

TIL IT HAPPENS TO YOU: PROVIDING VICTIMS OF SEXUAL ASSAULT WITH THEIR OWN LEGAL REPRESENTATION

ERIN J. HEURING

Erin J. Heuring, *Til it Happens to You: Providing Victims of Sexual Assault with their Own Legal Representation*, 53 IDAHO L. REV. 689 (2017).

This article © Copyright 2017 Idaho Law Review Except as otherwise expressly provided, permission is hereby granted to photocopy materials from this publication for classroom use, provided that: (1) Copies are distributed at or below cost; (2) The author of the article and the *Idaho Law Review* are properly identified; (3) Proper notice of the copyright is affixed to each copy; and (4) Notice of the use is given to the *Idaho Law Review*.

TIL IT HAPPENS TO YOU¹: PROVIDING VICTIMS OF SEXUAL ASSAULT WITH THEIR OWN LEGAL REPRESENTATION

ERIN J. HEURING*

*I know that you are tired of hearing rape poems.
I am tired of hearing rape poems,
the same way soldiers are tired of hearing their own guns
go off,
believe me,
we all wish the war was over, but friend,
you are staring out at a world on fire
complaining about how ugly you think the ashes are,
The poems are not the problem.²*

TABLE OF CONTENTS

I. INTRODUCTION	690
II. HISTORICAL LOOK AT THE MILITARY AND CIVILIAN JUDICIAL SYSTEMS	694
A. History of the Military Justice System	694
B. History of the Civilian Court System	696
C. History of Sexual Assault in the Military	699

1. LADY GAGA, TIL IT HAPPENS TO YOU (Interscope Records 2015).

* University of Idaho College of Law, J.D., 2017. The author would like to thank her two closest friends in law school, Thomas Cruz and Scott Ugelstad, for their friendship and support during these three years. Also, a thank you to Senator Kirsten Gillibrand for the inspiration for the article topic.

2. BRENNA TWOHY, *To the Guy in the Back of the Room Complaining About Listening to Another Rape Poem*, in FORGIVE ME MY SALT 55, 55–56 (2016).

D. History of Sexual Assault Victims in Civilian Court Systems	708
1. In the United States	708
2. Sexual Assault in Idaho.....	711
III. THE MODERN TREND: NATIONAL ATTENTION ON SEXUAL ASSAULT.....	712
A. The Recent Reforms to Military Sexual Assault Laws	712
B. The Civilian System’s Reaction to the Sexual Assault Problem.....	725
IV. RECOMMENDATIONS FOR A CIVILIAN SPECIAL VICTIMS’ COUNSEL PROGRAM.....	728
A. A Nationally Funded – State Run Program	731
B. A State Funded and Non-profit Run Program in Idaho	734
1. Other Programs to Compare to SVC Program	734
2. A Hybrid Approach to Creating a SVC Program	736
V. CONCLUSION	737

I. INTRODUCTION

When I was growing up, no one talked to me about rape except to tell me how to avoid it. I learned how not to dress, where not to go, and what not to do to avoid giving someone the wrong impression. I learned that it was my job to set the boundaries and stay within them. I learned that there was a line that shouldn’t be crossed and that it was my responsibility to make sure I didn’t cross it. But what if someone crossed that line but I didn’t choose it? What if when I told him I did not like him like that, he kissed me anyway? What if I told him no and pushed his hands away but he continued until I finally got tired and gave up? What if I did not

remember anything at all, left in the morning, and avoided him in public from then on?

No one ever taught me what sexual assault meant.³ No one ever taught me what I should do if someone sexually assaulted me. Later, in college, I learned about consent and that I should report sexual assaults. But I also learned what happened when someone came forward and reported.

In late January 2016, a woman reported a sexual assault to the police.⁴ According to her report, at about 2:45 a.m. on Sunday, January 31, while she was walking, a man grabbed her from behind, threw her to the ground and sexually assaulted her.⁵ The woman returned home and the following morning she went to the hospital, where the police met her and she provided a description of her attacker.⁶ Three weeks later the woman retracted her story and, while the police's investigation didn't support her story, they said it appeared some sort of assault did happen and an active sexual assault investigation continues.⁷ Whether or not an assault actually occurred is important⁸, but the reason why this woman recanted may not be as simple as that the assault did not happen.

3. "Victims may not realize that any form of sexual behavior that is not consented to and that causes discomfort, fear or intimidation is considered sexual assault in most jurisdictions. That includes indecent exposure, unwanted physical contact and lascivious acts, as well as oral and anal sex and vaginal rape, whether a body part or an instrument." Jane E. Brody, *The Twice-Victimized of Sexual Assault*, N.Y. TIMES (Dec. 12, 2011), http://www.nytimes.com/2011/12/13/health/the-twice-victimized-of-sexual-assault.html?_r=0 [hereinafter *The Twice-Victimized*].

4. *Boise Police Release Sketch of Suspect Wanted in Sexual Assault*, IDAHO STATESMAN (Feb. 9, 2016), <http://www.idahostatesman.com/news/local/community/boise/article59435802.html>.

5. *Id.*

6. *Id.*

7. *Boise Police Are Still Investigating Sexual Assault*, IDAHO STATESMAN (Feb. 24, 2016), <http://www.idahostatesman.com/news/local/crime/article62341197.html>.

8. False reporting rates are somewhere between 2-10% of reports but the definition of a false report can be misleading. Rates of false reporting are "frequently inflated because of inconsistent definitions and protocols, or a weak understanding of sexual assault. Misconceptions about false reporting rates have direct, negative consequences and can contribute to why

Nearly every woman can tell you about an experience with either sexual harassment or assault. Whether it is someone they know or a stranger, a relative or someone they have never seen before, women across the world experience all different levels of sexual violence. In the United States, in 2010, the Department of Justice reported that 188,280 people were victims of sexual assault but fewer than 40 percent of those assaults were reported to police.⁹ Due to “underreporting and poor prosecution: 15 of 16 rapists will never spend a day in jail.”¹⁰ Why is it that, most of the time, victims of sexual assault do not report these incidents to the police or pursue legal recourse?

There are numerous reasons why victims do not come forward when they are attacked.¹¹ Some of these reasons can be linked to the institutions which purport to protect victims but in many ways re-victimize those who seek them out for recourse.¹² Victims are often re-victimized by police, medical providers, and the legal system in the course of seeking justice.¹³ This was a problem that the military justice system faced to an extreme degree¹⁴, which Congress sought and still seeks to remedy through restructuring the military justice system and rewriting the Uniform Military Code of Justice.¹⁵ A critical and early piece of this reform was the estab-

many victims don't report sexual assaults.” *False Reporting*, NSVRC.ORG, http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf (last visited Nov. 2, 2016).

9. Brody, *supra* note 3.

10. *Id.*

11. See MARYLAND COALITION AGAINST SEXUAL ASSAULT, *Reporting Sexual Assault: Why Survivors Often Don't*, <https://www.umd.edu/ocrsm/files/Why-Is-Sexual-Assault-Under-Reported.pdf> (last visited Jan. 17, 2017).

12. See generally Brody, *supra* note 3.

13. See generally *id.*

14. See generally Steven Friess, *The Military Has a Rape Problem—and It's Not Just Women Who Suffer*, TAKE PART (Feb. 12, 2014), <http://www.takepart.com/feature/2014/02/12/military-rape-not-just-women>.

15. *Id.*

lishment of a separate legal counsel for the victim of a sexual assault crime.¹⁶ The separate legal counsel for victims is called the Special Victims' Counsel and provides an attorney to represent any victim of sexual assault, giving the victim a voice in the investigation and court case, as well as legal advice on the next steps.¹⁷ This SVC program is the most progressive example of a victim legal advocacy program that exists in the United States today.¹⁸

This article will recommend that a Special Victims' Counsel program be implemented in the civil judicial system which emulates the successful features of the military SVC's created in 2013. To fully explain this proposition, Part II will begin with an overview of the history of the military justice system as well as a comparison to the history of the civilian justice system in the United States. A history of how the military has treated sexual assault in the past will highlight different issues which were particular to the military system. After, there will be a discussion of the experience of sexual assault victims in the civilian court system historically. Part III will move to the present day and describe how the changes made to the military justice system have affected sexual assault reporting and prosecution in the military. Next, a discussion of the Special Victims' Counsel program will follow, which the military

16. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 672, 684 (2013).

17. *Id.*

18. Daniel Blackwell, *Taking a Progressive Stand Against Sexual Assault*, AIR COMBAT COMMAND (May 2, 2014), <http://www.acc.af.mil/News/ArticleDisplay/tabid/5725/Article/661281/taking-a-progressive-stand-against-sexual-assault.aspx>.

Quote from SVC on representing victims: After a lengthy investigation process and trial, [my client's husband] approached me. He told me how much having me there meant to his wife; that she felt she had a voice in the system and the court listened to her; that she had someone to call with questions; that someone was in her corner. He thanked me, then took a step back and saluted me, not because customs and courtesies required it, but as a sign of gratitude. It was an incredibly moving moment and it was then that I realized this program isn't about outcomes, it is about people. Victims' rights are not about ensuring a conviction; they are about promoting respect, dignity and meaningful participation in the justice system.

Id.

implemented in 2014, as a part of sexual assault reform in the Fiscal Year (FY) 2014 National Defense Authorization Act. This will contrast with the problems that the current civilian system still faces in its treatment of sexual assault victims. Part IV proposes the solution, which is the implementation of a Special Victims' Counsel in the civilian judicial system which emulates the SVC program the military established in 2013. This part will offer alternative solutions with advantages and disadvantages and will address any challenges that program may face and suggest remedies for those problems. Part V concludes with the resolution of the story set forth in the introduction, explaining how this story may have ended differently with the provision of help from a Special Victims' Counsel. The problem of sexual assault is multi-faceted and there is no one, perfect solution. But just because a problem is complex does not mean it should be ignored. The problem of sexual assault is and continues to be a topic of national discussion and prominent in the public eye. A change must be made and that change should be the provision of Special Victims' Counsel to represent victims of sexual assault.

II. HISTORICAL LOOK AT THE MILITARY AND CIVILIAN JUDICIAL SYSTEMS

A. History of the Military Justice System

Military law is founded in the Uniform Code of Military Justice (UCMJ),¹⁹ which Congress established through its power “to make [r]ules for the [g]overnment and [r]egulation of the land and naval forces”.²⁰ The UCMJ went into effect on May 31, 1951.²¹ In addition to the UCMJ, the military justice system follows the Manual for Court Martial (MCM) and the Military Rules of Evidence (MRE), which mirror the Federal Rules of Criminal Procedure and Federal Rules of Evidence.²² Often, in the past, the UCMJ, MCM,

19. Uniform Code of Military Justice, 10 U.S.C.A. §§ 801-946 (2015).

20. U.S. CONST. art. I, § 8, cl. 14.

21. *Truman Signs Code of Service Justice; Bill Provides a Civilian Court of Military Appeals and Safeguards Defendants*, N.Y. TIMES (May 7, 1950), <http://query.nytimes.com/gst/abstract.html?res=9C03E7DC133FE23BBC4F53DFB366838B649EDE>.

22. MANUAL FOR COURTS-MARTIAL UNITED STATES (2012), https://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf; MILITARY RULES OF EVIDENCE

and MRE adapted to the changes that the civilian courts were making.²³ But sometimes, as in this case, the military justice system makes progressive changes before the civilian system. Just as the court systems in the United States can learn from the court systems of other countries, the civilian and military court systems can learn from each other and take what works well for the other and adapt it to their own system.

Unlike the courts in the civilian system, which have jurisdiction over certain people who live in certain areas, the UCMJ has jurisdiction over all members of the United States Air Force, Army, Coast Guard, Navy, and Marine Corps, regardless of physical location.²⁴ This includes members of the military reserves who are subject to the UCMJ while on active duty or while on inactive duty but participating in a drill period.²⁵ Similarly, members of the National Guard are subject to the UCMJ only when they are activated by an executive order or during training.²⁶

The most current version of the UCMJ was updated in 2012 and is located in Title 10, Subtitle A, Part II, Chapter 47 of the United States Code.²⁷ Articles 77 through 134 of the UCMJ are called the “punitive articles” that, if violated, can result in a summary, special, or general court-martial.²⁸ The articles of the UCMJ are enforced through the MCM which specifies the procedures for

(2015), <http://www.hqmc.marines.mil/Portals/135/Docs/JAM/JSC/New%20MREs%20-%20Updated%20June%202015.pdf>.

23. See Patrick D. Pflaum, *The Continuous Evolution of Military Sexual Assault Law*, LAW TRENDS & NEWS, (A.B.A.: General Practice, Solo & Small Firm Division, Chi., Il.) 2011, https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/2011_winter/military_sexual_assault_law.html.

24. UNIFORM CODE OF MILITARY JUSTICE, <http://www.ucmj.us/about-the-ucmj> (last visited Jan. 18, 2017).

25. *Id.*

26. *Id.*

27. UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801-946 (2012).

28. *Id.* at §§ 877-934 (2012).

pre-trial, trial, and post-trial actions.²⁹ In contrast to the civilian judicial system, where police and prosecutors decide whether or not to charge someone with a crime, in the military, the commander decides whether to charge the military member.³⁰ Then, after an investigation, the commander decides whether there is enough evidence to send the member to a court-martial.³¹ Military lawyers assist the commander and provide advice, but the final decision remains with the commander.³² This difference between the military and civilian judicial systems creates an additional problem for promoting sexual assault reporting in the military, which will not be the main focus of this article.³³

B. History of the Civilian Court System

The United States' court system began developing in 1789 and was established through the U.S. Constitution.³⁴ The Constitution provided judicial power to the Supreme Court and gave the Supreme Court authority to delegate to a system of federal trial courts.³⁵ Additionally, the United States allowed the state court system to remain and work in parallel with the federal court system.³⁶ Article III of the Constitution provided loose guidelines for the creation of a Supreme Court but allowed the legislative branch

29. MANUAL FOR COURTS-MARTIAL UNITED STATES (2012), https://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf.

30. U.S. DEPT OF ARMY, FIELD MANUAL 8-10-5, THE COMMANDER'S ROLE IN THE MILITARY JUSTICE SYSTEM B-1 (June 10, 1991).

31. *Id.*

32. *Id.*

33. Many advocates point out that having a commander decide whether or not there is an investigation or a court martial dissuades military victims of sexual assault from reporting because their attackers may be favored by the commander or even be the commander themselves. These advocates promote a reform to the military judicial system that would take these decisions out of the chain of command and allow an independent decision to be made. *Comprehensive Resource Center for the Military Justice Improvement Act*, GILLIBRAND.SENATE.GOV (last visited Jan. 18, 2017), <http://www.gillibrand.senate.gov/mjia>.

34. FED. JUDICIAL CTR., *History of the Federal Judiciary*, (last visited Jan. 18, 2017), http://www.fjc.gov/history/home.nsf/page/talking_ej_tp.html; U.S. CONST. art. III.

35. *Id.*

36. *Id.*

to make specific decisions on how to expand the judicial system beyond that.³⁷ The Constitution “also granted the Congress the option to establish ‘such inferior courts’ as it saw fit, thus leaving unresolved the delegates’ debate on the need for lower federal courts that would assume jurisdiction otherwise exercised by state courts”.³⁸ The United States’ court system exercises judicial power over “all cases arising under the Constitution, the laws of the nation, and treaties”.³⁹ Congress enacted three types of federal courts

37. *Id.*

38. *Id.*

39. *Id.*

with the Judiciary Act of 1789:⁴⁰ the Supreme Court,⁴¹ circuit courts,⁴² and state courts.⁴³

40. FED. JUDICIAL CTR., *supra* note 34.

41.

The Supreme Court, with a chief justice and five associate justices, would meet twice a year in the nation's capital and hear appeals from lower federal courts and from the state supreme courts. The Supreme Court would also exercise the limited original jurisdiction defined by the Constitution. In each state and in Kentucky and Maine (then parts of other states), a district court with a single judge would have exclusive jurisdiction to hear cases involving admiralty and maritime law and conduct trials of minor federal crimes. The district courts shared with the state courts jurisdiction over small suits brought by the United States.

Id.

42.

The most important federal cases would be initiated in the third type of court, called circuit courts, which would convene in the same judicial districts in which the district courts met. The circuit courts had no judges of their own, but were served by two Supreme Court justices and the local district judge. (Congress soon revised the law to require only one justice on each circuit court.) Congress grouped the judicial districts into regional circuits for the purpose of assigning justices to serve on the circuit courts within that region. The circuit courts would hear some appeals from the district courts, but they were primarily trial courts. The circuit courts had exclusive jurisdiction over serious federal crimes and shared with the state courts jurisdiction over suits involving disputes above a certain monetary value, suits involving the U.S. government, and suits between citizens of different states.

Id.

43.

Congress protected distinctive state legal traditions by drawing the judicial districts to coincide with state boundaries and by providing for the use of the respective state's rules for most district and circuit court proceedings and for the selection of federal juries. Perhaps most important for protection of regional legal cultures, the assignment of "circuit riding" duties for Supreme Court justices ensured that the judges on the nation's highest court would learn about local legal procedures and would interact with citizens at the point where cases entered the federal judicial system. The Judiciary Act also promoted a local orientation of the lower courts by requiring district judges to live in the district where they served. In response to widespread concerns that defendants in federal trials would be forced to appear in distant courts, the Judiciary Act required civil trials to

C. History of Sexual Assault in the Military

A discussion of the history of sexual assault in the military must begin with a discussion of the role of women in the military. Though both men and women are victims of sexual assault in the military,⁴⁴ women “in the military are now more likely to be raped by fellow soldiers than they are to be killed in combat.”⁴⁵ Women have been serving in the U.S. military in various roles since the Revolutionary War,⁴⁶ but it hasn’t been until recently that they have been fully integrated and allowed to serve in any role, including combat roles.⁴⁷ Sexual assault has been a known and prevalent problem in the military for over twenty-five years⁴⁸ but the Depart-

be held in the district in which a defendant was served with a writ and trials involving the death penalty to be held in the county where the crime occurred.

Id.

44. In 2013, the Pentagon reported that it was “estimated that 26,000 service members experienced “unwanted sexual contact,” which includes rape, attempted rape and unwanted sexual touching. Of these, an estimated 12,100 were women — and 13,900 were men.” Sarah Childress, *Why the Military Has a Sexual Assault Problem*, FRONTLINE (May 10, 2013), <http://www.pbs.org/wgbh/frontline/article/why-the-military-has-a-rape-problem/>.

45. Jesse Ellison, *Judge Dismisses ‘Epidemic of Rape’ in Military Case*, THE DAILY BEAST (Dec. 13, 2011, 4:30 PM), <http://www.thedailybeast.com/articles/2011/12/13/judge-dismisses-epidemic-of-rape-in-military-case.html>.

46. *Time Line: Women in the U.S. Military*, THE COLONIAL WILLIAMSBURG FOUND. (2008), http://www.history.org/history/teaching/enewsletter/volume7/images/nov/women_military_timeline.pdf.

47. Andrew Tilghman, *All combat jobs open to women in the military*, MILITARY TIMES (Dec. 3, 2015), <http://www.militarytimes.com/story/military/pentagon/2015/12/03/carter-telling-military-open-all-combat-jobs-women/76720656/>.

48. Lindsay Rosenthal & Lawrence Korb, *Twice Betrayed: Brining Justice to the U.S. Military’s Sexual Assault Problem*, CTR. FOR AM. PROGRESS (Nov. 2013), <https://www.americanprogress.org/wp-content/uploads/2013/11/MilitarySexualAssaultsReport.pdf>.

ment of Defense (DoD) did not keep actual numbers of the incidents and reporting rates until fairly recently.⁴⁹ Before 2004, “neither the Department of Defense (DoD) nor any of the service branches routinely compiled statistics o[n] sexual assault.”⁵⁰ In 2004, Congress was concerned with the lack of data on sexual assault in the military and passed legislation to require annual sexual assault reports by the Secretary of Defense to be publicly submitted.⁵¹ Based on this law, the DoD redefined⁵² the definition of sexual assault as, “[I]ntentional sexual contact, characterized by the use of force, threats, intimidation, 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

49. Jack Nevin & Joshua R. Lorenz, *Neither a Model of Clarity Nor a Model Statute: An Analysis of the History, Challenges, and Suggested Changes to the “New” Article 120*, 67 A.F. L. REV. 269, 273 (2011).

50. *Id.*

51. *Id.*

52. Prior to the creation of the Sexual Assault Prevention and Response Program that was established by the Department of Defense after the National Defense Authorization Act mandated an overhaul of the military’s handling of sexual assaults, there was no cohesive definition of sexual assault. The NDAA FY 2005 mandated,

(1) Not later than January 1, 2005, the Secretary of Defense shall develop a comprehensive policy for the Department of Defense on the prevention of and response to sexual assaults involving members of the Armed Forces.

(2) The policy shall be based on the recommendations of the Department of Defense Task Force on Care for Victims of Sexual Assaults and on such other matters as the Secretary considers appropriate.

(3) Before developing the comprehensive policy required by paragraph (1), the Secretary of Defense shall develop a definition of sexual assault. The definition so developed shall be used in the comprehensive policy under paragraph (1) and otherwise within the Department of Defense and Coast Guard in matters involving members of the Armed Forces. The definition shall be uniform for all the Armed Forces and shall be developed in consultation with the Secretaries of the military departments and the Secretary of Homeland Security with respect to the Coast Guard.

Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004).

contact that is aggravated, abusive, or wrongful (to include unwanted and inappropriate sexual contact), or attempts to commit these acts.”⁵³

Ever since the legislation passed that required annual reports on the number of sexual assaults in the military, the number reported has steadily climbed.⁵⁴ “For example, in . . . 2009, the [Department of Defense] reported 3,230 incidents of sexual assault involving military members, representing an 11 percent increase from 2008 and a 20 percent increase from 2007.”⁵⁵ But, this increase in sexual assault reports does not necessarily signify an increase in sexual assaults in the military. Rather, it could show that mandatory annual reports encourage reporting because it increases trust in the reporting system.⁵⁶ This increased reporting should be viewed as a positive sign because more reports could result in more investigations and possible convictions of rapists. More often than not, when a victim reports a sexually assault, it was probably not the first time that the accused had sexually assaulted someone.⁵⁷ For instance, “in one study, published in 1987 in the *Journal of Interpersonal Violence*, 126 admitted rapists had committed 907 rapes involving 882 different victims.”⁵⁸

It is in the best interests of the military and society as a whole to attempt to eliminate rapists from the ranks because of the negative effects sexual assault has on military members and units.⁵⁹ But, in hindrance of this goal, sexual assault victims’ reluctance to

53. U.S. DEP’T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 17 (Jan. 23, 2012).

54. Nevin, *supra* note 49, at 274.

55. *Id.*

56. See generally CONGRESSWOMAN JACKIE SPEIER PRESS RELEASES, <https://speier.house.gov/media-center/press-releases>. (She has multiple press releases regarding sexual assault that can be found through the sites internal search engine).

57. See Brody, *supra* note 3.

58. *Id.*

59. See generally DEP’T OF THE AIR FORCE, *Air Force, Training Video Facilitator’s Guide: 2011 Campaign, Hurts One. Affects All.* (2011), http://www.sapr.mil/public/docs/training/Air_Force_Training_Video_Guide.pdf.

report their assaults continues to be a problem today.⁶⁰ In the military, victims of sexual assault have two options for reporting.⁶¹ The first option is “Complete, Unrestricted Reporting,” which is favored by the DoD.⁶² Unrestricted Reporting allows a victim of sexual assault to access medical treatment and counseling and request an official investigation of the allegation using existing reporting channels.⁶³ When a sexual assault is reported through Unrestricted Reporting, a Sexual Assault Response Coordinator (SARC) will be notified and will assign a Sexual Assault Prevention and Response Victim Advocate to the victim.⁶⁴ The victim will receive medical care and an examination, if desired.⁶⁵

The alternative form of reporting is Restricted Reporting which “allows sexual assault victims to confidentially disclose [his/her] sexual assault to specified individuals and receive medical treatment... counseling, and assignment of [a victim advocate], without triggering an official investigation.”⁶⁶ The victim’s Restricted Report will not be reported to law enforcement or to the victim’s command, to initiate the official investigative process, unless the victim consents.⁶⁷ Restricted Reporting removes the barrier that keeps some victims from coming forward and accessing services such as medical care and counseling.⁶⁸ Some victims may not want command or law enforcement involvement due to fear of

60. See *Reporting Sexual Assault: Why Survivors Often Don't*, MARYLAND COALITION AGAINST SEXUAL ASSAULT, <http://www.umd.edu/ocrsm/files/Why-Is-Sexual-Assault-Under-Reported.pdf> (last visited Nov. 2, 2016).

61. U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 17 (Jan. 23, 2012).

62. *Id.* at 4.

63. *Id.* at 3.

64. *Id.* at 17.

65. *Id.* at 3.

66. *Id.* at 4.

67. U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 17 (Jan. 23, 2012).

68. *Id.* at 5.

retaliation.⁶⁹ The reasons for someone in the military to refrain from reporting a sexual assault may be more extreme due to the potential loss of a job and discharge from military service, which has happened to many victims of sexual assault.⁷⁰ Civilian sexual assault victims may also face a threat of career and financial repercussions, but a fear that both types of victims may share is a fear of the judicial system.⁷¹

Though rape and sexual assault in the military were commonly known, it was not until a scandal at Lackland Air Force Base in 2012 that caused major public attention to be drawn to this issue.⁷² Lackland AFB is the first stop for newly enlisted Airmen to begin training.⁷³ There, enlistees undergo boot camp and experience the military way of life for the first time.⁷⁴ An aspect of military life that sometimes can differ from civilian life is the control

69. See generally Steven Friess, *The Military Has a Rape Problem—and It's Not Just Women Who Suffer*, TAKE PART, (Feb. 12, 2014), <http://www.takepart.com/feature/2014/02/12/military-rape-not-just-women>.

70. *Id.*; see also Sarah Childress, *How the Military Retaliates Against Sexual Assault Victims*, FRONTLINE (May 18, 2015), http://lens.blogs.nytimes.com/2014/12/17/surviving-rape-in-the-military/?_r=0; Jessica Hives, a young airman, experienced retaliation from her fellow peers after rumors of her sexual assault got out. The hostility she experienced from other airmen was so intense, a ranking officer told her that her safety on base could not be guaranteed. Hives was honorably discharged after being diagnosed with post-traumatic stress disorder stemming from her assault. The Air Force attempted to then diagnose her with a personality disorder and decrease her disability rating to 30 percent. Hives was able to maintain her 70 percent disability rating with the help of a civilian attorney. But, Hives still lost out on a career in the military while her attacker was never prosecuted. Cindy Huang, *Former Air Force Servicewoman Feels Betrayed by Military After Sexual Assault*, PBS NEWSHOUR, (May 23, 2013), <http://www.pbs.org/newshour/rundown/former-air-force-servicewoman-feels-disposed-of-betrayed/>.

71. See *The Twice-Victimized*, *supra* note 3/

72. Alexandra Lohman, *Silence of the Lambs: Giving Voice to the Problem of Rape and Sexual Assault in the United States Armed Forces*, 10 NW. J. L. & SOC. POL'Y 230, 232–33 (2015).

73. *Id.* at 233.

74. *Id.*

a superior can exert over a subordinate, especially a new and vulnerable enlistee.⁷⁵ In this case, fifty-nine enlistees accused thirty-two instructors of crimes ranging from seeking unprofessional relationships to sexual assault.⁷⁶ These incidents at Lackland AFB began in 2009 but were not reported until 2012.⁷⁷ One of the cases which proceeded to court martial was against Staff Sgt. Luis Walker, who was charged with the most serious crimes including rape, aggravated sexual contact, and aggravated sexual assault.⁷⁸ Walker was eventually convicted on “28 counts, including adultery, violating regulations and committing sexual crimes against female trainees”⁷⁹

The scandal at Lackland AFB was not the first of these types of scandals that the military had seen.⁸⁰

In 1996, dozens of women at the Aberdeen Proving Ground in Maryland accused male supervisors of rape, sexual assault and other offenses. A few years earlier, more than 80 women were assaulted during several days of drunken revelry at the Tailhook Association convention in Las Vegas, a case that led to the resignation of the Navy secretary and two admirals.⁸¹

75. *Id.* at 233–34.

76. Richard Lardner, *Lackland Air Force Base Scandal: Hearing Probes Sexual Misconduct At Training Headquarters*, HUFFINGTON POST (Jan. 23, 2013, 1:18 PM), http://www.huffingtonpost.com/2013/01/23/lackland-air-force-base_n_2535035.html. [http://web.archive.org/web/20160317090407/http://www.huffingtonpost.com/2013/01/23/lackland-air-force-base_n_2535035.html].

77. *Id.*

78. Molly Hennessy-Fiske, *Court-martial begins for Air Force trainer in sex-assault scandal*, L. A. TIMES (July 16, 2012), <http://articles.latimes.com/2012/jul/16/nation/la-na-nn-lackland-court-martial-20120716>.

79. James Dao, *Instructor for Air Force Is Convicted in Sexual Assaults*, N.Y. TIMES (July 20, 2012), <http://www.nytimes.com/2012/07/21/us/lackland-air-force-base-instructor-guilty-of-sex-assaults.html>.

80. *Id.*

81. *Id.*

These incidents are indicative of the problem of sexual assault in the military yet are not representative of the norm in the military and in the civilian world, where the actual norm is that sexual assaults are often not reported. In 2003, the Pentagon's inspector general conducted a survey which found that 12% of Air Force Academy graduates had been victims of rape or attempted rape while attending the academy.⁸² "The vast majority said they did not report the episodes to the authorities out of fear of being punished."⁸³

In 2012, the Sexual Assault Prevention and Response Office (SAPRO) released a report "estimat[ing] 26,000 cases of unwanted sexual contact and sexual assaults occurred in FY2012" and "50% of female service members indicated that they did not report their alleged assault in the belief that no one would help them and nothing would be gained from it."⁸⁴ Other reasons for not reporting have been fear of being perceived as causing trouble and fear of retaliation.⁸⁵

Congress made efforts to handle the problem of sexual assault within military ranks through various means in the past.⁸⁶ One of those ways was amending Article 120, the UCMJ sexual assault statute, numerous times.⁸⁷ Prior to 1992, marital rape was not included in the definition of rape in Article 120.⁸⁸ In 2006, the 2006 Defense Authorization Act was signed into law by President

82. *Id.*

83. *Id.* For example, "the woman said she did not report the episode out of fear that Sergeant Walker would 'recycle' her in punishment, meaning force her to redo basic training". *Id.*

84. *See* Lohman, *supra* note 72, at 241.

85. *Id.*

86. *See generally* DEP'T OF DEF., EXEC. OFFICE OF THE PRESIDENT, ANNEX 4: ANALYSIS OF MILITARY JUSTICE REFORM (Oct. 30, 2014), http://sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Annex_4_OGC.pdf [hereinafter ANNEX 4].

87. *Id.* at 5.

88. Jessica L. Cornett, *The U.S. Military Responds to Rape: Will Recent Changes be Enough?*, 29 WOMEN'S RTS. L. REP. 99, 107 (2008).

George W. Bush which amended Article 120.⁸⁹ This revision “[conformed] the Uniform Code of Military Justice and the Manual for Courts-Martial more closely to other Federal laws and regulations that address [sexual assault].”⁹⁰ The need to change the UCMJ, at that point, came about due to national public attention being focused on then-recent military sexual assault scandals and the perceived mishandling of those scandals by the military judicial system.⁹¹ In 2012, Congress reformed Article 120 by “simplif[ying] the theories of criminal liability,” “creat[ing] additional sex offenses” and eliminating the statute of limitations for sexual assault and sexual assault of a child.⁹²

Not all reforms have involved rewriting Article 120. The Defense Authorization Act for FY 2005 established the first requirement for the DoD to answer to Congress about the number of incidents of sexual assault.⁹³ In addition to reporting the number of

89. *Id.*

90. *Id.* at 108.

91. *Id.*

92. ANNEX 4, *supra* note 86, at 2.

(a) Rape. Any person subject to this chapter who commits a sexual act upon another person by—

- (1) using unlawful force against that other person;
- (2) using force causing or likely to cause death or grievous bodily harm to any person;
- (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
- (4) first rendering that other person unconscious; or
- (5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct;

is guilty of rape and shall be punished as a court-martial may direct.

10 U.S.C. § 920 (2016).

93. Lohman, *supra* note 72, at 248.

incidents, the DoD was required to report the action taken⁹⁴ if action was taken, and if not, the reasoning why it was not.⁹⁵ Since

94. Defense Authorization Act, Pub. L. No. 108-375, 118 Stat. 1811 (Oct. 28, 2004), <http://www.dod.gov/dodgc/olc/docs/PL108-375.pdf> [hereinafter Defense Authorization Act].

95. *Id.*

(f) ANNUAL REPORT ON SEXUAL ASSAULTS.—(1) Not later than January 15 of each year, the Secretary of each military department shall submit to the Secretary of Defense a report on the sexual assaults involving members of the Armed Forces under the jurisdiction of that Secretary during the preceding year. In the case of the Secretary of the Navy, separate reports shall be prepared for the Navy and for the Marine Corps. (2) Each report on an Armed Force under paragraph (1) shall contain the following:

(A) The number of sexual assaults against members of the Armed Force, and the number of sexual assaults by members of the Armed Force, that were reported to military officials during the year covered by such report, and the number of the cases so reported that were substantiated.

(B) A synopsis of, and the disciplinary action taken in, each substantiated case.

(C) The policies, procedures, and processes implemented by the Secretary concerned during the year covered by such report in response to incidents of sexual assault involving members of the Armed Force concerned.

(D) A plan for the actions that are to be taken in the year following the year covered by such report on the prevention of and response to sexual assault involving members of the Armed Forces concerned.

(3) Each report under paragraph (1) for any year after 2005 shall include an assessment by the Secretary of the military department submitting the report of the implementation during the preceding fiscal year of the policies and procedures of such department on the prevention of and response to sexual assaults involving members of the Armed Forces in order to determine the effectiveness of such policies and procedures during such fiscal year in providing an appropriate response to such sexual assaults.

(4) The Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives each report submitted to the Secretary under this subsection, together with the comments of the Secretary on the report. The Secretary shall submit each such report not later than March 15 of the year following the year covered by the report.

2005, the first year the numbers of sexual assaults began to be properly documented and reported, the number of sexual assaults reported each year has increased.⁹⁶

In addition to the sections requiring the annual reporting of instances of sexual assaults and the creation of a uniform definition of sexual assault, the 2005 NDAA also required the Secretary of Defense to[R]eview the Uniform Code of Military Justice and the Manual for Courts-Martial with the objective of determining what *changes are required to improve* the ability of the military justice system to address *issues relating to sexual assault* and to conform the Uniform Code of Military Justice and the Manual for Courts-Martial *more closely to other Federal laws and regulations* that address such issues.⁹⁷

This shows that, though the reforms seemed to have an effect on how many victims felt confident coming forward, the problem of under reporting remained and Congress was seeking further suggestions for reform.⁹⁸

D. History of Sexual Assault Victims in Civilian Court Systems

1. In the United States

Reporting sexual assaults is also uncommon on the civilian side.⁹⁹ One main reason is the fear of the criminal justice system.¹⁰⁰ Just as members of the military fear reporting sexual assaults due

(5) For the report under this subsection covering 2004, the applicable date under paragraph (1) is April 1, 2005, and the applicable date under paragraph (4) is May 1, 2005.

Id.

96. Lohman, *supra* note 72, at 248–49.

97. See Nevin, *supra* note 49, at 277 (alteration in original).

98. See Nevin, *supra* note 49, at 277–78.

99. See *Reporting Sexual Assault: Why Survivors Often Don't*, MARYLAND COALITION AGAINST SEXUAL ASSAULT, <http://www.umd.edu/ocrsm/files/Why-Is-Sexual-Assault-Under-Reported.pdf> (last visited Jan. 18, 2017).

100. *Id.*

to distrust that it will bring them any type of justice, civilian victims question whether it will do them any good to report the crime.¹⁰¹ Generally, having a judicial system that discourages victims from coming forward does a disservice to those victims and also the public.¹⁰² Without the reporting of sexual assaults, the perpetrators of sexual assault may never be found and may continue to attack.¹⁰³ Though reporting sexual assaults would benefit society, victims continue to not report and “the most common reason rape victims do not receive . . . legal services is that they do not disclose their sexual assault.”¹⁰⁴ An additional reason why, throughout history, sexual assault victims do not report is the difficulty of feeling that they, themselves, are put on the stand, in addition to the accused.¹⁰⁵ The litigation process, “[a]s demonstrated so graphically in a series of highly publicized rape trials . . . is an extended, emotionally draining experience that, more often than not, re-victimizes the rape survivor and increases her need for an array of legal services.”¹⁰⁶

101. *Id.* Survivors of sexual assault cite “belief that the police would not do anything to help” and “not enough proof” as reasons why they did not report. *Id.*

102. *Id.* Discouraging victims from reporting does a disservice to the public because, “[d]ue partially to low reporting rates, only 9 percent of all rapists get prosecuted. Only 5 percent of cases lead to a felony conviction. Only 3 percent of rapists will spend a day in prison. The other 97 percent walk free.” *Id.*

103. *See id.*

104. Lois H. Kanter, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253, 276 (2005).

105. *Id.* at 268.

Although many changes in the law have occurred in the modern history of rape law reform, the focus remains on the victim and her behavior, and her sexuality is a weapon to be used against her. Defendants routinely seek to override rape shield laws, argue against privileges protecting private records of the victim, and relentlessly attack the reputation, credibility, and motives of the victim -- usually in pursuing their defense of consent. Similar to those adolescent ‘sex delinquents’ of earlier times, today’s sexually active teenager is more vulnerable both to sexual assault itself and to allegations that she was a willing participant.” *Id.*

106. *Id.* at 259–60.

There are many services available to sexual assault victims, including legal services through non-lawyer advocates, social services, provision of housing, health care, and employment, and attorneys focusing on “statewide issues such as training, legislative action, and advice to rape crisis centers,” which may be more appealing to victims than reporting their sexual assaults.¹⁰⁷ But, historically, there has been an “inattention to violence against women” by providers of these civil legal services.¹⁰⁸ There are numerous factors causing this inattention, “that impede civil legal services programs from giving rape victims priority for service.”¹⁰⁹ Included in these factors are, “the realities of rape and its crippling impact on victims, the myth of criminal justice remedies, and the screening out of most rape victims by seemingly neutral eligibility requirements.”¹¹⁰ Because of these factors, legal service lawyers are unaware of the particular needs of victims of sexual assault and as a result, victims do not receive the services they need.¹¹¹

It follows that these services would be easier to deliver and access if reporting sexual assault was easier. But sexual assault, generally, is fundamentally more difficult to report than other crimes due to the “attack on the physical, psychological and sexual integrity of the individual victim.”¹¹² If the victim is assaulted by someone they know, the loss of trust can be even more damaging and cause more difficulty in reporting.¹¹³ In addition to the trauma of being sexually assaulted, many victims tend to feel shame or guilt and will blame themselves.¹¹⁴ This can be magnified by a reaction from authority figures which is not supportive but rather seems to place some of the blame and responsibility on the victim as well.¹¹⁵ It is because of the foregoing reasons that the reporting

107. *Id.* at 265.

108. *Id.* at 275.

109. Kanter, *supra* note 104, at 276.

110. *Id.*

111. *Id.*

112. *Id.* at 277.

113. *Id.*

114. *Id.*

115. Kanter, *supra* note 104, at 278.

rates of sexual assault have been so low, historically, in the civilian system.¹¹⁶

2. Sexual Assault in Idaho

Idaho has thirteen crimes that are used to prosecute sexual assault in the state.¹¹⁷ Included among these are rape, male rape, sexual abuse of a vulnerable adult, and sexual exploitation of a vulnerable adult.¹¹⁸ The Center for Disease Control and Prevention approximates that, “1 out of 5 women in Idaho have been victims of rape . . . [and] about half of the women and a quarter of the men in Idaho have been victims of sexual violence other than rape.”¹¹⁹ These approximations mirror the national problem with sexual assault. In regard to the way Idaho colleges have handled sexual assault, a former student sued Boise State University over mishandling “her report of ongoing sexual harassment by a fellow student who she said raped her” and two other Idaho colleges were under investigation by the Department of Education for their handling of sexual violence cases.¹²⁰ Between 2011 and 2013, thirty sexual assaults were reported at Idaho’s three largest colleges, but this number does not include sexual assaults which took place in houses or apartments off-campus where many students live.¹²¹ Because the number is restricted to on-campus acts in addition to low reporting rates, the number of sexual assaults at Idaho’s colleges is likely much higher.¹²² One student, who was raped at a party,

116. *Id.* at 277.

117. *Idaho Sexual Assault Laws*, AGE OF CONSENT, <https://www.ageofconsent.net/laws/idaho> (last visited Jan. 18, 2017).

118. IDAHO CODE §§ 18-505B, 6101 (2016).

119. *Sexual Violence Prevention*, IDAHO DEP’T OF HEALTH AND WELFARE, <http://healthandwelfare.idaho.gov/Health/SexualViolencePrevention/tabid/200/Default.aspx> (last visited Jan. 18, 2017).

120. Katy Moeller, *How Often is Sexual Assault Reported on Idaho College Campuses? Many Crimes Go Unreported*, MAGICVALLEY.COM (August 16, 2015), http://magicvalley.com/news/local/crime-and-courts/how-often-is-sexual-assault-reported-on-idaho-college-campuses/article_166921e0-d2ec-53ab-b8dd-5506b44c9a99.html.

121. *Id.*

122. *Id.*

told police that she did not initially want to report because she thought she would get in trouble for underage drinking.¹²³ The same types of fears that have historically kept victims of sexual assault from reporting continue to affect reporting rates in Idaho.¹²⁴

III. THE MODERN TREND: NATIONAL ATTENTION ON SEXUAL ASSAULT

A. The Recent Reforms to Military Sexual Assault Laws

In 2012, Secretary of Defense Leon Panetta tried to make further reforms to the military justice system regarding sexual assault, including suggesting the immediate transfer of female sexual assault victims to new units and the recommendation that “the most senior commanders within the unit should handle reports of rape and sexual assault.”¹²⁵ Despite these efforts, the major issue of non-reported sexual assaults not only remained, but worsened.¹²⁶ According to the DoD’s Sexual Assault Prevention and Response Office report for fiscal year 2012 (FY12), the estimated number of instances of unwanted sexual contact was 26,000.¹²⁷ In contrast, the number of actual reports of sexual assault made in FY12 was 3,374.¹²⁸

In the aftermath of these scandals and attempts at major reform, Congress began to suggest various major reforms to change the way the military handles sexual assault. The National Defense Authorization Act of 2014 transformed the UCMJ in a way that

123. *Id.*

124. *Id.*

125. *See* Lohman, *supra* note 72, at 249.

126. Hayes Brown, *Pentagon: Estimated 26,000 Sexual Assaults In Military Last Year*, THINK PROGRESS, (May 7, 2013) <https://thinkprogress.org/pentagon-estimated-26-000-sexual-assaults-in-military-last-year-af3c0ef85d94#.483yt1ylj>. A possible reason behind the lack of effectiveness of Secretary Panetta’s efforts was his stepping down in 2013 and the different approach taken by his successor Secretary Chuck Hagel. *See* Lohman, *supra* note 72, at 249.

127. DEPT OF DEF., ANNUAL REPORT, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 69 (2014).

128. *Id.* at 64.

“enhance[d] victims’ rights and improve[d] the military justice process.”¹²⁹ The National Defense bill that passed was Senator Claire McCaskill’s Victim Protection Act.¹³⁰ The Victim Protection Act included “26 historic reforms that,” according to Senator McCaskill, “are going to make [the] military the most victim-friendly criminal justice system in the world.”¹³¹ Senator McCaskill, in a Senate hearing debating the pending amendments to the NDAA, explained a defining factor of her bill that set it apart as a revolutionary reform:¹³² “in no other system does a victim get their own lawyer. In no other system will they have the protection, empowerment, and the deference we are creating for them in this bill.”¹³³ Senator McCaskill further explained,

In my years of experience handling [sexual assault] cases—hundreds of them with victims—I would have given anything if that victim had had the confidence of independent legal advice. [. . .] it would have made a tremendous difference in the staggering number of victims who refused to go forward.¹³⁴

129. Major John W. Brooker, *Improving Uniform Code of Military Justice Reform*, 22 MIL. L. REV. 1, 2 (2014).

130. Ramsey Cox & Jeremy Herb, *Senate Approves McCaskill Sexual Assault Bill in 97-0 Vote*, THE HILL (March 10, 2014, 6:25 PM), <http://thehill.com/blogs/floor-action/senate/200393-senate-votes-97-0-for-military-sexual-assault-bill>.

131. 159 CONG. REC. S8303 (daily ed. Nov. 20, 2013).

132. *See id.* (discussing the establishment of the Special Victims’ Counsel); *See infra* Part III.

133. 159 CONG. REC. S8303 (daily ed. Nov. 20, 2013).

134. *Id.*

This is the most personally painful moment of anyone’s life. Make no mistake about it, no matter what we do in this Chamber and no matter what this bill accomplishes, we will never be able to get every victim to come forward because of the nature of this horrific crime, but we have to do better.

Id. (statement of Sen. McCaskill).

Assigning victims legal counsel already had an effect on reporting rates of sexual assault in the military, according to Senator McCaskill.¹³⁵ Later, during the hearing, Senator Kaine addressed the chamber in regards to “one of the problems with sexual assault,” which is that “it is often a very underreported crime.”¹³⁶

If someone breaks into my apartment, I do not hesitate to call the police and say: There has been a break-in. If somebody bashes my car windshield in, I do not hesitate to call in and say: Look, a crime has been committed. But crimes of sexual assault . . . are crimes where there is underreporting, in both civilian and military, and on college campuses. So one of the most important aspects in any reform is to create an environment where people feel they can come forward with a complaint, when they have one.¹³⁷

Senator Kaine voiced specific support for the aspect of the amendment that appoints special victims counsel to victims of sexual assault:

It adds to it, also, something that would be unique in the military. . . . If someone complains of a sexual assault, they will be assigned a special victims' counsel, whose job it is to have their back, to hear the painful story, to share the various reporting mechanisms, counseling resources that are available, how the crime might be prosecuted. At every step along the way, as that victim is becoming a survivor and dealing with the challenge, that special victims' counsel will be there to help them make decisions and give them the backup and support they need.

This is based on a pilot project in the Air Force, a pilot project in the Air Force that is working. What we are finding, based on this pilot project in the Air Force, is even when people file complaints in a restricted, confidential way—they come in and say: I want to file a complaint, but I don't want

135. “They are giving victims their own lawyers. They are ramping up the protection, information, and deference they give victims. That is the single most important factor, based on all of my experience, that will dictate whether a victim has the courage to come out of the shadows...” *Id.*

136. *Id.* at S8306.

137. *Id.* (statement of Sen. Kaine).

to go against the perpetrator because I don't want people to know; I just want help-after they get a special victims' advocate and learn about the proceedings and learn about the protections, and they build up a bond with somebody who has their back, they are very likely to say: You know what, now I have the confidence to actually file my complaint publicly and take on the perpetrator-who needs to be taken on, who needs to be drummed out of the military if they committed a sexual assault.

So I believe the core of getting this right is about giving victims an avenue where they can have the time, they can have the advice, they can have the privacy and discretion to understand what their options are and then make a decision and go forward.

I think if we pass this bill with that special victims' counsel this will be the single best thing we will be able to do to tackle the crime of sexual assault.¹³⁸

Senator McCaskill's bill was introduced in the Senate on January 14, 2014.¹³⁹ On March 10, 2014, the Senate passed the Victims' Protection Act of 2014 with a vote of 97-0.¹⁴⁰

A competing bill of the Victim Protection Act was Senator Kirsten Gillibrand's Military Justice Improvement Act (MJIA).¹⁴¹ The MJIA went even further in reforms than Senator McCaskill's bill because it would have "create[d] a transparent, accountable

138. 159 CONG. REC. S8306 (daily ed. Nov. 20, 2013) (statement of Sen. Kaine) (emphasis added).

139. *S.1917 – Victims Protection Act*, CONGRESS.GOV, www.congress.gov/bill/113th-congress/senate-bill/1917/actions (last visited Jan. 18, 2017).

140. *Id.*

141. *The Key Differences: Gillibrand's Amendment and Levin/McCaskill's Proposal*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/key-differences-between-gillibrands-and-levinmccaskills-proposals/> (last visited Jan. 18, 2017).

system that is outside the chain of command” in “the hope of getting more victims to come forward and report . . .”¹⁴² Though Senator Gillibrand’s bill got over 50 co-sponsors and supporters, many military leaders felt the reforms went too far.¹⁴³ In a letter written

142. 159 CONG. REC. S8301 (daily ed. Nov. 20, 2013). In the Military Justice System, at the time Senator Gillibrand proposed this bill,

[T]he investigative process varies significantly from the civilian system. When a service member accuses a fellow service member of a crime they must report the crime through their chain of command. This means the victim reports to their immediate commander. The commander is then expected to conduct an inquiry. The investigation may also be conducted by other members of the command depending on the rank and severity of the charge. When all the evidence is gathered and the investigation is completed the immediate commander of the victim holds the discretion to dismiss the charges by taking no action, initiating administrative action, imposing non-judicial punishment, preferring charges, forward the case to a higher authority in order to prefer charges, or court martial the accused.

Danielle Christenson, Chain of Command: The Barriers of Reporting Sexual Assault in the Military (May 5, 2013) (unpublished theses) (http://vc.bridgew.edu/cgi/viewcontent.cgi?article=1037&context=honors_proj).

143. Senator Gillibrand’s bill proposes removing the discretion of whether or not to recommend certain cases to court martial from the commander and to “independent, trained, military prosecutors.” *Comprehensive Resource Center for the Military Justice Improvement Act*, Kristen Gillibrand United States Senator for New York, <http://www.gillibrand.senate.gov/mjia/> (last visited Nov. 2, 2016); The bill text reads,

With respect to charges under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), that allege an offense specified in paragraph (2) and not excluded under paragraph (3), the Secretary of Defense shall require the Secretaries of the military departments to provide for the determination under section 830(b) of such chapter (article 30(b) of the Uniform Code of Military Justice) on whether to try such charges by court-martial as provided in paragraph (4).

S. 1752, 113th Cong. § 2(a)(1)(A) (2013). The bill continues and specifies,

[T]he determination whether to try such charges by court-martial shall be made by a commissioned officer of the Armed Forces designated in accordance with regulations prescribed for purposes of this subsection from among commissioned officers of the Armed Forces in grade O-6 or higher who— (i) are available for detail as trial counsel under section 827 of title 10, United States Code (article 27 of the Uniform Code of Military Justice);

(ii) have significant experience in trials by general or special court-martial; and

to Senator Carl Levin, Army General Martin Dempsey said “taking away a commander’s ability to convene a court-martial would ‘radically’ alter a principal tenet of military law dating back more than two centuries and merged more than 60 years ago into a single Uniform Code of Military Justice”.¹⁴⁴ Dempsey also said in his letter that, “While Congress has modified the UCMJ from time to time, it has never removed commanders from the military justice system. The consequences of such a decision would be far-reaching and extraordinarily damaging to the nation’s security”.¹⁴⁵ Because of the concerns of military leaders,¹⁴⁶ many felt that the MJIA was

(iii) are outside the chain of command of the member subject to such charges.

S. 1752, 113th Cong. § 2(a)(4)(A) (2013).

[T]he military is deeply concerned that curbing too sharply a commander’s ability to decide how and when to punish or pardon service members will send a message there is lack of faith in the officer corps, and that in turn will undermine the efficiency and effectiveness of the military in peacetime and war.

Richard Lardner, *Military Seeks to Temper Military Justice Overhaul*, REAL CLEAR DEF. (May 31, 2015), http://www.realcleardefense.com/articles/2015/05/31/military_seeks_to_temper_military_justice_overhaul_107992.html.

144. Lardner, *supra* note 143.

145. *Id.*

146. High-ranking military commanders, among others, did not agree with Senator Gillibrand’s suggestion to remove the decision making power from commanders for these alleged crimes. This is due to the critical aspect commanders play in military justice.

Today, the authority vested in senior commanders to convene courts-martial remains a central tenet of the UCMJ, but Congress has refined procedural requirements for their disposition decisions. For example, in Article 34(a) the UCMJ initially provided that the convening authority may not refer a charge for trial by general court-martial “unless he has found” that the charge alleges an offense under the UCMJ and is warranted by the evidence. In 1983, Congress changed Article 34(a) to state that the convening authority may not refer such a charge “unless he has been advised in writing by the staff judge advocate that” the charge alleges an offense, that the charges are supported by the evidence, and that there is jurisdiction over the accused and the offense.

Report of the Response Systems to Adult Sexual Assault Crimes Panel, DOD ANNUAL REPORT, 125 (June 2014).

too progressive. It did not pass the Senate.¹⁴⁷ Alternatively, Congress passed Senator McCaskill's bill, and its provisions became a part of the FY 2014 National Defense Authorization Act.¹⁴⁸ The major push for this reform came from the American public.¹⁴⁹

The American public had been concerned about the problem of military sexual assault for a long time, but certain incidents and stories catalyzed that concern into action by Congress.¹⁵⁰ Senator Gillibrand spoke about a documentary film, *The Invisible War*, which spotlighted the problem of military sexual assault and gave a voice and face to victims.¹⁵¹ Senator Gillibrand stated,

One of the reasons why *The Invisible War* was so effective: It put a face on the issue. Those were real victims telling their stories. And that's why, as Chairwoman of the Personnel Subcommittee on the Armed Services Committee, my first hearing was on sexual assault and rape in the military, and I had the victims testify first to tell their stories.¹⁵²

The women in film included Kori Cioca, Ariana Klay, and Trina McDonald, all who survived sexual assault while serving in the military.¹⁵³ Senator Gillibrand mentioned some of these women in her floor speech when advocating for her bill, the MJIA.¹⁵⁴

It is because they love the military that they are making their voices heard-standing united behind brave survivors.

147. *Senate Vote 59 – Rejects Blocking Military Commanders From Sex Assault Cases*, PROPUBLICA (March 6, 2014), <http://politics.nytimes.com/congress/votes/113/senate/2/59>.

148. *See* Defense Authorization Act, *supra* note 95.

149. *Id.*

150. *See generally* Robert Draper, *The Military's Rough Justice on Sexual Assault*, THE NEW YORK TIMES MAGAZINE (Nov. 26, 2014), <http://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html>.

151. *Id.*

152. Rebecca Huval, *Sen. Kirsten Gillibrand Credits The Invisible War With Shaping New Bill*, PBS: WOMEN & GIRLS (May 10, 2013), <http://www.pbs.org/independentlens/blog/sen-gillibrand-credits-the-invisible-war-in-shaping-new-bill/>.

153. Kirby Dick, *The Invisible War*, PBS: WOMEN & GIRLS, <http://www.pbs.org/independentlens/films/invisible-war/> (last visited Nov. 2, 2016).

154. 159 CONG. REC. S8300 (daily ed. Nov. 20, 2013).

I will share some of those stories because it is their stories which inform some of this legislation.

. . . Sarah Plummer came to Washington, DC, all the way from Colorado. Yesterday [she] came to courageously tell [her] stor[y] so that [her] brothers and sisters in uniform get a military justice system that is finally worthy of their great service to our Nation. Sarah's story is extremely disturbing. She was raped as a young marine in 2003. She said: I knew the military was notorious for mishandling rape cases, so I didn't dare think anything good would come of reporting the rape. . . .

Trina McDonald, who at 17 enlisted in the Navy, was stationed at a remote base in Alaska. Within 2 months, she was attacked, repeatedly drugged, and raped by superior officers over the course of 9 months. She said: At one point my attackers threw me in the Bering Sea and left me for dead in the hopes that they would silence me forever. They made it very clear that they would kill me if I ever spoke up or reported what they had done. . . .

A1C Jessica Hives, who was raped in 2009 by a coworker who broke into her room at 3:00 in the morning, said: Two days before the court hearing, his commander called me on a conference call at the JAG office, and he said that he didn't believe that <the offender> acted like a gentleman, but there wasn't reason to prosecute. I was speechless. Legal had been telling me this is going to go through court. We had the court date set for several months. And two days before, this commander stopped it. I later found out the commander had no legal education or background, and he had only been in command for four days. Her rapist was given the award for Airman of the Quarter. She was transferred to another base.¹⁵⁵

It was the voices of these victims, people coming forward and telling their stories, that influenced the members of Congress to make a change.

155. *Id.*

The changes made to the UCMJ in the FY2014 NDAA were the most extensive changes made since the 1950's. Major changes involved altering the language of Article 32 from an "investigation" to a "preliminary hearing" and disallowing the convening authority from changing the outcome or findings of a court-martial without an explanation.¹⁵⁶ More relevant, though, are the changes which were meant to make the UCMJ more "victim friendly." For example, Section 1704 ensures that "victims will have the right to have trial counsel or victim counsel present when being interviewed by the defense," and Section 1706 gives victims "the right to submit post-trial matters for consideration by the convening authority."¹⁵⁷ And Section 1716 established the Special Victims' Counsel, which "requires the services to establish victims' counsel (SVC) to provide legal assistance to eligible victims of alleged sex-related offenses."¹⁵⁸

That section provides:

The Secretary concerned shall designate legal counsel (to be known as 'Special Victims' Counsel') for the purpose of providing legal assistance to an individual eligible for military legal assistance under section 1044 of this title who is the victim of an alleged sex-related offense, regardless of whether the report of that offense is restricted or unrestricted.¹⁵⁹

This establishment of legal counsel for victims of sexual assault was unprecedented in the military justice system.¹⁶⁰ The le-

156. Graci Bozarth, *The Price of Pleasure: Sexual Assault and the Evolution of the Uniform Code of Military Justice*, 84 UMCK L. REV. 181, 196-97 (2015).

157. MILITARY JUSTICE BRANCH, H.R. 3304, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014: SUMMARY OF MILITARY JUSTICE AND SAPR PROVISIONS 2 (2014), [http://www.hqmc.marines.mil/Portals/135/JAM/Encl%201%20-%20FY14%20NDAA%20Summary%20-%20MilJus%20and%20SAPR\[1\].pdf](http://www.hqmc.marines.mil/Portals/135/JAM/Encl%201%20-%20FY14%20NDAA%20Summary%20-%20MilJus%20and%20SAPR[1].pdf).

158. *Id.* at 3.

159. National Defense Authorization Act Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 962, 966-67 (codified as amended at 10 U.S.C.A. § 1044e (2015)) [hereinafter NDAA FY2014].

160. See C. Todd Lopez, *Sexual assault victims now entitled to their own lawyer*, U.S. ARMY (Nov. 1, 2013), <http://www.army.mil/article/114268/>.

gal counsel available to victims includes the following: legal consultation regarding potential criminal liability of the victim, the Victim Witness Assistance Program, the potential for civil litigation against other parties, the responsibilities of prosecution and defense attorneys, and the victim's responsibility to testify.¹⁶¹ In

161.

- (1) Legal consultation regarding potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense and the victim's right to seek military defense services.
- (2) Legal consultation regarding the Victim Witness Assistance Program, including— . . .
- (3) Legal consultation regarding the responsibilities and support provided to the victim by the Sexual Assault Response Coordinator, a unit or installation Sexual Assault Victim Advocate, or domestic abuse advocate, to include any privileges that may exist regarding communications between those persons and the victim.
- (4) Legal consultation regarding the potential for civil litigation against other parties (other than the Department of Defense).
- (5) Legal consultation regarding the military justice system, including (but not limited to)—
 - (A) the roles and responsibilities of the trial counsel, the defense counsel, and investigators;
 - (B) any proceedings of the military justice process in which the victim may observe;
 - (C) the Government's authority to compel cooperation and testimony; and
 - (D) the victim's responsibility to testify, and other duties to the court.
- (6) Accompanying the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense.
- (7) Legal consultation regarding eligibility and requirements for services available from appropriate agencies or offices for emotional and mental health counseling and other medical services;
- (8) Legal consultation and assistance—
 - (A) in personal civil legal matters in accordance with section 1044 of this title;

addition, legal counsel may accompany the victim to any legal proceeding, provide counsel in civil legal matters, and provide guidance in acquiring medical and mental health care and military and veteran benefits.¹⁶² Along with that extensive list, Section 1716 gave the victim another important protection: the relationship between a Special Victim's Counsel (SVC) and a victim is a relationship between an attorney and a client, making it subject to attorney-client privileges.¹⁶³

Though the Special Victims Counsel program has been in place only for a few years, the positive impact is already apparent.¹⁶⁴ Since it began in 2013, the SVC program "has trained more than 180 lawyers to help survivors navigate everything from reporting crimes and writing letters to parole boards, to any potential legal proceedings."¹⁶⁵ The SVC has been seen as "a big step forward" by "legal experts in the military" because of the speed in which it was brought about and the improvement in the way survivors navigate the aftermath of an assault.¹⁶⁶ On November 25,

(B) in any proceedings of the military justice process in which a victim can participate as a witness or other party;

(C) in understanding the availability of, and obtaining any protections offered by, civilian and military protecting or restraining orders; and

(D) in understanding the eligibility and requirements for, and obtaining, any available military and veteran benefits, such as transitional compensation benefits found in section 1059 of this title and other State and Federal victims' compensation programs.

NDAA FY2014, *supra* note 159, at 967–68.

162. *Id.* at 967.

163. *Id.* at 968.

164. *See generally* Air Force Special Victims' Counsel Program (Sept. 9, 2013), <https://web.archive.org/web/20150906225826/http://www.afjag.af.mil/shared/media/document/AFD-130129-005.pdf>.

165. Meredith Clark, *New military program to protect victims sees early success*, MSNBC, <http://www.msnbc.com/msnbc/military-sex-assault-svc-program> (last updated Apr. 3, 2014, 12:22 PM).

166. *Id.*

2015, President Obama signed the FY 2016 National Defense Authorization Act (NDAA) into law,¹⁶⁷ which “expanded both the categories of victims entitled to [Special Victims Counsel] services and the types of services that SVC provides . . . ,” explained Col. Walt Hudson, an Army judge advocate chief.¹⁶⁸ First, the NDAA now provides access to SVC to not only active service member victims or their families but also to civilian employees of the DoD.¹⁶⁹ Next, SVC attorneys are now able to “provide legal consultation and assistance [to sexual assault victims] in connection with various government proceedings,” including complaints against the government that are currently under review by an inspector general, equal employment complaints, Freedom of Information request, and Congressional correspondence.¹⁷⁰ Another improvement to the current program is a codification of the current Army practice of “requiring . . . investigators and trial counsel [to] provide victims entitled to SVC notice of that right before questioning them or taking statements from them.”¹⁷¹ Also, the new NDAA “requires the defense secretary to establish baseline training standards for SVCs” and develop ways to assess the performance of SVCs and evaluate the SVC program as a whole, as well as client satisfaction with the program.¹⁷²

Prior to this expansion, the minimum training standards for the SVC program had to include training about sexual assault, aggravated domestic violence, and child abuse cases and related “legal issues and sensitivities.”¹⁷³ Additionally, training included interviewing techniques, an understanding of how trauma affects

167. David Vergun, *New legislation expands sexual assault victim rights*, US ARMY (Dec. 8, 2015), www.army.mil/article/159605.

168. *Id.*

169. H.R. Rep. No. 114-1753, § 533, at 90 (2016), <https://www.congress.gov/114/bills/hr1735/BILLS-114hr1735enr.pdf>.

170. *Id.*

171. Vergun, *supra* note 167.

172. *Id.*

173. Memorandum for Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff under Secretaries of Defense Deputy Chief Management Officer Director, Cost Assessment and Program Evaluation Director, Operational Test and Evaluation General

memory, an understanding of the special rights and needs of sexual assault victims, and a “focus on building advanced litigation, case management, and technical skills.”¹⁷⁴ Currently, to assess the performance and effectiveness of the SVC program, the Military Departments collect statistics regarding the “[percent] of . . . court-martial cases that involve SVC offenses in each fiscal year,” the “[percent] of special victim offense courts-martial tried by, or with direct advice and assistance of, a specially trained prosecutor,” the “compliance with DoD [Victim and Witness Assistance Program] reporting requirements . . . to ensure victims are consulted with and regularly updated by SVC personnel,” the “[percent] of specially trained prosecutors and other legal support personnel having received additional and advanced training in SVC topical areas,” and “victim feedback of effectiveness of SVC prosecution and legal support services and recommendations for possible improvements.”¹⁷⁵

In addition to the changes made to the SVC program, the FY 2016 NDAA also made changes to the way the military handles sexual assault prevention.¹⁷⁶ The NDAA mandates that the military improve “the prevention and response to male victims of sexual assault,” “develop a comprehensive strategy to prevent retaliation against victims and those who intervene to assist the victims,” and also, “ensure that the commander of each senior ROTC unit” as well as military science professors, instructors, and civilian employees, “receive regular sexual assault prevention and response

Counsel of the Department of Defense Inspector General of the Department of Defense Assistant Secretaries of Defense Department of Defense Chief Information Officer Assistants to the Secretary of Defense Director, Administration and Management Director, Net Assessment Directors of the Defense Agencies Directors of the DoD Field Activities 8 (Feb. 12, 2014), www.dtic.mil/whs/directives/corres/pdf/DTM-14-003.pdf [hereinafter Memorandum for Secretaries].

174. *Id.*

175. *Id.* at 8–9.

176. *See Vergun, supra* note 167.

training and education.”¹⁷⁷ The military SVC program is a progressive response to the problem of sexual assault and has no comparatively extensive counterpart in the civilian world.¹⁷⁸

B. The Civilian System’s Reaction to the Sexual Assault Problem

Victims of sexual assault continue to fear¹⁷⁹ the criminal justice system, which leads to a low level of reporting for sex-based crimes.¹⁸⁰ This is a problem that faces not only the United States but also neighboring countries like Canada.¹⁸¹ “The ‘Violence Against Women Survey,’ conducted in . . . Canada in 1993, involved a national sample of more than 12,000 female adults.¹⁸² Although 39% of the respondents reported that they had experiences a sexual assault, only 6% of sexual assaults were actually reported to the police.”¹⁸³ According to a survey by the U.S. Justice Depart-

177. See NDAA FY2014, *supra* note 159.

178. See generally Bozarth, *supra* note 156.

179. Victims may fear not being believed or fear being blamed for the assault. *Reporting of Sexual Violence Incidents*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/topics/crime/rape-sexual-violence/pages/rape-notification.aspx> (last modified Oct. 26, 2010).

180. See *Reporting Sexual Assault: Why Survivors Often Don’t*, MARYLAND COALITION AGAINST SEXUAL ASSAULT, <http://www.umd.edu/ocrsm/files/Why-Is-Sexual-Assault-Under-Reported.pdf> (last visited Jan. 18, 2017).

181. See generally Larry C. Wilson, *Independent Legal Representation For Victims of Sexual Assault: A Model for Delivery of Legal Services*, 23 WINDSOR Y. B. ACCESS JUST. 249 (2005).

182. *Id.* at 250.

183. *Id.*

ment, over the last five years, 68% of sexual assaults were not reported.¹⁸⁴ In the United States, there are an average of 321,500 victims of sexual assault each year.¹⁸⁵ But according to U.S. Department of Justice's National Crime Victimization Survey,¹⁸⁶ the rate of sexual assaults has fallen by 63% in recent years.¹⁸⁷ Despite the fall in the rate of sexual assaults, nearly 1 in 5 women will be raped in their lifetime and 1 in 71 men will be victims of sexual assault.¹⁸⁸ The national eye has been drawn to the problem of sexual assault recently, not only in the military, but also on college campuses.¹⁸⁹

184. RAINN, THE CRIMINAL JUSTICE SYSTEM: STATISTICS, <https://rainn.org/get-information/statistics/reporting-rates> (last visited Jan. 18, 2017).

185. RAINN, VICTIMS OF SEXUAL VIOLENCE: STATISTICS, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited Jan. 18, 2017).

186. *Id.* The NCVS collects data each year from a nationally representative sample of 90,000 households on the frequency, characteristics, and consequences of criminal victimization in the United States. The survey enables the Bureau of Justice Statistics to estimate the likelihood of victimization by rape or sexual assault, robbery, aggravated and simple assault, theft, household burglary, and motor vehicle theft. BUREAU OF JUSTICE STATISTICS, DATA COLLECTION: NATIONAL CRIME VICTIMIZATION SURVEY (NCVS), <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=245> (last visited Jan. 18, 2017).

187. RAINN, VICTIMS OF SEXUAL VIOLENCE: STATISTICS <https://rainn.org/get-information/statistics/frequency-of-sexual-assault> (last visited Jan. 18, 2017).

188. MICHELE C. BLACK ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011). "In calculating the prevalence of rape, The Centers for Disease Control and Prevention (CDC) counts completed forced penetration, attempted forced penetration, or alcohol/drug facilitated completed penetration. Like other researchers, the CDC considers attempted forced penetration to fall within the definition of "rape" because that crime can be just as traumatizing for victims. As the CDC further explains, the most common form of rape victimization experienced by women was completed forced penetration: 12.3% of women in the United States were victims of completed forced penetration; 8% were victims of alcohol/drug-facilitated completed penetration, and 5.2% were victims of attempted forced penetration. These are lifetime estimates and a victim might have experienced multiple forms of these subtypes of rape in her lifetime." THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION, 1, n.1 (2014), https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf.

189. Kelly Wallace, *23% of women report sexual assault in college, study finds*, CNN, Sept. 23, 2015, <http://www.cnn.com/2015/09/22/health/campus-sexual-assault-new-large-survey/>.

In January 2014, the White House released a “Renewed Call to Action” for the problem of rape and sexual assault.¹⁹⁰ President Barack Obama stated:

It is up to all of us to ensure victims of sexual violence are not left to face these trials alone. Too often, survivors suffer in silence, fearing retribution, lack of support, or that the criminal justice system will fail to bring the perpetrator to justice. We must do more to raise awareness about the realities of sexual assault; confront and change insensitive attitudes wherever they persist; enhance training and education in the criminal justice system; and expand access to critical health, legal, and protection services for survivors.¹⁹¹

The Obama Administration has been working aggressively to combat sexual assault in the United States.¹⁹² President Obama signed the third reauthorization of the Violence Against Women Act in 2013, which funds “multidisciplinary sexual assault teams” that include detectives, prosecutors, healthcare providers and victim advocates who work together to successfully prosecute sexual assault offenders.¹⁹³ Additionally, the VAWA funds “specialized training” for prosecutors, “so they can learn how to conduct trauma-informed interviews and investigations” which in turn, should promote justice for victims.¹⁹⁴ Beyond the VAWA, the Obama Administration has acknowledged that the rates of arrests, prosecutions, and convictions, of sexual assault offenders are low and has committed to ensuring that law enforcement officers and

190. See generally THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION (2014), https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf.

191. *Id.* at ii.

192. Tanya Somander, *President Obama Launches the “It’s On Us” Campaign to End Sexual Assault on Campus*, WHITEHOUSE.GOV, Sept. 19, 2014, <https://www.whitehouse.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus>.

193. See WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *supra* note 190 at 3.

194. *Id.*

prosecutors are equipped with the best knowledge and skills to investigate and prosecute sexual assault crimes.¹⁹⁵ But the area still demands further research and funding from the federal and state governments.

IV. RECOMMENDATIONS FOR A CIVILIAN SPECIAL VICTIMS' COUNSEL PROGRAM

The military's Special Victims' Counsel (SVC) program provides a progressive approach to beginning to deal with the rampant problem of sexual assault.¹⁹⁶ The SVC program represents an area of the legal system where the military is ahead of civilian courts in progress and effectiveness, and this approach eclipses any recommendation made thus far in the attempt to curb sexual assaults in the civilian world.¹⁹⁷ Therefore, the United States' federal and state governments should establish a SVC program for victims of sexual assault that imitates the SVC program implemented by FY2014 NDAA in state and federal judicial systems. The "SVC program . . . has been a singular success in aiding victims and restoring confidence in the criminal justice system" because of the unique way that a Special Victims' Counsel works only for the victim, rather than answering ultimately to the command.¹⁹⁸ A SVC differs from a prosecutor because the SVC can give the victim legal advice without considering the government's case.¹⁹⁹ Additionally, a SVC helps

195. *Id.* at 5.

196. See generally Meredith Clark, *New military program to protect victims sees early success*, MSNBC (Apr. 2, 2014), <http://www.msnbc.com/msnbc/military-sex-assault-svc-program>; "It is certainly challenging helping a victim of such a horrendous crime understand and appreciate that they do, in fact have a voice and that they will be heard. We must remember that these survivors often feel as though all control has been taken away from them. It is my job to put that control back in their hands. It is a slow and deliberate process but it is working, and the results are nothing short of remarkable." Lt. Drew Schaffer, SVC, Naval Submarine Base New London. Jag Pao, *U.S. Navy's Victim Legal Counsel* (Apr. 8, 2015), <http://jag.navy.mil/2015/04/08/sailors-provide-legal-services-to-sexual-assault-victims/#sthash.IV3D2s4i.dpuf>.

197. *Id.*

198. Nancy Montgomery, *Air Force program a rare bright spot in military's sex assault fight*, STARS AND STRIPES (Feb. 26, 2014), <http://www.stripes.com/news/air-force-program-a-rare-bright-spot-in-military-s-sex-assault-fight-1.269628>.

199. *Id.*

the victim to know that there is someone on her side.²⁰⁰ “In a survey of 27 victims . . . , 94 percent said they were extremely satisfied with the advice and support their SVC provided”²⁰¹ This satisfaction was despite whatever outcome their cases had.²⁰² A SVC program for civilian victims of sexual assault would give victims confidence to come forward and report and also to pursue justice.

Sexual assault differs from other crimes because of its invasiveness to the victim, how difficult it is to collect concrete evidence, and the social attitudes toward sexual assault.²⁰³ Often times, these reasons create barriers that are hard for a victim to fight through on her own.²⁰⁴ The military SVC program has shown that providing legal counsel to victims results in more confidence and satisfaction with the legal system by victims.²⁰⁵ This confidence can translate to higher reporting rates and ultimately higher conviction rates and a safer military. There is an economic cost to sexual assaults, both in the military and non-military world,²⁰⁶ and that cost should be considered when contemplating the cost of a solution like a civilian SVC program.

200. *Id.*

201. *Id.*

202. “They were satisfied even though more than half the cases didn’t go to court-martial, and were resolved with administrative actions, non-judicial punishment discharges or no action at all.” *Id.*

203. *See Kanter, supra* note 104, at 277–78.

204. *Id.*

205. *See generally* Air Force Special Victims’ Counsel Program (Sept. 9, 2013), <https://web.archive.org/web/20150906225826/http://www.afjag.af.mil/shared/media/document/AFD-130129-005.pdf>; *see also* C. Todd Lopez, Sexual Assault Victims Now Entitled to their Own Lawyer, WWW.ARMY.MIL (Nov. 1, 2013), <http://www.army.mil/article/114268/>.

206. Military Sexual Assault Cost the U.S. \$3.6 Billion Last Year: Study, HUFFINGTON POST (July 16, 2013), http://www.huffingtonpost.com/2013/07/16/military-sexual-assault-cost_n_3606413.html (finding that the monetary cost of sexual assault in the military in 2012 was \$3.6 billion based on medical and mental health services and other “intangible costs”).

The military SVC program is not the first program that suggested or tried providing separate legal counsel for victims.²⁰⁷ In the United States, the Justice For All Act of 2004 provides rights to victims of Federal offenses for access to private counsel.²⁰⁸ This access did not ensure provision of counsel, only the ability to intervene at certain points of the pretrial, trial, and sentencing phases.²⁰⁹ These rights are provided under the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (CRVA).²¹⁰ More reform is needed, under the CRVA, to afford victims the right to "retain and instruct counsel" so that "their voice may be heard alongside the defendant and state."²¹¹

There are challenges with the plan to create a SVC program like the military's in the civilian world. The military has a steady stream of personnel to train to fill new positions such as the SVC attorney and support staff positions created after the passage of FY14 NDAA.²¹² In contrast, the civilian sector would need to attract qualified attorneys to train and fill positions as SVC. Another difference is the ability of the various branches and offices of the military to work together cohesively to achieve a single goal due the top-down obedience to those in command nature. The civilian side is fractured between the three branches of government, federal and state governments, and non-governmental entities, as well. These groups often have different objectives which inhibits them from working together seamlessly. Despite these challenges, a SVC program designed to fit the civilian system would be the best

207. See generally Tyrone Kirchengast, Victim Lawyers, Victim Advocates, and the Adversarial Criminal Trial, 16 NEW CRIM. L. REV. 568 (2013).

208. *Id.* at 577–78.

209. *Id.* at 578.

210. *Id.*

211. "The CVRA does not directly grant victims private counsel, but provides a schedule of rights that give victims the ability to intervene in certain matters, to be provided with information, or to participate in key decision-making processes, across the pretrial, trial, and sentencing phases." *Id.* What the CRVA is missing is a "means by which victims of crime are recognized as important agents of justice." *Id.*

212. See generally National Defense Authorization Act for Fiscal Year 2014, 113 Pub. L. No. 66, § 1716, 127 Stat. 672, 684 (2013).

approach to addressing the prevalence of sexual assault underreporting.

A. A Nationally Funded – State Run Program

Ideally, a SVC program would be nationally run through the federal government. This approach is ideal because it would promote uniformity and would be simpler to ensure that victims of sexual assault in every state have the option to be represented by legal counsel. An example of how this national SVC program could be implemented is the method behind the implementation of the exchanges of the Patient Protection and Affordable Care Act (ACA).²¹³ The ACA mandated that each state either set-up its own health insurance exchange or, it may opt out of running its own exchange, and the federal government would step in to create a federally run exchange.²¹⁴ Additionally, the ACA expanded Medicaid eligibility for participating states.²¹⁵ As an incentive to participate, this Medicaid expansion was 100% funded by the federal government for the first three years and gradually, will lessen to 90% funded by 2020.²¹⁶ This method of mandating states to create their own health insurance exchange and providing an incentive to expand Medicaid coverage would be the best method to emulate for implementing a national SVC program. The Legislature should create guidelines and requirements in a SVC program bill. These guidelines would be based on those set forth in section 1716 of FY14 NDAA.²¹⁷ For example, the SVC program should provide an

213. Patient Protection and Affordable Care Act, 111 Pub. L. No. 148, 124 Stat. 119 (2010).

214. Peter Grier, *Health care reform bill 101: What's a health 'exchange'?*, CSMONITOR (Mar. 20, 2010), <http://www.csmonitor.com/USA/Politics/2010/0320/Health-care-reform-bill-101-What-s-a-health-exchange>.

215. Phil Galewitz, *Consumers Guide to Health Reform*, KAISER HEALTH NEWS (Apr. 13, 2010), <http://khn.org/news/consumers-guide-health-reform-2/>.

216. Tami Luhby, *States forgo billions by opting out of Medicaid expansion*, CNN (July 1, 2013), <http://money.cnn.com/2013/07/01/news/economy/medicaid-expansion-states/index.html>.

217.

-
- (1) Legal consultation regarding potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense and the victim's right to seek military defense services.
 - (2) Legal consultation regarding the Victim Witness Assistance Program, including— . . .
 - (3) Legal consultation regarding the responsibilities and support provided to the victim by the Sexual Assault Response Coordinator, a unit or installation Sexual Assault Victim Advocate, or domestic abuse advocate, to include any privileges that may exist regarding communications between those persons and the victim.
 - (4) Legal consultation regarding the potential for civil litigation against other parties (other than the Department of Defense).
 - (5) Legal consultation regarding the military justice system, including (but not limited to)—
 - (A) the roles and responsibilities of the trial counsel, the defense counsel, and investigators;
 - (B) any proceedings of the military justice process in which the victim may observe;
 - (C) the Government's authority to compel cooperation and testimony; and
 - (D) the victim's responsibility to testify, and other duties to the court.
 - (6) Accompanying the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense.
 - (7) Legal consultation regarding eligibility and requirements for services available from appropriate agencies or offices for emotional and mental health counseling and other medical services;
 - (8) Legal consultation and assistance—
 - (A) in personal civil legal matters in accordance with section 1044 of this title;
 - (B) in any proceedings of the military justice process in which a victim can participate as a witness or other party;
 - (C) in understanding the availability of, and obtaining any protections offered by, civilian and military protecting or restraining orders; and

attorney to every victim who reports a sexual assault to the police. After the assignment, the attorney should provide the victim with legal advice regarding the potential for civil litigation, the civilian justice system process, and the victim's responsibility to testify.²¹⁸ The attorney should also accompany the victim to any proceedings connected to the reporting, investigation, and prosecution of the alleged offense.²¹⁹ Further, the relationship between the attorney and victim will be like that of an attorney and client.²²⁰ All SVC attorneys must be admitted to the bar of the state where they are practicing and must be certified through a SVC training program.²²¹ The training program would cover the elements of: proof for various sexually based crimes, crime scene management, DNA collection requirements, identifying, obtaining, preserving, and transporting forensic evidence, rights of crime victims, support available for victims, and sensitivities associated with victims of child abuse, sexual assault, and domestic violence.²²² This bill would mandate that each state implement a state-run SVC program per these guidelines by a certain deadline, which will ensure uniformity between the state's programs. The federal government should create an office to oversee the SVC program implementation. As the military SVC program continues to evolve, the civilian program should mirror those changes. Ideally, the communication

(D) in understanding the eligibility and requirements for, and obtaining, any available military and veteran benefits, such as transitional compensation benefits found in section 1059 of this title and other State and Federal victims' compensation programs.

10 U.S.C. § 1044e (2014).

218. *See Id.*

219. *Id.*

220. "The relationship between a Special Victims' Counsel and a victim in the provision of legal advice and assistance shall be the relationship between an attorney and client." *Id.* at § (c).

221. *See id.* at § (d).

222. *See* DEP'T OF DEFENSE, ESTABLISHMENT OF SPECIAL VICTIM CAPABILITIES WITHIN THE MILITARY DEPARTMENTS TO RESPOND TO ALLEGATIONS OF CERTAIN SPECIAL VICTIM OFFENSES, REPORT TO THE COMMITTEES ON ARMED SERVICES OF THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2013), http://www.sapr.mil/public/docs/reports/DoD_SpecialVictimsCapabilities_Report_20131213.pdf.

between the two programs will provide for a smoother implementation as well as a confidence in the program, which will translate into more victims of sexual assault represented and eventually, more sexual assaults reported.

B. A State Funded and Non-profit Run Program in Idaho

But, a national level SVC program may be a tough sell. Obtaining funding for the program is one foreseeable challenge. Currently, many court appointed public defenders struggle to manage the number of cases they are assigned.²²³ As it is, the judicial system, could not handle assigning any other clients with legal representation which is funded by the government.²²⁴ Due to the lack of funding for court appointed public defenders, there is likely not a lot of current funding that the government could set aside for a SVC program. This challenge could be overcome by examining the federal or state budget and making certain cuts or tax increases to provide funding for a SVC program.²²⁵ Another challenge with the national level approach is the time it would take for the Legislature to draft, debate, and agree upon a bill. This challenge is lessened because the Legislature may copy the SVC program set out in FY2014 NDAA.²²⁶ But, while waiting for the Legislature to act, and while the national discussion on sexual assault and how to increase reporting rates continues, the state of Idaho should take the next step toward progress.

1. Other Programs to Compare to SVC Program

An initial option is a pro-bono network to provide representation services to victims of sexual assault. SVC cases may require less work than actual defense cases and therefore may not need lawyers to dedicate their entire workweek to them. A SVC is there to guide the victims of sexual assault through the judicial process

223. See generally Bonnie C. Groller, *Cosmetic Repair to a Crumbling Foundation: A Critical Examination of Idaho's Most Recent Indigent Defense Legislation*, 52 IDAHO L. REV. 669 (2016).

224. *Id.*

225. The military SVC program was funded through this method by way of the FY2014 NDAA. If enough national attention is directed toward the civilian SVC bill and the bill has strong advocates in the legislature, this is a viable way of funding the program.

226. NDAA FY2014, Pub. L. No. 113-66, 127 Stat. 672, 1716 (2013).

and give them confidence that the system is working. A SVC can also advise victims on what other steps they may want to take should the case not turn out the way they hope. Merely advising a client and speaking for them does not involve the intensive work of representing a defense client in court and, therefore, the government may not need to supply salaries to and employ lawyers to be SVC, though that would be ideal. A volunteer pool could be set up where lawyers would be trained as SVC and then could volunteer to take cases pro-bono. If this was not creating enough incentive for lawyers to meet the demand for SVC, a small but reasonable compensation could be paid to SVC from the Criminal Justice Act fund.²²⁷

Another possible route to implement a Special Victims' Counsel program for victims of sexual assault in the civilian system would be a non-profit organization. This non-profit organization could imitate other non-profit organizations that were designed to cater to the needs of other vulnerable groups of people in the legal system, like children or domestic violence victims. For example, Legal Services for Children provides representation and legal advice to persons under the age of twenty-one at no cost.²²⁸ LSC employs attorneys, social workers, and support staff to aid clients with guardianship, education, foster care, emancipation, and immigration cases.²²⁹ In contrast, the non-profits that provide legal services to victims of domestic violence usually provide legal advice, but not necessarily legal representation.²³⁰ Sexual assault victims are at an even greater disadvantage to finding free or reduced-cost legal representation than victims of domestic violence.²³¹ The

227. The Criminal Justice Act provides federal funds for attorneys, experts, and services necessary for the adequate representation of indigent defendants. Criminal Justice Act, 18 U.S.C. § 3006A (2016).

228. LEGAL SERVICES FOR CHILDREN, <http://www.lsc-sf.org>. (last visited Jan. 17, 2017).

229. *Id.*

230. Denise Grab, *Accused Batterers Get Free Attorneys. Domestic Violence Victims Don't. That Needs to Change.*, SLATE (July 23, 2015), http://www.slate.com/blogs/xx_factor/2015/07/23/free_legal_representation_for_domestic_violence_victims_level_ground_for.html.

231. *See generally* Kanter, *supra* note 104.

gap in services available to sexual assault victims makes it imperative that the Idaho state government work to fill that gap.

2. A Hybrid Approach to Creating a SVC Program

A combination of state government oversight and non-profit organization management would bring together the public and private to create a SVC program. The Idaho state government should create a grant for a Special Victims' Counsel pilot program. This pilot program would employ and train attorneys to be SVC for victims of sexual assault. Like the Legal Services for Children non-profit, the SVC program would begin by providing services to those who called in or came to a drop-in clinic.²³² Once the SVC program approves an attorney to take on a client,²³³ the attorney may begin accompanying the client to any proceedings regarding the reporting, investigation, and prosecution of the case.²³⁴ The responsibilities of the SVC attorneys will be much like those of the military SVC attorneys.²³⁵ This pilot program will also provide advice about any civil litigation option the victim may have, the rights the victim has regarding testifying, and the judicial process generally.²³⁶ Non-profit organizations and other groups could compete for the grant money to create this pilot program by proposing plans for how to most efficiently establish the program and presenting these plans to a committee formed in the Idaho state legislature. Then, the winning group would use the grant money to create the pilot program and manage it day-to-day. Once the pilot program, where victims seek out services, is efficiently running, a committee should be formed to help expand the program to assign SVC to each victim of sexual assault, regardless of whether they seek out the program. This is important because sexual assault victims may be unaware of this service. Additionally, after the chosen non-profit

232. LEGAL SERVICES FOR CHILDREN, <http://www.lsc-sf.org>. (last visited Jan. 17, 2017).

233. This should be contingent on the sexual assault being reported to police and the police are conducting an investigation. If a victim comes to the clinic before reporting, the staff may provide counsel and information about how to report, but official representation cannot begin before an official report has been made. Additionally, a victim may come to the clinic at any point after reporting, even if the trial has already begun.

234. See NDAA FY2014, Pub. L. No. 113-66, 127 Stat. 672, 1716 (2013).

235. *Id.*

236. *Id.*

begins running the SVC pilot program, the Idaho state legislature should connect with Idaho college and high school campuses to run a state-wide informational awareness campaign.²³⁷ This campaign will spread awareness about the services the SVC program provides and how to access those services. The goal of the SVC pilot program would be to improve victims' confidence in the judicial system and to promote sexual assault reporting, with the hopes of eventually curbing sexual assaults themselves.

V. CONCLUSION

*"Til it happens to you, you don't know how it feels, how it
feels*

*Til it happens to you, you won't know, it won't be real"*²³⁸

The woman who recanted her story may have done so because she simply was not sexually assaulted.²³⁹ But a substantial likelihood exists that she recanted for other reasons. These other reasons could include a fear that she was not, and would not be, believed by police, a concern that she would be blamed, and a lack of confidence that the report would go anywhere at all.²⁴⁰ With the creation of a Special Victims' Counsel program, this woman would have been provided with an attorney shortly after reporting her sexual assault. Perhaps, with the confidence legal representation provides, her fear of continuing with the investigation would have

237. This attempts to address the current problem of sexual assault on college campuses which is a major part of national discourse at the moment. Kelly Wallace, *23% of women report sexual assault in college, study finds*, CNN (Sept. 23, 2015), <http://www.cnn.com/2015/09/22/health/campus-sexual-assault-new-large-survey/>.

238. LADY GAGA, *TIL IT HAPPENS TO YOU* (Interscope Records 2015).

239. "[O]nly about 8 percent of rape reports turn out to be false, which the FBI estimates is no high than any other falsely reported crime." Ruth Brown, *Untested rape kit tracking bill moves forward*, IDAHO PRESS-TRIBUNE (Feb. 25, 2016), http://www.idaho-press.com/members/unttested-rape-kit-tracking-bill-moves-forward/article_c399caa8-4ef0-56b7-bb01-2c8d8e1f509e.html.

240. There is problem of a backlog of rape kits across the country which could lead victims to believe that nothing will come of reporting or continuing with a report. *Id.*

subsided and she would not have recanted.²⁴¹ The fear of reporting is central to the sexual assault crisis that is facing the country. The creation of the military Special Victims' Counsel program was the most progressive step that Congress has recently made to restore victims' confidence in the judicial system and promote reporting of sexual assaults. The next step should be to establish a program to provide Special Victims' Counsel to sexual assault victims in the civilian justice system through either a federal national mandate or a state-run SVC program. Now is the moment to make fundamental changes to the way the judicial system treats victims of sexual assault. The public eye has turned toward survivors of sexual assault²⁴² and the nation has already shown that it is willing to pass legislation and fund a program that provides legal representation to sexual assault victims.²⁴³ This is the next step in sexual assault reform and Idaho should take it.

241. The provision of SVC could also deter false reporting because those inclined to make something up may not want to interact with their own attorney on such a personal level.

242. The national discourse about sexual assault has emphasized that victims no longer need to stay silent and should come forward because there should not be any judgment or condemnation. At the 2016 Oscars, Lady Gaga performed her song *Till It Happens To You* and survivors of sexual assault flooded the stage. Lady Gaga wrote the song for the documentary *The Hunting Ground* which exposes the high rates of sexual assault on college campuses. This national discussion began after the outrage about sexual assault in the military and the subsequent legislation.

243. FY2014 NDAA created and provided funding for the military SVC program.