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## Administrative Compensation for Military Harassment and Sexual Assault: A Win-Win for Victims and the Military

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Gwendolyn Savitz\*

## Administrative Compensation for Military Harassment and Sexual Assault: A Win–Win for Victims and the Military

### ABSTRACT

*Last year, none of the more than 20,000 victims<sup>1</sup> of sexual assault in the military were entitled to any compensation. Nor were the hundreds of thousands of service members subjected to racial and sexual harassment compensated in any way. Advocates have fought for decades to overturn the Feres doctrine to allow victims to sue the government in court. The military has countered that it must retain control over all issues involving discipline. However, the military lacks the information necessary to be able to take effective action against those who harm others because many victims are afraid to come forward for fear of retaliation. This Article offers a way to solve both problems. It proposes creating an administrative process to compensate victims for the harm they endured while simultaneously providing an incentive for them to report the initial crime, as well as any retaliation they experience, thereby finally providing the military with the critical information it needs to act, which it is unable to obtain any other way.*

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1. Many now prefer the term “survivor” to that of “victim” to describe someone who has experienced sexual assault, emphasizing their resilience and continued agency. Others prefer “victim” to emphasize that the person was the target of a criminal act. In this Article, I use the term “victim” to emphasize the extent to which those subject to harassment and assault continue to be victims of the military itself. For many, the treatment by the military after a report of sexual assault or harassment is made is worse than the initial incident, a tragedy this Article hopes to help address. For further references on the issue, see Aviva Orenstein, “My God!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159, 223 n.5 (1997). See also Jayne S. Ressler, *Anonymous Plaintiffs and Sexual Misconduct*, 50 SETON HALL L. REV. 955, 1004 n.18 (2020) (sidestepping the issue by using the term “recipient”).

## TABLE OF CONTENTS

I.	Introduction .....	331
II.	The Problem .....	332
	A. Harassment and Sexual Assault Are Alarming Common in the Military and Woefully Underreported .....	333
	1. Sexual Assault .....	333
	2. Sexual Harassment .....	335
	3. Racial Harassment .....	337
	B. Retaliation Can Be Even Worse .....	339
	1. Professional Retaliation .....	341
	2. Social Retaliation .....	343
	C. The Military Justice System Harms Victims and Fails To Provide the Information the Military Needs .....	345
	1. An Overview of the Military Justice System ...	345
	a. Sexual Assault .....	346
	b. Sexual and Racial Harassment .....	349
	2. The Current Process Harms Individual Victims and Means There Will Be More in the Future ..	350
	3. The Current Military Justice System Harms Military Readiness and National Security .....	352
	D. The Structural Problems with the Current Military System That Have Led to This Result .....	353
	1. The Current System Only Aims To Punish the Wrongdoer .....	353
	2. No Direct Compensation Is Available for Victims .....	355
	a. Service Members Have No Recourse to the Courts for Compensation .....	355
	b. Any Compensation from the Veteran's Administration Is Inadequate and Far Too Late .....	357
	3. The Current System Does Not Incentivize the Military To Change .....	358
	4. The Problem Requires Accurate Information To Solve .....	360
III.	The Solution .....	360
	A. Congress Should Expand the Recently Created Medical Compensations System To Include Harassment, Assault, and Retaliation .....	361
	1. The Current Method of Medical Malpractice Compensation .....	361
	2. How To Expand the Current System To Include Harassment and Sexual Assault Victims .....	362

- a. Claimants Would Be Entitled to Automatic Compensation, Provided They Filed Within a Short Statute of Limitations . . . . . 363
- b. Protecting Claimants Filing in Good Faith from Filing Repercussions . . . . . 364
- c. Independent Judges Should Make Decisions Based on a Preponderance of the Evidence . 366
- d. The Office Must Be Adequately Staffed To Process All Applications Quickly and Accurately . . . . . 366
- B. How This Would Address the Problems . . . . . 367
  - 1. Benefits to Individual Victims . . . . . 368
  - 2. Benefits to the Military as a Whole . . . . . 368
- C. Alleviating Potential Concerns Raised by the Proposal . . . . . 369
  - 1. This Compensation Would Not Interfere with Military Matters . . . . . 370
    - a. Discipline and Chain of Command . . . . . 370
    - b. Training and Tradition . . . . . 371
  - 2. This Plan Would Help Despite the Military’s Poor Use of Existing Information . . . . . 372
  - 3. Compensation Would Not Give Rise to Overwhelming Numbers of False Reports . . . . . 373
- IV. Conclusion . . . . . 374

I. INTRODUCTION

Hundreds of thousands of military service members are harmed each year through racial harassment, sexual harassment, and sexual assault. This harm is further compounded by rampant retaliation against both those who report these crimes and any service members who appear to come to their aid. While the military claims to want to solve these issues, the retaliation members continuously face for reporting violations indicate the military will never learn where some of the biggest problems are. This, in turn, leads to toxic environments like the one documented at Fort Hood Military Base. The nation’s attention turned to Fort Hood after Specialist Vanessa Guillén was murdered by a fellow soldier. Before the murder, Specialist Guillén told her family she had experienced sexual harassment, but she had been too scared to report due to fear of retaliation.<sup>2</sup>

This is an extreme example of the harm far too many service members must face. Just as the military was not officially informed of Spe-

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2. Johnny Diaz et al., *What To Know About the Death of Vanessa Guillen*, N.Y. TIMES (Apr. 30, 2020), <https://www.nytimes.com/article/vanessa-guillen-fort-hood.html> [https://perma.cc/VH2D-LDA7].

cialist Guillén's harassment or the identity of her harasser, the military will never learn the names of those hurting their fellow service members in countless other cases. Without this information, the military cannot possibly take action against perpetrators or prevent future harm.

This Article proposes the first realistic framework to finally give the military access to this critical information, while providing victims modest compensation for the harm they have already endured. Under this proposal, victims who reported events of sexual harassment, racial harassment, and sexual assault deemed likely to be true would be compensated. To qualify for this payment, victims would need to report the crime within a relatively brief window of time, allowing the military to quickly take action against those causing the harm.

Importantly, this proposal would not only compensate the victims of the initial crime but would provide payment for each documented instance of retaliation. Merely encouraging better harassment and assault reporting of the initial crime alone will not solve this problem.

This approach provides multiple benefits. First, it would compensate the victims for two distinct violations, the initial crime as well as the retaliation that followed. Second, it would provide an incentive for victims to report and continue reporting retaliation, enabling the military to take action against sexual harassment, racial harassment, and sexual assault. This is critical, as many individuals like Specialist Guillén are too afraid to report for fear of retaliation, and since very often the person retaliating against the victim is not the same individual who committed the initial crime.

## II. THE PROBLEM

The military faces an acknowledged problem involving sexual assault, sexual harassment, and racial harassment.<sup>3</sup> The military has taken steps to address these issues, including extensive training programs and even the creation of additional departments.<sup>4</sup> The problem persists, however, because the military has yet to fully acknowledge that the current system places tremendous burdens on victims of as-

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3. *E.g.*, *Military Services' Prevention of and Response to Sexual Assault: Hearing Before the Subcomm. on Pers. of the S. Comm. on Armed Servs.*, 116th Cong. 31–35 (2019) (statement of Dr. Elizabeth P. Van Winkle, Exec. Dir., Off. of Force Resiliency, Off. of the Under Sec'y of Def. (Pers. & Readiness)):

I am extremely concerned . . . about many of the trends and data we are seeing in regards to sexual misconduct within the military at large. However, I sit before you committed and dedicated to making this right. We are leaders in changing culture . . . yet our rates show we have not yet solved this complex and difficult challenge.

*Id.* at 31.

4. *See infra* notes 124, 125 and accompanying text discussing the CATCH program.

sault and harassment by asking them to risk the additional harm of retaliation for the military to potentially hold the culprits accountable.

This section begins with a more thorough description of the prevalence of sexual assault, sexual harassment, and racial harassment in the military. It then describes the problem with retaliation for those who report or consider reporting the harassment or assault. Next, the section describes the disciplinary structure set up in the military to address these issues and how it fails to help either the victim or the military itself. It then examines how these problems are the result of the inherent nature of the disciplinary system. Finally, the next section explains how these problems cannot be solved until the military is able to obtain better information on those committing the infractions.

### A. Harassment and Sexual Assault Are Alarming Common in the Military and Woefully Underreported

It is estimated that more than 20,000 service members were sexually assaulted in 2018.<sup>5</sup> For racial or sexual harassment, the numbers go up in order of magnitude.<sup>6</sup> However, very few of these incidents are reported largely due to fear of retaliation, addressed in Part II.B. These issues affect hundreds of thousands of victims every year. Victims are disproportionately minorities and women—the very individuals needed to diversify the military. The military cannot diversify if minorities and women are no longer part of it, and too often these victims are forced out by the treatment they are made to endure following their report of harassment or assault.

#### 1. Sexual Assault

The military uses the term “sexual assault” to refer to an array of non-consensual penetrative and non-penetrative offenses involving sexual contact. These offenses are now consolidated into Article 120 of the Uniform Code of Military Justice.<sup>7</sup>

In 2018, more than 20,000 service members were estimated to be victims of a sexual assault, including approximately 13,000 women

5. DEP'T OF DEF., *Appendix B: Statistical Data on Sexual Assault*, in ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2019, at 10–11 (2020) [hereinafter 2019 REPORT *Appendix B*], [https://media.defense.gov/2020/Apr/30/2002291671/-1/-1/1/3\\_APPEN-DIX\\_B\\_STATISTICAL\\_DATA\\_ON\\_SEXUAL\\_ASSAULT.PDF](https://media.defense.gov/2020/Apr/30/2002291671/-1/-1/1/3_APPEN-DIX_B_STATISTICAL_DATA_ON_SEXUAL_ASSAULT.PDF) [https://perma.cc/35B3-LBBC].

6. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2018, at 3, 12 (2019) [hereinafter 2018 REPORT], [https://www.sapr.mil/sites/default/files/DoD\\_Annual\\_Report\\_on\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf) [https://perma.cc/XB5T-X9ZJ] (reporting that rates climb from 6.2% for women and 0.7% for men for sexual assault to 24.2% of women and 6.3% of men for sexual harassment).

7. 10 U.S.C. § 920.

and 7,500 men.<sup>8</sup> Since women make up a much smaller percentage of the armed forces, the rates at which women are attacked are significantly higher than that of men. In 2018, over six percent of female service members were attacked versus less than one percent of men.<sup>9</sup> Stated another way, “Women now make up only about 20 percent of the military, but are the targets of 63 percent of assaults . . . with the youngest and lowest-ranking women most at risk.”<sup>10</sup>

Thus, more than six percent of women in the military were attacked in 2018—a single year. And yet, service members sign multi-year contracts.<sup>11</sup> An estimate of the rate of attacks over a longer period showed that more than thirteen percent of women and nearly two percent of men said they experienced a sexual assault since joining the military.<sup>12</sup> This number does not even completely capture the lifetime rate of sexual assault during military service, since the survey was done not upon a member’s exit from the military, but rather at a point in participants’ ongoing military careers.<sup>13</sup> Other estimates have put the number even higher, approximating that up to a quarter of women in the military may be sexually assaulted during their time career (and up to eighty percent may experience sexual harassment, addressed further in the following section).<sup>14</sup>

Given such alarming statistics, Congress has placed a great deal of pressure on the Department of Defense (DOD) to fix this problem, and the DOD has responded with an increasing number of educational programs and victim services.<sup>15</sup> Despite such efforts, the problematic numbers continue. Between 2016 and 2018 alone, the percentage of women who reported they had been the victim of a sexual assault in the last year rebounded nearly fifty percent, bringing the numbers

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8. 2019 REPORT *Appendix B*, *supra* note 5, at 10–11.

9. 2018 REPORT, *supra* note 6, at 3.

10. Dave Philipps, *This Is Unacceptable: Military Reports a Surge of Sexual Assaults in the Ranks*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/us/military-sexual-assault.html> [https://perma.cc/6WGZ-SDX8].

11. *Joining the Military: Know What You Should Know Before Committing*, MILITARY.COM, <https://www.military.com/join-armed-forces/making-commitment.html> [https://perma.cc/EE7R-LZWG] (last visited Aug. 15, 2021) (“Most first-term enlistments require a commitment to four years active duty and two years of inactive (Individual Ready Reserve, or IRR). But the services also offer programs with two-, three- and six-year active-duty or reserve enlistments.”).

12. LISA DAVIS ET AL., DEP’T OF DEF., 2016 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS 39 (2017), [https://www.sapr.mil/public/docs/reports/FY16\\_Annual/Annex\\_1\\_2016\\_WGRA\\_Report.pdf](https://www.sapr.mil/public/docs/reports/FY16_Annual/Annex_1_2016_WGRA_Report.pdf) [https://perma.cc/VZ47-TWNB].

13. Since some members would still be sexually assaulted after completing the report but before leaving the military.

14. Maureen Murdoch et al., *Women and War: What Physicians Should Know*, 21 J. GEN. INTERNAL MED. S5, S7 (2006).

15. See *infra* note 174 and accompanying text.

roughly back to where they had been in 2014.<sup>16</sup> Even still, the number of victims fails to capture the extent of the problem as many service members are victimized more than once. The 2016 survey, which went into greater detail than the 2018 survey, revealed that sixty-two percent of the women and sixty-seven percent of the men who had been sexually assaulted within the past year said they had experienced more than one event. Twenty-five percent of the women and thirty-five percent of the men said they had experienced five or more assaults—the highest possible option in the survey.<sup>17</sup>

The numbers quoted so far are from anonymous surveys done on a regular basis under mandated congressional oversight. Therefore, the military can say what percentage of service members report having been victimized, but it cannot say who the victims are or, more importantly, who attacked them. This is because only a small percentage of these crimes are reported. The DOD estimate for fiscal year 2016 was that thirty-one percent of women and fifteen percent of men who experienced at least one sexual assault that year reported it to the military.<sup>18</sup> Many possible reasons exist for this discrepancy, but one particularly problematic reason is the fear of retaliation, addressed in Part II.B.

## 2. *Sexual Harassment*

Military law contains its own prohibition of sexual harassment.<sup>19</sup> It functions similarly to non-military sexual harassment under Title VII.<sup>20</sup> However, while the acts may be similar, the frequency of the violations are not. Historically, sexual harassment appears to have been far more prevalent in the military than in other types of jobs, with rates more than twice the national average for civilians.<sup>21</sup>

The most recent survey data from 2018 showed “an estimated 24.2 percent of active duty women and an estimated 6.3 percent of active duty men indicated experiencing sexual harassment,” a statistically

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16. 2018 REPORT, *supra* note 6, at 5.

17. DAVIS ET AL., *supra* note 12, at 42–43.

18. *Id.* at 103–04. The report did not discuss the actual reporting rate for each instance. Since so many individuals indicated experiencing more than one incident, it is likely that a significant additional number go undetected.

19. 10 U.S.C. § 1561(e).

20. *See e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751–54 (1998) (discussing the history of the terms).

21. Deborah J. Bostock & James G. Daley, *Lifetime and Current Sexual Assault and Harassment Victimization Rates of Active-Duty United States Air Force Women*, 13 VIOLENCE AGAINST WOMEN 927, 940–41 (2007) (showing that while roughly eleven percent of civilian women met the EEOC guidelines for sexual harassment, the numbers were much higher in the military, as exemplified by the Air Force in the study).

significant increase from 2016.<sup>22</sup> This increase is particularly alarming because research has shown that active-duty women who experience sexual harassment are at three times the risk to also experience sexual assault.<sup>23</sup> The numbers are even worse for men—active-duty men who experience sexual harassment are at twelve times the risk for sexual assault.<sup>24</sup>

Just as with sexual assault, the percentage of members subject to harassment in a given year does not fully convey the harm. For forty percent of the female respondents, the harassment continued for at least a few months, and a quarter of respondents reported the harassment continued for at least a year.<sup>25</sup> The report also revealed shattered trust. Seventy-five percent of respondents reported that at least one perpetrator was someone in the chain of command, consisting of persons who serve as the foundation of authority and trust within the military.<sup>26</sup>

Despite its prevalence, harassment is reported far less frequently than sexual assault—not just when comparing percentages of total unreported instances but even comparing raw numbers. In fiscal year 2019, there were 6,236 reports of sexual assault but only 1,021 formal complaints of sexual harassment, making sexual assault reported nearly six times as frequently as sexual harassment based solely on the raw number of reports alone.<sup>27</sup>

An Army independent review committee addressed this discrepancy in the Fort Hood Report issued in response to the murder of Vanessa Guillén, a soldier who was stationed at Fort Hood in Texas.<sup>28</sup> The report attempted to identify the elements and circumstances at the Army base which led to such a tragic outcome. It revealed not only glaring deficiencies in Fort Hood's implementation of the programs intended to address sexual assault and harassment, but also reasons to

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22. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2019, at 11 (2020) [hereinafter 2019 REPORT], [https://media.defense.gov/2020/Apr/30/2002291660/-1/-1/1/1\\_DEPARTMENT\\_OF\\_DEFENSE\\_FISCAL\\_YEAR\\_2019\\_ANNUAL\\_REPORT\\_ON\\_SEXUAL\\_ASSAULT\\_IN\\_THE\\_MILITARY.PDF](https://media.defense.gov/2020/Apr/30/2002291660/-1/-1/1/1_DEPARTMENT_OF_DEFENSE_FISCAL_YEAR_2019_ANNUAL_REPORT_ON_SEXUAL_ASSAULT_IN_THE_MILITARY.PDF) [<https://perma.cc/72QB-SKYA>].

23. *Id.*

24. 2018 REPORT, *supra* note 6, at 4.

25. DAVIS ET AL., *supra* note 12, at 183.

26. *Id.* at 175–76 (asserting that thirty-four percent of women were harassed by their immediate supervisor, forty-one percent were harassed by someone else in their chain of command, and another thirty-four percent were harassed by another high-ranking military member; whereas thirty-two percent of men were harassed by their immediate supervisor, forty percent were harassed by someone else in their chain of command, and thirty-one percent were harassed by another high-ranking military officer).

27. 2019 REPORT, *supra* note 22, at 6, 12.

28. *Fort Hood Independent Review*, U.S. ARMY, <https://www.army.mil/forthood-review/> [<https://perma.cc/U6AN-YBRY>] (last visited Aug. 15, 2021).

criticize the military more broadly. Relying on the above-referenced comparison between reported instances of sexual assault versus harassment, the report stated:

Logic alone would challenge such a low number of sexual harassment reports across the entire military . . . It would mean that for every less serious violation, there are 6 to 8 extremely serious ones. An analogy in the civilian sector would be if there were 8 times more homicides than assaults. It is just not possible and does not reflect the real world. In order to enter into the realm of prevention, sexual harassment must be reported and documented. Studies, including Army research projects, have demonstrated that sexual harassment is a precursor and grooming process for sexual assault.<sup>29</sup>

Sexual harassment can make military life unbearable for some victims. One survey found that of the respondents survey who indicated they had suffered sexual harassment or other sex-based discrimination, nearly thirty percent later took steps to leave the military.<sup>30</sup>

### 3. *Racial Harassment*

Since the 1990s, the military has been required to conduct Armed Forces Workplace and Equal Opportunity Surveys to assess racial discrimination in the military every four years and to submit a report of the results to Congress.<sup>31</sup> However, results from the most recent survey, conducted in 2017, were not released until January 2021,<sup>32</sup> likely held up because of the alarming increase in racial harassment reported. The report shows the percentage of service members experiencing racial harassment jumped from 8.6% in 2013 to 17.9% in 2017.<sup>33</sup> The numbers are even worse when looking only at the percent-

29. U.S. ARMY, REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE 47 (Nov. 6, 2020) [hereinafter FORT HOOD REPORT], [https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03\\_FHIRC\\_report\\_redacted.pdf](https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03_FHIRC_report_redacted.pdf) [https://perma.cc/DEC2-E755].

30. DAVIS ET AL., *supra* note 12, at 195 (“Of the 26.5% of DoD women and 6.8% of DoD men who indicated experiencing a sex-based MEO [Military Equal Opportunity] violation in the past 12 months, 29% of women and 27% of men indicated the upsetting situation made them take steps to leave or separate from the military.”).

31. 10 U.S.C. § 481.

32. *The Pentagon Has Sat on Racial Discrimination Survey Data for Years*, NBC NEWS (Dec. 18, 2020, 10:30 AM), <https://www.nbcnews.com/news/nbcblk/%E2%80%8Bpentagon-has-sat-racial-discrimination%E2%80%8B%E2%80%8B-survey%E2%80%8B-data-years-n1251701> [https://perma.cc/RZ25-2VDA]; Phil Stewart, *Exclusive: Long-Withheld Pentagon Survey Shows Widespread Racial Discrimination, Harassment*, REUTERS (Jan. 14, 2021, 7:05 AM), <https://www.reuters.com/article/us-usa-military-civilrights-exclusive/exclusive-long-withheld-pentagon-survey-shows-widespread-racial-discrimination-harassment-idUSKBN29J1N1> [https://perma.cc/94H4-AQHL].

33. *Compare SAMANTHA DANIEL ET AL.*, DEP’T OF DEF., 2017 WORKPLACE AND EQUAL OPPORTUNITY SURVEY OF ACTIVE DUTY MEMBERS: EXECUTIVE REPORT app. B at 45 (2019), <https://apps.dtic.mil/sti/pdfs/AD1113643.pdf> [https://perma.cc/AY6W-P6SC], *with* NATALIE NAMROW ET AL., DEF. MANPOWER DATA CTR., 2013 WORK-

age of minority service members subject to racial harassment. That number nearly doubled from 13.3% of minority service members in 2013 to 24.4% of minority service members in 2017.<sup>34</sup>

Of those who experienced harassment and did report it, only sixteen percent of respondents indicated the military took action against the perpetrator, while ten percent of respondents answered that the official response was to take action against them, the reporter.<sup>35</sup> Additionally, thirty-five percent of survey-takers said they experienced retaliation of some sort because they reported the harassment.<sup>36</sup>

The world has changed significantly since 2013 in ways that could negatively affect race relations within the military, including the rise of Donald Trump and white supremacists' increased willingness to publicly state and defend their beliefs.<sup>37</sup> Since the military itself did not release the information for years, the *Military Times* conducted annual polls of its readers over the last three years. These polls showed an alarming increase in active-duty troops saying "they have personally witnessed examples of white nationalism or ideological-driven racism."<sup>38</sup> More than one-third of all respondents, and over half of minority respondents, claimed to "have seen evidence of white supremacist and racist ideologies in the military."<sup>39</sup> This was a dramatic jump from the prior year, when little more than one in five respondents responded similarly.<sup>40</sup> The reported incidents included "swastikas being drawn on service members' cars, tattoos affiliated with white supremacist groups, stickers supporting the Ku Klux Klan, and Nazi-style salutes between individuals."<sup>41</sup> Further, a research

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PLACE AND EQUAL OPPORTUNITY SURVEY OF ACTIVE DUTY MEMBERS: OVERVIEW REPORT 12 (2014), <https://apps.dtic.mil/sti/pdfs/ADA628536.pdf> [<https://perma.cc/M95C-YAJM>].

34. Compare DANIEL ET AL., *supra* note 33, at 45, with NAMROW ET AL., *supra* note 33, at 16.
35. Compare DANIEL ET AL., *supra* note 33, at 80, with NAMROW ET AL., *supra* note 33, at 99. The percentage of instances in which known action was taken against the harasser represented a large drop from the comparable numbers in 2013, when twenty-three percent of respondents indicated that action had been taken against the person causing the harm; roughly half of respondents in 2013 were also unsure whether action had been taken against the person they reported.
36. DANIEL ET AL., *supra* note 33, at 80. Retaliation in general is addressed in greater detail in Part II.B.
37. Glenn Thrush & Maggie Haberman, *Trump Gives White Nationalists an Unequivocal Boost*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-charlottesville-white-nationalists.html> [<https://perma.cc/UD27-F9BM>].
38. Leo Shane III, *Signs of White Supremacy, Extremism Up Again in Poll of Active-Duty Troops*, MIL. TIMES (Feb. 6, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/02/06/signs-of-white-supremacy-extremism-up-again-in-poll-of-active-duty-troops/> [<https://perma.cc/BEQ4-5KWC>].
39. *Id.*
40. *Id.*
41. *Id.*

and investigations specialist with the Southern Poverty Law Center stated that white supremacist organizations are both recruiting members of the military and encouraging their own members to join the military to gain “knowledge of firearms, explosives and other military skills.”<sup>42</sup> The military must learn about problematic behavior in order to correct it, yet retaliation or fear thereof dramatically impacts how likely individuals are to report such events, as discussed in further detail in the following section.

## B. Retaliation Can Be Even Worse

It is not merely assault or harassment themselves that cause problems. After the initial incident, the perpetrator or others can also subject the victim to additional harmful behavior meant to dissuade them from reporting the incident or to punish them for having reported. For many victims, the retaliation is worse than the initial act.<sup>43</sup> As one victim put it, “Sexual assault is not what messes you up. It is the reprisals, the hazing. I could recover from the assault but nothing is done for the retaliation.”<sup>44</sup> Despite its potential severity, retaliatory behavior is almost never reported. The DOD received only eighty-four reports of retaliation in fiscal year 2016.<sup>45</sup>

The military cannot control retaliatory behavior if it does not have notice of both the behavior and its perpetrator. This is particularly true when the individual who committed the initial infraction is not the same as the individual who is engaged in the retaliation, which may be the case over half the time.<sup>46</sup> For these incidents, notification is an absolute requirement to eliminate the behavior and remove of the offender, if warranted.

Retaliation is particularly problematic because while the initial offense may have occurred in private, retaliation often involves more public actions intended to intimidate the victim of the offense and warn other members of the unit of what will happen if they report as well. Thus, retaliation often creates more public harm with potentially

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42. *Id.*

43. HUM. RTS. WATCH, EMBATTLED: RETALIATION AGAINST SEXUAL ASSAULT SURVIVORS IN THE US MILITARY 26 (2015) [hereinafter HUM. RTS. WATCH REPORT], [https://www.hrw.org/sites/default/files/report\\_pdf/us0515militaryweb.pdf](https://www.hrw.org/sites/default/files/report_pdf/us0515militaryweb.pdf) [<https://perma.cc/CW33-Q4FN>] (“Many considered the aftermath of the assault—bullying and isolation from peers or the damage done to their career as a result of reporting—worse than the assault itself.”).

44. *Id.* at 36 (citing Telephone Interview with PC Ashley Parker (Dec. 17, 2013)).

45. DEP’T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2016, at app. B: STATISTICAL DATA ON SEXUAL ASSAULT 41 (2017) [hereinafter 2016 REPORT APPENDIX B], [https://sapr.mil/public/docs/reports/FY16\\_Annual/Appendix\\_B\\_Statistical\\_Section.pdf](https://sapr.mil/public/docs/reports/FY16_Annual/Appendix_B_Statistical_Section.pdf) [<https://perma.cc/2M77-XZB2>].

46. *Id.* (stating that in the reported instances, only ten percent of the alleged retaliators were the perpetrator of the initial sexual assault or harassment).

dramatic effect on the environment for the entire unit and beyond. When other members of a unit observe retaliation, they, in turn, will hesitate to report violations they experience, and the victims who reported initially will hesitate before reporting again, despite the fact that many victims are victimized multiple times.<sup>47</sup> As the military itself put it, quoting a national ethics report:

Both reporters and non-reporters take cues about the consequences for reporting from the experience of others who have reported. Once employees perceive that others are retaliated against for reporting, they will refrain from coming forward when they have concerns. Misconduct that goes unreported can continue, increasing risk, because management is never given the opportunity to address the problem.<sup>48</sup>

Retaliation is pervasive in the military. The same report noted more than sixty percent of women who had filed an unrestricted report of sexual assault experienced retaliation in some form.<sup>49</sup> All retaliation is problematic for the victim. Nevertheless, there are important distinctions between how the military handles different types of retaliation. This section describes the basic categories of retaliation, which are defined not by the action that the retaliation stems from (such as sexual assault or racial harassment) but rather by the form that the retaliation takes.

The military has previously categorized retaliation as being either professional or social, though these categories have not been clearly and consistently defined across the Services. Professional retaliation is generally a form of reprisal while social retaliation is more commonly referred to as ostracism or maltreatment. A single victim can, and frequently is, subject to both types, but each would potentially be addressed in different ways.

The military has indicated it is moving away from these definitions and towards terms “that consider the intent of the actor and clearly delineate actionable experiences.”<sup>50</sup> This Article does not emphasize the distinction between the two. Rather, it evaluates the range of ways individuals can be harmed by the military’s failure to control retaliation, regardless of the classification. Still, the classifications do help

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47. See *supra* note 17 and accompanying text.

48. DEP’T OF DEF., DoD RETALIATION PREVENTION AND RESPONSE STRATEGY: REGARDING SEXUAL ASSAULT AND HARASSMENT REPORTS 3 (2016) [hereinafter RETALIATION REPORT], [https://www.sapr.mil/sites/default/files/DoD\\_Retaliation\\_Strategy.pdf](https://www.sapr.mil/sites/default/files/DoD_Retaliation_Strategy.pdf) [<https://perma.cc/AH7Y-AGXW>] (quoting ETHICS RES. CTR., RETALIATION: WHEN WHISTLEBLOWERS BECOME VICTIMS 5 (2012) <https://www.bozeman.net/home/showdocument?id=502> [<https://perma.cc/GZ6E-DRVP>]).

49. *Id.* at 6 (stating that approximately “62% of women who filed an Unrestricted Report of sexual assault with a military authority indicated they experienced some type of retaliation associated with their report,” and explaining that the male sample size was too small to use for estimates).

50. HUM. RTS. WATCH REPORT, *supra* note 43, at 24 n.18 (quoting E-mail from Maj. Gen. Jeffrey Snow, U.S. Army, to Human Rights Watch (May 4, 2015)).

explore the different ways members of the military can retaliate against a reporter.

### 1. *Professional Retaliation*

A professional reprisal can include “interfering with promotion, unreasonably downgrading someone’s evaluation or unfairly denying an award.”<sup>51</sup> These acts are similar to the adverse employment action required in a typical employment retaliation complaint.<sup>52</sup>

After surveys in 2012 and 2014, in which more than sixty percent of respondents claimed to have experienced retaliation, the military attempted to more carefully measure different types of retaliation within its ranks. Beginning in 2016, the military changed how it asked questions to more closely align with military conduct violations.<sup>53</sup> Using the new measure, more than one third of women and half the men reporting sexual assault experienced what they perceived to be a professional reprisal.<sup>54</sup> However, not all of those individuals answered in a way that met the legal criteria. Based on their survey responses, nineteen percent of women and thirty-six percent of men met the legal criteria to prove professional retaliation.<sup>55</sup>

Due to the sample size, more detailed information on the reprisals was only available for women due to the sample size.<sup>56</sup> Women’s responses indicated a senior enlisted leader committed fifty-two percent of reprisals, a unit leader committed thirty-seven percent, and someone else in the victim’s chain of command committed fifty-four percent of the reprisals.<sup>57</sup> Further, the reprisals were successful both in hurting the victim and preventing the case from proceeding. Ninety percent of the women said the reprisal hurt their career,<sup>58</sup> and more than

51. Lolita C. Baldor, *Pentagon: Claims of Retaliation for Complaints on Rise*, AP NEWS (Apr. 30, 2018), <https://apnews.com/article/sexual-assault-north-america-ap-top-news-politics-88598aa61e034069b5dd44b7cb3136b2>; accord. 10 U.S.C. § 1034(b)(1).

52. *E.g.*, *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506–07 (1993).

53. DAVIS ET AL., *supra* note 12, at 10.

54. DEP’T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2016, at 32 (2017) [hereinafter 2016 REPORT], [https://sapr.mil/public/docs/reports/FY16\\_Annual/FY16\\_SAPRO\\_Annual\\_Report.pdf](https://sapr.mil/public/docs/reports/FY16_Annual/FY16_SAPRO_Annual_Report.pdf) [https://perma.cc/Q2KE-G8MH].

55. *Id.*

56. *Id.* at 32–33.

57. *Id.*

58. DAVIS ET AL., *supra* note 12, at 131 (reporting that six percent of women who experienced professional reprisal said the retaliatory action had been “somewhat harmful,” thirty-one percent reported that it had been “moderately harmful,” and fifty-three percent said the action had been “very harmful”—the strongest possible response).

half reported they decided to drop or no longer participate in their sexual assault case in direct response to a reprisal.<sup>59</sup>

Given how effectively the reprisals pushed victims to drop charges of assault and harassment, it is perhaps not surprising that victims only made eighty-four reports of retaliation in 2016—including both professional and social retaliation.<sup>60</sup> A 2016 report on the completed reprisal investigations—including those initiated the prior year, since many of the 2016 reports were still pending—found sixty-one retaliators were investigated (one report could involve more than one retaliator).<sup>61</sup> Of these investigations, the allegations were substantiated for seventeen of the retaliators, and further action was taken against seven, which included one administrative discharge and three referrals for court-martial.<sup>62</sup> While shockingly low, these outcomes were better than a report on the four largest military bases issued by Senator Kirsten Gillibrand's office the year before. The Gillibrand report failed to find a single documented instance of action being taken in response to retaliation.<sup>63</sup>

Retaliation is not only an issue for sexual assault and harassment. Reporting racial harassment can also lead to retaliatory behavior. Of those who reported racial harassment or discrimination in the 2017 report, twenty-nine percent said they experienced social retaliation, and twenty-two percent said they experienced professional retaliation.<sup>64</sup>

When discussing reasons for not reporting, twenty-three percent of respondents indicated they did not report for fear of reprisals from their chain of command.<sup>65</sup> Twenty-two percent also said they did not report for fear of the effect it would have on their performance evaluations or future promotions.<sup>66</sup> Finally, twenty-eight percent did not report because they were afraid of retaliation from their harasser or the harasser's friends.<sup>67</sup>

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59. 2016 REPORT, *supra* note 54, at 32–33 (admitting that only forty-four percent of respondents indicated they were willing “to participate and/or move forward with their report of sexual assault” despite the professional reprisal).

60. *Id.* at 35.

61. 2016 REPORT APPENDIX B, *supra* note 45, at 43.

62. *Id.*

63. OFF. OF SEN. KIRSTEN GILLIBRAND, SNAPSHOT REVIEW OF SEXUAL ASSAULT REPORT FILES AT THE FOUR LARGEST U.S. MILITARY BASES 4–5 (2016), [https://dacipad.whs.mil/images/Public/10-Reading\\_Room/04\\_Reports/04\\_Gillibrand\\_Reports/2016\\_Gillibrand\\_MilSexAsslt\\_Report\\_201605.pdf](https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/04_Gillibrand_Reports/2016_Gillibrand_MilSexAsslt_Report_201605.pdf) [<https://perma.cc/N7YP-45MM>] (finding not a single reported instance of action taken against retaliation at any of the four bases in the year surveyed).

64. DANIEL ET AL., *supra* note 33, at 81.

65. *Id.* at 84.

66. *Id.*

67. *Id.*

Given the dismal rate at which retaliation is reported, those seeking to learn more must often affirmatively seek out victims of retaliation. A recent report by Human Rights Watch includes interviews with hundreds of survivors about their experiences with retaliation in the military for their reports.<sup>68</sup> The survivors provided examples of drastic changes of assignment, such as being reassigned from military intelligence to garbage collection.<sup>69</sup> The Human Rights Watch report also discussed how easy it can be to show displeasure to someone who has reported a violation:

Many survivors told Human Rights Watch that disciplinary action against them became a daily part of life after they reported. The military disciplinary system provides a spectrum of administrative options for commanders to ensure good order and discipline. These options also create ample opportunity for commanders to exercise their authority to retaliate against service members for reporting sexual assault.<sup>70</sup>

However, it is not merely professional retaliation victims must worry about—social retaliation is also rampant.

## 2. *Social Retaliation*

The military understands how its environment can increase social retaliation. As it has previously explained:

The military's strong values of unity and solidarity can have unintended consequences in toxic climates. When a Service member reports sexual assault or sexual harassment in such a climate, he or she may be seen as a potential threat to group unity. Thus, retaliation may ensue as a misguided way for some to protect the group.<sup>71</sup>

However, the fact the military understands why social retaliation occurs does not mean it has been able to stop it. The leaders of a group can also feel the same desire as other members, leading to an unwillingness to confront ostracism or other social retaliation within the unit.<sup>72</sup>

The public nature of social retaliation makes it a very effective method of ensuring cooperative behavior from both the victim and those that witness or otherwise learn about the inappropriate behavior. Human Rights Watch's report on sexual assault recounted episodes demonstrating the effectiveness of retaliation. In one, a violent gang rape was interrupted when the victim's roommate walked in, but the victim refused to report it based on how her roommate had been treated when the roommate reported her own sexual assault.<sup>73</sup> In another, a drill sergeant victimized numerous women but was only re-

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68. HUM. RTS. WATCH REPORT, *supra* note 43, at 34.

69. *Id.* at 38.

70. *Id.* at 7.

71. RETALIATION REPORT, *supra* note 48, at 12 (citations omitted).

72. HUM. RTS. WATCH REPORT, *supra* note 43, at 34.

73. *Id.* at 29.

ported by one. That victim later learned the severe retaliation she suffered prompted the other victims to make a pact to never report the drill sergeant's behavior.<sup>74</sup>

In 2014, a Rand study estimated more than half the women who reported sexual assault in the military experienced social retaliation.<sup>75</sup> A similar study and finding was repeated two years later regarding ostracism.<sup>76</sup> Three quarters of these individuals said the behavior was coming from someone above them in their chain of command.<sup>77</sup> Additionally, thirty-eight percent reported experiencing maltreatment, another version of social retaliation, of which eighteen percent of the total respondents met the legal criteria of professional retaliation.<sup>78</sup>

Of those who spoke with someone in their chain of command about the situation, "a little less than two-thirds (62%) indicated they were told or encouraged to drop the issue, more than half (57%) indicated the situation continued or got worse for them, and less than half (40%) indicated leadership took steps to address the situation," further demonstrating how vicious the retaliation cycle can be.<sup>79</sup> Three-quarters of the individuals who did not file a report made that decision because they feared that doing so would do "more harm than good."<sup>80</sup>

Another survey showed twenty-eight percent of all racial harassment and discrimination victims who did not report the racial harasser's behavior explicitly said they did not do so because they feared retaliation from the perpetrator or their friends.<sup>81</sup> Of those brave enough to report, twenty-nine percent experienced social retaliation.<sup>82</sup>

It is not just victims who experience this retaliation. Anyone associating with the victim can be fair game as well, leading victims to lose critical sources of support.<sup>83</sup> The Human Rights Watch report documented incidents where certain service members gave explicit warn-

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74. *Id.*

75. NATIONAL DEFENSE RESEARCH INSTITUTE, SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: TOP-LINE ESTIMATES FOR ACTIVE-DUTY SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 21 (2014), [https://www.rand.org/pubs/research\\_reports/RR870.html](https://www.rand.org/pubs/research_reports/RR870.html) [https://perma.cc/SEQ2-QGL5].

76. DAVIS ET AL., *supra* note 12, at 132. The number who met the legal criteria of retaliation, however, was lower, at twelve percent for women and seventeen percent for men.

77. *Id.* at 133.

78. *Id.* at 133-34.

79. *Id.* at 141.

80. *Id.*

81. DANIEL ET AL., *supra* note 33, at 84. This was the closest match on the survey to a fear of social retaliation.

82. *Id.* at 81.

83. HUM. RTS. WATCH REPORT, *supra* note 43, at 36, 52.

ings about what would happen to anyone seen talking to or hanging out with a victim.<sup>84</sup>

One potential problem in holding wrongdoers accountable is that the legal definition of the ostracism that characterizes social retaliation varies significantly between Services.

For example, in order to violate the punitive regulations of the Departments of the Navy and Air Force, ostracism must be committed with the intent to prevent reporting of a crime or to dissuade someone from participating in the justice process. Under the Army regulation, the crime of ostracism in some instances could be committed with no intent to prevent reporting or interfere with the administration of justice.<sup>85</sup>

The differences could be significant, particularly if social retaliation occurs after the conclusion of the resulting criminal case, as at that point, it would be impossible to prevent reporting or participation. However, it would still be very possible to punish the reporter. The difference in the definitions will never matter, however, if the incident is never reported, and problems with the justice system go far beyond differences in definitions, as the next section explains.

### C. The Military Justice System Harms Victims and Fails To Provide the Information the Military Needs

The military justice system requires reporting to function, but many instances of sexual harassment or assault are never reported. When harassment or assault is reported, it is often at great cost to the reporting individual. This section begins by describing how the justice system works in the military for sexual assault and harassment cases, followed by a discussion on how the current system has failed both the victims it purports to help and the military itself.

#### 1. An Overview of the Military Justice System

Unwanted behavior in the military is categorized and treated differently than violations in the civilian context. Crimes are defined by military-specific statutes, and the entire process, from investigation and prosecution to the court at which a case may be heard, are all run by the military. While harassment and sexual assault are both dealt with through military systems, they are treated very differently. Sexual assault is viewed as a crime, while harassment is viewed as “disruptive misconduct that invites direct action by the chain of command.”<sup>86</sup>

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84. *Id.* at 36, 54.

85. RETALIATION REPORT, *supra* note 48, at 5.

86. FORT HOOD REPORT, *supra* note 29, at 51. There has, however, been a move to make sexual harassment a specific offense with its own system of confidential reporting. Alex Horton, *Proposed Vanessa Guillén Law Would Transform Military’s Sexual Misconduct Inquiries*, WASH. POST (Sept. 16, 2020, 5:40 PM), <https://>

a. *Sexual Assault*

One option for an individual who believes they have been the victim of a sexual assault is to file an unrestricted report, in which the victim discloses both their name and the name of their attacker.<sup>87</sup> There are many different people the victim can contact to initiate the report, although the majority of reports are made at a Sexual Assault Response Coordinator (SARC) office. This process sets in motion an official investigation.<sup>88</sup> The investigation itself is conducted by a Military Criminal Investigation Organization (MCIO) that, depending on the service, can make a call about whether there is any basis to the case.<sup>89</sup> Part of this process includes consulting a judge advocate about whether probable cause exists.<sup>90</sup>

If the case is strong, a judge advocate can recommend that charges be preferred, a process typically done by the commander of the accused.<sup>91</sup> This preferral starts the court-martial process, which can take various levels of formality depending on the seriousness of the charge.<sup>92</sup>

If the judge advocate believes there is insufficient evidence for a court-martial, the report of investigation can conclude the case is un-

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[www.washingtonpost.com/national-security/2020/09/16/proposed-vanessa-guilln-law-would-transform-militarys-sexual-misconduct-inquiries/](http://www.washingtonpost.com/national-security/2020/09/16/proposed-vanessa-guilln-law-would-transform-militarys-sexual-misconduct-inquiries/) [https://perma.cc/DD5R-JFJH]. While the Equal Opportunity Office states it does accept sexual harassment claims, it does not accept complaints of racial harassment—only racial discrimination (where an individual can point to an adverse action). Thus, the military system explicitly intends to deal with harassment, especially racial harassment, through the chain of command.

87. Dep't of Def., *Unrestricted Reporting*, SEXUAL ASSAULT PREVENTION & RESPONSE, <https://sapr.mil/unrestricted-reporting> [https://perma.cc/SJ3G-EBXE] (last visited June 28, 2021).
88. SUBCOMM. OF THE JUD. PROC. PANEL, REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY 8 (2017), [https://dacipad.whs.mil/images/Public/10-Reading\\_Room/04\\_Reports/01\\_JPP\\_Reports/JPP\\_SubcommReport\\_Investigations\\_Final\\_20170224.pdf](https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/01_JPP_Reports/JPP_SubcommReport_Investigations_Final_20170224.pdf) [https://perma.cc/9NEK-CQTG].
89. DEP'T OF DEF., REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 95 (2014), <https://www.hsdl.org/?abstract&did=755886> [https://perma.cc/UZ4L-4X57] (detailing differences in how such cases are determined, with some branches allowing investigators to determine a lack of probable cause and not present the case to the commander).
90. FORT HOOD REPORT, *supra* note 29, at 69 (calling it “a vital component of the investigative case file”). The judge advocate is a military attorney while the statement of whether probable cause exists is referred to as a probable cause opine. *Id.*
91. DEP'T OF DEF., THE SEXUAL ASSAULT ACCOUNTABILITY AND INVESTIGATION TASK FORCE 13–14 (2019), [https://media.defense.gov/2019/May/02/2002127159/-1/-1/1/SAAITF\\_REPORT.PDF](https://media.defense.gov/2019/May/02/2002127159/-1/-1/1/SAAITF_REPORT.PDF) [https://perma.cc/29F7-69N3] (finding review of the commanders' decisions whether to prefer charges indicated the decisions were reasonable ninety-five percent of the time).
92. 10 U.S.C. § 816.

founded.<sup>93</sup> However, this does not mean the judge advocate determined that the assault did not happen or that no punishment will occur. It simply reflects that the evidence gathered is not sufficient for the typical criminal burden of proof of a court-martial.<sup>94</sup>

Three options remain available to the commander—all of which are considered administrative procedures. The assailant could be subject to nonjudicial punishment, administrative discharge, or other adverse administrative actions.<sup>95</sup>

In nonjudicial punishment, the commander offers the assailant an opportunity to present evidence for their side and then accept the punishment as determined by the commander.<sup>96</sup> Punishments can include military grade reductions, pay reductions, and extra duties.<sup>97</sup> An administrative discharge involuntarily removes the individual from the military, but it does not result in a dishonorable discharge classification.<sup>98</sup> Other adverse administrative action covers a broad range of punishments, including “corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or other administrative withholding of privileges, or any combination thereof.”<sup>99</sup>

The results of a court-martial are public information.<sup>100</sup> Therefore, a victim can learn of the final disposition of their assailant’s court-martial. In contrast, a victim whose assailant is punished through any of the administrative procedures is not entitled to learn what happened, since the administrative records are considered protected per-

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93. JOINT SERV. COMM. ON MIL. JUST., *MANUAL FOR COURTS-MARTIAL UNITED STATES* 11-9 (2019).

94. *Id.*

95. 32 C.F.R. § 105.17(b)(1) (2014).

96. Trial Defense Services, *Article 15 Information: If I Agree To Accept the Article 15 Am I Admitting Guilt?*, U.S. ARMY FORT RILEY, <https://home.army.mil/riley/index.php/?about/dir-staff/?legal-assistance-office/trial-defense-services> [https://perma.cc/U9GF-Q6WM] (last visited June 28, 2021).

97. 10 U.S.C. § 815(b). These were also the most commonly noted administrative punishments in the 2017 sexual assault report. DEP’T OF DEF., *ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2017*, at 28 (2018), [https://sapr.mil/public/docs/reports/FY17\\_Annual/DoD\\_FY17\\_Annual\\_Report\\_on\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](https://sapr.mil/public/docs/reports/FY17_Annual/DoD_FY17_Annual_Report_on_Sexual_Assault_in_the_Military.pdf) [https://perma.cc/28MU-JTVK].

98. DEP’T OF THE ARMY, *ARMY REGULATION 63S-200, PERSONNEL SEPARATIONS: ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATION*, 45–46 (2016). [https://armypubs.army.mil/?epubs?/DR\\_pubs?/DR\\_a/pdf/web/AR635-200\\_Web?\\_FINAL?\\_18JAN2017.pdf](https://armypubs.army.mil/?epubs?/DR_pubs?/DR_a/pdf/web/AR635-200_Web?_FINAL?_18JAN2017.pdf) [https://perma.cc/73X5-XYHV]. This does not automatically mean the assailant will receive an honorable discharge—three options are available: Honorable, General (under honorable conditions), or Under Other Than Honorable Conditions. *Id.* at 46.

99. 32 C.F.R. § 105.17(b)(1)(iv) (2014).

100. FORT HOOD REPORT, *supra* note 29, at 77.

sonnel records. Instead, the victim is told that “appropriate administrative action was taken.”<sup>101</sup>

The obvious frustration created by this situation appears to have been what led Congress to enact section 549 of the National Defense Authorization Act for Fiscal Year 2020,<sup>102</sup> which required commanders to notify victims of the status of their case.<sup>103</sup> However, the provision has already “been interpreted to prevent disclosure of the ultimate disposition or characterization of service.”<sup>104</sup> This means victims can still be informed at the end of a case that “appropriate administrative action was taken.”<sup>105</sup>

Filing an unrestricted report also potentially entitles the victim to request an expedited transfer if a concern exists about retaliation or other repercussions for filing the report.<sup>106</sup> This transfer allows the victim to relocate away from their assailant, but the victim is given no choice about the location of their next transfer.<sup>107</sup>

If a sexual assault victim wishes to remain anonymous, they must instead file a restricted report. A restricted report is supposed to shield the identity of the victim, although it does not always work, particularly in smaller groups where the identity is easy to figure out.<sup>108</sup> Because the critical difference between a restricted and an unrestricted report is disclosure of the identity of the victim, once an unrestricted report has been filed in which the victim is named, it cannot be changed to a restricted report with the victim identified anonymously. However, a victim who files an unrestricted report may choose not to assist in the investigation conducted by the military police,<sup>109</sup> an option many decide to take in response to later retaliation.<sup>110</sup>

Filing only a restricted report does entitle the victim to access medical treatment and counseling.<sup>111</sup> It does not trigger the official investigative process, and it does not enable the victim to apply for a protective order or transfer within the military.<sup>112</sup> Additionally, a vic-

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101. *Id.*

102. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 549, 133 Stat. 1198, 1379 (2019).

103. FORT HOOD REPORT, *supra* note 29, at 78.

104. *Id.* (pointing out that phrasing such as “notwithstanding 5 U.S.C. § 552a,” which would serve to clearly indicate the intent to override was not used).

105. *Id.* at 77.

106. *Id.* at 15.

107. *Id.* at 15, 81 (“[N]o realistic incentives exist for Soldiers to file a false report.”).

108. HUM. RTS. WATCH REPORT, *supra* note 43, at 68.

109. FORT HOOD REPORT, *supra* note 29, at 15.

110. *See supra* note 59 and accompanying text.

111. FORT HOOD REPORT, *supra* note 29, at 14.

112. Dep’t of Def., *Restricted Reporting*, SEXUAL ASSAULT PREVENTION & RESPONSE, <https://sapr.mil/restricted-reporting> [<https://perma.cc/YZL2-BGQU>] (last visited June 28, 2021).

tim who wishes to file a restricted report and, theoretically maintain confidentiality could lose that protection by discussing the assault with a member of the victim's chain of command, law enforcement, or someone else who is a mandatory reporter.<sup>113</sup> That person's required report would then result in an official investigation and a breach of confidentiality.<sup>114</sup>

*b. Sexual and Racial Harassment*

The report process is completely different for sexual harassment. In January 2021, Congress directed the Secretary to create a confidential method of reporting sexual harassment within the military.<sup>115</sup> Until that is in place, there is no confidential method of reporting sexual harassment. Sexual harassment victims can currently file formal or informal complaints, but these are categorized not by the level of confidentiality desired, as with sexual assault, but rather by the seriousness of the allegation. Informal complaints are intended for "less severe or egregious incidents" that individuals can resolve either entirely on their own or with minimal assistance.<sup>116</sup> Formal complaints can only be filed after the complainant has been read the penalties associated with perjury and attested to the veracity of the statements.<sup>117</sup> Formal complaints necessitate an investigation conducted by the commander, not the military police.<sup>118</sup> There have been repeated attempts to make sexual harassment a crime, although it is not clear to what extent that would change the reporting methods or actions.<sup>119</sup>

Racial harassment appears to follow a similar reporting scheme, except there has not been any similar calls to raise the offense to a

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113. FORT HOOD REPORT, *supra* note 29, at 14.

114. *Id.*

115. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 532 (directing the Secretary to "prescribe in regulations a process by which a member of an armed force under the jurisdiction of the Secretary of a military department may confidentially allege a complaint of sexual harassment to an individual outside the immediate chain of command of the member"). *But see* FORT HOOD REPORT, *supra* note 29, at 51 (arguing that since it is reported in the chain of command, the identity will inherently be known). Alternatively, the anonymous reporting could be closer to the restricted report in sexual assault, which allows a record to be made (and the military to make note of such) but cannot formally start the disciplinary process.

116. FORT HOOD REPORT, *supra* note 29, at 12. It is not clear what type of situation would qualify as sexual harassment in which the victim would feel totally comfortable resolving the issue on their own and yet would still choose to report it.

117. *Id.* at 13.

118. *Id.*

119. *See* Horton, *supra* note 86 ("The [I Am Vanessa Guillén Act] would also create a confidential reporting system for harassment similar to a system in place for sexual assault allegations and categorize sexual harassment as a distinct crime under military law.").

crime. There appears to be a greater consensus that reporting racial harassment should be done within the chain of command, but this could be the chain of command of either the victim or the offender.<sup>120</sup>

2. *The Current Process Harms Individual Victims and Means There Will Be More in the Future*

Individual victims are required to come forward and report for the military discipline system to work, as the complaint sets any of the previously discussed processes in motion. However, the purpose of this complaint is to benefit the military, which can now take action against the perpetrators, not to benefit the victim. In fact, the victim instead bears the burden of the process. That burden can be formidable, as detailed in the discussion on retaliation in Part II.B. Victims never receive compensation for their harm or even an apology from the government. Instead, they are only eligible for medical care, as they would be for any other injury. Victims are sometimes specifically advised by those with greater experience against even taking advantage of this care because their medical records are not protected.<sup>121</sup>

The military still encourages victims to come forward by providing a list of benefits for filing an unrestricted report. One of the stated benefits is that the military will be able “to hold the offender appropriately accountable.”<sup>122</sup> The victim is also encouraged to report to protect future victims from the same suspect moving forward.<sup>123</sup> Concern that someone else could be victimized by the same individual has even led to an elaborate reporting system for those not yet willing to file an unrestricted report, where the victim files separately with the CATCH program using the name of the suspect.<sup>124</sup> If an additional victim reports the same assailant through the CATCH program, the victims are notified and encouraged to file unrestricted reports, knowing that at least two individuals have already been victimized, to prevent the same thing from happening to future victims.<sup>125</sup>

More personal reasons for filing an unrestricted report are “a sense of closure or healing which can aid recovery,” the ability to file for a military protective order, and eligibility for “an Expedited Transfer to move to a different unit or base.”<sup>126</sup> Elsewhere, those not yet willing to

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120. NAMROW ET AL., *supra* note 33, at 79.

121. HUM. RTS. WATCH REPORT, *supra* note 43, at 78.

122. Dep’t of Def., *supra* note 87. Unlike the page on restricted reporting, where potential downsides are listed, no downsides are listed on the unrestricted reporting page.

123. *Id.*

124. Dep’t of Def., *Catch A Serial Offender (CATCH) Program*, SEXUAL ASSAULT PREVENTION & RESPONSE, <https://www.sapr.mil/CATCH> [https://perma.cc/Z2QE-8QZV] (last visited June 29, 2021).

125. *Id.*

126. Dep’t of Def., *supra* note 87.

file an unrestricted report are cautioned not to speak about the incident, even with friends, to avoid telling a mandatory reporter who would be forced to reveal the incident to authorities.<sup>127</sup>

Filing an unrestricted report at least allows a victim to speak about the assault with friends, but additional benefits are few. The victim can also be confident other members of the military are gossiping about the incident.<sup>128</sup> Many victims see little action taken against their attacker as they suffer the ostracism and retaliation described in Part II.B.

Victims are thus given a choice. They can choose not to report the incident, or if they choose to report, they can file either a restricted or unrestricted report. If the victim files a restricted report, they likely cannot speak about it with any friends for fear that person may need to report. The victim would have to attempt to carry on, confident that at least they will be less likely to face retaliation. Alternatively, a victim can file an unrestricted report, disclosing the behavior and their aggressor's identity and risking retaliation. By filing an unrestricted report, the victim risks retaliation and being forced to leave whatever support they have built at their current location and go to a new location—that they are not able to choose—for the chance that they might one day learn “appropriate action” was taken against their attacker.

Note, these are the choices for those alleging sexual assault in a military setting. For sexual and racial harassment, there is no effective method of anonymous reporting, meaning anyone choosing to report automatically faces potential retaliation. In theory, that retaliation is reportable as well, but a victim who has already seen no action taken against their harasser and instead, has faced retaliation has little reason to come forward and ask for more of the same. Instead, any of these victims may choose to sacrifice future benefits—including educational benefits that may have been the primary motivator for joining the military—to take an administrative discharge just to be able to leave the military sooner.<sup>129</sup>

The inability of the military to fully learn about and respond to initial incidents of harassment, assault, and retaliation, particularly for those who file the full reports the military wants, provides a further disincentive to report and ensures more service members than necessary will be victims in the future as well.

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127. Dep't of Def., *supra* note 112.

128. HUM. RTS. WATCH REPORT, *supra* note 43, at 68 (relating stories of individuals who heard their commander talking about their case with others who had no need to know).

129. *Id.* at 50 (describing how a lawyer who works with sexual assault victims explained that it can take two years to get a medical discharge, “which can be ‘living hell’ if the perpetrator is in the chain of command”). It also gets worse, since members of their unit who saw the retaliation will also hesitate if something similar happens to them.

3. *The Current Military Justice System Harms Military Readiness and National Security*

The military was an early leader in troop integration and has long argued for the importance of diversity.<sup>130</sup> A diverse military, one that represents the population it serves, has been called critical to military readiness.<sup>131</sup> This importance has only grown as the population from which the military predominantly draws grows increasingly diverse.<sup>132</sup> However, the benefits of diversity are important throughout the military ranks, not merely among the newly recruited, and the decline in diversity as one rises up the ranks has been well documented.<sup>133</sup>

Individuals who are victims of harassment or sexual assault have a harder time focusing on what they need to advance in the military, including taking the classes necessary for enlisted members to rise higher in the ranks.<sup>134</sup> A general unwillingness or inability to continue putting up with retaliatory behavior also forces victims to leave the military before they had planned.<sup>135</sup> As one psychiatrist reported, “I am yet to meet a victim of sexual assault who reports that she is looking forward to her military career.”<sup>136</sup> This is commonly understood but poorly documented, since many victims will not provide the real reason they are leaving when asked.

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130. MIL. LEADERSHIP DIVERSITY COMM’N, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST-CENTURY MILITARY 3 (2011), [https://diversity.defense.gov/Portals/51/Documents/Special%20Feature/MLDC\\_Final\\_Report.pdf](https://diversity.defense.gov/Portals/51/Documents/Special%20Feature/MLDC_Final_Report.pdf) [<https://perma.cc/YZ6Z-DQ3W>] (saying that the military has fought for and valued diversity since President Truman issued Executive Order 9981 in 1948 requiring the armed forces to desegregate).
131. DEP’T OF DEF., DEPARTMENT OF DEFENSE BOARD ON DIVERSITY AND INCLUSION REPORT: RECOMMENDATIONS TO IMPROVE RACIAL AND ETHNIC DIVERSITY AND INCLUSION IN THE U.S. MILITARY 1 (2020), <https://media.defense.gov/2020/Dec/18/2002554852/-1/-1/0/DOD-DIVERSITY-AND-INCLUSION-FINAL-BOARD-REPORT.PDF> [<https://perma.cc/B7GJ-YM8G>] (“A military culture of diversity and inclusion is not optional. It is mission essential.” (quoting Under Secretary of Defense for Personnel and Readiness, Matthew P. Donovan)).
132. MIL. LEADERSHIP DIVERSITY COMM’N, *supra* note 130, at 14–15.
133. *E.g.*, Helene Cooper, *African-Americans Are Highly Visible in the Military, but Almost Invisible at the Top*, N.Y. TIMES (May 25, 2020), <https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html> [<https://perma.cc/TXY7-ML59>] (“Some 43 percent of the 1.3 million men and women on active duty in the United States military are people of color. But the people making crucial decisions, such as how to respond to the coronavirus crisis and how many troops to send to Afghanistan or Syria, are almost entirely white and male.”).
134. HUM. RTS. WATCH REPORT, *supra* note 43, at 64.
135. *Id.* at 49–50 (describing victims who were forced out by the military after an assault as well as victims who damaged their future prospects to get out as quickly as possible).
136. *Id.* at 50.

When victims leave, the military suffers significant loss: important alternative viewpoints, institutional knowledge, and the money spent training the person. What's more, as the same individuals that help diversify the military are the most likely to be victims of harassment and assault, the military is also disproportionately losing these diverse individuals. This harms the military and, by extension, the country.

This is theoretically something the military understands. As the military itself has said, "Increasing the racial/ethnic and gender diversity of senior leadership requires eliminating barriers that disproportionately affect the advancement of racial/ethnic minorities and women."<sup>137</sup> Yet the current system, where victims are required to come forward to report events despite the likelihood of retaliation, is a major barrier that has perpetuated the lack of diversity. The following section goes into greater detail on the structural problems with the current military system.

#### **D. The Structural Problems with the Current Military System That Have Led to This Result**

In the military, unwanted behavior is handled entirely from a disciplinary perspective. The military must learn the identity of the individual who has committed the infraction so their behavior can be addressed, whether through education or punishment. Little thought is given to those who have suffered from the bad behavior, and almost nothing is done to address the harm these victims suffer after reporting. Because the current system puts most of the burden onto the victims, the military itself faces comparatively little pressure to improve the situation or to demonstrate broadly to the low-level members primarily responsible for enforcement that it even wants to change it.

##### *1. The Current System Only Aims To Punish the Wrongdoer*

As described in Part II.C.1, the entire structure of the military justice system requires the military learn the names of individuals who are alleged to have committed some violation, determine whether the alleged incident occurred, and punish the wrongdoer as necessary. Such a system could, theoretically, be successful at removing bad actors from the military. However, deficits in reporting and prosecution mean the system as it is currently structured fails to fulfill that goal.

Few service members report their sexual assaults.<sup>138</sup> While the military recently showed an increase in the number of reported rapes,

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137. MIL. LEADERSHIP DIVERSITY COMM'N, *supra* note 130, at xvii.

138. See 2019 REPORT Appendix B, *supra* note 5, at 10 (estimating that 2019 had the highest percentage reported at thirty percent, nearly three times what it was estimated to be in 2012).

there was no corresponding increase in the number of cases referred to court-martial—the most serious cases, and often the only cases in which the victim learns the result.<sup>139</sup> Additionally, there remains the dismal conviction rate for courts-martial, a poor indication of the success of military prosecutions and yet another disincentive for those brave enough to report the offenses.<sup>140</sup> For example, between 2018 and 2020 at Fort Hood (considered one of the locations where women are most at risk of sexual assault), there were eighteen charges of rape preferred.<sup>141</sup> Of these eighteen cases, thirteen of the accused were found not guilty and three cases were dismissed.<sup>142</sup> The two successful convictions out of those eighteen cases represent an eleven percent successful prosecution rate for those cases which make it to court-martial—and a much lower percentage of all allegations made.<sup>143</sup>

As discussed in Part II.C.2, the military touts “a sense of closure” as one of the benefits to reporting a sexual assault including rape. However, the vast majority of sexual assault reports result in administrative action, which remains confidential, and the overwhelming majority of the court-martial cases do not end with convictions. Thus, the theoretical benefit of “closure” evoked by the military gives way to the reality that the commonly understood idea of closure for the victims seems unlikely.

If the military intends for punishment to deter future service members contemplating poor behavior, a poor conviction rate is likely ineffective. It is not merely that the system seems to do a poor job holding perpetrators accountable, it metes out that accountability at an excruciatingly slow pace. Frequently, the system reaches results only after a period of years.<sup>144</sup> Moreover, due to military turnover, the participants are often no longer stationed together or enlisted at that point.

The military has also made an extensive push towards prevention. In fact, according to the military, “The Department of Defense continues to address sexual assault comprehensively. The Department’s approach focuses on prevention by addressing problematic culture and preparing leaders at all levels to promote healthy unit climates.”<sup>145</sup> The military has also argued that, “[w]hile supporting victims and holding alleged offenders appropriately accountable are enduring efforts for the Department, sexual assault prevention must receive

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139. *Id.* at 19.

140. HUM. RTS. WATCH REPORT, *supra* note 43, at 30 (stating victims were twelve times more likely to be retaliated against when reporting a sex crime than to see their attacker convicted, as the conviction rate was only around five percent of all cases investigated).

141. FORT HOOD REPORT, *supra* note 29, at 64.

142. *Id.* at 64–65.

143. *Id.* at 65.

144. *See id.* at 76.

145. 2019 REPORT, *supra* note 22, at 8.

equal, if not greater, emphasis if further reductions in victimization are to occur.”<sup>146</sup> But education, which has been the military’s preferred approach for decades, is not working.<sup>147</sup> That is partly because the other critical component of the system, the disciplinary system, is broken.

## 2. *No Direct Compensation Is Available for Victims*

As the previous section demonstrated, the military disciplinary system is focused entirely on punishing identified wrongdoers, and wrongdoers are only identifiable when someone reports an incident. The military says prevention is the primary component of the military’s response to sexual assault, but education alone has been shown to be insufficient.

Reporting by the victim is, therefore, an essential component of the disciplinary system. After the report, however, little additional thought is given to the victims. Missing from the military’s list of benefits for the victim in reporting as described in Part II.C.2 is any compensation for the victims for the harm they might have suffered, a fact not lost on commenters.<sup>148</sup> Much has been made of the fact that service members are barred from any sort of tort or administrative compensation for their harm, aside from an extremely limited amount available only after leaving the military through Veterans Administration benefits. This section briefly addresses these issues.

### a. *Service Members Have No Recourse to the Courts for Compensation*

Service members who are victims of sexual assault or harassment receive no direct compensation from the military for the harm they have suffered.<sup>149</sup> They are barred from recovery using either traditional tort law methods of recovery under the Federal Tort Claims Act (FTCA) or discrimination claims under Title VII.

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146. *Id.* at 21.

147. Increased education has been presented as the solution to the sexual assault problem for decades. *See, e.g., Military Justice Improvement Act: Quotes You Should Read*, GILLIBRAND SENATE, <https://www.gillibrand.senate.gov/mjia/quotes> [<https://perma.cc/WM36-UMGW>] (last visited Aug. 15, 2021) (listing quotes going back decades generally evoking the military’s “major effort under way to try to educate everybody, to let them know we have a zero-tolerance policy where sexual assault is involved” (quoting Secretary of Defense Dick Cheney)).

148. *See generally* Andrew F. Popper, *Rethinking Feres: Granting Access to Justice for Service Members*, 60 B.C. L. REV. 1491 (2019) (arguing that the *Feres* doctrine should be repealed to enable service members suffering injuries like sexual assault and medical malpractice the opportunity to be made whole).

149. Except, as discussed in the following section, for later mental issues tied to sexual assault or repeated harassment.

The FTCA allows recovery against the United States when an employee of the United States has committed a tort.<sup>150</sup> The military, however, is exempt from such suits under a 1950 doctrine established in *Feres v. United States*.<sup>151</sup> Each of the three underlying cases alleged servicemen were harmed by the negligence of others in the military. Feres, an army lieutenant, died in a fire in his barracks, allegedly due to negligent conduct by supervisors.<sup>152</sup> The other two consolidated cases involved medical malpractice by Army surgeons.<sup>153</sup>

The Court held the FTCA barred all three cases, as all three accidents were incidental to service with the military.<sup>154</sup> Reasoning, in part, that the FTCA relies on local tort law while the relationship between service members and the military depends entirely on federal law, the Court did “not think that Congress, in drafting [the FTCA], created a new cause of action dependent on local law for service-connected injuries or death due to negligence.”<sup>155</sup> The Court also focused on the alternative recovery already available to military members injured while in service.<sup>156</sup> However, as these payments typically compensate physical injuries, they provide no relief for those suffering mentally due to harassment or sexual assault, if it has not yet caused PTSD or a similar disability.<sup>157</sup> Even for physical injuries, many believe the alternative recovery under-compensates victims.<sup>158</sup>

Title VII, an alternative method of recovery common to the civilian world and available to all other government employees, also does not apply to service members. Title VII allows a victim of harassment and assault—sexual assault can be considered an extreme form of harassment—to recover from the employer of the perpetrator.<sup>159</sup> Not only does this enable recovery from an entity that is less likely to be judgment-proof, but it also provides an important incentive for the em-

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150. 28 U.S.C. § 1346.

151. 340 U.S. 135 (1950).

152. *Feres v. United States*, 177 F.2d 535, 536 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (1950).

153. *Feres*, 340 U.S. at 137.

154. *Id.* at 144.

155. *Id.* at 146.

156. *Id.* at 144 (“This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services.”).

157. Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723, 766 (2013).

158. Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 395, 420–21 (2010) (detailing both the difficulty in bringing claims and the inadequacy of the amount).

159. 42 U.S.C. § 2000e-2(a)(1).

ployer to prevent such behavior from occurring in the first place.<sup>160</sup> While this recovery extends to some civilians working with the military, it does not apply to service members under various rationales. In denying Title VII claims for service members, courts have relied on the language of Title VII itself;<sup>161</sup> regulations interpreting Title VII issued by the Equal Employment Opportunity Commission (EEOC), the agency responsible for handling Title VII claims;<sup>162</sup> and an extended version of the *Feres* doctrine.<sup>163</sup> This means service members cannot recover from the military while still in service.<sup>164</sup> Nor, as explained in the following section, is there a way to recover directly for sexual assault or harassment after the victim has left the service.

*b. Any Compensation from the Veteran's Administration Is Inadequate and Far Too Late*

One of the personal tragedies for many individuals subject to harassment or assault while in the armed services is that they often feel forced out of the military before they had intended.<sup>165</sup> This is particularly tragic for those who had planned to make the military their career, since they could have been the individuals most likely to diversify military's upper ranks.

One benefit of leaving the military, however, is that veterans are eligible for services through the U.S. Department of Veterans Affairs (VA). Survivors of military sexual trauma (MST) can be eligible for counseling and other treatment regardless of whether they reported the incident(s) while in the military or whether they otherwise would qualify for disability services with the VA.<sup>166</sup> While the VA specifically states survivors are not eligible for disability benefits based on the assault or extended harassment itself, they may be eligible for "disa-

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160. *Faragher v. City of Boca Raton*, 524 U.S. 775, 777 (1998) (saying the Court had decided to "implement Title VII sensibly by giving employers an incentive to prevent and eliminate harassment").

161. *See, e.g., Jackson v. Modly*, 949 F.3d 763, 775 (D.C. Cir. 2020), *cert. denied, rev'd sub nom. Jackson v. Braithwaite*, 141 S. Ct. 875 (2020).

162. *Brown v. United States*, 227 F.3d 295, 298 (5th Cir. 2000).

163. *Hodge v. Dalton*, 107 F.3d 705, 707 (9th Cir. 1997).

164. The strongest method to allow such recovery and impose liability on the government would be to provide victims access to Article III courts to pursue their claims against the federal government. That could be done by amending Title 28, making clear the basis of liability under the FTCA, dealing with the discretionary function exception, and undoing the part of the *Feres* doctrine that currently blocks such claims. Absent that best case scenario, the approach proposed in this Article provides a pathway for both accountability and justice for the victims.

165. *See supra* note 135 and accompanying text.

166. *Military Sexual Trauma (MST)*, U.S. DEP'T OF VETERANS AFFAIRS, <https://www.va.gov/health-care/health-needs-conditions/military-sexual-trauma> [<https://perma.cc/Z8NY-69LT>] (last visited May 21, 2021).

bility compensation for conditions resulting from MST . . . like PTSD,” the most common mental health condition linked to MST.<sup>167</sup>

After the VA determined how much harder it was for veterans to obtain the required evidence for PTSD resulting from sexual assault than from other injuries, it adopted a relaxed standard for determining eligibility for PTSD benefits in 2011.<sup>168</sup> Still, a later report documented that over a six-month period in 2017, more than 1,000 veterans were improperly refused benefits under these new standards—nearly half of all the claims filed during that period.<sup>169</sup> The report pointed to a lack of review as one cause of the improper refusals, highlighting the importance of multiple levels of decision-making. Even with the newly expanded access to compensation, however, victims are not compensated for the attack itself or the failure of the government to protect them from attack. Rather, victims are compensated for harms that arise as a result of an attack, if they can demonstrate the harm is directly attributable to the attack and otherwise manage to make a sufficient showing entitling them to compensation.<sup>170</sup>

While alternative methods of compensation like this were one of the reasons the *Feres* Court cited for prohibiting recovery by service members, it is important to remember these payments are only to those individuals who demonstrate additional harm in specific ways and are able to complete the “time-consuming and fact intensive inquiry” required to receive benefits.<sup>171</sup> Even then, the payments are considered insufficient by many.<sup>172</sup>

### 3. *The Current System Does Not Incentivize the Military To Change*

It is difficult to remake a culture completely. The military’s struggle to eliminate racial harassment, sexual harassment, and sexual assault demonstrate the extent to which these issues may be an ingrained part of military culture.<sup>173</sup>

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167. *Id.*

168. DEP’T OF VETERANS AFFAIRS, DENIED POSTTRAUMATIC STRESS DISORDER CLAIMS RELATED TO MILITARY SEXUAL TRAUMA 2 (2018), <https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf> [<https://perma.cc/8KER-XWDL>]. For an overview of the subject see Evan R. Seamone & David M. Traskey, *Maximizing VA Benefits for Survivors of Military Sexual Trauma: A Practical Guide for Survivors and Their Advocates*, 26 COLUM. J. GENDER & L. 343, 345–46 (2014).

169. *Id.* at 5.

170. *Id.* at 8.

171. Banner, *supra* note 157, at 766–67.

172. *See supra* note 158 and accompanying text; *see also* Banner, *supra* note 157, at 767 (reporting that women’s PTSD compensation is typically lower than men’s).

173. There are many reasons individuals join the military. For some, the military represents the epitome of what it truly means to be a man, in the form of hegemonic masculinity. Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and*

Congress has demanded change, as have many high-level military members, but for most service members, there is nothing truly demonstrating that the military takes the issue seriously. Education, which the military argues is central to its effort to change the culture,<sup>174</sup> is undoubtedly intended to demonstrate the military's belief in equality and commitment to diversity. However, those going through required educational programs can interpret them as a bureaucratic game Congress has forced the military to play rather than a statement of core military values.<sup>175</sup> Some installations manifest this effect in simply going through the motions on training. Ticking an administrative box, regardless of the money the organization has spent to create that box, does not change the culture—a fact pinpointed in the Fort Hood report as one of the reasons for the toxic culture there.<sup>176</sup>

Inertia alone can also be a powerful force, which means the will to change must be that much stronger. For years, the military has attempted to signal importance through forced education to no effect. The military is always ready with a new educational plan, but it is time to direct resources elsewhere and forcefully incentivize change, demonstrating to everyone how seriously the military is now taking its commitment to its members' safety.

Money speaks. A direct financial commitment to compensating for infractions is a more forceful signifier of importance, perhaps strong enough to overcome the inertia. As described above, victims currently receive no compensation to help make them whole and atone for the government's failure to protect them from its own employees. Providing compensation to those harmed by the military's failure to protect them, as discussed further in Part III, would help show lower level service members that this issue is indeed one the military takes seriously—seriously enough to believe it can stop the behavior and to compensate those for whom it fails to do so. In contrast to corporations, which can face financial liability for failing to control these issues, the military has no monetary incentive driving its actions. This situation could change if the solution discussed in this article was implemented.

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*Police Officers Who Commit Intimate Partner Abuse*, 2015 BYU L. REV. 1183, 1208–09 (explaining the term and its origins).

174. In the most recent report, two of the actions DOD planned were having the services “update their junior leader education and training efforts with learning objectives developed collaboratively with the Department” and “[p]iloting prevention workforce training sessions.” 2019 REPORT, *supra* note 22, at 4.
175. See FORT HOOD REPORT, *supra* note 29, at 18 (“The main cause was the inability of the command elements . . . to proactively drive the SHARP Program elements . . . down into the ranks where most of the SHARP violations took place.”).
176. *Id.* at 33 (“The Committee determined that [a] focus on mostly administrative matters and quantitative response dynamics regarding the SHARP Program came at the expense of qualitative, proactive prevention driven outputs.”).

#### 4. *The Problem Requires Accurate Information To Solve*

As discussed in Part II.C.1, the military must know the identity of an individual behaving in a harmful way before it can take action against that individual. But, because the military provides no incentive for individuals to report and allows further harm to come to those individuals, victims are unsurprisingly unwilling to report many instances.<sup>177</sup>

Without this critical information, the military justice system is unable to function. The second part of this Article proposes a program that seeks to remedy this deficit, allow the military to obtain necessary information, and actively protect those harmed by fellow service members.

### III. THE SOLUTION

Congress should build off of the recently passed provision allowing administrative payment for medical malpractice suffered by service members to further compensate for harassment, sexual assault, and retaliation.<sup>178</sup>

In essence, this Article proposes a trade. The military would more fully compensate victims for what they have endured—indeed, would, for the first time, compensate victims of most cases at all. In return, the military would obtain the information it requires to take action against the wrongdoers. Those able to demonstrate the alleged violation occurred would be automatically entitled to compensation without having to further show damages, but they would have a limited window after the event in which to file. This time constraint would better enable the military take swift action against those causing the harm.

Swift action is critical because the military culture is formed and perpetuated not only from the initial act itself but also from the retaliation against the victim after the act is reported (or based on a belief that the victim has reported or might report). Additionally, for the reasons described in Part II.B, there is an understandable hesitancy to report retaliation. Allowing additional compensation for reporting retaliation would finally provide a reason for many victims to start coming forward and allow the military to take action against those engaged in it.

This section describes the recently passed administrative compensation system in more detail and suggests expansion to allow harassment and assault claims. It then explains how this expansion would

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177. *See supra* note 140 and accompanying text.

178. 10 U.S.C. § 2733a.

benefit both the victims and the military before addressing potential concerns this solution could raise.

**A. Congress Should Expand the Recently Created Medical Compensations System To Include Harassment, Assault, and Retaliation**

In December 2019, when Congress passed the annual defense authorization bill, it established an administrative remedy for service members who were victims of medical malpractice by military medical personnel. The DOD is responsible for the program, including writing the relevant regulations. This oversight ensures the military retains control of the process, one reason courts had hesitated to allow such claims in the past.

Since an administrative process is already in development to allow civil recovery for injuries suffered while employed by the military, it would be relatively straightforward to expand the program to also allow recovery for harassment, sexual assault, and retaliation. This section begins by describing what is known about the current system, then explaining more specifically how it could be expanded to allow recovery for assault and harassment.

*1. The Current Method of Medical Malpractice Compensation*

Congress included a provision in the National Defense Authorization Act for Fiscal Year 2020 making military members eligible for compensation for medical malpractice performed by a military medical employee.<sup>179</sup> Service members, or their authorized representatives, are allowed to bring a medical malpractice claim for personal injury or death “that was caused by the medical malpractice of a Department of Defense health care provider.”<sup>180</sup>

There are restrictions, however. The claim must be (1) “filed by the member of the uniformed services who is the subject of the medical malpractice claimed,” (2) for injury caused by a DOD health care provider performing medical services while acting within their scope of employment, (3) one for which “the act or omission constituting medical malpractice occurred in a covered military medical treatment facility,” (4) presented within two years of its accrual date, (5) unable to “be settled and paid under any other provision of law,” and (6) substantiated as required.<sup>181</sup>

The Secretary of Defense is instructed to create regulations with “[u]niform standards consistent with [those] used in a majority of States in adjudicating claims under [the FTCA] to be applied to the

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179. Pub. L. No. 116-92 § 731 (codified at 10 U.S.C. § 2733a).

180. 10 U.S.C. § 2733a(a).

181. 10 U.S.C. § 2733a(b).

evaluation, settlement, and payment of claims under this section without regard to the place of occurrence of the medical malpractice giving rise to the claim.”<sup>182</sup> This instruction is a response to the Court’s concern in *Feres* that it would not have made sense for Congress to allow compensation for members of the military under a patchwork of differing state tort laws.<sup>183</sup> Instead, the law creates a uniform system of standards based on what would happen in the majority of states to apply to medical malpractice claims.

While the military moved quickly to say it was accepting claims under the new system,<sup>184</sup> there have been no proposed regulations published in the Federal Register or any reports of decisions reached regarding payment. There is, therefore, little known aside from the statutory text.

## 2. *How To Expand the Current System To Include Harassment and Sexual Assault Victims*

The most significant difference in the program proposed here versus the existing medical program is that medical malpractice inherently means that a specific physical injury was inflicted.<sup>185</sup> Damages can, therefore, be calculated based on that injury. To fully realize the goals of this program, however, recovery for harassment, assault, and retaliation claimants would not require proof of damages. The proposal here would allow a set amount of compensation, to be determined as part of the rulemaking process, for certain defined incidents, provided they were, “substantiated as required,” as with the medical process.<sup>186</sup> Claimants would be eligible for this set amount of compensation without needing to prove resulting harm, provided they filed within a relatively brief statute of limitations. Alternatively, a victim with damages in excess of the set amount of compensation or who filed outside of the relatively short statute of limitations could obtain compensation to make them whole, if they prove damages.

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182. 10 U.S.C. § 2733a(f)(2)(B).

183. *Feres v. United States*, 340 U.S. 135, 142–43 (1950).

184. *E.g.*, *Claims & Tort Litigation (Code 15)*, U.S. NAVY JUDGE ADVOC. GENERAL’S CORPS, [https://www.jag.navy.mil/organization/code\\_15.htm](https://www.jag.navy.mil/organization/code_15.htm) (last visited Aug. 15, 2021) (stating that it is accepting claims under what it is calling the Medical Claims Act and linking to a page with a link to the traditional FTCA form for claim submission).

185. E. Haavi Morreim, *Medical Research Litigation and Malpractice Tort Doctrines: Courts on a Learning Curve*, 4 HOUS. J. HEALTH L. & POL’Y 1, 23 (2003) (“Medical malpractice requires not just that the physician breach a duty of care, but that this breach cause an injury—typically a physical injury.”).

186. 10 U.S.C § 2733a(b).

a. *Claimants Would Be Entitled to Automatic Compensation, Provided They Filed Within a Short Statute of Limitations*

Providing compensation for all documented instances of harassment, retaliation, or sexual assault would help officially acknowledge that simply living through the experience is itself a harm worth compensating.<sup>187</sup> In exchange, the short statute of limitations would require those affected to come forward quickly, enabling the military to learn of the issue and take prompt disciplinary action.

Automatic compensation would encourage individuals to come forward even if they could not document any particular harm aside from experiencing the event itself. Since one of the main goals of the program is to obtain information on all instances of assault, harassment, and retaliation, providing an incentive only for those who could also demonstrate additional harm would limit the number of potential reporters.<sup>188</sup> Broad reporting is important to address harassment and sexual assault, and it is virtually essential to address retaliation. Providing additional compensation for each reported instance, particularly of retaliation, would both compensate the individual for experiencing each additional instance and, critically, encourage victims to continue reporting.

As retaliation is more likely to be public and, therefore, more likely to affect the behavior of the entire unit, allowing the military to learn of the retaliation quickly enough to take prompt action would be critical to controlling it and changing the tenor of that unit. Since the retaliation and the initial incident are not necessarily committed by the same individual, providing a reason to report each additional incident would also make it more likely that individuals engaged primarily in retaliation, rather than harassment or assault, would still come to the attention of the military.

Creating this straightforward path to compensation for each type of harm would make it easier for far more victims to come forward than requiring victims to bring separate claims in court. An administrative process with set payments would also make it much easier for victims to file for repeated violations, which frequently occur, and allow more victims to seek compensation. Creating a process enabling a broader group to participate in reporting would more widely distribute compensation than one where each victim was required to bring an individual tort action. In exchange, requiring swift presentation of

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187. This could also make it easier for friends of the victim who are also experiencing retaliation to come forward.

188. It could also be limited if those who have endured harm do not want to have to relive the episode to prove it. This would, therefore, help reduce the invasion of privacy inherent in a program like this.

claims would capture this information in a way that allowed the military to act quickly.

Administrative rulemaking is tailor made for determining what factors to use when differentiating types of incidents and the corresponding payments. Allowing different organizations to weigh in on the important factors to consider and the relative amounts of harm would be the easiest method to determine an appropriate level. Setting the amount at the thirtieth or fortieth percentile of comparable-case awards could help establish an amount that would help ensure widespread compensation beyond nominal payments without generally being perceived as a windfall. Such an amount would, by design, not be sufficient to compensate those suffering severe and lingering additional harm. For these severe cases, an option could be available to provide the victim additional compensation. Extensions to the strict statute of limitations could be proper for those who demonstrate further resulting harm, since the proposed reduction of the statute of limitations is made in part to offset the automatic compensation.

*b. Protecting Claimants Filing in Good Faith from Filing Repercussions*

Victims may fear coming forward with claims for several reasons. Someone filing a good faith report using the system should not have to fear the information they disclose will negatively affect them either through prosecution for making the statement itself or for a collateral offense.

One reason many victims of sexual assault have been reluctant to file is that the victim can be prosecuted for military disciplinary offenses, such as underage drinking or adultery, that they committed near the time of the assault.<sup>189</sup> Some service members take advantage of this concern and explicitly warn their victims not to disclose an assault since the victim will also get in trouble.<sup>190</sup> Underage drinking, while hardly laudatory behavior, pales in comparison to assault or harassment. However, given the competitive nature of many promotions, even a comparatively mild administrative punishment could take someone out of contention for a desired promotion or transfer.<sup>191</sup> Therefore, a victim may stay quiet for the sake of their career, al-

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189. 32 C.F.R. § 105.3 (2000) (including in the very definition of the term “collateral misconduct” the fact that it is “one of the most significant barriers to reporting assault because of the victim’s fear of punishment” in the very definition of the term “collateral misconduct”).

190. HUM. RTS. WATCH REPORT, *supra* note 43, at 64 (“A victim reported that her perpetrator, a superior who got her drunk and then assaulted her while she was passed out, told her not to tell or she would be in trouble for underage drinking.”).

191. *Id.* at 42 (describing a similar concern regarding evaluations that a supervisor has made artificially low performance evaluation).

lowing a comparatively sophisticated assailant to go unpunished and with free range to continue assaulting other service members.

When this concern has been raised in the past, the military's response has been that it does not want to relax the rule for fear that victims would report assaults only to get out of trouble for their own transgressions and that victims rarely receive punishment for these collateral offenses.<sup>192</sup>

Since this proposed program aims to provide better information about instances of harassment, assault, and retaliation to enable military prosecution of the offenses, a similar concern could arise about the claimant's so-called collateral offenses. However, there is a difference between someone caught engaging in underage drinking who then attempts to avoid consequences by claiming they were victimized and someone who comes forward to inform the military of the entire situation. Victims should not face liability for associated minor violations the military learns about only because the victim shared the information about their harassment and assault with the military, whether the information is shared as described within this proposed system or through a traditional report.<sup>193</sup> This safe harbor would encourage more victims to come forward and remove a tool used by comparatively sophisticated assailants to help prevent disclosure of the attack. Recently, Congress passed legislation making this safe harbor available for victims reporting sexual assaults, but in the proposed program it would also apply to reports of harassment and retaliation as well as sexual assault.<sup>194</sup>

Another concern victims could have when coming forward, particularly in cases where the evidence is comparatively scant, is that if the committee does not determine the incident occurred by a preponderance of the evidence, victims could face prosecution for making a false statement. As discussed further in Part III.C.3, the ability to prosecute those making false statements is one reason false reports should be a comparatively small concern in military reports. However, in sev-

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192. MARTHA S. BASHFORD, DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION & DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, ANALYSIS AND RECOMMENDATIONS REGARDING THE DOD DRAFT REPORT ON ALLEGATIONS OF COLLATERAL MISCONDUCT AGAINST INDIVIDUALS IDENTIFIED AS THE VICTIM OF SEXUAL ASSAULT IN THE CASE FILES OF A MILITARY CRIMINAL INVESTIGATIVE ORGANIZATION 4 (2019), [https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD\\_Letter\\_DoD\\_Victim\\_Collateral\\_Misconduct\\_20190916.pdf](https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Letter_DoD_Victim_Collateral_Misconduct_20190916.pdf) [<https://perma.cc/X6C4-2UVR>] (claiming that an average of six percent of service members reporting a sexual assault face accusations collateral violations).

193. HUM. RTS. WATCH REPORT, *supra* note 43, at 67 (arguing for the removal of the collateral violation rule to encourage more victims to come forward).

194. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 539A (requiring the Secretary of Defense to develop a "safe-to-report" policy that provides protection for a reporter of sexual assault against "minor collateral misconduct" occurring close in time to the assault).

eral instances, failure to convict in a court-martial was treated as evidence of a fabricated report.<sup>195</sup> Under the proposed system, a concern could arise that, similarly, a report that does not result in payment would automatically be considered a false report. Victims need reassurance that filings made in good faith will not result in prosecution, even if ultimately the evidence is insufficient to support payment. Those whose reports are not made in good faith, however, can and should be prosecuted for the false report to help send a message that the military takes the entire process seriously.

*c. Independent Judges Should Make Decisions Based on a Preponderance of the Evidence*

Administration of the recently created medical malpractice program is delegated to the DOD. Since that program is the basis for expansion here, this program would also be within DOD purview. Keeping military actions within the Department's control helps address one of the concerns raised in *Feres*—it could be dangerous to grant civilian courts oversight of the military. The agency employees responsible for this program would logically be employees of the DOD. With this established, however, program administrators should still be sufficiently independent from the traditional military chain of command so victims can feel confident they will be given a fair hearing. Independence ensures the administrative law judge will not hesitate to compensate even for actions committed by relatively high-ranking service members.

This compensation determination should also be considered a civil matter, relating to the victim rather than the perpetrator. As with other civil compensation like tort claims, it is reasonable to require only a preponderance of the evidence rather than the beyond a reasonable doubt criminal standard.<sup>196</sup> As discussed further in Part III.C.3, a determination that compensation was due to the victim under this program would in no way relate to a determination about whether the service member should be held liable for the conduct by the military. The program's role would only be to alert the military about the alleged incident so the military could take separate disciplinary action as appropriate and with the applicable burden of proof.

*d. The Office Must Be Adequately Staffed To Process All Applications Quickly and Accurately*

There is no judicial review available for claims under the medical malpractice program, which helps avoid concerns over civilian judicial

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195. HUM. RTS. WATCH REPORT, *supra* note 43, at 61.

196. Myka Held, Note, *A Constitutional Remedy for Sexual Assault Survivors*, 16 GEO. J. GENDER & L. 445, 461 (2015).

oversight of the military. For a similar restriction on judicial review of the administrative decision to be in place here, additional safeguards in the program would be necessary. First, there must be multiple levels of review. This stratification would not necessarily be different than civilian analogues of the program, like the Social Security Administration determining disability benefits or the EEOC reviewing claims of workplace harassment or assault.

However, the lack of judicial review means this program must be sufficiently staffed to function on its own, unlike the EEOC which performs more of a triage role when reviewing claims before individuals are allowed to bring their own claim in court.<sup>197</sup> If a board is the final level of review in the process, then it must have the capacity to review all claims brought to it. Staffing must be sufficient, therefore, to enable all claims to be fully considered.

Not only should the claims be fully considered, but this process should also be done quickly. Just as there is a tradeoff between the guaranteed payout and the short statute of limitations, the review of the claim must also be completed quickly to encourage individuals to actually use the process, particularly when one of the goals is for victims to report repeated violations. A short statute of limitations should help make this easier, since the situations under review would all be relatively recent, making retrieval of photographic evidence, testimony, or medical records all relatively straightforward. It would also help address one of the current problems with the military justice system—the time delay, which often means victims have left the military before a final decision in their case. The due process protection that can result in a lengthy criminal process does not apply in this civil version, and fast decisions will be necessary to build confidence in the system. A fast and efficient process will both quickly compensate those harmed by military inaction and further encourage quick reporting.

## **B. How This Would Address the Problems**

In Parts I.C.2 and 3, this Article described how the current process harms both the victims and the military itself. The program advocated here would significantly benefit both parties.

Victims would finally obtain both official recognition of and compensation for the harm they have suffered both initially and as targets of retaliation. The military would obtain better timely information on systemic problems it has thus far been unable to solve. Not only would it have this information, but the military would also have a good reason to use it because it presents an active and direct way to address

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197. David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 *YALE L.J.* 616, 670–71 (2013) (pointing out that while the EEOC does perform a triage function, it does not seem to do a good job predicting which cases will succeed in court).

the severe harassment and assault issues, especially since those problems disproportionately affect the diverse individuals the military claims to value so highly.

1. *Benefits to Individual Victims*

Up until now, victims have been asked to self-sacrifice to allow the military to potentially hold their assailant or harasser accountable. This proposal would help reduce some of that burden. Not only would the victim receive some measure of compensation for what they have endured, this compensation would be possible without demonstrating harm resulting from the incident itself—a feature designed to make it easier to report and encourage much broader reporting. This would also be a significantly lighter burden compared to what victims would face if *Feres* were repealed and they were allowed to sue the military in court. The proposal would also acknowledge the continued harm these events cause by compensating the victim for each act of assault, harassment, or retaliation, providing an incentive to keep reporting violations and a way to hold perpetrators and the military accountable.

Removing concerns victims have about liability for collateral violations would encourage many to come forward, removing the fear that even a comparatively mild punishment for a collateral violation could damage the victim's career as well. Additionally, one of the most important benefits would be that, once the military is put on notice and can take broader action against individuals, more of those engaged in harmful behavior would be reprimanded. Others would then learn these behaviors were no longer tolerated, leading to fewer victims in the future.

2. *Benefits to the Military as a Whole*

While the prior section emphasized the benefits to victims from official acknowledgment and compensation, this proposal truly is a win-win for both victims and the military. It is designed to finally provide the military with the critical information it needs to take real action and begin to change the culture. Increased reporting of assault and harassment will let the military know about the issues and help normalize the process of reporting. What will likely make the biggest difference, however, is the incentive to report retaliation. Thus far, retaliation has been widespread but virtually impossible to deal with, particularly since those in the chain of command so often have been the ones engaging in the behavior.<sup>198</sup> Part II.B discussed how effective retaliation can be at preventing individuals from continuing with a report they had already filed. Someone shaken enough to retract a

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198. *See supra* note 26 and accompanying text.

claim of rape due to retaliation likely would never report the retaliation itself, and absent this reporting, the military would never be able to learn about those engaged in retaliation because they are often not the ones who committed the initial infraction.<sup>199</sup>

By continually paying out for claims, the military will critically provide a critical incentive for the individuals most affected by these behaviors to continue reporting, finally giving the military a window into how widespread the behavior is and who is engaged in it.

The short statute of limitations has the military's best interest in mind. Forcing individuals to come forward quickly and report the infractions places the military in the best possible position to take quick action to deal with the individuals engaged in the problematic behavior. This swift action would help change the entire tone within the unit and, unit by unit, the military as a whole—thereby finally making the military truly welcome for all members who wish to serve their country in this way.

### C. Alleviating Potential Concerns Raised by the Proposal

This section addresses some of the likely concerns the administrative system proposed in this Article would raise. It begins with one of the primary reasons given for the *Feres* doctrine, which bars military members' tort claims against the U.S. Government. Courts, relying on *Feres*, have hesitated to impose liability in part because they did not want an external entity intervening in military matters. This concern could still arise here since the proposal would remove some oversight from the chain of command.

The second concern addresses a primary failure already discussed in the Article. The military justice system as it exists now does not appear terribly effective at imposing liability in response to complaints. Given this shortcoming, why would it be expected to do any better with additional complaints, one of the driving purposes behind the proposal?

Finally, this section addresses the specter of false reports that already haunts reporters. If individuals are already suspected of falsely reporting when they receive no benefit for doing so and instead, face tremendous pressure not to, how likely will they be to falsely report when they will be entitled to some amount of payment for what they have endured?

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199. See *supra* note 46 and accompanying text.

1. *This Compensation Would Not Interfere with Military Matters*

As the *Feres* doctrine expanded, one of the judicial concerns was an unwillingness from civilian courts to interfere with military matters.<sup>200</sup> Since the administrative compensation system proposed in this Article, like that being put in place for medical malpractice, would be housed within the DOD, the strict concern about civilian oversight of the military would not be at issue. However, since the compensation would still come from an entity outside the direct chain of command of the service member, which places it outside the military's preferred method of dealing with issues, it is still important to address these issues. They fall into two distinct areas: concern over potential interference with discipline and the chain of command and concern that new liability could impact current military training and tradition.

a. *Discipline and Chain of Command*

Discipline in the military can be a matter of life or death, and members must be willing to immediately and unquestioningly obey an order given by their commander. The concern is that if it is easy to bring a complaint alleging harassment or assault, a commander may hesitate to impose discipline on a subordinate for fear of misinterpretation. However, it is not true that the military requires, or even desires, service members to obey every order without hesitation. The military does not expect service members to obey an illegal order,<sup>201</sup> and harassment, assault, and retaliation all go against the code of military conduct. Training given to new recruits and commanders could also help make the distinction clearer for both sides. Commanders should understand what they are expected and capable of asking subordinates to do and should similarly understand that it is not true that anything goes.

Chain of command concerns could also relate to the appropriate method of oversight. As described in this Article, a newly created administrative body would be responsible for reviewing behavior through a different channel than such behavior is normally dealt with—the chain of command. However, this would also not be a dramatic departure. The chain of command does not currently handle all investigations of alleged misbehavior. As described in Part II.C.1, the investigation of sexual assault is specifically removed from the chain of command and delegated to the military police, regardless of

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200. *United States v. Brown*, 348 U.S. 110, 112 (1954) (distinguishing the case from *Feres* because the suit was brought for injury after discharge when the plaintiff would no longer have been subject to military discipline).

201. *United States v. New*, 50 M.J. 729, 739 (A. Ct. Crim. App. 1999), *aff'd*, 55 M.J. 95 (C.A.A.F. 2001) ("Unless the order requires an obviously illegal act . . . the servicemember will obey the order . . .").

whether the alleged assailant was within the victim's chain of command. Harassment can also be reported outside the chain of command, even if it is not the military's preferred method.

It is also important to remember the solution proposed here addresses compensation for the victim, not the method of punishment for the assailant. This solution adds a victim-focused compensation program without disrupting the military's system of justice. In fact, this proposal allows the military to learn the wrongdoer's identity, when that information is known, so that it may take appropriate disciplinary measures through traditional means. Existing chain-of-command procedures need not change in situations where they would be applicable, particularly since the information would still be retained entirely within the military as a whole.

*b. Training and Tradition*

Military training is, by design, very intense. "Indeed, the very purpose of basic training is to break down the recruit's civilian orientation and orient him in the ways of military life."<sup>202</sup> Any attempt to allow recovery for harassment or sexual assault raises a concern of external oversight over the training process and concerns that necessary training components for an individual could be omitted to avoid liability. Part of the benefit of allowing the military to retain control over this issue is to ensure that the regulations governing payment are able to account for and distinguish necessary components of training from abuse. Those entering the military do not and should not expect a golden path to be laid out for them, but neither should they be forced to endure abusive behavior.

Often unspoken, but lurking behind some of the concerns about opening the door to liability, is the belief that there could be deeply embedded traditions within the culture of the unit that, if viewed by an outside observer, could result in liability. This could be interpreted as the kind of thinking that led to the situation at Fort Hood. When low-level officers do not believe the military actually cares about issues involving diversity, they can view it as a requirement of the job to check boxes while not actually changing anything.<sup>203</sup> Alternatively, if the command supports a discriminatory tradition, that speaks even more to a necessary culture change. It is possible no one on the inside can see how harmful the practice is, but a longstanding discriminatory practice may well need to end, and liability could be what finally forces it to happen. It would be understandable for some to mourn the passing of an era they remember with fondness. But, to actually become open to all, the military will need to get rid of discriminatory

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202. *Helwick v. Laird*, 438 F.2d 959, 967 (5th Cir. 1971).

203. *See supra* note 176 and accompanying text.

practices. It is possible that liability is necessary before that is finally understood by many members. Distinguishing between valid traditions and components of training, on one hand, and discriminatory anachronisms that are past their time, on the other hand, is one of the reasons to allow the military to retain control over the final regulations implementing the specifics of the compensation scheme.

2. *This Plan Would Help Despite the Military's Poor Use of Existing Information*

This Article has highlighted how the military often fails to learn about harmful acts its members suffer, but some incidents are already being reported, giving the military the opportunity to at least address those instances. Yet, as shown by the dismal conviction record for the strongest cases that make it to court-martial, the military is not currently doing an effective job with the cases it does get.<sup>204</sup> This record raises doubts about whether the military would really be able to address these problems effectively if presented with more reported cases, one of the specific goals of the program advocated here. However, there are multiple reasons for optimism that increased reporting would make a significant difference. The proposal here would give the military additional critical information and provide a monetary reason for it to take the issue seriously.

One problem with the current system is that fewer retaliations are reported than the initial offenses even though many find the retaliation worse than the initial offense. This retaliation further hurts the victim and helps dissuade others from reporting both initial offenses and other retaliation. Breaking this cycle requires the military to give someone a reason to come forward, repeatedly, if necessary, to report continued retaliation. The compensation provided through this system could help make that happen. Since one of the functions of retaliation is to communicate to the rest of the group that the reporting is the real threat to group unity, not the behavior complained of, removing this signaling could not only prompt more people to report, but it could also help change the culture that allowed the harmful behavior in the first place.

The second issue is when military members are aware that many people are engaging in certain conduct, but only a few have been reported for it. There could be an increased hesitancy to impose a significant punishment, even when the behavior itself could warrant such a punishment. As more and more incidents are reported, concerns about only punishing the "unlucky" few would subside.

Finally, the proposal set forth here would help realign the military's priorities. One of the defining features of tort law, including the

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204. FORT HOOD REPORT, *supra* note 29, at 65.

concept of *respondeat superior*, is that requiring payment for harm caused provides the employer a strong incentive to make sure it does not happen.<sup>205</sup> The military, up to this point, has lacked this critical force for change. Making the military pay, literally, for the harm caused by the military's failure to prevent these incidents would make those in power pay more attention to the situation and help signal to all those along the chain of command responsible for enforcing these guidelines that the military does, in fact, really mean to take these issues seriously. The payment expected on a single claim here would be much less than the liability the military could face in a single court case, but the difference would be the frequency and ease with which victims would receive payment. Not only would this help spread compensation to a greater percentage of victims, but it would also be enough money for the military to take the issue seriously.

The Fort Hood report laid much of the blame at the feet of low-level supervisors who did not implement Army requirements simply because they did not agree with them.<sup>206</sup> Putting money behind what have previously seemed to be empty proclamations would help reinforce their nondiscretionary nature for those at all levels of the military and effectively communicate that this is now a military priority.

### 3. *Compensation Would Not Give Rise To Overwhelming Numbers of False Reports*

The current system in the military provides no incentive reporting—falsely or truthfully. Though rampant retaliation and ostracism generally makes life miserable for those who file reports, the Fort Hood report made clear that a large percentage of soldiers believe there is a strong incentive to file false reports and that many false reports are filed.<sup>207</sup> They are not alone in this thinking either. There is a nearly constant refrain when discussing reporting sexual assault or harassment that false reporting occurs constantly.<sup>208</sup> In reality, the widely accepted understanding is that false reports are rare, estimated to represent at most eight percent and as little as two percent of all reports filed.<sup>209</sup> Given the pervasive fear of false reports, however, one expected reaction to a victim compensation proposal is a concern over increased false reports. By its nature, providing something,

205. William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 914–15 (1981).

206. See *supra* note 175 and accompanying text.

207. FORT HOOD REPORT, *supra* note 29, at 81 (finding only two individuals out of over 2,000 surveyed who claimed to be victims of false reports and noting that neither victim's career was destroyed as a result).

208. See DEP'T OF DEF., *supra* note 89, at 102.

209. NAT'L SEXUAL VIOLENCE RSCH. CTR., FALSE REPORTING: OVERVIEW 3 (2012), [https://www.nsvrc.org/sites/default/files/Publications\\_NSVRC\\_Overview\\_False-Reporting.pdf](https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf) [<https://perma.cc/JKC9-GV4C>].

in this case the possibility of monetary compensation, to those who report an incident does provide an additional incentive to make a report—that is the point.

Yet, there are four reasons this still should not be a particularly great concern. First, as mentioned, false reporting rates are consistently very low. Second, though filing a report may eventually provide payment, it would only be the first step. Before the victim could receive compensation, the newly-created agency would have to determine it was more likely the claimed incident occurred than not. Filing a report alone would not entitle someone to compensation, as the agency within the military charged with making these determinations would decide the matter. Filing a claim with no factual basis would be pointless since it would result in no compensation. Third, it would be equally pointless to file a false claim in an attempt to harm an individual's military career because while filing the report is necessary for payment, this proposal would not change the military justice system for the accused. A civil liability standard for payment would help ensure that victims were more likely to be compensated, and payment on a claim would not result in a disciplinary finding that the act occurred or in criminal liability for the accused. The protections built into the military justice system would remain for anyone accused of a crime. Fourth, it is already specifically a violation of the military code to make a false official statement.<sup>210</sup> Reporting a violation in the military is not and would not be equivalent to doing so in the civilian world. The military commonly brings charges in reported courts-martial against those who make false official statements.<sup>211</sup>

Therefore, someone making one of the very rare baseless claims would receive no compensation, as the claim determined not to meet the standard required for payment. This claim would not get the accused individual in trouble—the military justice system would likewise determine the claim to be without merit, and the false victim would instead find that they were the subject of a military justice investigation for having made the false statement.

#### IV. CONCLUSION

Congress must take real action to stop the plague of harassment, assault, and retaliation in the armed services. Education alone cannot solve these problems. Instead, the military must take action against those committing these crimes—something it can only do if it knows

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210. 10 U.S.C. § 907(a).

211. *E.g.*, see U.S. ARMY, SUMMARIZED REPORT OF RESULTS OF TRIAL (2020), <https://www.rmda.army.mil/readingroom//ReadingRoom/FileDownload.dl?docId=?00eab089-4fac-41c2-a806-18a4554a2dc0%27> [https://perma.cc/QW4V-RF88] (finding seven soldiers charged with making a false official statement in just February 2020).

who the offenders are. The proposal here would allow the military to simultaneously obtain this critical information and provide some measure of compensation to those harmed, who have remained locked out of court and without recourse against the individuals who harmed them.