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INTRODUCTION

"[A] female soldier in Iraq is more likely to be raped by a fellow soldier than killed by enemy fire."[1] At least twenty percent of female veterans who served in Iraq and Afghanistan have experienced MST (Military Sexual Trauma),[2] and approximately one in three military women has been sexually assaulted compared to one in six civilians.[3] Though joining the military always involves an element of risk, for some recruits, the risk comes not only from enemy combatants, but from fellow service members as well. Awareness of the extent of the problem of sexual assault in the military has increased in recent years, as have

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1. Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579, 579 (2014).

2. *See Military Sexual Trauma*, U.S. DEPARTMENT OF VETERAN AFFAIRS, http://www.mentalhealth.va.gov/msthome.asp (last visited Nov. 19, 2014). The U.S. Department of Veteran Affairs defines military sexual trauma as "sexual assault or repeated, threatening sexual harassment that occurred while the Veteran was in the military. *Id.* It includes any sexual activity where someone is involved against his or her will – he or she may have been pressured into sexual activities (e.g., with threats of negative consequences for refusing to be sexually cooperative or with implied faster promotions or better treatment in exchange for sex), may have been unable to consent to sexual activities (e.g., when intoxicated), or may have been physically forced into sexual activities. *Id.* Other experiences that fall into the category of MST include "unwanted sexual touching or grabbing; threatening, offensive remarks about a person's body or sexual activities; and/or threatening or unwelcome sexual advances." *Id.*

3. *See* U.S. DEPARTMENT OF LABOR, TRAUMA-INFORMED CARE FOR WOMEN VETERANS EXPERIENCING HOMELESSNESS 11 (2011), *available at* http://www.dol.gov/wb/trauma/WBTraumaGuide2011.pdf.

efforts at reform.[4] Nevertheless, the problem persists, and in some cases has been exacerbated by actions that violate the constitutional rights of sexual assault survivors.[5] Plaintiffs seeking to have their rights vindicated in federal court or to gain exposure by accessing records from the Department of Defense have been left disappointed.[6]

This Note explores the problem of sexual assault in the military through the lens of the First Amendment, focusing on survivors' rights to freedom of speech without retaliation and the press's right to freedom of information concerning the scope of sexual assault in the military. Part I of this Note provides an overview of the problem of sexual assault in the military and the recent efforts at reform. Part II explores the chilling effect of certain military policies on the free speech of sexually assaulted service members, while Part III explores freedom of the press and freedom of information concerns regarding the release of information about sexual assault in the military. Part IV addresses the First Amendment concerns raised in three recent circuit court decisions involving sexual assault in the military. Part V proposes specific policies that could be put in place to protect survivors' rights and the right of the public/press to be informed about incidents of sexual assault in the armed forces. Finally, Part VI proposes legislative solutions by comparing the problem of sexual assault in the military to the problem of sexual assault on college campuses. Specifically, it proposes that Congress amend the Freedom of Information Act (FOIA)[7] to require the release of information about military sexual assaults, just as the Clery Act[8] requires colleges to disclose information about sexual assaults which would otherwise be constrained by the Family Educational Rights and Privacy Act (FERPA).[9]

4. *See Schenck*, *supra* note 1, at 594.

5. *See, e.g.*, Jodie Friedman, *Reporting Sexual Assault of Women in the Military*, 14 CARDOZO J. L. & GENDER 375, 377 (2008) (discussing the retaliation experienced by servicewomen who reported their sexual assaults).

6. *See* Klay v. Panetta, 758 F.3d 369, 377 (D.C. Cir. 2014); Cioca v. Rumsfeld, 720 F.3d 505, 517–18 (4th Cir. 2013); Serv. Women's Action Network v. Dep't of Def., 570 F. App'x 54 (2d Cir. 2014).

7. 5 U.S.C. § 552 (2012).

8. *See* 20 U.S.C. § 1092(f) (2012).

9. *See* 20 U.S.C. § 1232(g) (2012).

PART I: OVERVIEW OF THE PROBLEM

One source of information about the scope of sexual assault in the military comes from the United States Department of Defense itself.[10] Every year, federal law requires the Department of Defense to provide Congress with a report on sexual assaults in the armed services.[11] Although sexual assault in general remains one of the most underreported crimes,[12] the report does provide some context to the rates of reported incidents. The 2013 *Annual Report on Sexual Assault in the Military* revealed that reporting increased in all four branches of the armed forces from the previous year.[13] The total number of reports of alleged sexual assault received—5,061—was a fifty percent increase from 2012.[14] The Department argued that this increase stemmed from survivors' increased confidence in reporting and better support provided by the military rather than increased instances of crime.[15]

Increased media coverage over the past ten years about the extent of sexual harassment and assault in the military has led to calls for reform.[16] The movement has been fueled by survivors sharing their stories,[17] marines speaking out about the rape culture,[18] news articles and

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10. *See* U.S. DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 2 (2013), [hereinafter DOD ANNUAL REPORT], *available at* http://www.sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

11. *Id.*

12. Jennifer L. Truman & Michael Planty, *Criminal Victimization, 2011*, U.S. DEPARTMENT OF JUSTICE–BUREAU OF JUSTICE STATISTICS 9 (2012), *available at* http://www.bjs.gov/content/pub/pdf/cv11.pdf.

13. *See* DOD ANNUAL REPORT, *supra* note 10, at 2.

14. *Id.*

15. *Id.* at 3.

16. *See, e.g.*, Molly O'Toole, *Military Sexual Assault Epidemic Continues To Claim Victims As Defense Department Fails Females,* HUFFINGTON POST (Oct. 6, 2012, 9:36 AM), http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department_n_1834196.html (sharing the stories of Army, Navy, Marine, and Air Force servicewomen who were raped while on active military duty).

17. *See id.*

18. *See* Callie Beusamn, *Marine Corps Veteran Righteously Rants Against Military Rape Jokes*, JEZEBEL (Aug. 29, 2014, 4:10 PM), http://jezebel.com/marine-corps-veteran-righteously-rants-against-military-1628499352 (quoting Marine veteran Brian Jones who said "[i]t's hard to believe that in 2014 that I have to tell my fellow Marines and my fellow veterans that they shouldn't make rape jokes

documentaries highlighting the issue,[19] and politicians advocating for change.[20] Though some scholars have questioned the accuracy of statistics and facts released by the media,[21] overall the increased publicity has resulted in action by Congress and other government officials to combat the problem.[22] In 2004, Secretary of Defense Donald Rumsfeld directed the Under Secretary of the Defense for Personnel and Readiness to perform a ninety-day review of all sexual assault policies and programs.[23] The same year, Congress directed a Department of Defense Task Force to assess how the Army and Navy address sexual harassment

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about the women they serve with."); Brian Adam Jones, *The Sexist Facebook Movement The Marine Corps Can't Stop*, TASK AND PURPOSE (Aug. 20, 2014), http://taskandpurpose.com/sexist-facebook-movement-marine-corps-cant-stop/ (noting derogatory Facebook captions on pictures of military women passed through the ranks, including "Smash or pass," "Roses are red, violets are blue, be my fucking Valentine, or I'll rape you," and "You have tattoos and daddy issues? Guess I don't need this roofy").

19. *See, e.g.*, O'Toole, *supra* note 16; THE INVISIBLE WAR, http://www.notinvisible.org/the_movie (last visited January 31, 2015) (describing a documentary that explores the "long-hidden history" of rape in the military and features interviews with victims, military officials, and members of Congress).

20. *See, e.g.*, Jay Newton-Small, *Ernst Says She Was Sexually Harassed in the Military*, TIME (Aug. 15, 2014), http://time.com/3119176/ernst-says-she-was-sexually-harassed-in-the-military/ (discussing comments made on the campaign trail by Joni Ernst, a recently elected U.S. Senator from Iowa and twenty-year Army veteran, who shared her experience with sexual harassment while serving and called for new legislation); Darren Samuelsohn, Juana Summers & Anna Palmer, *Kirsten Gilibrand's sexual assault bill derailed*, POLITICO (Mar. 10, 2014, 3:14 PM), http://www.politico.com/story/2014/03/senate-military-sexual-assault-vote-104372.html (describing efforts of Senator Kirsten Gilibrand from New York to enact a bill to overhaul sexual assault prosecution in the military).

21. *See* Tricia D'Ambrosio-Woodward, Esq., *Military Sexual Assault: A Comparative Legal Analysis of the 2012 Department of Defense Report on Sexual Assault in the Military: What It Tells Us, What It Doesn't Tell Us, and How Inconsistent Statistic Gathering Inhibits Winning The "Invisible War,"* 29 WIS. J. L. GENDER & SOC'Y 173, 181 (2014) (arguing that the "wide scope of definitions used has contributed to misunderstanding the extent and nature of sexual crimes within the military and negatively impacted the ability to implement appropriate measures to combat the crime."); Schenck, *supra* note 1, at 583 ("[T]he Department of Defense is its own worst enemy in the context of generating adverse and misleading publicity, which at a minimum, may result in discouraging females from joining the military.").

22. Schenck, *supra* note 1, at 592–93.

23. *Id.* at 592.

and assault and make recommendations for improvement.[24] A similar task force directive was issued in 2005.[25] The Department of Defense also created its own internal office to address sexual assault, the Sexual Assault Prevention and Response program (SAPR). [26]

In 2013, Secretary of Defense Charles Hagel established an independent review panel to assess the systems used to investigate, prosecute, and adjudicate crimes of sexual violence and recommend ways to improve the effectiveness of the system.[27] The same year, SAPR created a strategic plan with five lines of effort: prevention, investigation, accountability, advocacy/victim assistance, and assessment.[28] In January of 2014, Congress passed the Consolidated Appropriations Act, which appropriated $25 million for the Department of Defense to implement a Sexual Assault Special Victims Program.[29] Between 2013 and 2014, New York Senator Kirsten Gillibrand worked to develop a bill to overhaul the military's processes for reporting and prosecuting sexual assault.[30] Her bill, which would have replaced the chain-of-command procedure with independent prosecutors, failed in the Senate after a 55-45 vote on March 6, 2014.[31]

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24. *Id.* at 593.

25. *Id.*

26. DOD ANNUAL REPORT, *supra* note 10, at 6.

27. *See id.* at 13–15; Schenck, *supra* note 1, at 594.

28. *See* DOD ANNUAL REPORT, *supra* note 10, at 6.

29. *See* Consolidated Appropriations Act, 2014, Pub. L. No. 113–76, §§ 8124–8125, 128 Stat. 5, 133–34 (2014).

30. *See* Amy Goodman, *Pentagon Study Finds 26,000 Military Sexual Assaults Last Year, Over 70 Sex Crimes Per Day*, NATION OF CHANGE (May 8, 2013), http://www.nationofchange.org/pentagon-study-finds-26000-military-sexual-assaults-last-year-over-70-sex-crimes-day-1368029583. In an Armed Services Committee hearing on military sexual assault on May 7, 2013, Gilibrand stated, "Because it's in the chain of command, because this is what our witnesses have told us, people aren't reporting. They don't feel that there is a[n] atmosphere by which they can report safely. They're afraid of retaliation. They're afraid of being treated poorly by their commanders, being treated poorly by their colleagues. There isn't a climate by which they can receive justice in this system. And that is why I want the decision not to be part of the chain of command, but be done entirely by trained professionals who may not have a bias or may not have a lens that is untrained." *Id.*

31. *See* Darren Samuelsohn, Juana Summers & Anna Palmer, *Kirsten Gilibrand's Sexual Assault Bill Derailed*, POLITICO (Mar. 6, 2014, 3:14 PM), http://www.politico.com/story/2014/03/senate-military-sexual-assault-vote-104372.html.

Increased recognition of the scope of the problem of sexual assault in the military has also lead to litigation.[32] Organizations such as the Service Women's Action Network and the American Civil Liberties Union have brought suit demanding the release of information about the scope of the problem and disclosure of reporting and prosecution policies.[33] Groups of current and former service members who experienced sexual assault have also sued members of the Department of Defense directly, claiming a violation of their constitutional rights.[34] Three federal circuit courts issued opinions relating to sexual assault in the military between 2013 and 2014.[35] The claims, analysis, and proposed solutions offered by these three cases raise two First Amendment concerns: (1) the potential chilling effect on speech caused by military policies discouraging survivors to speak out about harassment and abuse; and (2) freedom of the press concerns about our democratic right to be informed about public issues such as sexual assault in the military.

PART II: FREEDOM OF SPEECH CONCERNS WITH THE CHILLING EFFECT OF MILITARY POLICIES

Possessing freedom of speech is meaningless if speaking out means effectively ending one's military career, yet this has been the reality for many service members who report their sexual assaults.[36] This is true despite the fact that the Supreme Court has specifically recognized a First Amendment protection against employment-related retaliation for speaking freely.[37] In *Smith v. Arkansas State Highway Employees, Local 1315*,[38] the Court held that "[t]he government is prohibited from infringing upon [the right of an individual to speak freely] . . . by

32. *See generally* Serv. Women's Action Network v. Dep't of Def., 570 F. App'x 54 (2d Cir. 2014); Cioca v. Rumsfeld, 720 F.3d 505 (4th Cir. 2013).

33. *See Serv. Women's Action Network*, 570 F. App'x 54.

34. *See generally* Klay v. Panetta, 758 F.3d 369 (D.C. Cir. 2014).

35. *See generally id.*; *Serv. Women's Action Network*, 570 F. App'x 54; *Cioca*, 720 F.3d 505.

36. Friedman, *supra* note 5, at 377.

37. Smith v. Arkansas State Highway Emps., Local 1315, 441 U.S. 463, 464–65 (1979).

38. *Id.*

imposing sanctions for the expression of particular views it opposes."[39] Further, individuals who choose to speak freely are "protected by the First Amendment from retaliation for doing so."[40]

Many individuals in the U.S. military who have experienced sexual assault have simply chosen to not speak at all.[41] In the hierarchical military structure, when faced with the decision between reporting an assault or enduring "ostracism, harassment, or ridicule,"[42] the majority of survivors choose to remain silent.[43] A 2005 survey of a sample of students at the U.S Military, Naval, and Air Force Academies revealed that across the branches, only 40–44 percent of female cadets who experienced sexual assault discussed the incident with others or reported it to the authorities.[44] In a Department of Defense poll of active female service members who were asked what would keep them from reporting a sexual assault, the most common response was "fear of social consequences."[45] Another poll of service members who had been exposed to inappropriate sexual conduct showed that 54% responded that they avoided reporting for fear of retaliation from their perpetrator or friends.[46] In the closely-knit military environment, it is highly probable that the victim will know the perpetrator, and this fact actually makes it more likely that the victim will not report the assault.[47]

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39. *Id.* at 464.

40. *Id.* at 465.

41. Friedman, *supra* note 5, at 377.

42. *Id.*

43. *Id.*

44. *Id.*

45. Emily Hansen, *Carry That Weight: Victim Privacy Within the Military Sexual Assault Reporting Methods,* 28 J. MARSHALL J. COMPUTER & INFO. L. 551, 581 (2011).

46. *Id.*

47. *See* RICHARD FELSON & PAUL-PHILIPPE PARE, THE REPORTING OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT BY NONSTRANGERS TO THE POLICE, 8 (2005), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/209039.pdf (suggesting that "the fact that a woman knows her rapist may encourage her to blame herself. She may feel that she 'led him on' and was not really raped, and that consequently there is no crime to report. Even when a woman identifies herself as a rape victim, she may fear that others will not believe she was raped if she knew the man.") (quoting Linda S. Williams, *The Classic Rape: When Do Victims Report?*, 31 SOCIAL PROBLEMS 459, 460 (1984)).

These female service members undoubtedly suffered mental and emotional anguish as a result of keeping their abuse (and abusers) a secret. However, the survivors who reported their attacks also experienced devastating consequences and an abridgement of their First Amendment right to speak freely without retaliation.[48] Numerous service members have shared their experience of mistreatment by the military and the demise of their military careers as a result of their decision to report a sexual assault.[49] Survivors have reported being sequestered, sent on leave, accused of lying, and threatened—in many cases while watching their attackers becoming promoted and awarded.[50] After reporting her sexual assault, one Air Force woman was served demerits and later had codes entered into her discharged papers which "effectively prohibit[ed] her from ever holding another military or government job."[51] Another Army servicewoman was threatened with arrest for refusing to return to the base that was the scene of her rape.[52] Other service members have born further shame and humiliation after the details of their rape were released to the other service members in their units.[53] The fear of harassment or ridicule by peers is especially relevant in the context of military academies, where "[t]he supervisory role of upperclassmen over underclassmen and the mission of transitioning cadets from civilian life to military life are significant factors contributing to the potential for abuse of power and acts of reprisal toward cadets who 'tell on' their peers."[54]

Under current military policy, a survivor of sexual assault has two choices when reporting his/her experience: restricted or unrestricted reporting.[55] Restricted reporting does not trigger the official investigative process, and allows the survivor to disclose the details of his/her assault confidentially and receive medical treatment and counseling if

48. Friedman, *supra* note 5, at 377.

49. *Id.* at 379.

50. Friedman, *supra* note 5, at 377–78.

51. *Id.* at 379.

52. *Id.* at 378.

53. Hansen, *supra* note 45, at 551 (noting the experience of a Coast Guard woman who was called a "[c]razy, lying whore" by fellow personnel after the details of her rape were released and circulated throughout her entire unit).

54. Friedman, *supra* note 5, at 379.

55. Hansen, *supra* note 45, at 553.

necessary.[56] In contrast, unrestricted reporting triggers the official investigation process.[57] A survivor reports the incident to his/her chain of command, who then reports the issue to law enforcement.[58] After that point, the details of the assault are available to others on a "need to know" basis.[59] In theory, both methods are confidential, but unfortunately, survivors have had details of their assaults released under both restricted and unrestricted reporting.[60] There is debate over whether unrestricted reporting actually results in efficient prosecution, and some have suggested that the method is not worth the time or the potential humiliation for survivors.[61]

PART III: FREE PRESS CONCERNS ABOUT OUR RIGHT TO BE INFORMED ABOUT SEXUAL ASSAULT

Investigating wrongdoing and implementing change in an organization as vast and powerful as the United States military is a daunting task. To begin to tackle the issue of sexual assault in such a formidable institution, organizations suing to challenge established procedures have requested the release of information about the number of reported sexual assaults and how those complaints were processed throughout different branches of the military.[62] This approach is grounded in a First Amendment right to information. Plaintiffs have argued that the public has a right to be informed about serious issues of national significance such as the frequency of sexual assault in the U.S. military.[63] This freedom of the press, or "freedom to acquire information," was recognized by the Supreme Court in *Houchins v.*

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56. *Id.* at 554.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 560 (noting the comments of a military chaplain, who said "I wouldn't try to persuade a victim to report because of the low conviction rate that only tends to humiliate the victim further. . . . I can't in good conscience tell them that is a good idea.").

62. *See* Serv. Women's Action Network v. Dep't of Defense, 888 F. Supp. 2d 231, 237–38 (D. Conn 2012) [hereinafter *SWAN I*] (listing the different branches from which the Service Women's Action Network requested documentation).

63. *See id.* at 237.

KQED, Inc:[64] "[W]ithout freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist."[65] The Court also noted the "important societal function" that the press holds by disseminating information to the public:

> In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process the press performs a crucial function in effecting the societal purpose of the First Amendment."[66]

Congress codified this right to information in the Freedom of Information Act (FOIA), enacted on July 4, 1966.[67] FOIA provides individuals with a right to access federal agency records, subject to nine exceptions.[68] FOIA was the cornerstone of *Service Women's Action Network v. Department of Defense,* a recent Second Circuit case in which plaintiffs sought the release of information about sexual assaults in the military, claiming that the government was "intentionally shielding information regarding the true extent of sexual violence in the military because disclosure would result in negative publicity and increased expenses."[69]

In framing the First Amendment right at stake, the plaintiffs in *Service Women's Action Network* also emphasized the "compelling interest" of the public in knowing this information, "given the potential enormity of the problem, the emotional and financial cost that it imposes on military service members, and the increasing number of women serving in Afghanistan and Iraq."[70] Plaintiffs argued that this interest was

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64. 438 U.S. 1, 32 & n.23 (1978).

65. *Id.* at n.23.

66. *Id.* at 39.

67. U.S. DEP'T OF JUSTICE, *What is FOIA?*, FOIA.GOV, http://www.foia.gov/about.html (last visited Nov. 24, 2014).

68. 5 U.S.C. § 552(b)(1)–(9) (2012).

69. *SWAN I*, 888 F. Supp. 2d at 237.

70. Compl. ¶ 36, Serv. Women's Action Network v. Dep't of Def., 888 F. Supp. 2d 231 (D. Conn 2012) (No. 3:10cv1953).

made "all the more compelling because taxpayers are financially responsible for the treatment of the MST [military sexual trauma] survivors who successfully navigate the processes of applying for service-connected benefits for PTSD [Post Traumatic Stress Disorder] and related illnesses."[71] As will be explored more below, the government argued in response that FOIA did not require it to release certain categories of information as "they were questions about government policies, rather than requests for files or similar information,"[72] and that searching for and releasing other categories of information would be "unduly burdensome."[73]

PART IV: RECENT CASE LAW ADDRESSING SEXUAL ASSAULT IN THE MILITARY

Three Circuit Courts have considered First Amendment concerns in addressing suits arising out of sexual assault in the military: the D.C. Circuit in *Klay v. Panetta,*[74] the Second Circuit in *Service Women's Action Network v. Department of Defense,*[75] and the Fourth Circuit in *Cioca v. Rumsfeld.*[76] Although differing in legal theories and requested remedies, none of the plaintiffs had their rights fully vindicated, and the cases serve as an example of the progress still needed to address the problem of sexual assault in the military and the violations of First Amendment rights that will continue to occur until remedial action takes place. While *Klay* and *Cioca* focus on the violation of the plaintiffs' constitutional rights, including freedom of speech,[77] *Service Women's Action Network* focuses entirely on the release of information under FOIA, a right grounded in the First Amendment right to freedom of the press and freedom of information.[78]

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71. *Id.*

72. *SWAN I*, 888 F. Supp. 2d at 241.

73. *Id.* at 243.

74. Klay v. Panetta, 758 F.3d 369 (D.C. Cir. 2014).

75. Serv. Women's Action Network v. Dep't of Def., 570 F. App'x 54 (2d Cir. 2014).

76. Cioca v. Rumsfeld, 720 F.3d 505 (4th Cir. 2013).

77. *Id.* at 507; *Klay*, 758 F.3d at 372.

78. 570 F. App'x 54, 56 (2d Cir. 2014).

A. Cioca v. Rumsfeld and Klay v. Panetta

The plaintiffs in *Cioca* were twenty-eight former and current service members who had been survivors of sexual assault.[79] They alleged that their reports of rape or assault "were met with skepticism, hostility, and retaliation by military authorities."[80] They further alleged that the defendants—the former and current Secretary of State—violated their constitutional rights, including their First Amendment right to free speech, by failing to "'(1) investigate rapes and sexual assaults, (2) prosecute perpetrators, (3) provide an adequate judicial system . . . and, (4) abide by Congressional deadlines to implement . . . reforms to stop rapes and other sexual assaults.'"[81]

Similarly, the plaintiffs in *Klay* were current and former service members who had experienced sexual assault during their time in the military as well as negative repercussions from reporting their assault.[82] Their complaint also focused entirely on the violation of their constitutional rights, including Fifth Amendment rights to bodily integrity, due process, and equal protection, and a First Amendment right "to speak about their assaults without retaliation."[83] The plaintiffs asserted that they possessed a right under the First Amendment "to report sexual assault, sexual harassment and rapes without suffering retaliation, including adverse employment actions," [84] and further, that "[d]espite voluminous evidence of widespread retaliation, none of the Defendants

79. *Cioca*, 720 F.3d at 506.

80. *Id.* at 507.

81. *Id.* (citing Joint Appendix at 4, Cioca v. Rumsfeld, No. 12-1065 (4th Cir. Apr. 23, 2012)).

82. *Klay*, 758 F.3d at 369. The central named plaintiff, Ariana Klay was a National Merit Scholar, Division 1 Soccer player, and first-generation college student who joined the Naval Academy. Compl. ¶ 7, Klay v. Panetta, 924 F.Supp.2d 8 (D.D.C. 2012). After graduating with honors, she joined the Marine Corps as an officer. *Id.* ¶ 8. After enduring sexual harassment and hostility, Klay was raped by a fellow officer and his civilian friend on August 28, 2010 at her home one block from the barracks. *Id.* ¶17. Klay reported the rape, but the resulting harassment and retaliation led her to attempt suicide. *Id.* ¶18. In its investigation of the harassment, the Marine Corps concluded that Klay caused the harassment because she "wore make up, regulation-length skirts (as part of her uniform) and exercised in running shorts and tank tops." *Id.* ¶19.

83. *Klay*, 758 F.3d at 372.

84. Compl. ¶ 161, Klay v. Panetta, *supra* note 82.

took *any* steps, let alone systemic and effective steps, to identify and punish the personnel who retaliated against those courageous enough to report rape and sexual assault."[85] In support of their argument, plaintiffs stated that "[t]he most recent annual report reveals that less than eight percent of identified perpetrators are court-martialed and convicted."[86]

In both *Cioca* and *Klay*, the district court dismissed the suit, and in both cases, and the circuit court affirmed the district court's decision.[87] Both sets of plaintiffs sued under the theory laid out in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*,[88] which provides that a "violation of [a Constitutional Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages," despite the absence of any federal statute creating liability.[89] Though seeming to create expansive remedies, *Bivens* has been applied extremely narrowly, primarily because of the Court's hesitance in "implying new remedies at law."[90] In the forty years since *Bivens* was decided, the Court has *never* granted a *Bivens* remedy in the military context.[91]

The Supreme Court's primary concern, and one expressed in both *Cioca* and *Klay*, has been a potential violation of the separation of powers, as the Constitution specifically grants Congress the power to regulate the armed forces.[92] In *Cioca,* the Fourth Circuit noted language from Chief Justice Burger's majority opinion in *Chappell v. Wallace*,[93]

> [t]he special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. The special nature of military life—the need for

85. *Id.* ¶ 124.

86. *Id.* ¶ 127.

87. *Cioca*, 720 F.3d at 505; *Klay* 758 F.3d at 371.

88. 403 U.S. 388 (1971).

89. *Id.* at 389 (noting that although Congress enacted 42 U.S.C. § 1983 to create a cause of action against state officials, it never created a similar cause of action against federal officials).

90. *Cioca*, 720 F.3d at 509 (quoting Lebron v. Rumsfeld, 670 F.3d 540 (4th Cir. 2012)).

91. *Id.* at 509–10.

92. *See* U.S. Const., art. I, § 8; *Cioca*, 720 F.3d at 509; *Klay* 758 F.3d at 376.

93. 462 U.S. 296 (1983).

> unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.[94]

Summarizing the Supreme Court's previous holdings, the Fourth Circuit in *Cioca* concluded that two primary principles applied: (1) Injuries from military service create special factors that counsel against creating an implied right of action under *Bivens* and (2) "[N]o *Bivens* remedy is available for injuries that arise out of or are in the course of activity incident to service."[95] Anticipating this standard, plaintiffs in their brief argued that rape, sexual assault and "the resultant failures to punish the perpetrators" did not serve a military mission and thus were not activity incident to service.[96] The court, however, disagreed with the plaintiff's appropriation of the incident to service standard and concluded that their allegations were incident to their service in the military, not because the injuries they suffered were in furtherance of a military mission, but because they challenged "a wide range of military and disciplinary decisions" made within the military chain of command.[97] According to the court, allowing the suit to continue would allow the judicial branch to "second-guess military decisions."[98]

The D.C. Circuit, deciding *Klay* one year after *Cioca*, followed almost identical reasoning. As in *Cioca*, the plaintiffs in *Klay* argued that the incident to service test should only include conduct that is done to further a military mission.[99] Since it is preposterous to conclude that they "were raped to advance a military mission," the plaintiffs argued that their experiences did not arise out of their military service.[100] The court again disagreed and quoted language from *Cioca*.[101] Declaring that the

94. *Cioca*, 720 F.3d at 509–510 (quoting Chappell v. Wallace, 462 U.S. 296, 303–04 (1983)).

95. *Id.* at 512 (quotations omitted) (quoting United States v. Stanley, 483 U.S. 669, 682 (1987)).

96. *Cioca*, 720 F.3d at 514.

97. *Id.* at 514–15.

98. *Id.* at 514 (citing United States v. Shearer, 473 U.S. 52, 58 (1985)).

99. *Klay*, 758 F.3d 369 at 374.

100. *Id.*

101. *Id.* at 375.

relevant inquiry is whether the suit "would call into question military discipline and decisionmaking," the court held that the plaintiff's allegations were incident to service, and therefore no *Bivens* remedy was available.[102] While recognizing the severity of the harm suffered by plaintiffs, the D.C. Circuit nevertheless concluded in its dismissal that "the existence of grievous wrongs does not free the judiciary to authorize any and all suits that might seem just."[103]

B. Service Women's Action Network v. Department of Defense

As *Cioca* and *Klay* demonstrate, unless Congress creates a specific cause of action against the Department of Defense, survivors of sexual assault must find other avenues to vindicate their rights and reform the military's sexual assault policies. Such an effort was made in the *Service Women's Action Network* cases. In a federal district court in Connecticut, the plaintiffs, Service Women's Action Network and the American Civil Liberties Union, sued the Department of Defense and the Department of Veteran Affairs under an already established federal remedy: the Freedom of Information Act (FOIA).[104] The plaintiffs' two claims under FOIA were that (1) defendants failed to promptly release responsive records upon plaintiffs' request; and (2) defendants failed to make a reasonable effort to search for responsive records, as required under FOIA.[105] Correspondingly, plaintiffs requested an order to disclose and release copies of the requested records.[106] The district court granted in part and denied in part the defendants' motion for summary judgment through a detailed analysis of each of plaintiffs' specific FOIA requests. For First Amendment analysis, the plaintiffs' requests for information to the Department of Defense (DoD) are particularly instructive:

1. Information pertaining to where and how the DoD stores military-related reports and investigations about military

102. *Id.* (quoting *Cioca,* 720 F.3d at 515).

103. *Id.* at 377.

104. *SWAN I,* 888 F. Supp. 2d at 236.

105. *Id.* FOIA provides that "an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system." 5 U.S.C. § 552(a)(3)(C) (2012).

106. *SWAN I,* 888 F. Supp. 2d at 236.

sexual trauma ("MST") complaints, equal opportunity ("EO") complaints, sexual harassment ("SH") complaints, and/or domestic violence ("DV") complaints.

2. Information concerning how service members can request or obtain from DoD military-related reports and investigations about MST, EO, SH, and/or DV complaints.
3. The number of requests by service members for the release of records relating to MST, EO, SH, and DV complaints...
4. The number of reports relating to MST, EO, SH, and/or DV complaints released to service members or the public...
5. The number of military-related incidents of SH, EO, DV, and/or MST reported by service members...
6. The number of sexual-assault-related courts-martial...
7. The number of charges sworn in all sexual-assault-related courts-martial...
8. The number of sexual-assault-related courts-martial that resulted in acquittal...
9. The number of sexual-assault-related courts-martial that resulted in convictions...
10. The crimes for which convictions in sexual assault-related courts-martial were secured, and/or the sentences awarded for those convictions...
11. All records related to the non-judicial or administrative resolution of sexual assault-related complaints that did not result in court martial...
12. A breakdown by gender and/or race of any information that falls within the scope of requests 1 through 11.[107]

With regard to requests 1 and 2, the defendants argued that they were not required to respond because the requests were questions about government policies rather than requests for files.[108] The court agreed and granted summary judgment for these first two requests, noting that "an agency need not respond to or answer questions disguised as a FOIA request."[109]

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107. *Id.* at 237–38.

108. *Id.* at 241.

109. *Id.* (internal quotations omitted) (quoting Scaff–Martinez v. DEA, 770 F.Supp.2d 17, 23 (D.D.C. 2011)).

The court discussed the aggregate versus individual nature of requests 10-12, noting that when a FOIA request demands all records from an agency on a given topic, then "the agency is obliged to pursue any clear and certain lead it cannot in good faith ignore; [b]ut, an agency need not conduct a search that is unduly burdensome."[110] For item 11, the court was "tempted to find as a matter of law" that it was "unduly burdensome,"[111] but nevertheless, the court found a genuine issue of material fact as to item 11 and denied the defendant's motion of summary judgment on that issue.[112]

The court then proceeded with an analysis of the reasonableness of the Department's search, noting at the outset that "the burden of demonstrating that a search is adequate rests on the agency."[113] In order to satisfy that burden, the agency may submit "non-conclusory declarations that explain, in reasonable detail, the scope and method of the agency's search, as well as any justifications for acknowledged non-disclosures."[114] The court analyzed the declarations of each of the defendants and held that the declarations on the part of the Department of the Navy failed to demonstrate the sufficiency of their search, but the declarations of the Marine Corps and Board of Veterans Appeals were sufficiently detailed to demonstrate adequacy of the search.[115] Therefore, the defendants' motion for summary judgment was granted in part and denied in part.[116] Thereafter, the defendants again moved for summary judgment.[117]

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110. *Id.* at 242 (internal quotations omitted) (quoting Halpern v. FBI, 181 F.3d 279, 288 (2d. Cir. 1999)).

111. *Id.* at 243. This was a result of the fact that "record," as defined in the request, included but not was not limited to "correspondences, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies." *Id.* at 242–43.

112. *Id.* at 243.

113. *Id.* at 246.

114. *Id.*

115. *Id.* at 232.

116. *Id.*

117. *Serv. Women's Action Network*, 888 F. Supp. 2d 282 (D. Conn. 2012) [Hereinafter *SWAN II*].

Three months later, the district court again considered the defendants' motion for summary judgment on the reasonableness of the request as well as the plaintiffs' entitlement to a fee waiver for the request.[118] FOIA provides that a requester may receive documents for free or at a reduced cost if it can demonstrate the disclosure is in the public interest.[119] The court's analysis of the public interest nature of the request is relevant from a freedom of information perspective. The court used a four-factor test to determine whether disclosure was in the public interest.[120] The court generally agreed with the plaintiffs' argument that disclosure is important to inform the public of the prevalence of sexual assault complaints in the military and the Department's policies for dealing with such complaints.[121] The court noted that the plaintiffs had raised "troubling allegations, supported by reports and their own extensive experience . . . about the prevalence of and response to sexual assault and its associated psychological fallout in the U.S. military" and that their requests were "an attempt to get at the heart of an issue and contribute significantly to the public understanding."[122] The court therefore concluded that the plaintiffs were entitled to a public interest fee waiver.[123]

However, this fee waiver was ultimately insignificant, as the court held that the plaintiffs' request would impose an unreasonable burden on the Department of Defense and granted the defendants' motion for summary judgment.[124] The court's decision was based on the

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118. *Id.*

119. 5 U.S.C. § 552(a)(4)(A)(iii) (2012) (requiring disclosure of documents when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester").

120. *SWAN II*, 888 F. Supp. 2d at 288. The United States Department of Justice uses a four-part test to evaluate when disclosure of information is in the public interest: (1) whether the subject of the requested records concerns the operations or activities of the government; (2) whether the disclosure is likely to contribute to an understanding of the government's operations or activities; (3) whether disclosure of the requested information will contribute to the public understanding; and (4) whether the disclosure is likely to contribute significantly to the public understanding of government operations or activities. *Id.*

121. *Id.* at 289–90.

122. *Id.* at 290.

123. *Id.* at 291.

124. *Id.* at 283.

figures given by the Department of Defense showing that the records requested by the plaintiffs would require nearly forty-five million dollars in search and duplication costs, including 712,000 files, and take 2,300 work-years.[125] Plaintiffs had argued in response that defendants "grossly overestimate[d]" the amount they requested, and stated they were willing to limit their request to the terms outlined in settlement offers.[126] However, the court concluded that it could not evaluate the reasonableness of the plaintiffs' modified request on the record.[127]

On appeal, the Second Circuit upheld the district court decision in a brief summary order.[128] The Second Circuit reasoned that district courts do not have to consider claims raised for the first time in a brief opposing summary judgment; therefore it did not need to consider the plaintiffs' offer to modify the initial request.[129] Plaintiffs had argued that FOIA's goal of encouraging "efficient, prompt and full disclosure of government records" should allow litigants to narrow requests during litigation, but the circuit court disagreed with this argument, reasoning instead that it might encourage litigants to "continually test the permissible breadth of their requests."[130] The plaintiffs did not contest the issue of whether their initial request was unreasonably burdensome, so the Second Circuit did not consider this issue in affirming the district court's judgment in favor of the Department of Defense.[131]

PART V: PROPOSED POLICY CHANGES TO PROMOTE FREEDOM OF SPEECH OF ALL SERVICE MEMBERS

From the reporting and vindication-of-rights standpoint, survivors of sexual assault should not be at a disadvantage simply because, at the time of the assault, they were members of the military rather than civilians. Civilians who report sexual assault to the police generally do not face retaliation for doing so. If the perpetrator is an

125. *Id.* at 291.
126. *Id.*
127. *Id.*
128. Serv. Women's Action Network v. Dep't of Def., 570 F. App'x 54 (2d Cir. 2014).
129. *Id.* at 56.
130. *Id.* at 57.
131. *Id.*

acquaintance or family member of the victim, he or she may face some ridicule or harassment like military victims do when they are attacked by their peers.[132] However, outside the possibility of a civilian being sexually assaulted by a superior at work, he or she will generally not experience the kind of career-ending consequences that service members experience when they report sexual assaults to commanders.[133] This general rule is not without exceptions, especially in the context of other large institutions like colleges and universities,[134] and it is also important to note that *all* survivors of sexual assault can experience devastating psychological and emotional consequences.[135] Nevertheless, it is alarming that an individual's decision to join the United States military may mean relinquishing important First Amendment rights. Though a civilian may bring a suit in federal court under *Bivens* and 42 U.S.C. § 1983 for a violation of their First Amendment rights,[136] as *Cioca* and *Klay* demonstrate, absent action by Congress, that remedy is unavailable to service members whose injuries "arise out of or are in the course of activity incident to service."[137]

Therefore, under the current system, a female Marine who was raped while on base by a fellow Marine and reported the assault could experience extreme retaliation as a result of reporting her rape: harassing comments from peers, a demerit, a change of assignment that was

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132. *See supra*, Part II.

133. *See supra*, Part II.

134. *See, e.g.*, Shanlon Wu, *Colleges vs. Military: Who's Worse at Prosecuting Sexual Assaults?*, THE HUFFINGTON POST BLOG (June 8, 2014), http://www.huffingtonpost.com/shanlon-wu/colleges-versus-military-sexual-assault_b_5100534.html.

135. *Effects of Sexual Assault*, RAPE ABUSE & INCEST NATIONAL NETWORK, https://www.rainn.org/get-information/effects-of-sexual-assault (last visited Nov. 19, 2014). Effects of sexual assault include post-traumatic stress disorder, substance abuse, self-harm, Stockholm syndrome, depressions, flashbacks, borderline personality disorder, suicide, eating disorders, body memories, and dissociative identity disorder. *Id.*

136. 42 U.S.C. § 1983 (2012) provides: "Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

137. *See supra* notes 95–99 & accompanying text.

effectively a demotion, etc. However, she would have *no* legal remedy for the violation of her freedom of speech. If that same female Marine was raped by a complete stranger at her home while on leave, she could report that rape confidentially to the police. If she experienced any kind of retaliation by a state actor for speaking out in the course of the reporting or investigative process, she would have a valid cause of action in federal court for the violation of her First Amendment rights under 42 U.S.C. § 1983. The act of joining the United States military is itself a sacrifice. Military men and women travel far from home and can be separated from their families for months at a time. Of all the things they give up, their constitutional rights should not be one of them.

To preserve the freedom of speech for service members by encouraging them to speak freely and eliminating possible retaliation for doing so, military leaders should consider: (1) providing truly confidential and independent channels for survivors to report sexual assaults; (2) establishing ongoing support for survivors by providing counselors that check-in with them on a regular basis to screen for additional harassment or retaliation; (3) maintaining consistent and serious consequences for officers and commanders that exhibit retaliatory behavior toward service members who have reported sexual assaults; and (4) creating an investigative process that is sensitive to survivors' desire for privacy yet also open to their choice to waive their privacy in order to provide awareness about the issue of sexual assault in the military.

A. Confidential and Independent Channels for Reporting

Before any retaliation or a First Amendment violation can occur, a service member must decide to report his/her sexual assault. As a preliminary matter, to protect freedom of speech, we must ensure that survivors have a confidential and independent means of reporting their assaults; confidential in that no one can gain access to their story without their permission, and independent in that the report is not made to their immediate supervisor or anyone with decision-making authority over their specific role in the military. Commanders are trained on how to handle and report sexual assault, but their responses have been varied

and according to some, ineffective.[138] The larger issue is that commanders are burdened by outside pressures to limit the number of sexual assaults reported for their unit, as their promotions are dependent on the conduct and performance of the service members they supervise.[139] The Department of Defense's 2013 *Annual Report on Sexual Assault in the Military* reveals that 25% of women and 27% of men who received unwanted sexual conduct were victims to someone in their military chain of command.[140] There have been efforts to bring independence to the investigation, prosecution, and sentencing stages of military sexual assault cases, such as Senator Kristen Gilibrand's bill, the Military Justice Improvement Act.[141] However, additional reform is necessary to ensure independence in the reporting process itself. These changes should be created and implemented by individuals with an understanding of the realities of military life and the intricacies of the hierarchical power structure, but at minimum the polices should include the removal of commanders from the reporting process and the appointment of an independent official to facilitate confidential reporting.

B. Ongoing Support

Assuming that the procedures are established to ensure confidential and independent reporting of sexual assault, policy changes are also necessary to ensure that survivor's free speech rights are not violated by retaliation from superiors or peers. Providing a support network of counselors and other health professionals is necessary, both for the healing process and for screening for additional harassment or retaliation. Senator John Kerry's Defense Sexual Trauma Response Oversight and Good Governance Act (STRONG),[142] provisions of which were enacted as part of the 2011 National Defense Authorization Act,[143]

138. Hansen, *supra* note 45, at 577.

139. *Id.* at 578.

140. DOD ANNUAL REPORT, *supra* note 10, at 2.

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

142. Defense Sexual Trauma Response Oversight and Good Governance Act 2011, H.R. 1529, 112th Cong. (2011).

143. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, H.R. 6523, 112th Cong. (2011).

provided one full-time Sexual Assault Response Coordinator and one Sexual Assault Victim Advocate for each military unit, with discretion to assign more Advocates/Coordinators and advocates as necessary for each unit.[144] This is a positive step forward.

One area of concern, however, is that Coordinators and Advocates must be service members or Department of Defense service personnel,[145] which could raise issues of independence depending on the individual's ties to the unit or to the commander. To ensure independence, Coordinators and Advocates should have the authority to report commander and service member misconduct and to take immediate steps to remove a victim from a hostile environment if necessary. To the extent that verbal harassment[146] and sexist comments are a daily reality of military life, Advocates and Coordinators should have policies to regularly screen for harassment and retaliation stemming from the sexual assault. They should also have the ability to raise flags on officers or commanders who regularly make sexist remarks.[147]

C. Consequences for Perpetrators

However, even if Coordinators and Advocates are reporting commanders and service members who engage in retaliatory or harassing

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144. Defense Sexual Trauma Response Oversight and Good Governance Act 2011, H.R. 1529, 112th Cong. (2011).

145. *Id.*

146. Sara Sorcher, *How the Military's 'Bro' Culture Turns Women Into Targets*, (Sep. 5, 2013), NATIONAL JOURNAL, http://www.nationaljournal.com/magazine/how-the-military-s-bro-culture-turns-women-into-targets-20130905 ("The sexual-assault epidemic plaguing the armed forces is rooted in a hypermasculine ethos that fosters predation.").

147. A recent report on students at military academies revealed that 80-90% of female cadets indicated they have been the object of sexist comments in the past year. Anna Mulrine, *Sexual harassment in the military: what female cadets have to say*, THE CHRISTIAN SCIENCE MONITOR, (Jan. 10, 2014), http://www.csmonitor.com/USA/Military/2014/0110/Sexual-harassment-in-the-military-what-female-cadets-have-to-say. Pentagon officials note that this culture of sexist commentary is particularly troubling because "[t]here is a strong positive correlation between the experience of sexual harassment and the eventual sexual assault of people in military units." *Id.* Furthermore, "because these two problems are on the same continuum of harm, getting at that sexual harassment—the crude and sexist behavior—is part of the prevention work [for] sexual assault." *Id.*

behavior, if there are not swift, consistent, and serious consequences in place, the entire system will be ineffective and retaliation will continue. More importantly, if the perpetrator is a fellow service member or even a commander, the survivor's ability to heal and move on from an attack will be severely diminished by the continued presence and daily reminder of her attacker in her midst. A transfer of assignment, without more, is insufficient to remedy the problem, and may in fact perpetuate the cycle of abuse among other service members. The harshness of the punishment should align with the seriousness of the offense, with verbal sexual harassment aligning with transfers and demerits, inappropriate sexual advances aligning with demotions, and rape aligning with dishonorable discharge and criminal prosecution. For verbal sexual harassment and inappropriate sexual advances, it is also important that the perpetrator's punishment be accompanied by education and continued monitoring. This is necessary, not only to prevent recidivism, but to promote a service-wide understanding about what sexual assault is, how seriously the U.S. military views it, and the damaging consequences that accompany it for both survivors and offenders.

D. Policies for Both Privacy and Awareness

Finally, throughout the reporting, investigation, and prosecution of military sexual assault, policies should be established that are both respectful of a survivor's desire for privacy and also receptive to a decision to waive privacy in order to provide awareness about the issue of sexual assault in the military. This suggestion presents a juxtaposition of the two First Amendment concerns discussed in this Note: (1) a survivor's right to freedom of speech without retaliation and (2) the public's right to information. Ensuring survivor's ability to speak freely without fear of retaliation means creating an investigative process that allows for total confidentiality. Many survivors will not want the details of their attack used or exploited by the media. In fact, some argue that the media's sensationalizing of sexual assault in the military may discourage women from joining the armed forces.[148] Nevertheless,

148. Lisa Schenck, a law professor and retired colonel from the U.S. Army, argues that "the DoD is its own worst enemy in the context of generating adverse and misleading publicity, which at a minimum, may result in discouraging females

women and men who have shared their stories of sexual assault and retaliation have proven immensely powerful in raising public awareness and bolstering efforts at reform.[149] Though there is limited data on this issue, it is also likely that these publicized stories may encourage survivors to speak out or seek help, and even prevent further abuse from occurring. Survivors should be offered the choice between privacy and speaking out throughout the course of the investigation and prosecution of their assault. Firm polices should ensure that a victim's wishes are scrupulously honored and that no survivor experiences negative consequences as a result of his/her decision to retain privacy or to speak out. Since all the policies discussed are essentially regulating the leadership and internal structure of the military, the changes should be implemented by the Department of Defense itself with consistent overview by an oversight committee independently established by the executive branch.

PART VI: PROPOSED POLICY CHANGES TO PROMOTE FREEDOM OF INFORMATION ABOUT SEXUAL ASSAULT IN THE MILITARY

The public has a right to know whether the United States military—the organization trusted with the enormous and honorable task of protecting the liberty of all Americans—is protecting the liberty of its own members who experience sexual assault. Though the U.S. military has implemented changes to its sexual assault reporting policies in the past ten years, partially as a result of the media and the hard work of politicians and advocates, continued transparency is necessary. This transparency serves the public's right to information by guaranteeing freedom of the press, and will also provide valuable information for men and women considering a military career. As *Service Women's Action*

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from joining the military." Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579, 583 (2014). Though much of Professor Schenck's argument focuses on the creation of the statistics through annual reporting metrics, she also states that politicians and the media have used "inflammatory language and misleading statistics" to justify their calls for reform. *Id.* at 581.

149. *See, e.g.*, *About My Duty to Speak*, MY DUTY TO SPEAK, http://mydutytospeak.com/about-my-duty-to-speak/ (last visited Feb. 28, 2015) (noting that the blog, which functions as a forum for survivors to share their stories, has been utilized by the Department of Defense and Congress in reform efforts).

Network v. Department of Defense indicates, efforts to obtain detailed information about the number of sexual assault incidents and the military's procedures in handling sexual assault cases is difficult, time-consuming, and in some instances, completely unsuccessful. This Note argues that additional legislation is necessary to bypass the restrictions inherent in FOIA. Specifically, this Note addresses the similarities between the problem of sexual assault on college campuses and military bases, and suggests that Congress enact legislation to counteract provisions of FOIA the same way that it enacted the Clery Act and Campus SaVE Act to counteract provisions of the Family Educational Rights and Privacy Act (FERPA).

A. A Similar Problem

While the United States military and American colleges and universities are vastly different entities, they also possess some compelling similarities with regard to the problem of sexual assault. For example, both have a history of male domination and female exclusion.[150] Both involve the formation of young people and communal living. Both are composed of a bureaucratic administrative structure with a desire to maintain a positive image with the media. Finally, both have a history of failing to disclose the extent of sexual assault occurring within their organizations. Though college women have not experienced retaliation to the level and extent of that experienced by military women reporting sexual assault, some of the same issues with regard to reporting

150. Women were not allowed to serve in the armed forces until the passage of the Women's Armed Services Integration Act in 1948. Women's Armed Service Integration Act of 1948, Pub. L. No 80-229, 62 Stat. 356. In 2013, the U.S. military lifted a ban on female soldiers serving in combat roles, allowing any qualified women to serve in combat. Elisabeth Bumiller and Thom Shaniker, *Pentagon is Set to Lift Combat Ban for Women,* N.Y. TIMES, (Jan. 23, 2013), http://www.nytimes.com/2013/01/24/us/pentagon-says-it-is-lifting-ban-on-women-in-combat.html?pagewanted=all&_r=0. While co-educational universities began as early as the late 1800s, it was not until 1996 that the Supreme Court struck down the last male-only admissions policy at the Virginia Military Institute as a violation the Equal Protection Clause of the Fourteenth Amendment. *See* United States v. Virginia, 518 U.S. 515 (1996); *see also The History of Women and Education*, NATIONAL WOMEN'S HISTORY MUSEUM, https://www.nwhm.org/online-exhibits/education/1800s_7.htm.

are present. A recent Department of Justice study indicates that five percent of college women experience rape every year.[151] Of those women, 95.2% do not report the incident to law enforcement.[152] Reasons for not reporting included mistrust of the campus judicial system, desire to prevent family from knowing about the incident, fear of being treated hostilely by the police, and fear of retaliation by the assailant.[153]

B. Family Educational Rights and Privacy Act (FERPA)

Congress enacted the Family Educational Rights and Privacy Act (FERPA) in 1974 for two primary purposes: (1) to provide parents access to student files and the opportunity to correct inaccurate information; and (2) to establish consistent school policies regarding access to student records to third parties.[154] FERPA applies to any educational agency or institution that receives federal funding,[155] and operates to guarantee specific rights to parents and guardians.[156] These rights transfer to students when they turn eighteen or attend school beyond the high school level.[157] FERPA vests public schools with a duty to maintain the privacy and confidentiality of education records; schools cannot release any "personally identifiable information" about a student without express permission from the parent or student unless the request is one of the statutory exceptions.[158] Law enforcement records have been a FERPA exception since it was enacted, though the confines of that exception have been clarified and adapted through FERPA's nine amendments.[159]

Although FERPA was enacted to provide privacy rights to parents and students and to maintain consistent disclosure policies

151. BONNIE S. FISHER ET AL., U.S. DEPARTMENT OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/182369.pdf.

152. *Id.* at 24.

153. *Id.* at 23–26.

154. 20 U.S.C. § 1232g(a)(4) (1974).

155. 34 C.F.R. § 99.1 (1974).

156. 20 U.S.C. § 1232g(a)(4) (1974).

157. *Id.*

158. 34 C.F.R. § 99.3 (1974).

159. *See Legislative History of Major FERPA Provisions*, U.S. DEPARTMENT OF EDUCATION, http://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html (last visited Feb. 11, 2015).

among public schools, it has been used by university administrators as a shield to prevent the release of information they do not want revealed to the public, such as the incidence of sexual assault on campus. In the past, schools refused to release law enforcement records of students, citing fears of loss of funding and the presence of "personally identifiable information."[160] Frustrated students, parents, and members of the press realized that in many cases, universities were more motivated by a fear of civil lawsuits and negative publicity than protecting students' privacy interests, and a resistance movement began.[161]

C. The Clery Act and the Campus SaVE Act

Throughout the late 1980s and early 1990s, awareness of the problem of sexual assault on college campuses increased. School newspapers and publications began suing universities to obtain information about the incident of crime on campus.[162] A movement arose of parents and families speaking up about their right to know the details of crimes occurring on college campuses. In 1986, nineteen-year-old Jeanne Clery, a freshman at LeHigh University, was raped and murdered in her dorm room.[163] In the three years following her death, Clery's parents worked tirelessly to reform sexual assault policies on college campuses, focusing on a requirement for schools to disclose all crime occurring on campus.[164] Their lobbying efforts were successful in 1990, when Congress passed the Crime Awareness and Campus Security Act, now known as the Clery Act.[165]

The Clery Act applies to all colleges and universities that receive federal funding and requires them to compile and distribute an annual report containing: (1) statistics of specific on-campus crimes, (2) arrests

160. Bonnie S. Fisher et. al., *Making Campuses Safer for Students: The Clery Act As A Symbolic Legal Reform*, 32 STETSON L. REV. 61, 65 (2002).

161. *Id.* at 66.

162. *See* Communications v. Criser, 19 Fla. Supp. 2d 97 (Fla. 8th Cir. 1986); Bauer v. Kincaid, 759 F. Supp. 575 (W.D. Mo. 1991); Fisher, *supra* note 160, at 66.

163. *Our History*, CLERY CENTER FOR SECURITY ON CAMPUS, http://clerycenter.org/our-history (last visited Nov. 21, 2014).

164. Joseph Shapiro, *Campus Rape Victims: A Struggle For Justice*, NPR (Feb. 24, 2013), http://www.npr.org/templates/story/story.php? storyId=124001493.

165. Student Right-to-Know and Campus Security Act of 1990, Pub. L. No. 101-542, 104 Stat. 2381 (codified as amended at 20 U.S.C. § 1092(f) (2012)).

for weapon possession and liquor and drug violations, and (3) campus policies and procedures for security and crime prevention.[166] The Clery Act has been amended three times since it was enacted; once in 1992 to require universities to provide more details about their sexual assault policy; again in 1998 to clarify reporting requirements, expand crime categories, and provide a money sanction for failure to disclose accurate information; and finally, in 2000, to require notice to the community about registered sex offenders.[167]

The Clery Act has experienced some success. The U.S. Department of Justice has indicated that over a recent ten-year period, campuses have reported a nine percent drop in violent crime.[168] The Clery Act is not without limitations, and some claim it has yet to provide the community with accurate information about the true level of crime on college campuses.[169] Others have criticized its enforcement by the Department of Education.[170] Though the Department has the authority to fine schools for violations of the Clery Act, it has fined offending schools only six times in the past twenty-four years.[171] The largest fine was $350,000 against Eastern Michigan University, where officials covered up information about the rape and murder of a student for weeks and told her parents that she had died of natural causes.[172]

In response to gaps in the Clery Act, in 2013 passed the Campus Sexual Violence Elimination Act (Campus SaVE Act) as part of the reauthorization of the Violence Against Women Act.[173] The SaVe Act expanded the reporting requirements of universities, mandating that

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166. Pub. L. No. 101-542, §§ 202, 204, 104 Stat. 2381, 2385-2386 (1990); Fisher, *supra* note 160, at 68.

167. Fisher, *supra* note 160, at 70–71.

168. Shapiro, *supra* note 164.

169. *See* Fisher, *supra* note 160, at 89 (arguing that the Act's "failure to take into account the extent of nonreporting by victims in the production of crime statistics is a gross oversight" and that overall "the actual results of the Clery Act have been more symbolic than substantive").

170. *Id.*

171. *Id.*

172. *Eastern Michigan University Stays Quiet About Student's Rape and Murder for Weeks*, ABC NEWS, (June 20, 2007) http://abcnews.go.com/GMA/story?id=3297153.

173. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

universities report statistics on incidents of domestic violence, dating violence, and stalking, in addition to the other crime reporting mandated by the Clery Act.[174] Other important provisions of the SaVE Act include a requirement to keep a survivor's identity private when mandatory reporting is required for crimes that are a threat to other students, clear minimum standards for discipline proceedings, and transparency about survivors' rights [175]

Navigating the boundaries of FERPA, the Clery Act, and the Campus SaVe Act is a continual process, and tensions persist between the media and university administrators. As part of an ongoing effort to provide clarity on the application of FERPA, Secretary of Education Arne Duncan gave members of the press permission to contact the Department of Education directly when they believe that schools are misapplying FERPA to prevent the release of information about sexual assaults or other campus crimes.[176] Overall, however, the Clery Act and the SaVE Act have expanded the national dialogue about sexual assault on college campuses and shed critical light on the FERPA provisions previously used to shield campus crime information. These laws have forced university officials to confront the sexual assault problem on their campuses and to implement more crime prevention policies, better support for survivors, and more consistent investigation and punishment for perpetrators. Finally, they have garnered continual interest and support from institutes that have provided funds to universities that

174. 20 U.S.C. § 1092(f)(1)(F)(iii) (2012).

175. Lauren P. Schroeder, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students from Sexual Assault*, 45 LOY. U. CHI. L.J. 1195, 1225 (2014).

176. At a press conference, Secretary Duncan was asked about further plans to issue guidance to schools on preventing misapplications of FERPA. Duncan responded: "We always try to do our best to provide very clear guidance and try and strike that balance between absolutely maintaining privacy, but also as much as we can, absolute transparency. Where districts or schools are—I'm not saying they are—but if they're sort of hiding behind FERPA and not sharing simple information, we're happy to try and assist there." Sara Gregory, *Department of Education secretary says agency is happy to assist reporters when schools mistakenly cite FERPA*, STUDENT PRESS LAW CENTER (Sept. 4, 2013 4:51 PM), http://www.splc.org/blog/splc/2013/09/department-of-education-secretary-says-agency-is-happy-to-assist-reporters-when-schools-mistakenly-cite-ferpa?p=5638.

implement programs to combat sexual assault and domestic violence issues.[177]

D. Proposed Legislation

Similar transparency, reform, and awareness are needed in the context of sexual assault in the U.S. military. The Department of Defense should not be allowed to hide behind FOIA in the same way that universities in the past hid behind FERPA to avoid releasing information about sexual assault. The Department is already required to produce an annual report on sexual assault.[178] Nevertheless, further legislation is necessary to reveal the types of information requested in *Service Women's Action Network v. Department of Defense*, such as how the Department responds to survivors of military sexual trauma and more detailed information about reporting, investigation, and the resolution of sexual assault complaints that did not result in court martial.[179] Like the Clery Act, the proposed statute would be grounded in a First Amendment right of freedom of press and freedom of information, and rather than allowing the press, or concerned citizens to access the data by request, disclosure of several categories of information would be mandated on a yearly basis. There should also be sanctions in place for failure to release the specified information. Though these required disclosures would necessarily be an administrative and financial burden on the Department of Defense, the payoff—increased transparency, and ultimately, less incidences of sexual assault—is worth the cost.

CONCLUSION

The decision to join the United States military carries with it inherent risks. As a nation, we depend on the men and women willing to take those risks to serve overseas. At present, however, those inherent risks include not only foreign gunfire, but also the threat of sexual assault

177. Fisher, *supra* note 160, at 88 (noting that the National Institute of Justice awarded $6.8 million to twenty universities to address issues of sexual assault, domestic violence, and stalking).

178. *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137 (2011).

179. *See supra* Part IV.B.

from fellow service members. United States citizens should be aware of the silent war happening within the military's ranks, and increased transparency is necessary moving forward if the problem of sexual assault in the military is to be remedied. In the future, clear policies should be in place to ensure swift, serious consequences for perpetrators and to protect the First Amendment rights of survivors.