectively prosecuted, this seems to be contradicted by other military personnel.<sup>66</sup> When questioned about the investigation and prosecution of sexual assault, commanders expressed dissatisfaction in the length of time.<sup>67</sup> One chaplain stated:

I wouldn't try to persuade a victim to report because of the low conviction rate that only tends to humiliate the victim further. . . . I can't in good conscience tell them that is a good idea they are coming to me for

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59. *Id.* at 13.

60. *Id.*

61. *Id.*

62. *Id.* This examination ensures the collection, handling, analysis, testing, and safe-keeping of any bodily specimens, to meet the requirements necessary for the use as evidence in criminal proceedings. In the context of the criminal proceedings and this topic, accountability of the alleged sexual assault perpetrators is also another issue plaguing the DoD. The Task Force suggested that the DoD review the effectiveness of the new sexual assault provision, Article 120 of the UCMJ, and believed that the Department needs to increase its efforts to ensure the sexual assault prevention and response programs function well in deployed environments, where the only resources available to sexual assault victims, are those internal to the operating forces. *Id.*

63. DoD, Directive 6495.02, *supra* note 16, at 13.

64. DoD, *supra* note 17, at 36. Essentially, commanders have the discretion to allow the claim to go forward to law enforcement personnel. According to *Sexual Assault in Military Services*, "most commanders believe sexual assault is a crime that should be prosecuted." *Id.* (emphasis added). Accordingly, most, but not all, commanders believe sexual assault is a crime.

65. *Id.* The time to complete this investigation varies based on the evidence, complexity of the case, and availability of eyewitnesses. They may be further delays if the victim delays in reporting. *Id.*

66. *Id.* at 37. The prosecution rates of military sexual assault are imprecise due to the broad definition of sexual assault. For example, "cases of unwanted sexual assault are unlikely to go to courts martial and are combined with cases of rape and sodomy, when prosecution rates are calculated." *Id.*

67. DoD, *supra* note 17, at 37.

help, I don't want to send them on the path to more humiliation.<sup>68</sup>

## B. COMMANDERS AND THE MILITARY JUSTICE SYSTEM

The military chain of command influences how service members react to sexual assaults.<sup>69</sup> Unlike civilian society, where District Attorneys and U.S. Attorneys make prosecutorial decisions, the military justice system holds alleged offenders accountable through "command" decisions.<sup>70</sup> The chain of command is a hierarchical system that outlines direct authority, responsibility, and accountability from the highest to lowest levels within the specific organization.<sup>71</sup> A commander occupies a position of command authorized by appointment or by assumption.<sup>72</sup> Integral in an effective chain of command is the responsibility of leaders to support subordinate personnel by providing clear and accurate orders, instructions and information.<sup>73</sup> Accordingly, subordinates are expected to use their direct chain of command as the first recourse.<sup>74</sup>

It is the commander's responsibility to protect the rights of the military victim and the military alleged perpetrators.<sup>75</sup> When a sexual assault is reported to a commander, the victim has the right to be reasonably protected from the accused.<sup>76</sup> This includes protection from threat, harm, or intimidation from the accused or people acting in concert with or under the control of the accused.<sup>77</sup> Commanders can impose

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68. *Id.* Another chaplain added, "[t]he biggest reality is that the victim gets punished by the system but the offender does not." *Id.*

69. *Id.* at 8.

70. DoD, *supra* note 30, at 5. "Commanders are responsible and entrusted with specific legal responsibilities pertaining to offenses and offenders within their scope of responsibility." *Id.* at 5-6.

71. DoD, *supra* note 17, at 8.

72. *Id.*

73. *Id.*

74. *Id.* Therefore, the chain of command has a profound influence on how other military personnel handle sexual assault reports. *Id.* Accountability and discipline are important attributes to the chain of command. This presents an issue in regards to sexual assault reports that involve misconduct on the part of the victim, such as underage drinking, fraternization or adultery. *Id.* at 37.

75. Military commands and other leaders in the chain of command are responsible for the behavior and welfare of their military personnel at all times, whether on or off duty. DoD, *supra* note 17, at 9. Although some focus groups reported that commanders took sexual assault seriously, the preached zero-tolerance was just an empty slogan. One group member said this:

Our leaders need to really have a no tolerance attitude an not just a policy letter. . . [personnel can tell when they aren't genuine. When we say that we're going to nail the accused and then go ridicule the victim for his/her choices, that attitude gets out and erodes trust in the process.

*Id.* at 50.

76. DoD, *supra* note 30, at 13.

77. *Id.*

military protective orders and even arrange separate living and work conditions.<sup>78</sup> The immediate commander initially has discretion to decide how to resolve criminal offenses that involve members of that command.<sup>79</sup> The Manual for Court Marshall provides that commanders should handle criminal allegations in a timely manner at the lowest appropriate level of disposition.<sup>80</sup>

Due to commanders' responsibility to actively ensure proper support and discipline of those under their charge, the restricted reporting option for military sexual assault presents a challenge to some commanders.<sup>81</sup> This reporting option requires commanders to respect the protections offered to victims to ensure the confidentiality and support.<sup>82</sup> This confidentiality conflicts with commanders' traditional expectations of credibility.<sup>83</sup> However, this has led to some commanders inappropriately pressuring SARCs and VAs to reveal details, particularly when the victim chose restricted reporting.<sup>84</sup> This is especially true for a victim placed in a deployed environment where commanders often feel an added burden of accountability.<sup>85</sup> Further, commanders want a detailed justification for airlifting service members out of the area because doing so creates constraints on resources.<sup>86</sup> Accordingly, commanders feel "re-

78. *Id.*

79. Rules for Courts-Martial (R.C.M.) 306(a). Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate to act on cases over which authority has not been withheld. *Id.*

80. Rules for Courts-Martial (R.C.M.) 306(b). How offenses may be disposed of. Within the limits of the commander's authority, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense. Commanders may: (1) take no action (e.g., when insufficient evidence exists or a case is unfounded); (2) take adverse administrative action (e.g., counseling, admonition, reprimand, extra military instruction, or withholding privileges); (3) impose non-judicial punishment; (4) disposition of charges; or (5) forward for disposition (e.g. forward the charges and case file (with a recommendation as to disposition) to a superior commander, or subordinate authority for disposition. *Id.*

81. DoD, *supra* note 17, at 9. Individuals who are in the immediate chain of command seek to be made aware of issues affecting those service members they are responsible for, and subsequently take appropriate action. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 23.

85. DoD, *supra* note 17, at 35. Commanders expect to know where their personnel are at all times to ensure their safety and mission accomplishment. *Id.*

86. *Id.* Under restricted reporting, the commander must respect the victim's wishes to remain confidential. This contradicts with a commander's responsibility of unit accountability. *Id.* at 9.

stricted” by the “unrestricted” reporting method.<sup>87</sup>

On the other hand, commanders’ promotions are dependent on the conduct and performance of the soldiers they supervise.<sup>88</sup> Therefore, commanders have an incentive to see that sexual assault allegations and convictions are few.<sup>89</sup> Suitably, the overwhelming majority of cases are overlooked, as exemplified by the allegations within the class action suit.<sup>90</sup>

### C. CONSTITUTIONAL GUARANTEES TO PRIVACY

Privacy concerns are cited as a barrier to sexual assault reporting.<sup>91</sup> Fittingly, in order to expand on these privacy concerns for sexual assault victims, the fundamental right to privacy needs to be addressed. The Supreme Court has held that some liberties are so important that they are deemed to be “fundamental rights” and that, generally, the government cannot infringe upon them unless strict scrutiny it met.<sup>92</sup> The Supreme

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87. *Id.* at 35.

88. Jackie Speier, *Rapes of Women in the Military ‘A National Disgrace’*, SFGATE (April 17, 2011), [http://articles.sfgate.com/2011-04-17/opinion/30227745\\_1](http://articles.sfgate.com/2011-04-17/opinion/30227745_1).

89. *Id.*

90. *Id.*; see also U. S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-924, MILITARY PERSONNEL: DOD’S AND THE COAST GUARD’S SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAMS FACE IMPLEMENTATION AND OVERSIGHT CHALLENGES 7 (2008), available at <http://www.gao.gov/assets/280/279925.pdf>. When polled, Army SARC’s were less likely to agree that commanders and supervisors support restricted reporting (64%) than were SARC’s in the Air Force (89%), Navy (93%) or Marine Corps (94%). DoD, *supra* note 17 at 32.

91. DoD, *supra* note 30, at 10. Prior to establishing the two reporting methods for military sexual assault, information concerning a sexual assault had a possibility of being disclosed without the individual’s consent to the Department of Defense officials. *Id.*

92. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 792 (3d ed. 2006). Almost all fundamental rights have been protected by the Court under the Due Process Clause of the Fifth and Fourteenth Amendment and/or the Equal Protection Clause of the Fourteenth Amendment. Specifically, the Court under both the Due Process Clause and the Equal Protection Clause has protected the right to privacy. For example the Court has invalidated state laws restricting access to contraceptives both as violating equal protection and as infringing the right to privacy. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding that a law prohibiting distribution of contraceptives to unmarried individuals violated equal protection); see also *Carey v. Population Services Int’l*, 431 U.S. 678 (1977) (declaring unconstitutional a law that provided that only licensed pharmacist could provide contraceptives to persons over the age of 16 and that no one could provide to those under the age of 16).

Relatively little depends on whether the Court uses due process or equal protection as the basis for protecting a fundamental right. Under either provision, regarded as fundamental, even though it is not mentioned in the text of the Constitution. Also, once a right is deemed fundamental, under due process or equal protection, strict scrutiny is generally used. The major difference between due process and equal protection as the basis for protecting fundamental rights is how the constitutional arguments are phrased. If a right is safeguard under due process, the constitutional issue is whether the government’s interference is justified by a sufficient purpose. But if the right is protected under equal protection,

Court held in *Griswold v. Connecticut*, that the right to privacy was a fundamental right.<sup>93</sup> Although *Roe v. Wade* is the key case recognizing a constitutional right to abortion, it is also a key case emphasizing the fundamental right of privacy.<sup>94</sup>

In *Roe*, Justice Blackman wrote for the Court and concluded:

[t]his right to privacy, whether it be found in the Fourteenth Amendment's conception of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.<sup>95</sup>

In 2003, the Court re-visited the fundamental right to privacy in *Lawrence v. Texas*, when it applied the constitutional right to privacy and applied it to private, consensual homosexual activity.<sup>96</sup> Justice Ken-

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the issue is whether the government's discrimination as to who can exercise the right is justified by a sufficient purpose. In other words, if the law denies the right to everyone, then due process would be the best grounds for the analysis; but if the law denies a right to some, while allowing it to others, the discrimination can be challenged as offending equal protection or the violation of the right can be objected under due process.

CHEMERINSKY, *supra*, at 793-94.

93. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). The Court explained that this right was not protected by the liberty of the Due Process Clause, but instead was implicit in specific provisions in the Bill of Rights, specifically, the First, Third, Fourth and Fifth Amendments. These specific provisions, "suggest that specific guarantees of the Bill of Rights penumbral, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. . . We had many controversies over these penumbral rights." *Id.* at 485. This approach has been much criticized and has not been followed in subsequent cases. Other concurring opinions in *Griswold* include Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, stating the Ninth Amendment as authority for the Court to protect non-textual rights to privacy. *Id.* at 486. Justice Harlan concurred and agreed that the right to privacy should be protected under the liberty of the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty." *Id.* at 500. Justice White also concurred in the judgment and agreed that the law did not even meet a rational basis test. *Id.* at 505. Justice Black and Stewart wrote dissenting opinions arguing the law was constitutional because there was no right to privacy mentioned in the Constitution. *Id.* at 507. Justice Black wrote: "The Court talks about a constitutional right of privacy as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not." *Griswold*, 381 U.S. at 508.

Justice Black concluded:

I get nowhere in this case by talk about a constitutional right to privacy as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has the right to invade it unless prohibited by some specific constitutional provision.

*Id.* at 509-10.

94. *Roe v. Wade*, 410 U.S. 113 (1973).

95. *Id.* at 153.

96. CHEMERINSKY, *supra* note 92, at 844. Seventeen years earlier, in *Bowers v. Hardwick*, the Court ruled that the right to privacy does not protect a right to engage in private

nedly, writing for the majority, emphasized constitutional protection for all individuals in the most intimate and private aspects of their lives.<sup>97</sup> Justice Kennedy's majority opinion is a strong affirmation of the right of privacy under the Constitution by placing emphasis on the Court's safeguard for privacy, even though it is not enumerated in the Constitution.<sup>98</sup>

More relevant to this comment is the discussion surrounding an individual's right to privacy by controlling information about them.<sup>99</sup> The Supreme Court has not directly addressed the right to privacy under the Due Process Clause to provide a right to control information; however, there are constitutional provisions that are relevant.<sup>100</sup> *Whalen v. Roe* is the primary Supreme Court case concerning constitutional protection for

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consensual homosexual activity. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Justice White, writing for the majority, contended that earlier decisions protecting privacy pertained to matters of family and reproduction, and homosexual activity did not fit within these rights.

We think . . . that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection to family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.

*Id.* at 191.

97. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

Justice Kennedy wrote:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do not more than prohibit a particular sexual act. Their penalties and purposes, though, have far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do not seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their home and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

*Id.*

98. *Id.* The Court was silent on whether privacy was a fundamental right or what level of scrutiny should be used. The Court did rely on privacy cases where strict scrutiny was used. However, due to the silence, the decision on the level of scrutiny leaves this issue open until the Supreme Court returns to it and offers clarification. For example, the Eleventh Circuit read *Lawrence* as using only a rational basis and thus applied this deferential test in upholding a state law that prohibited sale, distribution or possession of "sex toys." *Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004); see also CHEMERINSKY, *supra* note 92, at 846.

99. See generally Paul M. Schwartz, *Property, Privacy and Personal Data*, 117 Harv. L. Rev. 2055 (2004).

100. For example, the Fourth Amendment limits the ability of the government to gather information about individuals by generally requiring a warrant based on probable cause before a person can be searched. CHEMERINSKY, *supra* note 92, at 855.

control over information.<sup>101</sup> *Whalen* addressed the privacy concerns surrounding New York's monitoring system of prescription drugs that might be abused.<sup>102</sup> Ultimately, the Court rejected the privacy argument regarding the monitoring of medical information; however it addressed that the right to privacy might be recognized in the future to include a right to control information.<sup>103</sup> Justice Stevens stated:

[w]e are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive governmental files. . . the direction of our Armed Forces, and the enforcement of criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.<sup>104</sup>

#### D. PRIVACY AND BARRIERS TO REPORTING

When a victim chooses restricted reporting, the report should remain confidential.<sup>105</sup> Information is confidential when it is communicated by one individual in private, with the expectation that it will not be disclosed routinely to third-parties without the individual's permission.<sup>106</sup> Further, privileged communications have legal protection from disclosure of communications between specified individuals.<sup>107</sup> However, in practice, focus group participants, varying in rank, did not believe that restricted reports would be kept confidential.<sup>108</sup> One focus group member stated, "[i]f you want something to get out, all you have to do is say it's a secret."<sup>109</sup>

In contrast, if a victim chooses an unrestricted reporting method, the

101. *Whalen v. Roe*, 429 U.S. 589 (1977).

102. *Id.*

103. CHEMERINSKY, *supra* note 92, at 856.

104. *Whalen*, 429 U.S. at 605. The Court also has upheld reporting requirements in other areas, even though they pose some privacy concerns. In *California Bankers Association v. Schultz*, the Court upheld the constitutionality of the Bank Secrecy Act of 1970, which required banks to maintain records of financial transactions. *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974). The Court rejected claims based on the Fourth and Fourteenth Amendments and concluded that the law was constitutional because of the government's need to monitor financial transactions and prevent fraudulent conduct. *Id.* All in all, although there is a strong argument that the Constitution should be interpreted to protect a right to control information, there is nevertheless little support for such a right from the Supreme Court.

105. DoD, *supra* note 17, at 67.

106. DoD, *supra* note 30, at 11.

107. *Id.*

108. DoD, *supra* note 17, at 31. The data suggested that personal concerns of establishing and maintaining a strong identity and making meaningful connections with others, were central factors preventing reporting military sexual assaults. *Id.*

109. *Id.* at 32.

information is provided on a legitimate need to know basis.<sup>110</sup> A legitimate need to know basis is:

the legitimate requirement of a person or organization to know, access or possess sensitive or classified information that is critical to the performance of an authorized, assigned mission; or the necessity for access to, or knowledge or possession of, specific information required to carry out official duties.<sup>111</sup>

In 2009, various focus groups comprised of active military personnel were asked, “[w]hat would keep you from reporting a sexual assault?”<sup>112</sup> A common response from the participants was fear of being stigmatized.<sup>113</sup> Participants expressed concern that “everyone would talk about me” and that they would be “labeled.”<sup>114</sup> However, in exclusively female focus groups, fear of social consequences was the most common reason

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110. DoD, Directive 6495.02, *supra* note 16, at 9.

111. ‘Need to Know’ Definition, TELECOM GLOSSARY 2000, [http://www.its.blrdoc.gov/projects/devglossary/\\_need\\_to\\_know.html](http://www.its.blrdoc.gov/projects/devglossary/_need_to_know.html) (last visited Sep. 7, 2011).

112. DoD, *supra* note 17, at 30.

Theme and Description	Percent
<p><b>1. Personal Identity is Threatened</b> Responses in this category suggest the victim’s sense of self is threatened, either by the sexual assault itself or by the anticipated reporting process and its aftermath.</p>	<b>56%</b>
<p><b>2. Social Consequences</b> Responses in this category reflect concerns that “everyone will know” and will ostracize, label, or otherwise humiliate the victim who reports.</p>	<b>45%</b>
<p><b>3. Fear of Reprisal or Punishment</b> Responses in this category include general concerns that the victim would face reprisal or retribution for reporting and specific concerns about career reprisals. Punishment for collateral misconduct is included as well.</p>	<b>33%</b>
<p><b>4. Mistrust of the Process</b> Responses in this category reflect a sense of mistrust in the reporting, investigative, or legal processes. Poor outcomes include lengthy trial process and beliefs that the offender won’t be held accountable or “nothing will be done.”</p>	<b>31%</b>
<p><b>5. Perpetrator Characteristics</b> Responses in this category indicate some personnel would not report because the perpetrator is someone they know and they do not want to subject that person to investigation and punishment. Victims are less likely to report if the perpetrator was a superior.</p>	<b>16%</b>

*Id.* at 31.

113. *Id.* at 30. Focus group participants identify that threats to personal identity (e.g. self-blame or pride) was the most common response. *Id.* Male focus group participants indicated that they would avoid reporting because “they would be seen as less of a man or their sexual orientation would be question.” *Id.*

114. *Id.*

participants would not report.<sup>115</sup> More recently, of the 24,029 active military personnel surveyed in 2010, 4.4% of women and 0.9% of men indicated they experienced unwanted sexual conduct.<sup>116</sup> However, the majority (71%) did not report their experiences, with over one-half (60%) indicating they did not think their report would be kept confidential.<sup>117</sup> Likewise, 54% were afraid of retaliation or reprisals from the person who did it or their friends.<sup>118</sup> Some women chose not to report because it might have career implications.<sup>119</sup> For example, 52% feared being labeled a troublemaker, 40% thought their performance evaluation or chances for promotion would suffer, and 24% were afraid that they or others would be punished for infractions or violations.<sup>120</sup>

There is a cultural element of male domination embedded in military sexual assault – “rape is about power, not sex.”<sup>121</sup> Due to this cultural element, the prevalence of sexual assault in the military is understandable given its hyper-masculine and misogynistic culture.<sup>122</sup> The military culture pressures members to prove themselves as masculine, which is often achieved through the domination of others.<sup>123</sup> Some

115. DoD, *supra* note 17, at 30.

116. DEF. MANPOWER DATA CTR., 2010 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: OVERVIEW REPORT ON SEXUAL ASSAULT 42 (2010).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Megan N. Schmid, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475 (2010). Culture is a multifaceted concept referring to the beliefs, values, rules, norms, customs, and behaviors generally shared among members of a group, community or society. *Id.* Although members do not need to universally agree with all aspects associated with their culture, they do share a common consensus, which is the central feature to the concept of culture. IRWIN ALTMAN & MARIN M. CHEMBERS, *CULTURE AND ENVIRONMENT* 3 (1984). Specifically, military culture is a part of American culture; it is different in many ways due to its own values, rules, custom and norms. DoD, *supra* note 17, at 33.

122. Schmid, *supra* note 121, at 491. Masculinity is traditionally defined around the idea of power,” therefore the military – serving as both the symbolic and actual source of the nation’s power – is the ideal forming ground for a culture of masculinity. *Id.* Reflecting the masculine military culture, Retired Navy Admiral James Webb commented on the purported virtues of the military by posing the question “where in the country can someone go to find out if he is a man? *Id.* And where can someone who knows he is a man go to celebrate his masculinity?” *Id.* Webb further stated that the inclusion of women in the military made male service members “feel stripped, symbolically and actually. *Id.* Hence, the admission of women into the military disrupted its masculine identity. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 501 (1991).

123. DoD, *supra* note 17, at 9. Military culture is unique to that of civilian society. *Id.* at 6. Military culture fosters military effectiveness through unit cohesion. *Id.* at 10. To achieve unit cohesion, standards of behavior are instilled including honor, integrity, discipline, teamwork, courage, loyalty, selfless duty and the supporting customs. *Id.* at 33. How-

servicemen achieve this masculinity through sexual assault. The latter member resorts to violence and denigration of women (or other men) in order to prove masculinity. Thus, sexual assault is a “natural part of the [military] institution” because of the culture.<sup>124</sup>

#### E. REPERCUSSIONS

Based of the status quo, women in the military now are more likely to be raped by fellow soldiers than killed by enemy fire.<sup>125</sup> This statistic has sad consequences as demonstrated by the sexual assault and murder of Marine Lance Corporal Maria Lauterbach, by a fellow Marine, Cesar Laurean, while she was stationed at Camp LeJeune, North Carolina.<sup>126</sup>

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ever, service members come into the military with diverse experiences, values, beliefs and cultural experiences. To achieve unit cohesion, military training serves as the primary socialization process. *Id.* at 7. Military socialization through military training creates the potential for abuses in authority and perceived power. Cadets view their training officers as authority figures based on their expertise and place in the chain in the command. Due to the limited amount of time and corresponding intensity that goes into military training, a report of sexual assault slows down the process, if not completely stalls it.

One commander remarked:

[T]he expectations of a training environment are to get them in, get them trained, get them fit to fight. . . a sexual assault report stops this process momentarily. . . some leaders may view it as an inconvenience rather than a crime. . . [a]lthough any leaders know how to talk about zero tolerance, the fact remains that many people’s behaviors don’t always match up, and that sends a mixed message to our younger folks.

*Id.* at 7-8. Further, due to the tightly controlled social structure of the military, subordinates find the need to express their independence or to relieve tension in private situations off duty. Although some service members relieve this tension in a constructive way, others engage in risky or dangerous behavior, including driving at excessive speeds, driving under the influence, disregarding safety precautions, engaging in sexual behavior with multiple partners, or binge drinking. DoD, *supra* note 17, at 37.

124. Schmid, *supra* note 121, at 491. Individuals define themselves through their culture, adapting to the environment by adapting to shared values and behavior demonstrated by others. Thus, it is important for commanders to set an example for their insubordinates. DoD, *supra* note 17, at 33.

125. Speier, *supra* note 80. See *Sexual Assault in the Military: Hearing Before the Subcomm. on Nat’l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 1 (2008) (statement of Jane Harman, Cong. Rep.) (stating of the female veterans seen at one Veterans Administration health center, 41% were victims of sexual assault and twenty-nine percent were raped, all while in the military).

126. *N.C. Investigators Issue Warrant in ‘Disgusting’ Murder of Pregnant Marine*, FOX NEWS (Jan. 13, 2008), <http://www.foxnews.com/story/0,2933,322285,00.html>. Within the *Cioca* complaint, plaintiffs allege that after reporting the rape, plaintiffs suffered greatly, in particular Marine Lance Corporal Laughterbach. When she first reported the rape, “she was met with skepticism, if not outright disbelief, by her superiors and met with harassment and ostracism by her male fellow Marines. . . [t]hat six-month nightmare ended when she was murdered and buried in a shallow fire pit in the backyard of fellow Marine Cpl. Cesar Laurean.” See *Oversight Hearing on Sexual Assault in the Military Before the Subcomm. on Nat’l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov’t Reform*

This was days after meeting with prosecutors to discuss allegations that Laurean had raped her.<sup>127</sup> Lauterbach was eight months pregnant at the time.<sup>128</sup>

Based on the frequency of military sexual assault, the Department of Veterans Affairs codified “Military Sexual Trauma” or MST.<sup>129</sup> MST is a “psychological trauma, which in the judgment of a Department of Veterans Affairs mental health professional, resulted from a physical assault of sexual nature, battery of a sexual nature, or sexual harassment which occurred while the Veteran was serving on active duty or active duty for training.”<sup>130</sup> Medical record data compiled from the users of Department of Veterans Affairs healthcare indicate that Post Traumatic Stress Disorder (“PTSD”), other anxiety disorders, depression and other mood disorders, and substance abuse disorders, are some of the mental health problems associated with MST.<sup>131</sup> Based off data collected from Department of Veterans Affairs universal screening program from all veterans seen at Veterans Health Administration facilities, about one in

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111th Cong. 1 (2010) (written statement of Merle F. Wilberding, Attorney, Coolidge Wall, Co.), available at <http://oversight.house.gov/images/stories/Hearings/pdfs/20100224Wilberding.pdf>.

127. FOX NEWS, *supra* note 126.

128. *Id.*

129. 38 U.S.C. § 1720D (West 2011).

130. *Military Sexual Trauma*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.ptsd.va.gov/public/pages/military-sexual-trauma-general.asp> (last visited Dec. 19, 2011). Establishing service connection for PTSD requires (1) a current, clear medical diagnosis of PTSD; (2) credible supporting evidence that the claimed in-service stressor actually occurred; and (3) medical evidence of a causal nexus between current symptomatology and the specific claimed in-service stressor. *See* 38 C.F.R. § 3.304(f); *Anglin v. West*, 11 Vet. App. 361, 367 (1998). The evidence required to support the occurrence of an in-service stressor varies “depending on whether or not the veteran was ‘engaged in combat with the enemy’ . . . [w]here . . . VA determines that the veteran did not engage in combat with the enemy . . . the veteran’s lay testimony, by itself, will not be enough to establish the occurrence of the alleged stressor.” *Moreau v. Brown*, 9 Vet. App. 389, 395 (1996), *aff’d*, 124 F.3d 228 (Fed. Cir. 1997).

131. U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 130. More shocking, women with past military service were more likely to commit suicide. A study examined rates for female non veterans and veterans. According to the data, female veterans between the ages of 18 and 34 are at the highest risk for suicide. As the age of the female veteran increased, the rate of suicide, however, decreased. Nevertheless, within each age group, the rate was higher than civilian women’s suicide rates. Mark Kaplan, the co-author of the study and professor at School of Community Health, Portland State University, stated, “[t]his study shows that young women veterans have nearly triple the suicide rate of young women who never served in the military. The elevated rates of suicide among women veterans should be a call-to-action, especially for clinicians and caregivers to be aware of warning signs and helpful prevention resources.” Bentson H. McFarland et al., *Self-Inflicted Deaths Among Women With U.S. Military Service: A Hidden Epidemic?*, 61 PSYCHIATRIC SERVICES 1177 (2010), available at <http://www.mentalhealthportland.org/wp-content/uploads/2010/12/Self-Inflicted-Deaths-Among-Women-With.pdf>.

five women and one in one-hundred men seen responded “yes” when screened for MST.<sup>132</sup> Accordingly, the Department of Veterans Affairs bolstered training for its mental health professional on military sexual trauma, and also now provides disability compensation for those who have developed some major health problems due to their trauma.<sup>133</sup>

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132. U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 130. MST side effects include:

- (1) Strong emotions - feeling depressed or having sudden intense emotional responses to things, irritability;
- (2) Feelings of numbness - having trouble feeling love or happiness;
- (3) Trouble Sleeping;
- (4) Trouble with Attention, Concentration and Memory - trouble staying focused, mind wandering;
- (5) Problems with Alcohol or Other Drugs - drinking excessively, using drugs daily to cope with memories or unpleasant feelings, or drinking to fall asleep;
- (6) Trouble with Reminders of the Sexual Trauma - feeling on edge, not feeling safe, trouble trusting others;
- (7) Problems in Relationships - feeling alone or not connected, abusive relationships, trouble with employers or authority figures;
- (8) Physical Health Problems - sexual issues, chronic pain, weight or eating problems.

*Id.* In a recent Department of Veterans Affairs study on the effect of MST on relationships, the Department began conducting interviews with couples. Veterans receiving PTSD treatment and married, or in a committed relationship, were asked to participate in a couple’s study. Each partner was interviewed separately and was asked a range of questions regarding their relationship and the impact of deployment, PTSD, and substance. The couples were then brought back together and talked about the interview and their answers. U.S. DEP’T OF VETERANS AFFAIRS, MEDICAL PROGRAMS AND INFORMATION TECHNOLOGY PROGRAMS: CONGRESSIONAL SUBMISSION FY 2012 FUNDING AND FY 2013 ADVANCE APPROPRIATIONS REQUEST 3A-17 (2011), *available at* [http://www.va.gov/budget/docs/summary/Fy2012\\_Volume\\_II-Medical\\_Programs\\_Information\\_Technology.pdf](http://www.va.gov/budget/docs/summary/Fy2012_Volume_II-Medical_Programs_Information_Technology.pdf), [hereinafter U.S. DEP’T OF VETERANS AFFAIRS, MEDICAL PROGRAMS].

133. U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 130. The Veterans Affairs Adjudication Procedure Manual M21-1 provisions on PTSD claims in P 5.14 require that, for cases where available records do not provide objective or supportive evidence of the alleged in-service stressor, it is necessary to develop for this evidence. THE VETERANS AFFAIRS ADJUDICATION PROCEDURE MANUAL M21-1, Part III, P 5.14b(3), *available at* [http://www.benefits.va.gov.warms/warms/M21\\_1.asp](http://www.benefits.va.gov.warms/warms/M21_1.asp). As to personal-assault PTSD claims, more particularized requirements are established. Specifically, The Veterans Affairs Adjudication Procedure Manual M21-1 states in pertinent part:

- (1) Veterans claiming service connection for disability due to an in-service personal assault face unique problems documenting their claims. Personal assault is an event of human design that threatens or inflicts harm. Examples of this are rape, physical assault, domestic battering, robbery, mugging, and stalking. Although most often these incidents involve female veterans, male veterans may also be involved. Care must be taken to tailor development for a male or female veteran. These incidents are often violent and may lead to the development of PTSD secondary to personal assault. It is possible for someone to develop symptoms of PTSD as a result of this type of stressful experience.
- (2) Because assault is an extremely personal and sensitive issue, many incidents of personal assault are not officially reported, and victims of this type of in-service trauma may find it difficult to produce evidence to support the occurrence of the stressor. Therefore, alternative evidence must be sought.
- (3) To service connect PTSD, there must be credible evidence to support the veteran’s assertion that the stressful event occurred. This does not mean that the evidence actually proves that the incident occurred, but rather that the preponderance of evidence supports the conclusion that it occurred.

Similar to the different sexual assault reporting methods, in reality the Department of Veteran's Affairs response is inadequate in providing the appropriate disability compensation to these victims. Due to limited understanding about the causes of PTSD in women, current legislation favors veterans whose PTSD originated in combat, rather than from MST.<sup>134</sup> Department of Veterans Affairs requirements place an unreal-

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- (4) The service record may be devoid of evidence because many victims of personal assault, especially sexual assault and domestic violence, do not file official reports either with military or civilian authorities. Therefore, development to alternative sources for information is critical. Alternative sources that may provide credible evidence of the in-service stressor include: (a) Medical records from private (civilian) physicians or caregivers who may have treated the veteran either immediately following the incident or sometime later; (b) Civilian police reports; (c) Reports from crisis intervention centers such as rape crisis centers or centers for domestic abuse; (d) Testimonial statements from confidants such as family members, roommates, fellow service members, or clergy; (e) Copies of personal diaries or journals.
  - (5) Identifying possible sources of alternative evidence will require that you ask the veteran for information concerning the incident. This should be done as compassionately as possible in order to avoid further traumatization. The PTSD stressor development letter used by regional offices to solicit details concerning the in-service stressful incident may be inappropriate for this type of PTSD claim. Therefore, if the stressful incident is a personal assault, use Exhibit A.3 or a letter developed locally for this type of claim.
  - (6) The suggested attachment to the development letter shown in Exhibit A.1 is inappropriate for PTSD claims based on personal assault and should not be used for that purpose. Instead use Exhibit A.4 to this letter or an attachment developed locally.
  - (7) Rating board personnel must carefully evaluate all the available evidence. If the military record contains no documentation that a personal assault occurred, alternative evidence might still establish an in-service stressful incident. Behavior changes that occurred at the time of the incident may indicate the occurrence of an in-service stressor. Examples of behavior changes that might indicate a stressor are (but not limited to): (a) Visits to medical or counseling clinic or dispensary without a specific diagnosis or specific ailment; (b) Sudden requests that the veteran's military occupational series or duty assignment be changed without other justification; (c) Lay statements describing episodes of depression, panic attacks or anxiety but no identifiable reasons for the episodes; (d) Evidence of substance abuse such as alcohol or drugs;
  - (8) Rating boards may rely on the preponderance of evidence to support their conclusions even if the record does not contain direct contemporary evidence. In personal assault claims, secondary evidence may need interpretation by a clinician, especially if it involves behavior changes. Evidence that documents such behavior changes may require interpretation in relationship to the medical diagnosis by a VA neuropsychiatric physician.

THE VETERANS AFFAIRS ADJUDICATION PROCEDURE MANUAL M21-1, Part III, P 5.14c (1)-(3), (5)-(7), (8)(a), (8)(b), (8)(e), (8)(h), (8)(n), and (9) (1993), *available at* [http://www.benefits.va.gov/warms/warms/M21\\_1.asp](http://www.benefits.va.gov/warms/warms/M21_1.asp). To clarify, the veteran experiencing MST can receive free counseling or health services through the Department of Veterans Affairs; however, the veteran may not be eligible to receive disability compensation for the MST. U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 130.

134. *Advocacy*, SERVICE WOMEN'S ACTION NETWORK, <http://servicewomen.org/our-work/advocacy/> (last visited June 20, 2011). In a recent study for the Department of Veterans Affairs 2012 Congressional Submission, approximately 22% of female veterans and 1% of

istic, unfair, and discriminatory burden of proof on veterans who suffer from MST, because service members cannot safely report MST in the current military climate.<sup>135</sup> Moreover, formal investigations of sexual harassment are destroyed two years after they are filed, making it impossible to provide original evidence to the VA for a claim, assuming that the victim reported the sexual assault.<sup>136</sup> Further, out of the 13% of the victims who report, 90% are involuntarily honorably discharged.<sup>137</sup> In effect, once a victim reports, he/she loses their job in the military, thus making the need for disability compensation for MST greater.<sup>138</sup>

Further, the personal stories and statistics have prompted the attention of the legislature. A bipartisan bill to support the nineteen thousand annual military victims of sexual assault in the United States Armed Forces was introduced on April 13, 2011.<sup>139</sup> The Defense Sexual Trauma Response, Oversight and Good Governance Act (“Defense STRONG Act”) would expand legal rights and protections for service members who have been victims of sexual assault.<sup>140</sup> The legislation would provide victims with the right to legal counsel and the right to transfer to another base.<sup>141</sup> It also would allow them to maintain confidentiality when speaking with victim advocates.<sup>142</sup> Finally, the Defense STRONG Act

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male veterans who utilize VA reported a history of MST. However, only 15% of women veterans use VA facilities. *Id.* *Female* veterans who served in combat and experience MST were diagnosed with a mental health condition. U.S. DEP’T OF VETERANS AFFAIRS, MEDICAL PROGRAMS, *supra* note 132, at 3A-17.

135. SERVICE WOMEN’S ACTION NETWORK, *supra* note 134. For instance, after explaining that awarding service connection for PTSD requires credible supporting evidence, the Board of Veterans Appeals discussed that the appellant did not mention the alleged sexual assault until more than thirty-two years after service, and did not mention the alleged in-service harassment when he first filed his claim for PTSD in April 2001. *Terry v. Shinseki*, 2011 U.S. Vet App. LEXIS 574 (2011) (finding not only a stigma around reporting rape, but also a stigma around reporting PTSD).

136. SERVICE WOMEN’S ACTION NETWORK, *supra* note 134. *See also* *Patton v. West*, 12 Vet. App. 272 (1999). In April 1995, Patton testified under oath before the Regional Office that he had been sexually assaulted but had been told (presumably by a sergeant) that he would receive a dishonorable discharge and would be sent to prison if he reported it. In the 1997 Board of Veterans Appeals decision here on appeal, the Board denied the PTSD claim because it was “based on noncombat-related unverified stressors”, and because corroboration of an in-service stressor was an essential element of his PTSD claim. *Id.*

137. Serena Marshall, *Sexual Assault in the Military: New Legislation Seeks to Alter Reporting Process*, ABC NEWS BLOGS (Nov. 17, 2011, 5:02 PM), <http://abcnews.go.com/blogs/politics/2011/11/sexual-assault-in-the-military-new-legislation-to-protect-service-members/>.

138. *Id.*

139. Defense Sexual Trauma Response Oversight and Good Governance Act, S. 1018, 112th Cong. (2011).

140. *Id.*

141. *Id.*

142. *Id.*

would mandate increased training on sexual assault prevention for troops.<sup>143</sup>

On November 16, 2011, Congresswoman Jackie Speier introduced legislation that would dramatically alter how military sexual assaults were handled.<sup>144</sup> The Sexual Assault Training Oversight and Prevention Act, or the STOP Act, would remove commander's discretion when determining to pursue a sexual assault case.<sup>145</sup> Speier explained, "[t]hey decide whether it's true or not. . . It's the judge and the jury."<sup>146</sup> Under the STOP Act, jurisdiction for reporting, oversight, and investigation would be placed in a new office, the Sexual Assault Oversight and Response Office.<sup>147</sup> Further, the prosecution of sexual assaults would be through this office.<sup>148</sup> Arguably, the most common sense provision of this legislation is the creation of the sexual assault offender database.<sup>149</sup>

### ANALYSIS

The culture and adjudication procedure in the military is vastly different than that within the civilian sphere. The military's sexual assault adjudication is unique due to the chain of command that places authority and accountability in a hierarchical system. That said, there are gaps between the protocols on paper, specifically the sexual assault reporting

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143. *Id.*; the Sexual Assault task force found that SAPRO has no systematic evaluation plan or feedback mechanism for assessing overall effectiveness of sexual assault prevention and response training efforts. The task-force found that the current sexual assault and prevention training was predominantly computer-based, or conducted with briefing slides in large group setting with mixed ranks and genders, and focused principally on awareness and reporting and not necessarily prevention. More importantly, however, is the fact that commanders and other unit leaders are not routinely involved or participate in sexual assault prevention and response training of their personnel, and training for Department of Defense civilian personnel does not occur consistently. DoD, *supra* note 17, at 17-18.

144. Marshall, *supra* note 137.

145. *Id.*

146. *Id.*

147. Jackie Speier, *Sexual Assault Training Oversight Act Summary*, <http://www.speier.house.gov/images/stopactsummary.pdf> (last visited Feb. 20, 2012). This Office would: (1) work with various military investigative organization to investigate cases of sexual assault; (2) Ensure that victims are given safety, security, and place to communicate their experiences; (3) Have the authority to reassign a victim to separate them from their assailant; (4) Create a new method of reporting sexual assault that takes it out of the hands of the normal chain of command; (5) the Military Criminal Investigation Organizations will report directly do the Sexual Response Office; (6) Sexual Assault Grievance Board for Offense reporting and written guidelines regarding who to contact. *Id.*

148. *Id.* Essentially, a Director of Military Prosecution would be appointed, who would have final and independent authority to oversee the prosecution of sexual related offenses. The Director would have the authority to request that a case be sent to a Department of Defense appellate court or referred to the Department of Justice.

149. *Id.* Upon a sexual assault conviction, this information would be sent to the Department of Justice to be incorporated into the National Sex Offender Registry.

methods, and what is being practiced. These gaps revolve around the role of the commander within each reporting method. Ultimately, these gaps have enabled privacy breaches demonstrated by subsequent victim harassment. These privacy breaches not only foster victim harassment but also a breach of victims' constitutionally protected right to privacy. Therefore, these gaps need to be bridged through new policy measures.

#### A. UNRESTRICTED REPORTING

The commander within a military unit assumes his/her role by authorization or by assumption of command.<sup>150</sup> Once in this role of responsibility and authority, they are essentially the supervisor to the military personnel assigned below them. Subordinates are normally expected to report to their chain of command as the first recourse for addressing issues.<sup>151</sup> Many victims report to their command because the commander has the capability to initially act upon the report. Many sexual assault victims first report the assault to their commanders, and have inadvertently chosen unrestricted reporting, without realizing the limited privacy protections this method provides.

Sexual assault training is provided to commanders on how to address sexual assault reports.<sup>152</sup> Further, the Manual for Court Marshall instructs commanders to dispose of criminal allegations at the lowest level of disposition.<sup>153</sup> Accordingly, commanders are disposing of sexual assault reports in a variety of manners, all of which expose the victim to harassment by other military personnel, his or her perpetrator, command, or others in a superior position.

First, in the best situation, where the command unit takes appropriate action based off the report, their actions prove to be inadequate resulting from an apparent lack of training.<sup>154</sup> Although training is provided, it is clearly not preparing commanders to deal with the assaults in reality. In practice, after a report is made to a commander, he or she separates the victim and perpetrator, and places the victim in es-

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150. DoD, *supra* note 30, at 9.

151. *Id.* at 8.

152. DoD, *supra* note 17, at 71.

153. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. pt. II, ch. XIII (2000).

154. DoD, *supra* note 17, at 29-30. Many focus groups stated that commanders need better training on sexual assault prevention and response, which was confirmed after interviewing various commanders. Some commanders indicated they received training on their role in sexual assault prevention and response prior to assuming the role of commander; many rely solely on their on-the-job training and information they receive from SARCs and Victim Advocates. However, the commander is responsible for seeking out the SARC or Victim Advocate to obtain this information. Therefore, it is difficult to ensure that commanders understand that sexual assault prevention and response program policy and their role in sexual assault prevention. *Id.*

essentially a solitary confinement situation, until the law enforcement officials sort out the details of the report. Although each case is fact specific, it takes law enforcement officials a few weeks to sort out the details, assuming that the assault did not occur on deployment, which may take over a month. During this time, the victim, and not the perpetrator, is the outcast. Due to this negative stigma, fellow service members often harass the victim.

Second, command units dispose of these criminal allegations by intentionally putting the victim and perpetrator together. This was the case of the class action Plaintiff Bertzikis. When she reported the rape to her command, the command's response was to stop talking of the rape, or be charged with a military crime equivalent to slander.<sup>155</sup> Further, the command failed to take any substantial steps to investigate the matter or have it adjudicated within the military system of justice.<sup>156</sup> Instead, Bertzikis' command unit forced her to live on the same floor as her rapist in barracks and required the two to work together.<sup>157</sup> The two were instructed to use the time to "work out their differences."<sup>158</sup>

The above posed situations assume that commanders acted upon the report. However, the immediate commander has the initial discretion to determine the resolution of criminal offenses for members of his or her unit. Therefore, a commander has the discretion to not pursue the criminal offense if he or she feels the offense is unmerited. Applied to this analysis, a commander with little background in military justice is the

155. *Cioca*, No. 2011cv00151. As stated previously, a common barrier to reporting was fear of reprisal. Most focus group participants did not specify the type of reprisal, but one junior officer expressed:

[S]ome responsibilities would be taken from you or not given to you. . . it would be reflected in the language on your performance reports. . . even when you [move to a new duty station], someone would find out, especially if you're in a smaller career field.

DoD, *supra* note 17, at 30. Further, service members were fearful of collateral misconduct on their behalf if they were the victims. *Id.* Collateral misconduct is when a victim of sexual assault violated military regulations or committed a crime. This misconduct will be documented when the victim reports the sexual assault and will be referred to the appropriate commander. In practice, any prosecution of the misconduct will be delayed until the sexual assault is properly adjudicated. However, individuals have expressed concern over this practice. If the prosecution is delayed, the victim is exposed to aggressive questioning on the stand, which reinforces the notion that the victim only reported the assault to avoid punishment for their misconduct. *Id.* at 37-38.

156. *Cioca*, No. 2011cv00151. Victims are emerged in an environment where the perpetrators are not prosecuted. In 2007, only 8% percent of those actually accused of rape or sexual assault were court marshaled. The perpetrators were confronted only with "non-judicial punishment" or no consequences. Commanders are permitted to make judicial decisions. *Id.* Jackie Speier recognized this in drafting the STOP Act, her observation that commanders are the "judge and jury." Marshall, *supra* note 136.

157. *Cioca*, No. 2011cv00151.

158. *Id.*

first to decide what do to with a victim's report of sexual assault. The class action suit alleges this is where the breakdown occurs; commanders responding to sexual assault reports with an indifferent "this stuff happens" attitude, or failing to respond at all to reports, due to the he said/she said nature of sexual assaults.<sup>159</sup> Commanders also try and convince victims that what happened was "no big deal" and not worth causing conflict in the unit. This "avoiding conflict" approach occurred against class action Plaintiff Andrew Schmidt, who was encouraged to avoid "reporting one of your own," and told reporting this sexual abuse would ruin his career because "bad things happen to those who rock the boat."<sup>160</sup> Or the story of Heath Phillips, who was sexually assaulted multiple times during his first year enlisted in the Navy.<sup>161</sup> When Phillips reported the assaults he was called a "liar" and "told [he] was a mama's boy, this doesn't happen, you just want to go home."<sup>162</sup> This treatment forced him to go AWOL (absent without leave).<sup>163</sup>

However, even in the case of total failure on the part of the commander, details about the sexual assault are spread around the unit. This demonstrates firsthand the breach of the victim's privacy rights directly linked to the failure of the command unit to react appropriately under the reporting methods. This breach is further evidence that commanders are infringing upon military sexual assault victims' constitutionally protected right to privacy, without the victim first being afforded due process. In the case of the class action Plaintiff, Airman First Class Jessica Nicole Hinves, her rapist's commander dismissed the prosecution, as he is permitted to do under the military system of deference to the commanders.<sup>164</sup> This particular individual within the command unit had no legal training, and had only been on his job for four days.<sup>165</sup> Nevertheless, his order was obeyed and the court martial process was abandoned.<sup>166</sup>

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159. Another common barrier to reporting was mistrust in the reporting, investigative, and legal process, or concerns that "nothing would be done." For example one focus group participant said, "I've heard different stories where it has just been covered up. The victim goes forth and tells, but it doesn't go anywhere." DoD, *supra* note 17, at 30.

160. *Cioca*, No. 2011cv00151. Male victims of sexual assault align themselves with concepts of male strength and sexuality to conclude that "real men" do not get raped, and if they do get raped, they are homosexual. Due to the majority of rapes involving female victims, male victims often do not seek assistance or report. Kimberly A. Lonsway et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 3 THE VOICE 2 (2009), available at [http://www.ndaa.org/pdf/the\\_voice\\_vol\\_3\\_no\\_1\\_2009.pdf](http://www.ndaa.org/pdf/the_voice_vol_3_no_1_2009.pdf).

161. Marshall, *supra* note 137.

162. *Id.*

163. *Id.*

164. *Cioca*, No. 2011cv00151.

165. *Id.*

166. *Id.*

Even further, commanders are pressured to keep the number of sexual assault reports for their assigned unit to a minimum. Commander promotions are dependent on the conduct and performance of the military personnel under their supervision. Therefore, commanders naturally have an incentive to see that sexual assault allegations and convictions are few, as this would, in return, reflect on their supervising skills. Although, the victim should be protected from threat, harm, or intimidation from the accused, some commanders have ulterior motives when failing to act upon sexual assault reports. Accordingly, the more the claim is disposed, the better it looks for the commander. When class action plaintiff Stephanie B. Schroeder reported her rape to her immediate commander, he laughed at her, and said, “[d]on’t come bitching to me because you had sex and changed your mind.”<sup>167</sup>

### B. RESTRICTED REPORTING

Restricted reporting is intended to give victims an outlet to receive appropriate medical care, and enable the victim time to trust command to eventually pursue an official investigation.<sup>168</sup> However, as described above, the actions of command units are failing to gain the trust of sexual assault victims. The rationale behind a restricted report is its confidential nature. Victims can *only* report to SARC, a VA, healthcare personnel, or a chaplain.<sup>169</sup> Therefore, if a victim tells anyone else, including friends or family, the confidentiality is breached and he or she

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167. *Id.* There are certain risk factors for sexual assault. First, alcohol, which is associated with impaired decision making, lowered inhibitions, social norm violations, and underestimations of risk for sexual assault. Kelly Cue Davis et al., *Alcohol's Effects on Sexual Decision Making: An Integration of Alcohol Myopia and Individual Differences*, 68 J. STUD. ON ALCOHOL AND DRUGS 843-851 (2007), available at <http://www.kinseyinstitute.org/publications/PDF/Davis%20et%20al%202007%20myopia.pdf>. Further, individuals seeking independence from the military socialization seek out alcohol and sexual gratification after period of deprivation from making personal choices. DoD, *supra* note 17 at 23. Second, difficulties with interpersonal boundaries pose a challenge in the military. Working and living in close proximity with little privacy alters individual's interpersonal boundaries. Third, prior victimization increases the risk for future sexual assault due to his/her slower response time to risky situations. More than half of female military recruits experienced unwanted sexual contact before entering the military. Terri L. Messman-Moore & Amy L. Brown, *Risk Perception, Rape, and Sexual Re-victimization: A Prospective Study of College Women*, 30 PSYCHOL. OF WOMEN Q. 159-72 (2006). Fourth, environmental factors including solitary night duty, poor barracks security and insufficient environmental lighting. Certain safety initiatives have been installed including door locks, lights, security camera and security patrols. Further, increasing strong leadership presence in dorms, barracks, or other living areas, and creating non-alcoholic alternatives for off-duty time. Fifth, false impressions of safety due to the military atmosphere. DoD, *supra* note 17, at 23-24.

168. DoD, Directive 6495.02, *supra* note 16, at 16.

169. *Id.* at 13. Some chaplains feel pressured to reveal the details of sexual assault to commanders. One chaplain commented:

can no longer receive the protection of restricted reporting. With that said, victims are forgoing an official investigation of perpetrators to ensure confidentiality. This means that victims are voluntarily choosing to remain in the same work and living situation with their perpetrators, in exchange for the protection of confidentiality.<sup>170</sup> This also means that perpetrators are free from any criminal investigation and free to assault or rape again.

Once victims complete a restricted report, SARCs will compile the report “without information that could reasonably lead to personal identification of the alleged victim or assailant to the senior commander within twenty-four hours.”<sup>171</sup> However, in reality, senior commanders are ascertaining either the identity of victims and/or perpetrators based off the non-identifying information, or demanding the SARC, VA, medical personnel, or chaplain reveal the identities. Senior commanders are deliberately breaching the confidentiality purpose of the report, because they generally prefer to know all criminal offenses occurring within their units. Although this preference is understandable, it frustrates the purpose of restricted reporting. Moreover, once victim confidentiality is breached, victims are forced to make an unrestricted report, which exposes them to unit harassment. While the right to privacy is constitutionally protected, commanders are nevertheless breaching this right by exposing victims to harsh consequences for reporting.

### C. PRIVACY AND HARASSMENT

Although the details of an unrestricted report should remain on a “need to know” basis, in reality an unrestricted report opens Pandora’s Box to retaliation. This in effect breaches victims’ constitutionally protected right to privacy. Further, the purpose of a restricted report is to ensure victim confidentiality, which allows the individual victim to control the flow of personal information. In other words, the purpose of a restricted reporting is to uphold victims’ privacy rights. Nevertheless, once a report is made through either channel, commanders and fellow

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The medical privilege is well known to commanders but the chaplains’ privilege isn’t as well understood; [we] need to train commanders on this so they don’t pressure chaplains to divulge what they were told.

DoD, *supra* note 17, at 32.

170. Focus groups participants do not believe that the report will remain confidential. Even senior officers and senior enlisted members believed the information would be disclosed somehow. An explanation to this belief is the victim would share the details with someone outside of the restricted reporting sphere, who would then in return share the information with others. A commander is someone outside of the restricted reporting sphere. Further, the possibilities of rumors and immature attitudes of others in the victim’s unit can foster the spread of the details of the assault. *Id.*

171. DoD, Directive 6495.02, *supra* note 16, at 14. This report serves a public safety purpose. *Id.*

service members blame the victim for ruining a “good soldier’s reputation.”<sup>172</sup> Class action Plaintiff Seaman Kori Cioca experienced this firsthand after she reported her rape, when her officer in charge said to “let her burn” because “she ruins careers.”<sup>173</sup>

Further, additional strains on the reporting system occur when the perpetrator out-ranks the victim.<sup>174</sup> Since command units provide immediate assistance to sexual assault victims, if the perpetrator is a part of this unit, a victim is left with virtually no assistance. This was the tragic scenario of class action Plaintiff Seaman Kori Cioca. Cioca’s supervisor began a pattern of harassment, starting with spitting in her face in front of her work colleagues and calling her a “stupid fucking female, who didn’t belong in the military.”<sup>175</sup> In several instances, the supervisor would grab Cioca’s buttocks while walking past her, and order her to “turn you fucking disrespectful non-rate.”<sup>176</sup> The harassment escalated to the point of Cioca reporting to her command and requesting a transfer on two occasions, but command denied her requests.<sup>177</sup> Instead, her command informed the supervisor about her reports.<sup>178</sup> The supervisor subsequently threatened to stab Cioca and her family, and assigned her to extra solitary duty.<sup>179</sup> During this solitary duty the supervisor would blow cigarette smoke in her face and tell her, “[she] would pay for [going to command], [he] was in charge and there wasn’t anything a woman could do about it.”<sup>180</sup> Approximately two months later, Cioca was violently raped by her supervisor, and was eventually discharged on the basis that she “had a history of inappropriate relationships with individuals in the Coast Guard.”<sup>181</sup>

Therefore, it is not a coincidence that when the focus group comprised of female active military personnel were asked, “[w]hat would

172. There is also concern about false reporting. Although false reports are rare, many service members believe that they are a common occurrence. The overestimate is due to several reasons: (1) the victim re-counts the incident differently during the course of the investigation; (2) insufficient evidence; (3) case resulted in an acquittal; (4) the results of the investigation or trial were not published or shared. Further, there is a difference between false reports and unsubstantiated reports. DoD, *supra* note 17, at 33.

173. *Cioca*, No. 2011cv00151.

174. According to the discussion provided under R.C.M 306(b), there are a few factors to be taken into consideration for disposition: nature of the offenses, any mitigating circumstances, character and military service of the accused, recommendations made by subordinate commanders, interest of justice, the of the decision on the accused and the command. Rules for Courts-Martial (R.C.M.) 306(b) (emphasis added).

175. *Cioca*, No. 2011cv00151.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Cioca*, No. 2011cv00151.

keep you from reporting a sexual assault,” they responded “fear of social consequences.”<sup>182</sup> In another poll, out of the individuals who indicated they were exposed to inappropriate sexual conduct, 54% of the respondents indicated they avoided reporting because they were afraid of retaliation from perpetrators or their friends.<sup>183</sup> Victims are inhibited from reporting due to lack of privacy, from both reporting methods, and the subsequent harassment. Examining this inhibition in the larger context of privacy as a fundamental right demonstrates the failure of the reporting methods for military sexual assault. Military sexual assault victims are not reporting, as demonstrated by the astoundingly low sexual assault report percentage, because of the value of privacy. As stated earlier by one active service member, “[i]f you want something to get out, all you have to do is say it’s a secret.”<sup>184</sup> As determined by the Supreme Court, the fundamental right to privacy is deeply rooted in the Constitution’s basic rights; the fact that military sexual assault victims are voluntarily choosing not to report demonstrates this basic right. Accordingly, the privacy issues surrounding the reporting methods for military sexual assault pose an issue that needs to be further addressed.

Ultimately, there is an explanation for this inherent disregard for the privacy of the victims: commanders do not support either reporting method due to the embedded hyper masculine, misogynistic culture of the military.<sup>185</sup> This inherent disregard for victim privacy has gradually fostered a status quo of victim harassment and commander disregard. This status quo will remain, unless the power of the command unit, and its discretion surrounding sexual assault reports, is abolished.

#### D. THE CONSTITUTION AND PRIVACY

The value of privacy for military sexual assault victims has outshadowed their desire to report the assault. Further, even assuming victims do report, their privacy is breached when commanders or other personnel report the assault to unauthorized individuals. Essentially, when analyzing privacy concerns surrounding reporting methods of sexual assault in the military, the issue is two-tiered: victims’ value of privacy outweighing the decision to report, and/or when the assault is reported, the subsequent privacy breach by the command unit. Accordingly, to understand the multifaceted right to privacy, one needs to turn to the Constitution.

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182. DoD, *supra* note 17, at 30.

183. *Id.* at 26.

184. *Id.* at 32 and n. 80.

185. Ann M. Vallandingham, *Department of Defense’s Sexual Assault Policy: Recommendations for Comprehensive and Uniform Policy*, 54 NAVAL L. REV. 205, 206 (2007).

The Constitution as a whole protects an individual's fundamental right to privacy. Although, this protection is not expressly stated within the text of the Constitution, explained within *Roe v. Wade*, different Constitutional Amendments protect this fundamental right.<sup>186</sup> Determining which Constitutional Amendment protects an individual's right to privacy is dependent upon how that particular individual conceptualizes the right to privacy. The conceptualization of the right to privacy and the subsequent determination of its Constitutional counterpart apply to laypeople, as well as, Supreme Court Justices. Certain Justices have used the framework of the First Amendment, Fourth Amendment, and Fifth Amendment, to plant the roots of the fundamental right to privacy.<sup>187</sup> However, the right to privacy has been upheld as a personal "liberty" embodied in the Fourteenth Amendment.<sup>188</sup> Justices have protected an individual's right to "personal, marital, familial, and sexual privacy," through the Bill of Rights or its penumbras.<sup>189</sup> Even further, Justices have used the Ninth Amendment's reservation of rights to the people to necessitate the protection of individuals' right to privacy.<sup>190</sup>

Due to the complexity and individual understanding of privacy, it is a challenge determining the appropriate constitutional framework to analyze the two tiered privacy issues plaguing military sexual assault victims. First, each individual values his or her personal privacy differently. An individual's value of privacy is an intimate determination and may change throughout his or her lifetime. Accordingly, a victim's decision to refrain from reporting resulting from their concept of privacy, and confidence in their command unit is, in essence, a part his or her personal liberty. Second, using personal liberty in the context of due process, when a victim reports a military sexual assault based on the guarantee of privacy, or the very least discretion on legitimate individuals who have the need to know, and that privacy is breached by his or her command unit, it is a violation of the victim's due process rights.<sup>191</sup> The fun-

186. *Roe v. Wade*, 410 U.S. 113, 147-64 (1973).

187. *See*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968), *Katz v. United States*, 389 U.S. 347, 350 (1967), *Boyd v. United States*, 116 U.S. 616 (1886).

188. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

189. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

190. *Id.* at 486 (Goldberg, J., concurring).

191. *Poe v. Ullman*, 367 U.S. 497, (1961).

The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests

damental right to privacy is just another concept that embodies a protected personal liberty. Whether it is the decision to terminate a pregnancy, as in *Roe*, or the decision to confidentially report a sexual assault, both decisions are protected by the right to privacy, and in return make up the indefinable concept of personal liberty.<sup>192</sup>

#### E. REPERCUSSIONS

There are mental, physical and economic repercussions resulting from the two-tiered privacy issues military sexual assault victims' face. Whether victims chose not to report the assault to protect their privacy, or report the assault, and their privacy is subsequently breached, the DoD is failing to adequately address repercussions stemming from the assault itself.<sup>193</sup> The DoD includes in the definition of Military Sexual Trauma ("MST"), rape, sexual assault, and sexual harassment.<sup>194</sup> Even by modest standards, MST can be considered an epidemic.<sup>195</sup> Although the underreporting of MST is rampant, estimates of the prevalence of MST are alarming: one in six civilian women experience sexual assault; however, for military women this figure escalates to one in three.<sup>196</sup> Due

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require particularly careful scrutiny of the state needs asserted to justify their abridgment.

*Id.* at 543 (Harlan, J., dissenting from dismissal on jurisdictional grounds).

192. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.

*Id.* at 850-51.

193. In general, mental health services are available to victims. However, like the reporting methods appear to be adequate on paper and not in reality, this applies to the mental health services. Victims are reluctant from seeking mental health treatment from military provided mental health services, because mental health records can be subpoenaed. In deployed situations, victims may receive counseling via teleconference, however, the teleconference number seems to be defective or unresponsive in many cases. DoD, *supra* note 17, at 33.

194. SERVICE WOMEN'S ACTION NETWORK, *supra* note 134.

195. *Id.*

196. *Id.* The dynamics of rape, sexual assault and sexual harassment that occur in the military are different than civilian life. MST triggers intense feelings of by intense feelings of betrayal in survivors because it upsets the deep belief systems geared toward loyalty to fellow service members and respect for chain of command. Victim betrayal in regards to the respect for the chain of command is due to command's failure to act appropriately and to protect the privacy of the victim. This is especially true because in most cases, it is command who breaches victim privacy, and this breach begins peer harassment. Ultimately,

to the high number of diagnosed MST, compared to the actual number of sexual assaults reported, it appears that more sexual assault victims are choosing to not report based on concerns for their privacy. This simple comparison provides hard evidence that the privacy safeguards established in the reporting methods are failing in reality.

Examining this in a larger context, victims are not receiving the appropriate aftercare, which affects survivors' economic stability.<sup>197</sup> Stress, depression, and other mental health issues accompany MST. These side effects increase the likelihood that survivors will experience high rates of substance abuse, and will have difficulty sustaining work after discharge from the military.<sup>198</sup> However, these veterans who suffer from health conditions resulting from MST face vast hurdles when applying for disability compensation from the Department of Veterans Affairs.<sup>199</sup> To receive disability compensation, the disability must be service connected.<sup>200</sup> Therefore, a veteran must point to a service-connected MST trigger. If a veteran did not report the military sexual assault, he or she is at a severe disadvantage in proving the origin of his or her trauma, despite the diagnosis of MST by Department of Veterans Affairs' health professionals.<sup>201</sup> Ultimately, few victims report military sexual assault to protect their privacy, but nevertheless experience MST. These victims, however, are unable to receive appropriate benefits to re-

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this privacy breach results in MST, where the adverse mental and physical effects are long-term and survivors are required immediate, adequate treatment for full recovery. *Id.*

197. Brittany L. Stalsburg, *Rape, Sexual Assault and Sexual Harassment in the Military: The Quick Facts*, SERVICE WOMEN'S ACTION NETWORK (April 2011), available at <http://servicewomen.org/wp-content/uploads/2011/09/R-SASH-Quick-Facts-081811.pdf>.

198. *Id.* Even further, MST and its consequences of inadequate treatment are often risk factor for homelessness among women veterans. Currently there are over 13,000 homeless women veterans in the United States due to the increased rate for women veterans to be homeless than civilian women. Gail Gamache et al., *Research and Practice: Overrepresentation of Women Veterans Among Homeless Women*, 93 AM. J. PUB. HEALTH 1132-136 (2003), available at <http://ajph.aphapublications.org/cgi/content/abstract/93/7/1132>. Further, only 60% of the Department of Veterans Affairs homeless shelters are available to women veterans. *Homeless Women Veterans: The Facts*, SERVICE WOMEN'S ACTION NETWORK (2009), <http://servicewomen.org/wp-content/uploads/2011/09/HWVfactsheet.pdf>.

199. Stalsburg, *supra* note 198.

200. 38 U.S.C. § 1110 (2011).

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

*Id.*

201. Stalsburg, *supra* note 198.

lieve the associated side effects. Accordingly, the repercussions of the privacy issues surrounding the reporting methods affect victims' years after the sexual assault due to the unavailability of appropriate Department of Veterans Affairs' benefits.

#### F. POLICY

The hyper-masculine culture of the military provides an obstacle for effective sexual assault reporting methods. Although it takes time for a culture to change, especially one that is deeply rooted, the DoD needs to reduce the power and discretion of the commanding unit when it comes to reports of sexual assaults.<sup>202</sup> However, this problem is not an easy one to solve due to the military's tradition of utilizing the chain of command. Nevertheless, commanders' authority over the sexual assault reporting methods needs to be reduced to begin to solve the said privacy issues and to reestablish confidence back into the command unit.

In 2006 the National Defense Authorization Act ("NDAA") revised the Uniform Code of Military Justice ("UCMJ") rape law.<sup>203</sup> The new statute, in many ways, took a step forward in the military's struggle against sexual assault. An examination of the legislative intent shows that the authors crafted the new statute in the belief that "[r]ape is an act of violence, anger, and power, distinguished by its coercive and sometimes brutal nature. The essence of rape is the force or coercion used by

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202. Focus group participants stated that they wanted their command unit to do more that talk about zero tolerance, and wanted to take action against their perpetrators in a just and fair way. Service members are concern that sexual assault policies for its punishment are inconsistent because perpetrators receive different treatment dependent on rank, branch of service, or his/her relationship with the commander. Further, one service member stated:

Similar to the community approach to drunk driving, it would be effective to identify those who have been guilty of sexual assault including (especially) officers. This would be a way of clearly documenting that sexual assault would not be tolerated, that there are consequences, and that no one can escape the consequences.

DoD, *supra* note 17, at 38.

203. Major Troy C. Wallace, *Command Authority: What Are The Limits on Regulating The Private Conduct of America's Warriors*, 2010 ARMY L. 13, 21 (2010). In 2006 the military rape statute was revised in Uniform Code of Military Justice. 10 U.S.C. § 920 includes a revision to the definition of rape, as well as, thirteen other offenses. Specifically, the new offense of aggravated sexual contact makes it criminal to engage in sexual contact by use of force. 10 U.S.C. § 920 (2006). Prior to this revision, the alleged misconduct would have been charged as indecent assault under 10 U.S.C. § 934. Further, an affirmative defense of consent was created, which must be proved by the defense by a preponderance of evidence. *Id.* In 2010, a Petition for a writ of certiorari was filed asking the Supreme Court to determine if this affirmative defense violated due process by shifting the burden of disproving an element of the government's case. *Neal v. United States*, 09-5004 (May 24, 2010). The writ was subsequently denied, but this was the first case to question the constitutionality of the amended changes.

the defendant, not the lack of consent of the victim.”<sup>204</sup> This was the first step by the military to address the rampant issue of sexual assault in the military.

Currently, the Defense STRONG Act is proposed legislation to remedy the apparent flaws with the reporting methods.<sup>205</sup> This legislation seeks to establish within the DoD a Director of the Sexual Assault Prevention and Response Office to serve as the single point of authority, accountability, and oversight for DoD policy regarding prevention of and response to sexual assault.<sup>206</sup> This would provide oversight to ensure that the sexual assault programs of the military departments comply with DoD’s policy.<sup>207</sup> The STRONG Act would further require the assignment within each military department of at least one full-time Sexual Assault Response Coordinator and one full-time Sexual Assault Victim Advocate, allowing the Secretary of the military department concerned to assign additional coordinators and/or advocates based on the demographics or needs of the unit.<sup>208</sup> It would direct the Secretary of Defense to establish a professional training and certification program for such coordinators and advocates, and requires performance evaluations of all coordinators and advocates.<sup>209</sup> Finally, it would provide the inclusion of sexual assault prevention and response-training modules at each level of professional military education.<sup>210</sup>

The Defense STRONG Act seeks to establish a single point of authority for sexual assault reports. The Act would ensure that whoever is the single point of authority would be adequately trained to handle sensitive information and respond appropriately. However, the additional certified individuals do not remedy the victim privacy breaches and subsequent harassment. Accordingly, the Act only goes half way to combat the issues of the sexual assault reporting methods. Therefore, a more drastic approach is necessary to appropriately handle the apparent flaws within the current reporting methods. Since commanders retain broad, and often unchecked, discretion over sexual assault reports, there is no incentive to adequately handle these reports. This is not to say that there

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204. Wallace, *supra* note 203.

205. Defense Sexual Trauma Response Oversight and Good Governance Act, S. 1018, 112th Cong. (2011); *see also* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (codified as amended at 10 U.S.C. § 920 (2006)) (amending UCMJ Article 120 by adding provisions for rape, sexual assault, and other sexual misconduct offenses).

206. Defense Sexual Trauma Response Oversight and Good Governance Act, S. 1018, 112th Cong. (2011) (providing for implementation of additional recommendation of the Defense Task Force on Sexual Assault in the Military).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

are commanders that handle sexual assault reports in a professional and timely manner; however, after evaluating the current state of sexual assaults in the military, the majority of commanders appear to fail to act appropriately when presented with a sexual assault report. This failure, whether caused by a misogynic culture or inadequate training, is the root of the problems surrounding the military sexual assault reporting methods.

Although the recent Sexual Assault Training Oversight and Prevention (STOP Act) has several noteworthy provisions, the Act itself does not take into consideration the funding involved for a successful application.<sup>211</sup> The Act recognizes, and takes into consideration, that commanders have too broad – and often unchecked – authority when handling sexual assault reports.<sup>212</sup> The Act subsequently eliminates commander discretion in handling sexual assault reporting, and places it in an autonomous new office.<sup>213</sup> This office would provide a broad range of assistance to sexual assault victims, including the authority to re-assign the victim away from his/her assailant.<sup>214</sup> Further, the appointed Director of Military Prosecutions would oversee the prosecution of sexually related offenses.<sup>215</sup> However, the cost of establishing this new office, and in effect a new military justice bureaucracy, is not explained, nor offered by Representative Jackie Speier.<sup>216</sup> The Act provides the drastic provisions necessary to see change in military sexual assaults, however, there is a more fiscally sound policy that can be implemented.

### *Proposed Policy*

The current policy needs change to reduce the role and discretion of commanders in the reporting methods for military sexual assault. Using the logic from the proposed STRONG Act, establish within each command unit, a single point of authority through a SARC. Moreover, using the STOP Act's provision of eliminating commanders in the reporting methods, the discretion and jurisdiction for determining sexual assault cases would be assigned to a SARC, instead of creating a new office within the DoD. Under the current policy, SARCs are available on mul-

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211. Currently, the Department of Defense is expected to face a 10% budget cut in part to reduce to the \$1.2 trillion federal deficit, therefore, establishing a new office within this department seems optimistic at best. See Eric Lipton, *Lawmakers Trade Blame as Deficit Talks Crumble*, N.Y. TIMES (Nov. 20, 2011), <http://www.nytimes.com/2011/11/21/us/politics/lawmakers-concede-budget-talks-are-close-to-failure.html?pagewanted=all>.

212. Speier, *supra* note 147.

213. *Id.*

214. *Id.*

215. *Id.*

216. Michael Doyle, *Lawmaker Wants Military Rape Cases Shifted to New Office*, McCLATCHY (Nov. 17, 2011), <http://www.mcclatchydc.com/2011/11/17/130634/lawmaker-wants-military-rape-cases.html>.

titude of United States military bases. However, under this proposed policy, a SARC would be deployed in a certain territory, and be the single point of authority for sexual assault for several units within that geographic territory. Since communications with SARCs are confidential, a sexual assault victim can report either unrestricted or restricted, without fear of a breach of privacy. If the victim provides a restricted report, the SARC would still provide a non-identifiable report to the commander, regarding the attack.

Therefore, if an active military service member was sexually assaulted, he or she would report to the SARC, instead of his or her assigned commander.<sup>217</sup> If the sexual assault victim did report to the commander, the commander would have a direct order to report this to the assigned SARC, and not to act upon this report. From there, the well-trained SARC would weigh the claim and determine the appropriate action. If the SARC felt the claim was meritorious, he or she would then assign the claim to VA, who would, like under the current policy, follow the claim through the adjudication. If the SARC finds the claim to meritorious, and the victim wishes to pursue adjudication, only then would the commander be made aware of the identity of the victim and perpetrator and the details of the report. If at any point the victim receives any adverse treatment following a report, by means of harassment or violence, the SARC can document the commander's failure to reasonably oversee his/her unit. This documentation would be placed within the commander's personnel file for promotional review.

If the claim was unmeritorious, or the victim chose not to pursue court action, the victim could receive the appropriate aftercare, and the SARC would draft a sealed report and place it within the victim's personnel file. If at any time in the future, the victim's claim develops, the SARC may unseal the report and review the details, and the victim will have another opportunity to determine whether to go forward with court intervention. Due to the sealed nature of these reports, commanders would virtually be unaware that such report exists within the victim's personnel file. Only SARCs would be able to view the existence of such report and have the ability to unseal. Furthermore, if the victim later develops MST, the Department of Veterans Affairs in determining a service-connection, can contact the assigned SARC to the victim's personnel file.<sup>218</sup> The SARC will have the ability to conclusively state if there was

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217. Based off the size of the unit, more than one SARC may be assigned. A SARC and Victim Advocate would be assigned to each individual unit, whether deployed or stationed within the United States border.

218. Allowing victim harassment, or if the commander him/herself is harassing the victim, the commander would be charged with conduct unbecoming of an officer:

Conduct violate of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the of-

an assault to render a qualified service connection.

This policy essentially strips commanders of their discretion in sexual assault reports, and places it in the hands of an objective, well-trained SARC. Although this is a drastic move, commanders' discretion would only be undercut in regards to matters that fall under the sexual assault, rape, and sexual misconduct code.<sup>219</sup> Moreover, this drastic maneuver is only to counter a flawed system with serious consequences. Ultimately, the discretion and role of the commander in the reporting methods for military sexual assault fails to uphold the privacy rights of victims. This policy would re-establish the confidence back into reporting military sexual assault. Once confidence is restored, victims will feel more at ease when reporting due to the additional privacy safeguards, and will finally receive appropriate care.

Finally, using the proposal in the STOP Act, upon a perpetrator's sexual assault conviction, this information would be provided to the National Sex Offender Registry. Providing this information to the National Registry provides protection to civilians as well as veterans, from potentially dangerous individuals. Moreover, if this database was implemented, perpetrators may re-asses whether to commit a sexual assault, for fear of returning to civilian life as a registered sex offender.

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ficer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising. This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121. Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman.

United States v. Lofton, 69 M.J. 386, 388 (C.A.A.F. 2011).

219. United States v. Schweitzer, 68 M.J. 133 (C.A.A.F. 2009).

An officer's conduct need not violate other provisions of the UCMJ or even be otherwise criminal to violate Article 133, UCMJ. The gravamen of the offense is that the officer's conduct disgraces him personally or brings dishonor to the military profession such as to affect his fitness to command the obedience of his subordinates so as to successfully complete the military mission. Clearly, then, the appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising as hereinbefore spelled out — this notwithstanding whether or not the act otherwise amounts to a crime.

*Id.* at 137.

*Successful Application*

First, the SARC training program already exists, unlike the proposal in the STOP Act. Therefore, only additional participants would be hired, instead of initiating a training program or establishing a new DoD office. Potential SARCs would be either members of the armed forces or civilian employees. The SARC training program would train individuals in prevention techniques, to the reporting methods, commander protocol, victim harassment, MST, and the adjudication process for sexual assault claims. Ultimately, it is the SARC who has the knowledge to weigh sexual assault reports and determine the appropriate action.

Second, a SARC is objective. The role and discretion of the commander is the flaw in the current sexual assault reporting methods. If commander discretion were eliminated, then sexual assault claims would be properly handled. Further, allowing the SARC to document any reports of harassment and include said reports in commanders' personnel file provides incentive to act and respond appropriately. The commander would then be ultimately forced to pay closer attention to the victim harassment of his or her unit. Further, this would hinder commanders from disclosing details of the sexual assault to individuals who are outside of the "need to know" basis. In return, this would in return reduce the potential for harassment, and provide for consistent persecution of alleged perpetrators.

Third, the communications between a SARC and a sexual assault victim are already confidential.<sup>220</sup> This is in contrast to the position of a commander who does not enjoy privileged conversations with a sexual assault victim. Due this assured confidentiality, a victim can report to a SARC, as the point of authority, and be assured an accurate and appropriate response.

*Potential Backlash*

There is potential for negative treatment to this proposed plan due to substantially abolishing a commander's authority in sexual assault cases. This directly violates commanders' inherent authority. For example, according to *Army Command Policy*, the most basic command responsibilities, all of which require the commander to exercise his inherent command authority, include maintaining good order and discipline in the unit, providing for the well-being of service members and preventing service members from being victimized by sexual harassment and sexual assault.<sup>221</sup> Moreover, this policy takes away other military regulations that provide commanders with the authority to accomplish

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220. DoD, *supra* note 17, at B-1.

221. Wallace, *supra* note 203, at 21.

various administrative functions, including the administration of military justice, the issuance and filing of reprimands, and separation from service.<sup>222</sup> Therefore, claim resolution falls under the broad grant of authority to commanders to adjudicate “all activities reasonably necessary to . . . safeguard or promote the morale, discipline, and usefulness of members.”<sup>223</sup> Accordingly, this proposed policy goes against the chain of command, which is established and firmly rooted in military tradition. However, as noted by the STOP Act, drastic alterations to the reporting methods are needed to balance the emotional nature of sexual assault, with the rigid nature of the military.

Another negative to this proposed policy is the cost of funding. The military would need to hire and support additional SARCs. Further, the military would need to enhance the training program to accurately place SARCs with the appropriate information needed to weigh sexual assault reports. Although the program is already established, the number and frequency of training programs would need to be proportionate to the increased number of SARCs. Moreover, additional VAs would need to be hired to account for their presence through the adjudication process for sexual assault victims. Although their training would remain the same, the number of VAs would need to increase in proportion to the increase of SARCs. However, the cost of funding these individuals would be substantially less than the proposed office in the STOP Act.

## CONCLUSION

Every four hours a sexual assault or rape is reported in the United States Armed Forces.<sup>224</sup> Military sexual assault victims are inhibited from reporting because the methods do not insure their privacy; or victims are reporting and are subject to harassments and/or violence. The decision to abstain from reporting is a victim’s right; however, victims are abstaining due to the failure of their command unit to maintain discretion and privacy. On a larger scale, commanders are breaching a sexual assault victim’s right to privacy, as it relates to their personal liberty, without the protection of due process. Ultimately, the command unit fails to maintain victim privacy, which has spurred the epidemic of Military Sexual Trauma.

Commanders have the duty to protect service members after a sexual assault from threat, harm, or intimidation from the accused or people acting in concert with or under the control of the accused.<sup>225</sup> However,

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222. *Id.*

223. *Id.* at 15.

224. MILITARY RAPE CRISIS CENTER, <http://www.stopmilitaryrape.org/news/> (last visited Dec. 22, 2011).

225. DoD, *supra* note 30, at 13.

victims are reporting to their commanders as a means to combat a wrong, but instead are subjected to harassment due their commander's disregard for their privacy. Under the current policy structure, if a victim reports to a commander, the commander in return has the discretion to go forward with the claim. This has led to commander inconsistencies from sexual assault reports to adjudication. Accordingly, the current reporting methods do not transfer from paper to practice, and therefore these methods needs to be altered.

Commanders need to be stripped of their discretion and held accountable for their indiscretions. This can be accomplished by appointing a SARC as the sole point of authority for sexual assault reports. If a SARC is the sole contact, an objective person can weigh a victim's claim and direct the commander on how to act appropriately. Further, placing the SARC with the ability to document the malfeasance of the commander will provide an incentive for commanders to circumvent acting improperly to harassment claims. If the policy is implemented, and commanders are held accountable, the privacy rights of military sexual assault victims can be maintained, and survivors can be rightfully treated with dignity instead of disrespect.