

**TO THE HONORABLE MEMBERS OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
ORGANIZATION OF AMERICAN STATES:**

**PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF CARLA
BUTCHER, ERICA DORN, CHRISTIAN EVERAGE, MARIEL MARMOL, NICOLE
MCCOY, LAMANDA WALKER, AND ELLE WOODS BY THE UNITED STATES OF
AMERICA AND THE UNITED STATES DEPARTMENT OF DEFENSE, WITH
REQUEST FOR AN INVESTIGATION AND HEARING ON THE MERITS**

Submitted by attorneys appearing as counsel for the petitioners under the provisions of Article 23 of the Commission's Regulations, on behalf of the petitioners, United States citizens:

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MILITARY TERMINOLOGY GLOSSARY¹

Chain of Command	The succession of commanding officers from a superior to a subordinate through which command is exercised (Department of Defense Dictionary of Military Terms)
Command	(1) The authority that a commander in the Armed Forces lawfully exercises over subordinates by virtue of rank or assignment; (2) an order given by a commander; that is, the will of the commander expressed for the purpose of bringing about a particular action; or (3) a unit (or units), an organization, or an area under the command of one individual (Department of Defense Dictionary of Military Terms)
Commander	A commissioned officer or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a Department of Defense organization or prescribed territorial area (Department of Defense Instruction Number 5505.3, March 24, 2011)
Convening Authority	Unless otherwise limited, general or special courts-martial may be convened by persons occupying positions designated in Article 22(a) or Article 23(a) of the UCMJ, respectively, and by any commander designated by the Secretary concerned or empowered by the President. The power to convene courts-martial may not be delegated. The authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions. (Rule for Courts-Martial 504(b) and discussion)
Courts-Martial	Military court. There are three levels: Summary (minor offenses), Special (misdemeanors), and General (serious offenses)
Judge Advocate (JA)	A military attorney who is an officer of the Judge Advocate General's Corps of the Army, Air Force, Marine Corps, Navy

¹ Where noted, definitions are taken from Department of Defense (DoD) Dictionary of Military Terms (as amended through Aug. 15, 2014), available at http://www.dtic.mil/doctrine/dod_dictionary/, and Rules for Courts-Martial.

and the United States Coast Guard who is designated as a judge advocate (Department of Defense Dictionary of Military Terms)

Manual for Courts-Martial (MCM)

A book containing the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures

Members Panel

Military equivalent of a jury

Nonjudicial Punishment

A limited number of punishments available to commanders to summarily impose for “minor offenses”

Preferral

Comparable to a civilian indictment, preferral is the formal act of signing and swearing allegations of offenses against a person who is subject to the Uniform Code of Military Justice. Preferred charges and specifications must be signed under oath before a commissioned officer of the Armed Forces authorized to administer oaths. (Rule for Courts-Martial 307)

Referral

The order of a convening authority that charges against an accused will be tried by a specified court-martial. Referral requires three elements: (1) a convening authority who is authorities to convene the court-martial and not disqualified, (2) preferred charges which have been received by the convening authority for disposition, and (3) a court-martial convened by that convening authority or a predecessor. (Rule for Court-Martial 601(a) and discussion)

Specification

A plain, concise, and definite statement of the essential facts of the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. (Rule for Courts-Martial 307(c)(3))

Staff Judge Advocate (SJA)

A judge advocate so designated in the Army, Air Force, or Marine Corps, and the principal legal advisor of a Navy Coast Guard, or joint force command who is a judge advocate (Department of Defense Dictionary of Military Terms)

Uniform Code of Military Justice (UCMJ)

The substantive laws governing service members

I. INTRODUCTION

1. Petitioners Carla Butcher, Erica Dorn, Christian Everage, Mariel Marmol, Nicole McCoy, Lamanda Walker, and Elle Woods are United States citizens and former members of the United States Navy and the United States Marine Corps. While serving in the military, they were sexually assaulted, harassed, or raped by their military colleagues. When the petitioners reported being assaulted they were treated dismissively by commanders² and, in some cases, were forced to endure severe retaliation and harassment. In most instances, the petitioners' claims were not investigated or, when investigated, the perpetrators received either no or minimal punishment. In the majority of instances, reporting the sexual violence led to the termination of petitioners' military careers. The petitioners were also unable to take the actions that civilians may take to protect themselves from sexual predators, such as calling the police, going to a shelter, changing housing or jobs, or relocating.

2. More specifically, after reporting rape, sexual assault, or sexual harassment, five of the seven petitioners were either forced out of the military or downgraded in rank or duty. Petitioner Woods was forced to leave the Marine Corps after she reported her rape and became the subject of investigation and then prosecution for the military offense of "fraternization"; Petitioner Walker was coerced into pleading guilty to a crime she did not commit in order to be discharged from the Navy to escape her rapist; Petitioner Dorn left the Navy after she was re-assigned to a less prestigious position following her report of sexual harassment; Petitioner Marmol also left the Navy after she was re-assigned to a less prestigious position during the Naval Criminal Investigative Service investigation of her rape; and Petitioner Everage was discharged from the Navy after she received a poor evaluation from her commanders as retaliation for reporting sexual assault.

² A commander is an officer in the service member's chain of command, with authority over that service member.

3. In contrast to the victims, the perpetrators of sexual violence escaped serious punishment. The majority of the perpetrators were either not prosecuted or not punished commensurate with the seriousness of their offenses. For example, Petitioner McCoy's assailant did not face any punishment after the commander halted the criminal investigation; Petitioner Woods' rapist did not face any criminal charges at all; Petitioner Walker's rapist did not face any charges and was allowed to graduate from his program; Petitioner Marmol's superior was never charged or punished for raping her; Petitioner Everage's assailant was removed from the ship but never formally charged with sexual assault; and Petitioner Butcher's rapist was acquitted because key evidence was lost before trial.

4. While all petitioners served in either the United States Navy or Marine Corps, their experiences reflect the United States' systematic failure to prevent and respond to sexual violence in all branches of the military.³ The United States Congress, the governmental authority vested with the power of creating law for the military, has repeatedly attempted to address rampant sexual violence in the military over the past twenty years.⁴ Its laws and policies, however, have not gone far enough. The United States Department of Defense, which directs the United States military's operations, has also taken important steps to address military sexual violence,⁵ but it too has failed to implement sufficiently effective measures to meaningfully prevent and respond to these pervasive human rights violations. Former Secretaries of Defense Donald Rumsfeld and Robert Gates were in charge of the Department of

³ See Cornell International Human Rights Clinic, Petition to the Inter-American Commission on Human Rights Alleging Violations of the Human Rights of Mary Gallagher, et al. by the United States of America and the United States Department of Defense, with Request for an Investigation and Hearing on the Merits, (Jan. 23, 2014) (detailing other incidents of sexual assault in the United States military, including assault against members of the U.S. Army, Air Force, and Coast Guard).

⁴ See, e.g., The Military Justice Improvement Act, S. 967, 113th Cong. (2013); National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. (2013) (amending 10 U.S.C. § 860); Exec. Order No. 13,669, 79 Fed. Reg. 34,999 (June 18, 2014).

⁵ See, e.g., REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 10 (June 2014)

Defense and United States military when the petitioners experienced their human rights abuses. As detailed in Section V.C, despite an increase in reports of sexual violence in the United States military during their time in office, both Secretaries displayed an indifferent attitude towards the problem of sexual violence in the military.

5. The claims of the seven petitioners demonstrate that the United States—through its laws, policies, and practices—has continually violated fundamental provisions of the American Declaration of the Rights and Duties of Man (“American Declaration”).⁶ The United States’ failure to protect the petitioners from being subjected to sexual violence, to respond effectively to their complaints, and to provide them with a meaningful remedy violated the petitioners’ human rights. Specifically, the United States violated the petitioners’ rights to life, security of person, and humane treatment under Article I; their right to equal protection before the law under Article II; their rights to freedom of investigation, opinion, expression, and dissemination of ideas under Article IV; their rights to protection of honor and reputation, and to privacy under Article V; their right to inviolability of the home under Article IX; their right to work under Article XIV; their right to juridical personality under Article XVII; and their right to resort to the courts under Article XVIII.⁷

6. The petitioners therefore request that the Commission: declare this petition admissible; investigate, with hearings and witnesses as necessary, the facts alleged in this petition; declare that the United States of America is responsible for the violation of petitioners’ rights under the American Declaration of the Rights and Duties of Man, including their rights under Articles I, II, IV, V, IX, XIV, XVII, and XVIII. The petitioners further request that the

⁶ Organization of American States, American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.

⁷ *Id.*

Commission grant monetary compensation for the violation of their rights under the American Declaration; recommend adoption by the United States and the United States Department of Defense necessary laws and measures to ensure the successful investigation, prosecution, and punishment of crimes of sexual violence, including the removal of the decision whether to investigate, prosecute, and punish perpetrators from the “chain of command”;⁸ recommend the adoption of laws preventing the military from using Articles 15 (nonjudicial punishment) and 134 (adultery) of the Uniform Code of Military Justice to punish perpetrators of sexual violence; monitor compliance with recent laws intended to prohibit retaliation against service members who report sexual violence; recommend that the United States grant service members access to United States federal courts so that individuals whose rights have been violated by the United States military may seek judicial remedies; recommend that the United States ensure equal access to disability benefits to veterans who are survivors of military sexual assault; request an advisory opinion from the Inter-American Court of Human Rights regarding the nature and scope of the United States’ obligations under the American Declaration; and any other recommendations and relief that the Honorable Commission may deem just and necessary.

II. REQUEST TO JOIN PETITIONS UNDER ARTICLE 29(5) OF THE RULES OF PROCEDURE

7. The petitioners respectfully request that the Honorable Commission join and process this petition with the “Petition to the Inter-American Commission on Human Rights Alleging Violations of the Human Rights of Mary Gallagher, et al. by the United States of America and the United States Department of Defense, with Request for an Investigation and Hearing on the Merits” submitted by the Cornell Law School International Human Rights Clinic

⁸ The “chain of command” is the “succession of commanding officers [commanders] from a superior to a subordinate through which command is exercised.” DoD Dictionary of Military Terms (as amended through Aug. 15, 2014), *available at* http://www.dtic.mil/doctrine/dod_dictionary/data/c/3019.html.

on behalf of twenty former members of the U.S. military on January 23, 2014.⁹ Under Article 29(5) of the Rules of Procedure of the Inter-American Commission on Human Rights (“Rules of Procedure”), where two petitions “address similar facts . . . or reveal the same pattern of conduct, the Commission may join and process them together in the same file.”¹⁰ Both petitions illustrate the same violations of fundamental rights set forth in the American Declaration. All petitioners were sexually violated by military colleagues and then experienced mishandling of their cases by the United States’ military, which included failing to afford the petitioners meaningful redress and, in many cases, active retaliation against them. The petitions are thus suitable to process together.

III. REQUEST TO EXPEDITE EVALUATION UNDER ARTICLE 29(2) OF THE RULES OF PROCEDURE

8. The petitioners respectfully request that the Commission expedite the evaluation of this petition in accordance with Article 29(2) of the Rules of Procedure, as the petition meets two of the available criteria that allow for expedited review. Article 29(2) permits the Commission to expedite the evaluation of a petition when “the decision could have the effect of repairing serious structural situations that would have an impact in the enjoyment of human rights” or “the decision could promote changes in legislation or state practices and avoid the reception of multiple petitions on the same matter.”¹¹ A favorable decision in this case could significantly impact the “serious structural situation” of the Department of Defense’s failure to

⁹ Counsel Elizabeth Brundige, Assistant Clinical Professor of Law and Director of the Cornell Law School Global Gender Justice Clinic, also represents the petitioners in “Petition to the Inter-American Commission on Human Rights Alleging Violations of the Human Rights of Mary Gallagher, et al. by the United States of America and the United States Department of Defense, with Request for an Investigation and Hearing on the Merits.” The earlier petition was submitted on January 23, 2014, by the Cornell Law School International Human Rights Clinic, which Professor Brundige then taught and directed.

¹⁰ Inter-Am. Comm’n H.R., Rules of Procedure, art. 29(5) (2013), *available at* <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

¹¹ *Id.*, art. 29(2).

create and implement policies that would adequately prevent and address sexual violence in the military, a military justice system that violates the human rights of victims of sexual violence, and a civil judicial process that prevents members of the military who were subject to sexual violence during their service from accessing the justice system that is available to civilians. Additionally, a decision in this case “could promote changes in legislation” by holding the United States accountable for the human rights violations perpetuated by the Department of Defense and the military justice system, and by increasing public awareness and support for ongoing legislative efforts to reform the military laws and procedures with regard to sexual violence. As will be outlined in Section V.C.3, *infra*, reports of sexual assault are rising in the military, and without a decision in this case, the Commission will continue to receive multiple petitions on this matter.

IV. FACTUAL AND PROCEDURAL BACKGROUND

A. Summary of Facts

9. The following are summaries of the violations alleged by the individual petitioners. Additional information is available in: Petitioners’ First Amended Complaint (Attachment A); Judgment of the United States District Court for the District of Columbia (Attachment B); and Judgment of the United States Court of Appeals for the District of Columbia Circuit (Attachment C).

1. Petitioner Carla Butcher

10. Carla Butcher served in the Navy from September 24, 2001 to June 5, 2005. She was stationed in Virginia, United States. On March 11, 2002, Petitioner Butcher was raped by an officer within her Command¹² while her ship was docked in Malta for a two-day excursion.

11. During this excursion and prior to the rape, the officer sent Petitioner Butcher an email that she interpreted as a friendly gesture. After more emails, however, Petitioner Butcher grew uncomfortable and believed the officer was trying to initiate a sexual encounter. She began to avoid him.

12. On the night of the attack, Petitioner Butcher and several of her friends decided to go for a night out to the local clubs. As their night was ending, Petitioner Butcher and one of her friends separated from the rest of the group. The two headed to another club, but upon arriving her friend realized he had left his sweater across the street and asked Petitioner Butcher to wait for him at the club. As soon as the friend left, the officer who had sent emails to Petitioner Butcher approached her, claiming that she was at a “restricted” club and ordering her to leave. The officer grabbed Petitioner Butcher, who was intoxicated, and escorted her away from the club. After this, Petitioner Butcher lost consciousness. When she woke up, she was in a hotel room and the officer was raping her. She said “no” and then fell unconscious again. For the next several hours, Petitioner Butcher woke periodically in severe pain as the officer continued to rape her.

13. The next morning, Petitioner Butcher was extremely distraught and confronted her attacker. When she told the officer that she was going to file a report, he told her that

¹² “A unit or units, an organization, or an area” under the authority of one individual (e.g. a commander). DoD Dictionary of Military Terms, (as amended through Aug. 15, 2014), *available at* http://www.dtic.mil/doctrine/dod_dictionary/data/c/3223.html.

everyone would just think she was a “slut,” and that, because of his rank as a first class petty officer, he would not get more than a “slap on the wrist.”

14. After returning to the ship, Petitioner Butcher immediately reported the rape to her chief. Naval Criminal Investigative Service (“NCIS”) opened an investigation and interviewed her about the incident. The morning after her report, she was put on a flight back to Virginia. It was not until the third day after the report that Petitioner Butcher received a rape kit examination at a medical office of the Naval Base in Virginia. The examination showed significant vaginal tearing and trauma. Petitioner Butcher also provided investigators with her clothing and blood-stained underwear from the night of the assault.

15. During the investigation, Petitioner Butcher learned that two weeks prior to her assault, another young woman on her ship had accused the same officer of sexually assaulting her. The accused’s commander, however, had declined to investigate and took no action on the allegations, deciding instead to remove the woman from the ship.

16. The matter proceeded through an “Article 32 hearing,” a proceeding under the Uniform Code of Military Justice (“UCMJ”) similar to a preliminary or grand jury hearing in civilian law, where it was determined that there was sufficient evidence to proceed to a court-martial. At trial, however, the rape kit results were excluded from evidence because the prosecutors claimed they could not locate the doctor who had conducted the exam. The previous assault allegation against the officer was also excluded because the other victim, fearing retribution, was too scared to testify. The defense, however, was allowed to question Petitioner Butcher about being molested as a child.

17. During the trial, the prosecutor told Petitioner Butcher that she was partly to blame for the rape, mentioning that she had “worn heels and tight jeans.” Petitioner Butcher’s

perpetrator was found not guilty of rape and fraternization by the court-martial “members panel,” comprised of fellow service members. After the court-martial, Petitioner Butcher was given the option of reassignment and chose to be relocated to San Diego. A year later, her rapist was transferred to the same base. He continues to live in San Diego only a few miles from where Petitioner Butcher lives with her family.

18. Petitioner Butcher contracted a sexually transmitted disease from her rapist. After the rape, Petitioner Butcher became suicidal and was diagnosed with Post-Traumatic Stress Disorder (“PTSD”).

2. Petitioner Erica Dorn

19. Erica Dorn joined the Navy in 1996 and served as a Hospital Corpsman specializing as a psychiatric technician. Petitioner Dorn was deployed to Iraq from February 12, 2003 to June 30, 2003 as part of Operation Iraqi Freedom. For the majority of her deployment, Petitioner Dorn was the only female service member traveling with the unit.

20. During Petitioner Dorn’s deployment in Iraq, two senior officers—lieutenants—and a corpsman (the perpetrators) sexually harassed Petitioner Dorn. They viewed pornographic videos and magazines in the workplace and, while doing so, made comments to Petitioner Dorn such as, “Dorn, you should try doing this,” or “You would look good in this, Dorn.” The perpetrators walked around naked while Petitioner Dorn was present, and they frequently talked to her about sex and orgasms. They referred to Petitioner Dorn as “Bitch,” “Beauty Queen,” and “Princess,” and made sexualized and derogatory comments about her in her presence, saying things like “Question: Who is more likely to become a prostitute or a lesbian? Answer: Dorn!” They threatened to “get her pregnant” so she would have to leave the military. Once, one of the lieutenants drew a picture of Petitioner Dorn engaging in sexual acts with the other

lieutenant, referred to the drawing as “art therapy,” and circulated the drawing among the men in Petitioner Dorn’s unit. When Petitioner Dorn objected to the harassment by asking them to stop or walking away when it occurred, the perpetrators escalated their abuse. When the perpetrators were not harassing Petitioner Dorn, they frequently refused to acknowledge her presence. Despite their role as her superiors, they would ignore Petitioner Dorn’s direct questions while making comments such as “Do you hear something?”

21. The corpsman made open threats of sexual violence to Petitioner Dorn. Once, while helping Petitioner Dorn lift her pack, he stated, “If I’m going to help you with this pack, you have to give me some.” At other times he threatened her by saying, “Be careful when you are sleeping or I might jump in your bed” and, “Be careful when you go to sleep because you might wake up with a knife to your throat I don’t know how much longer I can stand it.” Petitioner Dorn was so afraid of being raped by the corpsman that she began sleeping in the female chaplain’s tent.

22. Petitioner Dorn reported the harassment to her master chief¹³ once she was stationed back in the United States and was safe from the violence threatened by the corpsman, but the master chief told her that “this happens all the time,” that she was overreacting, and that she should think about the consequences of reporting the sexual harassment. The master chief became frustrated when Petitioner Dorn insisted that she wanted to report the harassment, and he sent her to discuss the issue with a female commander, who reiterated the responses of the master chief.

23. After Petitioner Dorn returned to the United States, she filed a formal complaint of sexual harassment with the Navy Equal Opportunity Office. After filing the complaint,

¹³ “Master chief” or “master chief petty officer” refers to the highest enlisted or noncommissioned officer in the U.S. Navy or Coast Guard. See Department of Defense Instruction No. 1340.25, Combat Zone Tax Exclusion 2 (Sept. 28, 2010), available at <http://www.dtic.mil/whs/directives/corres/pdf/134025p.pdf>.

Petitioner Dorn requested that she not be forced to work alongside the perpetrators. As a result, she was re-assigned to a less prestigious and notoriously difficult position in pediatrics. The perpetrators were not removed from their assignments, and despite Petitioner Dorn's reassignment, she still frequently came into contact with the perpetrators in her new position. Petitioner Dorn felt as though she was being punished for reporting the harassment.

24. Despite originally planning to make her career in the military, Petitioner Dorn left the Navy in 2003 due to the threats and harassment she suffered from superior officers and lack of adequate response. She suffers from PTSD as a result of these events.

3. Petitioner Christian Everage

25. Christian Everage joined the United States Navy as a seaman in 2002. She served actively with the Navy for nine-and-a-half years, advancing to an engineman second class, and recently joined the Reserves.

26. In 2010, Petitioner Everage began a one-year assignment aboard the USS Jason Dunham Destroyer Ship, in Virginia, United States. On January 6, 2011, Petitioner Everage was sexually assaulted by a leading chief officer in her engineering department. A few days prior to the assault, the chief intentionally brushed past Petitioner Everage's buttocks. While the incident upset Petitioner Everage, she said nothing about it and tried her best to avoid the chief.

27. On the night of the assault, the chief switched Petitioner Everage from morning watch to overnight duty, which took place from 10 p.m. to 2 a.m. As was customary during rounds, Petitioner Everage went to the Central Control Station. When Petitioner Everage entered the room, the chief was there waiting for her. He asked her if she was angry at him for touching her buttocks. He apologized and asked if she would accept his apology with a hug. Petitioner Everage told him she accepted the apology but did not want to hug him. The chief responded

violently, putting the Petitioner in a chokehold and then shoving his hand up her shirt and fondling her breasts. He continued assaulting her and tried to unzip her pants, stating, “Let me touch it.” Petitioner Everage was eventually able to break free from the chief’s hold.

28. Petitioner Everage confided in a peer later that night. Soon after the incident she developed serious anxiety and had trouble sleeping. The chief started loitering around Petitioner Everage while she was working, making it difficult for her to work. Eventually the stress of her abuser’s constant presence led Petitioner Everage to have an emotional breakdown.

29. On February 2, 2011, Petitioner Everage filed a report of the sexual assault with NCIS. She requested to be transferred off the ship. However, NCIS acted contrary to protocol and refused to take any action because Petitioner Everage did not reveal the chief’s identity in her initial complaint. Subsequently, when Petitioner Everage did reveal the chief’s identity, the accused’s commander removed the chief from the ship but Petitioner Everage’s superiors continued to disregard her requests to be transferred.

30. Despite being told that her report would remain confidential, everyone on the ship knew that Petitioner Everage had filed a report. Petitioner Everage was blamed and harassed by shipmates, superiors, and the chief’s brother, who was also on the ship. Petitioner Everage continued to face retaliation by her Command for reporting her assault. The highest-ranking officers on the ship (the commanding officer, the executive officer, and the command master chief) verbally attacked her. They also accused her of lying and searched her emails without her permission. Finally, after complaining to the Sexual Assault Response Coordinator¹⁴ about the continued harassment, Petitioner Everage was allowed to transfer off the ship. Petitioner

¹⁴ The role of the Sexual Assault Response Coordinator (“SARC”) is to assist survivors of sexual assault and coordinate sexual assault survivor care. *See* Responding to Reports of Sexual Assault, Myduty.mil, *available at* http://myduty.mil/public/docs/responding_to_reports_of_sexual_assault.pdf.

Everage tried to follow up with NCIS about the status of the case against the chief but later learned that the NCIS closed the investigation after concluding that there were no witnesses.

31. After complaining about the sexual assault, Petitioner Everage received poor markings on her performance evaluations, despite the fact that many of her superiors had told her that her substantive work was very good. The same commanding officers who had accused Petitioner Everage of lying and verbally attacked her sat on the evaluation board. Due to the poor evaluation, Petitioner Everage was discharged from the Navy and prevented from re-enlisting. Petitioner Everage now suffers from diagnosed anxiety, depression, and PTSD.

4. Petitioner Mariel Marmol

32. Mariel Marmol served in the Navy from 2004 to 2011. In February 2007, she was raped by her direct supervisor at the Naval Air Station in Florida, United States. Petitioner Marmol was in her barracks room when her supervisor approached her and said that he wanted to “hang out.” Believing that she could trust her supervisor, Petitioner Marmol allowed him into her room. The supervisor raped Petitioner Marmol.

33. Petitioner Marmol did not immediately file a complaint because she was afraid that she would not be believed since the perpetrator was her direct supervisor and was respected in the unit. She was also concerned about professional repercussions because she knew that retaliation was a common response when women reported rape and sexual assault. However, once Petitioner Marmol learned that both another service member and a civilian had filed complaints against the same perpetrator for sexual assault, Petitioner Marmol decided to file a complaint with the NCIS.

34. NCIS suggested that Petitioner Marmol communicate with the perpetrator in order to obtain a recording of the perpetrator incriminating himself. However, commanders had

somehow learned about her complaint. While NCIS, not the chain of command, is the authority that typically issues restraining orders, Command mistakenly issued mutual restraining orders against Petitioner Marmol and a person she did not know. When Petitioner Marmol asked why a restraining order had been issued between her and someone she did not know, Command pressured her into revealing the identity of the actual perpetrator. Once her superior officers knew the identity of the perpetrator, they issued mutual restraining orders against Petitioner Marmol and the perpetrator. This restraining order prevented Petitioner Marmol from testifying as a corroborating witness at the court-martial for the other service member's complaint against the perpetrator, and commanders told her that she was forbidden to take any part in that process.

35. NCIS told Petitioner Marmol that her case had been transferred to the Navy Legal Department. The Department informed her that they were closing her case for lack of evidence but said that they would re-open her case and contact her if the other case against the perpetrator was successful. Despite the perpetrator being convicted and sentenced to eight years of confinement for the rape of the other service member, the Navy Legal Department never prosecuted him for the rape of Petitioner Marmol and refused to provide Petitioner Marmol with information about why her case was not re-opened.

36. Petitioner Marmol suffered negative personal and professional consequences as a result of being raped and reporting it. Navy coworkers ostracized her, accused her of lying and having an "attitude," and subjected her to unwanted touching. During the NCIS investigation, Petitioner Marmol's superior claimed that she was unable to perform her duties while the investigation was underway and downgraded her to working as a store clerk.

37. Petitioner Marmol left active duty in the Navy in July 2011, because it was evident that reporting the rape had permanent career repercussions. She continues to serve in the

Navy Reserve and has faced ongoing harassment and discrimination during her service, including verbal abuse and social ostracization, being forced not to eat lunch or to eat alone, and being marked as absent when she was present. She suffers from PTSD and anxiety as a result of the rape and retaliation.

5. Petitioner Nicole McCoy

38. Nicole McCoy joined the Marine Corps in January 2008. On April 2, 2010, Petitioner McCoy was sexually assaulted by her platoon leader, a sergeant, at the Marine Corps Logistics Base in Georgia, United States.

39. The day of the assault, the sergeant asked Petitioner McCoy to come to his barracks room to discuss a trip she would be taking. When she arrived, he made sexual advances and became forceful when she resisted. The sergeant began to grope and kiss her, then held her down on the bed while she struggled to get away. She eventually managed to break free and escape the barracks room, but he remarked to her that they would later “pick up where [they] left off.”

40. In the days immediately following the assault, Petitioner McCoy told several supervising sergeants in her Command about the assault. They responded by tipping off the perpetrator in advance that Petitioner McCoy would be filing a report about the attack. The sergeants then joined the attacker in trying to obstruct the investigation and harassing Petitioner McCoy. No one was ever disciplined.

41. Petitioner McCoy then filed a formal report with the Marines Corps Criminal Investigative Division (“CID”). During CID’s investigation, Petitioner McCoy’s perpetrator attempted to change the layout of the furniture in his room to undercut her allegations. A CID investigator told Petitioner McCoy that it was very obvious the furniture and decorations in the

room had been recently moved. Another sergeant in the Command informed Petitioner McCoy that her perpetrator's immediate supervisor had helped him move the furniture in order to impede the investigation.

42. Although the Marine Corps issued a protective order to protect Petitioner McCoy from her perpetrator, it subsequently ignored the terms of the order and required Petitioner McCoy to participate in mandatory events with her perpetrator. In addition, the Marines Corps did not take away the perpetrator's master key that gave him access to all of the barracks rooms, which led Petitioner McCoy to fear for her safety. When she began suffering from panic attacks as a result of this fear, the Sexual Assault Response Coordinator told her that the Marine Corps could not help her unless her panic attacks were combat-related.

43. The Sexual Assault Response Coordinator informed Petitioner McCoy that she could receive counseling only for her combat-related PTSD and that she needed to deal with her sexual-assault related PTSD on her own. Furthermore, the Sexual Assault Response Coordinator and Petitioner McCoy's superiors told her that if she wanted to seek counseling, they would need a record of her attendance, the reasons for her attendance, and full disclosure of the contents of any journal that she might keep pursuant to the counseling. Because this seemed unnecessarily invasive, Petitioner McCoy decided not to seek counseling at that time. It was not until she moved to a different Command and was appointed a different Sexual Assault Response Coordinator that she received treatment.

44. During the CID investigation, Petitioner McCoy's commander blamed and ridiculed her for reporting the assault. Her staff sergeant berated her for "cutting him off at the knees" by reporting the assault to CID and seeking help from the Sexual Response Assault

Coordinator. Her commander also made it clear to her that she, and not the perpetrator, had undermined the entire unit by reporting the assault.

45. Petitioner McCoy's husband was stationed at another base, and when chain of command finally got him transfer orders to come back to Georgia, they made it clear that they expected Petitioner McCoy to drop the sexual assault charges in return. As soon as the transfer went through, the chain of command shut down the investigation.

46. Although the Sexual Response Assault Coordinator had assured Petitioner McCoy that the perpetrator would be brought to justice, the chain of command kept the results of the investigation a secret, telling Petitioner McCoy that disclosing the results would violate the privacy of her perpetrator. When she forced them to disclose the findings to her under the Freedom of Information Act, Petitioner McCoy received a heavily redacted record that revealed CID had been investigating primarily into Petitioner McCoy's own reputation on base, rather than the allegation of sexual assault. Many of the interviewees for the investigation were people that were openly hostile to Petitioner McCoy, themselves having made advances toward her and been rebuffed. As a result of the sexual assault, Petitioner McCoy continues to suffer from PTSD and has lost faith in the military justice system.

6. Petitioner Lamanda Walker

47. Lamanda Walker (born Johnson and formerly Cummings) served in the United States Navy from 2002 to 2003. In 2002, Petitioner Walker attended A-School, the technical training course that immediately follows new recruit training camp. One evening just before the Thanksgiving holiday, she and several classmates attended a party at a hotel. While she was talking to a male classmate in one of the rooms, her friends left the party without telling her. The male classmate began kissing her. He then started trying to touch her in a sexual manner.

Petitioner Walker resisted both verbally and physically his attempts to sexually touch her, but the male classmate forced himself on her and raped her. During the rape, Petitioner Walker began experiencing flashbacks of being molested as a child, and she blacked out from the trauma. When she regained consciousness, her perpetrator was leaving the room. Petitioner Walker then contacted a friend who picked her up. She subsequently shut herself in her barracks and kept to herself for several days, confiding in only a few close friends about the rape.

48. After her absence, Petitioner Walker returned to class. Noticing a change in her behavior and fearing she was suicidal, the class leader questioned Petitioner Walker about her change in behavior. At this point, Petitioner Walker reported the rape to the class leader, and the matter was referred to NCIS for investigation.

49. When it became known that Petitioner Walker had reported the rape, the perpetrator and his friends in the unit began to harass Petitioner Walker. They called her names like “slut,” “whore,” “skank,” and “liar.” They harassed Petitioner Walker openly and obviously, but the commanders did nothing to stop the harassment. Instead, the perpetrator’s commander permitted him to graduate and move on to a new duty station. Commanders then retaliated against Petitioner Walker for reporting the rape. Commanders prevented Petitioner Walker from completing her coursework, and barred her from graduating A-School. Her own commander informed her that she had been put on “legal hold” for “falsifying legal documents and statements.” Petitioner Walker was not permitted to graduate with her class.

50. Petitioner Walker contacted the Judge Advocate General (“JAG”) seeking help against the commanders’ retaliation. The JAG officer told Petitioner Walker that if she continued to try to seek justice against the perpetrator, the prosecutor would be permitted to

introduce evidence at court-martial that Petitioner Walker had shared with her psychiatrist about being sexually active after the rape.

51. The JAG officer advised Petitioner Walker that she had no real option but to plead guilty to the charges of falsifying legal documents, or else she would continue to be subject to the “hold” and would not be able to progress or graduate. He advised her to plead guilty so that she would be able to leave the Navy. Petitioner Walker relented and agreed to falsely plead guilty. During the court-martial process, when Petitioner Walker’s parents sought information about the Navy’s handling of the case, a Navy officer bluntly told Petitioner Walker’s mother that “the Navy needs the men more than they need your daughter.”

52. After Petitioner Walker made her false admission of guilt at an adjudicatory hearing, the military judge turned off his microphone and apologized to Petitioner Walker for what the Navy had done to her. She was given 30 days of restriction and was docked two-thirds of her pay for one month. After this she was “processed out” for her PTSD and Major Depressive Disorder.

53. As a result of the rape and retaliation, Petitioner Walker’s career choices have been limited, and she continues to suffer from PTSD and Major Depressive Disorder. The PTSD led to the breakdown of her first marriage, and she still struggles with the physical aspects of relationships. Her guilty plea has shown up on a background check for at least one job, and she had to explain to the employer the circumstances behind the charges, including the rape. To cope with PTSD, Petitioner Walker entered a trauma recovery program that neither the military nor the VA would pay for. She now openly advises women not to join the military.

7. Petitioner Elle Woods

54. Elle Woods (born Helmer) served as an officer in the Marine Corps from June of 2004 until January 2007. In January 2005, the Marine Corps recruited Petitioner Woods from The Basic School, a six-month program for newly commissioned officers, to serve as a Public Affairs Officer at the Marine Barracks in Washington, D.C., United States. She was instructed to send photographs of herself wearing her uniform, which she did. She later learned from her company commander that she was selected on the basis of her appearance; the Marine Barracks commanders wanted an attractive female to be a “poster child.” Petitioner Woods was the only woman working in the media office.

55. After Petitioner Woods began her new position, one of the captains with whom she worked began to harass her. He made sexual advances, which she continually spurned, and inundated her with social emails. In March 2005, two months after the harassment began, Petitioner Woods complained to the Marine Barracks Equal Opportunity Officer about the harassment and provided the officer with the emails from the captain, but the Marine Corps took no action.

56. In March 2006, Petitioner Woods’ immediate superior, a major, informed her that she was required to attend a St. Patrick’s Day “pub-crawl.” Petitioner Woods objected to going, but the major told her it was a mandatory work event. The Marine Corps paid for the “pub-crawl,” which consisted of a group of Marine Corps officers identified by matching T-shirts going from bar to bar and taking shots of alcohol. When Petitioner Woods drank water to try and keep herself from becoming intoxicated, the major told her she had to keep pace with the larger male officers and required her to drink an extra shot as a “punishment.”

57. Petitioner Woods became very intoxicated after being forced to consume so much alcohol. She left to find a cab, but the major followed her out and told her he needed her to go to his office to discuss a business matter. Once they reached the major's office, he tried to kiss her. Petitioner Woods resisted, and he grabbed her. In the process, he knocked her over. She hit her head on the side of the desk and lost consciousness. When Petitioner Woods awoke, she discovered that she was lying on the floor of the major's office, wearing the major's shorts. She saw the major was passed out on the floor nearby, naked from the waist down.

58. Petitioner Woods immediately reported the incident to her commander. The colonel in her chain of command and another officer came to the office and saw the major lying naked on the floor. Petitioner Woods told the colonel that she needed to go to the hospital because she needed a rape kit performed and she was worried she had a concussion. The colonel repeatedly told her that she should go to bed and the whole matter would be dealt with in the morning. When Petitioner Woods made it clear she was not going to follow his orders, he insisted that the other officer take Petitioner Woods to a specific military hospital to see a specific physician whom he knew. The colonel called ahead to make sure only that physician would see her. The colonel asked her not to get a rape kit, saying that then the matter would "be out of his hands." Petitioner Woods got into the car with the other officer but persuaded him to take her to a different hospital where she was able to obtain a rape kit and a medical examination. The doctor noted that her injuries were consistent with sexual assault.

59. The following day Petitioner Woods went to speak to the investigators with NCIS. She told them that the doctor had performed a rape kit and that she needed it to be processed and analyzed to prove she was raped. The NCIS investigator told Petitioner Woods that NCIS only processed rape kits when the victim knew for certain that she was raped, and

since Petitioner Woods was unconscious during the attack there was no way to tell whether she had been raped. Petitioner Woods pointed out that she could not have consented due to being unconscious and the only way to prove the rape would be to process the rape kit, but NCIS still refused to process it. Two weeks later, Petitioner Woods developed a vaginal infection as a result of the rape. She returned to NCIS and demanded that they take pictures of the bruises she had sustained after the attack and note the vaginal infection in their records. The NCIS official said the evidence was purely circumstantial: that the bruises could have come from a car accident and that she could have contracted the same vaginal infection through consensual sex. She again asked about the rape kit. This time an NCIS official said they would look into it but returned after making a phone call and told Petitioner Woods that the rape kit had been misplaced.

60. Despite the medical and circumstantial evidence of rape and reports from the colonel and the other officer who had seen the major lying naked on the floor, NCIS initially refused to investigate, claiming that Petitioner Woods' inability to remember the rape precluded any investigation. After a lengthy delay, during which time the crime scene was destroyed, NCIS conducted a very brief investigation. It concluded that nothing could be done since Petitioner Woods was not conscious during the assault.

61. Subsequently, Petitioner Woods complained to the major's superior officer. He admitted that NCIS's investigation was "woefully inadequate" and removed the major from his command. The officer, however, refused to press charges or further punish the major for raping Petitioner Woods. Instead, the major was moved to a more prestigious media position, handling social functions in the White House. The major's superior told Petitioner Woods she needed to "toughen up," saying, "You need to pick yourself up and dust yourself off. I can't babysit you all the time."

62. After her attacker was promoted, instead of receiving justice, Petitioner Woods became the subject of investigation and prosecution for the events that occurred on the night of her rape. Her superiors at the Marine Corps told her that if she did not stop complaining about the rape they would charge her with fraternization for having sex with a superior. They told her that the situation did not look good for her since witnesses had seen her drinking throughout the night and voluntarily leaving with the major.¹⁵ Petitioner Woods refused to drop her complaint, and her superiors followed through on their threat: they prosecuted her for fraternization and found her guilty. She was removed from her position in Washington, D.C. and transferred to the Quantico Marine Base in Virginia to await her discharge. In the beginning of January 2007, she received a General Discharge¹⁶ and was forced to leave the Marine Corps while her rapist remains a Marine in good standing. Even after leaving the military, Petitioner Woods continues to encounter demeaning treatment from members of the military. When she appeared on television in connection with her federal lawsuit, a Marine Corps media officer openly blamed her for the type of discharge she received and suggested that she was a “bad apple.” Recently, Petitioner Woods was speaking with a JAG attorney who works specifically as an advocate for victims of sexual assault, and he referred to all WMs, which stands for “Women Marines,” as “Walking Mattresses.” As a result of the military’s past and continuing mistreatment, Petitioner Woods suffers from PTSD, anxiety, and major depression.

¹⁵ Petitioner Woods’ superiors claimed they had a witness who had seen her consume over forty “Irish Car Bombs” the night of the assault. Petitioner Woods is certain she had nowhere near that amount, and the average person, male or female, would be physically unable to consume that amount of alcohol.

¹⁶ A General Under Honorable Conditions Discharge “(commonly referred to as a General Discharge) is for service members whose service was satisfactory, but involved situations where the Soldier’s conduct and/or performance of duty were not so meritorious to warrant an Honorable Discharge.” Recipients usually “have engaged in minor misconduct or have received nonjudicial punishment under Article 15, UCMJ.” Receiving a General rather than an Honorable Discharge prevents veterans from receiving educational benefits. “Additionally, there can be quite a stigma attached to having not received an Honorable Discharge. This stigma can have negative consequences while searching for work or applying for school.” Captain Bill Wicks, *Leaving on good terms: Types of discharges, their consequences*, Fort Hood Sentinel (Feb. 16, 2012), <http://www.forthoodsentinel.com/story.php?id=8539>.

B. Procedural Background

63. Although each case discussed above varies with regard to the specific facts, the outcomes were all the same: the petitioners were precluded from obtaining access to justice within the military justice system. The petitioners' claims were all either never investigated or never given an adequate trial in the military justice system. The perpetrators received little to no punishment under the military justice system for their violent actions, and some were even promoted. Nor was there an appeals process available to petitioners when their cases were not investigated and prosecuted. The petitioners, having no access to justice within the military justice system, then filed a civil lawsuit in United States federal court.

64. The petitioners filed a complaint in the U.S. District Court for the District of Columbia ("District Court") on March 6, 2012 against Secretary of Defense Leon Panetta; former Secretaries of Defense Donald Rumsfeld and Robert Gates as the leaders and representatives of the United States Department of Defense, and Commandant of the Marine Corps James Amos; former Commandants of the Marine Corps James Conway and Michael Hagee; Secretary of the Navy Ray Mabus; and former Secretaries of the Navy Donald Winter and Gordon England ("the Defendants").¹⁷ In their complaint, the petitioners alleged that their rights under the U.S. Constitution had been violated. In particular, they alleged that their right to substantive due process under the Fifth Amendment to the Constitution was violated when the "Defendants condoned a culture which allowed sexual harassment, sexual assault and rape."¹⁸ They also claimed that their procedural due process Fifth Amendment rights were violated when the "Defendants failed to implement military and federal regulations regarding

¹⁷ Petitioners' First Amended Complaint ¶ 181–89.

¹⁸ *Id.* ¶ 225.

sexual harassment, rape and sexual assault,”¹⁹ denied petitioners access to justice, and unfairly terminated or otherwise mistreated the petitioners.²⁰

65. They also alleged that their Fifth and Fourteenth Amendment right to equal protection was violated when “Defendants subjected [petitioners] to a pattern of sexual harassment, rape and sexual assault, failed to protect servicewomen and servicemen from rape, sexual assault, and sexual harassment; failed to conduct proper investigations and prosecute offenders; retaliated against servicemembers who reported being raped, harassed or sexually assaulted; discriminated on the basis of gender; and encouraged a culture of sexism and misogyny.”²¹ Additionally, the petitioners alleged that their First Amendment right to freedom of speech was violated when the Defendants retaliated against petitioners for exercising their right “to speak about being raped, sexually assaulted, or sexually harassed”²² and that their Seventh Amendment right “to have a jury decide the fate of their perpetrators”²³ was “impermissibly interfered with and extinguished” by the Defendants.²⁴

66. The petitioners sought monetary damages for violations of their constitutional rights²⁵ pursuant to *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)²⁶ and *Davis v. Passman*, 442 U.S. 228 (1979).²⁷ However, on February 7, 2013, the United States District Court for the District of Columbia granted a motion by the Defendants to

¹⁹ *Id.* ¶ 228.

²⁰ *See id.* ¶ 228.

²¹ *Id.* ¶ 233.

²² *Id.* ¶ 236–37.

²³ *Id.* ¶ 239.

²⁴ *Id.* ¶ 240.

²⁵ *See id.* ¶ 2; *see also* *Davis v. Passman*, 442 U.S. 228 (1979); *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

²⁶ *See Bivens*, 403 U.S. at 397 (allowing a cause of action against a federal agent for Fourth Amendment Constitutional violations and determining that monetary damages were appropriate).

²⁷ *See Davis*, 442 U.S. at 245 (finding that monetary damages were a judicially manageable, appropriate remedy for a violation of constitutional rights—particularly gender discrimination—where there was no clear congressional declaration regarding damages and no special circumstances advising against awarding monetary damages); *see also* *Craig v. Boren*, 429 U.S. 190, 210 (1976).

dismiss the petitioners' complaint. Although the court acknowledged "the deeply troubling nature of the allegations in [petitioners'] complaint," it found that in light of the well-established precedent of the U.S. Supreme Court, it was "compelled to conclude that a *Bivens* remedy is unavailable to plaintiffs."²⁸

67. The petitioners appealed the case to the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals"), which affirmed the District Court's dismissal on the grounds that no *Bivens* remedy was available.²⁹

68. The decisions of the District Court and Court of Appeals relied on Supreme Court precedent that insulates the United States Military from *Bivens* actions. In *Feres v. United States*, the U.S. Supreme Court held that "the Government is not liable under the [Federal Tort Claims Act] for injuries to servicemen where the injuries arise out of or are in the course of activity that is incident to service."³⁰ As the Court of Appeals explained, the Supreme Court subsequently extended this holding—now commonly known as the "*Feres* doctrine"—to *Bivens* actions, such as the case brought by the petitioners, which allege violations of constitutional rights.³¹ The Court of Appeals decision was guided by the Supreme Court decision of *Chappell v. Wallace*, in which the Supreme Court held:

The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. The special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would

²⁸ *Klay v. Panetta*, 924 F. Supp. 2d 8, 20 (D.D.C. 2013) (quoting *Stanley v. CIA*, 639 F.2d 1146, 1153 (5th Cir. 1981)).

²⁹ *Klay v. Panetta*, 758 F.3d 369, 377 (D.C. Cir. 2014).

³⁰ *Feres v. United States*, 340 U.S. 135, 146 (1950); *see Klay*, 924 F. Supp. 2d at 13. The Federal Tort Claims Act is a federal statute that permits private parties to sue the United States in a federal court for most torts committed by persons acting on behalf of the United States.

³¹ *Klay*, 758 F.3d 369 (citing *United States v. Stanley*, 483 U.S. 669 (1987)); *Chappell v. Wallace*, 462 U.S. 296 (1983).

be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.³²

The Court of Appeals agreed with the District Court, which had held that the *Feres* doctrine precluded it from providing relief to the plaintiffs if their injuries “arise out of or are in the course of activity incident to [military] service.”³³ The “incident to service” test asks the extent to which “particular suits would call into question military discipline and decisionmaking [and would] require judicial inquiry into, and hence intrusion upon, military matters.”³⁴

69. In determining whether petitioners’ injuries occurred in the course of activity “incident to service,” the court considered several Supreme Court decisions involving *Bivens* claims of active duty service members whose connection to the defendants stemmed from their military relationship.³⁵ In each of these cases, the Supreme Court had found that the injury occurred in the course of activity incident to military service and thus abstained from considering the merits of the case.³⁶

70. Applying this Supreme Court precedent to the petitioners’ cases, the Court of Appeals found that:

Plaintiffs’ suit invites a civilian court to adjudicate, for example, whether it was proper for the defendants to permit felons to serve in the military, commanders to use nonjudicial punishment on offenders, offenders to be honorably discharged, and military (rather than civilian) authorities to investigate and prosecute sexual assaults. This is precisely the kind of “judicial inquiry into, and hence intrusion upon, military matters” that the Supreme Court disavowed³⁷

Consequently, the Court of Appeals held that the *Feres* doctrine barred it from adjudicating the petitioners’ claims. It explained that:

³² See *Chappell v. Wallace*, 462 U.S. 296, 303–04 (1983) (citations omitted).

³³ *Klay*, 758 F.3d at 372 (quoting *Klay*, 924 F. Supp. 2d at 13) (quoting *Stanley*, 483 U.S. at 684) (internal quotation marks omitted).

³⁴ *Stanley*, 483 U.S. at 682 (interpreting the “incident to service” test laid down in *Feres*).

³⁵ *Id.* at 708–09 (citing *Chappell v. Wallace*, 462 U.S. 296 (1998)).

³⁶ See *Chappell*, 462 U.S. at 299; *Stanley*, 483 U.S. at 682.

³⁷ *Klay*, 758 F.3d at 375 (quoting *Stanley*, 483 U.S. at 682).

In affirming the district court’s dismissal, we do not take lightly the severity of plaintiffs’ suffering or the harm done by sexual assault and retaliation in our military. But the existence of grievous wrongs does not free the judiciary to authorize any and all suits that might seem just. Our authority to permit *Bivens* actions is narrow to start, and narrower in the military context. We therefore . . . [conclude] that no *Bivens* remedy is available here.³⁸

The court therefore found that the petitioners possessed no *Bivens* civil cause of action against the United States military for its violations of petitioners’ constitutional rights.

71. Additionally, the Court of Appeals determined that, given its “conclusion that special factors preclude a *Bivens* remedy, [the court] need not address . . . whether the defendants are protected by qualified immunity.”³⁹

V. THE UNITED STATES MILITARY JUSTICE SYSTEM FAILS TO ADEQUATELY PREVENT AND RESPOND TO SEXUAL VIOLENCE

A. Structural Problems with the United States Military Justice System Impede Victims of Sexual Violence from Obtaining Redress

72. Members of the United States military are subject to a system of laws and procedures entirely separate from those governing civilians. The only notice members receive of this circumstance is a single sentence in the enlistment contract: “As a member of the Armed Forces of the United States, I will be . . . subject to the military justice system, which means, among other things, that I may be tried by military courts-martial.”⁴⁰ Under this military justice system, the military has significant discretion in carrying out laws prescribed by Congress and the President.

³⁸ *Id.* at 377.

³⁹ *Id.* at 373 n. 1.

⁴⁰ Enlistment/Reenlistment Document: Armed Forces of the United States, ¶ 9(3), available at <http://usmilitary.about.com/library/pdf/enlistment.pdf>.

73. Congress controls the military’s criminal laws, which are written into a bulky federal law known as the Uniform Code of Military Justice.⁴¹ The military’s rules of evidence and procedure, on the other hand, are set by the President of the United States.⁴² Nearly the entirety of United States military law, including its rules of procedure and evidence, is printed in a book called the Manual for Courts-Martial.⁴³ When a service member is accused of an offense under the UCMJ, the accused’s chain of command has control over what happens to the alleged perpetrator, within certain bounds.

1. Procedure When a Service Member is Accused of a Crime

a. Investigation and Initial Disposition

74. After a service member has been accused of committing an offense under the UCMJ, an officer in the accused’s chain of command must order a preliminary investigation into the accusation.⁴⁴ Pursuant to a 2012 order from the Secretary of Defense, the commander overseeing this investigation and making the initial decision on the allegation must be grade O-6 (colonel or Navy captain) or above if the offense alleged is sexual assault, rape, or forcible

⁴¹ The Uniform Code of Military Justice (UCMJ), a federal law enacted in 1950 and included in the Manual for Courts-Martial, lays out the substantive laws applicable to service members. *See* Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 112 (1999). The punitive articles of the UCMJ—codifying and prescribing punishment for the crimes applicable to service members—are included in Part IV of the Manual for Courts-Martial. *See id.* at 97.

⁴² The President makes changes to the military rules of evidence and procedure through Executive Orders.

⁴³ The first official Manual for Courts-Martial was published in 1951. Prior to 1951, the branches of the U.S. military prepared separate courts-martial manuals, and any announced changes had to be manually added by individual military officers. The first official Manual for Courts-Martial was prepared by a congressional committee representing all of the military branches jointly. Manuals for Courts-Martial, Library of Congress: Military Legal Resources, *available at* http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html.

⁴⁴ Rule for Court-Martial 303 [hereinafter RCM]. Although a victim is not required to report the offense to the accused’s commander, the accused’s chain of command typically learns of the offense in one of four ways: through law enforcement; through military channels; through a voluntary report from the victim; or through observing the offense firsthand. The Judge Advocate General’s Legal Center and School: Criminal Law Dep’t, PRACTICING MILITARY JUSTICE 1–4 (2013) [hereinafter *Practicing Military Justice*], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Practicing-Military-Justice_Jan-2013.pdf.

sodomy.⁴⁵ The purpose of the investigation is to “gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation.”⁴⁶ Once the investigating commander deems the inquiry to be complete and has reviewed the evidence, that commander has authority to dispose of the charges by: (1) taking no action; (2) initiating administrative action; (3) imposing an Article 15 nonjudicial punishment; (4) preferring⁴⁷ charges for court-martial; or (5) forwarding to a higher authority for preferral of charges.⁴⁸

b. Convening a Court-Martial

75. A commander who has statutory authority to order a trial is known as a “convening authority.”⁴⁹ A commander who prefers charges must therefore forward those charges up the chain of command for disposition if he is not a convening authority. Any commander who forwards charges is expected to include a written recommendation for the next commander as to the appropriate disposition.⁵⁰ A general court-martial convening authority⁵¹ who prefers charges for an accused by signing a charge sheet becomes an “accuser” and is barred from personally ordering a trial by general court-martial.⁵² A commander in the chain of command who receives the charges but is not a convening authority can either dismiss the

⁴⁵ Leon Panetta, Memorandum: Withholding Initial Disposition Authority under the Uniform Code of Military Justice in Certain Sexual Assault Cases, Apr. 20, 2012, *available at* http://www.dod.gov/dodgc/images/withhold_authority.pdf.

⁴⁶ RCM 303 Discussion.

⁴⁷ A “preferral” is a charge sheet confirming charges against the accused with a “plain and concise statement” of the facts underlying the charge, indicating that the commander believes there is sufficient evidence from the investigation to establish the accused’s guilt and that a trial should be ordered. RCM 307(c)(3). The statement of facts, known as a “specification,” must allege “every element of the charged offense expressly or by necessary implication.” RCM 307(c)(3) & Discussion. This charge sheet must be signed under oath by the commander. RCM 307(a) and (b).

⁴⁸ *Practicing Military Justice*, *supra* note 44, at 1–4.

⁴⁹ See R. Chuck Mason, *Military Justice: Courts-Martial, an Overview*, Congressional Research Service 4 (Aug. 12, 2013), *available at* <https://www.fas.org/sgp/crs/natsec/R41739.pdf>.

⁵⁰ RCM 306(5) Discussion.

⁵¹ General courts-martial are the highest level of courts-martial, reserved for serious offenses, including those punishable by death. Mason, *supra* note 49, at 7.

⁵² RCM 303 Discussion, UCMJ art. 1.

charges or forward them further up the chain of command for disposition. Any commander in the chain of command may also make minor changes to the charges or sign a new preferral if major changes are necessary.⁵³ A general court-martial convening authority who is not an accuser and who receives charges has authority to refer the matter to trial by general court-martial.⁵⁴ A “referral” is the official written order that states that the accused will be tried by a military court that has jurisdiction over the particular crime.⁵⁵

76. There are three types of military courts, or “courts-martial”: summary (for minor offenses), special (for misdemeanors), and general (for serious/capital offenses).⁵⁶ Only a convening authority with specific authority over general courts-martial can order a general court-martial.⁵⁷ Pursuant to a 2014 amendment to the UCMJ, the offenses of sexual assault and rape must be tried by a general court-martial if a court-martial is ordered.⁵⁸ Congress has also urged that the offenses of rape, sexual assault, forcible sodomy, or attempts to commit these acts be adjudicated by courts-martial in all instances, rather than disposed of by nonjudicial punishment or administrative action.⁵⁹ Unfortunately, Congress’ imploration is not binding on the military, and does not create any legal obligation on commanders.

c. Mandatory Pretrial Investigation and Legal Consultation

77. Before a charge can be officially referred for general court-martial, a “thorough and impartial investigation of all the matters set forth” in the charge preferral must be

⁵³ RCM 401(a) Discussion. *See* RCM 603(a) and (b).

⁵⁴ RCM 303 Discussion, UCMJ art. 1.

⁵⁵ *See* Mason, *supra* note 49, at 4.

⁵⁶ *See id.* at 5-7.

⁵⁷ Commanders with general court-martial convening authority are typically: division or corps commanders in the Army; commanders of numbered air forces or major commands in the Air Force; regional commanders in the Navy; and general officers in command of the Marine Corps. *See* Task Force Report on Care for Victims of Sexual Assault, Department of Defense 6 (Apr. 2004), *available at* <http://www.defense.gov/News/May2004/d20040513SATFReport.pdf>.

⁵⁸ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1705 (2013) (amending 10 U.S.C. § 860).

⁵⁹ *Id.* § 1752: Sense of Congress on Disposition of Charges Involving Certain Sexual Misconduct Offenses under the Uniform Code of Military Justice through Courts-Martial.

conducted.⁶⁰ This investigation, known as an Article 32 hearing, has its closest analog in the civilian Grand Jury hearing.⁶¹ The accused has an opportunity to cross-examine the witnesses against him and to present “anything he may desire in his own behalf, either in defense or mitigation,” including his own witnesses.⁶² As of 2014, victims of sexual crimes are now protected by the military’s “Rape Shield” law in Article 32 hearings,⁶³ and they are no longer required to testify or even attend the hearing.⁶⁴ Prior to this change, individuals like the petitioners who reported rape or other sexual crimes were faced with the risk of prosecutors revealing traumatic personal experiences or potentially embarrassing sexual history at the Article 32 hearing.⁶⁵ Petitioner McCoy, for example, said that when she reported being raped, the ensuing investigation was largely directed at her own sexual history and reputation, which would have been scrutinized at the hearing. Petitioner Butcher, similarly, was questioned at the Article 32 hearing about being molested as a child, a matter seemingly irrelevant to the prosecution of her rapist.

78. Before a court-martial can be ordered, the convening authority must also consult with his Staff Judge Advocate (“SJA”), the military attorney for the command, and receive a written opinion that the evidence produced by the initial investigation is legally sufficient to warrant a trial.⁶⁶ Pursuant to a 2014 amendment to the UCMJ, if the SJA believes the case should go to trial, but the convening authority disagrees, the investigative file must be referred to

⁶⁰ RCM 405(a).

⁶¹ David Vergun, *New Law Brings Changes to Uniform Code of Military Justice*, DoD News (Jan. 8, 2014), <http://www.defense.gov/news/newsarticle.aspx?id=121444>.

⁶² UCMJ art. 32(b).

⁶³ Exec. Order No. 13,669, 79 Fed. Reg. 34,999, § 1(f)(i)(2) (June 18, 2014).

⁶⁴ FY14 National Defense Authorization Act § 1702: Revision of [UCMJ] art. 60 (2014).

⁶⁵ See Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N.Y. TIMES (Sept. 20, 2013), <http://www.nytimes.com/2013/09/21/us/intrusive-grilling-in-rape-case-raises-alarm-on-military-hearings.html?pagewanted=all>.

⁶⁶ UCMJ art. 34.

the secretary of the particular branch (Army, Navy, or Air Force) for a deciding opinion.⁶⁷ If both the SJA and the convening authority agree that the case should not go to court-martial (e.g., for lack of evidence), the entire investigative file must be forwarded up the chain of command to the next convening authority for a second, independent opinion.⁶⁸ This second convening authority also assumes control over the decision of whether to go to court-martial.⁶⁹

79. Although the 2014 amendment prevents a single convening authority from refusing to refer a matter to trial by court-martial, the amendment does not cure the more fundamental problem: commanders who receive a criminal report may decide not to sign a preferral at all, opting instead to use their broad authority to issue a more lenient Article 15 nonjudicial punishment. They may also decide to drop the matter altogether. Because commanders are not lawyers, they do not have the legal training sufficient to make this decision. Additionally, the 2014 amendment does not address some of the structural injustices of military courts-martial.

2. Problems with Military Courts-Martial

80. Courts-martial, the courts that adjudicate all offenses arising under the UCMJ, are not federal Article III courts, which are established by the United States Constitution; they are “legislative courts” established by Congress pursuant to Article I of the Constitution.⁷⁰ Courts-martial are courts of limited jurisdiction with authority over service members and a limited number of other individuals, including paid retirees of the armed forces and prisoners of war.⁷¹ Courts-martial primarily adjudicate military offenses enumerated in Articles 81 through 134 of

⁶⁷ FY14 National Defense Authorization Act § 1744: Review of Decisions not to Refer Charges of Certain Sex-Related Offenses for Trial by Court-Martial.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Mason, *supra* note 49, at 2, fn. 15.

⁷¹ UCMJ art. 2.

the UCMJ. Some of these offenses, such as “mutiny”⁷² and “insubordinate conduct,”⁷³ are exclusive to the military and have no civilian counterpart. Courts-martial may also obtain jurisdiction over some state and federal offenses through the use of the general catchall of Article 134, which can be used to punish any “disorders and neglects” that prejudice the good order and discipline of the military or discredit the armed forces, as well as “crimes and offenses not capital” committed by persons subject to the UCMJ.⁷⁴

81. Because courts-martial are not constrained by the constitutional requirements of Article III courts, there are significant differences between civilian courts and courts-martial. For example, the military service member accused is required to wear his or her uniform with grade insignia and any decorations earned.⁷⁵ Moreover, a military accused will not be tried by a jury of common citizens.⁷⁶ Rather, he or she will be tried either in front of a military judge alone⁷⁷ or by a members panel that is comprised of active duty service members selected by the convening authority.⁷⁸ These members may personally know the accused,⁷⁹ which may influence their determination of the accused’s guilt or innocence, as well as the sentence they impose, which can take into account the accused’s military service and character.⁸⁰ These

⁷² *Id.* art. 94.

⁷³ *Id.* art. 91.

⁷⁴ RCM 307 Discussion. The precise limits of Article 134 are unclear.

⁷⁵ RCM 804(e)(1).

⁷⁶ *See Ex Parte Quirin*, 317 U.S. 1, 39–40 (1942). Although most of the same requirements of federal courts have been applied to military courts through presidential executive orders, military courts are explicitly excluded from the constitutional requirement of a Grand Jury indictment, and the Supreme Court has inferred from this an exclusion to the right of a civil jury in courts-martial. *See* U.S. Const. art. V. *See also* Mason *supra* note 49, at 9-15 (laying out the procedural differences between U.S. federal courts and military courts).

⁷⁷ RCM 501(a).

⁷⁸ RCM 103(14) and 501(a)(1)(A),(B).

⁷⁹ In *United States v. Gooch*, the Court of Appeals for the Armed Forces stated that personal knowledge of the accused was not an appropriate criterion to categorically exclude someone from the members panel. 69 M.J. 353, 367 (C.A.A.F. 2011).

⁸⁰ RCM 1001(b)(2). The court-martial members panel is empowered to determine both guilt and an appropriate sentence for a service member. UCMJ art. 51. For any offense for which the death penalty is the mandatory punishment by statute, the members panel must unanimously concur in order to convict the accused. UCMJ art. 52. For any other offense, there must be a concurrence of two-thirds of the members panel. *Id.* To sentence the accused to life in prison or confinement for more than ten years, there must be a concurrence of three-fourths of the

differences between civilian courts and courts-martial, which can serve to favor the accused and prejudice victims, only compound the pervasive problem of sexual violence in the U.S. military.

B. The United States Military Fosters a Culture of Sexual Violence

82. Sexual violence in the military is perpetrated at alarming rates. As many as one in every three women in the United States military has experienced an attempted or completed rape while serving.⁸¹ Equivalent figures for American women as a whole are significantly lower, with 18–25 percent of women experiencing either an attempted or completed rape in their lifetime.⁸² When taking into consideration the fact that the military statistic applies only to a brief period of these women’s lives (while they are in service), the numbers are particularly high. Although similar studies have not been conducted on men in the military, at least one study of male service members found that 4 percent of those seeking benefits for PTSD experienced in-service sexual violence.⁸³ In a recent report on sexual violence in the military, the Department of Defense estimated that 26,000 service members experienced unwanted sexual contact in 2012 alone.⁸⁴ Military culture is partly to blame for this disturbing aspect of military life.

83. Recent studies have found that military culture may promote sexual violence. Service members often use “[s]exualized and violent language” around each other, and, because of their training, see violence as a “means for obtaining one’s goals.”⁸⁵ The U.N. Special Rapporteur on Violence against Women specifically noted during her 2011 visit to the U.S. that

members. *Id.* Any other sentence “shall be determined by the concurrence of two-thirds of the members.” *Id.* If the accused opts to be tried by military judge alone, then the military judge will decide both guilt and the appropriate sentence. UCMJ art. 51(d).

⁸¹ See Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the US Military: A Review of the Literature and Recommendations for the Future*, 15 AGGRESSION AND VIOLENT BEHAVIOR 268 (2010).

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See DEPARTMENT OF DEFENSE, FISCAL YEAR 2013 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 71 (2014), available at http://www.sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

⁸⁵ Turchik & Wilson, *supra* note 82, at 271 (citing M. HUNTER, HONOR BETRAYED: SEXUAL ABUSE IN AMERICA’S MILITARY, (2007)).

sexual violence in the military is “prompted by numerous factors, ranging from a very hierarchic and command driven structure, to a culture that promotes masculine traits of power and control, and a pattern of underreporting and impunity.”⁸⁶ One study found that service members displayed a “learned ability to objectify other people,” which was promoted by a belief that “those outside the military will not understand what goes on within the military.”⁸⁷ Additionally, the “group cohesion and deindividualization” taught by the military operates to reinforce “negative normative sexual and gender beliefs.”⁸⁸ Sexist attitudes are widely accepted and greatly contribute to the prevalence of military sexual violence.⁸⁹ The fiercely closed-off and regressive military environment likely makes it more difficult for victims to report acts of sexual violence because they fear stigmatization and personal and professional repercussions.⁹⁰

84. Additionally, the number of previous sexual offenders within the ranks of the U.S. Military further contributes to the prevalence of sexual violence. Ninety-nine percent of the perpetrators of sexual assault in the United States military are men,⁹¹ and many male service members were admitted into the military in spite of having a history of sexual violence. A study of Navy recruits found higher rates of men who had perpetrated sexual assaults prior to joining the military (9.9–11.6 percent) than a similar sample of men attending college (4.4 percent).⁹² Although in 2014 Congress banned sex offenders from enlisting in any branch of the U.S.

⁸⁶ See U.N. Human Rights Council, *Report Of The Special Rapporteur On Violence Against Women, Its Causes And Consequences*, Ms. Rashida Manjoo, Addendum, Mission to the United States of America (June 1, 2011), U.N. Doc. A/HRC/17/26/Add.5, ¶ 27.

⁸⁷ Turchik & Wilson *supra* note 82, at 271 (citing M. HUNTER, *HONOR BETRAYED: SEXUAL ABUSE IN AMERICA’S MILITARY* (2007)).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 270.

⁹² *Id.*

military,⁹³ there are still many such offenders within its ranks. In recent years, all the branches have participated in “moral waivers” to increase recruiting numbers, and the military gave an increased number of moral waivers to recruits with histories of “[r]ape, sexual abuse, sexual assault, criminal sexual abuse, incest, or other sex crimes” and “[i]ndecent acts or liberties with a child, molestation.”⁹⁴ Furthermore, because rape and sexual assault are significantly underreported in the civilian world, it is likely that people with histories of sexual violence will continue to be able to join the military.⁹⁵ In addition to the presence of sex offenders within the United States military, the significant disparity between the number of male and female officers exacerbates the difficulties faced by female victims of sexual violence who are trying to obtain justice.

85. Women are in a significant minority within the military, and their absence in the higher echelons of the military corresponds to the lack of progressive policies to curb sexual violence in the military, which is disproportionately inflicted on female service members. Although the percentage of female officers is roughly proportionate to the total percentage of women in the military, women mostly occupy the lower officer pay grades. In 2014, women represented 16.7 percent of officers in the U.S. military, yet held only 7.5 percent of the top four pay grades.⁹⁶ Of the top two pay grades, comprised of 183 officers in total, only sixteen were

⁹³ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1711: Prohibition on Service in the Armed Forces by Individuals Who Have Been Convicted of Certain Sexual Offenses (2013) (amending 10 U.S.C. § 860).

⁹⁴ Henry Waxman et al., Letter to The Honorable David Chu, Committee on Oversight and Government Reform, Apr. 21, 2008, *available at* <http://www.hsdl.org/?view&did=485463>.

⁹⁵ In fact, according to the U.S. Bureau of Justice Statistics, the percentage of rapes and sexual assaults going unreported has been rapidly increasing, from 45 percent in 2002 to 73 percent in 2011. *See* Jennifer L. Truman & Michael Planty, *Criminal Victimization 2011*, BUREAU OF JUSTICE STATISTICS 8 (Oct. 2012), *available at* <http://www.bjs.gov/content/pub/pdf/cv11.pdf>.

⁹⁶ Table, Active Duty Females by Rank/Grade and Service, Oct. 2014, Defense Manpower Data Center [hereinafter Table, Active Duty Females] *available at* https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp.

women.⁹⁷ Because the vast majority of officers are men, it is significantly more likely that a victim of rape, sexual assault, or harassment will have her report examined by a male officer. This is especially true after the Secretary of Defense removed initial disposition authority for rape, sexual assault, and forcible sodomy allegations from any officer below the O-6 pay grade.⁹⁸ As of October 2014, only 8.4 percent of officers grade O-6 or above were women.⁹⁹ Although a female officer would not necessarily treat a report differently than a male officer, the lack of women in policy-making positions in the military likely influences the overall lack of progressive policies in regards to the treatment of female service members who report sexual assault.

C. The Department of Defense's Inadequate Response to Sexual Violence in the United States Military Has Created a Culture of Impunity for Sexual Violence

86. Although sexual violence in the military is a pervasive problem that Congress has highlighted numerous times, the Department of Defense has been slow to respond. The Department's inaction and the failure of its policies to address incidents of sexual violence created a culture of impunity that enabled sexual violence in the U.S. military and the violations of the petitioners' rights under the American Declaration.

1. Failure of Sexual Assault Prevention and Response Office to Assist Victims of Sexual Violence

87. In October 2005, the Department of Defense established the Sexual Assault Prevention and Response Office ("SAPRO") as a single point of accountability for all sexual

⁹⁷ *Id.* In 2009, only one of the 40 generals and admirals (the top paygrade for all branches) was a woman: Army General Ann Dunwoody. In 2012, Air Force General Janet Carol Wolfenbarger became the second woman to hold this rank. See Mark Thompson, *Female Generals: The Pentagon's First Pair of Four-Star Women*, Time (Aug. 13, 2012), available at <http://nation.time.com/2012/08/13/female-generals-the-pentagons-first-pair-of-four-star-women/>. In June, 2014, Michelle Howard became the first woman to attain the rank of Admiral in the Navy's 239-year history. See Elena Schneider, *A Four-Star Female Admiral Makes History for the Navy*, The New York Times, July 11, 2014, available at http://www.nytimes.com/2014/07/12/us/12admiral.html?_r=0.

⁹⁸ Panetta, *supra* note 45.

⁹⁹ Table, Active Duty Females, *supra* note 96.

assault policy matters within the Department of Defense.¹⁰⁰ SAPRO develops and implements the Department of Defense's Sexual Assault Prevention and Response program and specifically has attempted to provide better assistance for victims of sexual violence through Sexual Assault Response Coordinators, Sexual Assault Prevention and Response Program Victim Advocates, and JAG attorneys who specialize in sexual assault. However, this office was poorly maintained and ineffective.

88. In October 2004, Congress passed the National Defense Authorization Act for Fiscal Year 2005 ("2005 NDAA"), which established the Defense Task Force on Sexual Assault in the Military Services ("Defense Task Force") and entrusted it with investigating sexual violence in the military, under the guidance of the Department of Defense.¹⁰¹ Part of the charge for the Defense Task Force was to evaluate the success of SAPRO and what could be done to improve its effectiveness. In its subsequent report, the Task Force determined that SAPRO was underfunded, poorly organized, and provided very little assistance to victims.¹⁰² The Task Force also believed "that the current placement of SAPRO within the Office of the Secretary of Defense has constrained critical aspects of the SAPR program."¹⁰³ Regarding its organizational structure, the Defense Task Force recommended that SAPRO receive higher-level attention to

¹⁰⁰ The Department of Defense created SAPRO at the recommendation of the Care for Victims of Sexual Assault Task Force, a temporary investigative unit that had conducted a 90-day investigation of sexual assault in the military. *See* Mission & History, Department of Defense: Sexual Assault Prevention & Response Office, *available at* <http://www.sapr.mil/index.php/about/mission-and-history>.

¹⁰¹ Under the 2005 National Defense Authorization Act, when the Academy Task Force completed its investigation of sexual violence in the military academies, its name would automatically change to the Defense Task Force on Sexual Assault in the Military Services ("Defense Task Force") and it would begin investigating sexual assault in the military generally. *See* Public Law 108-375, § 576.

¹⁰² The Task Force report, released in 2009, found that funding for SAPRO was "sporadic and inconsistent," and financial support for its continued existence on a particular installation had to be "resourced locally." REPORT OF THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES ES-2 (Dec. 2009) [hereinafter REPORT OF THE DEFENSE TASK FORCE], *available at* http://www.ncdsv.org/images/SAPR_DTFSAMS_Report_Dec_2009.pdf. Surprisingly, SAPRO also had no "systematic evaluation plan or feedback mechanism for assessing overall effectiveness of sexual assault prevention and response training efforts." *Id.* at ES-3. Furthermore, SAPRO had "limited itself to policy matters, [and did] not provide individual victim assistance." *Id.* at ES-2.

¹⁰³ *Id.* at ES-2.

effect greater progress and, specifically, that the Deputy Secretary of Defense take responsibility for SAPRO.¹⁰⁴

89. The structural problems identified by the Defense Task Force were reflected in the experiences of the petitioners. When Petitioner McCoy sought counseling from a Sexual Assault Response Coordinator to deal with her ongoing PTSD as a result of being sexually assaulted, the Sexual Assault Response Coordinator told her she would have to deal with it on her own since it was not related to combat. Petitioner Woods witnessed first-hand how certain military officials who are supposed to represent victims of sexual violence actually condone sexual violence, when a JAG attorney referred to all Women Marines as “Walking Mattresses.” Such responses re-victimize sexual assault survivors and contribute to a culture of impunity for sexual violence within the U.S. military.

2. Actions and Inaction by United States Secretaries of Defense that Impeded Efforts to Combat Sexual Violence in the United States Military

90. Secretaries of Defense Donald Rumsfeld and Robert Gates were in charge of the United States military during the time period when the human rights violations alleged in this petition took place. As high-level overseers of the military, they were responsible for ensuring the sexual violence was prosecuted and that the rights of service member victims were protected. However, on several occasions, the Secretaries impeded efforts to combat sexual violence in the U.S. military.

91. Secretary Rumsfeld was slow to respond to and at times appeared to disregard Congressional calls for change in the military’s response to sexual violence in its ranks. For example, on April 15, 2004, eighty-five members of Congress sent a joint letter to Secretary Rumsfeld expressing concern that he had ignored recommendations to address military sexual

¹⁰⁴ *Id.*

violence that were made in eighteen reports issued over the previous sixteen years.¹⁰⁵ The members stated that they were “concerned that the problem of sexual misconduct in the military is repeatedly investigated, but recommendations for substantive change in the reports are often ignored.”¹⁰⁶ Congress later criticized the Department of Defense under Secretary Rumsfeld’s leadership for its delay in constituting the Defense Task Force established by the 2005 NDAA, calling this delay “embarrassing;”¹⁰⁷ the Task Force met for the first time only in August 2008 and issued its report in December 2009.¹⁰⁸

92. Under Secretary Gates’ leadership, the Department of Defense demonstrated a similar reluctance to engage with the United States Congress in its efforts to address the problem of military sexual assault. In July 2008, the United States House Oversight Committee on National Security and Foreign Affairs subpoenaed Dr. Kaye Whitley, Director of SAPRO, to testify on July 31, 2008 about her office’s efforts to eradicate sexual assault.¹⁰⁹ Secretary Gates and Gates’ subordinates directed Dr. Whitley to ignore the subpoena, which she did.¹¹⁰ As stated by the Chair of the Committee at the subsequent hearing: “But what kind of a message does her and the Department’s unwillingness until now to allow testimony send to our men and women in uniform? Do they take Dr. Whitley’s office seriously? Is she being muzzled, or is the

¹⁰⁵ Rep. Carolyn Maloney et al., Letter to Rumsfeld, April 15, 2004, *available at* <https://maloney.house.gov/sites/maloney.house.gov/files/documents/olddocs/041404militarysexualassault.pdf>.

¹⁰⁶ *Id.*

¹⁰⁷ Statement of Rep. Chris Shays, House Subcommittee Hearing: ‘Sexual Assault in the Military and at the Academies,’ Serial No. 109-220 (2006), *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-109hhr33682/html/CHRG-109hhr33682.htm>; Statement of Rep. Chris Shays, House Subcommittee Hearing: ‘Sexual Assault in the Military’ – Part II, Serial No. 110-188 (2008).

¹⁰⁸ Letter from Louis V. Iasiello and Millicent Wasell, Chairs of the Defense Task Force, to Secretary of Defense Robert M. Gates, Dec. 1, 2009, in Report of the Defense Task Force, *supra* note 102, at i.

¹⁰⁹ Statement of Congressman John Tierney, House Subcommittee Hearing: ‘Sexual Assault in the Military’ – Part II, Serial No. 110–188 (2008).

¹¹⁰ Statement of Rep. Chris Shays, House Subcommittee Hearing: ‘Sexual Assault in the Military’ – Part II, Serial No. 110–188 (2008).

Department hiding something?”¹¹¹ Secretary Gates then failed to ensure that the Department of Defense met its statutorily mandated deadline of January 2010 for implementing a database to centralize all reports of rapes and sexual assaults, as prescribed by the National Defense Authorization Act for Fiscal Year 2009.¹¹² The database was not created until mid-2012.¹¹³

93. Secretary Gates also impeded the United States Army’s efforts to address sexual violence. As reported by the *Washington Post* on November 26, 2010, Secretary Gates and his subordinates ignored the established competitive procurement process for contracting, and selected an inexperienced, small firm known as United Solutions and Services (“US2”) to receive a \$250 million contract designed to implement the Army’s obligations to prevent sexual assault and harassment.¹¹⁴ Prior to being selected without any competition for the sexual assault work, US2 had only three employees and several small contracts for janitorial work.¹¹⁵ When the Army was audited in 2011, the U.S. Interior Department Office of Inspector General found that the contract with US2 was illegal and that the Army knew that US2 was “too small to do all the work itself.”¹¹⁶

¹¹¹ Statement of Rep. John Tierney, House Subcommittee Hearing: ‘Sexual Assault in the Military’ – Part II, Serial No. 110–188 (2008).

¹¹² Statement of Brenda S. Farrell, House Subcommittee Hearing: ‘Sexual Assault in the Military,’ Serial No. 111–73 (2010).

¹¹³ DEPARTMENT OF DEFENSE, FISCAL YEAR 2012 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY: Volume One 42 (2013) [hereinafter DEPARTMENT OF DEFENSE, FY12 ANNUAL REPORT], available at http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-Volume_One.pdf.

¹¹⁴ See Robert O’Harrow Jr., *Alaska native status gave tiny, inexperienced firm a \$250 million Army contract*, WASH. POST, Nov. 26, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503333.html?nav=hcmodule>.

¹¹⁵ *Id.* One of US2’s tasks was to launch a “global campaign to prevent sexual assaults in the military.” Robert O’Harrow Jr., *Audit: Army, Interior Broke Law by Awarding Contract to Alaska Native Corporation*, THE WASHINGTON POST, Aug. 17, 2011, available at http://www.washingtonpost.com/business/audit-army-interior-broke-law-by-awarding-contract-to-alaska-native-corporation/2011/08/16/gIQAMJN9LJ_story.html.

¹¹⁶ Robert O’Harrow Jr., *Audit: Army, Interior Broke Law by Awarding Contract to Alaska Native Corporation*, THE WASHINGTON POST, Aug. 17, 2011, available at http://www.washingtonpost.com/business/audit-army-interior-broke-law-by-awarding-contract-to-alaska-native-corporation/2011/08/16/gIQAMJN9LJ_story.html.

3. Increasing Reports of Sexual Violence in the United States Military

94. Despite having established the Sexual Assault Prevention and Response Office as a single point of accountability for all sexual assault policy matters within the Department of Defense, the permanent office has not been able to effectively curb sexual violence in its ranks. After its establishment in 2005, the number of reports of sexual violence within the military has consistently increased,¹¹⁷ while the rate of reporting remains low.¹¹⁸

95. The chart below details the number of sexual offense¹¹⁹ cases in the military every year, the number of cases that were referred to court-martial, and the number of cases that were referred for Article 15 nonjudicial punishment or administrative action. Because victims face stigma, trauma, and potential professional and personal retaliation, the Department of Defense predicts that only 20 percent of the cases are ever reported.¹²⁰ These numbers are taken from the Department of Defense's annual reports on sexual assault, which it began producing in 2005 under obligation of the 2005 NDAA.¹²¹

¹¹⁷ See Section V.C.3, *infra*.

¹¹⁸ In 2006, the Department of Defense estimated that only 7 percent of sexual offenses in the U.S. military were reported. By 2010, the number had only climbed to 13 percent, and by 2012 it had dropped down to 11 percent. See Exhibit 5: Estimated Number of Service Members Experiencing Unwanted Sexual Contact Based on Past-Year Prevalence Rates versus Number of Service Member Victims in Reports of Sexual Assault for Incidents Occurring during Military Service, CY 2004-FY 2014, Provisional Statistical Data on Sexual Assault (Fiscal Year 2014) 12, available at

http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Appendix_A.pdf.

¹¹⁹ The term describes completed and attempted oral, anal, and vaginal penetration with any body part or object, and the unwanted touching of genitalia and other sexually-related areas of the body.

¹²⁰ DEPARTMENT OF DEFENSE, FISCAL YEAR 2010 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 15 (2011) [hereinafter DEPARTMENT OF DEFENSE, FY10 ANNUAL REPORT].

¹²¹ See DEPARTMENT OF DEFENSE, CALENDAR YEAR 2004 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 1, 2 (2005); DEPARTMENT OF DEFENSE, CALENDAR YEAR 2005 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 2, 3 (2006); DEPARTMENT OF DEFENSE, CALENDAR YEAR 2006 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 2, 4 (2007); DEPARTMENT OF DEFENSE, FISCAL YEAR 2007 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 4, 19 (2008); DEPARTMENT OF DEFENSE, FISCAL YEAR 2008 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 6, 36 (2009); DEPARTMENT OF DEFENSE, FISCAL YEAR 2009 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 58, 64 (2010); DEPARTMENT OF DEFENSE, FY10 ANNUAL REPORT, *supra* note 120, at 3, 71; DEPARTMENT OF DEFENSE, FISCAL YEAR 2011 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 2, 32 (2012) [hereinafter DEPARTMENT OF DEFENSE, FY11 ANNUAL REPORT]; DEPARTMENT OF DEFENSE, FY12 ANNUAL REPORT, *supra* note 113, at 57, 58, 60, 68; and DEPARTMENT OF DEFENSE, FISCAL YEAR 2013 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 2, 78 (2014).

Year	Reported Offenses	Unrestricted Reported Offenses ¹²²	Referred for Court-martial ¹²³	Nonjudicial Punishment	Administrative Action
2004	1,700	1,700	113	132	97
2005	2,374	2,047	79	91	104
2006	2,947	2,277	72	114	84
2007 ¹²⁴	2,688	2,085	103	120	126
2008	2,908	2,265	317	247	268
2009	3,230	2,516	137	201	111
2010	3,158	2,410	187	163	118
2011	3,192	2,439	240	155	75
2012	3,374	2,558	266	109	74
2013	5,061	3,768	838	210	139

96. As the table details, the number of reported sexual violence incidents has increased over the years as the number of punishments—a strikingly small number compared to incidents—has, for the most part, stayed the same. In 2012, out of the 1,714 times that commanders were faced with the decision to impose some form of disciplinary action, only 37 percent of cases went to military courts.¹²⁵ Additionally, 18 percent of sexual assault offenders against whom commanders took action received only an Article 15 nonjudicial punishment.¹²⁶ In 2011, only 64 percent of cases that went to trial and resulted in a conviction ended in a

¹²² “Unrestricted Reported Offenses” refers to the number of reports sexual violence victims chose to be processed through the unrestricted reporting system, which allows for investigation and possible prosecution, as opposed to the restricted reporting system, which ensures confidentiality but does not provide a judicial remedy. The restricted reporting system was introduced in 2005. The regulations governing the restricted and unrestricted reporting systems are contained in 32 C.F.R. § 105.8 - "Reporting Options and Sexual Assault Reporting Procedures.

¹²³ This is the number of cases that were referred to court-martial in the same year that they were reported. Some cases were referred to court-martial in a different year than they were reported.

¹²⁴ During this year, the Department of Defense went from calendar year to fiscal year reporting.

¹²⁵ See DEPARTMENT OF DEFENSE, FY12 ANNUAL REPORT, *supra* note 113, at 69–70.

¹²⁶ *Id.*

discharge or dismissal, which means that the military retained one in every third convicted perpetrator.¹²⁷

97. Studies have shown that more sexual violence “occurs in units where the commanding officer is neutral or indifferent to abuse than in those where officers did not tolerate abuse.”¹²⁸ In fact, one study found that in military units where officers tolerate or initiate sexual harassment, incidents of rape triple or quadruple.¹²⁹

D. The Chain of Command is Ineffective at Handling Sexual Violence Within the Military Justice System

98. As detailed in Section V.C, *supra*, very few cases of military sexual violence are ever reported, investigated, or prosecuted, so perpetrators often go unpunished. The military justice system prosecutes only 8 percent of those alleged to have perpetrated the crimes of rape or sexual assault, as compared to the civilian system, which prosecutes 40 percent of those alleged to have committed such crimes.¹³⁰

99. The rate of reporting is low for several reasons. First, many victims fear retaliation from their supervisors or fellow service members for reporting incidents. 62 percent of women who reported cases of unwanted sexual contact in 2012 also reported a combination of professional retaliation, social retaliation, administrative action, and/or other punishments.¹³¹ Of those known who did not report to authorities, 47 percent cited a fear of retaliation as the reason

¹²⁷ See DEPARTMENT OF DEFENSE, FY11 ANNUAL REPORT, *supra* note 121, at 45. This is a trend across several years. Currently the Navy is the only branch that discharges service members convicted of these crimes.

¹²⁸ Turchik & Wilson, *supra* note 82, at 271.

¹²⁹ Anne G. Sadler et al., *Factors Associated with Women’s Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262, 268 (2003).

¹³⁰ See American Association of University Women, “STOP Act Aims to End Sexual Assault in the Military,” April 24, 2013, available at <http://www.aauw.org/article/stop-act-aims-to-end-sexual-assault-in-the-military/>; Bill Briggs, *Civil Rights Commission urged to order audit of military sex-assault cases*, NBNEWS.com, Jan. 11, 2013, available at http://usnews.nbcnews.com/_news/2013/01/11/16469177-civil-rights-commission-urged-to-order-audit-of-military-sex-assault-cases?lite.

¹³¹ See Department of Defense Sexual Assault Prevention and Response Program, Response Systems Panel Briefing, 17 (June 27, 2013), available at http://www.sapr.mil/public/docs/speeches/DoD_SAPRO_ResponseSystemsPanel_Briefing_27Jun13_Online.pdf.

for not reporting, and 43 percent “had heard about negative experiences of other victims” who reported unwanted sexual contact.¹³² Although retaliation became a criminal offense under UCMJ Article 92 in 2014, it is unclear how exactly the offense will be punished or even monitored.¹³³

100. Second, the Manual for Courts-Martial currently maintains that the officer who determines whether or not a report of rape or sexual assault has merit is in the accused service member’s chain of command.¹³⁴ This conflict of interest prevents the victim as well as the accused from receiving impartial and unbiased treatment. Even though victims have the option to report acts of sexual violence outside of their chain of command, the ultimate decision on whether to prosecute still lies within the chain of command of the accused. It is likely that this policy of granting commanders enormous discretion in disposing of cases deters reporting by victims. In the civilian criminal justice system, independent prosecutors—usually with no connection to the accused—bring cases to trial.¹³⁵ In contrast, the UCMJ permits commanders, after an informal investigation, to drop the matter altogether, thereby cutting off access to the judicial system for victims.¹³⁶ Moreover, the current UCMJ Article 15 permits commanders to use lenient nonjudicial punishments for almost any alleged crime if the commander believes the alleged wrongdoing is actually “minor.”¹³⁷

101. Delegating authority to make sexual violence disposition decisions to commanders in the chain of command is problematic primarily because of their lack of impartiality and legal training, and their extralegal motives. Commanders are not impartial

¹³² See DEPARTMENT OF DEFENSE, FY 2012 ANNUAL REPORT, *supra* note 121, at 27.

¹³³ Section 1709 of the National Defense Authorization Act for Fiscal Year 2014 directs the Secretary of Defense to make retaliation punishable under Article 92 of the Uniform Code of Military Justice (UCMJ).

¹³⁴ RCM 306(c)(1)–(5).

¹³⁵ See Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 2 (2012).

¹³⁶ RCM 306(c)(1)–(5).

¹³⁷ UCMJ art. 15.

because they often have a close working relationship with the accused.¹³⁸ The 2012 Workplace and Gender Relations Survey of Active Duty Members reported that 25% of surveyed female victims of sexual assault indicated that the perpetrators were in their chain of command; in these cases, the convening authority would know both the accused and survivor and therefore would not be in a position to make an unbiased disposition decision.¹³⁹ Additionally, most commanders are not lawyers and do not have the training to appropriately handle reports of rape, sexual assault, or harassment.¹⁴⁰ Commanders are also operationally focused and often base their decisions on what is best for the military, rather than the victim.¹⁴¹

102. The military justice system did not provide effective access to justice to the seven petitioners, and its ineffective handling of sexual violence continues to infringe upon the human rights of current service members. The petitioners' experiences are not anomalies but rather are part of a larger problem with investigation, prosecution, and punishment of sexual violence cases in the U.S. military that largely stems from relying on commanders for important legal decisions. The problem is all the more severe because commanders are the only avenue to justice for service members.

E. United States Federal Courts Deny Victims of Sexual Violence Access to Judicial Remedies

103. As discussed in greater detail in Section IV.B *supra*, the United States federal court system does not provide service member victims with a method for seeking civil redress in federal court. The Supreme Court of the United States has long held that the United States

¹³⁸ See Service Women's Action Network, Briefing Paper: Department of Defense (DoD) Annual Report on Sexual Assault in the Military, Fiscal Year (FY) 2011, 2 (2012) [hereinafter Service Women's Action Network Briefing Paper].

¹³⁹ See DEFENSE MANPOWER DATA CENTER, 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS 37 (2013), available at http://www.sapr.mil/public/docs/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf.

¹⁴⁰ See Service Women's Action Network Briefing Paper, *supra* note 138, at 3.

¹⁴¹ *Id.*

military cannot be sued for violations of United States constitutional rights or for monetary damages.

104. Victims are prevented from bringing their constitutional violation claims against the military in federal court on a theory that it violates the separation of powers doctrine in the United States Constitution.¹⁴² The Supreme Court has found that “the unique disciplinary structure of the Military Establishment” and Congress’s exercise of its constitutional authority over military affairs to create a separate military justice system require civilian courts to abstain from providing service members with a civil remedy.¹⁴³

105. Victims are prevented from bringing liability claims for monetary damages against the military in federal court because the Supreme Court has shielded the military from liability suits through the *Feres* doctrine. As discussed in Section IV.B., *supra*, the *Feres* doctrine states that “the Government is not liable under the Federal Tort Claims Act [later extended to other causes of action] for injuries to servicemen where the injuries arise out of or are in the course of activity that is incident to [military] service.”¹⁴⁴ The U.S. Court of Appeals for the D.C. Circuit, in *Klay v. Panetta*, described how the petitioners’ injuries arose out of or were in the course of activities incident to their military service, precluding them from civil relief.¹⁴⁵ This case law therefore prevents victims from seeking any redress in United States civilian court for violations of their rights, leaving the ineffective military justice system as their only recourse.

¹⁴² See *Klay v. Panetta*, 758 F.3d 369, 374 (2014) (stating that “respect for the separation of powers demands that courts hesitate to imply a remedy” for claims without a statutorily granted cause of action, and that a remedy should not be inferred where Congress has “extensively engaged with the problem of sexual assault in the military but has chosen not to create such a cause of action.”).

¹⁴³ See *Chapelle v. Wallace*, 462 U.S. 296, 304 (1983); See *Chapelle v. Wallace*, 462 U.S. 296, 304 (1983); *United States v. Stanley*, 483 U.S. 669, 684 (1987).

¹⁴⁴ *Feres v. United States*, 340 U.S. 135, 146 (1950).

¹⁴⁵ See *Klay*, 758 F.3d at 372.

F. The United States Does Not Afford Survivors of Military Sexual Trauma Equal Access to Disability Benefits

106. Military Sexual Trauma (“MST”) is defined in 38 U.S.C. § 1720(D) as “psychological trauma . . . resulting from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the Veteran was serving on active duty or active duty for training.”¹⁴⁶

107. According to Department of Veterans Affairs (“VA”) statistics, in 2012, 85,000 veterans sought treatment for MST.¹⁴⁷ One study of female veterans found that subjects with MST had higher rates of PTSD—sixty percent—than those who had experienced other forms of trauma.¹⁴⁸ In fact, “[p]ost-traumatic stress disorder is one of the known consequences of rape . . . [and] rape is the trauma most highly correlated with the development of this disorder.”¹⁴⁹

108. While the most common mental health issue that arises from MST is PTSD, MST is also associated with “anxiety disorders, depression, dissociative disorders, eating disorders, bipolar disorder, substance use disorders, and personality disorders.”¹⁵⁰ A study published in 2014 found that MST “tended to be associated with alcohol use” and “binge drinking.”¹⁵¹ Other common effects of MST include sudden changes in emotional state, constant feelings of anger or irritability, and depression.¹⁵² Other times MST can lead to feelings of numbness or difficulty

¹⁴⁶ 38 U.S.C. 1720(D).

¹⁴⁷ Kevin Freking, *Military sex abuse has long-term impact for vets*, ASSOCIATED PRESS, May 20, 2013, <http://bigstory.ap.org/article/military-sex-abuse-has-long-term-impact-vets>.

¹⁴⁸ See Deborah Yaeger et al., *DSM-IV Diagnosed Posttraumatic Stress Disorder in Women Veterans With and Without Military Sexual Trauma*, 21 J GEN. INTERN MED., S65 (2006), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1513167/>.

¹⁴⁹ *Id.*

¹⁵⁰ Jenny K. Hyun, Joanne Pavao, & Rachel Kimerling, *Military Sexual Trauma*, 20 PTSD RESEARCH QUARTERLY 2 (2009), available at <http://www.ptsd.va.gov/professional/newsletters/research-quarterly/v20n2.pdf>.

¹⁵¹ Suzannah K. Creech & Brian Borsari, *Alcohol use, military sexual trauma, expectancies, and coping skills in women veterans presenting to primary care*, 39 ADDICTIVE BEHAVIORS 379, 384-5 (2014), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3819401/pdf/nihms-501129.pdf>.

¹⁵² See Factsheet: Military Sexual Trauma, U.S. Dep’t of Veterans Affairs 2 (Oct. 2014), available at http://www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf

feeling love or happiness.¹⁵³ Reminders of sexual trauma can cause intense emotional reactions leading to veterans feeling “on edge or ‘jumpy’ all the time,” feeling unsafe, or going to extreme lengths to avoid reminders of the trauma.¹⁵⁴ MST can also cause veterans to have difficulty trusting other people, creating problems in relationships and with authority figures, and causing veterans to feel alone or disconnected from others.¹⁵⁵ MST makes it hard to stay focused, and affected veterans often find their thinking clouded and their memory impaired.¹⁵⁶ Finally, MST can cause serious physical health problems such as sexual issues, chronic pain, weight or eating problems, and stomach or bowel problems.¹⁵⁷

109. Unfortunately, former service members who suffer from PTSD based on their experiences of military sexual violence face significant challenges in obtaining treatment and disability compensation from the VA. The VA uses a higher evidentiary standard in evaluating these claims than in evaluating claims based on other stressors, such as combat or fear of enemy activity.¹⁵⁸ As a result, survivors of military sexual assault are less likely to be approved for disability compensation than are other veterans with PTSD. The VA-granted disability benefit claims rate for MST-related PTSD claims has lagged behind the grant rate for other PTSD claims by between 16.5 and 29.6 percent each year from 2008 to 2012.¹⁵⁹ This lower grant rate disproportionately affects female veterans, whose disability claims are more likely than those of male veterans to be based on MST.¹⁶⁰

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See RAINN, “Military Sexual Trauma,” <http://rainn.org/effects-of-sexual-assault/military-sexual-trauma>.

¹⁵⁸ AMERICAN CIVIL LIBERTIES UNION and SERVICE WOMEN’S ACTION NETWORK, BATTLE FOR BENEFITS: VA DISCRIMINATION AGAINST SURVIVORS OF MILITARY SEXUAL TRAUMA 3-4 (2013), available at <https://www.aclu.org/sites/default/files/assets/lib13-mst-report-11062013.pdf>

¹⁵⁹ *Id.* at 1, 5.

¹⁶⁰ *Id.* at 1, 8. As a result, for every year between 2008 and 2011, a gap of “nearly ten percentage points separated the overall grant rate for PTSD claims brought by women and those brought by men.” *Id.* at 1; see also *id.* at 8.

IV. THIS PETITION IS ADMISSIBLE UNDER THE COMMISSION'S RULES OF PROCEDURE

A. Petitioners Have Met the Requirements of Article 31 of the Rules of Procedure

110. Under Article 31 of the Rules of Procedure of the Inter-American Commission on Human Rights, petitioners must demonstrate that they have exhausted domestic remedies available to them.¹⁶¹ Article 31(2) states that the requirement does not apply, however, when:

(a) the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.¹⁶²

Crucially, it is necessary for petitioners to exhaust only those domestic remedies that are “adequate to protect the rights allegedly infringed and effective in securing the results envisaged in establishing them.”¹⁶³ Petitioners must show that domestic remedies have been exhausted, that a remedy is unavailable as a matter of law, fact, or delay, or that any potential remedy would be inadequate or ineffective to rectify the violations alleged.

¹⁶¹ Inter-Am. Comm'n H.R., Rules of Procedure, art. 31 (2013).

¹⁶² *Id.* art. 31(2)(a)-(c).

¹⁶³ *El Mozote Massacre v. El Salvador*, Case 10.720, Inter-Am. Comm'n H.R., Report No. 24/06, OEA/Ser.L/V/II.124 doc. 5 ¶ 33 (2006); *see also Velasquez Rodriguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 4 ¶¶ 62–66 (Jul. 29, 1988); *Fairen Garbi and Solis Corrales v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 6 (Mar. 15, 1989); *Godínez Cruz v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5 ¶¶ 65–69, and 86–90 (Jan. 20, 1989); *Santander Tristan Donoso v. Panama*, Case 12.360, Inter-Am. Comm'n H.R., Report No. 71/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1, ¶¶ 21–2 (2002). The Commission has incorporated the longstanding jurisprudence of the Inter-American Court which states that “[a]dequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted.” *Fernando A. Colmenares Castillo v. Mexico*, Case 12.170, Inter-Am. Comm'n H.R., Report No. 36/05, OEA/Ser.L/V/II.124 Doc. 5 (2005) (citing *Velasquez Rodriguez*, Inter-Am. Ct. H.R., ¶ 64).

1. Petitioners Have Met the Exhaustion of Domestic Remedies Requirement

111. After seeking a remedy through the military justice system and being denied, petitioners sought redress through litigation in United States courts by bringing their civil claim to the U.S. District Court and appealing upon dismissal to the U.S. Court of Appeals for the District of Columbia Circuit.¹⁶⁴ Upon final dismissal of the case by the Court of Appeals, petitioners had exhausted domestic remedies. While petitioners did not seek review by the U.S. Supreme Court, the exhaustion rule does not require petitioners to seek the “extraordinary” remedy of U.S. Supreme Court review. Review on a petition for writ of certiorari to the U.S. Supreme Court is discretionary in nature,¹⁶⁵ and the Supreme Court functions as an extraordinary jurisdiction of restricted scope and access.¹⁶⁶ U.S. Courts of Appeal are the final decision-making courts in 99 percent of federal cases.¹⁶⁷

112. The Commission has recognized that petitioners do not need to seek a writ of certiorari to satisfy Article 31 of Rules of Procedure of the Inter-American Commission on Human Rights. In deeming the petition admissible in *Juvenile Offenders Sentenced to Life Imprisonment Without Parole v. United States*,¹⁶⁸ the Commission stated that:

In regards to the arguments of the State to the effect that the alleged victims had recourse to the Supreme Court through a writ of certiorari to remedy this situation

¹⁶⁴ See *Klay v. Panetta*, 758 F.3d 369 (2014); *Klay v. Panetta*, 924 F. Supp. 2d 8 (D.D.C. 2013).

¹⁶⁵ Supreme Court of the United States, Court Rules, Rule 10, *available at* <http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf> (stating that “[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion.”).

¹⁶⁶ In fact, “[i]n recent years, the United States Supreme Court has decided fewer cases than at any other time in its recent history” Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53, WM. & MARY L. REV. 1219 (2012). In the Supreme Court’s October Term 2013 (the Court begins considering cases in October and runs until June or July of the following year), the Court issued only 73 merits opinions, a significant decline from the approximately 150 merits opinions it issued annually in the 1980s and early 1990s. The Court has issued an average of only 79 opinions annually between October Term 2000 and October Term 2013. See Graphs: Merits Opinions & Summary Reversals, SCOTUSblog Stat Pack (October Term 2013) 15, 16 (July 3, 2014), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/SCOTUSblog_Stat_Pack_for_OT13.pdf.

¹⁶⁷ See JOHN GREER, WENDY SCHILLER, & JEFFREY SEGAL, GATEWAYS TO DEMOCRACY: AN INTRODUCTION TO AMERICAN GOVERNMENT 2d Ed. 549 (2014).

¹⁶⁸ *Juvenile Offenders Sentenced to Life Imprisonment Without Parole v. United States*, Inter-Am. Comm’n H.R., Report No. 18/12, Petition 161-06, Admissibility (Mar. 20, 2012).

. . . the IACHR observes that the writ of certiorari is a discretionary remedy permitting the United States Supreme Court to review the judgments of federal or state courts. The Supreme Court itself has recognized that this remedy is discretionary in the Rules of the United States Supreme Court, since a request for a writ of certiorari will only be admissible for compelling reasons; additionally, consideration of a request for a writ of certiorari is not a matter of right, but of judicial discretion.¹⁶⁹

Under this jurisprudence, petitioners need not appeal to the U.S. Supreme Court before submitting this petition.

2. Petitioners Are Excepted From the Exhaustion of Domestic Remedies Requirement

113. Alternatively, this petition satisfies the criteria for exception to the exhaustion of domestic remedies requirement as defined in Article 31(2) of the Rules of Procedure in two respects: first, the unbalanced nature of the military justice system does not provide petitioners with a fair opportunity to obtain justice and, second, the federal justice system would be a futile remedy in light of Supreme Court precedents.¹⁷⁰

114. First, the Honorable Commission has long held that military justice systems in general are ineffective remedies to address human rights violations, and “thus those with access only to the military justice system have not necessarily been required to exhaust domestic remedies before submitting cases to the Commission.”¹⁷¹ In the case of *Márcio Lapoente da Silveira v. Brazil*,¹⁷² the Commission discussed the problems of military courts investigating human rights violations. Quoting *El Dorado dos Carajás v. Brazil*, the Commission stated:

When the military justice system conducts the investigation of a case, the possibility of an objective and independent investigation by judicial authorities which do not form part of the military hierarchy is precluded. Thus, when an

¹⁶⁹ *Id.* ¶ 58 (emphasis added).

¹⁷⁰ Inter-Am. Comm’n H.R., Rules of Procedure, art. 31(2).

¹⁷¹ *Márcio Lapoente da Silveira v. Brazil*, Case 4524-02, Inter-Am. Comm’n H.R., Report No. 74/08, OEA/Ser.L/V/II.130 Doc. 22, rev. 1 ¶ 64 (2008).

¹⁷² *Márcio Lapoente da Silveira*, Inter-Am. Comm’n H.R., Report No. 74/08.

investigation is initiated in the military justice system, a conviction will probably be impossible even if the case is later transferred to the civil justice system In those cases which remain in the military justice system, the investigation will frequently be conducted in such a manner as to prevent the case from reaching the final decision stage.¹⁷³

The Commission therefore found that domestic remedies need not be exhausted even though there is a formal remedy in the military for investigating human rights violations.¹⁷⁴

115. In the present case, petitioners tried and failed to receive access to justice through the United States military justice system. The current structural problems with the United States military justice system prevent it from conducting objective and independent investigations into sexual offenses committed by its own military members. The petitioners had no recourse within the military justice system and on this ground alone meet the exception to the exhaustion of domestic remedies requirement.

116. Second, an exception to the exhaustion principle applies because petitioners had no reasonable prospect of success in the federal courts. The Honorable Commission has previously found an exception to the exhaustion-of-domestic-remedies requirement applied under Article 31.2(b) of the IACHR's Rules of Procedure where potential recourse to the Supreme Court constituted an ineffective remedy "due to a lack of prospects for success."¹⁷⁵ The petitioners in that case had not sought Supreme Court review because "the domestic remedies [could] not be considered to have had a reasonable prospect of success in light of the consistent case law of the United States courts, including the Supreme Court."¹⁷⁶

117. Similarly, petitioners in this case filed a civil lawsuit claiming violations of their constitutional rights in domestic federal court after they failed to obtain access to justice through

¹⁷³ *Id.* ¶ 69 (quoting *El Dorado Dos Carajas v. Brazil*, Case 11.820, Inter-Am. Comm'n H.R., Report No. 4/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 146 (2003)).

¹⁷⁴ *Id.* ¶ 70.

¹⁷⁵ *Juvenile Offenders Sentenced to Life Imprisonment Without Parole v. United States*, Inter-Am. Comm'n H.R. Report No. 18/12, Petition 161-06, Admissibility, ¶ 47 (Mar. 20, 2012).

¹⁷⁶ *Id.* ¶ 57.

the military justice system. On July 18, 2014, the Court of Appeals for the District of Columbia Circuit rejected those claims. The strong Supreme Court case law cited in both the District Court and Circuit Court dismissals meant that the petitioners did not have a reasonable prospect for success in that forum, even in the extraordinarily unlikely event that the Supreme Court agreed to review the lower courts' dismissal of the case.¹⁷⁷ The Supreme Court and other federal courts have repeatedly made clear that the federal judiciary will not adjudicate civil rights or personal injury claims by military service members against the military or military officials.¹⁷⁸ Therefore, petitioning the Supreme Court for a writ of certiorari would have been futile in this case, and the petitioners have met the exception to the exhaustion of domestic remedies requirement.

B. Petitioners Have Timely Filed Their Petition under Article 32(1) and Article 32(2) of the Rules of Procedure

118. Article 32(1) of the Rules of Procedure requires that petitions be lodged “within a period of six months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies.”¹⁷⁹ The six-month deadline from the date of the Court of Appeals decision, the date of exhaustion of domestic remedies, is on January 18, 2015. Thus the petition meets the timeliness requirement outlined in the terms of Article 32(1).

119. Additionally or alternatively, where petitioners are subject to an exception from the prior exhaustion of domestic remedies under Article 31(2), Article 32(2) of the Rules of Procedure states, “the petition shall be presented within a reasonable period of time [F]or this purpose, the Commission shall consider the date on which the alleged violation of rights

¹⁷⁷ See discussion in Section IV.B, *supra*.

¹⁷⁸ See *e.g.*, *Chappell v. United States*, 462 U.S. 296, 303–04 (1983) (“[T]he unique disciplinary structure of the Military Establishment and Congress’ activity in the field constitute ‘special factors’ which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type [civil] remedy against their superior officers.”); see also *Feres v. United States*, 340 U.S. 135, 146 (1950) (“[T]he Government is not liable under the [Federal Tort Claims Act] for injuries to servicemen where the injuries arise out of or are in the course of activity that is incident to service.”).

¹⁷⁹ Inter-Am. Comm’n H.R., Rules of Procedure, art. 32(1).

occurred and the circumstances of each case.”¹⁸⁰ Given the severity of the human rights violations suffered by petitioners and their recent recourse to U.S. federal courts, petitioners fall within the “reasonable period of time” standard. In addition, due to ongoing procedural failings and substantive legal limitations that stand in the way of petitioners making themselves whole, petitioners are subject to continuing harm consequent to the human rights violations described herein, including serious mental and physical trauma such as PTSD, anxiety and depression. Petitioners have thus filed within a reasonable period of time.

C. Petitioners Have No Proceedings Pending Before Any Other International Tribunals

120. Article 33 of the Rules of Procedure renders a petition inadmissible if its subject matter “is pending settlement pursuant to another procedure before an international governmental organization . . . or, . . . essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization”¹⁸¹ The subject of this petition is not pending settlement and does not duplicate any other petition in any other international proceeding.

D. The American Declaration of the Rights and Duties of Man is Binding on the United States

121. The Charter of the Organization of American States (“OAS Charter”) and the American Declaration of the Rights and Duties of Man are binding on the United States and are applicable in this petition. The Honorable Commission has found that the United States “is bound to respect the provisions contained in the American Declaration, and the IACHR is competent to receive petitions alleging violations committed by the State . . . because the State

¹⁸⁰ *Id.*, art. 32(2).

¹⁸¹ *Id.*, art. 33.

ratified the OAS Charter on June 19, 1951, having been subject to the Commission's jurisdiction since 1959, the year of that organ's creation, and in accordance with Articles 1 and 20 of the IACHR's Statute and Articles 23 and 51 of its Rules of Procedure."¹⁸²

E. The Commission Should Interpret the Provisions of the American Declaration in the Context of Developments in International Human Rights Law

122. The American Declaration imposes binding international legal obligations on the United States. On many occasions, international tribunals have found that international human rights instruments like the Declaration are to be interpreted with respect to the evolving norms of human rights law. The Inter-American Court has stated that it is appropriate to look to the Inter-American system of today in determining the legal status of the Declaration.¹⁸³

123. Similarly, the Inter-American Commission recently reported that it has:

[T]raditionally interpreted the scope of the obligations established under the American Declaration in the context of the international and inter-American human rights systems more broadly, in light of developments in the field of international human rights law since the instrument was first adopted, and with due regard to other rules of international law applicable to members states.¹⁸⁴

¹⁸² See *Juvenile Offenders Sentenced to Life Imprisonment Without Parole v. United States*, Inter-Am. Comm'n H.R., Report No. 18/12, Petition 161-06, Admissibility, ¶ 39 (Mar. 20, 2012); see also Inter-Am. Comm'n H.R., Rules of Procedure, arts. 51-52.

¹⁸³ See Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 37 (July 14, 1989).

¹⁸⁴ *Jessica Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No.80/11 ¶ 118 (2011) (citing generally *Wayne Smith v. United States*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, OEA/Ser.L/V/II.139, doc. 21 (2010); *Andrea Mortlock v. United States*, Case 12.534, Inter-Am. Comm'n H.R., Report No. 63/08 (2008); *Maya Indigenous Communities of Toledo Dist. v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004); *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002); *Michael Domingues v. United States*, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)).

Furthermore, according to the International Court of Justice, international instruments must be interpreted and applied in the overall framework of the juridical system in force at the time of interpretation.¹⁸⁵

124. It is important to note that the Commission considers the American Convention on Human Rights “to represent an authoritative expression of the fundamental principles set forth in the American Declaration.”¹⁸⁶ Although the United States is not a party to the Inter-American Convention on Human Rights, analogous provisions of Convention-related reports and jurisprudence of the Commission and Court interpreting its articles thus provide a significant guide to interpretation of the Declaration.

125. In addition, the Commission has held that other prevailing international and regional human rights instruments are relevant in interpreting and applying the provisions of the Declaration.¹⁸⁷ The Commission has directly cited a number of human rights standards in making such an interpretation, including authorities from the U.N. Human Rights Committee, the

¹⁸⁵ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (June 21, 1971).

¹⁸⁶ *Statehood Solidarity Comm. v. United States*, Case 11.204, Inter-Am. Comm’n H.R., Report No. 98/03, OEA/Ser.L/V/II.114, doc. 70 rev.1 ¶ 87 & n.79 (2003) (citing *Juan Raúl Garza v. United States*, Case 12.243, Inter-Am. Comm’n H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 88–89 (2000)); *see also* Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.106, doc. 40 rev. ¶ 38 (2000) [hereinafter IACHR Report on the Situation of Asylum Seekers in Canada] (confirming that while the Commission does not directly apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

¹⁸⁷ *See, e.g., Ramón Martínez Villareal v. United States*, Case 11.753, Inter-Am. Comm’n H.R., Report No. 52/02, Doc. 5 rev. 1 at 821 ¶ 60 (2002) (citing *Juan Raúl Garza v. United States*, Case 12.243, Inter-Am. Comm’n H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 88–89 (2000)) (“[I]n interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.”).

U.N. Committee Against Torture, U.N. Special Rapporteurs, the European Court of Human Rights,¹⁸⁸ as well as international humanitarian law such as the Geneva Conventions.¹⁸⁹

V. BY FAILING TO PREVENT AND ADEQUATELY RESPOND TO THE SEXUAL VIOLENCE EXPERIENCED BY PETITIONERS, THE UNITED STATES VIOLATED PETITIONERS' RIGHTS UNDER THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

126. The United States had a duty to uphold the petitioners' rights protected under the American Declaration. By creating a culture of impunity, where State actors commit heinous acts of sexual violence and remain unpunished, the United States routinely violated its duties under the American Declaration.

A. The United States Violated Petitioners' Rights to Life, Security of Person, and Humane Treatment under Article I

1. The United States Violated Petitioners' Rights to Life and Security of Person under Article I

127. Article I of the American Declaration states, "Every human being has the right to life, liberty and the security of his person."¹⁹⁰ The Commission has held that "the protection of the right to life is a critical component of a State's due diligence obligation to protect women

¹⁸⁸ See, e.g., *Ximenes-Lopes v. Brazil*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149 ¶ 51 (Jul. 4, 2006) (citing *Storck v. Germany*, App. No 61603/00, Eur. Ct. H.R. (2005) and other international declarations, standards and principles in order to "illuminate the reach and content" of the right to life and the right to humane treatment" in the Inter-American system, and finding "these soft-law documents helpful for the adjudication of the instant case"); *Ricardo Canese v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111 ¶¶ 115–35 (Aug. 31, 2004) (relying on HRC General Comment 27); *Raxcacó Reyes v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 133 ¶¶ 47, 69 (Sep. 15, 2005) (citing HRC Concluding Observations on reports of Iran and Iraq); IACHR Report on the Situation of Asylum Seekers in Canada, *supra* note 186, ¶¶ 28, 159, 165 (referencing the U.N. Convention on the Rights of the Child to interpret Canada's responsibilities to asylum seekers under the American Declaration and the OAS Charter).

¹⁸⁹ See, e.g., Organization of American States, Regarding the Situation of the Detainees at Guantanamo Bay, United States, Resolution No. 2/11, MC 259-02 (July 22, 2011); Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba, Inter-Am. Comm'n H.R. decision of Mar. 12, 2002, 41 ILM 532 (2002); *Bámaca Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 70 ¶¶ 207–9 (Nov. 25, 2000).

¹⁹⁰ Organization of American States, American Declaration of the Rights and Duties of Man, art. I, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.

from acts of violence. This legal obligation pertains to the entire state institution, including the actions of those entrusted with safeguarding the security of the State.”¹⁹¹

128. In interpreting the right-to-life provision of Article 4 of the American Convention on Human Rights, the Commission has found that states are required to “adopt the necessary measures, not only at the legislative, administrative and judicial level, by issuing penal norms and establishing a system of justice to prevent, eliminate and punish . . . and protect individuals from the criminal acts of other individuals and to investigate these situations effectively.”¹⁹² This language is equally useful in understanding the United States’ obligations under the American Declaration.

129. Furthermore the Commission has stated that the protection of personal integrity under Article I of the American Declaration includes protection for women against violence.¹⁹³ The Commission has urged states to comply with Article I by ensuring that violence against women—whether domestic violence or violence caused by state agents—is “duly investigated, tried before a court, and punished.”¹⁹⁴

130. The United States repeatedly violated petitioners’ rights to life and security of person by failing to meet its obligation to adopt the necessary measures to prevent, eliminate, punish, and protect petitioners from the criminal acts of other individuals. The military justice system failed in every one of petitioners’ cases whether at the prevention, investigation, or

¹⁹¹ Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 128 (2011).

¹⁹² Application before the Inter-American Court of Human Rights, Claudia Ivette González et. al. v. United Mexican States, Case Nos. 12.496, 12.497 and 12.498, Inter-Am. Comm’n H.R. ¶ 156 (2007) (quoting *The Pueblo Bello Massacre v. Columbia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 120 (Jan. 31, 2006 and interpreting Article 4 of the American Convention on Human Rights)).

¹⁹³ Luis Lizardo Cabrera v. Dominican Republic, Case 10.832, Inter-Am. Comm’n H.R. Report No. 35/96, OEA/Ser.L/V/II.95 doc. 7 rev. at 821 ¶ 78 (1997) (citing *Ireland v. United Kingdom*, 5310/71, Eur. Ct. H.R., ¶¶ 162–63 (1978)); *see also*, *Tyrer v. United Kingdom*, 5856/72, Eur. Ct. H.R., ¶ 28 (1978).

¹⁹⁴ Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.100 Doc. 17, Chapter III(C)(2) (1998).

judicial stage. The military justice system failed Petitioner Butcher by excluding rape kit evidence and allowing the defense to blame Petitioner Butcher for her rape because of her appearance. It failed Petitioner Walker by retaliating against her for reporting her rape instead of prosecuting her rapist. It failed Petitioner Dorn by ignoring her complaint and demoting her instead of punishing those who sexually harassed her. The military justice system failed Petitioner Everage by closing the investigation into her assault because no one witnessed it. It failed Petitioner Marmol by closing her case and refusing to prosecute her assailant for her rape. It failed Petitioner McCoy by obstructing the investigation of her attack. And it failed Petitioner Woods by making her the subject of the investigation into her own rape instead of her rapist. The culture of impunity that exists within the United States military and the broad discretion afforded to commanders under the current military justice system impedes effective prevention and response for these types of crimes.

2. The United States Violated Petitioners' Right to Humane Treatment under Article I

131. Article I of the American Declaration ensures “life, liberty and the security of [one’s] person,”¹⁹⁵ and the protections included therein have been read by the Commission as co-extensive with those afforded by Article 5 of the American Convention.¹⁹⁶ Article 5 guarantees every person’s “right to humane treatment,” which includes the “right to have his physical,

¹⁹⁵ Organization of American States, American Declaration of the Rights and Duties of Man, art. I, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.

¹⁹⁶ Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R. OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., ¶ 155 (2002) (“While the American Declaration does not contain a general provision on the right to humane treatment, the Commission has interpreted Article I of the American Declaration as containing a prohibition similar to that under the American Convention”); *see also* Juan Antonio Aguirre Ballesteros (Chile), Case 9437, Annual Report of the Inter-Am. Comm’n H.R., Report No. 5/85 43, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1984–1985).

mental, and moral integrity respected” and the right not to be “subjected to torture or cruel, inhuman, or degrading treatment.”¹⁹⁷

132. Furthermore, the Inter-American human rights system recognizes the right to be free of torture as a *jus cogens*, non-derogable norm, linking this to the right to security of the person outlined in Article 1 of the American Declaration: “[a]n essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations *erga omnes*.”¹⁹⁸

133. Torture is defined in the Inter-American Convention to Prevent and Punish Torture (“Inter-American Torture Convention”) as the following:

[A]ny act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.¹⁹⁹

In establishing the scope of torture, the Inter-American Court²⁰⁰ and Commission²⁰¹ have relied on this definition, and the Court has specifically held that it must refer to the Inter-American Torture Convention in interpreting the scope and content of Article 5 of the American Convention.²⁰² The Inter-American Torture Convention requires states to “take effective

¹⁹⁷ Organization of American States, American Convention on Human Rights, art. 5, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

¹⁹⁸ IACHR Report on the Situation of Asylum Seekers in Canada, *supra* note 186, ¶¶ 118, 154; *see also* Luis Lizardo Cabrera, Inter-Am. Comm’n H.R., Report No. 35/96, ¶ 79; *Goiburú v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 128 (Sep. 22, 2006) (on torture).

¹⁹⁹ Organization of American States, Inter-American Convention to Prevent and Punish Torture, art. 2, Dec. 9, 1985, O.A.S.T.S. No. 67.

²⁰⁰ *Tibi v. Ecuador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 145 (Sep. 7, 2004); *Gómez-Paquiyaury Brothers v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 105 (Jul. 8, 2004).

²⁰¹ *Raquel Martín de Mejía v. Peru*, Case 10.970, Inter-Am. Comm’n H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7 rev. ¶ 185 (1996).

²⁰² *Tibi*, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 145.

measures to prevent and punish torture . . . and other cruel, inhuman, or degrading treatment or punishment.”²⁰³

a. Rape Violates the Right to Humane Treatment under Article I of the American Declaration

134. The Inter-American Commission has consistently found that rape is a form of torture, stating in *Raquel Martín de Mejía v. Peru*:

[R]ape is a physical and mental abuse that is perpetrated as a result of an act of violence . . . Moreover, rape is considered to be a method of psychological torture[;] . . . its objective, in many cases, is not just to humiliate the victim but also her family or community.²⁰⁴

Further, the Inter-American system has held that rape is a violation of the right to humane treatment and amounts to torture where it is an “intentional act through which physical and mental pain and suffering is inflicted on a person . . . committed with a purpose . . . by a public official or by a private person acting at the instigation of the former.”²⁰⁵

135. A number of other international and regional bodies have also found rape by state officials, such as members of the military, to constitute torture. The European Court of Human Rights held that such rape was “an especially grave and abhorrent form of ill-treatment” amounting to torture,²⁰⁶ and the African Commission on Human and Peoples’ Rights has also found rape by military and security forces to constitute torture.²⁰⁷ The CEDAW Committee has identified sexual violence as a form of torture,²⁰⁸ as have several U.N. Special Rapporteurs on

²⁰³ Organization of American States, Inter-American Convention to Prevent and Punish Torture, art. 6, Dec. 9, 1985, O.A.S.T.S. No. 67.

²⁰⁴ *Raquel Martín de Mejía*, Inter-Am. Comm’n H.R., Report No. 5/96, ¶ 186.

²⁰⁵ *Id.* ¶ 157; *see also* Rosendo Cantu et al. v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 114 (Aug. 31, 2010); Miguel Castro-Castro Prison v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 309 (Nov. 25, 2006).

²⁰⁶ *Aydin v. Turkey*, No. 57/1996/676/866, Eur. Ct. H.R., ¶¶ 83–85 (1997).

²⁰⁷ *Malawi African Association and Others v. Mauritania*, African Comm’n on Human and Peoples’ Rights Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, African C.H.R., ¶¶ 117–18 (2000).

²⁰⁸ U.N. Convention on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 19 ¶ 7 (11th session, 1992).

Torture.²⁰⁹ The International Criminal Tribunal for the Former Yugoslavia has declared that rape and other forms of sexual assault constitute torture and are prohibited by international humanitarian law.²¹⁰

136. Most recently, in November 2014, the U.N. Committee Against Torture found that sexual violence in the U.S. military violated the United States' obligations under the Convention Against Torture to take measures to prevent acts of torture, investigate and afford redress for such acts, and protect complainants from retaliation.²¹¹ It stated, "the Committee remains concerned about the high prevalence of sexual violence, including rape, and the alleged failure of the Department to adequately prevent and address military sexual assault of both men and women serving in the armed forces."²¹²

137. The rapes of Petitioners Butcher, Marmol, Walker and Woods by fellow members of the military constituted torture. By failing to adequately prevent and respond to these rapes, the United States violated their right to humane treatment under Article 1 of the American Declaration, interpreted in light of Article 5 of the American Convention.

b. Other Forms of Sexual Violence Violate the Right to Humane Treatment under the American Declaration

138. The Inter-American Commission has found that acts of sexual violence not amounting to rape also violate the right to humane treatment under Article 5 of the American

²⁰⁹ Commission on Human Rights (1986), 'Report by the Special Rapporteur, Mr P Kooijmans', U.N. Doc. E/CN.4/1986/15, 19 February 1986 at 26; Commission on Human Rights (1992), 'Forty-Eighth Session, Summary Record of the 21st Meeting (Oral Statement of Special Rapporteur Kooijmans)', U.N. Doc. E/CN.4/1992/SR.21, 11 February 1992 at ¶ 35; U.N. Commission on Human Rights (1995), 'Report of the Special Rapporteur, Mr. Nigel S. Rodley, Submitted Pursuant to Commission on Human Rights Resolution 1992/32', U.N. Doc. E/CN.4/1995/34, 12 January 1995 at ¶¶ 15–24; U.N. General Assembly (2008), 'Manfred Nowak 2008 Report', at ¶ 26 and ¶¶ 34–36.

²¹⁰ Prosecutor v. Celebici, Case No. IT-96-21 T, Ruling, ¶ 476 (Nov. 16, 1998); Prosecutor v. Anto Furudzija, Case No. IT-95-17/1-T, Ruling, ¶ 163 (Dec. 10, 1998).

²¹¹ U.N. Committee Against Torture, *Concluding observations on the third to fifth periodic reports of United States of America*, CAT/C/USA/CO/3-5, ¶ 30 (2014).

²¹² *Id.*

Convention.²¹³ In the case of *Miguel Castro-Castro Prison v. Peru*, the Inter-American Court defined sexual violence as “actions with a sexual nature committed with a person without their consent, which besides including the physical invasion of the human body, may include acts that do not imply penetration or even any physical contact whatsoever.”²¹⁴ Such acts inflict mental and emotional suffering, which are relevant to a finding of a violation of the rights to humane treatment and personal integrity.²¹⁵ This interpretation is supported by that of the United Nations Committee Against Torture, which recently found that sexual violence in the U.S. military, including but not limited to acts of rape, violated the United States’ obligation to prevent torture and cruel, inhuman, and degrading treatment.²¹⁶

139. Under Article I of the American Declaration, interpreted in light of Article 5 of the American Convention and the Inter-American Torture Convention, the United States has an obligation to protect its service members from sexual violence at the hands of other members of the military and to punish the perpetrators of such violence where it occurs. Yet, members of the U.S. military raped Petitioners Butcher, Marmol, Walker and Woods; sexually assaulted Petitioners Everage and McCoy; and sexually harassed and threatened with rape Petitioner Dorn.

²¹³ *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶¶ 306, 308 (Nov. 25, 2006). *See also* Ana, Beatriz and Celia González Pérez v. Mexico, Case 11.565, Inter-Am. Comm’n H.R., Report No. 53/01, ¶ 45 (2001) (“[S]exual violence committed by members of the security forces of a State against the civilian population constitutes, in any situation, a serious violation of the human rights protected under Articles 5 and 11 of the American Convention.”).

²¹⁴ *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 306 (Nov. 25, 2006). Like the petitioners in this case, the petitioners in the *Miguel Castro-Castro Prison* case were subjected to sexual violence by members of the military. *Id.* at ¶ 432.

²¹⁵ *See id.* ¶ 308; *Urrutia v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 93 (Nov. 27, 2003); *Victims of the Tugboat “13 de Marzo” v. Cuba*, Case 11.436, Inter-Am. Comm’n H.R. Report No. 47/96, OEA/Ser.L/V/II.95, Doc. 7 rev., ¶ 106 (1996); *Maria Mejia v. Guatemala*, Case No. 10.553, Inter-Am. Comm’n H.R., Report No. 32/96, OEA/Ser.L/V/II.95 Doc. 7 rev. at 370, ¶¶ 60–61 (1997). In addition, the Inter-American Commission and Court have found that the sex of a victim has bearing on whether conduct may constitute cruel, inhuman or degrading treatment and thus a violation of the right to humane treatment. *See Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832, Inter-Am. Comm’n H.R. Report No. 35/96, OEA/Ser.L/V/II.95 doc. 7 rev. at 821 ¶ 78 (1997) (citing *Ireland v. United Kingdom*, 5310/71, Eur. Ct. H.R., ¶¶ 162–63 (1978)); *see also*, *Tyrer v. United Kingdom*, 5856/72, Eur. Ct. H.R., ¶ 28 (1978).

²¹⁶ U.N. Committee Against Torture, *Concluding observations on the third to fifth periodic reports of United States of America*, CAT/C/USA/CO/3-5, ¶ 30 (2014).

All of the Petitioners were denied meaningful redress, and all experienced PTSD, anxiety, and/or depression as a result of the violence they experienced and the military's inadequate response to it. The United States therefore violated petitioners' right to humane treatment under Article I of the American Declaration.

B. The United States Violated Petitioners' Right to Equal Protection Before the Law under Article II

140. Article II of the American Declaration states, "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."²¹⁷ The Honorable Commission has consistently found the principles within this article to be the "backbone of the universal and regional systems for the protection of human rights"²¹⁸ and has interpreted them to mean that states have the obligation "to adopt the measures necessary to recognize and guarantee the effective equality of all persons before the law; to abstain from introducing in their legal framework regulations that are discriminatory towards certain groups either in their face or in practice; and to combat discriminatory practices."²¹⁹ The Commission has required states to ensure that the right to non-discrimination is affirmatively protected.²²⁰ In interpreting the Declaration, the Commission has found the right to be free from discrimination in Article II to be analogous to the guarantees of equal protection of the law included in Articles 1 and 24 of the American Convention²²¹ and

²¹⁷ Organization of American States, American Declaration of the Rights and Duties of Man, art. II, OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.

²¹⁸ Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 107 (2011).

²¹⁹ *Id.* ¶ 109.

²²⁰ See Maria da Penha Maia Fernandes v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 ¶ 60 (2000); The Situation of the Rights of Women in Ciudad Juárez, Mexico: the Right to be Free from Violence and Discrimination, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.117, Doc. 44 ¶ 106 (2003) [hereinafter IACHR, Situation of the Rights of Women in Ciudad Juárez].

²²¹ Organization of American States, American Convention on Human Rights, art. 1(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("The States Parties to this Convention undertake to respect the rights and freedoms

Article 4(f) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (“Convention of Belém do Pará”).²²² This Commission has also clarified that “the right to equality before the law does not mean that the substantive provisions of the law have to be the same for everyone, but that the application of the law should be equal for all without discrimination.”²²³

1. The United States Discriminated Against the Petitioners on the Basis of Military Status

141. The United States military has adopted its own military justice system that handles criminal acts committed by and against its members. This system has systematically failed to investigate and prosecute cases of sexual violence. As discussed in Section V.A.2, *supra*, the military justice system is separate from, and unequal to, the civilian justice system. It lacks the independence of the civilian system, conferring upon commanders the authority to decide whether to investigate, prosecute, and punish alleged perpetrators, and trying accused persons before a military judge or members panel selected by the convening authority, the members of which may know the accused.²²⁴

142. The petitioners in this case had no choice but to use this military justice system. They were all denied access to justice in their cases when they may have been afforded an effective remedy in a civilian court. At the very least, petitioners’ cases would have been investigated to a more thorough degree had they been able to utilize the civilian criminal justice

recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”); *id.* art. 24 (“All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”).

²²² Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (“Convention of Belém do Pará”), art. 4 (1994) (“Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others . . . [t]he right to equal protection before the law and of the law.”).

²²³ *Jessica Lenahan (Gonzales)*, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 109.

²²⁴ See discussion at Section V.A.2, *supra*.

system, where decisions about the investigation and prosecution of their cases would not be subject to the discretion of commanders. The separate military justice system did not provide petitioners with an equal avenue to accessing the courts as civilians in the United States possess. The military commanders who handled the petitioners' complaints of sexual violence denied them access to a meaningful remedy, and in some cases actively retaliated against them.

2. The United States Discriminated Against the Petitioners on the Basis of Gender

143. The petitioners' experience of gender-based sexual violence is a form of discrimination under international and regional human rights law, and constitutes a violation of Article II of the American Declaration. The Inter-American Commission has described gender-based violence as itself constituting a form of discrimination, stating that the State's "failure to protect women from . . . violence breaches their right to equal protection of the law."²²⁵

144. Article 6 of the Convention of Belém do Pará reasserts the discriminatory nature of gender-based violence, providing that "[t]he right of every woman to be free of violence includes . . . the right of women to be free from all forms of discrimination."²²⁶ The Convention of Belém do Pará is highly relevant to interpreting Article II of the Declaration. The Commission has held that "there is . . . an integral connection between the guarantees set forth in the Convention of Belém do Pará and the basic rights and freedoms set forth in the American Convention in addressing the human rights violation of violence against women."²²⁷ The American Convention functions as an interpretive guide to the Declaration, and the Commission has further noted that the Belém do Pará Convention "reflect[s] a hemispheric consensus on the

²²⁵ *Id.* ¶ 134 (citing *Opuz v. Turkey*, No. 33401/02, Eur. Ct. H.R. (2009), ¶¶ 190–91).

²²⁶ Convention of Belém do Pará, art. 6.

²²⁷ IACHR, *Situation of the Rights of Women in Ciudad Juárez*, *supra* note 220, ¶ 120.

need to recognize the gravity of the problem of violence against women and take concrete steps to eradicate it.”²²⁸

145. It is now well established under international law that violence against women, which includes sexual violence, is a form of discrimination against women and a violation of human rights. The Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”) has interpreted discrimination against women to include gender-based violence, which it defines as: “violence that is directed at a woman because she is a woman or that affects women disproportionately.”²²⁹ In General Recommendation 19, the CEDAW Committee explained that “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”²³⁰ In General Recommendation 28, the CEDAW Committee emphasized that discrimination against women on the basis of sex and gender, as gender-based violence, includes acts that

inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, the violence that occurs within the family or domestic unit or within any other interpersonal relationship, or violence perpetrated or condoned by the State or its agents regardless of where it occurs.²³¹

The Committee further emphasized the responsibility of States to eliminate violence against women, stating that “States parties have a due diligence obligation to prevent, investigate, prosecute and punish . . . acts of gender-based violence.”²³²

²²⁸ *Id.* ¶ 103.

²²⁹ *Id.* ¶ 20 (defining violence against women for purposes of the treaty).

²³⁰ U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 19, ¶ 1 (11th session, 1992). *See generally* U.N. Secretary General, *In Depth Study on All Forms of Violence Against Women*, ¶ 65, U.N. Doc. A/61/122/Add.1 (Jul. 6, 2006) (noting that “recognition of violence against women as a form of discrimination and, thus, a human rights violation, provides an entry point for understanding the broad context from which such violence emerges and related risk factors”).

²³¹ U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 28, ¶ 19 (47th session, 2010).

²³² *Id.*

146. In the Inter-American system, the Belém do Pará Convention discusses the nature of States' responsibility to prevent and punish violence against women. This responsibility includes, among other obligations, the duty to “refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents and institutions act in conformity with this obligation.”²³³ States must also “apply due diligence to prevent, investigate, and impose penalties for violence against women” and establish and afford access to “fair and effective legal procedures for women who have been subjected to violence.”²³⁴ They must put in place the necessary mechanisms to “ensure that women subjected to violence have effective access to restitution, reparations, and other just and effective remedies.”²³⁵ The Convention also imposes on States a progressive duty to provide specialized services for victims of violence,²³⁶ which includes services that address the physical and mental health consequences of gender-based violence.²³⁷

147. In *Jessica Lenahan (Gonzales) v. United States*, the Honorable Commission acknowledged that “a State’s failure to act with due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law” as required under Article II.²³⁸ It explained that, “the principle of due diligence . . . has been applied in a range of circumstances to mandate States to prevent, punish, and provide remedies for acts of violence, when these are committed by either State or non-State actors.”²³⁹ This

²³³ Convention of Belém do Pará, art. 7(a).

²³⁴ *Id.* art. 7(a), (f).

²³⁵ *Id.* art. 7(g).

²³⁶ *Id.* art. 8(d).

²³⁷ *See, e.g.*, INTER-AMERICAN COMMISSION OF WOMEN (CIM) ORGANIZATION OF AMERICAN STATES ET AL., VIOLENCE IN THE AMERICAS: A REGIONAL ANALYSIS, INCLUDING A REVIEW OF THE IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT, AND ERADICATION OF VIOLENCE AGAINST WOMEN (CONVENTION OF BELÉM DO PARÁ) 57-62 (July 2001).

²³⁸ *Jessica Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 111 (2011).

²³⁹ *Id.* ¶ 122.

obligation requires “the organization of the entire state structure—including the State’s legislative framework, public policies, law enforcement machinery and judicial system—to adequately and effectively prevent and respond to these problems.”²⁴⁰ It further noted that “the States’ duty to address violence against women also involves measures to prevent and respond to the discrimination that perpetuates this problem.”²⁴¹ The Commission found that a State “may incur international responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women.”²⁴²

148. In the present submission, the United States failed to act with due diligence to prevent, investigate, sanction, and offer reparations for acts of violence against women. The United States not only did not adequately investigate and prosecute the perpetrators in these cases, but also took an active role in preventing all seven petitioners from seeking justice. In some cases this took the form of intentionally harming the petitioners through harassment, denial of promotions, and other threats to their careers. In Petitioner Woods’ case it led to the actual termination of her career. In almost all of the cases, the United States continued to allow sexual violence to go unpunished. Through the United States’ inaction, it implied, and in Petitioner Walker’s case stated outright, that the military “needs the men more than they need [women].”²⁴³

149. In addition, the United States failed to afford the petitioners restitution or the specialized services they required. After Petitioner Woods reported her rape, her superior officer repeatedly discouraged her from going to the hospital. Petitioner McCoy was denied counselling

²⁴⁰ *Id.* ¶ 125.

²⁴¹ *Id.* ¶ 126.

²⁴² *Id.* ¶ 126. The Commission also explained that “State inaction towards cases of violence against women fosters an environment of impunity and promotes the repetition of violence ‘since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.’” *Id.* ¶ 168 (quoting *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 ¶ 56 (2000)).

²⁴³ *Klay v. Panetta*, Original Complaint, ¶ 71.

for her sexual-assault-related PTSD. Petitioner Walker was unable to secure disability benefits to pay for a trauma-recovery program. The higher evidentiary standard imposed by the VA in evaluating claims for benefits based on MST-related PTSD, a policy that has a disparate impact on female veterans, further discriminates against the petitioners and other survivors of military sexual assault.

150. The United States' failure to prevent and adequately respond to the sexual violence experienced by petitioners and the active retaliation of its military officers against those petitioners who sought redress denied the petitioners their right to equal protection of the law and fostered a culture of within the United States military in which perpetrators could sexually assault their female colleagues with impunity.

C. The United States Violated Petitioners' Rights to Freedom of Investigation, Opinion, and Expression and Dissemination of Ideas under Article IV

151. Article IV of the American Declaration states, "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever."²⁴⁴ The Commission has found that this right to access information is a "right to truth" for "the victim, her family members and society as a whole to be informed of all happenings related to a serious human rights violation."²⁴⁵ Furthermore, "[t]he Commission has emphasized the principle that the ability of victims of violence against women to access judicial protection and remedies includes ensuring clarification of the truth of what has happened."²⁴⁶

152. The United States violated the petitioners' right to truth by preventing the petitioners from seeking justice, including by actively withholding necessary information from

²⁴⁴ Organization of American States, American Declaration of the Rights and Duties of Man, art. IV, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.

²⁴⁵ Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 193 (2011).

²⁴⁶ *Id.* ¶ 181.

the petitioners. In Petitioner McCoy's case, a commander refused to disclose the results of the investigation of her rape. It was only after she filed a request under the Freedom of Information Act that she received a heavily redacted record that showed intent to discredit her rather than to verify her allegations. When Petitioner Dorn reported sexual harassment to her master chief, he advised her not to report to any higher authority because it might have negative repercussions for the unit. In Petitioner Everage's case, her investigation was abruptly closed without explanation, and NCIS would not return her phone calls. When Petitioner Butcher's case proceeded to court-martial, she could not even use her rape kit as conclusive evidence of her rape because the examining doctor could not be found. She was also denied the opportunity to introduce several other witnesses because the military's pattern of retaliation had intimidated them from appearing in court. In Petitioner Woods' case, NCIS first refused to process her rape kit, then later claimed it was misplaced and insisted that her lack of consciousness during the rape made it impossible to verify her allegations despite witness testimony and doctors' notes corroborating her sexual assault. In all of these cases, the military's failure to investigate, especially in the face of substantial corroborating evidence, amounted to a violation of the petitioners' rights to freedom of investigation, opinion, and expression and dissemination of ideas under Article IV.

D. The United States Violated Petitioners' Rights to Privacy and to the Protection of Honor and Personal Reputation under Article V

153. Article V of the American Declaration states, "Every person has the right to the protection of the law against abusive attacks upon [their] honor, [their] reputation, and [their] private and family life."²⁴⁷ Article V of the American Declaration mirrors Article 11 of the

²⁴⁷ Organization of American States, American Declaration of the Rights and Duties of Man, art. V, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.

American Convention and should be interpreted similarly. Article 11 expands the language in Article V, stating:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.²⁴⁸

The experience of sexual violence causes dignitary harms that violate Article V of the Declaration and Article 11 of the Convention. In *Ana, Beatriz and Celia González Pérez v. Mexico*, the Commission found that sexual violence committed by members of security forces constituted a serious violation of the rights protected under Article 11 of the American Convention.²⁴⁹ The Commission has also stated that “sexual abuse, besides being a violation of the victim[s’] physical and mental integrity, implies a deliberate outrage to their dignity.”²⁵⁰ In the case of *Ana, Beatriz and Celia González*, the Commission concluded that rape affected the private lives of the victims and their families, causing them to exit their community “in a situation of fear, shame and humiliation.”²⁵¹

154. Aside from subjecting victims to the dignitary harm of humiliation in their community, sexual violence can also violate Article V’s protection of honor, reputation, private and family life through its impact on a victim’s ability to have intimate relations with a partner of his or her choosing. In *Rosendo Cantu v. Mexico*, the Inter-American Court of Human Rights held that the right to privacy includes the right to “the protection of privacy,” which in turn protects the right to a “sexual life and the right to establish and develop relationships with other

²⁴⁸ Organization of American States, American Convention on Human Rights, art. 11, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

²⁴⁹ *Ana, Beatriz and Celia González Pérez v. Mexico*, Case 11.565, Inter-Am. Comm’n H.R., Report No. 53/01, ¶¶ 45–54 (2001).

²⁵⁰ *Raquel Martín de Mejía v. Peru*, Case 10.970, Inter-Am. Comm’n H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7 rev. ¶ 197 (1996).

²⁵¹ *Ana, Beatriz and Celia González Pérez*, Inter-Am. Comm’n H.R., Report No. 53/01, ¶ 52.

human beings.”²⁵² The act of sexual violence destroys the victim’s “right to decide freely with whom to have intimate relations, causing [them] to lose full control over this most personal and intimate decision, and [their] basic bodily functions.”²⁵³

155. The United States enabled the sexual and physical abuse of the petitioners. Some of the petitioners were violated on multiple occasions, and all were further mentally harmed when the United States did not afford them meaningful redress and threatened their careers and livelihoods on top of the abuse. All of the petitioners suffer from Military Sexual Trauma as a result of the violence that U.S. military members committed against them. Many have also been diagnosed with clinical anxiety, depression, and PTSD. This trauma has caused the petitioners pain and suffering and has had a substantial impact on their work and personal relationships. For example, Petitioner Walker’s marriage fell apart as a result of the trauma she suffered, and she struggles with the physical aspects of relationships.

156. The United States further violated the petitioners’ rights to honor and reputation under Article V by retaliating against them after they complained of the abuse they suffered. The Commission has held that demotion of military rank can be a violation of a person’s right to honor. In *Tomas Eduardo Cirio v. Uruguay*, the Commission found that

the State violated the right to honor, to the detriment of Major Cirio . . . by stripping him of his status and benefits as punishment for criticizing the activities of the armed forces, and by degrading him both in rank and status for having “affected the prestige” of the armed forces by stating that its members had committed violations of human rights.²⁵⁴

157. The retaliation experienced by the petitioner in *Tomas Eduardo Cirio* was similar to the facts in the present petition. In the present case, several petitioners were downgraded in

²⁵² Rosendo Cantu et al. v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 119 (Aug. 31, 2010).

²⁵³ *Id.*

²⁵⁴ Tomas Eduardo Cirio v. Uruguay, Case 11.500, Inter-Am. Comm’n H.R., Report No. 124/06, OEA/Ser.L/V/II.127 Doc. 4 rev. 1, ¶ 95 (2007).

rank, denied promotions, or discharged from the military for reporting that other military members had violated their human rights by sexually assaulting them. All of the petitioners were subjected to harassment, shame, and stigma for reporting these incidents of abuse. By participating in retaliation tactics against the petitioners, the United States violated petitioners' rights to honor and reputation under Article V of the Declaration in the same way that Uruguay violated Major Cirio's rights in *Tomas Eduardo Cirio*.

E. The United States Violated Petitioners' Right to Inviolability of the Home under Article IX

158. Article IX of the American Declaration states that “[e]very person has the right to the inviolability of his home.”²⁵⁵ By failing to protect petitioners from violence within their homes, the United States has violated this provision of the American Declaration. Petitioners, as members of the United States military, are in a unique situation. Military members are often required to work and live on base in United States military-provided housing, so the military bases should be considered their homes. The military—owner and landlord of the petitioners' residences—controlled where and with whom the petitioners would live, and so was under a heightened obligation to ensure that petitioners were protected from violence within their homes.

159. The United States failed to fulfill this obligation. Petitioner Marmol was raped in her bedroom in the barracks. After Petitioner Dorn's perpetrator threatened to rape her at knifepoint while she was in her bed, she became too afraid to remain in her own quarters and began sleeping in the chaplain's tent. Petitioners Everage, McCoy, and Woods were all subjected to sexual violence while on their military base. When Petitioner Everage requested a

²⁵⁵ Organization of American States, American Declaration of the Rights and Duties of Man, art. IX, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.

transfer to a safer location, the military ignored her and transferred her attacker instead, forcing Petitioner Everage to suffer through further harassment by her attacker’s friends. The United States violated these petitioners’ right to inviolability within their homes when it allowed them to be sexually assaulted and raped within their homes and when it failed to transfer them to a safer location. Furthermore, as petitioners worked and lived in the same locations, the petitioners who were assaulted at work also had their right to inviolability of the home violated.

F. The United States Violated Petitioners’ Right to Work under Article XIV

160. Article XIV of the American Declaration states, “Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit.”²⁵⁶ Petitioners experienced widespread workplace sexual harassment in the course of their employment as United States military service members. Sexual harassment violates the right to work “under proper conditions” that is protected in Article XIV of the American Declaration. Addressing women’s right to work, the Commission has stated that “[i]t is important that the States not only abstain from discriminating or tolerating discrimination of any kind in labor-related matters, but also honor their obligation to create the conditions that will better enable women to join the workforce and remain on the job.”²⁵⁷ The Commission went on to cite the penalization of workplace harassment against women—especially sexual harassment—as a priority issue related to the exercise of the right to work.²⁵⁸

²⁵⁶ Organization of American States, American Declaration of the Rights and Duties of Man, art. XIV, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.

²⁵⁷ The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights, Inter-Am. Comm’n H.R., Thematic Report, OEA/Ser/L/V/II.143 ¶ 84 (2011).

²⁵⁸ *Id.* ¶ 85.

161. The Commission has further recommended that states undertake the following measures in order to respect and ensure women's right to work and live free from discrimination in this area:

Adopt legislative measures to make sexual harassment a punishable offense in the criminal, civil and administrative jurisdictions, and support these measures with the regulations and training that law enforcement personnel require Guarantee due diligence so that all cases of gender-based violence in the labor area are investigated promptly, thoroughly and impartially, and those responsible are properly punished and the victims redressed.²⁵⁹

The affront to personal dignity that occurs as a result of sexual and other types of workplace harassment detrimentally affects an individual's ability to work and to access their right to work under proper conditions.

162. Other relevant international and regional human rights bodies have emphasized that sexual harassment violates the right to a safe workplace. The International Labour Organization (ILO) has held that sexually harassing conduct may be deemed a violation of the right to safe and healthy working conditions guaranteed under ILO Conventions. Defining sexual harassment, the ILO Committee of Experts on the Application of Conventions and Resolutions stated that it contains the following key elements:

(1) (*quid pro quo*): any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable, and offensive to the recipient; and a person's rejection of, or submission to, such conduct is used explicitly or implicitly as a basis for a decision which affects that person's job; or (2): (*hostile work environment*) conduct that creates an intimidating, hostile or humiliating working environment for the recipient.²⁶⁰

The ILO Convention No. 155 (Occupational and Health), as amended by the 2002 Protocol requires states to take action to prevent sexual harassment, as such conduct is harmful to the

²⁵⁹ *Id.* ¶ 169.

²⁶⁰ INTERNATIONAL LABOUR OFFICE, REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS 463 (2003).

physical and mental health of workers.²⁶¹ Further, the ILO issued a report entitled “Sexual harassment at work: National and International responses” in 2005, which states: “Sexual harassment is a hazard encountered in workplaces across the world that reduces the quality of working life, jeopardizes the well-being of women and men, undermines gender equality and imposes costs on firms and organizations.”²⁶² Further, “[f]or the International Labour Organization, workplace sexual harassment is a barrier towards its primary goal of promoting decent working conditions for all workers.”²⁶³

163. In addition, the U.N. Committee on Economic, Social and Cultural Rights, which protects the international human right to work,²⁶⁴ has held that sexual harassment constitutes a form of discrimination that hinders individuals from accessing their economic rights.²⁶⁵ The Committee has called upon many states to ensure that laws against sexual harassment are effectively enforced and to adopt preventative and protective measures to combat sexual harassment of women in the workplace.²⁶⁶ The European Social Charter also calls upon states to “promote awareness, information and prevention of sexual harassment in the workplace or in

²⁶¹ Convention (No. 155) concerning occupational safety and health and the working environment, art. 4, June 22, 1981, 1331 U.N.T.S. 280. Under Article 4 of Convention No. 155, states are required to “formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment” in order to “prevent accidents and injury . . . by minimising . . . the causes of hazards inherent in the working environment.” Sexual harassment is likely to be deemed a hazard inherent in the work environment, which states must work to minimize.

²⁶² DEIRDRE MCCANN, *SEXUAL HARASSMENT AT WORK: NATIONAL AND INTERNATIONAL RESPONSES* vii (2005), available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_travail_pub_2.pdf.

²⁶³ *Id.*

²⁶⁴ See U.N. General Assembly, *International Covenant on Economic, Social and Cultural Rights*, art. 6., Dec. 16, 1966, U.N.T.S. 993.

²⁶⁵ See U.N. Committee on Economic, Social and Cultural Rights, General Comment 20: Non-Discrimination, E/C.12/GC/20, Jun. 10, 2009, ¶ 7 (the European Parliament and Council also describe harassment and sexual harassment as forms of sex discrimination under Directive 2002/73/EC).

²⁶⁶ See e.g., Concluding observations of the Committee on Economic, Social and Cultural Rights, Slovakia, U.N. Doc. E/C.12/SVK/CO/2 (2012); Concluding observations of the Committee on Economic, Social and Cultural Rights, Republic of Korea, U.N. Doc. E/C.12/KOR/CO/3 (2009); Concluding observations of the Committee on Economic, Social and Cultural Rights, Madagascar, U.N. Doc. E/C.12/MDG/CO/2 (2009); Concluding observations of the Committee on Economic, Social and Cultural Rights, Dominican Republic, U.N. Doc. E/C.12/DOM/CO/3 (2010); Concluding observations of the Committee on Economic, Social and Cultural Rights, Argentina, U.N. Doc. E/C.12/ARG/CO/3 (2011).

relation to work and to take all appropriate measures to protect workers from such conduct,” in order to safeguard the right to dignity at work.²⁶⁷

164. Petitioners were subject to pervasive sexual harassment, which created a hostile work environment, during the course of their employment with the United States military. For example, Petitioner Dorn was subjected to repeated sexually harassing taunts by her co-workers who referred to her as “Bitch,” “Beauty Queen,” and “Princess,” and who watched pornographic videos during work hours while commenting that Petitioner Dorn would look good in the videos. Petitioner Woods’ immediate superior routinely harassed her at work by making sexual advances and inundating her with social emails. This sexual harassment prevented petitioners from having access to a safe workplace and subjected them to a hostile and discriminatory work environment. The United States thus violated petitioners’ right to work under proper conditions as guaranteed by Article XIV of the American Declaration.

165. The United States also violated petitioners’ right to work through retaliation and harassment against petitioners in their workplaces when they reported incidents of sexual violence. The U.N. Committee Against Torture recently concluded that in order to “prevent and eradicate sexual violence in the military” the United States must “[e]nsure that, in practice, complainants and witnesses are protected from any acts of retaliation or reprisals, including intimidation, related to their complain[t] or testimony.”²⁶⁸ Despite efforts by the Department of Defense to prevent retaliation, it still frequently occurs and creates intolerable working conditions for victims of sexual violence. Petitioner Everage was subjected to continual harassment for reporting her attack after Command refused to transfer her off the ship where she

²⁶⁷ COUNCIL OF EUR., European Social Charter, art. 26(May 3, 1996), *available at* <http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ESCRBooklet/English.pdf>.

²⁶⁸ U.N. Committee Against Torture, *Concluding observations on the third to fifth periodic reports of United States of America*, CAT/C/USA/CO/3-5, ¶ 30 (2014).

was assaulted; after reporting her rape, Petitioner Walker was continually harassed by her peers, who called her a “slut” and a “liar”; Petitioner Dorn was demoted after filing an official complaint of sexual harassment; Petitioner Marmol was downgraded after reporting her rape. By retaliating against the petitioners instead of punishing their attackers, the United States violated the petitioners’ right to work under Article XIV of the American Declaration.

166. The United States also violated the petitioners’ right, under Article XIV, to follow their vocation freely. After Petitioner Woods filed a complaint about her rape she was prosecuted for fraternization and discharged from the military. She has been unable to work in the military since then. Petitioner Everage was discharged from the Navy and prevented from re-enlisting after reporting the attack against her. By forcing petitioners out of their jobs in retaliation for reporting the abuses they suffered, the United States violated the petitioners’ right to follow their vocation freely under Article XIV.

G. The United States Violated Petitioners’ Right to Recognition of Juridical Personality under Article XVII

167. Article XVII of the American Declaration states that “every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.”²⁶⁹ The Inter-American Court on Human Rights has interpreted Article XVII in conjunction with Article 3 of the American Convention, as setting forth a right to individual juridical personality.²⁷⁰ The Court has interpreted the right to juridical personality to mean the right of an individual “to be the holder of rights (capacity of exercise) and obligations; the violation of [which] presumes an absolute disavowal of the possibility of being a holder of such

²⁶⁹ Organization of American States, American Declaration of the Rights and Duties of Man, art. XVII, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.

²⁷⁰ See *Bámaca Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶¶ 178–79 (Nov. 25, 2000).

rights and obligations.”²⁷¹ The Inter-American Court held that the State must enforce a broader interpretation of the right for “persons in situations of vulnerability, exclusion and discrimination” to guarantee “legal and administrative conditions that may secure for them the exercise of such right.”²⁷²

168. By denying the petitioners access to both the military and federal court systems, the United States violated their right to recognition of juridical personality. The petitioners, all women in the military, are particularly vulnerable to discrimination based on their minority status within the United States military. In 2011, only 14.5 percent of active duty military members were women, and a much smaller percentage were in positions of authority.²⁷³ By denying the petitioners access to an effective legal system, the United States failed to protect the petitioners’ rights to juridical personality, though the State had a heightened obligation to do so.

H. The United States Violated Petitioners’ Rights to Resort to the Courts and to a Fair Trial under Article XVIII

1. By Limiting Petitioners to the Military Justice System, the United States Violated Petitioners’ Rights to Access Judicial Remedies for Adjudication of Their Human Rights Claims

169. Article XVIII of the American Declaration states that “Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his

²⁷¹ *Id.*

²⁷² *Sawhoyamaya Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 189 (Mar. 29, 2006).*

²⁷³ CNN Staff, *By the Numbers: Women in the U.S. Military*, CNN (Jan. 4, 2013), <http://www.cnn.com/2013/01/24/us/military-women-glance/>.

prejudice, violate any fundamental constitutional rights.”²⁷⁴ In interpreting Article XVIII, this Commission has found that:

Article XVIII of the American Declaration establishes that all persons are entitled to access judicial remedies when they have suffered human rights violations. This right is similar in scope to the right to judicial protection and guarantees contained in Article 25 of the American Convention on Human Rights, which is understood to encompass: the right of every individual to go to a tribunal when any of his or her rights have been violated; to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place; and the corresponding right to obtain reparations for the harm suffered.²⁷⁵

The Commission has also found that the right to judicial protection (and thus, by extension, the right of access to judicial remedies under the American Declaration) requires states to undertake a “purposeful investigation” of the facts involving alleged violations of fundamental rights. Purposeful investigation “means in practice that the State will act with due diligence, i.e. with the existing means at its disposal, and will endeavor to arrive at a decision.”²⁷⁶

170. The Commission has long held that military justice systems, including military investigations and trials, are ineffective and inadequate forums to adjudicate human rights violations.²⁷⁷ In its 1992 Annual Report, the Commission advised member states that “under no circumstances are military courts to be permitted to sit in judgment of human rights violations.”²⁷⁸ In its 1993 Annual Report, it recommended that “all cases of human rights

²⁷⁴ Organization of American States, American Declaration of the Rights and Duties of Man, art. XVIII, OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc. 6, rev. 1 at 17.

²⁷⁵ Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 172 (2011).

²⁷⁶ Raquel Martín de Mejía v. Peru, Case 10.970, Inter-Am. Comm’n H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7 rev. ¶ 157 (1996).

²⁷⁷ *Márcio Lapoente da Silveira*, Inter-Am. Comm’n H.R., Report No. 74/08, ¶ 64.

²⁷⁸ Inter-American Commission for Human Rights, Annual Report 1992-1993, OEA/Ser.L/V/II.83 Doc. 14 (Mar. 12, 1993), Chapter V(VII), ¶ 6.

violations must therefore be submitted to the ordinary courts.”²⁷⁹ And again in its 1997 Annual Report, the Commission stated that the “special jurisdiction [of military tribunals] must exclude the crimes against humanity and human rights violations.”²⁸⁰ Where alleged human rights violations related to the mistreatment and torture of a victim have been submitted to the military justice system, the Commission has found that victims were deprived of due process of law for the protection of the rights that were violated.²⁸¹ Significantly, the Inter-American Court and Inter-American Commission have found that military jurisdiction is inappropriate for human rights violations of rape. In *Rochela Massacre v. Colombia* and *La Cantuta v. Peru* the Court held that the military justice system is not competent for the investigation, prosecution, and punishment of military perpetrators of human rights violations that include rape.²⁸² In the *Case of Ana, Beatriz and Celia Gonzales Perez v. Mexico*, the Commission stated that rape “cannot in any way be considered acts that affect the legal assets of the military” and therefore “there is no link to an activity by the Armed Forces that can justify the involvement of the military courts . . . the investigation into the facts related to this case by the military courts is completely inappropriate.”²⁸³

171. As discussed in Section IV, *supra*, the Honorable Commission expounded on the inadequacies of military justice systems in the case of *Márcio Lapoente da Silveira v. Brazil*, in which it quoted the U.N. Working Group on the Administration of Justice’s study on

²⁷⁹ Inter-American Commission for Human Rights, Annual Report 1993, OEA/Ser.L/V/II.85 Doc. 8 rev. (Feb. 11, 1994), Chapter V(IV), Final Recommendations, ¶ 4.

²⁸⁰ Inter-American Commission for Human Rights, Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 (Feb. 17, 1998), Chapter VII, ¶ 1.

²⁸¹ *Márcio Lapoente da Silveira*, Inter-Am. Comm’n H.R., Report No. 74/08, ¶ 73.

²⁸² See *Rochela Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 163, ¶¶ 200, 204 (May 11, 2007); *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 162, ¶ 142 (Nov. 29, 2006).

²⁸³ *Ana, Beatriz and Celia González Pérez v. Mexico*, Case 11.565, Inter-Am. Comm’n H.R., Report No. 53/01, ¶ 82 (2001).

“administration of justice through military tribunals and other exceptional jurisdictions.”²⁸⁴ The study found that “in all circumstances, the competence of military tribunals should be abolished in favor of those of the ordinary courts, for trying persons responsible for serious human rights violations”²⁸⁵ The Inter-American Commission concluded that “the Commission does not consider the military []to have the independence and autonomy needed to impartially investigate alleged violations of human rights allegedly carried out by [the] military”²⁸⁶ Furthermore, the Commission recommended that the State confer on the ordinary justice system the authority to judge all crimes committed by a state’s military police,²⁸⁷ finding that military courts in Brazil “tend[ed] to be indulgent with [personnel] accused of human rights and other criminal offenses, thereby allowing the guilty to go unpunished.”²⁸⁸

172. Similarly, other relevant international and regional bodies have found that the use of military justice in cases of human rights violations violates the victim’s right to due process. According to the U.N. Special Rapporteur on Torture: “military tribunals should not be used to try persons accused of torture . . . [C]omplaints about torture should be dealt with immediately and should be investigated by an independent authority.”²⁸⁹ Not only were petitioners in this case limited to the military justice system in seeking the investigation, prosecution, and punishment of their perpetrators, but they were also barred from seeking a civil remedy in the U.S. federal courts for the human rights violations they experienced. When they

²⁸⁴ *Márcio Lapoente da Silveira*, Inter-Am. Comm’n H.R., Report No. 74/08, ¶ 65.

²⁸⁵ *Id.* (internal quotation marks omitted).

²⁸⁶ *Id.* ¶ 69 (quoting *El Dorado dos Carajás v. Brazil*, Case 11.820, Inter-Am. Comm’n H.R., Report No. 4/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 146 ¶ 27 (2003)) (internal quotation marks omitted).

²⁸⁷ See Inter-American Commission for Human Rights, Report on the Situation of Human Rights in Brazil, OEA/Ser.L/V/II.97, Doc. 29 rev. 1, Chapter III ¶ 95(i) (Sep. 29, 1997) [hereinafter IACHR Report on Human Rights in Brazil]; *El Dorado dos Carajás v. Brazil*, Case 11.820, Inter-Am. Comm’n H.R., Report No. 4/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 146 ¶ 28 (2003).

²⁸⁸ IACHR Report on Human Rights in Brazil, *supra* note 287, ¶ 77.

²⁸⁹ Special Rapporteur on Torture, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Comm’n on Human Rights, ¶ 76(g), U.N. Doc. E/CN.4/1995/34, (1995).

filed a complaint against the United States military for its failure to prevent and respond to the sexual crimes perpetrated against them, both the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit dismissed the complaint. The courts relied on Supreme Court precedent that barred federal lawsuits for personal injury or civil rights claims for harms that occurred “in the course of activity incident to [military] service.”²⁹⁰ The Supreme Court explained, “The special status of the military has required, the Constitution contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel.”²⁹¹

173. By requiring the petitioners to submit their claims of sexual violence through the military justice system and by barring the petitioners and other victims of military sexual violence from pursuing civil remedies in U.S. courts, the United States violated petitioners’ right to judicial remedies under the American Declaration.

2. The Chain of Command Structure of the Military System, Combined with the Military’s Culture of Impunity, Violated Petitioners’ Rights to Adequate Investigation, Prosecution, and Punishment

174. The Commission has held that Article 25 of the Convention (which the Commission interprets as similar in scope to Article XVIII²⁹²) in conjunction with Article 1 and Article 8(1) of the Convention encompasses and sets forth three interconnected rights: first, “the right of every individual to go to a tribunal when any of his rights have been violated;” second, the right “to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not the violation has taken place;” and finally, the right to

²⁹⁰ *United States v. Stanley*, 483 U.S. 669, 684 (1987).

²⁹¹ *Chappell v. Wallace*, 462 U.S. 296, 303–04 (1983).

²⁹² *See Jessica Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 172 (2011).

have remedies enforced when granted.²⁹³ When petitioners brought forth their complaints of sexual violence, their rights were violated by the military's ineffective or complete lack of investigation, prosecution, and punishment of the perpetrators even though the Commission has held that the State has an obligation to prosecute and convict perpetrators of violence against women.²⁹⁴

175. The Commission has held that the State has a duty, under Article XVIII of the American Declaration, to punish perpetrators of human rights violations:

[W]hen the State apparatus leaves human rights violations unpunished and the victim's full enjoyment of human rights is not promptly restored, the State fails to comply with its positive duties under international human rights law. The same principle applies when a State allows private persons to act freely and with impunity to the detriment of the rights recognized in the governing instruments of the inter-American system.²⁹⁵

The Inter-American Court of Human Rights has determined that the State has “a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”²⁹⁶ The duty to investigate must be undertaken as an inherent juridical obligation by the State, “not as a mere formality preordained to be ineffective.”²⁹⁷ Once state authorities are made aware of an incident, the Court and Commission have held that they must initiate without delay a serious, impartial and effective investigation that must be carried out using all

²⁹³ Raquel Martín de Mejía v. Peru, Case 10.970, Inter-Am. Comm'n H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7 rev. ¶ 157 (1996).

²⁹⁴ See Rapporteurship on the Rights of Women, *Access to Justice for Women Victims of Violence in the Americas*, Inter-Am. Comm'n H.R., Report, OEA/Ser.L/V/II. Doc. 68 ¶ 24 (2007).

²⁹⁵ *Jessica Lenahan (Gonzales)*, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 173.

²⁹⁶ *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4 ¶ 174 (Jul. 29, 1988).

²⁹⁷ *Id.* ¶ 177.

available legal means with the aim of ascertaining the truth.²⁹⁸ Further, the State must remove all *de facto* and *de jure* obstacles and mechanisms that maintain impunity and use all possible measures to advance the proceedings.²⁹⁹

176. The Court has held that the obligation to investigate effectively has a wider scope when dealing with cases of violence against women,³⁰⁰ and for an investigation to be effective it must include a gender perspective.³⁰¹ Special care must be taken in investigations of all claims of sexual violence. As the Court held in the *Case of the Dos Erres Massacre v. Guatemala*, the failure to investigate serious violations of personal integrity, such as sexual violence committed in the context of systematic patterns, is a breach of the State's obligations with respect to serious human rights violations.³⁰² Furthermore, as the Court observed in *González ("Cotton Field") v. Mexico*, when a State learns of a situation in which women are being abused and raped, its due diligence obligation requires swift action on the part of police, prosecutors and officers of the court.³⁰³ It is essential that authorities conduct investigations into acts of violence against women in a determined and effective manner, taking into account society's obligation to reject violence against women, as well as the State's obligations to eliminate violence against women and to ensure that victims have confidence in the state institutions for their protection.³⁰⁴

177. The Court's judgments in the cases of *Fernández Ortega v. Mexico* and *Rosendo Cantú v. Mexico* set out the following requirements for an appropriate investigation of sexual

²⁹⁸ See *id.* ¶ 191; Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 ¶ 412 (1997).

²⁹⁹ See *Carpio Nicolle v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 117, ¶ 134 (Nov. 22, 2004).

³⁰⁰ *González ("Cotton Field") v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 205, ¶ 293 (Nov. 16, 2009).

³⁰¹ See *id.* ¶ 455.

³⁰² "Las Dos Erres" Massacre v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 211 ¶¶ 140-41 (Nov. 24, 2009).

³⁰³ See *González ("Cotton Field")*, Inter-Am. Ct. H.R. No. 205, ¶ 452.

³⁰⁴ See *Fernández Ortega v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 193 (Aug. 30, 2010).

violence: 1) the victim's statement should be taken in a safe and comfortable environment, providing privacy and inspiring confidence; 2) the victim's statement should be recorded to avoid or limit the need to repeat it; 3) the victim should be provided with medical, psychological and hygienic treatment, both on an emergency basis, and continuously if required, under a treatment protocol aimed at reducing the consequences of the rape; 4) a complete and detailed medical and psychological examination should be done immediately by appropriate, trained personnel, of the sex preferred by the victim, and the victim should be informed that she can be accompanied by a person of confidence if she so wishes; and 5) the investigative measures should be coordinated and documented and the evidence handled with care, including taking sufficient samples and performing all possible tests to determine the possible perpetrator of the act, and obtaining other evidence such as the victim's clothes, immediate examination of the scene of the incident, and the proper chain of custody of the evidence; and vi) access to advisory services or, if applicable, free legal assistance at all stages of the proceedings should be provided.³⁰⁵ In general, an effective and appropriate investigation into sexual violence must endeavor to avoid re-victimizing the victim or forcing her or him to re-live the deeply traumatic experience each time she or he recollects or retells the events in question.³⁰⁶ Clearly in this case, the United States did not meet the standards for an appropriate investigation of sexual violence enumerated above.

178. The U.N. Committee Against Torture recently expressed concern about United States' response to military sexual violence.³⁰⁷ The Committee urged the United States to "increase its efforts to prevent and eradicate sexual violence in the military by taking effective

³⁰⁵ Rosendo Cantu et al. v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216 (Aug. 31, 2010); *Fernández Ortega*, Inter-Am. Ct. H.R. No. 215.

³⁰⁶ See *Fernández Ortega*, Inter-Am. Ct. H.R. No. 215, ¶ 196.

³⁰⁷ U.N. Committee Against Torture, *Concluding Observations on the Third to Fifth Periodic Reports of United States of America*, CAT/C/USA/CO/3-5, ¶ 30 (2014).

measures to . . . [e]nsure prompt, impartial and effective investigations of all allegations of sexual violence.”³⁰⁸

179. The United States military justice system is currently unable to impartially investigate and prosecute violations of human rights carried out by its members. The United States did not meet its obligation to provide a judicial remedy for the violations committed against the petitioners in any of the petitioners’ cases. Most of the petitioners’ cases were never even referred for investigation before a judicial tribunal. In Petitioner Butcher’s case—the only case to go before a court-martial—the results of her rape kit were excluded from evidence, the defense was allowed to question her about her experience as a victim of childhood sexual violence, the prosecutor told Petitioner Butcher that she was partly to blame for the rape, and her perpetrator was acquitted.

180. The actions of the chain of command in all petitioners’ cases prevented the petitioners from seeking redress because commanders had broad discretion over whether the victims’ cases went to court-martial or whether the perpetrator was required to serve his punishment. In the cases of Petitioner Dorn, Everage, Marmol, McCoy, Walker and Woods, commanders either ordered or urged the petitioners not to pursue a criminal investigation, tipped off the perpetrators that the petitioners had filed a complaint, or actively tried to hide evidence of the crime. It is for these reasons that this Commission has strongly recommended against using the military justice system to investigate and punish human rights violations and has found that military justice systems do not provide a sufficient judicial remedy.

181. After failing to receive a judicial remedy in the military justice system, petitioners then sought redress in the civilian federal courts by suing the United States military for a violation of their constitutional rights. Yet, the petitioners were unable to receive a judicial

³⁰⁸ *Id.*

remedy there as well. The petitioners' claims were dismissed before the District Court and Court of Appeals because of case law from the United States Supreme Court.³⁰⁹ This case law prevents anyone from bringing either a constitutional claim or liability claim against the United States military. Therefore, the petitioners were denied access to the courts on both fronts, in both the military justice system and United States federal courts system.

VI. RELIEF REQUESTED

182. The facts stated herein establish that the United States of America is responsible for the violation of the petitioners' rights under Articles I, II, IV, V, IX, XIV, XVII, and XVIII of the American Declaration of the Rights and Duties of Man. Thus the petitioners' respectfully request that the Inter-American Commission on Human Rights:

1. Declare this petition admissible;
2. Investigate, with hearings and witnesses as necessary, the facts alleged in this petition;
3. Declare that the United States of America is responsible for the violation of petitioners' rights under the American Declaration of the Rights and Duties of Man, including their rights under Articles I, II, IV, V, IX, XIV, XVII, and XVIII;
4. Grant monetary compensation for the violation of petitioners' rights under the American Declaration;
5. Recommend adoption by the United States of all necessary laws and measures to ensure the prevention and successful investigation, prosecution and punishment of all sexual violence crimes, including:
 - a. Undertaking all necessary means to prevent sexual violence in the United States military and ensure a safe working environment for service members;

³⁰⁹ See discussion in Section IV.B, *supra*.

- b. Removing the decision whether to investigate, prosecute, and punish alleged perpetrators from the chain of command; and
 - c. Adopting laws and policies to prevent the military from using Articles 15 (nonjudicial punishment) and 134 (adultery) of the Uniform Code of Military Justice to punish perpetrators;
6. Recommend monitoring of the United States military's compliance with the recent changes made by Congress to military law, particularly with regard to the laws intended to prohibit retaliation against service members who report sexual assault;
 7. Recommend that the United States grant service members access to the federal courts so that individuals, including survivors of sexual assault, whose rights have been violated by the United States military may seek judicial remedies;
 8. Recommend that the United States ensure that veterans who are survivors of military sexual assault have equal access to disability benefits;
 9. Seek an advisory opinion from the Inter-American Court of Human Rights regarding the nature and scope of the United States' obligations under the American Declaration; and
 10. Provide any other recommendations and relief that the Honorable Commission deems just and necessary to remedy petitioners' human rights violations.

VII. ATTACHMENTS

- A. Petitioners' First Amended Complaint**
- B. Judgment of the United States District Court for the District of Columbia**
- C. Judgment of the United States Court of Appeals for the District of Columbia Circuit**