

**CREATING A TRUE ARMY OF ONE:
FOUR PROPOSALS TO COMBAT
SEXUAL HARASSMENT IN TODAY’S ARMY**

DANA MICHAEL HOLLYWOOD*

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* J.D., William and Mary School of Law, 2006; M.A.L.D, Fletcher School of Law and Diplomacy at Tufts University, 1999; B.A., Boston University, 1992. The author is a Judge Advocate General in the United States Army. The opinions expressed in this Article are those of the author and are not meant to represent the opinions of the United States Army. Dedicated to the beautiful, caring, intelligent women in my life: Mom, Darlene, Ella, and Charlotte.

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INTRODUCTION

In 1988,¹ 1995,² and 2002³ the Department of Defense (“DoD”) conducted sexual harassment surveys of active-duty Army members as well as the other three military services⁴ and the Coast Guard.⁵ Although the results of the 2002 survey are encouraging and sexual harassment in the Army is declining,⁶ more than a quarter of female soldiers still experience some form of sexual harassment.⁷

One researcher has put the costs of sexual harassment to the U.S. Army at “\$250 million a year in lost productivity, personnel replacement costs, transfers, and absenteeism.”⁸ Apart from the financial costs, sexual harassment has a direct correlation to the Army’s combat effectiveness. As the

¹ MELANIE MARTINDALE, DEF. MANPOWER DATA CTR., *SEXUAL HARASSMENT IN THE MILITARY: 1988* (1990). The Defense Manpower Data Center is a research arm of the Pentagon.

² LISA D. BASTION & ANITA R. LANCASTER, DEF. MANPOWER DATA CTR., DEPARTMENT OF DEFENSE 1995 SEXUAL HARASSMENT SURVEY (1996), available at <http://www.ijoa.org/imta96/paper23.html>.

³ RACHEL N. LIPARI & ANITA R. LANCASTER, DEF. MANPOWER DATA CTR., ARMED FORCES 2002 SEXUAL HARASSMENT SURVEY (2003), available at <http://www.defenselink.mil/news/Feb2004/d20040227shs1.pdf>.

⁴ The three other military services are the Air Force, Navy, and Marine Corps.

⁵ When the surveys were conducted, the Coast Guard fell under the Department of Transportation (“DoT”). On March 1, 2003, the Coast Guard moved from the DoT to the Department of Homeland Security (DHS). See Homeland Security Act of 2002, Pub. L. No. 107-296, § 1704, 116 Stat. 2135, 2314.

⁶ In the 1988 survey, sixty-four percent of servicewomen said they had experienced behavior in the past twelve months labeled as sexual harassment. In the 1995 survey, that figure had declined to fifty-five percent. *DoD Committed to Zero Tolerance of Sexual Harassment, Prepared Remarks to the Senate Armed Servs. Comm.*, 105th Cong. 71–72 (1997) (statement of Edwin Dorn, Under Sec’y of Def. for Pers. and Readiness), available at <http://www.defenselink.mil/speeches/1997/di1209.html>.

⁷ The 2002 survey reported that twenty-four percent of Army women had been sexually harassed in the twelve months prior to filling out the survey. ARMED FORCES 2002 SEXUAL HARASSMENT SURVEY, *supra* note 3, at 8. For the purposes of the 2002 Sexual Harassment Survey:

Sexual harassment is composed of three sub-factors: crude and offensive behavior, unwanted sexual attention, and sexual coercion. Crude and offensive behavior is the verbal and nonverbal behaviors of a sexual nature that [are] offensive or embarrassing to the respondent. These include repeatedly telling jokes or stories of a sexual nature. Unwanted sexual attention are [sic] attempts to establish a sexual relationship. And sexual coercion is [the] classic quid pro quo.

David S.C. Chu, Under Sec’y of Def., Briefing on Armed Forces 2002 Sexual Harassment Survey (Feb. 25, 2004), available at <http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=2169>.

⁸ Nathan Seppa, *Sexual Harassment in the Military Lingers On*, AM. PSYCHOL. ASS’N MONITOR, May 1997, at 40–41.

Secretary of the Army's Senior Review Panel on Sexual Harassment explained:

In the post cold war era, strategic projection of land power has become the conceptual framework for decisive victory. [This] is accomplished through the presence of soldiers on the ground in distant regions, demonstrating military capability and commitment.⁹

Thus, our strength as a land power rests with our soldiers. Indeed, as the Senior Review Panel Report concluded, our soldiers are our "most important weapon system."¹⁰ Consequently, factors that impact our soldiers, such as the "human relations environment in which [they] live and work" directly impact combat readiness.¹¹

The Army is based on trust. The American people believe that the Army will protect their way of life and the soldiers entrusted with that duty believe their leaders will do what is right.¹² The fact that a quarter of female soldiers continue to be sexually harassed violates that trust and weakens the Army. The Army is a "values-based institution"¹³ in which a "premium is put on teamwork."¹⁴ When sexual harassment exists, male and female soldiers are less likely to interact normally and work as members of a team. As the Senior Review Panel argues:

A number of male soldiers expressed a fear of being falsely accused of sexual harassment. Men who raise this concern apparently believe that their careers will be permanently damaged by the allegation alone whether they are guilty or not. Many men have determined that the only way to avoid such an allegation is to avoid interaction or contact with women. Female soldiers confirmed this trend in male perception and behavior, expressing concern about being isolated in their units by male soldiers who no longer even speak with them In the present tension-ridden atmosphere, male and female soldiers are far less likely to interact normally, much less to work as members of a cohesive team.¹⁵

⁹ THE SECRETARY OF THE ARMY'S SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT 11 (1997), available at http://www.dtic.mil/dtfs/doc_research/p18_13.pdf [hereinafter SENIOR REVIEW REPORT].

¹⁰ *Id.* at 13.

¹¹ *Id.* at 12.

¹² *There's a Problem, and We Mean to Fix It, Prepared Remarks to the Senate Armed Servs. Comm.*, 105th Cong. 10 (1997) (statement of Togo D. West, Jr., Sec'y of the Army and Gen. Dennis J. Reimer, U.S., Army Chief of Staff) (Feb. 4, 1997) [hereinafter West & Reimer testimony], available at <http://defenseink.mil/speeches/speech.aspx?SpeechID=623>.

¹³ *Id.*

¹⁴ *Id.* at 14.

¹⁵ SENIOR REVIEW REPORT, *supra* note 9, at 65–66.

What is the impact of soldiers failing to work as members of a team? The former Secretary of the Army, Togo West, and the former Army Chief of Staff, General Dennis Reimer, argue that this lack of teamwork “can often lead to failure of the mission, or even injury or death.”¹⁶

This Article proposes substantive changes that seek to restore that teamwork and trust. Part I provides a historical context and considers how the Army has responded to sexual harassment in the past. In particular, this Part considers the triumvirate of sex scandals that befell the Army in the 1990s and the organization’s responses, culminating with the 2002 Armed Forces Sexual Harassment Survey. The Army’s discordant responses to such conspicuous cases are particularly important, for they determine whether and how victims will respond to harassment in the future.¹⁷ Part II considers how the Army defines sexual harassment, with particular emphasis on the shortcomings inherent in DoD Directive 1350.2’s complaint process. Part III considers how the Army punishes those accused of sexual harassment. In particular, this Part considers the difficulty of punishing harassers, as sexual harassment is currently not included in the punitive articles of the Uniform Code of Military Justice. Part IV considers four proposals to more effectively combat sexual harassment in today’s Army.

Although the Army has confronted the issue of sexual harassment by forming countless committees, issuing numerous reports and regulations, implementing Prevention of Sexual Harassment (POSH) and sensitivity training,¹⁸ and establishing new complaint processes, female soldiers are still subject to pervasive sexual harassment.

The Army will only be able to eliminate or, at the very least, substantially reduce sexual harassment by fundamentally changing the military justice system. Necessary changes include revising the Uniform Military Code of Justice and amending federal legislation heretofore inapplicable to military members. The Army must also promote a “healthy human relations environment”¹⁹ in which each soldier is treated with dignity and respect.²⁰ Only then will a true “Army of One”²¹ be created. As the Senior

¹⁶ West & Reimer testimony, *supra* note 12, at 14.

¹⁷ See, e.g., *infra* notes 418–441 and accompanying text.

¹⁸ In determining what constitutes sexual harassment, typical POSH and sensitivity training focuses on three questions: “What was the intent of the individual exhibiting the behavior?”; “What was the impact of the behavior on the victim?”; and “Was the behavior unwelcome or unsolicited?” Typical training is given by the equal opportunity advisor (“EOA”) and generally delineates three categories of sexual harassment: verbal, nonverbal, and physical. See, e.g., U.S. ARMY, THE PREVENTION OF SEXUAL HARASSMENT, available at <http://www.104thasg.hanau.army.mil/EO/InstructorsGuides/PreventionofSexualHarassment.htm> (last visited Dec. 3, 2006).

Serving as an EOA is a full-time position. SENIOR REVIEW REPORT, *supra* note 9, at 43. Each EOA is a graduate of the sixteen-week Defense Equal Opportunity Management Institute (“DEOMI”) course. *Id.* at 52. Normally one EOA will be assigned to a brigade (a unit of approximately 2,000 soldiers). *Id.* at 43.

¹⁹ SENIOR REVIEW REPORT, *supra* note 9, at 14.

²⁰ *Id.*

²¹ In January 2001 the Army replaced the recruiting slogan “Be all you can be” with

Review Panel warns, “Should we fail . . . our ability to fight wars and promote peace will surely suffer.”²²

I. HOW THE ARMY HAS RESPONDED TO SEXUAL HARASSMENT

A. *The Army’s Equal Opportunity (“EO”) Program*

The Army created its Equal Opportunity (“EO”) program in 1964—well before the high-profile sexual misconduct cases of the 1990s.²³ The program’s purpose was to ensure “fair treatment for all persons based solely on merit, fitness, and capability in support of readiness.”²⁴ That is, the Army seeks to maximize human potential based on merit. The same year, under instruction from the DoD, the Army promulgated Army Regulation (“AR”) 600-20, its first EO regulation.²⁵ At that time, women constituted less than two percent of military members in the gender-segregated Women’s Army Corps (“WAC”).²⁶ While sexual harassment was evident

the oddly contradictory rallying cry “An Army of One.” The fact that the motto attempted to promote both individuality and a sense of equality within an organization that has traditionally eschewed both is precisely the point. *See, e.g.*, Heike Hasenauer, *What’s Up with An Army of One?*, SOLDIERS ONLINE, http://www.Army.mil/soldiers/apr2001/features/ad_campaign1.html (last visited Dec. 3, 2006) (noting that the new slogan “accomplishes the Army’s mission ‘to emphasize the fact that you can retain your individuality in the Army and still meld well into a larger force’”). In addition to promoting individuality, the slogan also seeks to advance the ideas of equality and personal dignity. *See, e.g.*, Army Public Affairs, Operation Tribute to Freedom, Army Birthday 2004, http://www4.army.mil/otf/speech.php?story_id_key=6011 (a generic speech prepared for “Army audiences and the general public” noting that “[a]n Army of One is an Army that upholds the dignity and value of every Soldier, regardless of their rank, race, religion or sex”).

Some critics, however, viewed the slogan as “awkward and needing too much explanation” and in October 2006 the Army pulled the plug on “An Army of One.” Gina Cavallaro & Michelle Tan, “*Army Strong*” Gets Thumbs Up, ARMY TIMES, Oct. 11, 2006, at 5, available at <http://www.armytimes.com/print.php?f=1-292925-2169156.php>. On October 9, 2006 the Army unveiled its latest advertising campaign, the product of a \$200 million a year contract with advertising giant McCann Erickson/New York. *See, e.g.*, Lewis Lazare, *Army Campaign Is All That It Can Be*, CHI. SUN TIMES, Oct. 10, 2006, at 53. Army Secretary Francis J. Harvey says the new slogan, “Army Strong,” “characterizes what the Army is all about.” Cavallaro & Tan, *supra*, at 5. A promotional video by McCann Erickson explains, “There’s strong, and then there’s Army strong. There is nothing on this green earth that is stronger than the U.S. Army.” Ctr. for Media and Democracy, *U.S. Army: From “One” to “Strong,”* ADVERTISING AGE, Oct. 9, 2006, <http://www.prwatch.org/node/5286> (last visited Dec. 3, 2006).

“An Army of One” is not the first recruiting slogan to be jettisoned. Past Army recruiting slogans since the draft ended in 1973 include: “Today’s Army Wants to Join You” (1971–1973); “Join the People Who’ve Joined the Army” (1973–1979); “This is the Army” (1979–1981); “Be All You Can Be” (1981–2001); and “An Army of One” (2001–2006). “*An Army of One*” is out: *Service Unveils New Slogan*, ARMY TIMES, Oct. 9, 2006, <http://www.armytimes.com/story.php?f=1-292925-2162575.php>.

²² SENIOR REVIEW REPORT, *supra* note 9, at 14.

²³ *Id.* at 39.

²⁴ U.S. DEP’T OF ARMY, REG. 600-20: ARMY COMMAND POLICY, July 15, 1999, para. 6-1, available at http://www.usma.edu/EO/regspubs/r600_20.pdf (hereinafter AR 600-20) [hereinafter AR 600-20].

²⁵ *Id.*

²⁶ The Act set the two percent ceiling on the number of women permitted to serve in

during the years of the WAC, the WAC chain of command typically ensured the resolution of such problems through the “Petticoat Connection,” the WAC’s term for its all-female chains of command.²⁷ Losing the petticoat connection with the disestablishment of the WAC in the late 1970s proved to be a great loss for women who were sexually harassed and now felt as though they had nowhere to turn for help.²⁸

B. The 1970s and Disestablishment of the Women’s Army Corps

The 1970s were years of substantive change for women in the Army.²⁹ Beginning in 1972, women could participate in the Reserve Officer’s Training Corps (“ROTC”).³⁰ In 1973, with the transition from the draft to an all-volunteer Army, the government made a decision to both increase the number of female soldiers and to better integrate them into Army career fields.³¹ As the Senior Review Panel concedes, “[t]his decision was made in part to sustain a quality force in the post-draft era and to ensure the viability of the all-volunteer Army.”³² In 1976, women entered the United States Military Academy (“USMA”) at West Point as cadets.³³ By 1977, all branches were open to female officers except the combat arms.³⁴ Finally, in 1978, the WAC was abolished and women were integrated into the regular Army.³⁵

each branch of the armed forces. *See* The Women’s Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356, 356–57 (repealed 1967). In 1967, Congress removed the two percent cap on women in the military. *See* Pub. L. No. 90-130, 81 Stat. 374, 374–84 (1967). *See also* Rudi Williams, *Military Women Take 200-Year Trek Toward Respect, Parity*, AMERICAN FORCES INFORMATION SERVICE, http://www.defenselink.mil/news/Aug1998/n08121998_9808123.html (last visited Dec. 3, 2006).

²⁷ LINDA BIRD FRANCKE, *GROUND ZERO: THE GENDER WARS IN THE MILITARY* 167 (1997).

²⁸ As a retired female Army Sergeant explained:

We had had WAC staff advisors who advocated for women, particularly enlisted women If they had problems within the male ranks, like sexual harassment, the WAC first sergeant would go to the man’s sergeant and straighten it out Nine times out of ten during integration, the woman was being harassed by the sergeant himself Who was going to advocate for that young woman?

Id. at 167–68.

²⁹ SENIOR REVIEW REPORT, *supra* note 9, at 40.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* Today the United States Army is composed of eighteen branches in three groupings. The combat arms branches include Air Defense Artillery, Armor, Aviation, Corps of Engineers, Field Artillery, and Infantry. *See* U.S. Army, Branches & Orientation, <http://www.branchorientation.com> (last visited Dec. 3, 2006). The combat support branches include Chemical Corps, Military Intelligence Corps, Military Police Corps, and Signal Corps. *Id.* The combat service support branches include Adjutant General’s Corps, Judge Advocate General Corps, Medical Service Corps, Nurse Corps, Finance, Ordnance Corps, Quartermaster Corps, and Transportation. *Id.*

³⁵ SENIOR REVIEW REPORT, *supra* note 9, at 40.

C. Female Enlistment Rates as Indicia of Harassment

More than twenty-five years after the disestablishment of the WAC, women account for fifteen percent³⁶ of active duty Army soldiers.³⁷

Some researchers point to these numbers as the explanation for the chasm that exists between the Army's "zero tolerance" and the widespread reports of sexual harassment in today's Army. As Mickey Dansby, the director of Research at the Defense Equal Opportunity Management Institute, explains, "You're talking about a six-to-one ratio of men to women, and . . . a population that's relatively young in a lot of cases."³⁸

There are, however, numerous other hypotheses to explain the problem. Some contend that there is more sexual harassment in the military "because of the rigid hierarchy and power differentials in its organizational structure, which make it difficult for subordinates to defend themselves against harassment," or because "the macho tradition of military life may simply attract more traditional men, which could contribute to [the] high levels of harassment."³⁹ Others contend that the Army today has become more attractive for the misfit male unable to find a productive place in civilian society and the majority of recruits today are "socially maladapted, socially disaffected men" prone to mistreating women.⁴⁰ Still others blame the Army's combat exclusion policy. As Maya Murray explains, "[W]henever a person is denied the opportunity to prove that they [sic]

³⁶ This figure is still well below the point that would allow women to influence Army culture. As Martha Chamallas explains:

The point at which a group gets beyond token representation to achieve a "critical mass" will differ from context to context. However, the figure of twenty-five percent is most often cited as an indication that a given group has the ability to form alliances and coalitions and to engage in effective strategies to influence the culture of an organization.

Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 324–25 (1998).

³⁷ See HEADQUARTERS, DEP'T OF ARMY, DEPUTY CHIEF OF STAFF, ARMY G-1, ARMY PROFILE FY04 3 (2004), available at <http://www.armyg1.army.mil/hr/demographics/FY04%20Army%20Profile.pdf>. By comparison, the Air Force had the highest proportion of women on active duty (19.6%). OFFICE OF ARMY DEMOGRAPHICS, FY04 PROFILE OF AIR FORCE (2004), available at <http://www.armyg1.army.mil/hr/demographics/FY04%20Air%20Force%20Profile.ppt>. The Marine Corps had the lowest proportion of women on active duty (6.1%). OFFICE OF ARMY DEMOGRAPHICS, FY04 PROFILE OF MARINE CORPS (2004), available at <http://www.armyg1.army.mil/hr/demographics/FY04%20Marine%20Corps%20Profile.ppt#1>. The Navy was just shy of the Army at 14.5%. OFFICE OF ARMY DEMOGRAPHICS, FY04 PROFILE OF NAVY (2004), available at <http://www.armyg1.army.mil/hr/demographics/FY04%20Navy%20Profile.ppt#1>.

³⁸ Seppa, *supra* note 8, at 40.

³⁹ *Id.*

⁴⁰ Diane H. Mazur, *The Beginning of the End for Women in the Military*, 48 FLA. L. REV. 461, 470–71 (1996).

have the skills . . . then that person will . . . be devalued. And behavior towards that individual frequently will be less than civil.”⁴¹

The Army has identified four factors that have historically affected the proportion of enlisted female members.⁴² “First, women tend to have a lower inclination to enlist than do men.”⁴³ “Second, ground combat exclusion policies restrict the positions and skills in which women may serve.”⁴⁴ “Third, the military personnel system is a ‘closed’ system. Growth must come from within, and from the bottom up; lateral entries play virtually no role. Consequently, the gender structure of the career force is shaped primarily by the proportion of females recruited.”⁴⁵ “Fourth, women leave the Services at a higher rate than men.”⁴⁶

D. A Triumvirate of Tragedies

Until the mid-1990s, the Army was largely free of the highly publicized sexual misconduct cases that had dogged the other services.⁴⁷ That changed in the mid-1990s with a troika of high-profile cases of sexual misconduct.

⁴¹ Yxta Maya Murray, *Sexual Harassment in the Military*, 3 S. CAL. REV. L. & WOMEN’S STUD. 279, 296 (1994) (quoting retired Army Brigadier General Pat Foote).

⁴² OFFICE OF THE UNDER SEC’Y OF DEF., PERS. AND READINESS, POPULATION REPRESENTATION IN THE MILITARY SERVICES FISCAL YEAR 2000, 3-7 (2002), available at <http://www.dod.mil/prhome/poprep2000/assets/pdf/chapters2000.pdf>.

⁴³ *Id.* (quoting ALPHONSO MALDON, JR., ASSISTANT SEC’Y OF DEF. (FORCE MGMT. POLICY), 1999 YOUTH ATTITUDE TRACKING STUDY (2000)).

⁴⁴ *Id.* at 3-13 (“Women are ineligible for infantry and other positions in which the primary mission is to physically engage the enemy.”) (quoting Memorandum from Les Aspin, Sec’y of Def., Direct Ground Combat Definition and Assignment Rule (Jan. 13, 1994)). Today, the Army has the lowest percent of career fields open to women of all four services. See *id.* at 3-8 (“Nearly all career fields (92 percent) are now open to women: 91 percent in the Army, 96 percent in the Navy, 93 percent in the Marine Corps, and 99 percent in the Air Force.”).

⁴⁵ *Id.* at 3-7.

⁴⁶ *Id.*

⁴⁷ Most notable is the Tailhook scandal. Tailhook is an annual convention of naval aviators. See Eloise Salholz & Douglas Waller, *Tailhook: Scandal Time*, NEWSWEEK, July 6, 1992, at 40. In September 1991, at the 35th Annual Tailhook Symposium in Las Vegas, Nevada, twenty-six women, including fourteen female officers, were sexually assaulted. *Id.* “In total, 119 Navy and 21 Marine Corps officers were referred by Pentagon investigators for possible disciplinary actions.” *Post Tailhook Punishment*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/navy/tailhook/disc.html> (last visited Dec. 3, 2006). Tailhook initiated a seismic shift in how the military viewed sexual harassment. Prior to the debacle, sexual harassment was viewed at a micro, individual level, rather than at a macro, cultural level. As the Chief of Naval Operations, Admiral Frank Kelso, told a hearing of the House Armed Services Committee, “Until Tailhook, we dealt too often with sexual harassment at the local level, one case at a time, rather than understanding it as a cultural issue.” Eric Schmitt, *The Military Has a Lot to Learn About Women*, N.Y. TIMES, Aug. 2, 1992, at A3. For a more thorough discussion of the event, see WILLIAM H. MCMICHAEL, *THE MOTHER OF ALL HOOKS: THE STORY OF THE U.S. NAVY’S TAILHOOK SCANDAL* (1997).

1. Aberdeen: "The Army's Most Devastating Leadership Failure Since Vietnam"

One general officer has referred to the incidents of sexual abuse and harassment at Aberdeen as "the Army's most devastating leadership failure since the Vietnam War."⁴⁸ Aberdeen Proving Ground is the Army's ordnance training base and home to the ordnance Advanced Individual Training ("AIT")⁴⁹ school.⁵⁰ The Army began investigating allegations of sexual misconduct in the fall of 1996.⁵¹ At the conclusion of the investigation, over fifty female recruits had made official complaints of sexual harassment and abuse against eleven drill sergeants (responsible for the women's training) and one officer.⁵² The outcome of the cases varied greatly from no conviction to twenty-five years in prison.⁵³ Attempting to avoid the Tailhook title, the Army moved quickly to confront the scan-

⁴⁸ CLAUDIA J. KENNEDY WITH MALCOM MCCONNELL, *GENERALLY SPEAKING* 169 (2001).

⁴⁹ An individual does not become a soldier in the Army until he or she has successfully completed both Basic Combat Training ("BCT") and Advanced Individual Training ("AIT"). See U.S. Army, *About the Army: Training, Careers & Jobs*, available at http://www.goarmy.com/about/training_careers_jobs.jsp#training (last visited Dec. 3, 2006). During BCT and AIT, the individual is referred to as a trainee or a recruit. *Id.* BCT is generally nine weeks and focuses on the skills and values one needs to become a soldier. *Id.* AIT follows and is where one learns the skills to perform his or her Military Occupational Specialty (MOS), his or her Army job. AIT typically lasts seven to nine weeks but up to a year for some jobs (such as linguist). Although the instructors at AIT are drill sergeants (as they are at BCT), recruits are given much more freedom. Taken together, BCT and AIT comprise Initial Entry Training ("IET"). *Id.* A combination of BCT and AIT is called One Station Unit Training ("OSUT"). U.S. Army, *Operation Blue to Green*, available at <http://www.goarmy.com/btg> (last visited Dec. 3, 2006).

⁵⁰ U.S. Army, *Installation Mgmt. Agency, Facts and Figures: Aberdeen Proving Ground*, <http://www.apg.army.mil/apghome/sites/about/facts.asp> (last visited Dec. 3, 2006).

⁵¹ Peter S. Canellos, *Army Commander Vows Wide Probe*, *BOSTON GLOBE*, Nov. 14, 1996, at A3.

⁵² Neil A. Lewis, *Ex-Sergeant Pleads Guilty to Having Sex with Trainees*, *N.Y. TIMES*, Apr. 8, 1997, at A11. See also *Army Investigates Sexual Misconduct*, *ONLINE NEWSHOUR*, Nov. 8, 1996, http://www.pbs.org/newshour/bb/military/togo_west_11-8.html; *Conduct Unbecoming: Harassment in the Military*, *ONLINE NEWSHOUR*, Feb. 4, 1997, http://www.pbs.org/newshour/bb/military/jan-june97/harassment_2-4.html.

⁵³ The sole officer involved in the scandal, Captain ("CPT") Robertson pled guilty to adultery and sodomy. Lewis, *supra* note 52, at A11. Robertson acknowledged that he had had sex with a trainee when she came to him seeking advice as to how to deal with a drill sergeant who was sexually harassing her and served four months in prison as a result. *Id.* The most serious case at Aberdeen involved Staff Sergeant ("SSG") Simpson, who was found guilty of eighteen of nineteen rape counts and other charges of sexual misconduct. *Marching Side by Side*, *ONLINE NEWSHOUR*, Apr. 29, 1997, http://www.pbs.org/newshour/bb/military/april97/coed_4_30.html. The military jury based the charges of rape on Simpson's use of "constructive force" to compel trainees to have sex with him. *Id.* Simpson was sentenced to twenty-five years in prison, an average of 1.4 years for each rape count. Jamie McIntyre, *Army Sergeant Sentenced to 25 Years for Rape*, *CNN.COM*, May 6, 1997, <http://www.cnn.com/US/9705/06/army.sex>. SSG Simpson also received a demotion to private, loss of pay and benefits, and a dishonorable discharge. T. S. NELSON, *FOR LOVE OF COUNTRY: CONFRONTING RAPE AND SEXUAL HARASSMENT IN THE U.S. MILITARY* 89 (2002).

dal.⁵⁴ Indeed, the Army acted so quickly and candidly that it won an award from the Public Relations Society of America for its decisive handling of the debacle.⁵⁵

On November 7, 1996, the Chief of Staff of the Army reported the depth of the allegations to the Senate Armed Services Committee and to the American people.⁵⁶ That same day, the Army established a toll-free hotline number for soldiers to use to report instances of sexual harassment and misconduct.⁵⁷ That number (1-800-342-9647) continues to remain in use twenty-four hours a day, seven days a week. Within two weeks of the disclosure, the Secretary of the Army established the Senior Review Panel on Sexual Harassment.⁵⁸ The Panel was directed to “examine the human relations environment in the . . . Army, review policies and procedures that contribute to that environment, and recommend ways to achieve an Army where all soldiers and civilians are treated with dignity and respect.”⁵⁹

Within ten weeks of the disclosure, a new teaching packet on sexual harassment was distributed to the field with specific instructions from the Deputy Chief of Staff that the training be conducted by a brigade or battalion commander.⁶⁰ The Army also undertook an exhaustive investigation, directing Criminal Investigation Command (“CID”) to “personally interview every female soldier currently stationed at Aberdeen as well as every female soldier who had trained there in the previous two years.”⁶¹ Finally, in June of 1997, Secretary of Defense Cohen directed a committee to assess the training policies of the Army, Navy, Air Force, and Marine Corps.⁶² The Federal Advisory Committee on Gender-Integrated Training and Related Issues was chaired by former Senator Nancy Kassebaum-Baker and included a team of four retired military officers, one retired noncommissioned officer (“NCO”) and six civilians (including Condoleezza Rice).⁶³

⁵⁴ Douglas R. Kay, Comment, *Running a Gauntlet of Sexual Abuse: Sexual Harassment of Female Naval Personnel in the United States Navy*, 29 CAL. W. L. REV. 307, 310 (1992) (noting that the failure to deal adequately with Tailhook had a deleterious impact on the Navy). In the wake of Tailhook, the Secretary of the Navy resigned—a fact that could not have been lost on Togo West, the Secretary of the Army when Aberdeen broke. *Id.*

⁵⁵ Thomas E. Ricks, *Army Tight-Lipped on Scandal; Handling of Generals' Dispute Reflects an Institutional Tendency*, WASH. POST, Apr. 7, 2000, at A29.

⁵⁶ West & Reimer testimony, *supra* note 12, at 14.

⁵⁷ *Id.* at 10 (noting that by “January 30, 1997, 6,979 calls had been placed to the hotline”).

⁵⁸ Dana Priest, *Panel Named to Review Army Harassment Policies; Commanders Are Focus of Internal Investigation*, WASH. POST, Nov. 23, 1996, at A9.

⁵⁹ SENIOR REVIEW REPORT, *supra* note 9, at 8.

⁶⁰ West & Reimer testimony, *supra* note 12, at 13.

⁶¹ *Id.* at 10.

⁶² See FED. ADVISORY COMM. ON GENDER INTEGRATED TRAINING AND RELATED ISSUES, REPORT OF THE FEDERAL ADVISORY COMMITTEE ON GENDER INTEGRATED TRAINING AND RELATED ISSUES TO THE SECRETARY OF DEFENSE (1997), <http://www.defenselink.mil/pubs/git/report.html> [hereinafter ADVISORY REPORT].

⁶³ *Id.* at app.

2. *The Fall of Sergeant Major McKinney*

Ironically, the Army's attempt to respond to Aberdeen backfired. One of the men appointed to the Federal Advisory Committee was Sergeant Major of the Army ("SMA")⁶⁴ Gene McKinney. His appointment prompted a soldier to allege that McKinney had "forcibly kiss[ed] her and tr[ie]d to pressure her into having sex."⁶⁵ Not only was SMA McKinney the Army's most senior enlisted soldier, but he had recently appeared in the videotape for the sexual harassment teaching packet in which he declared, "there is absolutely no place for sexual harassment in America's Army."⁶⁶

In addition to touching on difficult issues of "rank and race,"⁶⁷ the case highlighted how the Army responded to sexual harassment complaints pre-Aberdeen reforms. The first woman to accuse SMA McKinney was Sergeant Major ("SGM") Brenda Hoster.⁶⁸ SGM Hoster was herself a decorated soldier, who had been awarded the silver star and had served the Army for twenty-two years.⁶⁹ SGM Hoster initially confronted SMA McKinney and told him to stop his offensive behaviors.⁷⁰ When they continued, she reported the abuse to a superior in her chain of command.⁷¹ No action was taken, and SGM Hoster's request for a transfer was denied.⁷² Shortly thereafter, SGM Hoster learned about SMA McKinney's appointment to the Army's Senior Review Panel and went public with her accusations, including a television interview with Sam Donaldson on *Primetime Live* in February 1997.⁷³ In time, five other women followed with similar accusations.⁷⁴

During his trial, SMA McKinney fought back with charges of racism and argued that "high-level officers charged with similar offenses were allowed to retire quietly without prosecution or penalty."⁷⁵ The military jury found SMA McKinney not guilty of eighteen of nineteen charges.⁷⁶ McKinney was acquitted of all underlying sexual misconduct charges and found

⁶⁴ See Sergeant Major of the Army Kenneth O. Preston, <http://www.army.mil/leaders/leaders/sma> (last visited Dec. 3, 2006) (explaining that the SMA, the Army's highest ranking enlisted man, "serves as the Army Chief of Staff's personal adviser on all enlisted-related matters, particularly in areas affecting soldier training and quality of life. The SMA devotes the majority of his time to traveling throughout the Army observing training, and talking to soldiers and their families").

⁶⁵ Chamallas, *supra* note 36, at 311.

⁶⁶ *Id.*

⁶⁷ NELSON, *supra* note 53, at 38 (noting that the fact that McKinney was an enlisted African American man while his six accusers were white was not lost on McKinney's counsel).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 39.

⁷⁴ Jane Gross, *Top Sergeant of Army is Acquitted*, N.Y. TIMES, Mar. 14, 1988, at A1.

⁷⁵ *Id.*

⁷⁶ *Id.*

guilty of one count of obstructing justice.⁷⁷ How SMA McKinney could be found guilty of obstructing justice by a jury that did not agree there was an underlying crime to conceal is one of the puzzling aspects of the case.⁷⁸

As two analysts have observed, the “good soldier defense [likely] led to [SMA McKinney’s] acquittal In the military, adducing evidence of good military character is seldom difficult as service members receive periodic performance evaluations and often commendations and decorations.”⁷⁹ In the case of SMA McKinney, who was selected as the highest-ranking enlisted member of the Army and whose record was impeccable, such evidence obviously proved decisive for the jury.⁸⁰

Tragically, just as the Army was trying to demonstrate that it cared about sexual harassment, the McKinney spectacle and verdict may have given Army women yet another reason to suffer in silence. The verdict suggested that, although one may be a highly respected and decorated Sergeant Major in the Army like SGM Hoster, one is “not expected to say ‘knock it off’ to a supervisor who sexually harasses you. You are not expected to make any effort to stop the illegal behavior, even when it hurts the institution for which you work.”⁸¹ Quite the contrary, coming forward exposes one to personal attacks as “liars, cheats, and admitted frauds,” as SMA McKinney’s attorney labeled the accusers, and, in the case of SGM Hoster, a \$1.5 million libel suit by SMA McKinney.⁸²

a. The Secretary of the Army’s Senior Review Panel on Sexual Harassment

The Senior Review Panel to which McKinney had originally been appointed following the disclosures of abuse at Aberdeen issued its findings in a 638-page report in July 1997.⁸³ The Panel “conducted an extensive policy review, collected data at 59 Army installations worldwide, and completed exhaustive analysis of the data collected.”⁸⁴ After more than seven months, “22,952 soldiers [had been] surveyed, 7,401 soldiers and 1,007 ci-

⁷⁷ *Id.* (noting that “[t]he guilty verdict relate[d] to a telephone conversation from Sergeant Major McKinney to Staff Sgt. Christine Fetrow on Feb. 18, 1997, when he tried to coach her in her dealings with military investigators. Unbeknownst to him, she was cooperating with the prosecution and recording the call.”).

⁷⁸ See, e.g., *Separating the Sexes*, ONLINE NEWSHOUR, Mar. 16, 1998, http://www.pbs.org/newshour/bb/military/jan-june98/mckinney_3-16.html.

⁷⁹ Michael I. Spak & Jonathan P. Tomes, *Sexual Harassment in the Military: Time for a Change of Forum?*, 47 CLEV. ST. L. REV. 335, 352 (1999); see also MANUAL FOR COURTMARTIAL, pt. III, M.R.E. 405 (2005 ed.) (“In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion.”).

⁸⁰ Spak & Tomes, *supra* note 79, at 352.

⁸¹ Mazur, *supra* note 40, at 468–69.

⁸² Editorial, *McKinney Case Showcases Military Law’s Shortcomings*, USA TODAY, Mar. 18, 1998, at 12A.

⁸³ See SENIOR REVIEW REPORT, *supra* note 9.

⁸⁴ *Id.* at 2.

vilians [had participated] in focus group discussions, and 808 leaders [had been] interviewed.”⁸⁵ It is a remarkable document. The Panel confronted sexual harassment head on, defined shortcomings in a forthcoming manner, and recommended substantive changes.⁸⁶

Of the areas upon which the Panel focused, the EO system garnered the most unflattering treatment. In its assessment of the program, four main concerns emerged from the review.

First, the Panel found that “[m]any commanders have not demonstrated a commitment to the program.”⁸⁷ Rather, they have “fail[ed] to accept the EO program as their personal responsibility [and have] delegate[d] its operations to a subordinate. . . .”⁸⁸ As evidence, the Panel noted that AR 600-20, Army Command Policy, authorized 547 enlisted EOA positions yet only 324, or 59%, were filled.⁸⁹ Moreover, of the slots filled, the demographic make-up of EOAs did not parallel the demographic make-up of the Army.⁹⁰ In 1997, enlisted EOAs were currently 56% African American, as compared to the Army’s enlisted composition of 27% African American.⁹¹ Women comprised 32% of enlisted EOAs, while 14% of the Army’s enlisted personnel were women at the time.⁹² The Panel found that this gave support to the “common perception . . . that the Army’s EO program is irrelevant—a peripheral program designed for and comprised of only minorities and women.”⁹³

Second, soldiers do not trust the EO reporting system.⁹⁴ The Panel noted:

In [a] survey administered by the Panel, soldiers were asked, if they had been sexually harassed how they chose to resolve the sexual harassment. Of the soldiers who indicated that they were sexually harassed in the last twelve months, 12% used the formal complaint system, while 33% resolved their sexual harassment complaint informally. The other 55% apparently chose either to ignore the sexual harassment, or to handle it in a way that they did not consider “formal” or “informal”—handling incidents

⁸⁵ *Id.* at 36.

⁸⁶ *See generally id.*

⁸⁷ *Id.* at 43.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 44.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*; see also *War on Harassment*, ONLINE NEWSHOUR, Sept. 11, 1997, http://www.pbs.org/newshour/bb/military/july-dec97/harassment_9-11.html.

⁹⁴ SENIOR REVIEW REPORT, *supra* note 9, at 72.

of sexual harassment themselves or putting up with the sexual harassment rather than using the reporting system.⁹⁵

The reason most often given by soldiers for not reporting harassment or entering into sexual relations with harassers was fear of reprisals from the chain of command, other soldiers, or the harassers themselves.⁹⁶ Indeed, the Panel found that soldiers' working conditions regularly deteriorated as a result of a complaint being made.⁹⁷ Third, the Panel found that "[c]urrent Army EO training is often ineffective and does not adequately train soldiers."⁹⁸ AR 600-20 mandates EO training at least twice a year.⁹⁹ Although this training is generally taking place, the Panel faulted leaders for not attending.¹⁰⁰ The Panel also expressed concern with the training methodologies employed.¹⁰¹

Finally, the Panel found inadequate EO resourcing and a lack of understanding about the roles, missions, and functions of the EOA.¹⁰² Although EO is intended to be a commander's program, many EOAs have limited access to the commander.¹⁰³ Despite attending weekly command and staff meetings, few EOAs have a "speaking part."¹⁰⁴

As the Panel was undertaken in response to Aberdeen, it also undertook a review of sexual harassment during Individual Entry Training ("IET").¹⁰⁵ Panel members traveled to training installations throughout the

⁹⁵ *Id.* at 47.

⁹⁶ *Id.*; see also Donna St. George, *From Victim to Accused Army Deserter; Harassment Allegations Have Galvanized Activists*, WASH. POST, Sept. 19, 2006, at A1 (quoting Specialist Suzanne Swift, a victim of sexual harassment and sexual assault, as explaining that she agreed to engage in sexual relations with a superior because "she feared retaliation if she refused").

⁹⁷ SENIOR REVIEW REPORT, *supra* note 9, at 46 ("Soldiers who complain are [also] often ostracized by other soldiers and/or their chain of command, or find themselves being transferred to another unit.").

⁹⁸ *Id.* at 49.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 51 (quoting one EOA as remarking, "Rarely is the senior leadership attending training. They ensure soldiers attend, but do not make an appearance themselves.").

¹⁰¹ *Id.* (arguing that training needs to be more interactive and include small discussion groups and training relevant to a soldier's job).

¹⁰² *Id.* at 52.

¹⁰³ *Id.* at 51 (noting that "only about one-third of EOAs stated that they met with their commander weekly"). The reasons for this are varied, but the Panel notes two in particular:

Many EOAs are buried in the staff sections making access to commanders difficult The access problem is further exacerbated by the rank differential presented when a sergeant first class EOA is expected to interface routinely with a brigade commander. Some EOAs commented that their main responsibility is focusing on ethnic celebrations or unrelated work, not on recommending strategies to prevent and eliminate discrimination and sexual harassment.

Id. at 51-52.

¹⁰⁴ *Id.* at 51.

¹⁰⁵ See generally *id.* at 78-84 (providing an overview and analysis of the Panel's results from responses of soldiers undergoing Individual Entry Training).

Army and conducted “written surveys and focus groups [of] trainees, drill sergeants, and instructors.”¹⁰⁶ Although the Panel found that the majority of drill sergeants and instructors perform their duties honorably, there was still cause for concern.¹⁰⁷ The Panel concluded that drill sergeants are inadequately trained to handle sexual harassment issues.¹⁰⁸ As such, “[s]oldierization in IET tolerates sexualized behaviors that are inconsistent with instilling respect as an Army core value.”¹⁰⁹ As the Panel’s data indicates,¹¹⁰ “trainees in AIT reported experiencing higher rates of sexual harassment and inappropriate behavior than trainees in either BCT or OSUT.”¹¹¹ In fact, the rates of sexual harassment were found to be higher amongst female trainees in AIT than active duty female soldiers.¹¹²

b. The Federal Advisory Committee Report on Gender Integrated Training

Six months after the Senior Review Panel published its report and one year after the public disclosure of abuse at Aberdeen, the Federal Advisory Committee chaired by former Sen. Kassebaum-Baker issued its report.¹¹³ The Advisory Committee issued eight broad recommendations, including reforming recruiting policy,¹¹⁴ training of cadre,¹¹⁵ and reinvigorating basic training¹¹⁶ (toughening basic training requirements).¹¹⁷ Nonetheless, the report is unclear as to how any of these recommendations serve to combat sexual harassment. The Advisory Committee’s *magnum opus* was the recommendation that male and female recruits be segregated during BCT.¹¹⁸

¹⁰⁶ *Id.* at 79.

¹⁰⁷ *See, e.g., id.* at 80.

¹⁰⁸ *Id.* at 85.

¹⁰⁹ *Id.* at 80.

¹¹⁰ *Id.* at 81.

¹¹¹ *Id.* at 80.

¹¹² *Id.* Of the one in three women who claimed to be sexually harassed during AIT, twenty-seven percent said their drill sergeant was the source of sexual harassment. *Id.* at 82.

¹¹³ The twenty-five-page report resulted from Advisory Committee members visiting seventeen military sites and speaking to over 1000 recruits, 500 instructors, and 300 first-term service members between June 27, 1997 and December 16, 1997. ADVISORY REPORT, *supra* note 62, at Executive Summary.

¹¹⁴ *Id.* at Recommendations: Recruiting Policy (“Decrease emphasis on monetary incentives in advertising and public relations campaigns and emphasize more motivational themes of challenge and patriotism.”).

¹¹⁵ *Id.* at Recommendations: Training Cadre (“Increase the number of training cadre.”).

¹¹⁶ *Id.* at Recommendations: Basic Training Requirements (“Toughen basic training requirements, and enforce consistent standards for male and female recruits.”).

¹¹⁷ *Id.* at Executive Summary.

¹¹⁸ *See, e.g., Gender-Integrated Training, Subcomm. on Pers., Comm. on Armed Servs., 105th Cong. (1997)* (statement of Nancy Duff Campbell, Co-President, National Women’s Law Center) (Jun. 5, 1997) (noting that “[t]he Air Force integrated basic training in 1976 The Navy integrated basic training in 1993 and in 1994 the Army followed suit. [T]he Marine Corps remains gender segregated in basic training”).

Secretary of Defense Cohen decided to reject this recommendation and to continue gender integration in training units and in barracks in the Army, Navy, and Air Force; although he did order that male and female recruits be rigidly separated in their living quarters.¹¹⁹ Conservative members of Congress vowed to return to segregation through legislation, and one member of Congress said Secretary Cohen's decision showed "a lack of intestinal fortitude."¹²⁰ In June 1998, the House voted to overturn the gender-integrated policy by a vote of 358-61, but the Senate sided with the Clinton Administration in rejecting the chief recommendation of the Advisory Committee.¹²¹

Unlike the Senior Review Panel, the Advisory Committee report adds little to the debate. In the words of one scholar, "[t]here seems to be a disconnect between the crisis and the response."¹²² Indeed, it is unclear what many of the recommendations have to do with combating sexual harassment.¹²³ Moreover, even on its chief recommendation—reseggregating BCT—the report misses the mark. As Chamallas argues:

Aberdeen is an advanced—not a basic—training facility and the report made no recommendation to resegment the sexes at this level of training. More to the point, the report did not explain how segregating the sexes into separate barracks during [BCT] would prevent male instructors from exploiting female recruits, particularly when there was no proposal that only women instructors train women recruits.¹²⁴

3. Allegations Among General Officers

Less than two years after the publication of the Advisory Committee's Report, the Army was again wracked with a third high-profile case of sexual misconduct. It involved allegations by Lieutenant General ("LTG") Claudia Kennedy, the first woman to be promoted to three-star general in the Army, against another general officer.¹²⁵ Ironically, LTG Kennedy had been one of the seven Panel Members on the Secretary of the Army's Senior Review Panel on Sexual Harassment.¹²⁶

According to LTG Kennedy, Major General ("MG") Smith groped her (when he was a Brigadier General and she a Major General) and attempted

¹¹⁹ Steven Lee Myers, *Defense Chief Rejects Advice to Separate Sexes in Training*, N.Y. TIMES, Mar. 17, 1998, at A1.

¹²⁰ *Id.*; see also Editorial, *The Military and Women*, WALL ST. J., Feb. 21, 1997, at A14.

¹²¹ *House, Senate Differ on Basic Training of Sexes*, SEATTLE TIMES, June 25, 1998, at A3.

¹²² Chamallas, *supra* note 36, at 312.

¹²³ *Id.* at 312-13.

¹²⁴ *Id.*

¹²⁵ See Ricks, *supra* note 55, at A29.

¹²⁶ See SENIOR REVIEW REPORT, *supra* note 9, at 8.

to forcibly kiss her in her office in October 1996.¹²⁷ LTG Kennedy initially decided not to come forward publicly with the incident. LTG Kennedy recalled:

In my mind, reporting Smith's actions now did not seem necessary. I outranked him and I could control his future access to me now that I knew he could not be trusted I was [however] aware that I might be failing in my duty to protect more junior women by not reporting the incident.¹²⁸

Nonetheless, in September 1999 LTG Kennedy learned that MG Smith was being nominated as the Deputy Inspector General ("IG"), United States Army.¹²⁹ The Deputy IG's responsibilities include investigating allegations of sexual misconduct by general officers and assessing the efficacy of programs designed to eliminate sexual harassment.¹³⁰ It was at this point that LTG Kennedy decided to come forward with the incident.¹³¹ LTG Kennedy recalled in her memoirs:

And, in view of all the disturbing revelations of sexual misconduct I had seen while on the Review Panel, I knew the integrity of the Inspector General's office was especially important. If a person like Smith held the number two position in that office, the Army would be in trouble.¹³²

In September 1999 she reported the incident to the Inspector General of the Army, LTG Ackerman.¹³³ At no point did she go public with her accusations, but on March 30, 2000, the *Washington Times* broke the story.¹³⁴

On July 7, 2000, five weeks after LTG Kennedy retired, the "Army officially announced that the Inspector General had 'substantiated charges of sexual harassment made by Lt. Gen. Claudia Kennedy against Maj. Gen. Larry Smith.'" ¹³⁵ The statement continued that LTG Kennedy "'did not report the incident to any Army official until Maj. Gen. Smith was identified

¹²⁷ John Donnelly, *Army Substantiates Sex Harassment Claim; Accused General Resigns*, BOSTON GLOBE, July 8, 2000, at A3.

¹²⁸ KENNEDY, *supra* note 48, at 167.

¹²⁹ *Id.* at 187.

¹³⁰ *Id.*

¹³¹ *Id.* at 188–89.

¹³² *Id.* at 187.

¹³³ KENNEDY, *supra* note 48, at 190.

¹³⁴ See Rowan Scarborough, *Female General Accuses Peer of Harassment*, WASH. TIMES, Mar. 30, 2000, at A1. See also Ricks, *supra* note 55, at A29 ("Some Pentagon officials suspect the leak was intended to embarrass [LTG Kennedy], and perhaps to retaliate against Army Secretary Louis Caldera for considering promoting her to be chief of the Training and Doctrine Command, which would have brought her an unprecedented fourth star.").

¹³⁵ KENNEDY, *supra* note 48, at 201.

in 1999 to be the Deputy Inspector General of the Army,' a position that involved overseeing investigations of sexual harassment."¹³⁶ MG Smith "received an administrative memorandum of reprimand from [the] Vice Chief of Staff of the Army[, e]ffectively end[ing] Smith's career."¹³⁷

E. The Armed Forces 2002 Sexual Harassment Survey

Four years after LTG Kennedy retired from the Army, the Defense Manpower Center published the congressionally mandated¹³⁸ Armed Forces 2002 Sexual Harassment Survey.¹³⁹ The Survey is designed to allow for comparisons to the 1995 Sexual Harassment Survey, and it provided the Army with its first opportunity to assess the changes implemented in response to Aberdeen. The introduction to the 2002 Survey explains:

[The Defense Manpower Center] chose to ground its sexual harassment research on the body of work conducted by scientists at the University of Illinois-Urbana Champaign Their research has shown that many women experience sexual harassment in the workplace, [that] those who experience it suffer negative consequences (e.g., health [and] psychological well-being), and that leaders/organizations are responsible for the occurrence of sexual harassment and its consequences.¹⁴⁰

The sample size of the 2002 Survey consisted of 60,415 individuals and included "all active-duty members of the Army, Navy, Marine Corps, Air Force, and Coast Guard, below the rank of admiral or general, with at least 6 months of active-duty service."¹⁴¹ Data collection took place from December 2001 through April 2002.¹⁴² The response rate was better than a third, with a total of 19,960 eligible service-members returning usable surveys.¹⁴³

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Section 561 of the National Defense Authorization Act of 2003 requires the Secretary of Defense to carry out one of four quadrennial surveys (sexual harassment for the reserves; sexual harassment for active duty; EO for reserves; EO for active duty) each year. The purposes of the four surveys are to identify and assess gender issues and discrimination, as well as racial and ethnic discrimination among active and reserve members of the Armed Forces. *See* Pub. L. No. 107-314, 116 Stat. 2458, 2553 (codified as amended at 10 U.S.C. § 481 (2002)).

¹³⁹ *See generally* LIPARI & LANCASTER, *supra* note 3 (analyzing the results of the survey).

¹⁴⁰ *Id.* at 3. For a discussion of this model, see L. F. Fitzgerald et al., *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82 J. APPLIED PSYCHOL. 578, 589 (1997).

¹⁴¹ LIPARI & LANCASTER, *supra* note 3, at 5.

¹⁴² *Id.*

¹⁴³ *Id.*

As the survey indicated¹⁴⁴ sexual harassment of females dropped for each of the services—evidence that the post-Aberdeen reforms were having a positive impact.¹⁴⁵ The largest drop occurred among Marine Corps women.¹⁴⁶ While Army women reported a 23% decrease, the Army still had the highest percentage (29%) of women being harassed of the four services.¹⁴⁷

The 2002 Survey had particularly good news for the Army in two areas. First, recent research on sexual harassment in the workplace had identified the importance of intolerance of harassment by an organization's leaders as playing a significant role in discouraging sexual harassment.¹⁴⁸ In both the 1995 and 2002 Surveys, Army women were asked to assess "whether leaders made honest and reasonable efforts to stop sexual harassment."¹⁴⁹ Army women provided feedback for three leadership levels: their immediate supervisors, their senior installation leaders, and Service leadership.¹⁵⁰ Respondents reported that "[M]ore members indicated in 2002, than in 1995, that their immediate supervisor (75% vs. 67%), their installation/ship leaders (75% vs. 65%), and their Service leaders (74% vs. 65%) were making honest and reasonable efforts to stop sexual harassment."¹⁵¹ Again, this change of heart by Army leaders is likely attributable to the public spectacle of Aberdeen.

Although these figures are encouraging in that Army women have faith that their leaders are doing the right thing, the data indicate that the Army continues to lag behind the other three services.¹⁵² The percentage of 2002 respondents who indicated that their leaders made "honest and reasonable efforts to stop sexual harassment at all three levels were 66%, 62%, and 62%. The same figures for the Navy were 69%, 70%, and 68%; the figures for the Marine Corps were 67%, 69%, and 72%, and the figures for the Air Force were 73%, 70%, and 69%.¹⁵³

Second, more good news came in the numbers on training. Higher percentages of Army men and women received sexual harassment training in the twelve months prior to filling out the 2002 Survey than the other three services.¹⁵⁴ While sexual harassment training is clearly important, it is not dispositive of the problem. Were it dispositive, the service with the highest percent of its members trained should also have the lowest percent of females sexually harassed. Yet the inverse is true: the Army

¹⁴⁴ *Id.* at 16.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 47 (quoting L. F. Fitzgerald et al., *supra* note 140).

¹⁴⁹ *Id.* at 48.

¹⁵⁰ *Id.* at 49.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

has the highest percentage of its members trained, yet more Army women continue to be sexually harassed than women in the other services. There are clearly other factors at play, particularly the way in which the Army defines and punishes sexual harassment.

II. HOW THE ARMY DEFINES SEXUAL HARASSMENT

The Army currently has two definitions of sexual harassment.¹⁵⁵ Each applies to a distinct group of claimants and each definition has a corresponding complaint process. Consequently, different complainants are entitled to different remedies.

A. Definition One: DoD Directive 1350.2

DoD Directive 1350.2, entitled *Department of Defense Military Equal Opportunity ("MEO") Program* contains the first definition.¹⁵⁶ The MEO program's primary policy is the "eliminati[on of] unlawful discrimination and sexual harassment within the Department."¹⁵⁷ The Directive states that "[u]nlawful discrimination . . . is contrary to good order and discipline and is counterproductive to combat readiness and mission accomplishment."¹⁵⁸

AR 600-20, *Army Command Policy*, implements Directive 1350.2.¹⁵⁹ AR 600-20 prescribes "the policies and responsibilities of command, which include the well-being of the force, military discipline and conduct, [and] the Army Equal Opportunity Program."¹⁶⁰ AR 600-20 implements 1350.2's definition of sexual harassment with a few minor provisions that do not affect the substance of the definition.¹⁶¹

¹⁵⁵ The process delineated in AR 600-20 is identical to the guidelines set forth in 10 U.S.C. § 1561 (2000). A third definition of sexual harassment is also set forth in 10 U.S.C. § 1561. Although not identical to the 1350.2 definition, the definitions are so substantially similar that none of the substantive provisions are affected. *See* 10 U.S.C. § 1561(e) (2000).

¹⁵⁶ *See generally* U.S. DEP'T OF DEF., DIRECTIVE 1350.2, THE DEFENSE MILITARY EQUAL OPPORTUNITY PROGRAM (1995), available at http://www.dtic.mil/whs/directives/corres/pdf/d13502wch1_081895/d13502p.pdf [hereinafter DoD DIRECTIVE 1350.2].

¹⁵⁷ *Id.* at 2.

¹⁵⁸ *Id.* at 3.

¹⁵⁹ *See* AR 600-20, *supra* note 24, at ¶ 1-1.

¹⁶⁰ *Id.*

¹⁶¹ The definition of sexual harassment codified by DoD Directive 1350.2 reads in full:

A form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature [sic] when:

Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career, or

Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or

Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive work-

This definition is significant for four reasons. First, the definition is very expansive, as the term “workplace . . . for military members may include conduct on or off duty, 24 hours a day.”¹⁶² Indeed, as AR 600-20 admonishes soldiers, “[t]he standards of conduct for members of the Armed Forces regulate a member’s life 24 hours each day.”¹⁶³ Thus, if a soldier is in the gym after work and is harassing other patrons there, the definition would cover that conduct.

Second, the definition considers *quid pro quo*¹⁶⁴ and hostile environment, the two legally recognized types of sexual harassment for purposes of Title VII litigation.¹⁶⁵

ing environment.

DoD DIRECTIVE 1350.2, *supra* note 156, at 19.
The definition goes on to explain:

This definition emphasizes that workplace conduct, to be actionable as “abusive work environment” harassment, need not result in concrete psychological harm to the victim, but rather need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive. (“Workplace” is an expansive term for Military members and may include conduct on or off duty, 24 hours a day.) Any person in a supervisory or command position who uses or condones any form of sexual behavior to control, influence, or affect the career, pay, or job of a Military member or civilian employee is engaging in sexual harassment. Similarly, any Military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature in the workplace is also engaging in sexual harassment.

Id.

¹⁶² *Id.* at 20.

¹⁶³ AR 600-20, *supra* note 24, at app. § C-9.

¹⁶⁴ *Id.* at § 7.6 (explaining that *quid pro quo* is a Latin term meaning “this for that” and refers to conditions placed on a person’s career or terms of employment in return for sexual favors). *See also* Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976) (“Retaliatory actions of a male supervisor, taken because female employee declined his sexual advances, constitute[d] sex discrimination within the definitional parameters of Title VII of the Civil Rights Act of 1964.”). It should be noted, however, that since 1998, it appears as though the Court has come to reject the term *quid pro quo*. In *Burlington Indus., Inc. v. Ellerth* the Court explained, “The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.” 524 U.S. 742, 756–57 (1998). It appears that *quid pro quo* has been replaced, at least in cases involving employer liability, with “tangible employment action,” which means a significant change in employment status and almost invariably involves harassment by a supervisor. *See, e.g.*, Pennsylvania State Police v. Suders, 542 U.S. 129, 142–43 (2004) (explaining “[t]he United States Supreme Court delineates two categories of hostile work environment claims: (1) harassment that culminates in a tangible employment action, for which employers are strictly liable, and (2) harassment that takes place in the absence of a tangible employment action, to which employers may assert an affirmative defense”). *See also Ellerth*, 524 U.S. at 744; Faragher v. Boca Raton, 524 U.S. 775 (1998).

¹⁶⁵ AR 600-20, *supra* note 24, at § 7.6 (noting that “[a] hostile environment occurs when soldiers or civilians are subject to offensive, unwanted and unsolicited comments or behaviors of a sexual nature. If these behaviors unreasonably interfere with their performance, then the environment is classified as hostile.”). *See also* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (“[S]exual misconduct constitutes prohibited ‘sexual

Third, the directive places an affirmative obligation on “[a]ny person in a supervisory or command position.”¹⁶⁶ Such individuals are expected to be familiar with the conditions in which their soldiers work. Thus, a commander who was unaware, but should have known, that his or her motorpool was rife with sexual harassment could be held liable under this definition.

Last, Directive 1350.2 is a sort of legal Frankenstein. Its language is derived from bits and pieces of civilian acts and case law. For example, para. E2.1.15 of the Directive is identical to part of the 1980 guidelines issued by the Equal Employment Opportunity Commission (EEOC), declaring harassment on the basis of sex a violation of § 703 of Title VII.¹⁶⁷ Similarly, the explanation immediately following § E2.1.15.3 is identical to language in the 1993 Supreme Court decision in *Harris v. Forklift Systems, Inc.*¹⁶⁸

Such derivation is inherently problematic, for when civilian terms are applied to the military, they lose their meaning because they have different purposes, remedies, and penalties.¹⁶⁹ For example, Directive 1350.2 fails to acknowledge that different remedies for sexual harassment are available to civilians and military members.¹⁷⁰ As a result of the inapplicability of Title VII to military personnel,¹⁷¹ as well as the *Feres* Doctrine,¹⁷² monetary damages available to civilian claimants are unavailable to military claimants.

Moreover, Directive 1350.2 fails to acknowledge that the civil definition of sexual harassment corresponds to different penalties. Civilian employers who harass their employees or allow harassment of subordinates to occur are subject to civil—rather than criminal—liabilities and penal-

harassment,’ whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where ‘such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.’”).

¹⁶⁶ AR 600-20, *supra* note 24, at § 7.4

¹⁶⁷ *See, e.g.*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM., SEXUAL HARASSMENT, http://www.eeoc.gov/types/sexual_harassment.html (last modified Mar. 29, 2006); 29 C.F.R. § 1604.11 (2004). DoD Directive 1350.2, para. E2.1.15 is identical to § 1604.11(a) but does not track the language in § 1604.11(b)-(g).

¹⁶⁸ 510 U.S. 17, 22 (1993) (holding that “so long as the [work] environment would reasonably be perceived . . . as hostile or abusive, there is no need for the environment also to be psychologically injurious”).

¹⁶⁹ *See, e.g.*, Michael F. Noone, *Chimera or Jackalope? Department of Defense Efforts to Apply Civilian Sexual Harassment Criteria to the Military*, 6 DUKE J. GENDER L. & POL’Y 151, 151 (1999) (arguing that “[c]riteria developed to proscribe sexually harassing behavior, as defined by Title VII of the Civil Rights Act of 1964, are being used in the armed forces to which the Act does not apply”).

¹⁷⁰ *Id.* at 168.

¹⁷¹ *See* Gonzalez v. Dep’t of the Army, 718 F.2d 926, 930 (9th Cir. 1983).

¹⁷² *Feres v. United States*, 340 U.S. 135, 146 (1950) (holding that the Government is not liable under the Federal Tort Claims Act to uniformed members of the Armed Services “where the injuries arise out of or are in the course of activity incident to service”); *see also infra* Part IV.B.

ties.¹⁷³ On the other hand, Directive 1350.2 expressly holds that “unlawful discrimination . . . based on sex . . . is contrary to good order and discipline”¹⁷⁴ and thereby criminal under the Uniform Code of Military Justice (“UCMJ”).

By failing to take account of such differences, the promulgation of Directive 1350.2 may have satisfied Congress, the press, and feminist groups—what one author has referred to as the military’s “external constituencies”¹⁷⁵—but has in actuality done very little to serve its “internal constituency”—female military members.¹⁷⁶

This first definition of sexual harassment employs the Equal Opportunity (“EO”) complaint system detailed in AR 600-20.¹⁷⁷ Although the EO process involves military complaints, any person, including a soldier’s family member, or other civilian, can file an EO complaint.¹⁷⁸

An EO complaint is a highly regulated process vesting enormous discretion in the Commander.¹⁷⁹ The process begins with a complainant filing a formal complaint with her unit chain of command within sixty days of the alleged incident.¹⁸⁰ The EO complaint process acknowledges that a soldier may not feel comfortable filing a complaint with her unit chain of command, either because the complainant views the chain of command as indifferent to sexual harassment or because the complaint is against a member of the chain of command.¹⁸¹ As such, alternative agencies exist.¹⁸² Nonetheless, the processing of EO complaints through the chain of command is “strongly encouraged.”¹⁸³

Within fourteen calendar days of receiving the complaint, the commander can choose either to conduct an investigation personally, or, as is often the case, appoint an investigating officer (“IO”).¹⁸⁴ The IO will meet with both the legal advisor and the unit’s EOA prior to the investigation.¹⁸⁵ The IO will also review his report with the EOA prior to submitting it to

¹⁷³ See, e.g., Noone, *supra* note 169, at 159.

¹⁷⁴ DoD DIRECTIVE 1350.2, *supra* note 156, at 3.

¹⁷⁵ Noone, *supra* note 169, at 169.

¹⁷⁶ *Id.* at 170.

¹⁷⁷ AR 600-20, *supra* note 24, at app. § D-1.

¹⁷⁸ This would be unlikely, however, as the AR 600-20 complaint process awards no monetary remedy.

¹⁷⁹ See, e.g., MANUAL FOR COURTS-MARTIAL, pt. II, R.C.M. 306(a) (2005 ed.) (“Each commander has discretion to dispose of offenses by members of that command.”).

¹⁸⁰ AR 600-20, *supra* note 24, at app. § D-1.

¹⁸¹ *Id.*

¹⁸² *Id.* (delineating eight other agencies); see also *infra* notes 414–417 and accompanying text for a consideration of such agencies’ viability as an alternative to the chain of command.

¹⁸³ AR 600-20, *supra* note 24, at app. § D-1.

¹⁸⁴ *Id.* at app. § D-4. The process for choosing an IO is arbitrary. As the investigation may take several weeks and takes precedence over the officer’s regular duties, a commander is unlikely to appoint his most qualified officer to such a position. Consequently, the determinative factor is often which officer is the most expendable at a given time.

¹⁸⁵ *Id.* at app. § D-6.

the appointing authority.¹⁸⁶ Upon receipt of the report, the appointing authority forwards it to “the servicing staff or command judge advocate for a determination of legal sufficiency.”¹⁸⁷ The standard of proof to substantiate a claim of sexual harassment is a preponderance of the evidence.¹⁸⁸ Once the SJA has completed the legal review, the appointing authority will determine “whether further investigation is necessary or whether to approve all or part of the findings and recommendations.”¹⁸⁹

Three points should be underscored regarding the EO complaint system. First, military commanders, rather than attorneys, determine what, if any, punishment to mete out. Under Rules for Courts-Martial 306(c), a commander may take *any* of the following actions to dispose of a suspected offense of sexual harassment: no action;¹⁹⁰ administrative action;¹⁹¹ non-judicial punishment;¹⁹² or trial by court-martial.¹⁹³ The commander can either take the EOA’s¹⁹⁴ or SJA’s¹⁹⁵ advice or leave it.¹⁹⁶ Indeed, as many commanders tend to view incidents of sexual harassment as indicative of a poor command climate and thus as reflecting poorly on their leadership, there is a strong incentive to dismiss the charges despite countervailing advice.¹⁹⁷

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at app. § D-7.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ MANUAL FOR COURTS-MARTIAL, pt. II, R.C.M. 306(c)(1) (2005 ed.).

¹⁹¹ *Id.* R.C.M. 306(c)(2). Administrative actions “range from counseling to involuntary separation” and are “meant to be corrective and rehabilitative.” *See SENIOR REVIEW REPORT, supra* note 9, at 42.

¹⁹² MANUAL FOR COURTS-MARTIAL, pt. II, R.C.M. 306(c)(3) (2005 ed.) (“A commander may consider the matter pursuant to Article 15, nonjudicial punishment.”). Article 15 “permits commanders to impose various punishments, depending on the rank of the commander and the service member being punished without a trial by court-martial.” *See Spak & Tomes, supra* note 79, at 369 n.9.

¹⁹³ MANUAL FOR COURTS-MARTIAL, pt II, R.C.M. 501 (2005 ed.).

¹⁹⁴ EOAs are more “institutionally handicapped [than SJAs, because they are] . . . enlisted, giving them little clout in the hierarchy of officers.” FRANCKE, *supra* note 27, at 175; *see also SENIOR REVIEW REPORT, supra* note 9, at 52. When a commander acts contrary to an EOA’s recommendation, there is nothing the EOA can do without jeopardizing his or her career. As one Army platoon sergeant and EOA explained, “We are taught to be loyal to our boss If we go around him, it’s very dangerous. Even as an equal opportunity staff advisor, I can’t think of a time I would not be loyal to my boss.” *Id.*

¹⁹⁵ An SJA’s only recourse to a commander who acts contrary to his recommendation “is to ask a superior commander to take away the subordinate’s authority to act and persuade the senior to order trial by court-martial, an act that hardly endears the lawyer to the subordinate commander, who may be sitting on [the SJA’s] next promotion board.” Spak & Tomes, *supra* note 79, at 341.

¹⁹⁶ *Id.*

¹⁹⁷ The Senior Review Panel refers to this as the “‘zero defects mentality’ . . . that is, one mistake and your career is ruined.” SENIOR REVIEW REPORT, *supra* note 9, at 48. The Senior Review Panel found that many lower level leaders perceive that an EO complaint is an adverse reflection of their leadership and a “defect from which they can never recover.” SENIOR REVIEW REPORT, *supra* note 9, at 48; *see also Spak & Tomes, supra* note 79, at 341 (concluding that “in both authors’ experience as judge advocates, it was not uncommon for a commander to not follow legal advice as to whether to try a particular offense by court-martial”).

Second, the individual chosen to investigate what can be a fairly complex set of circumstances is not required to have any legal training. While the IO does meet with a legal advisor prior to beginning his investigation, this is a procedural rather than a substantive safeguard.¹⁹⁸

Last, although the complainant “has the right to appeal to the next higher commander in his or her chain of command, the complainant may not appeal [any] action taken against the perpetrator.”¹⁹⁹ Consequently, as long as an offender is punished, regardless of how lenient that punishment may be, the victim is precluded from appealing.

In sum, the EO complaint process is a highly flawed system for fairly resolving incidents of sexual harassment. By truckling to commanders rather than unbiased legal professionals, it affects the converse of its stated policy—ensuring just treatment for soldiers.

B. Definition Two: Title VII

The second definition of sexual harassment the Army uses is only applicable to civilians employed by the Department of the Army (“DA”) and not to military personnel.²⁰⁰ This definition is identical to the Title VII definition.²⁰¹ Unlike DoD Directive 1350.2, which tracked the language of § 1604.11(a) and then combined it with the *Harris* holding, this definition combines § 1604.11(a) with § 1604.11(b), which includes the well-developed standard of the totality of the circumstances.²⁰²

As this definition does not apply to green-suiters (soldiers), monetary damages may be awarded.²⁰³ As a result of the Civil Rights Act of 1991,²⁰⁴ Department of the Army employees who allege that they have been discriminated against can recover up to \$300,000 in compensatory dam-

¹⁹⁸ AR 600-20, *supra* note 24, at app. § D-6 (“The discussion should include the specific requirements of both regulations, advice on how investigations are conducted, and advice on how to question an interviewee who is suspected of committing a violation of the UCMJ.”).

¹⁹⁹ *Id.* at app. § D-8.

²⁰⁰ See U.S. Army, Civilian Personnel Online, <http://cpol.army.mil> (last visited Nov. 19, 2006) (“The U.S. Army has employed civilians since 1776 in support of men and women in uniform. The Department of Defense is America’s oldest, largest, busiest and most successful ‘company.’ Today, with over 250,000 civilian employees [compared with approximately 480,000 active-duty soldiers], the Army is the Department of Defense’s largest federal employer.”).

²⁰¹ See 29 C.F.R. § 1604.11(a) (2002).

²⁰² *Id.* at § 1604.11(b).

²⁰³ 42 U.S.C. § 1981a (1991), amended by Civil Rights Act of 1991, Pub. L. No. 102-66, § 1977(A)(b)(3)(D).

²⁰⁴ The Civil Rights Act of 1991 amended the Civil Rights Act of 1964 by reversing five Supreme Court decisions dating from 1989 that had been considered adverse to victims. In addition, The Civil Rights Act of 1991 provides for awards of punitive damages in cases of intentional discrimination and establishes a Glass Ceiling Commission to recommend ways to remove barriers to women and minorities seeking advancement. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CIVIL RIGHTS ACT OF 1991, <http://www.eeoc.gov/policy/cra91.html> (last modified Jan. 15, 1997).

ages upon a showing of discrimination.²⁰⁵ Thus, a victim's ability to recover monetary damages depends not upon whether she is a DA employee, but whether she is a soldier.

An example may prove illustrative. Captain ("CPT") *M.* is a company commander in the Army. Private First Class ("PFC") *F.* works for CPT *M.* in his orderly room, doing administrative duties. Mrs. *C.*, a civilian secretary, also works for CPT *M.* in his orderly room. CPT *M.* sexually harasses both females. The first sexual harassment definition (Directive 1350.2) would apply to PFC *F.*; the second definition (Title VII) would apply to Mrs. *C.* Under the Title VII definition, Mrs. *C.* could sue the Army and CPT *M.* for up to \$300,000. If PFC *F.* filed suit against her own commander, Directive 1350.2 would, at best, punish him under the EO complaint system. Although PFC *F.* and Mrs. *C.* are members of the same team, varying standards and remedies apply. In such a scenario it is difficult to contend that a true 'Army of One' exists.

III. HOW THE ARMY PUNISHES SEXUAL HARASSMENT

A. *An Overview of the Military Justice System*

Upon joining the United States military, an individual "becomes subject to a completely new justice system."²⁰⁶ The justification for the maintenance of a separate legal system for military personnel has long been premised on the notion that the military is a "specialized community."²⁰⁷ Such a presumption is as old as the Constitution. In the Fifth Amendment, the framers of the Constitution distinguished cases arising in the military services from those arising in civilian life.²⁰⁸ The Fifth Amendment provides in part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.*"²⁰⁹

While the Supreme Court has acknowledged that the soldier is also a citizen,²¹⁰ it has also recognized that "the military, as a 'specialized community governed by a separate discipline,' may regulate service members'

²⁰⁵ 42 U.S.C. § 1981 (1991), amended by Civil Rights Act of 1991, Pub. L. No. 102-66, § 1977(A)(b)(3)(D).

²⁰⁶ Rod Powers, Military Justice 101, <http://usmilitary.about.com/od/justicelaw/legislation/a/miljustice.htm> (last visited Dec. 3, 2006).

²⁰⁷ Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.").

²⁰⁸ See U.S. CONST. amend. V.

²⁰⁹ *Id.* (emphasis added).

²¹⁰ Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962) ("[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.").

conduct in ways which would be constitutionally impermissible in civilian society.”²¹¹

Hand in hand with this presumption has been a judicial deference to military matters.²¹² Indeed, as Justice Jackson noted in *Orloff v. Willoughby*, “judges are not given the task of running the Army.”²¹³

Unlike its domestic counterpart, whose *raison d’être* is to dispense justice, the purpose of the military’s system of justice “is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”²¹⁴ Military justice therefore consistently seeks to balance “two basic interests: war fighting and the desire for an efficient, but fair, system for maintaining good order and discipline.”²¹⁵

As noted, a military commander has several methods available to enforce good order and discipline within the unit. They range from mild administrative measures, such as formal or informal counseling, to non-judicial punishment under Article 15 of the UCMJ, to Courts-Martial,²¹⁶ which can result in imprisonment or death. All of these procedures for disciplining military members are contained in the Uniform Code of Military Justice (“UCMJ”), a federal law.²¹⁷ In 1950, Congress passed the original version of the UCMJ.²¹⁸ It had been drafted a year earlier by “a special committee appointed by the Secretary of Defense in 1949, who aimed to

²¹¹ Noone, *supra* note 169, at 152 (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974) (quoting *Willoughby*, 345 U.S. at 94)).

²¹² *See, e.g.*, *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (“Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment.”). *See also* *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) (“The case arises in the context of Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.”).

²¹³ 345 U.S. at 93.

²¹⁴ MANUAL FOR COURTS-MARTIAL, pt. I, Preamble (2005 ed.).

²¹⁵ Powers, *supra* note 206.

²¹⁶ There are three types of courts-martial: Summary, Special, and General. *See generally* MANUAL FOR COURTS-MARTIAL, pt. II, R.C.M. 501 (2005 ed.). A Summary Court-Martial consists of one commissioned officer and may try only enlisted personnel for non-capital offenses. Military.com, Legal Matters: Courts-Martial, <http://www.military.com/benefits/legal-matters/courts-martial> (last visited Dec. 3, 2006). A Special Court-Martial consists of at least three members and a military judge, although an accused may be tried by military judge alone upon request. *Id.*; *see also* MANUAL FOR COURTS-MARTIAL, pt. II R.C.M. 501(a)(2) (2005 ed.). A General Court-Martial consists of at least five members and a military judge. *Id.* R.C.M. 501(a)(1). In both a Special and General Court-Martial, an accused may request a judge alone. *Id.* R.C.M. 501(a)(1)(B) and 501(a)(2)(C).

²¹⁷ Its provisions are contained in Chapter 47 of 10 U.S.C.A. §§ 801–940 (West 2006).

²¹⁸ Scott A. Liljegren, *Winning the War Against Sexual Harassment Battle by Battle: Why the Military Justice Model Works—A Proposal for Federal and State Statutory Reform*, 38 WASHBURN L.J. 175, 188 (1998).

create a common body of statutory law governing all members of the armed forces.”²¹⁹

The UCMJ both establishes military courts for trying service members and provides military commanders with the procedures by which they discipline their members.²²⁰ The President implements the provisions of the UCMJ through the Manual for Courts-Martial (“MCM”), which is an executive order.²²¹ The MCM “is the basic directive implementing the UCMJ” and “provides regulations which explain, amplify, and implement the UCMJ.”²²² It also “provides elements of military offenses, the Military Rules of Evidence, Rules for Courts-Martial, and sentencing guidelines.”²²³

B. UCMJ Charging Options for Sexual Harassment

Although Congress has not expressly prohibited sexual harassment in the punitive articles of the UCMJ,²²⁴ the UCMJ provides a number of charging options to the commander seeking to dispose of verified allegations of sexual harassment by court-martial. Unfortunately, each has an inherent limitation. The most commonly relied upon UCMJ article for punishing sexual harassment is Article 93: Cruelty and Maltreatment.²²⁵ Article 93 provides that “[a]ny person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.”²²⁶ The Department of the Army’s Military Judges’ Benchbook indicates that these terms refer “to unwarranted, harmful, abusive, rough, or other unjustifiable treatment which, under all the circumstances: (a) results in physical or mental pain or suffering, and (b) is unwarranted, unjustified and unnecessary for any lawful purpose.”²²⁷

Article 93 lists two elements for cruelty and maltreatment: “(1) That a certain person was subject to the order of the accused; and (2) That the accused was cruel toward, or oppressed, or maltreated that person.”²²⁸ Article 93 specifically observes that “sexual harassment may constitute this offense.”²²⁹ The example of sexual harassment was added to the 1984 version of the MCM, and, since that time, various military appellate courts

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See Exec. Order No. 12473, 32 C.F.R. pt. 151 (1999) (codified at 10 U.S.C.A. § 836 (2002)).

²²² Liljegren, *supra* note 218, at 189.

²²³ *Id.*

²²⁴ See generally MANUAL FOR COURTS-MARTIAL, pt. IV, arts. 78, 80–134 (2005 ed.).

²²⁵ See MANUAL FOR COURTS-MARTIAL, pt. IV, ¶ 17 (2005 ed.).

²²⁶ *Id.* ¶ 17.a.

²²⁷ U.S. DEP’T OF ARMY, PAMPHLET 27-9, LEGAL SERVICES: MILITARY JUDGES BENCHBOOK 273 (2002), available at http://www.apd.army.mil/pdf/p27_9.pdf.

²²⁸ MANUAL FOR COURTS-MARTIAL, pt. IV, ¶ 17.b (2005 ed.).

²²⁹ *Id.* ¶ 17.c.(2).

have signaled their approval of the use of Article 93 to prosecute verified allegations of sexual harassment.²³⁰

The great limitation of Article 93 is the defined “nature of the victim.” Article 93 prohibits an individual subject to the Code from maltreating, or being cruel or oppressive to, “[a]ny person subject to his orders.”²³¹ The MCM explains that “[a]ny person subject to his orders” includes the following:

[N]ot only those persons under the direct or immediate command of the accused but extends to all persons, subject to the code or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the person.²³²

As Colonel William Barto, former instructor at the Judge Advocate General’s School, U.S. Army explains, “[t]he phrase ‘any person subject to his orders’ can be interpreted in a variety of ways.”²³³ A comprehensive interpretation would hold that Article 93 would be violated “whenever the accused is superior in rank to the victim, regardless of the presence of a supervisory relationship between the two individuals.”²³⁴ As Barto explains:

Judge Gierke of the United States Court of Appeals for the Armed Forces²³⁵ would appear to support this position when, writing for a highly divided court in *United States v. Hullett*,²³⁶ he recently asserted in dicta that “under appropriate circumstances, sexually-oriented comments by a senior noncommissioned officer to a junior in rank or position might constitute . . . a violation of Article 93, UCMJ.”^{237 238}

²³⁰ See, e.g., *United States v. Carson*, 55 M.J. 656, 659 (A. Ct. Crim. App. 2001) (holding that Appellant’s exposure of his penis to his female subordinate constituted a violation of Article 93); *United States v. Hullett*, 40 M.J. 189, 193 n.2 (C.M.A. 1994) (remarking that “under appropriate circumstances, sexually-oriented comments by a senior noncommissioned officer to a soldier junior in rank or position might constitute . . . a violation of Article 93, UCMJ”); *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (affirming that sexual harassment may constitute the offense of maltreatment).

²³¹ MANUAL FOR COURTS-MARTIAL, pt. IV ¶ 17.c.(1) (2005 ed.).

²³² *Id.*

²³³ William T. Barto, *Sexual Harassment and the Uniform Code of Military Justice: A Primer for the Military Justice Practitioner*, ARMY LAW., July 1995, at 3, 5.

²³⁴ *Id.*

²³⁵ *Id.* at n.22 (“On 5 October 1994, the United States Court of Military Appeals (“COMA”) was renamed the United States Court of Appeals for the Armed Forces (“CAAF”), and each service court of military review was renamed as a court of criminal appeals.”).

²³⁶ *Id.* at n.23 (“40 M.J. 189 (C.M.A. 1994”).

²³⁷ *Id.* at n.24 (“*Id.* at 193 n.2.”).

²³⁸ *Id.* at 5.

The UCMJ generally requires an individual to obey the lawful orders of those superior in *either* command (a supervisory position) or rank.²³⁹ Consequently, it would seem logical that this comprehensive view would prevail in the case law. Nonetheless, a limited interpretation, arguing that Article 93 is violated only when a command relationship exists, also has currency. In *United States v. Curry*,²⁴⁰ the United States Navy-Marine Corps Court of Military Review convicted Yeoman²⁴¹ First Class Curry for violating Article 93 by “oppress[ing]” female Petty Officer Ries.²⁴² Yeoman First Class Curry requested that Petty Officer Ries (junior to Curry in rank but not under his supervision) give him “‘a head to toe body massage’ at a friend’s house.”²⁴³ The COMA reversed Curry’s conviction for violating Article 93.²⁴⁴ While the COMA acknowledged that Ries was junior in rank to Curry, she nonetheless “had no duty which required her to obey any orders of appellant. He lacked authority over her, and he did not try to order her to do anything.”²⁴⁵

Whether a court applies a comprehensive or limited interpretation of Article 93, the fact remains that the phrase “subject to his orders” significantly limits reliance on Article 93 to prosecute incidents of sexual harassment because incidents of sexual harassment are not limited to situations in which the victim is junior in rank or supervised by the harasser. For example, when LTG Claudia Kennedy was sexually harassed by MG Smith, she was neither junior in rank (she outranked him, she being a Major General and he a Brigadier General) nor under his supervision.²⁴⁶ Consequently, although the Inspector General of the Army substantiated the charges, MG Smith, a two-star general, could not have been punished under Article 93 because his victim, a three-star general, was “not subject to his orders.”

As a result of this limitation, when the government believes an incident of sexual harassment is serious enough to warrant trial by court-martial but cannot apply Article 93, it must look to alternative articles. One possibility, for instance, is punishing an incident of sexual harassment under Article 134, indecent language.²⁴⁷ As one observer explains, “Article 134 is the catch-all of this nation’s military justice system, a compendium of 55 offenses that the armed forces say are ‘prejudicial to good order and discipline’ or likely to ‘bring discredit’ on the service.”²⁴⁸ Indecent language is just one of these offenses.

²³⁹ See, e.g., MANUAL FOR COURTS-MARTIAL, pt. IV, ¶ 13.c.(1) (2005 ed.).

²⁴⁰ 28 M.J. 419 (1989).

²⁴¹ A Yeoman is a petty officer performing chiefly clerical duties in the U.S. Navy.

²⁴² *Curry*, 28 M.J. at 424.

²⁴³ *Id.* at 423.

²⁴⁴ *Id.* at 424.

²⁴⁵ *Id.*

²⁴⁶ See Ricks, *supra* note 55, at A29.

²⁴⁷ MANUAL FOR COURTS-MARTIAL, pt. IV, ¶ 89 (2005 ed.).

²⁴⁸ Jane Gross, *Justice in the Military Has Its Reasons*, N.Y. TIMES, Mar. 1, 1998, at

The MCM defines indecent language as “that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts.”²⁴⁹ The MCM lists three elements²⁵⁰ to the offense of indecent language:

That the accused orally or in writing communicated to another person certain language;

That such language was indecent;

That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.²⁵¹

Unfortunately, indecent language is fraught with its own limitations. As the following two cases indicate, courts are often reluctant to apply a violation of Article 134 to situations that may be commonly perceived as sexual harassment.²⁵²

In *United States v. Hullett*,²⁵³ the COMA considered the appeal of Sergeant First Class (“SFC”) Hullett, who had been convicted of “communicating indecent language . . . in violation of Article 134.”²⁵⁴ The language at issue was a comment made by Hullett to Specialist B to the effect that if she (“Specialist B”) “gave him a chance, he’d make [her] eyes roll in the back of [her] head and [her] toes curl under.”²⁵⁵ Hullett made the comment “a couple of times.”²⁵⁶ Asked if she thought SFC Hullett was serious, Specialist B testified that “he was kidding a lot of the time . . . but every once in a while it would sound like he meant it.”²⁵⁷

In reversing Hullett’s conviction, the court focused on the second and third elements of the offense. As to whether the language was indecent, the court concluded that “[w]hile appellant’s comments may have been in poor taste . . . [a] certain amount of banter and even profanity in a military office is normally acceptable, and even when done in ‘poor taste,’ will only rarely rise to the level of criminal misconduct.”²⁵⁸

A16.

²⁴⁹ MANUAL FOR COURTS-MARTIAL, pt. IV, ¶ 89.c (2005 ed.).

²⁵⁰ The third element is common to all offenses delineated under Article 134. *See generally id.*

²⁵¹ *Id.* at ¶ 89.b.

²⁵² Barto, *supra* note 233, at 11.

²⁵³ 40 M.J. 189 (1994).

²⁵⁴ *Id.* at 190. SFC Hullett’s conviction “provide[d] for a bad-conduct discharge and reduction to the lowest enlisted grade.” *Id.* at 190.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 193 (quoting *United States v. Hanson*, 30 M.J. 1198, 1201 (1990)).

As to whether the remarks were “prejudicial to good order and discipline”²⁵⁹ or were likely to “bring discredit”²⁶⁰ to the Army, the court concluded that “sexual banter and bragging were common among both male and female soldiers in the . . . section”²⁶¹ and “[s]ince the language in question was privately communicated on a military installation,”²⁶² there could be no discredit to the Army or prejudicial effects on good order and discipline.²⁶³

In a strongly worded dissent, Justice Sullivan remarked, “[i]n today’s Army, no junior soldier should have to put up with such remarks and appellant should not be excused from the consequences of his remark because, as the lead opinion puts it, ‘[t]he remark in question was a common joke.’ I would affirm.”²⁶⁴

United States v. Peszynski is another example of courts’ reluctance to apply a violation of Article 134.²⁶⁵ In *Peszynski*, the United States Navy-Marine Corps Court of Military Review reversed the defendant’s conviction on three specifications alleging sexual harassment in violation of Article 134.²⁶⁶

Technician Second Class Peszynski was stationed at an aviation squadron at Naval Air Station, Barber’s Point, Hawaii.²⁶⁷ In order to earn extra cash, he worked part-time as a shift manager at the Pizza Hut, a concession restaurant aboard the air station.²⁶⁸ As the court explains:

From nearly the first day on the job . . . [three] women²⁶⁹ became the object of a nearly constant stream of sexually suggestive comments and other forms of sexually suggestive behavior from [Peszynski]. He would make frequent references to their breasts and buttocks, ask them out socially (although . . . [he] and two of the victims were married), stare leeringly at their bodies, make up passages of a sexual nature from novels one victim was reading, and touch or stroke them in a manner reasonably perceived by them to be sexually suggestive.²⁷⁰

In reversing Peszynski’s three convictions under Article 134, the court explained:

²⁵⁹ *Id.* at 192.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 190.

²⁶² *Id.* at 192.

²⁶³ *Id.*

²⁶⁴ *Id.* at 194–95 (Sullivan, J., dissenting).

²⁶⁵ 40 M.J. 874 (C.A.A.F. 1994).

²⁶⁶ *Id.* at 882.

²⁶⁷ *Id.* at 876.

²⁶⁸ *Id.*

²⁶⁹ One of the women was junior to Peszynski in rank. The other two women were wives of active duty service members. *Id.*

²⁷⁰ *Id.* at 876.

Comments and gestures described only as “repeated,” “unwelcome,” and “of a sexual nature” simply do not, by themselves, provide a definitive standard of behavior subject to punitive sanction. These descriptive terms are not inherently criminal or even necessarily pejorative in nature; they are basically neutral. As such, they do not serve as an adequate standard by which to determine criminal behavior.²⁷¹

In addition to Articles 93 and 134, other MCM-chargeable offenses for sexual harassment may include: adultery,²⁷² extortion,²⁷³ fraternization,²⁷⁴ and indecent acts with others.²⁷⁵ If the harassment involves physical contact, it may constitute assault,²⁷⁶ indecent assault,²⁷⁷ assault with the intent to commit rape or sodomy,²⁷⁸ rape,²⁷⁹ or sodomy.²⁸⁰

Although the UCMJ offers some possibilities for prosecuting sexual harassment, until Congress chooses to expressly prohibit sexual harassment in the punitive articles of the UCMJ, many prosecutions will fail for lack of an appropriate provision, “leaving military prosecutors to leap Herculean legal hurdles.”²⁸¹

IV. FOUR PROPOSALS TO COMBAT SEXUAL HARASSMENT IN TODAY’S ARMY

This Article now examines four proposals, which, if implemented, would serve to significantly minimize incidents of sexual harassment in the Army. The first proposal considers how to more effectively punish those convicted of sexual harassment. The second and third proposals seek to create a true “Army of One” by ensuring that female soldiers have the same rights as their civilian counterparts after they have been harassed. The fourth proposal is concerned with preventing sexual harassment from occurring.

A. *Revision of the Uniform Code of Military Justice*

It is superbly ironic that the military, which constantly preaches the importance of modernization in order to deal with new threats, has been

²⁷¹ *Id.* at 879–80.

²⁷² MANUAL FOR COURTS-MARTIAL, pt. IV, ¶ 62 (2005 ed.).

²⁷³ *Id.* ¶ 53.

²⁷⁴ *Id.* ¶ 83.

²⁷⁵ *Id.* ¶ 90.

²⁷⁶ *Id.* ¶ 54.

²⁷⁷ *Id.* ¶ 63.

²⁷⁸ *Id.* ¶ 64.

²⁷⁹ *Id.* ¶ 45.

²⁸⁰ *Id.* ¶ 51.

²⁸¹ Editorial, *supra* note 82, at 12A.

unwilling to do just that with its bedrock of military law. Yet, to date, Congress has refused to expressly prohibit sexual harassment in the punitive articles of the UCMJ. It is time for Congress to act.

Although the DoD has expansively defined sexual harassment in DoD Directive 1350.2, “convening authorities must [still] choose between a number of potential charges.”²⁸² Moreover, as two retired Army JAG Corps officers have noted, “[c]hoosing among all . . . [the] potential offenses is not easy and often results in so-called ‘stacking’ the charges—charging the accused with all that may apply and letting the court members sort it out.”²⁸³ This is arguably what occurred in the McKinney trial.²⁸⁴ Among McKinney’s nineteen counts, he was charged with criminal assault and battery for placing his hand on a woman’s arm and trying to pull her toward him. He also faced a possible prison term for asking a woman to meet him at his hotel for drinks.²⁸⁵ As one thoughtful editorial noted, “small wonder the jury had trouble finding him guilty ‘beyond a reasonable doubt.’”²⁸⁶

Including sexual harassment in the punitive articles of the UCMJ would in no way diminish a commander’s discretion in punishing an incident of sexual harassment. Under the Rules for Courts-Martial, a commander would retain his right to dispose of an offense by taking no action or administrative action, or by enforcing a non-judicial punishment.²⁸⁷ In particularly egregious instances, a soldier would be charged under the punitive article of sexual harassment, and the offense would be disposed of through trial by court-martial.²⁸⁸

Without delay, Congress should expressly prohibit sexual harassment in the punitive articles of the UCMJ by adopting the following Article:

113 Article 135—(Sexual Harassment)²⁸⁹

a. **Text.**

Any person subject to this chapter who is guilty of sexual harassment shall be punished as a court-martial may direct.

²⁸² Spak & Tomes, *supra* note 79, at 344.

²⁸³ *Id.* at 345.

²⁸⁴ See *supra* notes 72–76 and accompanying text.

²⁸⁵ Editorial, *supra* note 82, at 12A.

²⁸⁶ *Id.*

²⁸⁷ MANUAL FOR COURTS-MARTIAL, pt. II, R.C.M. 306(c)(1–4) (2005 ed.).

²⁸⁸ *Id.* R.C.M. 306(c)(4).

²⁸⁹ While the American Bar Association has approved a resolution that would change Article 93 to expressly cover sexual harassment, for the purposes of this Article, Article 93 would be left intact and a new Article would be added. In reality, the new Article would be some other number than Article 135, as it would likely precede both Article 133 (Conduct unbecoming an officer and gentleman) and Article 134 (General Article). See AM. BAR ASS’N CRIMINAL JUSTICE SECTION, ANNUAL MEETING 1993: RESOLUTION 100 (MILITARY LAW COMM.; COMM’N ON WOMEN IN THE PROFESSION; COSPONSORED BY JUDGE ADVOCATES ASS’N AND STANDING COMM. ON LAW IN THE ARMED FORCES), <http://www.abanet.org/crimjust/policy/cjpol.html> (last visited Dec. 3, 2006).

b. Elements.

*Sexual harassment is a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when: (1) Submission to such conduct is made either explicitly or implicitly a condition of a person's job, pay, or career; or (2) Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or (3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment.*²⁹⁰

c. Explanation

(1) *Nature of victim.* A victim need not be junior in either rank or command to the accused as sexual harassment can occur when the victim is superior to the accused in either rank or command.²⁹¹ The victim and the accused may be of the same sex.²⁹² The victim may or may not be a civilian.

(2) *The Nature of the Act.* The definition of sexual harassment considers the two currently recognized types of sexual harassment: *quid pro quo* and *hostile environment*.

d. Lesser included offense. Article 80 (attempt).

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.²⁹³

f. Sample specification.

*In that _____ (personal jurisdiction data), did (at/on board/location) on or about _____ 20_____, sexually harass _____ by creating an intimidating work environment.*²⁹⁴

B. Overturning the Feres Doctrine

If a female DoD employee were sexually harassed by a soldier, she would likely seek to hold the Government vicariously liable and assert her claim under the provisions of the Federal Tort Claims Act ("FTCA").²⁹⁵ Unlike her civilian counterpart, a female soldier sexually harassed by another soldier would find her claim barred by the much-criticized²⁹⁶ *Feres* doctrine.

²⁹⁰ This is the same definition used by DoD Directive 1350.2.

²⁹¹ This explanation solves the "subject to his orders" limitation presented by Article 93.

²⁹² See *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998) (holding that "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII").

²⁹³ There are no minimum sentencing guidelines in the military, only maximum guidelines. It is therefore possible to be convicted but receive no punishment. Confinement of one year is the maximum punishment under Article 93.

²⁹⁴ This list is not meant to be exhaustive but merely provides a sample specification.

²⁹⁵ See Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 812 (1946) (codified as amended in scattered sections of 2 U.S.C. and 28 U.S.C.).

²⁹⁶ See *Mackey v. United States*, 226 F.3d 773 (6th Cir. 2000); *Taber v. United States*,

The *Feres* doctrine precludes tort claims by military members injured by a federal tortfeasor when the injury is “incident to service.”²⁹⁷ If the Army is to create a true “Army of One,” *Feres* must be overruled and female soldiers who have been the victims of sexual harassment must be given the same rights for redress as their civilian counterparts.

In 1946, the “passage of the [FTCA] resulted in a broad waiver of the Federal Government’s sovereign immunity.”²⁹⁸ The FTCA allowed an employee of the federal government to sue the United States in tort as though it were a private person.²⁹⁹ In passing the FTCA, “Congress chose to place all Americans on an equal footing in litigating the civil liability of the federal government for claims of tort injuries.”³⁰⁰

The FTCA contained several exceptions for Uncle Sam,³⁰¹ however, including § 2680(j), by which the government withheld consent to be sued for “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”³⁰²

In 1949, the Supreme Court had its first encounter with an FTCA suit brought by a member of the armed forces. In *Brooks v. United States*, the Court considered whether military members could recover under the FTCA for injuries unrelated to their service.³⁰³ In *Brooks* a car in which two soldiers were riding was struck by an Army truck.³⁰⁴ One soldier was killed and the other seriously injured.³⁰⁵ The government moved to dismiss on the ground that the plaintiffs were barred from recovery under the FTCA because they were in the armed forces at the time of the accident.³⁰⁶

The district court denied the motion and entered judgments in favor of the deceased soldier’s estate and the injured soldier.³⁰⁷ The court of appeals reversed.³⁰⁸ On certiorari, the Supreme Court agreed with the district court that the servicemen were entitled to damages and that the FTCA did not exclude claims of servicemen.³⁰⁹ In dicta, however, Justice Murphy cautioned that, had Brooks sought recovery for injuries suffered “incident to [his] service, a wholly different case would be presented.”³¹⁰

67 F.3d 1029 (2d Cir. 1995); *Persons v. United States*, 925 F.2d 292 (9th Cir. 1991); *Garner v. Santoro*, 865 F.2d 629 (5th Cir. 1989); *Sanchez v. United States*, 813 F.2d 593 (1987); *Broudy v. United States*, 661 F.2d 125 (9th Cir. 1981); *Jones v. La Riviera Club, Inc.*, 655 F. Supp. 1032 (D.P.R. 1987).

²⁹⁷ *Feres v. United States*, 340 U.S. 135, 146 (1950).

²⁹⁸ *Costo v. United States*, 248 F.3d 863, 866 (9th Cir. 2001).

²⁹⁹ *See id.*

³⁰⁰ *Id.* at 869 (Ferguson, J., dissenting).

³⁰¹ *See, e.g.*, 28 U.S.C. § 2680 (2000).

³⁰² *Id.* at § 2680(j).

³⁰³ 337 U.S. 49 (1949).

³⁰⁴ *Id.* at 50.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *See United States v. Brooks*, 169 F.2d 840, 846 (4th Cir. 1948).

³⁰⁹ *Brooks*, 337 U.S. at 54.

³¹⁰ *Id.* at 52.

That “wholly different case” presented itself to the Court the very next year in *Feres v. United States*.³¹¹ In *Feres*, the Court combined three servicemen’s lawsuits against the government.³¹² In each suit, the injury for which compensation was sought under the FTCA occurred while the serviceman was on active duty, and the negligence alleged was on the part of other members of the Armed Forces.³¹³

In *Feres*’s suit,³¹⁴ the decedent perished by fire in his Army barracks, and his executrix sued the Government.³¹⁵ In Jefferson’s suit,³¹⁶ the plaintiff was required to undergo abdominal surgery while in the Army.³¹⁷ After the Army had discharged plaintiff, during a separate surgery eight months later, “a towel thirty inches long by eighteen inches wide, marked ‘Medical Department U.S. Army,’ was discovered and removed from his stomach.”³¹⁸ The complaint alleged negligence on the part of the Army surgeon.³¹⁹ In Griggs’s suit,³²⁰ an active-duty officer died while undergoing surgery, and his wife sued the Government.³²¹

In each action, the Court denied relief, holding that servicemen could not recover under the FTCA for injuries that “arise out of or are in the course of activity incident to service.”³²² The Court gave three reasons for its holding. First, the Court concluded that government liability in a case like *Feres* was not analogous to any liability of a private individual and, thus, not permitted by the FTCA.³²³ Second, Congress could not have intended that local tort law govern the “distinctively federal” relationship between the government and its military forces.³²⁴ Third, soldiers already received generous³²⁵ veterans’ benefits, and Congress could not have intended for them to “double dip” by receiving double compensation for their injuries.³²⁶

Four years after *Feres*, the Court developed a fourth rationale based on military discipline. In *United States v. Brown*, the Court explained that

³¹¹ 340 U.S. 135 (1950).

³¹² *Id.*

³¹³ *Id.* at 138.

³¹⁴ *Feres v. United States*, 177 F.2d 535 (2d Cir. 1949).

³¹⁵ *Feres*, 340 U.S. at 136–37.

³¹⁶ *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949).

³¹⁷ *Id.* at 519.

³¹⁸ *Feres*, 340 U.S. at 137.

³¹⁹ *Id.*

³²⁰ *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949).

³²¹ *Feres*, 340 U.S. at 137.

³²² *Id.* at 146.

³²³ *Id.* at 141–42.

³²⁴ *Id.* at 143.

³²⁵ Whether death gratuities were ever “generous” is debatable, but certainly not true today. In January 2005, the *New York Times* reported that the United States military pays a \$12,242 gratuity to families of fallen soldiers in Iraq. James Barron, *For Families of Fallen Soldiers, the 2nd Knock Brings \$12,000*, N.Y. TIMES, Jan. 26, 2005, at A1.

³²⁶ *Feres*, 340 U.S. at 144–45.

lawsuits have a negative impact on military discipline and would involve the civilian courts in second-guessing military decision making.³²⁷

Today, the justification for the *Feres* doctrine rests on the rather shaky military discipline rationale. By 1955 the Court had rejected the first rationale³²⁸ and noted in *United States v. Shearer*³²⁹ that the other two were “no longer controlling.”³³⁰ Consequently, “when courts try to figure out whether a claimant should be barred because he/she was acting incident to service, they focus on the effect of the lawsuit on the military discipline structure.”³³¹ First however, a determination must be made as to whether an accident is “incident to service.” This is no easy task. As the Supreme Court has cautioned, “The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases.”³³² Courts generally consider four factors in determining whether an accident occurred incident to service:

- (1) the place where the negligent act occurred;
- (2) the duty status of the plaintiff when the negligent act occurred;
- (3) the benefits accruing to the plaintiff because of his status as a service member; and
- (4) the nature of the plaintiff’s activities at the time the negligent act occurred.³³³

None of these factors is dispositive, however, and courts tend to focus on “the totality of the circumstances.”³³⁴ As Kelly Dill notes, “[m]any courts are reluctant to impose the *Feres* doctrine”³³⁵ and have “successfully side-stepped the *Feres* bar by distinguishing minor facts and deciding events do not qualify as incident to service.”³³⁶ In one recent case, for example, a woman’s sailor-husband, two children, and two step-children all died from carbon monoxide poisoning resulting from the hazardous condition of old gas appliances in their Navy barracks.³³⁷ The sailor’s wife was allowed to recover because the injury occurred on a Sunday while her husband was off-duty for the weekend.³³⁸ Had the accident occurred just twenty-four hours later, the *Feres* doctrine would have barred the widow from any recovery.³³⁹

³²⁷ 348 U.S. 110, 112 (1954).

³²⁸ See *Indian Towing Co. v. United States*, 350 U.S. 61, 66–69 (1955).

³²⁹ 473 U.S. 52 (1985).

³³⁰ *Id.* at 58 n.4.

³³¹ Kelly L. Dill, Comment, *The Feres Bar: The Right Ruling for the Wrong Reason*, 24 CAMPBELL L. REV. 71, 77 (2001).

³³² *Shearer*, 473 U.S. at 57.

³³³ *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001).

³³⁴ *Millang v. United States*, 817 F.2d 533, 535 (9th Cir. 1987).

³³⁵ Dill, *supra* note 331, at 78.

³³⁶ *Id.*

³³⁷ *Hall v. United States*, 130 F. Supp. 2d 825, 826 (S.D. Miss. 2000).

³³⁸ *Id.* at 828.

³³⁹ *Id.*

In another case, a child was born with severe birth defects to an active-duty Air Force woman.³⁴⁰ The child's parents, Mr. and Mrs. Smith, brought a medical malpractice suit against their doctor (who was in private practice) on behalf of themselves and their son.³⁴¹ They claimed that the doctor had failed to ensure that Mrs. Smith had received "particular prenatal tests."³⁴² The Smiths were therefore deprived of the opportunity to make an informed decision as to whether to terminate the pregnancy.³⁴³ The doctor impleaded the government, claiming that it "negligently failed to complete and report [results of the prenatal] test."³⁴⁴ The government moved for summary judgment, claiming that the *Feres* doctrine barred the parents' and the child's claims.³⁴⁵

The court granted summary judgment in part, holding that the parents' claim for wrongful birth was barred by the *Feres* doctrine because the mother was an active duty service member and her prenatal care (or lack thereof) was paid for by the government.³⁴⁶ Nonetheless, the court also held that the child's claim for wrongful life was not barred by the *Feres* doctrine.³⁴⁷ The court concluded: "It is not likely that a suit alleging military negligence inflicted on a civilian child will impair the discipline necessary for effective service. This suit will not require the court to second-guess a decision of the military"³⁴⁸

The previous two cases demonstrate the extent to which some courts will go to manipulate the "incident to service" factors so as not to apply *Feres*. Nonetheless, in the majority of cases, there is a tight enough fit between the facts of the case and the military discipline rationale so that courts have no choice but to apply the doctrine.³⁴⁹ *Costo v. United States*³⁵⁰ is one such case. In *Costo*, the Court of Appeals for the Ninth Circuit only "reluctantly"³⁵¹ and "without relish"³⁵² applied the doctrine, saying that they did so out of deference to precedent.³⁵³ In *Costo*, two sailors drowned on a white-water rafting trip provided by the Navy's Morale, Welfare, and Recreation ("MWR") program.³⁵⁴ *Costo*'s parents brought suit against the United States alleging that MWR "breached its duty to the plaintiffs" by failing to obtain a rafting permit, failing to hire trained guides, failing to

³⁴⁰ Smith v. United States, 148 F. Supp. 2d 504, 507 (D.N.J. 2001).

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* at 509.

³⁴⁴ *Id.* at 510.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 515.

³⁴⁷ *Id.* at 521.

³⁴⁸ *Id.* at 518 (quoting Romero v. United States, 954 F.2d 223, 226 (4th Cir. 1992)).

³⁴⁹ Dill, *supra* note 331, at 77.

³⁵⁰ 248 F.3d 863 (9th Cir. 2001).

³⁵¹ *Id.* at 864.

³⁵² *Id.* at 869.

³⁵³ *Id.* at 864.

³⁵⁴ *Id.* at 865.

scout the river, failing to properly equip the raft, and failing to rescue the rafters.”³⁵⁵

The court applied the facts to the four “incident to service” factors and concluded that although the soldiers were on “liberty,” the injury occurred while both were active duty, and the activity was provided as a benefit to the sailors’ military service.³⁵⁶ The court concluded that the activity was “incident to service” because the boat rental was governed by military regulations, the program was regulated by the military, and the MWR program was under the command of the base’s commanding officer.³⁵⁷ As such, the *Feres* doctrine barred plaintiffs’ claims.³⁵⁸

Feres has created arbitrary, inequitable, and inconsistent case law. As Justice Ferguson wrote in his vigorous dissent in *Costo*:

Less than half of the persons on the rafting trip that claimed the lives of Costo and Graham were identified as members of the armed services. The holding today would have allowed any of the civilians injured or killed on the trip to sue, but barred such recourse to the military personnel, despite the fact that the two suits would have implicated virtually identical policy concerns regarding the law of the situs and military decision-making. On the other hand, had Costo and Graham participated in a similar rafting trip run entirely by civilians, they may have been able to sue, yet still collect veteran’s benefits. I cannot find a rational basis for the court to engage in such line-drawing on the basis of an incident to service test.³⁵⁹

Three main arguments can be delineated against the *Feres* doctrine. First, *Feres* is unconstitutional on equal protection and separation of power grounds.³⁶⁰ As Justice Ferguson wrote in his *Costo* dissent, “The doctrine effectively declares that the members of the United States military are not equal citizens, as their rights against their government are less than the rights of their fellow Americans. This judicially created classification runs afoul of the Equal Protection clause of the 14th and 5th Amendments.”³⁶¹

Justice Ferguson also argued that “[judges] should never overrule the plain language of Congress unless there is a constitutional violation.”³⁶²

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 867.

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 869.

³⁵⁹ *Id.* at 875–76 (Ferguson, J., dissenting).

³⁶⁰ *Id.* at 869.

³⁶¹ *Id.* at 870.

³⁶² *Id.* at 871 (9th Cir. 2001) (Ferguson, J., dissenting) (quoting *Marbury v. Madison*, 5 U.S. 137, 177–79 (1803)).

To do so “runs against our basic separation of powers principles”³⁶³ by engaging in judicial re-writing of an unambiguous and constitutional statute.³⁶⁴

Feres also raises serious due process concerns.³⁶⁵ As one author recently wrote:

The rulings in *Feres* [et al.] should be overturned as unconstitutional, in that they collectively support a prohibition of members of the armed forces from bringing a civil claim against anyone for sexual harassment while on active duty. With nowhere to assign the blame for these victims’ injuries, I am simply unable to locate the due process afforded these citizens.³⁶⁶

The second argument against maintaining the troubled doctrine is that the military discipline rationale on which it rests today cannot logically be sustained.³⁶⁷ On the most basic level, “if servicemembers believe that the military treats its personnel fairly, they may be more likely to accept and meet the demands of their jobs.”³⁶⁸

Nor does the legislative history support the rationale. In a powerful dissent in *United States v. Johnson*,³⁶⁹ which barred a military widow from suing a civilian tortfeasor responsible for her husband’s death, Justice Scalia questioned why, if *Feres* lawsuits were so clearly detrimental to military discipline, Congress did not include them as one of the many exceptions to the FTCA.³⁷⁰ “Perhaps,” he concluded, “Congress recognized that the likely effect of *Feres* suits upon military discipline is not as clear as we have assumed.”³⁷¹ Equally inexplicable to Justice Scalia and the dissenters is why, if *Feres* lawsuits are so clearly detrimental to military discipline, the Court in *Feres* did not recognize the military discipline rationale as one of its original justifications.³⁷²

In a compelling argument, Justice Scalia turns the whole military discipline rationale on its head by positing that “Congress [may have] thought that *barring* recovery by servicemen might adversely affect military discipline.”³⁷³ “After all, the morale of Lieutenant Commander Johnson’s comrades-in-arms will not likely be boosted by news that his widow and chil-

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ Liljegren, *supra* note 218, at 203.

³⁶⁶ *Id.*

³⁶⁷ See, e.g., Robin Rogers, Comment, *A Proposal for Combating Sexual Discrimination in the Military: Amendment of Title VII*, 78 CAL. L. REV. 165, 192 (2000).

³⁶⁸ *Id.*

³⁶⁹ 481 U.S. 681 (1987).

³⁷⁰ *Id.* at 693 (Scalia, J., dissenting).

³⁷¹ *Id.* at 699.

³⁷² *Id.* at 700.

³⁷³ *Id.*

dren will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death.”³⁷⁴

Finally, perhaps the most compelling argument against *Feres* is the unfairness and irrationality the decision has engendered. As Justice Scalia concluded his dissent in *Johnson*:

Had Lieutenant Commander Johnson been piloting a commercial helicopter when he crashed into the side of a mountain, his widow and children could have sued and recovered for their loss. But because Johnson devoted his life to serving in his country's Armed Forces, the Court today limits his family to a fraction of the recovery they might otherwise have received. If our imposition of that sacrifice bore the legitimacy of having been prescribed by the people's elected representatives, it would (insofar as we are permitted to inquire into such things) be just. But it has not been, and it is not.³⁷⁵

It is time for the Court or Congress to overrule the *Feres* doctrine.

C. Amendment of Title VII To Apply to Military Members

The Civil Rights Act of 1964 is arguably the “most important civil rights legislation ever enacted.”³⁷⁶ The Act “contains [eleven] titles barring discrimination in voting rights, public accommodations, education, employment, and use of federal funds.”³⁷⁷ In *Heart of Atlanta Motel, Inc. v. United States*³⁷⁸ and *Katzenbach v. McClung*,³⁷⁹ “the Supreme Court upheld the constitutionality of the Act under [both] the commerce clause and the fourteenth amendment.”³⁸⁰

Title VII³⁸¹ of the Act addresses employment discrimination and states that it is unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin”³⁸² Title VII addresses both disparate treatment of protected groups and the disparate impact of certain policies on such groups. To make a disparate treatment claim, an employee must allege intentional

³⁷⁴ *Id.* at 681.

³⁷⁵ *Id.* at 703 (Scalia, J., dissenting).

³⁷⁶ MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 256 (5th ed. 2003).

³⁷⁷ *Id.*

³⁷⁸ 379 U.S. 241 (1964).

³⁷⁹ 379 U.S. 294 (1964).

³⁸⁰ ROTHSTEIN & LIEBMAN, *supra* note 376, at 256.

³⁸¹ 42 U.S.C. § 2000e-2 (2000).

³⁸² *Id.* at (a)(1).

acts of discrimination on the part of an employer.³⁸³ Disparate impact refers to facially neutral policies that disproportionately burden a protected group.³⁸⁴

Title VII came to include discrimination based on sex through an unlikely advocate. Seeking to kill Title VII, Representative Howard W. Smith (D-Va.) believed that by including a ban on sexual discrimination, Title VII would be doomed.³⁸⁵ Twenty-two years after Representative Smith's failed efforts, the Supreme Court held that sexual harassment constituted sex discrimination in violation of Title VII in *Meritor Savings Bank v. Vinson*.³⁸⁶

Congress has amended Title VII three times. The Equal Employment Opportunity Act of 1972³⁸⁷ expanded its coverage and increased the EEOC's enforcement power.³⁸⁸ Six years later the Pregnancy Discrimination Act of 1978³⁸⁹ expanded the definition of sex discrimination to include discrimination on the basis of "pregnancy, childbirth, or related medical conditions . . .".³⁹⁰ Finally, in 1991, Congress made sexual harassment "a much more serious offense in terms of employer liability."³⁹¹ Prior to the Civil Rights Act of 1991,³⁹² "Title VII only allowed a victim injunctive relief, reinstatement, or recovery of such restitution as lost wages or back pay For the first time, these amendments allowed victims of intentional sexual harassment to sue for compensatory and punitive damages resulting from their injuries."³⁹³ The total amount of damages for combined compensatory and punitive damages is based on a sliding scale tied to the size of the defendant employer.³⁹⁴

Title VII applies to all private employers with fifteen or more employees.³⁹⁵ It also applies to federal, state, and local government employers.³⁹⁶ The statute does not apply to members of the military but applies to employees or personnel in "military departments."³⁹⁷ Courts have concluded

³⁸³ See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

³⁸⁴ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

³⁸⁵ ROTHSTEIN & LIEBMAN, *supra* note 376, at 258.

³⁸⁶ 477 U.S. 57 (1986).

³⁸⁷ See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111.

³⁸⁸ ROTHSTEIN & LIEBMAN, *supra* note 376, at 259.

³⁸⁹ Pregnancy Discrimination Act of 1978, P.L. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)).

³⁹⁰ 42 U.S.C. 2000e(k) (2000). See also UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N., FACTS ABOUT PREGNANCY DISCRIMINATION (2004), <http://www.eeoc.gov/facts/fs-preg.html>.

³⁹¹ Liljegren, *supra* note 218, at 184.

³⁹² Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

³⁹³ Liljegren, *supra* note 218, at 184.

³⁹⁴ For defendants with 15 to 100 employees, the maximum is \$50,000; for 101 to 200 employees, the maximum is \$100,000; for 201 to 500 or more employees the maximum is \$300,000. 42 U.S.C. § 1981a(b)(3)(A)-(D) (2000).

³⁹⁵ 42 U.S.C. § 2000e(a) (2000).

³⁹⁶ *Id.* §2000e-16(a).

³⁹⁷ *Id.*

that the term “military departments” can be understood to include only civilian employees of the Army, Navy, and Air Force and not enlisted personnel.³⁹⁸ The reasoning is that, had Congress intended for Title VII to apply to servicemembers, it would have used the term “armed forces,” which appears in Title X.³⁹⁹ This is the logic the Tenth Circuit employed in *Corey v. United States*.⁴⁰⁰ In *Corey*, the plaintiff was an enlisted female in the Air Force.⁴⁰¹ For three years, a colonel repeatedly subjected her to a continuous pattern of sexual harassment and sexual assault.⁴⁰² The plaintiff reported several of the incidents to her lieutenant commander, but he took no action.⁴⁰³ Rather, he “attempted to cover up the incident and made threats to potential witnesses to prevent them from assisting in the investigation [against the perpetrator].”⁴⁰⁴ Plaintiff then filed a civil action, claiming sexual harassment and intentional infliction of emotional distress (IIED) and seeking compensatory and punitive damages.⁴⁰⁵

The district court dismissed the plaintiff’s sexual harassment claim, holding that “Title VII was inapplicable to uniformed military personnel.”⁴⁰⁶ The court also dismissed her IIED claim as non-justiciable under *Feres*.⁴⁰⁷ In affirming dismissal of the plaintiff’s Title VII claim, the Tenth Circuit noted:

The definitions of “military departments” and “armed forces” contained in the United States Code . . . compel the view “that the term ‘military departments’ in section 717(a) of Title VII . . . can be fairly understood to include only civilian employees of the Army, Navy, and Air Force and not both civilian employees and enlisted personnel.”⁴⁰⁸

The primary justification for this limitation again rests on the questionable military discipline rationale. The same arguments used to debunk the military discipline rationale’s justification for the *Feres* doctrine can be applied here. It is disingenuous to distinguish between the protected rights of Army civilians and Army soldiers. Each is a member of the same team. If the Army is committed to creating a true “Army of One,” or an “Army Strong,” all of its members must be afforded the same rights. Con-

³⁹⁸ See, e.g., *Gonzalez v. Dep’t of the Army*, 718 F.2d 926, 927–29 (9th Cir. 1983).

³⁹⁹ *Id.*; see also *Johnson v. Alexander*, 572 F.2d 1219, 1224 n.5 (8th Cir. 1978).

⁴⁰⁰ No. 96-6409, 1997 WL 474521, at *1 (10th Cir. 1997).

⁴⁰¹ *Id.* at *2.

⁴⁰² *Id.* at *3.

⁴⁰³ *Id.* at *4.

⁴⁰⁴ *Id.* at *2.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at *5 (citing *Gonzales v. Dep’t of Army*, 718 F.2d 926, 928 (9th Cir. 1983)).

⁴⁰⁷ *Id.* at *5.

⁴⁰⁸ *Id.* at *8; see also *Feres*, 340 U.S. 135.

gress should therefore amend § 717(a) of Title VII so that it applies to all military members and not just civilian personnel.

D. Removing Sexual Harassment Claims from the Commander's Discretion

While the previous three proposals are certainly important, they all address sexual harassment *ex post facto*. Although one could argue that all three have a modified deterrent effect, they are primarily concerned with addressing sexual harassment after it has occurred.

This final proposal aims to prevent sexual harassment from occurring in the first place. It rests on a simple theory: soldiers do not trust the current system. As Retired Lieutenant Colonel Karen Johnson, vice president of the National Organization for Women, explained to the American News Service in 1999:

More than half of women in the military don't trust their commander to act responsibly if they report sexual harassment. That is the reality. I talk to women every month who are in the military and have tried to go through the chain of command to report sexual harassment. They get penalized.⁴⁰⁹

As discussed above, the EO complaint system implemented in AR 600-20 vests enormous discretion in the commander.⁴¹⁰ Although the commander has a vested interest in the case's denouement, as a guilty finding will reflect poorly on his or her leadership ability, it is he or she who receives the initial complaint, and it is he or she who determines what, if any, disciplinary action to take. This has an impact on both the accused and accuser in a sexual harassment case. The accused is emboldened. He understands if an investigation is undertaken, his commander will likely be labeled a poor leader and may therefore be unwilling to respond to the allegation. Thus, there is no deterrent. In fact, there is the opposite. The accuser is further victimized. She does not trust the system and is often forced to suffer in silence.

The foregoing is not meant to suggest that all commanders suffer from what the Senior Review Panel refers to as the "zero defects mentality."⁴¹¹ Indeed, there are many commanders who profoundly care about their soldiers and consistently do the right thing. The point, however, is that the system is designed so that doing the right thing is often detrimental to one's career. For that reason, the system is fundamentally flawed and requires a major overhaul.

⁴⁰⁹ NELSON, *supra* note 53, at 246.

⁴¹⁰ See AR 600-20, *supra* note 24.

⁴¹¹ See SENIOR REVIEW REPORT, *supra* note 9.

The Army has long acknowledged this problem. The Senior Review Panel warned of a “lack of trust in the EO Complaint system”⁴¹² and that “lower level leaders often perceive that an EO complaint is an adverse reflection on their leadership.”⁴¹³ Even AR 600-20, the regulation that implements DoD Directive 1350.2 and delineates the EO process, tacitly recognizes the problem by stating: “Should the complainant feel uncomfortable in filing a complaint with his/her unit chain of command, or should the complaint be against a member of that chain of command, a number of alternative agencies exist through which the issues may be identified for resolution.”⁴¹⁴ Thus, though the Army acknowledges that the degree of discretion placed in the commander’s hands in matters of sexual harassment may result in a lack of trust in the entire system, it placates itself with the Panglossian view that the existence of “alternative agencies” obviates this severe shortcoming.

AR 600-20 lists eight such alternative agencies: (a) Someone in a higher echelon of the complainant’s chain of command; (b) Equal Opportunity Advisor; (c) Inspector General (“IG”); (d) Chaplain; (e) Provost Marshal (“PM”); (f) Medical agency personnel; (g) Staff Judge Advocate (“SJA”); and (h) Chief, Community Housing Referral and Relocation Services Office (“CHRRS”).⁴¹⁵ These eight “alternative agencies” have come to be viewed as a panacea to a broken system. They are nothing of the sort. There are three fundamental problems with relying upon this list as an alternative to the chain of command.

First, the most vulnerable soldiers (consider a new recruit in basic training being harassed by her Drill Sergeant) are entirely unaware of these “alternative agencies.” A new recruit knows her Drill Sergeant and her Commander; she certainly does not know who the EOA, IG, PM, SJA, or CHRRS are. Indeed, she may go her entire career without ever figuring out who these “alternative agencies” are, what they do, or where they are located. In the very unlikely scenario in which she did know of them, she probably would not have access to those individuals since drill sergeants keep tight control of recruits during basic training and advanced individual training.

Second, relying on “alternative agencies” exonerates leaders of their responsibilities. As Professor Diane Mazur argues:

Policies that encourage women to take their complaints outside the chain of command are the worst possible way to approach the problem of sexual misconduct. If we tell the military that it is incapable of preventing sexual misconduct, it will never become capa-

⁴¹² *Id.* at 46.

⁴¹³ *Id.* at 48.

⁴¹⁴ AR 600-20, *supra* note 24, at 112.

⁴¹⁵ *Id.*

ble. If we tell individual supervisors and commanders that they are incompetent to respond to women's concerns, they will remain incompetent.⁴¹⁶

Third, the assumption that soldiers who distrust the system as a whole would trust an "alternative agency" is unsubstantiated. The Senior Review Panel hit the nail on the head when it explained:

With the core EO complaint system suspect, however, even the IG and other support elements (e.g., chaplain, mental health office, staff judge advocate, criminal investigation command) are painted with the same brush and considered by some to be too aligned with the chain of command. One soldier reported that, "The chaplain is just another man in uniform."⁴¹⁷

The following three cases tragically illustrate the flaws with the current system, the naiveté in relying upon "alternative agencies," and the need for reform.

Private Dawn Stubbs was attending BCT at Fort Leonard Wood, Missouri, in December 1982.⁴¹⁸ On December 21, her drill sergeant "ordered her to the latrine for what she thought was some last minute cleaning before she left for the holiday."⁴¹⁹ Once there, Stubbs's drill sergeant sexually assaulted her and gave her an ultimatum, telling her the remainder of her time in BCT would be easy if she would have sex with him or could be made much "rougher."⁴²⁰

The next morning Stubbs left Leonard Wood to spend the holidays with her sister in Arkansas. Stubbs had been raped five years earlier, and confided in her sister that she "felt trapped" and that if "she complained, the Army would turn on her as a troublemaker."⁴²¹ The day Stubbs was scheduled to return to basic training she told her sister "she was not going back to the Army and subject herself to the sexual harassment."⁴²² She then killed herself with a shotgun.

When Stubbs's sister sought damages from the United States and the drill sergeant, alleging wrongful death by sexual harassment and emotional distress, the Eighth Circuit ruled that the *Feres* doctrine barred her FTCA cause of action.⁴²³

⁴¹⁶ Mazur, *supra* note 40, at 470.

⁴¹⁷ SENIOR REVIEW REPORT, *supra* note 9, at 48.

⁴¹⁸ *Stubbs v. United States*, 744 F.2d 58, 59 (8th Cir. 1984).

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.* at 61.

Private Alexis Colon was stationed at Fort Hood, Texas, when she was sexually harassed in April 1992.⁴²⁴ Unlike Stubbs, Colon trusted the system, at least enough to file a complaint accusing two sergeants of sexually harassing her. Her trust was misplaced, however. Two days after making her complaint, Colon's commander "accused her of sexually harassing the two sergeants and threatened her with prosecution."⁴²⁵ That day Colon "wrote a suicide note and shot herself in the heart with a .45 caliber revolver."⁴²⁶

From February 2004 through February 2005, Specialist Suzanne Swift served honorably in Iraq during the global war on terror, as have 130,000 other women since 2001.⁴²⁷ During the time of her service, she was repeatedly subjected to sexual harassment, including numerous solicitations for sexual favors by two of her superiors.⁴²⁸ Swift responded by reporting the behavior to the company's EO rep.⁴²⁹ In time, when the EO rep had failed to take any action, and fearing reprisals, Swift engaged in a sexual relationship with one of the sergeants harassing her—an act she has since labeled "a bad decision."⁴³⁰ When she terminated the relationship several months later the sergeant sought revenge. Swift was ordered to do work-outs at four in the morning, report every hour on the hour in full military gear, and wear a wall clock around her neck.⁴³¹ Swift returned to the U.S. in February 2005 and eight months later received orders for a second deployment to Iraq. Moments before departing, Swift decided she could not continue to serve an organization that had so grossly failed to protect her and risk the abuse again. She therefore went absent without official leave ("AWOL"). On June 14, 2006, Swift was arrested and returned to military control.⁴³² She will likely go to a special court martial, though, as of this writing, no date has been set.⁴³³

How many women like Private Stubbs, Private Colon, and Specialist Swift are in the Army today? How many women are being harassed but not reporting their harassment because they have lost faith in the system? How many women find the strength to report their harassment only to be ignored or to face reprisals?

The Armed Forces 2002 Sexual Harassment Survey reports that a mere thirty percent of women who had experienced sexual harassment in

⁴²⁴ Jim Doyle, *Suit in Death of Army Private*, S.F. CHRON., Sept. 16, 1993, at A9.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ St. George, *supra* note 96, at A1.

⁴²⁸ Carol Burke, *U.S. Soldier Goes AWOL—Alleges Sexual Harassment*, S.F. CHRON., Sept. 15, 2006, at A1.

⁴²⁹ St. George, *supra* note 96, at A1.

⁴³⁰ Burke, *supra* note 428, at A1.

⁴³¹ St. George, *supra* note 96, at A1.

⁴³² *Court Martial for Deployment Refuser*, ARMY TIMES, Oct. 16, 2006, at 5.

⁴³³ *Id.*

the twelve months prior to the survey reported the experience.⁴³⁴ This was down from thirty-eight percent in the 1995 survey.⁴³⁵ The five reasons the other seventy percent of female service members most frequently indicated as reasons for not reporting harassment included: “Was not important enough to report” (67%); “You took care of the problem yourself” (65%); “You felt uncomfortable making a report” (40%); “You did not think anything would be done” (33%); “You thought you would be labeled a troublemaker” (32%).⁴³⁶

In fiscal year⁴³⁷ 2001 (the year considered for the 2002 survey) there were 73,865 female soldiers in the Army.⁴³⁸ According to the 2002 survey, twenty-nine percent of these women, or 21,421 female soldiers, were sexually harassed.⁴³⁹ Seventy percent of these women, or 14,995 female soldiers, did not report their harassment.⁴⁴⁰ Out of this group of roughly 15,000 female soldiers, one out of every three did not report their harassment because they had lost faith in the system.⁴⁴¹ These numbers are intolerable. The Army can continue to proclaim “zero tolerance” of sexual harassment and tinker at the edges, but until it creates an EO system in which all soldiers have complete trust, these numbers will persist.

Establishing an EO reporting system that all soldiers can trust will have two important results. First, it will act as a deterrent to the occurrence of sexual harassment in the first place. Despite higher percentages of Army men and women experiencing sexual harassment training at any time, one out of every three female soldiers continues to be harassed. One reason is that harassers see few consequences for their behavior.

The second important result of an EO reporting system is that such a system would drastically reduce the number of false allegations of sexual harassment.⁴⁴² It is axiomatic that if women know complaints will be taken seriously they will only make serious complaints. The motives behind false

⁴³⁴ See LIPARI & LANCASTER, *supra* note 3, at 30. These figures represent an average of the four services.

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 33. Those filling out the survey could choose as many factors as applied to their situation.

⁴³⁷ Financial operations of the federal government are carried out in a twelve-month fiscal year, beginning on October 1 and ending on September 30. The fiscal year carries the date of the calendar year in which it ends. See CTR. FOR DEF. INFO., KEY TERMS RELATED TO MILITARY SPENDING, <http://www.cdi.org/issues/glossary.html> (last visited Dec. 3, 2006).

⁴³⁸ BETTY MAXFIELD, DEP'T OF ARMY, DEPUTY CHIEF OF STAFF, G-1, HUMAN RESOURCES POL'Y DIRECTORATE, ARMY DEMOGRAPHICS FY01, *available at* <http://www.armyg1.army.mil/hr/demographics/FY01ArmyProfile.ppt> (last visited Dec. 3, 2006). This figure included 10,250 commissioned officers, 788 warrant officers, and 62,827 enlisted personnel.

⁴³⁹ See LIPARI & LANCASTER, *supra* note 3, at 16.

⁴⁴⁰ *Id.* at 30.

⁴⁴¹ *Id.* at 33.

⁴⁴² For a discussion of false sexual harassment claims see Henagen, Note, *False Claims of Sexual Harassment in Education: The Path To an Appropriate Remedy for the Wrongly Accused*, 76 WASH. U. L. Q. 1431, 1432 (1998) (noting that “[f]alse accusations of sexual harassment are especially problematic for educators”).

allegations are difficult to discern.⁴⁴³ Some women make false allegations because it makes them feel empowered in an environment in which they have often felt powerless. Other women may simply act out of animus. If one views the military as a microcosm of society, it stands to reason that close to half, if not more, of the allegations are false.⁴⁴⁴

This Article therefore proposes a sweeping overhaul of the system as it pertains to sexual harassment claims. The skeleton of the EO complaint system detailed in AR 600-20 should be retained, but the actors need to change. The company level commander should be divested of authority in sexual harassment cases and replaced with the general court-martial convening authority (“GCMCA”).

Such a proposal would require the amendment of R.C.M. 306 which currently provides:

Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally.⁴⁴⁵

Congress should amend R.C.M. 306(a) to read: “A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally” *to include all claims of sexual harassment*. Under such a proposal, rather than filing a formal complaint with her chain of command within sixty days of the alleged incident, the complainant would file the complaint with the GCMCA.⁴⁴⁶ The general’s staff would be responsible for appointing an IO who would present a report to

⁴⁴³ See, e.g., *Defining Harassment: When Is a Company Liable for a Sexual Harassment Claim*, ONLINE NEWSHOUR, Apr. 30, 1998, http://www.pbs.org/newshour/forum/april98/harassment_4-30.html (quoting attorney Carol Connor Flowe as stating that “[i]n my view, much of this is the result of false allegations made by employees—usually, but not always, women—who claim sexual harassment after receiving a negative job evaluation or being discharged”).

⁴⁴⁴ By analogy, in FY 2003, the EEOC, the federal agency responsible for enforcing federal anti-discrimination statutes in the employment context, reported that out of 13,566 claims filed under Title VII alleging sexual harassment discrimination, 46.1% or 6,703 had “no reasonable cause.” UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: SEXUAL HARASSMENT CHARGES, EEOC & FEPAs COMBINED: FY 92-FY 03, <http://www.eeoc.gov/stats/harass.html> (last visited Dec. 3, 2006). In fact, the percent of unsubstantiated allegations in the Army are far greater than this figure. Although the Army only chose to publish these figures for three years, the FY04 Army Profile reports an average of 61% of sexual harassment allegations made to be false. See MAXFIELD, *supra* note 438, at 6 (noting in FY 02 39% of the 127 formal complaints made were substantiated; in FY 03 38% of the 125 formal complaints made were substantiated; and in FY 04 41% of the 119 formal complaints made were substantiated).

⁴⁴⁵ MANUAL FOR COURTS-MARTIAL, pt. II, R.C.M. 306(a) (2005 ed.).

⁴⁴⁶ AR 600-20, *supra* note 24, at 114.

the office of the SJA who would then submit it, along with his recommendation, to the GCMCA.

Under such a system, a general officer, rather than a company commander, would determine whether a claim was legitimate and, if so, what punishment to mete out. Such a system has a number of advantages over the present EO reporting system. Foremost, a general officer has a broader perspective than a company commander. He or she also does not have as strong a vested interest in a case's outcome. As Harvard professor Graham T. Allison famously noted, "where you stand depends upon where you sit."⁴⁴⁷ That is, most policy positions can be derived by looking at a person's political position within an organization. The GCMCA will stand for a system all soldiers can trust because he sits in an impartial place.

Critics may argue that if a commander is deprived of handling these issues as a company commander, he will never gain such experience. Such an argument fails on two counts. First, the purpose of the EO system is not to "prepare" commanders for future assignments but to ensure equal opportunity and just treatment for soldiers and their families. Second, a good commander will gain experience with these issues simply by being a good commander, by caring about his soldiers and by taking an active interest in their lives. He certainly does not need a tendentious, broken system to do so.

CONCLUSION

Sexual harassment is inconsistent with the Army's values of respect, honor, and integrity.⁴⁴⁸ It weakens the Army and imperils its mission. In the past ten years the Army has made remarkable strides in combating sexual harassment. Dedicated and honorable Army soldiers and leaders have worked tirelessly to promote a healthy human relations environment in which each soldier is treated with dignity and respect. Nonetheless, despite these efforts, one out of every three female soldiers continues to be sexually harassed, and much work remains before a true "Army of One" is created.

An "Army of One" as well as an "Army Strong" will be created only when all members of the Army team are treated equally and have the same rights; when an EO system in which all soldiers trust is put in place; and

⁴⁴⁷ Kathleen M. Conley, *Campaigning for Change: Organizational Process, Governmental Politics, and the Revolution in Military Affairs*, XII AIRPOWER J. 60-61 (1998) (noting that "Allison's governmental . . . politics model posits that the various players within governments take positions that will tend to enhance their power, both laterally and vertically. Because 'where you stand depends upon where you sit,' Model 3 analysis causes us to identify the channels in which an issue arises. . . .").

⁴⁴⁸ The seven Army values are loyalty, duty, respect, selfless service, honor, integrity, and personal courage; a misspelled version of leadership (L-D-R-S-H-I-P) serves as the abbreviation. See UNITED STATES ARMY, SOLDIER LIFE, available at http://www.goarmy.com/life/living_the_army_values.jsp (last visited Dec. 3, 2006).

when incidents of sexual harassment are no longer minimized or ignored. Bringing about such reforms will entail great change—change that will clearly be difficult for a conservative institution such as the Army to embrace. Nonetheless, the men and women in the Army deserve no less. For all that they sacrifice, each of us owes them our support. As Elie Wiesel remarked upon accepting the Nobel Peace Prize, “I swore never to be silent whenever and wherever human beings endure suffering and humiliation. We must always take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented. Sometimes we must interfere.”⁴⁴⁹

⁴⁴⁹ THE WORDS OF PEACE: SELECTIONS FROM THE SPEECHES OF THE WINNERS OF THE NOBEL PEACE PRIZE 105 (Irwin Abrams ed., Newmarket Press 1995).