

**Decades of Military Failures Against Sex Crimes  
Earned America's Distrust and Congressional Imposition:  
The Judge Advocate General's Corps's Newest, Most Important Mission**

*A Reflection Paper by Major David Lai\**

Undoubtedly, judge advocates are tremendously frustrated over the recent heavy-handed congressional intrusion into military justice.<sup>1</sup> The media demonization of the military is incessant. America's faith in its military seems to be only slightly better than its confidence in Congress.<sup>2</sup> Servicemembers are beyond worn from all the briefings and politics.<sup>3</sup> How did we get here? How did it get so bad?

"Until the mid-1990s, the Army was largely free of the highly publicized sexual misconduct cases that had dogged the other services."<sup>4</sup> That all changed in the fall of 1996 with the Aberdeen sex scandal.<sup>5</sup> It was "the

Army's most devastating leadership failure since the Vietnam War."<sup>6</sup> The command interviewed every female Soldier who attended basic training from 1995 to early 1997, received thousands of complaints of abuse, and preferred charges against a dozen Soldiers and officers.<sup>7</sup> Only a company commander and two drill sergeants were convicted of rape while the other eight defendants were discharged or disciplined administratively.<sup>8</sup> The court found Sergeant Delmar G. Simpson guilty of raping six junior enlisted female Soldiers and sentenced him to 25 years.<sup>9</sup>

Responding to public and congressional outrage, the Secretary of the Army formed the Senior Review Panel on Sexual Harassment (Senior Review Panel).<sup>10</sup> The Senior Review Panel found that "leadership is the fundamental issue . . . [p]assive leadership has allowed sexual harassment to persist; active leadership can bring about change to eradicate it."<sup>11</sup> However, the Army Equal Opportunity (EO) program took the core of the blame and became the scapegoat;<sup>12</sup> it was subsequently "reorganized" from the top down.<sup>13</sup> "We [now] have a

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<sup>1</sup> See e.g., Jim Michaels, *Marine Officer: Sex Assault Problem's Scope Exaggerated*, USA TODAY (July 15, 2013), <http://usat.ly/16ArZ9C>.

<sup>2</sup> See *Sexual Assault in the Military Widely Seen as Important Issue, But No Agreement on Solution*, PEW RESEARCH CENTER (June 12, 2013), <http://www.people-press.org/2013/06/12/sexual-assault-in-the-military-widely-seen-as-important-issue-but-no-agreement-on-solution/> [hereinafter Pew Research].

<sup>3</sup> See Andrew Tilghman, Hope Hodge Seck, Michelle Tan, Patricia Kime, David Larter, Steve Losey and Leo Shane III, *America's Military: A Conservative Institution's Uneasy Cultural Evolution*, MILITARY TIMES (Dec. 21, 2014), <http://www.militarytimes.com/story/military/2014/12/21/americas-military-a-conservative-militarys-cultural-evolution/18959975/>.

<sup>4</sup> Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today's Army*, 30 HARV. J.L. & GENDER 151, 159 (2007).

<sup>5</sup> "[T]he Army announced that three male trainers at the northern Maryland training base had been charged with rape, abuse and

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harassment of female soldiers under their supervision. Accusations against other soldiers followed, and the Army soon found itself in the middle of a scandal exposing rampant sex and abuse of authority among male drill sergeants and the female soldiers whose lives they virtually controlled." Jackie Spinner, *In Wake of Sex Scandal, Caution Is the Rule at Aberdeen*, WASH. POST (Nov. 7, 1997), <http://www.washingtonpost.com/wp-srv/local/longterm/library/aberdeen/caution.htm>. See MG (RET.) ROBERT D. SHADLEY, *THE GAME: UNRAVELING A MILITARY SEX SCANDAL* (2013).

<sup>6</sup> Hollywood, *supra* note 4, (quoting Claudia J. Kennedy with Malcolm McConnell, *Generally Speaking* 169 (2001)).

<sup>7</sup> Spinner, *supra* note 5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* ("I don't think you're going to find full closure on Aberdeen until this issue [concerning the legal definition of rape] is resolved," said Eugene Fidell, president of the National Institute of Military Justice.")

<sup>10</sup> U.S. DEP'T OF THE ARMY, *THE SEC. OF THE ARMY'S SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT* (1997), [http://www.dtic.mil/dtfs/doc\\_research/p18\\_13.pdf](http://www.dtic.mil/dtfs/doc_research/p18_13.pdf).

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 3. The panel found that "the Army lacks institutional commitment to the [Equal Opportunity (EO)] program and soldiers distrust the EO complaint system." *Id.* Additionally, it also recommended that the Army "[p]ublish Army Regulation (AR) 600-20, Army Command Policy, immediately and publish interim changes in a timely manner." *Id.*

<sup>13</sup> *Id.* Among its many recommendations, the Senior Review Panel sought to "[r]e-engineer the EO program from top to bottom to make it

plan on the street,” promised Colonel Herman Keizer Jr., co-chairman of the Army's human relations task force. “[T]he critical thing we have to do next is be able to say this has made a difference.”<sup>14</sup>

However, in 2004, the military suffered another series of severe setbacks.<sup>15</sup> Following the 2003 Air Force Academy sex scandal<sup>16</sup> where, as Senator Wayne Allard (R-CO) described it, “the entire support and legal system at the academy appear[ed] to have failed,”<sup>17</sup> the Department of Defense (DoD) launched another series of task forces, investigations, surveys, and further studies. The DoD Care for Victims of Sexual Assaults Task Force “found that ‘[e]xisting policies and programs aimed at preventing sexual assault were inconsistent and incomplete,’ and the lack of confidentiality available to victims in the military prevented a significant number of victims from even reporting sexual assaults.”<sup>18</sup> This resulted in the creation of the restricted reporting option and the Sexual Assault Prevention and Response (SAPR) program.<sup>19</sup>

In 2005, the DoD Task Force on Sexual Harassment and Violence at the Military Service Academies (task

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responsive to leaders and soldiers, to protect those who use it, and to ensure that those working in it are not stigmatized.” *Id.*

<sup>14</sup> Spinner, *supra* note 5.

<sup>15</sup> “In 2004, perhaps in response to public outrage, the [Department of Defense (DoD)] became serious about rethinking the current sexual assault policies, and the Secretary of Defense ordered a review of sexual assaults throughout the military.” Katherine A. Krul, *The Sexual Assault Prevention and Response (SAPR) Program—In Need of More Prevention*, 2008 ARMY LAW. 41, 42.

<sup>16</sup> Diana Jean Schemo, *Air Force Ignored Academy Abuse*, N.Y. TIMES (Sept. 23, 2003), <http://www.nytimes.com/2003/09/23/politics/23CADE.html> (“The blistering report released . . . by the commission, led by Tillie Fowler, a former congresswoman from Florida, . . . [cited] repeated warnings from the Air Force surgeon general and its Office of Special Investigations, as well as the Senate Armed Services Committee, . . . [and] concluded that ‘since at least 1993, the highest levels of Air Force leadership have known of serious sexual misconduct problems at the academy,’ but failed to take effective action. Instead, it made fitful, limited efforts to investigate the issue, but quickly dropped them.”).

<sup>17</sup> Eric Schmitt & Michael Moss, *Air Force Academy Investigated 54 Sexual Assaults in 10 Years*, N.Y. TIMES (Mar. 7, 2003), <http://www.nytimes.com/2003/03/07/us/air-force-academy-investigated-54-sexual-assaults-in-10-years.html> (“Senator Wayne Allard, Republican of Colorado, said he believed that the situation at the Air Force Academy was worse than the Tailhook scandal . . . Mr. Allard said, ‘We really do need to instill confidence in the system so victims know when they report rape they know the rape itself will not jeopardize their career.’”).

<sup>18</sup> Krul, *supra* note 15 (quoting U.S. DEP’T OF DEFENSE, TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT (2004)).

<sup>19</sup> See U.S. DEP’T OF DEFENSE, DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM (Oct. 6, 2005). See also SHARP POLICY: RESTRICTED REPORTING, [http://www.sexualassault.army.mil/Template-Policy.cfm?page=policy\\_restricted\\_unrestricted\\_reporting.cfm](http://www.sexualassault.army.mil/Template-Policy.cfm?page=policy_restricted_unrestricted_reporting.cfm).

force) published its report.<sup>20</sup> In it, the task force made a number of findings and proposals: (1) the academies need more women, both in the cadet corps and as staff and faculty, and more women in visible leadership roles; (2) “the leadership, staff, faculty, cadets and midshipmen must model behaviors that reflect and positively convey the value of women in the military;” (3) the Uniform Code of Military Justice (UCMJ) should be updated to include privileged protections between the victim and the medical and mental health care providers and victim advocates; (4) Congress should “revise the current sexual misconduct statutes to more clearly and comprehensively address the full range of sexual misconduct,” to include sexual harassment; (5) Article 32 proceedings need to be amended to better protect the privacy of victims and alleged offenders; (6) servicemembers require classes and training on sexual harassment and assault; and (7) the SAPR Program must be fully implemented to better ensure that victims are informed of and afforded their federally mandated rights.<sup>21</sup> Of the twelve appointed members on the task force who issued these recommendations, two were judge advocates: one was Brigadier General Jarris J. Sanborn of the Air Force, and the other was Major General (retired) Michael J. Nardotti Jr., The Judge Advocate General (TJAG) of the Army from 1993–97.<sup>22</sup> Following the DoD reports, the then Air Force Secretary, James G. Roche, declared that “[w]e cannot bear the thought of a criminal being commissioned . . . . We’re learning enough to realize that change must occur . . . [c]hange in the climate, change in how we manage.”<sup>23</sup>

The sexual assault and harassment problem in the respective services, and at the military academies for that matter, have unfortunately persisted. Just last year at the United States Military Academy (West Point), its rugby team was investigated and disbanded for having a hostile team environment and a culture of disrespect toward women.<sup>24</sup> Shortly after, Colonel Matthew Moten, the head of West Point’s history department, and, coincidentally, the father of Second Lieutenant Marshall Moten, a former West Point rugby player who was

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<sup>20</sup> U.S. DEP’T OF DEFENSE, REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES (June 2005) [hereinafter Report on Military Academies].

<sup>21</sup> *Id.* at ES1-ES3.

<sup>22</sup> *Id.* at iv.

<sup>23</sup> Schmitt & Moss, *supra* note 17.

<sup>24</sup> Joe Gould, *West Point Rugby Team Disbanded Over 'Inappropriate' Emails: Punishment Includes 'Respect Rehabilitation.'* ARMY TIMES (June 2, 2013), <http://www.armytimes.com/article/20130602/NEWS/306020005/West-Point-rugby-team-disbanded-over-inappropriate-emails>. See also Thomas Ricks, *What West Point Says About Why the Rugby Team Was Temporarily Disbanded*, FOREIGN POLICY (May 29, 2013), [http://ricks.foreignpolicy.com/posts/2013/05/29/what\\_west\\_point\\_says\\_about\\_why\\_the\\_rugby\\_team\\_was\\_temporarily\\_disbanded](http://ricks.foreignpolicy.com/posts/2013/05/29/what_west_point_says_about_why_the_rugby_team_was_temporarily_disbanded).

himself investigated and “one of the 15 cadets found guilty of ‘unsatisfactory behavior,’”<sup>25</sup> was formally reprimanded and resigned after an Army Regulation 15-6 inquiry over “accusations of trying to kiss and touch female subordinates and wives of subordinate officers.”<sup>26</sup>

Around the same time at West Point, Sergeant First Class (SFC) Michael McClendon was “charged with crimes for taking nude photos of female cadets without their consent, extending the military’s sex-scandal crisis to the hallowed ground of its premier training academy.”<sup>27</sup> What made this case even worse, SFC McClendon was a hand-selected, tactical Non-Commissioned Officer (NCO) charged “to be a leader for a company of cadets, . . . responsible for the health, welfare, and discipline of 125 future officers . . . [and] to establish a proper command climate within their respective companies.”<sup>28</sup> He was supposed to be “in the top 10% of the NCO Corps” in the Army.<sup>29</sup>

Sex scandals also continued to rock the other service academies. Last year, United States Naval Academy football players were investigated for the alleged sexual assault of another cadet.<sup>30</sup> One of the midshipmen was court-martialed and was later acquitted.<sup>31</sup> Charges were dropped on one of the other midshipmen over evidentiary issues; his statements were taken without him being read his Article 31 rights.<sup>32</sup> Last August, the United States Air Force Academy’s superintendent, Lieutenant General Michelle D. Johnson, initiated another investigation looking “into misconduct among student athletes and possible cover-ups by members of the athletic staff, after two Colorado newspapers reported allegations of rape,

drug use, and spiked drinks at illicit parties involving football players.”<sup>33</sup> Just this past November, one of the Air Force Academy athletics officials was caught soliciting sex from an undercover police officer and resigned.<sup>34</sup>

Sadly, all of these accounts are just a diminutive survey of the headlines from the ever expansive sexual assault and harassment history of the military.<sup>35</sup>

So, what is the point? For many of us, especially new and young judge advocates, we do not seem to understand the outrage over the military’s handling of sex crimes. Many within the military, throughout the ranks, believe

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<sup>33</sup> Dave Philipps, *Informant Debate Renewed as Air Force Revisits Cadet Misconduct*, N.Y. TIMES (Aug. 9, 2014), <http://www.nytimes.com/2014/08/10/us/informant-debate-renewed-as-air-force-revisits-cadet-misconduct.html>.

<sup>34</sup> Tom Roeder, *Air Force Academy Athletic Official Arrested in Prostitution Sting*, CO. SPRINGS GAZETTE (Nov. 19, 2014), <http://www.military.com/daily-news/2014/11/19/air-force-academy-athletic-official-arrested-prostitution-sting.html?comp=700001075741&rank=2>.

<sup>35</sup> See, e.g., Tom Vanden Brook, *Fort Hood Assault Prevention Chief Under Investigation*, USA TODAY (May 14, 2013), <http://www.usatoday.com/story/news/nation/2013/05/14/fort-hood-sexual-assault-pentagon-investigation-prostitution/2159685/>; Richard Sisk, *Two-Star Relieved in Sexual Assault Investigation*, MILITARY.COM (June 08, 2013), <http://www.military.com/daily-news/2013/06/08/army-two-star-relieved-in-sex-assault-investigation.html>; Luis Martinez, *Army’s Top Sexual Assault Prosecutor Accused of Sexual Assault*, ABC NEWS (Mar 6, 2014), <http://abcnews.go.com/blogs/politics/2014/03/armys-top-sexual-assault-prosecutor-accused-of-sexual-assault/>; Molly O’Toole, *James Wilkerson, Air Force Pilot Convicted Of Sexual Assault, Reassigned*, HUFFINGTON POST (April 8, 2013), [http://www.huffingtonpost.com/2013/04/02/james-wilkerson-air-force-sexual-assault\\_n\\_2994998.html](http://www.huffingtonpost.com/2013/04/02/james-wilkerson-air-force-sexual-assault_n_2994998.html); Jeff Black, *Marine Recruiter Charged with Sexual Assault of Teen-Aged Recruits*, NBC NEWS (Jan. 27, 2013), [http://usnews.nbcnews.com/\\_news/2013/01/27/16726962-marine-recruiter-charged-with-sexual-assault-of-teen-aged-recruits?lite](http://usnews.nbcnews.com/_news/2013/01/27/16726962-marine-recruiter-charged-with-sexual-assault-of-teen-aged-recruits?lite); *Marine Convicted of Rape Walks Without Prison Time*, MILITARY.COM (MAY 8, 2013), <http://www.military.com/daily-news/2013/05/08/marine-convicted-of-rape-walks-without-prison-time.html>; *Navy Commander Pleads Guilty To Rape, Sex Assault*, FOX NEWS (Oct. 29, 2011), <http://www.foxnews.com/us/2011/10/29/navy-commander-pleads-guilty-to-rape-sex-assault/>; Kristin Davis, *Tyndall JAG Convicted in Underage Sex Case*, ARMY TIMES (Feb. 26, 2013), <http://www.armytimes.com/article/20130226/NEWS/302260315/>; Michael Biesecker, *Ex-Army Prosecutor, Maj. Erik J. Burris, Found Guilty Of Rape At Court-Martial*, HUFFINGTON POST (Jan. 27, 2015), [http://www.huffingtonpost.com/2015/01/27/maj-erik-j-burris-guilty\\_n\\_6554228.html](http://www.huffingtonpost.com/2015/01/27/maj-erik-j-burris-guilty_n_6554228.html); *Disbarred US Army Lawyer Pleads Guilty to Forcible Sodomy with Infant - Sentenced to 37 Years in Prison*, SALEM NEWS (Jan. 7, 2011), <http://www.salem-news.com/articles/january072011/army-rape.php>; *Navy JAG attorney Sentenced for Child Porn*, NAVY TIMES (Jul. 8, 2011), <http://archive.navytimes.com/article/20110708/NEWS/107080326/>; *Navy-JAG-attorney-sentenced-child-porn; Ralston Adultery Case Shows Inequity of Air Force, Flinn Says*, L.A. TIMES (June 9, 1997), [http://articles.latimes.com/1997-06-09/news/mn-1682\\_1\\_air-force](http://articles.latimes.com/1997-06-09/news/mn-1682_1_air-force); Jane Gross, *Court Martial of Army Sergeant Major Opens on Sexual Misconduct Charges*, N.Y. TIMES (Feb. 4, 1998), <http://partners.nytimes.com/library/national/020498mckinney-sex-trial.html>; David Culver, *Air Force Officer Not Guilty in Assault Case*, NBC (Nov. 13, 2013), <http://www.nbcwashington.com/news/local/Air-Force-Officers-Battery-Trial-Moves-Forward-231743911.Html>.

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<sup>25</sup> Charles Clymer, *I Want to Apologize to West Point*, HUFFINGTON POST (Sept. 12, 2013), [http://www.huffingtonpost.com/charles-clymer/i-want-to-apologize-to-we\\_b\\_3846095.html](http://www.huffingtonpost.com/charles-clymer/i-want-to-apologize-to-we_b_3846095.html).

<sup>26</sup> *West Point Professor Quits after Investigation*, STAR & STRIPES (Sept. 10, 2013), <http://www.military.com/daily-news/2013/09/10/west-point-professor-quits-after-investigation.html>.

<sup>27</sup> Tom Vanden Brook, *Sergeant Busted for Taking Nude Photos of Cadets*, USA TODAY (May 24, 2013), <http://www.usatoday.com/story/news/nation/2013/05/22/sex-scandal-hits-west-point/2352163/>.

<sup>28</sup> *Id.* UNITED STATES MILITARY ACADEMY, WEST POINT, UNITED STATES CORPS OF CADETS TACTICAL NON-COMMISSIONED OFFICER PROGRAM, <http://www.usma.edu/g1/SitePages/TAC%20NCO%20Program.aspx>. [hereinafter USMA TAC NCO Program].

<sup>29</sup> USMA TAC NCO Program, *supra* note 28.

<sup>30</sup> Phil Stewart, *U.S. Naval Academy Football Players Investigated for Sexual Assault*, REUTERS (May 31, 2013), <http://www.reuters.com/article/2013/05/31/us-usa-military-sexualassault-idUSBRE94U17520130531>.

<sup>31</sup> Helene Cooper, *Former Naval Academy Football Player Is Acquitted of Sexual Assault*, N.Y. TIMES (Mar. 20, 2014), [http://www.nytimes.com/2014/03/21/us/former-naval-academy-football-player-is-acquitted-of-sexual-assault-charges.html?\\_r=0](http://www.nytimes.com/2014/03/21/us/former-naval-academy-football-player-is-acquitted-of-sexual-assault-charges.html?_r=0).

<sup>32</sup> *Id.*

that this is all political.<sup>36</sup> There are others who believe that the documentary, *The Invisible War*, manufactured the indignation.<sup>37</sup> Many more argue that this is not just a military problem but a greater societal crisis.<sup>38</sup> In fact,

<sup>36</sup> “[S]urvey showed some dissatisfaction with the service’s focus on sexual assault. Only about half of respondents believe sexual assault to be a ‘serious or significant’ problem in the military. About 18 percent had no opinion and 31 percent said that they do not believe it’s a significant or serious problem.” Stephen Losey, *America’s Military: A Conservative Institution’s Uneasy Cultural Evolution*, MILITARY TIMES (Dec. 21, 2014), <http://www.militarytimes.com/story/military/2014/12/21/americas-military-a-conservative-militarys-cultural-evolution/18959975/>.

<sup>37</sup> See Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129 (2014); and Mark Kermod, *The Invisible War Review – Sexual Assault within the US Military*, THE GUARDIAN (Mar. 8, 2014), <http://www.theguardian.com/film/2014/mar/09/invisible-war-review-kermod-kirby-dick>.

<sup>38</sup> See Pew Research, *supra* note 2 (“A substantial majority of Americans (81%) view sexual assault in the military as an extremely or very important issue. But the public does not believe the problem of sexual assault is a bigger problem in the military than outside it: Just 11% say it is more of a problem inside the military, 23% say it is more of a problem outside the military, while 63% say it is about the same.”). Lieutenant General Flora Darpino, Army TJAG, once said that “sexual assault is not just an Army problem, but it is a problem where the Army has a unique ability to make a difference. ‘Sexual assault is a societal problem, it is the most under-reported crime there is out there,’ she said. ‘But I feel the Army is better equipped to address this issue than a lot of the rest of society.’” C. Todd Lopez, *Women Leaders Serve as Role Models, Whether They Realize It or Not*, ARMY NEWS (Jan. 21, 2014), [http://www.army.mil/article/118716/Women\\_leaders\\_serve\\_as\\_role\\_models\\_whether\\_they\\_realize\\_it\\_or\\_not/](http://www.army.mil/article/118716/Women_leaders_serve_as_role_models_whether_they_realize_it_or_not/). See, e.g., Daniel Burke, “*Sea Change*” in *Catholic Sex Abuse Scandal*, CNN (Jun. 10, 2015) <http://www.cnn.com/2015/06/10/us/pope-vatican-bishops-sex-abuse-tribunal/index.html>; Amy O’Leary, *In Virtual Play, Sex Harassment Is All Too Real*, N.Y. TIMES (Aug. 1, 2012), [http://www.nytimes.com/2012/08/02/us/sexual-harassment-in-online-gaming-stirs-anger.html?\\_r=0](http://www.nytimes.com/2012/08/02/us/sexual-harassment-in-online-gaming-stirs-anger.html?_r=0); Kyung Lah, “*RapeLay*” Video Game Goes Viral Amid Outrage, CNN (Mar. 31, 2010), <http://www.cnn.com/2010/WORLD/asiapcf/03/30/japan.video.game.rape/index.html>; Jessica Luther, *How Football Culture Can Change Rape Culture*, THE NATION (Apr. 16, 2014), <http://www.thenation.com/article/179347/how-football-culture-can-change-rape-culture>; Jeff MacGregor, *Only the Truth will Save Us*, ESPN (Oct. 19, 2013), [http://espn.go.com/espn/story/\\_/id/9845262/society-fails-victims-sexual-assault-stigmatized](http://espn.go.com/espn/story/_/id/9845262/society-fails-victims-sexual-assault-stigmatized); Walter Moseley, *Ten Things to End Rape Culture*, THE NATION (Feb. 4, 2013), <http://www.thenation.com/article/172643/ten-things-end-rape-culture>; Tony Gonzalez, *University Confronts Culture of Sexual Violence*, USA TODAY (Sept. 8, 2013), <http://www.usatoday.com/story/news/nation/2013/09/08/university-confronts-culture-of-sexual-violence-2780705/>; Angela Carone, *Fraternity Culture Linked To College Sexual Assault Problem*, KPBS (Oct. 21, 2014), <http://www.kpbs.org/news/2014/oct/21/fraternities-and-campus-sexual-assault-problem/>; Julia Kacmarek and Elizabeth Geffre, *Rape Culture Is: Know It When You See It*, HUFFINGTON POST (June 1, 2013), [http://www.huffingtonpost.com/julia-kacmarek/rape-culture-is\\_b\\_3368577.html](http://www.huffingtonpost.com/julia-kacmarek/rape-culture-is_b_3368577.html); Rahiel Tesfamariam, *Bigger than Rick Ross: An Industry that Glorifies Rape and Drug Culture*, WASH. POST (Mar. 29, 2013), [http://www.washingtonpost.com/blogs/therootdc/post/ric-ross-uoeno-glorifying-rape-and-drug-culture/2013/03/28/2ce16392-97d0-11e2-97cd-3d8c1afe40f\\_blog.html](http://www.washingtonpost.com/blogs/therootdc/post/ric-ross-uoeno-glorifying-rape-and-drug-culture/2013/03/28/2ce16392-97d0-11e2-97cd-3d8c1afe40f_blog.html); Todd Leopold and Ben Brumfield, *Rape Allegations Haunt Bill Cosby in the Digital Age*, CNN (Nov. 15, 2014), <http://www.cnn.com/2014/11/14/showbiz/tv/bill-cosby-rape-allegations/index.html>; and Ken Rudin, *Congressional Sex Scandals in History*, WASH. POST (1998), <http://www.washingtonpost.com/wp-srv/politics/special/clinton/congress.htm>.

many military prosecutors contend that we are better at prosecuting and try proportionally more sex crime cases than our civilian counterparts.<sup>39</sup> This military shaming is largely unwarranted,<sup>40</sup> and congressmen, who are not versed in and do not practice military justice, should not meddle in the military’s “specialized community governed by a separate discipline from that of the civilian.”<sup>41</sup> But, while these counterarguments defending the military are probably true to an extent, have we not, considering our soiled history over the past two decades, earned America’s distrust and the congressional imposition to some degree? So many promises and commitments have been unkept, recommendations unheeded, initiatives half-baked and unresourced, victims unsupported and alienated, cases untried or lost.<sup>42</sup> Would the military, or

<sup>39</sup> “The Judge Advocate General of the Army described seventy-nine cases where Army commanders chose to prosecute off-post offenses after civilians declined to prosecute or could not prosecute. She said the cases demonstrated that ‘Army commanders are willing to pursue difficult cases to serve the interests of both the victims and our community.’” REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, 129 (June 2005), *available at* [http://responsesystemspanel.whs.mil/Public/docs/Reports/00\\_Final/RSP\\_Report\\_Final\\_20140627.pdf](http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf). “[C]ivilian jurisdictions face under-reporting challenges similar to those of the military. Further, it is not clear that the criminal justice response in civilian jurisdictions—where prosecutorial decisions are supervised by elected or appointed lawyers—are any more effective at encouraging reporting of sexual assaults, or investigating and prosecuting these assaults when they are reported.” *Id.* at 167. “When the same criteria are used for calculation of prosecution and conviction rates, the military justice system’s rates are comparable to major civilian prosecution entities for the same types of offenses.” Lisa M. Schenck, *Article: Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579, 582 (2014). See also, e.g., Ailsa Chang, *In the Bronx, Victims Get 24 Hours to Talk--Or the DA Lets the Accused Walk*, WNYC (Aug. 21, 2012), <http://www.wnyc.org/story/231114-bronx-da/>.

<sup>40</sup> Per Pew Research, “[j]ust 11% [surveyed] say sexual assault is more of a problem in the military than outside it; twice as many (23%) think it is more of a problem outside of the armed forces, while 63% say it is about the same in and out of the military.” Pew Research, *supra* note 2. See also, Michaels, *supra* note 1 (“Capt. Rodman, assigned to Pentagon as a lawyer, worries Draconian ‘solutions’ will only make things worse.”).

<sup>41</sup> *Parker v. Levy*, 417 U.S. 733, 787 (1974) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)). “About half of Americans (52%) have a great deal or fair amount of confidence that military leaders will make the right decisions when it comes to the problem of sexual assault in the military, but just 36% express at least a fair amount of confidence in Congress on this issue.” Pew Research, *supra* note 2.

<sup>42</sup> “The Pentagon has spent decades trying to rid its ranks of sexual predators—and encouraging victims to come forward—but progress has been slow. . . . Sen. Kirsten Gillibrand, D-N.Y., said, ‘There is no other mission in the world for our military where this much failure would be allowed.’ . . . That’s slowly changing, with the emphasis on *slowly*.” Mark Thompson, *Military’s War on Sexual Assault Proves Slow Going*, TIME (Dec. 4, 2014), <http://time.com/3618348/pentagon-sexual-assault-military/>. “‘There have been indications of real progress,’ Defense Secretary Chuck Hagel said . . . , but ‘we still have a long way to go.’” *Id.* “General Ray Odierno, the Army chief of staff, fired a volley at his troops on the subject. ‘The Army is failing in its efforts to combat sexual assault and sexual harassment,’ Odierno said in a written message. ‘It is up to every one of us, civilian and Soldier, general officer to private, to solve this problem within our ranks.’” Mark Thompson, *The Roots of*

the Judge Advocate General Corps (JAG Corps), for that matter, have made any changes without public anger and congressional commandment?<sup>43</sup>

To the American public, the military has not been at the forefront, leading the charge against sexual harassment and violence.<sup>44</sup> We have been reactionary. We respond under pressure, every decade or so, after another sex scandal and public outcry. Each time, we conduct another task force that makes nearly identical recommendations.<sup>45</sup> The 2005 report by the task force that investigated the military academies specifically identified problems and made recommendations regarding the Military Rules of Evidence (MRE) 513 privileges and Article 32 proceedings that are similar, if not identical, to the changes Congress is now demanding.<sup>46</sup> These were proposals endorsed by the Army's TJAG nearly a decade ago.<sup>47</sup>

No one has made the claim, but we, as judge advocates in the field and at the frontlines of this invisible war, bear a significant share of the responsibility for the military's failures. We advise commanders. In many ways, we are equally responsible for the victims. We prosecute and defend cases. However, we have not taken the lead on the issue until recently. Why do so many victims of sexual assault in the military feel so revictimized by our military justice process?<sup>48</sup> Did trial counsels fail in their duty to

serve and protect their victims? Do judge advocates, as prosecutors for the armed forces, even see that as one of their duties? Why were the Victim Witness Liaisons (VWL) ineffective?<sup>49</sup> Did we take the VWL program seriously? Did we sufficiently train, resource, and stress its importance? Why did commanders fail to see that sex crimes are at intolerable levels in the military? Did we not recognize it ourselves, or, if we did, why had we kept silent and let commanders fail? Surely, it is commanders' duty and responsibility to govern, but do we not have an equal responsibility to lead the way and help perpetuate change? Whatever the answers are, we have, as judge advocates and military justice practitioners, taken on the burden of change. Congress has assigned the mission to us. Our leadership has declared their commitment and issued our marching orders.<sup>50</sup> Regardless of whether the forced changes are good or otherwise, the failure is now ours.

As history has shown, the military comes under scrutiny about every decade for the same issue, and each time someone takes the blame. The Army EO program was reorganized in the nineties. Then, SAPR was criticized in the 2000s. The JAG Corps is now squarely in the crosshairs. If we fail to lead the military out of this persistent cycle of the same problem, the JAG Corps may very well carry the blame at the next outbreak of sex scandals.

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*Sexual Abuse in the Military*, TIME (May 17, 2013), <http://nation.time.com/2013/05/17/the-roots-of-sexual-abuse-in-the-military/> [hereinafter *The Roots of Sexual Abuse*].

<sup>43</sup> In a letter to Senator Gillibrand, "Lieutenant General Claudia Kennedy, the first woman to reach the rank of three-star general, . . . [declared that] '[h]aving served in leadership positions in the US army, I have concluded that if military leadership hasn't fixed the problem in my lifetime, it's not going to be fixed without a change to the status quo.'" Karen McVeigh, *Senator Kirsten Gillibrand Gains Support for Army Sexual Assault Reform*, THE GUARDIAN (Sept. 24, 2013), <http://www.theguardian.com/world/2013/sep/24/generals-kirsten-gillibrand-army-sexual-assault>.

<sup>44</sup> See generally Liz Halloran, *Stunned by Military Sex Scandals, Advocates Demand Changes*, NPR (May 25, 2013), <http://www.npr.org/2013/05/23/186335999/stunned-by-military-sex-scandals-advocates-demand-changes>.

<sup>45</sup> See, e.g., Ashley Rowland, *Report Underscores Army's Ineffectiveness to Prevent Sexual Assaults in Korea*, STARS & STRIPES (May 21, 2013) ("The Eighth Army's Prevention of Sexual Assault Task Force was formed in 2011 to assess the climate in South Korea regarding sexual assault among soldiers and the effectiveness of the Army's current programs . . . . However, nearly two years later, Eighth Army officials say that the report has yet to be finalized and approved by leadership."). Interestingly, among its draft findings and recommendations, this task force reportedly found that "[t]here was a lack of female unit victim advocates at small, predominantly male installations . . . . The report also noted that most commanders did not understand the role and responsibility of unit victim advocates." *Id.*

<sup>46</sup> See Report on Military Academies, *supra* note 20.

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

<sup>48</sup> See generally Karisa King, *In Cases of Military Sexual Assault, Victims Are Victimized Twice*, BUSINESS INSIDER (May 25, 2013),

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<http://www.businessinsider.com/in-cases-of-military-sexual-assault-victims-are-victimized-twice-2013-5#ixzz3QZRLMbUV>.

<sup>49</sup> See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 17-7 (2 Oct. 2011).

<sup>50</sup> "[President] Obama said curbing sexual assault in the ranks will require 'putting our best people on this challenge.'" *The Roots of Sexual Abuse*, *supra* note 42. "If I do not see the kind of progress I expect, then we will consider additional reforms that may be required to eliminate this crime from our military ranks and protect our brave service members who stand guard for us every day at home and around the world." White House Press Release, President Barack Obama, Statement by the President on Eliminating Sexual Assault in the Armed Forces (Dec. 20, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/20/statement-president-eliminating-sexual-assault-armed-forces>. "[General] Odierno said 'it is time we take on the fight against sexual assault and sexual harassment as our primary mission.'" *The Roots of Sexual Abuse*, *supra* note 42. See also Memorandum from Lieutenant General Flora D. Darpino, The Judge Advocate General, to Judge Advocate Legal Services Personnel, subject: Special Victims Counsel (1 Nov. 2013), available at [http://jpp.whs.mil/Public/docs/RFI/Set\\_1/Encl13-25/RFI\\_Enclosure\\_Q16\\_USA.pdf](http://jpp.whs.mil/Public/docs/RFI/Set_1/Encl13-25/RFI_Enclosure_Q16_USA.pdf).

Now, it is, more than ever, conceivable that military justice may be stripped to its bones and civilianized.<sup>51</sup> By that point, one of the JAG Corps's main mandate may be nevermore, and our core mission (and our own careers) may lose relevancy. If we, as trial and defense counsels, as Chiefs of Justice and Senior Defense Counsels, as Special Victims Counsel (SVC), and legal assistance attorneys, cannot continue to demonstrate successful and just prosecutions, or if victims remain unsatisfied despite our efforts, the next public and congressional explosion will surely be targeted directly at us.

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<sup>51</sup> See generally Murphy, *supra* note 37.