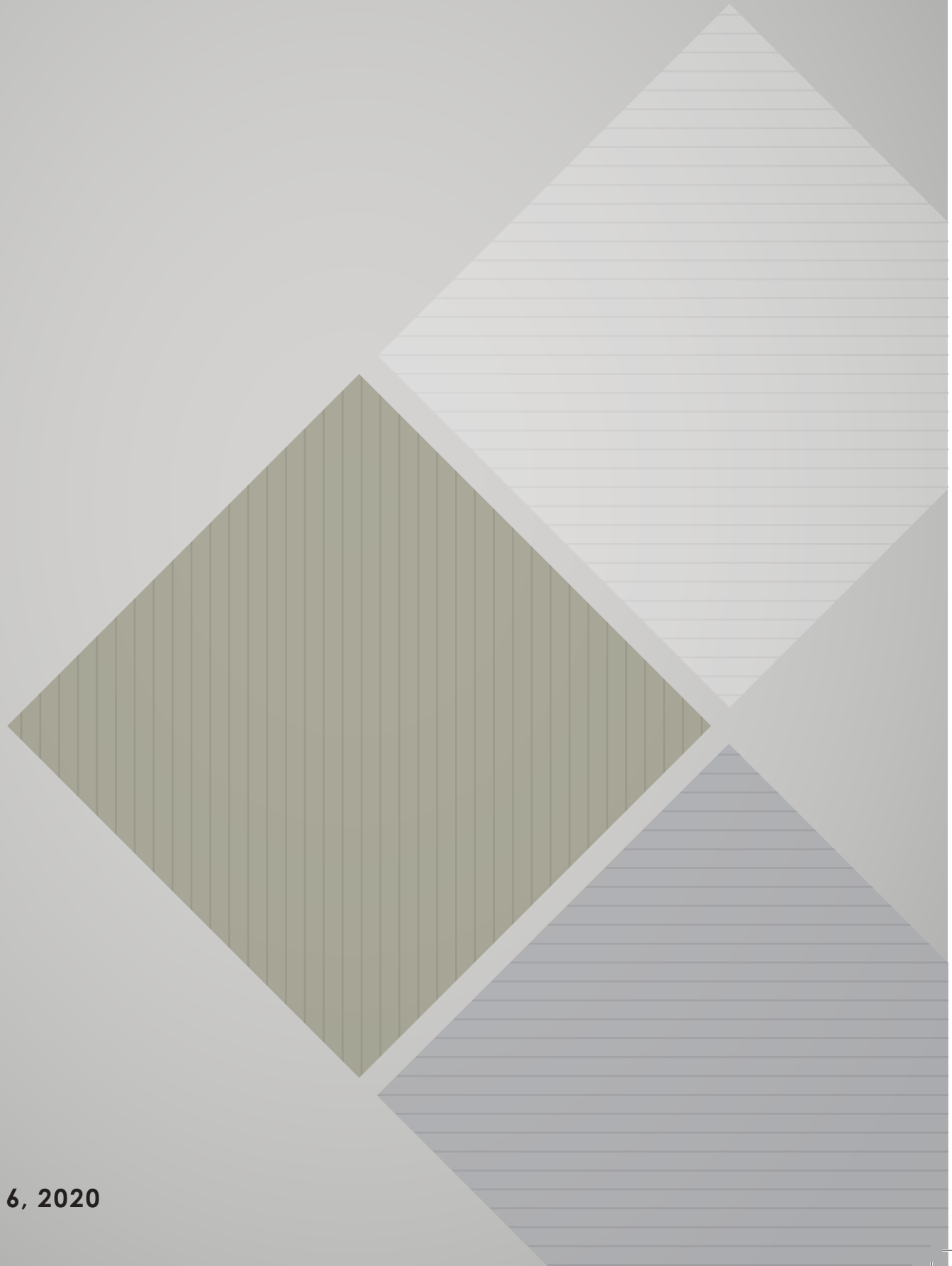


# **REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE**



**NOVEMBER 6, 2020**



# Report of the Fort Hood Independent Review Committee

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## EXECUTIVE SUMMARY

The U. S. Secretary of the Army appointed the Fort Hood Independent Review Committee (FHIRC or Committee) and directed it to “conduct a comprehensive assessment of the Fort Hood command climate and culture [], and its impact, if any, on the safety, welfare and readiness of our Soldiers and units.” In addressing this mandate, the FHIRC determined that during the time period covered by the Review, the command climate relative to the Sexual Harassment/Assault Response and Prevention (SHARP) Program at Fort Hood was ineffective, to the extent that there was a permissive environment for sexual assault and sexual harassment.<sup>1</sup>

As set forth in this Report, specific Findings demonstrate that the implementation of the SHARP Program was ineffective. During the review period, no Commanding General or subordinate echelon commander chose to intervene proactively and mitigate known risks of high crime, sexual assault and sexual harassment. The result was a pervasive lack of confidence in the SHARP Program and an unacceptable lack of knowledge of core SHARP components regarding reporting and certain victim services. Under a structurally weak and under-resourced III Corps SHARP Program, the Sexual Assault Review Board (SARB) process was primarily utilized to address administrative and not the actual substantive aspects of the Program. While a powerful tool by design, the SARB process became a missed opportunity to develop and implement proactive strategies to create a respectful culture and prevent and reduce incidents of sexual assault and sexual harassment. From the III Corps level and below, the SHARP Program was chronically under-resourced, due to understaffing, lack of training, lack of credentialed SHARP professionals, and lack of funding. Most of all, it lacked command emphasis where it was needed the most: the enlisted ranks.

A resonant symptom of the SHARP Program’s ineffective implementation was significant underreporting of sexual harassment and sexual assault. Without intervention from the NCOs and officers entrusted with their health and safety, victims feared the inevitable consequences of reporting: ostracism, shunning and shaming, harsh treatment, and indelible damage to their career. Many have left the Army or plan to do so at the earliest opportunity.

As part of the command climate, the issues of crime and Criminal Investigation Division (CID) operations were examined. The Committee determined that serious crime issues on and off Fort Hood were neither identified nor addressed. There was a conspicuous absence of an effective risk management approach to crime incident reduction and Soldier victimization. A military installation is essentially a large, gated community. The Commander of a military installation possesses a wide variety of options to proactively address and mitigate the spectrum of crime incidents. Despite having the capability, very few tools were employed at Fort Hood to do so. Both the Directorate of Emergency Services (DES) and the CID have a mandate and a role to play in crime reduction.<sup>2</sup> Each

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<sup>1</sup> Per an Agreement with the Undersecretary of the Army, the review period encompassed Fiscal Years (FY) 2018, 2019, and 2020. Data and information from previous FYs were incorporated as necessary for context.

<sup>2</sup> Relevant to crime prevention and investigations, two of CID’s mandated objectives are: (i) “*Participating in the Army crime prevention program by identifying areas which are especially vulnerable to crime and by making recommendations to appropriate*

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contributed very little analysis, feedback and general situational awareness to the command toward facilitating and enabling such actions. This was another missed opportunity.

The deficient climate also extended into the missing Soldier scenarios, where no one recognized the slippage in accountability procedures and unwillingness or lack of ability of non-commissioned officers (NCOs) to keep track of their subordinates. The absence of any formal protocols for Soldiers who fail to report resulted in an *ad hoc* approach by units and Military Police (MP) to effectively address instances of missing Soldiers during the critical first 24 hours, again with adverse consequences.

Consistent with the FHIRC Charter, this Report sets forth nine Findings and offers seventy Recommendations. The Findings of the Committee are as follows:

- Finding #1: The Implementation Of The SHARP Program At Fort Hood Has Been Ineffective, Due To A Command Climate That Failed To Instill SHARP Program Core Values Below The Brigade Level.
- Finding #2: There Is Strong Evidence That Incidents Of Sexual Assault And Sexual Harassment At Fort Hood Are Significantly Underreported.
- Finding #3: The Army SHARP Program Is Structurally Flawed.
- Finding #4: The Fort Hood CID Office Had Various Inefficiencies That Adversely Impacted Accomplishment Of Its Mission.
- Finding #5: The Mechanics Of The Army's Adjudication Processes Involving Sexual Assault And Sexual Harassment Degrade Confidence In The SHARP Program.
- Finding #6: Fort Hood Public Relations & Incident Management Have Deficiencies.
- Finding #7: There Were No Established Procedures For First Line Supervisors In 'Failure to Report' Situations That Define Appropriate Actions In The Critical First 24 Hours.
- Finding #8: The Criminal Environment Within Surrounding Cities And Counties Is Commensurate With Or Lower Than Similar Sized Areas: However, There Are Unaddressed Crime Problems On Fort Hood, Because The Installation Is In A Fully Reactive Posture.
- Finding #9: The Command Climate At Fort Hood Has Been Permissive Of Sexual Harassment / Sexual Assault.

Based on these Findings, set forth in greater detail within this Report, the FHIRC provides Recommendations regarding: (i) the structure of the SHARP Program; (ii) implementation of the SHARP Program; (iii) legal components of the SHARP Program; (iv) disclosure after adjudication of

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*authorities for elimination of conditions conducive to criminal activity.”; and, (ii) “Ensuring known or suspected serious crimes and crimes which may result in damaging the public confidence in the Army are thoroughly and impartially investigated by USACIDC special agents.” Army Regulation 195-2, 21 July 2020, para 1-6 (p. 3).*

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SHARP allegation; (v) Fort Hood and U.S. Army Criminal Investigation Command (USACIDC) issues; (vi) missing Soldier protocols; (vii) crime prevention and response; (viii) command climate issues, and, (ix) installation public relations and incident management. While the Recommendations are set forth in full at the end of this Report on Pages 123-132, some of the more salient points include:

- ✓ The United States Army SHARP Program at Fort Hood should have a structure similar to the United States Army Trial Defense Service (TDS) and the United States Army Combat Readiness Center (CRC) and Director of Army Safety, insofar as each are structured to support the Command, while outside of the chain of command.
- ✓ At the installation level, there should be a cadre of pooled full-time Victim Advocates, comprised of a hybrid of civilian and uniformed personnel. Consider whether some or all Civilian Sexual Assault Response Coordinators (SARCs) and Victim Advocates (VAs) need Mobility Agreements to ensure compatibility with unit deployment requirements. All collateral SHARP positions should be phased out and consolidated into full-time VAs within the III Corps SHARP Program Office. All Brigade SARCS and VAs should be civilian positions.
- ✓ Strengthen and centralize all SHARP functions, governance and personnel under the installation SHARP Program Management Office.
- ✓ The SHARP Program Manager should be responsible for assessing the readiness of units in terms of SHARP awareness and cultural posture. Additionally, the installation SHARP Program Office, using the SHARP Cadre Pool, should be responsible for developing and conducting training at units throughout the installation.
- ✓ The Army should require that the installation SHARP Program Office track and monitor the aging and life-cycle of each sexual assault and sexual harassment case, and prepare a quarterly report regarding the same.
- ✓ The nature and the results of all SHARP disciplinary actions should be published at least semiannually, without identifying the subject, victim or unit, in order to deter future conduct and engender confidence in the SHARP response process.
- ✓ The Army should examine, from recruitment throughout the lifecycle of a Soldier, how the Army can better develop the “whole” person, helping each Soldier recognize the value of the warriors with whom they serve.
- ✓ Fort Hood should increase the number of appointed Special Victim Counsel.
- ✓ USACIDC should ensure that the Fort Hood and other CID offices that cover Corps and Divisional Posts maintain a sufficient number of experienced (more than 5 years) and highly experienced (more than 8 years) Special Agents to accomplish its mission. USACIDC should increase Detachment level expertise, licenses and equipment for electronic evidence forensic services, particularly for electronic data from mobile phones and laptops.
- ✓ The Command should establish a crime prevention and public safety working group to develop and implement strategies and employ all the tools available to the Command to reduce crime.

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- ✓ Establish an Army-wide set of protocols for “failure to report” scenarios for the critical first 24 hours of a Soldier’s absence.
- ✓ DES and CID should work with local law enforcement to identify high-risk establishments, locations and living areas and rapidly declare them off limits.

The FHIRC acknowledges the military’s time-honored role in protecting the security of our Nation. The sacrifices made every day by Soldiers and their families deserve unwavering respect and gratitude. Each Member of the FHIRC accepted this appointment with the intention and hope of supporting the mission and well-being of our brave Soldiers. Soldiers assaulting and harassing other Soldiers is both corrosive to esprit de corps and contrary to good order and discipline. Worse, it is contrary to Army Values. The Findings and Recommendations contained in this Report are offered in the spirit of constructive improvements, not to provide a basis for punitive actions.

### ENDORSEMENT

The Members of the Fort Hood Independent Review Committee endorse this Report and submit these Findings and Recommendations to the Secretary of the Army for disposition.



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Christopher Swecker  
FHIRC Chairman



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Jonathan P. Harmon  
FHIRC Member



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Carrie F. Ricci  
FHIRC Member



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Queta Rodriguez  
FHIRC Member



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Jack L. White  
FHIRC Member



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## CONTEXT & PURPOSE OF REPORT

Beyond recent events, this Independent Review (Review) must necessarily be informed by the context in which it is undertaken. With decades of military experience among its Members, the Fort Hood Independent Review Committee (FHIRC or Committee) appreciates the difference between the conduct of Soldiers as warfighters in the field or in theater, and the management of a military community during events that occur in garrison. The FHIRC appreciates the skills requisite to inculcating the esprit de corps necessary to cohesively accomplish military missions, in contrast and comparison with interactions within a community as diverse and dynamic as that which exists at Fort Hood and its surrounding cities. And, the FHIRC has been mindful of the fact that every aspect of Army engagement seeks to embrace Army Values.

With this in mind, the culture and climate of Fort Hood cannot be adequately assessed in a vacuum. The FHIRC's assessment would be remiss if it did not consider the culture and climate of the Army on a grander scheme. To be clear, this Report does not suggest – and, the Committee has not identified – a direct correlation between sexual harassment and sexual assault and the Army's endeavors toward gender inclusion. However, in reviewing the atmosphere at Fort Hood as it relates to sexual harassment and sexual assault, the Committee is not oblivious to the context of gender integration in the Army.<sup>3</sup>

Almost five years ago, then U. S. Secretary of Defense Ashton Carter declared that all positions in the U. S. military, including all combat positions, would be open to women. Although technically the remaining barrier to the integration of women into all military positions was removed with the elimination of the “1994 Direct Ground Combat Definition and Assignment Rule” in January 2013, it was not until December 3, 2015 that the U. S. Secretary of Defense issued a Memorandum regarding Implementation Guidance for the Full Integration of Women in the Armed Forces, which stated that:

Over the last three years, the Military Services have opened over 111,000 positions to women and have independently studied, developed, and verified operationally relevant standards for them. After careful review of this work, and informed by the counsel and judgment of the Secretaries of the Military Departments, Chiefs of the Military Services, and the Chairman of the Joint Chiefs of Staff, I have now determined that no exceptions are warranted to the full implementation of the rescission of the “1994 Direct Ground Combat Definition and Assignment Rule.” Anyone, who can meet operationally relevant and gender neutral standards, regardless of gender, should have the opportunity to serve in any position.<sup>4</sup>

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<sup>3</sup> At every critical juncture of performing this Review and drafting this Report, the FHIRC remained mindful of the seven core Army Values: Loyalty, Duty, Respect, Selfless Service, Honor, Integrity, and Personal Courage.

<sup>4</sup> See U.S. Secretary of Defense Memorandum, *Implementation Guidance for the Full Integration of Women in the Armed Forces* (03 Dec. 2015), <https://dod.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf>.

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In accordance with this declaration, in early 2016 the Army developed an Army Gender Integration Implementation Plan. This Plan detailed the Army's "approach for integrating women into all military occupational specialties (MOSs)," including allowing "qualified female Soldiers to serve in the Infantry, Armor, and Special Forces."<sup>5</sup> Of note, a pivotal component of the pursuit of full integration involved "[c]ontinually assessing integration strategies to successfully posture the force."<sup>6</sup>

The Army has a history of being forward thinking on social issues of the sort that require a focused and concerted effort in order to get to a better place. The Gender Integration Implementation Plan set forth by the Department of Defense (DoD) is one of these efforts. It is not a coincidence that the U. S. Secretary of Defense's December 3, 2015 Memorandum emphasizes that "[i]t is absolutely critical to our warfighting ability and the welfare of our people that we embark on integration with a commitment to the monitoring, assessment, and in-stride adjustment that enables sustainable success,"<sup>7</sup> and the Army similarly committed to "[c]ontinually assessing integration strategies to successfully posture the force."<sup>8</sup> Meaningful change, and the successful implementation of such meaningful change, requires careful iterative thought and assessment, a process toward which the Army has historically demonstrated that it can render itself well-positioned and committed.

The Committee's assessment has taken into account the current climate and culture of integrating women into all positions in the Army. The Army's Plan used the term "Soldier 2020" as "[t]he Army's campaign to gender integrate combat arms and improve readiness across the force."<sup>9</sup> As the end of 2020 nears, the FHIRC finds that providing a culture and climate that is characterized by inclusion, commitment to diversity, freedom from sexual harassment and sexual assault, and adherence to Army Values is key to successful gender integration.

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<sup>5</sup> See Army Gender Integration Implementation Plan, U.S. Army (10 Mar. 2016), <https://www.army.mil/standto/archive/2016/03/10/>. For more information See also U.S. Secretary of Defense Memorandum, *Implementation Guidance for the Full Integration of Women in the Armed Forces* (03 Dec. 2015), <https://dod.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf>.

<sup>6</sup> *Ibid.*

<sup>7</sup> See U.S. Secretary of Defense Memorandum, *Implementation Guidance for the Full Integration of Women in the Armed Forces* (03 Dec. 2015), <https://dod.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf>.

<sup>8</sup> See Army Gender Integration Implementation Plan, U.S. Army (10 March 2016), <https://www.army.mil/standto/archive/2016/03/10/>.

<sup>9</sup> See HQDA Execution Order 097-16 to the U.S. Army Implementation Plan 2016-01 (9 March 2016) (p.39), [https://dod.defense.gov/Portals/1/Documents/pubs/WISR\\_Implementation\\_Plan\\_Army.pdf](https://dod.defense.gov/Portals/1/Documents/pubs/WISR_Implementation_Plan_Army.pdf).

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## OBJECTIVES

The objectives of the FHIRC are consistent with its Charter, as set forth via Memorandum from the Secretary of the Army and the Chief of Staff of the Army, dated July 28, 2020.<sup>10</sup> Specifically, within a prescribed methodology, the FHIRC set out to review whether the relevant commands and units at Fort Hood were operating within the spirit of applicable DoD and Army policies and regulations regarding sexual assault prevention and response, sexual harassment, and equal opportunity. The FHIRC reviewed the command climate in units at Fort Hood including, without limitation, whether the atmosphere is conducive to the uninhibited reporting of sexual harassment and sexual assault. The FHIRC reviewed the effectiveness of the Fort Hood Sexual Harassment/Assault Response and Prevention (SHARP) Program, to include the training, education and abilities of leaders at all levels to receive and respond appropriately to reports of sexual harassment and sexual assault. Additionally, the FHIRC performed a comprehensive assessment of the regulations, policies, and procedures governing response to on and off-post crime issues involving Soldiers and reports of missing Soldiers.

## FHIRC COMPOSITION

With broad expertise with organizational dynamics, the law, and government investigations, the Fort Hood Independent Review Committee Members have a combined 75 years of experience as active-duty military and law-enforcement personnel. The Members' divergent yet complementary backgrounds enabled the Committee to inform this Review by bringing to bear disparate viewpoints from vantage points advantageous to the undertaking.

The Committee was led by Attorney and Risk Consultant Chris Swecker, who retired after 24 years as an FBI Special Agent and head of the FBI's Criminal Investigation Division (CID). Chris has conducted independent reviews of Fortune 500 companies, law enforcement agencies, universities and nuclear facilities. During his FBI career Chris was designated a FBI Inspector for 18 months during which time he inspected various FBI Field Offices. Joining Chris is Jonathan P. Harmon, a West Point graduate and First Calvary Division Officer who now serves as Chairman of McGuireWoods, an Am Law 50 firm providing legal and business solutions to clients worldwide. Jon is a nationally recognized trial attorney skilled in litigating high-stakes cases that require deep investigation of complex facts. Carrie F. Ricci also joins the team, bringing with her an abiding dedication to this nation and our Army. Carrie is a retired Army JAG Officer who served three years at Fort Hood, including as a trial counsel, and is now a senior executive serving as an associate general counsel for the U. S. Department of Agriculture. The team also boasts a native Texan who spent over two decades as an intelligence analyst and manpower operations officer in the U. S. Marine Corps, Queta Rodriguez. Queta has served as Director, Veterans' Services, Bexar County, TX and currently serves as a Regional Director for FourBlock, a national nonprofit that helps veterans transition into civilian careers. Rounding out the team, Jack L. White is a West Point graduate and former Armor

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<sup>10</sup> Secretary and Chief of Staff of the Army Memorandum, *Fort Hood Independent Command Climate and Culture Assessment*, (28 Jul. 2020).



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Officer who has been an attorney both in government and in the private sector. After clerking at the U. S. Supreme Court, Jack joined the law firm of FH+H PLLC, where he has served as a Partner and demonstrated expertise in government investigations, civil rights claims, and a wide variety of constitutional and civil matters requiring the development of intricate facts.<sup>11</sup>

As a team, the FHIRC was augmented by five former FBI Special Agents (FBISA), representing over 100 years of investigative experience. These FBISAs were decorated and accomplished in their field. They were chosen for their experience, professionalism and judgment. Two served in the U. S. Army prior to entering the FBI; one graduated from the United States Military Academy at West Point. These team members are former six year US Army Ranger and (b) (6) FBI Special Agent in Charge (SAC) (b) (6) (West Point (b) (6)), former Supervisory Special Agents (b) (6), (b) (6) and (b) (6), and former Newark Assistant SAC (ASAC) (b) (6).

## METHODOLOGY / APPROACH

To accomplish the various components of its Charter, the FHIRC determined early that it needed to gather relevant information from as many Soldiers and members of the Fort Hood community as possible, with context that would be provided by a number of related stakeholders. Accordingly, the Committee developed a multi-faceted approach that was cultivated through considerable review and analysis before engaging directly with the Fort Hood community. Interactions within the Fort Hood community were further informed by subsequent consultations with additional individuals with pertinent expertise, as set forth below.

### 1. Preparing for the On-Site Review

To properly determine “how” to conduct a Review that included 41,972 Soldiers and civilians comprising the Fort Hood community, the Committee requested and received a wide breadth of briefings and information prior to its on-site review at Fort Hood.

#### 1.1. Inspector General (IG) Briefings

The Committee received a significant amount of information from the Office of the Inspector General (IG) of the U. S. Army regarding inspections it conducted of the Army SHARP Program and related issues relevant to command climate at Fort Hood and other installations. Prior to receiving or reviewing any IG reports, the Committee received an “Army IG 101” briefing. This briefing provided: (1) a general orientation to the Army IG mission and focus; (2) an overview of how Army IGs think about command climate; and (3) an opportunity for the Committee to obtain input from the IG on the Committee’s proposed Survey, to use as part of the review. The Office of the Inspector General remained a valuable resource for the FHIRC throughout its review.

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<sup>11</sup> The FHIRC received invaluable information management assistance from (b) (6) of McGuireWoods and report composition assistance from (b) (6) of FH+H PLLC.

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## 1.2. Fort Hood Overview Brief

While two of the Committee Members had been stationed at Fort Hood while serving as Active Duty U. S. Army Officers, the FHIRC deemed it important to receive a contextual overview of the structure and functionality of Fort Hood and III Corps. During a fairly comprehensive briefing, the FHIRC was provided with valuable information concerning the commands, respective missions, units and organization of the garrison at Fort Hood. The briefing provided the FHIRC with further insight into logistical considerations associated with any on-site review, and direction regarding particular stakeholders with information relevant to accomplishing its Charter objectives. Additionally, the FHIRC was briefed on the dynamics of the cities and communities surrounding Fort Hood.

## 1.3. Climate Survey Briefings

As part of its regular effort to assess a unit's effectiveness, the Army routinely prepares Climate Surveys. These Surveys are commonly referred to as Defense Equal Opportunity Management Institute (DEOMI) Organizational Climate Survey (DEOCS). As the Committee's Charter was to assess the command climate at Fort Hood, it viewed DEOCS of Fort Hood units as very significant. Separately, DEOCS provided valuable information to the Committee before, during, and after its on-site Review.

## 1.4. Public Source Information

Where appropriate, and as necessary, the Committee conducted its own independent research. Some of the material reviewed included:

- The DOD's *Annual Report on Sexual Assault in the Military* for 2016, 2017, 2018 and 2019
- The Office of People Analytics *2019 Military Service Gender Relations Working Group Active Duty*
- The House Armed Services Committee July 29, 2020 Hearing on "*The Military's #Me Too Movement: An Examination of Sexual Harassment and Perceived Retaliation in The Department of Defense and at FT Hood*"
- The Fort Hood Press Conference Re: the Vanessa Guillén case held on July 2, 2020
- Various media reports in regard to Fort Hood and the Vanessa Guillén case
- Various US Army rules, regulations and policies
- Various public research articles on sexual assault and sexual harassment

## 1.5. Safety Briefing

At the request of the Committee, the U. S. Army Combat Readiness Center provided a briefing on safety at Fort Hood. The purpose was to help ensure that the FHIRC had an appropriate frame of reference when evaluating the installation, appropriately considering relevant comparables. The briefing covered mission-related accidents, as well as off-duty accidents. It also compared accidental deaths at Fort Hood to the rest of the Army and discussed the elements of the Army's Safety Program.

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## 1.6. Analytical Support and Access

The FHIRC requested and received numerous briefings before, during, and after its on-site Review at Fort Hood. Communication of anecdotal information as it was being collected, alongside thorough review and analysis of collected data, was a priority throughout the Review. To that end, the Committee's Review included conducting detailed analyses of data and collected information from multiple organizations, such as the Army Analytics Group (AAG), the DoD Sexual Assault Prevention and Response Office (SAPRO), the Army Office of The Inspector General (TIG), and the U. S. Army Criminal Investigation Division Command (USACIDC), Command Intelligence Operation Center (CIOC), in response to requests by the FHIRC. These briefings usually related to topics the Committee requested and / or needed, in order to accomplish the various components of its Charter.

The FHIRC had access to various data sources for this Review, including the Total Army Personnel Database, Active Duty Pay File from the Defense Manpower Data Center, Army Law Enforcement Reporting Tracking System, Defense Casualty Analysis System, Defense Sexual Assault Incident Database, Inspector General Action Reports System, Army Safety Management Information System, Defense Equal Opportunity Management Institute, Organizational Climate Surveys, Interactive Personnel Electronic Records Management System, FBI Uniform Crime Reporting Drug and Alcohol Testing Management Information System, Integrated Case Reporting System, and Army Courts Martial Information System.<sup>12</sup>

## 2. During the On-Site Review at Fort Hood

Contemporaneous to receiving information from various stakeholders and components of the Army, the FHIRC contemplated and deliberated over its approach to the on-site review. The Committee met on numerous occasions to discuss and strategize regarding the most prudent manner in which to fulfill its Charter. After reviewing and analyzing the wealth of available information and considering various methods, the FHIRC settled upon a three-fold approach: (1) interview and / or talk directly with as many Soldiers within the Fort Hood community—especially women—as possible; (2) encourage and facilitate frank and open discussions, free from the fear of negative consequences or retaliation; and (3) gather relevant and targeted information from every conceivable stakeholder at Fort Hood in a straightforward and manner. To accomplish these goals, the Committee employed a number of directed techniques, tools, and methods, as set forth below.

### 2.1. Interviews

#### 2.1.1. Personal Interviews

The Committee determined it was critical to personally interview as many Soldiers as possible. The Findings herein resonantly support this determination. In identifying which Soldiers to

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<sup>12</sup> The U.S. Army Office of Economic and Manpower Analysis (OEMA) provided support in performing data analytics, at the request of the Committee.

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interview, the Committee placed significant weight on: (i) the unit where Vanessa Guillén was assigned (3CR); (ii) the largest unit on the installation (1CD); and, (iii) women.

The Committee developed and utilized a standardized interview outline that assured anonymity and solicited information in the following areas: (a) personal experience with sexual harassment, assault, and retaliation; (b) reporting of sexual harassment and assault; (c) equal treatment and inclusiveness; and (d) safety on the installation and within the community. To encourage interviewees to provide as much candid information as possible, each Soldier or civilian was appropriately assured that their identity would remain confidential, unless the interviewee discussed direct involvement in criminal activity. A Committee Member or designee personally interviewed each selected Soldier or civilian in a secure, confidential setting away from the interviewee's unit and away from their respective chain of command. To further protect confidentiality all available women Soldiers in the 3CR were interviewed so that no particular Soldier would be perceived to be a willing information source for the FHIRC.

The Committee concluded that female Soldiers and civilians may be more comfortable sharing incidents of sexual harassment and sexual assault with another woman. As a result, the Committee endeavored to have women conduct the majority of the personal interviews of female Soldiers or civilians. Further, any woman who actually expressed a preference to be interviewed by a woman was accommodated. Regardless of gender, the interviews were conducted by experienced interviewers and most lasted a minimum of 30 minutes, with some lasting as long as two hours.<sup>13</sup>

The FHIRC paid particular attention to the leaders of the Fort Hood Sexual Harassment & Assault Response and Prevention (SHARP) Program. The Committee received a briefing from the leader of the Fort Hood SHARP Program and interviewed all of the key SHARP leaders, affording particular attention to interviews of Soldiers serving as either Sexual Assault Response Coordinators (SARC) or Victim Advocates (VA) throughout Fort Hood, in some instances, multiple times.

In summary, over about a three-week period, the FHIRC conducted in-person interviews of 647 Soldiers stationed at Fort Hood. The majority of the interviewees were assigned to the 1CD and the 3CR. Of the 647 interviews, 575 were enlisted (E-1 to E-9); and, the remainder were either officers or civilians. A total of 503 female Soldiers were interviewed from the 3CR and 1CD.

## 2.1.2. Group Interviews

The Committee also conducted group interviews. The group interviews contained as few as five people and as many as forty-five people. One or more Committee Members led each group interview during which he or she asked questions designed to cover the same areas as the personal interviews. A junior JAG officer was assigned to each group interview to summarize the key results. The group interviews were largely organized by unit and rank. However, the Committee also established a number of specialty group interviews, with Soldiers in common specialties. For example,

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<sup>13</sup> Five former FBI Special Agents (FFBISA) who served as additional support to the FHIRC were instrumental in this undertaking. Each of them had extensive experience conducting investigations, which was helpful during this Review. They were particularly skilled in establishing rapport, interviewing, and drawing and analyzing important details. Three reside in Texas and were familiar with Fort Hood.

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there was a group interview of all available Chaplains on the installation. There were a number of groups established to address the viewpoints of healthcare professionals, both uniformed and civilian. There were group interviews consisting only of personnel who worked on III Corps staff. And, there was a group interview of installation SHARP personnel.

The Committee ensured Soldiers would be free to speak openly during each of the group interviews. Raters or senior raters of any Soldier who was in the session were excused. Soldiers were assured that there would be no written record of anything they said during the group sessions that could be attributed to them. Throughout the interviews, members of the group were asked to respond to certain statements by a show of hands. The JAG officer would generally note the percentage of individuals who agreed or disagreed with certain statements posed by the Committee Member. Additionally, Committee Members asked numerous open-ended questions to solicit viewpoints and opinions from the group. Each session was scheduled for one hour. A total of 1,817 US Army Soldiers and civilians of the Fort Hood Post were interviewed in personal group interviews.

## **2.2. In-Person Meetings with Civil Rights Organizations**

Based in no small part on various Committee Members' respective memberships in various Civil Rights Organizations, the FHIRC determined that meeting with Civil Rights Organizations active within the Fort Hood community would inform its understanding of the interconnectivity between the community writ large and the installation. To that end, the FHIRC met collectively with leaders from the following Civil Rights Organizations: (i) League of United Latin American Citizens (LULAC); (ii) the National Association for the Advancement of Colored People (NAACP); (iii) the Sociedad Cultural Hispano Americana; and, (iv) the Hispanic American Chamber of Commerce. During the group session and subsequent follow-on individual meetings, the Committee shared with the Civil Rights Organizations its plan for reviewing the climate at Fort Hood. Additionally, each Civil Rights Organization spoke directly to the Committee about its concerns and perspectives relating to Vanessa Guillén's death, the command climate, and other issues relating to Fort Hood. Following these meetings, various Committee Members ensured that lines of communication remained open, consistent with accomplishing the objectives of the FHIRC Charter.

## **2.3. In-Person Meetings with Local Mayors**

Again, the FHIRC determined that engaging with local mayors would inform its understanding of the interconnectivity between the community writ large and the installation. To that end, in order to better understand the climate surrounding Fort Hood, the Committee met with the Mayors of Killeen, Copperas Cove, and Harker Heights. The Mayors provided their respective perspectives on their relationships with Fort Hood and its leaders, as well as insights from their respective vantage points regarding the climate at Fort Hood, their cities' dependence on Fort Hood, and their views on sources of problems in and around the installation. The local Mayors also extolled the many strengths of Fort Hood and its surrounding communities.



## 2.4. In-Person Meetings with Local Law Enforcement

As part of the group and personal interviews, and consistent with the components of its Charter directly related to law enforcement, the Committee interviewed many Soldiers and civilians in the Fort Hood CID Office and the Military Police. Off-post, the Committee met with Sheriffs and Chiefs of Police from Killeen, Copperas Cove, Harker Heights, Coryell County, and Bell County. The FBI's San Antonio Special Agent in Charge (SAC), Assistant SAC and Senior Supervisory Resident Agent for the Waco Resident Agency were interviewed multiple times. The FBI also provided crime analysis and other valuable information. The Director and Colonel of the Texas Department of Public Safety, the DPS Chief of the Criminal Division and a Texas Ranger assigned to the Fort Hood area were also interviewed and provided valuable insight and information. Interviews also included a representative of the US Attorney's Office for the Western District of Texas. After meeting collectively with local law enforcement personnel, the Committee Chair conducted numerous follow-on meetings with local, state and federal law enforcement, prosecutors and their departments.

The Texas DPS and San Antonio FBI also provided crime analysis and data that informed the FHIRC as to the crime environment in and around Fort Hood.

In conjunction with local law enforcement meetings, the FHIRC reviewed all 53 of the CID suicide files for FYs 2018-2020; 19 death files for FY 2018-2020,<sup>14</sup> and a sample of 40 recently closed sexual assault files. In total, the FHIRC reviewed 112 CID files.

## 2.5. In-Person Meetings with Local District Attorneys

Also because of the components of its Charter directly related to law enforcement, the Committee determined that meeting with local District Attorneys would inform its review, consistent with its Charter. To that end, the FHIRC met with the District Attorneys for the counties surrounding Fort Hood—Bell and Coryell Counties. The District Attorneys offered their perspectives on crime at Fort Hood and in their respective jurisdictions. In particular, the District Attorneys provided insight into sexual assaults prosecuted in their jurisdictions. In order to further discuss specific details relating to crime and to gain more particularized perspectives on the command climate at Fort Hood, the Committee's Chair met extensively with each District Attorney on-site in their respective offices.

## 2.6. In-Person Meeting With The Guillén Family

Within the confines of the FHIRC Charter, two members of the Committee met with the Guillén family, limited to the family's experiential appreciation of the climate at Fort Hood. (b) (6) Guillén, (b) (6) Guillén, (b) (6) Guillén, (b) (6) Guillén, and the family's attorney were present for the meeting. During the meeting the Committee Members and the Guillén family discussed a range of topics including: the family's dealings with the chain of command; the search for Vanessa and the Fort

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<sup>14</sup> These included cases that were the subject of extensive media reporting, including the Vanessa Guillén, Freddie Morales, and Elder Fernandes files.

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Hood community's role therein; the protests; the family's interactions with CID; the family's grief; and things the family believes the Army could have done better.

## 2.7. Confidential Individual Surveys

The FHIRC determined early that gathering confidential, individualized information on command climate topics would be essential in accomplishing the objectives as set forth in its Charter. Consequently, the Committee prepared a twenty (20) question survey that was strategically designed to be completed in five (5) minutes or less.<sup>15</sup> The Survey covered the following topics: sexual assault, sexual harassment, retaliation, knowledge of SHARP basics, equal treatment, confidence in leadership, and safety.

The Survey was distributed electronically to every Soldier and civilian at Fort Hood. Upon conveying the importance of the broadest coverage possible through this survey, the FHIRC benefited tremendously from the support of the Sergeant Major of the Army in this endeavor. All Soldiers and civilians within the Fort Hood community were required to complete the individual survey.<sup>16</sup> As a result, 31,612 responses were submitted.

## 2.8. Hotline

The FHIRC sought to ensure that anyone within the Fort Hood community who had meaningful information to contribute, consistent with the FHIRC Charter, had the ability to do so. Accordingly, the Committee requested that the Army establish a hotline, to allow Soldiers and civilians alike to talk to Committee Members anonymously about any topic relevant to its Charter. The Committee informed every Soldier and civilian at Fort Hood of the hotline via email and / or during personal or group interviews. The hotline took a life of its own, as Soldiers assisted by sharing its existence and purpose via social media. Committee Members talked with Soldiers and civilians via the hotline throughout the review, and the hotline remained active throughout the Committee's time at Fort Hood. The Hotline received over 30 calls and the Chairman received 11 emails from Soldiers wishing to provide information relevant to the Review.

## 3. Specialized Interviews and Briefings

The FHIRC also conducted over 150 interviews of and briefings with key stakeholders and individuals who were deemed to be important sources of information. Briefings were requested from subject matter experts on topics that were considered vital to the FHIRC's Review, such as practitioners regarding military law and procedures; USACIDC and its Criminal Intelligence Operations Command (CIOC), regarding global and local CID operations and crime analysis matters; SHARP Program Managers at the III Corps Level and the Department of Defense Sexual Assault

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<sup>15</sup> See Appendix A: FHIRC Survey Questions.

<sup>16</sup> As most soldiers do not have home computers that are Common Access Card (CAC) enabled, each unit has access to a CAC enabled computer. The Survey was sent to each unit, to enable each Company-Level Commander and/or First Sergeant to direct Soldiers to a CAC enabled computer to complete the Survey.

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Prevention and Response Office (SAPRO), regarding comparisons between and among the Armed Services and perspectives on the SHARP Program; Public Affairs Office personnel, regarding practices and procedures; and, behavioral health specialists, regarding Soldier mental health. In many cases, multiple interviews were conducted in person at Fort Hood and by phone as follow-up to earlier interviews or briefings. Interviews were also held with various Fort Hood Commanders at all echelons.

## 4. Post On-Site Analysis

After completing the on-site Review at Fort Hood, the Committee conducted additional interviews of Soldiers and civilians within the Fort Hood community via telephone. The Committee analyzed all of the information collected during the on-site Review, and reviewed analysis of particular itemized questions based on data collected. Repeated in-person sessions occurred to evaluate potential supported Findings. The Review entailed an iterative process, with the objective of ensuring helpful recommendations supported by collected data and information.

### SHARP PROGRAM HISTORY & BACKGROUND

Findings set forth in this Report are informed by an appreciation of the history, background and inception of the Army's SHARP Program. The SAPR Program and the Sexual Assault Prevention and Response Office (SAPRO) were established in 2005 to create a single point of authority for the Department of Defense (DoD) sexual assault policy. SAPRO and the SAPR Program were formed after a comprehensive review was conducted in 2004 by the Victims of Sexual Assault Task Force, and later that year the Joint Task Force for Sexual Assault Prevention and Response, which analyzed DoD's processes relating to victims of sexual assault in the Military Departments and implemented recommended policies.<sup>17</sup>

Section 577 of Public Law 108-375 set forth the SAPR Program and policy requirements. The law required the Secretary of Defense to develop a comprehensive policy for DoD "on the prevention of and response to sexual assaults involving members of the Armed Forces."<sup>18</sup> This included developing a uniform definition of sexual assault for the Military, and creating a policy that "at a minimum, address[ed] the following matters:

- (1) Prevention measures.
- (2) Education and training on prevention and response.
- (3) Investigation of complaints by command and law enforcement personnel.
- (4) Medical treatment of victims.
- (5) Confidential reporting of incidents.
- (6) Victim advocacy and intervention.

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<sup>17</sup> See Public Law 108-375, "Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005," October 28, 2004, <https://www.sapr.mil/mission-history>.

<sup>18</sup> *Id.*



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- (7) Oversight by commanders of administrative and disciplinary actions in response to substantiated incidents of sexual assault.
- (8) Disposition of victims of sexual assault, including review by appropriate authority of administrative separation actions involving victims of sexual assault.
- (9) Disposition of members of the Armed Forces accused of sexual assault.
- (10) Liaison and collaboration with civilian agencies on the provision of services to victims of sexual assault.
- (11) Uniform collection of data on the incidence of sexual assaults and on disciplinary actions taken in substantiated cases of sexual assault.”<sup>19</sup>

While the DoD SAPRO focuses on sexual assault, around 2008 the Army office reorganized by incorporating sexual harassment into its program. The reorganized program was given the acronym “SHARP” (formerly the Army Sexual Assault Victim Program).

## The Army SHARP Program

The Army’s SHARP Program is executed by the Deputy Chief of Staff, G-1 (DAPE–AR) Army Resilience Directorate (ARD), under the supervision of the Assistant Secretary of the Army, Manpower and Reserve Affairs (ASA M&RA), and implements the Army’s policy regarding sexual harassment and sexual assault.<sup>20</sup> By design, the SHARP Program “enhances Army readiness by fostering a culture free of sexual harassment and sexual assault through prevention, education and training, response capability, victim support, reporting procedures, and appropriate accountability that enhances [] safety, well-being, [and] readiness.”<sup>21</sup> It focuses on “cultural change across the Army with a vision toward a culture of discipline and respect in which Soldiers intervene in sexual harassment and sexual assault to protect one another,”<sup>22</sup> and is intended to maintain full-time staff at the brigade level. The SHARP Program sets forth different procedures for handling sexual harassment and sexual assault claims.

## Treatment Of Sexual Harassment

If a Soldier, or his or her dependent family member who is at least 18 years old, experiences sexual harassment, he or she may file an *informal* complaint. An informal complaint is reserved for “less severe or egregious incidents”<sup>23</sup> that may be resolved by the individual, with minimal assistance, or through direct resolution. Informal complaints are generally dealt with orally and the complainant does not have to submit a writing or follow prescribed timelines (although complaints should generally

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<sup>19</sup> *Id.*

<sup>20</sup> Army Regulation 600-20, 24 Jul. 2020, para 7-1 and 7-2 (p. 87-88).

<sup>21</sup> *Id.*, at para 7-2 (p. 88).

<sup>22</sup> Mission and Overview, SHARP, U.S. Army, [https://www.sexualassault.army.mil/iam\\_mission.aspx](https://www.sexualassault.army.mil/iam_mission.aspx).

<sup>23</sup> Filing an Informal Complaint of Sexual Harassment, SHARP, U.S. Army, [https://www.sexualassault.army.mil/informal\\_harassment.aspx](https://www.sexualassault.army.mil/informal_harassment.aspx).

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be resolved within 14 calendar days). The complainant may seek the assistance of the Sexual Assault Response Coordinator (SARC), who will provide information regarding support services, but cannot provide mediation themselves (although the SARC can provide a referral to a mediator). The SARC is required to maintain a memorandum of record about the complaint and any resolution.<sup>24</sup>

Alternatively, if a Soldier, or his or her dependent family member who is at least 18 years old, experiences sexual harassment, he or she may file a *formal* complaint. It is strongly recommended that a formal complaint be filed within 60 calendar days from the date of the harassment to facilitate the complaint investigation and resolution.<sup>25</sup> The full-time brigade SARC receives formal complaints on either a DA Form 7746, which documents the complaint and requested remedy (this form may also be used to document anonymous complaints), or if an informal complaint is investigated by a commander, then it will be entered into the Sexual Harassment Integrated Case Reporting System (ICRS) as a formal complaint with the commander as the complainant (if the complainant declines to file a Form 7746).<sup>26</sup> Formal complaints are reportable to brigade headquarters, and must include specific information, required documentation and timelines.<sup>27</sup> The brigade SARC must immediately refer all formal complaints to the brigade commander, and the complainant must attest to the veracity of the statements in the complaint before the brigade commander, after being read the penalties associated with perjury.<sup>28</sup> An investigation will begin within 72 hours from receipt of the complaint and should typically be resolved within 14 calendar days.<sup>29</sup>

Commanders are responsible for the effective execution and implementation of the SHARP Program. If a Commander becomes aware of or receives a formal or informal complaint of sexual harassment, the commander must initiate a commander's inquiry or AR 15-6 investigation.<sup>30</sup> Commanders will not initiate an AR 15-6 investigation if the complaint involves sexual assault; rather, in a complaint involving sexual assault, the commander must immediately contact the SARC and the U. S. Army Criminal Investigation Command (USACIDC). When there is any question

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<sup>24</sup> Army Regulation 600-20, 24 July 2020, para 7-8, (p.106).

<sup>25</sup> *Id.*, at para 7-8.

<sup>26</sup> *Id.*

<sup>27</sup> Filing a Formal Complaint of Sexual Harassment, SHARP, U.S. Army, [https://www.sexualassault.army.mil/formal\\_harassment.aspx](https://www.sexualassault.army.mil/formal_harassment.aspx).

<sup>28</sup> Army Regulation 600-20, 24 July 2020, para 7-8n(4), (p. 107):

The full-time brigade SARC will refer all formal complaints to the BDE commander immediately. The commander will have the complainant swear to the contents of the statement(s) contained in the formal complaint by administering an oath to the complainant, in accordance with this regulation. At that time, the commander will inform the complainant of the potential adverse consequences to knowingly submitting a false complaint; that is, a complaint containing information that the complainant knew to be false. False complaints may be punishable under the UCMJ.

<sup>29</sup> *Id.*, at para 7-8.

<sup>30</sup> *Id.*, at para 7-6.

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as to whether a complaint involves sexual harassment or sexual assault, commanders are to consult with their assigned legal office.

## Treatment Of Sexual Assault

A Soldier, or his or her dependent family member who is at least 18 years of age, who has been sexually assaulted has multiple vehicles through which to seek assistance or redress. These vehicles include contacting his or her local Sexual Assault Response Coordinator (SARC), Victim Advocate (VA), healthcare provider, chaplain, or a lawyer.<sup>31</sup> The Army has also established the Special Victims' Counsel (SVC) program, in accordance with a Secretary of Defense August 14, 2013 memorandum regarding Sexual Assault Prevention and Response, to provide legal support to victims of sexual assault. Through the SVC program, a sexual assault victim may request an Army lawyer to provide them with legal advice and representation.<sup>32</sup> The SHARP Program envisions a number of resources available to victims of sexual assault. In addition to seeking out these resources, a Soldier (or their adult dependent) may file a restricted report or an unrestricted report regarding the sexual assault.

A *restricted* report allows a sexual assault victim to disclose the details of the assault, including the identity of the assailant, on a confidential basis, and to “receive medical treatment and counseling, without triggering the official investigative process.”<sup>33</sup> Restricted reports may only be filed with the SARC, VA, or a healthcare provider. With the victim’s consent, the SHARP Victim Advocate will ensure the victim is taken to a healthcare provider instead of reporting the sexual assault to the command or law enforcement.<sup>34</sup> Although the senior commander is notified when a restricted report is filed, he or she is not provided with the victim’s name or any other personally identifiable information.<sup>35</sup> While filing a restricted report does not trigger an investigation, if the victim confides in a person within their chain of command or in law enforcement regarding the sexual assault, then an investigation must be initiated, and confidentiality may be compromised. A restricted report may be converted to an unrestricted report, upon the victim’s written authorization.

In addition to the restricted reporting option, in 2019, the Catch a Serial Offender Program (CATCH) was implemented throughout the Department of Defense. CATCH serves to improve the DoD’s ability to identify repeat sexual assault offenders. The CATCH program enables Soldiers making a restricted report to provide information about the offender and the assault to law enforcement in a confidential manner. If the information provided matches another allegation, the

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<sup>31</sup> What Should I Do?, SHARP, U.S. Army, [https://www.sexualassault.army.mil/what\\_to\\_do.aspx](https://www.sexualassault.army.mil/what_to_do.aspx).

<sup>32</sup> SHARP: Special Victim Counsel Program, U.S. Army, <https://www.army.mil/standto/archive/2013/12/02/>.

<sup>33</sup> Army Regulation 600-20, 24 July 2020, Glossary, (p.210).

<sup>34</sup> *Id.*, at para 7-5, (p.102).

<sup>35</sup> *Id.*, at para 7-9, (p.112).

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sexual assault victim may convert his or her report from restricted to unrestricted and participate in the investigation.<sup>36</sup>

Filing an *unrestricted* report “allows a Soldier or eligible DA [Department of the Army] Civilian who is sexually assaulted and desires medical treatment, counseling, and an official investigation of their allegation to use current reporting channels (for example, the chain of command or law enforcement), or they may report the incident to the SARC or SHARP Victim Advocate.”<sup>37</sup> Once an unrestricted report is filed, the SARC will immediately notify a SHARP Victim Advocate. With the victim’s consent, a healthcare provider may conduct a forensic examination (which may be used as evidence). The SARC or commander will immediately notify USACIDC when an unrestricted report is filed.<sup>38</sup> Once USACIDC is involved, the victim may not change from filing an unrestricted report to a restricted report; however, he or she may decline to participate in the investigation at any time. The victim is assigned a SARC and SHARP Victim Advocate, and is given the “DD Form 2701 (Initial Information for Victims and Witnesses of Crime), which sets out victims’ rights and points of contact,” by DoD law-enforcement agents.<sup>39</sup>

In addition, a victim who has filed an unrestricted report has the right to request an expedited transfer, this right exists for situations where the victim feels uncomfortable due to retaliation or ostracism for example.<sup>40</sup> “The “SARCs, SHARP VAs, and VRs [victim representatives] will inform victims of the resources available to report instances of retaliation, reprisal, ostracism, maltreatment, sexual harassment, or to request a transfer, or seek an MPO [Military Protective Order].”<sup>41</sup> If the victim fears for their safety, they can request assistance from the “Commander or SARC to request a safety transfer, or an MPO, TRO [temporary restraining order], and/or CPO [civilian protective order].”<sup>42</sup> If an MPO is issued, the commander must ensure that the victim is aware of their option to request a transfer from their assigned command.<sup>43</sup> The victim will also be informed that if they wish to seek protection off base, they must seek a CPO, as the MPO is not enforceable by civilian law enforcement off base. The Expedited Transfer Victim Requests Army policy states that: “there is a presumption in favor of transferring or reassigning a sexual assault victim, at his or her request, following that victim’s credible report of sexual assault.... For the purposes of this policy, a report of sexual assault is credible when the battalion commander or above, after considering all available evidence from USACIDC or other investigative agency and the advice of the servicing legal office, concludes that there are reasonable grounds to believe that an offense constituting sexual assault has

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<sup>36</sup> Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2019 (p. 16).

<sup>37</sup> Army Regulation 600-20, 24 July 2020, Glossary, (p.212).

<sup>38</sup> *Id.*, at para 7-5, (p.102).

<sup>39</sup> *Id.*, at para 7-9, (p.111).

<sup>40</sup> *Id.*, at Appendix I, (p.160).

<sup>41</sup> *Id.*, at para 7-10, (p.113).

<sup>42</sup> *Id.*, at para 7-10, (p.113).

<sup>43</sup> *Id.*, at para 7-11, (p.114).

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been committed against the person requesting the transfer or reassignment. For purposes of this policy, a credible report is limited to reports of crimes being investigated by USACIDC, other MCIO [Military Criminal Investigation Organization], or other investigative agencies.”<sup>44</sup>

The commander may also “[d]etermine the need for temporary reassignment to another unit, duty location, or living quarters on the installation of the victim or the subject being investigated, working with the subject’s commander if different from the victim’s commander, until there is a final legal disposition of the sexual assault report, and/or the victim is no longer in danger.”<sup>45</sup> When an unrestricted report of sexual assault has been filed, the commander will also “Flag (suspend favorable personnel actions) any Soldier under charges, restraint, or investigation for sexual assault in accordance with AR 600–8–2 and suspend the Soldier’s security clearance in accordance with AR 380 –67.”<sup>46</sup> At the same time, the commander is also supposed to discourage gossip or speculation, and “[e]mphasize that the subject is presumed innocent until proven guilty.”<sup>47</sup>

Commanders are also in charge of ensuring annual SHARP trainings occur. This involves incorporating “unit-level SHARP annual training into the overall training for the unit” and pre-deployment and post-deployment SHARP trainings.<sup>48</sup> “Annual SHARP training will be conducted face-to-face using the approved Department of the Army SHARP Annual Training Support Package available on the Army Training Network. Commanders will determine the duration, location, and means for conducting training. Unit leaders will lead the training with the assistance of certified SHARP professionals.”<sup>49</sup> In addition to annual training, when a report of sexual assault has been filed, the commander may also “consider some form of unit training; or have an outside expert address the unit regarding preventive measures, as well as some of the emotional or psychological feelings that may manifest themselves, affect the unit, and require the unit’s response during the course of the investigation.”<sup>50</sup>

Only those personnel with a legitimate need-to-know will be given details of the reported sexual assault. Until final disposition of the reported sexual assault, the sexual assault victim’s immediate commander is required to provide monthly updates to the victim, including the current status of any ongoing investigation or command proceedings regarding the assault.<sup>51</sup> The sexual assault victim “will have access to medical treatment and counseling, support, and consideration for

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<sup>44</sup> *Id.*, at Appendix I, (p.160).

<sup>45</sup> *Id.*, at para 7-11, (p.115).

<sup>46</sup> *Id.*, at p. 116.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*, at p. 115.

<sup>49</sup> *Id.*, at para 7-5, (p. 95).

<sup>50</sup> *Id.*, at para 7-11, (p.115).

<sup>51</sup> *Id.*, at para 7-5, (p. 97).

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protection orders and expedited transfers.”<sup>52</sup> USACIDC will investigate the unrestricted report and provide support to the Sexual Assault Review Board (SARB). “The SARB provides executive oversight, procedural guidance, and feedback concerning the installation’s SHARP Program.”<sup>53</sup> The SARB is chaired by the senior commander (or deputy commander), and on a monthly basis the board meets to review the installation’s SHARP Program, including its responses to any unrestricted reports of sexual assault. “Commanders will provide final disposition of sexual assault cases in accordance with AR 190-45.”<sup>54</sup>

## FINDINGS

### **1. FINDING #1: THE IMPLEMENTATION OF THE SHARP PROGRAM AT FORT HOOD HAS BEEN INEFFECTIVE, DUE TO A COMMAND CLIMATE THAT FAILED TO INSTILL SHARP PROGRAM CORE VALUES BELOW THE BRIGADE LEVEL.**

The FHIRC determined that, while basic components of the Fort Hood SHARP Program were in place and there was attention devoted to the Program at the III Corps Headquarters level, the core elements of the SHARP Program were diluted at each level below III Corps, to the point of being barely functional within the enlisted ranks. These ranks comprise 85% of the personnel at Fort Hood.<sup>55</sup> These ranks are also where at least 88% of sexual assault victims and over 90% of the identified subjects under command jurisdiction are found.<sup>56</sup> The Committee determined that responsibility for flawed execution ultimately rested on the upper echelons of Fort Hood leadership, based in large measure on a lack of emphasis on the SHARP Program. This dearth of command emphasis on the SHARP Program allowed form to pervasively supersede substance across the installation, at a heavy cost to morale and the health and safety of the Soldiers within the Fort Hood community.

The end result has been a SHARP Program that appeared to be compliant on the surface, but was hollow and lacking in leadership attention, day-to-day implementation, broad acceptance by the enlisted Soldiers, and full inculcation into the culture and character of the Fort Hood community. If ever there was a need for intrusive hands-on leadership with regards to the health and welfare of troops, Fort Hood is and was the environment.

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<sup>52</sup> *Id.*, at para 7-9, (p.112).

<sup>53</sup> *Id.*, at Appendix F, para F-2, (p.146).

<sup>54</sup> *Id.*, at para 7-9, (p.112).

<sup>55</sup> Fort Hood Fact Sheet, August 2020, Page 3.

<sup>56</sup> *See* Figure 1 derived from DSAID system data. Chart supplied by III Corps SHARP Program Office.

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While certain structural issues of the SHARP Program were contributing factors in the failed execution of the program at Fort Hood,<sup>57</sup> they were not the primary cause. The main cause was the inability of the command elements at the Division and Brigade levels to proactively drive the SHARP Program elements of knowledge, prevention, reporting, response and recovery down into the ranks where most of the SHARP violations took place.

The Committee sought out to identify gaps between the Army's stated goals and its current state using both qualitative and quantitative methods, in particular, using the following stated goals of the SHARP Program per U. S. Army Regulation 600-20, CH 7:

### *Sexual Assault Prevention and Response Goals*

- 1) *Create a climate that minimizes sexual assault incidents, which impacts Army personnel, Army civilians, and Family members, and, if an incident should occur, ensure that victims and subjects are treated according to Army policy.*
- 2) *Create a climate that encourages victims to report incidents of sexual assault without fear.*
- 3) *Establish sexual assault prevention training and awareness programs to educate Soldiers.*
- 4) *Ensure sensitive and comprehensive treatment to restore victims' health and well-being.*
- 5) *Ensure leaders understand their roles and responsibilities regarding response to sexual assault victims, thoroughly investigate allegations of sexual assault, and take appropriate administrative and disciplinary action.*

The Committee identified a marked lack of focus on the core elements of the SHARP Program. Across the installation, and especially in the Combat Brigades and their supporting elements, readiness was the primary focus of all activities, while the SHARP Program and the general well-being of Soldiers was a distant second. Mission readiness completely overshadowed the SHARP Program. Rather than viewing SHARP as a critical component of Soldier safety, morale, and respect, NCOs and officers at the Company/Troop level and below, treated SHARP as a perfunctory task, not a priority. Too many NCOs acted as if they had to shield the higher echelons from SHARP issues; and, there were too many instances described during individual interviews of NCOs themselves taking advantage of subordinate victims.<sup>58</sup>

The FHIRC, which has several Members with military experience, determined that this deficiency was not a matter of the military capabilities of the officers and NCOs. They will go where they are led. Unfortunately, it was attributable to a lack of commitment and leadership – spanning not one single command, but a series of commands across the Corps, Division and Brigade echelons – to focus efforts where they were needed the most: deep into and below the Company/Troop levels into the enlisted ranks.

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<sup>57</sup> See Finding #3, below.

<sup>58</sup> Between FYs 2015 to 2020 NCOs comprised 27.5% (287 of 1042) of sexual assault subjects based on data extracted from the Defense Sexual Assault Incident Database (DSAID) as of 21 SEP based on 380 reports in which the Subject was under UCMJ authority and CID completed the investigation and substantiated the report. Data and analysis supplied by III Corps SHARP Program Office.

# REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE

The evidence for this Finding is set forth and discussed in the sub-Findings below. This evidence was developed during the course of conducting 647 individual Soldier interviews, group interviews that encompassed over 1800 Soldiers and Army civilians and over 150 specialized interviews of select individuals on the base and the surrounding community. The Committee also examined its own Survey results across over 31,000 respondents and detailed analysis and reports provided by HQDA and US DoD.

The foundational underpinnings of this Finding follow.

## **1.1. During The Review Period Of 2018-2020, Fort Hood Leadership Knew Or Should Have Known Of The High Risk Of Sexual Assault And Harassment At Fort Hood.**

There is basic risk management concept that whenever a risk is predictable, it is preventable.<sup>59</sup> At Fort Hood there was a clearly identified high risk of serious harm: sexual assault involving female Soldiers in the enlisted ranks, which could have been addressed decisively and in proactive ways to mitigate the risk. Unfortunately, a “business as usual” approach was taken by Fort Hood leadership causing female Soldiers, particularly, in the combat Brigades, to slip into survival mode, vulnerable and preyed upon, but fearful to report and be ostracized and re-victimized.

The absence of Command focus and execution was even more concerning to the Committee, given that the high risks of sexual assault and sexual harassment at Fort Hood were known or should have been known by command leadership at all echelons. It was well publicized that the risk for sexual assault for women at Fort Hood was persistently high before and during the review period.<sup>60</sup> In fact, there were multiple and patent red flags that should have drawn focus and attention to the need to actively mitigate the risks and drive down the number of serious incidents.

This was especially true in the brigades within the 1CD and 3CR, where women were first introduced into armored/infantry units over 4 years ago. The placement of female Soldiers in combat Brigades is a fairly recent phenomenon. Since then Secretary of Defense Ashton Carter first formally announced the change in 2015, the numbers of female Soldiers in combat brigades have steadily increased. During the review period however, the ratio of males to females in the combat units was approximately 7 to 1.<sup>61</sup> Female enlisted Soldiers make up the lion’s share of the victims, mostly at the hands of enlisted male Soldier subjects.

The Department of Defense (DoD) Fiscal Year (FY) 2018 Annual Report on Sexual Assault in the Military reported that sexual assault occurs most often between junior enlisted acquaintances who are peers or near peers in rank. The 2018 force-wide survey showed that the vast majority of

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<sup>59</sup> *Law Enforcement Today*, March 26, 2017, quoting Retired Commander of California Highway Patrol and 45-year law enforcement risk management professional Gordon Graham.

<sup>60</sup> Media article from Nov 17, 2017 “*Ft Hood Reports the Most Sexual Assaults of Any Army Post*” KWTX: Killeen, TX.

<sup>61</sup> The 1CD had 18,827 soldiers assigned, of which 2,764(15%) were female. The 3CR had 4,394 soldiers assigned, of which 479 (11%) were female.





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sexual assaults of service members occurred between people aged 17 to 24 who work, train, or live in close proximity. The report indicated that sexual assault offenders were most often military men whom the victim considered to be a friend or acquaintance, acting alone. In addition, the alleged offender's rank was most often the same as the victim's or one rank higher, with most alleged incidents involving junior enlisted women in the grades of E3 and E4.<sup>62</sup>

This proved to be true at Fort Hood during and several years prior to the review period with the exception that a number of victims also included E-5s and many subjects were NCOs up to the E-7 rank. Numbers obtained from the III Corps SHARP Office showed the following breakdown of victims and subjects by rank for FYs 2018, 2019 and 2020.

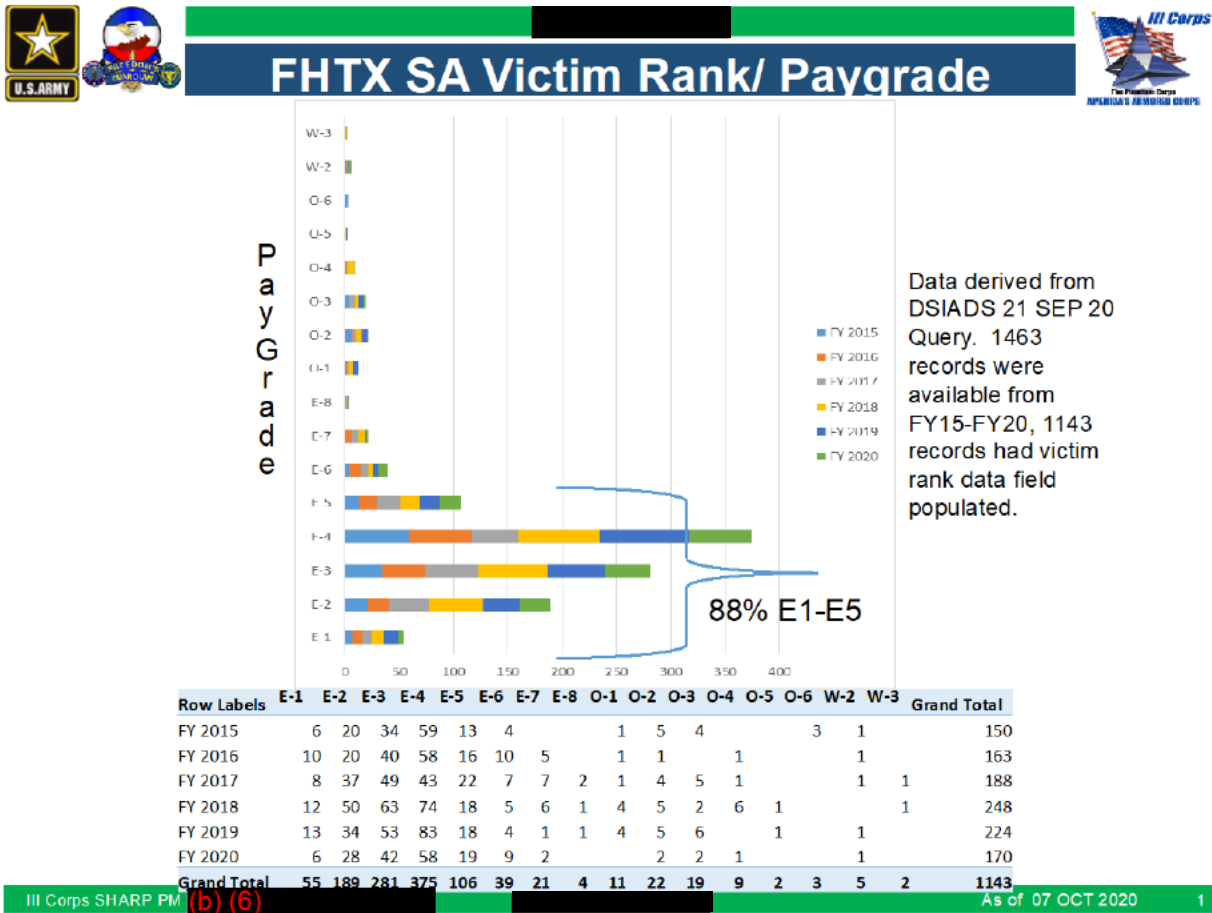
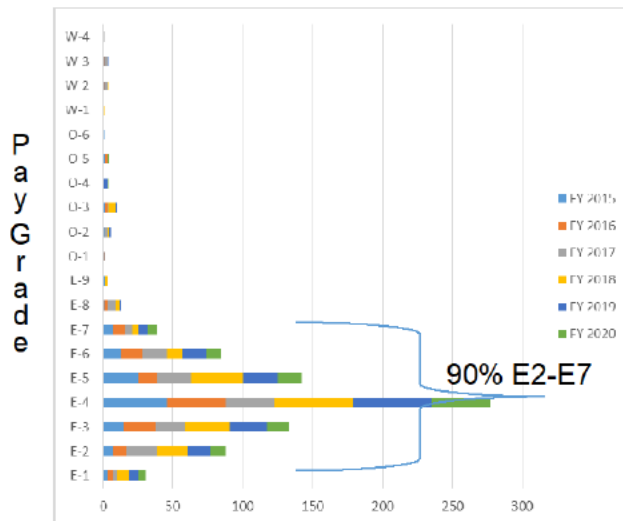


Figure 1: FY15-FY20 Victim Rank Break Out

<sup>62</sup> Of the 30,733 junior and senior enlisted Soldiers assigned to Fort Hood, 4917 (16%) are female.



## FHTX SA Subject Rank/ Paygrade



Data derived from DSIADS 21 SEP 20 Query. 1463 records were available from FY15-FY20, 848 records had subject rank data field populated. 463 data fields were blank and 179 were unknown.

Row Labels	E-1E-2	E-3	E-4	E-5	E-6	E-7	E-8	E-9	O-1	O-2	O-3	O-4	O-5	O-6	W-1	W-2	W-3	W-4	Grand Total
FY 2015	3	7	15	46	25	13	7	1	2	1	1	2	2	1					128
FY 2016	4	10	23	42	14	15	9	2		1	1	1	1						124
FY 2017	3	22	21	35	24	18	5	6			2	1					1	1	140
FY 2018	9	22	32	56	37	11	4	3	1		2	5			1	1			184
FY 2019	6	16	26	56	25	17	7	1		1	1	3						1	160
FY 2020	6	11	16	42	17	10	7					1	2						112
<b>Grand Total</b>	<b>31</b>	<b>88</b>	<b>133</b>	<b>277</b>	<b>142</b>	<b>84</b>	<b>39</b>	<b>13</b>	<b>3</b>	<b>2</b>	<b>6</b>	<b>10</b>	<b>4</b>	<b>5</b>	<b>1</b>	<b>1</b>	<b>4</b>	<b>4</b>	<b>848</b>

Figure 2: FHTX Sexual Assault Subject Rank Breakout

These charts show that most of the sexual assault victims and identified subjects are indeed found in ranks of E-1 to E-7 with the highest concentration of victims in the ranks of E-1 to E-5. These are also the youngest and most vulnerable Soldiers. Data also shows that 63% of the victims were between the ages of 18 to 23 years old.<sup>63</sup> This is where the risk at Fort Hood was highest; and, this is where efforts needed to be laser-focused in the area of training, close monitoring and focused initiatives to prevent and deter sexual harassment and sexual assault.

### 1.1.1. The Published Rates Of Violent Sex Crimes At Fort Hood Were Notably Higher In Comparison With Other Army Installations, The Army, And FORSCOM.

In comparing crime rates from CY 2015 to 2020, based on a five-year average rate per 100,000, Fort Hood's rates of violent sex crimes were 30.6% higher than FORSCOM averages and 43.2% higher than the Army.<sup>64</sup> Fort Hood also had the highest founded sex offense rates among similar

<sup>63</sup> Analysis provided by III Corps SHARP Program Office, based on DSAIDs data for FYs 2015-2020.

<sup>64</sup> Data provided by USACIDC, includes Soldiers identified as alleged offenders (probable cause threshold or currently under investigation) in incidents recorded in the Army Law Enforcement Case Management system.

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posts in Army for first term enlisted Soldiers, and while not statistically significant,<sup>65</sup> also has the highest founded sex offense rates for NCOs.<sup>66</sup> (See Figures 3 and 4 below).

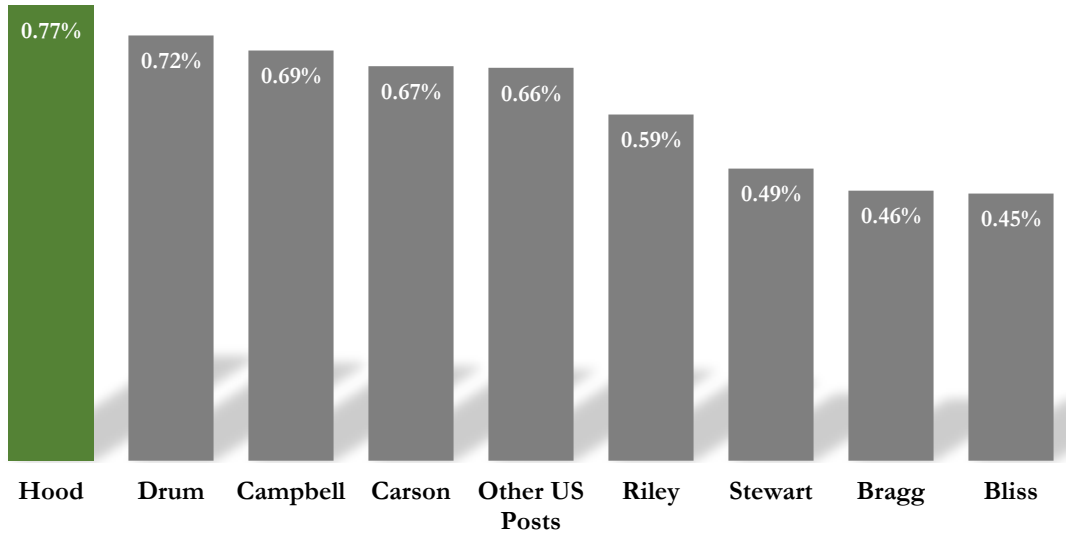


Figure 3: Percent of First Term Enlisted Soldiers with Founded Sex Offense

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<sup>65</sup> According to the FHIRC researcher statistical analysis was conducted to understand how Fort Hood differed from other US Army divisional posts. A statistically significant result meant that the observed difference between Fort Hood and other posts in the data sample was likely to exist in reality after controlling for characteristics such as race, gender, AFQT, rank, MOS, etc. On the other hand, a statistically insignificant result meant that any observed difference is more likely due to randomness in the data sample taking into account those characteristics. Variations in the population can affect statistical significance.

<sup>66</sup> Analysis of founded offense rates among first term enlisted Soldiers arriving at their duty station between 2015 and 2019 over the duration of their assignment. For NCOs, analysis is among Soldiers E-5 to E-8 who start a new assignment between 2015 and 2018 (inclusive) and offense rates are constructed over a one-year horizon. Data source: US Army personnel data merged with Criminal Investigation Division and Military Police found cases from the Army Law Enforcement Reporting Tracking System database.



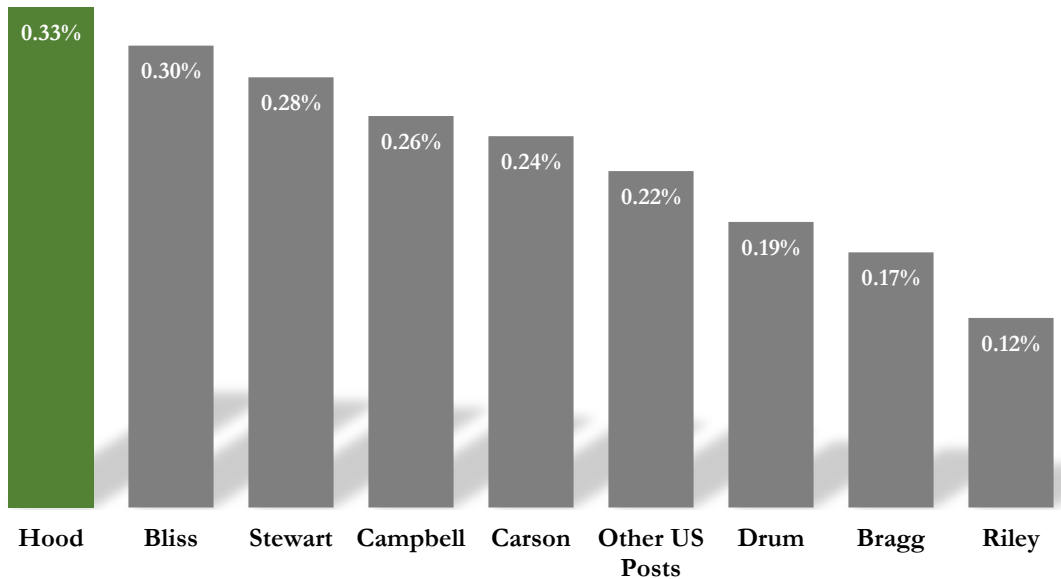


Figure 4: Percent of NCOs (E5 to E8) with Founded Sex Offense

Data analysis revealed that restricted and unrestricted sexual assault reports recorded in the Defense Sexual Assault Incident Database (DSAID) system increased from 214 in 2016, to 241 in FY 2017 to 309 in 2018, before a slightly lower number of 277 in 2019. The 2020 reports stood at 204 as of August 31, 2020, with one month left in the reporting year; however, analysis of historical crime data and interviews revealed that the COVID lockdown and travel restrictions clearly had an impact on most crime categories in 2020.<sup>67</sup> So even while the 2020 rates at Fort Hood are lower than the FORSCOM average, they were still sufficiently high to merit focused attention. During this Review, the FHIRC also identified significant evidence of substantial underreporting of sexual assault and sexual harassment.<sup>68</sup>

**1.1.2. The DoD Commissioned And Published Comprehensive Studies That Showed A High Risk Of Sexual Assault And Harassment At Fort Hood.**

Fort Hood was identified as a high-risk installation for sexual assault as far back as 2014. The DOD Office of People analytics used data from the *2016 Workplace and Gender Relations Survey* (WGRA), to complete the *2016 Contextual Risk for Sexual Assault* project, which estimated sexual assault risk scores for all DoD installations. Fort Hood was identified as having the highest possible sexual assault risk score for installations for women and men in 2016, with an assigned risk level of 5 on a

<sup>67</sup> The DSAID system does not capture sex crimes directed at a domestic partner, juveniles, or civilians.

<sup>68</sup> See generally Finding #2.



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scale of 1 to 5, with higher scores indicating a higher risk. This was consistent with the *2014 Rand Military Workforce Study* results for women.<sup>69</sup>

Again in 2018, various climate indicators at Fort Hood were classified as “high risk.” Fort Hood’s risk categories for sexual assault for women in 2018 were classified as level 4 on the same 5-point scale.

Areas of potential climate concern for Fort Hood included high levels of supervisor workplace hostility, gender discrimination against women and underage drinking among women, coupled with low levels of peer respect and cohesion, responsibility and intervention, and supervisor response climate. The risk of female gender discrimination at Fort Hood was also high at an assigned level of 5.

The OPA report was widely disseminated, and it offered several recommendations, which included disseminating the risk estimates to military leaders to make them more aware of problems in their commands and identifying progress on their respective installations, as well as investigating conditions leading to patterns of sexual assault risk.

### **1.1.3. Command Climate Surveys Of Key Commands At Fort Hood Also Showed A High Risk Of Sexual Assault And Sexual Harassment.**

The Defense Organizational Climate Survey (DEOCS), produced by the Army Office of People Analytics, is a unit-level survey designed to provide Commanders information about their unit’s climate. By law, it is administered within 120 days of assuming Command and annually thereafter. It includes quantitative results and open-ended “short answer” responses. These responses are used to inform the command of issues that merit special attention.<sup>70</sup> The Climate surveys for several of the key commands at Fort Hood showed ample reason for concern and placed them on notice of significant issues with regards to SHARP Program implementation. The FHIRC found minimal evidence that these surveys were used the way they were intended: to identify command climate issues and take action to address them.

### **1.2. There Was Widespread Lack Of Knowledge Of Basic SHARP Reporting Methods And The Right To Special Victims’ Counsel.**

The III Corps climate survey covering the period July 1, 2018 to June 30, 2019 showed that only 55% of the 13,695 respondents could demonstrate a working knowledge of critical aspects of the SHARP Program, to include the various ways to report a sexual assault. Enlisted (E1 to E9) and

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<sup>69</sup> Fort Hood was classified as having an average level of sexual assault reporting in 2016, which OPA suggested the rate at which active duty victims chose to come forward to file a report was in line with the DoD average.

<sup>70</sup> The DEOCS cautions that that other methods should be employed before taking management or disciplinary action based solely on the results the DEOCs survey.



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junior enlisted (E1 to E6) ranks showed the least knowledge of the system, based on a six-question mini-exam contained in the survey with 53% and 51 % respectively.<sup>71</sup>

Results for the 1CD Climate survey for the same time period shows that only 46% of enlisted and 44% of junior enlisted could answer the basic knowledge of reporting methods and SVC questions correctly. Overall, the 1CD as a unit scored only 50% correctly.<sup>72</sup>

Results for the knowledge of SHARP reporting questions for the 3CR were even more concerning. Only 46% of the 1877 respondents, or 863, could demonstrate basic knowledge of the SHARP reporting processes and right to have a Special Victim Counsel. Once again, enlisted and junior enlisted correct response rates were even lower at 43% and 41%, respectively.<sup>73</sup> These are dismal figures and should have alerted the command that basic knowledge of the SHARP Program was lacking in these units, and especially within the junior enlisted ranks. See also Figure 5 below which was created with data from October 2017 to March 2019 which shows similar percentages.<sup>74</sup>

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<sup>71</sup> DEOCS Report: Ft Hood III Corps: 7/01/2018 - 6/30/2019.

<sup>72</sup> DEOCS Report: Ft Hood 1CD 7/01/2019 - 6/30/2019.

<sup>73</sup> DEOCS Report: 3d Cavalry Regiment; April 21, 2020.

<sup>74</sup> Analysis of all surveys completed by Soldiers assigned to units at CONUS installations between October 2017 and March 2019. Data Source: Defense Equal Opportunity Management Institute Organizational Climate Survey (DEOCS). All intra-Fort Hood comparisons using FHIRC Survey or DEOCS data in this report group units into the following categories:

- 1CD: 1st Cavalry Division
- 3CR: 3rd Cavalry Regiment
- III Corps: III Corps Headquarters and subordinate brigades, including 11th Signal Brigade, 36th Engineer Brigade, 89th Military Police Brigade, and 504th Military Intelligence Brigade
- 13th ESC: 13th Expeditionary Sustainment Command and 1st Medical Brigade
- Medical: Darnall Medical Center, Public Health Command, and Dental Command
- Other Fort Hood units: all other Fort Hood units, including 1st Army Division West, 69th Air Defense Artillery Brigade, Operational Test Command, 48th Chemical Brigade, and the 3rd Security Force Assistance Brigade

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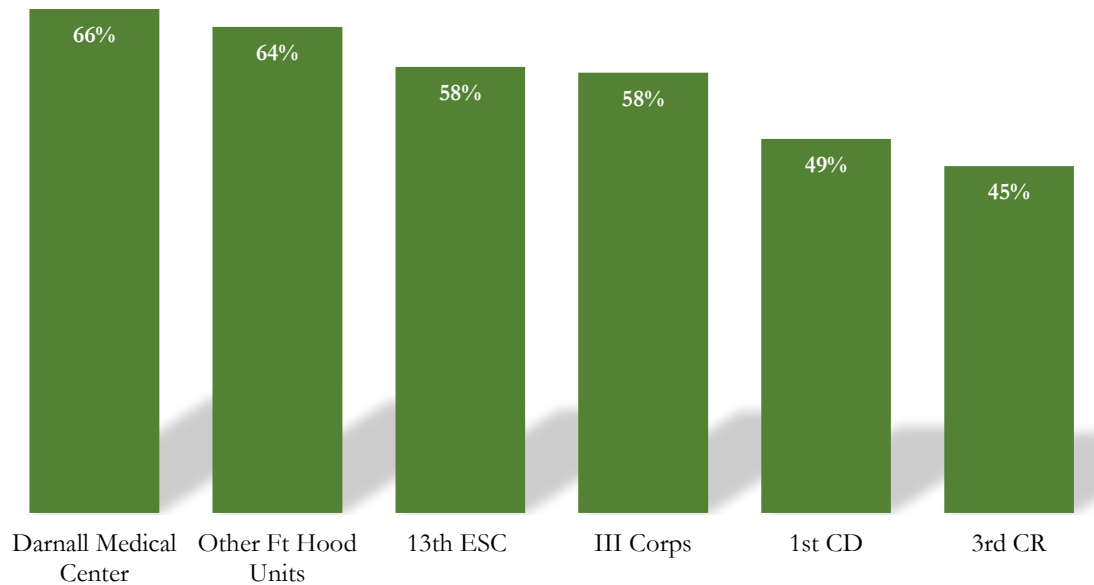


Figure 5: Percent Correct of Five Answers to DEOCS SHARP Reporting Knowledge Questions

It is noteworthy that during FYs 2018 and 2019, 1CD and 3CR were also seriously delinquent in compliance with respect to mandated SHARP training requirements.

Perhaps the most telling result is depicted in Figure 6 below, where the percentages of Soldiers who answer all of the 5 simple SHARP related knowledge questions correctly was less than 30% across the largest units at Fort Hood, with 3CR and 1CD at less than 20%.<sup>75</sup>

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<sup>75</sup> *Ibid.*



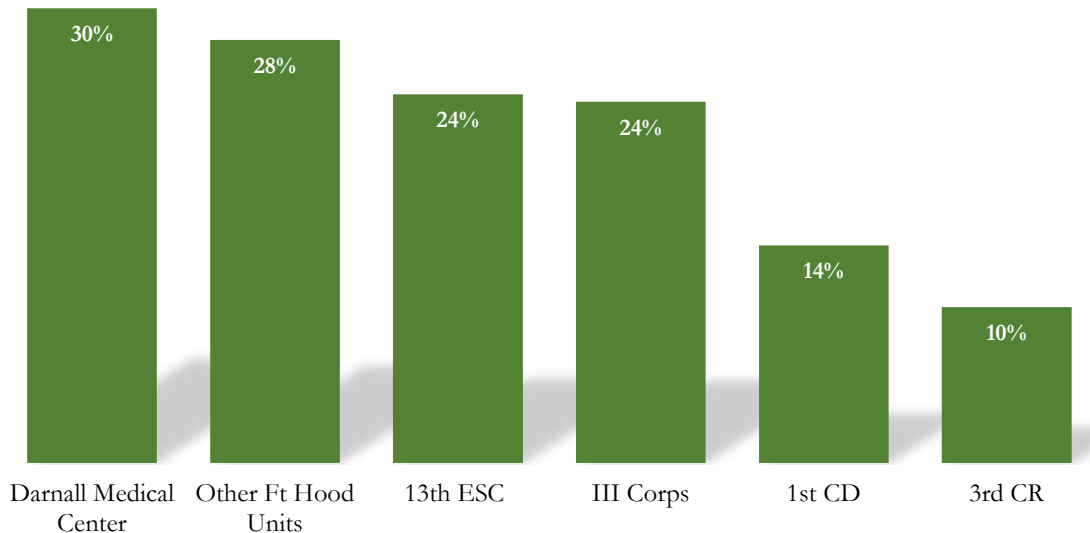


Figure 6. Percent of Respondents Answering All Five Reporting Knowledge Questions Correctly

### 1.3. There Was Universal Fear of Retaliation, Exposure And Ostracism For Reporting SHARP Violations.

The DEOCs III Corps survey covering July 1, 2018 through June 30, 2019, revealed that only 60% of III Corps women believed there would be no form of retaliation if they were to report a sexual assault. Overall, only 62% of the 13,695 III Corps respondents believed that there would be no form of retaliation if a report were filed. The III Corps percentage was 64% as it related to sexual harassment.<sup>76</sup>

Within the 1CD, only 61% of the 7,849 respondents answered that they had confidence that a reporter would not experience some form of retaliation for filing a complaint of sexual assault and 64% with regard to filing a sexual harassment complaint.<sup>77</sup>

Within the 3CR, only 57% of the respondents were confident that there would be no retaliation if they were to report sexual assault and 61% if they were to report sexual harassment. Among women in the 3CR, only 53% would not fear retaliation for reporting sexual assault and 56% felt the same in regard to reporting sexual harassment. Once again, junior enlisted scored the lowest of all the ranks in this area at 53% and 56% respectively.<sup>78</sup>

<sup>76</sup> DEOCS Report: Ft Hood III Corps: 7/01/2018 - 6/30/2019.

<sup>77</sup> DEOCS Report: Ft Hood 1CD 7/01/2019 - 6/30/2019.

<sup>78</sup> DEOCS Report: 3d Cavalry Regiment; April 21, 2020.





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One Brigade within the 1CD, the 1st ABCT merits special mention, where only 46% of enlisted and 44% of junior enlisted *did not* fear retaliation if they were to report sexual assault. With respect to knowledge of reporting, a dismal 46% of the unit respondents could demonstrate basic knowledge of the SHARP reporting protocols. Among the junior enlisted, only 39% managed to pass the 6 question SHARP reporting mini-test provided in the survey and 42% among enlisted ranks.<sup>79</sup>

Among all units listed above, the highest percentage of positive responses for other elements of the SHARP Program including sexual assault prevention, sexual assault response, and vulnerability to sexual harassment was just over 70%, with a low of 46%.

These are not passing grades in any context. The U. S. Army must not set a bar so low that these numbers are acceptable. The FHIRC took note of the recently published FORSCOM Inspector General Report of their examination of the SHARP Program at Fort Hood. The Committee recognizes the Inspector General Office's essential role of inquiring into and reporting upon the "discipline, efficiency, economy, morale, training, and readiness throughout the Army," through Inspections, Assistance and Investigations.<sup>80</sup> The Committee also appreciated the limited period of time allotted to the FORSCOM IG to examine the SHARP Program at Fort Hood. Within these time-restrictions, the IG Inspection relied primarily on a limited number of sensing sessions, with a total of 306 total participants and a survey in which only 282 people responded. This actually represented twice the usual number of IG sessions and survey respondents but was a significantly smaller sample than the scope of the FHIRC survey and interviews.<sup>81</sup>

By contrast, over 31,612 people completed the FHIRC survey across Fort Hood; and, over 2,500 individuals participated in either group or individual interviews; the FHIRC had the benefit of unfettered access to enterprise level Army and DoD data, multi-disciplinary analysis; consultations were undertaken with a variety of relevant stakeholders and SMEs; and, hundreds of documents were reviewed over an extended time period. Within that context, the FHIRC does not agree with the FORSCOM IG Report's primary Finding that "Unit leaders executed the SHARP Program to standard" at Fort Hood.

The FHIRC noted also that as "the eyes, ears of the FORSCOM Commanding General"<sup>82</sup> the IG should set higher standards than those set in the recent inspection where only 65% of the 60 female respondents to the IG survey stated that they believed that they could file a sexual assault or

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<sup>79</sup> DEOCS Report: 1 ABCT, 1CD dated July 22, 2020.

<sup>80</sup> See Army Regulation 20-1.

<sup>81</sup> See Armed Forces Command Inspector General Report (Final), Sexual Assault/Harassment Prevention Program Inspection (FHTX), 4 August 2020. (FORSCOM IG Report).

<sup>82</sup> See Statement of Colonel Patrick Wempe, US Army Forces Command Inspector General Before the Subcommittee on Military Personnel Committee on Armed Services, United States House of Representatives, July 29, 2020.

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harassment complaint without reprisal/retaliation,<sup>83</sup> This strikes at the very heart of the SHARP Program and hardly represents “an overall positive command climate” with respect to female Soldiers.

The FHIRC survey across all Fort Hood units asked several questions about retaliation and the answers of the 31,612 respondents were consistent with the DEOCs surveys. Among enlisted and women, the responses were again the least favorable. For example, 28% (1,644) of women believed that a person would be ostracized for filing a sexual harassment complaint; 22% of women (1,297) believed a reporter would be blamed for causing problems and 18% of women (1,045) felt that a person who intended to file a sexual harassment complaint would be discouraged from moving forward. With regard to sexual assault the percentages were 27%, 20% and 17% respectively. The percentages for the 3CR and 1CD were even higher across these survey questions with the 3CR consistently displaying the highest percentages of female Soldiers who feared retaliation. See Figures 7 and 8 below.

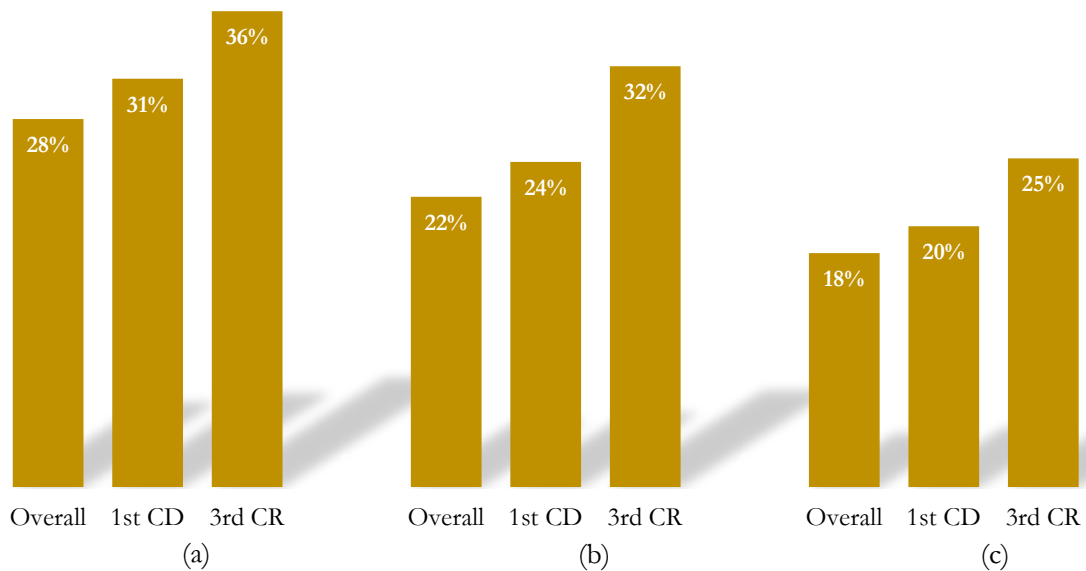


Figure 7: Left to Right, Percent of Females That Agree if an Individual Were to File a Sexual Harassment Complaint They Would be a) Socially Excluded, b) Blamed For Causing Problems, or c) Discouraged From Moving Forward With Complaint

<sup>83</sup> See FORSCOM IG Report page 6 statement that “the majority” of female soldiers would not expect reprisals for filing a report.



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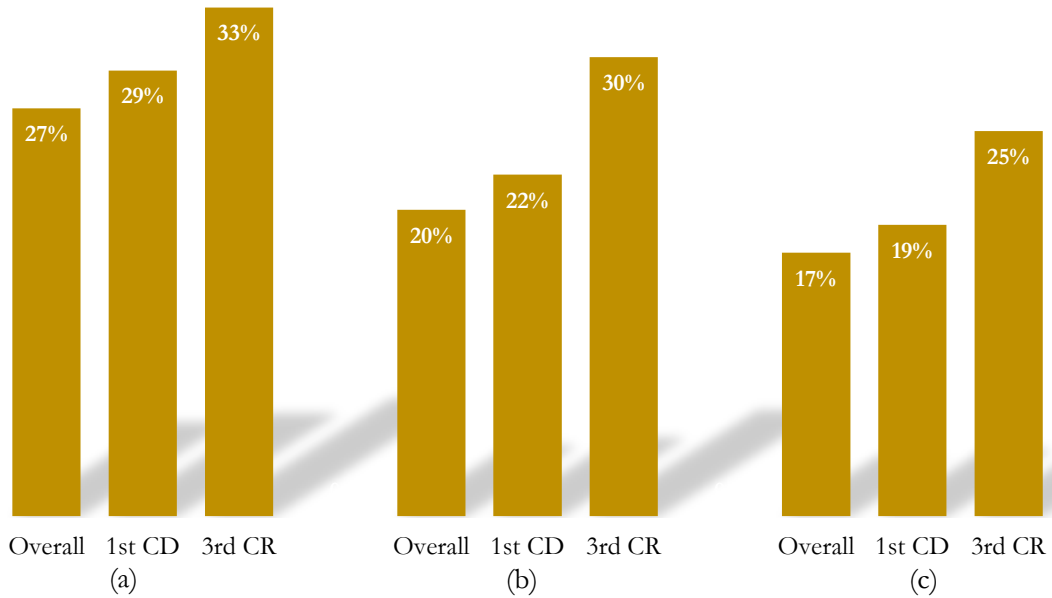


Figure 8: Left to Right, Percent of Females That Agree if an Individual Were to File a Sexual Assault Complaint They Would be a) Socially Excluded, b) Blamed For Causing Problems, or c) Discouraged From Moving Forward With Complaint

Regarding confidentiality, 1,112 of 5942 women (19%) did not believe that a report would be kept confidential by the chain of command; however, 27% of female Soldiers in the 3CR felt that a report would not be kept confidential. (See Figure 9)

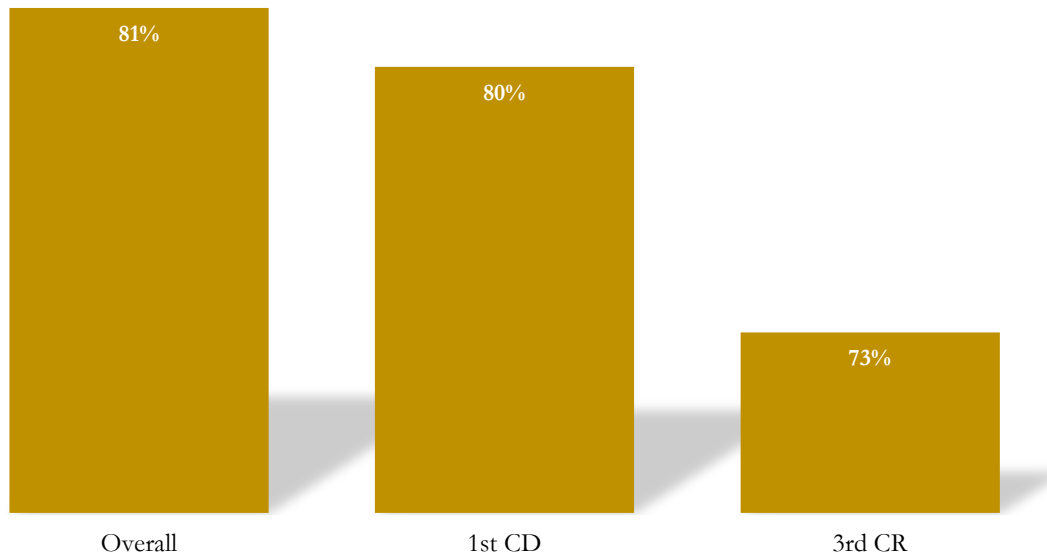


Figure 9: Percent of Females That Agree if a Coworker Were to Report a Sexual Assault, Chain of Command/Supervisors Can Be Trusted to Keep the Knowledge of the Report Limited to Those With Need to Know



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The numbers are similar when it comes to reporting sexual assault. In both categories across ranks, junior enlisted Soldiers and junior NCOs agree at 4-7 percentage points less than senior NCOs and officers.

These numbers reflect a widespread lack of knowledge and confidence in the system, and they signal an increased risk of sexual assault and sexual harassment, especially in the lower enlisted ranks where over 88% of the violations occur and the highest numbers of victims and subjects are found. (See Figures 1 and 2.)

The SHARP Program cannot be effective without driving the execution of the program essentials deep into the enlisted levels, which at Fort Hood represent 85% of the base Soldier population. These program essentials necessarily include creating conditions that engender wholesale confidence in reporting and establishing and developing a system wide knowledge of reporting channels. The Command must cultivate a zero-tolerance orientation toward sexual assault, sexual harassment, retaliation, and breaches of confidentiality. And, there must be a swift and just response that is visible to the victim and would-be wrongdoers. This Review determined that these critical elements were lacking.

The Department of the Army Inspector General (DAIG) conducted a Special Interest Inspection (SII) of the Army SHARP Program from November 2013 to 28 February 2014, entitled *Special Interest Item (SII) Inspection of the Army Sexual Harassment/ Assault Response and Prevention (SHARP) Program* to assess compliance with and implementation of applicable Army and DoD policy and guidance. The inspection found that leaders (both NCOs & Officers) who inculcated and personally took ownership of promoting dignity and respect in their units and demonstrated it on a daily basis, were more successful than those who merely had administratively correct programs and processes. This finding is not surprising.

## **1.4. Review And Analysis Of The Mandated Sexual Assault Review Boards Revealed An Emphasis On Form Over Substance.**

The Sexual Assault Review Board (SARB) is an Army mandated executive tool to ensure victims are protected and to identify issues in the area of SHARP implementation and drive prevention strategies, remedies and improvements in its administration. When used properly, the SARB process is one of the Commander's best opportunities to receive vital information and assess the effectiveness of the implementation of the SHARP Program across his/her area of responsibility. It is also an opportunity and tool to formulate and drive strategies to address those issues.

US Army Regulation 600-20 states:

The primary purpose of the SARB is to ensure victims' physical, emotional, and spiritual needs are provided for, their rights are protected, and their recovery is facilitated. The SARB provides executive oversight, procedural guidance, and feedback concerning the installation's SHARP Program. This board reviews the installation's prevention program and the response to any unrestricted report of sexual assault involving the installation. This includes reviewing cases and procedures to improve processes, system accountability, and victim access to

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quality services. In order to ensure the SARB remains victim-centric and to avoid potential interference with the administration of justice, the subject will not be discussed at the SARB, except when retaliatory behavior is being reported or the safety of the victim is being discussed.<sup>84</sup>

Members of the Review Committee examined the 2018, 2019 and 2020 SARB minutes/SARB presentations and interviewed key participants in the monthly SARB meetings. A retired career Army Officer became the Program Manager (PM) of the III Corps SHARP Team in August of 2018. He immediately focused on using the SARB meetings to stimulate action to address training delinquencies and understaffing, as well as training and provisioning of the SHARP SARCs and VAs.

The SARB records revealed many of the Fort Hood units were seriously deficient in mandated basic and refresher SHARP training. In fact, the 1CD and 3CR were the most delinquent and non-complaint. SARB presentations reveal that as of August 2018 *only 135* of the 4,171 Soldiers and civilians of the 3CR received the mandatory “Annual Standing Tall” online training and only 2,085 had taken the mandated annual unit refresher training. The First Brigade of the 1CD had similarly dismal numbers with 887 of 2,630 and 1,956 of 2,630 respectively. In November 2019, *none* of the 2,153 members of the 69<sup>th</sup> ADA Brigade took either of the mandated training. Similarly, none of the 2,630 members of the 1<sup>st</sup> Air Calvary Brigade (1ACB) had taken either course. These numbers slowly improved in 2019; however, 3 of the 1CD Brigades continued to lag behind, with only approximately half of the unit members completing the required training. By mid-2020, through the urging and persistence of the Program Manager, training within most units was current.

There is evidence that the Program Manager also identified and called out at the meetings serious SHARP staffing, training and resource deficiencies at the Provost Marshal’s Office (PMO) and across Fort Hood units. Gradually, these issues were addressed, and by the end of first quarter 2020, most of the training was up to date and SHARP personnel staffing/training and provisioning was over 90%.

During the review period six different Senior Commanders or Deputy Senior Commanders presided over the SARB meetings, reflecting a lack of continuity until MG Efflandt took over in December 2019. MG Efflandt personally attended 11 meetings during the review period. By all accounts, he was the most engaged and active of the presiding Commanders. MG Efflandt focused on cleaning up the number of older cases carried as pending due to administrative defects or deficiencies, and he consolidated the 1CD SARB into the III Corps SARB by engaging the Commanding General, LTG White, to order the consolidation.

The Committee assessed that, while certain administrative aspects of the SHARP Program were addressed, the Command at Fort Hood did not effectively use the SARB process to address serious SHARP Program issues. Nor did the Command use the SARB to devise strategies to drive the SHARP core elements below the III Corps level, despite being provided sufficient essential information necessary to do so by the SHARP Program Office and other key SARB participants.

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<sup>84</sup> Army Regulation 600-20, 24 July 2020, Appendix F.

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The minutes confirmed, however, that throughout the review period the majority of these SARB meetings generally lasted for an hour or less, and appeared to be focused on administrative issues from a higher command standpoint. The meetings and PowerPoint slides largely reflected efforts to highlight SARC/VA staffing and credentialing status/issues, as well as to aggregate and distill consolidated data from BDE/Regimental SARCs/VAs. This was clearly designed to satisfy DA/DoD-mandated SHARP Program requirements regarding the gathering, collating and tracking of incidences of sexual assault and to a lesser degree during this period, sexual harassment. The Committee determined that this focus on mostly administrative matters and quantitative response dynamics regarding the SHARP Program came at the expense of qualitative, proactive prevention-driven outputs.

Given the limited amount of time allocated for these high-level meetings, SARB discussions adhered to a prescribed format which appeared to be noticeably void of any consistent emphasis on ensuring that Commanders and their subordinate leaders at every level down to SGT/E-5 and even Corporal/E-4 were appropriately and tangibly engaged with their troops and were being held accountable for results which could be validated by way of applicable metrics. In fact, there was very little evidence of the establishment or tracking of any specific and measurable goals, objectives and metrics for success while a great deal of focus was placed on simply correcting administrative issues.

An area of concern was the lack of evidence in the minutes of the participation of Brigade Commanders. The III Corps PM revealed that the Brigade Commanders primarily participated by phone or teleconference, but no roll call was taken nor was participation documented. Also, of concern was the non-participation of any Brigade commanders or representatives of the 1CD, which apparently held their own unsanctioned SARB.<sup>85</sup> It finally took an order by LTG White, while still serving in Iraq, for the 1CD representatives to begin participating in June 2020. Given that the 1CD is the largest unit at Fort Hood this Committee assessed that the lack of 1CD participation was detrimental to a cohesive unified installation command strategy to implement the SHARP Program. Note that the 1CD, until mid-2019, was consistently deficient in their training and throughout the review period had a high number of offenses in the ALERTS system.

The Committee also determined that the SARB meetings were not conducted in person from December 2019 thru February 2020. After the Vanessa Guillén case became public, however, the meetings began to focus almost singularly on reducing the number of active sexual assault cases reflected in DSAIDs, which at the time numbered over 1,000.

It was clear that SARB meeting frequency and SHARP Program data scrutiny on the part of MG Efflandt regarding administratively delinquent unit reporting and victim follow ups that were the primary causes of the 1000+ open cases demonstrably intensified and became more prescriptive beginning in 5/2020. The FHIRC was informed he initiated two-part meetings at that juncture in order to provide additional time for him to be briefed in detail by each unit commander on individual SHARP cases and to personally review, approve or deny requests to close these complaints and investigations. Dual-meeting dates were as follows:

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<sup>85</sup> SHARP Program Managers pointedly stated that these sessions were “meetings, not SARBs.”

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- 5/28/2020 & 6/4/2020
- 6/25/2020 & 6/26/2020
- 7/29/2020 & 8/4/2020
- 8/27/2020 & 9/1/2020

To be sure, this effort was commendable and went beyond what any other Commander had done. But these were administrative issues that should have been addressed throughout the three-year review period by the previous presiding Commanders. Also, there continued to be an absence of any goals or objectives. At the same time, the concentration and development of initiatives by leadership to drive the prevention aspects of the SHARP Program into the enlisted ranks was still nowhere apparent in the meeting presentations and minutes.

Finally, the SARB process was never utilized to identify hotspots in terms of units that were outliers in areas of concern. For example, at times the III Corps, the 3CR and the 1CD were identified as obvious hotspots; but prescriptive remedies were never discussed, developed or implemented.

## **1.5. The SHARP Program Was Understaffed, Undertrained And Under-Resourced During Most Of The Review Period.**

The FHIRC determined from reviewing III Corps Program data derived from the SARB presentations and interviews with Fort Hood SHARP representatives that the staffing, training and provisioning of SHARP personnel was not a priority in the Brigades, which contributed to inefficiencies in the overall program. As noted in Finding #3, SHARP SARCs and VAs are not selected through the Army Department of Administrative Services. They are selected by Brigade or Battalion Commanders and, aside from the Civilian Brigade lead VAs, are taken from existing manning allocations without a backfill. They were not trained, provisioned or provided the necessary system accesses when their assignment to SHARP duties began.

The III Corps Program Manager classified a brigade or his own III Corps program office as yellow or green in terms of staffing, training and provisioning the full time brigade level SARCS and civilian lead VA positions depending on whether their SARCs and/or VAs met all the requirements above. The PM also tracked this information as it related to Collateral SARCs and VAs, which operate at the battalion level.

At the beginning of FY 2019, eight of the 21 brigades were classified as yellow due to one missing SARC, three missing VAs, four VAs or SARCs lacking appointment orders, eight lacking training and one lacking system access. This represented a 72% readiness level.

The readiness status of the Collateral SARCs/VAs at the Battalion/Troop levels was even more concerning. At the beginning of FY 2019 eleven of the 21 Brigades were lacking one or more fully trained, duly appointed and fully credentialed SARCs and/or VAs. For example, 19 of 62 allocated collateral duty SARCs were not on-board. This situation was particularly concerning in the 1CD where only 12 of 22 allocated collateral SARCs were on-board. This means that 10 Battalions had no local SARCs to receive victims and direct victim services. The Headquarters Battalion had no SARC on-board.



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By the beginning of FY 2019 the status of full time SARC and VAs had stabilized, however, collateral duty SARC and VAs were still in a yellow status with 46 of 71 credentialed and trained collateral duty SARC and 78 of 91 VAs on board at the battalion/troop levels. It was only after MG Efflandt began presiding over the SARB meetings that these numbers were published, and the situation began to improve. Over the next 8 months the collateral duty SARC/VA staffing and readiness was gradually raised to 89% by August 2020.

Besides staffing, there were other issues identified during the review that involved SHARP resources and properly equipping SHARP personnel to effectively discharge their duties. Many did not have mobile phones or internet access in their offices. The 3CR placed their Regimental SHARP office in a tiny windowless room with no phone or internet access. Few had access to official vehicles to meet victims and transport them to the hospital or for follow up services. There were minimal resources or funding for training aids and training in general. SHARP personnel often had to pay for all these items out of their personal funds or use their personal mobile phones and vehicles.

Additionally, the quality of SHARP personnel in the 3CR was raised as a serious issue. Multiple interviews supported this assertion. During the course of individual interviews one particular VA was singled out by many 3CR Soldiers as being toxic and unresponsive to their needs. It was heard from a large number of interview subjects that none of the 3CR Soldiers would go to that person because they gave bad advice. This VA was also notorious with CID Special Agents who complained about the VA's lack of professionalism during victim interviews. (b) (6)

[REDACTED] The III Corps SHARP PM warned the last two 3CR commanders about this VA on several occasions beginning in 2018 and nothing was done until a victim finally lodged an IG complaint. It was the opinion of the PM and other SHARP officials that this VA placed victims in the 3CR at risk. Another 3CR SHARP VA was (b) (6) [REDACTED] at the time of the onsite portion of this review. The 3CR Commander selected and senior rated the brigade lead VA.

Lastly, III Corps is allocated two SHARP Program trainers responsible for supporting and coordinating the training of all collateral duty SHARP personnel, at the battalion level, through a 2-week "Foundation Training." These trainers also support unit level annual, pre-deployment and post-deployment training for all personnel across III Corps. However, since May 2018, there has been only one trainer available to conduct training and serve as a resource to Commanders. Given the high turnover rate of SHARP personnel, it is nearly impossible for one master trainer alone to ensure training is conducted, much less track vacancies at the unit level to ensure new personnel are properly trained.

The training, staffing, credentialing and quality of SHARP personnel is critical to the effectiveness of the program. It is also incumbent on the Brigade leadership to select and maintain competent and effective SHARP personnel in their units. The FHIRC found that the resource and staffing shortcomings adversely impacted the Fort Hood program and contributed to its ineffectiveness.



## **1.6. There Was A Pervasive Lack Of Confidence In The SHARP Program Among Soldiers.**

The extensive interactions that the Committee had with Soldiers at Fort Hood demonstrated a wholesale lack of confidence from the vantage point of those whom the SHARP Program is designed to protect. The FHIRC determined that this pervasive lack of confidence had a detrimental impact on reporting and other critical aspects of the program. This lack of confidence partly stemmed from a widespread perception revealed during interviews and surveys that SHARP reports were not treated with confidentiality and Soldiers feared retaliation in some form should they file a SHARP-related incident report.

Individual interviews of hundreds of members of the Fort Hood community were conducted within the construct of a deliberate methodology, as set forth earlier in this Report. The results of these interviews were both alarming and informative. Even filtering and discounting the interview results for possible influencing factors such as personal agendas, social media and extensive news reporting around the Vanessa Guillén case, the inevitable conclusion is that the SHARP Program at Fort Hood failed to protect and serve the people who need its protections and services the most.

The main factors affecting confidence in the SHARP Program were fear of retaliation, lack of confidence in leadership's ability to effectively address sexual assault or sexual harassment, lack of confidentiality, and lack of confidence in the outcome. The individual interviews also uncovered an unacceptably high number of unreported instances of sexual assault and sexual harassment.

Also informative were the responses to questions regarding the basic elements of the SHARP Program. Of the 507 females interviewed, 32% (164 female Soldiers) stated that they would not be comfortable reporting sexual assault or sexual harassment through the SHARP Program as currently implemented at Fort Hood. Only 50% of the female Soldiers interviewed were confident that their command would take any such report seriously. In addition, 50% were not confident in their Commanders.

Another extremely disturbing set of responses addressed the question whether the interviewee had witnessed or experienced acts of retaliation for reporting an incident of sexual harassment or sexual assault. A total of 36%, 184 of the 507 females interviewed, responded yes to this question. Finally, 355 or 70% of the female Soldiers interviewed stated that the leadership at Fort Hood had not done a sufficient job in sexual harassment and sexual assault training and prevention.

### **1.6.1. It Was The Prevailing View Of SHARP Victim Advocates And Sexual Assault Response Coordinators That The SHARP Program At Fort Hood Was Ineffective.**

In addition to the 647 interviews of the 1CD and 3CR Soldiers a total of 79 personal interviews were conducted with Fort Hood SHARP and EO specialists including 51 Sexual Assault Response Coordinators and Victim Advocates (VA). These interviews revealed that many of those most closely involved in the SHARP Program at Fort Hood lacked confidence in most aspects of the program.



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The following interview summary from a very dedicated and experienced SARC (SARC 1) summed up the general attitude of these representatives. “After four exhaustive years as a high-level SARC official, he/she feels disillusioned at what he/she now perceives is an increasing degree of erosion in the support for and commitment to the SHARP Program as a whole by leaders spanning the ranks of major general (O-8) down to squadron/battalion commanders (O-5). While he/she believes that the “nuts and bolts” of the SHARP Program are materially sound, the lack of leadership emphasis within most units at Fort Hood has manifested a climate of distrust and non-confidence about the program’s effectiveness and confidentiality.”

A SARC (SARC 2) stated *“I believe a vast number of the issues which the SHARP program is experiencing of late is attributable to the poor quality of the NCOs that unit commanders at the Company/Troop level are consistently selecting to function as their SHARP representatives. These soldiers are most often NCOs within the unit who have consistently provided subpar performances relative to their assigned responsibilities, and they are buttonholed into collateral duties such as SHARP so that other more effective NCOs can address ongoing leadership/operational taskings of a priority nature. As a result, these poorly-equipped NCOs are responsible for administering to a Special Emphasis Program (SEP) for their unit that they are not trained or competent to handle, and the SHARP program as a whole suffers a loss in confidence re confidentiality, retaliation, timeliness and appropriate adjudication as a result.”*

A third SARC (SARC 3) had such little faith in the Army SHARP Program at Fort Hood that he/she encouraged victims to report to an entity outside Off-Post and to use outside victim services.

A fourth SARC (SARC 4) stated *“The general feeling of the soldiers in my (unit) is that the SHARP program is largely ineffective and worthless. The overall process just takes too long, and the victims of these alleged and unacceptable acts are victimized over and over again in many different ways after initially summing up the courage to finally report them using the program. Soldiers do not trust their leaders or the SHARP program due to the prevailing perception of a failure in keeping their information confidential, and because alleged perpetrators of these incidents seem to remain in their units without any fear of being moved or punished.”*

A fifth SARC (SARC 5) whose statement is worth airing in its entirety summed up: *“I have been waiting for a long time to have the opportunity to come clean about the many issues that the SHARP program is experiencing relative to soldier trust and credibility. These fundamental issues must be aggressively addressed, as the III Corps command is clearly sweeping everything under the rug in favor of protecting their career progression instead. I have personally heard many high-level commanders state that the SHARP program is pointless, and it is apparent that most Brigade, Battalion and Company commanders do not take the program seriously unless an adverse incident or development takes place.*

*However, due largely to the Vanessa Guillén murder and other transgressions which have recently occurred at Fort Hood, commanders are now responding in a knee-jerk manner to demonstrate their sudden seriousness and commitment to supporting SHARP, most notably within 3 CR. III Corps general officers and senior leaders who are not nearly as proactive as they need to be re supporting the SHARP program overall through personally and visibly leading by example, emphasizing the importance of the program with subordinate leaders at every level, and holding commanders accountable for results and corresponding metrics that will substantiate effectiveness and restore confidence on the part of soldiers re how this program will ensure that reporting, investigation and adjudication of their cases will be handled in a fair, timely and confidential manner.*

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*...Our commanders need to do a much more effective job of remaining engaged re the true climate, morale and concerns within their units, and I strongly believe they are just as culpable as the soldiers who perpetrate acts of sexual harassment and assault when these officers and senior NCOs do not emphasize the need for the SHARP program to be a unit priority to ensure its effectiveness. The reporting process re SHARP should not be delegated to any level below Brigade, as it is abundantly clear and compelling that reporting below this level is potentially exposed to unit politics, commander/senior NCO influence and possible corruption/compromise re confidentiality and retaliation.” (emphasis added)*

### 1.7. Group Interviews Of Representatives Of Fort Hood Units Revealed That Implementation Of The SHARP Program At Fort Hood Did Not Effectively Reach The Troop/Company Levels

A mission-critical component of this Review was the conduct of group interviews of up to 45 Soldiers and Army civilian workers at a time from all units represented on the installation. A Committee Member led each of these interviews, while a JAG officer took notes, noted reactions, and recorded observations. During some sessions, a second committee Member recorded observations and asked questions. These group sessions were intended to complement the individual interviews and comprehensive survey results. The goal was to develop a deeper and broader understanding of attitudes and beliefs across ranks and units' components related to key SHARP components, such as prevention, the reporting system and incident response up to and including resolution. The interviews also touched on safety, mental health, and morale and equal opportunity issues. Over 80 sessions were conducted while the FHIRC was on-site at Fort Hood. This section focuses primarily on the responses of the 1CD and 3CR, not only because the FHIRC Charter mandates such a review, but also because they are the largest units and consist of combat brigades where women are significantly outnumbered, and the risk of SHARP violations was documented to be the highest, according to the DEOCS surveys discussed previously.



**“[I]T IS UP TO US (NCOs) TO STOP THIS ...  
WE HAVE KNOWN ABOUT IT FOR YEARS ...  
IT IS STILL A PROBLEM BECAUSE WE ARE  
NOT DOING RIGHT BY OUR SOLDIERS.”**

1CD NCO

The interviews were not conducted like traditional IG focus/sensing sessions. A show of hands was requested on key issues and questions and responses were noted by the JAG officer. If a particular issue was of interest, the moderator had the freedom and discretion to dwell on the issue as long as necessary to develop a good understanding as to numbers and intensity of the attitudes and beliefs on the issue. The results were compiled, and certain conclusions can be drawn in areas where there was overwhelming consensus within and between group interview sessions.

A total of 970 members of the 1CD were interviewed which consisted of 584 male, 218 minority male, 102 minority female and 66 Caucasian female Soldiers. They were generally divided into separate groups that were composed of ranks of enlisted, junior enlisted, senior enlisted and



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officers however some groups were mixed ranks. The most candid and animated groups were the ones consisting of enlisted Soldiers. The results were informative and sometimes disturbing.

The overwhelming majority of these interviewees lacked confidence in the SHARP reporting system and believed that a justifiable fear of retaliation, ostracism, embarrassment and breach of confidentiality greatly inhibited reporting sexual harassment and sexual assault. A clear and convincing majority felt that responses/investigations that resulted from reports took too long and often the perpetrator appeared back in the unit or a nearby unit. A very large number of Soldiers commented that the SHARP Program essentially took a back seat to other priorities, and SHARP personnel were not good trainers. It was uniformly believed that SHARP VAs were not the best Soldiers and expendable, therefore were assigned SHARP duties.

For example, 8 of the 10 groups made up of 40 to 45 Soldiers each in the ranks of E-1 to E-4 (444 Soldiers in total) reported a sense of hopelessness with the SHARP reporting process. Most reported they had been exposed to senior NCOs acting inappropriately toward someone they know, and they were aware of multiple incidents of retaliation against the victim by both the unit and by senior NCOs. Soldiers were ostracized and treated as the problem when they reported. Many in this rank expressed concern that there were no real consequences for offenders; *“the victim gets all of the hardship”*; and, there was a complete lack of confidentiality for the reporting process.

Many in this group also recounted times when the accused was moved, and the victim was then punished by being given extra duties or “chaptered out.” These E-1 to E-4 Soldiers recounted multiple instances of an accused being moved to another unit where he was allowed to *“victimize a whole other unit.”*

They stated NCOs of all ranks were often the ones junior enlisted Soldiers saw preying on their friends and fellow Soldiers. Many reported NCOs contacting junior enlisted Soldiers by phone and communicating inappropriate messages that made the junior enlisted Soldiers feel uncomfortable; however, the junior enlisted Soldier felt they had to put up with it because of the rank of the person sending the message.

During the interview sessions with these E-1s to E-4s, only 2 of the 10 groups stated they did not think sexual assault and/or sexual harassment were problems in their particular units; however, Soldiers in both of these units said they did think Fort Hood overall has a significant problem with both.

Despite their units having a favorable climate, however, Soldiers in these two groups also cited a lack of confidentiality in reporting; retaliation against the victim; and, a total failure of “toxic” leadership to hold the offenders accountable as major detriments to reporting these offenses.

All the E-1 to E-4 groups spoke of the same problems with reporting: the lack of confidentiality; the length of time an investigation takes; keeping the victim *“in the dark”* regarding the status of the investigation, as well as the outcome; retaliation against the victim and little to no consequences for the offender.



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Soldiers in all 10 sessions expressed doubt that anything would happen to an offender. Multiple Soldiers told stories of NCOs or higher leadership protecting each other. Even in the groups that did not think their particular units had problems provided multiple accounts of knowing someone in another unit that had experienced sexual assault and/or sexual harassment.

An overwhelming number of Soldiers in this rank believe if someone reported a SHARP complaint, their career would be over. Most Soldiers did not know who their SHARP Representatives were.


Of 4 other groups that consisted only of Soldiers in the ranks of E-4 to E-5, there was agreement that Fort Hood has a problem with sexual harassment, sexual assault and retaliation. They said victims who report become targets for retribution. Some voiced the feeling females who are in the Infantry are ready targets, especially when they are deployed.

Three out of these four groups of E-4s to E-5s believed the problems of sexual harassment, sexual assault and retaliation were worse at Fort Hood and that “the superiors are the guilty party.” Many in these three groups recalled instances when the victim had to continue working with the predator. One valiant Soldier stated with considerable passion: “[I]t is up to us [NCOs] to stop this ... we have known about it for years ... it is still a problem because we are not doing right by our Soldiers.” Three of these four E-4 to E-5 groups felt confidentiality is breached often during the SHARP process, with no consequences.

One group consisting of 45 E-4 to E-6 members of the 1CD had a lot to say about confidentiality of the SHARP reporting process, with everyone in this group describing an extreme lack of confidentiality. Most said if these cases were truly confidential, no one would be able to speak with specific details. The consensus was that because details always seem to leak out, confidentiality does not exist. Most in this group said their Soldiers *would not report* because they do not have faith the system would take care of their case, and that biased behavior throughout leadership sometimes begins even when a report is first hinted at.

One group of 42 E-6 Staff Sergeants to O-3 Captains unanimously agreed that reporting is rare due to fear of retaliation. They noted there is no trust in the Soldier’s first line supervisor because they have seen times when reports have been swept under the rug. They believe there is lack of protection for the victim, and that the victim’s career could be negatively affected because of retaliation.

Three groups consisting of a mix of officers up to the rank of Captain all acknowledged that reporting sexual harassment or sexual assault was greatly inhibited for fear of embarrassment and possible reprisal. One female Soldier summed up the feeling of the women in these units by stating with visible emotion: “[T]his is us calling for help right now...we need help.”



***“[T]his is us calling for help  
right now...we need help”***

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A total of 279 male Soldiers from the 3CR were interviewed in groups of 40-45. There were no females in these groups as the female Soldiers in the 3CR were all afforded individual interviews. The male Soldier's responses differed in some respects from the mixed group of 1CD Soldiers but there was consensus that there were serious problems at Fort Hood with respect to sexual harassment and sexual assault.

For example, in a group of 45 E-1s to E-4s most did not believe Fort Hood has a healthy environment regarding sexual harassment and sexual assault. Most agreed that the higher-ranking NCOs are the ones who get away with sexual misconduct because they are moved when there is an incident. This group was concerned that when these NCOs are moved, the toxic environment and leadership spreads, directly affecting morale. Retaliation is a big deterrent to reporting.

Many in the group expressed that the main problems were the lack of trust in the leadership; the lack of confidentiality in the reporting process and the fear or retaliation. Compared to other duty stations, many felt that Fort Hood leadership does not engage with their Soldiers; and, thus do not know anything about them. Some who have been at other posts see this as an Army wide issue.

The importance and relevance of designing the personal interviews to focus heavily on female Soldiers was reinforced by what FHIRC members observed during these group interviews. When female Soldiers spoke up about their concerns, they were frequently shut down and essentially drowned out by the male Soldiers. There were many incidents when a courageous female Soldier would speak up regarding her experiences with the SHARP Program or the flaws in the program, only to be contradicted and even ridiculed by other male members in the group in front of both the interviewer and the JAG Officer annotating responses. This dynamic exposed the hardened attitudes of a number of male Soldiers towards female Soldiers and the SHARP Program in general.

The responses of the male Soldiers primarily revealed a satisfaction with the status quo and their belief that it is incumbent on female Soldiers to adjust to the male environment since they volunteered to join the Army. It is worth noting however 45%, or 63 of 140 male Soldiers advised during individual interviews that the Army had not done a sufficient job in sexual harassment and sexual assault training and prevention; 21%, or 30 male Soldiers had seen or heard of someone who had experienced retaliation for reporting a sexual harassment or sexual assault and only 60% or 84 responded that their command would take a SHARP report seriously.

### **1.7.1. Fort Hood NCOs in 3CR Acknowledged There Were Issues With Sexual Harassment And Assault But Accepted No Responsibility.**

Group interviews of 3CR NCOs exposed an interesting dynamic that revealed much about the attitude of the first line supervisors towards female Soldiers and the SHARP Program. Three groups consisting of a total of 131 E5 and E6 male NCOs expressed that they had no concerns about sexual assault and sexual harassment. They did not take responsibility for any of the prevalent issues at Fort Hood or the Army at large. Many in these sessions expressed that it is the breed of Soldier that is the root of all of these problems. These groups expressed a preference and practice of resolving sexual harassment brought to their attention informally, but none of them reported or documented

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their actions. If the behavior persisted, however, they indicated that they would report it to their SARC.

Another group of 48 E-7 to E-9 male Soldiers also saw no problems with sexual harassment or sexual assault at Fort Hood. Many in this group felt that compared to colleges, Fort Hood does a better job taking care of their Soldiers regarding sexual assault and sexual harassment. Everyone in the group felt that if a report were made, it would be taken seriously. About half thought the report would be handled fairly; and, half thought that the person who is accused would not get a fair shake. This group believed the stigma attaches to the accused, even if it is determined that an accusation of sexual harassment or assault is unfounded. This group also believed the fear of retaliation emanates from the lower enlisted. This group stated that there is a breakdown in basic leadership. This breakdown stems from deficient manning, as there are not enough qualified leaders in positions to help Soldiers.

The last two groups consisting of WO1s to Majors (O-5) were of mixed views. Some in the room said they did not feel Fort Hood was safe for female Soldiers, especially junior enlisted. *“Once leadership leaves for the day, there is no accountability in the barracks or on post.”* Most in the group thought there were some incidences of both sexual harassment and sexual assault at Fort Hood, but they did not believe it was any different from the rest of the Army. Most in this group were concerned with the climate at the lower levels regarding professionalism in the workplace; but all Soldiers in the group stated they were doing what they could to educate their Soldiers on appropriate conduct. This group expressed having difficulty in readily identifying what is considered “unwanted” in terms of the demeanor and behavior of some of the Soldiers. They also expressed that being able to identify what is unwanted is a critical element in these incidences.

This group expressed that they took their jobs as mandatory reporters seriously. However, from what they had seen, some junior enlisted believe certain unacceptable behaviors are treated as acceptable. It was observed that some have grown up with this type of behavior their whole lives and now they are expected to change. They believe the junior enlisted Soldiers do not trust field grade leaders *because they see some of those individuals actually committing the acts of misconduct.* These Soldiers indicated that particular leaders are not trained to lead; they are being shoved into these positions with little to no training or guidance.

### **1.7.2. There Is A Relationship Between The Lack Of Confidence And Underreporting SHARP Violations.**

The group interviews also revealed that the general lack of confidentiality in the SHARP Program affected SHARP reporting. Underreporting occurs in the junior enlisted ranks and among junior officers, for similar reasons: reports are not taken seriously or lack of confidence in leadership; lack of confidentiality; and, fear of retaliation. For example, across ten focus groups comprised of E1-E4, there was an overwhelming consensus there would be little to no consequence to the offender. Multiple Soldiers told stories of NCOs or higher leadership protecting each other or “sweeping it under the rug.” The group interviews underscored the connection between Soldiers’ lack of confidence in the SHARP Program and their lack of willingness to report incidents of sexual harassment or sexual assault.

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All of these factors appear to have a direct negative impact on uninhibited reporting. In fact, the FHIRC observed that there was wholesale fear of reporting sexual assault and sexual harassment and very little confidence in the response to reports, when reporting actually occurred. As set forth below in Finding #2, there is considerable evidence that sexual assault and sexual harassment are significantly underreported at Fort Hood and that female Soldiers have been and remain at high risk.

In summary there were many breakdowns in the process, not the least of which was the absence of leadership emphasis or any goals or objectives in the area of prevention. Very few of the most critical components of the SHARP Program were tracked. Command elements did not use the tools available such as the SARB process to drive initiatives to any measurable effect. The main cause, however, was the failure of leadership to get the message to the ranks where the lion's share of the violations occurred. Operational imperatives overshadowed the safety and security of the Soldiers who were vulnerable and essentially on their own. With the mountain of evidence collected, it was not difficult to determine that implementation of the SHARP Program was ineffective.

## **2. FINDING #2: THERE IS STRONG EVIDENCE THAT INCIDENTS OF SEXUAL ASSAULT AND SEXUAL HARASSMENT AT FORT HOOD ARE SIGNIFICANTLY UNDERREPORTED.**

In examining a variety of data sources, the FHIRC determined that incidents of sexual harassment and sexual assault were significantly underreported. It is worth noting that addressing the psychological, spiritual and physical needs of victims of sexual harassment and sexual assault is important to leaders within the Fort Hood community. To that end, there are a number of methods through which any victim may report. Some of these methods never result in a record of an official report within the structure of the SHARP Program. For example, when a victim consults a member of the Chaplain Corps, there may very well be no interaction with a Sexual Assault Response Coordinator or Victim Advocate. Or, if a victim reports to the Carl R. Darnall Army Medical Center (CRDAMC), that victim may request medical treatment only. To be sure, the professionals at CRDAMC are very well trained and customarily advise victims of the avenues of reporting through the SHARP Program. However, for a variety of reasons as set forth in this Finding, Soldiers frequently elect not to report at all.

The most compelling evidence that incidents of sexual assault and sexual harassment are significantly underreported comes from the individual interviews, group interviews, and the installation-wide survey conducted by the FHIRC. Through the individual interviews, the FHIRC learned the magnitude of Soldiers' distrust in the SHARP Program and the impact of that distrust on reporting. Specifically, of the 507 interviews of female Soldiers, *the team identified 93 credible accounts of sexual assault and 135 credible instances of sexual harassment.* Of these incidents, only 59 out of the 93 accounts of sexual assaults were actually reported using either restricted or unrestricted channels. Only 72 of the 135 incidents of sexual harassment were reported. Some of the accounts of unreported sexual assault were extremely serious and had significant impact on the victim's health and well-being. They had to work each day carrying this burden, and many described having to see the



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subject/predator working in the same or nearby unit. Narratives from these interviews invoke sadness and outrage.

Some of the most compelling evidence comes from the 20-question survey that was a mandatory exercise across all units assigned to Fort Hood. Over 31,000 responses were submitted rendering the results credible and persuasive. By way of example, underreporting was captured through question 13 of the survey which requested a yes or no response to the following: “In the past 12 months I observed a situation I believe was sexual assault.” Of the 31,612 respondents 1,339 responded yes. This is a stark number when considering that the SHARP Program at Fort Hood recorded only a total of 185 unrestricted and 32 restricted reports of sexual assault incidents on Fort Hood in FY 2019 and 103 and 16 respectively as of the end of August FY 2020.

Further, Question 12 of the FHIRC survey asked respondents to answer yes or no to the question: “In the past 12 months I observed a situation that I believe was sexual harassment.” Of the 31,612 respondents 2,625 answered yes. In contrast, only 36 formal and informal sexual harassment reports were filed at Fort Hood in FY 2019, 35 in FY 2020. Even if one were to significantly discount the number of positive survey responses this is compelling indicator that reports of both sexual assault and sexual harassment were grossly underreported.

The responses to a follow up question regarding whether the sexual assaults or sexual harassments that were witnessed were reported raised significant concern. As depicted in Figures 10 and 11 the survey responses indicated that only 25% of the females who witnessed sexual harassments were reported and only 20% of the observed sexual assaults were reported. The percentage that were reported may actually be high if the FHIRC survey results, which revealed that 1339 respondents witnessed a sexual assault in the last 12 months, are taken into consideration. Using this number based on 217 sexual assault reports in 2019 and 113 in 2020 the reporting rate would be only 16% of observed assaults.



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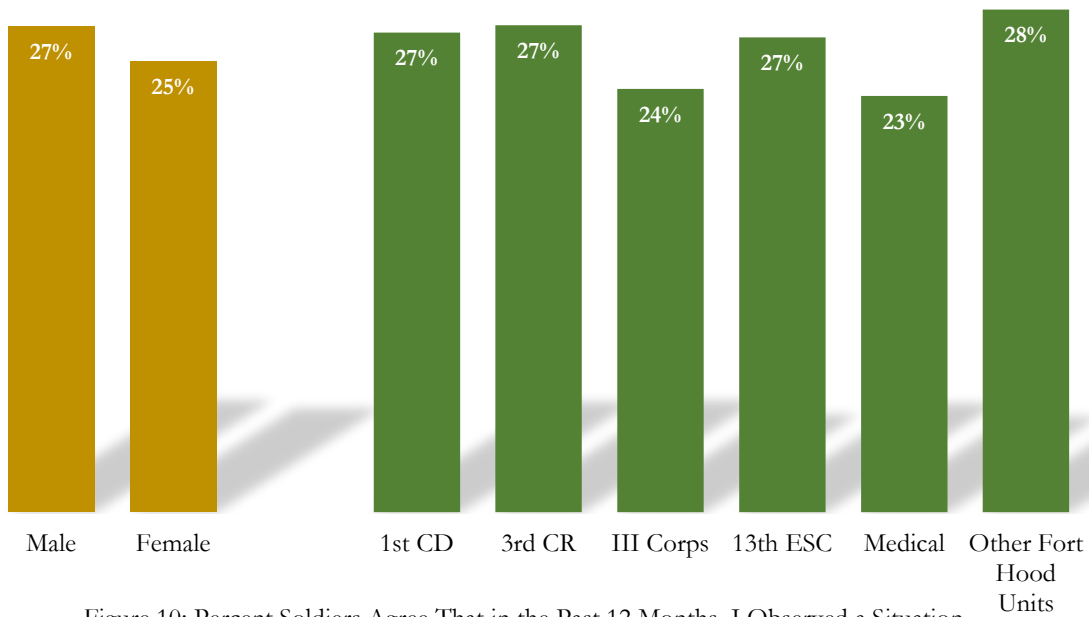


Figure 10: Percent Soldiers Agree That in the Past 12 Months, I Observed a Situation That I Believe Was Sexual Harassment and it Was Reported

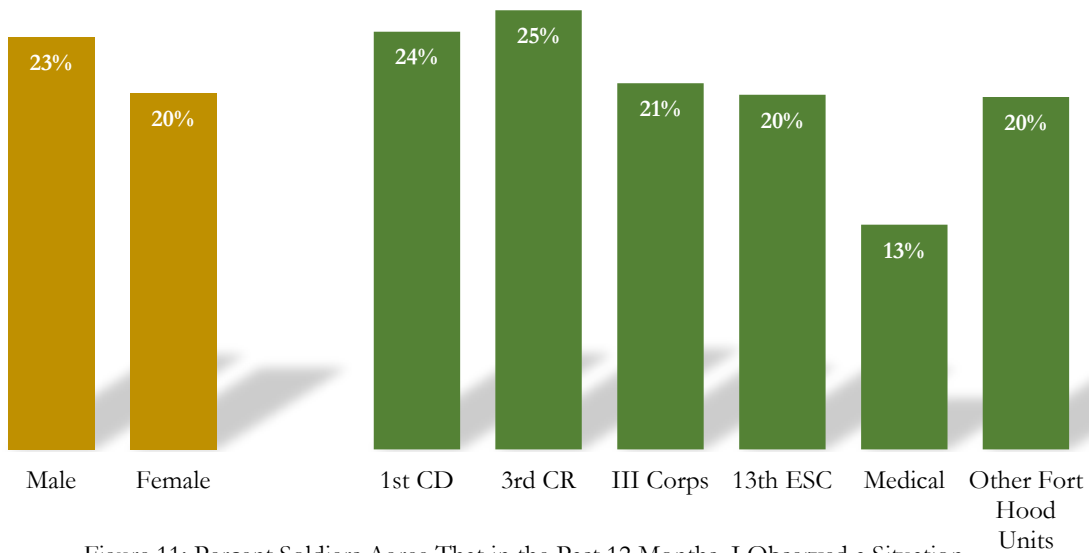


Figure 11: Percent Soldiers Agree That in the Past 12 Months, I Observed a Situation That I Believe Was Sexual Assault and it Was Reported

Most SHARP representatives who were interviewed in person on this topic stated that the reported numbers for sexual harassment were extremely far off the mark. One described a formal report of sexual harassment as “a unicorn.” In interviews the III Corps SHARP Program Manager and Program staff insisted that the sexual harassment numbers are not trustworthy. If such reports



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are made, they are often made verbally to the Soldier's immediate supervisor. If the supervisor fields a verbal complaint, then it appears he or she rarely documents the report and action taken.

The FHIRC also determined from in-person interviews and group interviews that a significant number of sexual assault victims opt to go outside the installation to urgent care clinics or appear for treatment, meds or pregnancy/STD tests at Darnell Hospital but do not file a report of any kind. The Darnell Hospital based Forensic Nurse/SHARP Program Manager (Darnell PM) stated that the hospital always treated them and honored their requests to not file any report in DSAIDs.

The Bell County and Coryell County District Attorneys (DA) advised that each year approximately two dozen Soldier and civilian victims who were sexually assaulted by a Soldier off the installation are afforded the DA's prosecution and victim safeguard services, rather than reporting the sexual assault to someone at Fort Hood. They cited lack of confidentiality, slow justice and fear of retaliation as reasons they reported off the installation. They also cited a very slow investigation and resolution process as a basis for the mistrust.

Note also that the DSAID system does not capture SHARP violations committed by a Soldier against a current or former domestic partner or juvenile. The ALERTS system should capture these incidents as they will still be investigated by CID, but they will not be tracked in DSAID and it's unlikely they will be tracked if they occurred off-post.

Group interviews of 28 Chaplains revealed further evidence of unreported SHARP violations. Without breaching privileges or confidences, the interview of Chaplains related that many had met with victims seeking spiritual help and counsel who have unburdened themselves in describing sexual assaults and sexual harassments. According to the Chaplains to the best of their knowledge many of these victims did not report their experiences for fear of retaliation and being stigmatized.

Finally, the Committee learned of situations described as "walkaways, consults or contacts," which are victims who contact SHARP representatives to receive information about services, but refuse to file any type of report. Such incidents were singled out in the DoD Inspector General's 2020 *Evaluation of the Department of Defense's Handling of Incidents of Sexual Assault Against (or Involving) Cadets at the United States Military Academy* dated September 30, 2019. The DoD IG recommended that the Director of the DoD Sexual Assault Prevention and Response Office (SAPRO) develop and institute a process that documents consults or contacts with victims of sexual assault and any results.<sup>86</sup> Interviews of SHARP personnel at Fort Hood revealed that this change has yet to be implemented.

Examples of many of the non-reported instances described above were described to FHIRC Members in either individual or group interviews. The information provided above is consistent with a 2018 study conducted by the Defense Department's SAPRO which found that by comparing survey

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<sup>86</sup> DoD Inspector General's 2020 Evaluation of the Department of Defense's Handling of Incidents of Sexual Assault Against (or Involving) Cadets at the United States Military Academy dated September 30, 2019.

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estimated sexual assault prevalence rates to reported sexual assaults in FY 2018, SAPRO projected that only approximately 38% of victim service members in the Army report their sexual assault.<sup>87</sup>

In the *DOD annual report of sexual assaults 2019* it was reported that in FY 2019 the Military Services received a total of 1,021 formal sexual harassment complaints. The number of sexual assault reports from Service members increased by 3%, from 6,053 in FY18 to 6,236 in FY19. There were only 28 formal and 8 informal sexual harassment reports at Ft Hood in 2019. There were 25 formal and 10 informal reports in 2020.<sup>88</sup> Across the military and at Fort Hood the ratio of reported sexual assaults to sexual harassments is roughly 6 to 1 and 8 to 1 respectively.

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

In conjunction with an appropriate command response, DoD policy encourages service members to address behaviors perceived to be sexually harassing at the lowest interpersonal level. Service members may also elect to address what they believe to be offensive situations through an informal or formal complaint, or even an anonymous complaint. Dealing with such situations at the lowest levels as they occur may be desirable. But without documenting the incident as, at a minimum, an informal complaint, there is no opportunity to address these precursor offenses. There was consensus from almost all sources interviewed during this review that such conduct should be made known to the leaders who would then be able to proactively address the situation and deter more serious conduct. This is the very reason informal sexual harassment reporting was established.

A major inhibitor to reporting as identified in individual and group interviews and the FHIRC survey, was that when the sexual harassment or sexual assault occurred many victims were engaged in collateral violations. The most common were underage alcohol consumption. DSAIDs and ALERTS Data shows that almost 70% of SHARP related incidents involve alcohol and between 7% to 10% involve drugs. Interviews also revealed several instances of use of a “date rape” drug being introduced in the victim’s drinks. Interviews with JAG and CID revealed that these collateral violations are not automatically discarded from consideration as a disciplinary matter and may be used as impeachment material for the subject’s defense. The FHIRC determined through interviews that this had a discernable chilling effect on reporting.

Finally, as an adjunct to this discussion, the DEOCs discussion in Finding #1 regarding fear of retaliation should be noted. In summary, this Committee has high confidence that sexual assault

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<sup>87</sup> See DoD 2018 *Annual Report on Sexual Assaults*.

<sup>88</sup> Fort Hood III Corps Program Office Data.

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and sexual harassment are significantly under-reported which seriously undermines any effort to deal with and deter such conduct.

## **3. FINDING #3: THE ARMY SHARP PROGRAM IS STRUCTURALLY FLAWED.**

Attempts at effectively addressing issues related to sexual misconduct is not new to the Armed Services. Indeed, the *Report of The Defense Task Force on Sexual Assault in the Military Services*, published in December of 2009, set forth a number of recommendations related to strategic direction, prevention and training, response to victims, and accountability. To the great credit of the Department of the Army, the FHIRC identified a number of these recommendations that have been implemented. Yet, in a number of ways, the current SHARP manning structure reflects the needs placed on the Army a decade ago, when the objective was to rapidly infuse Sexual Assault Response Coordinators (SARC) or Victim Advocates (VA), after contractor staffing was eliminated due to the finding that sexual assault prevention and response is an inherently governmental function. As set forth below, the next steps in the evolution of the structure of the SHARP Program are due.

### **3.1. By Design, SHARP Military Professionals Are Assigned Via Borrowed Military Manpower.**

As *Findings #1 and #2* demonstrate with pristine clarity, SHARP Military professionals are an integral part of the SHARP Program's success. However, manning and utilization within the SHARP Program suffer from the fact that there is no visibility of personnel placement Army-wide. This is best illustrated by direct comparison with other areas of importance within the Army.

For example, the Army emphasizes the training, coaching, counseling, and mentoring of Soldiers upon initial entry into the Army, in order to transform them from civilians to combat-ready Soldiers. Accordingly, the Army assigns Drill Sergeants a Special Qualifications Identifier (SQI), and stabilizes Soldiers in this role for a period of 2-3 years.<sup>89</sup> Because of the priority afforded to the services provided by Drill Sergeants, manning is controlled by Training and Doctrine Command (TRADOC).<sup>90</sup>

Similarly, determining and reporting on the economy, efficiency, discipline, morale, esprit de corps, readiness, and resources of the command is important to the Army. Accordingly, the Army assigns Inspector General (IG) non-commission officers (NCOs) a SQI, and stabilizes Soldiers in this role for a period of 3 years.<sup>91</sup> Because of the priority afforded to the services provided by IG NCOs, manning is governed by the modified table of organization and equipment (MTOE) and table of distribution and allowances (TDA) authorization documents.<sup>92</sup>

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<sup>89</sup> DA PAM 614-200, 3-3.

<sup>90</sup> TRADOC Regulation 350-16, May 2020.

<sup>91</sup> DA PAM 614-200, 8-12.

<sup>92</sup> Inspector General Activities and Procedures, AR 20-1, 2-1.

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Likewise, the Army values the process of formulating, directing, and sustaining a comprehensive effort to maximize human potential to ensure fair treatment for military personnel, family members and civilians without regard to race, color, gender, religion, age, disability or national origin. Accordingly, the Army assigns Equal Opportunity Advisors (EOAs) a SQI and stabilizes Soldiers in this role for a period of 3 years.<sup>93</sup> Because of the priority afforded to the services provided by EOAs, manning is governed by regulation and is visible Army-wide.<sup>94</sup>

Unlike these career broadening opportunities, SHARP assignments are Command Selected. There is no visibility Army-wide; and, there is only an Additional Skill Identifier (ASI) of 1B or 1H. In contrast to assignments as a Drill Sergeant, an IG NCO or an EOA, where assignments and utilization are governed in a manner commensurate with their respective priorities within the Army, SHARP personnel come from borrowed military manpower. These personnel are stabilized for only a period of 2 years.<sup>95</sup> And, a significant portion of this stabilization period is spent completing the credentialing process and attending the 6-week SHARP Career Course,<sup>96</sup> leaving little time to actually perform their valuable services. Manning at the Brigade level is per the MTOE and TDA; however, the lower unit SARCs are assigned catch-as-catch-can.

## 3.2. SHARP Assignments Are Unlike Other Career Broadening Opportunities.

Noncommissioned Officers can benefit from the opportunity to advance their military careers through a variety of broadening assignments. Those specific opportunities are: (i) Drill Sergeant; (ii) Inspector General; (iii) Equal Opportunity; (iv) Recruiting; (v) White House; and, (vi) SHARP. Different broadening opportunities enjoy different attributes. For example, as noted in the previous section, Drill Sergeants, Inspector General NCOs, and Equal Opportunity Advisors each enjoy a SQI; specifically, Drill Sergeants have SQI-X;<sup>97</sup> IG NCOs have SQI-B; and, Equal Opportunity NCOs have SQI-Q. Recruiting and Retention NCOs enjoy a unique Military Occupational Specialty associated with a broadening opportunity, particularly MOS 79R or 79T.<sup>98</sup> And, NCOs with the opportunity to serve in the White House enjoy particularized attention through the Army's Special Management Branch. Assignments in each of these roles are Department of the Army (DA) selected, managed, and developed. The *only* assignments that are labeled career broadening, but are not DA-selected, DA-managed, and DA-developed are SHARP assignments.

Unlike other career opportunities advantageous to a Soldier's professional development, service within the SHARP Program is not *functionally* a broadening developmental

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<sup>93</sup> DA PAM 614-200, 8-13.

<sup>94</sup> Army Regulation 600-20, 24 July 2020, para 6-1, (p. 72).

<sup>95</sup> DA PAM 614-200, 8-37.

<sup>96</sup> DA PAM 614-200, p. 13 (Code P).

<sup>97</sup> DA PAM 614-200, 8-2, pg. 82, Positions of Significant Trust and Authority.

<sup>98</sup> *Ibid.*

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opportunity. Examples of broadening through developmental assignments are Joint, North Atlantic Treaty Organization (NATO), Drill Sergeant, Recruiting, Advanced Individual Training (AIT) platoon sergeant, instructor, Reserve Officers' Training Corps (ROTC), IG NCO, and EOA assignments. These assignments are primarily Military Occupational Specialty (MOS)-immaterial and challenge the NCO to increase their knowledge of Army policy and programs, increase skills beyond their Career Management Field (CMF) by performing the required duties of the assignment, and encourage growth as well as mentorship of these key attributes: character, presence, and intellect.<sup>99</sup> Common among career broadening opportunities is oversight and visibility within Enlisted Personnel Management.<sup>100</sup> Because of the importance of these roles within the Army, there is visibility over all Enlisted Branches and Military Occupational Specialties.

Assignments within the SHARP Program may also be contrasted through a different aperture. To the extent that the importance of the SHARP Program may be reflected in the Army's allocation of personnel, a comparison between Army EOAs and SHARP personnel is illuminating. Each Army Command (ACOM), Army Service Component Command (ASCC) and Direct Reporting Unit (DRU) is allocated one (1) O-5 Lieutenant Colonel, one (1) E-9 Sergeant Major, and one (1) E-8 Master Sergeant. Each Corps is allocated one (1) O-5 Lieutenant Colonel, one (1) E-9 Sergeant Major, one (1) E-8 Master Sergeant, and one (1) E-7 Sergeant First Class.<sup>101</sup> Large installations, with over 10,000 Soldiers, are allocated an additional Sergeant First Class. Each Division is allocated one (1) O-5 Lieutenant Colonel, one (1) E-9 Sergeant Major, and two (2) Sergeants First Class. And, each Brigade is allocated 1 EOA.

In contrast with the EO Program, the SHARP Program allocates a single full-time Sexual Assault Response Coordinator and Victim Advocate to each Brigade.<sup>102</sup> On installations with more than one SARC, the senior commander appoints a lead SARC. To be clear, there is no requirement that the senior commander hire or appoint an individual specifically to fill the role of lead SARC. Rather, any existing SARC on the installation may be appointed as the lead SARC. The senior commander, however, should select a full-time SARC assigned to their command as the lead SARC. The lead SARC is supported by and works in collaboration with the supporting SHARP Program Manager, as appropriate. This latitude, in contrast with the deliberate allocation of key experienced personnel within the EO Program, reflects a marked disparity in priority.

### **3.3. Considerable Time Is Required To Develop SHARP Military Professionals.**

Unlike other career broadening opportunities where screening, selection, training and certification occurs prior to commencement of duties, there is a long timeline for screening, selection,

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<sup>99</sup> Army Regulation 600-25, 11 December 2018, para 2-14, (p.13-14).

<sup>100</sup> DA PAM 611-21, <https://www.milsuite.mil/book/groups/smartbookdapam611-21/>.

<sup>101</sup> Army Regulation 600-20, 24 July 2020, C-1b, Command Staffing (p.132).

<sup>102</sup> Army Regulation 600-20, 24 July 2020, para 7-5, z, Installations (pg. 101).

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training and certification of SHARP Military Professionals, all of which must occur during the NCO's time on station. Specifically, the credentialing process takes 2-6 months, at best.

A Battalion Sexual Assault Response Coordinator and all Victims Advocates must be appointed by the first O-6 Commander in the chain of command. A Brigade SARC must be appointed by a General Officer or SES. This appointment occurs after a diligent interview process with the appointing commander. The candidate must then submit for local police records, ASAP, and National Sex Offender Checks, which takes 1-2 weeks. Next, there is a submission for HRC background screening, which takes another 2-3 weeks at best and can sometimes take 2 or more months. Then, the candidate must attend and complete the SHARP Foundation Course. Following this 2-week course, the D-SAACP/NOVA, which is held quarterly, must approve the appointment, which ordinarily occurs 3-15 weeks from submission. Only after all of this may Appointment Orders be signed by the proper appointing authority.<sup>103</sup>

There are no institution directed career possibilities for the Military SHARP Professional. A SFC/E-7 SARC that starts at the Brigade does not have an institutionally supported path forward to serve as a SARC at echelons above the Brigade. As a direct result, the Army does not increase or grow the institutional knowledge, experience and expertise of dedicated SHARP Professionals over time.

### **3.4. Aside From Personnel Assignment Problems, Further Structural Problems Frustrate The Efficacy Of The SHARP Program.**

Setting aside the aforementioned issues related to staffing within the SHARP Program, the Committee observed conceptual problems that impact the Program's implementation. The SHARP Program conflates a number of crucial components that have dynamic differences. For example, there are marked differences between sexual assault, which is criminal conduct that invites an investigation under the Uniform Code of Military Justice (UCMJ) and sexual harassment, which is disruptive misconduct that invites direct action by the chain of command.

The most salient difference is that victims making a *restricted* report of sexual assault have confidentiality from the chain of command being informed; but, those making a sexual harassment allegation do not. There is no "confidential" sexual harassment report. In practice, within the chain of command, one cannot have complete confidentiality regarding criminal activity like sexual assault, according to AR 600-20. However, a Soldier alleging sexual harassment may actually benefit from discretion, particularly where such confidentiality could shield the Soldier from unwarranted reprisal. Increased recognition that treatment of a victim is resonantly distinguishable from socialized prevention would be advantageous.

Similarly, response to both sexual harassment and sexual assault is markedly different from prevention. When responding to an instance of either sexual harassment or sexual assault, the

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<sup>103</sup> Of note, in some instances, an exception to policy for a rank waiver is required and must (i) be signed by the first GO/SES in the SARC or VA candidate's chain of command, (ii) receive concurrence from the ACOM/ASC/DRU SHARP PM, and (iii) be approved by the SHARP HQDA Director.



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command is addressing a discrete and known victim, and a potentially identifiable alleged offender or assailant. The singularity of focus is unique. However, prevention is social, involving a group or groups, of different sizes and attributes. Prevention is a sophisticated undertaking, requiring data-informed modification of cultural norms and priorities. Effective prevention improves group dynamics such that instances of sexual harassment and sexual assault are unacceptable. Conflating response and prevention, without respecting the marked differences between the two, compromises the ability to adequately focus on each.

With that in mind, the Committee observed a general lack of emphasis on prevention, to the detriment of the overall efficacy of the SHARP Program. Effective prevention must be proactive.<sup>104</sup> Proactive prevention requires an education and skillset that is distinguishable from response or victim support, which are no less important. The Army made a deliberate choice to assign prevention duties to SARCs and VAs, and to spend comparatively little time in training focused on prevention. However, this choice creates a substantive mission burden that is unlikely to advance the ability to implement courses of action oriented toward forward-thinking prevention and substantive alteration of climates that are permissive of sexual assault and sexual harassment.

The FHIRC observed that there would be tremendous benefit to having assigned and dedicated violence prevention personnel, who are practitioners assigned at the Major Command and Post level. Indeed, the Committee saw specific instances where such professionals could have guided senior mission commanders in what they should do to address risk factors for sexual assault - as well as sexual harassment, gender discrimination, workplace incivility, domestic violence, child abuse, and other “people” problems. This observation suggests that the Army would benefit from increasing its capacity for violence prevention. While the Army tasks its SARCs and VAs to do this, the present training program, which is nobly intended to render them optimally beneficial, can only provide them rudimentary skills. And, these skills are often lost once borrowed military manpower transitions back into their regular MOS duties. Having dedicated professionals would increase the Army’s proactive capabilities. When compared with the other Armed Services, the Army leads the way insofar as it has identified the importance of dedicating a significant investment of time training SHARP Military Professionals for their “response” duties.<sup>105</sup> The Army would benefit from taking the next steps in deepening and broadening this training, in order to better equip these professionals in the realm of prevention.

Furthermore, there is a degree to which the treatment of sexual harassment and sexual assault, and the environment where such activities occur, is viewed in isolation. What causes the disrespect of the contributions of both genders that leads to such activities? What signature behaviors may be

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<sup>104</sup> This observation is consistent with a specific observation articulated in the 2009 Report of The Defense Task Force on Sexual Assault in the Military Services, where a General Court-Martial Convening Authority commented: “If I had the opportunity to make a suggestion it would be that there is a full time SARC paid appropriately. When a case does come in it is ‘STOP ALL.’ This makes the SARC a ‘reactive’ position and a person who responds due to emergencies. The SARC should be a proactive position who consistently thinks about SARC duties, not just during emergencies.”

<sup>105</sup> The Committee benefited from consultation with Dr. Nathan W. Galbreath, Ph.D., M.F.S., Director, Department of Defense Sexual Assault Prevention Office.

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addressed early, in order to change the environment where such unhealthy activities occur? Are there ways to develop Soldiers to make them less likely to engage in such destructive activities? These questions are the underpinnings of a whole-person concept that leads to better Soldiers and more cohesive units.

Finally, the Army's 21<sup>st</sup> Century Soldier concept would benefit from a more holistic personnel development program and military community development program, in order to address core problems that lead to instances of sexual harassment and sexual assault. The FHIRC observed no uniform system of addressing, from recruitment throughout the lifecycle of a Soldier, how the Army develops the "whole" person, thereby helping each Soldier recognize the value of the warriors with whom they serve. It is readily apparent that the notion of considering the well-being of the whole Soldier is within the contemplation of the Department of Defense. The recently published DoD Policy on Integrated Primary Prevention of Self-Directed Harm and Prohibited Abuse or Harm is a strong step in the right direction.<sup>106</sup> The Army would benefit tremendously from genuinely embracing steps like this.

Given the apparent increase in Adverse Childhood Experiences in recent generations,<sup>107</sup> leaders must recognize that today's recruits and newest leaders may need "more" in terms of focus on the character of a professional warrior. Past training approaches must be updated to inculcate from day one the dignity, respect, and inclusion demanded from Soldiers serving in today's Army. Additionally, separation policy must be enforced, so those who cannot live up to Army standards are not afforded multiple opportunities to demonstrate their incompatibility with military service.

### **4. FINDING #4: THE FORT HOOD CID OFFICE HAD VARIOUS INEFFICIENCIES THAT ADVERSELY IMPACTED ACCOMPLISHMENT OF ITS MISSION.**

This Review determined that the Fort Hood based 43rd Criminal Investigation Division (CID) detachment Special Agent workforce was unstable, under-experienced, over-assigned and under-resourced leading to inefficiencies that had an adverse impact on investigations, especially complex cases involving sex crimes and Soldier deaths. The FHIRC determined that these inefficiencies are the result of staffing protocols and other policies and procedures that transcend Fort Hood CID.

The USACIDC command is mandated by Army Regulation (AR) 195-2 to pursue the following objectives:

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<sup>106</sup> See DoD Instruction 6400.09, <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/640009p.pdf?ver=2020-09-11-104936-223>.

<sup>107</sup> Logan-Greene, P., Green, S., Nurius, P., and Longhi, D. (2014) Distinct Contributions of Adverse Childhood Experiences and Resilience Resources: A Cohort Analysis of Adult Physical and Mental Health. *Social Work Health Care, 53*, 776-797.

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## **1–6. Objectives**

*The operational procedures of each Army USACIDC element will be directed toward attaining the following objectives:*

*a. Ensuring known or suspected serious crimes and crimes which may result in damaging the public confidence in the Army are thoroughly and impartially investigated by USACIDC special agents.*

*b. Participating in the Army crime prevention program by identifying areas which are especially vulnerable to crime and by making recommendations to appropriate authorities for elimination of conditions conducive to criminal activity. This USACIDC effort, in the form of crime surveys, includes the examination of all aspects of management and property and fiscal accountability in which malfeasance and misfeasance may occur. Additionally, the Army crime prevention program will be conducted when criminal conditions, either engaged in or directed against Army personnel, may affect troop health, discipline, and welfare both on and off military installations.*

*c. Informing promptly appropriate authorities of facts uncovered during criminal investigations and crime prevention activities by preparing and submitting required reports in accordance with applicable directives.*

*d. Maintaining a proactive criminal intelligence collection, analysis and reporting cycle to alert commanders to threats and criminal elements. Commanders who are provided with validated criminal intelligence can initiate appropriate force protection measures.<sup>108</sup>*

## **4.1. The Fort Hood CID Detachment Did Not Have A Sufficient Number of Credentialed Special Agents On Board To Handle Its Caseload Of Complex Sex Crimes And Death Investigations**

The Fort Hood Army CID is the 43rd Military Police Detachment (CID) of the 11th Military Police (MP) Battalion, which consists of four other CID detachments located at US Army installations across the southwest including Fort Bliss, Fort Huachuca, Fort Sill, and Fort Sam Houston (JBSA). The 11th MP Battalion reports to the US Army Criminal Investigation Command (USACIDC) at Quantico, Virginia. Counting all the CID detachments across the entire Army, CID composes only 3% of the USACIDC. Fort Hood CID is the largest CID component in the 11th MP Battalion and the third largest Army installation in the US.

Fort Hood CID like most CID offices is staffed mainly with Warrant Officers and Enlisted E-5 through E-9s. The Fort Hood CID also has 3 Civilian Law enforcement investigators called “1811s” which is the Office of Personnel Management (OPM) criminal investigation occupational series.

The FHIRC was informed that the USACIDC only allocates staffing resources every five years. The Command uses a weighted case complexity system. For example, a weight of 12 is

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<sup>108</sup> Army Regulation 195-2, 21 July 2020, para 1-6 (p. 3).

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allocated to death investigations, 8 to sex crimes and 3 to drug crimes so 4 homicide cases a year would equate to a score of 48. The formula does not take into consideration the experience level of the agents assigned to any given office nor how many agents actually work cases. The Fort Hood CID Commander advised that the 43<sup>rd</sup> CID detachment staffing level had not been updated for at least 4 years.

During the review period the Fort Hood CID was allocated 45 Special Agents consisting of 19 Agents assigned to penetrative and other serious sex crime cases, 16 General Crimes investigators, and 4 TDA Agents. The TDA designation is for Agents who are not subject to deployment. Fort Hood CID also had three 1811 Sexual Assault Investigators (SAIs) who advised on special victim cases and cyber forensics. The complement also includes the Commander/Special Agent in Charge (C/SAC), an ASAC and an E-7 detachment Sergeant.

The FHIRC was advised by the Fort Hood CID that in FYs 2018, 2019 and the beginning of 2020 the Fort Hood CID average staffing level of on-board Agents was at approximately 65%, but had dipped to as low as 45%. As a result of the Guillén case at the time of the site visit to Fort Hood there were 41 of 45 allocated Special Agents (SAs) actually on board. The CID Command counts “spaces not faces” and is oblivious to how many “faces” are actually working on a busy post like Fort Hood. The current formula allocates one civilian SAI for every 30 sex-crime cases opened per year that met the criteria for case initiation.<sup>109</sup> The allocations stop when the staffing level reaches justification for three SAIs or 90 cases. The Fort Hood CID opened approximately 342 to 359 sex crime cases annually between FYs 2018 and 2020 and could justify an allocation of 9-10 SAIs (yet it only has 3).<sup>110</sup> The SAIs bring much needed specialized skills, experience and continuity to the Fort Hood CID Detachment.

Fort Hood CID sex crimes caseload per Senior Special Victims Investigator (SSVI) and Basic Special Victims Investigator (BSVI) were the highest and second highest respectively among divisional posts.<sup>111</sup> While not statistically significantly different from other posts after controlling for basic post characteristics such as gender, rank, AFQT score, etc. this was primarily due to the wide variation in the number of SSVIs and BSVIs during the research time sample of 2015-2020. For example, during that period the Fort Hood CID only had between one and four SSVIs. The SSVI designation is for Special Agents who have advanced training in sex crime investigations and the BSVI is for Agents

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<sup>109</sup> CID’s sex crimes caseload includes more than the sexual assaults tracked in the DSAID system, which does not track juveniles, domestic sexual assaults and certain other sex crimes. As a result, this is a higher number than the sexual assaults carried in DSAID.

<sup>110</sup> Sex crime cases investigated by CID are all sex crime offenses listed under Article 120 of the UCMJ. These include Rape, Sexual Assault, Aggravated Sexual Contact and abusive sexual contact. Not all of these offenses are tracked in DSAIDS therefore these numbers will not match with DSAIDS offenses. By definition, they will also not include restricted reports of sexual assault which are not worked by CID.

<sup>111</sup> Analysis of cases opened and individual agents active from fiscal year 2015 through 2019. Data source: US Army personnel data merged with Army Law Enforcement Report Tracking System.

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who have only completed a basic course. This illustrates how few experienced Special Agents were available to work the sex crime caseload described above.<sup>112</sup>

The Fort Hood CID also had responsibility for maintaining a drug suppression program. Fort Hood has the highest drug test failure rate per test taken of all divisional posts. Fort Hood's failure rates are over 30% higher than divisional posts and 151.7% higher than non-divisional CONUS posts.<sup>113</sup> The USACIDC Criminal Intelligence Operations Center (CIOC) provided analysis of FORSCOM crime data that Fort Hood average drug crime rates from FYs 2015-2020 were almost 31% higher than FORSCOM.<sup>114</sup> The Fort Hood CID is assigned 13 Military Police Investigators (MPI) for drug suppression efforts and two for General Crimes. There were 11 on board as of the date of the Fort Hood site visit. The drug MPIs mainly were used to interview Soldiers who tested positive for drugs and document the failed Urinalysis test failure case files. Despite this gilded opportunity for the gathering of intelligence and development of human sources, nothing was done in that regard. In fact, this review found that very little actual drug suppression took place at Fort Hood despite what area police chiefs described as a "thriving drug culture" among Soldiers they encountered as a result of drug violations within their jurisdictions involving Fort Hood Soldiers.

Leadership of the 43rd CID detachment at Fort Hood consists of a Commander or Special Agent in Charge (C/SAC) and two Assistant Special Agents in Charge (ASAC). All three are Warrant Officers who are experienced, competent and professional. In contrast they report to leadership at the Battalion level whose experience in actual law enforcement positions was minimal. This Review determined that the Fort Hood CID office received almost no guidance and minimal support from the Battalion leadership. In fact, during the Vanessa Guillén investigation, guidance and resource assistance from the Battalion was nonexistent until MG Efflandt inquired into whether the CID had sufficient resources and expertise. After that inquiry, the CID Office finally obtained some much-needed assistance in the form of temporary duty Special Agents, electronic evidence forensics, analysis of electronic evidence, and drafting of probable cause affidavits to support warrants.

The Fort Hood CID has no clerical or administrative support employees and no dedicated evidence technicians or training specialists. As a result, these full-time duties must be assigned to Special Agents. Two Special Agents are assigned full-time to evidence technician duties and one to training responsibilities. There are many administrative and reporting requirements for CID investigations, so yet another Special Agent is assigned to coordinate and discharge those duties. Counting the three managers, the three vacancies, two evidence technicians, one trainer and the Agent assigned mostly administrative duties the actual number of Special Agents working cases

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<sup>112</sup> Research based on CID cases opened after 2015 and Office of Economic and Manpower Analysis personnel data merged with Military Entrance Processing Command (MEPC) data.

<sup>113</sup> Analysis of all drug test records between January 2015 and March 2020. Data Source: Drug and Alcohol Testing Management Information System (DAMIS) Drug Test results linked to DMDC Master Personnel File at the individual level for duty locations.

<sup>114</sup> Fort Hood Crime Comparison-Soldier Offender Rates provided by CIOC.

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was 35. Of those the FHIRC determined that only three had more than 2 years of investigative experience.

This Review also found that there was a serious and almost debilitating lack of continuity in the Fort Hood Special Agent ranks that hindered its overall mission. All Enlisted and Warrant Officer SAs were subject to transfer and were usually transferred just after reaching the 2-year mark at Fort Hood. They also were subject to deployment (minus the four TDA Agents), TDY assignments, on and off site training programs, protection details, ancillary duties, and attendance at combat unit field training events. Numerous law enforcement, civilian and military sources cited a persistent lack of continuity as a problem in establishing any kind of working relationship with CID at Fort Hood.

A prime example of the priority placed on movement of Agents and CID leadership over stability and continuity was evident in the Guillén investigation. In that investigation, the Special Agent in Charge of the Fort Hood CID left his duties at Fort Hood pursuant to his Permanent Change of Station (PCS) to another post *in the middle of the Guillén investigation*, one of the most complex and high profile investigations the office has ever handled. This was noted by local law enforcement and prosecutors who considered it unwise and detrimental to the case.

### **4.2. The Fort Hood CID Detachment Was Inexperienced.**

There is also a high ratio of inexperienced Special Agents assigned to Fort Hood CID, which contributed to its inefficiencies. A review of the Agents assigned to Fort Hood CID during FY 2019 revealed that 58 of the 63 Agents assigned Enlisted Agents (92%) were apprentice agents, who were fresh out of the 16 week CID Special Agent Course (CIDSAC) at Fort Leonard Wood, Missouri and not fully accredited to conduct investigations solo. An apprentice Agent is defined as an agent who has been at his first unit assignment less than a year and must receive mentorship and constant evaluation for suitability from a more experienced SA. Upon successful completion of the year and the certification of his/her SAC, an apprentice becomes an accredited CID Special Agent.

During the same period 6 of the 13 assigned Warrant Officers were also apprentice Special Agents. According to CID sources in and outside Fort Hood, these extremely high ratios of apprentice agents are not conducive to timely, thorough and compliant investigations. Most of these SAs were reassigned after 26 months, causing a rolling cascade of apprentice Agents at Fort Hood CID.

Between the Chairman of the FHIRC and 5 support members of the FHIRC, all of whom are former FBI Special Agents, there is a combined 150+ years of experience in conducting and managing complex investigations. It has been the experience of these career federal law enforcement professionals that investigative agents with less than 2 years' experience are generally only capable of conducting simple witness interviews, handling less complex investigative techniques and acting in a support role for more experienced case agents. They are still developing investigative skills and learning procedures, documentation and administrative requirements. They have less training and need to work under close supervision. They are not ready for complex investigations involving deaths, traumatized victims, warrants and electronic and other forensic evidence. It is the rare newly minted

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Agent who is capable of developing and articulating evidence to support evidentiary warrants issues by judges or magistrates to obtain such evidence.

In essence, the Fort Hood CID is a training ground. When considering the crime issues, the number of highly publicized death cases, the high number of sexual assaults and the other crime dynamics on the post discussed in Finding #8, this situation cannot help but impact investigative tempo, quality and timeliness of investigations, especially when a very complex case arises such as that involving the disappearance of Vanessa Guillén. There were simply too few journeyman level Agents to work the complex sex crime and death cases while mentoring the large number of inexperienced and un-credentialed Special Agents who are constantly transferring in and out. There was minimal continuity and institutional knowledge at the Fort Hood CID. This also impacted outside law enforcement relationships as discussed further in Section 4.5 below.

CID sources and outside law enforcement and prosecution sources stated that due to the wholesale inexperience of the Agent cadre the investigations are “checklist driven” with emphasis on developing a complete file as opposed to identifying and working leads and suspects that are most likely to resolve cases. Investigative acumen and experience driven actions are lacking. The Commander/Special Agent in Charge (SAC) and ASACs are competent and experienced, however they have burdensome administrative duties and also carry a caseload. They have very little time to mentor.

That inexperience was evident to the FHIRC when reviewing the death and suicide CID case files covering FYs 2018-2020. These reviews revealed areas of concern as to investigative attention to detail, completeness and file documentation. For example, in one death case in April 2020 a Soldier overdosed on Methamphetamine and Fentanyl. There were no interviews, no crime scene investigation, and no apparent attempt to determine who supplied the drugs. There was no attempt to investigate the Soldier’s history of drug use or the identity of his associates. Drug overdoses should be fully investigated to determine where, when and how such drugs come into the possession of a Soldier and who supplied the drugs for potential prosecution of the supplier and to cut off the flow of drugs to the post.

In another investigation in 2018 an infant was shaken to death by his Soldier grandfather in a Fort Hood apartment. The subject lied about the circumstances and cause of the child’s death. Several statements were taken of the subject who initially said the infant struck his head. He later admitted he shook the baby to death because he was crying excessively. Autopsy results stated the death was a homicide, however a referral was not documented in the file as of the time of this Review. Moreover, the subject was allowed to stay in the barracks while the case was investigated for 18 months, with no apparent evaluation of the risk the subject posed to himself or others.<sup>115</sup>

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<sup>115</sup> The FHIRC Chairman was advised by Fort Hood CID that the subject was found guilty at a Courts Martial, but final disposition was not reflected in the file and therefore no disposition was sent to the FBI’s records management system, The National Crime Information Center (NCIC).

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Deficiencies in failing to pursue all logical investigative leads were also noted by the FHIRC in another high-profile case of a Soldier who went missing and ultimately committed suicide. Conspicuously absent in the CID file was any documentation of a search for the Soldier, nor was there any indication that a key witness was contacted or interviewed. The totality of the facts contained in the file led the FHIRC to conclude that the initial underpinnings of what might be a motive on the part of another to engineer the Soldier's disappearance existed. At a minimum, important investigative threads that should have been identified, analyzed and logically run to ground by CID during the initial stages of this investigation were not pursued.

The case file review also revealed that off-post suicides and deaths were not fully investigated by CID to determine whether there were contributory causes such as lifestyle issues, locations, or other influences that would inform the command about certain activities, people and places off-post that may be higher-risk for their Soldiers. Such information would enable the formulation of remedial actions for the health and safety of Soldiers living off-post. For example, in 2019 there was a homicide of a Soldier outside a notorious strip bar in Killeen. It was determined that a number of establishments are known for prostitution and drugs. In fact, the area Police Chiefs stated that prostitution was rampant. Several of the death investigations revealed a nexus with vice crimes.

A fulsome investigation of each suicide would have satisfied the USACIDC objectives stated in its regulation quoted above. Of the 19 on-post suicide cases, only one mentioned a postmortem behavioral assessment. This case happened to involve (b) (6)

The same absence of a postmortem applies to the 34 off-post suicides. It is not clear whether or why this is not done as a matter of practice in all cases. Failure to perform and refer to a postmortem behavioral assessment is a wasted opportunity to learn more about Soldier suicides that can help lead to better prevention strategies.

The lack of fulsome investigations in these cases was attributable to the low number of experienced Agents, which also contributed to the absence of true joint investigations with off post law enforcement agencies.

Consistent with its Charter and for the limited purpose of evaluating the CID mission, the Committee examined the conduct of the SPC Vanessa Guillén investigation, which exposed the inexperience of the Fort Hood CID Special Agents.<sup>116</sup> The Committee noted that early in the investigation various Special Agents conducted brief, choppy interviews of key individuals. In these critical early interviews there was no indication in the file of whether the interviews were by phone or in person. There were no witness contacts provided, insufficient details gleaned, and no witness diagrams. The interviews appeared to be rote and indeed checklist driven.

There also appeared to be little cohesion as disparate Special Agents conducted important interviews that should have been tied together. For example, according to the CID case file at 1425

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<sup>116</sup> Vanessa Guillén was posthumously promoted from PFC to SPC. Her new rank will be used in this report.



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hours on April 24, 2020 SA #1 interviewed a Squadron Headquarters arms room custodian and recorded in the file that on the day SPC Guillén disappeared, she left his location to meet with SPC Aaron Robinson, who was alone in his unit's arms room (an isolated area in a basement) that Robinson staffed and controlled that day. SPC Robinson was ultimately revealed to be her killer.

Two hours later, at 1630 hours, CID SA #2 determined from SPC Guillén's phone records that SFC Guillén had texted Robinson at 1018 hours.

SPC Robinson was interviewed two more hours later at 1822 hours on April 24, 2020 by CID SA #3. There was no indication of whether SA #3 attempted to examine or take custody of Robinson's phone, take a picture of the important 1018 hours text, or took any steps whatsoever to preserve evidence on the phone device itself, especially that critical text. This interview was short, perfunctory, and lacked important details.

Finally, at 2005 hours CID SA #4 interviewed SPC Robinson by phone during which Robinson described his personal interaction with SPC Guillén in his arms room the morning she disappeared. Again, important details were lacking.

Apparently, CID bought wholesale into information provided by three NCOs who were interviewed and stated that they observed SPC Guillén leave the arms room area at 1330 on April 22, 2020 and walk in the direction of the barracks parking lot. None of the NCOs were in SPC Guillén's unit, nor were they personally acquainted with her. They provided conflicting descriptions of her clothing, and apparently were not pressed for details or re-interviewed until much later in the investigation. As a result, CID Agents did not consider SPC Robinson of sufficient interest to even examine his phone, subject him to a more intense investigative focus and at least a more intense and detailed interview by an experienced Special Agent. The NCOs later changed their stories about the time they supposedly observed SPC Guillén the morning she disappeared.

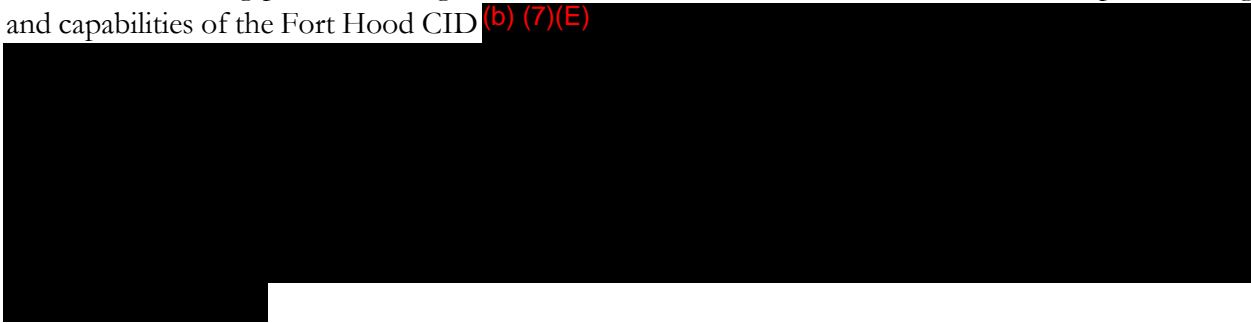
CID did not advise her unit to change SPC Guillén's duty status entry from absent without leave (AWOL), despite the fact that her car keys, barracks room key, government issued Common Access Card (CAC), and wallet were left in the Squadron HQ arms room and she never returned from what was supposed to be a very brief visit to the other arms room to meet with SPC Aaron Robinson, the subject who ultimately murdered her. Also notable, SPC Guillén's car was still parked in the parking lot across the street from her barracks and all financial activity on her credit card and bank accounts had ceased.

(b) (7)(E)

117 (b) (7)(E)

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The missing person investigation of SPC Guillén revealed some issues with the provisioning and capabilities of the Fort Hood CID (b) (7)(E)



As quoted earlier in this Finding, one of CID's mandated objectives is "*Ensuring known or suspected serious crimes and crimes which may result in damaging the public confidence in the Army are thoroughly and impartially investigated by USACIDC special agents.*"<sup>118</sup> The file reviews reveal that Fort Hood CID fell short on this objective due to an inexperienced and constantly changing cadre of Special Agents.

### 4.3. The Fort Hood CID Detachment Was Over-Assigned.

Across multiple interviews with the Fort Hood CID leadership, examination of CID manning tables for the 11th MP Battalion and knowledgeable CID sources, there was evidence that, when factoring in the number of Agents actually assigned sex crimes and other complex cases such as Soldier deaths, the Fort Hood CID was understaffed compared to other CID Battalions.

Further empirical support for the determination that Fort Hood CID's Special Victim Investigators were over-assigned with regard to sex crimes cases can be found in data which compares Fort Hood CID's sex crime caseload numbers to its peers. Fort Hood CID was found to have, by a large margin, the highest sex crimes caseload per Senior Special Victims Investigator (SSVI) with an average of 64.2 compared to 41.2<sup>119</sup> (See Figure 12). Again, while not statistically significantly different from other posts after controlling for basic post characteristics, the Fort Hood CID had the second highest caseload per Basic Special Victims Investigator (BSVI) when compared to installations of a similar size.<sup>120</sup> As discussed in Section 4.1 the statistical significance was impacted by the wide fluctuations in the number of SSVIs and BSVIs as well as the low number of SSVIs. These factors were a reflection of both the instability of the overall SVI workforce and the lack of experience of the sex crimes investigators.

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<sup>118</sup> Army Regulation 195-2, 21 July 2020, para 1-6 (p. 3).

<sup>119</sup> Analysis of cases opened and individual agents active from fiscal year 2015 through 2019. Data source: US Army personnel data merged with Army Law Enforcement Report Tracking System.

<sup>120</sup> Analysis of cases opened and individual agents active from fiscal year 2015 through 2019. Data source: US Army personnel data merged with Army Law Enforcement Report Tracking System.

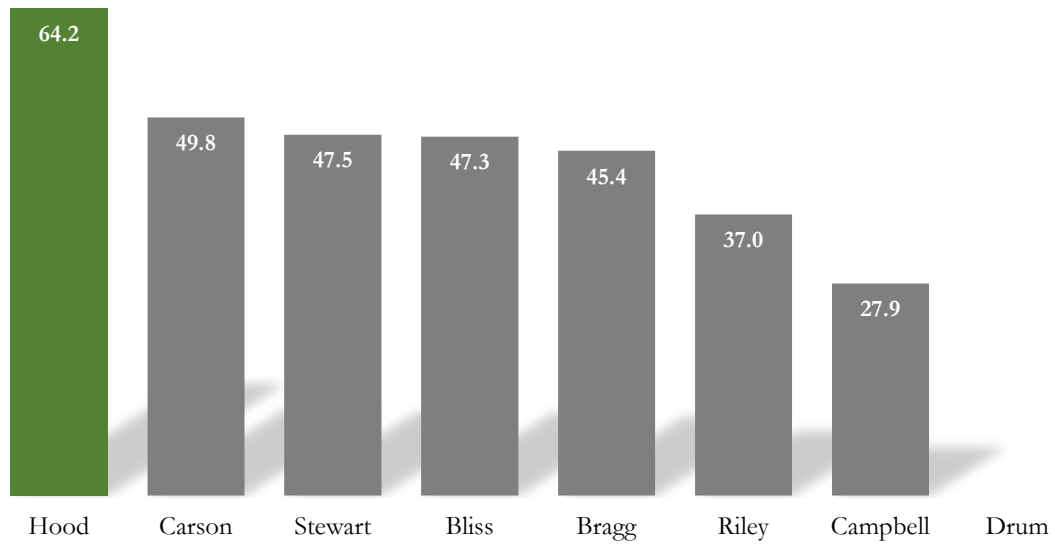


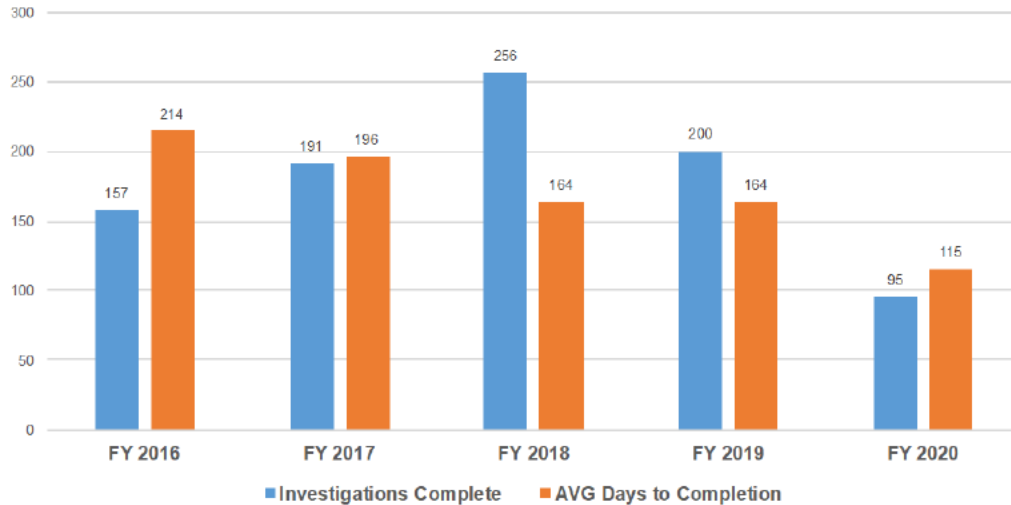
Figure 12: Sex Crime Cases per Senior Special Victims Investigator (SSVI)

#### 4.4. Fort Hood CID Investigations Were Extremely Long.

Separately, a very large number of Soldiers in both personal and group interviews reported that investigations were extremely drawn out, and by the time they were completed, the victims or subjects or both had transferred or transitioned out of the Army. Victims seldom saw the outcome of their cases, and there was minimal deterrent value derived from the cases. This Review obtained data that showed that the yearly average days to complete an investigation between 2016 and 2020 ranged between a high of 214 days in 2016 to 115 in 2020. (See Figure 13 below).



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DSAIDS Data as of 18 SEP 2020. 957 records were pulled from FY16 to FY20. 899 were reliable and utilized for this analysis.



Figure 13: Average Days Completion of Investigation

Figure 14 below shows the average case duration for sex crimes (between case opening and referral to commander) across Army posts for 2015-2020. Excluding Fort Bragg, the duration of CID investigations of sex crimes at Fort Hood was the second highest among divisional posts which was statistically significantly different from other divisional posts. Again, excluding Fort Bragg, Fort Hood also had the longest duration time (215 days) among the divisional posts and sex crime cases took an average of 30 days longer than other divisional posts.<sup>121</sup>

<sup>121</sup> Analysis of length of CID investigations that opened in fiscal year 2015 or later (up to July 2020) with a founded offense and that are referred to a commander. For duration, analysis of the time between the date the commander receives the DA Form 4833 referral from CID and the date this is returned to CID. Data source: CID cases from the Army Law Enforcement Reporting Tracking System.



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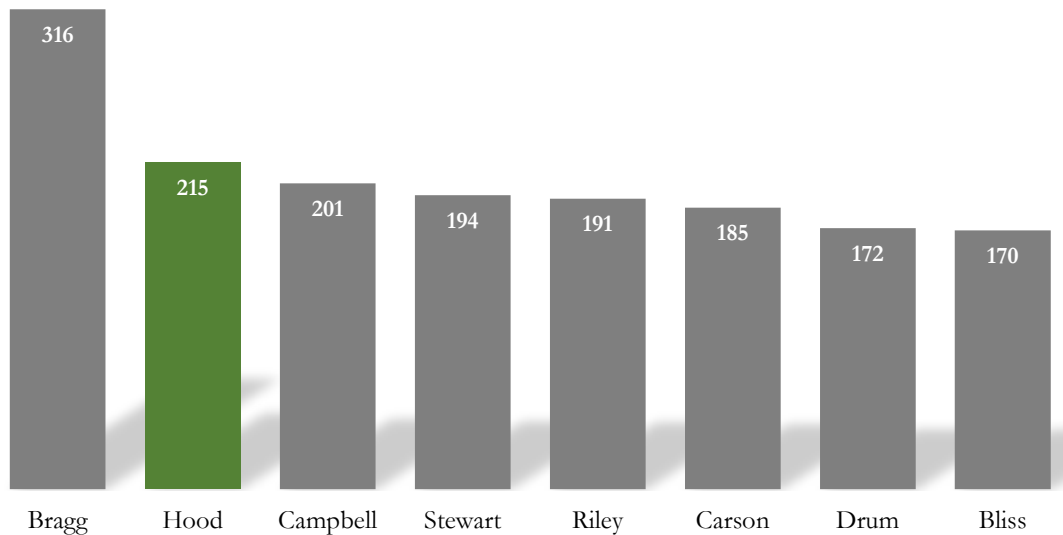


Figure 14: Average Days Between CID Case Open and Case Referral to a Commander (via DA Form 4833) for Sex Crimes

Moreover, in interviews with Fort Hood FHIRC members JAG prosecutors conveyed that many sex crime cases were sent back to CID after they were placed in a “Final Report” status for additional investigation, to provide critical items of evidence. In many cases, the JAG Officers conducted their own follow-up to obtain evidence, but could not provide a specific number, as such situations are not tracked. They informed the FHIRC in response to a request for information (RFI) that a hand search of the over 600 cases was prohibitive. Similarly, CID could not provide, nor did they track, such events.

A knowledgeable CID source who contacted a FHIRC Member—in addition to various other knowledgeable JAG interview sources—stated that a large number of sexual assault cases were lost or dismissed at court-martial partially due to investigations that are rote and lack essential evidence. This Review obtained data from the Fort Hood OSJA which showed that there were 75 Courts-Martial convened between 2018 and 2020 that involved at least one sex crime specification. In these cases, there were 85 total *not guilty* verdicts out of a total of 306 specifications preferred.<sup>122</sup> Some defendants, however, were found guilty of separate specifications.

More illuminating was that in these 75 cases there were a total of 65 charges of sexual assault preferred. Of these 28 charges were withdrawn/dismissed, 22 were found not guilty and there were 3 mistrials. That is a success rate of 22%. Similarly, a total of 51 abusive sexual contact charges were preferred which resulted in 17 charges withdrawn and 15 not guilty dispositions for a successful prosecution rate of 33%. Of 18 total rape charges preferred only two resulted in guilty

<sup>122</sup> In many cases, multiple charges were preferred besides sex crimes.



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dispositions. Of these 18 rape cases 13 were found not guilty and 3 were dismissed. This represents an 11% successful prosecution rate.

## 4.5. The Fort Hood Detachment Was Under-Resourced.

State and federal prosecuting attorneys and local law enforcement advised that there was little interaction between their offices and Fort Hood CID. Unlike other Army posts there were no CID Agents imbedded at any of the local police departments. They could not remember a true joint investigation they had done with CID despite the many overlapping jurisdiction cases involving Soldier subjects or victims, some of which were very high profile. It was evident that few of the Chiefs or Sheriffs had met the previous CID leadership and were barely acquainted with the current leadership. Many described CID as a “closed book” because of its perceived limitations in sharing information.<sup>123</sup> The FHIRC has determined that a well-crafted MOU and joint investigations would greatly enhance investigations of mutual interest.

It was discovered that the Killeen Police Department (KPD) made a formal request to Fort Hood CID to imbed an Agent with them because they handle over 100 Soldier-subject cases a year and many victims were Soldiers. The Chief of the KPD produced a PowerPoint (PPT) presentation for the FHIRC which was used to support the request to CID. The presentation opened with the purpose of the request: *“To develop a strong partnership with the Killeen PD and Fort Hood CID to allow for early identification of problems and rapid joint solutions reducing crime and violence involving US Army personnel.”* The PPT went on to describe the current state as *ad hoc* coordination. The presentation pointed out that there were no specific MOUs, designated points of contact or regularly scheduled contact (i.e. monthly liaison, etc.). It was a well-reasoned and justified request; however, CID leadership advised a Member of the FHIRC that there were no Special Agents with the requisite skills and experience to imbed with local law enforcement. Another limitation was that any Agent who was assigned would be subject to movement via a PCS or deployment.

Local and state law enforcement executives also mentioned that CID did not attend their regular monthly law enforcement meetings to maintain liaisons. They also mentioned that there were open offers to CID to participate in “ride-a-longs” in squad cars during busy shifts. Other posts had CID and unit leaders participate in riding in a patrol car for busy shifts. It would have been extremely useful for Fort Hood CID, DES and Command leadership to observe the local crime hotspots, tour the much discussed high density housing areas where crime rates were high and develop a better understanding of the Soldier related crime and crime dynamics in their jurisdictions on busy shifts.

Complex investigations and those involving forensic electronic evidence exploitation needs were slowed down by the shortage of electronic forensic exploitation equipment, application licenses and Agents qualified and experienced enough to retrieve, analyze and exploit the forensic evidence. Other bottlenecks were DNA and body fluid testing and analysis, which are common in


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<sup>123</sup> Because unlike most states, Texas does not recognize Army CID Special Agents as Law Enforcement Officers, in the absence of a joint investigation, many departments will not share their law enforcement reports with Fort Hood CID.



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sexual assault cases. All DNA testing takes place at the CID forensic Lab in Georgia with a 30 to 60 day turnaround. (b) (7)(E)



Some critical computer and electronic devices and forensic resources were held at the Battalion level and priority was afforded to cases that had charges filed and for which the 120-day trial clock was running. CID sources advised that the JAGs were not interested in preferring charges without DNA analysis so pending investigations were at the back of the line.

There was also mention by Fort Hood JAG sources that the apprentice Agents had great difficulty supporting warrants for crucial evidence. This is an investigative skill that was in short supply. Reliable CID and Fort Hood JAG sources stated that cases that involved search warrants or magistrate orders to obtain evidence were problematic as the inexperienced Agents had difficulty developing and articulating the necessary probable cause. For example, in the Vanessa Guillén case the Fort Hood CID office needed the assistance from USACIDC resources at Quantico, VA, Texas Rangers and other federal agencies to help them develop the information needed to secure warrants to obtain cell phone and computer evidence. In the Guillén case there were two instances where the incorrect information led to fruitless searches and expenditure of scarce manpower.

The FHIRC also developed information that Fort Hood CID has very few Agents who can act as case Agents capable of leading even a moderately complex investigation. This was again evident in the Guillén case where no one individual Agent seemed to have a strategic overview of the entire case to direct leads and focus the investigation where it was needed. It was only when outside help was secured from the Texas Department of Public Safety, the U. S. Marshalls, and the FBI, that the case was broken. During this review there were ample indications that Fort Hood CID was in no position to conduct any proactive investigations, such as mandated drug suppression investigations, contributing to the overall reactive posture at Fort Hood with respect to crime reduction and suppression.<sup>124</sup>

In short, the CID staffing and resource allocation model as it related to Fort Hood did not work effectively to support the CID mission. There were not enough experienced Agents to provide continuity and institutional experience to work complex cases or be proactive in crime prevention. The Fort Hood CID needed to have a balanced mix of apprentice, experienced (5-10 years) and highly experienced (8 or more years) Special Agents to provide stability and ongoing expertise. Going forward there should always be a cadre of experienced and highly experienced investigators to handle the over 340 sex crime cases and an average of 18 death cases per year involving Fort Hood Soldiers.<sup>125</sup> These are complex matters that involve forensic evidence, evidentiary warrants, evidence analysis and informed judgment about investigative strategy. The Fort Hood CID must be provided the capability to routinely work joint investigations with their state, local and federal

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<sup>124</sup> See Finding #8.

<sup>125</sup> Data provided by CIOC on death cases between FYs 2018 and 2020.

counterparts and should not have to scramble to plug holes in a complex and urgent investigation such as the Vanessa Guillén missing soldier/homicide case.

## **5. FINDING #5: THE MECHANICS OF THE ARMY'S ADJUDICATION PROCESSES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT DEGRADE CONFIDENCE IN THE SHARP PROGRAM.**

Fort Hood Soldiers revealed a lack of confidence in the SHARP Program that emanates out of concern for the fair treatment of both the victim and the accused throughout the Military Justice or administrative adjudication process. Soldiers want the administration of justice to be swift and fair, but to have both demands carefully weighing multiple factors and maximum transparency.<sup>126</sup> Striking the right balance requires continual reassessment and refinement, as evidenced by the more than 250 legislative proposals to revise the DoD SAPR Program since 2004.

Regarding fair treatment of victims, Soldiers voiced multiple concerns. During individual interview sessions, past victims of sexual assault expressed frustration over the length of time it took for their complaint to be fully adjudicated. Additionally, it was also noted that subjects often reappeared in the same unit or another unit within the same brigade, battalion or company. Victims described being uninformed about the progress of their cases and case resolutions. Soldier observers noted that because there was seldom, if any, general information published about disciplinary actions, no deterrent value was derived from final adjudications. Some cited other Army installations where such actions were regularly publicized, but with names, units and other identifying details omitted, allowing the type of action and disposition to be publicly disseminated.

Victims further expressed dismay that Military Protective Orders failed to protect them from periodic contact with their assailant while their case was being adjudicated. Soldiers also questioned the fair treatment of subjects, expressing a misplaced belief that a “false” victim could ruin the career of another Soldier through false reporting. The FHIRC discovered that fears in this regard are largely uninformed and exaggerated.

### **5.1. Long Delays In The Process Of Investigation And Adjudication Of Sexual Assault Cases At Fort Hood Were So Prevalent That Victims and Potential Victims Lost Confidence In The SHARP Program.**

It is often said that justice delayed is justice denied. This was frequently the case at Fort Hood, at least as to the case files reviewed by the FHIRC. A thorough review across group interviews, individual interviews, survey comments and interviews of key SHARP, JAG and CID personnel, noted that after a Soldier files a sexual assault report, the investigation and final adjudication of these cases

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<sup>126</sup> DoDI 6495.02, March 28, 2013, Enclosure 4, 3b. Victim's Perception of the Military Justice System. The DoD seeks increased reporting by victims of sexual assault. A system that is perceived as fair and treats victims with dignity and respect, and promotes privacy and confidentiality may have a positive impact in bringing victims forward to provide information about being assaulted.






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were interminably long. Criminal justice is necessarily a lengthy process in any jurisdiction, military or civilian; however, Soldiers on Fort Hood experienced unreasonable delays that can be mitigated.

Neither the III Corps SJA Office nor the Fort Hood CID office were able to produce data regarding the time lapse between the filing of a report of sexual assault to final adjudication. Only the III Corps SHARP Office was willing and able to conduct even a rudimentary analysis of the overall time lapse based upon a request for information by the FHIRC. Worse, it appears that no specific office is assigned the responsibility of routinely tracking the aging of sexual assault and related sex crime cases.<sup>127</sup>

Research and document requests revealed some informative data. However, it was abundantly clear that no leader at any level was accountable, and no one undertook to track the aging of cases from the time of reporting through investigation, commander referral, disciplinary procedure and final disposition. This was true despite the many points at which delays and bottlenecks can and often do occur, to include the initial SJA probable cause (PC) opine, SJA return of case files to CID for reinvestigation or additional investigation, assignment of a Special Victim Counsel, and selection of the appropriate disciplinary proceeding to pursue. Without executive level tracking of sexual assault and sexual harassment cases, there is no way to effectively evaluate whether victims are receiving just results or any results at all. The FHIRC found this scenario surprising and unacceptable.



**"I WAS SEXUALLY ASSAULTED TWO TIMES BY THE SAME SOLDIER BEFORE MUSTERING UP THE COURAGE TO FINALLY FILE AN UNRESTRICTED REPORT WHEN HE ATTEMPTED TO ASSAULT ME A THIRD TIME. I FILED THE COMPLAINT IN EARLY APRIL OF THIS YEAR, AND IT IS STILL BEING INVESTIGATED...IT'S TAKING TOO LONG FOR RESOLUTION."**

Female SPC/E4

Part of the delay in adjudication occurs during the criminal investigation. CID personnel have identified significant resource constraints, and as discussed in Finding #4 above, the Fort Hood CID office was understaffed and inexperienced, yet routinely handled approximately 33% more sex crime cases than the next closest caseload for a CID office servicing a divisional post.<sup>128</sup> The Fort Hood CID Command provided anecdotal data and charts that illustrate that factoring in that only 35 Special Agents are actually working cases, that their caseload is actually twice that of other CID Commands with half the number of working Agents.

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<sup>127</sup> This question was asked during several interviews of Fort Hood JAG personnel and in a formal RFI.

<sup>128</sup> The sex crime caseload per Enlisted 31D and Warrant Officer 31A CID Agent was approximately 30% higher than other Divisional Installations. Analysis of all cases and individuals active from fiscal year 2015 through 2019. Data Source: CID cases that opened after fiscal year 2015 through 2019, merged with Military Entrance Processing Command (MEPC) and Total Army Personnel Database personnel data.

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The time that elapsed from when the CID office received a report of sexual assault to completion of the CID investigation varied between 2016 and 2019 from 157 to 256 days. The Figure below reveals that the duration of CID investigations of sex crimes at Fort Hood is the second highest among divisional posts. On average, a CID investigation of a sex crime offense takes 215 days at Fort Hood and 211 days at other divisional posts, including Fort Bragg. With Fort Bragg excluded, Fort Hood sex crime investigations take about 30 days longer on average and the median investigation takes about 25 days longer than other divisional posts.<sup>129</sup>

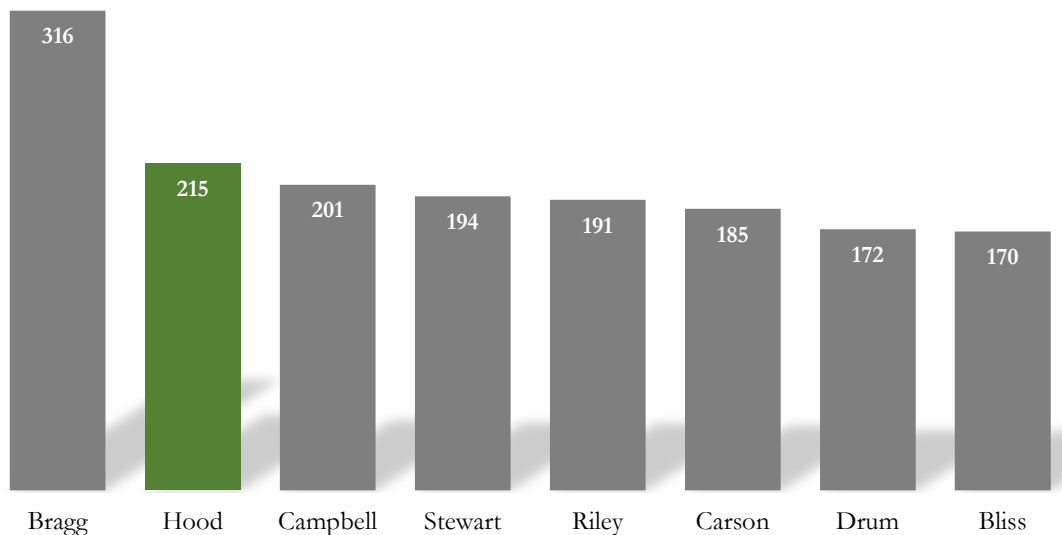


Figure 15: Average Days Between CID Case Open and Case Referral to a Commander (via DA Form 4833) for Sex Crimes

One source of delay can come about when the CID case agent requested a “probable cause (PC) opine” from the assigned legal advisor in the servicing SJA office. The PC opine is a legal opinion that states whether there are reasonable grounds to believe an offense was committed and the alleged offender committed it. Although the probable cause opine can be made at any time during the investigation, it is a vital component of the investigative case file. Indeed, without it, potential investigative leads from fingerprint and DNA analyses cannot be pursued.

The Army Office of the Judge Advocate General (OTJAG) and the U. S. Army Criminal Investigation Command (CID) maintain a Memorandum of Agreement (MOA) as to legal coordination for law enforcement reports.<sup>130</sup> Pursuant to the MOA, the legal adviser must provide a

<sup>129</sup> Data Source: CID cases that opened in fiscal year 2015 or later (up to July 2020), from the Army Law Enforcement Reporting Tracking System (ALERTS).

<sup>130</sup> Memorandum of Agreement Between The Office of the Judge Advocate General and the U. S. Army Criminal Investigation Command (CID), Subject: *Legal Coordination for CID Law Enforcement Reports, June 5, 2018*. The MOA expires on October 1, 2022, but is subject to renewal.

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PC opine within 14 calendar days after the Special Agent has presented the supporting facts. Data provided by Fort Hood for calendar year 2019 and 2020 (through 26 October 2020) reveals that, out of 27 offenses that received an opine, 15 (56%) were rendered in 14 days or less, and 12 (44%) were provided after more than 14 days, with an average length of time of 23 days. Recognizing that complex cases will require a lengthier legal review process, the 23-day average is reasonable. However, there were individual cases with lengthy delays by any standard, such as 78, 70, 66, 60 and 50 days. Also, there is anecdotal information from OSJA personnel that legal advisors must periodically send case files back to CID for further investigation before a PC opine could be rendered, causing further delays. In the 2019/2020 data provided by Fort Hood, three of the 33 cases documented were with the CID office after being returned for further investigation.

Another bottleneck can occur at Fort Hood at the time of appointment of a Special Victims' Counsel (SVC). As of the date of this report there are just four trained full-time SVCs on Fort Hood, despite a total of 269 unrestricted sexual assault reports in 2018 and 220 in FY 2019 (Figure 17). In fact, Fort Hood has the unfortunate distinction of having the highest percent of Soldiers reporting on-post sexual assault.<sup>131</sup> A sexual assault adjudication cannot proceed without assignment of a SVC in cases where the victim wishes to be represented by a SVC. The Fort Hood CID Command advised that it can take up to three weeks to conduct a victim interview with the SVCs because of delays in assignment or the workload of the SVCs.

Fort Hood was not able to produce any data on the length of time it took to appoint an SVC, but with only four SVCs, it is reasonable to believe that anecdotal stories of periodic backlogs are not fictional. As of the date of this report, the FHIRC understands that the Judge Advocate General requested and has been authorized additional SVCs Army-wide, and that additional SVCs will be allocated to Fort Hood in short order.

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<sup>131</sup> Analysis from unrestricted victim-level sexual assault reports among first term enlisted Soldiers arriving at their duty station over the duration of their assignment between 2015 and 2019. Data Source: Unrestricted Defense Sexual Assault Incidence Database, merged with administrative personnel data.

# REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE

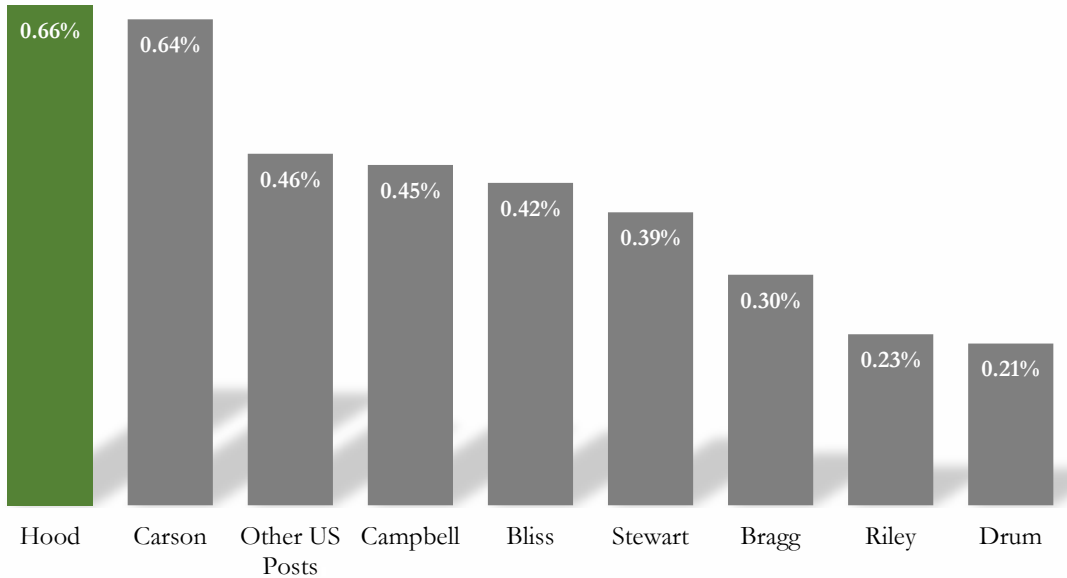
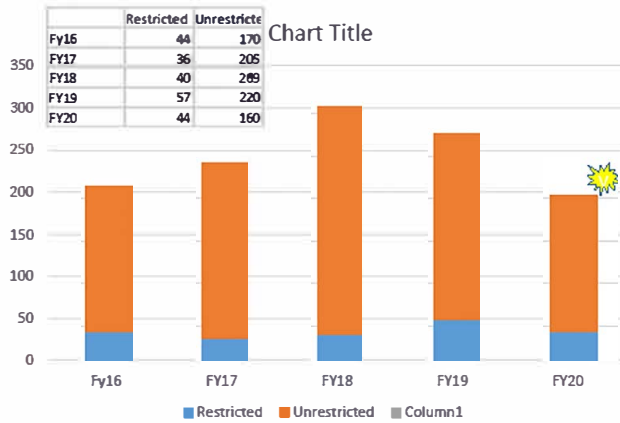


Figure 16: Percent of Post Population Reporting On-Installation Sexual Assault

## Fort Hood Sexual Assault Reports FY16 – FY 20



Does not include SEP 2020

(b) (6) Data derived from SMS as of 31 AUG 2020

Figure 17: Fort Hood Sexual Assault Reports FY16-FY20

The FHIRC had to look to the SHARP PM for some relevant usable data related to sexual assault investigations. This data revealed that the average length of time it took just to prefer Courts

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Martial cases ranged from a low of 72 days in 2020 to a high of 102 days in 2020. The average time to prefer charges for non-sexual offenses ranged from a low of 54 days in 2017 to a high of 221 days in 2019. Between 2017 and 2020 Non-Judicial Punishment took an average low of 69.5 days in 2020 to an average high of 162 days in 2018. The length of time it took to complete an investigation is set forth in the following chart provided by the III Corps SHARP PM:

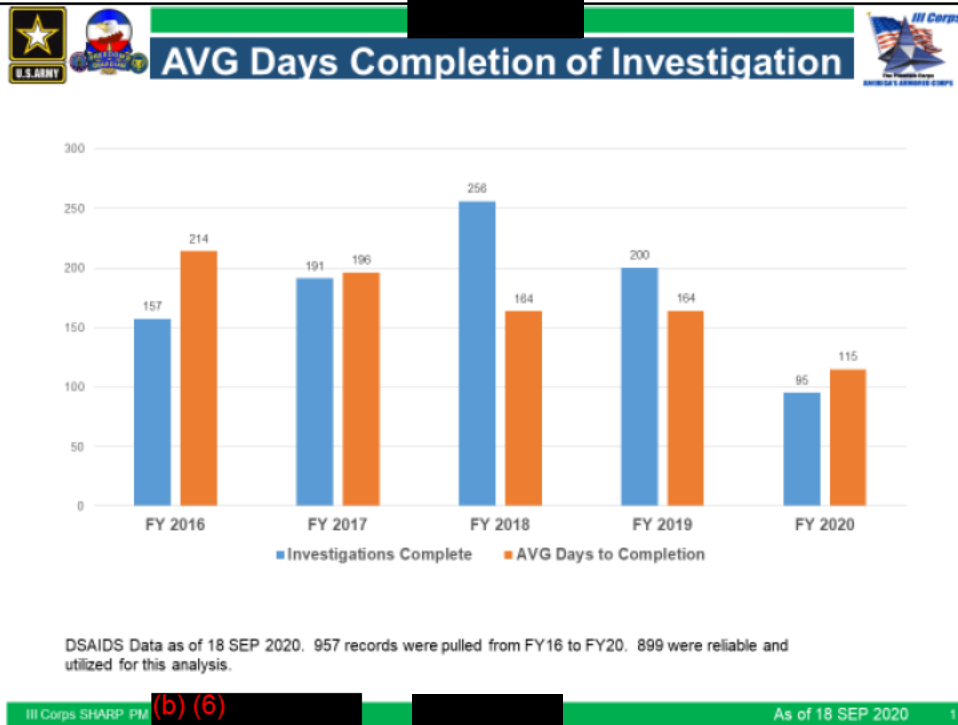




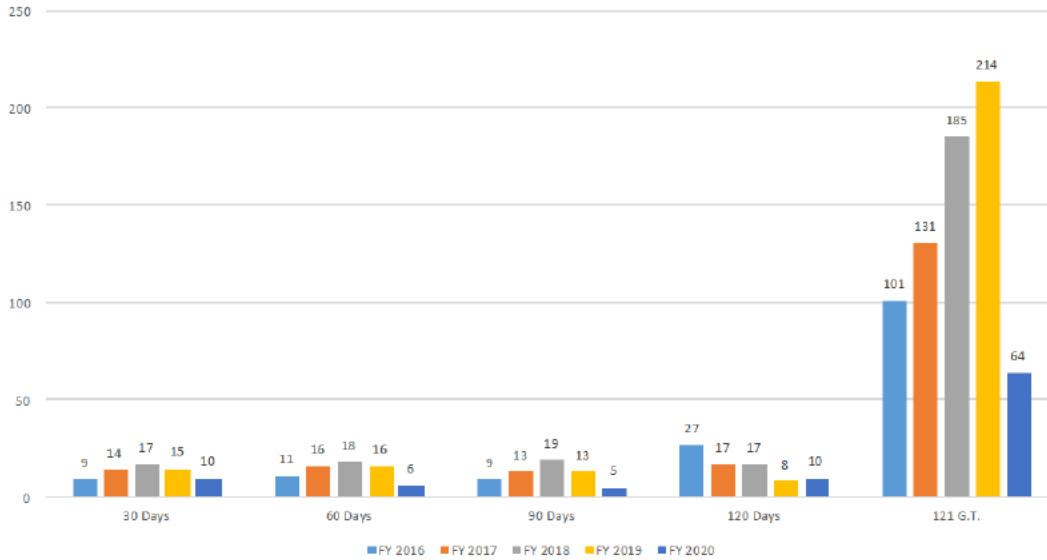
Figure 18: Average Days of Completion of Investigation

By regulation all sexual assaults are investigated by the CID. In response to a request for information, the SHARP PM provided the FHIRC the breakdown of time lapses from the time of a sexual assault report to CID and the time a final report was submitted for a close out “opine” to the unit Commander and his/her Military Justice Advisor of the Soldier subject, as depicted in Figure 19 below. Analysis revealed that between FY 2016 and 2020 a total of 695 of 899 (77%) sexual assault investigations took over 120 days; a total of 79 (9%) took 90 to 120 days. CID advised that some cases took over 1.5 years.



(b) (6)


## 30, 60, 90, 120, G.T Completion of Investigation



DSAIDS Data as of 18 SEP 2020. 957 records were pulled from FY16 to FY20. 899 were reliable and utilized for this analysis.

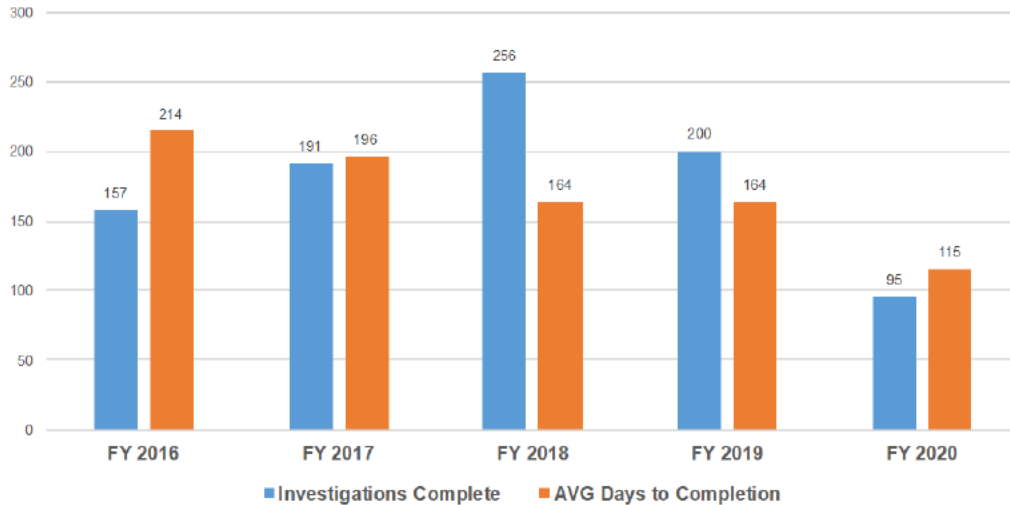
III Corps SHARP PM (b) (6)
As of 18 SEP 2020 1

Figure 19: 30, 60, 90, 120, G.T Completion of Investigation

The breakdown of these time lapses from report to completion and average days to completion of CID sexual assault or related sex crime investigations from 2016 to 2020 are set forth below, in Figure 20.



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DSAIDS Data as of 18 SEP 2020. 957 records were pulled from FY16 to FY20. 899 were reliable and utilized for this analysis.



Figure 20: Average Days Completion of Investigation

Of note, the time lapse for completion of a sexual harassment investigation was much lower than the time lapse for completion of a sexual assault investigation. Between 2016 and 2020, the average investigation time period was 20 days or less each year.<sup>132</sup> There are, however, statutory requirements for initiation of an investigation within 72 hours of a report, completion within 14 days of commencement, and production of a final report to the command within 20 days.<sup>133</sup> Also of note, 191 formal and informal reports of sexual harassment were lodged at Fort Hood between 2016 and 2020, for an average of thirty-eight (38) per year.<sup>134</sup> These cases are investigated by an officer appointed by the command and not by CID, and are admittedly less complex. It is reasonable to conclude, however, that statutory requirements for opening and completing an investigation positively impacts the timeliness of sexual harassment investigations.

Turning to the adjudication process once a case is referred to the command for action, Fort Hood timeframes are in line with other divisional posts. According to information contained in the Army Courts Martial Information System (ACMIS), from preferal of charges by a commander to trial

<sup>132</sup> Data provided by III Corps SHARP Program Office utilizing Army Consolidated Records Schedule (ACRS) data as of August 31, 2020.

<sup>133</sup> See 10 U. S. C. § 1561.

<sup>134</sup> *Ibid.*

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termination, the average time at Fort Hood is 209 days. However, the time between referral to court-martial and trial termination is statistically significantly shorter at Fort Hood, averaging 109 days (median 92) as compared to the divisional post average of 121 days (median 103).<sup>135</sup>

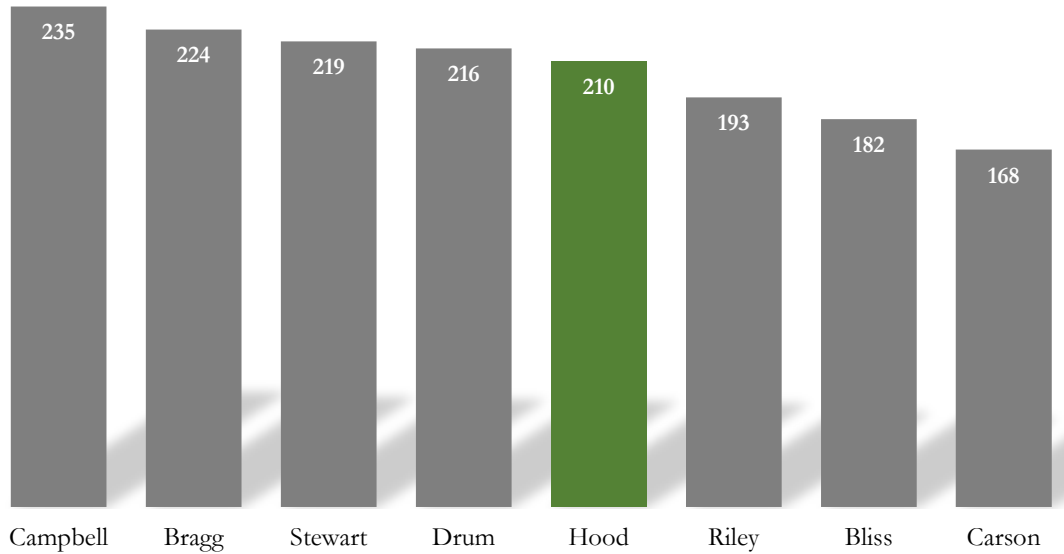


Figure 21: Average Days Between Referral of Charges and Trial Termination

<sup>135</sup> Analysis of courts-martials relating to sex crimes that terminated between the beginning of fiscal year 2015 and 2019. Data source: Courts-Martial trials recorded in the Army Courts Martial Information System (ACMIS).





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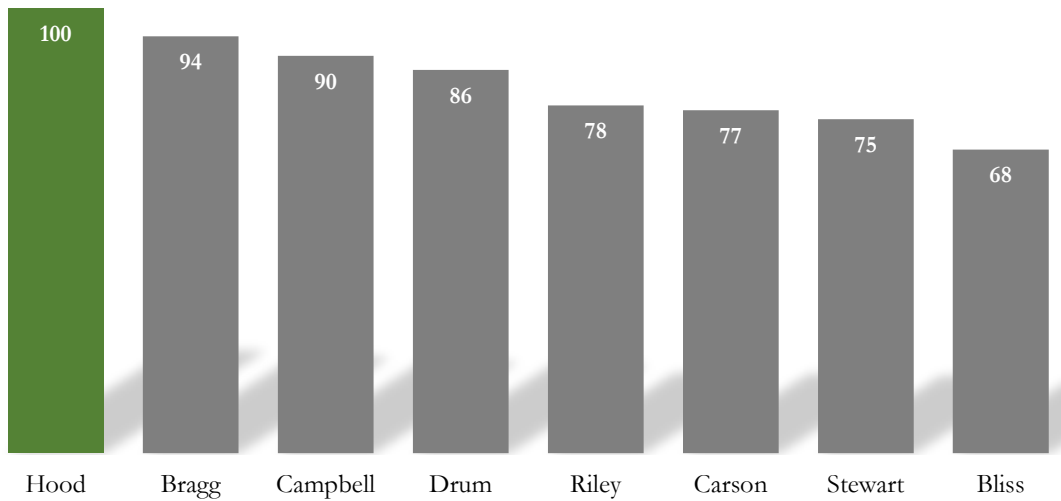


Figure 22: Average Days Between Preferral of Charges and Referral to Court-Martial

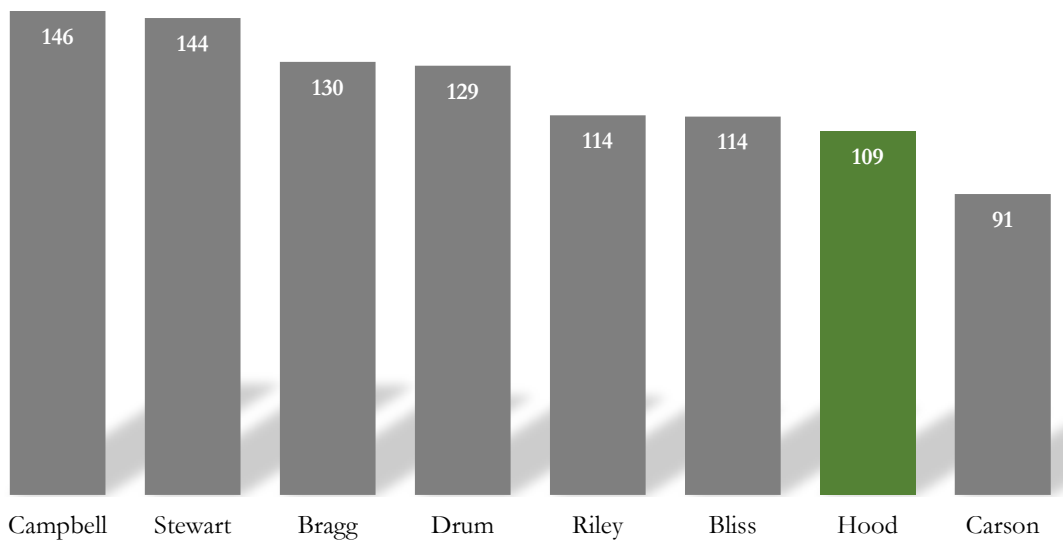


Figure 23: Average Days Between Referral to Court Martial and Trial Termination

The data available supports the widely held perception that sexual assault and related sex crime cases move very slowly after they are reported, as further discussed in the Finding 4. According to knowledgeable outside contacts involved in the criminal justice system as well as insiders within CID, the CID, the OSJA and the SHARP III Corps Program Office are not adequately staffed for the size of their caseload; and, they experience constant turnover. These circumstances were cited as fueling



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delays throughout the process. It was especially disturbing to the FHIRC members that the time lapses were not routinely tracked by CID, the OSJA, or the SHARP Program Manager. The FHIRC could not identify person, position or entity who routinely tracked the entire lifecycle of any SHARP violations to monitor and address any preventable delays.

As one SHARP official pointed out, a program that is not inspected or afforded attention by leadership will deteriorate. The time interval at each separate stage of the process must be monitored and documented to identify and relieve bottlenecks. The tracking mechanism should also include a reporting requirement to raise leadership awareness to trends or problems that demand their attention. The FHIRC determined this lack of attention to tracking important time frames for completion of investigations and adjudications to be a serious deficiency that contributed to the lack of confidence in the response to sexual assault incidents.

## **5.2. Victims Of Sexual Assault Reported They Were Not Kept Informed.**

The Department of Defense instructs the services that a foundational standard for a victim assistance program includes “manag[ing] the expectations of military justice or administrative proceedings.”<sup>136</sup> Multiple victims of sexual assault reported they were not kept informed of the ultimate disposition of their complaint, or even if any action had been taken against the accused Soldier. A closer review of the process reveals this should not be the case. Criminal proceedings are a matter of public record, and there is no impediment to informing the victim of the final judgement. Furthermore, Judge Advocate General Policy Memorandum 17-08, dated 1 December 2017, requires that the prosecution provide certain information to the victim and special victim’s counsel if applicable, without requiring that the victim first submit a request. This includes information about the preferral of charges, the preliminary hearing, pre-trial confinement, docketing and scheduling orders, and pleadings implicating victim’s interests. Finally, the National Defense Authorization Act (NDAA) of 2020 contains a provision that requires victims of sexual assault “receive notification of each significant event in the military justice process that relates to the investigation, prosecution, and confinement of such other member [the accused] for such assault.”

The difficulty in providing information to victims occurs when a determination is made not to proceed via the military justice route, but to instead initiate an administrative action against the accused Soldier. Administrative actions are not made public and the Soldier retains rights under the Privacy Act before information pertaining to such records can be released. Currently, when the Army receives FOIA requests for this kind of information the request is routinely denied under both FOIA and the Privacy Act, because administrative actions are protected personnel records. The standard response has been to simply state that “appropriate administrative action was taken.”

It would appear Congress sought to address this problem through section 549 of the NDAA of 2020, which provides that the commander “shall periodically notify the victim of the status of a final determination on further action on such case, whether non-judicial punishment under section

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<sup>136</sup> DoD Instruction 6400.07, 3b(3), November 25, 2013; Incorporating Change 1, April 3, 2017.



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815 of such title (article 15 of the Uniform Code of Military Justice), *other administrative action*, or no further action. Such notifications shall continue not less frequently than monthly until such final determination” (emphasis added). This provision, however, presents some ambiguity and can be interpreted to prevent disclosure of the ultimate disposition or characterization of service. For example, although the victim is to be notified of “the status of a final determination,” the word “status” can be interpreted strictly to mean whether action has been taken, which would preclude disclosure of the final determination itself, and/or other related information, such as the characterization of service. Additionally, section 549 does not contain the language “notwithstanding 5 U.S.C. § 552a,” which would serve to clearly override operation of the Privacy Act. Because this leaves the provision subject to interpretation, and because the provision requires implementation “under regulations prescribed by the Secretary of Defense,” the services will need to look to DoD for clarification.

Fort Hood should maintain a robust cadre of well-trained SVCs who will ensure victims are properly informed. Victims who decline representation will not benefit from the skilled assistance of an SVC and will be less likely to remain informed. With or without an assigned SVC, Commanders must be sure to execute their responsibility to provide information to victims of sexual assault, as outlined and required by DoDI 6495.02 and AR 600-20.

Fort Hood would benefit from considering ways to provide greater transparency to the Fort Hood community on the adjudication of sexual assault, as well as other misconduct, at regular intervals. Take steps to increase transparency and demonstrate the command’s focused attention, concern, and action would help shift the permissive environment found on Fort Hood from one of passive acceptance to accountability.

### **5.3. There Was Widespread Lack Of Awareness Of The Right To A Special Victim Counsel.**

A review of DEOCS data revealed that when Soldiers were asked whether they were aware of the SVC and the role they play, approximately 35% of Fort Hood respondents answered the question incorrectly in the 2017 to 2019 timeframe. Of the Soldiers responding, E1 to E3 respondents answered incorrectly about 50% of the time. With a majority of sexual assault victims falling into the junior enlisted ranks, it is important to better educate Soldiers on Fort Hood about the availability of SVCs. This knowledge will help bolster confidence in the SHARP Program.<sup>137</sup>

“SVCs ensure that their clients know that, regardless of the outcome of the judicial or administrative process, the military justice and administrative system supports them and gives them the opportunity to be heard. It is vital that the military justice process proceed in a fair and just manner, protecting both the rights of the victim and the

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<sup>137</sup> Analysis of all surveys completed by Soldiers assigned to units at CONUS installations between October 2017 and March 2019. Data Source: Defense Equal Opportunity Management Institute Organizational Climate Survey (DEOCS).

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Constitutional rights of the accused. Communications between SVCs and victims are confidential and privileged due to the attorney-client relationship established. This gives victims not only a sense of comfort, but also assists in building rapport between the SVC and victim.<sup>138</sup>

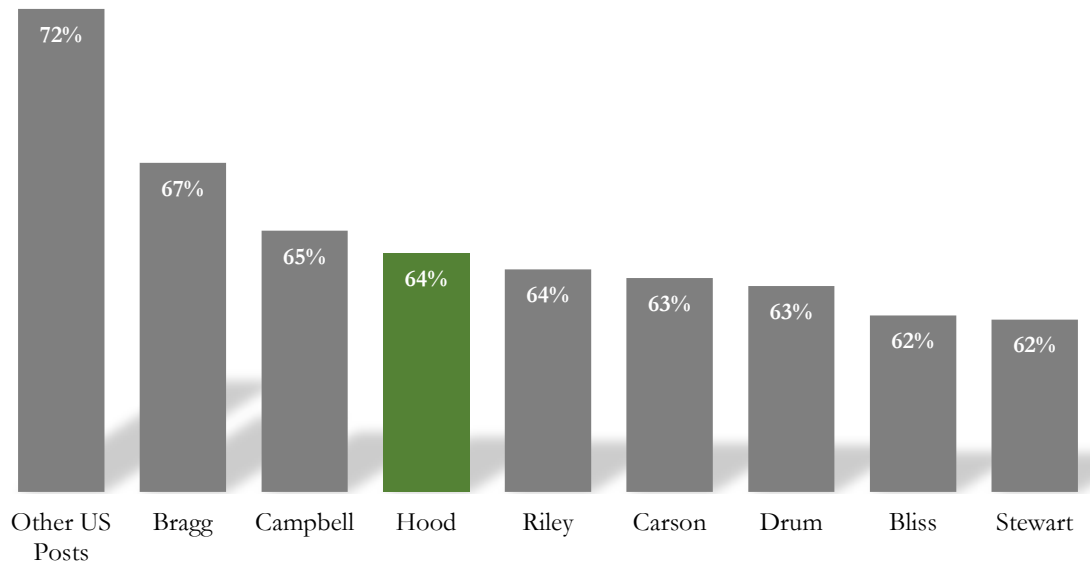


Figure 24: Percent of All Respondents Who Knew of Right to Special Victim Counsel

<sup>138</sup> Army Special Victims' Counsel, <https://www.jagcnet.army.mil/Sites/SVCounsel.nsf/home.xsp>, Posted: 03/27/2017 09:34:11 AM EDT.



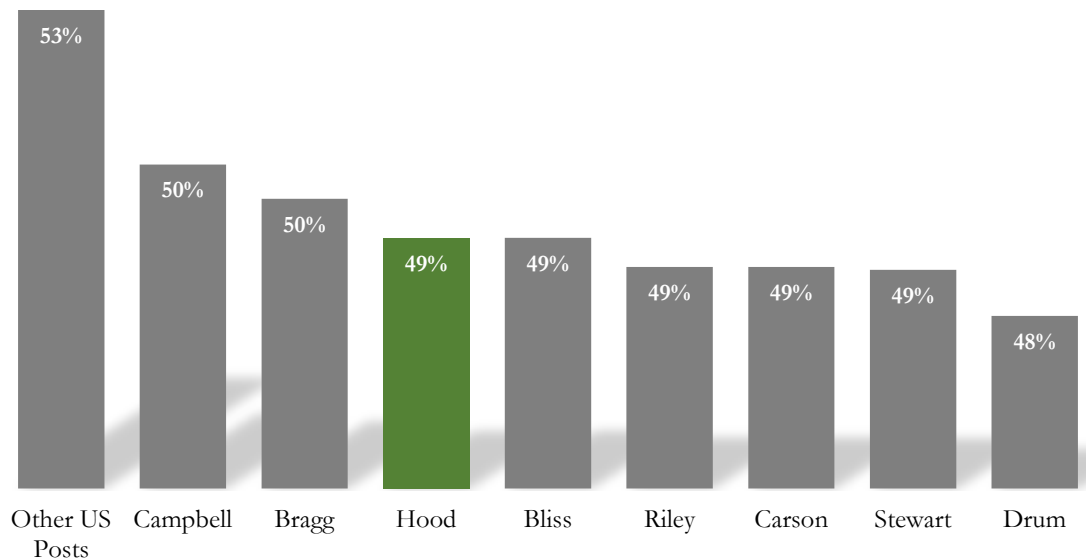


Figure 25: Percent of E1 to E3 Respondents Who Knew of Right to Special Victim Counsel

#### 5.4. Soldiers Lacked Confidence In Military Protective Orders

During individual interview sessions, Soldiers did not express a great deal of confidence in Military Protective Orders (MPOs), describing multiple occasions where protective order “did not work,” either for themselves or a fellow Soldier. MPOs are lawful orders issued by commanders and are formalized on DD Form 2873. A MPO is described as “[a] written lawful order issued by a commander that orders a Soldier to avoid contact with those persons identified in the order. MPOs may be used to facilitate a ‘cooling-off’ period following domestic violence and sexual assault incidents, to include incidents involving children.”<sup>139</sup> It is a tool that the commander uses to keep the parties safely distanced from each other, and the parameters of the order will be contained on the form.

The most frequent complaint was that the accused Soldier was moved to a sister unit in the same brigade footprint and could be seen walking across the parking lot or in another area near the victim’s workplace. The issuance of an MPO does not necessarily mean that the victim will never see the accused again. It is important for leaders to manage a victim’s expectations regarding the MPO and ensure the victim understands its limitations and all options available to a victim to distance themselves from the accused, included the possibility of an expedited transfer for the Victim. If a victim finds they frequently see the accused after the issuance of an MPO and it is making the victim feel unsafe, the victim or an advocate for the victim should discuss this with the commander, who can review available options for remedying the situation while respecting both the rights of the accused and the victims.

<sup>139</sup> See 32 CFR § 635.19.



## 5.5. Soldiers Feared That The SHARP Program Might Incentivize False Reporting.

Soldiers also raised concerns for the subject of a SHARP complaint, fearing that an innocent Soldier may be falsely accused. Soldiers, male and female, frequently shared their belief that the SHARP Program can be weaponized to discredit another Soldier, giving examples such as the possibility of filing a false SHARP report against an overbearing superior or a peer with whom a Soldier has quarreled. The subject is typically moved to a different unit and flagged, pending investigation of the underlying complaint. A “flag” is placed in the personnel file of the accused Soldier in order to preclude any favorable personnel actions, including schooling and PCS moves, while the appropriate body investigates the complaint. Essentially, a Soldier’s career is placed on hold and a stigma will likely attach throughout the lengthy adjudication process. If the Soldier is later absolved of the charges, regaining that lost career time may be difficult. Soldiers of all ranks, including some Judge Advocates, identify the ability to obtain an expedited transfer as an enticing incentive that may cause a disgruntled Soldier to fabricate a complaint. However, there are safeguards in place. A Soldier’s O-6 level commander must first conclude that “there are reasonable grounds to believe that an offense constituting sexual assault has been committed against the person requesting the transfer or reassignment,” and the Soldier is not entitled to dictate the location to which they will be transferred or reassigned.<sup>140</sup> This phenomenon appears to be more mythical than factual.

Additional evidence that this fear is unfounded lies in a review of 647 individual interviews and surveying 1,817 Soldiers using a group interview format, where just two Soldiers claimed to have been on the receiving end of a false SHARP report, and neither career was destroyed. FHIRC is not aware of a single substantiated report from a Soldier on the receiving end of an invented SHARP report. Still, this perception was not uncommon and has a potent and degrading influence on the confidence that Soldiers place in the SHARP Program. The fear that women lie about sexual assault is not unique to the military and certainly not to Fort Hood. However, Soldiers should be made aware that all credible studies show that false reporting of sexual assault is rare,<sup>141</sup> and that no realistic incentives exist for Soldiers to file a false report. Commanders are not required to grant an expedited request unless credible evidence exists to believe a sexual assault has occurred, a victim cannot dictate the location for an expedited reassignment, and lying to cover up an offense does not work as victims can be prosecuted for collateral offenses when appropriate.

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<sup>140</sup> AR 600-20, Appendix I.

<sup>141</sup> In the “False Reporting Overview,” provided by the National Sexual Violence Resource Center, the Center explains that a review of research finds that the prevalence of false reporting is between 2 percent and 10 percent. <https://www.nsvrc.org/publications/false-reporting-overview> (2012). The following studies support these findings: a multi-site study of eight U.S. communities including 2,059 cases of sexual assault found a 7.1 percent rate of false reports (Lonsway, Archambault, & Lisak, 2009); a study of 136 sexual assault cases in Boston from 1998-2007 found a 5.9 percent rate of false reports (Lisak et al., 2010); using qualitative and quantitative analysis, researchers studied 812 reports of sexual assault from 2000-2003 and found a 2.1 percent rate of false reports (Heenan & Murray 2006). Furthermore, research shows that rates of false reporting are frequently inflated, in part because of inconsistent definitions and protocols, or a weak understanding of sexual assault.

## 6. FINDING #6: FORT HOOD PUBLIC RELATIONS & INCIDENT MANAGEMENT HAVE DEFICIENCIES.

The ability of the command at Fort Hood to manage public relations has a direct impact on the installation's command climate. Recent negative media attention caused Soldiers to question their environment and fear their surroundings. At Fort Hood, over 50% of men and nearly two-thirds of women are concerned about what goes on after duty hours.<sup>142</sup> As stories spun out of control regarding Fort Hood's alleged pervasive criminal activity, Soldiers lost confidence in the ability of the Army to guard their safety. While the death of any Soldier is tragic, and the murder of SPC Guillén was horrific, known truths about each incident were quickly overshadowed by gross speculation, false narratives, and viral internet story telling.

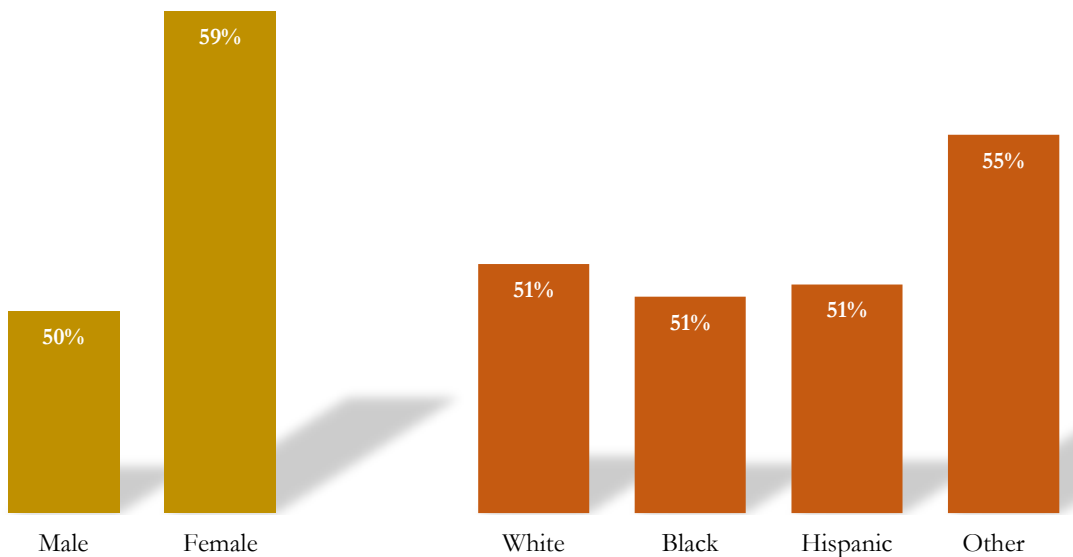


Figure 26: Percent Concerned About What Goes On After Duty Hours On or Near Fort Hood (By Gender And Race)

<sup>142</sup> See Figure 26. Graphs reflect percentage that answer yes and/or agree with statement (lower is better). Women agree more than men with this statement by 9 percentage points.



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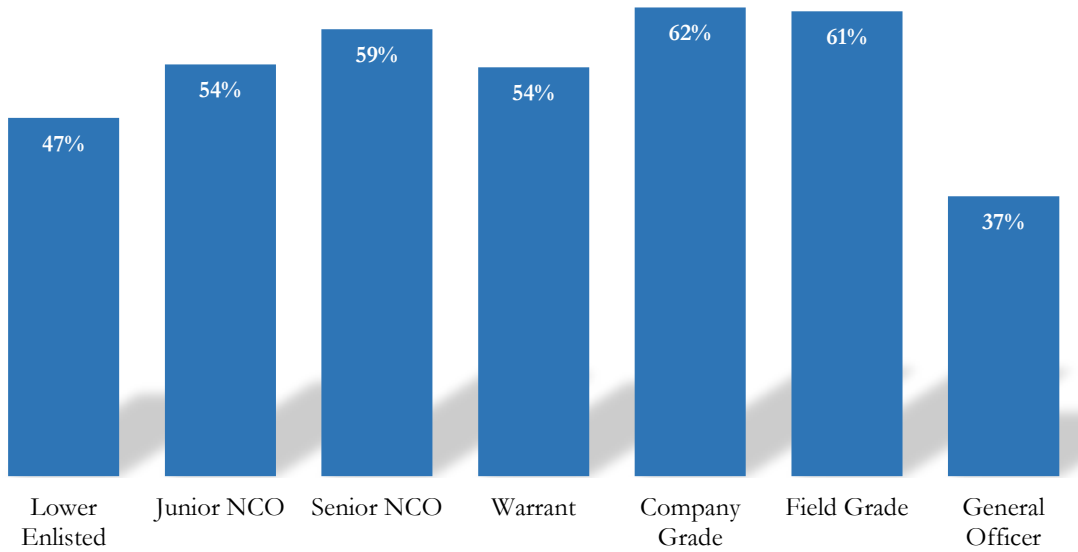


Figure 27: Percent Concerned About What Goes On After Duty Hours On or Near Fort Hood (by rank)

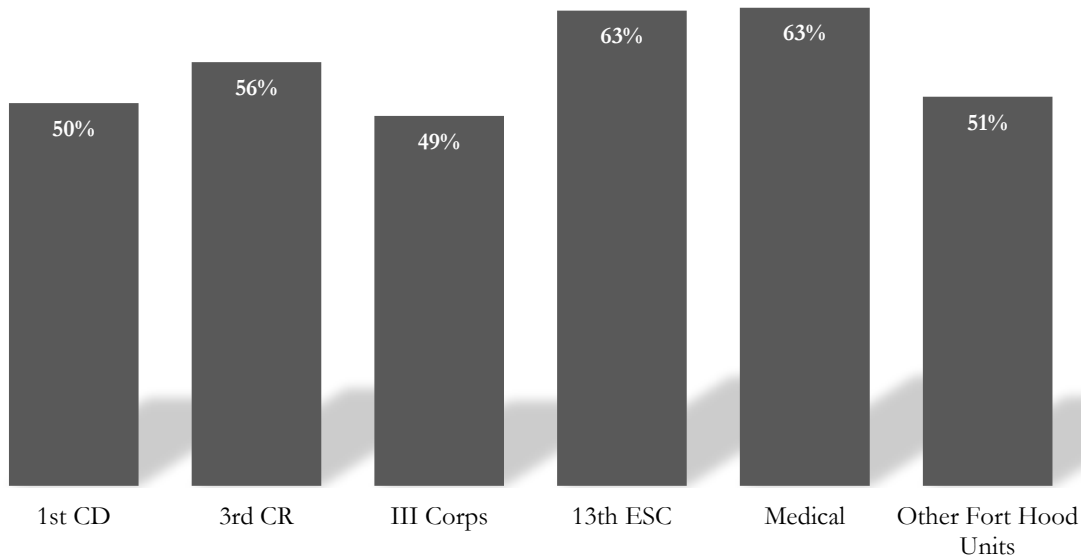


Figure 28: Percent Concerned About What Goes On After Duty Hours On or Near Fort Hood (by unit)

Army Public Affairs Officers are expected to “leverage communication techniques to effectively tell the Army’s story to the right audience using the right tools, doing so as rapidly as possible.”<sup>143</sup> In 2020 the III Corps and U. S. Army Garrison Fort Hood Public Affairs Office (Fort

<sup>143</sup> *The United States Army*, Army Public Affairs, accessed 23 Oct. 2020, [www.army.mil/publicaffairs/](http://www.army.mil/publicaffairs/).





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Hood PAO) was not adequately manned to deliver on this mission. Several key members of the office, including the senior public affairs officer, were forward deployed with the Corps headquarters, leaving behind an office sorely understaffed to handle a crisis. Of the six uniformed personnel assigned to the Fort Hood PAO, three were deployed, and in May the most senior member, the Deputy PAO, began retirement processing. The office received no relief until early July, with the redeployment of the PAO Sergeant Major.

In the critical months of May and June, the severely undermanned Fort Hood PAO faced a public affairs crisis, beginning with the disappearance of 3CR Soldier SPC Vanessa Guillén and the unanticipated public uproar and media frenzy that ensued. In a few short months, the installation, its leadership, and the Army itself came under intense public scrutiny. From the time of SPC Guillén's disappearance on April 22, 2020, through the remainder of the Spring and Summer months, the Fort Hood PAO found itself unable to adequately inform the public and pragmatically inform public perception. The facts became largely irrelevant as a groundswell of support for false theories and poorly informed accusations took root through social media outlets.

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### Sample Comment #1:<sup>144</sup>

Normally I would not comment on posts like this. However, being that this is the III Corps and Fort Hood page, I figured those in charge of posts and podcast production might have a bit more tact when addressing such a serious, and sensitive matter. I'm extremely disappointed by this post, and the lost potential of what could have been a proper statement to the public.

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### Sample Comment #2:<sup>145</sup>

Do you guys seek outside perspective before you make posts?

Because this was made in poor taste.

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To frustrate public relations further, beyond PAO activities, the Committee observed a pervasive absence of a human touch in the command's interactions with the family of SPC Guillén and with the general public. Simply put, many of the command's actions were clumsy at best and at times insensitive. As an example, SPC Guillén's command contacted the Guillén family after their arrival in the Fort Hood area and tried to arrange for the family to accept a gift basket with items such as a supermarket gift card and toys for their youngest child. At this point, offers of charity were unwelcome. The family understandably wanted nothing more than to have all efforts focused on locating their missing loved one. Although the gift basket was coordinated by the family readiness group with only the best of intentions and out of sincere compassion, the offer was not framed in that

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<sup>144</sup> Comment found on the Fort Hood and III Corps Facebook page, July 9, 2020, in response to Season 1, Episode 29 "Fort Hood's Great Big Podcast," posted to the Facebook page.

<sup>145</sup> Comment found on the Fort Hood and III Corps Facebook page, July 9, 2020, in response to Season 1, Episode 29 "Fort Hood's Great Big Podcast," posted to the Facebook page.

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vein, and instead looked more like complete insensitivity to the family’s immediate needs – they were desperate to find their daughter/sister. This outreach only served to brew suspicion and mistrust.

Public relations also suffered because of limited local connectivity. Upon visiting Fort Hood, the FHIRC learned that the installation’s connection to the local community is largely through the Chamber of Commerce and elected officials, with no enduring connection to local cultural or civil rights organizations. Indeed, the civil rights groups we met with seemed to yearn for a more meaningful connection to the Fort Hood community and expressed a desire to work in harmony with the installation’s leadership. One prominent organization pointed out with considerable emotion the lack of a “*seat at the table*” with anyone at the Post at Fort Hood. This lack of community connection contributed to the command’s overall lack of relatability before the general public. In late Spring when the public began vocalizing its mistrust of Fort Hood and Army leadership, the installation’s deepest connections outside of its gates rested almost entirely with political and business leaders. With the public already expressing distrust for military authority, civilian authorities would fare no better. Hinging community relations solely on engagement with political and business representatives fosters relationships that risk being more transactional and exploitive than interactive and relational.

Perhaps the most glaring example of blundered public relations that the FHIRC uncovered is the July 2, 2020 press conference held on Fort Hood to inform the media and the public that human remains had been located. The Deputy Commanding General and a CID Special Agent provided the briefing and awkwardly took turns answering questions, with each rushing to leave the podium as soon as they completed their response, causing viewers to question their sincerity. Additionally, statements like “I can’t release that information,” only served to frustrate media attendees who openly displayed their dismay. It also unfortunately fueled misplaced suspicion of a cover up within the general public.

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### Sample Comment #1:<sup>146</sup>

This press release was horrible to watch! Everyone was stumbling all over their words. There was zero lack of sincerity in this press release. They couldn’t even look the media in the eyes while they addressed them. I guess looking at that piece of paper was better to look at. Was I the only one who noticed how many times they flubbed her rank after they posted a headline that she had been posthumously promoted to the rank of Specialist? Talk about damage control for the post going south. They literally just raised more questions than answers especially with the dates. I clearly remember photos being posted in mid-June of Soldiers searching for her, not April 23.

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<sup>146</sup> Comment responding to the July 2, 2020 press conference posted to the Fort Hood and III Corps Facebook page.

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## Sample Comment #2:<sup>147</sup>

I can't watch this. I don't believe any of you are being honest or really care about the soldier Vanessa Guillén. I feel shame, disappointment and disgust. Her life mattered. SHE mattered.

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Finally, Soldiers interviewed by the Committee frequently indicated they did not feel they were kept informed of crime related events and Soldier deaths on Fort Hood. Fort Hood Soldiers and civilians were just as adversely affected by the media blitz as the local community around Fort Hood and openly contributed to the negativity on social media. The entire Fort Hood and Killeen community was on edge, but we found that Soldiers stationed there were no better informed than the community outside of the gates. As a direct result, during one on one interviews many Soldiers stated they do not feel safe on Fort Hood because of "recent events," or some would say "all of the soldiers turning up dead." Much of the information about these events (Soldier deaths and suicides) Soldiers gathered from news reports that often were incomplete and contained inaccurate supposition that went uncorrected.

## **7. FINDING #7: THERE WERE NO ESTABLISHED PROCEDURES FOR FIRST LINE SUPERVISORS IN 'FAILURE TO REPORT' SITUATIONS THAT DEFINE APPROPRIATE ACTIONS IN THE CRITICAL FIRST 24 HOURS.**

Prior to the murder of SPC Guillén and the arrival of the FHIRC, Fort Hood's protocols and procedures were inadequate to account for, to safeguard and to determine the whereabouts of missing Soldiers in the hours immediately after they went missing. What happened when a Soldier was first identified, or should have been first identified, as not present for duty under irregular, unusual, uncharacteristic, or suspicious circumstances was in the hands of the immediate NCO responsible for that Soldier and that Soldier's whereabouts. The NCO had total discretion in handling the matter immediately after learning a Soldier failed to report for duty, leading to inconsistent *ad hoc* responses across the various units. It was apparent to the FHIRC that NCOs had little guidance on how to handle—or even what facts should be considered—"suspicious circumstances."

Although the FHIRC conducted file reviews of the CID death investigations, there was scant information in the files as to the initial action of deceased Soldiers' units when/if the Soldier failed to report.<sup>148</sup> Some of the cases involved scenarios where the death of the Soldier was known immediately, and others involved circumstances where the Soldiers were missing for an extended

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<sup>147</sup> Comment responding to the July 2, 2020 press conference posted to the Fort Hood and III Corps Facebook page.

<sup>148</sup> Despite data showing that during the review period of 2018-- 2020 there were over 50 soldier suicides and 11 homicides, the Fort Hood CID Commander advised that the Fort Hood CID Detachment has only worked two missing soldier cases in the last five years. The Fort Hood CID investigates missing soldier cases when they are reported by the Military Police, a unit, or an interested party, such as a family member or friend.

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period of time. Unfortunately, especially in cases handled in coordination with local law enforcement, there was often insufficient information in the files to make a determination. In one case, a Soldier was reported as AWOL on August 30, 2016. Pursuant to Army regulations, this Soldier was declared a deserter on September 27, 2016. On October 6, 2016, this Soldier was found dead at his residence. Apparently, his unit NCO(s) knew so little about their Soldier that in looking for him they only checked an old address in Copperas Cove. (b) (6)

The FHIRC identified several examples where day-to-day Soldier accountability was loosely enforced, leading to an initial presumption that a Soldier who fails to report is AWOL. In other instances, there was little to no effort expended at the unit level to even try to identify whether a missing Soldier's absence was involuntary, or the circumstances suspicious. The status of AWOL often became a default designation without fact gathering or any documented due diligence.

Parallel to unit Soldier accountability deficiencies, the FHIRC determined that the Military Police (MPs) play an important role in failure to report/missing Soldier cases reported to them. They are the first responders and have the capability to enter the missing Soldier into law enforcement databases, put out "be on the look out" (BOLO) notices, conduct mobile phone pings under an emergency order and conduct other initial investigation. The Committee found that the Fort Hood MPs and Directorate of Emergency Services (DES) follow the practice that a Soldier must be missing over 24 hours before they take such actions. Incidentally, this occurred in the Guillén case where, despite immediate indications that her absence was suspicious, the MPs initially refused to begin taking these types of investigative actions.<sup>149</sup>

At Fort Hood, how an NCO initially dealt with situations in the first hours of becoming aware of a missing Soldier was totally dependent on the NCO's knowledge of that Soldier and how up-to-date the NCO's "*Leader Book*" was concerning the missing Soldier's vital information such as address/contacts as well as contacts for family and friends.<sup>150</sup> Also important were the NCO's knowledge of his/her Soldier's off duty pursuits as well as the Soldier's past and current reliability, personal and family situation, general accountability, mental health, and any at risk behavior.

Without any firm, formal, objective guidance from the command, NCOs were left to their own subjective evaluations and processes. The NCO would need to evaluate the circumstances for indicators of involuntary absence and determine what course of action to take, if any, in those first few hours, which could be crucial in the case of a Soldier at risk of harm from themselves or others. Given the high incidence of sexual assaults and attempts, suicides and attempts, AWOLs and desertions, and the numbers of Soldiers reporting mental health issues, the absence of guidance is a lapse in leadership at Fort Hood that the FHIRC identified.

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<sup>149</sup> Some of SPC Guillén's personal belongings, including her military ID/CAC, her car keys and other items, were found in an arms room where she had been working, and her car was still in the barracks parking lot. This was known by SPC Guillén's first line NCO and was relayed to the MPs.

<sup>150</sup> Leader books should contain vital information about each soldier an NCO supervises.

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As a marker, the regulations, protocols and procedures in place prior to the death of SPC Guillén clearly focused on determining whether a Soldier was present for duty, and if not, whether they were properly and timely identified as being Duty Status Whereabouts Unknown (DUSTWUN), Absent Without Leave (AWOL), or a Deserter, and to ensure that the proper protocols and procedures were timely initiated and followed through for each such classification. The guidelines in place did not appear to address the steps to take and the criteria to consider in making an initial determination whether the circumstances might indicate the missing Soldier was at risk of harm to themselves or others.

During the individual and group interviews involving over 2500 Soldiers, and the specialized interviews of Fort Hood's top leaders, select unit commanders, CID, DES and civilian law enforcement, it was evident that there was considerable confusion at the NCO levels as to the actions to undertake when a Soldier fails to report at the appropriate times. Several disturbing trends were identified. First there was almost universal agreement that the NCOs did not know their enlisted Soldiers well enough to identify whether they were truly missing or AWOL. Most NCOs when prompted at group interview sessions could not produce a "leader book" which, when kept up to date is an effective tool for the NCO to collect and maintain detailed information about the Soldiers under their supervision.

Second, the interviews revealed that the methods of conducting daily accountability formations varied widely, especially during the COVID lockdown phases. Some were allowed to text their check-ins from mobile devices, some required some sort of mobile device video application check-in and some NCOs required in-person check-ins. The Fort Hood CID advised the FHIRC Chairman that during one missing person investigation an NCO advised "50% accountability is good enough."

It was also determined that the Military Police had adopted a policy of withholding the use of very effective tools to locate missing persons until 24 hours passed despite the circumstances. In the case of SPC Guillén, the Military Police (b) (7)(E) on April 22, 2020 at 0600, approximately 10 hours after she failed to report under suspicious circumstances.<sup>151</sup> They concluded that she was in no known danger, despite the facts that: (a) she left her car keys, barracks room key, CAC card and wallet in the arms room where she had been working; (b) she oddly never returned to retrieve these items; and, (c) her car was still in the barracks lot. No BOLO was disseminated to nearby law enforcement agencies, and her name was not entered into NCIC until 2342 hours on April 24, 2020, almost 54 hours after she failed to report on April 22, 2020 at 1800. It is clear that none of these steps would have saved the life of SPC Guillén, but such steps may be the difference between life and death in future cases.

During the Committee's on-site visit FHIRC Members asked pointed questions of various leaders concerning this topic. Before departing Fort Hood, the FHIRC Chairman was provided a *Missing Persons Protocol/Checklist* that addresses the absence of such protocols and procedures. The

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<sup>151</sup> (b) (7)(E)

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Chairman was advised that this protocol was going to be adopted across the installation. These are much needed protocols that establish mandatory actions and a checklist in the hours immediately following a Soldier failing to report. In issuing these protocols, the Command signaled its intention to change the mindset of those involved in reporting and investigating missing persons at Fort Hood. This is clear from the very first sentence of the Checklist, which states:

*“Missing person reports are extremely serious and should be handled as a homicide investigation, until evidence clearly proves otherwise.”*

The checklist also calls for expedited entry of a missing person’s information into the National Crime Information Center (NCIC), within two hours, and the National Missing and Unidentified Persons System (NamUs), within 24 hours.<sup>152</sup> In addition, the proposed *Absent Service Member Battle Drill* lists a number of specific immediate actions to be taken, to be followed up if necessary, with a number of other elevated, specific actions to be taken in the second hour, to include specific actions by MPs, DES, CID and Retention, insuring each one of these agencies is involved at the outset, when time is critical. The Battle Drill also emphasizes the assessment of life-threatening indicators. At the expiration of this initial period of investigation, a decision point is reached on whether to activate a Crisis Action Team.

The necessity and advisability of the implementation of these new protocols has already been proven. During the time the Panel was at Fort Hood, these protocols and prompt action by Fort Hood personnel located a missing Soldier at risk for self-harm.

If these protocols had been in place at Fort Hood during the review period they may have been sufficient to save Soldiers from harm, as demonstrated by a suicide that was prevented during the on-site review.<sup>153</sup> At minimum an immediate response at the unit level and first responder level may very well have brought a speedier resolution and mitigated the painful impacts in certain missing Soldier cases. Additionally, action has been taken to conduct a “training stand down” for a period of time to require the officers and NCOs to get to know their Soldiers and rebuild lost trust. Getting back to the basics of taking care of Soldiers is important for many reasons, not the least of which is recognizing when an absent Soldier may be in trouble.

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<sup>152</sup> NCIC and NaMus are law enforcement data clearing houses that contain missing persons, arrest warrants for fugitives, stolen property, criminal histories and other law enforcement records.

<sup>153</sup> This event was described during group and individual interviews.

## **8. FINDING #8: THE CRIMINAL ENVIRONMENT WITHIN SURROUNDING CITIES AND COUNTIES IS COMMENSURATE WITH OR LOWER THAN SIMILAR SIZED AREAS; HOWEVER, THERE ARE UNADDRESSED CRIME PROBLEMS ON FORT HOOD, BECAUSE THE INSTALLATION IS IN A FULLY REACTIVE POSTURE.**

As part of its Review of the command climate the FHIRC examined whether the perception that there are significant crime problems facing Soldiers at Fort Hood on and off-post was a reality. The impression created by the intense media coverage focused on Fort Hood during and after the Vanessa Guillén case, was that crime is out of control at Fort Hood and the surrounding communities.

This Review determined that there are indeed unaddressed crime issues at Fort Hood, which require proactive analysis and command level actions to mitigate. Similar to Finding #2 above regarding the clearly identified high-risk of sexual assault, the FHIRC considered the high crime rates on Fort Hood to be a risk to health and safety that leadership knew or should have known existed.

The FHIRC also found, however, that the crime rates of surrounding cities and counties of Fort Hood are actually low compared to cities outside other major US Army installations and comparable sized cities and towns in Texas and elsewhere in the US.<sup>154</sup>

Media coverage has highlighted instances of missing Soldiers, Soldier related homicides, and Soldiers arrested in prostitution, drugs, and sex crimes, all involving a connection to Fort Hood. The FHIRC made a concerted effort to separate fact from fiction. Where crime issues were identified the FHIRC attempted to pinpoint the drivers of these crime dynamics.

There is also a violent sex crime rate at Fort Hood that notably exceeded the average Soldier offender rate for Violent Sex Crimes for FORSCOM by 30.6% and for the Army by 75.8% for CYs 2015 – 2018.<sup>155</sup>

This Finding was informed by a number of information sources and relied heavily on data provided by the CID Command Headquarters Criminal Intelligence Operations Center (CIOC) at Quantico, Virginia, which provided valuable assistance to the FHIRC.<sup>156</sup> In addition, several hundred relevant documents were reviewed; specialized interviews were conducted with key Fort Hood based command level individuals within the Garrison Command, CID, OTJA, the 89<sup>th</sup> MP Group, the Fort Hood Department of Emergency Services (DES) and III Corps leadership; a full slate of interviews were conducted with over 25 state, local and federal law enforcement officers, Special Agents, executives and prosecutors that were identified as stakeholders in crime issues relating to Fort Hood

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<sup>154</sup> Analysis conducted using all data is from 2018, the most recent year available. Data Source: FBI Uniform Crime Reporting (UCR) Program Known Offenses.

<sup>155</sup> Fort Hood CY Crime Comparison – Soldier Offender Rates provided by CIOC.

<sup>156</sup> The CID Command detailed a Supervisory Analyst to support the FHIRC who accessed relevant data bases, performed analysis and coordinated with CIOC resources at Quantico, Virginia.

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and Soldiers assigned to the post; and, analysis of ALERTS database undertaken to further inform the FHIRC on this topic.

## 8.1. Crime Rate Comparison: Killeen, Texas vs. Other Cities Adjacent To Army Posts.

To assess the crime environment off-post the Committee looked at Uniform Crime Reports (UCR) data and CIOC data which compared the FBI UCR data for crime rates at Killeen, Texas, which is adjacent to Fort Hood, to the crime rates for cities near other Major Army Posts for 2018.

The results were surprising. Of the eight cities examined, Killeen was at the bottom for most categories (7<sup>th</sup> for Aggravated Assault, 6<sup>th</sup> for Violent Crime and Property Crime, 5<sup>th</sup> for Murder and Non-Negligent Manslaughter, 4<sup>th</sup> for Robbery) except Rape, in which Killeen was 3<sup>rd</sup>. When Fort Hood (*on base only*) and Killeen, Texas were compared to other similar sized cities in Texas Fort Hood had the lowest rate of crime per 100,000 for Violent Crime and the second to lowest rate for Rape. Killeen was 6<sup>th</sup> for Violent Crime and 4<sup>th</sup> for Rape.<sup>157</sup> Military Posts are essentially large gated communities so a comparison of crime rates on an installation like Fort Hood to civilian jurisdictions is not useful.<sup>158</sup>

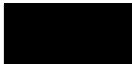
Jurisdiction	Population	Violent Crime	Murder & Non-Negligent Manslaughter	Rape	Robbery	Aggravated Assault	Property Crime
Killeen, TX	148,007	577	7	117	146	307	3,366
Rate per 100,000		389.8	4.7	79.1	98.6	207.4	2,274.2
El Paso, TX	688,442	2,554	24	405	376	1,750	10,391
Rate per 100,000		370.98	3.5	58.8	54.6	254.2	1,509.4
Fayetteville, NC	210,117	1,549	19	79	228	1,223	6,742
Rate per 100,000		737.2	9.0	37.6	108.5	582.1	3,208.7
Clarksville, TN	156,264	1,078	20	108	129	826	4,551
Rate per 100,000		689.9	12.8	69.1	82.6	528.6	2,912.4
Colorado Sp., CO	471,124	2,705	34	543	525	1,605	16,236
Rate per 100,000		574.2	7.2	115.3	111.4	340.7	3,446.2
Watertown, NY	25,525	175	0	65	19	91	911
Rate per 100,000		685.6	0	254.7	74.4	356.5	3,569.1
Junction City, KS	22,875	51	2	6	5	38	197
Rate per 100,000		223.0	8.7	26.2	21.9	166.1	861.2
Hinesville, GA	33,163	147	1	8	33	105	1,204
Rate per 100,000		443.3	3.0	24.1	99.5	316.6	3,630.6

Figure 29: FBI Uniform Crime Report Comparison of Selected Jurisdictions US Army Post<sup>159</sup>

<sup>157</sup> CIOC Chart: Fort Hood to Uniform Crime Report Comparison 2018.

<sup>158</sup> FBI Uniform Crime Reports provided by Texas Department of Public Safety

<sup>159</sup> Provided by CIOC.





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In fact, Killeen and other areas near Fort Hood are not uniquely high crime areas. See Figure 30 below.

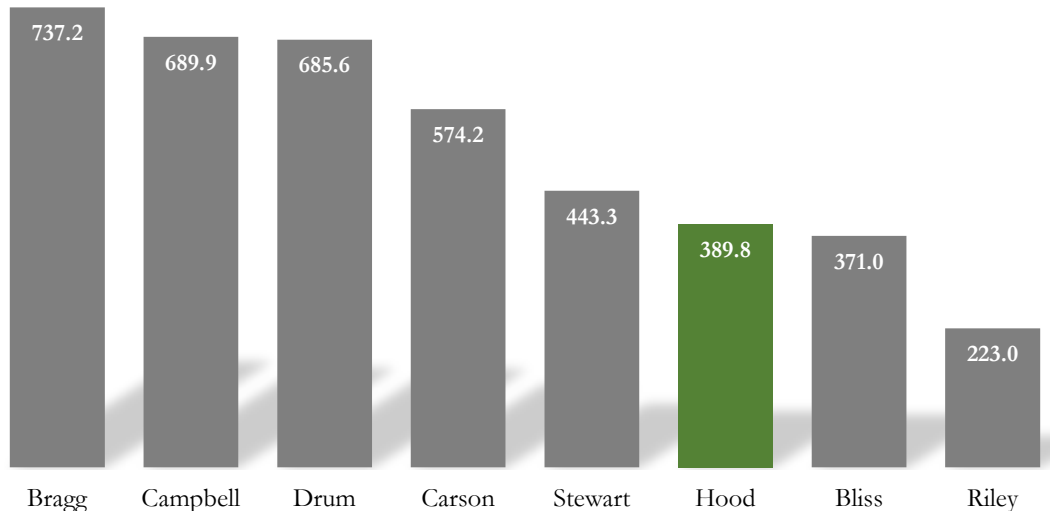


Figure 30: Violent Crime Rate per 100,000 Near Divisional Posts (2018)

There are however logical explanations for the perception that Soldiers were targeted as easy victims of crime or fell into bad elements in the cities surrounding the installation. These cities include large numbers of Fort Hood based Soldiers, Army Family Members as well as Soldier retirees and Soldiers involuntarily separated from the Army during their tenure at Fort Hood. The area is known for being military friendly and boasts a low cost of living attractive to active duty Soldiers and retirees. In fact, there are 19,868 active duty Soldiers living in the communities surrounding Fort Hood. In addition, there are 37, 021 Army Family Members living with them.

In Killeen, Texas, the most populous community which is located just outside two of the main gates to Fort Hood there are a combined 11,002 active duty Soldiers and 20,501 Family Members living within the city limits. This constitutes 21% of the 148, 007 residents of Killeen. In addition, the area Police Chiefs and Sheriffs advised that Soldiers assigned on-post spend a lot of leisure and entertainment time off-post in the surrounding communities, often at late hours. They opined that the hours, locations and activities they engage in render them vulnerable to crime victimization.

According to the Chief of Police (COP) for the KPD, the housing allowances for enlisted personnel often force them to rent “quadraplex or eightplex units”, which are high density connected housing units located in housing projects prevalent in Killeen. According to the COP these are high crime areas, which have become beehives of criminal activity such as drugs, domestic violence and vice crimes. The COP has been very vocal in communicating that the density and configuration of these housing developments breeds crime.

Even with the relatively low crime rates within the city there is a large population of Soldiers and Army Family Members that could potentially fall victim to all the crimes that occur in the



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city. More Soldiers in the population equates to more Soldier victims according to the area Police Chiefs who consider themselves stakeholders with Fort Hood because they have encountered many Soldier victims and subjects in their jurisdictions.

Even with this large Soldier population the perception that Soldier victimization is at epidemic levels is not supported by empirical data. For example, Killeen's aggravated assault rate of 207 per 100,000 would be expected to produce approximately 42 Soldier or dependent assault victims per year. To assist in our analysis, the CIOC, HQ USACIDC provided crime data mined from the Army's ALERTS data system on Soldier victims in off-post incidents. The data provided by them shows that there were only 4 aggravated assaults reported to CID involving Soldier victims off-post in FY 2018; 4 in 2019 and 5 in 2020. In comparison on-post there were reports of 9 aggravated assault victims in 2018, 32 in 2019, and 31 in 2020.

The CID Command cautioned that off-post Soldier victims are undercounted and not routinely tracked by Fort Hood CID. The DES maintains a daily chronological record of police activity known as a "blotter" and canvasses the local law enforcement agencies to see if any Soldiers were admitted to local jails, however, outside law enforcement contacts, Fort Hood CID, and DES sources agreed that many Soldier arrests "fall through the cracks." Federal, State and local law enforcement and prosecutors advised that this partly due to lack of close connectivity between surrounding communities and Fort Hood CID. They cited a good working relationship with DES however that was due primarily to the efforts of the Acting Deputy DES Director who has been stationed at Fort Hood for a significant period of time and represented the only real continuity between outside law enforcement and Fort Hood due to constant transfers and "churn" of Fort Hood CID and DES leadership.

This review noted that unlike other major bases Fort Hood does not have a MOU governing cooperation with the surrounding local police jurisdictions. There were no recent MOUs between the local District Attorneys of Bell and Coryell Counties regarding overlapping jurisdictional matters involving Soldier subjects and victims. The KPD presented a detailed request for an MOU and an imbedded CID presence at KPD to CID, however no MOU has been forthcoming. It was alarming to learn from the KPD Police Chief stated that he has never met his current counterparts at CID other than in passing at a press conference regarding the Vanessa Guillén case.

Despite the perceptions built up by the media, data and collective input from the surrounding jurisdictions and CIOC data seem to indicate that Soldiers are not victimized off-post any more than civilian residents and in fact crime rates outside the post are relatively low. Below is a chart provided by the CIOC showing the tally of Soldier victims outside Fort Hood:



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Crime Types/Subtypes/ Subtypes Grouped	Fort Hood Soldier Victims for FY18-FY20 by On/Off Post (All Offense Findings by Most Serious Offense in the LER)											
	FY18			FY19			FY20			Grand Total		
	Off Post	On Post	Total	Off Post	On Post	Total	Off Post	On Post	Total	Off Post	On Post	Total
<b>Violent Felony</b>	<b>49</b>	<b>78</b>	<b>127</b>	<b>45</b>	<b>88</b>	<b>133</b>	<b>64</b>	<b>78</b>	<b>142</b>	<b>158</b>	<b>244</b>	<b>402</b>
Homicide	1	2	3	1	3	4	2	2	4	4	7	11
Murder				1		1	2	1	3	3	4	7
Voluntary Manslaughter	1		1							0	1	1
Involuntary Manslaughter					1	1				0	1	1
Negligent Homicide				1	1					0	1	1
Attempted Murder		2	2		1	1		1	1	0	4	4
Sex Crimes	45	59	104	40	49	89	57	44	101	142	152	294
Rape and Attempts	10	9	19	10	9	19	6	4	10	26	22	48
Sexual Assault and Attempts	35	48	83	30	39	69	51	40	91	116	127	243
Forcible Sodomy		2	2		1	1				0	3	3
Aggravated Assault	3	9	12	4	32	36	5	31	36	12	72	84
Kidnapping		2	2		1	1				0	3	3
Robbery		6	6		3	3		1	1	0	10	10
<b>Non-Violent Felony</b>	<b>44</b>	<b>500</b>	<b>544</b>	<b>38</b>	<b>520</b>	<b>558</b>	<b>38</b>	<b>440</b>	<b>478</b>	<b>120</b>	<b>1,460</b>	<b>1,580</b>
Drug Crime					1	1				0	1	1
Failure to Obey General Order					2	2		1	1	0	3	3
Larceny	9	203	212	6	244	250	8	155	163	23	602	625
Larceny - Government Property/Funds		24	24	7	32	39	7	23	24	2	79	81
Larceny - Private Property/Funds	9	179	188	0	212	217	7	132	139	21	523	544
Other Sex Crimes	20	30	50	13	47	60	15	51	66	48	168	216
Other Non-Violent Felonies	15	237	252	18	225	243	15	223	238	49	388	437
<b>Misdemeanor</b>	<b>29</b>	<b>204</b>	<b>233</b>	<b>20</b>	<b>195</b>	<b>215</b>	<b>25</b>	<b>185</b>	<b>210</b>	<b>74</b>	<b>584</b>	<b>658</b>
Traffic Violations		2	2	1	10	11		3	3	1	15	16
Assault and Battery	8	168	176	5	148	153	3	150	153	16	464	480
Drunk and Disorderly					2	2				0	2	2
Drunk Driving without Personal Injury								1	1	0	1	1
Family Abuse	1		1		1	1		1	1	1	2	3
Other Misdemeanors	20	34	54	14	36	50	22	30	52	56	100	156
<b>Other</b>	<b>19</b>	<b>7</b>	<b>26</b>	<b>12</b>	<b>7</b>	<b>19</b>	<b>14</b>	<b>7</b>	<b>21</b>	<b>45</b>	<b>21</b>	<b>66</b>
Other - Accidental Death	2	1	3	3	1	4	4	2	6	9	4	13
Other - Attempted Suicide		1	1							0	1	1
Other - Death By Natural Causes	1	1	2		1	1	1	1	1	2	2	4
Other - Missing Persons								1	1	0	1	1
Other - Suicide	12	4	16	8	5	13	8	2	10	28	11	39
Other - Undetermined Manner of Death	4		4	1		1	1	2	3	6	2	8
<b>Grand Total</b>	<b>141</b>	<b>785</b>	<b>930</b>	<b>115</b>	<b>810</b>	<b>925</b>	<b>141</b>	<b>710</b>	<b>851</b>	<b>397</b>	<b>2,309</b>	<b>2,706</b>

Figure 31: Fort Hood Soldier Victims for FY18-FY20 by On/Off-Post

State, local and federal law enforcement advised that while crime rates are comparatively low drugs and vice can easily be found in Killeen and the surrounding cities and counties for Soldiers who go looking for such illicit activities. Some of the crime is driven by a thriving trade in cannabis legally purchased or diverted from Colorado, California and/or other states where cannabis sales and cultivation has been legalized. These law enforcement professionals agreed that the drug trade boosts the number of crime incidents such as drug “rip off” robberies; crimes committed to procure money for drugs; and crimes committed in furtherance of the illicit drug trade. Black markets of any kind invite crime some of which, especially drug purchases and drug usage, will inevitably spill over onto Fort Hood or impact its Soldiers.

Police executives in the cities near Fort Hood cited high levels of domestic violence, which contributed to a large share of the crime incidents, especially in Killeen. Outside law enforcement sources noted that most of their domestic incidents were related to alcohol and drugs. Both habits are expensive, drain family resources, cloud judgment, and cause family disturbances.

Other notable observations from these contacts was that many Soldiers who separate involuntarily from the military either stay in Killeen or gravitate to Killeen and surrounding cities after separating from other Army installations because of the military friendly environment. (*See discussion of SPC Delacruz homicide below*). They also observed that there are a large number of broken military homes where both separated/divorced spouses and children live in the area off-post giving rise to domestic disputes. This was the case in the off-post murder of Freddie Delacruz.

While there has been a considerable amount of publicity over recent Soldier suicides and homicides there was no evidence developed that an unusual crime surge in the surrounding communities was the exclusive driving force behind these tragic events.

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Fort Hood had the second highest number of attempted suicides by a large margin over other divisional posts having the 3<sup>rd</sup> and 4<sup>th</sup> highest offenses, and had the 3<sup>rd</sup> highest suicide deaths for first-term enlisted Soldiers arriving at duty station between 2015 and 2019.<sup>160</sup> However, because the decision to report suicide attempts as a crime may differ across commands, these rates could reflect differences in policy and enforcement, rather than higher prevalence.

The Fort Hood CID investigated every incident of suicide on-post involving a Fort Hood Soldier during the review period, 2018 to 2020. Suicides that occurred off-post were investigated by the appropriate local law enforcement agency and was monitored by CID, meaning that they “coordinated” with the investigation and populated the CID investigative files with whatever reports the local jurisdiction was willing to provide them. Of the 53 suicide cases recorded between FYs 2018 and August 2020 a total of 34 occurred off-post and these CID files were generally sparse.

During the onsite review, support members of the FHIRC reviewed CID death files relating to Fort Hood based Soldiers. There was no evidence that the suicides were caused by external forces outside the post. The motivations for the suicides gleaned from the files were observed to be domestic situations, mental health issues or in three cases, pending criminal charges or military disciplinary actions.

This review also studied all homicide cases between 2018 and 2020 involving Fort Hood based Soldier victims. Murders on base were rare and CID has only investigated 2 missing person cases in the last 5 years. There were only 2 deaths originating on post in 2020, both of which involved the Guillén case. The cases of Guillén and Robinson are still under investigation and a prosecution is pending, therefore no conclusions are presented in this report regarding those cases.

The Committee also studied the off-post homicides during the same time period, including:

1. PV2 Gregory Scott Morales - Disappeared on 19 August 2019; remains discovered in a field in Killeen on 19 June 2020. Killeen PD and Army CID investigation pending, foul play suspected, cause of death pending/undisclosed.
2. Shelby Tyler Jones - Died from gunshot wound on 1 March 2020; Soldier was shot outside of a strip club in Killeen. Killeen PD investigation presented to grand jury. DA declined to prosecute.
3. SPC Freddy Delacruz Jr. - Died from gunshot wound on 14 March 2020; Soldier was shot during a triple homicide at an apartment complex in Killeen. A state capital murder warrant was issued for Barnard Morrow, a Soldier who was chaptered out of the Army and served in the same unit as Delacruz.
4. Former Fort Hood Soldier, Michael Steven Wardrobe - Died from gunshot wound on 23 March 2020; Former Soldier was shot during a dispute with current Fort Hood SPC. Jovino Jamel Roy – Died at a Killeen residence. Motive of the altercation remains unknown.

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<sup>160</sup> Analysis conducted on first-term enlisted Soldiers arriving at duty station between 2015 and 2019. Data Source: Administrative personnel data merged with Army Law Enforcement Reporting Tracking System (ALERTS) and Defense Casualty Analysis System (DCAS).

# REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE

5. PFC Brandon Scott Rosecrans - Died from gunshot wound on 18 May 2020; Soldier was found dead in Harker Heights and his vehicle was discovered burned several miles away. Court documents indicated the homicide was over disagreement about a gun sale.

These cases occurred in two different cities and involved disparate facts. FHIRC was unable to discern any patterns or find evidence to support a conclusion that the homicides were caused by an abnormal crime wave in the areas surrounding the post or that Soldiers were being specifically targeted for homicides.

In summary, there is reliable evidence that crime rates are low in Killeen and very low in the other cities and counties surrounding Fort Hood.<sup>161</sup> Soldiers visit and live in areas where much of the crimes occur in Killeen.<sup>162</sup> Based on the data available the FHIRC could not conclude that Killeen and the surrounding communities were driving crime rates on Fort Hood.

## 8.2. Crime Rates At Fort Hood Are High Compared To Other Installations, FORSCOM, And The Army.

In analyzing the crime environment on Fort Hood the FHIRC examined data provided by the CIOC entitled *Fort Hood CY 2015 – 2019 Crime Comparison*. The data provided Soldier offender rates, referenced above, in which Fort Hood average crime rates in various categories are compared directly to FORSCOM. Using data from this chart, the FHIRC support team created a new chart that added comparisons to the Army as well.<sup>163</sup> The evaluation of this data offered a method for evaluating the problems facing Fort Hood that provided important context.

This review determined that violent sex crimes and other sex crimes, violent felonies, assault and battery, drug offenses, drunk and disorderly, larceny and other misdemeanors, desertions and AWOL were all higher at Fort Hood compared to FORSCOM averages over the 2016 to 2020 time period. This information is set forth below in the following table in Figure 32.

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<sup>161</sup> This includes Bell County, Coryell County, Copperas Cove, Belton, Gatesville, Harker Heights, Temple and Lampasas.

<sup>162</sup> These places could be declared off limits by the Fort Hood Command which expressed a reluctance to do so because of the cumbersome procedures it would entail. The installation must use an Armed Forces Disciplinary Control Board, governed by AR 190-24, to place an off-post establishment off limits. In addition to procedural requirements, the regulation states that “[p]rior to initiating AFDCBs action, installation commanders will attempt to correct adverse conditions or situations through the assistance of civic leaders or officials.” As mentioned in *Finding #6*, community relations are not presently a priority of the installation.

<sup>163</sup> FORSCOM has more soldiers as opposed to the larger Army which includes a sizable civilian population.

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Fort Hood Crime Comparison (FORSCOM and All-Army): CY2015 - JUN CY2020-Soldier Offenders						
Crime Types & Categories  (Rate per 100,000 Active Duty Soldiers)	Avg for CY2015-2019			CY15-19 Fort Hood Average Soldier Offender Rates Compared to FORSCOM & ARMY		
	Fort Hood	FORSCOM	Army	Fort Hood compared to FORSCOM	FORSCOM compared to Army	Fort Hood compared to Army
Violent Felony	376	338	236	11.2%	43.1%	59.3%
Violent Sex Crimes	232	177	132	30.6%	34.8%	75.8%
Rape & Attempts	62	56	39	10.7%	43.6%	59.0%
Sexual Assault & Attempts	180	128	97	40.6	32.0%	85.6%
Other Sex Crimes	197	168	158	17.4%	6.1%	24.7%
Desertion	202	123	85	64.0%	44.5%	137.6%
AWOL	434	313	180	38.7%	73.9%	141.0%
Assault & Battery	718	713	552	0.7%	29.1%	30.1%
Drug Crimes	1,513	1,271	803	19.0%	58.3%	88.4%
Drunk & Disorderly	289	274	220	5.2%	24.9%	31.4%
Larceny	46	41	32	13.1%	25.5%	43.8%
Larceny: Private Property/Funds	26	16	13	66.8%	16.0%	100.0%
Other Misdemeanors	876	768	584	14.0%	31.6%	50.0%

Figure 32: **RED** indicates the percent by which Fort Hood’s crime rate exceeds FORSCOM’s, FORSCOM’S exceeds the Army, and Fort Hood exceeds the Army.

This table dramatically illustrates the most serious crime problems facing Fort Hood and the extent to which Fort Hood’s crime rates in these serious offenses exceeds the crime rates found throughout FORSCOM and Army-wide. The FHIRC determined that a comparison of Fort Hood to similar Army installations, to the Army as a whole, and to the Army community – not the surrounding civilian community, offers a better identification and understanding of the extent of the crime problems facing Fort Hood.

This data also aided the Committee in attempting to identify the factors causing or contributing to that crime problem and to recommend actions that can be taken to reduce the severity of the crime problems that Fort Hood and its most vulnerable Soldiers are facing.

### 8.3. FHIRC Survey Results

Also, of significance to the FHIRC were the results of the FHIRC Survey responses to question 16: *“I have reason to believe that individuals in my workplace have been engaging in criminal activity.”* Over 10% (3,593) of the total respondents across the Post answered yes to this question. Across the ranks



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enlisted, junior NCOs, and company grade officers agreed at twice the level of other ranks. (Notably members of the 1CD, 3CR and 13ESC agree with this statement at 2-3 times the rate of other III Corps units.

Similarly of import were the results of FHIRC survey questions 17: “*I am concerned about what goes on after duty hours at Ft Hood*” and 18: “*Laws and regulations are not always enforced in my unit.*” An alarming 50% of men and 66% of female respondents answered yes to question 17 for a total of 16, 228 respondents and 30% of all respondents agreed with number 18 for a total of 9, 202 respondents. These results speak volumes regarding the crime dynamic on Fort Hood.

## 8.4. Fort Hood Has Experienced A Historically High Rate And Number Of Sexual Assault Incidents

According to prior reporting by the *Stars and Stripes*,<sup>164</sup> the Pentagon reported Fort Hood had the most sexual assaults of any Army post from 2013 to 2016 and the second most of any U.S. military installation in the world. This situation would appear significantly unchanged according to the most recent data available. This is supported by data which shows that between 2015 and 2019, Fort Hood had the highest first term enlisted Soldier founded sex crime offense rate of any other divisional post<sup>165</sup>

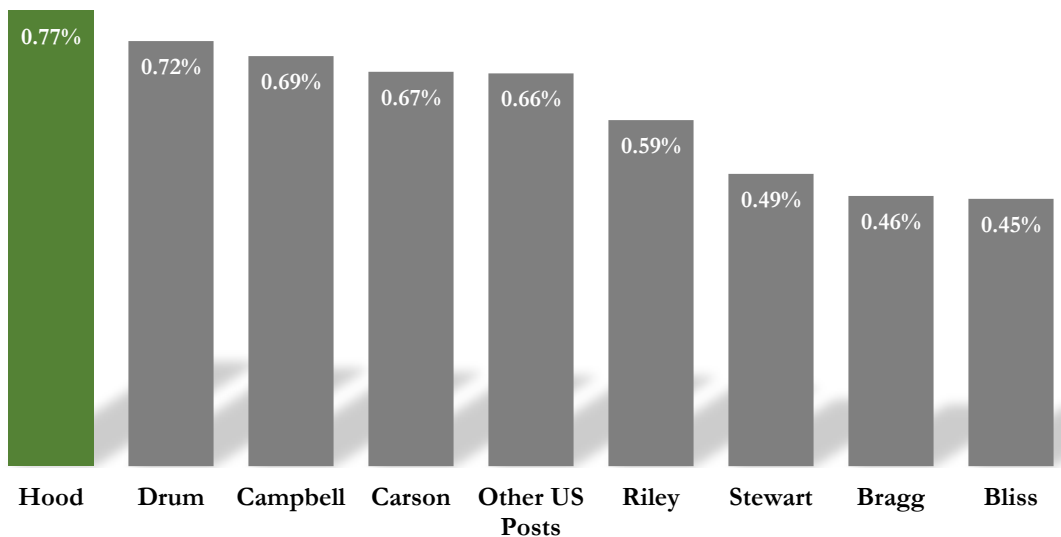


Figure 33: Percent of First Term Enlisted Soldiers with Founded Sex Offense

<sup>164</sup> *Stars and Stripes* is an editorially independent daily American military newspaper reporting on matters concerning the members of the United States Armed Forces and their communities.

<sup>165</sup> Analysis from founded offense rates among first term enlisted Soldiers arriving at their duty station between 2015 and 2019 over the duration of their assignment. Data Source: Administrative personnel data merged with CID and MP found cases from the Army Law Enforcement Reporting Tracking System (ALERTS) database.



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Additional analysis shows that, among divisional posts, Fort Hood has the highest reported on and off installation sexual assault rates (unrestricted cases only) among first term Soldiers. This is true for both men and women for on installation sexual assault report rates.<sup>166</sup>

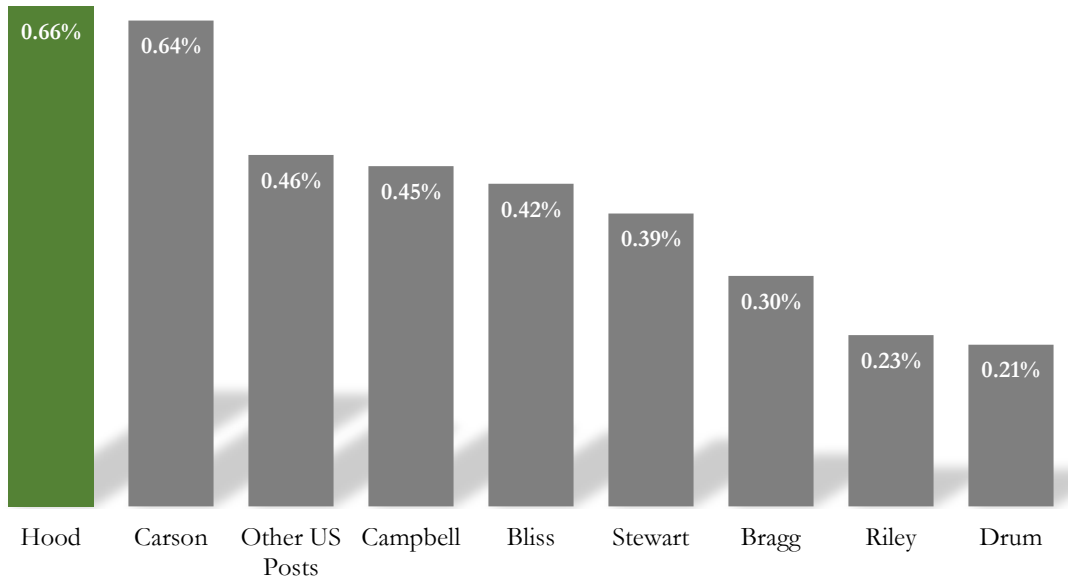


Figure 34: Percent of Post Population Reporting On-Installation Sexual Assault

<sup>166</sup> Analysis of unrestricted victim-level sexual assault reports among first term enlisted Soldiers arriving at their duty station over the duration of their assignment between 2015 and 2019. Data Source: Administrative personnel data merged with Defense Sexual Assault Incidence Database (DSAID) unrestricted, victim-level sexual assault reports (closed cases only). Note: Reports can be made at any military location and not only the location where the incident occurred; therefore, these reporting data represent the location of the sexual assault response coordinator currently responsible for the victim's case management. Unrestricted sexual assault reports likely underestimate actual prevalence (i.e., number of soldiers experiencing a sexual assault, as estimated by scientific surveys). Moreover, reporting rates differ by gender (women report at higher rates than men) and by installation. Different reporting rates across installations may reflect a multitude of factors that make the true underlying crime rate difficult to uncover. In so much as it is thought that these factors differ across installations, reporting rate comparisons should be interpreted with caution.





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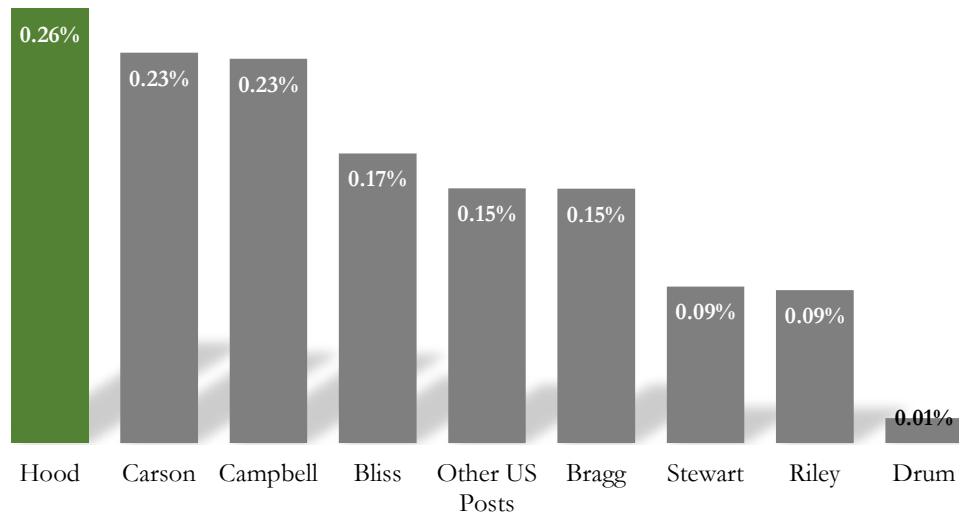


Figure 35: Percent of Post Population Reporting Off-Installation Sexual Assault

The analysis further revealed that unrestricted sexual assault reports likely underestimate actual prevalence (i.e., number of Soldiers experiencing a sexual assault, as estimated by scientific surveys). By comparing survey-estimated sexual assault prevalence rates to reported sexual assaults in fiscal year 2018, the DoD SAPRO found that only approximately 38% of victimized service members in the Army report their sexual assault.<sup>167</sup>

Overall, less than one percent (0.66%) of first term Soldiers at Fort Hood reported an unrestricted, on-installation sexual assault during their first assignment (3.16% of female and 0.16% of male). These rates are higher than any other divisional post. Furthermore, Fort Hood's sexual assault report rates are statistically significantly higher than the average report rates for all divisional posts (0.44% overall, 2.30% for females, and 0.11% for males) both without and with controls.<sup>168</sup>

More disturbing, among Soldiers with the rank of Sergeant to Master Sergeant (E5 to E8), Fort Hood has higher non-violent felony rates as compared to similar posts. Sex crimes and AWOL offenses, while not statistically different from other divisional posts, are still high.<sup>169</sup> This information was corroborated by group and individual interviews conducted by the FHIRC. Many interviewees pointed out that NCOs were the worst sexual assault and sexual harassment offenders.

<sup>167</sup> See DoD 2018 Annual Report on Sexual Assaults.

<sup>168</sup> Analysis of unrestricted sexual assault reports among first term Soldiers. Data Source: Administrative personnel data merged with Defense Sexual Assault Incidence Database (DSAID) unrestricted, victim-level sexual assault reports (closed cases only)

<sup>169</sup> Analysis conducted using founded offense rates among Soldiers E-5 to E-8 who start a new assignment between 2015 and 2018 (inclusive). Data Source: Administrative personnel data merged with CID and MP found cases from the Army Law Enforcement Reporting Tracking System (ALERTS) database.

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The most recent data for the first six months of CY 2020 shows Fort Hood’s overall Violent Felony rate dropped by 12.8 % compared to FORSCOM, but Fort Hood’s rates for Homicide, Murder and Attempted Murder were higher than FORSCOM. Fort Hood’s rates for Violent Sex Crimes decreased relative to FORSCOM, but the rate for other Sex Crimes increased relative to FORSCOM. Fort Hood in FY 2020 continued to have much higher rates for Desertion, AWOL, Drug Crime, and Larceny.

Fort Hood Crime Comparison (FORSCOM and All-Army) CY 2020-Soldier Offenders					
Crime Types & Categories  (Rate per 100,000 Active Duty Soldiers)	CY2020				
	Fort Hood	FORSCOM	Army	Fort Hood compared to FORSCOM	Fort Hood compared to Army
Violent Felony	197	226	156	-12.8%	26.3%
Homicide	11	10	6	10.0%	83.3%
Murder	8	6	4	33.3%	100.0%
Attempted Murder	3	2	1	50.0%	200.0%
Violent Sex Crimes	123	130	93	-5.4%	32.3%
Rape and Attempts	22	26	21	-15.4%	4.8%
Sexual Assault and Attempts	101	107	75	-5.6%	34.7%
Other Sex Crimes	99	88	82	12.5%	20.7%
Desertion	66	43	34	53.5%	94.1%
AWOL	200	149	91	34.2%	120.0%
Assault and Battery	194	291	223		
Drug Crime	1,013	766	463	32.2%	118.8%
Drunk and Disorderly	112	138	87	-18.8%	28.7%
Drunk Driving with Personal Injury	27	20	10	170.0%	197.0%
Larceny	19	12	8	58.3%	137.5%
Larceny: Government Property/Funds	16	8	5	100.0%	220.0%

Figure 36: RED indicates the percent higher than. GREEN indicates the percent lower than.

### 8.5. Crime Rates Comparison: Fort Hood vs Fort Bragg & JBLM

In a Fort Hood Fact Sheet, dated August 2020, provided by CIOC,USCIDC, there is a comparison between Fort Hood, Fort Bragg, and JBLM for CY 2018, CY 2019, CY 2020, and for CY 2015–2019, based on the comparison of population normalized crime rates per 100,000



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Soldiers.<sup>170</sup> The table below illustrates the crime areas in which Fort Hood’s crime rates exceeded the crime rates of Fort Bragg and JBLM, which are highlighted in blue and red. For CY 2015–2019, with the exception of Rape and Attempts and Forcible Sodomy, Fort Hood’s average crime rates exceeded those of Fort Bragg and JBLM in every area as set forth below. The percentage by which Fort Hood exceeded the crime rates of Fort Bragg and JBLM for those offenses is also set forth in red in the table below:

Crime Types and Categories (Active Duty Soldier Offender Counts)	CY2018			CY2019			CY2020			Avg for CY2015-CY2019				
	Hood	Bragg	JBLM	Hood	Bragg	JBLM	Hood	Bragg	JBLM	Hood	% over Bragg	Bragg	% over JBLM	JBLM
Violent Felony	132	88	95	146	100	123	72	77	65	129	43%	90	18%	109
Violent Sex Crimes	89	51	58	82	49	76	45	43	45	80	57%	51	14%	70
Rape and Attempts	16	20	26	23	14	29	8	7	13	21		16		31
Sexual Assault and Attempts	74	35	32	63	36	52	37	36	34	62	59%	39	51%	41
Forcible Sodomy	2		3	2	2	1	0	1	1	2		2		3
Aggravated Assault	37	28	31	63	52	49	30	26	19	44	42%	31	22%	36
Non-Violent Felony	950	974	717	1,030	886	812	615	369	460	940	14%	822	31%	720
Drug Crime	553	455	405	524	442	460	370	158	248	520	33%	392	44%	362
Desertion	71	38	20	45	29	22	24	8	11	69	116%	32	176%	25
AWOL	127	88	64	154	84	55	73	32	28	149	99%	75	119%	68
Other Sex Crimes	75	47	52	76	53	58	36	35	29	68	17%	58	26%	54
Other Non Violent Felonies	203	217	175	320	245	260	129	117	150	229	7%	214	9%	211
Assault and Battery	262	251	186	219	131	170	71	57	77	246	18%	208	27%	193
Drunk and Disorderly	81	46	74	92	25	57	41	13	27	99	241%	29	39%	71
Family Abuse	103	106	18	19	16	8	15	18	4	70	49%	47	192%	24
Other Misdemeanors	332	253	135	297	169	168	125	68	85	301	57%	192	117%	139
Population Averages	35,461	46,037	27,336	36,556	46,250	27,443	36,540	46,048	28,003	34,384		46,332		27,654

Figure 37

As set forth in the table below, Fort Hood Sexual Assault Reports and Sexual Assault Incidents for FY 2016 to 2020 show a peak in FY 2018 with 309 and 283 respectively. Both declined in FY 2019 to 277 and 217 respectively but were still demonstrably higher than FY 2016 and FY 2017. The average number of Sexual Assault Reports was 260.25 for FY 2016–2019. The average number of Sexual Assault Incidents was 226 for FY 2016–2019 (Data provided by III Corps SHARP PM as of 31 August 2020).<sup>171</sup>

<sup>170</sup> Subject: Fort Hood Crime Data Comparison, Purpose: To provide senior leaders an overview of Fort Hood death and crime data.

<sup>171</sup> Note these numbers come from the DSAID system and thus the Sexual Assault Report numbers here will not match the Fort Hood CID sex crimes caseloads because the DSAID system does not track juveniles, domestic and certain other sex crimes.

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	Sexual Assault Reports			Sexual Assault Incidents		
	Unrestricted	Restricted	Total	Unrestricted	Restricted	Total
FY 2016	170	44	214	165	36	201
FY 2017	205	36	241	176	27	203
FY 2018	269	40	309	257	26	283
FY 2019	220	57	277	185	32	217
FY 2020 3 Quarters	160	44	204	103	16	119
FY 2020 Projected	213	59	272	137	21	158

Figure 38

## 8.6. Analysis Of High Rates And Numbers Of Drug Related Incidents On-Post Involving Fort Hood Soldiers

It was expressed frequently to Members of the FHIRC that Fort Hood’s Soldiers and families were concerned by the amount of drug use by their fellow Soldiers. The FHIRC noted that drug crimes were up 39% for the quarter. Fort Hood DES crime reports indicate this increase was largely due to proactive efforts to increase random anti-terrorism measures (RAMs) at Access Control Points (ACP), which enabled Fort Hood to interdict drugs at the gates. The DES crime report predicted that drug crimes are expected to go up again in the 4th quarter with resumption of Military Working Dog Health and Welfare Inspections and unit Urinalysis (UA). These types of proactive efforts are commendable and may contribute to an eventual downward trend in these types of drug crimes, however, stops at the gates and conducting follow ups to positive UA tests are only part of an effective drug suppression program on a military post. There are many other effective proactive measures that can be taken.

As previously stated, state, local and federal law enforcement contacts advised that drugs could be easily found in Killeen and the surrounding cities and counties. The source is mostly a robust and thriving trade in cannabis legally purchased or diverted from Colorado, California and/or other states where cannabis sales and cultivation has been legalized. This review determined that the influence of traditional drug cartels was minimal as the diverted domestic cannabis is considered far superior to the cartel products. Law enforcement sources noted the previous presence of some well-known gangs, which were involved in drug dealing, but aggressive task force enforcement operations directed towards national and regional level gangs such as the gangster disciples, has reduced the gang presence in and around Fort Hood to localized “hybrid gangs” based in certain neighborhoods and some motorcycle gang activity.<sup>172</sup>

<sup>172</sup> Local, state and federal law enforcement officials interviewed by FHIRC members described these types of gangs as gangs loosely organized around high crime neighborhoods who were not affiliated with regional or national gangs such as MS-13, Bloods, Crips etc. They engaged in criminal activities but were not stable nor did they reflect the organizational structure of traditional gangs.



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Analysis using the Army's drug testing program shows that Fort Hood's rate of failed drug tests per administered test was statistically the highest among all Army posts, even when including control variables. Specifically, the rate of failed drug tests per administered tests was 30.5% higher than the average rate at divisional installations, and 151.7% higher than the rate at other CONUS installations.<sup>173</sup> Of the positive UAs the presence of THC/cannabis was four times more prevalent than the next highest drug, cocaine with methamphetamine and amphetamine third and fourth respectively.<sup>174</sup>

Individual and group interviews that touched over 2400 Soldiers made it absolutely clear that illegal drugs are readily available on and off the post. Illicit drugs can undermine a Soldier's readiness, infect units with malaise and drive other crimes.

Unfortunately, this review could not find any evidence of a proactive drug suppression program using all available tools including development of human sources, joint drug operations with local anti-drug task forces to address suppliers, limited undercover operations on bases to make controlled drug purchases,<sup>175</sup> and the identification of on base suppliers and health and welfare checks at strategic times to detect and deter drug usage on the base and in the barracks. Significant drug cases are often made using credible informants and human sources. (b) (7)(E)

## 8.7. Crime Rate Comparison: 3CR & 1CD vs Other Units At Fort Hood

The Committee was provided data by CIOC with similar breakdowns comparing select Brigades – 1ABCT, 2ABCT, 3ABCT, and 1st CAB, 1st CD Sustainment Brigade & 3rd Cavalry Regiment—to Total Fort Hood Soldiers by Subject Offenses and Soldier Subjects (by most Serious Offense). A noteworthy data point is that these Brigades account for 100% of the on-post incidents of homicide, voluntary manslaughter, negligent homicide, attempted murder, kidnapping and robbery between 2017 and 2020. Also, according to CIOC data the Brigades of the 1CD and the 3CR led all other Fort Hood units in Law Enforcement Reports (LER) filed from June 2018 through June 2019.<sup>176</sup>

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<sup>173</sup> Analysis conducted using all drug test records between January 2015 and March 2020. Data Source: Drug and Alcohol Testing Management Information System (DAMIS) Drug Test results between January 2015 and March 2020 linked to DMDC Master Personnel File at the individual level for duty locations.

<sup>174</sup> Army Regulation 600-85 prohibits drug usage by Army employees and Soldiers. While there are varying views and attitudes towards cannabis usage in today's society and many states have legalized the drug, the Army has a zero tolerance for usage as Soldiers are constantly operating sophisticated machinery and equipment outfitted with the latest technology and must be ready to deploy to conflict areas or rescue missions on short notice. AR 600-35 requires that separation be initiated after a positive UA or documented incident of drug possession or sale.

<sup>175</sup> (b) (7)(E)

<sup>176</sup> CIOC analysis of ALRTS data provided in graph depicting "Top Ten Brigades by LER Count (6/1/2018-6/1/2020). The 3CR had 261; 2nd ABCT-243;1st ABCT-225;1st CDCA-129 and the 1st CDSB-112.

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Analysis also found 1CD has higher rates of assault that are statistically significant, and, although not statistically significant accounting for the usual factors of AFQT scores, rank, gender etc. 3CR had the highest rate for Failure to Obey a General Order, Drug Related and Drinking Related Offenses.<sup>177</sup>

The rate of deaths by suicide among first term Soldiers at Fort Hood is highest among first term Soldiers in the 3CR and is a statistically significant rate compared to the rest of Fort Hood.<sup>178</sup>

The analysis also shows that 3CR has the lowest female reporting rates for sexual assault occurring in on-post units.<sup>179</sup> FHIRC is not able to draw a statistical conclusion of whether this lower number is due to underreporting or a lower number of cases.

The Committee does note that in one of the focus group sessions with the 1CD the participants stated they believed if a Soldier is harassed or assaulted most would not report the incident for a variety of reasons, to include embarrassment, lack of trust in leadership, personal concerns over their use of alcohol and their fear of collateral misconduct, and the fear of retaliation by peers and leadership. In response to this, one participant stated, “the narrative I have to have as a commander is who is not reporting ... that is the narrative getting away from us.”

## 8.8. Disciplinary Issues At Fort Hood

There were also other signs of disciplinary issues at Fort Hood which has the highest fraction of first-term enlisted Soldiers separated for misconduct or barred from reenlistment.<sup>180</sup> Fort Hood had a statistically significant higher average rate of courts-martial (making up 29% of courts-martial at divisional installations) and Referred Non-Commissioned Officer Evaluation Reports compared to other divisional installations.<sup>181</sup>

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<sup>177</sup> Analysis of founded offense rates among first-term Soldiers who start a new assignment between 2015 and 2019. Data Source: US Army personnel data merged with CID and MP found cases from the Army Law Enforcement Reporting Tracking System database.

<sup>178</sup> Analysis of suicide casualty rates among first term enlisted Soldiers arriving at their duty station between 2015 and 2019 over the duration of their assignment. Data Source: US Army personnel data merged with CID and MP found cases from the Army Law Enforcement Reporting Tracking System (ALERTS) database, and with casualty data from the Defense Casualty Analysis System (DCAS).

<sup>179</sup> Analysis of unrestricted victim-level sexual assault reports among first term enlisted Soldiers arriving at their duty station between 2015 and 2019 over the duration of their assignment. The rates reflect the share of first-term Soldiers that make any unrestricted sexual assault report (based on case open date) during their assignment to a given unit (on average 2.5 years). Data Source: US Army personnel data merged with Defense Sexual Assault Incidence Database (DSAID) unrestricted, victim-level sexual assault reports (closed cases only).

<sup>180</sup> Analysis of first-term enlisted Soldiers arriving at duty station between 2012 and 2019 with a contract term between three and six years. Data Source: US Army personnel data merged with Military Entrance Processing Command (MEPCOM) data.

<sup>181</sup> Analysis of derogatory information filed against Soldiers while they were assigned to units stationed at CONUS installations between January 2015 and May 2018. Data Source: IPERMS Derogatory Records combined with the population of installations using DMDC Master Personnel data.

## REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE

In addition to the attention-grabbing statistics regarding violent felonies, violent sex crimes and other sex crimes, Fort Hood has extremely high drug crime, desertion and AWOL rates.<sup>182</sup>

### **8.9. Group Interviews By The FHIRC Revealed That Many Soldiers Felt That Fort Hood Was Not Safe.**

The FHIRC conducted numerous group interviews while on Fort Hood to learn more about these issues. One of the issues addressed in each focus group was safety, on and off post.

It was clear from the responses from the group interviews of all ranks that safety on and off post was a real, every day, continuing, significant concern. Most focus groups reported concerns that Soldiers and their families did not feel safe on or off post. Some reported they did not feel as safe on Fort Hood as they felt at other posts. One reason they cited for this was the belief that the leadership at Fort Hood was so mission oriented, so focused on being in a continuous mission first OPTEMPO status, that the health, safety and welfare of its Soldiers was a secondary priority at best, and at worst an unwelcome distraction that detracts from its mission critical priorities. Soldiers who have been assigned to other installations said the other posts *they have served at have been proactive in making their post safe, as opposed to Fort Hood, which has not been proactive in these areas.*

One group of Soldiers compared Fort Hood to deployment in war zones. One said, “being at Fort Hood is more of a deployment than Kuwait.” Several Soldiers stated they felt “*safer in Afghanistan than at Fort Hood.*”

Several NCOs said their Soldiers choose to go AWOL to get out of Fort Hood and said their Soldiers don’t feel like the Army values them at all. Many acknowledged that they, along with their junior Soldiers, joined the Army to escape the same type of community they now find themselves a part of in Killeen and Fort Hood. Some females reported they did not feel safe doing staff duty checks on the installation, because they are afraid of their fellow Soldiers.

Based on the review of group interview session comments regarding safety by the 1CD, 3CR, III Corps and the 89th MP Brigade, the following issues were the ones most commonly voiced as the reasons why Soldiers and their families do not feel safe on base, in work areas, barracks and housing areas:

- 1) Access to the base and movement around all areas of the base are not sufficiently monitored nor controlled. It is too easy to access the base and to move freely around the base. “One CAC card is all you need,” to enter and then freely move about the base.
- 2) Surveillance cameras are scarce.
- 3) Adequate lighting is lacking in the bathrooms, particularly women’s bathrooms, arms rooms, barracks and housing.<sup>183</sup>

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<sup>182</sup> CIOC Fort Hood CY Crime Comparison-Soldier Subjects, *supra*.

<sup>183</sup> The FHIRC observed the arms room area where SPC Vanessa Guillén was murdered and it was indeed dark and secluded.

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- 4) Adequate mental health services and confidential access to those services without fear of damaging one's standing or career are lacking. Soldiers expressed fear that someone in their ranks might snap under the pressure. There was a consensus perception that the mental health services afforded on post were insufficient to deal with this problem and access to these services was hindered due to the lasting stigma attached to those who sought help.
  - a. Soldiers also reported that some people seeking mental health services are turned away or told it will take three weeks to be seen, unless they are on the verge of suicide. There were also indications that Soldiers may not have full knowledge of what services are available to them and how best to avail themselves of those services.
  - b. MPs reported having to deal with Soldiers who have voiced suicidal or homicidal thoughts on a frequent basis. "This is a call we get as MPs almost daily." The MPs did not feel they were adequately trained in dealing with suicidal Soldiers and were only learning to cope with these issues and situations through repeated experience.
- 5) Barracks checks, welfare checks and communications between NCOs and their units and their Soldiers to keep track of all Soldiers and achieve a safer environment were lacking. Some noted most SHARP complaints arise from incidents in the barracks. In one group some members claimed there are NCOs who never conduct barracks checks of their Soldiers.
- 6) Soldiers in the barracks complained they were not afforded an appropriate level of personal privacy. Senior leaders barge in unannounced without regard for or respect for any personal boundaries. Several talked about the lack of doors and locks in sleeping areas of the barracks and bathrooms and the lack of shower curtains.
- 7) Soldiers complained about a lack of safe alternatives for recreation and entertainment. They cited a need for adequate recreational facilities on post, such as basketball courts and lounges with video games.

A large segment of the Soldiers interviewed expressed that Fort Hood leadership was not proactive in insuring a safe environment on base. One Soldier stated, "*the military is good at training us to fight the enemy; it doesn't seem to afford us the training to protect ourselves in our own lives.*"

One group said no one feels safe on post anymore and that the command cares more about a lost sensitive item than they do about finding a missing Soldier. The feelings of some were summed up in the following statement, "*If we lose a piece of equipment, the whole base is locked down, but if we lose a Soldier, nothing happens.*" Many Soldiers are convinced leadership does not care and that nothing is going to change. Some noted spontaneously a seeming lack of respect given to Soldiers who pass away.



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Fort Hood's reactive posture may very well explain recent climate surveys conducted by DEOMI showing Trust in Leadership at Fort Hood was at the bottom in 2014–2016 and one rung from the bottom in 2017–2019.<sup>184</sup>

### 8.10. Interviews Of 3CR And 1CD By Committee Members Regarding Sexual Assault.

During the confidential interviews with female Soldiers of 3CR and 1CD, many spoke of the culture at Fort Hood, which they feel exhibits a total disregard and disrespect for female Soldiers. Some female Soldiers said they have come to believe the Army only wants females “*on paper or to show numbers*” but “*now that we are here, they really don't want us.*” A female E-4 stated “[Fort Hood] *is the worst place I have ever been.*”

A (b) (6) talked about overhearing her NCO tell her unit that “*females are here for our entertainment.*” Another (b) (6) said her NCO openly stated he did not want any females in his unit, but, now that they are here, they are sexual objects and “*should be at his feet.*”

There were multiple female Soldiers who related instances where male Soldiers held betting pools to see who could “*get to*” new female Soldiers assigned to the unit.

(b) (6) reported she has witnessed NCOs openly discussing junior enlisted Soldiers in sexual terms; in fact, it happens so often, “*it's the norm.*” (b) (6) . Another (b) (6) “*Everyone knows but no one says anything*” for fear of retaliation.

An E-7 reported sexual harassment and/or assault is “*almost like an initiation to Fort Hood.*” This E-7 said “*in my Command, I believe sexual harassment happens every single day.*” The E-7 advised “*nobody stops it; leaders turn a blind eye or they themselves are the offenders.*”

(b) (6)

Female Soldiers in the 3CR talked about the disregard for their privacy and safety at Fort Hood, particularly in their barracks and at their work places on base, specifically by their NCOs, and how their complaints of mistreatment and even sexual assault were ignored. Female Soldiers reported the belief that if an NCO accused of sexual assault was critical to the mission, nothing would happen to that NCO.

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<sup>184</sup> Analysis of surveys completed by Soldiers assigned to units at CONUS installations between April 2014 and September 2016, and between October 2017 and March 2019. Data source: Defense Equal Opportunity Management Institute Organizational Climate Survey (DEOCS).

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One female Soldier reported being sexually assaulted twice (b) (6) since coming to Fort Hood. She told her Platoon Sergeant, who told her “*you can report it but nothing will happen.*” Nothing has happened (b) (6).

One (b) (6) had a Sergeant walk in on her in her barracks room while she was not dressed. (b) (6) tried to report the Sergeant and learned he has multiple reports against him for similar behavior. Another female Soldier reported being in her barracks room (b) (6) when her NCO came in to do a room check without knocking. She was partially undressed (b) (6) had to push him away to keep him from assaulting her in her room.

This type of culture towards women in the Enlisted ranks if not addressed proactively creates breeding grounds for sexual assault.

Numerous females Soldiers reported that it is a daily battle to get through the day without allowing the multiple advances from male Soldiers upset them. They explained that male Soldiers routinely, openly, aggressively and relentlessly approach female Soldiers. When Soldiers explain this to leaders they say they don’t have any way to stop that kind of behavior. The FHIRC described this to a senior installation leader who stated, “what can I do about it?” This type of climate quickly develops into a hostile working environment, particularly for the junior enlisted Soldier, and particularly when leaders don’t recognize this kind of behavior as an issue.

### **8.11. Absence Of Proactive Crime Reduction Initiatives Based On Sophisticated Crime Reporting And Analysis**

The FHIRC determined that during the review period the Fort Hood command was appraised of crime incidents as well as basic crime trends on a monthly basis. The FHIRC was provided copies of monthly emails that provided a “Monthly Crime Data Snapshot.” The emails broke crime down by brigade and listed top ten repeat offenders, police initiatives, LER tracking, and recommendations from the 89 MP Brigade.

The FHIRC reviewed every monthly crime update email for the period 2018 through July 2020. The information contained in the emails was informative but did not provide sufficient context and enough crime analysis commensurate with law enforcement industry standards. It did not display the same type of detailed, in-depth criminal intelligence the FHIRC has seen in modern law enforcement intelligence units or even other Army installations. Ironically, the FHIRC was provided a similar update from 2014 that did provide such analysis. It is not clear when or why this modern approach to public safety was abandoned at Fort Hood.

Such analysis should inform the command elements as to the most serious problems, where and why these incidents occur, and recommend the most viable options to proactively address the crime issues and drive down incidents. Without context, the limited information provided in this report could be misleading. For example, while trends are interesting, simply reporting that a particular crime category dropped from one month invites complacency on the part of the command responsible for the health and welfare of the Soldiers despite that the crime rate is still significantly

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above the those of peer installations and FORSCOM averages. All crime affects quality of life and safety was a frequent issue raised in individual, group, and specialty interviews.

As another example, the email noted sex crimes had been down, but pointed out that July experienced Fort Hood's most significant jump in sex crimes and the highest number of reported sex crimes in the last six months. The email also noted July was especially high for Military Protective Orders (MPOs). The email went on to note MPOs were a recent initiative and emphasis. There has been a national and installation-wide focus on reporting and responding to sexual harassment and sexual assault which may account for the increase in both MPOs and reported sex crimes. This type of information and analysis was not sufficient to develop and drive a proactive approach to improving Fort Hood's response to a persistent and troubling history of Violent Sex Crimes perpetrated by Fort Hood Soldiers against their fellow Soldiers.

This was partially a function of the command not asking the right questions and partly DES and CID not conducting the type of modern crime analysis practiced by every good law enforcement agency in the country. In order to be effective at crime reduction one must clearly identify the crime issues, understand their drivers and design proactive initiatives to drive them down and deter future violations. This was the shortcoming at Fort Hood. Despite a persistently high crime rate in key areas the command and its supporting law enforcement elements were back on their heels conducting business as usual, reacting to crimes and not developing and implementing strategies to prevent them.

Unlike other installations, there was no regular crime prevention/reduction focused working group in operation at Fort Hood to routinely engage Fort Hood stakeholders in understanding and cooperating to reduce crime issues. The closest thing to it was the monthly email that was disseminated to various stakeholders, including leadership elements at every echelon from Brigade Commander to the Commanding General.

The Fort Hood CID also had responsibilities towards the command to provide criminal intelligence and analysis in furtherance of crime reduction per USACIDC objectives: "*Participating in the Army crime prevention program by identifying areas which are especially vulnerable to crime and by making recommendations to appropriate authorities for elimination of conditions conducive to criminal activity.*" Another objective is "*Ensuring known or suspected serious crimes and crimes which may result in damaging the public confidence in the Army are thoroughly and impartially investigated by USACIDC special agents.*"<sup>185</sup>

As a result of a high crime rate and absence of any proactive initiatives to address the crime issues on Fort Hood, Soldiers on the installation expressed a general feeling of insecurity and perceived the post to be unsafe. Both group and individual interviews overwhelmingly supported this Finding.

After extensive discussion with the recently arrived 89th MP Brigade Commander, who has extensive experience in crime analysis and crime reduction methods, the DES released their first *3d QTR FY20 Fort Hood Quarterly Criminology Report* dated 30 SEP 20. This report represents a step forward by Fort Hood in developing the type of criminal intelligence product that can be used to drive a proactive approach to addressing the issues Fort Hood is facing. However, the report still does not

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<sup>185</sup> Army Regulation 195-2, para 1.6, 21 July 2020.

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include any comparative analysis of Fort Hood to FORSCOM, other bases, or the Army. Comparative analysis of Fort Hood to these entities is the yardstick that has been used in the past and is being used now to put Fort Hood's crime problem into perspective.

Another glaring omission was crime analysis of off-post jurisdictions. Given that more than half of Fort Hood based Soldiers live off-post this is vital information. Soldiers can be victims and subjects off-post, however the command is generally uninformed on this important topic and thus unable to formulate strategies to protect Soldiers and their families when not on-post.

The analysis notes a downward crime trend for the 3rd quarter and predicts one for the long term, due to various factors, such as COVID, but also notes all units are not present, and that the "3rd QTR saw less interaction with leadership outside the home delaying reporting for many crimes until 4th QTR and may have contributed to significant decreases in many offenses."

The report's statement that, "[a]n increase in some felony and high profile crimes contribute to [the] perception" that crime levels are not trending down appears to skirt the issues of most concern to its Soldiers and their families, mainly: how long these feelings have existed, and that these feelings will continue to persist, until there is real progress in how these matters are handled, and there is sustained, long term improvement in Fort Hood command's ability to address all crime problems affecting the health, safety and welfare of Fort Hood Soldiers and their families. It is totally understandable that the Fort Hood community's perceptions aren't significantly changed by a one quarter downturn which may simply be attributed to COVID restrictions, delayed reporting, or not all units being present on post.

For the 3rd quarter sex crimes were up by 18.6% compared to the 2nd quarter. This increase in sex crimes could contribute to the public perception that crime is not trending downward at Fort Hood.

The conditions in 3CR were of particular concern in the FHIRC's review of sex crimes at Fort Hood. The 3CR had the highest number of sex crimes this quarter compared to all other (14) units at Fort Hood. 3CR had 24 reported sex crimes, 17 penetrative and attempts and 7 abuse/misconduct (non-penetrative). The next highest unit had a total of 13. Only one other unit had more than 10.

The 3CR also had the highest per capita drug rates for both positive UAs and those offenses not including UAs. 3CRs crime rate for positive UAs was over twice as high as the next highest unit (31 to 15). No other unit had a rate higher than 10. The average was 4.8 excluding 3CR. For drug offenses not including UAs, 3CR also reported the highest per capita, 8.4, the average for the other 7 units reported was 3.1

The report did not provide any takeaways, analyst comments, 4th Quarter Police Initiatives or Command Mitigation Strategies for 3CR's issues regarding sex crimes or drug crimes.



## 8.12. Underutilization Of The Armed Forces Disciplinary Control Board

This review determined that The Fort Hood Armed Forces Disciplinary Control Board (AFDCB) was underutilized and dormant.<sup>186</sup> Officers and commanders advised that the process was cumbersome and slow and seldom used. The FHIRC determined that business and commerce between the installation and the community seemed to override Soldier safety. On numerous occasions, the Committee was told that if local places are declared off-limits, then Soldiers would go elsewhere. This seemed self-serving to the Members of the FHIRC who noted that business with Soldiers seemed to be placed above Soldier safety. The FHIRC heard numerous accounts during interviews of Soldiers who had been stationed at other U. S. Army installations where the AFDCB had been actively and effectively utilized.<sup>187</sup>

The FHIRC also examined examples of off-limits memorandums from other bases, which listed dozens of businesses and locations of every description that were declared off-limits.<sup>188</sup> There should be zero tolerance for high-risk establishments and businesses that exploit and cheat Soldiers.

No person interviewed during this review could provide a current list of off-limits establishments, however a series of memos were accessed online that showed only two specific establishments were currently off-limits. The memo had barely changed since 2013 and only two businesses had been declared off-limits during that entire time period. Notably these were the same two businesses for the 7-year period. Certain types of business such as drug paraphernalia shops and unlicensed tattoo parlors were also declared off-limits.

Despite the assertions of the KPD Chief of Police regarding high crime in the notorious Killeen high density housing areas, known as “quadraplexes,” none had been declared off-

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<sup>186</sup> 32 CFR § 631.11 Off-limits establishments and areas.

- (a) The establishment of off-limits areas is a function of Command. It may be used by commanders to help maintain good order and discipline, health, morale, safety, and welfare of service members. Off-limits action is also intended to prevent service members from being exposed to or victimized by crime-conducive conditions. Where sufficient cause exists, commanders retain substantial discretion to declare establishments or areas temporarily off-limits to personnel of their respective commands in emergency situations. Temporary off-limits restrictions issued by commanders in an emergency situation will be acted upon by the AFDCB as a first priority. As a matter of policy, a change in ownership, management, or name of any off-limits establishment does not, in and of itself, revoke the off-limits restriction.
- (b) Service members are prohibited from entering establishments or areas declared off-limits according to this part. Violations may subject the member to disciplinary action per applicable Service parts, and the Uniform Code of Military Justice (UCMJ). Family members of service members and others associated with the Service or installation should be made aware of off-limits restrictions...

<sup>187</sup> A ten-year-old article in the *Fort Hood Sentinel* indicates the AFDCB was once active at Fort Hood as well, *see* article at [http://www.forthoodsentinel.com/editorial/armed-forces-disciplinary-control-board-good-order-and-discipline-matters-reviewed-effected/article\\_583f59da-3573-50ae-9a46-34fbee2bf44.html](http://www.forthoodsentinel.com/editorial/armed-forces-disciplinary-control-board-good-order-and-discipline-matters-reviewed-effected/article_583f59da-3573-50ae-9a46-34fbee2bf44.html), dated January 1, 2010.

<sup>188</sup> For example, a 1.2-mile area of a river was declared off-limits because of currents and drownings. It should be noted that several Soldier deaths at Fort Hood involved Soldier drownings.

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limits. Other installations have been proactive in declaring such high crime neighborhoods as off-limits.

A disproportionate number of Soldiers live off-post because of the condition of the housing and barracks on-post. Leaders from Commanders down to NCOs have a duty to closely monitor conditions off-post to address and, as much as possible, remediate high-risk areas and activities. If sufficient information is available, areas and establishments can be made off-limits by the commander pursuant to 32 CFR § 631.11 and Army Regulation 190-24.

## 8.13. Conclusions

Leadership is, and will remain, at a loss to address the crime problems affecting the health, safety and welfare of its Soldiers and their families at Fort Hood without a comprehensive, intelligence driven, proactive strategy to address the crime issues facing its command. Fort Hood must look beyond the numbers being reported for criminal offenses. It must develop the capability to analyze those numbers, to identify the factors driving those numbers up or down (beyond COVID and the number of units on post), and to identify the policies, practices and procedures needed to attack its crime problems. It must be able to look at units where concentrations of incidents occur such as 3CR and 1CD and determine why they have inordinate offense rates and execute a plan to mitigate them.

Fort Hood can also better prepare its Soldiers to confront a known danger. Based on the individual and focus group interviews conducted, the FHIRC was left with the firm belief that Fort Hood, with the concentrated efforts of commanders, SHARP, DES and CID, should be able to construct reliable profiles of criminal drivers, subjects, abusers, victims, behaviors, circumstances and situations that could be used to train its Soldiers to better protect themselves from crimes.

Soldiers could be trained to recognize the most likely offenders and the methods used by predators to groom, isolate and/or otherwise increase the likelihood of a successful sexual assault and decrease the likelihood of an unrestricted crime report. Instruction and warnings are specifically needed on the role of alcohol and drugs, especially date rape drugs, in predatory behavior and rape. Soldiers of all ranks need to be better prepared to identify the most at-risk Soldiers, the behaviors and circumstances that put them at greater risk, and the locations and situations on and off base to avoid. Further guidance to all ranks on what behavior is unacceptable and will not be tolerated of any professional Soldier and how best to prevent, avoid, evade and report unacceptable behavior is needed.

Simple safety and security measures also need to be taken at Fort Hood. Adequate lighting in bathrooms, barracks and housing areas make everyone safer and deter crime. High quality surveillance cameras and license plate readers at all gates and strategically placed cameras at major intersections would contribute to deterring crime, solving crimes, increasing the security of the post. They would especially enhance law enforcement efforts. Practices and procedures governing access to and movement around the post also needs to be reviewed and tightened to ensure only those who should have access to the base have it and that they are not free to roam the base without restriction, unless that is in the best interests of the Army.



## **9. FINDING #9: THE COMMAND CLIMATE AT FORT HOOD HAS BEEN PERMISSIVE OF SEXUAL HARASSMENT / SEXUAL ASSAULT.**

Throughout its hallowed history, the U.S. Army has justifiably prided itself on its remarkable ability to consistently identify, develop and maximize the talents of superb leaders at every level. These leaders have reliably provided the requisite level of expertise, skill, inspiration, and passion necessary to vigorously protect and defend our Nation from all existential threats.

This foundational premise has taken on an added level of significance of late at the Army's largest domestic installation located at Fort Hood, Texas. Emblematic of an Army that has been decisively engaged in conflicts for the better part of two decades, at Fort Hood, the ever-increasing demands related to operational tempo, training requirements and logistical / administrative support needs within its garrison environment necessitate the sustainment of a dedicated, focused and engaged leadership cadre. And, these leaders must be fully committed to facilitating overall success in achieving mission objectives, maintaining good order and discipline, and most importantly, taking care of Soldiers and their families as a high-priority endeavor.

However, subsequent to conducting an extensive number of interviews of Fort Hood Soldiers, Department of the Army civilians, local officials and other members of the community that comprises Fort Hood, aggregating a voluminous amount of substantive relevant data, and ultimately analyzing this universe of data and information within the context of assessing the current level of Soldier confidence in the SHARP Program, the FHIRC has concluded that the existing command climate at Fort Hood is neither conducive to nor adequately supportive of the prevention of incidences of sexual harassment and sexual assault.

Of note, there were two Commanding Generals and one Acting Commanding General from 2018 through September 2020, when the on-site phase of this review began. This climate, however, is not attributable to any one commander or command staff. Nor did it spontaneously combust during the review period, or as a direct consequence of recent events. It was a culture that was developed over time out of neglect and persisted over a series of commands that predated 2018. A toxic culture was allowed to harden and set.

As much as this finding applies to the actual prevention of incidents of sexual harassment and sexual assault, it also applies to the fear of reporting, the treatment of reporters, the adequacy and timeliness of the ensuing investigation, and the adjudication of cases and investigations. The FHIRC largely attributes this determination to a definitive lack of leadership engagement, commitment and accountability at all levels of officer and NCO oversight relative to emphasizing and personalizing the importance of preventing, reporting and responding to sexual harassment/abuse incidents. It is also attributable to inadequacies of junior NCOs in identifying and engaging in training opportunities related to personal development and interpersonal interactions.

Pervasive erosion of confidence in the SHARP Program, and frustration of the numbers of Soldiers willing to report being violated, result from shortcomings in terms of tangible, visible and measurable leadership with respect to the creation of a zero-tolerance command climate in relation to sexual harassment and sexual assault, failure to prioritize SHARP protocols and response, and an

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unacceptable inability to ensure that the confidentiality of reporting remains paramount. These factors also inhibit the creation of an environment where sexual harassment and sexual assault never occurs in the first instance.

This situation has been further exacerbated by an overwhelming perception on the part of interviewees within the Fort Hood community that they would likely be subjected to direct or indirect retaliation, reprisal, intimidation or adverse reputational impact by their respective chains of command if they filed reports of sexual harassment or sexual assault, utilizing the SHARP Program.

As set forth with greater clarity in Findings #1 and #2, numerous Soldiers, particularly within the ranks of PVT/E-1 through SPC/E-4, cited an overall lack of confidence in the credibility and effectiveness of the SHARP Program. Interviewees largely felt that the training was outdated and prosaic, and many expressed concerns that it was administered by fellow Soldiers whom they did not fully trust. The lengthy amount of time that the SHARP Program takes to fully investigate and adjudicate cases was frequently noted as well.

An environment where sexual assault and sexual harassment is as insidious as it appears to be at Fort Hood portends a widespread lack of respect between and among its Soldiers. Where there is respect for the value, purpose and contributions of all Soldiers, no matter their gender, the environment will not tolerate sexual assault or sexual harassment in any form. Indeed, a noteworthy and troubling lack of overall respect and emphasis on dignity and equality was noted within the culture at 3CR. This is emblematic of a broader problem that may require further focus on personal development, adjacent to leadership development, in order to ensure an Army comprised of Soldiers with reciprocal appreciation for the worth of their fellow Soldiers.

All issues related to response to and prevention of sexual harassment and sexual assault are difficult. Among these difficult issues, between response and prevention, it is less difficult to contemplate how to *respond* to incidents of sexual harassment and sexual assault. In those instances, horrible though they are, there is a victim, there is an allegation, and there is either an assailant or an individual behaving improperly. Prevention is more difficult. It is more difficult to create a culture where these instances never occur in the first instance. But, the Nation deserves more than an Army that does what is easy. The Nation deserves an Army that does what is necessary. It is necessary for Soldiers of both genders to never be more concerned with what may happen to them inside the wire than what may happen to them outside the wire. It is necessary for all who choose to serve their country by wearing the Uniform of a U.S. Army Soldier to be treated with dignity and respect, in an environment free from sexual harassment and sexual assault. Such an environment increases combat readiness. Our Soldiers deserve no less.



## OTHER OBSERVATIONS OUTSIDE OF CHARTER MANDATE

### **1. Soldiers In The Greatest Need Do Not Seem To Avail Themselves Of Mental / Behavioral Health Assistance, Possibly Because Of Misperceptions And/Or Fear Of Disclosure.**

While outside of the scope of the FHIRC Charter, the Committee made a number of observations, leading to its conclusion that mental health issues require further investigation. Of the 647 individuals interviewed, 523, or 81%, stated they would feel comfortable seeking mental health assistance. The FHIRC learned that adequate mental health resources are available for Soldiers at Fort Hood, and that most Soldiers would feel comfortable seeking mental health assistance. Combat units have embedded behavioral health officers assigned at the brigade/regimental level. Soldiers can also seek assistance through Military and Family Life Counselors, or up to eight sessions with an off-post civilian provider through MilitaryOneSource.

Despite the high positive response rate and availability of multiple mental health care venues, Fort Hood has high suicide attempt and suicide death rates relative to similar posts. First-term enlisted Soldiers arriving at Fort Hood between 2015 and 2019 have the second highest attempted suicide offense rates (0.91%), which is significantly higher than the average rate among divisional posts (0.39%). Because the decision to report suicide attempts as a crime may differ across commands, these rates could reflect differences in policy and enforcement, rather than higher prevalence. However, on Fort Hood, deaths by suicide as reflected in casualty records are high (0.07%). Among CONUS installations that host a division, Fort Hood has the third highest suicide death rate.

Aside from issues concerning Soldiers' willingness to avail themselves of mental health assistance, a significant number of Soldiers reported difficulty, even when they tried. Wait times for mental health help were often prohibitive, sometimes several months or more, considering delays caused by field and training obligations.

Additionally, during individual interviews, Soldiers who indicated they would not feel comfortable seeking help for a mental health issue stated that they did not believe that their communications would be kept confidential. Others feared that seeking mental health assistance would negatively impact their career and possibly follow them into civilian life.

The Committee reviewed 19 case files provided by the Fort Hood CID office investigating Soldier suicides that occurred in FYs 2018- 2020. A postmortem behavioral assessment was mentioned in only one of the 19 files, making it appear that no such assessment was conducted in the other 18 cases. The FHIRC suggests that because of the high rate of Soldier suicides and suicide attempts, a postmortem analysis in every case is indicated. As a general matter, further study of mental health treatment and suicide at Fort Hood is recommended.



## **2. Mold, Barracks, Family Housing And Other Facilities, As Well As Quality Of Life Issues.**

Throughout individual and group interview sessions, Soldiers and civilians complained that many barracks, workspaces, and family housing units are in poor repair and present health hazards. The most common but certainly not the only complaints include: persistent mold, bug and pest infestations, lengthy wait times for needed repairs, and inadequate or non-functioning lighting. Many female soldiers reported the inability to use a restroom, without the benefit of lighting provided by their personal cell phones. In office spaces, numerous soldiers described the sound of mice scurrying in overhead ceiling tiles and the prevalence of mice feces and urine in motor pool areas. The subject of decrepit facilities arose so frequently that the FHIRC recommends further investigation to determine what actions might be taken to better address these quality of life issues.

Two FHIRC members had the opportunity to meet with a military spouse of perhaps the most outspoken family to call attention to the substandard conditions that plague numerous family housing units on Fort Hood. This family stated they have suffered the misfortune of having mold and other health threats present in three of their previous on-base units, causing each of their five children to become ill. Additionally, most of their clothing and household goods have been ruined. The family also reports that their persistent pursuit of adequate living quarters appears to be a nuisance for the installation, as reflected in a reminder they received from the Garrison Commander that “family housing is a privilege, not a right.” Once again, it appears the human touch is missing at Fort Hood.

## **3. Equal Opportunity & Inclusion For People Of Color And Women May Require Further Attention.**

As part of its assessment of the command climate at Fort Hood, the FHIRC researched, investigated and assessed equal opportunity and inclusion at Fort Hood.<sup>189</sup> Despite the abundance of data from personal interviews, surveys, and previous DEOCS, the FHIRC was not able to make a conclusive finding. Nevertheless, the FHIRC believes that further attention in the area of equal opportunity and inclusion for people of color and women is warranted.

### **3.1. Recent History Of Equal Opportunity & Inclusion At Fort Hood**

Numerous DEOCS were conducted at Fort Hood between 2014-2019 relating to diversity management, inclusion, and discrimination. These surveys show that there were deficiencies in these areas well before the events that led to the FHIRC’s investigation. Below, Figures 39-44 depict the average scores, by installation, on various metrics evaluated during each DEOCS. As is evident, Fort

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<sup>189</sup> In assessing the command climate as it relates to diversity and inclusion, the FHIRC was very cognizant of the current climate in the United States. At the time of the investigation, the United States was undergoing tremendous social unrest due to the recent deaths of African Americans after encounters with the police. Racial equality, justice, and discrimination were dominating the news and social media. In a nutshell, the FHIRC’s investigation into the issue of race and inclusion was done at a time of unprecedented sensitivity to racial issues. The FHIRC analyzed the data it received from the on-site investigation against this backdrop.

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Hood scored at or near the bottom in each of these categories from 2014-2019. While not substantially lower than the average, Fort Hood's scores were statistically significantly different even after controlling for basic post characteristics (in all Figures below, a higher score is better).<sup>190</sup>

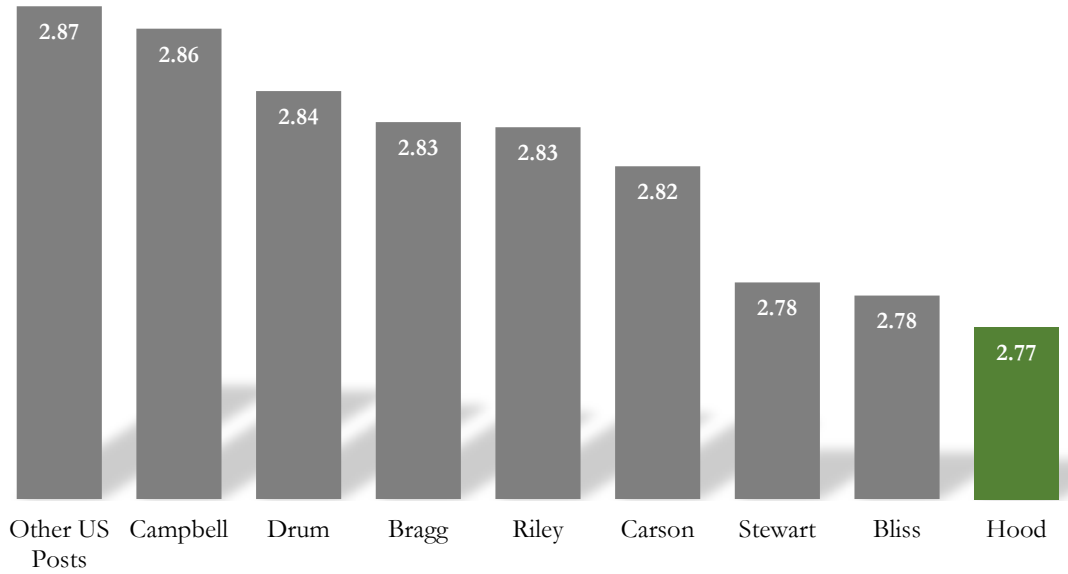


Figure 39: Diversity Management (2014 to 2016)

<sup>190</sup> Analysis of surveys completed by Soldiers assigned to units at CONUS installations between April 2014 and September 2016, and between October 2017 and March 2019. Data source: Defense Equal Opportunity Management Institute Organizational Climate Survey (DEOCS).



# REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE

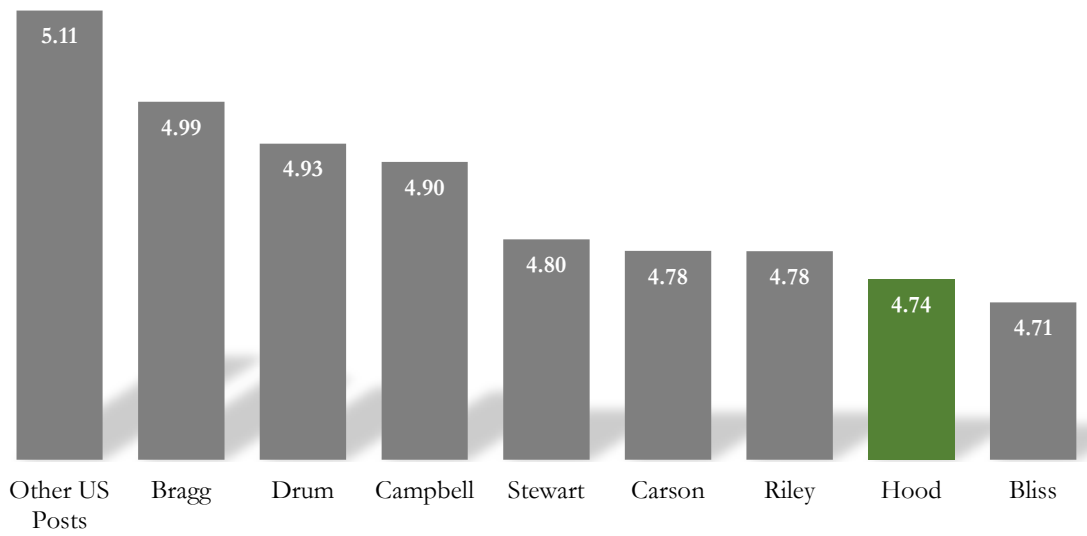


Figure 40: Inclusion (2017 to 2019)

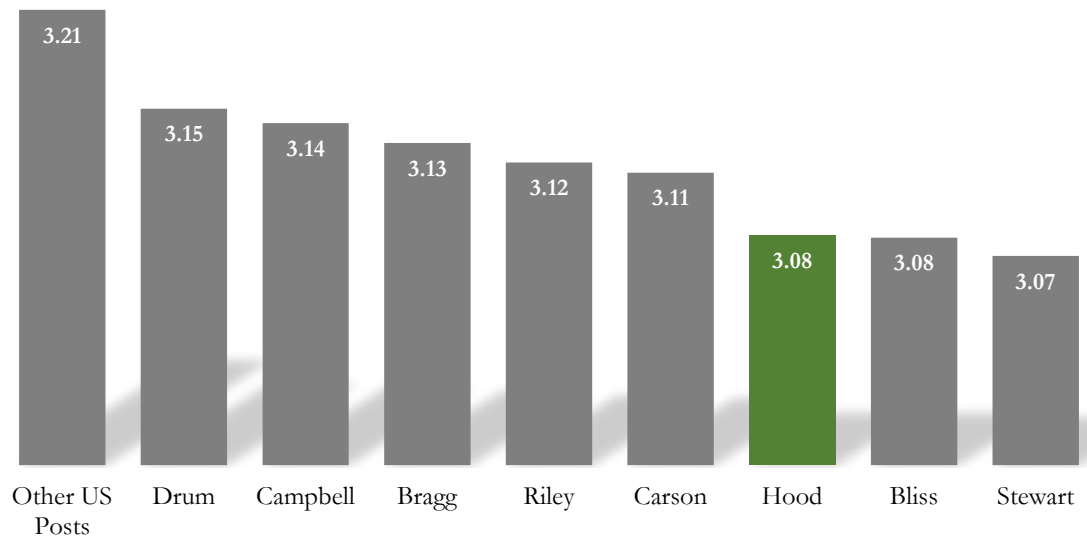


Figure 41: Sex Discrimination (2014 to 2016)



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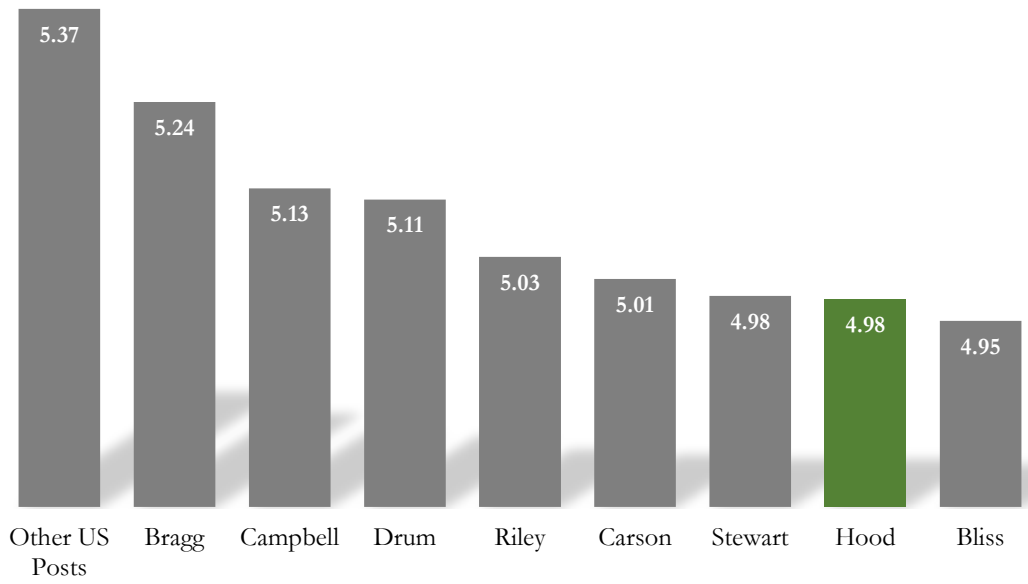


Figure 42: Sex Discrimination (2017 to 2019)

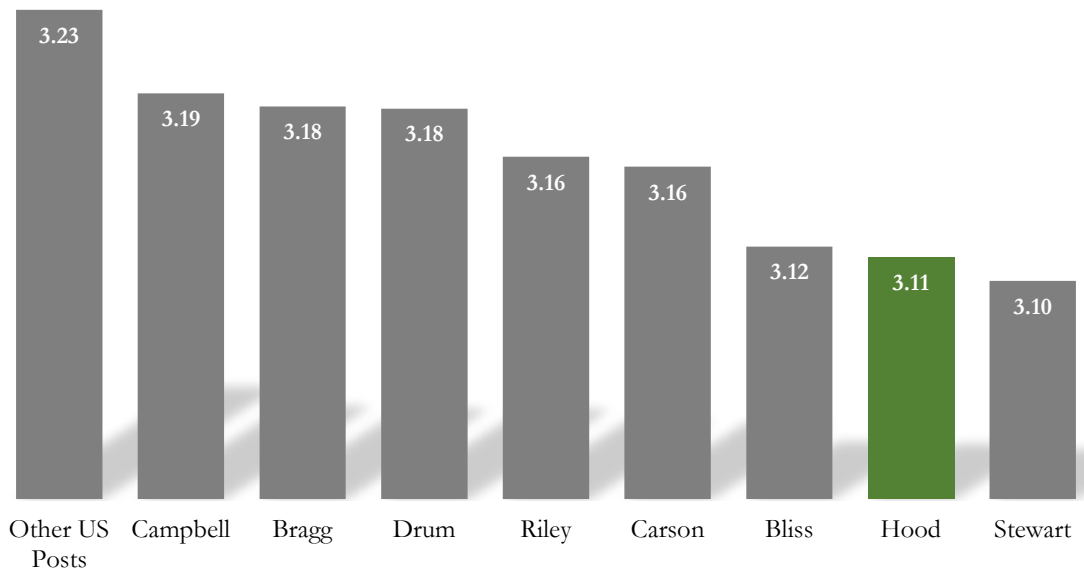


Figure 43: Racial Discrimination (2014 to 2016)



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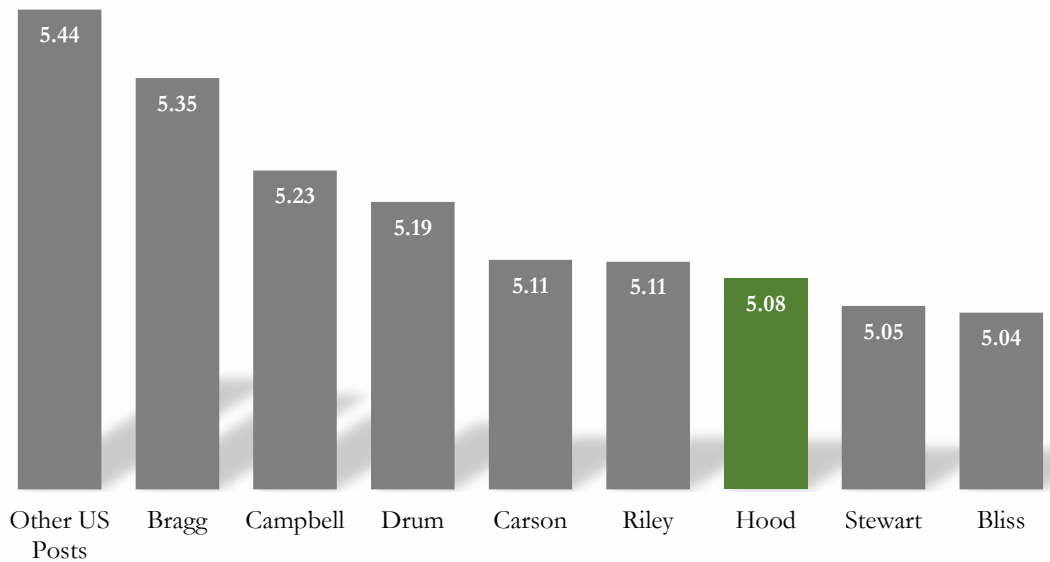


Figure 44: Racial Discrimination (2017 to 2019)

## 3.2. The Interviews And Surveys

The results from the individual interviews and Surveys were concerning but not conclusive. The personal interviews showed that fifty-four percent (54%) of respondents had concerns about how women or minorities were treated in the Army; and forty-four percent (44%) believed the Army had not gone far enough in the promotion of women and minorities. Given the Survey's sample size, the FHIRC could not draw a definitive conclusion from these percentages. However, the Group Interviews and Survey results provided further support for the belief that equal opportunity for people of color and women merits further attention.

Soldiers were not required to provide written comments relating to discrimination or inclusion, yet many did. Soldiers and civilians provided numerous examples and/or comments relating to discrimination and/or a lack of inclusion within their unit. Below are some excerpts from the individual surveys that highlight the types of written comments received:

*"Racism is a huge problem in my unit. (b) (6) My chain of command asked me to keep quiet about it and said 'It's not a big deal' when I reported it. I tried to go to our brigade EO rep."*

*"The contributions of female Soldiers in this command is still not appreciated as much as those of the males - there is a definite 'boys club' among the staff and commanders."*

*"They don't treat females equally and if you do treat females equally you are frowned upon."*

*"Yes, I have observed a great deal of favoritism by superiors. Also, I have witnessed a number of racist remarks and often people's complexions are joked about. I really do not appreciate the amount of disrespect that I see here."*

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*“Females in this unit are not respected at all. We are often taunted, teased and ridiculed for going to seek medical help for sickness injuries or other female health issues. We are often seen and verbally told that we are weaker than the males and that we should not be amongst males in a combat MOS, because we are not fit.”*

*“[T]here is so much race segregation that doesn’t allow some to feel comfortable and its blatantly obvious. Everything is a big put on or show when anyone from above shows up so nobody ever gets caught. As a Hispanic I feel like I can’t come up to soldiers of other races and get the same treatment and compassion as others would.”*

*“While it’s not sexual harassment/ assault related, I have heard racist remarks that I think were not dealt with properly. Furthermore I don’t think it is professional by the EO rep to discourage the person reporting the overt racism from properly filing a complaint, basically sweeping it under the rug.”*

*“There is a disparity in the treatment of individuals based on race and its blatantly obvious. . . The punishments for infractions should be the SAME across the board. Currently this is not the case. Diversity & Inclusion and Racism & Sexism training should be implemented in basic training and should be an annual requirement taught by someone OUTSIDE that organization.”*

*“I wake up now regretting I joined the military as a young minority female and do not feel as though I fit in with my current company. I feel like an outcast often, I come to work and just sit here and talk to no one. . . I want to be somebody and I want to be utilized, but instead I am left to defend for myself at Fort Hood with no voice.”*

*“There is notable favoritism in regards to some communications, promotions and assignments I have observed at this Army post but nothing criminal or falling under the heading of sexual harassment or assault. I do feel I am listened to differently and treated as less valued as a female than my male colleagues in my place of”*

*“I have worked for the Government for over (b) years and I have never seen “SO MUCH” in your face RACISM, CRONYISM, NEPOTISM, and RETALIATION. I know it sound harsh, but this is a daily reality here for people of color. The sad part about it, is that it is allowed here on Fort Hood.*

While the Committee cannot generalize these comments into an overall finding, these words are important to share as they do represent a part of the climate at Fort Hood. In addition to the individual interviews and surveys, the FHIRC analyzed feedback received during Group Interviews. Although the FHIRC conducted Group Interviews with over 1,800 people, the results of these interviews were inconclusive. Some Soldiers believed that equal opportunity and inclusion were problematic at Fort Hood, while many others believed that it was not.

In sum, there was not enough evidence to conclude that discrimination or inclusion was a widespread problem at Fort Hood. In general, responses to the FHIRC indicated a belief that, while Fort Hood and the Army had endeavored to improve in the areas of discrimination and inclusion, there was still much more work to be done on these issues. This sentiment is worthy of consideration as the Army takes a closer look at equal opportunity and inclusion at Fort Hood.

## RECOMMENDATIONS

### SHARP Structure

The SHARP Program manning structure would benefit greatly from professionalizing the force. Specifically, rather than staffing the Program with borrowed military manpower, the SHARP Program should be comprised of qualified trained professionals, committed to this crucial component of military readiness. The FHIRC offers the following Recommendations for implementation at Fort Hood to address the Findings articulated above, and for consideration for broader application. The Recommendations below are justified by the Findings set forth in this Report. The Committee believes they are ideal, but are provided without regard for external factors such as budgeting and manpower constraints.

1. The United States Army SHARP Program at Fort Hood should have a structure similar to the United States Army Trial Defense Service (TDS) and the United States Army Combat Readiness Center (CRC) and Director of Army Safety, insofar as each are structured to support the Command, while outside of the chain of command. To ensure objectivity and fairness, the SHARP Program should operate independent from local commands and their legal advisors.
2. While the climate related to sexual assault and sexual harassment within a unit should remain within a Unit Commander's authority, the oversight of the SHARP Program should not. The Army should assign a Senior Pentagon level SHARP Commander at the rank of Brigadier General (O-7) or above, who works in coordination with the Army Resilience Directorate, and reports directly to the Vice Chief of Staff of the Army.
3. Fort Hood should have an enhanced SHARP Program Office that is fully staffed, trained, funded and led by an SES or SL civilian who reports to and is rated by the Senior Pentagon level SHARP Commander.
4. The local SHARP Program Manager (PM) should be an SES or SL civilian, at a level incapable of being managed by the Installation Commander.
5. All Brigade level SARCs and lead VAs should report to and be rated by the installation SHARP PM. Brigade level SARCs are responsible for managing each SHARP complaint from immediately following intake, through resolution.
6. At the installation level, there should be a cadre of pooled full-time SARCs and VAs, comprised of a hybrid of civilian and uniformed personnel, instead of the current structure of collateral-duty SARCs and VAs. This structure has the added benefit of relieving collateral duty burdens within units. The FHIRC is well aware of the hazards of having contract civilian personnel in these positions and does not recommend this course of action. Civilian SARCs and VAs must have Mobility Agreements, to ensure compatibility with unit deployment requirements.
7. All SARCs and lead Victim Advocates supporting a Brigade or Brigade level equivalent should be civilians at a GS grade level to be determined after a comprehensive assessment based upon level of responsibility. The Army should consider giving SHARP Program positions a career



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ladder track to provide for succession planning and development of expertise. Under a career ladder, employees would be eligible to receive promotion to the next grade level after successfully completing the specified GS level for one year. For example, depending on the duty position (VA or SARC), the career ladder could span GS9-GS11; GS-11-GS13, or GS12-GS14.

8. Strengthen and centralize all SHARP functions, governance and personnel under the installation SHARP Program Management Office.
9. SHARP Cadre Pool Members report to the SHARP PM, not any unit commander.
10. Within this Cadre, SHARP Military Professionals (SARCs and VAs) should be selected, trained and assigned at the Department of the Army level, which will ensure they are appointed, credentialed, trained and ready to perform their duties when they hit the ground.
11. Establish SHARP as a Special Qualifications Identifier (SQI) and fully fund the Program, in order to: (i) enable interdisciplinary development of SHARP Military Professionals across Military Occupational Specialties, (ii) encourage the best to aspire to become SHARP Military Professionals, (iii) reward these professionals for their service, and (iv) preserve institutional knowledge through professional development.

### Implementation of The SHARP Program

The FHIRC appreciates the perspective that unit commanders bear ultimate responsibility for the command climate within their respective units, and should therefore control factors that directly impact that climate, including response to and prevention of sexual harassment and sexual assault. However, in light of its observations regarding SHARP systems and their functionality, the Committee has concluded that in the war against deeply dysfunctional norms related to sexual harassment and sexual assault, many of the weapons best suited to combat these ills lie outside of the command. The increased trust that would be engendered among Soldiers—who overwhelmingly support this solution—only bolsters this conclusion.

12. Members of the SHARP Cadre Pool should be responsible for initial intake, such that no Soldier reporting an incident of sexual assault/harassment *must* report to uniformed personnel. However, any *soldier* desiring to report to uniformed personnel because of military unique circumstances, for example, may do so.
13. Investigations of sexual harassment must be handled by a 15-6 Investigating Officer from a different brigade or brigade equivalent than the subject, who are trained by and work closely with a legal advisor to conduct a thorough and complete investigation.
14. The Sexual Assault Review Board should establish specific and measurable goals and objectives for the SHARP Program.
  - a. Incident prevention and reduction
  - b. Timely investigations
  - c. Timely adjudications

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- d. SHARP knowledge
  - e. Training completion and results of knowledge tests
  - f. Case tracking timelines from report to resolution and identify bottlenecks and delays built into the system
  - g. Victim updates and victim satisfaction
15. Unit commanders should be required to take appropriate actions and, at minimum, engage neutral parties to facilitate focus group discussions within their units to identify causes, whenever their DEOCS climate surveys indicate a yellow status in any unit component regarding SHARP related climate factors.
  16. There must be a command emphasis on SHARP training, to demonstrate its importance. Unit commanders must ensure time is allotted for SHARP training and the assessment of SHARP readiness.
  17. The SHARP PM should be responsible for assessing the readiness of units in terms of SHARP awareness and cultural posture, with the commanders responsible for acting upon this assessment. The installation SHARP Program Office, utilizing the SHARP Cadre Pool, should be responsible for developing and conducting training at units throughout the installation. The SHARP Program Office must track assessments and recommend remedial measures when appropriate.
  18. Specific to Fort Hood, the SHARP 360 training currently housed in a self-contained building provides highly effective and engaging training, particularly for peer intervention and incident prevention, and should be utilized to the maximum extent possible. Units that do not take advantage of this training are missing a golden opportunity to positively impact their Soldiers' understanding of the SHARP Program and its principles.
  19. Increase focus on the SHARP-related component of the evaluations of all officers and NCOs, to make it material and substantive, rather than just another block to check.
  20. The Army Inspector General and the Army Department of Administrative Services should change the thresholds for green, yellow, and red status for SHARP climate factors, to raise the bar. A status of red should begin at 60% favorable responses and all levels above that should be adjusted accordingly.

### Legal Components Of The SHARP Program

The FHIRC understands very clearly that Soldiers at Fort Hood overwhelmingly question the objectivity and fairness of the SHARP Program. To address this inherent mistrust, the Program must operate independent from local commands and their legal advisors. Furthermore, local commanders must make it their business to properly manage and prioritize SHARP related adjudications.

21. The Army should conduct an audit of OTJAG compliance over the last five years at Fort Hood, with the MOU dated June 5, between Army CID Command and OTJAG establishing a 14 day time frame to render a probable cause and/or final report opinion. The audit should determine

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whether these opinions are timely, identify the causes of any delays, and require appropriate adjustments to facilitate compliance.

22. The pervasive mistrust of the SHARP process and the lack of soldier confidence in leadership's ability to effectively address sexual harassment or sexual assault complaints demands an external check on the process. The SHARP PO, in consultation with its legal advisors, should review the disposition of substantiated Sexual Harassment and Sexual Assault cases on a semiannual basis for consistency and report such to all commanders serviced by that Program Office, up to and including the GCMCA for each command. Unsubstantiated cases should be forwarded to the next higher-level commander for a second review and final determination.
23. The Army should coordinate with DoD regarding implementation of Section 549 of the National Defense Authorization Act of 2020, entitled "Notice to victims of alleged sexual assault of pendency of further administrative action following a determination not to refer to trial by court-martial."
24. The Army should examine the staffing levels and timely assignment of Special Victim Counsel at Fort Hood and assess the impact on CID investigations, as any delay in assignment of an SVC can bring an investigation to a standstill.
25. The Army should require that the installation SHARP Program Management Office track and monitor the aging and life-cycle of each sexual assault and sexual harassment case, and prepare a semiannual report regarding the same.
26. Assign executive level responsibility to accurately track the length of time elapsed for full adjudication of a sexual assault complaint from investigation to final disposition.
27. The Army should ensure that breach of confidentiality with respect to leaking or publication of a SHARP report by any person involved in the process is a punitive offense.
28. Reinforce leadership education on the management of Military Protective Orders and management of complainant expectations. Commanders should make every effort to ensure the subject and the complainant are able to avoid contact to the maximum extent possible.

### **Disclosure After Adjudication of SHARP Allegation**

29. The nature of the case and the results of all SHARP disciplinary actions should be published at least semiannually, without identifying the subject, victim or Unit, in order to deter future conduct and engender confidence in the SHARP response process.
30. Publicly disseminate court-martial convictions for SHARP offenses.
31. Ensure required disclosures are provided to complainants, particularly the final resolution of their SHARP report, and contain the maximum disclosure allowed by law.
32. Educate Soldiers at all levels, including leaders and Judge Advocates, of available statistics that demonstrate the low incidence of false sexual assault reporting generally, and the flawed logic in believing soldiers are highly incentivized to file false SHARP reports.

## Fort Hood & USACIDC Command Issues

In order to fully address its own stated objectives in AR 195-2 the USACIDC needs to develop and maintain a Special Agent workforce capable of effectively and efficiently handling the high volume and scope of complex sex crime and death caseloads at CID offices covering Corps and Divisional Posts such as Fort Hood and equip them with the tools necessary to do so. The FHIRC cautions that treating these CID Offices as training sites seriously undermines the ability to meet those CID objectives.

33. The Fort Hood CID should establish and track the progress of specific and measurable goals, objectives, and metrics, for their operations regarding:
  - a. Timely investigations
  - b. Drug crime suppression
  - c. Crime reduction
  - d. Task force and joint investigative activities
  - e. Staffing
  - f. Training
34. The CID Command should evaluate its staffing model and personnel movement protocols for high tempo/high turnover CID offices like Fort Hood which cover Corps and Divisional posts to ensure they are staffed at a level where they are capable of working:
  - a. Complex cases on the installation;
  - b. Joint investigations for complex cases off the installation;
  - c. Proactive crime suppression in conjunction with DES and Commanders, especially drug activity;
  - d. Competently and effectively handle the large volume of death and sex crime cases.
35. USACIDC should enhance the availability at the Detachment level of electronic forensic resources, expertise, software licenses and equipment, related to the retrieval and exploitation of electronic evidence regarding mobile phones and laptops such that exigent cases can be handled immediately and sex crime and death investigations are fully and timely serviced.
36. CID should be furnished its own mobile phone tracking expertise, software application licenses and equipment.
37. USACIDC should ensure that on the largest and busiest installation, the CID Office has an appropriate number of experienced Special Agents to handle complex investigations and mentor apprentice Special Agents.
  - a. There should be no less than a 50/50 ratio of apprentice to credentialed Special Agents; and, 30% of these Special Agents should have no less than 5 years of experience and 20% should have no less than 8 years of experience.

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- b. The USACIDC and the Director of Army Staff should evaluate whether this requires an increase in the number of CID Civilian Special Agents (1811 civilian criminal investigators) for continuity and effectiveness in handling complex cases.
  - c. CID should study whether manpower allocations should be reallocated every other year to ensure the CID staffing in the Detachments covering Corps and Divisional Posts are fully capable of discharging all of the USACIDC objectives listed in AR 195-2
38. CID Fort Hood should immediately establish MOUs and reconsider imbedding Special Agents with local law enforcement stakeholders, especially KPD to facilitate:
- a. Rapid notification and tracking of Soldier subjects and victims;
  - b. Conduct of joint investigations involving crimes involving Soldiers and cases of mutual interest;
  - c. Development of true law enforcement partnerships;
  - d. Enhancement of day-to-day communication channels;
  - e. Exchange of crime information, investigative reports, criminal intelligence and crime analysis;
  - f. Identify establishments, neighborhoods and areas off post that are high risk to soldiers;
39. Fort Hood CID, DES and unit commanders should periodically participate in “ride-a-longs” with local police and sheriffs to establish greater understanding of crime dynamics outside Fort Hood and high-risk areas for Soldiers.
40. CID and DES should provide Fort Hood Command and stakeholders with information and intelligence on a regular basis to support employment of all the tools available to the Command to reduce crime such as drug suppression, placing high crime establishments off limits, identification and dissemination of high-risk activities and sites off post, barracks health and welfare checks, and targeted law enforcement operations on the installation.
41. CID should fully investigate all soldier drug overdoses to determine the source of the drugs and the extent and nature of the soldier’s and his/her known associates’ involvement in drugs.
42. CID should fully investigate all death cases, including suicides on and off post to determine whether high-risk people, places or activities contributed to the death to inform responsible commanders and enable formulation of mitigation strategies.

### Missing Soldier Protocols

While the installation announced it is presently engaged in establishing protocols for handling instances of missing Soldiers, this undertaking must be deliberate and ongoing. Protocols must focus on proactive accountability and timely response.

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43. Establish an Army-wide set of protocols for “failure to report” scenarios for the critical first 24 hours to ensure consistent and robust response at the Unit and MP level when a Soldier’s absence may be involuntary.
44. Train and equip NCOs with the criteria, knowledge and skills necessary to develop and evaluate facts that would help them more clearly identify and recognize “suspicious circumstances” in situations where a Soldier fails to report.
45. Through training, command emphasis and strict enforcement, ensure that Unit leadership and NCOs know enough about their Soldiers to position them to effectively ensure their health and safety.
  - a. Maintain up to date Leader books regarding their Soldiers;
  - b. Conduct regular health and welfare checks;
  - c. Monitor and be alert for lifestyle issues that are high-risk and deal with them;
  - d. Receive and brief their soldiers on CID/DES information about crime and high-risk places and activities.
46. Ensure Unit Soldier accountability checks are strictly enforced and documented according to general orders and Army policy and regulations.
47. Establish stricter protocols for MPs to respond effectively when contacted by units in possible missing Soldier scenarios such that time lapse of 24 hours is not the only criteria that initiates an MP response.

### **Crime Prevention & Response**

Fort Hood would benefit greatly from a reorientation toward identifying, assessing and preventing criminal activity before it even occurs utilizing modern public safety strategies and techniques.

48. Establish a monthly crime prevention governance body of all Fort Hood stakeholders with the overall mission of force protection and enhancing public health and safety through risk management and targeted reduction of crime incidents on the installation by:
  - a. Establishing shared specific and measurable goals, objectives and appropriate metrics for success;
  - b. Using sophisticated crime analysis to identify trends, hot spots, high crime, or outlier units;
  - c. Establishing mitigation actions and initiatives;
  - d. Identifying accountability for achievement of goals and objectives;
  - e. Informing command stakeholders of all information affecting their units;
  - f. Providing analytical products and reports regarding off-post crime dynamics involving Soldiers and identify initiatives and strategies to interact with off-post law enforcement to mitigate the crime risks to Soldiers off-post;
  - g. Devising specific proactive strategies to reduce drug crimes.

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49. Consider full-time imbeds, of CID and/or DES with local law enforcement partners to facilitate rapid notification and decisions in case of joint jurisdictional issues involving Fort Hood Soldiers.<sup>191</sup>
50. Commission a survey to identify strategic locations to install closed-circuit television (CCTV) and license plate readers on the installation to:
  - a. Deter crime by alerting Fort Hood visitors, workers, and inhabitants that certain movements and actions are under CCTV coverage;
  - b. Solve crimes by timely identification of vehicle movements and suspects;
  - c. Assist criminal investigators in complex investigations by establishing critical timelines of people and vehicle movements;
  - d. Facilitate real time crime apprehensions in exigent circumstances;
  - e. Provide real time intelligence to crises managers during such situations.
51. Establish an awareness program with the theme of “Vulnerability Avoidance,” especially in the area of sexual assault and high-risk off-post activities.
52. Streamline the Fort Hood Armed Forces Disciplinary Control Board process so that timely and effective actions can be taken to address high risk establishments and areas off base.
53. Through effective liaison and sophisticated crime analysis, DES and CID should work with local law enforcement to identify high-risk establishments and living areas. These areas should be rapidly declared off limits by the commander. This topic should be a regular agenda item for the Crime working group.
54. DES and CID crime reports should focus on the crime dynamics both on and off post, since a large number of Soldiers live off-post.
55. DES and CID should publish off post crime statistics and hotspots to the general Fort Hood population, to facilitate situational awareness.

### **Command Climate Issues**

Although the gravamen of the Committee’s Recommendations is focused on tangible, quantifiable, material actions that the Army may undertake, there is an imperative Recommendation that will necessarily require considerable circumspection and contemplation. Fort Hood in specific—and the Committee believes the Army as a whole—must undertake the process of dramatic change in its culture related to sexual harassment and sexual assault. In the humble but informed opinion of the FHIRC Members, this involves a core change in perspective, which will begin with the type of heightened respect and appreciation for the contributions and value of all service members that lessens proclivities toward engagement in or toleration of activities as denigrating as sexual harassment and sexual assault. Furthermore, it is necessary to better understand the science of victim psychology and

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<sup>191</sup> DES has limitations conducting off-post law enforcement activities, but can embed and liaise with a local department. CID has fewer limitations and more flexibility operating off-post in a task force or joint investigation environment.

## REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE

behavior to avoid victim shaming and callous responses to counterintuitive victim conduct. Failure to institute this cultural change ostracizes an entire segment of the Army and compromises combat readiness.

56. The Army should examine, from recruitment throughout the lifecycle of a Soldier, how the Army can better develop the “whole” person, helping each Soldier recognize the value of the warriors with whom they serve. This development must be iterative through the Soldier’s career; and, it cannot be relegated to another perfunctory PowerPoint presentation. It requires comprehensive consideration and circumspect implementation.
57. Define the 21st Century Soldier as one who values respect and inclusion, and knows how to carry that out in day-to-day interactions.
58. Command leadership at all levels should devise strategies and initiatives to reestablish and emphasize the role of NCOs and Junior Officers in knowing and connecting with their Soldiers at the unit level in ways that facilitate respect for the health, safety, and well-being of all members of the unit and the Army.
59. Establish and maintain a culture and climate of equal opportunity, and zero tolerance for sexual assault and sexual harassment.
60. Practice intrusive leadership in these areas through direct and persistent engagement.
61. Mandate the use of DEOCs climate surveys to identify and take action on items identified as yellow or red.
62. The U. S. Army should raise expectations by utilizing the DEOCS climate surveys more effectively by revising the red category so that a red condition starts 60% favorable response and adjust the other color conditions accordingly.
63. Establish Command focus and leadership in the area of crime prevention and drive initiatives to enhance health and safety of Soldiers, Army civilians, and dependents.
64. The Installation Commander should lead and direct the SARB process, and use it as a tool to support the SHARP Program.
65. Ensure that unit leaders use existing tools to check the state of morale and well-being of Soldiers and establish new ways to do so where warranted.
  - a. Focus groups
  - b. Climate surveys
  - c. Walk around
  - d. Rely on NCO information
  - e. Monitor crime and sexual assault and sexual harassment incidents involving respective units



## **Installation Public Relations & Incident Management**

Structural impediments to robust dissemination of information during ongoing investigations do not obviate the need for a human touch in communicating with the public and managing serious incidents. Development of deep and abiding relationships within the community—relationships that are greater than mere transactional or exploitative engagements—can be advantageous during times of crisis.

66. The III Corps and Fort Hood Public Affairs Office needs a surge capability and public relations crisis management team.
67. III Corps and Fort Hood must respond quickly and factually to inform the public and help shape public perception.
68. Use a trained spokesperson as the primary means of communicating with the public rather than relying on commanders and law enforcement.
69. Cultivate enduring holistic relationships with community organizations.
70. Make a special effort to keep the Fort Hood community informed.



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## CONCLUSION

Although the Findings in this Report outline failures in leadership, they should not be interpreted as an indictment of military commanders or the U. S. Army. While the issues raised in this Report are serious and require urgent attention, they did not result from intentional or malicious action. Rather, the climate described throughout this Report was the result of inaction in critical areas like the SHARP Program that are critical to the health and safety of our Soldiers.

This climate was the product of a mindset developed over the course of almost two decades of intense military conflicts and countering threats to the national security of this Nation around the globe. Military readiness became paramount over all other responsibilities, without fully appreciating that integrity and respect between and among Soldiers is a critical component of military readiness. Over the years, those in command at Fort Hood, however, failed to make the connection between the health and safety of the Soldiers and mission readiness. This paradigm of benign neglect was allowed to take root over time at Fort Hood, at the expense of Soldiers, particularly females in combat units.

The Committee's Review was not conducted like an audit or Inspector General inspection. It was a comprehensive assessment of something that is intangible, the neglect of which risks tangible and sometimes tragic consequences—command climate. Considering the breadth and scope of individual and group interviews, specialized interviews, and a survey that drew a 100% response across the installation, the FHIRC purposed to go far beyond any previous review or assessment. The FHIRC is confident that these steps, combined with analyzing the Army's own data, were effective in developing an accurate picture of the climate and fully support the Findings herein.

One of the most important takeaways is that the military must raise the bar for its leadership. Military commanders must be capable of achieving success in warfighting while fostering a climate that is consistent with Army values of respect, and *esprit de corps*, leaving no Soldier behind, whether on the battlefield or in garrison. Sexual assault and sexual harassment, a form of bullying, is fratricide. A climate of zero tolerance must be driven deep into the ranks.

While the FHIRC was chartered to examine the conditions at Fort Hood, it would behoove the leadership of the U. S. Army to examine whether the mindset described in this Report exists elsewhere within the organization. The current situation at Fort Hood calls for engaged and intrusive leadership. Our Soldiers deserve nothing less.

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## APPENDIX A: FHIRC SURVEY QUESTIONS

- 1) My chain of command/supervisors do not tolerate sexual harassment. [Agree/Disagree answers for all questions]
- 2) My chain of command/supervisors model respectful behavior towards all individuals.
- 3) My chain of command/supervisors would correct individuals who refer to coworkers as 'honey', 'babe', 'sweetie', or use other unprofessional language at work.
- 4) Individuals from my workplace do not use offensive gestures or images that are sexual in nature while on
- 5) If a coworker were to report a sexual assault, my chain of command/supervisors would take it seriously and take action.
- 6) If a coworker were to report a sexual assault, my chain of command/supervisors can be trusted to keep the knowledge of the report limited to those with a need to know.
- 7) Contributions of males (both military and DA civilians), in all career fields, are respected within my organization.
  - 7a) Contributions of females (both military and DA civilians), in all career fields, are respected within my organization.
- 8) In my work group, if a military member or civilian employee were to file a sexual harassment complaint they would be excluded from social interactions or conversations.
- 9) In my work group, if a military member or civilian employee were to file a sexual harassment complaint, they would be blamed for causing problems.
- 10) In my work group, if a military member or civilian employee were to file a sexual harassment complaint, they would be discouraged from moving forward with the complaint.
- 11) Would any of your answers in 8-10 above change if the individual were reporting a sexual assault instead of sexual harassment?
  - 11a) If yes, which question number(s), (Number of surveys with/without a selection).
- 12) In the past 12 months, I observed a situation that I believe was sexual harassment.
  - 12a) If yes, was the situation reported?
- 13) In the past 12 months, I observed a situation that I believe was sexual assault.
  - 13a) If yes, was the situation reported?
- 14) I know the difference between a restricted and unrestricted report of sexual harassment or sexual assault.
  - 14a) Given #14, I also understand how each one works.

## REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE

- 15) I know where to go to report sexual assault or sexual harassment and I would feel comfortable going to that location, or telling a co-worker who needs to make a report to go to that location.
  - 15a) Given #15, I also know how to report sexual assault or sexual harassment via online website/hotline numbers/email process
- 16) I have reason to believe individuals in my workplace have been engaging in criminal activity.
- 17) I am concerned about what goes on after duty hours on or near Fort Hood.
- 18) Laws, regulations, and policies are not always enforced in this command.
- 19) If the results of this survey show areas that need improvement, my command will take the results seriously and make positive changes.

Are there any additional comments you would like to provide to the panel members?  
(Comments)




# REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE

## APPENDIX B: FHIRC ONLINE SURVEY

Fort Hood Awareness Survey x +  
https://fhoodsurvey.army.mil

FORT HOOD AWARENESS SURVEY

 Welcome to the Fort Hood Awareness Survey  
Your submission will be sent anonymously to a review team.

Service Status:   
Rank/Grade:   
Unit:   
Gender:   
Race/Ethnicity:

1. My chain of command/supervisors do not tolerate sexual harassment.  
 Agree  Disagree

2. My chain of command/supervisors models respectful behavior towards all individuals.  
 Agree  Disagree

3. My chain of command/supervisors would correct individuals who refer to coworkers as 'honey', 'babe', 'sweetie', or use other unprofessional language at work.  
 Agree  Disagree

4. Individuals from my workplace do not use offensive gestures or images that are sexual in nature while on duty.  
 Agree  Disagree

5. If a coworker were to report a sexual assault, my chain of command/supervisors would take it seriously and take action.  
 Agree  Disagree

6. If a coworker were to report a sexual assault, my chain of command/supervisors can be trusted to keep the knowledge of the report limited to those with a need to know.  
 Agree  Disagree

7. Contributions of males (both military and DA civilians), in all career fields, are respected within my organization.  
 Agree  Disagree

7a. Contributions of females (both military and DA civilians), in all career fields, are respected within my organization.  
 Agree  Disagree

8. In my work group, if a military member or civilian employee were to file a sexual harassment complaint they would be excluded from social interactions or conversations.  
 Agree  Disagree

9. In my work group, if a military member or civilian employee were to file a sexual harassment complaint, they would be blamed for causing problems.  
 Agree  Disagree

10. In my work group, if a military member or civilian employee were to file a sexual harassment complaint, they would be discouraged from moving forward with the complaint.  
 Agree  Disagree

11. Would any of your answers in 8-10 above change if the individual were reporting a sexual assault instead of sexual harassment?  
 Yes  No

11a. If so, which question number(s)  
 8  9  10

12. In the past 12 months, I observed a situation that I believe was sexual harassment.  
 Agree  Disagree

12a. If yes, was the situation reported?  
 Yes  No

13. In the past 12 months, I observed a situation that I believe was sexual assault.  
 Agree  Disagree

13a. If yes, was the situation reported?  
 Yes  No

14. I know the difference between a restricted and unrestricted report of sexual harassment or sexual assault.  
 Agree  Disagree

14a. Given #14, I also understand how each one works.  
 Agree  Disagree

15. I know where to go to report sexual assault or sexual harassment and I would feel comfortable going to that location, or telling a co-worker who needs to make a report to go to that location.  
 Agree  Disagree

15a. Given #15, I also know how to report sexual assault or sexual harassment via online website/hotline numbers/email process.  
 Agree  Disagree

16. I have reason to believe individuals in my workplace have been engaging in criminal activity.  
 Agree  Disagree

17. I am concerned about what goes on after duty hours on or near Fort Hood.  
 Agree  Disagree

18. Laws, regulations, and policies are not always enforced in this command.  
 Agree  Disagree

19. If the results of this survey show areas that need improvement, my command will take the results seriously and make positive changes.  
 Agree  Disagree

Are there any additional comments you would like to provide to the panel members?

**Thank you for your submission - your input is important to us!**

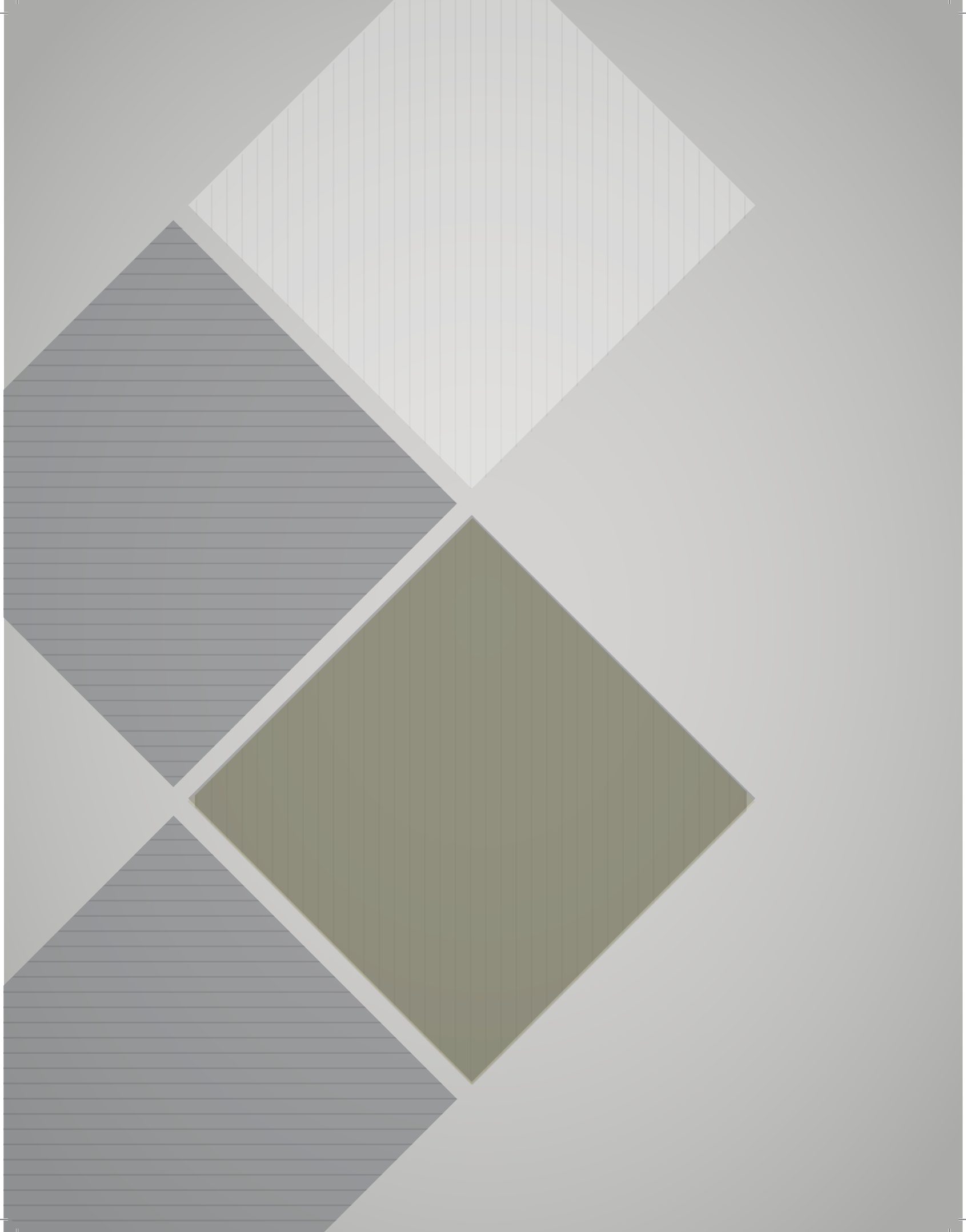
We understand the need for confidentiality so all of your previous inputs will be sent anonymously to the Fort Hood Independent Review Panel (FHIRP).

If you would like to schedule an appointment to speak to a panel member, call (937) 846-0900 between 0900-1700. This scheduling line will close on 11 September 2020.

Otherwise, please press 'Done'. (Do not use the back arrow)









# Racial Disparity in Military Justice



Protect Our Defenders (POD) submitted a series of Freedom of Information Act (FOIA) requests to each military service branch seeking demographic information on military justice and disciplinary proceedings. POD received responses from four of the service branches, and analyzed this previously unpublished data to assess the prevalence of racial and ethnic disparities within the military's disciplinary and criminal justice systems.

POD's analysis of the data shows that, for every year reported and across all service branches, **black service members were substantially more likely than white service members to face military justice or disciplinary action.** These disparities have not improved, and in some cases have increased, in recent years.

In its official response to POD's request, the Air Force explicitly acknowledged that:

***"Diversity is a national security imperative, and we understand, in order to recruit and retain a diverse population of Airmen, they must have confidence that our system is free of any unlawful discrimination."***

## FINDINGS

Overall, **black service members were at least 1.29 times and as much as 2.61 times more likely than white service members to have an action taken against them in an average year.**

- In the **Air Force**, black airmen on average are 1.71 times (71%) more likely to face court-martial or Non-Judicial Punishment (NJP) than white airmen.
- In the **Marine Corps**, black Marines are, on average, 1.32 times (32%) more likely to receive a guilty finding at a court-martial or NJP proceeding than white Marines, with the size of the disparity becoming more significant the more serious the disciplinary action was.
- In the **Navy**, black sailors are on average 1.40 times (40%) more likely than white sailors to be referred to special or general court-martial.
- In the **Army**, black soldiers are on average 1.61 times (61%) more likely to face a special or general court-martial compared to white service members.

In contrast to civilian society, the military serves as an imperfect "control" for factors associated with criminal involvement, including rigorous recruiting standards and background checks, educational requirements, and screenings for illicit drug use. Service members also enjoy full employment with a steady income.

Despite these equalizing factors, **racial disparities are present at every level of military disciplinary and justice proceedings**, particularly between black and white service members. These findings raise questions about racial bias and discrimination among decision-makers in the military justice system.

## BOTTOM LINE

Military leadership has been aware of significant racial disparity in its justice process for years, and has made no apparent effort to find the cause of the disparity or remedy it. The leadership has vigorously opposed any suggestion that the commander-controlled justice system is hindered by conflicts of interest or bias and has gone to great lengths to tout the fairness of the system. However, the military's own data raises serious challenges to the idea that the system in its current form is capable of delivering impartial justice.

To view *Racial Disparity in Military Justice*, go to [www.protectourdefenders.com/disparity](http://www.protectourdefenders.com/disparity)

Links to documentaries:

I am Vanessa Guillen

<https://ff.hrw.org/film/iamvanessaguillen>

Bombshell: The Hedy Lamarr Story

<https://www.pbs.org/wnet/americanmasters/bombshell-hedy-lamarr-story-documentary/9906/>

Military veterans kicked out for being gay still fighting for honorable discharges

Jim Axelrod, Jess Kegu, Pat Milton

February 16, 2023

<https://www.cbsnews.com/news/military-veterans-dont-ask-dont-tell-honorable-discharges/>

The 1993 law known as "don't ask, don't tell" — which allowed gay people to serve in the U.S. military, so long as they remained closeted — has been repealed for over a decade, but many of those whose military careers were ended by the policy are still missing out on honorable discharge status and benefits, a CBS News investigation has found.

An estimated 14,000 service members were kicked out under the discriminatory policy during its 18 years on the books, in some cases with discharges that deprived them access to the full benefits afforded to those with honorable discharges including VA loan programs, college tuition assistance, health care, and some federal jobs.

Donnie Ray Allen, a Marine veteran, and Amy Lambre, who served in the Navy, both say the early years of "don't ask, don't tell" brought a fresh wave of homophobia and witch-hunting to the military.

"If you put your hand on your hip, if you sat with your legs crossed — the witch hunt was always around, no matter what, during those times in the military," Allen said. "I was so angry and mad at the situation that we were all forced to serve that way."

Lambre and Allen were kicked out of the military with less than honorable discharges after allegations of homosexual conduct. They say they've spent years suffering from the emotional fallout.

"Most of my friends will tell you I've never really talked about what happened to me, what I had to live through, because I didn't know how to heal from that trauma," Allen said.

"I'm 'less than' ... less than honorable," Lambre said, explaining how this discharge changed her sense of self. "It's a dark place."

There are official channels that allow veterans who were less than honorably dismissed from the military under the defunct rules of "don't ask, don't tell" to apply for an upgraded discharge that would open doors to benefits they would have otherwise been entitled to. But servicemembers told CBS News that many of those who qualify have been reluctant to seek an upgrade because they believe it's difficult to access.

Lambre says she first started the process in 2013 without success. "It just got stalled and I didn't feel like there was any hope for anything," she said.

The Navy would not comment on Amy Lambre's case due to privacy.

"The Department has conducted several outreach campaigns to inform all Veterans who believe they have suffered an error or injustice to seek correction to their military records," the Department of Defense told CBS News. "This effort included an individualized letter campaign during the 5th anniversary of the repeal of DADT policy to those who may have been personally impacted."

The Pentagon added that it has collaborated with the Department of Veterans Affairs "to update its web-based tool that provides Veterans with customized, step-by-step instructions on how to request an upgrade to their discharge, based upon their responses to a series of questions."

But even the VA has acknowledged that veterans have been deterred from this process, writing in a September 2021 blog post that "large numbers of LGBTQ+ Veterans who were affected by previous homophobic and transphobic policies have not applied for a discharge upgrade due to the perception that the process could be onerous." That observation is backed up by the numbers. According to the most recent data available, just 1,242 veterans who were discharged or dismissed as a result of their sexual orientation have been granted discharge upgrades.

Leon Panetta, the secretary of defense who oversaw the repeal in 2011, acknowledged to CBS News, "there wasn't a lot of thought about the people who'd been discharged, who'd gone through hell on this issue, about: 'What do we do about them?' And in some ways I regret that." "It's like everything else when it comes to civil rights," Panetta said. "In order to be able to move forward and embrace the future, you can't just push the past aside."

Part of the challenge in identifying service members who were wrongly dismissed is that in some cases they were hit with other infractions, even though the driving motivation behind their dismissal may have been their sexual orientation. Former Air Force Captain Andrew Espinosa has spent 30 years fighting what he believes was a conviction fueled by homophobia.

In May 1993, a few months before "don't ask don't tell" was implemented but in the middle of a debate raging about whether gay people could serve, Espinosa's life changed forever. He was pulled out of combat duty after an accusation was made that he put his hand on the knee of a male airman and kissed him on the cheek. Espinosa has always maintained his innocence but told CBS News, "Just the accusation itself set these wheels in motion that never stopped."

He says that accusation was the catalyst for a life-changing indictment on a charge of indecent assault — a federal felony.

At the time, Espinosa says the military claimed his case had nothing to do with his sexual orientation — despite a 1993 letter from a military official to his mother acknowledging "homosexuality is a factor in this case." He also had support from an Air Force chaplain, who wrote in a letter to his command, "the recent debates on gays in the military and the subsequent policy statement seems to have fanned the flames of homophobic hysteria in the military. ... It is this irrational fear, I believe, that seems to be the motivation for the command's insistence in putting Capt Espinosa on trial."

Espinosa was found guilty at trial and was dishonorably discharged — the most serious form of punitive discharge — leaving him without health care or any VA benefits. Later in life, when Espinosa applied to be a census taker, he says he was denied because of his dishonorable discharge, which prohibits him from working for the federal government.

When asked about Espinosa's case, an Air Force spokesperson told CBS News, "there was insufficient evidence to warrant clemency in this case," adding that they "looked at the possibility of an upgrade based on the repeal of the Department of Defense Don't Ask Don't Tell (DADT) policy" but determined that the circumstances that led to "the applicant's discharge did not meet these conditions."

Espinosa has been left with few means to appeal his conviction. The Air Force said he continues to have "the option to submit new evidence" for reconsideration of his case or seek a presidential pardon. But after having already received two denials, Espinosa says he has given up. "I'm not gonna go beg."

In response to questions from CBS News about the time it takes to process a discharge upgrade

application, the Defense Department said the individual review boards — which are controlled by each service branch — "strive to finalize 90% of all cases within 10 months."

The Air Force says its Board for the Correction of Military Records and its Discharge Review Board have taken an average of 209 days and 114 days, respectively, over the last three years to process applications. The Navy says its Board for the Correction of Naval Records and its Naval Discharge Review Board are currently issuing decisions within 4 to 6 months and 6 to 10 months, respectively.

Earlier this month, the system worked for Donnie Ray Allen. He finally received his honorable discharge, triggering access to benefits he never thought he'd have.

"Even saying it, like, I can't stop smiling 'cause I'm just like, 'Wow!' Like, it actually happened," he said.

For Leon Panetta, there's still more work to be done.

"It's not just about the future," Panetta said. "It's also about making sure that we correct the past."



Yale Law School  
Veterans Legal Services Clinic

## FOR IMMEDIATE RELEASE

November 28, 2022

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## **BLACK VETERAN FILES SUIT OVER RACIAL DISPARITIES IN VA BENEFITS ADMINISTRATION**

*VA Data Shows Black Veterans Denied Disability Benefits at Higher Rate than White Veterans*

**New Haven, CT** – Today, Conley Monk Jr., a Black veteran of the Marine Corps, filed a lawsuit in federal court against the U.S. Department of Veterans Affairs (VA) seeking redress for harm caused by longstanding racial disparities in veterans’ benefits programs. After he returned from service in the Vietnam War, the VA denied Mr. Monk’s applications for education, housing, and disability benefits for decades, before finally agreeing in December 2020 that he was, in fact, eligible all along. Since then, Mr. Monk has obtained records from the VA showing a statistically significant difference in benefits claims outcomes between Black and white veterans. Specifically, for decades, VA denied the applications of Black veterans at higher rates than their white counterparts.

“My father fought in the Army in World War II, and I went to Vietnam with the Marines. But like my father before me, I was mistreated by the VA for years, and other Black veterans were denied their rightful benefits. It’s time for the VA treat Black and white veterans equally,” said Mr. Monk, who is also the co-founder and director of the National Veterans Council for Legal Redress (NVCLR). NVCLR, along with the Black Veterans Project, filed the Freedom of Information Act requests that revealed longstanding racial disparities in VA claims outcomes. Mr. Monk is also filing an administrative claim on behalf of his late father, Conley Monk Sr., a Black Army veteran who served during World War II, fought at Normandy, and yet was denied veterans’ benefits in the 1940s. The Monks’ story shows the generational harm that VA has caused Black veterans and their families.

“I am deeply concerned by reports of racial discrimination in VA care and benefits,” said U.S. Senator Richard Blumenthal, a member of the Senate Committee on Veterans’ Affairs and a veteran of the Marine Corps. “Stronger oversight and clear action should be taken promptly to stop any discrimination— absolutely abhorrent wherever it occurs. All who serve and sacrifice for our great nation deserve equal treatment and protection. Findings made in this work by Yale Veterans Legal Services Clinic, and the National Veterans Council for Legal Redress, demand immediate attention.”

“Since our nation’s founding, our government has relied on Black Americans to win its wars,” said Richard Brookshire, co-founder of Black Veterans Project. “Yet for decades, it has allowed racially discriminatory practices to obstruct Black veterans from equally accessing veterans’ housing, education and healthcare benefits — with wide-reaching economic consequences for Black veterans and their families. This lawsuit reckons with a shameful history of racism by the Department of Veterans Affairs and seeks redress for long-standing impropriety and inaction reverberating across generations of Black military service.”

Mr. Monk’s lawsuit, filed under the Federal Tort Claims Act, could provide a legal pathway for Black veterans to seek reparations from the VA. “This lawsuit seeks to hold the VA accountable for years of discriminatory conduct,” said Adam Henderson, a Law Student Intern with the Yale Law School Veterans Legal Services Clinic. Henderson also noted, “VA leaders knew, or should have known, that they were administering benefits in a discriminatory manner, yet they failed to address this unlawful bias. Mr. Monk—and thousands of Black veterans like him—deserve redress for the harms caused by these negligently administered programs.”

*The National Veterans Council for Legal Redress (NVCLR), co-founded by Mr. Monk, is a Connecticut-based non-profit veterans service organization that engages in advocacy and public education to promote the respect and acceptance of all who served our country, and works to secure benefits for veterans and their families.*

*Black Veterans Project (BVP) advances research and public education to address long-standing racial inequities across the military and veteran landscape. BVP is a subsidiary of the Black Veterans Empowerment Council (BVEC) — a coalition of national, state and local veteran organizations seeking to shift long-standing racial, economic and social inequalities suffered by Black veterans in the United States.*

*The Veterans Legal Services Clinic, which represents Mr. Monk, is part of the Jerome N. Frank Legal Services Organization at Yale Law School.*

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT**

CONLEY F. MONK JR.,

*Plaintiff,*

v.

UNITED STATES OF AMERICA,

*Defendant.*

Civil Action No. 3:22-cv-1503

November 28, 2022

**COMPLAINT**

1. The U.S. Department of Veterans Affairs and its predecessor, the Veterans' Administration (collectively "VA"), have operated generous programs of education, housing, disability compensation, and other benefits since World War II. For decades, there have been anecdotal reports and widespread suspicion of racial discrimination in these programs.

2. In 2021, in response to Freedom of Information Act (FOIA) litigation, VA disclosed records confirming these long-held suspicions for the first time. Analysis of these records reveals a statistically significant difference in VA disability compensation claim determinations based on race from 2001 to 2020, the period for which VA disclosed data. Each year, VA was more likely to reject applications of Black veterans than of white veterans.

3. The result of VA's racial discrimination has been to deny countless meritorious applications by Black veterans, depriving them and their families of care and support that their faithful service had earned.

4. Plaintiff Conley Monk Jr. is one of these veterans. Mr. Monk comes from a family of Black service members; his father was in a segregated U.S. Army unit during World War II and fought at Normandy, and a number of his siblings served in the armed forces. Mr.



Monk himself joined the U.S. Marine Corps after high school and served in combat in Vietnam, where he was promoted to lance corporal and also seriously wounded.

5. For nearly fifty years after he returned home to Connecticut in 1970, the VA improperly denied Mr. Monk's applications for education, housing, and disability benefits. Mr. Monk suspected racial bias at the VA but had no way to prove it.

6. VA eventually granted Mr. Monk benefits in 2015 and again in 2020, confirming that he was disabled by wounds suffered during his military service and eligible for disability compensation. But VA has never fully compensated him for the harm it caused by repeatedly denying his benefits applications.

7. Last year, for the first time, Mr. Monk learned of concrete evidence of persistent racial disparities in VA benefits programs, namely the 2021 statistical analysis described above. This analysis was based on records that VA disclosed in FOIA litigation brought by Mr. Monk's organization, the National Veterans Council for Legal Redress, and the Black Veterans Project.

8. In early 2022 Mr. Monk filed an administrative claim with the VA. He alleged that because VA leaders knew or should have known of pervasive racial disparities in the award of VA benefits, and because they nevertheless failed to address these disparities, VA leadership negligently breached its statutory duty of care under 38 U.S.C. § 303 (2018) and 38 U.S.C. § 210(b) (1958). VA has not responded to Mr. Monk's administrative claim.

9. Mr. Monk is not seeking to relitigate his individual benefits requests. Instead, he seeks to recover for the harm caused to him by VA leaders' negligent failure to redress the longstanding racial disparities in veterans' benefits administration, about which leadership has known or should have known for decades.

10. VA's tortious conduct caused Mr. Monk to suffer periods of housing insecurity,

financial hardship, and difficulty accessing proper medical care. He suffered severe emotional harm when he was forced to repeatedly relive the most traumatic moments of his life as part of his applications and re-applications for disability compensation. And he suffered dignitary and reputational harm as a result of VA's discriminatory actions.

11. Having exhausted his administrative remedies, Mr. Monk brings this action pursuant to the Federal Tort Claims Act. He asserts claims for negligence, negligent infliction of emotional distress, and negligent supervision, and seeks thereby to redress the harms caused to him by the failure of VA leaders and staff to administer their benefits programs in a manner free from racial discrimination against Black veterans.

### **JURISDICTION AND VENUE**

12. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346(b).

13. Venue is proper under 28 U.S.C. §§ 1402(b) and 1391(e)(1) because Plaintiff resides in the District of Connecticut, a substantial part of the events, acts, or omissions giving rise to the claims occurred in this District, and no real property is involved in this action.

### **PARTIES**

14. Plaintiff Conley F. Monk Jr. is a 74-year-old resident of New Haven, Connecticut. He is a veteran of the U.S. Marine Corps, served with distinction in the Vietnam War, and continues to advocate for veterans as the co-founder and Director of the National Veterans Council for Legal Redress (NVCLR).

15. Defendant United States of America is sued under the Federal Tort Claims Act (FTCA) for the tortious acts of its employees, including employees of the Department of Veterans Affairs and its predecessor agency, the Veterans' Administration.

## **LEGAL FRAMEWORK**

16. The United States Government has provided assistance for individuals who served in the nation's armed forces since 1776, when the Continental Congress established disability pensions for veterans – the predecessor to today's disability compensation program.

17. In 1944, President Franklin D. Roosevelt signed the Servicemen's Readjustment Act of 1944 ("G.I. Bill") providing, among other things, sweeping education and home loan benefits to World War II veterans.

18. At the signing ceremony, President Roosevelt remarked that the G.I. Bill and earlier legislation "provide the special benefits which are due to the members of our armed forces—for they have been compelled to make greater economic sacrifice and every other kind of sacrifice than the rest of us, and are entitled to definite action to help take care of their special problems."

### ***Education Benefits***

19. The G.I. Bill's education benefits were intended to give servicemembers the opportunity to resume their education or technical training after their discharge from the military. Under the original legislation, eligible veterans who enrolled in a qualifying educational program – including undergraduate and professional schools, vocational schools, apprenticeships, and scientific and technical institutions, among others – could receive monetary assistance for tuition, books, supplies, and other necessary expenses from VA to complete their education.

20. After the original G.I. Bill expired in 1956, Congress continued to fund and expand education benefits for veterans.

21. In 1976, when Mr. Monk applied for VA education benefits, eligible veterans could receive a monthly cash benefit (based on their number of dependents) to cover educational

costs and a loan from VA (based on the government's determination of financial need) to cover the cost of tuition.

22. Approximately 20 million veterans have benefited from the education benefits program initially established by the G.I. Bill. The program has enabled veterans to pursue university courses, certificate programs, on-the-job training, apprenticeship training, flight training, and non-college degree courses.

### ***Home Loan Benefits***

23. Like VA education benefits, the VA home loan program was created by the original G.I. Bill in 1944. The program was designed to help veterans purchase and retain their homes through government-guaranteed loans.

24. Under the original VA home loan program, veterans could apply for home loan guarantees from VA of up to 50 percent of the loan amount, not to exceed \$2,000. Since 1944, Congress has amended the program to increase the guaranty to up to \$45,000.

25. In 1983, at the time Mr. Monk applied for a home loan guaranty from VA, veterans could receive a guaranty of up to \$27,500.

26. As of October 2020, VA has guaranteed more than 25 million home loans.

### ***Disability Compensation***

27. The VA disability compensation program provides support for veterans who were injured during their military service or whose condition worsened as a result of their service.

28. Current VA disability compensation provides a monthly tax-free cash benefit to veterans with disabilities that are the result of a disease or injury incurred or aggravated during active military service. Depending on the degree of disability and number of dependents, a veteran may receive more than \$4,000 in monthly cash benefits.

29. The amount of disability compensation that Mr. Monk could have received when he first applied in 1982 is uncertain based on publicly available information. In 2010, the second time Mr. Monk applied for disability compensation, a veteran with a spouse could earn up to \$2,823 per month in benefits from VA. In 2012, the last time Mr. Monk applied for disability compensation, a veteran with a spouse could earn up to \$2,973 per month in benefits from VA.

30. In fiscal year 2021, VA provided over \$112 billion in disability compensation to approximately 5.6 million veterans and their families.

***Eligibility for Education, Housing, and Disability Benefits***

31. In addition to eligibility criteria specific to each VA benefits program, individuals are eligible for education, housing, and disability benefits only if they are considered a “veteran” under 38 U.S.C. § 101(2). The statute defines veterans as those individuals who were discharged from the military “under conditions other than dishonorable.” *Id.*

32. Individuals who receive an Honorable, General under Honorable, or Uncharacterized discharge are generally eligible for these VA benefits, unless a statutory bar applies. *See* 38 U.S.C. § 5303; 38 C.F.R. § 3.12.

33. Individuals who receive a Dishonorable discharge are not considered veterans and are ineligible for these VA benefits. 38 U.S.C. § 101(2).

34. Individuals who receive an Other than Honorable (previously “Undesirable”) or Bad Conduct discharge may be eligible for VA benefits. When a person with such a discharge applies for benefits, VA must conduct a “character of discharge” (COD) assessment to determine whether such a discharge was “under conditions other than dishonorable,” taking into consideration the person’s military records and any other evidence submitted. 38 C.F.R. § 3.12.

***VA's Duty to Administer Education, Housing, and Disability Benefits***

35. The U.S. Department of Veterans Affairs and its predecessor agency, the Veterans' Administration, have been responsible for administering veterans' education, housing, and disability benefits programs.

36. On July 3, 1930, Congress established the Veterans' Administration, headed by the VA Administrator.

37. Until 1957, federal law stated that the VA Administrator, "under the direction of the President, shall have the control, direction, and management of the various agencies and activities [enumerated herein]" concerning the "administration of the laws relating to the relief and other benefits provided by law" for veterans. 38 U.S.C. § 11 (1934).

38. In 1957, Congress amended the statute, providing that the "Administrator . . . is responsible for the *proper execution and administration* of all laws administered by the Veterans' Administration and for the control, direction, and management of the Veterans' Administration." Veterans' Benefits Act of 1957, Pub. L. No. 85-56, 71 Stat. 83, 91-92 (1957) (emphasis added); 38 U.S.C. § 210(b) (1958).

39. In October 1988, President Reagan elevated the Veterans' Administration to a Cabinet-level department. The Veterans' Administration officially became the modern-day U.S. Department of Veterans Affairs on March 15, 1989.

40. On August 6, 1991, Congress passed the Department of Veterans Affairs Codification Act, establishing the purpose and structure of the new Department. Congress imposed the same duty of care on the Secretary of Veterans Affairs as it did on the former VA Administrator, providing that the VA Secretary is "responsible for the *proper execution and administration* of all laws administered by the Department and for the control, direction, and

management of the Department.” 38 U.S.C. § 303 (emphasis added).

### **FACTUAL ALLEGATIONS**

#### **A. VA Officials Breached Their Duty of Care by Administering Benefits in a Racially Discriminatory Manner**

41. On February 22, 2021, Mr. Monk’s organization, NVCLR, along with the Black Veterans Project (BVP) filed Freedom of Information Act (FOIA) requests with three components of VA. These FOIA requests sought information regarding the administration of service-connected disability compensation, as that program is the largest veterans’ benefits program and serves the most veterans. The disability compensation program also directly harmed Mr. Monk, as he was repeatedly denied benefits for years.

42. VA provided responses to some, but not all, of these FOIA requests. Due to the inadequacy of VA’s response, NVCLR and BVP filed administrative appeals and, after VA failed to respond fully and adequately, a complaint in U.S. district court. After months of litigation, in 2021 VA conducted further searches and produced additional documents.

43. The records disclosed by VA included claims outcomes for veterans from 2001 to 2020. The data did not cover previous years because, VA represented, it did not link ratings decision data to specific files and did not fully retain disability decision data prior to 2001.

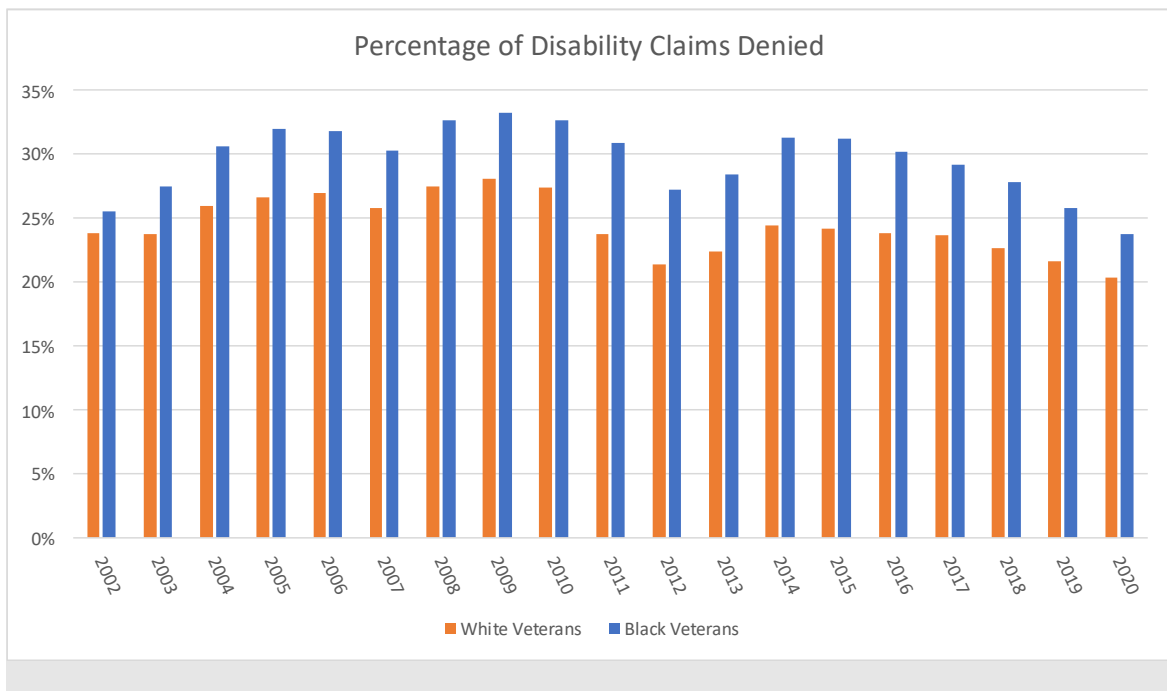
44. Through their counsel, NVCLR and BVP consulted a Yale University statistician to analyze the VA records.

45. The analysis found a statistically significant difference in VA claim outcomes (the number of claims denied, partially granted, or granted) between: (1) Black veterans and white veterans; (2) Black male veterans and white male veterans; and (3) Black female veterans and white female veterans.

46. VA denied Black veterans, Black male veterans, and Black female veterans disability compensation at statistically higher rates than their white counterparts. For instance, between 2001 to 2020, the average denial rate for disability compensation was 29.5% for Black veterans and 24.2% for white veterans.

47. In addition, the statistician’s analysis found that the VA’s average grant rate for disability compensation was 30.3% for Black veterans and 37.1% for white veterans. This is also a statistically significant disparity.

48. The data showed that from 2002 to 2020, a Black veteran applying for disability compensation was more likely to be denied than a white veteran. This data is displayed below.



49. On information and belief, additional records possessed by VA and not yet publicly disclosed further confirm racial disparities in the administration of VA benefits programs since World War II and a disparate impact on Black veterans, of which VA leaders knew or should have known and negligently failed to redress.



**B. VA Knew or Should Have Known About Racial Discrepancies and Failed to Remedy Them**

50. VA officials violated their statutory obligation and duty of care to properly execute and administer the law when they administered benefits in a manner they knew or should have known resulted in racially disparate outcomes, and when VA leadership negligently failed to redress those pervasive racial disparities.

51. These officials included every VA Administrator or Secretary since World War II, from Frank Hines (VA Administrator until 1945) to Secretary Denis McDonough (VA Secretary 2021-present), as well as each Under Secretary of Veterans Affairs for Benefits and other senior VA officials responsible for administering veterans' benefits programs in the same period.

52. For example, the training, supervision, auditing, and record-keeping practices implemented by VA leaders caused a disparate impact on Black veterans applying for benefits as compared to white veterans.

53. The records that NVCLR and BVP received from VA through their FOIA requests demonstrate that for decades VA leadership, including VA Secretaries, knew or should have known of pervasive, longstanding racial disparities in veterans' benefits for Black veterans. And for decades, VA officials have negligently failed to redress these disparities.

54. VA officials also knew or should have known that racial bias in the military justice system was affecting the discharge status of Black veterans like Mr. Monk, who initially received an Undesirable (now, Other Than Honorable) discharge.

55. The Defense Department's own analysis shortly after Mr. Monk's discharge demonstrated that Black servicemembers were substantially more likely than white servicemembers to face military justice or disciplinary action. TASK FORCE ON THE ADMIN. OF MIL. JUST. IN THE ARMED FORCES, OFF. OF THE ASSISTANT SEC'Y OF DEF., REPORT OF THE TASK

FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES VOL. I 32 (1972); *see also* PETER G. NORDLIE ET AL., U.S. ARMY RESEARCH INSTITUTE FOR THE BEHAVIORAL AND SOCIAL SCIENCES, MEASURING CHANGES IN INSTITUTIONAL RACIAL DISCRIMINATION IN THE ARMY 25 (1975) (finding “a strong relationship between skin color and type of discharge”).

56. More recent analyses have reached similar conclusions. DANIEL P. MACDONALD, ET AL., DEFENSE EQUAL OPPORTUNITY MANAGEMENT INSTITUTE DIRECTORATE OF RESEARCH DEVELOPMENT AND STRATEGIC INITIATIVES, REPORT OF RACIAL DISPARITIES IN THE MILITARY JUSTICE SYSTEM 17 (2017) (finding that Black servicemembers were 36.6% and 50% more likely to face courts-martial and non-judicial punishments, respectively, than white servicemembers).

57. After the 1972 Defense Department Report, the U.S. Equal Employment Opportunity Commission (EEOC) concluded that military discharges were so tainted by race discrimination that an employer who required an honorable discharge as a condition of hiring violated Title VII of the Civil Rights Act of 1964, absent a business necessity. EEOC Decision No. 74-25 (1973); *see also* EEOC Decision No. 76-13 (1975) (same, as to blanket refusal to hire or re-employ veteran with less-than-honorable discharge), *overruled in part on other grounds by* EEOC Decision No. 80-26 (1980); *Dozier v. Chupka*, 395 F. Supp. 836 (S.D. Ohio 1975) (holding municipal fire department disqualification of applicants with less-than-honorable discharges has impermissible adverse impact based on race).

58. Because VA looks to veterans’ service records and discharge status in making COD determinations, VA knew or should have known that bias in the military justice system would likely lead to racial disparities in its COD determinations absent a concerted effort to identify and correct for this effect.

59. VA leaders also knew or should have known that placing undue weight on the

ostensibly voluntary nature of an Other than Honorable discharge contributes to racial disparities in COD determinations and has the same sort of impermissible disparate impact that the EEOC determined was unlawful in employment settings.

60. VA failed to rectify these issues, resulting in COD determinations that were based on racially disparate discharge statuses.

61. The negligence of VA leadership, and their failure to train, supervise, monitor, and instruct agency officials to take steps to identify and correct racial disparities, led to systematic benefits obstruction for Black veterans.

62. VA officials also negligently failed to collect and aggregate claims data prior to 2001 in a manner that would have enabled VA to identify the nature and scope of these disparities. Further, VA leaders failed to properly train, supervise, and instruct employees on procedures and practices that would administer benefits in nondiscriminatory ways.

63. VA acknowledged its record-keeping negligence in its FOIA responses, conceding that “rating decision data was never directly linked to the Pending Issue File or to the CPMR, limiting our ability to link outcomes to claims.” In addition, disability decision data was not fully retained by VA prior to 2001. VA’s negligence in maintaining a system that could not track and rectify racial discrepancies harmed thousands of Black veterans.

64. VA’s negligence in failing to create and maintain a system to track claims and identify racial disparities led the agency to fail to properly execute and administer the law, as required by statute.

**C. Conley Monk Jr.’s Military Service and Service to Veterans**

65. Conley Monk Jr. is a proud Black Vietnam War veteran who has been a leader, advocate, and counselor to other veterans for more than 50 years. He is one of thousands of

Black veterans harmed by VA's tortious conduct.

66. Mr. Monk was born in Rocky Mount, North Carolina, in 1948 into the accomplished Monk family that includes the jazz musician Thelonius Monk, the Hall of Fame football player Art Monk, and generations of teachers, police officers, and public servants.

67. Mr. Monk's father, Conley Monk Sr., served in a segregated unit in the U.S. Army during World War II and participated in the Normandy invasion.

68. Mr. Monk moved with his family to Connecticut when he was very young. He grew up and attended public schools in New Haven, and during high school he worked part-time at the VA Hospital in West Haven.

***Mr. Monk's Military Service***

69. On November 12, 1968, at 20 years old, Mr. Monk voluntarily enlisted in the U.S. Marine Corps and continued a long tradition of family service.

70. He completed boot camp at Parris Island, South Carolina, and Motor Vehicle Operations School at Camp Lejeune, North Carolina. He then deployed to Vietnam.

71. Mr. Monk arrived in Vietnam on July 20, 1969. Moments after he touched ground in Da Nang, while still disembarking from the airplane, Mr. Monk and the men with whom he arrived were barraged by enemy forces firing mortar rounds into the base. Mr. Monk felt defenseless against the attack, as neither he nor any of the men on their first deployment had been issued weapons yet.

72. The next morning, Mr. Monk was driven through an area under enemy fire to meet his unit in Quang Tri. Quang Tri was one of the most contested areas in south Vietnam, and American troops there regularly engaged in heavy ground fighting.

73. As a motor vehicle operator, Mr. Monk was responsible for transporting troops

and equipment. He also performed interior and perimeter guard duty.

74. Because Quang Tri was located less than 20 kilometers from the Demilitarized Zone (DMZ), Mr. Monk regularly drove into the DMZ, where fighting was heavy. Mr. Monk's convoys were frequently attacked. Indeed, his convoy truck had bullet holes throughout it. Mr. Monk saw daily reminders that death could come at any time. As he drove through the combat zone, he passed the bodies of fallen Viet Cong fighters on the side of the road.

75. One of his most gruesome memories arises from witnessing a fellow Marine drive over a Vietnamese man who had jumped in front of their vehicle without warning. Unsure of whether the man was going to attack, the driver ran the man over, right before Mr. Monk's eyes. Memories of the grisly death and the uncertainty of whether his comrade had been right to run over the Vietnamese man haunt Mr. Monk to this day.

76. Despite the intensity of the violence, Mr. Monk performed his duties faithfully. He ultimately received a Rifle Marksman Badge, a National Defense Service Medal, a Vietnam Service Medal with one star, and a Vietnam Combat Medal with Device.

77. In November 1969, Mr. Monk's unit was pulled out of Vietnam. He was transferred to the 3rd Battalion of the 3rd Marine Division, temporarily stationed in Okinawa, Japan.

78. Mr. Monk began to fully experience the onset of Post-Traumatic Stress Disorder (PTSD) in Okinawa. He was in a constant state of fear and hypervigilance. Mr. Monk's PTSD led to two altercations in Okinawa that resulted in him spending time in base prison. Mr. Monk was told that he would stay in base prison until he signed papers agreeing to an Undesirable discharge and waiving his right to a court-martial.

79. Mr. Monk did not understand that by accepting an Undesirable discharge, he

would not only forfeit his eligibility for medical care and other financial support and benefits for veterans, but also face a lifetime of stigma. Depressed and symptomatic with PTSD, Mr. Monk signed the discharge papers.

80. Mr. Monk was discharged on September 15, 1970. He received an Undesirable discharge (now known as a discharge “Under Other than Honorable” conditions).

***Mr. Monk’s Return Home and Service to Veterans***

81. Upon his return home, Mr. Monk’s condition worsened. He reacted instinctively to loud sounds, conflating them with blasts from Vietnam. Whenever he went into a restaurant or was near a window, Mr. Monk would put his back up against the wall to feel safe. Over time, he resorted to self-medication to cope with his symptoms and developed an addiction to drugs.

82. In the early 1970s, Mr. Monk consulted a psychiatrist for help with his substance use and mental health. However, as the American Psychiatric Association’s Diagnostic and Statistical Manual did not recognize PTSD as a medical condition until 1980, there was little understanding of PTSD at the time. As a result, Mr. Monk’s PTSD went untreated and undiagnosed for years.

83. Faced with his family’s disappointment and dismay, Mr. Monk resolved to get clean from his drug addiction. He enrolled in the Connecticut Mental Health Center substance use program and ended his addiction. While in the program, Mr. Monk noticed that many of the men seeking treatment were veterans facing special challenges that the program was not able to address. Mr. Monk wanted to help these men whose experiences he recognized in himself.

84. Following his treatment, Mr. Monk became an addiction counselor certified by the Addiction Prevention Treatment Foundation. He later joined the Yale Department of Psychology where he worked for four years, first as a drug counselor and later as a senior

rehabilitation counselor.

85. Informed by his own experiences and time working with Vietnam veterans, Mr. Monk started a group called “The Undesirables” to help veterans with Other than Honorable discharges apply for discharge upgrades and medical benefits. Mr. Monk built the organization from the ground up, using books at the public library to teach himself how to write the bylaws, and recruiting pro bono lawyers and accountants.

86. The group later changed its name to the National Veterans Council for Legal Redress. Today, NVCLR is a Connecticut-based non-profit veterans service organization that engages in advocacy and public education to promote the respect and acceptance of all who served our country and works to secure benefits for veterans and their families. Mr. Monk continues to serve as the Director of NVCLR.

**D. VA Repeatedly Denies Mr. Monk Benefits**

87. Soon after Mr. Monk left the U.S. Marine Corps, he applied for unemployment compensation in Connecticut. The state unemployment agency sought information from the Veterans’ Administration regarding Mr. Monk’s eligibility.

88. The VA conducted a COD determination and, in a March 1971 administrative decision, found that Mr. Monk was “discharged under dishonorable conditions and is not therefore entitled to any benefits administered by the Veterans’ Administration.” As a result, Mr. Monk was denied unemployment compensation in Connecticut. Mr. Monk requested the VA reconsider its decision, but VA refused to do so in May 1971.

89. The VA’s 1971 COD determination was flawed because it relied exclusively on a finding that Mr. Monk voluntarily signed his discharge papers, and it was not based on all of the facts and circumstances surrounding the incidents that led to Mr. Monk’s discharge, as required

by law. The agency's failure to conduct a meaningful COD determination, and its stubborn refusal to reconsider that initial conclusion negatively impacted Mr. Monk for decades.

90. In 1976, Mr. Monk applied for VA education benefits in connection with his enrollment in a degree program at the University of New Haven. At the time, Mr. Monk and his partner were raising his two young daughters, and Mr. Monk had enrolled at University of New Haven to better his life and opportunities for his young family.

91. In a decision dated April 12, 1976, VA denied Mr. Monk's application for education benefits based on his discharge status. VA relied exclusively on the flawed 1971 COD determination and failed to make a new COD determination in connection with this application for educational assistance.

92. After VA denied his benefits application, Mr. Monk continued his education but had to pay out-of-pocket while also working two jobs. However, in 1979, just three and a half credits short of completion, Mr. Monk was forced to give up his studies because of the financial strain on his family. He was never able to complete his education or obtain his degree, which impaired his ability to support his family and achieve financial stability in his household.

93. In 1982, upon learning about the newly-defined medical condition of PTSD, Mr. Monk recognized the symptoms in himself and applied to VA for disability compensation benefits for PTSD.

94. However, VA denied his application, continuing to rely on the flawed 1971 COD determination and declining to make a new COD determination. VA's decision left Mr. Monk feeling hopeless and as if the military had abandoned him despite his years of dedicated service.

95. In 1983, now a father of four, Mr. Monk applied for VA home loan benefits. Mr. Monk and his partner were excited to move their family into a nice home in West Haven,



Connecticut. Despite his previous denials, Mr. Monk hoped that VA would look favorably on him given his continued service to veterans. He also knew of other veterans with Other than Honorable discharges who were receiving VA benefits.

96. Nevertheless, VA concluded that Mr. Monk was ineligible for VA home loan guaranty benefits. VA relied on the flawed 1971 COD determination and, again, failed to make a new COD determination.

97. After VA denied Mr. Monk's home loan application, Mr. Monk spent months applying to other financial institutions to secure a home loan. He was homeless for a period of time because of his inability to pay for housing. Although Mr. Monk eventually succeeded in securing a home loan, the delay harmed him and his family as they lost the economic and social benefits associated with homeownership.

98. Feeling abandoned by VA and the military, Mr. Monk stopped applying for benefits for over two decades. He believed VA's benefits system to be plagued by racial bias and feared that he would never receive help from the country he had faithfully served.

99. In 2007, Mr. Monk suffered a severe stroke as the result of his undiagnosed diabetes. The stroke left him unable to read, write, or walk for months. Soon thereafter, Mr. Monk was diagnosed with type II diabetes mellitus as a result of his exposure to Agent Orange in Vietnam. Due to his financial constraints, Mr. Monk's physician treated him with free medication samples that he otherwise could not afford. Mr. Monk's wife and oldest daughter helped him pay for his medical care.

100. In 2010, hoping for additional assistance, Mr. Monk again applied for VA disability compensation, this time for his type II diabetes mellitus.

101. As the 2021 statistical evidence establishes, VA was significantly more likely to deny the application of Mr. Monk, a Black veteran, than that of a white veteran. And indeed, in a decision dated December 8, 2010, VA rejected his application, relying again on the flawed 1971 COD determination and failing to make a new COD determination. VA also reminded Mr. Monk that it had previously denied his 1976 and 1982 applications for assistance.

102. VA's denial reaffirmed Mr. Monk's disillusion and feelings of hopelessness. It also compounded the financial stress on his family as they continued to pay for Mr. Monk's medical care.

103. In September 2011, Mr. Monk asked the Veterans Legal Services Clinic at Yale Law School for assistance in seeking a discharge upgrade and VA benefits. The Clinic referred Mr. Monk to a psychiatrist for evaluation. Over a total of four hours, Mr. Monk retold the psychiatrist the traumatic events that caused his PTSD. He relived the worst experiences of his life, over and over again, to support his re-application for disability compensation.

104. The psychiatrist concluded Mr. Monk had a severe case of PTSD, which arose from his military service in Vietnam.

105. In February 2012, this time represented by the Clinic, Mr. Monk applied again for disability compensation for PTSD, diabetes, and diabetic peripheral neuropathy in his arms and legs. As the 2021 statistical analysis indicated, VA was more likely to deny Mr. Monk's 2012 application than that of a white veteran. And VA did so again, still relying on his discharge status and the flawed 1971 COD determination. VA did not conduct a new COD determination.

106. Mr. Monk appealed. In September 2015, after Mr. Monk had obtained an upgrade of his discharge status through a separate application to the Board for Correction of Naval

Records and litigation in U.S. district court, VA granted Mr. Monk's disability compensation for PTSD with a 100% rating, as well as for diabetes and associated peripheral neuropathy.

107. When VA finally granted Mr. Monk benefits, it erroneously assigned his claim an "effective date" based solely on his discharge upgrade. VA refused to consider whether he was eligible any earlier, as it continued to rely on its flawed and cursory 1971 COD determination. This VA mistake cost Mr. Monk thousands of dollars in retroactive benefits.

108. Mr. Monk appealed again. The U.S. Court of Appeals for Veterans Claims held that VA had erred in refusing to consider his eligibility for benefits before the date of his discharge upgrade. *Monk v. Wilkie*, 2020 WL 2461722 (Vet. App. May 13, 2020).

109. On remand, the Board of Veterans Appeals agreed, at long last, that even before it was upgraded, "his discharge . . . was *not* a bar to benefits." *In re Monk*, 2020 WL 8912950, at \*1 (Bd. Vet. App. Dec. 15, 2020) (emphasis added) (granting disability compensation beginning February 2012). This decision effectively overturned VA's cursory 1971 COD determination that had wrongly barred Mr. Monk from vital benefits and services for decades. *Id.*

110. VA's decision granting disability compensation changed Mr. Monk's life. For the first time, he felt truly recognized by VA for his service. He no longer felt beneath veterans who received benefits from VA. And most importantly, he could now provide for his family, his church, and his community in ways that he previously could not.

**E. VA's Negligent Administration of Benefits Harmed Mr. Monk**

111. VA's belated acknowledgement that Mr. Monk was eligible for benefits and services even in the period before his discharge status was upgraded did not, however, make him whole. Mr. Monk was and continues to be a victim of VA's negligent administration of housing, education, and disability benefits.

112. VA's negligence caused Mr. Monk to be denied veterans' benefits to which he was entitled.

113. VA's negligence harmed Mr. Monk and his family both financially and emotionally.

114. Each time Mr. Monk applied for VA benefits, he submitted extensive supporting documentation, filled out various VA forms, and interacted with VA officials.

115. In the case of his third disability compensation application in 2012, Mr. Monk also underwent psychiatric evaluations. Through painstaking detail, Mr. Monk relived and retold his trauma to numerous individuals – including doctors, his counsel, and character references – to prove his eligibility for disability compensation.

116. Mr. Monk also endured the emotional trauma of applying for VA benefits repeatedly when VA initially denied his 2012 application, forcing him to navigate the appeal system and litigate two federal lawsuits to secure his benefits.

117. The entire process exacerbated Mr. Monk's PTSD and caused significant emotional distress.

118. Upon returning home from his military service, Mr. Monk also suffered the severe reputational and dignitary harms associated with his benefit denials. The veterans' community that once embraced Mr. Monk as a son of a World War II veteran now looked down upon him. The shame and stigma associated with his benefit denials caused Mr. Monk to feel like an outsider and a failure. He suffered significant emotional, dignitary, and reputational harm because of VA's actions.

119. Mr. Monk also suffered harm stemming from his perception of racial discrimination within the VA benefits system. He experienced this discrimination as an affront to

his dignity, and it caused him emotional distress.

120. Not only did Mr. Monk suffer significant emotional distress because of VA's negligent administration of benefits, but he also lost hundreds of thousands of dollars in educational, housing, and health care benefits.

121. VA's denial of education benefits forced Mr. Monk to leave the University of New Haven before he could obtain his degree. Without the financial means to pay for college, he lost both the opportunity to complete his associate's degree as well as the earning potential associated with the degree. He and his family were thus deprived of the lifetime income and financial stability that a college degree would have provided.

122. After VA denied Mr. Monk's home loan application, Mr. Monk spent months applying to other financial institutions to secure a home loan. He was homeless for a period of time because of his inability to pay for housing. Although Mr. Monk eventually succeeded in securing a private home loan years later, the delay impacted him and his family as they lost the economic and social benefits associated with homeownership.

123. Finally, and most prominently, Mr. Monk and his family struggled to pay the costs of his health care. For years, Mr. Monk's family was forced to pay for medication and treatments that would have been covered by VA had the agency granted his 1982 and 2010 applications.

124. VA eventually provided some benefits to Mr. Monk but only after years of delay and traumatization. However, the benefits he has received are inadequate, and not designed to contemplate, the unique harm Mr. Monk suffered due to VA's pattern of racial discrimination and the disparate impact on Black veterans. The indignity of racial discrimination is a distinct injury, and this suit seeks redress for this harm VA caused to Mr. Monk.

**F. Mr. Monk Timely Files This Complaint**

125. Mr. Monk spent decades trying to obtain his rightfully owed benefits through VA's administrative channels, but he was unaware of the pervasive and systematic racial bias affecting his eligibility for veterans' benefits until VA disclosed long-withheld records to NVCLR in 2021, and those records were analyzed.

126. However, as evidenced by the data analysis discussed above, Mr. Monk now knows that he is one of thousands of Black veterans treated in a discriminatory manner by VA and subject to the racially disparate impact of VA's operation of its benefits programs.

127. While there was speculation for years that racial disparities existed in VA's benefits system, there was no data available to substantiate these claims prior to September 2021, when Mr. Monk, NVCLR, and BVP received the statistical analysis of the data from their FOIA requests. There had been some publicly available reporting on the issue, but the full extent of the harm was not known until after this data was analyzed.

128. Mr. Monk did not know, and had no way of knowing, about the racial disparities in VA's administration of benefits until the records were disclosed and analyzed in 2021.

129. Having discovered VA's tortious conduct in September 2021, Mr. Monk submitted an administrative claim under the Federal Tort Claims Act in February 2022 and now timely files this Complaint. He seeks not to relitigate his flawed 1971 COD determination and specific benefits denials, but rather to hold VA accountable for its illegal, tortious, and racially discriminatory administration of benefits.

**G. Mr. Monk has Exhausted his Administrative Remedies Under the Federal Tort Claims Act**

130. The United States is liable pursuant to the Federal Tort Claims Act (FTCA) for the tortious acts of its employees in "circumstances where the United States, if a private person,

would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b).

131. Pursuant to 28 U.S.C. § 2675(a), a claimant must tender an administrative claim to the federal government before filing suit under the FTCA. An agency’s failure to make a final disposition of a claim within six months after it is filed “shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim.” 28 U.S.C. § 2675(a).

132. At all times relevant to this Complaint, VA officials acted within the scope of their employment and/or their official duties as employees of VA, an agency of the federal government.

133. On February 25, 2022, Mr. Monk filed an FTCA administrative claim with VA for the tortious actions alleged here and committed by VA leadership and officials acting under the supervision of VA Administrators and, subsequently, VA Secretaries.

134. As of the filing of this Complaint, VA has not responded to Mr. Monk’s FTCA claim. VA’s failure to dispose of Mr. Monk’s FTCA claim within six months of filing constitutes a final denial. *See* 28 U.S.C. § 2675(a).

135. Mr. Monk has administratively exhausted his claim under the FTCA.

### **CLAIMS FOR RELIEF**

#### **FIRST CLAIM FOR RELIEF**

#### **28 U.S.C. § 1346(b) – Federal Tort Claims Act – Negligence**

136. Mr. Monk repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

137. Under Connecticut law, negligence requires a showing of: (1) a duty of care to the plaintiff; (2) a breach of that duty; (3) proximate causation; and (4) damage to the plaintiff.

*Lawrence v. O & G Indus.*, 126 A.3d 569, 574 (Conn. 2015).

138. Federal law imposes a duty of care on the VA Secretary to administer veterans' benefits in a non-discriminatory manner. 38 U.S.C. § 303 (2018); 38 U.S.C. § 210(b) (1958).

139. VA Administrators and Secretaries, and other senior officials, breached this duty when through training, supervision, auditing, record-keeping, and other measures, they failed to redress longstanding, pervasive race discrimination and disparate impacts of which they knew or should have known.

140. Due to this benefits obstruction, Mr. Monk was denied hundreds of thousands of dollars' worth of education, housing, and disability compensation. He also suffered significant emotional, psychological, and dignitary harm.

**SECOND CLAIM FOR RELIEF**  
**28 U.S.C. § 1346(b) – FTCA – Negligent Infliction of Emotional Distress**

141. Mr. Monk repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

142. In Connecticut, a defendant engages in the tort of negligent infliction of emotional distress when: (1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress. *Carrol v. Allstate Ins. Co.*, 815 A.2d 119, 127 (Conn. 2003).

143. For over four decades, VA employees repeatedly denied Mr. Monk's requests for VA education, housing, and disability compensation benefits. He endured numerous psychological and physical evaluations to apply for VA benefits.

144. The failure of VA officials and employees to maintain a racially neutral system of administering benefits led to a higher likelihood that he would be denied benefits, thus creating a risk of psychological harm.



145. It was foreseeable that Mr. Monk would experience emotional distress from having to relitigate his claims and navigate the VA benefits process over and over again.

146. VA officials caused Mr. Monk to be so severely emotionally distressed that it might result in illness or bodily harm.

147. As a result of the actions of VA officials and employees, Mr. Monk suffered severe emotional distress, including exacerbation of his PTSD.

**THIRD CLAIM FOR RELIEF**  
**28 U.S.C. § 1346(b) – FTCA – Negligent Supervision**

148. Mr. Monk repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

149. In Connecticut, negligent supervision occurs when: (1) the plaintiff suffers an injury due to the defendant’s failure to supervise an employee; and (2) the defendant had a duty to supervise the employee. *Roberts v. Circuit-Wise, Inc.*, 142 F. Supp. 2d 211, 213 (D. Conn. 2001). The defendant has a duty of care where the defendant “knew or reasonably should have known of the employee’s propensity to engage in that type of tortious conduct.” *Id.*

150. VA officials and employees failed to instruct VA staff on how to distribute benefits in a racially neutral way. Leadership failed to create a system in which data related to benefits decisions could be aggregated and potential bias could be identified. Mr. Monk thus had to file his claims in a system that was racially discriminatory, lowering his chances of receiving the benefits he deserved.

151. VA officials and employees knew or should have known about these failures but failed to rectify them.

152. VA leadership’s negligent supervision of VA managers and adjudicators violated their statutory duty to ensure the proper execution of VA laws.

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

- (1) Award Plaintiff compensatory damages in an amount to be determined at trial;
- (2) Require Defendant to pay Plaintiff's reasonable fees, costs, and expenses, including attorneys' fees, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(b); and
- (3) Grant such other relief as the Court deems just and equitable.

Dated: November 28, 2022  
New Haven, Connecticut

Respectfully Submitted,

By: /s/ Jason Parkin  
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Rebecca Harris, Law Student Intern\*  
Adam Henderson, Law Student Intern\*  
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\* Motion for law student appearance forthcoming.



Monk v. USA, Docket No. 3:22-cv-01503 (D. Conn. Nov 28, 2022), Court Docket

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## Multiple Documents

Part	Description
1	Main Document
2	Memorandum in Support

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

CONLEY F. MONK, Jr.,	:	
<i>Plaintiff,</i>	:	
	:	
v.	:	No. 3:22-cv-1503 (JBA)
	:	
THE UNITED STATES OF AMERICA,	:	March 31, 2023
<i>Defendant.</i>	:	

**MOTION TO DISMISS**

The United States of America moves to dismiss Plaintiff Conley Monk, Jr.’s complaint, ECF No. 1, pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(h), for the reasons set forth in the attached memorandum of law. *See* D. Conn. L. Civ. R. 7(a)1.<sup>1</sup> The United States requests that the Court grant its motion and dismiss Plaintiff’s claims in their entirety.

Respectfully submitted,

VANESSA ROBERTS AVERY  
UNITED STATES ATTORNEY

/s/ Natalie N. Elicker  
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<sup>1</sup> Currently pending are the Defendant’s motion for permission to file a dispositive motion, ECF No. 22, and motion to file excess pages, ECF No. 21. Previously, the Court ordered today as the deadline for Defendant’s response to the complaint, ECF No. 18, and Defendant has previewed that it would be moving to dismiss, ECF No. 19. Therefore, in an abundance of caution, Defendant files this motion consistent with the Court’s scheduling order.

ORAL ARGUMENT  
IS NOT REQUESTED

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

CONLEY F. MONK, Jr.,  
*Plaintiff,*

v.

THE UNITED STATES OF AMERICA,  
*Defendant.*

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No. 3:22-cv-1503 (JBA)

March 31, 2023

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

**T C**

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## INTRODUCTION

The United States Department of Veterans Affairs (VA) considers the issue of racial disparities in veteran benefit decisions to be of great significance and is working actively to address it. The VA is committed to eliminating barriers so that all veterans are treated fairly and equally. *See* Transcript of Press Conference of Secretary Denis McDonough, Mar. 2, 2023 ( I've directed the leadership team here at VA to start up an equity team immediately. . . to look into disparities in grant rates to Black Veterans, as well as to all Veterans, minority Veterans, and historically underserved Veterans, and to eliminate them. I will expect that team to consider policies across VA to address these concerns, including changes related to organizational structure, training, quality control, outreach, and more. ). But this case does not provide an appropriate vehicle to address such issues.

In 1970, while experiencing post-traumatic stress disorder (PTSD) that remained undiagnosed until 2011, Conley Monk, Jr. (Plaintiff) asked to be discharged from the United States Marine Corps with an undesirable discharge status in lieu of facing military misconduct charges. Soon after, in 1971, he sought a discharge upgrade from the military and benefits from the VA. The VA denied Plaintiff's benefits request, and subsequent requests, due to Plaintiff's discharge status. In 2011, however, a psychiatrist diagnosed Plaintiff with PTSD during and since military service, and he submitted this diagnosis to the relevant federal agencies in 2012. In May of 2015, the Board for Correction of Naval Records (BCNR) upgraded Plaintiff's discharge status. In September of 2015, the VA awarded Plaintiff disability benefits, which were later made retroactive to February 2012, the date he requested.

Now, in this lawsuit, Plaintiff seeks money damages from the United States under the Federal Tort Claims Act (FTCA) to compensate him for the VA's denials of his benefits requests

beginning in 1971. The FTCA, however, does not provide the authority to adjudicate the substance of Plaintiff's present action. Congress has specifically precluded judicial review of VA benefits decisions by Federal District Courts through the Veterans' Judicial Review Act (VJRA). The VJRA, not the FTCA, sets out the appropriate procedures for challenging VA benefits determinations. Plaintiff successfully used these procedures to obtain VA disability benefits retroactive to the date he desired. Plaintiff again makes a request that arises out of a VA benefits determination, but he cannot seek monetary compensation from this Court under the FTCA as redress for the VA's past benefits determinations, regardless of how his complaint is framed.

Moreover, the Court lacks subject matter jurisdiction over this complaint because the VA's benefits decisions are quintessential quasi-adjudicative government functions for which there is no private analogue. Congress has not otherwise waived the United States' sovereign immunity under the FTCA for Plaintiff's claims. Because Plaintiff cannot show any like circumstances under which a private actor would be liable under Connecticut law, his FTCA claims fail for lack of subject matter jurisdiction.

Finally, even if Plaintiff could circumvent these defects, his lawsuit would be time-barred and also barred by principles of res judicata. Plaintiff has been litigating issues surrounding his discharge status and VA benefits, with the assistance of the same counsel, since at least 2011. He was on notice of his injury (the denial of access to benefits) and its alleged cause (adverse decisions by the VA) for well over two years before submitting his administrative claim on February 25, 2022.

Each of these reasons provides an independent basis to dismiss for lack of jurisdiction.



AC ROUND

**I S r d R r r d**  
**A M r S r d D r**

The Department of the Navy is housed within the Department of Defense (DoD), an executive agency of the United States. 10 U.S.C. 111. The Marine Corps is housed within the Navy. 10 U.S.C. 8063. Since 1968, a person who enlists in one of the armed forces typically agrees to serve for a minimum term of two years. *See* 10 U.S.C. 505(c) Pub. L. 90-235, Jan. 2, 1968, 81 Stat. 753, 754 (codified at 10 U.S.C. 505(c)). To help maintain good order and discipline, 10 U.S.C. 934, within the armed forces, including the Marines, Congress adopted the Uniform Code of Military Justice. 10 U.S.C. 801, *et se* . Under that Code, an enlisted Marine who engages in minor misconduct, such as having periods of being absent without leave (A OL) or engaging in disobedience, may receive nonjudicial punishment in the course of their service. 10 U.S.C. 815(b). A Marine who commits more serious offenses, such as continued periods of A OL, attempted larceny, and striking an officer, could be tried by a special court-martial. 10 U.S.C. 819. If convicted, the punishment for such offenses can include a dishonorable discharge or a bad conduct discharge. 10 U.S.C. 856 Manual for Courts-Martial, United States, at 322 (A OL), 333 (striking a petty officer), 408 (larceny) (2019 Ed.). A Marine who wishes to avoid trial by special court-martial can make a request to be discharged from service with an other than honorable characteri ation of service (previously called an undesirable discharge). *See* Marine Corps Order 1900.16-1004, Characteri ation of Service, at 2.c.(2) (Feb. 15, 2019) (stating that an other than honorable characteri ation is authori ed only if (1) the Marine has been afforded the opportunity to request an administrative board, or (2) the Marine requests separation in lieu of trial by court-martial under paragraph 6419 of this Manual. ). If approved, the commanding officer directs that the charges be withdrawn from the

military's justice system, and the Marine is discharged from their military service. *See* Marine Corps Order 1900.16-6419, Separation in Lieu of Trial by Court-Martial.

In 2009, Congress passed legislation requiring military departments to screen certain members of the armed forces for PTSD or traumatic brain injury before separating them from military service. *See* 10 U.S.C. 1177 *see als* DODI 1332.14 Encl. 5, Sec. 9 (updated June 23, 2022). These and other laws and policies provide a pre-discharge framework for detecting a servicemember's PTSD and considering any role it played in a person's military service. *See* Marine Corps Order 1900.16-6110, Health Assessments Prior to Administrative Separations.

### C r r M r R r d

Congress and the military branches have provided recourse for former servicemembers who believe that their discharge was improper. Congress has authorized the Secretary of any military department to correct any military record when the Secretary considers it necessary to correct an error or remove an injustice. 10 U.S.C. 1552(a)(1). Congress required that the Secretary generally must make such corrections through boards of civilians, *id.*, and granted the Secretaries authority to issue procedures for such process, 1552(a)(3)(A). The Secretary of Defense additionally must approve the procedures. 1552(a)(3)(A). The Secretary of the Navy has established procedures for applications for the correction of military records by former members of the Navy and Marine Corps to the BCNR. 32 C.F.R. 723.1, *et se* .  
SECNAVINST 5420.193 (Nov. 19, 1997).

In 2014, the Secretary of Defense issued a memorandum directing the BCNR (and Boards for Correction of Military Records) to apply liberal consideration to claims of PTSD in the petitions of Vietnam veterans. Sec'y of Def., *Memorandum for Secretaries of the Military Departments Regarding the Consideration of Military Records for Correction of Military Records in Disciplinary Proceedings of Veterans Suffering from Post-Traumatic Stress*

*Disorder* at 1 (Sept. 3, 2014). This memorandum is commonly referred to as the Hagel Memorandum.

In 2016, Congress amended 10 U.S.C. 1552 to explicitly recognize PTSD claims in the corrections boards' administrative review of discharges. National Defense Authorization Act, 2018, Pub. L. 115-91, 520(a), Dec. 12, 2017, 131 Stat. 1283, 1379. In relevant part, the law added a new subsection (h) to provide additional measures for former members whose requests for record corrections claim combat-related PTSD. *See* 10 U.S.C. 1552(h)(1). Drawing on DoD's Hagel Memorandum, one of those measures is that the corrections board must review the claim with liberal consideration to the claimant that post-traumatic stress disorder potentially contributed to the circumstances resulting in the discharge or to the original characterization of the claimant's discharge. 1552(h)(2)(B).

## C r

Congress enacted Title 38 of the U.S. Code to create a system for providing veterans with benefits and created the position of Secretary of Veterans Affairs, a cabinet-level, executive official,<sup>1</sup> to oversee such benefits. Congress created a framework for administering VA benefits claims in which the adjudicatory process is nonadversarial and uniquely pro-claimant. *Elkins v. Secretary of Veterans Affairs*, 229 F.3d 1369, 1376 (Fed. Cir. 2000) *de v. est*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (noting the character of the veterans' benefits statutes is strongly and uniquely pro-claimant).

VA benefits adjudications are nonadversarial because Congress imposed on the VA a duty to notify and assist claimants in substantiating claims for VA benefits. *See* 38 U.S.C.

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<sup>1</sup> The President appoints the VA Secretary, by and with the advice and consent of the Senate. 38 U.S.C. 303.

5100, 5102, 5103, 5103A, 5107 38 C.F.R. 3.102, 3.103, 3.159, 3.326(a). Another unique component of the VA's benefits program is that, even beyond the VJRA appeal process described below, a claimant can reopen a final denial at any time by submitting new and material evidence, 38 U.S.C. 5108 (2012),<sup>2</sup> or revise a final benefits denial upon a showing of clear and unmistakable error, which can result in retroactive benefits back to the date of the original claim, 38 U.S.C. 5109A(a)-(b). In addition, the VA supports the provision of free services to veterans, including assistance with the preparation, presentation, and prosecution of claims for VA benefits, by veterans service organizations (such as the American National Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, and the Veterans of Foreign Wars). *See* 38 U.S.C. 5902, 5904. In the words of the Supreme Court,

Congress has expressed special solicitude for the veterans' cause. A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life. And Congress has made clear that the VA is not an ordinary agency. Rather, the VA has a statutory duty to help the veteran develop his or her benefits claim.

*S. in seki v. Sanders*, 556 U.S. 396, 412 (2009) (cleaned up).

Congress provided that only individuals who were discharged from service under conditions other than dishonorable are considered veterans and are eligible for VA benefits. 38 U.S.C. 101(2). To determine whether an individual's other than honorable discharge qualifies as dishonorable for purposes of VA benefits, the VA makes a character of discharge (COD) assessment pursuant to regulations adopted in 38 C.F.R. 3.12(c) (d).<sup>3</sup> *See*

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<sup>2</sup> As of February 19, 2019, the concept of reopening based on new and material evidence has been replaced with the similar concept of readjudication based on new and relevant evidence. 38 U.S.C. 5108 Veterans Appeals Improvement Modernization Act of 2017, Pub. L. 115-55, Aug. 23, 2017, 131 Stat. 1105, 1109 38 C.F.R. 19.2. Because Plaintiff filed his 2012 request for reopening under the prior version of section 5108, we cite the prior version herein.

<sup>3</sup> *See also* U.S. Dep't of Veterans Affs., Compensation Pension, M21-1, Part , Subpart iv, Chapter 1, Section A - Character of Discharge (COD) and Bars to Benefits, Article ID: 554400000177986.

*ar e . ilkie*, 972 F.3d 1333, 1334 (Fed. Cir. 2020) (holding that Congress authorized the VA to define a discharge for willful and persistent misconduct as a discharge under dishonorable conditions under 38 U.S.C. 101(2)). Congress allowed that a claimant who disagrees with the VA's COD assessment may appeal through the VJRA process described below and, even if a claimant does not appeal, final COD assessments may be reopened based upon new and material evidence, 38 U.S.C. 5108 (2012), or revised based on clear and unmistakable error, 38 U.S.C. 5109A.<sup>4</sup>

At the culmination of the nonadversarial VA benefits process, Congress provided through the VJRA that the Secretary's decisions respecting benefits are final and subject to limited review:

The Secretary of Veterans Affairs shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans. . . . Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and *a n t e r e i e e d a n t e r f f i c i a l r a n c r t e t e r a n a c t i n i n t e n a t r e f a n d a s r t e r i s e*.

38 U.S.C. 511(a) (emphasis added). That limited review includes the Board of Veterans' Appeals (an entity within VA), then the Court of Appeals for Veterans Claims, then the Court of Appeals for the Federal Circuit, and finally the Supreme Court, *see* 38 U.S.C. 7104, 7105, 7252, 7292.

#### **D T F d r T r C A**

The FTCA is a limited waiver of sovereign immunity by the United States for claims for property damage or personal injury caused by the negligent or wrongful act or omission of any

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<sup>4</sup> While VA determines COD for purposes of benefits eligibility, Congress did not provide any means for VA to alter a former servicemember's discharge status. Only military branches, and their associated boards, can determine and or alter discharge status. *See* Section I.A.-B., above.

employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the *law of the place* where the act or omission occurred. 28 U.S.C.

1346(b)(1) (emphasis added). Under the FTCA, the United States is liable only in the same manner and to the same extent as a private individual under *like circumstances* . . . . 28 U.S.C.

2674 (emphasis added).<sup>5</sup> The FTCA does not, however, provide damages for all injuries caused by government employees, and contains numerous exceptions to the limited waiver of sovereign immunity. *See* 28 U.S.C. 2680 *series* . . . *United States*, 340 U.S. 135, 146 (1950) (holding the government not liable under the FTCA for injuries to servicemen arising out of or in the course of activity incident to military service).

State law provides the FTCA's substantive causes of action. *See* *D. Meier*, 510 U.S. 471, 478 (1994) (The law of the State is the source of substantive liability under the FTCA. ) *Iran* . . . *United States*, 690 F.3d 78, 86 (2d Cir. 2012) (The FTCA directs courts to consult state law to determine whether the government is liable for the torts of its employees. ).

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<sup>5</sup> Until the mid-20th century, an injured person could obtain compensation from the United States for the tortious acts of federal employees only by persuading Congress to pass a private bill. *See* Stephen L. Nelson, *Empire in the Wilderness and the Federal District Courts: Understanding the Discretionary Nature of the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 265 (2009). Some members of the public were concerned that the private bill system was unjust and wrought with political favoritism. *Id.* at 267 *see also* Jeffrey Axelrad, *Federal Tort Claims Act and Administrative Law: A History of the Federal Tort Claims Act*, 52 ADMIN. L. REV. 1331, 1332 (2000) (Favoritism in Congress . . . could make or break the claimant's ability to be made whole. ). To replace the private bill system, Congress enacted the FTCA in 1946. *See* Nelson, 51 S. TEX. L. REV. at 267-71.

The passage of the FTCA does not preclude the government from providing individuals with other avenues for compensatory relief when Congress believes it is appropriate. For example, Congress passed The Radiation Exposure Compensation Act in 1990 to establish an administrative program for claims relating to atmospheric nuclear testing and uranium industry employment. 42 U.S.C. 2210 *note* Radiation Exposure Compensation Act, Pub. L. 101-426, Oct. 15, 1990, 104 Stat. 920. More recently, Congress passed the SFC Richard Stayskal Military Medical Accountability Act of 2019 to permit active-duty military members to file claims for injuries caused by medical malpractice at DoD hospitals. *See* 10 U.S.C. 2733a 32 C.F.R. 45.1, *et seq.* Pub. L. 116-92, 731(a)(1), Dec. 20, 2019, 133 Stat. 1198, 1457.

**I I F r d<sup>6</sup>**

**A r r**

Plaintiff alleges that he voluntarily enlisted in the U.S. Marine Corps (USMC) on November 12, 1968, when he was 20 years old. Compl. ¶ 69. He trained with the USMC in South Carolina for several months and arrived in Vietnam in July 1969. *id.* ¶ 70-71. He served in Vietnam for four months and in Okinawa, Japan, for ten months. *id.* ¶ 71, 77, 80. The USMC discharged Plaintiff almost two years after he enlisted, on September 15, 1970, with an Undesirable discharge, also called a discharge Under Other than Honorable conditions. *id.* ¶ 80.<sup>7</sup>

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<sup>6</sup> Among other materials, Defendant cites to the allegations Plaintiff made in prior lawsuits, including *Monk v. Marine Corps*, No. 3:14-cv-260 (E) (D. Conn., filed Mar. 3, 2014) and *lack Veterans Protection v. U.S. Dept. of Veterans Affairs*, No. 3:21-cv-935 (VLB) (D. Conn., filed July 8, 2021), and rulings in his prior lawsuits, including *Monk v. Ilkie*, No. 19-217, 2020 L 2461722 (Vet. App. May 13, 2020). (To avoid confusion, Defendant generally refers to Plaintiff's various cases by their full case name, rather than with a short form title. Citations to the complaint in this case are preceded by this case's name, *Monk v. United States*, where necessary to avoid confusion.) The Court may take judicial notice of facts in such materials because their accuracy cannot reasonably be questioned. Fed. R. Evid. 201.

Such materials are, further, integral to the complaint. In reviewing a motion to dismiss, a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint. Where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, thereby rendering the document integral to the complaint. Therefore . . . a defendant may introduce that document as part of a motion attacking the pleadings. *See* *Shars v. Iwert*, 885 F. Supp. 2d 546, 552 (D. Conn. 2012) (cleaned up).

<sup>7</sup> The United States Court of Appeals for Veterans Claims summarized Plaintiff's final nine months in the service as follows:

Disciplinary problems began to arise in December 1969. He was cited and administratively punished for several offenses, such as being drunk and disorderly, willfully disobeying a lawful order, threatening a noncommissioned officer, and being absent without leave numerous times. Matters came to a head in August 1970, when three charges were preferred against him: being absent without leave on two separate occasions, attempted theft, and striking a petty officer. Rather than face trial by special court martial, Mr. Monk requested discharge for the good of the service. The request was granted and he received an undesirable discharge, also called a discharge under other than honorable conditions.

*Monk v. Ilkie*, 2020 L 2461722, at 1.

Plaintiff alleges, in substance, that he was under duress when he decided to accept an Undesirable discharge rather than undergo a court-martial. *d.* 78. Plaintiff alleges he was spending time in base prison in response to two altercations at the time he agreed to be discharged. *d.* He alleges that he understood that by accepting the Undesirable characterization, he would be released from staying in base prison, but did not understand, nor anticipate, the financial ramifications and allegedly stigmatizing effects of accepting an Undesirable discharge. *d.* 78-79.

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Plaintiff alleges that the Navy and the VA improperly denied multiple benefits applications, even though these applications were submitted and decided *ef re* he was formally diagnosed with PTSD in 2011. *See id.* 103-104.

Plaintiff first sought administrative relief from the VA within nine months of his September 1970 discharge in connection with an application related to Connecticut unemployment benefits. *d.* 87-89. This application triggered a COD assessment by the VA to verify Plaintiff's benefits eligibility pursuant to his discharge status. The VA found that Plaintiff committed multiple offenses in service, decided to accept an undesirable discharge rather than stand trial by court-martial, and willingly signed a statement acknowledging that accepting an undesirable discharge could deprive him of any rights as a veteran under federal law. *d.* 88. The VA determined that, given his willful and persistent misconduct, Plaintiff's discharge was issued under dishonorable conditions, and Plaintiff was not therefore entitled to any benefits administered by the Veterans' Administration. *d.*<sup>8</sup> Plaintiff did not appeal, nor does he allege

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<sup>8</sup> In this March 1971 administrative decision, the VA cited VA Regulation 1012(D)(4) (now codified at 38 C.F.R. 3.12(d)(4)), which specified that benefits are not payable when a veteran is discharged or released from *ntin ed*



he appealed, the VA Secretary's 1971 COD decision, and therefore the decision became final.

*See id.*<sup>9</sup>

Around ten months after his discharge, in July 1971, Plaintiff applied to the Naval Discharge Review Board (NDRB), organized pursuant to 10 U.S.C. 1553, to request a discharge upgrade. *Monk v. Mass.*, No. 3:14-cv-260 (E), Complaint 38, ECF No. 1 (D. Conn., filed Mar. 3, 2014). The NDRB denied this request. *Id.* In 1976, Plaintiff applied to the VA for education benefits, which were denied based on his COD determination. *Monk v. United States*, Compl. 91. Shortly after receiving this adverse decision, he applied to the BCNR to again request relief relating to his discharge. *Monk v. Mass.*, ECF No. 1 38. And in April 1979, he requested secretarial review by the Secretary of the Navy of the NDRB's adverse decision relating to his discharge. *Id.* His applications to the NDRB and BCNR, and his request to the Secretary of the Navy, were denied. *Id.* Plaintiff subsequently sought veterans benefits from the VA several times over a span of decades—all such requests were submitted before he presented evidence of a PTSD diagnosis and all were denied. *See Monk v. United States*, Compl. 93-94 (1982 application for disability compensation benefits for PTSD), 95-96 (1983 application for home loan benefits), 99-101 (2010 application for disability compensation for diabetes, diagnosed sometime after 2007 and before 2010).

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active duty by reason of willful and persistent misconduct.' *Monk v. Ilkie*, 2020 WL 2461722, at 1. Given this regulation, and after reviewing service records, VA determined that Mr. Monk's request for discharge for the good of the service rather than stand trial was an admission of guilt of the charges listed. Those facts substantiated a determination that the veteran was discharged under dishonorable conditions,' thereby disentitling him to VA benefits. *Id.* The VA consistently applied this regulation to Plaintiff's applications through 2010. *See e.g.*, Compl. 101.

<sup>9</sup> Though he did not appeal, Plaintiff did ask the VA to reconsider its decision, which it declined to do in May 1971. Compl. 88.



In late 2014, after DoD issued the Hagel Memorandum, the Court granted the agencies' request for voluntary remand, over Plaintiff's objections, and dismissed Plaintiff's lawsuit without ruling on the merits. *Mink v. McAuliffe*, ECF Nos. 40 (defendants' second motion to remand), 41 (plaintiffs' opposition), 42 (defendant's reply), 48 (order granting ECF No. 40 and dismissing case). In May 2015, the BCNR granted Plaintiff's administrative request to upgrade his application. *See Mink v. United States*, Compl. 106 *Mink v. Ilkie*, 2020 WL 2461722, at 2.

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Also in early 2012, with his newly documented PTSD diagnosis and the assistance of current counsel, Plaintiff informally applied to the VA for benefits. *Mink v. Ilkie*, 2020 WL 2461722, at 1-2 *see also Mink v. United States*, Compl. 105. Plaintiff formally applied for disability compensation in September of 2012. *Mink v. Ilkie*, 2020 WL 2461722, at 2 *see also Mink v. United States*, Compl. 105. He asked the VA to rely on his new diagnosis to find: that his other than honorable discharge was not a benefits-disqualifying dishonorable discharge, under 38 U.S.C. 101(2) and 38 C.F.R. 3.12 or that he met the VA's standard for insane at the time of his discharge, which would render him eligible for benefits, 38 C.F.R. 3.12(b). *Mink v. Ilkie*, 2020 WL 2461722, at 2. In the 2012 application, he sought disability compensation for PTSD, diabetes, and diabetic peripheral neuropathy in his arms and legs. *Mink v. United States*, Compl. 105. The VA considered the evidence of record, including its 1971 decision, and continued to find Plaintiff ineligible for benefits. *See id.* Plaintiff appealed. *d.* 106.<sup>11</sup>

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<sup>11</sup> This appeal appears to be the first appeal Plaintiff had ever taken of a VA decision pursuant to the VJRA. *See generally* Compl.

In September 2015, after the BCNR upgraded Plaintiff's discharge status (see above, Section II.C.1.), the VA determined that the BCNR's decision conclusively set aside any bar to benefits based on the status of the veteran's discharge, and immediately granted entitlement to VA healthcare, and undertook to grant compensation for any disability shown to be connected to service. *Mink v. Wilkie*, 2020 L 2461722, at 2. Specifically, the VA granted Plaintiff's disability compensation request for PTSD with a 100 rating, as well as for diabetes and associated neuropathy, effective July 2012. *Mink v. United States*, Compl. 106. However, Plaintiff disagreed with the effective date, because it did not date back to his February 2012 informal application for benefits. *d.* 107. Plaintiff appealed his VA determination to the Board of Veterans' Appeals and then to the U.S. Court of Appeals for Veterans Claims. *d.* 108. There, Plaintiff again argued that the status of his discharge was never a proper bar to benefits and alternatively that his insanity during service permitted his receipt of benefits. *Mink v. Wilkie*, 2020 L 2461722, at 3, 7, 8. The Court vacated the Board of Veterans' Appeals' decision and remanded for further factual development. *d. at 7 see als Mink v. United States*, Compl. 108.

On remand, the Board of Veterans' Appeals found that Plaintiff met the criteria for insanity under 38 C.F.R. 3.354 and held that his discharge (while now upgraded) should not have been considered a bar to benefits at the time he filed his informal claim for benefits in 2012. *in re Mink*, No. 20079020, 2020 L 8912950, at 1 (Bd. Vet. App. Dec. 15, 2020) *see als Mink v. United States*, Compl. 109.

By 2020, the Board of Veterans' Appeals gave Plaintiff all the relief to which he was entitled under the VA's disability benefits scheme retroactive benefits starting from the date of

his informal February 2012 application as provided by Congress. 38 U.S.C. 5110(a) (2012) 38 C.F.R. 3.400(r). *See Monk v. United States*, Compl. 109.

## D r r FOIA A d

In 2021, the National Veterans Council for Legal Redress (NVCLR) (which Plaintiff directs) and Black Veterans Project (BVP) requested information from three components of the VA, including the Veterans' Benefits Administration (VBA), pursuant to the Freedom of Information Act (FOIA). *See Black Veterans Project v. U.S. Dept. of Veterans Affairs*, No. 3:21-cv-935 (VLB), Complaint 23, ECF No. 1 (D. Conn., filed July 8, 2021).<sup>12</sup> NVCLR and BVP requested records from 2001-2021. *See e.g., id.*, ECF No. 1-1 at 2-3 (request to VBA). From the VBA, they requested data on disability claim decisions generally broken down by the race and gender of the veteran. *Id.*

Plaintiff alleges that in 2021, NVCLR, BVP, and their legal counsel had an academic statistician perform an analysis of the VA records obtained through the FOIA request. *Monk v. United States*, Compl. 2, 44. Plaintiff alleges that the statistician's analysis showed racial disparities in VA claims outcomes between 2001 to 2020. *Id.* 2, 7, 44-48.

## III T C

Plaintiff filed his complaint on November 28, 2022. Complaint, ECF No. 1. The complaint alleges three counts of negligence against the United States pursuant to the FTCA. *Id.*

136-152. Plaintiff brings claims for negligence, negligent infliction of emotional distress, and

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<sup>12</sup> Here, Plaintiff alleges that additional records possessed by VA and not yet publicly disclosed support his allegations in this case. *Monk v. United States*, Compl. 49. However, BVP and NVCLR withdrew their FOIA suit after they received fulsome productions and confirmed that the VA had satisfied its FOIA obligations regarding their requests. *P.*, Joint Status Report at 1, ECF No. 52 (filed June 13, 2022). Plaintiffs did not litigate any issue with respect to the VBA's production of disability claims data. *See id.* *P.*, Pls' Mem. of L. in Opp. to Def.'s Mot. for Summ. J. at 2, ECF No. 37 (filed Apr. 1, 2022). Plaintiff does not explain the basis for his statement in paragraph 49 of the complaint in this case.

negligent supervision. *d.* 11. He alleges that various emotional, financial, and reputational harms flowed from the VA's 1971 COD finding and subsequent benefits denials. *d.* 111-124 *see* Section II.B, above. Nevertheless, he alleges that he seeks not to relitigate the 1971 COD determination and specific benefits denials, but rather to hold VA accountable for its illegal, tortious, and racially discriminatory administration of benefits. Compl. 129.

Plaintiff claims the VA's breach of its alleged duties caused him emotional harm, dignitary and reputational harm, financial hardship, and difficulty accessing medical care. *d.*

10. Plaintiff presented his administrative tort claim to the VA on February 25, 2022. *d.* 133. Plaintiff seeks 1,000,000 in damages. Joint Report of FRCP 26(f) Conf. at 3, ECF No. 19 (Statement of Undisputed Facts 3). The United States of America now moves to dismiss this case.

#### STANDARD OF REVIEW

Federal courts are courts of limited jurisdiction. *See* *Mintz v. Mintz*, 568 U.S. 251, 256 (2013). A party cannot waive a defect to subject matter jurisdiction. *See* *Walker v. Walker*, 565 U.S. 134, 141 (2012). A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. *Makar v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). If a court lacks subject matter jurisdiction, it must dismiss the action. *See* Fed. R. Civ. P. 12(h)(3) *see also* *Infirmary v. Salaf*, 343 F. Supp. 2d 109, 110 (D. Conn. 2004) ( If a court concludes that it does not have subject matter jurisdiction, it must dismiss the case. ).

A district court must take all uncontroverted facts in the complaint as true, and draw all reasonable inferences in favor of the party asserting jurisdiction. *and* *in* *Marina Friedberg v. United States*, 752 F.3d 239, 243 (2d Cir. 2014). However, where jurisdictional

facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings. . . . *d.* Thus, the court may base its consideration of subject matter jurisdiction on: (1) the complaint alone (2) the complaint supplemented by undisputed facts or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *See Carter v. Balt. Port Ec. S.*, 822 F.3d 47, 56-57 (2d Cir. 2016) (*entitled State Liability Insurance v. Dinkins*, 5 F.3d 591, 594 (2d Cir. 1993) (recognizing that the trial court may dismiss on the basis of the complaint alone or the complaint supplemented by undisputed facts evidenced in the record ) *see also* *Kr . . . .*, 976 F.3d 218, 224 (2d Cir. 2020) (affirming the dismissal of a case pursuant to Rule 12(b)(1) and confirming that the district court properly relied on undisputed facts to determine subject matter jurisdiction).

Here, subject matter jurisdiction is clearly lacking based on the complaint alone. However, on a fact-based challenge to subject matter jurisdiction, a defendant can proffer evidence beyond the plaintiff's pleading.<sup>13</sup> *Carter*, 822 F.3d at 57 *via Middle E. Instr. . . . E irate f D a i*, 215 F.3d 247, 253 (2d Cir. 2000) (holding that the court may refer to evidence outside of the pleadings in considering subject matter jurisdiction). In opposition to such a motion, the plaintiffs may come forward with evidence of their own to controvert that presented by the defendant, or may instead rely on the allegations in the Pleading if the evidence proffered by the defendant is immaterial . . . . *Carter*, 822 F.3d at 57 *see also* *at . . . D nna aran . St re . . . .*, 872 F.3d 114, 119 (2d Cir. 2017). The party asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists. *and n*, 752 F.3d at 243 (citing *Makar a*, 201 F.3d at 113).

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<sup>13</sup> Here, Defendant has cited to materials from other lawsuits including, *e. .*, Plaintiff's allegations in other federal court complaints and statements in the briefs his organization submitted in the *P FOIA* suit. *See* note 6, above.

**ARGUMENT**

The United States is immune from liability absent its consent, and the terms of that consent define the Court’s jurisdiction to entertain a suit against the United States. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *McMan v. United States*, 825 F.3d 118, 125 (2d Cir. 2016). Because the doctrine of sovereign immunity is jurisdictional, the plaintiff bears the burden of establishing that his claims fall within an applicable waiver. *Meer*, 510 U.S. at 475; *Makarova*, 201 F.3d at 113. Plaintiff has failed to prove that the United States’ sovereign immunity has been waived by Congress through the VJRA or the FTCA, or through any other waiver, and even if there were an applicable waiver here, Plaintiff’s claim would be untimely and barred by preclusion principles. His complaint therefore must be dismissed.

**I T C R R D R R D R A**

The complaint should be dismissed for lack of subject matter jurisdiction because the VJRA, 38 U.S.C. 511, prohibits individuals from disputing their benefits determinations, or VA decisions affecting those determinations, in Federal District Courts. Plaintiff’s claims in this lawsuit are inextricably intertwined with benefits-related decisions he received over the decades since his discharge. Characterizing this dispute as an FTCA action does not create subject matter jurisdiction where the Court would be required to analyze the appropriateness of those VA benefit decisions to determine liability and would be required to calculate forgone benefits in order to provide monetary relief.

**A T R A R D R D R R**

The VJRA provides in pertinent part that the Secretary of Veterans Affairs shall decide *all questions of law and fact* necessary to a decision by the Secretary under a law *that affects their interests in benefits* by the Secretary to veterans. 38 U.S.C. 511(a) (emphasis added). Under





*S r e*, 26 F.3d at 11 ( Although Sugrue’s complaints invoke provisions of the Fifth Amendment and are styled in part as constitutional actions, the courts do not acquire jurisdiction to hear challenges to benefits determinations merely because those challenges are cloaked in constitutional terms . . . . Similarly, neither the Privacy Act nor the FOIA may be used as a rhetorical cover to attack VA benefits determinations. . . . ) *arra ee nes . Der inski*, 968 F.2d 1497, 1501 (2d Cir. 1992) (distinguishing facial attacks against legislation affecting veterans from other constitutional and statutory claims relating to benefits, over which district courts do not have jurisdiction).

District courts in the Second Circuit have applied this principle in a variety of contexts. *See Sc in le . nited States*, No. 20-cv-6394 CJS, 2022 L 9462632, at 6 ( .D.N.Y., Oct. 14, 2022) ( L itigants cannot avoid Section 511(a) by dressing up what are really benefits claims as constitutional claims or other types of claims for which the Government may have waived sovereign immunity. ) *arr ll . nited States*, No. 1:19-cv-1230 (GTS DJS), 2020 L 4284130, at 6 (N.D.N.Y., July 27, 2020) ( I n the Second Circuit, styling a veterans’ benefits claim as a deprivation-of-property claim is insufficient to circumvent the bar on judicial reviewability where that claim essentially amounts to a challenge of the denial of benefits or of any other decision made by the Agency in connection with that benefits adjudication. ) *n ers . nited States*, No. 16-cv-2816 (JFB) (SIL), 2018 L 1157754, at 6-8 n.3 (E.D.N.Y., Jan. 31, 2018) (Report and Recommendation holding that plaintiff’s negligence-based claims were rhetorical cover for his actual dispute the denial of his self-employment assistance benefits), *ad ted* 2018 L 1157823 (E.D.N.Y., March 2, 2018) *Ma id . D a Med. tr.*, No. 13-cv-2958 (CBA), 2013 L 3766559, at 2 (E.D.N.Y., July 11, 2013) ( A veteran’s invocation of alleged discriminatory treatment or other constitutional claim does not overcome 38 U.S.C.

511(a)'s limitations on federal court review. ) *Pili ea . nited States*, No. 10 Civ. 6143 (NRB), 2011 L 4472064, at 6 (S.D.N.Y., Sept. 27, 2011) ( plaintiff cannot overcome the jurisdictional bar of Section 511 by reframing his claim in constitutional terms. The statute encompasses all claims, whatever their basis, as long as they are necessary to a decision by the Secretary under a law that affects the provision of benefits' ) (quoting 38 U.S.C. 511(a)).

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here an FTCA claim may involve questions relating to veterans' benefits, the D.C. Circuit has adopted a test to determine whether subject matter jurisdiction exists: if a determination of whether the VA acted in bad faith or with negligence would require the district court to determine first whether the VA acted properly in handling plaintiff's benefits claim, judicial review is foreclosed by 38 U.S.C. 511(a). *Price*, 228 F.3d at 421. District Courts in the Second Circuit have repeatedly applied the *Price* test in dismissing FTCA actions for lack of subject matter jurisdiction because the purported injuries are inextricably intertwined with benefits determinations.<sup>14</sup> In *Sc in le*, a veteran brought an FTCA claim based on the VA's allegedly negligent failure to process his application for disability benefits. 2022 L 9462632, at 2. The court held that it is well-settled that the United States has established the VJRA, and not the FTCA, as the exclusive statutory scheme under which to seek judicial review of claims involving veterans' benefits. *d.* at 5. Similarly, in *P ili ea* , a veteran brought claims for intentional or negligent infliction of emotional distress due to an allegedly falsified medical report, leading to denial of benefits. 2011 L 4472064, at 1. Like Plaintiff here, the

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<sup>14</sup> The Second Circuit has not expressly addressed this framework however, as discussed herein, multiple courts within the Circuit have utilized it in addressing FTCA claims. . . . Further, the Second Circuit has addressed the use of the purported constitutional or statutory violations as a disguised collateral attack on a benefits determination. *n ers*, 2018 L 1157754, at 7 n.1.

*Pili ea* plaintiff alleged that this caused him mental and emotional injury, physical pain and suffering, and homelessness. The court dismissed the case because evaluation of these claims would necessitate a consideration of the decision to deny his benefits. *d.* at 9. And in *iners*, where the plaintiff alleged FTCA violations relating to the Government’s refusal to provide self-employment assistance benefits, the court held that the plaintiff impermissibly engaged in a collateral attack on the VA’s benefits determination and the analysis behind its determination. 2018 L 1157754, at 8.

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Plaintiff asks the Court to do exactly what the *Price* test says Section 511 prohibits determine if the VA acted properly in handling his benefits claims. *See in le*, 2022 L 9462632, at 9. Plaintiff’s entire complaint is premised upon allegations that the VA improperly denied Mr. Monk’s applications for education, housing, and disability benefits over a course of decades. Compl. 5, 87-124. Although styled as an FTCA action, the complaint centers on questions of fact and law relating to benefits, including whether the VA’s negligence caused Mr. Monk to be denied veterans’ benefits to which he was entitled. *d.* 112. The Court could not hold that the VA acted discriminatorily with respect to Plaintiff without first analyzing the VA’s process and decision-making regarding Plaintiff’s benefits claims. The Court has no subject matter jurisdiction to address these questions.<sup>15</sup>

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<sup>15</sup> To the extent Plaintiff is challenging his original discharge on the basis that it was the result of racial discrimination, that discharge decision was not issued by the VA. *See* Background Section II.A., above. The VA is required to consider discharge status when making a COD determination for purposes of assessing entitlement to benefits. 38 U.S.C. 101(2) 38 C.F.R. 3.12. Because Plaintiff presented his FTCA administrative claim to the VA and his claims are premised on negligence, negligent infliction of emotional distress, and negligent supervision by VA leaders and staff only, Plaintiff’s original discharge by his service organization is not at issue here. Further, any FTCA claim alleging that the original discharge or failure to upgrade that discharge was the result of racial discrimination would be time-barred. Plaintiff successfully obtained an upgrade to his discharge status in September 2015. *See Monk v. United States*, Compl. 106. Before that time, Plaintiff filed a purported class action in this Court *ntin ed*

Plaintiff's alleged damages are similarly derived from his claimed entitlement to veterans' benefits. Plaintiff claims that due to the VA's benefits obstruction, he was denied hundreds of thousands of dollars' worth of education, housing, and disability compensation. Compl. 140 *see also id.* 113. In order to award the monetary relief Plaintiff seeks, the Court would necessarily have to assess both whether the VA negligently denied Plaintiff benefits and, if so, the amounts of benefits he should have received. These are questions exclusively reserved for the Secretary under the VJRA. *See S. r e*, 26 F.3d at 11 (no subject matter jurisdiction where complaint alleging Fifth Amendment violations based on the VA's denial of a certain level of benefits sought to place plaintiff in the position he would have occupied but for the . . . unlawful acts and conduct of the VA and make him whole ) *n ers*, 2018 L 1157754, at 8 (although plaintiff argued he has not pleaded the loss of benefits as damages, his allegations essentially challenge the decision-making of the Government, including how it chose and weighed evidence before it, which is outside the scope of this Court's judicial review. ).

Furthermore, Plaintiff cannot avoid the provisions of the VJRA through artful pleading. Although Plaintiff repeatedly disclaims any interest in relitigating his individual benefits requests and instead challenges the VA's alleged racially discriminatory administration of benefits generally, Compl. 9, 129, the fact remains that Plaintiff seeks *individual* relief based

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in March 2014 in which he and other plaintiffs alleged that African American servicemembers faced systemic discrimination and received disproportionate punishment, including in their discharge statuses. *M nk . Ma s*, ECF No. 1 29, 195 (claiming violations of the Fifth Amendment due to the military's refusal to upgrade their discharge statuses, which resulted from Vietnam Era discharge practices that had both a racially discriminatory impact and a racially discriminatory purpose ). Therefore, any claim that Plaintiff's discharge or failure to receive a discharge upgrade was the result of racial discrimination clearly accrued, at the latest, by March 3, 2014. *See* Argument Section III, below. This is well outside the two-year statute of limitations for FTCA claims. 28 U.S.C.

2401(b). Finally, even assuming that Plaintiff's original discharge was at issue and not time-barred, any FTCA claim based on his discharge would fail for the separate reason that the *eres* doctrine prohibits such claims. *See eres*, 340 U.S. at 141 *rres . nited States*, 621 F.2d 30, 31-32 (1st Cir. 1980) (serviceman's FTCA claim for wrongful dishonorable discharge was *eres* barred) *esel . nited States*, 868 F.2d 1277 (Fed. Cir. 1989) (*eres* barred former military medical resident's FTCA suit alleging improper discharge from military service based upon poor performance evaluations).

on the allegedly improper denial of his *individual* benefits requests. This is not obviated by allegations of systemic racial disparities, a perception of racial discrimination within the VA benefits system, or a broader pattern of discriminatory administration of benefits. *See id.* 52, 58, 119. Other courts addressing this issue have held that allegations of disparate treatment in administration of benefits fall within the exclusive jurisdiction of the VJRA. *Alt n . Sec eterans d in.*, 187 F. Supp. 3d 1317, 1326 (N.D. Ala. 2016) (where plaintiff alleged that racial disparity played into the decisions affecting his benefits, the court lacked jurisdiction because the claim for unequal treatment concerns, in substance, the handling of Plaintiffs' benefits claims. ) *sari n ale . nited States*, 898 F. Supp. 2d 410, 429 (D.P.R. 2012) ( Plaintiffs cannot circumvent the exclusive procedures or the restrictions of the VJRA by purporting to challenge systemic defects in VA programs or practices as distinguished from discrete VA actions or decisions. ), *acated n t er r nds* 544 F. App'x 5 (1st Cir. 2013) *e es .De t f eterans ffairs*, 227 F. Supp. 2d 1237, 1246 (M.D. Fla. 2002) (no subject matter jurisdiction where plaintiff alleged that the VA treated African American veterans differently than similarly situated white veterans by compensating only white soldiers for their service in Chemical Warfare Units because, under the VJRA, the court simply lacked jurisdiction to review the VA's handling and processing of the plaintiffs' benefits claims. ).

*n ers*, in which the plaintiff brought FTCA claims for negligence and negligent hiring, training, and retention, among other claims, is instructive. 2018 L 1157754, at 8. Like Plaintiff, Conyers spent numerous pages in his pleading listing concerns related to his self-employment benefits determination, including allegations that the VA erred in relying on certain information and failed to correct discrepancies in reaching its decision. *are n ers*, 2018 L 1157754, at 1, *it Compl.* 89 (alleging that the VA's COD determination for purposes

of assessing Plaintiff’s benefits was flawed because it relied exclusively on a finding that Mr. Monk voluntarily signed his discharge papers ). Also like Plaintiff, Conyers attempt ed to distinguish his allegations as unrelated to his benefits determination and stated that he only sought relief afforded under the FTCA. 2018 L 1157754, at 8 Compl. 9, 129. The court in *Conyers* nevertheless concluded that plaintiff’s purported personal injuries were inextricably intertwined with the denial of . . . benefits, and dismissed Conyer’s claims as prohibited by the VJRA. 2018 L 1157754, at 8-9 (adopted by *Conyers*, 2018 L 1157823, at 1). This Court should reach the same conclusion.

Notably, Plaintiff is familiar with, and has previously used, the VJRA process. As alleged in the complaint, Plaintiff obtained benefits retroactively from the date on which he first presented evidence of his PTSD to the VA by availing himself of the application and appellate process that Congress provided in the VJRA. Compl. 105-110. This Court is not the proper forum to further litigate those or any other benefits disputes. Plaintiff’s FTCA claims should be dismissed because they inherently involve questions of fact and law concerning his veterans’ benefits, and the Court therefore lacks subject matter jurisdiction.

**II T C r r r d C r d  
d r FTCA r**

Plaintiff has failed to show that Congress waived the United States’ sovereign immunity for his claims under the FTCA. When an action is brought against the United States government, compliance with the conditions under which the government has agreed to waive sovereign immunity is necessary for subject matter jurisdiction to exist. *Illia s . nited States*, 947 F.2d 37, 39 (2d Cir. 1991).

The FTCA, by its express terms, provides only a limited sovereign immunity waiver for specific kinds of lawsuits. The Supreme Court has recogni ed that the FTCA’s effect is to

waive immunity from recognized causes of action but not to visit the Government with novel and unprecedented liabilities. *Id.*, 340 U.S. at 142 *see also United States v. Isgrig*, 546 U.S. 43, 44 (2005) *in accord with United States v. United States, 369 U.S. 1, 7 (1962)*. 28 U.S.C. 2674 provides that the United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. Thus, pursuant to 28 U.S.C. 1346(b)(1) and 2674, the only claims that fall within the FTCA's purview are those where a private person in like circumstances would be subject to liability.

The FTCA does not create new causes of action, but only waives immunity under circumstances that would create liability in the same manner and to the same extent as a private individual under like circumstances. *Darkin Genetics*, 76 F.3d at 1266 (quoting 28 U.S.C. 2674) (cleaned up) *see also Carter v. United States*, 494 F. App'x 148, 149 (2d Cir. 2012) (reversing district court's finding that plaintiffs satisfied the private analogue requirement and noting that plaintiffs were asking the court to recognize and apply against the United States a new tort never before recognized under New York law).

Thus, the FTCA only waives sovereign immunity if the plaintiff's cause of action is comparable to a cause of action against a private citizen recognized in the jurisdiction where the tort occurred. *McMan*, 825 F.3d at 125 (internal quotation marks omitted). This private analogue requirement asks whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. *Id.* Plaintiff fails to meet his burden to allege an actionable private analogue for his claims. Because Plaintiff cannot show any like circumstances under which a private actor would be liable under Connecticut law, his FTCA claims fail for lack of subject matter jurisdiction.



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Plaintiff cannot carry his burden to establish that a private analogue exists under state law because the VA's administration of its benefits program is quasi-adjudicative. Courts in this Circuit have repeatedly held that when the government conduct at issue is quasi-legislative or quasi-adjudicative, as here, no private analogue exists. See *l . nited States*, 131 F.3d 131, 1997 L 774397, at 3 (2d Cir. 1997) (unpublished table decision) (finding no private analogue where claims arise from alleged negligent violations of the ministerial duties of federal court clerks) *k t ic*, 859 F.2d at 1125-26 (noting that quasi-legislative and quasi-adjudicative actions by an agency of the federal government are the type of actions for which a private person cannot be held liable) *.P. e . . . nited States*, 810 F.2d 34, 37 (2d Cir. 1987) (As to certain governmental functions, the United States cannot be held liable, for no private analog exists.) *. nited States*, No. 20-cv-4882 (MKB), 2022 L 4091011, at 2, 4 (E.D.N.Y. Sept. 6, 2022) (finding no private analogue where the Treasury Offset Program withheld plaintiff's settlement funds to satisfy a restitution order) *Per ta . nited States*, No. 3:16-cv-2112 (VLB), 2018 L 995111, at 3-4 (D. Conn. Feb. 21, 2018) (finding that the plaintiff failed to establish a private analogue under state law for the VA's alleged failure to properly administer benefits) *St r s . nited States*, No. 13-cv-811 MKB, 2015 L 1196592, at 19-20 (E.D.N.Y. Mar. 16, 2015) (finding no private analogue because the plaintiffs' negligence and intentional infliction of emotional distress claims were based on the quasi-adjudicative action of an agency) *i er a . nited States*, 739 F. Supp. 2d 138, 141-42 (E.D.N.Y. 2010) (finding no private analogue for negligent issuance of a passport, noting that o ften, action with no private analog ue falls into the category of either the 'quasi-legislative' or 'quasi adjudicative' action of an agency ).

Here, the challenged government function is quasi-adjudicative. The facts are similar to *Katlic*, 859 F.2d at 1125-26, which addressed the Department of State’s revocation of plaintiff’s citizenship. In *Katlic*, the Second Circuit first recognized the general rule that quasi-legislative and quasi-adjudicative actions by an agency of the federal government are the type of actions for which a private person cannot be held liable. *Id.* at 1125. In applying this principle to the facts of the Department of State’s citizenship determinations, the Second Circuit held that the withdrawal of a person’s citizenship constitutes a quasi-adjudicative action for which no private analog exists. *Id.* at 1125-26. The Second Circuit noted that the parties had not raised any analogous private cause of action and stated that “even if we were willing to analogize the relationship between the government and its citizens with that between a private association and its individual members, we would be hard pressed to find a cause of action *in tort*’ for alleged misconduct by the association.” *Id.* (citation omitted emphasis in original). Like the Department of State in *Katlic*, the Secretary of Veterans Affairs was tasked with administering government services, and Plaintiff has not alleged any private analogue for liability under state law. *See also Perita*, 2018 WL 995111, at 3-4 (dismissing FTCA claim based on provision of VA benefits for lack of private analogue).

There is no private analogue because the challenged conduct is quasi-adjudicative. Therefore, Plaintiff’s claims fail.

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Plaintiff’s complaint recites the elements of three recognized causes of action but does not identify any analogous causes of action under like circumstances. Rather than accept

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<sup>16</sup> Plaintiff has alleged that Connecticut law supplies the substantive law of this case. *See* Compl. 137, 142, 149. Plaintiff alleges he was living in Connecticut at the time his applications were denied. *Id.* 5, 13-14, 87, 95. The United States therefore assumes that the correct place providing the relevant law is Connecticut.

Plaintiff's general characterizations regarding the elements of the torts alleged, the FTCA requires that the Court look to the *conduct for the basis of the claim against the federal government* to determine whether there is an analogy that can be drawn between that conduct and conduct which could form the basis of a cause of action. *St r s*, 2015 L 1196592, at 19 (emphasis added cleaned up) (rejecting plaintiff's characterization of their claims as sounding in intentional infliction of emotional distress and negligence).

Merely invoking negligence fails to allege like circumstances, and therefore fails to allege a private analogue. *See Let n . nited States*, 180 F. Supp. 2d 177, 182 (D.D.C. 2002) (applying D.C. law) (dismissing FTCA claim for lack of private analogue and noting that to allege negligence, a complaint cannot merely make conclusory assertions but must specify a negligent act and characterize the duty whose breach might have resulted in negligence ). Similarly, merely invoking the term duty, without alleging any Connecticut law that charges a private defendant with the same duty, fails to allege a private analogue. Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. *a rence .*

*nd s. nc.*, 319 Conn. 641, 649 (2015) (affirming ruling that defendant owed no duty to plaintiffs who suffered only economic injury). Whether a duty exists is a question of law for the court, and only if the court finds that such a duty exists does the trier of fact consider whether that duty was breached. *as err ncti n ldin . Se. nn. ater t .*, 340 Conn. 200, 210 (2021) (cleaned up). Thus, merely incanting duty, breach, causation, damages does not state a tort claim under Connecticut law and the FTCA where no non-federal duty can be pleaded.

Plaintiff did not specify any non-federal duties in his negligence count and Plaintiff did not analogize his relationship with the VA to any relationship between two private people. For example, Plaintiff alleges that the VA was negligent by failing to make a concerted effort to identify and correct for racial discrepancies in the service branches' discharge decisions. Compl. 58. But he has not alleged any like circumstances in Connecticut where a private actor is charged with taking action to mitigate harms flowing from another actor's conduct. As another example, Plaintiff alleges that auditing and record-keeping practices implemented by VA leaders caused him harm. *d.* 52. But he has not alleged any like circumstances where a private actor has a duty in tort to audit and keep records.

His second and third counts, alleging negligent infliction of emotional distress and negligent supervision, likewise fail to allege that his relationship with the VA is similar to any relationship between a private plaintiff and defendant where Connecticut tort law recognizes claims for negligent infliction of emotional distress or negligent supervision.

Because Plaintiff failed to allege like circumstances for which Connecticut recognizes a cause of action, there is no basis to conclude that the denial of Plaintiff's benefits applications is an issue actionable under state law.

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Nor can Plaintiff base his FTCA claim on alleged violations of federal, as opposed to state, law. The FTCA's marshaling of the law of the place where the act or omission occurred, 28 U.S.C. 1346(b)(1), refers exclusively to state law. *See Meyer*, 510 U.S. at 478 *re United States*, 11 F.4th 79, 85 (2d Cir. 2021) *Sade . s. t . f it fNe a en*, 251 F.3d 307, 314-315 (2d Cir. 2001) (affirming summary judgment for the United States where plaintiffs failed to allege a private analogue under Connecticut law). Violations of the United

States Constitution, federal statutes, or federal regulations do not confer liability under the law of the place. *en v. United States*, 854 F.2d 622, 626 (2d Cir. 1988) *see also D rkin enetics*, 76 F.3d 1261, 1266 (2d Cir. 1996) ( The FTCA’s ‘law of the place’ requirement is not satisfied by direct violations of the Federal Constitution or of federal statutes or regulations standing alone. ) (citing *en*, 854 F.2d at 626).

Courts in the Second Circuit have uniformly held that the FTCA jurisdiction does not extend to a plaintiff who bases his tort claim on the agency’s failure to follow its own regulations, because those regulations are not state law. *Mc an*, 825 F.3d at 127 (dismissing claim grounded solely on the government’s failure to follow applicable regulations ) *D rkin enetics*, 76 F.3d at 1266 (finding federal statute prohibiting the export of diseased cattle could not undergird FTCA claim) *en*, 854 F.2d at 626 (rejecting FTCA claim based on alleged violations of federal regulations) *k t ic*, 859 F.2d at 1125 ( The FTCA does not extend to conduct governed exclusively by federal law ) (internal punctuation omitted) *i re . Medina*, No. 11-cv-2264, 2012 L 4767143, at 8 (S.D.N.Y. Sept. 27, 2012) (finding no private analogue for negligence claim based on failure to provide notice of prison rules and regulations). A federal statute or regulation that speaks only to the government’s conduct, therefore, cannot be read to impose state tort law duties upon private persons. *See indall v. United States*, 901 F.2d 53, 56 n.8 (5th Cir. 1990) ( A federal regulation cannot establish a duty owed to the plaintiff under state law. ).

In his complaint, Plaintiff alleges only that the government breached federal laws and regulations regarding veterans’ benefits. Those statutes and regulations cannot support an FTCA claim. For example, Plaintiff alleges that VA leadership breached its statutory duty of care under 38 U.S.C. 303 (2018) and 38 U.S.C. 210(b) (1958). Compl. 8, 35-40. He alleges

that federal law imposes a duty of care on the VA Secretary. *d.* 138. He claims that VA Administrators and Secretaries, and other senior officials, breached this duty when through training, supervision, auditing, record-keeping, and other measures, they failed to redress longstanding, pervasive race discrimination and disparate impacts of which they knew or should have known. *d.* 139. Without citing any non-federal statute, Plaintiff alleges that VA leadership's negligent supervisions of VA managers and adjudicators violated their *stat t r d t t ens r e t e r e r e e c t i n f l a s.* *d.* 152 (emphasis added).

The statutes and regulations governing VA benefits are federal law. Section 511 of Title 38 of the United States Code confers on the Secretary of Veterans Affairs the obligation to decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. This provision extends to the VA's decisions on disability, home loan, and education benefits, the three types of benefits Plaintiff sought from the VA. *See* Compl. 143 *see als* 38 U.S.C. 1110 1131 (disability compensation), 3461 (education), 3702 (housing loans). Section 511 also covers the decision-making process respecting other VA benefits. *See e. ., Per ta*, 2018 L 995111, at 3-4 (dismissing FTCA claim challenging VA's (withdrawn) denial of fee basis status benefit for lack of private analogue). Plaintiff has also failed to allege that Connecticut recognizes a freestanding duty to abide by private regulations. *See ats n . nited States*, 865 F.3d 123, 134-35 (2d Cir. 2017) (finding New York did not recognize such a duty and dismissing FTCA claim) *Mc an*, 825 F.3d at 127 (same).

The FTCA provides Plaintiff no recourse because his tort claim is based on alleged violations of federal law, rather than state law.

### III. **Administrative FTCA Claim**

Plaintiff's complaint should be dismissed on the separate basis that it is untimely. Under the FTCA, a claimant must present his tort claim administratively to the appropriate federal agency within two years after such claim accrues or it shall be forever barred. 28 U.S.C. 2401(b) *en nisc . nited States*, 150 F.3d 112, 120-21 (2d Cir. 1998). As set out in the complaint, Plaintiff presented his administrative tort claim to the VA on February 25, 2022. Compl. 133. Regardless of the accrual standard applied, Plaintiff's claims accrued, at the latest, in March of 2014, nearly eight years before he submitted his administrative claim in February of 2022. Indeed, Plaintiff sought the assistance of legal counsel regarding his benefits no later than 2011, and in a 2014 action made a number of allegations that are strikingly similar to those presented in the instant complaint.

#### **A. Administrative FTCA Claim**

Generally, an FTCA claim accrues at the time of injury. *nited States . rick*, 444 U.S. 111, 119-20 (1979). However, where a plaintiff would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted, a diligence-discovery rule of accrual applies. *r nisc* , 150 F.3d at 121. The diligence-discovery rule is not an exacting requirement. *d*. It requires only knowledge of, or knowledge that could lead to, the basic facts of the injury, i.e., knowledge of the injury's existence and knowledge of its cause or of the person or entity that inflicted it. *d*. (quoting *cci ne . nited States*, 670 F. Supp. 527, 536 (S.D.N.Y. 1987)). A plaintiff need not know every relevant fact of his injury or even that the injury was inflicted negligently or implicates a legal claim. *d. rick*, 444 U.S. at 123 (accrual of an FTCA claim does not await awareness by the plaintiff that his injury was negligently inflicted ). Rather, a claim will accrue when the plaintiff knows, or should know, enough of the

critical facts of injury and causation to protect himself by seeking legal advice. *r nisc*, 150 F.3d at 121 . . . *e rel. astill . nited States*, 656 F.3d 135, 140 (2d Cir. 2011). Whether a plaintiff should have known these critical facts is decided by reference to whether a reasonable person exercising due and reasonable diligence would have discovered such facts.

*cci ne*, 670 F. Supp. at 536 (citing *arrett . nited States*, 689 F.2d 324, 327 (2d Cir. 1982)). Thus, while a mere hunch, hint, suspicion, or rumor of a claim does not cause accrual, such suspicions do give rise to a duty to inquire into the possible existence of a claim in the exercise of due diligence. *r nisc*, 150 F.3d at 121.

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Regardless of whether the Court applies the usual accrual rule or the diligence-discovery rule, Plaintiff's claims are untimely.

*irst*, his claims are clearly untimely to the extent they accrued at the time of injury. Plaintiff alleges that he was injured by the VA's administration of housing, education, and disability benefits. Specifically, he details repeated denials of benefits requests over the decades since his service, starting in 1971. Compl. 87-110. The last of these alleged injuries occurred no later than 2015, when the VA granted Plaintiff full disability benefits but assigned an effective date to the benefits that Plaintiff then successfully challenged. Plaintiff was aware of these denials and that they had been issued by the VA at the time of occurrence. An FTCA administrative claim filed in 2022 is clearly well outside the applicable two-year statute of limitations for even the most recent of Plaintiff's alleged injuries and indeed, is decades late for many of his benefits denial grievances.

*Sec nd*, the diligence-discovery rule does not revive Plaintiff's untimely claims. Plaintiff appears to invoke the rule, alleging that Mr. Monk did not know, and had no way of knowing,



about the racial disparities in VA's administration of benefits until the FOIA records were disclosed and analyzed in 2021. *d.* 128. As an initial matter, there is no reason to apply the diligence-discovery rule here, where the fact of Plaintiff's injuries (denial of access to benefits) and cause of Plaintiff's injuries (adverse decisions by the VA) were known at the time of infliction. However, even applying this rule, Plaintiff was aware of the critical facts of his injury and its cause well before February 25, 2020.

Since no later than September 2011, Plaintiff was sufficiently aware of the critical facts (*i.e.*, the VA's denials of Plaintiff's benefits applications, resulting in Plaintiff being unable to access various types of veterans' benefits) such that he sought and obtained legal counsel relating to his pursuit of benefits. *d.* 103. This fact alone is all that is required for purposes of accrual under the diligence-discovery rule. *See r nisc*, 150 F.3d at 121 . . . , 656 F.3d at 140 (noting that a claim accrues when plaintiff knows or should know enough of the critical facts of injury and causation to protect himself by seeking legal advice ). Plaintiff's claims therefore accrued well over two years prior to the submission of his administrative claim in February 2022.

Plaintiff cannot save his claims by arguing that, although he sought legal advice regarding veterans' benefits since at least 2011, he did not know and or could not have known that his denials were the result of racial discrimination. Discovery of the critical facts . . . of causation of the injury does not require a plaintiff to know he has a cognizable legal claim or even that the defendant acted negligently. *r nisc*, 150 F.3d at 121 *rick*, 444 U.S. at 123 (where plaintiff was aware of injury, nerve deafness, and its probable cause, administration of a drug treatment by a VA hospital, and had sought disability benefits on this basis, his later filed FTCA claim was barred by the statute of limitations given he could have timely sought medical and legal advice as to whether injury was negligently inflicted). Nor is it necessary for Plaintiff

to have been aware of the full extent of the harm, which he alleges was not known until his statistician analyzed the FOIA data in 2021. Compl. 127 *en nisc*, 150 F.3d at 121 (A plaintiff need not know each and every relevant fact of his injury) *Michael . nited States*, No. 17-cv-1893 (KAM) (RML), 2019 L 4602828, at 4 (E.D.N.Y., Sept. 23, 2019) (in medical malpractice action where plaintiff argued that she spent over two years trying to get an explanation as to her exact injuries before filing her FTCA claim, holding that plaintiff's claim was untimely). The diligence-discovery rule is not so exacting. *en nisc*, 150 F.3d at 121.

Even if notice of possible racial discrimination in benefits administration was necessary for claim accrual, Plaintiff's complaints in this and other publicly filed matters demonstrate that he had knowledge of sufficient critical facts to accrue his FTCA claims well before February 25, 2020. Plaintiff acknowledges that there was speculation for years that racial disparity existed in VA's benefits system, and that there had been public reporting on the issue, but alleges that he could not have known about data substantiating such claims until September 2021, when his counsel and a statistician analyzed data that his organization, NVCLR, received via FOIA. Compl. 127. But the FOIA requests did not simply stumble upon evidence of purported discrimination in the pursuit of other information BVP, NVCLR, and Plaintiff's counsel expressly sought information relating to racial disparities in administration of veterans' benefits. *See P*, No. 3:21-cv-935, Complaint, ECF No. 1 (filed July 8, 2021) (alleging that recent revelations regarding widespread discrimination across VA facilities highlight that the VA has failed to address systemic racism and call into question whether VA has been fairly administering benefits to Black veterans. ). The FOIA request itself thus reveals that Plaintiff had long had sufficient information to accrue his claims even prior to receiving responsive documents. *See Compl.* 41 *P*, ECF No. 1 23 (showing FOIA requests made to VA in

February 2021). Plaintiff does not explain why his organization waited until that time to do so, despite his having been represented by current counsel since at least September 2011. Compl.

103.

Since seeking legal advice in September 2011, counsel has represented Plaintiff in a variety of actions challenging decisions by the VA and the service branches. This includes a purported class action in which he alleged racial disparity and discrimination against Vietnam war veterans with PTSD in the handling of their discharge statuses and upgrades. *Monk v. United States*, 3:14-cv-260, Complaint, ECF No. 1 29, 195 (filed Mar. 3, 2014). In that action, filed in 2014, Monk alleged that a 1972 task force confirmed that African American servicemembers faced systemic discrimination and received disproportionate punishment, including in their discharge statuses. *Id.* 29. Plaintiff claimed that he was deprived of equal protection under the Fifth Amendment when his service organization refused to upgrade his discharge status, which resulted from Vietnam Era discharge practices that had both a racially discriminatory impact and a racially discriminatory purpose. *Id.* 195. These allegations are similar to those made in the complaint here. *Monk v. United States*, Compl. 57-58 (alleging that the VA knew or should have known that bias in the military justice system would likely lead to racial disparities in its COD determinations). Such allegations that discharge statuses and upgrades were administered in a racially discriminatory manner make clear that Plaintiff was on notice to inquire into whether his veterans' benefits were likewise being administered in an allegedly discriminatory manner.<sup>17</sup>

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<sup>17</sup> In this and his prior actions, Plaintiff also cites numerous studies and reports, some decades old, regarding disparate treatment of African American veterans by the United States government generally and the VA specifically. *See* Compl. 55-57 *P*, ECF No. 1 11-22 *Monk v. United States*, ECF No. 1 29. Although it is unclear when Plaintiff first became aware of these publications, publicly accessible reporting can be sufficient to put a plaintiff on notice to diligently inquire into the possible existence of a claim. *See* *McCine*, 670 F. Supp. at 536 (extensive press coverage regarding FBI investigations was more than enough to alert plaintiff to his FTCA claim). *Monk v. United States*, Compl. 57-58 (alleging that the VA knew or should have known that bias in the military justice system would likely lead to racial disparities in its COD determinations). Such allegations that discharge statuses and upgrades were administered in a racially discriminatory manner make clear that Plaintiff was on notice to inquire into whether his veterans' benefits were likewise being administered in an allegedly discriminatory manner.<sup>17</sup>

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Plaintiff's argument that the statute of limitations should accrue from when the records produced pursuant to his 2021 FOIA action were analyzed by his counsel and a statistician would negate the purpose of a statute of limitations. *Mink v. United States*, Compl. ¶¶ 44, 125, 127. An accrual date that turns on when a plaintiff (or his lawyers) finally decides to take action, rather than when the plaintiff was sufficiently alerted to the appropriateness of seeking legal advice, would render the limitations period meaningless. *Id.*, 656 F.3d at 141-42. By such logic, the statute of limitations would never begin to run until counsel and or experts have sought out relevant information and fully developed their analysis or reports on a timeline of their own choosing. *Id.* at 143-44 (Attorneys would therefore be able to set the accrual date to coincide with their own litigation strategy, regardless of the length of the delay. ). And a failure or inability of counsel to conduct a full fact-finding investigation before initiating litigation does not stop the statute of limitations from running. *See v. nisc*, 150 F.3d at 122 n.5. Other FTCA plaintiffs have made this same argument to no avail. *See v. nisc*, 656 F.3d at 143 (rejecting plaintiff's argument that the statute of limitations on her medical malpractice claim should run from when her and her daughter's medical records had been analyzed by experts, and noting that if the cause of action did not accrue until the attorneys obtained and reviewed the medical records, even had the plaintiff waited three, four, or ten years before retaining counsel, or had the Firm waited a similarly long time before beginning its investigation, that inaction would not have prevented this claim from accruing. ).

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claims against FBI) *see also* *Pitt v. News Corp.*, 57 F. Supp. 3d 173, 188 (E.D.N.Y. 2014) (News reports, if sufficiently probative and widely publicized, can trigger accrual, or at least require potential plaintiffs to undertake a reasonably diligent investigation. ).

Plaintiff's own allegations, in this and other matters filed years prior, demonstrate that he was aware, or with reasonable diligence should have been aware, of the critical facts of his alleged injuries and their cause since at least 2011, when he knew enough to seek legal advice and retain present counsel to assist in his pursuit of benefits. Plaintiff was therefore required to have filed his FTCA claim by September 2013, and certainly by 2017, two years after the VA issued its last disputed benefits decision and more than two years after he filed his purported class action alleging governmental racial discrimination against African American servicemembers, *Minkins*. Yet Plaintiff did not file his FTCA administrative claim until February 25, 2022, years late under even a generous standard. Plaintiff's FTCA claims are untimely.<sup>18</sup>

## **I r r d d**

Finally, in addition to being untimely, Plaintiff's claims are precluded. Plaintiff has already received an upgrade to his discharge status and access to VA benefits with a 100 disability rating, running retroactively from an effective date sought by Plaintiff. His discharge status upgrade and access to benefits are the results of valid and final judgments. Any new action allegedly arising from these same claims is therefore precluded.

The doctrine of res judicata, or claim preclusion, holds that when a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . , the claim extinguished includes all rights of the plaintiff to remedies against the

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<sup>18</sup> Plaintiff has not alleged that any form of equitable tolling should be applied to his claims, and he bears the burden of establishing entitlement to equitable tolling. *Ats n*, 865 F.3d at 132 ( Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. ). Even if he had pleaded equitable tolling, Plaintiff's claims would not merit such extraordinary relief. *d.* at 132-33 ( Equitable tolling is a rare remedy to be applied in unusual circumstances and should not be based on lack of education, *r se* status, or ignorance of the right to bring a claim or the uniqueness of a party's circumstances ) (internal quotations omitted).

defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. Restatement (Second) of Judgments 24 (1982). The rule of merger establishes that when a valid and final personal judgment is rendered in favor of the plaintiff, the plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment. Restatement (Second) of Judgments 18 (1982). Thus, claim preclusion applies in later litigation if an earlier decision was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action.’ *ae er . ellc P s i*, 936 F. Supp. 2d 87, 93-94 (D. Conn. 2013) (quoting *ec t . nited llecti n rea nc.*, 691 F.3d 218, 221-22 (2d Cir. 2012)). Litigation involves the same cause of action where it arises out of the same claim or nucleus of operative fact as a prior suit. *ald an . illa e f ir as el*, 207 F.3d 105, 108 (2d Cir. 2000) *ae er*, 936 F. Supp. 2d at 95.

As detailed herein, and regardless of how Plaintiff attempts to characterize the complaint, the nucleus of operative fact here is the alleged improper denials of benefits applications and or failure to upgrade his discharge. All such claims have long since been resolved. In May 2015, the BCNR granted Plaintiff’s request to upgrade his discharge status. Also in 2015, the VA granted Plaintiff’s disability compensation request for PTSD with a 100 rating, as well as his requests relating to diabetes and associated neuropathy. Compl. 106. After Plaintiff disputed the effective date applied to this benefits grant, in 2020, the Board of Veterans’ Appeals ultimately ruled in Plaintiff’s favor and granted his benefits retroactively from the effective date argued by Plaintiff. No party has sought to appeal or otherwise reconsider these valid and final judgments entered in Plaintiff’s favor. *See rti . McD n*, 6 F.4th 1267, 1270 (Fed. Cir. 2021)

( Statutes and regulations governing veterans benefits expressly state general rules of finality for VA decisions. That is so for a decision by a VA regional office (or agency of original jurisdiction) unless timely appealed to the Board of Veterans' Appeals . . . . And it is also so for a Board of Veterans' Appeals decision unless timely appealed to the Veterans Court. ) *e* . *S lkin*, No. 17-754, 2017 L 4898294, at 3 (Vet. App., Oct. 31, 2017) ( Basic principles of finality and res judicata apply when a veteran claimant fails to timely appeal a decision and, in such a circumstance, unless otherwise provided by law, the cases are closed and the matter is thus ended ) (cleaned up quoting *ten . est*, 142 F.3d 1434, 1437-38 (Fed Cir. 1998)). As such, claims based on all or any part of Plaintiff's transactions or series of connected transactions with the VA have been extinguished.

The fact that Plaintiff now brings his grievances in the form of an FTCA action and argues that his prior benefits denials and or failure to receive a discharge upgrade are the result of discrimination does not save his claims from preclusion. The rule of Restatement (Second) of Judgments 24 (1982) applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action (1) To present evidence or grounds or theories of the case not presented in the first action, or (2) To seek remedies or forms of relief not demanded in the first action. Restatement (Second) of Judgments 25 (1982) *ald an*, 207 F.3d at 110 ( A plaintiff cannot avoid the effects of res judicata by 'splitting' his claim into various suits, based on different legal theories (with different evidence necessary' to each suit). ) *rlin . Mac rt r E ities td.*, No. 3:11-cv-558 (MPS), 2015 L 403212, at 2 (D. Conn., Jan. 28, 2015) (where plaintiff alleged employment discrimination and sought front and back pay in a state suit and a separate federal suit under different statutes, applying the Restatement and holding that even if the legal claims and remedies sought were entirely

separate, plaintiff's second action would be precluded) *ink . Ma ner*, 988 F. Supp. 74, 80-81 (D. Conn. 1997) (where claims were inextricably intertwined with earlier state court action and arose out of the same succession of facts, res judicata extinguished the claims even where plaintiff was prepared to present evidence or grounds or theories of the case not presented in the first action' or to seek remedies or forms of relief not demanded in the first action.' ) (quoting Restatement (Second) Judgments 25). Plaintiff's claims should be dismissed for the separate reason that they are precluded.

### **CONCLUSION**

Plaintiff has failed to sufficiently allege that the United States has waived sovereign immunity under 38 U.S.C. 511(a) and 28 U.S.C. 1346(b)(1), and his claims are untimely and precluded. Therefore, all three counts of the complaint must be dismissed for failure to establish subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3). Therefore, the defendant the United States requests that the Court grant its motion and dismiss Plaintiff's claims in their entirety.

Respectfully submitted,

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# New Study Examines VA Disability Compensation Awards for Race Discrimination During Military Service

NEWS PROVIDED BY  
**Dr. Evan R. Seamone** →  
 Jul 12, 2022, 08:43 ET

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*The study found that the VA has increasingly provided reparations for the psychological impact of prejudice in tandem with the Nation's awakening over systemic racial discrimination.*

GAINESVILLE, Fla. , July 12, 2022 /PRNewswire/ -- Veteran's benefits attorney and Fellow of the National Institute of Military Justice, Dr. Evan R. Seamone, has published the first ever study examining the award of disability benefits by the Department of Veterans Affairs (VA) for the impact of prejudice during military service. The *Administrative Law Review* article, "Disability Compensation for the Psychological Impact of Race Discrimination: Lessons from the Board of Veterans' Appeals," [https://administrativelawreview.org/wp-content/uploads/sites/2/2022/07/74.2-Seamone\\_Final\\_Crop.pdf](https://administrativelawreview.org/wp-content/uploads/sites/2/2022/07/74.2-Seamone_Final_Crop.pdf), documents trends in case decisions in the 26 years between 1993 and 2019.

Seamone found that the VA historically denied more discrimination claims than it granted consistently through 2015. However, since 2017, approval rates skyrocketed in a sharp reversal of outcome trends. The modern era marks the best success rates for VA discrimination appeals and distinguishes the VA from other courts in which discrimination claims have proven the most likely to fail, such as civil rights employment law cases for racial discrimination in the federal courts.

Seamone used natural language processing and machine learning to classify discrimination cases in a database of over 1 million VA appellate opinions.

Through a detailed analysis of 535 race discrimination and 118 sexual and gender identity minority discrimination decisions, the study provides an in-depth understanding of the characteristics of successful and unsuccessful claims, including:

- Veterans who claimed anxiety or depression as a result of discrimination won claims much more frequently than those who claimed Posttraumatic Stress Disorder (PTSD);
- Claims for more than one mental health disorder as a result of discrimination (as opposed to just one type of mental disorder) were substantially more likely to succeed;
- For veterans claiming PTSD, the greatest obstacle was establishing, through psychiatric evaluation, that the discriminatory events met the threshold for "trauma" under PTSD Criterion A of the *Diagnostic and Statistical Manual for Mental Disorders*;
- PTSD claims for discrimination also frequently failed to meet the VA regulatory requirement for independent corroborating evidence that the discriminatory stressor event occurred. Contrary to the stringent requirement for evaluating PTSD claims, VA regulations do not require independent corroborating evidence to establish other mental health disorders;
- Review of written decisions revealed that over two dozen BVA decisions contained "sanitized" descriptions of the discriminatory events, which made it impossible to determine the type and nature of the discrimination.

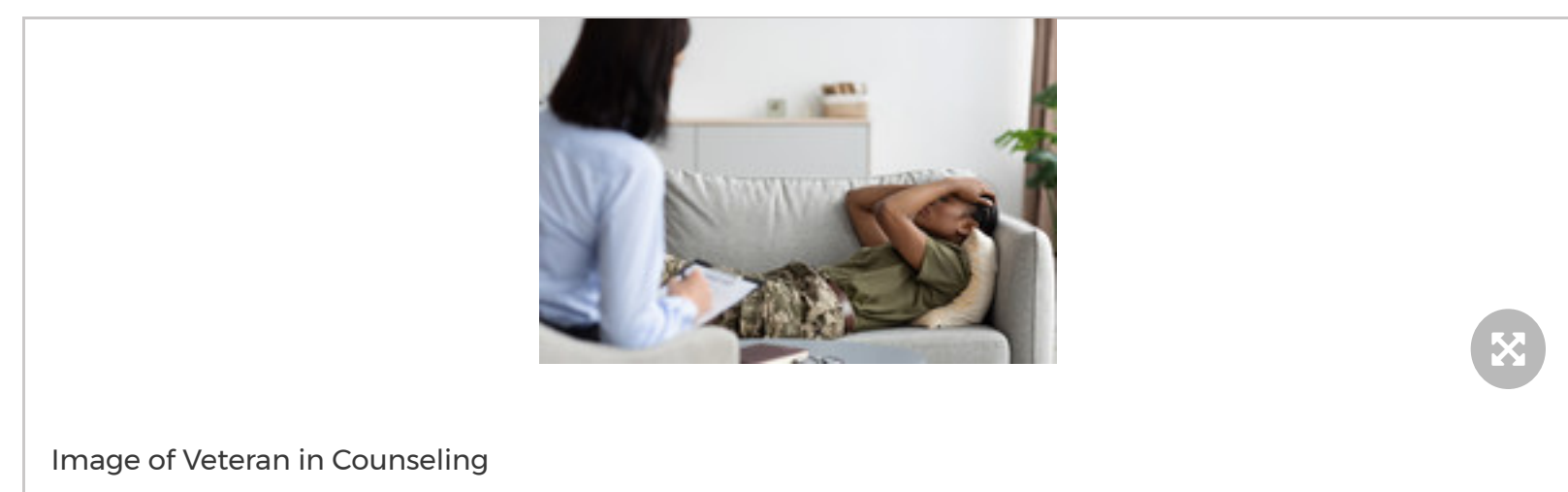
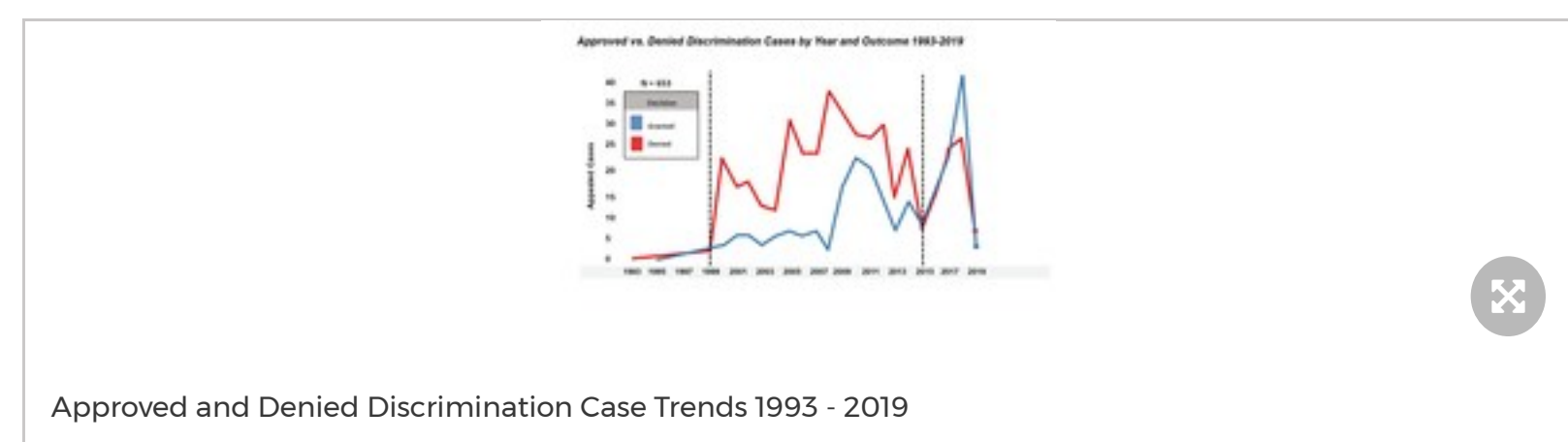
Seamone draws on these findings to recommend a requirement for judges to articulate specific facts in all discrimination cases to ensure that the public can accurately assess case trends. He further recommends that mental health evaluators use established and objective psychiatric tests designed to measure the impact of racial discrimination, such as the Race-Based Traumatic Stress Symptom Scale or the UConn Racial/Ethnic Stress & Trauma Survey. Because veterans and their advocates may believe that discrimination claims will fail, Seamone advocates for greater outreach to veterans to educate them that VA discrimination claims are not only winnable, but most likely to succeed at the present time.

To learn more about Evan Seamone's scholarly interests and publications, visit his SSRN author page at [https://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=1502236](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1502236) and his LinkedIn page at <https://www.linkedin.com/in/evan-seamone>.

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