

NOTES

UNRESTRICTED: WHY ACCESS TO A SPECIAL VICTIMS' COUNSEL SHOULD NOT REST ON VICTIM CREDIBILITY

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INTRODUCTION: THE YELLOW FOOTPRINTS

Parris Island is home to the Marine Corps Recruit Depot: the very beginning for hundreds of thousands of servicemembers who stand on yellow footprints, the first step of becoming a Marine. For a few recruits, however, Parris Island is the end of their military career. Consider the facts from *United States v. Deremer*: an injured recruit living among a dozen or so injured others alleges sexual assault and harassment.¹ After filing an official report, she answers questions from the Naval Criminal Investigative Service (NCIS) alongside her Special Victims' Counsel (SVC).² NCIS investigates the alleged assailant, who is another recruit recovering from knee surgery after sustaining an injury at boot camp.³ A few months later, without her SVC, the victim is brought back in and asked why she fabricated the allegation.⁴ No longer the victim, she is found guilty of making a false statement and is discharged from the Marine Corps.⁵

The immediate question from an onlooker is: Did she make it all up? The circumstances are intriguing and uncommon. She alleged assault by a fellow female recruit, and an injured one at that.⁶ Despite the lure of the obvious question, this Note addresses a different one: Should the victim have lost access to her SVC once her allegation was disbelieved? Under federal law, when a service-member alleges sexual assault, they receive an SVC to assist them in legal proceedings, a separate and distinct role from both prosecution and defense attorneys.⁷ The law does not state when or under what circumstances the attorney-client relationship between the alleged victim and their SVC terminates.⁸ What the law is clear on,

1. Consolidated Answer and Reply Brief on Behalf of Appellee at 6, 15, *United States v. Deremer*, 85 M.J. 546 (N-M. Ct. Crim. App. 2025) (No. 202300205) [hereinafter Brief for Appellee], *appeal denied*, No. 25-0167, 2025 WL 2906165 (C.A.A.F. Sep. 9, 2025).

2. Brief for Appellant at 2, *Deremer*, 85 M.J. 546 (No. 202300205) [hereinafter Brief for Appellant]. Although the Marines refer to SVC as Victim's Legal Counsel, the titles are synonymous. For clarity, this Note exclusively uses SVC.

3. Brief for Appellee, *supra* note 1, at 56.

4. Brief for Appellant, *supra* note 2, at 4-5.

5. *Id.* at 1-2, 4.

6. Brief for Appellee, *supra* note 1, at 56.

7. 10 U.S.C. § 1044e(a)(c).

8. *See id.* § 1044e(c).

however, is when the attorney-client relationship between an alleged victim and their SVC begins.⁹ This Note argues that the plain language of 10 U.S.C. § 1044e and its legislative intent require that an alleged victim's access to their SVC is not subject to limitations based on fraud, nor should it be.

Part I discusses the role of courts-martial in the military and the distinction between civilian ideals of justice and the military's objective of "good order and discipline."¹⁰ It also describes how the sociopolitical landscape in the early twenty-first century shaped the Uniformed Military Code of Justice (UCMJ), the internal decision to introduce counsel specifically for sexual assault victims, and Congress's decision to require SVC programs across all branches.¹¹ Part II examines the state of SVC programs today within branches and across the political landscape. It also provides a more detailed analysis of *United States v. Deremer* and the amicus curiae brief filed alongside it. Part III addresses the majority and dissenting opinions from the Navy-Marine Criminal Court of Appeals' finding in *Deremer* and their respective implications. Finally, Part IV addresses concerns with providing counsel under fraudulent pretenses. The most far-reaching implication of this Note's argument would be to provide an SVC to someone who alleges a blatantly false sexual assault, which is an understandably troubling scenario deserving of a genuine, detailed response. At the conclusion of this Note, it will be overwhelmingly clear that, despite those concerns, SVCs should always be provided to claimants.

I. GOOD ORDER AND DISCIPLINE

Identifying the differences between justice in civilian versus military environments is a prerequisite to understanding the role of SVC in sexual assault allegations. Congress plays the preeminent role in military justice, establishing the courts-martial and legislating the UCMJ. As such, the military cannot mistake its role as a typical law enforcement agency and must remember it is bound by Congress's legal directives.

9. *See id.* § 1044e(f).

10. MANUAL FOR COURTS-MARTIAL, UNITED STATES I-1 (2024).

11. *Id.* at I-1, II-8.

A. *Military Justice Proceedings*

The mission statement of military law is “to promote justice, to deter misconduct, to facilitate appropriate accountability, to assist in maintaining good order and discipline[,] ... to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”¹² In contrast, the mission of civilian law enforcement is to “protect the American people and uphold the Constitution of the United States” at the federal level,¹³ and, as is more commonly known, “to protect and to serve” at the local level.¹⁴ With the military’s distinct mission comes distinct crimes and punishments from criminalizing adultery¹⁵ to the reduction of a guilty servicemember’s pay grade.¹⁶ The military justice system operates under Congress’s direction, per constitutional mandate.¹⁷ Courts-martial are Article I courts, in contrast to federal courts, which derive their jurisdiction from Article III.¹⁸ It is Congress, not the military, that creates and ratifies the UCMJ through amending and adding to the United States Code.¹⁹

The UCMJ details the rights of both victims and perpetrators, while organizations inside and outside of the military carry out the UCMJ’s instruction. Each branch of the military has its own civilian investigative agency dedicated to independent criminal investigations.²⁰ Sexual assault crimes can be reported internally and then

12. *Id.* at I-1.

13. *Mission and Priorities*, FBI, <https://www.fbi.gov/about/mission> [<https://perma.cc/WXV4-Q238>].

14. *See, e.g.*, LAPD, <https://www.lapdonline.org/> [<https://perma.cc/5H7W-YT8Y>].

15. *See* 10 U.S.C. § 934 Art. 134; MANUAL FOR COURTS-MARTIAL, *supra* note 10, at A17-17 to A17-18.

16. MANUAL FOR COURTS-MARTIAL, *supra* note 10, at II-154.

17. U.S. CONST. art. I, § 8.

18. *Id.* (granting Congress power to make rules for the government and regulation of the armed forces); *id.* art. III (vesting the judicial power in courts whose judges hold office during good behavior).

19. *See* DEP’T OF DEF., *supra* note 10, at I-1.

20. *See generally Our Mission*, DEP’T OF THE ARMY CRIM. INVESTIGATION DIV., <https://web.archive.org/web/20250219111716/https://www.cid.army.mil/The-Agency/Our-Mission/> [<https://perma.cc/F2JG-DLWT>] (Army investigative agency); *About*, AIR FORCE OFF. OF SPECIAL INVESTIGATIONS, <https://www.osi.af.mil/About/Fact-Sheets/Display/Article/349945/office-of-special-investigations/> [<https://perma.cc/YBS2-AFNG>] (Air Force investigative agency); *Coast Guard Investigative Service (CGIS)*, U.S. COAST GUARD, <https://www.uscg.mil/Units/Coast-Guard-Investigative-Service/> [<https://perma.cc/J88W-LF6L>] (Coast Guard

referred out to the criminal investigative service or reported directly to the agency.²¹ Whether an investigation ensues is based largely on the type of report: restricted or unrestricted.²² Restricted reports do not trigger an investigation and maintain the confidentiality of both the victim and the offender.²³ Unrestricted reports do not have the same guarantee of confidentiality and notify the chain of command alongside a law enforcement investigator.²⁴ Investigations are not limited to those civilian agencies and can sometimes occur within the unit, like a command investigation.²⁵ These internal investigations provide leadership with information that it may use in discussions with the civilian investigators, the decision-making process for whether or not to prosecute, and review of the trial finding and sentence.²⁶

For most crimes, after the investigation is complete, a military commander acting as the convening authority will decide if the alleged offender will be criminally charged.²⁷ As of 2023, however, the decision to prosecute certain crimes no longer rests with the chain of command but, instead, with the Offices of Special Trial Counsel.²⁸ Those offenses are called “covered” offenses and include

investigative agency); *About NCIS*, NAVAL CRIM. INVESTIGATIVE SERV., <https://www.ncis.navy.mil/About-NCIS/> [<https://perma.cc/2RKJ-QTQD>] (Navy investigative agency); *Criminal Investigative Division: About*, MARINES, <https://www.lawenforcement.marines.mil/CID/> [<https://perma.cc/8YZK-XRYU>] (Marine investigative agency).

21. *See, e.g., Sexual Assault Investigations: Reporting Options*, NAVAL CRIM. INVESTIGATIVE SERV., <https://www.ncis.navy.mil/Resources/Sexual-Assault-Investigations/Reporting-Options/> [<https://perma.cc/Z9H7-6JFU>] (“Upon making an Unrestricted Report, the victim’s command is notified and the information is reported to law enforcement (NCIS). Victims may also report directly to NCIS.”).

22. *Victim Assistance*, DOD SEXUAL ASSAULT PREVENTION & RESPONSE, <https://sapr.mil/reporting-options> [<https://perma.cc/KY27-JKXD>].

23. *Id.*

24. *Id.*

25. NAVAL JUSTICE SCHOOLS, JAGMAN INVESTIGATIONS HANDBOOK 1 (Feb. 2001), <https://www.tecom.marines.mil/Portals/90/SpecialStaff/Equal%20Opportunity%20Advisor/jagmaninveshandbook.pdf> [<https://perma.cc/T2S4-X4N4>] (“Almost every naval officer will have contact with an administrative investigation (commonly referred to as a ‘JAGMAN’ investigation) during their military career, either as an investigating officer or as a convening authority.”).

26. *See id.*

27. *Military Justice Overview*, DOD VICTIM & WITNESS ASSISTANCE, <https://vwac.defense.gov/military> [<https://perma.cc/T6N7-2CSB>].

28. *Sexual Assault Now Tried Outside Military Chain of Command*, DOD NEWS (Dec. 28, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3627107/>

murder, rape, manslaughter, kidnapping, domestic violence, stalking, death of an unborn child, and child pornography offenses.²⁹ All Article 120 violations (rape, sexual assault, aggravated sexual contact, and abusive sexual contact) are covered offenses.³⁰ After an investigation of a sexual assault claim is complete, the findings are provided to the branch's Office of Special Trial Counsel, who may or may not prosecute the alleged offender.³¹

If trial counsel proceeds with the prosecution of an Article 120 violation and brings a case to trial, it will be heard at a special or general court-martial.³² The accused determines if a judge alone or a panel with a minimum of five servicemembers hears the case.³³ Courts-martial are conducted similarly to civilian trials, with defense and prosecuting attorneys, witness testimony, and rules of evidence.³⁴

If found not guilty of a sexual offense, the servicemember could return to their unit and resume normal duties or face separate proceedings, which could result in dismissal from the armed forces—even if acquitted at court-martial.³⁵ If found guilty of rape or sexual assault, the judge is required by the UCMJ to sentence the servicemember to a mandatory dishonorable discharge, which can

[<https://perma.cc/2ZWJ-AUSS>].

29. *OSTC FAQ*, AIR FORCE JUDGE ADVOC. GEN.'S CORPS, <https://www.afjag.af.mil/OSTC/OSTC-FAQ/> [<https://perma.cc/9674-JVC7>].

30. 10 U.S.C. § 920 Art. 120.

31. DOD NEWS, *supra* note 28.

32. DOD VICTIM & WITNESS ASSISTANCE, *supra* note 27.

33. *Id.*

34. *Id.* (“The trial of a court-martial is not unlike a civilian criminal trial. The differences lie in the procedural requirements. The military follows rules of evidence patterned after the Federal Rules of Evidence. The members or judge hears evidence and renders a decision concerning the accused's guilt. In order to convict the accused the members must be persuaded beyond a reasonable doubt that the accused is guilty. If the accused is convicted, a sentencing hearing is held.”).

35. The commanding officer can impose a nonjudicial punishment, “a disciplinary measure more serious than the administrative corrective measures ... but less serious than trial by court-martial” which cannot result in discharge from the armed forces. *MANUAL FOR COURTS-MARTIAL*, *supra* note 10, at V-1. To remove the servicemember, the commanding officer could proceed with a Board of Inquiry for officers or an Administrative Separation Board for enlisted members, wherein the worst discharge classification possible would be Other than Honorable discharge and the best would be Honorable. Servicemembers at these Boards have the right to defense counsel to represent them. *Defense/Personal Representative Frequently Asked Questions*, NAVY JAG CORPS, <https://www.jag.navy.mil/legal-services/dso/faq/> [<https://perma.cc/8BUW-849A>].

be reduced to a bad-conduct discharge by the convening authority.³⁶ Both dishonorable and bad conduct are punitive discharges, so the record of trial will be automatically reviewed by the branch's Court of Criminal Appeals.³⁷ At the discretion of the losing party, the case can then be appealed to the Court of Appeals for the Armed Forces, and finally, the Supreme Court.³⁸

B. Creation and Implementation of the Special Victims' Counsel

The twenty-first century ushered in a new era for women in the military, but these advances arrived alongside infamous sexual assault cases. In the same year that the House Armed Services Committee voted to allow women to fly combat missions, eighty-three women and seven men were sexually assaulted during an aviation symposium, later dubbed the Tailhook Scandal.³⁹ In January 2013, the Secretary of Defense lifted the ban on women serving in combat.⁴⁰ A month later, an Air Force general overturned the court-martial conviction of a pilot convicted of sexual assault and reinstated him, giving rise to a congressional review of the decision.⁴¹ At the congressional hearing, Senator Claire McCaskill said the decision to overturn the pilot's conviction "set[] the Air Force 'all the way back to Tailhook.'"⁴² In the Department of

36. MANUAL FOR COURTS-MARTIAL, *supra* note 10, at A12-5, A12-9. For more information on the types of discharges and their implications, see U.S. DEP'T OF LAB., VETERANS' EMP. & TRAINING SERV., VETS USERRA FACT SHEET #3: FREQUENTLY ASKED QUESTIONS - SEPARATIONS FROM UNIFORMED SERVICE, CHARACTERIZATIONS OF SERVICE, AND EFFECTS ON RIGHTS AND BENEFITS UNDER USERRA 4-7, <https://www.dol.gov/sites/dolgov/files/VETS/files/USERRA-Fact-Sheet-3-Separations.pdf> [<https://perma.cc/73T2-FZSP>].

37. DoD VICTIM & WITNESS ASSISTANCE, *supra* note 27.

38. 28 U.S.C. § 1259.

39. JOSLYN OGDEN, THE KENAN INST. FOR ETHICS, TAILHOOK '91 AND THE U.S. NAVY 2 (2015), https://kenan.ethics.duke.edu/wp-content/uploads/2018/01/TailhookUSNavy_Case2015.pdf [<https://perma.cc/7CFR-EZ9T>].

40. Stephanie Gaskell & Kate Brannen, *Women in Combat: What Will Change*, POLITICO (Jan. 24, 2013, at 13:24 ET), <https://www.politico.com/story/2013/01/women-in-combat-female-draft-unclear-086679> [<https://perma.cc/6UQK-8VXX>].

41. Sarah Childress, *Emails Shed New Light on Military Sexual Assault Case*, PBS: FRONTLINE (Sep. 4, 2013), <https://www.pbs.org/wgbh/frontline/article/emails-shed-new-light-on-military-sexual-assault-case/> [<https://perma.cc/KDQ4-8XSY>].

42. Donna Cassata & Richard Lardner, *Panel Criticizes Military on Sexual Assault Cases*, U.S. NEWS & WORLD REP. (Mar. 13, 2013, at 17:49 ET), <https://www.usnews.com/news/politics/articles/2013/03/13/congress-eyes-changes-in-courts-martial-procedures>

Defense's (DoD) Fiscal Year 2013 Annual Report on Sexual Assault in the Military—published the same year Congress mandated SVCs in all branches—5,061 reports were filed, containing 5,518 total victims, 4,113 of whom were individuals assaulted while in the military.⁴³

While the public outcry of sexual assault cases increased, suspicion within the military of fraudulent reporting remained.⁴⁴ A 2005 report of surveys conducted in military academies showcased cadet and midshipmen commentary on false allegations.⁴⁵ Forty-two percent of respondents who self-identified as victims of sexual assault said fraudulent reporting of sexual assault was a large or very large problem, compared to 35 percent of nonvictims who said the same.⁴⁶ A female cadet at the United States Air Force Academy wrote, "I truly feel that men do not stand a chance even if the claims are fraudulent."⁴⁷ A male cadet at the United States Military Academy felt similarly:

The largest problem here is that if and when a sexual problem is reported is that a male will not be treated fairly. If a female lies about getting assaulted after the two were caught having sex, then the male taking part in the action often times is subject to strict scrutiny and is often found wrong when a woman accuses them of rape. The males are hardly ever believed in their statements.⁴⁸

[<https://perma.cc/NP8V-DDNQ>].

43. The "total victims" number includes all individuals who reported a sexual assault within a given year to organizations that fall under the purview of the DoD. For example, the total number of victims could include civilian contractors or foreign nationals. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013, at 67-69 (2014), https://www.ncdsv.org/uploads/1/4/2/2/142238266/dod_annualreportonsexualassaultinthemilitary-fy2013_5-2014.pdf [<https://perma.cc/Q3XP-YPFJ>].

44. Ctr. for Mil. Readiness, *Sex, Lies, and Rape*, CMR NOTES, Aug. 2006, at 2, <https://www.cmrlink.org/data/Sites/85/CMRDocuments/CMR%20Notes%20Issue83-0806.pdf> [<https://perma.cc/PYF7-F7AN>].

45. OFF. OF THE INSPECTOR GEN. OF THE DEP'T OF DEF., REPORT ON THE SERVICE ACADEMY SEXUAL ASSAULT AND LEADERSHIP SURVEY 75, 153, 175 (2005), <https://media.defense.gov/2005/Mar/04/2001713108/-1/-1/1/Final%20Survey%20Report.pdf> [<https://perma.cc/RT4P-Q999>].

46. *Id.* at 26.

47. *Id.*

48. *Id.* at 126.

The Center for Military Readiness cited data from the Inspector General's report in a notes issue titled "Sex, Lies, and Rape" that lamented fraudulent reporting and how "[p]olicy makers are shell-shocked by incoming feminist fire."⁴⁹

While reports and commentary on false reporting focused on sentiment, there were examples of courts-martial convicting women of making false statements of sexual assault.⁵⁰ For example, in July 2013, an airman reported rape after her unit could not locate her, but she later pled guilty to lying about the consensual encounter.⁵¹ Cases like that provided a factual basis for skepticism across the military.⁵²

Even when they were believed, the military did not have a suitable mechanism to protect alleged victims of sexual assault before reforms rolled out in the 2010s. Before legislative reform in 2011, transferring stations or bases was a long, bureaucratic process that could not be accelerated by a victim's status.⁵³ The slow pace of an investigation could extend the amount of harassment or danger a victim faced if they shared a duty station or office with their attacker.⁵⁴ In a particularly gruesome example from 2007, a female Marine named Lance Corporal Maria Lauterbach reported that Corporal Cesar Laurean, a member of her senior command, raped her in April.⁵⁵ Although transferred to a different building away from where she once worked for her assailant, Lauterbach

49. Ctr. for Mil. Readiness, *supra* note 44, at 1.

50. *See, e.g.*, United States v. Neubauer, No. ACM S32308, 2016 CCA LEXIS 156, *1 (A.F. Ct. Crim. App. Mar. 10, 2016).

51. *Id.* at *2-5.

52. *See, e.g., id.* at *10 ("Your Honor, the accused's lies, her drug use, and the extent of her manipulation are extremely serious in this case.... What are all the airmen who have heard her claims, her false statements, what are they going to think next time they receive a report of sexual assault? How is the next victim of sexual assault going to feel coming forward hoping she'll be believed?").

53. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 673, 125 Stat. 1298, 1432 (2011) (providing for the first time that victims of sexual assault could request a transfer to reduce the risk of retaliation, reflecting the absence of a formal protection mechanism before the 2010s reforms).

54. *See Arrest Warrant Issued in Pregnant Marine Case*, NBC NEWS (Jan. 11, 2008, at 09:33 ET), <https://www.nbcnews.com/id/wbna22608032> [<https://perma.cc/3T6A-NN8P>] (reporting that a Marine rape victim remained stationed with her accused attacker and faced harassment before her death).

55. *Id.*

remained in Laurean's unit.⁵⁶ She was still discussing potential charges against Laurean with military prosecutors in December when he murdered her.⁵⁷ She was eight months pregnant at the time, and her burned remains were found in Laurean's backyard.⁵⁸ Laurean is serving a life sentence for the crimes.⁵⁹

In 2013, *The Invisible War*, a documentary about male and female rape victims whose stories were disbelieved, premiered on PBS.⁶⁰ The film sparked political dialogue and prompted an official response from the military, delivered by Major General Patton of the United States Army.⁶¹ As Director of the Sexual Assault Prevention and Response Office, he announced improvements in criminal investigations of sexual assaults and the rollout of SVC programs to "provide enhanced victim support and a capability to investigate and prosecute sexual offenses ... and ultimately yield greater accountability of offenders."⁶²

The Air Force piloted the SVC Program in January 2013.⁶³ The SVC Program was the first of its kind in the military, "operat[ing] independently of the prosecution's chain of command" to give victims of sexual assault an attorney to represent their interests apart from prosecution or defense counsel.⁶⁴ By March 2013, the SVC Program had about two hundred clients and sixty attorneys.⁶⁵

56. Lori Newman, *Marine Mother Shares Tragic Story of Daughter's Sexual Assault, Murder*, U.S. ARMY (Apr. 8, 2015), https://www.army.mil/article/145996/marine_mother_shares_tragic_story_of_daughters_sexual_assault_murder [<https://perma.cc/NGX6-RCKR>].

57. *Arrest Warrant Issued in Pregnant Marine Case*, *supra* note 54.

58. Mary McCarty, *Lauterbach Sexual Assault Case Prompts Policy Reforms in Military*, DAYTON DAILY NEWS (Dec. 25, 2011), <https://www.daytondailynews.com/news/local/lauterbach-sexual-assault-case-prompts-policy-reforms-military/5roFGpYliBaCicHjYSQzgJ/> [<https://perma.cc/D76Z-D3WR>].

59. *Id.*

60. *The Invisible War*, PBS: INDEP. LENS, <https://www.pbs.org/independentlens/documentaries/invisible-war/> [<https://perma.cc/H2BM-T38U>].

61. Major General Gary S. Patton, U.S. Army Dir., DoD Sexual Assault Prevention & Response Off., *The Invisible War: A Military Response* (April 5, 2023), https://web.archive.org/web/20131215180622/https://sapr.mil/public/docs/speeches/DoD_SAPRO_Speech_MGPatton_TheInvisibleWar_AMilitaryResponse_EVAWI_Conf_05Apr13_Online.pdf [<https://perma.cc/45WR-XNJF>].

62. *Id.* at 1-3.

63. *Testimony on Sexual Assaults in the Military: Hearing Before the Subcomm. on Personnel of the S. Comm. on Armed Servs.*, 113th Cong. 51 (2013) (statement of Lieutenant Gen. Richard C. Harding, JAG, U.S.A.F.).

64. *Id.*

65. *Id.* at 49.

While the Air Force JAG spoke positively about the future of the program,⁶⁶ the Army JAG was more skeptical, repeating the Army defense bar's description of the SVC Program as "well-intentioned" but "unnecessary" because it "could have a detrimental impact on the administration of military justice."⁶⁷ Similarly, the Navy JAG said SVC could "encroach[] on the rights of the accused" and "may complicate prosecution efforts."⁶⁸ The internal resistance to the pilot program was highlighted by one of the first Air Force SVCs, Maribel Jarzabek.⁶⁹ She spoke to *The Washington Post* about "suffer[ing] blowback ... for advocating too zealously on behalf of clients."⁷⁰ Jarzabek received low performance ratings "from supervisors who criticized her for being 'too victim-centered,'" and she was "[e]ffectively forced into separation from the Air Force by [her] low performance ratings."⁷¹ Despite the internal resistance to SVC programs, in August 2013, Secretary of Defense Chuck Hagel required each branch to establish an SVC Program.⁷²

Congress followed Secretary Hagel's directive with its addition of SVCs in the fiscal year 2014 defense appropriations bill.⁷³ Congress allocated \$25 million for each branch to implement a Sexual Assault Special Victims Program.⁷⁴ Its companion bill, the National Defense Authorization Act for Fiscal Year 2014, outlined the program's parameters, thus enacting federal law to create Special Victims' Counsel under Title 10 of the United States Code.⁷⁵

The law provides an SVC to any "victim of an alleged sex-related offense, regardless of whether the report of that offense is restricted

66. *See id.*

67. *Id.* at 192 (statement of Lieutenant Gen. Dana K. Chipman, JAG, U.S. Army).

68. *Id.* (statement of Vice Admiral Nanette M. DeRenzi, JAG, U.S. Navy).

69. *See* Ruth Marcus, *A New Voice for Sexual Assault Victims in the Military*, WASH. POST (Jan. 9, 2015), https://www.washingtonpost.com/opinions/ruth-marcus-a-new-voice-for-sexual-assault-victims-in-uniform/2015/01/09/76a91c8e-983e-11e4-aabd-d0b93ff613d5_story.html [<https://perma.cc/8CV6-KCXB>].

70. *Id.*

71. *Id.*

72. *See* Memorandum from Chuck Hagel, Sec'y of Def., Dep't of Def., to Sec'ys of the Mil. Dep'ts (Aug. 14, 2013), https://web.archive.org/web/20250206210935/https://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf [<https://perma.cc/Z57W-TCA9>].

73. Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, § 8124, 128 Stat. 133.

74. *Id.*

75. *See* Pub. L. No. 113-66, § 1716, 127 Stat. 966-69 (2013) (codified as amended at 10 U.S.C. § 1044e).

or unrestricted.”⁷⁶ An SVC can provide his or her victim-client with “[l]egal consultation regarding potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense[,] ... [l]egal consultation regarding the potential for civil litigation against other parties[, and] ... [r]epresent[ation of] the victim at any proceedings in connection with the reporting.”⁷⁷ The two share an attorney-client relationship, which begins when the alleged victim files their report or after they seek assistance, such as from a Sexual Assault Response Coordinator or military criminal investigator.⁷⁸ Congress has amended the statute almost every year since its creation.⁷⁹ For example, the earliest version of the law allowed the SVC to *accompany* the victim to proceedings in connection with their report, but the language changed the following year to allow the SVC to *represent* the victim in those proceedings.⁸⁰ The routine maintenance of § 1044e represents Congress’s continued focus on Special Victims’ Counsel and military sexual assault.

II. HE SAID, SHE SAID, MY COMMANDER SAID

High-profile allegations of sexual assault in the military are only the surface: thousands of allegations are reported annually to the DoD. This Part documents how these reports are portrayed by those responsible for investigating and charging alleged offenders.

A. *The Present State of Sexual Assault Reporting*

In 2021, the DoD reported a 13 percent increase in sexual assault reports from 2020, with the Army reporting the largest increase.⁸¹

76. 10 U.S.C. § 1044e(a)(1).

77. *Id.* § 1044e(b)(1), (4), (6).

78. *See id.* § 1044e(f)(1).

79. *See id.* § 1044e (amending the statute in 2013, 2014, 2015, 2017, 2019, and 2021).

80. Pub. L. No. 113-66, § 1716, 127 Stat. 967 (2013) (providing victims with the option to have SVCs accompany them to proceedings), *amended by* National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 534(a), 128 Stat. 3292, 3367 (2014) (substituting the “accompanying” option with the option for SVCs to represent victims at proceedings)).

81. DEP’T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2021, at 6, [hereinafter FY21 DoD ANN. REP.], https://www.sapr.mil/Portals/156/FY21_Annual_Report.pdf [<https://perma.cc/LNG7-K28Y>]. A “report” is one wherein either the subject or the victim is

Congressional representatives and military personnel called the situation “increasingly dire”⁸² and “deeply disappointing,”⁸³ but noted it was not “a new problem.”⁸⁴ There was a 1 percent increase in the number of reports in 2022, for a total of 8,942 reports.⁸⁵ The most recent data from the 2023 fiscal year showcased a 5 percent decrease from the prior year.⁸⁶

The varying reporting numbers were supplemented by infamous recent accounts of sexual assault: campus sexual assaults at the United States Coast Guard Academy⁸⁷ and multiple sexual assaults of Japanese women by Marines stationed in Okinawa.⁸⁸ Perhaps most damning were the events at Fort Hood. In 2020, two individuals’ deaths magnified glaring errors in the Army’s response to sexual harassment and assault reports: Private First Class Vanessa

an active-duty member of the armed forces.

82. *Update on the Implementation of Recommendations of the Independent Review Commission on Sexual Assault in the Military and the Establishment of the Office of Special Trial Counsel: Hearing Before the Subcomm. on Mil. Personnel of the H. Comm. on Armed Servs.*, 117th Cong. 1 (2022) (statement of Rep. Jackie Speier, Chairwoman, Subcomm. on Mil. Personnel).

83. *Id.* at 6 (statement of Gilbert R. Cisneros, Jr., Under Sec’y of Def. for Personnel & Readiness, Dep’t of Def.).

84. *Id.* at 17 (statement of Rep. Sara Jacobs).

85. DEP’T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2022, at 3 [hereinafter FY22 DOD ANN. REP.], https://www.sapr.mil/Portals/156/FY22_Annual_Report.pdf [<https://perma.cc/45YJ-QHCE>].

86. DEP’T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2023, at 4 n.2 [hereinafter FY23 DOD ANN. REP.], https://www.sapr.mil/Portals/156/FY23_Annual_Report.pdf [<https://perma.cc/2JVR-JCX9>].

87. The Coast Guard and its academy fall under the Department of Homeland Security, so it is excluded from DoD reports, but the Coast Guard is generally included in the discussion around military sexual assaults. See Susan Haigh, *More Former Cadets Accuse US Coast Guard Academy of Failing to Prevent Campus Sexual Assaults*, MILITARY.COM (Oct. 30, 2024, at 16:35 ET), <https://www.military.com/daily-news/2024/10/30/more-former-cadets-accuse-us-coast-guard-academy-of-failing-prevent-campus-sexual-assaults.html> [<https://perma.cc/3EFR-MBP3>].

88. See Konstantin Toropin & Thomas Novelly, *Troops in Japan Banned from Late-Night Drinking After String of Alleged Sexual Assaults on Okinawa*, MILITARY.COM (Oct. 3, 2024, at 18:18 ET), <https://www.military.com/daily-news/2024/10/03/troops-japan-banned-late-night-drinking-after-string-of-alleged-sexual-assaults-okinawa.html> [<https://perma.cc/GZ7R-AM5T>]; *U.S. Marine in Okinawa Referred to Prosecutors over Sexual Assault*, JAPAN WIRE BY KYODO NEWS (Sep. 5, 2024, at 20:13 ET), <https://english.kyodonews.net/articles/-/49905?words=U.S.+Marine+in+Okinawa+Referred+to+Prosecutors+Over+Sexual+Assault> [<https://perma.cc/N7NU-ZT8K>].

Guillén and Sergeant Elder Fernandes.⁸⁹ Guillén's death prompted the Army's commanding general to open a large-scale, highly-monitored investigation known as an AR 15-6.⁹⁰ The report identified sexual harassment complaints by Guillén, in particular, complaints about her attacker, Specialist Aaron Robinson, and multiple "fail[ures] to initiate an investigation."⁹¹ Robinson murdered Guillén, dismembered her body, and dumped her remains about thirty minutes from the Army base.⁹² A month after Guillén's remains were identified, Sergeant Elder Fernandes hung himself from a tree while an investigation that he was sexually assaulted by a superior remained open.⁹³ Directly preceding his suicide, Fernandes transferred units after reporting the assault, which his family's attorney said he was bullied for.⁹⁴

Supplementing those high profile incidents, Brown University released a report suggesting that in the decades following 9/11, sexual assault rates were "two to four times higher than DoD estimations."⁹⁵ The report consolidated all available independent data, some of which were surveys that focused exclusively on women or exclusively on veterans or active duty servicemembers surveyed through non-DoD channels.⁹⁶ The author credited the War in Afghanistan with making sexism and gendered violence "worse" during the twenty-year span.⁹⁷

89. Rachel Treisman, *Body of Missing Fort Hood Soldier Elder Fernandes Found a Week After Disappearance*, NPR (Aug. 26, 2020, at 20:09 ET), <https://www.npr.org/2020/08/26/906396032/body-of-missing-fort-hood-soldier-elder-fernandes-found-a-week-after-disappearan> [<https://perma.cc/9G3U-FRCC>].

90. U.S. ARMY, FORT HOOD AR 15-6 INVESTIGATION: EXECUTIVE SUMMARY 1 (2021), https://www.army.mil/e2/downloads/rv7/forthoodreview/fort_hood_ar_15_6_investigation_executive_summary.pdf [<https://perma.cc/34WU-LB8X>].

91. *Id.* at 1-2.

92. Dave Philipps, *Military Missteps Allowed Soldier Accused of Murder to Flee, Report Says*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/04/30/us/vanessa-guillen-fort-hood-aaron-robinson.html> [<https://perma.cc/56DA-YYDE>]; *Remembering Vanessa Guillen*, U.S. ARMY (2020), <https://home.army.mil/hood/find-vanessa-guillen> [<https://perma.cc/YSW4-BYKW>].

93. Treisman, *supra* note 89.

94. *Id.*

95. JENNIFER GREENBURG, BROWN UNIVERSITY WATSON INSTITUTE, DESERTED: THE U.S. MILITARY'S SEXUAL ASSAULT CRISIS AS A COST OF WAR 1, 2 (2004), https://costsofwar.watson.brown.edu/sites/default/files/papers/Greenburg_Sexual-Assault-Crisis_Costs-of-War.pdf [<https://perma.cc/Y3Q6-QEHS>].

96. *See id.* at 12.

97. *Id.* at 27.

Two days prior to the War in Afghanistan’s official end, the United States Navy-Marine Corps Court of Criminal Appeals affirmed a conviction of a Machinist’s Mate Third Class for “falsely reporting she was drugged and raped to avoid getting in trouble for missing a training class.”⁹⁸ She was sentenced to a seven-month confinement and a bad-conduct discharge from the Navy.⁹⁹ The fabrication of a reported assault—asking another sailor to punch her in the face and undergoing a hospital examination¹⁰⁰—is in sharp contrast to claims that thousands of sexual assaults go unreported.¹⁰¹ The conservative think-tank, the Center for Military Readiness (CMR),¹⁰² is pressing the alternative to reports like the one from Brown University. CMR believes “unjust and often career-ending” unfounded sexual assault reports are increasing.¹⁰³

The figures cited by CMR are from a category of sexual assault reports from 2021 that the DoD labeled as “unfounded, meaning evidence existed to find that a crime did not occur or that the accused did not commit the crime.”¹⁰⁴ That description has changed over the years, however. The following year’s annual report in 2022 described “unfounded” as “false or baseless,” but the 2023 description parroted the one from 2021.¹⁰⁵ No reports comment on the definition changes year over year, but the changes imply a back-and-forth inside the DoD about how unfounded reports are interpreted. With such changes, a single report could go from being described as only lacking evidence in 2021—not necessarily

98. *United States v. Daugherty*, No. 202000133, 2021 WL 3668078, at *1 (N-M. Ct. Crim. App. Aug. 18, 2021) (per curiam).

99. *Id.*

100. *Id.* at *1-2.

101. *See, e.g.*, GREENBURG, *supra* note 95, at 31 (“These 2023 data still indicate that at least 75 percent of military personnel do not report sexual assault, meaning that 75 percent likely do not receive adequate counseling, medical care, and resources for recovery that are most often accessed through reporting.”); *Facts on United States Military Sexual Violence*, PROTECT OUR DEFS. (May 2021), <https://www.protectourdefenders.com/wp-content/uploads/2021/05/MSA-Fact-Sheet-2021.pdf> [<https://perma.cc/6V3V-DNCL>] (“76.1% of [sexual violence] victims did not report the crime in FY18.”).

102. SASKIA STACHOWITSCH, *GENDER IDEOLOGIES AND MILITARY LABOR MARKETS IN THE US* 126 (2011).

103. *Unfounded Sex Assault Charges Trending Up in DoD Reports*, CTR. FOR MIL. READINESS (Aug. 27, 2019), <https://www.cmrlink.org/issues/full/unfounded-sex-assault-charges-trending-up-in-dod-reports> [<https://perma.cc/2MAC-P778>].

104. FY21 DOD ANN. REP., *supra* note 81, at 18.

105. FY22 DOD ANN. REP., *supra* note 85, at 20; FY23 DOD ANN. REP., *supra* note 86, at 21.

implying the assault did not take place—to being called “false” in 2022.

CMR’s presentation of data in this category was misleading. For example, CMR stated that 28 percent of reports in 2018 represented “unsubstantiated reports.”¹⁰⁶ Throughout the article, CMR uses their term, “unsubstantiated,” interchangeably with “unfounded,” the government’s term. However, 74 of 2,854 cases in which commanders considered action were labeled “Unfounded by Command/Legal Review,” which is less than 3 percent.¹⁰⁷ CMR derived its 28 percent value by combining the seventy-four “unfounded” reports with the 735 reports taken from a separate category titled “Insufficient Evidence of Any Offense to Prosecute.”¹⁰⁸ Although a lack of evidence cannot prove whether an assault took place, CMR’s interpretation of the category is that one in four allegations target innocent servicemembers.¹⁰⁹

CMR found support for its concern with “self-serving accusations following consensual misconduct” in the military: the allegation of sexual misconduct by Air Force General John Hyten.¹¹⁰ In 2019, after Hyten’s nomination as Vice Chairman of the Joint Chiefs of Staff, his former aide, Colonel Kathryn A. Spletstoser, filed suit alleging sexual assault by Hyten beginning in 2017.¹¹¹ California’s Central District Court allowed the United States to take Hyten’s place as the defendant in 2020, as the government unsuccessfully moved to dismiss the complaint first at the lower court and again at the Ninth Circuit Court of Appeals.¹¹²

Spletstoser’s complaint detailed “unwanted sexual advances” that occurred while she served under Hyten wherein “Hyten unexpectedly grabbed her hand and put it on his crotch” more than once,

106. See CTR. FOR MIL. READINESS, *supra* note 103.

107. *DoD Annual Reports Show Significant Increases in Sexual Assault Accusations Deemed “Unfounded”*, CTR. FOR MIL. READINESS (Aug. 27, 2019), https://www.cmrlink.org/data/sites/85/CMRDocuments/SAPROAnalysis-Unfounded_082719.pdf [<https://perma.cc/KM7X-ZBJ5>].

108. *Id.*

109. See CTR. FOR MIL. READINESS, *supra* note 103 (“The fact that 3-in-4 cases are substantiated and punished accordingly should not diminish concerns for the 1-in-4 innocent persons who are falsely accused.”).

110. *Id.*

111. *Spletstoser v. United States*, No. CV 19-10076, 2020 WL 6586308, at *2, *4 (C.D. Cal. Oct. 22, 2020), *aff’d sub nom.*, *Spletstoser v. Hyten*, 44 F.4th 938 (9th Cir. 2022).

112. *Id.* at *1; *Spletstoser*, 44 F.4th at 942.

tried to kiss Spletstoser multiple times, and “rub[bed] his penis against her and ejaculated in his shorts.”¹¹³ According to CMR, the Air Force investigated these allegations “and found none of them to be true.”¹¹⁴ CMR’s conclusion accurately represented remarks from the then-Secretary of the Air Force, who unequivocally stated during a congressional hearing that Hyten was “falsely accused.”¹¹⁵ Senators confirmed Hyten’s nomination, 75-22 in September 2019.¹¹⁶ Four years later, the government settled Spletstoser’s suit for \$975,000.¹¹⁷ That outcome is very rare, particularly considering that most suits against the United States alleging injuries—including sexual assault by another servicemember—during active duty are dismissed under the *Feres* doctrine.¹¹⁸

113. *Spletstoser*, 2020 WL 6586308, at *2-6.

114. CTR. FOR MIL. READINESS, *supra* note 103.

115. *Hearing to Consider the Nomination of: Gen. John. E. Hyten, USAF for Reappointment to the Grade of General and to be Vice Chairman of the Joint Chiefs of Staff Before the S. Comm. on Armed Servs.*, 116th Cong. 12 (2019) (statement of Dr. Heather Wilson, Former Sec’y, U.S.A.F.), https://www.armed-services.senate.gov/imo/media/doc/19-65_07-30-19.pdf [<https://perma.cc/M5J3-2GAF>].

116. Leo Shane, III, *Hyten Confirmed as New Joint Chiefs Vice Chairman Despite Sexual Assault Accusations*, MILITARYTIMES (Sep. 26, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/09/26/hyten-confirmed-as-new-joint-chiefs-vice-chairman-despite-sexual-assault-accusations/> [<https://perma.cc/VMV4-YSXY>].

117. See Michael Levenson, *U.S. to Pay \$975,000 to Resolve Sexual Assault Claims Against Air Force General*, N.Y. TIMES (July 13, 2023), <https://www.nytimes.com/2023/07/13/us/air-force-general-sexual-assault-lawsuit-settlement.html> [<https://perma.cc/6TX2-GEWB>]; Lara Seligman, *U.S. to Pay Nearly \$1M to Settle Sexual Assault Case Against Former Top General*, POLITICO (July 13, 2023, at 14:32 ET), <https://www.politico.com/news/2023/07/13/top-general-sexual-assault-settlement-00106189> [<https://perma.cc/5PYH-CPNY>].

118. The *Feres* doctrine forbids servicemember plaintiffs from pursuing tort claims against the government, including claims arising from sexual assault. See *Feres v. United States*, 340 U.S. 135, 146 (1950) (“We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”). See generally Lauren C. Brady, *When Sexual Assault Becomes Incident to Military Service*, 31 J.L. & POL’Y 97 (2002) (recounting how tort claims for sexual assault were often dismissed under *Feres* and pushing for the adoption of the Ninth Circuit’s holding in *Spletstoser* that sexual assault survivors should be able to recover damages); Ann-Marie Woods, *A “More Searching Judicial Inquiry”: The Justiciability of Intra-Military Sexual Assault Claims*, 55 B.C. L. REV. 1329 (2014) (arguing the Supreme Court should overturn *Feres* to protect military victims of sexual assault); Katherine Shin, Note, *How the Feres Doctrine Prevents Cadets and Midshipmen of Military-Service Academies from Achieving Justice for Sexual Assault*, 87 FORDHAM L. REV. 767 (2018) (urging a carve-out of the *Feres* doctrine so midshipmen and cadets could bring claims, particularly considering how Title IX does not cover military service academies).

The Hyten hearings and resulting settlement are conflicting. From CMR's perspective, Hyten's confirmation story was one of saving an innocent man and justifying more "resources to fight ruinous accusations that are false."¹¹⁹ For Spletstoser, the eventual settlement was a "victory" that tacitly confirmed her allegations despite the government's denial of liability.¹²⁰ The truth behind the DoD's *unfounded* label is a murky catch-all for the worst fears on both sides of this debate. Do the numbers represent a hardened military that refuses to genuinely investigate sexual assault? Or do the numbers represent retaliatory false accusations against innocent, hard-working servicemembers? When considering the impact and scope of SVCs who are assigned to cases that eventually fall in the unfounded category, those questions turn into the greatest challenges a JAG may face. How do you represent a victim who is not believed by investigators? How do you represent a victim who is not a victim at all?

B. How Special Victims' Counsel Programs Operate a Decade After Their Introduction

The Office of Special Trial Counsel (OSTC) rollout to all branches beginning in December of 2023¹²¹ ushered in the newest era of the military's response to sexual assault across its branches.¹²² Although separate and distinct from SVC programs, the push to implement OSTC across the branches was part of the broader congressional effort to address military sexual assault.¹²³ Today, the debate over whether to have SVCs has since faded in congressional discussions,

119. CTR. FOR MIL. READINESS, *supra* note 103.

120. Levenson, *supra* note 117.

121. 10 U.S.C.A. § 824a (West 2024); *see also* Press Release, Am's Navy, Navy Office of Special Trial Counsel Now Fully Operational (Dec. 28, 2023), <https://www.navy.mil/Press-Office/Press-Releases/display-pressreleases/Article/3627905/navy-office-of-special-trial-counsel-now-fully-operational/> [<https://perma.cc/7RHC-MZ7K>] (Navy's announcement); *Frequently Asked Questions*, U.S. ARMY OFF. OF SPECIAL TRIAL COUNS., <https://www.army.mil/ostc#org-faqs> [<https://perma.cc/T9MW-6XYS>] (Army's announcement).

122. *See* 10 U.S.C. § 1044e(f)(1).

123. *See* Claudia Grisales, *Bill to Combat Sexual Assault in Military Finally Has Votes to Pass, Senators Say*, NPR (May 6, 2021, at 05:00 ET), <https://www.npr.org/2021/05/06/993957643/bill-to-combat-sexual-assault-in-military-finally-has-votes-to-pass-senators-say> [<https://perma.cc/Z5FZ-LXMF>].

and the focus is instead on who has prosecutorial power¹²⁴ and how involved the SVC is in that decision.¹²⁵ The establishment of the OSTC removed the questions about SVCs influencing commander decisions because the decision to prosecute no longer lies with commanders.¹²⁶

However, SVCs still face conflict when supporting the victim's rights, as their role may conflict with the prosecuting attorney's outlook or case strategy.¹²⁷ JAGs serving as SVCs have their "[s]uccess [] defined by ensuring that each client receives the necessary context about the military justice process and the circumstances of their particular case."¹²⁸ They have no role in determining the truthfulness or validity of what their client says, they only provide them with necessary information and advocate for their wishes.¹²⁹ In practice, SVCs are present with victims when they give their statement to other attorneys or investigative authorities and are in routine communication with their client throughout the reporting process and criminal litigation if the case is pursued.¹³⁰ SVCs can also participate in the trial on behalf of their client, the most common example being a writ of mandamus petition, which compels a court-martial to comply with the Military Rules of Evidence.¹³¹ Where they are limited, however, is in asking

124. See Steve Beynon, *Army's New Special Prosecutors Hit Ground Running with Case Netting 20-Year Sentence for Rape, Assault*, MILITARY.COM (Feb. 22, 2024, at 11:34 ET), <https://www.military.com/daily-news/2024/02/22/armys-new-special-prosecutors-hit-ground-running-case-netting-20-year-sentence-rape-assault.html> [<https://perma.cc/AQ6B-PTWC>] (noting the congressional debate and implementation of Special Trial Counsel across all branches).

125. See Kyra Ziesk-Socolov, *Two-Front War: The Struggle for Legitimacy in Military Sexual Assault Adjudications*, 44 HARV. J. L. & GENDER 101, 111-12, 131 (2021) (discussing how the victim's SVC influenced a command decision to reject a plea deal from a high profile Army general).

126. See *supra* Part I.A.

127. Nicholas K. Leslie & Aaron R. Matthes, *A Roadmap for Leaders of SVCs*, ARMY LAW, no. 4, 2019, at 41, 43 (2019) ("A trial counsel may view the SVC's advocacy for administrative action as obstructionist, and friction between the two counsel may result.").

128. Chrissy L. Schwensen, *A Voice for the Victim: A Day in the Life of an SVC*, ARMY LAW, no. 3, 2020, at 22, 23.

129. See *id.* at 22-23.

130. See *id.*

131. See, e.g., *In re KK*, 84 M.J. 664, 665 (A.F. Ct. Crim. App. 2023) (ruling on a victim's writ of mandamus asking the court to vacate the lower court's decision to deny a continuance from the Government). See generally David A. Schlueter & Lisa M. Schenck, *This Is Not Your Grandparents' Military Justice System: The 2022 and 2023 National Defense Authorization*

to appeal a decision in its entirety.¹³² None of those routine tasks ask an SVC to determine whether a client's allegation is true or false, but doing so is the concern of almost every other party in a sexual assault report, from prosecuting attorneys to investigators.

In *United States v. Deremer*, it was the investigators who did not believe Deremer's allegation and, as a result, made the unilateral decision to forgo notice to her SVC.¹³³ The first time Deremer met with investigators in November 2021, her SVC accompanied her as she detailed how another recruit had groped her on multiple occasions over the past few months.¹³⁴

Deremer was in a wheelchair during the interview.¹³⁵ She had been using it for just over a month after reporting leg numbness.¹³⁶ The credibility of her reported paralysis was questioned by the medical provider who saw her for the leg numbness and reviewed her "unremarkable" scans.¹³⁷ NCIS investigated Deremer's allegation by interviewing other recruits in the same platoon, and, by December, not only concluded that the groping allegations were false, but also noted that numerous interviewees said Deremer could walk.¹³⁸

On December 15, NCIS closed the investigation and notified Deremer's command and her SVC that "probable cause existed that [Appellant's] accusations ... were false in nature."¹³⁹ However, Deremer's SVC was unaware of the case closure until February 9, 2022.¹⁴⁰ The following day, NCIS opened a new investigation with Deremer as the suspect, not the victim.¹⁴¹ Agents "intentionally"

Acts, ARMY LAW, no. 2, 2023 (discussing protections for sexual assault victims in the military justice system following the enactment of the 2022 and 2023 National Defense Authorization Acts).

132. See Schlueter & Schenck, *supra* note 131, at 83 n.81; *M.W. v. United States*, 83 M.J. 361, 362 (C.A.A.F. 2023) (finding no jurisdiction to hear the appeal of a victim's writ from a lower court).

133. Brief for Appellant, *supra* note 2, at 4.

134. Brief for Appellee, *supra* note 1, at 7.

135. *Id.* at 5, 38.

136. *Id.* at 5-6.

137. *Id.* at 5.

138. See *id.* at 8; Brief for Appellant, *supra* note 2, at 3.

139. Brief for Appellee, *supra* note 1, at 8 (alteration in original).

140. *Id.* at 9.

141. *Id.* at 10.

interviewed Deremer without her SVC,¹⁴² and during the interview, Deremer waived her right to counsel.¹⁴³ She initially confirmed her allegations of sexual assault, but later confessed to lying about the groping.¹⁴⁴ Deremer also confessed her ability to walk but said she was afraid of injury and did not want to return to training.¹⁴⁵

Ultimately, Deremer was accused—and charged—with lying about two things: the sexual assault and the leg numbness. Deremer’s convening authority preferred charges¹⁴⁶ against her, and she was arraigned for making a false official statement (related to the sexual assault claim) and malingering (related to the leg numbness claim) on April 12, 2023.¹⁴⁷ When Deremer’s defense counsel moved to have her confession suppressed, the military judge denied the motion.¹⁴⁸ Deremer opted to have a military judge sit alone instead of a jury panel, and that judge found her guilty of both charges.¹⁴⁹ The judge reduced her rank from E-2 to E-1 and gave her a punitive discharge.¹⁵⁰ Deremer appealed to the Navy-Marine Corps Court of Criminal Appeals (NMCCA).¹⁵¹

Deremer exemplifies the newest frontier in the debate surrounding sexual assault in the military. Congress has already given certain enumerated rights to victims, but now the question is how to apply those rights to scenarios in which victim credibility is doubted. Consider this simple dichotomy: Provide a victim with an SVC throughout all proceedings related to their initial sexual assault report or terminate the attorney-client relationship between a victim and an SVC if that victim’s report is untruthful.

142. Brief for Appellant, *supra* note 2, at 4.

143. *Id.* at 5.

144. Brief for Appellee, *supra* note 1, at 11-12.

145. Brief for Appellant, *supra* note 2, at 5-6; Brief for Appellee, *supra* note 1, at 12.

146. See *What You Should Know About Chapter 10, AR 635-200 Request for Discharge in Lieu of Trial by Court-Martial*, FORT CARSON FIELD OFF.: TRIAL DEF. SERV., <https://home.army.mil/carson/8716/4919/3011/request-for-discharge.pdf> [<https://perma.cc/FRV7-4CEC>] (“Preferral occurs when the prosecutor drafts the charges and your commander actually signs and reads you the charges. Referral takes place after preferral. Referral occurs when a commander with authority signs documents authorizing a particular court-martial to hear your case.”).

147. Brief for Appellee, *supra* note 1, at 13-14.

148. *Id.* at 14; Brief for Appellant, *supra* note 2, at 6.

149. Brief for Appellant, *supra* note 2, at 1-2.

150. *Id.*

151. See *infra* notes 157-88 and accompanying text for discussion of the case on appeal.

If Deremer were permitted to have her SVC regardless of the validity of her claim, her SVC would have been notified and likely present for the second set of questioning by NCIS agents.¹⁵² As Deremer's counsel noted before the NMCCA, any attorney "worth their salt" would have told Deremer to remain silent once the questioning from NCIS demonstrated the shift from treating her as a victim to treating her as a perpetrator.¹⁵³ In this vein, her counsel argued that the statements she made without her SVC present should be suppressed because, if she were with her SVC, her statements would have otherwise never been said.¹⁵⁴ Deremer's counsel asked that the military judge's decision to allow the statements Deremer made during that interview into evidence be characterized as an "erroneous evidentiary ruling," which the NMCCA reviews *de novo*.¹⁵⁵ The question before NMCCA was: Did allowing those statements actually change the outcome of Deremer's trial, or would she have been found guilty even if they had been suppressed?

If NCIS agents were not required to notify Deremer or her SVC when they closed the initial investigation, then the NMCCA must affirm the military judge's evidentiary ruling allowing her statement.¹⁵⁶ The impact of the statement's admissibility appears to be what the case hinged upon, considering that, out of the three assignments of error in Appellant's brief, the NMCCA decided to hear only that assignment of error at oral argument.¹⁵⁷ Such a ruling would confirm the authority wielded by the NCIS agents when they determined Deremer's allegations were false and decided to open a separate investigation against her.

It is this authority that the United States Marine Corps Victims' Legal Counsel Organization (VLCO) and the United States Navy

152. See Schwennsen, *supra* note 128, at 22.

153. NAVY JAG CORPS, *U.S. v. Deremer* Part 1 Audio, at 15:10-15:50 (Nov. 13, 2024), https://stjececmsdusgva001.blob.core.usgovcloudapi.net/public/documents/Deremer_Part_1.mp3 [<https://perma.cc/L62P-TN59>] (discussing how an attorney would react to a hostile interview).

154. *Id.*

155. See *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (quoting *United States v. Savala*, 70 M.J. 70, 77 (C.A.A.F. 2011)) ("This Court reviews 'the prejudicial effect of an erroneous evidentiary ruling *de novo*.'" (citation modified) (quoting *Savala*, 70 M.J. at 77)).

156. See *id.*

157. See Order Directing Oral Argument, *United States v. Deremer*, 85 M.J. 546 (N-M Ct. Crim. App. filed Aug. 21, 2024) (No. 202300205); Brief for Appellant, *supra* note 2, at 1-2.

Victims' Legal Counsel Program (VLCP) take specific issue with, according to their amicus curiae brief.¹⁵⁸ They characterized NCIS's investigation as "incomplete and ineffective."¹⁵⁹ VLCO and VLCP asked NMCCA to suppress the interrogation because NCIS "failed to notify PFC Deremer that her [SVC] was available—as was required by § 1044e(f)(2)."¹⁶⁰ They asked the court to find that NCIS acted outside its authority when (1) determining Deremer's allegations were false and (2) failing to notify her SVC when they questioned her for lying about the assaults and wheelchair use.¹⁶¹ While the amicus brief argues for those statements to have been suppressed, it offers no guidance to the court on whether that suppression should result in a confirmation or overruling of Deremer's conviction.¹⁶² At oral argument, the Chief Victims Legal Counsel of the Marine Corps confirmed that VLCO's interest in the case does not rest upon Deremer's legal remedy, but upon a ruling from the court that clarifies the right of a victim to his or her SVC.¹⁶³

When NMCCA judges heard oral argument on *Deremer* in November 2024, one judge noted how, despite the many changes to § 1044e, Congress never included any language on suppressing statements made without one's SVC.¹⁶⁴ This is a critical point. In other statutes, Congress requires the suppression of forced self-incriminating statements.¹⁶⁵ Ruling that the NCIS did not have the authority to deny Deremer the presence of her counsel but that such statements made were still admissible would simultaneously uphold and weaken the statute.

In the decision, released on February 7, 2025, the NMCCA appeared to juggle all these outcomes with a fractured coalition of

158. See Amicus Curiae Brief in Support of Appellant at 1-2, 11-12, *United States v. Deremer*, 85 M.J. 546 (N-M Ct. Crim. App. 2024) (No. 202300205).

159. *Id.* at 2.

160. *Id.* at 10.

161. *Id.* at 7, 10-11.

162. *Id.* at 11-12.

163. NAVY JAG CORPS, *U.S. v. Deremer* Part 2 Audio, at 00:35-01:28 (Nov. 13, 2024), https://stjececmsdusgva001.blob.core.usgovcloudapi.net/public/documents/Deremer_Part_2.mp3 [<https://perma.cc/V49Q-T75Q>] (explaining the VLCO's interest in the case).

164. *U.S. v. Deremer* Part 1 Audio, *supra* note 153, at 20:26-21:14.

165. See 10 U.S.C. § 831(d) ("No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.").

judges joining the majority, concurring in parts, and dissenting in others.¹⁶⁶ The court set aside Deremer's false official statement conviction,¹⁶⁷ the discussion of which spanned the entire brief. The court paid little attention to the malingering charge and wrote simply that the evidence on Deremer's ability to walk despite her claims to the contrary was sufficient to sustain the conviction.¹⁶⁸ The malingering charge was affirmed.¹⁶⁹ The false official statement charge and sentence, however, were set aside, and a rehearing was authorized.¹⁷⁰

The majority laid fault at the feet of the NCIS agents who denied Deremer her counsel and said NCIS's internal policy of removing an SVC from interviews when victim credibility is questioned has "no foundation in law."¹⁷¹ Secondly, the court continuously recalled Congress's intent and authority to "balance the rights of service-members against the needs of the military" and afford alleged victims "a right to counsel *different* from others within the military justice system."¹⁷² On that topic, the opinion closely aligns with the amicus curiae brief from the Marine and Naval SVC programs.¹⁷³

Most importantly, the court defined a clear rule for an alleged victim's access to an SVC. It is a due process violation to question an alleged victim without their SVC, and anything said without the SVC present will be classified as involuntary and therefore unusable.¹⁷⁴ To hold otherwise, the court said, would "utterly defeat the obvious congressional purpose of assuring military victims of sexual assault effective legal representation."¹⁷⁵ Applying that rule, the court found the statements Deremer made to the NCIS agent without her SVC inadmissible, and, therefore, the military judge abused his discretion by admitting them.¹⁷⁶ Finally, because the

166. United States v. Deremer, 85 M.J. 546, 548 (N-M Ct. Crim. App. 2025), *appeal denied*, No. 25-0167, 2025 WL 2906165 (C.A.A.F. Sep. 9, 2025).

167. *See id.* at 549, 555.

168. *Id.* at 554-55.

169. *Id.* at 555.

170. *Id.* at 554-55.

171. *Id.* at 552.

172. *Id.* at 553 (emphasis added).

173. *See* Amicus Curiae Brief in Support of Appellant, *supra* note 158, at 12.

174. *Deremer*, 85 M.J. at 554.

175. *Id.*

176. *See id.*

false official statement charge was based upon those statements, the court found sufficient prejudice to set it aside in its entirety.¹⁷⁷

The court's split opinions were noticeable as early as a three-sentence concurrence, in which Senior Judge Kisor wrote separately to say he did "not believe that it is unwise or inadvisable for the Court to reach the obvious constitutional violation under these facts."¹⁷⁸ The cursory—but pointed—defense in support of the majority opinion previewed the subject matter of the dissenting opinions.¹⁷⁹ The dissenters believed the court stretched its authority too far by giving an alleged victim and their SVC rights that are "more sacrosanct and immutable than any right to counsel protected by the Constitution," and "punish[ed] the Government."¹⁸⁰ Chief Judge Holifield's dissent centered around the rights afforded to Deremer as an alleged victim, and how the protections around alleged victims under the majority's rule may even exceed those of ordinary criminal defendants.¹⁸¹ That critique prods at the core of *Deremer*: Are we willing to give alleged victims a slate of rights distinct from all other parties in a criminal proceeding? Chief Judge Holifield was not willing. He added that the agent "applied a not unreasonable policy" by ignoring Deremer's representation, and that the majority's remedy of striking her statements "simply provides a windfall to [Deremer]."¹⁸²

The final dissent centered around Deremer's waiver of counsel in the interview with NCIS.¹⁸³ In Judge Harrell's analysis, once Deremer waived her right to counsel in the interview with NCIS, there was no requirement to have her SVC present.¹⁸⁴ His account ignored the critical moments before Deremer waived her right to counsel where she was subject to NCIS's questioning without her SVC when the agent *knew* she was represented.¹⁸⁵ Turning to the

177. *Id.* at 554-55.

178. *Id.* at 555 (Kisor, J., concurring).

179. *See id.* at 559-60 (Holifield, C.J., concurring and dissenting in part); *id.* at 560-65 (Harrell, J., concurring and dissenting in part).

180. *Id.* at 560 (Holifield, C.J., concurring in part and dissenting in part); *id.* (Harrell, J., concurring in part and dissenting in part).

181. *See id.* at 559-60 (Holifield, C.J., concurring in part and dissenting in part).

182. *Id.* at 560.

183. *See id.* at 560-65 (Harrell, J., concurring in part and dissenting in part).

184. *Id.* at 560.

185. *See* Brief for Appellant, *supra* note 2, at 4.

statute and congressional intent, Judge Harrell said if Congress wanted to provide the relief that the majority gave Deremer here—suppressing her statement to NCIS—it would have done so in the statute.¹⁸⁶ That is the same perspective he pressed at oral argument.¹⁸⁷ Ultimately, Judge Harrell would have held that Deremer’s title as “victim[.]” was replaced with “accused” in her second interview with NCIS, and the attorney waiver she provided would therefore satisfy the admission of her statements in court.¹⁸⁸

The majority, concurring, and dissenting opinions and their varying conclusions hinted at a broader discussion still ongoing, most recently on appeal at the Court of Appeals for the Armed Forces.¹⁸⁹ Ultimately, the ruling here did not finalize the conversation around whether access to counsel hinges on victim credibility; rather, it provided an example of one appeals court’s perspective on the matter.

III. THE UNQUALIFIED RIGHT TO (SPECIAL VICTIMS’) COUNSEL IS BEYOND A REASONABLE DOUBT

10 U.S.C. § 1044e is clear: SVCs represent all individuals who allege sexual assault either as a military servicemember or by a servicemember without any restriction surrounding the claim’s validity. The legislative history, from testimony of victims and congressional members to a joint explanatory statement that accompanied the enactment of the SVC Program, demonstrates Congress’s plain intent to provide all alleged victims of sexual assault with an SVC.¹⁹⁰

A. *Statutory Language*

The statutory foundation of counsel for victims who allege sexual assault is in 10 U.S.C. § 1044e: Special Victims’ Counsel for victims of sex-related offenses. Two components of the statute are particularly relevant to this discussion: how a victim is described, and the

186. *Deremer*, 85 M.J. at 562 (Harrell, J., concurring in part and dissenting in part).

187. *U.S. v. Deremer* Part 1 Audio, *supra* note 153, at 20:26.

188. *Deremer*, 85 M.J. at 564-65 (Harrell, J., concurring in part and dissenting in part).

189. *U.S. v. Deremer*, No. 25-0158/MC, 2026 WL 386541 (C.A.A.F. argued Jan. 28, 2026).

190. *See infra* Part III.B.

types of legal assistance authorized.¹⁹¹ A victim is anyone who alleges a violation of UCMJ articles 120, 120b, 120c, or 130 (rape and sexual assault, rape and sexual assault of a child, other sexual misconduct, and stalking, respectively) in either a restricted or unrestricted report.¹⁹² There is no requirement in the statute that a victim’s allegation must be proven true in order to receive or maintain a relationship with their SVC.¹⁹³ An SVC can represent the victim throughout the investigation, all the way through a court-martial.¹⁹⁴ In fact, SVC representation is authorized “at any proceedings in connection with the reporting.”¹⁹⁵

B. Legislative History

Even if the statutory language was ambiguous, the legislative history of congressional enactment of SVCs into the military confirms its purpose to assist alleged victims who would be otherwise disbelieved or have their claims otherwise unpursued. The Supreme Court encourages the use of congressional testimony, debates, and reports to “resolve a controversy as to the true meaning of equivocal statutory language.”¹⁹⁶ The testimony and debates that accompanied the passage of § 1044e reveal that Congress intended a broad interpretation of the phrase “alleged victim.”

When Congress contemplated the creation of SVCs, it heard testimony from victims whose reports were not investigated and whose stories were disbelieved. Congress heard each of the following stories—and many more—during the many hearings preceding the implementation of 10 U.S.C. § 1044e. Brian Lewis was raped while enlisted in the Navy, but his command told him not to report the incident to NCIS.¹⁹⁷ In his testimony before the Senate Committee on Armed Services, Lewis discussed the need for a system to

191. See 10 U.S.C. § 1044e.

192. See *id.*; MANUAL FOR COURTS-MARTIAL, *supra* note 10, at A17-10, A17-11, A17-15.

193. See 10 U.S.C. § 1044e.

194. See *id.* § 1044e(b)(6).

195. See *id.*

196. *Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 293 (1959).

197. *Testimony on Sexual Assaults in the Military: Hearing Before the Subcomm. on Personnel of the S. Comm. on Armed Servs.*, 113 Cong. 18 (2013) (statement of Brian K. Lewis, Advoc. Bd. Member, Protect Our Defs.).

“validate[] and lift[] [survivors] up and say that we believe you.”¹⁹⁸ Brigette McCoy, a Gulf War veteran raped twice in one year, testified that in her case, she “present[ed] the documentation that was necessary to move forward, and [the military] did not do anything.”¹⁹⁹ Another witness, Nancy Parrish, plainly stated why victims do not report sexual assaults to their chain of command: “They don’t report because they are disbelieved.”²⁰⁰ Members of Congress, while contemplating the enactment of SVC across all branches, were consistently told that leadership determined that victims were not credible, and consequently, assailants went unpunished.

Some stories brought before Congress addressed situations in which commanders believed a sexual encounter occurred but labeled it as a consensual act. Jackie Speier, a California House member, addressed this concern directly: “Writing off survivors as women who had consensual sex and now have regrets is insulting and I’m afraid how many in our military see this problem.”²⁰¹ In a letter to the Defense Subcommittee’s Chairman, Senators Dick Durbin, Richard Blumenthal, Barbara Boxer, and Kirsten Gillibrand asked for “independent, attorney-client privileged representation, empowering and advocating on behalf of victims and ensuring that their rights are respected.”²⁰² Similarly, Representative Jackie Speier called on members of Congress to “give discretion to an impartial office.”²⁰³ Congress heeded her call to action during the following session with the establishment of SVCs as part of the 2014 National Defense Authorization Act.²⁰⁴ During the debates over that bill, Senator Barbara Mikulski of Maryland explicitly addressed how SVCs would provide legal counsel to anyone who “feel[s] they

198. *Id.* at 43 (testimony of Brian K. Lewis, Advoc. Bd. Member, Protect Our Defs.).

199. *Id.* at 11-12, 24 (testimony of Brigette McCoy, former Specialist, U.S. Army).

200. *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Comm. on Armed Servs.*, 113 Cong. 206 (2013) (testimony of Nancy Parrish, President, Protect Our Defs.).

201. 158 Cong. Rec. 8632 (2012) (statement of Rep. Jackie Speier).

202. Letter from Sen. Richard Blumenthal, Sen. Barbara Boxer, & Sen. Kirsten Gillibrand to Sen. Dick Durbin & Sen. Thad Cochran (Apr. 26, 2013) (on file with the office of Sen. Richard Blumenthal).

203. 158 Cong. Rec. 8632 (2012) (statement of Rep. Jackie Speier).

204. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 966 (codified at 10 U.S.C. § 1044e).

have been victimized.”²⁰⁵ As she spoke about the various reforms of sexual assault prosecution, Mikulski noted how members had met with victims, were receptive to their perspectives, and saw this bill as a response to their experiences of disbelief.²⁰⁶ The bipartisan effort to provide counsel to victims of alleged sexual assault is illustrated by Republican Senator Kelly Ayotte (the current Governor of New Hampshire), who introduced the SVC Program as a stand-alone bill with Democratic Senator Patty Murray, as well as writing it into a provision of the National Defense Authorization Act.²⁰⁷

Furthermore, the Joint Explanatory Statement accompanying the 2014 Act directly contradicts the government’s argument in *Deremer* that the absence of Deremer’s SVC during the second NCIS interview was without error.²⁰⁸ Detailing the section of Sexual Assault Prevention and Response is a clarification that if “an *alleged* victim of an *alleged* sex-related offense” is asked to sit for an interview by defense counsel, such interview “shall take place only in the presence of trial counsel, a counsel for the victim, or a Sexual Assault Victim Advocate.”²⁰⁹ The clarification did not contemplate interviews by investigators, but the desire to protect victims from an adversarial party by ensuring representation is evident. The language is careful to place “alleged” in front of each iteration of “victim.” There is no standard of credibility a victim’s claim must meet.²¹⁰

Victims testified that they were not believed, so calling them “alleged victims” ensured that the only thing victims needed to get an SVC was to allege a sexual assault. Victims did not understand the military’s legal process, so Congress provided them with an attorney whose only role was to assist them through all proceedings related to their report. With the ever-present modifier of “alleged” in the statute and the expectation that attorneys represent their

205. 159 Cong. Rec. 17415-16 (2013) (statement of Sen. Barbara Mikulski).

206. *See id.* at 17416 (“During the course of this whole process, we have met with victims and heard their stories, we have met with experts and advocates, we have met with the military themselves. Now we are ready to give all concerned in this a voice by using the Defense bill for a vehicle for serious and significant reform.”).

207. 159 Cong. Rec. 17417 (2013) (statement of Sen. Kelly Ayotte).

208. *Id.* at 18953.

209. *See id.* (emphasis added).

210. *See id.*

clients in a wide array of legal proceedings—including questioning by law enforcement—Congress wrote a statute to reflect the testimony it heard.

C. Claim Validity Is Absent from Congress's Mandate

Legislative instruction should be followed to the utmost extent in all branches of the military.²¹¹ When members of Congress passed the earliest version of § 1044e in 2013, requiring SVCs to be provided to all alleged victims, they cited years of testimony from survivors of military sexual assault who were disbelieved.²¹² Naturally, the legislation Congress drafted and enacted reflected the fears that military survivors told them about, chief among them being disbelief. Ensuring access to all alleged victims addressed that fear because, under § 1044e, the only barrier between a victim gaining access to an SVC is the victim making a report.²¹³ If Congress set credibility limits on victims who could request an SVC based on their claim, disbelief would still prevent victims from seeking justice.

Under the statute, both as introduced and today, SVCs are available to all victims who allege sexual assault. It is evident that as long as a victim is alleging assault, the relationship with an SVC continues. But, without language on when that relationship terminates, it is disputable if an alleged victim who later recants still has access to their SVC.

In *Deremer*, the victim-turned-defendant told NCIS investigators during the interview without her attorney present that she lied about the allegations.²¹⁴ If her SVC had been present, would recanting her report have terminated the relationship? While this scenario is not settled by legislative history or text, what *is* settled is that NCIS's choice to interview Deremer without her SVC directly violated § 1044e because SVCs are available for victims at all stages, including their "potential criminal liability ... stemming from or in relation to" their report.²¹⁵ Deremer's SVC should have been

211. U.S. CONST. art. 1, § 8, cl. 14.

212. See discussion *supra* Part III.A-B.

213. 10 U.S.C. § 1044e(a).

214. Brief for Appellee, *supra* note 1, at 11-12.

215. See 10 U.S.C. § 1044e(b)(1).

present at the second interview with NCIS. The agents suspected she was lying about the assault and unilaterally decided to terminate her attorney-client relationship with her SVC by failing to inform the attorney about the interview. Their disbelief in her claim resulted in her loss of counsel.

That scenario is what Congress set out to avoid by keeping the definition of a victim broad with its ever-present precursor: “alleged.” Congress drafted the SVC Program with the victims who testified that peers, commanders, and trial counsel did not believe their assault claim in mind. The ability of anyone in the military—let alone outside of the military, such as NCIS agents—to control the SVC-victim relationship based purely on the victim’s credibility is absent from the statute and contrary to the legislative intent.

IV. THE CREDIBLE THREAT OF AN UNCREDIBLE ACCUSATION

When access to specialized counsel rests on allegation alone, the natural concern is that someone whose claim is blatantly false will continue to allege it for the privilege of personalized, individualized counsel. Providing an alleged victim with an SVC is only one of many options provided after making a report. For example, the military offers an expedited transfer process for sexual assault victims beginning mere hours after reporting.²¹⁶

According to the Department of Veterans Affairs (VA), in 2021, over half of all veterans seeking a disability rating for conditions related to military sexual trauma (MST) were approved for benefits.²¹⁷ Two-thirds of those veterans received a disability rating of 70 percent or higher.²¹⁸ That rating largely determines the monthly monetary compensation veterans receive.²¹⁹

To exemplify how those benefits could be manipulated, consider the following: a disgruntled junior enlisted soldier is unhappy on

216. U.S. DEP’T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE OFF., TOPIC: UPDATES TO THE EXPEDITED TRANSFER PROCESS 1 (2024) https://www.sapr.mil/Portals/156/DSD_Memo_Topic_Sheet_Expedited_Transfer.pdf [https://perma.cc/3R63-N4T3].

217. *Military Sexual Trauma Survivors See Increased Claim Grant Rates*, VA NEWS (Aug. 6, 2021), <https://news.va.gov/93019/military-sexual-trauma-survivors-see-increased-claim-grant-rates/> [https://perma.cc/6NB2-CCTY].

218. *Id.*

219. *About Disability Ratings*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/disability/about-disability-ratings/> [https://perma.cc/D5CK-TG7R].

deployment, angry with a fellow soldier, and generally regretful of her decision to join the military. An allegation of sexual assault against her fellow soldier will provide her with an immediate transfer out of her command, a solid record for VA benefits once she separates from the military, and an attorney whose sole responsibility is to assist, educate, and protect her. A false accusation appears to solve the immediate problems of the unhappy soldier.

That worst-case scenario is what groups like CMR envision when they list motives for false reporting: jealousy, revenge, desire for attention, and political ideology.²²⁰ What that scenario omits, however, are various pitfalls the lying soldier would fall into. First, the expedited transfer process hinges on “a credible report,” to be determined by the commander.²²¹ Without such a finding, the transfer will not take place.²²²

Second, VA disability ratings result not only in monthly compensation but also eligibility for other benefits, such as health care. It is possible for a disability rating not to result in monthly compensation.²²³ Furthermore, the process is lengthy.²²⁴ In 2025, for example, it took the VA an average of 94.8 days to issue a decision about a disability claim.²²⁵

Third, while access to an SVC does not hinge upon a victim’s credibility, representation by an SVC does not prevent criminal charges against the accuser. Even if a soldier blatantly lies and is provided an SVC, he or she can still be charged with making a false statement, exemplified in *Deremer*.²²⁶ In other words, having access to counsel is not an escape route for servicemembers who lie.

The risks must be weighed. Is it worse to provide counsel to someone who lied, or to leave someone who told the truth unaware about their legal rights as a victim? Ultimately, the path Congress

220. CTR. FOR MIL. READINESS, *supra* note 103.

221. U.S. DEP’T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE OFF., *supra* note 216, at 1.

222. *Id.* at 2.

223. *Non-compensable Disability*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/resources/non-compensable-disability/> [<https://perma.cc/3YCS-4R2R>].

224. *See The VA Claim Process After You Filed Your Claim*, U.S. DEP’T OF VETERANS AFFS., <https://www.va.gov/disability/after-you-file-claim/> [<https://perma.cc/56CA-TJBR>].

225. *Id.*

226. Making a false official statement is a violation of Article 107 of the Uniform Code of Military Justice. 10 U.S.C. § 907, Art. 107.

chose—which the military is legally bound to follow—identified the latter risk as far greater than the former.

CONCLUSION: FOLLOWING ORDERS

The military's objective in judicial proceedings is maintaining good order and discipline to promote the national defense. They have no directive to seek equitable justice or protect victims. Through decades of sexual assault scandals, Congress recognized the military's inability to follow its mandate of national defense when its troops were assaulting one another without repercussions. Congress took proactive efforts to address sexual assault before it happened—such as creating and enlarging the Sexual Assault Prevention and Response programs²²⁷ across the branches—but victims whose stories were disbelieved had little refuge in a program designed to prevent something that had already happened. Victims continued to testify that their stories were not believed when reported. The ultimate decision to expand victim access to the judicial system relied on that testimony.²²⁸ Congress crafted deliberate language to ensure legal representation for victims regardless of the kind of justice they sought.

The minimal percentages of unfounded reports do not support a concern of false reporting. Such continued commentary on false reporting from advocacy groups reflects a subculture that continues to question victims of sexual assault, even in the military.²²⁹ *United States v. Deremer* is another example: NCIS agents who did not find a victim credible revoked her access to counsel. Their fear of hardened individuals who set out to ruin lives is the same fear Congress heard while drafting § 1044e. That fear, however, must be subservient to Congress's decision to provide an SVC regardless of claim credibility. The actions of the NCIS agents in *Deremer*, the reports from CMR, and the anecdotal references to lying victims all reinforce the necessity of Congress's mandate because sexual assault victims are *still* facing a culture of disbelief.

227. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811, 1926.

228. See *supra* Part III.B.

229. See CTR. FOR MIL. READINESS, *supra* note 103.

When someone alleges sexual assault in the military, the allegation is what invokes their right to an SVC. Whether that allegation is true has no bearing on the attorney-client relationship between the alleged victim and the SVC.

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* J.D. Candidate, 2026, William & Mary Law School; B.A., Sociology and Statistics, 2020, University of North Carolina at Chapel Hill. All my thanks and admiration for the *Law Review* staff, especially the Executive Editor, a very hardworking friend. I wrote this Note while pregnant with my son, and now I publish as he smiles up at me. May he take after his father, a servicemember who is selfless, kind, curious, and above all, a feminist. And thank you to my mom, a fantastic writer who spent her career working to improve the military's health care system and provided me with very helpful edits.