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## Same-Sex Sexual Assault in the Military

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# SAME-SEX SEXUAL ASSAULT IN THE MILITARY

by

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A thesis submitted in partial fulfillment of the requirements  
for the Honors in the Major Program in Legal Studies  
in the College of Health and Public Affairs  
and in The Burnett Honors College  
at the University of Central Florida  
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## **ABSTRACT**

Sexual assault in the military is a large concern for the Department of Defense. They recognize it as an important and complex problem that needs to be addressed. In recent years, efforts have been initiated in order to improve the handling of sexual assault cases and data retention. An entirely new program has been created in order to address these cases. Focusing on the occurrence of same-sex assaults heightens the sensitivity of matters. This is due to the precarious and only very recent acceptance of homosexuals in the military. In the past, service members, homosexual or otherwise, may have been concerned with having any connection to homosexual acts. This is because such acts could result in removal from the military. However, in 2011 the “Don’t Ask, Don’t Tell” Repeal Act went into effect. This act allowed for the open service of homosexuals in the military. Around this same time period, reports from the Department of Defense indicated a rise in the number of sexual assault reports. This thesis analyzes the affect that policies from the Department of Defense and legislation such as the “Don’t Ask, Don’t Tell” Repeal Act have on reports of same-sex sexual assault in the military. Through research, this thesis finds that the enactments of various policies have had a measurable impact on treatment of same-sex sexual assault reports in the military, though not necessarily in the way certain media reports might suggest. This thesis also examines the history concerning homosexual service in the military, in order to provide a picture of the national attitudes towards homosexual service in the military, and why certain groups may blame the Lesbian, Gay, Bisexual, and Transgender for this rise in reports.

## **DEDICATION**

For the incredibly courageous individuals of the military who serve our country;

For the individuals who are victims of sexual assault and are the epitome of strength;

For the members of the LGBT community who deserve a voice;

And for my family, for continually encouraging me to undertake tasks which help me grow and reminding me daily what Christ-like love means.

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## INTRODUCTION

Historically, the Lesbian, Gay, Bisexual, and Transgender (LGBT) community has faced opposition in the military. For many years, an individual who identified as a homosexual was barred from serving in the military. In the past five years, efforts have been made for the open service of LGBT-identifying individuals in the military. Although the allowance was an accomplishment for the LGBT community, it raised concerns among some in the general public. Recently, Congressional reports have indicated a rise in the number of reports of sexual assault in the military. Certain groups across the nation believe this inclusion might be the cause of increased reports of sexual assault in the military.<sup>1</sup>

This is an issue which is relatively new to the military, because sexual assault reporting has not been tracked thoroughly or consistently for many years. Additionally, LGBT-identifying individuals have not been permitted to serve openly for long either. Due to this, there are not many conclusive ties between the LGBT community and same-sex sexual assault in the military. Nonetheless, the connection between LGBT service and sexual assaults has become a topic of conversation; one which represents an entire community in a negative light.

This thesis will begin with an exploration of the history of case law and policies leading to present-day treatment of LGBT individuals in the military. The investigation will provide a foundation for the discussions and debate surrounding legislation concerning LGBT service in the military. It will also examine reporting data shifts and policy enactments. This aspect will provide a snapshot of how data changes in response to legislation.

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<sup>1</sup> Bohon, Dave. "Homosexual Assaults Becoming a Problem in U.S. Military, DoD Survey Finds." *The New American*. The New American, 23 May 2013. Web. 20 July 2014. and Sprigg, Peter. "Homosexual Assault in the Military." *Family Research Council*. Family Research Council, May 2010. Web. 6 July 2014.

Cases pertaining to this subject matter are limited. This is most likely due to the relative recency in which LGBT individuals were allowed to be candid about their sexuality in the military, the infrequency of actual reports of sexual assault, and the even smaller portion of those that even involve same-sex sexual assault. Thus, in order to conclude the relationship between policy enactments, LGBT service, and sexual assault, the adaptation of policies and data shifts will be used as the significant indicators of whether there is a correlation and to what extent.

This thesis is designed to determine the overall correlation between policies and reports and cases, not pinpoint one particular cause of statistical changes in data. This thesis acknowledges the multiple nuances of statistical data and analyses and will instead be focusing on how legislation concerning sexual assault has changed over the years and presenting the data and reasoning as it is stated in the official reports. Brief discussion of data and numbers will occur, but these will be limited to facial analyses of numbers, not in-depth examination of data.

Additionally, even if a same-sex sexual assault case in the military does not specifically include an individual who identifies as LGBT, it does inevitably affect the treatment and conception of the community. Thus, this research will concern both instances involving the LGBT community and same-sex assaults involving individuals who do not themselves identify as LGBT.

## **Research Questions**

This research will address the following:

- A. Is there a connection between military sexual assault reports and LGBT service in the military?

1. What is the history of LGBT service over the years?
  - a. What was the discussion surrounding the pieces of legislation which significantly altered LGBT service?
2. What is the connection between policy changes and sexual assault reports?
  - b. How has the data regarding same-sex sexual assault reports changed over the years? (this is meant to be a brief overview of the numbers, not an exhaustive breakdown)

## Hypotheses

Military sexual assault reporting may naturally fluctuate. However, the hypothesis of this thesis is that these changes are not merely coincidental: there is a correlation between policy changes and reports of sexual assault in the military. Through research, this thesis expects to find that it is the enactment of various policies designed to improve reporting environments which have affected same-sex sexual assault reporting in the military, rather than the inclusion of a particular group in the military.

Previously, service members, homosexual or otherwise, were concerned with having any connection to a homosexual act, because it could result in their removal from the military.<sup>2</sup> Because the DADT repeal legalized the service of openly, LGBT-identifying individuals within the military, the legal ramifications of reporting a same-sex sexual assault have been altered.<sup>3</sup>

Additionally, current policies have created an environment in which victims might be more

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<sup>2</sup> "After Repeal: LGBT Service Members and Veterans." (n.d.): 1-4. Service Women's Action Network. Web. 28 July 2014. <<http://servicewomen.org/wp-content/uploads/2012/10/Final-LGBT-Fact-Sheet-10.4.12.pdf>>. and Turchik, Jessica A., and Susan M. Wilson. "Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future." *Aggression and Violent Behavior* 15.4 (2010): 267-77. Print.

<sup>3</sup> Don't Ask, Don't Tell Repeal Act of 2010. Pub. L. 111-321. 124 Stat. 3515-3516. 22 December 2010. Print.

willing to come forward and may achieve slightly higher rates of credibility, although still not at desired levels.<sup>4</sup> Therefore, this thesis asserts that it is plausible to see a change in reports of same-sex sexual assault and the outcomes of these cases, in reaction to policy changes.

## Procedures

Although many policies have had an impact on this topic, this research will be limited to the considerations of those with the most significant impact for the LGBT community:

- DADT Repeal Act
- Relevant updates to U.S.C. Title 10
- United States Department of Defense (DoD) Sexual Assault Prevention and Response (SAPR)
- Sexual Harassment/Assault Response and Prevention (SHARP)
- National Defense Authorization Act (NDAA).

Specific cases that affected the legal treatment of the LGBT community within the military, impacted the interpretation of DADT, and will be discussed for historical purposes are *Log Cabin Republicans v. United States*, *Cook v. Gates*, *Thomasson v. Perry*, *Lawrence v. Texas*, and *Bowers v. Hardwick*.

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<sup>4</sup> Cooper, Helene. "Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults." *Nytimes*. The New York Times, 1 May 2014. Web. 28 July 2014. and McVeigh, Karen. "US Military Sexual Assault Reports Soared 50% in 2013, Says Pentagon." *Theguardian*. Guardian News and Media, 01 May 2014. Web. 28 July 2014. and United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

## HISTORICAL OVERVIEW

Documented as early as 1920 in The Articles of War, same-sex relations were considered to be an act of sodomy.<sup>5</sup> The prohibition reflected both the policies and the ideological climate of the time. In November 1993, Public Law 103-160 was passed – effectively known as the “Don’t Ask Don’t Tell” Act (DADT).<sup>6</sup> This legislation stated that

the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.<sup>7</sup>

DADT determined that any individual who “has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts...has stated that he or she is a homosexual or bisexual...[or] has married or attempted to marry a person known to be of the same biological sex” would be “separated from the armed forces.”<sup>8</sup> Seventeen years later, bills H.R. 2965 and S. 4023 of the One Hundred Eleventh Congress called for a repeal of the “Don’t Ask, Don’t Tell” Act.<sup>9</sup> The act removed 10 U.S.C. 654: Policy concerning homosexuality in the armed forces.<sup>10</sup> This allowed for homosexuals and bisexuals to serve openly and legally in the military. This legislation went into effect officially on September 20, 2011 and is still in effect

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<sup>5</sup> United States. Cong. Senate. Subcommittee of the Committee on Military Affairs. *Establishment of Military Justice*. 66th Cong., 1st Sess. S. 64. 1919. Web. 7 July 2014.

<sup>6</sup> Policy Concerning Homosexuality in the Armed Forces. Pub. L. 103-160. 107 Stat. 1670-1673. 30 November 1993. Print.

<sup>7</sup> Policy Concerning Homosexuality in the Armed Forces. Pub. L. 103-160. 107 Stat. 1670-1673. 30 November 1993. Print.

<sup>8</sup> Policy Concerning Homosexuality in the Armed Forces. Pub. L. 103-160. 107 Stat. 1670-1673. 30 November 1993. Print.

<sup>9</sup> Don't Ask, Don't Tell Repeal Act of 2010. Pub. L. 111–321. 124 Stat. 3515-3516. 22 December 2010. Print.

<sup>10</sup> Don't Ask, Don't Tell Repeal Act of 2010. Pub. L. 111–321. 124 Stat. 3515-3516. 22 December 2010. Print.

as of the date of this research.<sup>11</sup> It should be noted that transsexuals are still not permitted to serve openly in the military due to medical and psychological requirements still in effect.<sup>12</sup> Thus, when referring to LGBT in the military, lesbians, gays, and bisexuals are the specific individuals being discussed, unless otherwise noted.

Although the allowance of openly homosexual individuals in the military was an accomplishment for the LGBT community, the DADT repeal raised concerns among the general public that this inclusion might be the cause of increased reports of sexual assault in the military.<sup>13</sup> These concerns represented a significant facet of the original desire to completely bar homosexuals from the military, and they continue today. An alternative theory is that the increase in the number of reported sexual assaults is merely the sign of the successful implementation of policies designed to create a more open environment for reporting and support. Essentially, the higher number of reports represents greater confidence in the military's system of justice.<sup>14</sup>

Despite these conflicting views, it is clear that many believe policies have a direct effect on the number of reports per year of sexual assault in the military, specifically same-sex assaults. This thesis plans to examine the interplay between policies and sexual assault reports,

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<sup>11</sup> Garamone, Jill. "United States Department of Defense." *Defense.gov News Article: 'Don't Ask, Don't Tell' Repeal Certified by President Obama*. U.S. Department of Defense, 22 July 2011. Web. 14 July 2014.

<sup>12</sup> Service, Congressional Research. "Homosexuals in the U.S. Military: Current Issues." *Homosexuals and the U.S. Military: Current Issues* (2009): 1-36. *Federation of American Scientists*. Congressional Research Service. Web. 20 July 2014. and *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*. Rep. no. DoDI 6130.03. Department of Defense, 28 Apr. 2010. Web. 20 July 2014.

<sup>13</sup> Bohon, Dave. "Homosexual Assaults Becoming a Problem in U.S. Military, DoD Survey Finds." *The New American*. The New American, 23 May 2013. Web. 20 July 2014. and Sprigg, Peter. "Homosexual Assault in the Military." *Family Research Council*. Family Research Council, May 2010. Web. 6 July 2014.

<sup>14</sup> "Pentagon Survey Reportedly Finds Military Sexual Assault Claims up 50 Percent." *Fox News*. FOX News Network, 01 May 2014. Web. 21 July 2014. and Tilghman, Andrew. "Sexual Assault Claims Jump 50 Percent - DoD: Victims Have More Confidence in System." *Army Times*. Garnett, 1 May 2014. Web. 21 July 2014.

specifically focusing on same-sex reports. It will investigate whether policies designed to improve reporting environments and/or policies allowing LGBT service have caused this increase in reports of same-sex sexual assault.

## CASE LAW

The following section provides brief summaries of Federal, State, and Military Court Cases.

Certain legal terminology will be used; the terms can be understood to mean the following:

Trial court: the court that hears the original case; this court looks at the facts of a case

Plaintiff: individual bringing suit in a court

Defendant: individual whom a suit is brought against in a court

Court of Appeals: the court that hears a case after it has already been decided in a lower court;

this court often looks at questions of law

Petitioner: individual bringing suit in a court of appeals; the person who lost at the lower level

Respondent: individual whom a suit is brought against in a court of appeals; the person who won at the lower level

Level of scrutiny: the standard with which the court looks at a question of law; the lowest level is rational basis, the highest is strict scrutiny

Opinion: official explanation by the court regarding the decision of a case and how it was determined

### Federal and State Court Cases

When determining the effects of policy on the LGBT community, an overview of case law over the years provides an important snapshot of the changing consideration of the issues. The decisions in *Log Cabin Republicans v. United States*, *Cook v. Gates*, *Thomasson v. Perry*, *Lawrence v. Texas*, and *Bowers v. Hardwick* each resulted in profound alterations of the view of DADT and the LGBT community.

*Bowers v. Hardwick* was decided June 30, 1986 by the Supreme Court of the United States (Bowers). The respondent, Hardwick, committed an act of sodomy with a consenting,

male adult in the bedroom of his own home. As stated in the official court opinion written by Justice White, “the issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”<sup>15</sup> According to Georgia Statute at the time, “a person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another...a person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years...”<sup>16</sup> Respondent Hardwick brought the action on the basis that the statute violated his protections under the Federal Constitution (Bowers).

The Supreme Court reversed the decision of the Court of Appeals for the Eleventh Circuit, holding that the Georgia statute did not violate any Constitutional protection (Bowers). The reasoning was that the Due Process Clause of the Fifth and Fourteenth Amendments “appears to focus only on the processes by which life, liberty, or property is taken.”<sup>17</sup> Furthermore, the Justices, in order to refrain from imposing their “own choice of values on the States and Federal Government,” considered what topics outside of life, liberty, or property would warrant “heightened judicial protection.”<sup>18</sup> Taking into consideration the decisions in *Palko v. Connecticut*, *Moore v. East Cleveland*, and *Griswold v. Connecticut*, the court determined that fundamental liberties would warrant such a protection (Bowers). The Supreme Court subsequently held that homosexuals’ right to commit sodomy was not a fundamental liberty (Bowers).

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<sup>15</sup> *Bowers v. Hardwick* (U.S. Lexis 123 [1986]).

<sup>16</sup> *Bowers v. Hardwick* (U.S. Lexis 123 [1986]).

<sup>17</sup> *Bowers v. Hardwick* (U.S. Lexis 123 [1986]).

<sup>18</sup> *Bowers v. Hardwick* (U.S. Lexis 123 [1986]).

This case had resounding implications due to Justice White's specificity. As stated in Footnote 2 of the opinion, "the only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy."<sup>19</sup> The case did not merely uphold the Georgia Statute, but tailored the decision to the rights of homosexual individuals. This meant that the decision did not comment on the Georgia statute's validity regarding *all* acts of anal sex or oral sex (between members of the same sex or otherwise), but rather was specifically upholding the idea that *homosexual* sodomy was a violation.

Justice Blackmun's dissent criticized the opinion for "[relegating] the actual statute being challenged to a footnote and [ignoring] the procedural posture of the case before it."<sup>20</sup> He also challenged the decision regarding right to privacy, stating, "We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life."<sup>21</sup> The intent being that two consenting adult's decisions regarding sexual intimacy occurring in the privacy of their own home should be considered protected as well. This attitude was unsupported by the Supreme Court until *Lawrence v. Texas* directly overruled *Bowers*, seventeen years later.

*Lawrence v. Texas* was decided June 26, 2003 by the Supreme Court of the United States (Lawrence). Petitioner, Lawrence, was inside his home with another petitioner, Garner. The two were engaging in a "sexual act," later referred to as "deviate sexual intercourse, namely anal sex,

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<sup>19</sup> *Bowers v. Hardwick* (U.S. Lexis 123 [1986]).

<sup>20</sup> *Bowers v. Hardwick* (U.S. Lexis 123 [1986]).

<sup>21</sup> *Bowers v. Hardwick* (U.S. Lexis 123 [1986]).

with a member of the same sex (man).”<sup>22</sup> Police entered Petitioner Lawrence’s home “in response to a reported weapons disturbance.”<sup>23</sup> Petitioners were subsequently arrested for violation of the Texas State Penal Code. The Texas Court of Appeals, Fourteenth District, ruled on the issue according to the controlling authority set down in *Bowers* (Lawrence). However, the Supreme Court granted certiorari to consider the following issues:

1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law--which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples--violate the Fourteenth Amendment guarantee of equal protection of laws?

2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

3. Whether *Bowers v. Hardwick*, should be overruled?<sup>24</sup>

The court reasoned that statutes, such as the ones in *Bowers* and *Lawrence*, although purported “to do no more than prohibit a sexual act” infringe upon the relationship and privacy rights of certain classes of individuals.<sup>25</sup> Citing *Planned Parenthood of Southern Pa. v. Casey*, the court held that, pertaining to “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education...persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>26</sup> This

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<sup>22</sup> *Lawrence v. Texas* (U.S. Lexis 5013 [2003]).

<sup>23</sup> *Lawrence v. Texas* (U.S. Lexis 5013 [2003]).

<sup>24</sup> *Lawrence v. Texas* (U.S. Lexis 5013 [2003]).

<sup>25</sup> *Lawrence v. Texas* (U.S. Lexis 5013 [2003]).

<sup>26</sup> *Lawrence v. Texas* (U.S. Lexis 5013 [2003]).

meant that the court overturned the decision from *Bowers* and ruled that the law was unconstitutional. The decision in this case had the profound impact of legalizing sexual activity between persons of the same sex in the United States.

*Thomasson v. Perry* was decided April 5, 1996 by the United States Court of Appeals, Fourth Circuit (Thomasson). The plaintiff, Lieutenant Thomasson, served in the Navy for ten years prior to this case. In 1994, Lieutenant Thomasson wrote a letter to four Admirals admitting that he was gay. As per the recently enacted DADT Policy, a “three-member Board of inquiry convened and conducted a two day hearing,” at the end of which it was decided that Lieutenant Thomasson was in violation of naval policies.<sup>27</sup> He was subsequently honorably discharged (Thomasson).

The plaintiff in this case brought suit to challenge “the constitutional validity of Section 571 of the National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654, and the Department of Defense Directive that governs homosexuality in the military.”<sup>28</sup> The Fourth Circuit Court of Appeals reasoned that the plaintiff was challenging a “statute that embodies the exhaustive efforts of the democratically accountable branches of American government and an enactment that reflects month upon month of political negotiation and deliberation.”<sup>29</sup> Citing *Westside Community Bd. of Ed. v. Mergens* and *Walters v. National Assn. of Radiation Survivors*, the court was reluctant to overturn the decision of the legislature (Thomasson). Additionally, in light of the delicate, and very public, balance so recently achieved, the court chose to exact extreme deference to military authority.

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<sup>27</sup> *Thomasson v. Perry* (U.S. App. Lexis 6591 [1996]).

<sup>28</sup> *Thomasson v. Perry* (U.S. App. Lexis 6591 [1996]).

<sup>29</sup> *Thomasson v. Perry* (U.S. App. Lexis 6591 [1996]).

The court held that the appropriate review for “a class comprised of service members who engage in or have a propensity or intent to engage in such acts”<sup>30</sup> of homosexuality was rational basis rather than strict scrutiny. The reasoning was that the class of individuals affected by 10 U.S.C. § 654 was not suspect, and the military had a legitimate interest in preventing the acts mentioned in the statute. As such, cases involving DADT and the discharge of homosexuals from the military were now subject to the lowest level of scrutiny under the Equal Protection Clause. Furthermore, given this newly appointed standard of review, the court held that DADT did not violate the petitioner’s equal protection rights. Thus, *Thomasson* upheld the Constitutionality of DADT (Thomasson).

Circuit Judge Hall dissented, arguing that “private prejudice is a private matter; we are free to hate. But the same concept of liberty for all that protects our prejudices precludes their embodiment in law...Consequently, the desire to disadvantage a politically unpopular group is never a legitimate governmental interest.”<sup>31</sup> His was a view that would not obtain constitutional legitimacy until the repeal of DADT in 2010.

*Cook v. Gates* was decided June 9, 2008 by the United States Court of Appeals, First Circuit (Cook, 2008). The individuals who brought the case were 12 former military service members who were “separated from the service” under the DADT Act.<sup>32</sup> They brought the case

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<sup>30</sup> *Thomasson v. Perry* (U.S. App. Lexis 6591 [1996]).

<sup>31</sup> *Thomasson v. Perry* (U.S. App. Lexis 6591 [1996]).

<sup>32</sup> *Cook v. Gates* (U.S. App. Lexis 12357 [2008]).

in order to challenge the constitutionality of DADT in terms of “due process and equal protection components of the Fifth Amendment and the free speech clause of the First Amendment.”<sup>33</sup>

Central to the issue was the decision in *Lawrence v. Texas*. When challenging the court’s determination of their substantive due process and equal protection claims, the plaintiffs asserted that the court “misunderstood *Lawrence* to mandate a rational basis standard of review, rather than some form of heightened judicial scrutiny.”<sup>34</sup> In its decision, the District Court upheld the decision in *Lawrence* to use a rational basis for scrutiny and found that the plaintiffs’ case “failed as a matter of law.”<sup>35</sup> The Court of Appeals agreed that “interpreting *Lawrence* is the critical first step in evaluating the plaintiffs’ substantive due process claim” and reviewed the level of scrutiny required for cases dealing with DADT.<sup>36</sup>

The Court of Appeals determined that language in *Lawrence* strongly suggests that it “identified a protected liberty interest.”<sup>37</sup> The Court alleged that *Lawrence*’s discussion of protected liberties lay somewhere between strict scrutiny and rational basis – intermediate scrutiny. Nonetheless, *Lawrence* did not “mandate heightened scrutiny” for homosexuals, and agreed with the lower court’s interpretation of using rational basis.<sup>38</sup>

Continuing, the court held that the sexual activity at issue in this case was outside the scope of sexual activity narrowly defined in *Lawrence*. The First Circuit also determined that the government interest inherent in DADT was substantially greater than the government interest in

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<sup>33</sup> *Cook v. Gates* (U.S. App. Lexis 12357 [2008]).

<sup>34</sup> *Cook v. Gates* (U.S. App. Lexis 12357 [2008]).

<sup>35</sup> *Cook v. Gates* (U.S. App. Lexis 12357 [2008]).

<sup>36</sup> *Cook v. Gates* (U.S. App. Lexis 12357 [2008]).

<sup>37</sup> *Cook v. Gates* (U.S. App. Lexis 12357 [2008]).

<sup>38</sup> *Cook v. Gates* (U.S. App. Lexis 12357 [2008]).

*Lawrence*. Considering the interest of the government and the still-standing rational basis review, the plaintiffs' challenges failed, and the decision of the lower court was affirmed (Cook, 2008).

*Log Cabin Republicans v. United States* was decided October 12, 2010 by the United States District Court for the Central District of California (Log Cabin, 2010). The plaintiff, Log Cabin Republicans, is a non-profit corporation who challenged the constitutionality of DADT on behalf of its members. The plaintiff contested that DADT was unconstitutional because it violated substantive due process and First Amendment rights. This represented a facial attack on the validity of the act (Log Cabin, 2010).

The court cited *Lawrence* and *Witt v. Department of Air Force* and determined that the standard of review necessary was intermediate scrutiny rather than rational basis. The court concluded that the first of the three prongs necessary to "survive Plaintiff's constitutional challenge" had been met.<sup>39</sup> It subsequently focused on the final two prongs necessary to satisfy the standard of review. In its review of testimony and other evidence, the court reasoned "that the effect of the Act has been, not to advance the Government's interests of military readiness and unit cohesion, much less to do so significantly, but to harm that interest."<sup>40</sup> By determining that DADT was a detriment to the very element it was stated to protect, the court's finding flagrantly opposed the opinion of homosexual service in the military that had been maintained

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<sup>39</sup> *Log Cabin Republicans v. United States of America* (U.S. Dist. Lexis 132448 [2010]).

<sup>40</sup> *Log Cabin Republicans v. United States of America* (U.S. Dist. Lexis 132448 [2010]).

for years. Additionally, the court found that “[DADT] infringes the fundamental rights of United States service members in many ways.”<sup>41</sup>

Although *Thomasson* ruled that DADT did not infringe upon the First Amendment right of free speech, the District Court reasoned that the *Thomasson* court and others had not “considered whether there might be any speech, other than admissions of homosexuality subject to being used as evidence in discharge proceedings, affected by the Act.”<sup>42</sup> The court further found that the speech restricted by DADT was content-based and protected under the First Amendment (*Log Cabin*, 2010). It further stated that “the sweeping reach of the restrictions on speech in the Don’t Ask, Don’t Tell Act is far broader than is reasonably necessary to protect the substantial government interest at stake here.”<sup>43</sup> This meant that the law failed to pass the prongs of the test set out to determine its constitutionality. The court’s decision resulted in a permanent injunction which barred the enforcement of DADT.

After the decision of *Log Cabin Republicans*, the United States appealed the decision (*Log Cabin*, 2011). However, “while the appeal was pending, Congress enacted the Don’t Ask Don’t Tell Repeal Act of 2010.”<sup>44</sup> Thus, the “injunctive relief awarded by the district court has become moot.”<sup>45</sup> Though the case did not progress further in the courts, the message it provided was clear: DADT was not constitutional. The decision in *Log Cabin* is clearly an indication of the parallel ideology of the courts and legislature surrounding the need for a change in treatment of homosexuals in the military. This is an indication that the national view of homosexuals had

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<sup>41</sup> *Log Cabin Republicans v. United States of America* (U.S. Dist. Lexis 132448 [2010]).

<sup>42</sup> *Log Cabin Republicans v. United States of America* (U.S. Dist. Lexis 132448 [2010]).

<sup>43</sup> *Log Cabin Republicans v. United States of America* (U.S. Dist. Lexis 132448 [2010]).

<sup>44</sup> *Log Cabin Republicans v. United States of America* (U.S. App. Lexis 19750 [2011]).

<sup>45</sup> *Log Cabin Republicans v. United States of America* (U.S. App. Lexis 19750 [2011]).

shifted severely from the archaic beliefs which originally catalyzed DADT and the separation of homosexuals from the military.

### **Military Court Cases**

April 18, 1958, the United States Court of Military Appeals decided *United States v. Marcey*. During this time period, homosexuals were not permitted to serve openly in the military, and sodomy was illegal in the United States. Two individuals, Marcey and Hoag, were “charged with assaults with intent to commit sodomy.”<sup>46</sup> The board of review convicted the individuals of assault. The Military Appeals court later “granted a petition for review in order to determine the admissibility of certain voluntary admissions of homosexual propensities contained in the accused's pretrial statements.”<sup>47</sup> At issue was whether the admission of homosexual tendencies was sufficiently useful as evidence to outweigh the prejudice it might instill.

The court reasoned that “a person who practices homosexuality is likely to assault for the purpose of satisfying his perverted sexual cravings, and proof of previous deviations from the sexual norm is a valuable ingredient in establishing specific intent in subsequent offenses of the same kind.”<sup>48</sup> It held that the proclivity to engage in homosexual behavior was admissible and had “probative value in proving an assault with intent to commit sodomy.”<sup>49</sup> Essentially, a military serviceman's homosexual tendencies were held to be acceptable evidence against him in determining his intent to commit a certain offense.

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<sup>46</sup> *United States v. Marcey* (CMA Lexis 601 [1958]).

<sup>47</sup> *United States v. Marcey* (CMA Lexis 601 [1958]).

<sup>48</sup> *United States v. Marcey* (CMA Lexis 601 [1958]).

<sup>49</sup> *United States v. Marcey* (CMA Lexis 601 [1958]).

On October 28, 2010 *United States v. Hayes* was decided (this case was an unpublished decision, and does not serve as precedent) (Hayes, 2010). It was during this same timeframe that the opinion in *Log Cabin Republicans* was filed and the DADT repeal occurred. *Hayes* was originally decided by the Navy-Marine Corps Court of Criminal Appeals on December 11, 2008 (Hayes, 2008). The case concerned an appellant, Hayes, who “was charged with forcible sodomy, but, pursuant to a pretrial agreement, pleaded guilty to indecent acts with another [male].”<sup>50</sup> During the course of the trial, the

military judge discussed his philosophical views of homosexuality, homosexual acts, the military's "don't ask, don't tell" policy, problems with sexual assaults in barracks facilities, and the leadership challenges presented when barracks spaces are shared by service members who might find other barracks residents sexually attractive.<sup>51</sup>

On August 14, 2009, the Armed Forces Court of Appeals remanded the case to the Navy-Marine Court of Criminal Appeals in order to decide whether the appellant was denied his right to a fair trial due to the military judge's apparent bias (Hayes, 2009).

Upon review, the Navy-Marine Corps Court noted that the court's decision, although it would remain unchanged if considered, would not conclude whether the judge was actually biased. Rather, the court considered of utmost importance the effect such statements might “create in the mind of a reasonable person observing the proceedings a serious question as to the

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<sup>50</sup> *United States v. Hayes* (CCA Lexis 505 [2008]).

<sup>51</sup> *United States v. Hayes* (CCA Lexis 364 [2010]).

legality and fairness of the court.”<sup>52</sup> Essentially, the court was not concerned as to the true personal opinions of the judge, but rather whether such commentary and behavior would be found acceptable in a court of law. The court reasoned that “the military judge's ill-considered commentary would trouble any observer and serves to undermine the essential faith of the general public in the military justice system of their Armed Forces.”<sup>53</sup> The court held that the findings were affirmed and remanded the case for a sentence rehearing (Hayes, 2010).

This case has significance because a court ruled against the inclusion of such personal, ancillary details being a factor in a case. As seen in *Macey*, these details of homosexuality would have previously been allowed. However, this court’s decision clearly marked the difference in national attitudes regarding the legality of such decisions, and erred on the side of excluding details because they do not dictate the actions of an individual.

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<sup>52</sup> *United States v. Hayes* (CCA Lexis 364 [2010]).

<sup>53</sup> *United States v. Hayes* (CCA Lexis 364 [2010]).

## LEGISLATION AND ADMINISTRATIVE REGULATION

Every fiscal year, the Department of Defense (DoD) provides Congress with a report on sexual assault in the military.<sup>54</sup> These findings are distributed by The Sexual Assault Prevention and Response Office (SAPRO). SAPRO “serves as the Department’s single point of authority for sexual assault policy”.<sup>55</sup> Annual SAPRO Reports do not encompass the *actual* numbers of sexual assaults which occur. Rather, these reports provide detailed breakdowns of policy enhancements, program improvements, and statistical data on *reported* sexual assault. The first annual report was released in 2005, detailing the data from the 2004 calendar year.<sup>56</sup> SAPRO continued providing calendar year reports in 2005 and 2006, then proceeded to release fiscal year reports from 2007 forward.<sup>57</sup>

In addition to providing the yearly reports to Congress, SAPRO also provides data regarding the *actual* number of sexual assaults every two or four years in the Workplace and Gender Relations Survey of Active Duty Members. These reports are developed using focus groups, and “assesses students’ perception of issues related to sexual assault, sexual harassment, and other gender-related topics at the U.S. Military Academy (USMA), the U.S. Naval Academy

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<sup>54</sup> "Mission & History." *Sexual Assault and Prevention Response*. United States Department of Defense, n.d. Web. 24 June 2014.

<sup>55</sup> "Mission & History." *Sexual Assault and Prevention Response*. United States Department of Defense, n.d. Web. 24 June 2014.

<sup>56</sup> "Mission & History." *Sexual Assault and Prevention Response*. United States Department of Defense, n.d. Web. 24 June 2014.

<sup>57</sup> "Mission & History." *Sexual Assault and Prevention Response*. United States Department of Defense, n.d. Web. 24 June 2014.

(USNA), the U.S. Air Force Academy (USAFA), and the U.S. Coast Guard Academy (USCGA).”<sup>58</sup>

Another important source of information is Melissa Sheridan Embser-Herbert’s compilation of an in-depth history of homosexuals in the military prior to the repeal of DADT. Her book, The U.S. Military’s “Don’t Ask, Don’t Tell” Policy provides a useful source for the policies and social climate leading up to the repeal of DADT. Embser-Herbert’s timeline of events includes significant aspects of legislation, such as the loophole used in 1970 which “permitted the retention of service members whose record was so outstanding as to overshadow the issue” of their sexual orientation, and the subsequent January 1982 DoD Directive 1332.14 which eliminated the loophole.<sup>59</sup>

In her discussion of the general ideology behind initially barring homosexuals from the military, she states, "A great deal of social psychology illustrates the way in which people both benefit from and provide benefits to those they see as being more similar to than dissimilar from themselves."<sup>60</sup> She goes further to discuss the slippery slope this line of thinking can lead to, namely, completely barring those individuals whom were different. The idea at the time was that these “different individuals” would interfere with unit cohesion.<sup>61</sup>

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<sup>58</sup> Cook, Paul J., Elizabeth P. Van Winkle, and Natalie Namrow. *2013 Service Academy Gender Relations Focus Groups: Overview Report*. Rep. no. 2013-045. Defense Manpower Data Center, Nov. 2013. Web.

<sup>59</sup> Embser-Herbert, Melissa Sheridan. *The U.S. Military's "Don't Ask, Don't Tell" Policy: A Reference Handbook*. Westport, CT: Praeger Security International, 2007. Print.

<sup>60</sup> Embser-Herbert, Melissa Sheridan. *The U.S. Military's "Don't Ask, Don't Tell" Policy: A Reference Handbook*. Westport, CT: Praeger Security International, 2007. Print.

<sup>61</sup> Embser-Herbert, Melissa Sheridan. *The U.S. Military's "Don't Ask, Don't Tell" Policy: A Reference Handbook*. Westport, CT: Praeger Security International, 2007. Print.

## **United States Code: Title 10**

Title 10 was originally enacted on August 10, 1956. At that time, the title included a definition of sodomy, but no specific mention of homosexuals. The definition of forcible sodomy was included in 10 U.S.C. 925, Art. 125., and stated “any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex by force or without the consent of the other person is guilty of forcible sodomy and shall be punished as a court-martial may direct.”<sup>62</sup>

It wasn't until 1993, in the DADT Act that the U.S. Code first explicitly mentioned homosexuality.

## **Department Of Defense Directive 1332.14**

January 28, 1982 the Department of Defense issued Department of Defense Directive (DoDD) 1332.14 regarding gays in the military. In Part 1, Section H it is specifically states “homosexuality is incompatible with military service.”<sup>63</sup> This marked the first time in history the Department of Defense formalized their stance on homosexual service in the military. Reasoning behind this stance was described as concern for privacy of other service members, recruitment, retention, “public acceptability of military,” and security purposes.<sup>64</sup> The DoD also released a definition of “a homosexual:” “a person, regardless of sex, who engages in, desires to

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<sup>62</sup> 10 U.S.C. § 925(a).

<sup>63</sup> National Security and International Affairs Division. *Defense Force Management: DOD's Policy on Homosexuality*. N.p.: United States General Accounting Office, 1992. Print.

<sup>64</sup> National Security and International Affairs Division. *Defense Force Management: DOD's Policy on Homosexuality*. N.p.: United States General Accounting Office, 1992. Print.

engage in, or intends to engage in homosexual acts.”<sup>65</sup> Homosexual acts were defined as “bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.”<sup>66</sup>

### **Implementation of “Don’t Ask, Don’t Tell”**

On January 29, 1993 former president Bill Clinton held a press conference regarding homosexuals in the military. He referenced discussions with Senator Nunn and Senator Mitchell, as well as conversations with the Joint Chiefs of Staff pertaining to this topic of homosexual service in the military. President Clinton acknowledged that it is a commonly held assumption that homosexuals *did* currently serve in the military, despite regulations banning them from doing so. These bans were the ones that had been in place since DoDD 1332.14 and the Title 10 ban on sodomy in the armed forces. He further stated that he would be submitting a draft of an Executive order by July 15<sup>th</sup>, 1993 which would allow for the open service of homosexuals in the military. This part of his efforts to fulfill statements made during his campaign indicating that he would do so. He specified that this order would also include a heightened focus on sexual conduct regulations. Even though Clinton was set on pursuing this directive, the deadline already represented a delay in achieving his goal and the first of the compromises which would ensue.<sup>67</sup>

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<sup>65</sup> National Security and International Affairs Division. *Defense Force Management: DOD's Policy on Homosexuality*. N.p.: United States General Accounting Office, 1992. Print.

<sup>66</sup> National Security and International Affairs Division. *Defense Force Management: DOD's Policy on Homosexuality*. N.p.: United States General Accounting Office, 1992. Print.

<sup>67</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

During questioning, the former president announced that he had reached an agreement with the Joint Chiefs of Staff to remove questions from enlistment forms related to sexuality. This would later make up the “Don’t Ask” portion of DADT. Despite additional questioning concerning possible increases of violence, Clinton referenced the far greater numbers of heterosexual sexual abuse complaints over the past ten years, shifting the focus to the larger issue of sexual assault in general. He further maintained his resolve to lift the ban on homosexuals in the military.<sup>68</sup>

Even in the face of Clinton’s resolve, prominent military leaders vehemently opposed lifting the ban. Typical of past beliefs and reasoning for the ban, military leaders believed that allowing homosexuals to serve openly would lead to dissolution of unit cohesion and a degradation of morale.<sup>69</sup>

During the 1992 investigation of the current military status of the LGBT community, Assistant Comptroller General Frank Conahan provided a report regarding the DoD’s Policy on Homosexuality. The purpose of the report was to analyze the cost of replacing individuals due to the ban, “statistics on the separation of homosexuals from the military services,” evidence in support of the ban, the general public’s attitudes, and the practices of other nations.<sup>70</sup>

The results of the analysis found that an average of 1,500 men and women were expelled annually during the time frame of 1980-1990. The highest number of separations occurred in

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<sup>68</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

<sup>69</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

<sup>70</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

1982, the same year the initial directive about homosexuality was released. Purportedly, the DoD did not maintain records related to the cost of upholding the ban; the report nonetheless estimated the total costs. The report also included the opinion of major U.S. psychiatric and psychological organizations. These organizations were opposed to the ban and found it “factually unsupported, unfair, and counterproductive.”<sup>71</sup>

The aspect of a potential security risk was refuted by two specific studies performed by the DoD. Furthermore, the report found increasing acceptance of homosexuals serving in the military, some allied nations with policies that accepted the service of homosexuals, and several police and fire departments in major cities that have “removed employment restrictions without adverse effects on mission.”<sup>72</sup>

Pertaining to the security concerns, in July 1991 and February 1992 the Secretary of Defense and the Joint Chiefs of Staff, respectively, gave testimony before the House Budget Committee. They no longer embraced the idea that homosexuals might pose security threats, yet still had issues with the effect it might have on order and discipline.<sup>73</sup>

Statistics gathered from fiscal years 1980 to 1990 determined that “16,919 members of the Army, Navy, Air Force, and Marine Corps were involuntarily discharged for being homosexuals.”<sup>74</sup> It was also estimated by the General Accounting Office that in 1990 alone, \$27

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<sup>71</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

<sup>72</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

<sup>73</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

<sup>74</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

million was spent on “recruiting and initial training for personnel to replace those dismissed;” these costs did not include monies spent on investigations and court costs.<sup>75</sup>

Senator Nunn, in his opposition to lifting the ban, referenced again the concerns of what allowing the open service of homosexuals would do to those who don’t identify as homosexual. As talks with Senators and military officials continued, Clinton further compromised and “agreed that prosecutions should continue against service members who committed homosexual acts in violation of military law.”<sup>76</sup>

In the time period before the July 15<sup>th</sup> deadline, Defense Secretary Aspen reviewed the current ban on homosexuals. While the review was taking place, the ban remained, with a few exceptions: recruits were not questioned regarding sexual orientation, continuances were sought for former service members who were discharged for homosexuality, service members were to no longer be dismissed solely due to homosexuality, but rather placed in Selected Reserve, and commanding officers were allowed to reassign accused or confirmed homosexuals.<sup>77</sup>

On February 4, 1993, during discussion of a Bill pertaining to Family and Medical Leave, Senator Bob Dole introduced an amendment which would

suspend all executive orders on homosexuals in the military since Jan. 1, 1993, until a thorough review of all executive orders on homosexuals in the military is

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<sup>75</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

<sup>76</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

<sup>77</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

conducted by July 15, 1993, and to require that all changes to the policy be approved by Congress.<sup>78</sup>

This amendment was tabled by Senate with a vote of 62-37.<sup>79</sup> Essentially, if this amendment had been accepted, Clinton's orders regarding enlistment questions, past cases, future dismissals, etc. would be null and void.

Instead of the amendment provided by Dole, an amendment by Senator Mitchell was adopted. It established a requirement that the research conducted about the topic be reported to Congress so the Senate Armed Services Committee could create the most applicable recommendation regarding legislation. This amendment allowed debates pertaining to this particularly polarizing and sensitive issue to be held in committee hearing rooms rather than on the Senate floor. The congressional hearings regarding the ban on homosexual service in the military began on March 29, 1993.<sup>80</sup>

During the investigatory phase, Senator Nunn and eight other committee members toured a naval base in Virginia. They brought television crews to document the tight living quarters and communal showers. Throughout the tour, Senator Nunn asked several sailors about their views

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<sup>78</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 3-S. Print.

<sup>79</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

<sup>80</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

on serving alongside openly homosexual sailors. The views varied between incredulity and neutrality, with the caveat that the sailor put forth 100 percent effort into his or her job.<sup>81</sup>

Proponents of lifting the ban were not satisfied with the compromise currently in place. They believed that enacting a “don’t ask, don’t tell” type of principle would essentially be forcing gays and lesbians to lie about their sexuality. Further talks created a parallel between the arguments against lifting the ban on homosexuals and those previously made against racial integration in the military.<sup>82</sup>

Before a final agreement was made, Representative Barney Frank, an openly gay congressman proposed an alternative in which gays in the military would be able to be open about their sexual orientation when they were off duty and off base. This proposal “expressly barred investigations of the private, off-base behavior of discreetly gay personnel, provided they did not run afoul of civilian law enforcement agencies.”<sup>83</sup> Yet Senator Nunn countered these ideals by stating that the mere knowledge that a fellow service member was a homosexual could disrupt a platoon as much as overt acts of homosexual conduct.

On July 19, 1993, after the closing of investigations pertaining to the proposed policy, Clinton issues a Pentagon directive which forbid “the Pentagon from asking gays to disclose

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<sup>81</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

<sup>82</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

<sup>83</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

their sexual orientation.”<sup>84</sup> However, the policy still did not allow for any disclosures pertaining to homosexuality. This fact angered many individuals both for and against lifting the ban. Those in favor of lifting the ban felt as though the White House had “misled” them to believe that the new policy would satisfy Clinton’s campaign promises. Those against the ban found the arrangement to be offensive to traditional values and inconsistent with a true understanding of the armed forces. Despite the heavy backlash regarding the directive, key supporters, the Joint Chiefs of Staff and the nation’s six highest-ranking officers, alleged that the directive could be effective.<sup>85</sup>

July 23<sup>rd</sup>, the Senate Armed Services Committee drafted the directive into bill and an identical version of the bill was drafted in the House Armed Services Committee on July 27<sup>th</sup>. On the Senate floor, Senator Barbara Boxer attempted to amend the bill to reflect only a recommendation by Congress, but leaving the final decision regarding the policy up to the president. This amendment was rejected with a vote of 33-63. On September 29<sup>th</sup>, the House passed “a defense authorization bill that codified the prohibition” with a vote of 268-162. On November 15<sup>th</sup>, the House voted 273-135 to adopt the conference report of the final version of the bill, and the Senate approved it on November 17<sup>th</sup> with a vote of 273-22.<sup>86</sup> November 30, 1993, President Clinton signed the Act into law: Public Law 103-160, 10 U.S.C. 654, also known as “Don’t Ask, Don’t Tell” (DADT). [Don’t Ask, Don’t Tell Policy: a reference handbook]

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<sup>84</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

<sup>85</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

<sup>86</sup> Skene, Neil. *Congressional Quarterly Almanac: 103rd Congress: 1st Session 1993*. Ed. Robert W. Merry. Vol. XLIX. N.p.: Congressional Quarterly, n.d. 454-62. Print.

DADT determined that any individual who “has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts...has stated that he or she is a homosexual or bisexual...[or] has married or attempted to marry a person known to be of the same biological sex” would be “separated from the armed forces.”

### **DADT Repeal Act**

Seventeen years after the enactment of DADT, bills H.R. 2965 and S. 4023 of the One Hundred Eleventh Congress called for a repeal of the “Don’t Ask, Don’t Tell” Act.<sup>87</sup> The act removed 10 U.S.C. 654: Policy concerning homosexuality in the armed forces.<sup>88</sup> This allowed for homosexuals and bisexuals to serve openly and legally in the military.

Talks of repealing DADT began again in January of 2010, during President Barack Obama’s State of the Union address. In response to this renewed initiative, a group, later deemed the Comprehensive Review Working Group, was created to review whether the repeal was even feasible given military readiness.<sup>89</sup> This legislation went into effect officially on September 20, 2011 and is still in effect as of the date of this research.<sup>90</sup> The specific piece of legislation required approval by the president, Defense Secretary, and the Chairman of the Joint Chiefs of Staff. Upon determination that the armed forces were appropriately equipped to proceed with the repeal, the legislation received authorization from each of the officials.<sup>91</sup>

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<sup>87</sup> Don't Ask, Don't Tell Repeal Act of 2010. Pub. L. 111–321. 124 Stat. 3515-3516. 22 December 2010. Print.

<sup>88</sup> Don't Ask, Don't Tell Repeal Act of 2010. Pub. L. 111–321. 124 Stat. 3515-3516. 22 December 2010. Print.

<sup>89</sup> Burrelli, David F. *The Repeal of “Don’t Ask, Don’t Tell”: Issues for Congress*. Rep. N.p.: Congressional Research Service, 2012. Print.

<sup>90</sup> Garamone, Jill. "United States Department of Defense." *Defense.gov News Article: 'Don't Ask, Don't Tell' Repeal Certified by President Obama*. U.S. Department of Defense, 22 July 2011. Web. 14 July 2014.

<sup>91</sup> Parrish, Karen. "United States Department of Defense." *Defense.gov News Article: President Signs 'Don't Ask' Repeal Act Into Law*. U.S. Department of Defense, 22 Dec. 2010. Web. 13 Apr. 2015.

President Obama considered the repeal a triumph. He cited DADT as a piece of legislation which actually undermined national security violated “the very ideals that our brave men and women in uniform risk their lives to defend.”<sup>92</sup> These statements show a drastic change from the previous views that homosexual military service undermined unit cohesion and hurt national security. It should be noted that the repeal still did not allow service of transgendered individuals in the military. The definition of mental disorders still included “sexual and gender identity disorders.”<sup>93</sup> The “gender identity disorder” was still viewed as an issue which would interfere with proper performance of military duties. In opposition to this fact, some protestors on college campuses around the nation still refused to allow military recruiters on campus. This indicates that there is still a push for *all* individuals identifying as part of the LGBT community to be accepted into the military.<sup>94</sup>

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<sup>92</sup> Schulman, Kori. "The President on the Don't Ask, Don't Tell Repeal Act of 2010: "An Historic Step"" *The White House Blog*. N.p., 18 Dec. 2010. Web. 13 Apr. 2015.

<sup>93</sup> Burrelli, David F. *The Repeal of "Don't Ask, Don't Tell": Issues for Congress*. Rep. N.p.: Congressional Research Service, 2012. Print.

<sup>94</sup> Burrelli, David F. *The Repeal of "Don't Ask, Don't Tell": Issues for Congress*. Rep. N.p.: Congressional Research Service, 2012. Print.

## **SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE ANNUAL REPORTS**

The 2002 and 2003 Department of Defense Care for Victims of Sexual Assault Task Force Reports showed insufficiencies in data and records pertaining to reports. Information was “incomplete, inconsistent and not integrated, and that significant gaps existed in the documentation of command dispositions.”<sup>95</sup> The Uniform Crime Reporting Program (UCR) of the Federal Bureau of investigation was also considered insufficient in its presentation of alleged reports due to its narrow focus on rape and attempted rape against women and the fact that reports proven unfounded were deleted.

The new format for reporting the year’s armed service sexual assault statistics sought to provide a more reliable and comprehensive system and documentation of sexual assault cases. The SAPRO reports include the following:

- Cases in which a service member was the offender
- Cases in which a service member was the victim
- Tracking of all reported founded and unfounded cases of sexual assault, not limited to rape or attempted rape

Along with the greater encompassing approach, the SAPRO reports contain information pertaining to policy enactments and initiatives designed to improve the integrity of the military sexual assault reporting process. These ten reports will track total sexual assault reports, gender

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<sup>95</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2004*. Department of Defense, 2005. Web. 2015.

information about victims and subjects/offenders, same-sex reports, and the totality of punitive measures enacted. Although it is not clear which punitive measures were taken in the cases of same-sex sexual assaults, they will provide a look at the trend in case outcomes in general, which can be loosely applied to same-sex sexual assaults. This will provide information regarding how policy changes affect case outcomes.

In order to determine the effects of policy changes such as the DADT Repeal Act, notice will be made regarding the reports surrounding the time the legislation was enacted. If there is a measurable increase surrounding that time, attention will be given to possible reasoning, and whether the reason itself may be the DADT Repeal Act.

The 2014 Fiscal Year Report is scheduled to be released in May of 2015, and is therefore, not available for this thesis.

### **SAPRO Report Overviews**

The following section includes overviews of all SAPRO Annual Reports Released.

#### 2004 Calendar Year Report Overview

In the introductory statements of the report, it is acknowledged that, as the new system for documenting reports of sexual assault,

we anticipate an increase in our numbers in the CY05 reports of sexual assault since there will be heightened awareness through the Department's comprehensive sexual assault policies, the extensive roll-out of training and education for the prevention and response

to sexual assaults, and the new Confidentiality policy with restricted reporting which helps remove one of the barriers to underreporting of sexual assaults.<sup>96</sup>

For purposes of the Calendar Year 2004 report, sexual assault “includes alleged offenses of rape, nonconsensual sodomy, indecent assault, and attempts to commit any of these offenses.”<sup>97</sup>

#### 2005 Calendar Year Report Overview

As of the Calendar Year 2005 report, no comparison could be made to the Calendar Year 2004 data until the remaining cases were completed and statistics were updated, as the 2005 report did for the 2004 data. It was also stated that neither the 2004 nor 2005 data could be compared to the 2002 and 2003 DoD Care for Victims of Sexual Assault Task Force Reports because of the drastic differences in data collection.<sup>98</sup>

#### 2006 Calendar Year Report Overview

At the time of the report, the Calendar Year 2006 report was considered the “most significant” because it was the “first full year reporting data was available.”<sup>99</sup> Meaning, 2006 was the inaugural year for full documentation of both unrestricted and restricted reports. Thus, it was cite as “the baseline for comparison with future years for trend analysis purposes.”<sup>100</sup> Even though the total number of unrestricted reports in 2006 was a 24% increase from those in 2005,

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<sup>96</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2004*. Department of Defense, 2005. Web. 2015.

<sup>97</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2004*. Department of Defense, 2005. Web. 2015.

<sup>98</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2005*. Department of Defense, 2006. Web. 2015.

<sup>99</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2006*. Department of Defense, 2007. Web. 2015.

<sup>100</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2006*. Department of Defense, 2007. Web. 2015.

this is not considered viable for “adequate data comparison and analysis.”<sup>101</sup> Proper comparison was scheduled to occur once data from 2007 was compiled. However, due to changes made in the 2007 Report, the 2006 data still would not be cited as the true benchmark for comparisons.<sup>102</sup>

### 2007 Fiscal Year Report Overview

Seeing as the 2006 report was a calendar year report and the 2007 year report was based on the fiscal year, there is overlap in the data. The data included was from October 1, 2006 through September 30, 2007. This means that last quarter of the Calendar Year 2006 Report data is included in the Fiscal Year 2007 data. Thus, upon the release of the 2007 report comparison could still not be made to previous years. The Fiscal Year 2007 report then became the baseline from which to compare reports from that point forward.<sup>103</sup> The reasoning behind the shift in reporting periods was due to the backlog of cases and subsequent changes to the Uniform Code of Military Justice. Specifically, the definition of the crime of rape, as seen in Article 120, was drastically altered:

...intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent. It includes rape, nonconsensual sodomy (oral or anal sex), indecent assault (unwanted, inappropriate sexual contact or fondling), or attempts to commit these acts. Sexual assault can occur without regard to gender or spousal relationship or age of victim. “Consent” shall not be deemed or construed to mean the failure by the victim to offer physical resistance. Consent is not

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<sup>101</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2006*. Department of Defense, 2007. Web. 2015.

<sup>102</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2006*. Department of Defense, 2007. Web. 2015.

<sup>103</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2007 Report on Sexual Assault in the Military*. Department of Defense, 2008. Web. 2015.

given when a person uses force, threat of force, coercion, or when the victim is asleep, incapacitated, or unconscious.<sup>104</sup>

The purpose of this revision was to provide a definition that more aptly encompasses the variety of crimes and offenses related to rape. When this definition changed, there was an increase in the number of crime categories. The data collection period was also altered in response to this change. The new date coincided with the date the revision went into effect; this date was October 1, 2007. Also seen in 2007 was the addition of reporting requirements, as “specified by section 596 of PL 109-163 and section 583 of PL 109-354.”<sup>105</sup>

#### 2008 Fiscal Year Report Overview

It is important to note that the Department of Defense records the date a report is issued, not the date of the alleged incident of sexual assault. The data collected also delineates offenses enacted against service members and those perpetrated by service members.<sup>106</sup>

#### 2009 Fiscal Year Report Overview

The Department of Defense revised their definition of sexual assault ...intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. Sexual assault includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive, or wrongful (to include unwanted and inappropriate sexual contact), or attempts

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<sup>104</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2007 Report on Sexual Assault in the Military*. Department of Defense, 2008. Web. 2015.

<sup>105</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2007 Report on Sexual Assault in the Military*. Department of Defense, 2008. Web. 2015.

<sup>106</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2008 Report on Sexual Assault in the Military*. Department of Defense, 2009. Web. 2015.

to commit these acts. ‘Consent’ means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent.<sup>107</sup>

The overall spectrum of crimes covered by the definition is the same as those covered in the 2007 definition; there was no broadening of acts considered covered by sexual assault in this regard. The definition does provide clearer information pertaining to what qualifies as consent.

#### 2010 Fiscal Year Report Overview

Efforts to use media to increase awareness and further prevention capabilities continued to improve during this Fiscal Year. The DoD changed the marketing campaign of “My Strength Is for Defending” to “Hurts One. Affects All.” This reflects the Department’s stance that sexual assault has negative consequences for not only the victim, but also for “families, friends, colleagues, the military community, and the larger population.”<sup>108</sup> The new marketing campaign was designed to further the message that preventing sexual assault is everyone’s responsibility. In addition to this alteration in media coverage, a confidential 24/7 hotline was proposed. The

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<sup>107</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2009 Report on Sexual Assault in the Military*. Department of Defense, 2010. Web. 2015.

<sup>108</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

“DoD Safe Helpline” was expected to be operational in 2011. Furthermore, the campaign “I. A.M. (Intervene-Act-Motivate) Strong” was employed.<sup>109</sup>

Stated in the report, after the fifth year since its inception, “it is unknown if or how the SAPR Policy has affected victims’ experience with reporting sexual assaults and participating in the military justice system.”<sup>110</sup> Due to this uncertainty, SAPRO scheduled studies for Fiscal Year 2011 which would provide comparisons between victim experiences prior to 2005 and after the implementation of the SAPR Program.

#### 2011 Fiscal Year Report Overview

The DoD Safe Helpline was launched in 2011 as planned. It included resources for texting, online communication, and telephone sessions. From April until September of 2011, the helpline was accessed by more than 16,300 individuals, and 770 received assistance.<sup>111</sup>

Also included in the 2011 Fiscal Year report was an explanation of the different punitive measures often taken against individuals. Court-martial action results in adjudication which can lead to “confinement, reduction in rank, fines or forfeitures, and discharge (enlisted) or dismissal (officers) from service.”<sup>112</sup> Occasionally, individuals are offered the chance to voluntarily resign rather than proceed through adjudication. In Nonjudicial punishments, most offenders have “sufficient evidence of minor UCMJ violation” and are subject to commander determination of

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<sup>109</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

<sup>110</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

<sup>111</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2011 Report on Sexual Assault in the Military*. Department of Defense, 2012. Web. 2015.

<sup>112</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2011 Report on Sexual Assault in the Military*. Department of Defense, 2012. Web. 2015.

punishment.<sup>113</sup> An offender may fight this if so desired, and choose to utilize court-martial proceedings instead. Administrative discharges may be “Honorable, General, and Under Other Than Honorable Conditions (UOTHC).”<sup>114</sup> The latter two often preclude the offender from receiving “full entitlements and benefits from the DVA.”<sup>115</sup> Adverse administrative action is enacted through “Letters of Reprimand, Letters of Admonishment, and Letters of Counseling.”<sup>116</sup> Often this is seen in cases in which the offense is not egregious and heightened disciplinary measures would be inappropriate.

#### 2012 Fiscal Year Report Overview

Use of the Safe Helpline increased drastically. It was determined that 49,000 “unique visitors” accessed the website, and 4,600 people received services via the many modes available through the helpline. Also developed and utilized was the Defense Sexual Assault Incident Database, which was the system designed to provide an all-inclusive record-keeping system for reports of sexual assault. Better record-keeping may result in clearer direction for which policy areas need improvement.<sup>117</sup>

#### 2013 Fiscal Year Report Overview

The 2013 Fiscal Year report marked the highest number of reports received since the inception of the SAPR program. The DoD stated in the report that they believe this

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<sup>113</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2011 Report on Sexual Assault in the Military*. Department of Defense, 2012. Web. 2015.

<sup>114</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2011 Report on Sexual Assault in the Military*. Department of Defense, 2012. Web. 2015.

<sup>115</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2011 Report on Sexual Assault in the Military*. Department of Defense, 2012. Web. 2015.

<sup>116</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2011 Report on Sexual Assault in the Military*. Department of Defense, 2012. Web. 2015.

<sup>117</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2012 Report on Sexual Assault in the Military: Volume I*. Department of Defense, 2013. Web. 2015.

“unprecedented increase” was due to “growing level of confidence in the DoD response system.” Based upon rates of actual numbers of sexual assaults, as reported in the various Workplace and Gender Relations Survey of Active Duty Members, the DoD was not concerned with an actual increase in sexual assaults. Instead, they believed the increase in reports was an indication of the success of the program. Although the issue of sexual assault was still not eradicated, the statistics included in the 2013 Fiscal Year Report were deemed promising.<sup>118</sup>

### **SAPRO Reports: Policy Action**

The following section includes a breakdown of relevant policy action and program implementations by year. These sections are not all inclusive but highlight relevant changes and improvements made during each annual report period.

#### 2004 Policy Action

In 2004, the Care for Victims of Sexual Assault (CSVA) Task Force was created. Its job was to conduct “an extensive review of all sexual assault policies and programs among the Services and DoD.”<sup>119</sup> A key recommendation made was to pinpoint an entity that would be held accountable for the Departments sexual assault policy; this led to the creation of the Joint Task Force for Sexual Prevention and Response. This entity was originally labeled as “interim” but designed with full intentions of growing into a permanent authority.

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<sup>118</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2013 Report on Sexual Assault in the Military*. Department of Defense, 2014. Web. 2015.

<sup>119</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2004*. Department of Defense, 2005. Web. 2015.

The first initiative of the Task Force was the development of a “new DoD-wide sexual assault policy.”<sup>120</sup> This policy was included in the 2005 version of the National Defense Authorization Act. The procedure for disseminating the policy is to release a “directive-type memoranda.”<sup>121</sup> The memoranda includes definitions of sexual assault, other sex-related offenses, and sexual harassment, which were intended to “eliminate confusion and uncertainty about which actions constitute which offense.”<sup>122</sup> The memoranda also include measures for confidentiality in circumstances in which the victim wishes not to pursue an investigation of the event(s). Opting out of investigatory procedures does not bar a victim from obtaining medical treatment or “accurate legal and judicial information.”<sup>123</sup> An aspect of the rationale for such a confidentiality agreement is to ensure that a victim’s personal safety and well-being is of utmost concern.

The policy memoranda also cover training for first responders, service members, and pre-deployment. Both of these measures are designed to encourage appropriate coverage in training programs of sexual assault prevention, risk factors, what constitutes sexual assault, cultural differences of host cultures, and how to obtain support if a sexual assault occurs outside of the United States

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<sup>120</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2004*. Department of Defense, 2005. Web. 2015.

<sup>121</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2004*. Department of Defense, 2005. Web. 2015.

<sup>122</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2004*. Department of Defense, 2005. Web. 2015.

<sup>123</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2004*. Department of Defense, 2005. Web. 2015.

Additional efforts in the memoranda provide supplementary support for the victim. This also includes efforts to protect the victim in cases of “collateral misconduct;” this being occasions in which victims may be in fear of facing punishment for actions that come to light through their reporting.<sup>124</sup> Although there is not complete dismissal of the victim’s actions, the policy encourages delay of disciplinary actions until the conclusion of investigation and final disposition.

### 2005 Policy Action

The DoD introduced an alternative reporting option in 2005. This option was labeled as “Restricted Report.” It enabled victims to report alleged sexual assaults confidentially, yet still obtain services in response to the offense. Victims who chose Restricted Reporting would not be subject to an investigation. Any information provided by the victim in the course of receiving treatment and health services would not be furnished to law enforcement. Commanders would be given notice that an incident had occurred, but would not be informed of any details regarding individuals involved. Individuals who chose this option would also be able to change the type of report to Unrestricted if they so desired.<sup>125</sup> When individuals changed their reports from Restricted to Unrestricted, the report would then be counted under the Unrestricted Report total and subtracted from the Restricted Report total.<sup>126</sup>

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<sup>124</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2004*. Department of Defense, 2005. Web. 2015.

<sup>125</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2005*. Department of Defense, 2006. Web. 2015.

<sup>126</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2008 Report on Sexual Assault in the Military*. Department of Defense, 2009. Web. 2015.

The Directive-Type Memoranda (DTMs) from 2004 became a DoD Directive in 2005.

Also in 2005, SAPRO began developing “a Defense Case Record Management System to ensure case resolution to victims” and “planning a Sexual Assault Response Coordinator (SARC) Conference for June 2006...”<sup>127</sup>

### 2006 Policy Action

2006 marked an impressive year for policy action. The introduction of the following measures furthered the goal of giving permanency to SAPRO:

- Department of Defense Instruction 6495.02
- Sexual Assault Prevention and Response Program
- Department of Defense Directive 6495.01

These initiatives were created during the 2006 calendar year and would later show great improvements as the annual reports were released. As was the goal of SAPRO in 2006, the SAPR Program would indeed gain permanency and continue to expand and further its goals.<sup>128</sup>

### 2007 Policy Action

The Sexual Assault Advisory Council (SAAC) was created by DoD Instruction 6495.02. SAAC is responsible for advising the Secretary of Defense on sexual assault policies regarding servicemen, coordinating and reviewing sexual assault policies and programs, monitoring

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<sup>127</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2005*. Department of Defense, 2006. Web. 2015.

<sup>128</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2006*. Department of Defense, 2007. Web. 2015.

progress, and developing education and training guidelines. The first meeting was held on April 12, 2007. The four subcommittees developed were Policy and Accountability, Training, Research, and Outreach.<sup>129</sup>

The additions made in Section 532 of Public Law 109-364 also required reports of sexual assault in Military Service Academies. It was also determined that in years ending in an even number, these academies would be required to submit to a survey and self-assessment in order to assess the program. The results from these assessments would be provided to Congress by the end of the year they were administered.

Noted in Fiscal Year 2007 was a conflict between mandatory reporting laws regarding many states have regarding rape and the restricted reporting option offered to service members. These regulations required “healthcare providers to report to law enforcement that they have treated a victim of sexual assault.” This conflicts with the anonymity and ability to receive care without sparking an investigation proffered by Restricted Reports. As of Fiscal Year 2007, this issue was not solved.

2007 was also a year peppered with conventions and events designed to raise awareness of sexual assault. The DoD sponsored Sexual Awareness Month in April, and encouraged bystander intervention. Slated for 2008, was information pertaining to the “dangerous intersection between alcohol and sexual assault.” In July, the DoD and others partnered together

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<sup>129</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2007 Report on Sexual Assault in the Military*. Department of Defense, 2008. Web. 2015.

to host the Prevention Summit. Strategies and recommendations were discussed to improve the prevention of sexual assault in the military.

### 2008 Policy Action

Due to Department wide investigations, it was determined that a “Department-wide sexual assault database initiative be implemented by January 2010.”<sup>130</sup> This was due to concerns that the current process of documenting reports by hand leads to many difficulties with record-keeping. The report also noted, as policy is enacted and more prevention efforts are made, “the Department expects reports of sexual assault to rise as victims gain confidence in the system and feel more comfortable reporting.”<sup>131</sup> In fact, the report specifically refers to the increase in reports during the 2008 Fiscal Year as “encouraging.”<sup>132</sup> This is because an increase in reports does not necessarily mean there has been an increase in assaults. Rather, as improvements are made to the handling of reports and victim services, individuals are more likely to come forward with their reports. This is considered an accomplishment in altering the issue of vast underreporting of sexual assaults.

### 2009 Policy Action

During this fiscal year, efforts towards improving education and prevention techniques included the development of a marketing campaign for specific military service. SAPRO

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<sup>130</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2008 Report on Sexual Assault in the Military*. Department of Defense, 2009. Web. 2015.

<sup>131</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2008 Report on Sexual Assault in the Military*. Department of Defense, 2009. Web. 2015.

<sup>132</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2008 Report on Sexual Assault in the Military*. Department of Defense, 2009. Web. 2015.

partnered with MCSR in order to create and disseminate the campaign message which centered on the theme “My Strength Is for Defending: Preventing Sexual Abuse Is Part of My Duty.”<sup>133</sup>

Other efforts included preparing for the implementation of a trial counsel training course, prevention strategy briefing for senior leaders from all branches of the military, revising commander training requirements, and creating a 3 year plan for institutionalizing oversight activities in the military. The plan was detailed in *Oversight Framework for SAPR*.<sup>134</sup> The purpose of this document was to help encourage bystander intervention. It is noted that many service members are aware that sexual assault can occur, but there needs to be conscious efforts made towards actively preventing sexual assault. Because of this, service members are given tools to know how to intervene safely and effectively. Training programs also instruct individuals on obtaining affirmative consent, thus drawing a large distinction between situations in which there is and is not consent.<sup>135</sup>

A review of SAPR policy occurred in Fiscal Year 2009, in order to document how well the services were adhering to the regulations set forth in DoDI 6495.02. The three main areas of inconsistency were lack of standardization amongst the military branches, insufficient programming to address “Reserve Component victim privacy and care following a Restricted

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<sup>133</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2009 Report on Sexual Assault in the Military*. Department of Defense, 2010. Web. 2015.

<sup>134</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2009 Report on Sexual Assault in the Military*. Department of Defense, 2010. Web. 2015.

<sup>135</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2009 Report on Sexual Assault in the Military*. Department of Defense, 2010. Web. 2015.

Report,” and inadequate communication between branches.<sup>136</sup> As these concerns were brought to light, each branch made plans to update their policies.

Looking forward to the next fiscal year, DoD created a system to be implemented in 2010 which would help gauge the effectiveness of service member training. It also developed plans to release a revised Sexual Assault Gender Relations Survey.<sup>137</sup>

### 2010 Policy Action

2010 saw the successful implementation of the Workplace and Gender Relations Survey of Active Duty Members (WGRA). Previously, a slightly different format for this survey was used, however, it still focused on gender relations; this occurred in 2006.<sup>138</sup> This survey, along with other prevention-related research was conducted in conjunction with Defense Manpower Data Center. The surveys helped gather data regarding bystander intervention practices. One area of concern with prevention policy was how intervention might be viewed by other service members. In order to address this matter, service members were questioned as to whether they found it to be their duty to intervene if a fellow service member was being harmed, intending to harm, or harming another. 95% responded in the affirmative. SAPRO plans to disseminate this

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<sup>136</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2009 Report on Sexual Assault in the Military*. Department of Defense, 2010. Web. 2015.

<sup>137</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2009 Report on Sexual Assault in the Military*. Department of Defense, 2010. Web. 2015.

<sup>138</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

information to the branches in order to show that others would be supportive of such action, rather than disdainful.<sup>139</sup>

In order to determine the possible consequences of “expanding SAPR programs to other members of the military community,” a pilot program was created and executed.<sup>140</sup> This program was based in U.S. Army Europe and gave “the Restricted Reporting option to eligible adult civilian beneficiaries of the military healthcare system in Europe.” The program concluded in February 2011; thus, the results were not available in the 2010 report, but intermittent responses seemed positive.<sup>141</sup>

Other concerns during the 2010 Fiscal Year were related to reporting environments. The physical locations of bases present unique and varied requirements for service provisions. This was an area SAPR realized needed to be address in the future concerning allocation of resources. Additionally, the Department continued to address the issue of stigmas associated with reporting. Often, sexual assaults go unreported because individuals do not want to appear weak or unable to fulfill their duties. Due to this stigma, a PSA called “Women Speak Out” was broadcast. It specifically encouraged sexual assault victims to speak out about assaults and obtain help.

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<sup>139</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

<sup>140</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

<sup>141</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

Training programs were also reworked to help investigators and attorneys with interviewing techniques that would not re-victimize individuals.<sup>142</sup>

The Joint Services Committee also submitted recommendations for edits to Article 120 of the Uniform Code of Military Justice. The submission referenced clarity issues and concerns of unwarranted acquittals. Additional proposed amendments were for the revision of Articles 43 and 118, pertaining to Statute of Limitations and Murder, respectively.<sup>143</sup>

Forensic exam standards were also encouraged to be on par with national standards. Forms were improved by including more detailed information on evidence collection. Furthermore, in Fiscal Year 2010, many senior armed forces leaders received special training for handling sexual assaults. This included 197 brigade commanders, 542 battalion commanders, and 195 command sergeants. Sexual assault training was also provided for 154 criminal investigators, 2,985 military law enforcement investigators and first responders, and 171 chaplains.<sup>144</sup>

Due to the attention congressionally, publicly, and legislatively the SAPR Program received in Fiscal Year 2010, the SAPRO Tracker was created. The Tracker was designed to be

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<sup>142</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

<sup>143</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

<sup>144</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

an all-encompassing resource for recommendations made pertaining to the SAPR Program. In its inaugural year, the Tracker recorded 130 tasks and approximately 700 sub-tasks.<sup>145</sup>

### 2011 Policy Action

The DoD restructured its forms which provided instructions regarding forensic examinations. The new version was clearer in its explanation of procedures and gave better guidance to those providing health services.

Talks began pertaining to implementing certification options across the branches. This was an effort to ensure standardization of services for the armed forces, which would assist victims and give an increased air of professionalism to the program. This standardization of care was the focus of many policy improvements over the year. Such a mindset was also the catalyst for improving education of victims regarding what documents or forms they would need in order to receive “assault-related benefits once they transition to veteran status.”<sup>146</sup>

### 2012 Policy Action

During the fiscal year, a change in the handling of initial dispositions was enacted. The modification resulted in O-6 grade commanders, higher level commanders with greater experience, being given the responsibility to handle cases of sexual assault.<sup>147</sup> Also in 2012 was a new version of DoDD 6495.01. Included was the ability of victims who submit an Unrestricted

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<sup>145</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

<sup>146</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2011 Report on Sexual Assault in the Military*. Department of Defense, 2012. Web. 2015.

<sup>147</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2012 Report on Sexual Assault in the Military: Volume I*. Department of Defense, 2013. Web. 2015.

Report to accelerate requested transfers, and the institution of a minimum of one coordinator and victim advocate in “each brigade or equivalent unit level.”<sup>148</sup> This directive also expanded the scope of individuals allowed to make Restricted Reports. The newly included group was military dependents 18 years and older.

Another DoDD directive, 7050.06, provided better protection for victims. The conjunction of DoDDs 6495.01 and 7050.06 increased protection of victims “from coercion, retaliation, and reprisal.”<sup>149</sup> This was a step taken to further victim confidence in reporting.

The Military Rule of Evidence (MRE) 514 was created by executive order during this time-frame as well. This legislation heightened privacy between victims and victim advocates. Though there were caveats to this confidentiality, it marked an additional step towards increasing confidence in the victim services provided.<sup>150</sup>

### 2013 Policy Action

DoDDs 6495.01 and 6495.02 were reissued in the fiscal year. Alterations targeted training requirements, investigation requirements, availability of legal consultation for victims, and optional Military Protective Orders for victims submitting Unrestricted Reports.

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<sup>148</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2012 Report on Sexual Assault in the Military: Volume I*. Department of Defense, 2013. Web. 2015.

<sup>149</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2012 Report on Sexual Assault in the Military: Volume I*. Department of Defense, 2013. Web. 2015.

<sup>150</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2012 Report on Sexual Assault in the Military: Volume I*. Department of Defense, 2013. Web. 2015.

The NDAA was updated as well, with requirements for Special Victim Capability. This legislation encouraged protection in special circumstances of assault, such as child abuse and domestic violence. The legislation required that in the 2014 Fiscal Year, a report would be issued regarding Special Victim Capability services.

### **SAPRO Reports: Statistics**

The following section includes breakdowns of each annual report and the statistics relevant to this thesis.

#### 2004 Statistics

There were 1,700 reports of “alleged cases of sexual assault involving members of the Armed Forces.”<sup>151</sup> Of those reported, 1232 cases were investigated as of December 31, 2004, with 468 pending completion. Based upon completed investigation statistics, the representative percentages of service member victims and service member alleged offenders was .06% each out of the total population of active duty and mobilized reserve/guard population.<sup>152</sup>

342 offenders were subject to punitive action via court-martial, nonjudicial punishment, and administrative actions or discharges. At the end of calendar year 2004, 340 more offenders were “awaiting final disposition of their offenses.” The remaining alleged offenders were either subject to foreign authorities (foreign nationals are not subject to Uniform Code of Military Justice authority), unidentified, or the offenses were unsubstantiated or had insufficient evidence.

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<sup>151</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2004*. Department of Defense, 2005. Web. 2015.

<sup>152</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2004*. Department of Defense, 2005. Web. 2015.

When latter reports were released, new information pertaining to the 468 incomplete investigations were released. Final action was able to be taken in 420 of these investigations. After including these newly completed cases, the statistics were as seen on the image in Appendix A.<sup>153</sup>

### 2005 Statistics

The calendar year of 2005 showed an increase in reports by 674. In the annual SAPRO Report, this was attributed to the new policy initiative of restricted reporting. The belief was that this option, which began on June 14, 2005, removed some of the barriers which typically barred individuals from reporting. The amount of restricted reports totaled 435 of the 2,374 reports of alleged assault for the year. Additional rationale for the increase was cited as being an Army policy change. Instead of performing an initial investigation and only documenting the reports that passed this stage, the Army began documenting all complaints. The result was a higher number of reports falling under the “unfounded/unsubstantiated” category.<sup>154</sup>

As of December 31, 2005, the MCIOs had 661 cases remaining for investigation. The results of these cases were to be announced in the Calendar Year 2006 annual report. Pertaining to the 1,386 completed investigations, it was found that 9% involved multiple offenders, raising the alleged offender total to 1,474. Of these offenders, punitive action was taken against 274, with the makeup being 79 via court-martial, 91 with nonjudicial punishment, and 104 through adverse actions and discharges. The 848 alleged offenders who received no punitive action upon

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<sup>153</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2004*. Department of Defense, 2005. Web. 2015.

<sup>154</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2005*. Department of Defense, 2006. Web. 2015.

final disposition were categorized as such: 44 through foreign authority action, 163 in which the offender was un-identified, and 641 were unsubstantiated or had insufficient evidence.<sup>155</sup>

### 2006 Statistics

2,947 total reports occurred in 2006. MCIOs investigated 1,402 from Calendar Year 2006, 609 from Calendar Year 2005, and 28 from Calendar Year 2004. With the backlog of investigations from previous years, 446 cases were pending disposition as of December 31, 2006.<sup>156</sup>

### 2007 Statistics

In Fiscal Year 2007, Unrestricted Reports amounted to 2,085 and Restricted Reports reached 603, totaling to 2,688. MCIOs investigated 1,955 cases that were reported prior to Fiscal Year 2007. 759 cases from previous years were still awaiting investigations, which were then scheduled to occur in Fiscal Year 2008. Of the investigations completed pertaining to previous years' reports, "1,172 subjects were referred for commander action," and "commanders took action on 600."<sup>157</sup> Of those 600, 181 were subject to court-martial, 201 to nonjudicial punishments, and 218 to administrative actions and discharges. According to the Fiscal Year 2009 report estimated legal costs for 2007 exceeded \$7 million.<sup>158</sup> The individuals not subject to commander action were deemed as such: 111 civilians or foreign nationals, 132 unidentified

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<sup>155</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2005*. Department of Defense, 2006. Web. 2015.

<sup>156</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Calendar Year 2006*. Department of Defense, 2007. Web. 2015.

<sup>157</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2007 Report on Sexual Assault in the Military*. Department of Defense, 2008. Web. 2015.

<sup>158</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2009 Report on Sexual Assault in the Military*. Department of Defense, 2010. Web. 2015.

offenders, 797 cases involving unsubstantiated/ insufficient evidence, victim death, report recant, or death of offender.<sup>159</sup>

In the report, it is noted that according to the 12 months of data captured in the Calendar Year 2006 report, the 2007 statistics show a “small net decrease in both the number of Unrestricted (192 fewer reports) and Restricted Reports (52 fewer reports).”<sup>160</sup> However, the report also noted that these findings were “likely insignificant in numerical terms...[but] could be the beginning of a downward trend in the number of reports.”<sup>161</sup> This statement also comes after many caveats regarding the inability to properly compare the data provided in various reports, due to the variables discussed.

2007 also marked the first year that gender of victims and subjects/offenders was released. The data included in Appendix B indicates that, of the reports investigated in Fiscal Year 2007, 143 were male on male (105 being service member on service member) and 9 were female on female (6 of which were service member on service member). As will later be shown, these numbers stay relatively consistent, despite increases in overall data.<sup>162</sup>

### 2008 Statistics

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<sup>159</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2007 Report on Sexual Assault in the Military*. Department of Defense, 2008. Web. 2015.

<sup>160</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2007 Report on Sexual Assault in the Military*. Department of Defense, 2008. Web. 2015.

<sup>161</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2007 Report on Sexual Assault in the Military*. Department of Defense, 2008. Web. 2015.

<sup>162</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2007 Report on Sexual Assault in the Military*. Department of Defense, 2008. Web. 2015.

Fiscal Year 2008 had 2,265 Unrestricted Reports and 643 Restricted Reports, totaling to 2,908 reports. 1,158 of these reports indicate that the alleged offense(s) was/were enacted by a service member on a fellow service member.<sup>163</sup> This data can be seen in Appendix C.

The data for punitive measures taken in completed cases is as follows: 317 offenders were subject to courts-martial, 247 received nonjudicial punishments, and 268 were subject to administrative action or discharge. 1,074 alleged offenders in completed investigations did not receive punitive action from respective commanders due to unsubstantiated or insufficient evidence, retraction of the report, inability to identify the offender, or lack of jurisdiction for the offender.<sup>164</sup>

In comparison to Fiscal Year 2007, court-martial action increased 8%. This still only results in 38% of cases going to court-martial action. However, this trend is present in civilian society as well; many reports of forcible rape do not result in the arrest of the perpetrator. Included in the Fiscal Year 2008 report was documentation from the *Sourcebook of Criminal Justice Statistics Online* depicting this fact. Stated reasons for this are the complexity of sexual assault cases and investigations, as well as common rape myths tainting the judgment of jurors.<sup>165</sup>

Gender data for Unrestricted Reports in Fiscal Year 2008 shows that out of the 2,265 reports, 123 reported sexual assaults were male on male, 96 of which were service member on

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<sup>163</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2008 Report on Sexual Assault in the Military*. Department of Defense, 2009. Web. 2015.

<sup>164</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2008 Report on Sexual Assault in the Military*. Department of Defense, 2009. Web. 2015.

<sup>165</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2008 Report on Sexual Assault in the Military*. Department of Defense, 2009. Web. 2015.

service member. 9 were female on female, 7 of which were service member on service member. In comparison to the 2007 Fiscal Year Report, these numbers were relatively consistent, in fact even decreased slightly, despite the overall increase in total numbers of reports.<sup>166</sup>

### 2009 Statistics

In a comparison of Fiscal Year 2009 to Fiscal Year 2008, there was an 11% increase in overall reports of sexual assault. The ratio of reports for Fiscal Year 2009 is 2.0 reports per thousand service members, an increase from the Fiscal Year 2008 ratio of 1.8:1,000 and Fiscal Year 2007 ratio of 1.6:1,000.<sup>167</sup>

There were a total of 3,230 reports for Fiscal Year 2009, 2,516 Unrestricted Reports and 714 Restricted Reports. 1,338 of the Unrestricted Reports involve offenses that occurred against a service member by a fellow service member. As depicted in Appendix D, in comparison between the three fiscal years, there has been a steady increase in reports in all three categories.<sup>168</sup>

Pertaining to completed investigations, 2,284 reached disposition by the end of Fiscal Year 2009. 715 of these investigations regarded reports made from previous years. 987 cases were still awaiting investigation completion by September 30, 2009. In the breakdown of punitive action, 983 offenders were subject to command action:

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<sup>166</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2008 Report on Sexual Assault in the Military*. Department of Defense, 2009. Web. 2015.

<sup>167</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2009 Report on Sexual Assault in the Military*. Department of Defense, 2010. Web. 2015.

<sup>168</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2009 Report on Sexual Assault in the Military*. Department of Defense, 2010. Web. 2015.

- 410 Court-Martial
- 351 Nonjudicial Punishments
- 53 Administrative Discharges
- 169 Adverse Administrative Actions<sup>169</sup>

997 offenders were not subject to command action due to death of the offender, insufficient evidence, statute of limitations expiration, etc. 94 of these offenders did not receive punishment because the commander declined action per Rules for Court Martial, Section 306, Paragraph (c)(1), which gives them such authority. Accordingly, this “does not bar later disposition of the offenses” under rules for administrative action, nonjudicial punishment, disposition of charges, and forwarding for disposition. [http://www.loc.gov/rr/frd/Military\\_Law/pdf/MCM-2012.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf)

89% of the victims in Unrestricted Reports were female and 11% were male. 87% of the subjects/offenders in Unrestricted Reports were male, 2% were female, and 11% were unknown. In Restricted Reports, 87% of the victims were female, 11% were male, and data was not available in 2% of reports. The gender of offenders for Restricted Reports was not included. Gender data also revealed that 173 reports involved male on male sexual assault, 140 of which were service member on service member. 17 sexual assault reports indicated female on female sexual assault, 14 of which were service member on service member. These numbers indicate a

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<sup>169</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2009 Report on Sexual Assault in the Military*. Department of Defense, 2010. Web. 2015.

jump in the total reports of same-sex assault. However, in comparison with the overall trend in reports, the increase was only 8% rather than the 11% seen in total reports.<sup>170</sup>

### 2010 Statistics

The total number of reports of sexual assault for Fiscal Year 2010 was 3,158. Unrestricted Reports reached 2,410, while there were 748 Restricted Reports. Statistically, in comparison to the previous fiscal year, total reports of sexual assault dropped 2%. Unrestricted Reports dropped 4% from the 2009 Report, and initial Restricted Reports (not factoring those that were converted to Unrestricted Reports by the victim) increased 5%.<sup>171</sup> The comparison of 2010 reporting rates to the previous fiscal year reports can be seen in Appendix E.

There were 1,614 investigations completed in Fiscal Year 2010, with 796 of these investigations originating from reports from previous fiscal years. By September 30, 2010, 841 reports were still pending investigation. 910 subjects were not subject to command action. Of the 1,025 subject who received punitive action, the breakdown is as follows:

- 529 Court-Martial Preferred
- 256 Nonjudicial Punishments
- 109 Administrative Discharges
- 131 Other Adverse Administrative Actions<sup>172</sup>

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<sup>170</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

<sup>171</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

<sup>172</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

In a comparison of data from the previous fiscal years, individuals subjected to court-martial have increased over the years. The percent of subject referred to this particular action increased from 30% to 38% to 42% and finally reached 52% in Fiscal Year 2010.

According to a breakdown of gender, female victims accounted for 90% of Unrestricted Reports and male victims accounted for 10%. 89% of the subjects in Unrestricted Reports were male, 2% were female, and 9% were unknown. In Restricted Reports, female victims represented 84%, male victims represented 13%, and 3% did not specify a gender. Male on male reports represented 150 cases, 120 of which were service member on service member. Female on female cases represented 27 total reports, 24 of which were service member on service member.<sup>173</sup>

The numbers for same-sex sexual assaults varied in comparison to other years during the 2010 Fiscal Year Report. The incidence of male on male cases decreased from the previous year, declining to levels seen in years 2008 and 2007. However, female on female cases increased marginally, though staying at a level comparable to the 2009 Fiscal Year.<sup>174</sup>

### 2011 Statistics

Total reports reached 3,192 for the 2011 Fiscal Year. 2,439 of these were Unrestricted Reports, and 753 were Restricted Reports.<sup>175</sup> There were 2,449 investigations completed by the

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<sup>173</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

<sup>174</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2010 Report on Sexual Assault in the Military*. Department of Defense, 2011. Web. 2015.

<sup>175</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2011 Report on Sexual Assault in the Military*. Department of Defense, 2012. Web. 2015.

end of the fiscal year, 939 of which were from reports from previous years, with 929 cases still pending. Of the completed investigations, 2,353 subjects received a completed disposition. Out of these cases, 349 were unfounded, and 486 were outside the scope of authority. From the pool of subjects that were left, 989 subjects received commander action. The breakdown for punitive action is as follows:

- 489 Court-martial preferred
- 187 Nonjudicial Punishments
- 48 Administrative Discharges
- 198 Commander Action for Other Criminal Offenses
- 67 Adverse Administrative Actions<sup>176</sup>

In comparison to previous fiscal years (as seen in Appendix F), Fiscal Year 2011 did not have the highest number of reports, but it did increase from Fiscal Year 2010. This makes it the second highest year for reports of sexual assault.

Per the gender breakdown of Unrestricted Reports for Fiscal Year 2011 88% of victims were female and 12% were male. In the Unrestricted Reports 89% of subjects were male, 2% were female and 9% were unidentified. In Restricted Reports 83% of victims were female, 14% were male, and 3% did not specify gender. Gender of the subjects of Restricted Reports was not available. 95 of the reports for the fiscal year were male on male, 87 of which were service

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<sup>176</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2011 Report on Sexual Assault in the Military*. Department of Defense, 2012. Web. 2015.

member on service member. 18 reports were female on female, all of which were service member on service member.<sup>177</sup>

These numbers of same-sex sexual assault indicate a decrease in both male on male and female on female cases. The male on male case reports dropped significantly and female on female cases declined to below 2009 Fiscal Year levels. This being the year that the DADT Repeal Act went into effect is a telling sign that the inclusion of openly homosexual individuals in the military does not adversely affect sexual assault reports.

#### 2012 Statistics

There were 3,374 total reports of sexual assault in the 2012 fiscal year. Compared to Fiscal Year 2011, this is a 6% increase in total reports. Unrestricted Reports totaled 2,558, and Restricted Reports reached 816.<sup>178</sup> The comparison between the 2012 Fiscal Year reporting levels and previous fiscal years can be seen in Appendix G.

The number of completed investigations, including those that involved reports from previous fiscal years, was 2,610. Out of these completed investigations, 2,661 subjects/offenders received a disposition. 1,124 subjects qualified for commander action. The punitive measures for sexual assault charges and other misconduct charges were as follows:

#### Sexual Assault:

#### Other Misconduct Charges:

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<sup>177</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2011 Report on Sexual Assault in the Military*. Department of Defense, 2012. Web. 2015.

<sup>178</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2012 Report on Sexual Assault in the Military: Volume I*. Department of Defense, 2013. Web. 2015.

- |                                    |   |
|------------------------------------|---|
| • 594 Court-martial                | • 37 Court-Martial                                |
| • 158 Non-judicial punishment      | • 122 Non-judicial punishment                     |
| • 63 Administrative Discharges     | • 26 Administrative Discharges                    |
| • 65 Adverse Administrative Action | • 59 Adverse Administrative Action <sup>179</sup> |

The gender breakdown in Unrestricted Reports determined that 88% of victims were female and 12% were male. In the breakdown of Restricted Reports, 90% were male, 2% were female, and 8% were Unidentified. 94 of the total Unrestricted Reports involved allegations of male on male sexual assault, 85 of which were service member on service member. 15 of the Unrestricted Reports were female on female, 11 of which were service member on service member. This fiscal year marked an all-time low regarding reports of male on male cases, and reflected the relatively stable numbers of female on female reported cases.<sup>180</sup>

### 2013 Statistics

Total reports submitted for the 2013 Fiscal Year Report were 5,061. This marked a 50% increase in total reports from the previous fiscal year. 3,768 of these were Unrestricted and 1,293 were Restricted.<sup>181</sup> The comparison of reporting levels can be seen in Appendix H. 3,337

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<sup>179</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2012 Report on Sexual Assault in the Military: Volume I*. Department of Defense, 2013. Web. 2015.

<sup>180</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2012 Report on Sexual Assault in the Military: Volume I*. Department of Defense, 2013. Web. 2015.

<sup>181</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2013 Report on Sexual Assault in the Military*. Department of Defense, 2014. Web. 2015.

investigations were completed in the fiscal year, with 3,234 subjects reaching disposition and 2,149 of them available for command action. The punitive action taken was as follows:

Sexual Assault:

- 838 Court-martial
- 210 Non-judicial punishment
- 58 Administrative Discharges
- 83 Adverse Administrative Action

Other Misconduct Charges:

- 34 Court-Martial
- 215 Non-judicial punishment
- 43 Administrative Discharges
- 90 Adverse Administrative Action<sup>182</sup>

The gender breakdown of victims in Unrestricted Reports was 86% female and 14% male. For subjects it was 89% male, 3% female, and 8% unidentified. In Restricted Reports, the gender makeup for victims was 79% female, 15% male, 6% unknown. 153 reports indicated male on male sexual assault, 141 of which were service member on service member. 23 were female on female, 20 of which were service member on service member.<sup>183</sup> Again, we see that the levels were comparable to those in the 2009 Fiscal Year Report, despite the ever increasing total numbers of reports. Though these numbers reflected an increase from the previous fiscal year, the numbers did not reach peak levels. In fact, in comparison to the drastic increase in overall reports, the consistency of the same-sex sexual assault reports is somewhat surprising.

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<sup>182</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2013 Report on Sexual Assault in the Military*. Department of Defense, 2014. Web. 2015.

<sup>183</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *Fiscal Year 2013 Report on Sexual Assault in the Military*. Department of Defense, 2014. Web. 2015.

## **SAPR REPORTS REVIEW**

As seen in the Reports, there has typically been an increase in sexual assault reports over the years that SAPRO implemented the program. The major outlier is the 2013 Fiscal Year Report, in which there was a 50% increase in total reports from the previous year. Despite this substantial increase in overall reports, the cases involving same-sex sexual assault remained relatively standard. Though one would expect that the reports of same-sex sexual assault would mirror the trend of total reports, they have not.

Two years after gender data for same-sex cases were included, in 2009, there was the largest jump in number of same-sex sexual assaults. However, this was prior to the DADT Repeal Act. Additionally, in the 2013 Fiscal Year Report, even in relation to the overall increase in reports, the same-sex reports were around the same level as seen in 2009. This indicates that the DADT Repeal Act did not cause an increase in same-sex sexual assault reports or incidences.

In fact, the reports of same-sex sexual assault appear to not be affected by obvious means, and their variation displays relatively minor fluctuations. Reasoning for the increase same-sex sexual assault in the 2009 Fiscal Year, may simply be attributed to confidence in SAPRO programming, however there is no conclusive indication or coinciding major policy shift which explains this jump.

## WORKPLACE AND GENDER RELATIONS SURVEYS

The Workplace and Gender Relations Surveys of Active Duty Members (WGRA) were designed to provide a view of the effectiveness of SAPR Programming, as well as provide information regarding actual levels of sexual assault in the services (not simply cases that are reported). Included in the survey were inquiries, such as why an individual would not report a sexual assault, perceived effectiveness of policies, and actual occurrence of sexual assault. Margins of error were taken into account. The surveys were conducted in 2006, 2008, 2010, and 2012; though the 2010 and 2012 surveys had slight variations.

In 2010, 26,505 individuals responded with completed surveys.<sup>184</sup> The percent of women across all military services who stated they had experienced unwanted sexual contact was 32%.<sup>185</sup> This signified that of the women who experience unwanted sexual contact, 71% did not report the incident to the DoD or civilian authorities. The percentage of men who did not report unwanted sexual contact was even higher, reaching 85%. Included in Appendix I is a table indicating the reasons why individuals from the 2010 survey did not report the incident. It indicates that reasons include fear of being labeled a “troublemaker,” fear of being found in violation for other infractions, and fear of retaliation.<sup>186</sup> However, for the most part, the percentage of individuals in each category decreased from 2006 to 2010. This supports the

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<sup>184</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *2010 Workplace and Gender Relations Survey of Active Duty Members*. Department of Defense, 15 Mar. 2011. Web. 2015.

<sup>185</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *2010 Workplace and Gender Relations Survey of Active Duty Members*. Department of Defense, 15 Mar. 2011. Web. 2015.

<sup>186</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *2010 Workplace and Gender Relations Survey of Active Duty Members*. Department of Defense, 15 Mar. 2011. Web. 2015.

ideology that individuals were becoming more confident in the programs and policies in place, and more likely to report cases of sexual assault.

In comparison to the number of reports increasing, as seen in the trends from the SAPRO Reports, the actual number of sexual assaults was indicated to have declined from 2006 to 2010. This is in direct opposition to the trends in reporting. These trends can be seen in the image included in Appendix J.

However, in 2012, the reports of unwanted sexual contact increased from 2010. It should be noted that the number of occurrences reached in 2012 still did not surpass the number of occurrences from 2006. Additionally, in the 2012 survey, the percentage of women who experienced unwanted sexual contact and did not report is decreased to 61%.<sup>187</sup> Although still indicating the drastic underreporting of cases of sexual assault, it depicts the lessening of the gap between reports and actual occurrences. Though these changes are not statistically significant as of yet, they do indicate a promising trend. The results further show that even though there may be an increase in reporting, it does not directly correlate to the actual incidences of sexual assault.

Regarding satisfaction of individuals with the current policies, again, the results have all been deemed statistically insignificant. Developments in satisfaction with SAPRO cannot be determined based on the data.

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<sup>187</sup> United States of America. United States Department of Defense. Sexual Assault and Prevention Response. *2012 Workplace and Gender Relations Survey of Active Duty Members*. Department of Defense, 15 Mar. 2013. Web. 2015.

## CONCLUSION

It cannot be denied that policy enactments have an effect on reports of sexual assault in general. As the SAPRO program gained credibility, fine-tuned its strategies, and bolstered its policies, confidence and willingness to report sexual assaults increased. It is also clear that policies are intricately connected to the service of LGBT individuals in the military: from their inability to serve in the armed forces, subsequent allowance to serve, and later ability to serve openly. This increase in reports understandably led to certain fluctuations in same-sex sexual assault reports as well. However, this does not indicate that the allowance of openly LGBT individuals in the military caused this increase. Furthermore, it does not denote that the actual occurrence of the crimes of sexual assault increased; it simply indicates that individuals were more forthcoming.

As seen in the WGRA reports, actual occurrences of sexual assault have not exceeded the levels indicated in 2006. Though, reporting levels *are* higher than they were in 2006. The statistics likely represent, as the DoD continuously stated in the reports, a heightened confidence in reporting same-sex sexual assaults and without fear of repercussions. The results shown in the WGRA have not shown any statistically significant changes in attitudes directed towards SAPR Programming, but the increase in reports shows that more individuals are accessing the resources available to them. This is a promising trend because the more individuals that access SAPR programming and resources, the greater the pool of individuals from which to solicit feedback, and the greater the likelihood that SAPRO can fine-tune its policies to fit the needs of individuals.

It is unfortunate for the LGBT community that arguments have been made which indicate allowing openly homosexual individuals to serve caused the increase in sexual assault reports. This opinion seems to be due to the coinciding timing of the repeal of DADT and improvements and faith in SAPR programming. However, as seen through an examination of the DADT Repeal and SAPR reports, the effects of the two are unrelated. The increases in reports of sexual assault do not correspond to the enactment of the DADT Repeal. The fluctuations in actual numbers of sexual assaults are much lower than they were in 2006, which preceded the repeal of DADT.

Given the impact policies have on the LGBT community in the military, future considerations for changes should reflect this. Possibilities include looking further into the rights of transsexuals to serve in the military, as well as the treatment of openly gay service members. Since allowing openly homosexual service members is relatively new, it is important that policies are designed to accommodate these special circumstances. Policies intended to assist racial and gender minorities in the armed forces should be expanded to include the LGBT community.

Reports could possibly be designed to include statistics about the number of individuals involved in sexual assault who identify as LGBT. This would enable a more transparent distinction between same-sex assaults and ones that are actually derived from the LGBT community. Such a distinction is imperative for accurate interpretation of information; a community should not be blamed for the actions of individuals.

## **APPENDIX A**

<b>B. YTD: SYNOPSIS OF THE COMPLETED INVESTIGATIONS:</b>	<b>CY04</b>
<b>TOTAL: # of completed investigations</b>	<b>1232</b>
<b>TOTAL: # investigations with more than one victim, subject, or both</b>	<b>196</b>
<b>TOTAL: # of SUBJECTS in the completed investigations:</b>	<b>1362</b>
# of your service member subjects	971
# of other Services service member subjects	40
# of non-service member subjects	73
# of unidentified subjects	278
<b>TOTAL: # of VICTIMS in the completed investigations:</b>	<b>1297</b>
# of service member victims	923
# of non-service member victims	66
# of service member victims from other Services	308
<b>C. YTD: FINAL DISPOSITIONS ACTIONS FOR THE SUBJECT:</b>	<b>CY04</b>
<b>TOTAL: # Final Dispositions for SUBJECTS in the following categories:</b>	<b>1362</b>
# of unidentified subjects	278
# No action: unsubstantiated/unfounded, insufficient evidence, victim recanted, death of offender	351
# Transfer to another Service for Final Disposition	23
# Transfer from another Service for Final Disposition	
# Civilian/foreign authority	51
# Pending completion as of 31-DEC	317
# completed as of 31-DEC	342
<b>TOTAL: Commander Disposition Action for Sexual Assault and Related Offenses:</b>	<b>342</b>
# Court-martial	113
# Nonjudicial Punishment	132
# Discharge in lieu of court-martial	28
# Discharge in lieu of disciplinary action ( <i>Other than Court Martial</i> )	14
# Other Administrative/Disciplinary action	55

## **APPENDIX B**

DoD FY07 - UNRESTRICTED REPORTS OF SEXUAL ASSAULT BY GENDER

G. REPORTED SEXUAL ASSAULTS INVOLVING SERVICE MEMBERS (BY or AGAINST Service Members) IN THE BELOW CATEGORIES FOR FY07 INVESTIGATIONS	Male on Female	Male on Male	Female on Male	Female on Female	Unknown on Male	Unknown on Female	FY07 Totals
	1742	143	6	9	20	165	2,085
# Service Member on Service Member	1066	105	6	6	1	0	1,184
# Service Member on Non-Service Member	559	13	0	2	0	0	574
# Non-Service Member on Service Member	55	12	0	1	0	0	68
# Unidentified subject on Service Member	62	13	0	0	19	165	259
H. FINAL DISPOSITIONS FOR SUBJECTS (FY07 reports completed in FY07)	Male on Female	Male on Male	Female on Male	Female on Female	Unknown on Male	Unknown on Female	FY07 Totals
# Final dispositions for SUBJECTS (Completed FY07 reports in the following categories)	1247	90	9	4	15	104	1,469
# Unidentified subjects	41	13	0	0	5	41	100
# No action (Unsubstantiated/unfounded, insufficient evidence, victim recanted, death)	439	19	4	1	10	59	532
# Under civilian/foreign authority	64	6	0	0	0	0	70
# Pending as of 30-SEP-07	390	22	1	1	0	4	418
# Completed as of 30-SEP-07	313	30	4	2	0	0	349
# Final dispositions (FY07 subjects)	313	30	4	2	0	0	349
# Courts-martial	87	14	1	1	0	0	103
# Nonjudicial punishments	111	6	3	0	0	0	120
# Discharges in lieu of courts-martial	19	2	0	0	0	0	21
# Discharges in lieu of disciplinary actions	13	2	0	0	0	0	15
# Other administrative actions	83	6	0	1	0	0	90

## **APPENDIX C**

**Table 3: Completed and Pending Investigations Resulting  
from Sexual Assault Reports Made During and Prior to FY08**

<b>Investigations Completed in FY08 Resulting from Reports Made During and Prior to FY08</b>	<b>Reports Made Prior to FY08</b>	<b>Reports Made During FY08</b>	<b>Total FY08</b>
<i>Total Investigations of Unrestricted Reports of Sexual Assault</i>	<i>869</i>	<i>2,265</i>	<i>3,134</i>
# Investigations <b>Completed</b> as of 30-SEP-08 (involving one or more subject)	<b>853</b>	<b>1,536</b>	<b>2,389</b>
# Investigations Still <b>Pending</b> as of 30-SEP-08	16	729	745

## **APPENDIX D**

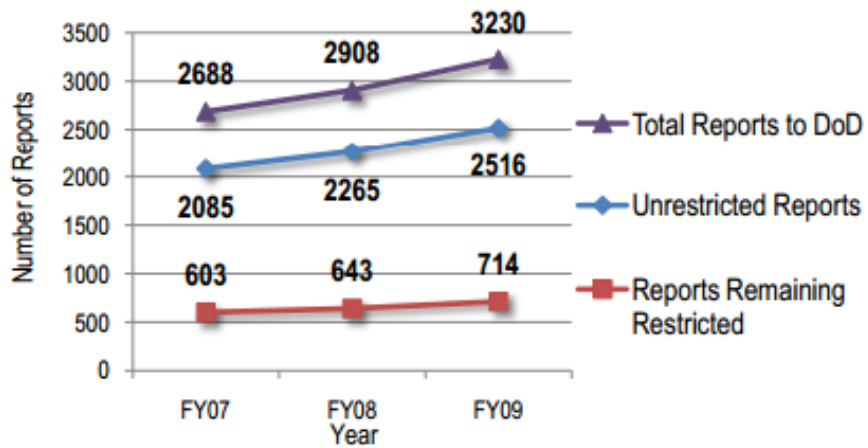


Exhibit 1: Total reports of sexual assault to the Department, Unrestricted Reports, and remaining Restricted Reports, FY07–09.

## **APPENDIX E**

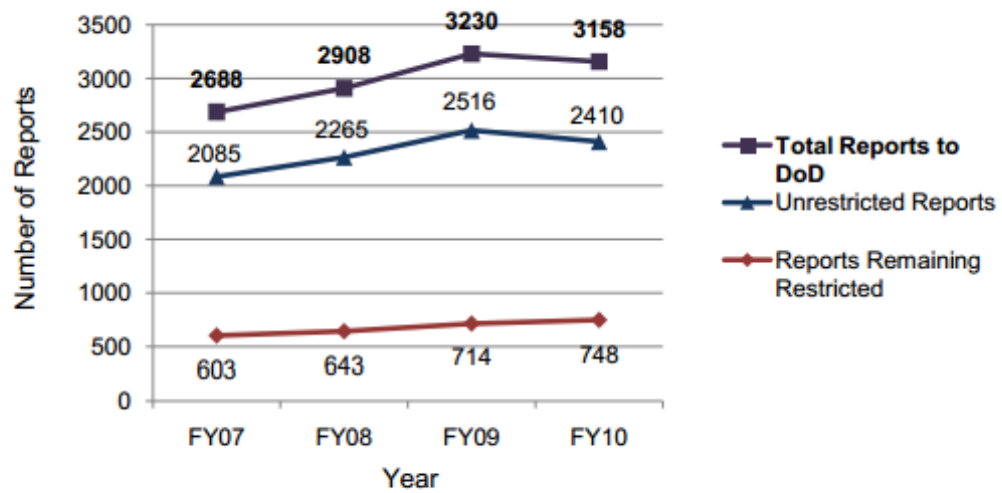


Exhibit 1: Total Reports of Sexual Assault Made to the DoD—  
Unrestricted Reports and Restricted Reports, FY07–FY10.

## **APPENDIX F**

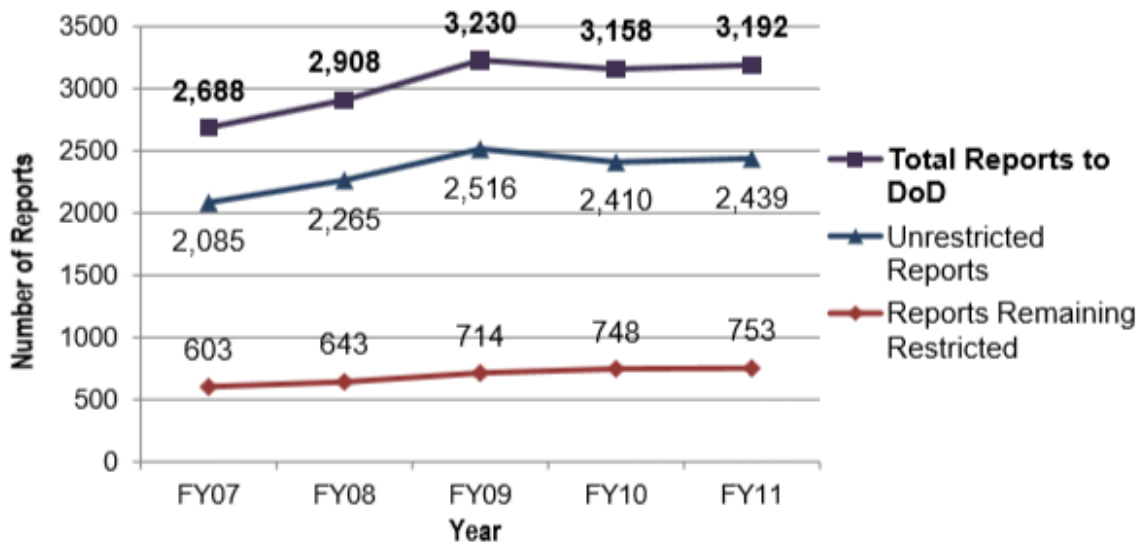


Exhibit 2: Total Reports of Sexual Assault Made to the Department — Unrestricted Reports and Restricted Reports, FY07–FY11.

## **APPENDIX G**

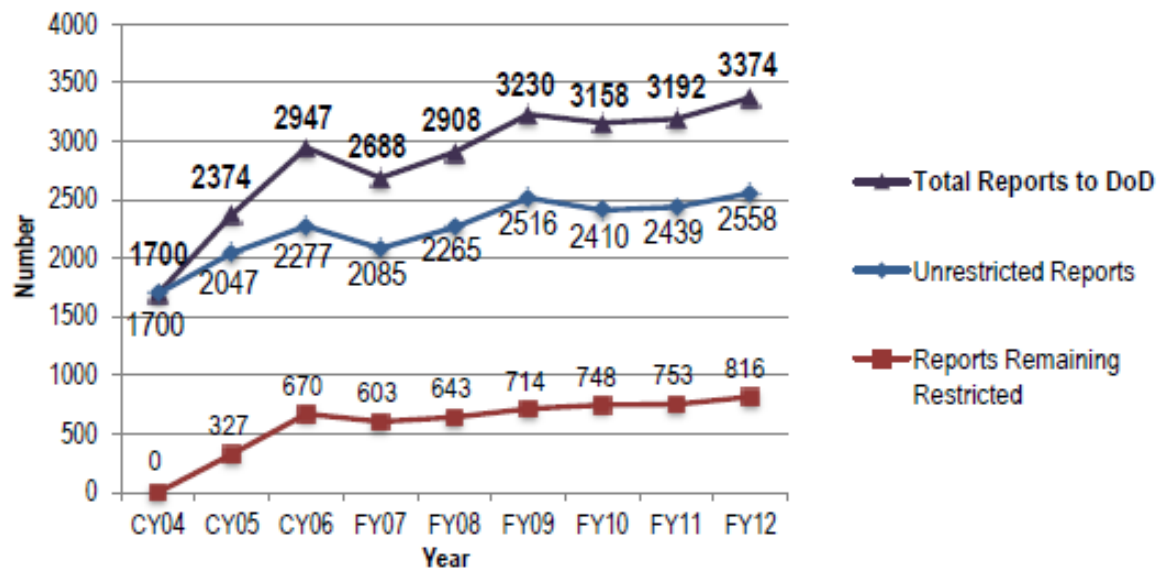
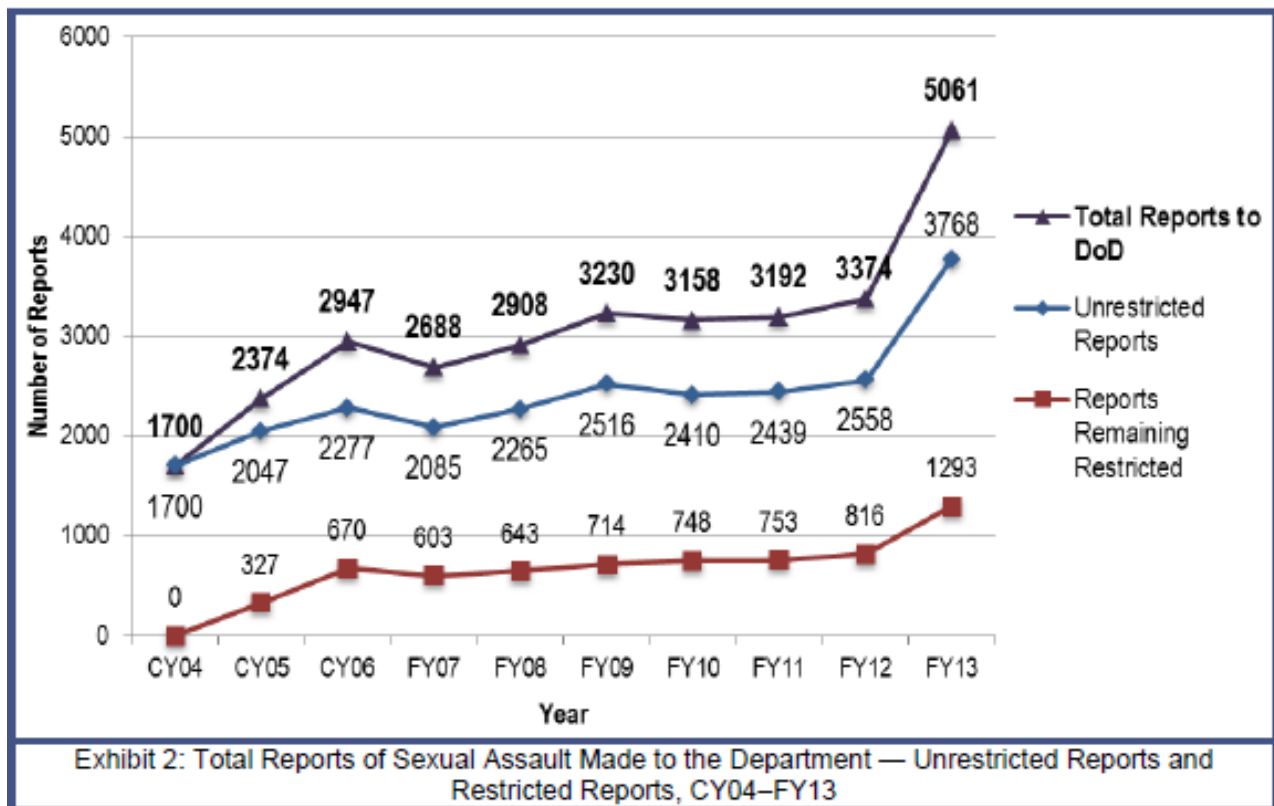


Exhibit 2: Total Reports of Sexual Assault Made to the Department — Unrestricted Reports and Restricted Reports, CY04–FY12

## **APPENDIX H**



## **APPENDIX I**

**Table 21.***Percent of Service Members Who Indicated Reasons for Not Reporting, by Gender and Year*

Reasons for not reporting the situation	Percent of Service Members Who Experienced Unwanted Sexual Contact		
	Year	Women	Men
You thought it was not important enough to report	2010	46	46*
	2006	47	59
You did not know how to report	2010	15	8
	2006	18	26*
You felt uncomfortable making a report	2010	65	32
	2006	58	51
You did not think anything would be done	2010	47	31*
	2006	53	44
You heard about negative experiences other victims went through who reported their situation	2010	47	20
	2006	NA	NA
You thought you would not be believed	2010	41	28*
	2006	41	35
You thought reporting would take too much time and effort	2010	36	28
	2006	36	46
You were afraid of retaliation/reprisals from the person(s) who did it or from their friends	2010	54	27
	2006	50	38
You thought your performance evaluation or chance for promotion would suffer	2010	40	20
	2006	31	26
You thought you would be labeled a troublemaker	2010	52	24
	2006	56	41
You did not want anyone to know	2010	67	43*
	2006	56	47
You did not think your report would be kept confidential	2010	60	36*
	2006	NA	NA
You feared you or others would be punished for infractions/violates, such as underage drinking or fraternization	2010	24	14
	2006	17	19*
Other	2010	12	16*
	2006	11	12
Margins of Error		±5-9	±10-15

Note. WGRA 2010 Question 64. NA indicates the question was not asked on the survey.

\*Caution should be taken in interpretation of this number because of a large margin of error.

## APPENDIX J

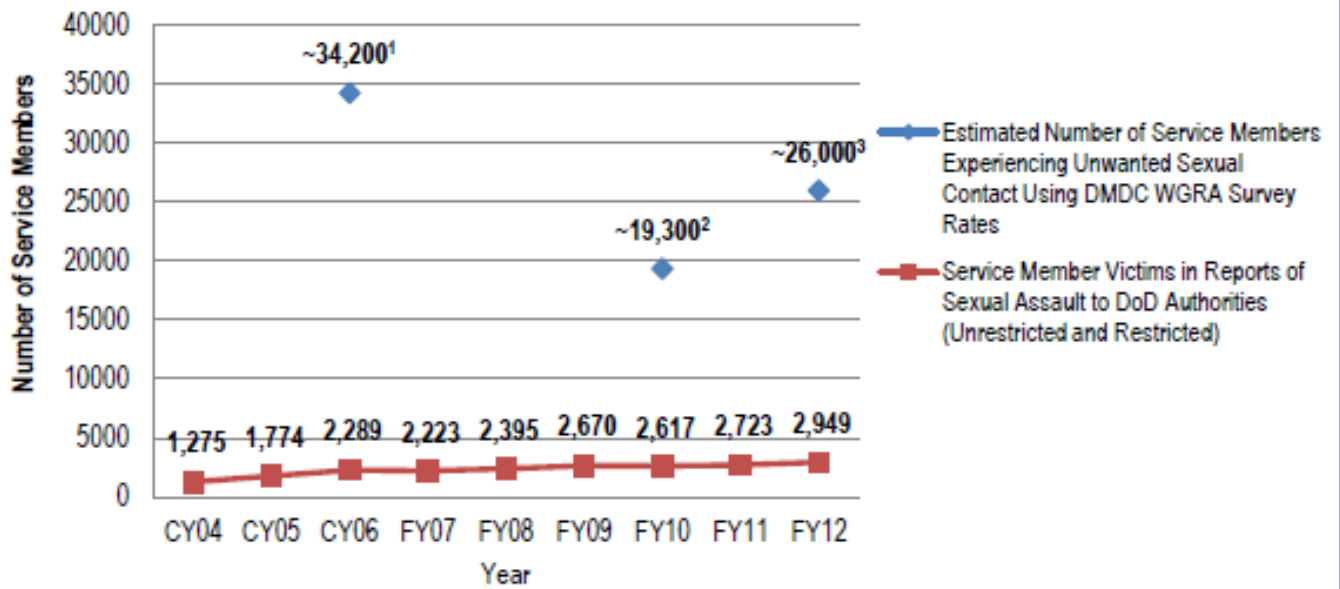


Figure 9: Service Member Victims in Reports of Sexual Assault to DoD vs. Estimates of Service Members Experiencing Unwanted Sexual Contact, CY04–FY12.

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