

**SEXUAL ASSAULT PREVENTION: REFRAMING THE COAST
GUARD PERSPECTIVE TO ADDRESS THE LOWEST LEVEL
OF THE SEXUAL VIOLENCE CONTINUUM—SEXUAL
HARASSMENT**

LIEUTENANT COMMANDER BRYAN R. BLACKMORE*

We get it. We know that the larger issue is a cultural problem, which has allowed demeaning behavior and attitudes towards women to exist within the Navy Department. Our senior leadership is totally committed to confronting this problem and demonstrating that sexual harassment will not be tolerated. Those who don't get the message will be driven from our ranks.

—Acting Navy Secretary Sean O'Keefe¹

In my view, all this stuff is connected. If we're going to get serious about things like sexual assault, we have to get serious about an environment that could lead to sexual harassment. In some ways, this stuff can all be linked.

—Gen. Mark A. Welsh III, Air Force Chief of Staff²

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¹ Melissa Healy, *Pentagon Blasts Tailhook Probe, Two Admirals Resign*, L.A. TIMES, Sept. 25, 1992, http://articles.latimes.com/1992-09-25/news/mn-1182_1_investigative-service/2.

I. Introduction

He was the “cool” Chief. He was the most approachable senior enlisted on the cutter. He let the junior enlisted come into the ship’s office where he would listen to them vent about life on a cutter. He offered them career advice. He played cards with them on the messdeck. He earned the complete trust of the crew. He also earned the trust of the command; he was the Executive Officer’s trusted assistant, ably handling all administrative matters on the cutter and earning a selection on the Chief Warrant Officer list.³

Chief became especially close to two junior enlisted females. The first female (Female 1), a junior petty officer, would come to his office regularly and discuss life with Chief. She told him all about her boyfriend, who was on another cutter. He provided her updates on his A-school status.⁴ Chief would also refer to her as his “boo” and call her “babe.” The other female (Female 2), a seaman,⁵ would also come to his office and hang out. Chief identified with her because they were both from the same hometown. They often talked about home; she sought career advice from him; and he updated her on her A-school status. He did not call her “boo,” but he did call her by her nickname, a shortened version of her last name.

During one patrol, Chief saw Female 1 in a bikini during a port call. He made a point of telling her that she looked really good in her bikini and that he really liked the pink bottom. She thought nothing of the comment at the time. During another port call a month later, and after most of the crew had consumed alcohol, Chief called her to his office. She thought Chief was going to update her on her boyfriend’s A-school status. Instead, Chief locked the door, sat on her lap and tried to kiss her.

² Becky Iannotta, *Air Force-wide Inspections Begin Today*, A.F. TIMES, Dec. 5, 2012, <http://www.airforcetimes.com/article/20121205/NEWS/212050303/Air-Force-wide-inspections-begin-today>.

³ *United States v. Hughey*, 72 M.J. 809 (C.G. Ct. Crim. App. 2011). The author was detailed as Trial Counsel in the general court-martial of Yeoman Chief Petty Officer (YNC) Hughey, and the case’s facts are based upon the author’s knowledge of the case.

⁴ A-school refers to the school that prepares Coast Guard members in the pay grade of E-3 to function as Third Class Petty Officers in their chosen rating. *See* U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1500.10C, PERFORMANCE, TRAINING AND EDUCATION MANUAL art. 7.F.1 (May 2009).

⁵ A Seaman in the Coast Guard has a pay grade of E-3. *See* U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1000.2, ENLISTED ACCESSIONS, EVALUATIONS, AND ADVANCEMENTS art. 2.B (Sept. 2011).

She resisted and reminded him that she had a boyfriend. She was able to get up, but Chief then pinned her up against the printer and rubbed himself against her. She continued to resist, and Chief finally relented. Before she was able to leave, he insisted that she tell him that they were still friends. She left the ship's office that night and did not report the incident.

At the next port call, Chief got really intoxicated. Most of the crew congregated at one bar shore-side. Chief made his way to a table of junior enlisted females. He sat down, leaned over, and rubbed the leg of a female Seaman sitting next to him. She slapped his hand away; Chief called her a "bitch."

Chief ended up at another table sitting next to another female junior petty officer. He rubbed her leg and told her she was beautiful; she rebuffed him and Chief left the table. Chief walked away and proceeded to hit on another junior enlisted female, telling her she looked "fine tonight" and that she was a "sexy Russian." She told him he was being inappropriate.

Chief was later seen grinding on other females on the dance floor. While dancing with one female petty officer, Chief told her to "get on my dick" and also said to her "damn, look at that ass." Another female petty officer reported Chief grabbed her butt on the dance floor. On the way back to the cutter that night with other crewmembers, he asked one female petty officer where her rack was located. She also told him that was inappropriate. Chief replied he was untouchable, he handled the "captains masts," and he would not get in trouble.

Later that night, Chief went to the rack of Female 2 and sexually assaulted her. The next day she was in shock and did not report the sexual assault to the command. Chief came to her rack the next night and sexually assaulted her again, accusing her of leading him on and kissing on him on the dance floor the night before. She woke up the next morning and reported both sexual assaults to a shipmate. She eventually spoke with Female 1 and learned that Chief sexually assaulted her during a previous port call.

Chief was tried by a general court-martial and convicted by a panel of members of one specification of Aggravated Sexual Contact and three specifications of Wrongful Sexual Contact, in violation of Article 120 of

the Uniform Code of Military Justice (UCMJ).⁶ He was also convicted of multiple specifications of Assault Consummated by Battery, in violation of Article 128 UCMJ;⁷ one specification of Housebreaking, in violation of Article 130; and two specifications of Unlawful Entry, one specification of Statements to the Prejudice of Good Order and Discipline in the Armed Forces, and one specification of Drunk and Disorderly Conduct, all in violation of Article 134.⁸ Chief was also charged with three specifications of Maltreatment, Article 93, based on his “get on my dick,” “damn, look at that ass,” and “sexy Russian” comments, as well as the comments about Female 1’s bikini. The panel found him not guilty of these specifications.

The armed forces receive harsh criticism daily from every direction because of the number of sexual assaults occurring within its ranks.⁹ Congress made significant changes to the UCMJ in the National Defense Authorization Act (NDAA) for Fiscal Year 2014,¹⁰ to include revising the Article 32 process,¹¹ limiting a convening authority’s ability to modify the findings and sentence of a court-martial,¹² allowing a victim to submit matters to a convening authority before the convening authority takes action on a court-martial,¹³ and mandating discharge or dismissal for members found guilty of sex-related offenses.¹⁴

The contemporary U.S. military culture has been cited as the source of the military sexual assault problem.¹⁵ In response, the Coast Guard, like the other services, has formulated a Sexual Assault Prevention and Response (SAPR) Strategic Plan to eradicate military sexual assaults.¹⁶

⁶ *Hughey*, 72 M.J. at 810.

⁷ *Id.* Specifically, Chief was convicted of three specifications of Assault Consummated by Battery and one specification of Simple Assault. *Id.*

⁸ *Id.* at 810–11.

⁹ See Lorelei Laird, *Military Lawyers Confront Changes as Sexual Assault Becomes Big News*, ABA J. MAG., Sept. 1, 2013, http://www.abajournal.com/magazine/article/military_lawyers_confront_changes_as_sexual_assault_becomes_big_news.

¹⁰ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 511 (2013).

¹¹ *Id.* § 1702.

¹² *Id.*

¹³ *Id.* § 1706.

¹⁴ *Id.* § 1705.

¹⁵ Captain Megan Schmid, Comment, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 478 (2010).

¹⁶ See All Coast Guard Message, 197/13, 062012Z May 13, Commandant, U.S. Coast Guard, subject: The Coast Guard Sexual Assault Prevention and Response (SAPR) Strategic Plan.

All of the services have attempted to address sexual assault through training and providing more robust services and protections to victims, with the hope of changing each service's culture. But with the exception of the Army, the services fail to explicitly address sexual harassment as an enabler of sexual assault in their SAPR policies and training.¹⁷

Admiral Papp, Commandant of the Coast Guard, stated in his Commander's Intent that the Coast Guard shall "[c]reate a culture intolerant of sexual assault or behaviors that enable it."¹⁸ The general court-martial of Chief Hughey¹⁹ exemplifies how sexual harassment can lead to, or enable, sexual assault. Many aspects of Chief Hughey's behavior constituted sexual harassment, but he was left unchecked and his acts of sexual harassment became acts of sexual assault. Sexual harassment is normally viewed as a form of employment discrimination,²⁰ which the Coast Guard recognizes.²¹ But the Coast Guard fails to recognize that sexual harassment is a form of sexual violence that enables sexual assault.²² Sexual harassment is a part of the sexual-violence continuum, a continuum that ends with sexual assault.²³

This article advocates for the Coast Guard to reframe the perspective in which it views and addresses sexual harassment to comprehensively prevent sexual assault. A comprehensive campaign to combat military sexual assault must include reframing the perspective through which the

¹⁷ See U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2012 vol. 1, encl. 1, at 1 (May 3, 2013), available at http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf. The cornerstone of the Army's sexual assault prevention strategy is the "I. A.M. Strong" Sexual Assault Prevention Campaign. Noting that sexual harassment may set a foundation for sexual violence, the Army's prevention strategy combines the Sexual Assault Prevention and Response (SAPR) Program with the Prevention of Sexual Harassment (POSH) effort and response to military sexual harassment incidents. The result is an overarching program called Sexual Harassment/Assault Response and Prevention (SHARP). *Id.*

¹⁸ All Coast Guard Message, 244/13, 311402Z May 13, Commandant, United States Coast Guard, subject: Commander's Intent Campaign to Eliminate Sexual Assault from the Coast Guard.

¹⁹ See *United States v. Hughey*, 72 M.J. 809, 810 (C.G. Ct. Crim. App. 2013).

²⁰ See 42 U.S.C. § 2000e-2 (2013).

²¹ U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 5350.4C, COAST GUARD CIVIL RIGHTS MANUAL art. 2.C.2.a (May 2010) [hereinafter COMDTINST 5350.4C].

²² See, e.g., *id.* art. 3.B.2.b (stating that sexual harassment is not sexual assault).

²³ See *Continuum of Sexual Aggression*, NAT'L CTR. ON DOMESTIC AND SEXUAL VIOLENCE, <http://www.ncdsv.org/images/att9selectedappendixcontinuumsexualaggression.pdf> (Mar. 12, 2014).

Coast Guard views sexual harassment, dispensing with the notion that sexual harassment and sexual assault are separate and distinct concepts. Rather than continuing to address sexual harassment as primarily a discrimination issue and sexual assault as criminal conduct, the Coast Guard needs to recognize the connection between the two and must address sexual harassment and sexual assault as part of a continuum of sexual violence. This requires re-evaluating Coast Guard sexual-harassment and sexual-assault policies and training; recognizing that sexual harassment has been, and continues to be, a pervasive problem; understanding the relationship between sexual harassment, organizational climate, and sexual assault; and integrating sexual harassment and sexual assault prevention efforts to maximize unity of effort. Ultimately, efforts to prevent sexual assault must include directly addressing behaviors found at the lower end of the sexual-violence continuum, starting with the enabling offense of sexual harassment.

Part II of this article details the legal background and Coast Guard definition of sexual harassment. Part III details the history and extent of the sexual harassment problem in the military, focusing on reports by the Government Accountability Office (GAO) that assess the levels of, and issues associated with, sexual harassment at the service academies and within the Department of Defense (DoD). Part IV analyzes the relationship among sexual harassment, organizational climate, and sexual assault, to include summarizing the statistics, reframing the perspective to look at the full sexual-violence continuum, and identifying research that both highlights sexual harassment as a precursor to sexual assault and evaluates the effect of organizational climate on the prevalence of sexual harassment and sexual assault. Part V examines Coast Guard sexual harassment policies and training, identifies an artificial distinction between sexual harassment and sexual assault inherent in Coast Guard policies and training, and provides recommendations to update policies and training to reflect the reality of the relationship between sexual harassment and sexual assault. Part VI summarizes the Coast Guard's SAPR Strategic Plan and the establishment of the Coast Guard SAPR Military Campaign Office (SAPR MCO), details the Plan's absence of sexual harassment and its relationship to sexual assault, argues that culture change must include directly addressing sexual harassment in the service's strategic planning, and recommends studying the Army's Sexual Harassment/Assault Response and Prevention Program (SHARP)²⁴ as a model for strategic integration of the Coast Guard's

²⁴ See *supra* note 17.

sexual harassment and sexual assault prevention efforts. Finally, Part VII urges elimination of the sexual harassment discrimination/sexual assault misconduct dichotomy currently present in Coast Guard policies and adoption of the sexual-violence continuum as the conceptual model for addressing sexual harassment and sexual assault as the transformational change necessary to eliminate sexual assault. This section concludes by summarizing the short- and long-term recommendations to effectuate this transformational change.

II. Sexual Harassment Legal Background and Definition

A. Sexual Harassment Legal Background

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²⁵ In 1986, the Supreme Court held that sexual harassment in the workplace constitutes actionable sex discrimination under Title VII.²⁶ Title VII does not explicitly extend these protections to the military,²⁷ but Coast Guard policy is “to apply the same protections to its military workforce.”²⁸ Despite the Coast Guard’s efforts to extend Title VII protections to its military members, the *Feres* doctrine bars military members from seeking legal remedies for Title VII violations.²⁹

²⁵ 42 U.S.C.A. § 2000e-2 (2013).

²⁶ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

²⁷ *See Hodge v. Dalton*, 107 F.3d 705 (9th Cir. 1997); *Randall v. United States*, 95 F.3d 339 (4th Cir. 1996); *Spain v. Ball*, 928 F.2d 61 (2d Cir. 1991); *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987); *Gonzalez v. Dep’t of the Army*, 718 F.2d 926 (9th Cir. 1983); *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978).

²⁸ COMDTINST M5350.4C, *supra* note 21, art. 2.C.2.a.

²⁹ *See Feres v. United States*, 340 U.S. 135 (1950) (holding that the government is not liable under the Federal Tort Claims Act for injuries to military members arising out of or in the course of activity incident to service).

B. Sexual Harassment Definition

The Coast Guard Civil Rights Manual provides the service's definition of sexual harassment.³⁰ Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made either implicitly or explicitly a term or condition of employment; or
2. Submission to or rejection of such conduct is used as a basis for employment decisions; or
3. 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.
4. This definition also encompasses unwelcome display or communication of sexually offensive materials.³¹

The Civil Rights Manual further delineates sexual harassment into two categories. The first category, tangible employment action, involves sexual harassment by a supervisor when it results in a personnel action.³² Tangible employment actions must be official actions, and include actions such as hiring, firing, promotion or failure to promote, demotion, undesirable assignment, or significant changes in benefits or pay.³³ The second category, hostile environment, encompasses all other situations that fall within the definition of sexual harassment.³⁴ The offender in hostile work environment claim may be a supervisor or coworker.³⁵ The harassment must be so severe and pervasive that a reasonable person would view the environment as hostile, offensive, or abusive.³⁶

³⁰ COMDINST M5390.4C, *supra* note 21, art. 2.C.2.b.

³¹ *Id.* The Department of Defense (DoD) uses the same definition of sexual harassment. U.S. DEP'T OF DEF., DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (MEO) PROGRAM encl. 2, para. E.2.1.15 (21 Nov. 2003).

³² COMDTINST M5350.4C, *supra* note 21, art. 2.C.2.c.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

In general, sexual harassment ranges from overt behaviors, to include inappropriate touching, to subtle behaviors, such as making suggestive remarks.³⁷ Furthermore, any behavior that relates to sex and is intentional or repeated, unwelcome, and interferes with a member's ability to work, or has an effect on a member's working conditions, may be sexual harassment.³⁸ Specific types of sexually harassing behavior include gender harassment, seductive behavior, sexual bribery, sexual coercion, and sexual imposition.³⁹

Gender harassment consists of sexist statements and behaviors that convey degrading attitudes based upon sex.⁴⁰ Seductive behavior is any unwanted, inappropriate, and offensive sexual advance.⁴¹ Examples include repeated and unwanted requests for dates, repeated and unwanted sexual invitations, and touching in a way that makes a person uncomfortable.⁴² Sexual bribery is the solicitation of sexual activity or other sex-related behavior in return for a reward.⁴³ Sexual coercion is also known as quid pro quo behavior; it is coercion of sexual activity by the threat of unfavorable action, such as a demotion, the failure to promote, or a negative performance appraisal.⁴⁴ Finally, sexual imposition involves uninvited physical violation or sexual assault.⁴⁵

III. The History and Extent of the Sexual Harassment Problem

A. The Problem Is Not New

Sexual harassment in the military is not a new problem. The mention of sexual harassment in the military conjures up images of the

³⁷ *Id.* art. 2.C.2.d.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Navy Tailhook scandal in 1991⁴⁶ and the sexual harassment and rape of Army female trainees at Aberdeen Proving Ground in 1996.⁴⁷ More recently, a single report of sexual harassment exploded into a full-blown sexual harassment and sexual assault scandal in the Air Force's basic training operations at Lackland Air Force Base in 2011.⁴⁸

Multiple sexual harassment incidents at the Naval Academy in 1989 and 1990, including a female midshipman being handcuffed to a men's room urinal and then being photographed by her male attackers, prompted increased congressional interest in the extent of sexual harassment at the service academies.⁴⁹ This interest prompted what would become the first of multiple GAO⁵⁰ reviews of sexual harassment

⁴⁶ See Michael R. Gordon, *Pentagon Report Tells of Aviators' 'Debauchery'*, N.Y. TIMES, Apr. 24, 1993, <http://www.nytimes.com/1993/04/24/us/pentagon-report-tells-of-aviators-debauchery.html>. A DoD inspector general's report found that as many as 83 women were sexually assaulted or harassed and that 140 service members engaged in improper behavior during the convention. Richard Serrano, *33 Top Officers Disciplined in Tailhook Case*, L.A. TIMES, Oct. 16, 1993, http://articles.latimes.com/1993-10-16/news/mn-46397_1_other-top-officers. "The activities ranged from attacking women along a hallway 'gauntlet' at the Las Vegas Hilton, to other incidents of crude nudity and indecent exposure." *Id.* Three admirals were censured and 30 other top-ranking officers received reprimands for failing to stop or report sexual assaults or harassment that occurred while they were attending the Tailhook Association's 1991 convention in Las Vegas. *Id.*

⁴⁷ See Tim Weiner, *One Sergeant Pleads Guilty as Army Widens Sex Inquiry*, N.Y. TIMES, Nov. 13, 1996, <http://www.nytimes.com/1996/11/13/us/one-sergeant-pleads-guilty-as-army-widens-sex-inquiry.html>.

The Aberdeen scandal was a military sex scandal in 1996 at Aberdeen Proving Ground, a U.S. Army post in Maryland. The Army brought charges against twelve instructors Nearly fifty women made sexual-abuse charges, including twenty-six rape accusations. One instructor was cleared. The remaining eleven were either convicted at court-martial or punished administratively.

The List: Military Scandals, WASH. TIMES, Jan. 8, 2011, <http://www.washingtontimes.com/news/2011/jan/8/list-military-scandals>.

⁴⁸ See Craig Whitlock, *Air Force Investigates Growing Sex Abuse Scandal*, WASH. POST, June 28, 2012, http://articles.washingtonpost.com/2012-06-28/news/35461886_1_sexual-misconduct-sexual-assault-female-recruits. One single complaint made in 2011 led to an investigation resulting in a dozen male drill instructors suspected of abusing, harassing, having sex, with or sexual assaulting female recruits. *Id.*

⁴⁹ U.S. GEN. ACCOUNTING OFFICE, DOD SERVICE ACADEMIES: MORE ACTIONS NEEDED TO ELIMINATE SEXUAL HARASSMENT 2 (Jan. 1994) [hereinafter 1994 GAO REP.].

⁵⁰ The General Accounting Office changed its legal name to the Government Accountability Office in 1994. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (2004).

at the service academies. From 1994 to 2007, the GAO conducted three reviews of sexual harassment at the service academies.⁵¹ In 2011, GAO expanded its review to include the DoD's sexual harassment prevention efforts.⁵²

In 1994, the GAO conducted a survey at the service academies and found sexual harassment was both prevalent and underreported.⁵³ During academic year 1991, between 93 and 97 percent of academy women reported experiencing at least one form of sexual harassment, with approximately 50 to 75 percent experiencing at least one form of sexual harassment on a recurring basis. Despite these numbers, there were only twenty-six formal reports of sexual harassment.⁵⁴

A year later, the GAO updated its 1994 report on sexual harassment at the service academies.⁵⁵ Specifically the GAO conducted a follow-up survey at the academies during academic year 1993–94, adding a question on sexual harassment using the wording of the DoD definition of sexual harassment in 1988.⁵⁶ This new question focused on more overt, physical forms of sexual harassment in addition to the verbal forms.⁵⁷ The responses indicated between 36 percent and 42 percent of academy women at least once or twice over the year had experienced physical, gender-related behavior that interfered with their performance, created a hostile environment, or was unwelcome, deliberate physical contact of a sexual nature.⁵⁸ Approximately 11 percent to 22 percent of academy women indicated experiencing *quid pro quo* sexual harassment.⁵⁹

⁵¹ See 1994 GAO REP., *supra* note 49; U.S. GEN. ACCOUNTING OFFICE, DOD SERVICE ACADEMIES: UPDATE ON EXTENT OF SEXUAL HARASSMENT 3 (Mar. 1995) [hereinafter 1995 GAO REP.]; U.S. GEN. ACCOUNTING OFFICE, MILITARY PERSONNEL: THE DoD AND COAST GUARD ACADEMIES HAVE TAKEN STEPS TO ADDRESS INCIDENTS OF SEXUAL HARASSMENT AND ASSAULT, BUT GREATER FEDERAL OVERSIGHT IS NEEDED 2 (Jan. 2008) [hereinafter 2008 GAO REP.].

⁵² See U.S. GEN. ACCOUNTING OFFICE, PREVENTING SEXUAL HARASSMENT: DOD NEEDS GREATER LEADERSHIP COMMITMENT AND AN OVERSIGHT FRAMEWORK (Sept. 2011) [hereinafter 2011 GAO REP.].

⁵³ 1994 GAO REP., *supra* note 49, at 2.

⁵⁴ *Id.* at 20–26.

⁵⁵ 1995 GAO REP., *supra* note 51, at 3.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 28. Two to six percent of academy women indicated experiencing this behavior a couple times a month or more often. *Id.*

⁵⁹ *Id.* at 29. One to 4 percent of academy women indicated experiencing this *quid pro quo* harassment at least a couple times a month. *Id.*

In 2007, twelve years after its last report on sexual harassment at the service academies, the GAO conducted a third review of sexual harassment and assault programs at the academies.⁶⁰ In this review, the GAO evaluated the academies' programs to prevent, respond to, and resolve sexual harassment and assault cases; the academies' visibility of sexual harassment and assault incidents; and DoD and Coast Guard oversight of the academies' sexual harassment and assault programs.⁶¹ With respect to the academies' visibility of sexual harassment and assault incidents, the GAO's conclusions were not positive. The academies collected data on sexual harassment and assault but a comparison of the sexual harassment data provided by the DoD academies' Military Equal Opportunity (MEO) offices and student perceptions collected from a 2006 Defense Manpower Data Center (DMDC)⁶² survey indicated that sexual harassment may be underreported.⁶³ Specifically, the DoD academies' MEO offices reported eight alleged sexual harassment incidents in 2006.⁶⁴ But survey results of DoD academy students in March and April 2006 indicated that an estimated 51 to 60 percent of female respondents and an estimated 8 to 12 percent of male respondents experienced sexual harassment.⁶⁵

A 2006 Coast Guard Academy survey revealed similar disparities.⁶⁶ According to the 2006 Cadet Human Relations and Climate survey,⁶⁷ 63 of the 793 student respondents (43 female and 20 male) reported being

⁶⁰ 2008 GAO REP., *supra* note 51, at 2.

⁶¹ *Id.*

⁶² The Defense Manpower Data Center (DMDC) is a support organization within DoD that reports to the Under Secretary of Defense for Personnel and Readiness. The DMDC's mission is to deliver timely and high-quality support to its customers and to ensure that the data it receives from different sources are consistent, accurate, and appropriate when used to respond to inquiries. The DMDC serves DoD organizations, such as the armed forces, the Office of the Secretary of Defense, and the Joint Staff, as well as external organizations, to include Congress. DMDC data is relied upon by these organizations to assist in making decisions regarding the military. *Id.* at 3 n.5.

⁶³ *Id.* at 21.

⁶⁴ *Id.* at 22.

⁶⁵ *Id.* at 26. In this survey, the DMDC defined sexual harassment as crude or offensive behavior, unwanted sexual attention, and sexual coercion. These estimates are based on a 95 percent confidence level with a margin of error of plus or minus 2 percent. *Id.*

⁶⁶ *Id.* at 21.

⁶⁷ The U.S. Coast Guard 2006 Cadet Human Relations Survey was administered in October 2006 and included all students in class years 2006 through 2009. The entire cadet population was surveyed, with 793 of 996 (80 percent) cadets completing the survey. *Id.* at 45.

subjected to sexual harassment or sexual assault.⁶⁸ The Coast Guard Academy combined sexual harassment and sexual assault into one survey question, thus making it difficult to directly compare the survey responses to reported data.⁶⁹ Regardless, the numbers from the survey responses exceed the ten recorded sexual assault and zero recorded sexual harassment incidents at the Coast Guard Academy in the 2006 academic year.⁷⁰ The disparity in the numbers provided by the academies' offices that are designated to handle sexual harassment complaints and student perceptions of sexual harassment led to the GAO's conclusion that the academies may not have complete visibility on the extent of the sexual harassment problem due to underreporting.⁷¹

Finally, in 2011, Congress tasked the GAO with conducting another performance audit. This time, instead of reviewing sexual harassment at the service academies, Congress directed the GAO to assess the DoD's sexual harassment prevention efforts.⁷² To complete this assessment, GAO officials analyzed DoD service policies and available sexual-harassment complaint data.⁷³ The GAO officials also visited six DoD locations, where they conducted fifty-nine small-group discussions and administered a confidential survey to 583 service members.⁷⁴ In particular, the GAO noted that there was inconsistent support for sexual-harassment policies by military commanders and senior enlisted members.⁷⁵ Notably, DoD Directive 1350.2,⁷⁶ which outlines the department's sexual-harassment policy, states it is DoD policy to use the chain of command to promote, support, and enforce the department's sexual harassment policies.⁷⁷ But the GAO found that service members have mixed perceptions regarding leadership's support of sexual

⁶⁸ *Id.* at 28.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 21.

⁷² 2011 GAO REP., *supra* note 52, at 4.

⁷³ *Id.* at 2–4.

⁷⁴ *Id.* The locations visited include Camp Victory, Iraq; Fort Carson, Colorado; Lackland Air Force Base, Texas; Marine Corps Base Camp Lejeune, North Carolina; Naval Station Norfolk, Virginia; and the USS *Carl Vinson* (CVN 70), Naval Air Station North Island, California. Since these locations are not representative of all DoD locations, the confidential survey results are not generalizable and thus cannot be projected across DoD, any service, or any single location visited. *Id.* at 4.

⁷⁵ *Id.* at 6.

⁷⁶ U.S. DEP'T OF DEF., DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (MEO) PROGRAM (18 Aug. 1995).

⁷⁷ 2011 GAO REP., *supra* note 52, at 8.

harassment policies and programs.⁷⁸ The GAO's review of the DoD's 2010 Workplace and Gender Relations Survey of Active Duty Members (2010 WGRA Survey),⁷⁹ responses from the GAO's confidential survey, and feedback from interviews during the GAO's site visits support this finding.

A cursory review of the 2010 WGRA Survey leads to the conclusion that service members generally perceived their leaders to be supportive of sexual harassment policies and programs, but the results also indicated a significant percentage of service members who did not necessarily concur with that perception.⁸⁰ Approximately 76 percent of service members believed that senior leadership made "honest and reasonable efforts to stop sexual harassment, regardless of what was said officially."⁸¹ The survey also found approximately 69 percent of women and 77 percent of men believed their immediate supervisor made "honest and reasonable efforts to stop sexual harassment, regardless of what is said officially."⁸² Those numbers seem to be positive, but the GAO noted that these results also showed that an estimated 31 percent of women and 23 percent of men did not believe or were unsure of whether their immediate supervisor made "honest and reasonable efforts to stop sexual harassment, regardless of what is said officially."⁸³ Further, GAO officials noted the survey also found an estimated 52 percent of women and 38 percent of men indicated that other service members would be able to get away with acts of sexual harassment, at least to some extent, in their work group even if it were reported.⁸⁴

Similarly, the GAO's confidential survey found that service members had mixed perceptions regarding whether their direct

⁷⁸ *Id.*

⁷⁹ See LINDSAY M. ROCK ET AL., 2010 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: OVERVIEW REPORT ON SEXUAL ASSAULT (Mar. 2011) [hereinafter 2010 WGRA], available at http://www.sapr.mil/public/docs/research/DMDC_2010_WGRA_Overview_Report_of_Sexual_Assault.pdf. This survey was the third survey of gender-related issues of active duty service members conducted by the Defense Manpower Data Center since 2002 as part of the quadrennial cycle of human relations surveys required by law. The purpose of this report is to enhance understanding of sexual assault in the military and the results of the Department's prevention efforts.

Id.

⁸⁰ 2011 GAO REP., *supra* note 52, at 8–9.

⁸¹ *Id.* at 8.

⁸² *Id.*

⁸³ *Id.* at 8–9.

⁸⁴ *Id.* at 9.

supervisor created a climate that discouraged sexual harassment.⁸⁵ Sixty-four of 264 female service members and 53 of 319 male service members interviewed by GAO officials responded that they did not think or were not sure whether their direct supervisor created a climate discouraging sexual harassment from occurring.⁸⁶

Feedback from the GAO's interviews during site visits also revealed service members had mixed perceptions of leadership's support of sexual harassment policies.⁸⁷ The GAO noted frequently hearing in interviews that there was "zero tolerance" for sexual harassment and that leaders issued statements against sexual harassment or regularly spoke to service members about sexual harassment, but GAO also heard plenty of examples of leadership not consistently displaying a strong stance against sexual harassment.⁸⁸ Examples included sexual-harassment incidents being "swept under the rug" and incidents of sexual harassment needing to occur multiple times or to multiple people before being addressed or taken seriously.⁸⁹ The GAO was also told during their site visits that some leaders do not back up their words with actions and that leaders who do not support or show their support for sexual harassment policies undermined implementation of the department's programs.⁹⁰ Finally, Equal Opportunity program officials at the site visits stated that leadership could negatively affect unit morale and cohesion by not taking sexual harassment seriously.⁹¹ A military chaplain and multiple service members echoed this sentiment, with one service member's comment specifically resonating: "Why would you stick your neck out for someone who doesn't respect you?"⁹²

B. Sexual Harassment Remains a Persistent Problem

Available statistics from more recent surveys conducted by the DMDC clearly indicate that sexual harassment remains a persistent problem in the active-duty components and at the service academies.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 9–10.

⁸⁹ *Id.* at 10.

⁹⁰ *Id.* at 11.

⁹¹ *Id.*

⁹² *Id.* at 11–12.

The DMDC conducts the WGRA,⁹³ which provides information on the prevalence of sexual assault, sexual harassment, and sexist behavior in the active component; personnel policies, practices, and training related to sexual assault; and an assessment of progress.⁹⁴ The DMDC also conducts the Service Academy Gender Relations Survey (SAGR), which assesses the incidence of sexual assault and harassment and gender-related issues at the three DoD academies and the Coast Guard Academy.⁹⁵ The 2012 surveys clearly indicate sexual harassment remains a persistent problem in the military. In fact, Major General Gary Patton, the former director of the DoD Sexual Assault Prevention and Response Office,⁹⁶ echoed this sentiment in December 2012 in response to the release of the Annual Report on Sexual Harassment and Violence at the Military Service Academies, Academic Program Year 2011–2012,⁹⁷ stating the “report shows that sexual assault and sexual harassment remain persistent problems at the academies.”⁹⁸

In the 2012 WGRA, the DMDC received completed questionnaires from 22,792 of the 108,000 active-duty service members that it

⁹³ The WGRA is a survey of active-duty service members designed to enhance the understanding of sexual assault in the military and the results of DoD’s sexual assault prevention efforts. *See* 2010 WGRA, *supra* note 79.

⁹⁴ DEF. MANPOWER DATA CTR., SURVEY NOTE, 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS 1 (Mar. 15, 2013) [hereinafter 2012 WGRA], available at http://www.sapr.mil/public/docs/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf; *see also* 2010 WGRA, *supra* note 79.

⁹⁵ 2012 WGRA, *supra* note 94. The 2012 Service Academy Gender Relations Survey was the fifth in a series of surveys mandated by law. This survey assessed the incidence of sexual assault and sexual harassment and gender-related issues at the U.S. Military Academy, U.S. Naval Academy, U.S. Air Force Academy, and U.S. Coast Guard Academy. *Id.*

⁹⁶ The Department of Defense announced that Major General Jeffrey Snow would be replacing Major General Patton as the Director of the DoD Sexual Assault Prevention and Response Office in January 2014. Major General Patton is scheduled to retire in the spring of 2014. *Secretary of Defense Chuck Hagel Names New DoD Director of Sexual Assault Prevention and Response Office*, U.S. DEP’T OF DEF. (Dec. 16, 2013), <http://www.defense.gov/releases/release.aspx?releaseid=16428>.

⁹⁷ The John Warner National Defense Authorization Act for Fiscal Year 2007 requires an annual report from each military academy during each academic year on the effectiveness of the policies, training, and procedures with respect to sexual harassment and violence involving Academy personnel. The John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 532, 120 Stat. 2083, 2200–2206 (2006).

⁹⁸ *Defense Department Press Briefing via Teleconference with Maj. Gen. Patton and Lt. Col. Galbreath on the Annual Military Academy Sexual Assault Report*, U.S. DEP’T OF DEF. (Dec. 21, 2012), <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5170> [hereinafter *MG Patton Press Briefing*].

surveyed.⁹⁹ The report includes rates for unwanted sexual contact and unwanted gender-related behaviors.¹⁰⁰ Unwanted sexual contact is intended to measure sexual assault; it is used as an umbrella term to include acts prohibited by the UCMJ.¹⁰¹ Unwanted gender-related behaviors encompass sexual harassment and sexist behavior.¹⁰² To determine the extent of unwanted gender-related behaviors, members were provided a list of twelve sexual-harassment behaviors and four sexist behaviors and were then asked to indicate how often they experienced those behaviors in the past year.¹⁰³ The twelve sexual harassment behaviors contain three components of sexual harassment: crude or offensive behavior, unwanted sexual attention, and sexual coercion.¹⁰⁴ Service members must have experienced at least one behavior defined as sexual harassment and indicated they considered that behavior to be sexual harassment to be included in the calculation for the sexual harassment rate.¹⁰⁵

According to the report, 23 percent of women and 4 percent of men reported experiencing sexual harassment in the past year.¹⁰⁶ Forty-one percent of women and 20 percent of men experienced crude or offensive behavior.¹⁰⁷ Twenty-three percent of women and 5 percent of men experienced unwanted sexual attention.¹⁰⁸ Finally, 8 percent of women and 2 percent of men reported experiencing sexual coercion.¹⁰⁹

In the 2012 SAGR, DMDC received completed surveys from 5,425 students out of an eligible sample size of 7,258 students.¹¹⁰ The SAGR report also includes rates for unwanted sexual contact and unwanted gender-related behaviors, and uses the same methodology and definitions as the WGRA. At the Coast Guard Academy, 40 percent of women and

⁹⁹ 2012 WGRA, *supra* note 94, at 6.

¹⁰⁰ *Id.* at 1–2.

¹⁰¹ *Id.* at 1.

¹⁰² *Id.* at 2.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ DEF. MANPOWER DATA CTR., 2012 SERVICE ACADEMY GENDER RELATIONS SURVEY 7 (Dec. 19, 2012) [hereinafter 2012 SAGR], *available at* http://www.sapr.mil/public/docs/research/DMDC_2012_Service_Academy_Gender_Relations_Survey.pdf.

10 percent of men indicated experiencing sexual harassment in 2012.¹¹¹ Seventy-six percent of women and 46 percent of men reported experiencing crude or offensive behavior.¹¹² With respect to unwanted sexual attention, 42 percent of women and 13 percent of men reported experiencing that type of behavior.¹¹³ Lastly, 11 percent of women and 4 percent of men reported experiencing sexual coercion.¹¹⁴

C. Complete Visibility and Leadership Support Needed

Not only do the GAO and 2012 DMDC reports clearly show sexual harassment has been a problem since the early 1990s and continues to be a problem today, they also underscore the importance of complete visibility over the extent of the problem. Congress took action in 2003 and 2004 to improve visibility of the sexual-harassment problem in the DoD. After reviewing DoD surveys from 1988, 1995, and 2002 that indicated sexual harassment was a problem in the military, the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (2003 NDAA)¹¹⁵ requires DoD to conduct four quadrennial surveys to assess racial, ethnic, and gender issues in the military.¹¹⁶

Similarly, in response to a series of sexual assault investigations at the Air Force Academy in 2003, Congress took action to address sexual harassment and assault at the DoD academies.¹¹⁷ In the National Defense Authorization Act for Fiscal Year 2004 (2004 NDAA), Congress required the three DoD academies to establish policies, programs, and procedures to address sexual harassment and sexual assault incidents and to provide annual reports on sexual harassment and sexual assault incidents.¹¹⁸ Initially, these requirements did not apply to the Coast Guard Academy, but the Coast Guard Academy adopted sexual harassment and assault policies, programs, and procedures similar to the DoD academies on its own accord.¹¹⁹ In 2010, the Department of

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458 (2002) [hereinafter 2003 NDAA].

¹¹⁶ *Id.*

¹¹⁷ 2008 GAO REP., *supra* note 51, at 1.

¹¹⁸ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 527, 117 Stat. 1392, 1468–70 (2003).

¹¹⁹ 2008 GAO REP., *supra* note 51, at 2.

Homeland Security mandated that the Coast Guard comply with these specific provisions in the 2004 NDAA.¹²⁰

The Coast Guard must also take steps to maximize visibility over sexual harassment within the service. Ideally, the Coast Guard would have been included in the 2003 NDAA, and thus included in the mandated surveys conducted by the DMDC. But for some reason, the Coast Guard was expressly excluded from the 2003 NDAA requirements.¹²¹ Regardless, the GAO reports clearly illustrate that sexual harassment is underreported, and the DMDC reports indicate that sexual harassment remains a persistent problem in the DoD services, as well as at the service academies. While these reports mainly address the DoD services, it is logical to conclude the Coast Guard is experiencing similar issues.¹²² Congress implemented the mechanisms to improve the DoD's visibility; the Coast Guard needs to follow suit and implement its own mechanisms to more accurately assess the severity of the sexual-harassment problem. The Coast Guard should consider pursuing a legislative proposal to include the Coast Guard in the surveys mandated in the 2003 NDAA, or it should conduct its own annual surveys that mirror the requirements in the 2003 NDAA.

The GAO also revealed another problematic area in its 2011 report: the perception that military leaders did not support sexual harassment programs or did not create a climate discouraging sexual harassment. These are two critical areas that must be addressed, as leadership support of sexual harassment policies and organizational climate play an important role in the relationship between sexual harassment and sexual assault.

¹²⁰ Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, 2152 (2009).

¹²¹ See 2003 NDAA, *supra* note 115, at 2554.

¹²² Twenty-one sexual harassment reports were made under the Anti-Harassment and Hate Incident Policy Procedures in fiscal year 2012. De Lesa Hanson & Emily Harcum, *Response: Proactive Prevention at Coast Guard*, CIVIL RTS. ON DECK., July 2013, available at <http://www.uscg.mil/civilrights/News/Civil.Rights.On.Deck/Jul13.pdf>. In fiscal year 2013, fifteen sexual harassment reports were made under the Anti-Harassment and Hate Incident Policy Procedures. E-mail from Ms. Erika Selmon, Formal Complaints Manager, Office of Civil Rights Operations, U.S. Coast Guard, to author (5 Feb. 2014, 16:37 EST) (on file with author).

IV. The Relationship Between Sexual Harassment and Sexual Assault

A. What Do the Statistics Reveal?

Just as the WGRA and SAGR statistics reveal that sexual harassment remains a problem, the statistics also indicate a strong connection between sexual harassment and sexual assault. In the 2012 WGRA, 6.1 percent of women and 1.2 percent of men indicated experiencing unwanted sexual contact.¹²³ Of the 6.1 percent of women who experienced unwanted sexual contact, 30 percent indicated that the offender sexually harassed them before or after the assault, 8 percent indicated that the offender stalked them, and 20 percent indicated that the offender both sexually harassed and stalked them.¹²⁴ Of the 1.2 percent of men who experienced unwanted sexual contact, 19 percent indicated that the offender sexually harassed them before or after the assault, 2 percent indicated that the offender stalked them, and 21 percent indicated that the offender both sexually harassed and stalked them.¹²⁵ Thus, according to these numbers, 50 percent of the women who experienced unwanted sexual contact indicated being sexually harassed by the offender and 40 percent of the men who experienced unwanted sexual contact indicated being sexually harassed by the offender.

For the Coast Guard Academy, the 2012 SAGR reported 9.8 percent of women and 0.7 percent of men indicated experiencing unwanted sexual contact.¹²⁶ Of the 9.8 percent of women who reported unwanted sexual contact, 22 percent indicated that the offender sexually harassed them, 4 percent indicated that the offender stalked them, and 15 percent indicated that the offender both sexually harassed and stalked them; while 59 percent of the respondents indicated that the offender neither sexually harassed nor stalked them.¹²⁷ In total, according to these numbers, 37 percent of the women who reported unwanted sexual contact were sexually harassed.

The 2012 SAGR also examined the timing of sexual harassment or stalking that was associated with an unwanted sexual contact experience.¹²⁸ Of the 9.8 percent of Coast Guard Academy women who

¹²³ 2012 WGRA, *supra* note 94, at 2.

¹²⁴ *Id.* at 3.

¹²⁵ *Id.* at 3–4.

¹²⁶ 2012 SAGR, *supra* note 110, app. D, slides 8–9.

¹²⁷ *Id.* at 32.

¹²⁸ *Id.* at 33.

reported experiencing unwanted sexual contact and acts of sexual harassment or stalking, 11 percent indicated that the offender sexually harassed or stalked them before the assault; 11 percent indicated that the offender sexually harassed or stalked them after the assault, and 19 percent indicated that the offender sexually harassed or stalked them both before and after the assault.¹²⁹

Major General Patton, in assessing the statistics in the 2012 SAGR, also recognized the connection between sexual harassment and sexual assault. In commenting on the 2012 SAGR, Major General Patton stated that the survey “shows no significant change in the prevalence of sexual harassment And we recognize that eliminating sexual harassment is critical to preventing sexual assault.”¹³⁰ He went further, stating:

We know from the survey respondents—that those who experienced a sexual assault in the past year, the vast majority of those people also experienced sexual harassment. So this is an important correlation, and it gets at establishing a climate—a non-permissive climate or environment in which the—the solution to this problem is an environment—creating a non-permissive environment where sexual harassment, sexist behavior, stalking, and these types of behaviors are not condoned, tolerated, or ignored. And we know that that would also contribute to establishing an environment where sexual assault is—would—would be reduced. So it’s important that we survey the sexual harassment and we address that point, as well.¹³¹

As Major General Patton noted, these statistics establish a strong correlation between organizational environment, sexual harassment, and sexual assault. Research on the interrelationship among these three issues further supports Major General Patton’s observations.

¹²⁹ *Id.*

¹³⁰ *MG Patton Press Briefing, supra* note 98.

¹³¹ *Id.*

B. Organizational Environment, Sexual Harassment, and Sexual Assault Are Interrelated

The statistics from the 2012 WGRA and SAGR surveys reveal a strong connection between sexual harassment and sexual assault, and Major General Patton's conclusions regarding that strong correlation are based on prior research that evaluated the relationship among organizational environment, sexual harassment, and sexual assault. Three research studies support the theory that sexual harassment is often a precursor to sexual assault.¹³² These studies also analyzed the effect organizational factors have on the prevalence of sexual harassment and sexual assault.¹³³

1. Factors Associated with Women's Risk of Rape in the Military Environment

In one study, which focused on risk factors for rape in the military, 558 women veterans were interviewed from November 1996 to May 1997.¹³⁴ The sample of women was selected from the Department of Veterans Affairs health care registries.¹³⁵ The 558 subjects selected consisted of women veterans from across the country who served in Vietnam, post-Vietnam, and the Persian Gulf eras, spanning a date range of military service from 1961 to 1997.¹³⁶ Complete interview data was compiled for 506 women veterans, with all branches of the Armed Forces represented.¹³⁷

¹³² See Anne G. Sadler et al., *Factors Associated with Women's Risk of Rape in the Military Environment*, 43 AM. J. OF INDUS. MED. 262 (2003); Melanie S. Harned et al., *Sexual Assault and Other Types of Sexual Harassment by Workplace Personnel: A Comparison of Antecedents and Consequences*, 7 J. OCCUPATIONAL HEALTH PSYCHOL. 174 (2002); DR. RICHARD J. HARRIS, *SEXISM, SEXUAL HARASSMENT AND SEXUAL ASSAULT: COMPARING DATA FROM 2002 AND 2006* (2008).

¹³³ See *supra* note 132.

¹³⁴ Sadler et al., *supra* note 132, at 263.

¹³⁵ *Id.*

¹³⁶ *Id.* The Vietnam era is considered to be February 28, 1961 to May 7, 1975, the post-Vietnam era is May 8, 1975 to August 1, 1990, and the Persian Gulf era is August 2, 1990 to date of interview. *Id.*

¹³⁷ *Id.* at 265. The majority of subjects served in the Army, Air Force, and Navy: 49 percent of the subjects served in the Army, twenty-three percent served in the Air Force, and twenty-two percent served in the Navy. *Id.* Percentages for subjects who served in the Marine Corps and Coast Guard were not detailed. *Id.*

The interview participants were asked about their exposure to violence during their military service. Approximately 399 participants, or 79 percent, reported experiencing sexual harassment during their service.¹³⁸ More than half of the participants, approximately 54 percent, reported experiencing unwanted sexual contact.¹³⁹ Finally, approximately one-third, or 151 participants, reported experiencing one or more attempted or completed rapes.¹⁴⁰ Of the participants who reported experiencing attempted or completed rape, over 60 percent indicated that the offender had sexually harassed them.¹⁴¹

This study also assessed the relationship between the military environment and rape during military service, and it identified several risk factors associated with sexual harassment.¹⁴² In general, women who were exposed to harassment or violence during their service were also more likely to experience rape.¹⁴³ And further, women who were sexually harassed or experienced unwanted sexual contact during their service had significantly elevated odds of in-military rape.¹⁴⁴ According to the numbers provided, women experiencing sexual harassment had approximately fifteen times greater odds of being raped, while those who reporting unwanted sexual contact had approximately seven times greater odds of being raped.¹⁴⁵ Women who reported hostile work environments

¹³⁸ *Id.* at 266. For purposes of this study, sexual harassment included *quid pro quo* demands and hostile environments. Hostile environments included unwanted and uninvited: sexual teasing, jokes, remarks, or questions, pressure for dates, sexually suggestive looks, gestures, letters, or other sexual attention, including unwanted sexual contact. *Id.* at 264.

¹³⁹ *Id.* at 266. Unwanted sexual contact was defined as unwanted intentional sexual touching or fondling of buttocks, thigh, leg, breasts, genitals, or other body part (excluding rape). *Id.* at 264.

¹⁴⁰ *Id.* at 266. The definition of rape adopted by The American Medical Association and The American College of Obstetricians and Gynecologists was used. It is defined as any act that occurred without an individual's consent that involves the use or threat of force and includes an act of attempted or completed sexual penetration of the victim's vagina, mouth, or rectum. *Id.* at 264.

¹⁴¹ *Id.* at 266–67.

¹⁴² *Id.* at 268.

¹⁴³ *Id.*

¹⁴⁴ *Id.* The interview participants were classified as those who experienced rape during their military service and those who did not. *Id.* at 264. “In-military rape” was not specifically defined, but in assessing the characteristics of rape occurring in the military environment, the researchers described the military environment as “a unique situation in which work and living quarters are located together, so rape occurring on and off-duty were considered as potentially work-related when on base or when the perpetrator was a ranking officer.” *Id.*

¹⁴⁵ *Id.* at 269.

had approximately six-fold greater odds of being raped, while those who experienced unwanted sexual advances, remarks, or pressure for dates in sleeping quarters had more than a three-fold increase in the odds of being raped.¹⁴⁶ Finally, and most notably from a military leadership and climate perspective, ranking officer or immediate supervisor behaviors had a strong association with women's frequency of rape.¹⁴⁷ A woman's odds of being raped increased five-fold when officers engaged in *quid pro quo* behaviors.¹⁴⁸ The presence of officers who allowed or initiated sexually harassing behaviors, such as sexually demeaning comments or gestures, was associated with a three to four-fold increase in odds of rape.¹⁴⁹

The conclusions from this study should alarm military leadership. The researchers concluded that military environmental factors were strongly associated with women's risk of rape during service.¹⁵⁰ The results demonstrate that the odds of rape increase when the living or working environments were sexualized.¹⁵¹ In particular, work environments that allow inappropriate sexual conduct, however subtle, can significantly increase the risk of rape for women.¹⁵² This finding indicates a continuum of violence, with rape the most severe behavior.¹⁵³ Lastly, this study's results underscore the importance of leadership behaviors. The behaviors of officers constitute a powerful risk factor with respect to violence towards women.¹⁵⁴ The findings from this study support prior research indicating women often identify higher-ranking personnel as perpetrators of unwanted sexual attention and that such sexual harassment is associated with male service members acting adversely toward female members.¹⁵⁵

¹⁴⁶ *Id.* at 268.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 269.

¹⁵¹ *Id.* at 271.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* See MELANIE MARTINDALE, SEXUAL HARASSMENT IN THE MILITARY: 1988 (1990); LISA D. BASTION ET AL., 1995 DEPARTMENT OF DEFENSE SEXUAL HARASSMENT SURVEY (1996), available at <http://www.ijoa.org/imta96/paper23.html>.

2. *Sexual Assault and Other Types of Sexual Harassment by Workplace Personnel: A Comparison of Antecedents and Consequences*

Another study used data from the 1995 DoD Gender Issues Survey to address whether the antecedents found to be associated with sexual harassment are also associated with sexual assault by workplace personnel.¹⁵⁶ Specifically, the authors noted that previous research had examined sexual harassment and sexual assault by workplace personnel as a unitary construct, but it is unknown whether factors such as organizational climate,¹⁵⁷ job-gender context,¹⁵⁸ organizational power, and sociocultural power that have been proposed as antecedents to sexual harassment also predict sexual assault by workplace personnel when sexual assault is considered separately.¹⁵⁹ This study used aspects of several theories for the causes of sexual harassment, to include sex role spillover theory,¹⁶⁰ organizational climate theory, and power differential theories¹⁶¹ while also considering sociocultural power¹⁶² to guide an examination of the theoretical antecedents and consequences of sexual assault by workplace personnel and sexual harassment in the military.¹⁶³

The sample for this study consisted of 22,372 female service members who responded to the survey, to include representation from all

¹⁵⁶ Harned et al., *supra* note 132.

¹⁵⁷ Organizational climate is defined as employees' perceptions of an organization's implementation of policies and procedures related to sexual harassment, the provision of resources for sexual-harassment victims, and the provision of sexual-harassment training. *Id.* at 176.

¹⁵⁸ Job-gender context is a construct identified in sex role spillover theory; it refers to the gendered nature of the work group, and includes variables such as the ratio of male to female workers and the gender traditionality of the job. *Id.*

¹⁵⁹ *Id.* at 177.

¹⁶⁰ Sex-role spillover theory is the carryover of gender-based roles into the workplace that are irrelevant or inappropriate to the work setting. See Barbara A. Gutek & Aaron G. Cohen, *Sex Ratios, Sex Role Spillover, and Sex at Work: A Comparison of Men's and Women's Experiences*, 40 HUM. REL. 97 (1987).

¹⁶¹ Power differential theories of sexual harassment emphasize the concept of power, viewing sexual harassment as an abuse of organizational power. The classic example involves a male abusing a supervisory position to sexually coerce a subordinate female. One criticism of this theory is that the focus on organizational power does not explain sexual harassment when no formal power differential exists, such as the case of harassment by a co-worker. Harned et al., *supra* note 132, at 176.

¹⁶² Sociocultural power includes factors such as age, marital status, and race, and proposes that women that lack cultural power and status advantages are at a higher risk to experience sexual harassment. *Id.*

¹⁶³ *Id.*

DoD services and the Coast Guard.¹⁶⁴ Of the 22,372 female service members, 941 reported being sexually assaulted by workplace personnel in the previous 12 months.¹⁶⁵ Approximately 72 percent, or 16,204, female service members reported experiencing other forms of sexual harassment while approximately 23 percent indicated not experiencing sexual assault or sexual harassment by workplace personnel in the past 12 months.¹⁶⁶ Of the 941 female service members who reported experiencing sexual assault, 938 (or 99.7 percent) indicated that workplace personnel sexually harassed them in the past 12 months.¹⁶⁷

This study used the data available from the 22,372 surveys to assess how organizational climate, job gender context, organizational power, and sociocultural power relate to sexual harassment and sexual assault. To measure organizational climate, the researchers reviewed the survey respondents' perceptions of the military's efforts to enforce sexual harassment policies, perceptions of the services provided by sexual harassment victims, and perceptions of the prevalence of sexual harassment training.¹⁶⁸ The responses were standardized and summed to create a composite variable of organizational climate, a higher score represented less tolerance of sexual harassment.¹⁶⁹ Four items were used to assess job gender context. These items included "job not usually held by personnel of your gender," "a work environment where personnel of your gender are uncommon," supervisor's sex, and the gender ratio among coworkers.¹⁷⁰ The responses were standardized and summed to create an indicator of how much a participant's workgroup was masculinized.¹⁷¹ To assess the organizational power of a survey respondent, the researchers looked at pay grade and years of active-duty service.¹⁷² A lower pay grade and fewer years of active duty-service represented a lower organizational power.¹⁷³ Lastly, a review of a respondent's age, education, race or ethnicity, and marital status was

¹⁶⁴ *Id.* at 177. Specific percentages of service-representation were not provided. The average age of the women was thirty-one and average time on active duty was just under ten years. *Id.*

¹⁶⁵ *Id.* at 180.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 179.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

completed to assess one's sociocultural power.¹⁷⁴ A younger age, lower education level, minority racial group membership, and non-married status represented lower sociocultural power.¹⁷⁵

After reviewing all of these factors, the researchers concluded there are important similarities and differences between sexual assault by workplace personnel and sexual harassment.¹⁷⁶ The results indicated that low sociocultural and organizational power were associated with an increased likelihood of experiencing both sexual assault and sexual harassment by workplace personnel.¹⁷⁷ With respect to an organization's climate and the job gender context, these two factors were found to be directly associated with sexual harassment but only indirectly associated with sexual assault by workplace personnel.¹⁷⁸ Instead, the relationship between organizational characteristics and sexual assault is completely mediated by women's experiences of sexual harassment.¹⁷⁹ The researchers explained the apparent indirect relationship with organizational characteristics and sexual assault by pointing out while both sexual assault and harassment appear to occur primarily on military installations, sexual assaults are not occurring in the workplace or during duty hours like instances of sexual harassment.¹⁸⁰ The researchers further noted that it is logical that organizational characteristics have an indirect relationship given that the majority of sexual assaults occur outside the immediate work setting.¹⁸¹ But despite this indirect relationship, the researchers highlighted that organizational characteristics are associated with the incidence of sexual assault by workplace personnel.¹⁸² Specifically, organizational characteristics affect how women are treated in the workplace, and this treatment may spill over into interactions between military personnel occurring outside the immediate work setting.¹⁸³ Because of this relationship, the researchers concluded that improving the military climate with respect to sexual harassment may decrease the occurrence of other types of sexual harassment, which, in turn, may lower sexual assault occurrences.¹⁸⁴

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 186.

¹⁷⁷ *Id.* at 185.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 187.

3. *Sexism, Sexual Harassment, and Sexual Assault: Comparing Data from 2002 and 2006*

Lastly, a 2008 Defense Equal Opportunity Management Institute (DEOMI) research report used more recent data to support prior research that analyzed the relationship between sexual assault and sexual harassment in the workplace.¹⁸⁵ The author of this report used data from the Armed Forces 2002 Sexual Harassment Survey¹⁸⁶ and the 2006 WGRA¹⁸⁷ to analyze the relationship among different types of sexual harassment and sexual assault to assess whether sexual assault indicators had changed.¹⁸⁸ Both surveys included responses from enlisted members and officers in the Army, Navy, Marine Corps, Air Force, and Coast Guard.¹⁸⁹

This study focused on using the survey results to identify separate categories of individual and environmental harassment and then to delineate the relationships between these two forms of sexual harassment and sexual assault.¹⁹⁰ On one hand, individualized harassment was characterized as the quid pro quo type of harassment, to include the exchange of work-related benefits or consequences for sexual favors through bribes, threats, or physical force.¹⁹¹ On the other hand, environmental harassment was unwanted sexualized actions that affected one's work performance by creating a hostile work environment.¹⁹² More specifically, this study used the 2002 and 2006 survey responses to identify individualistic forms of sexual harassment that were personal, frequently physical in nature, and left "little room for misinterpretation."¹⁹³ Examples of this individual harassment include sexual assault, touching, and sexual phone calls.¹⁹⁴ This individual harassment was differentiated from the broader and more public

¹⁸⁵ HARRIS, *supra* note 132.

¹⁸⁶ The 2002 Armed Forces Sexual Harassment Survey was conducted by the Defense Manpower Data Center to assess the prevalence of sexual harassment and other unprofessional, gender-related behaviors. *Id.* at 18.

¹⁸⁷ The 2006 Workplace and Gender Relations Survey was conducted by the Defense Manpower Data Center as part of a quadrennial cycle of human relations surveys mandated by law. *Id.* at 22.

¹⁸⁸ *Id.* at 2.

¹⁸⁹ *Id.* at 19, 23.

¹⁹⁰ *Id.* at 6.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 20, 24.

¹⁹⁴ *Id.*

environmental harassment, which included jokes, whistles, and suggestive looks.¹⁹⁵ The survey responses were then classified as having experienced individualistic unwanted, uninvited sexual behavior; environmental unwanted, uninvited sexual behavior; or both.¹⁹⁶ The study used this data to perform a logistic regression analysis¹⁹⁷ to assess the impact of these forms of sexual harassment on the likelihood of reporting sexual assault.¹⁹⁸

In both surveys, more than 50 percent of female service members reported experiencing some form of sexual harassment,¹⁹⁹ which was approximately double the percentage for males in both 2002 and 2006.²⁰⁰ To show the impact of environmental harassment on individualized harassment experiences, the study compared the numbers of attempted or actual sexual assaults against both men and women by whether environmental harassment was reported.²⁰¹ The results show that sexual-assault reports were rare when environmental harassment was not present but that it was much more prevalent when environmental harassment was reported.²⁰² The results of both surveys indicate the odds of sexual assault increased for both men and women when environmental harassment was present.²⁰³ The odds of sexual assault for men increased nearly 35 times, while the odds for women increased 12 times.²⁰⁴

The results of the logistic regression models designed to predict the probability of reporting attempted or actual sexual assault provide insight into what variables increase the odds of sexual assault.²⁰⁵ These models identified the dominant variables as individual harassment, sexist behavior, and environmental harassment.²⁰⁶ The logistic regression

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 21, 25.

¹⁹⁷ Logistic regression models are common in the fields of medicine, economics, sociology, psychology and other social sciences, and are used to predict binary outcomes. Generally, a logistic regression model predicts the probability of an event occurring (as opposed to not occurring) from a set of predictors. See Razia Azen & Nicole Traxel, *Using Dominance Analysis to Determine Predictor Importance in Logistic Regression*, 34 J. EDUC. & BEHAV. STAT. 319, 320 (2009).

¹⁹⁸ HARRIS, *supra* note 132, at 19.

¹⁹⁹ *Id.* at 26.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 27.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 29.

²⁰⁶ *Id.*

analysis also sheds light on the roles of individual and environmental harassment.²⁰⁷ The results of the analysis suggest that environmental harassment, along with sexist behavior, create a climate in which individual harassment is viewed as acceptable by potential offenders, and this climate, in turn, increases the likelihood of sexual assault.²⁰⁸ The linkage between individual and environmental harassment is apparent. When environmental harassment is not reported, individual harassment is rarely reported.²⁰⁹ For male service members, approximately 89 percent of those members reporting no environmental harassment also reported no individualized harassment.²¹⁰ For the female service members who reported no environmental harassment, approximately 81 percent of those female service members also reported no individualized harassment.²¹¹ Conversely, when environmental harassment was reported, the probability of acts of individualized harassment was extremely high, that is, approximately 98 percent for males and 99 percent for females.²¹² And according to this study, the presence of individualized harassment results in the greatest increase in the likelihood of sexual assault.²¹³

This research indicates that those members who experienced unprofessional, gender-related behaviors, such as crude or offensive behaviors, unwanted sexual attention, sexual coercion, and sexist behaviors, were also more likely to report experiencing attempted and actual rape.²¹⁴ The research also indicates that experiencing increased numbers of unprofessional, gender-related incidents also increases the likelihood of a sexual assault being reported.²¹⁵ Finally, the author also noted it is likely that an organizational context where environmental harassment may be unofficially condoned and institutionally supported as a process for excluding women and men who may not fit in sends a message to those service members with the propensity to engage in egregious individualized sexual harassment and sexual assault that their behaviors are acceptable.²¹⁶

²⁰⁷ *Id.* at 30.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 31.

²¹⁵ *Id.*

²¹⁶ *Id.*

4. Organizational Environment and Sexual Harassment Are Linked to Sexual Assault

These three research studies provide startling insights into the connections between organizational environment, sexual harassment, and sexual assault. All three support the proposition that sexual harassment is often a precursor to sexual assault. Specifically, service members who are sexually harassed are at significantly increased odds of being sexually assaulted. Furthermore, these studies highlight the importance that the organizational environment plays with respect to the levels of sexual harassment and sexual assault. Not surprisingly, in environments where sexual harassment is tolerated or unofficially condoned by leadership, the risk of sexual assault increases. In particular, the effect of leadership behavior of officers should be noted, as these studies indicate these behaviors constitute a powerful risk factor. If leadership engages in sexually harassing behavior, it creates an environment where other service members feel it is permissible to engage in similar harassing behaviors.

In sum, these studies show that sexual harassment is a precursor to sexual assault. They also show that the organizational environment plays a key part in the levels of sexual harassment, with environments that tolerate or condone sexual harassment and environments where leadership engages in sexually harassing behaviors having higher levels of sexual harassment. Thus, addressing organizational environments with respect to sexual harassment will lead to more successful effort to prevent sexual assaults.

Given that sexual harassment continues to be a persistent problem and the implications of the relationships among organizational environment, sexual harassment, and sexual assault, the Coast Guard must reframe the perspective in which it views sexual harassment and its connections to sexual assault. History and the current state of the sexual assault problem in the military compel a sea change in the culture of sexual harassment prevention and response.

C. Reframing the Perspective: The Sexual-Violence Continuum

The sexual-violence continuum provides a clear, straightforward conceptual model in which service members can understand the nature of sexual violence and how sexual harassment and sexual assault fit within

the overarching construct of sexual violence. Rather than solely focusing on sexual harassment as a discrimination issue,²¹⁷ the Coast Guard should view sexual harassment as offensive conduct within a continuum of sexual violence. In particular, by viewing sexual harassment as part of a continuum of sexual violence, it provides a framework from which the service can view all behaviors that enable, or serve as a precursor, to sexual assault.

Understanding the continuum of sexual violence first requires defining “sexual violence.” According to the Centers for Disease Control and Prevention (CDC), sexual violence “is any sexual act perpetrated against someone’s will.”²¹⁸ The CDC’s definition suggests a continuum of sexual violence, as it includes a completed nonconsensual sex act, such as rape, an attempted nonconsensual sex act, abusive sexual contact, such as unwanted touching, and non-contact sexual abuse.²¹⁹ Examples of non-contact sexual abuse include voyeurism, exhibitionism, unwanted exposure to pornography, threats of sexual violence to accomplish some other goal, taking nude photographs of a sexual nature without a person’s consent, and verbal or behavioral sexual harassment.²²⁰

Other organizations have further explained the sexual violence continuum. The National Center on Domestic and Sexual Violence (NCDSV)²²¹ does not view sexual assault as an isolated act but rather as an act on a continuum related to other common events or activities, both illegal and legal.²²² The NCDSV describes the continuum as beginning with suggestive looks, sexist comments, and verbal harassment, and escalating to exposure, sexual assault, aggravated sexual assault, and ultimately murder.²²³ According to the NCDSV, most women have

²¹⁷ See *infra* notes 241–73.

²¹⁸ *Sexual Violence: Definitions*, CTNS. FOR DISEASE CONTROL AND PREVENTION (Jan. 2, 2014), <http://www.cdc.gov/violenceprevention/sexualviolence/definitions.html>.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ The National Sexual Violence Resource Center’s (NSVRC) designs, provides, and customizes training and consultation, influences policy, promotes collaboration and enhances diversity with the goal of ending domestic and sexual violence. See *About NCDSV*, NAT’L CTR. ON DOMESTIC AND SEXUAL VIOLENCE, http://www.ncdsv.org/ncd_factsheet.html (last visited Nov. 3, 2014).

²²² *Continuum of Sexual Aggression*, NATL. CTR. ON DOMESTIC AND SEXUAL VIOLENCE, <http://www.ncdsv.org/images/att9selectedappendixcontinuumsexualaggressio.pdf> (last visited Mar. 13, 2014).

²²³ *Id.*

experienced some act that falls within the continuum.²²⁴ The NCDSV also states the common denominator in every act along the continuum is a lack of respect.²²⁵

Experts working in the field of sexual violence have also provided a definition for sexual violence.²²⁶ In research sponsored by the National Sexual Violence Resource Center,²²⁷ experts described sexual violence as a continuum of behaviors that includes both physical and nonphysical acts.²²⁸ Sexual violence was defined as nonconsensual acts that are sexual in nature.²²⁹ Most of the experts also emphasized that nonphysical acts, such as emotional or verbal abuse, constitute sexually violent acts.²³⁰ Thus, these experts conceptualized sexual violence as more than just the physicality of the act.²³¹

The Pee Dee Coalition, a volunteer victim advocacy training nonprofit organization in South Carolina, provides a similar description of the sexual-violence continuum.²³² They characterize sexual assault as a range of behaviors, with catcalls, voyeurism, and sexual harassment toward the lower end and molestation, rape, and incest at the higher end.²³³ The sexual-violence continuum represents a set of behaviors, some of which are accepted by society more than others.²³⁴ Underlying every behavior on the continuum are the attitudes and beliefs society

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Moira O'Neil & Pamela Morgan, *American Perceptions of Sexual Violence: A FrameWorks Research Report*, FRAMEWORKS INST. 3–4 (Sept. 2010), http://www.frameworksinstitute.org/assets/files/PDF_sexualviolence/AmericanPerceptionsOfSexualViolence.pdf.

²²⁷ The NSVRC mission is to provide leadership in preventing and responding to sexual violence through collaboration, sharing and creating resources, and promoting research. The NSVRC views sexual violence to include a range of behaviors, both physical and non-physical, that constitutes unwanted or age-inappropriate sexual activity. *See About the National Sexual Violence Center*, THE NAT'L SEXUAL VIOLENCE RESOURCE CTR., <http://www.nsvrc.org/about/national-sexual-violence-resource-center#SV> (last visited Mar. 13, 2014).

²²⁸ O'Neill & Morgan, *supra* note 226, at 9.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *The Sexual Assault Continuum*, PEE DEE COALITION VOLUNTEER VICTIM ADVOCACY TRAINING WEBSITE, <http://www.peedeecoalition.org/volunteer/sa2.html> (last visited Mar. 13, 2014).

²³³ *Id.*

²³⁴ *Id.*

holds about gender roles and acceptable behavior.²³⁵ For example, rape is universally unacceptable, but some of the other behaviors, such as catcalls or sexual harassment, may be tolerated, which could lead to offenders advancing from one behavior on the continuum to a more egregious behavior.²³⁶

It is time for the Coast Guard to reframe its perspective and look at sexual harassment and sexual assault through the lens of a sexual-violence continuum. Advocates and others working in the field of sexual violence are clearly using this broader definition of sexual violence and find the continuum to be a useful tool, but the public may not fully understand the concept.²³⁷ For instance, when the sexual-violence continuum was explored in a study involving 951 college students, the results indicated that students were able to identify acts at the more egregious end of the continuum, such as rape, as problematic but not the less serious, more subtle acts, such as harassment.²³⁸

In light of this apparent confusion, framing sexual harassment and sexual assault, as well as other sexually violent behaviors, through the lens of the sexual-violence continuum can reap extraordinary benefits in the Coast Guard's sexual assault prevention efforts. Specifically, the sexual-violence continuum is a useful way to conceptualize ways in which bystanders can intervene before a sexual assault occurs.²³⁹ Incorporating the sexual violence continuum into bystander intervention training can educate Coast Guard members on the behaviors on the continuum, clearly detail that there is a link among these various behaviors, and ultimately show intervention at one end of the continuum can impact other behaviors, to include preventing a sexual assault.²⁴⁰ In other words, the sexual-violence continuum provides a framework through which members can visualize how sexual harassment and sexual assault are connected and how sexual harassment may oftentimes be a precursor to sexual assault. Unfortunately, Coast Guard policies and

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Sarah McMahon, *Changing Perceptions of Sexual Violence Over Time*, VAWNET.ORG: NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN, http://www.vawnet.org/print-document.php?doc_id=2956&find_type=web_desc_AR (last visited Mar. 13, 2014).

²³⁸ *Id.*

²³⁹ Sarah McMahon, Judy L. Postmus & Ruth Anne Koenick, *Conceptualizing the Engaging Bystander Approach to Sexual Violence Prevention on College Campuses*, 52 J. C. STUDENT DEV. 115, 118 (Jan./Feb. 2011).

²⁴⁰ *Id.*

training fail to recognize the strong connection between sexual harassment and sexual assault.

V. Sexual Harassment Prevention, Response, and Training in the Coast Guard

A. Anti-Harassment and Hate Incident Procedures Policy

The Coast Guard's Civil Rights Manual provides Coast Guard members and employees guidance for applying and complying with the service's Equal Employment and Equal Opportunity (EEO/EO) requirements.²⁴¹ The procedures for combating harassment and promptly addressing any harassment complaint are prescribed in the Anti-Harassment and Hate Incidents Procedures (AHHIP) policy.²⁴² Sexual harassment is one of the forms of prohibited harassment under this policy;²⁴³ and the Sexual Harassment Prevention Policy is outlined in this manual.²⁴⁴ The Civil Rights Manual is intended to provide a single point of focus for the Coast Guard's efforts to prevent sexual harassment,²⁴⁵ and it outlines a service member's options, the command's options, and sexual harassment prevention training.

B. Sexual Harassment Response

1. A Service member's Options

The Civil Rights Manual provides two processes in which service members may respond to sexual harassment. Service members may respond utilizing the Harassment Complaint Process under the AHHIP Policy,²⁴⁶ the Discrimination Complaint Process under the EEO/EO Program,²⁴⁷ or both processes if they wish.²⁴⁸

²⁴¹ COMDTINST 5350.4C, *supra* note 21, art. I.d.

²⁴² *Id.* art. 2.C.1.

²⁴³ *Id.* art. 2.C.1.a.

²⁴⁴ *Id.* art. 2.C.2.

²⁴⁵ U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1600.2, DISCIPLINE AND CONDUCT art. 2.B.2.b.1 (Sept. 2011) [hereinafter COMDTINST 1600.2].

²⁴⁶ *Id.* art. 2.C.2.

²⁴⁷ *Id.* art. 4.A.

²⁴⁸ Joshua Bailes, *Complaints Corner: A Tale of Two Processes*, U.S. COAST GUARD CIV. RTS. DIRECTORATE (Apr. 2012), <http://www.uscg.mil/civilrights/News/Civil.Rights.On.Deck/Apr12.pdf> (last visited Mar. 12, 2014).

Under the Harassment Complaint Process, members are advised not to ignore the problem, not to assume the harassment will stop, and to expect that the harassment will likely intensify when ignored because the lack of corrective action will be seen by the perpetrator as acceptance or encouragement.²⁴⁹ If a service member believes he or she is being sexually harassed, the manual directs the member to tell the harasser that the behavior is unwelcome and must cease immediately, to report such behavior immediately to the supervisor or to an official at a higher level, and to seek advice on how to deal with the situation from the local Civil Rights Office.²⁵⁰

As seen from this guidance, the Harassment Complaint Process encourages service members to confront the harasser before reporting the harassment to a supervisor. The Coast Guard's Sexual Harassment Prevention training reinforces this notion, encouraging members to "try to resolve the issue at the lowest level" by letting "the harasser know that [he or she is] offended."²⁵¹ If the harassment continues or is severe enough to warrant immediate attention, the service member may report the harassment to his or her supervisor.²⁵² Once reported to a supervisor, the command must conduct an investigation and report the findings to the Civil Rights Directorate.²⁵³

A member may also utilize the Discrimination Complaint Process to respond to sexual harassment. Under this process, a member must report the harassment to an EO Counselor and indicate an "intent to initiate the process."²⁵⁴ The Discrimination Complaint Process has three stages: the pre-complaint process, alternative dispute resolution process, and the formal complaint process.²⁵⁵ A member does not have to exhaust the Harassment Complaint Process before initiating the Discrimination Complaint Process; the processes may run in parallel if the member chooses.²⁵⁶

²⁴⁹ COMDTINST M5350.4C, *supra* note 21, art. 2.C.2.f.

²⁵⁰ *Id.*

²⁵¹ THE OFFICE OF CIV. RTS., U.S. COAST GUARD, SEXUAL HARASSMENT PREVENTION OFFLINE STUDY GUIDE 23 (22 Dec. 2011) [hereinafter SHP STUDY GUIDE].

²⁵² COMDTINST M5350.4C, *supra* note 21, art. 2.C.2.h.

²⁵³ *Id.* art. 2.C.1.d.

²⁵⁴ Bailes, *supra* note 248.

²⁵⁵ COMDTINST M5350.4C, *supra* note 21, art. 4.A.

²⁵⁶ Bailes, *supra* note 248.

2. *The Command's Options*

The Civil Rights Manual states the most effective way to limit harassment is to treat it as misconduct even if it does not meet the requirements for action under civil rights laws and regulations.²⁵⁷ Commanding Officers or Officers-in-Charge (CO/OICs) are “directed to be intolerable of sexual harassment at their units and are required to take immediate corrective action when it occurs.”²⁵⁸ In addition to conducting an investigation after receiving a sexual-harassment report, CO/OICs are required to take appropriate steps to end the harassment and must take appropriate administrative and disciplinary action if warranted.²⁵⁹

The administrative and disciplinary options for commands are outlined in the Coast Guard’s Discipline and Conduct Manual.²⁶⁰ Similar to the guidance in the Civil Rights Manual, CO/OICs are directed to take prompt and appropriate administrative action simultaneously with the complaint processes.²⁶¹ The administrative options include informal or formal counseling, documenting the harassment in performance evaluations, and processing the offender for administrative separation.²⁶² Sexual harassment may also rise to the level of criminal offenses under the UCMJ. Conduct constituting sexual harassment can meet the elements of a wide range of UCMJ provisions, to include Attempt to Commit an Offense under Article 80, Failure to Obey an Order or Regulation under Article 92, Cruelty and Maltreatment under Article 93, Sexual Assault under Article 120, and Conduct Unbecoming an Officer and Gentleman under Article 133.²⁶³

In addition to listing these UCMJ provisions as disciplinary options, the Discipline and Conduct Manual also contains a lawful general order prohibiting illegal discriminatory conduct.²⁶⁴ Sexual harassment is included in this order’s definition of illegal discrimination.²⁶⁵ However,

²⁵⁷ COMDTINST M5350.4C, *supra* note 21, art. 2.C.1.

²⁵⁸ *Id.* art. 2.C.2.e.

²⁵⁹ *Id.* art. 2.C.2.j.

²⁶⁰ COMDTINST 1600.2, *supra* note 245, art. 2.B.2.b.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* The Discipline and Conduct Manual lists all potentially applicable UCMJ provisions for sexual harassment allegations. *Id.*

²⁶⁴ *Id.* art. 2.B.1.

²⁶⁵ *Id.*

using this order as an accountability tool is problematic for two specific reasons. First, it is susceptible to constitutional challenge, as it may not be drafted in a manner that it provides sufficient notice of what conduct is specifically prohibited.²⁶⁶ Second, if the order were to overcome a constitutional challenge, intentional discrimination on the part of the accused must be proven as an element.²⁶⁷ Proving the intent to discriminate required by this order in sexual harassment prosecutions is extremely difficult, as the trial counsel must show the purpose of the sexual harassment was to discriminate and that it was committed with the purpose of discriminating against someone because of his or her protected status.²⁶⁸

The responsibilities of COs and OICs are not limited to responding to sexual harassment incidents. They must also ensure members of their units receive annual training in sexual harassment prevention.

3. *Sexual Harassment Prevention Training*

Coast Guard members are required to complete Sexual Harassment Prevention (SHP) training annually.²⁶⁹ The SHP training is designed to raise awareness among Coast Guard personnel of behaviors that constitute sexual harassment and to educate personnel on how to respond, prevent, and eliminate sexual harassment.²⁷⁰ With respect to SHP training, the Civil Rights Manual is explicit in distinguishing sexual harassment from sexual assault, specifically dedicating a portion of the SHP training section to the topic “Sexual Harassment is not the same as

²⁶⁶ See *United States v. Pope*, 63 M.J. 68, 73 (C.A.A.F. 2006) (“To withstand a challenge on vagueness grounds, a regulation must provide sufficient notice so that a servicemember can reasonably understand that his conduct is proscribed.”).

²⁶⁷ COMDTINST M5350.4C, *supra* note 21, 2.B.1.b. Disciplinary or administrative action shall be taken only where the discriminatory conduct is intentional. Although law and policy prohibit intentional and unintentional discrimination, only those persons who discriminate intentionally are included within the scope of this Section. *Id.*

²⁶⁸ See E-mail from Captain Kevin Bruen, Staff Judge Advocate, Dist. Eleven, U.S. Coast Guard, to author (Mar. 17, 2014, 13:17 EDT) (on file with author). (“Sexual harassment is a form of discrimination, but the purpose of the harassment must be to discriminate. Not all sexual harassment is discrimination. The sexual harassment to be punishable under this order must be motivated by an intention to discriminate against somebody based on their protected status - race, gender etc.”).

²⁶⁹ COMDTINST M5350.4C, *supra* note 21, art. 3.B.2.c.

²⁷⁰ *Id.* art. 3.B.2.a.

Sexual Assault.”²⁷¹ In this section, the manual states SHP training pertains to employment and conditions of employment, and should never be confused with sexual assault.²⁷² The manual further states “sexual assault involves criminal activity and should be reported to the proper law enforcement authorities and investigating entities.”²⁷³

C. Sexual Harassment Policy and Training Must Be Re-evaluated

The Coast Guard’s sexual harassment policies and training need to be re-evaluated and updated to better reflect the reality that sexual harassment is misconduct, not just discrimination. The legal background of sexual harassment and the Coast Guard’s sexual harassment definition are straightforward and uncontroversial. In fact, the Coast Guard’s sexual harassment definition and complaint processes are consistent with the other services’ definitions and processes.²⁷⁴ The definitions of sexual harassment in all of the services describe a spectrum of behaviors, with the most severe forms of sexual harassment legally constituting sexual assault under Article 120.²⁷⁵ Yet, Coast Guard policy specifically states “sexual harassment is not the same as sexual assault” and trains its members accordingly.²⁷⁶

This artificial distinction between sexual harassment and sexual assault is inconsistent with other parts of the sexual-harassment policy and creates needless confusion. At its core, this distinction is completely contradictory, as the Civil Rights Manual’s definition of sexual harassment includes sexual assault.²⁷⁷ In the SHP Training section of the Civil Rights Manual, sexual assault is characterized as criminal activity while sexual harassment only pertains to employment and conditions of employment. The introduction to the AHHIP Policy, which states that the Coast Guard has determined the most effective way to limit harassing conduct is to treat it as misconduct, is not aligned with this notion. It is

²⁷¹ *Id.* art. 3.B.2.b.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ See generally U.S. DEP’T OF NAVY, SEC’Y OF NAVY INSTR. 5300.26D, DEPARTMENT OF THE NAVY (DON) POLICY ON SEXUAL HARASSMENT (3 Jan. 2006); U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ch. 7 (18 Mar. 2008); U.S. DEP’T OF AIR FORCE, INSTR. 36-2706, EQUAL OPPORTUNITY PROGRAM MILITARY AND CIVILIAN (5 Oct. 2010).

²⁷⁵ See 10 U.S.C.A. § 920 (2014).

²⁷⁶ COMDTINST M5350.4C, *supra* note 21, art. 3.B.2.b.

²⁷⁷ See *supra* note 45.

also inconsistent with the responsibility of CO/OICs in responding to sexual harassment reports, where the CO/OICs are directed to take appropriate administrative and disciplinary action.²⁷⁸

In addition, further guidance on disciplinary options is provided in the Discipline and Conduct Manual, where multiple provisions of the UCMJ and a lawful general order are provided as options for holding offenders accountable. In particular, that lawful general order prohibiting sexual harassment further undermines the Civil Rights Manual's attempt to distinguish sexual harassment from sexual assault. To put it another way, claiming that sexual assault is criminal activity while maintaining sexual harassment only pertains to employment and conditions of employment is misleading when the Coast Guard criminalizes sexual harassment under Article 92 in the Discipline and Conduct Manual.

The Coast Guard's online SHP Training and SAPR Training also perpetuate this artificial distinction between sexual harassment and sexual assault.²⁷⁹ The SHP Training explains the distinctions are important because the reporting procedures are different²⁸⁰ and runs through a number of vignettes to help reinforce the distinction.²⁸¹ The SAPR Training provides an identical explanation and identical vignettes.²⁸² While the Coast Guard SAPR Program Manual outlines the reporting options for victims and dictates that investigations will be conducted by the Coast Guard Investigative Service,²⁸³ sexual harassment allegations are addressed at the lowest level.²⁸⁴ But both the SHP and SAPR Training fail to address instances where sexual harassment would also meet the definition of sexual assault, thereby training Coast Guard members that sexual harassment and sexual assault are separate and distinct concepts.

²⁷⁸ See *supra* note 259.

²⁷⁹ See SHP STUDY GUIDE, *supra* note 251, at 11–13; THE OFFICE OF WORK-LIFE, U.S. COAST GUARD, SEXUAL ASSAULT PREVENTION AND RESPONSE OFFLINE STUDY GUIDE 11–13 (22 Nov. 2013) [hereinafter SAPR STUDY GUIDE].

²⁸⁰ See U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1754.10D, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM ch. 3 (Apr. 2012) [hereinafter COMDTINST 1754.10D].

²⁸¹ See SHP STUDY GUIDE, *supra* note 251, at 11–13.

²⁸² SAPR STUDY GUIDE, *supra* note 279, at 11–13.

²⁸³ COMDTINST 1754.10D, *supra* note 280, ch. 3.

²⁸⁴ See *supra* note 251.

This artificial distinction, and subsequent training emphasizing it, needlessly confuses Coast Guard members. In this author's experience, facilitating Sexual Assault Prevention Workshops (SAPWs),²⁸⁵ the confusion in distinguishing between sexual harassment and sexual assault is consistently an issue raised by Coast Guard members. Judge Advocates and Sexual Assault Response Coordinators who have facilitated SAPWs Coast Guard-wide have had similar experiences, prompting one facilitator to include a Civil Rights representative as a co-facilitator to help explain the distinction.²⁸⁶ In focus groups conducted at various locations by the SAPR MCO and Commandant's Junior Council in the summer of 2013, Coast Guard members expressed similar confusion with respect to the policies and definitions.²⁸⁷ Junior members indicated they had difficulty seeing the dividing line between "white and black" behavior, specifically noting that sexual harassment is handled at

²⁸⁵ The Coast Guard implemented Sexual Assault Prevention Workshops as part of the Sexual Assault Prevention and Response (SAPR) program to supplement annual sexual assault training. The workshops are facilitated by a combination of Sexual Assault Response Coordinators, Judge Advocates with experience litigating sexual-assault cases, and Coast Guard Investigative Service Special Agents with experience investigating sexual -assault allegations. The workshops are designed to increase awareness amongst Coast Guard personnel of the issues, policies, and procedures associated with sexual assault, and to engage in an open dialogue about the perceived problems, potential misperceptions, and solutions. HEALTH SAFETY & WORK-LIFE CTR., U.S. COAST GUARD, SEXUAL ASSAULT PREVENTION WORKSHOP FACILITATOR GUIDE intro. (June 2013).

²⁸⁶ See E-mail from Kristin Cox, Sexual Assault Response Coordinator, Base Seattle, U.S. Coast Guard, to author (Mar. 7, 2014, 10:03 EST) (on file with author) ("[T]he confusion happens almost every time we do the training—I also have experienced this confusion in a significant portion of the reports that come in. We have a lot of reports that start as [sexual harassment] complaints that are actually [sexual assault] and are now also getting reports that are [sexual harassment] but come in as [sexual assault], due to the ongoing confusion."); e-mail from Lieutenant Commander Luke Petersen, Judge Advocate, Dist. Eleven, U.S. Coast Guard, to author (Mar. 7, 2014, 13:49 EST) (on file with author) ("I agree that the [sexual harassment/sexual assault] dynamic is problematic for members, not just in differentiating the acts but in figuring out how to address what has occurred. We have such a bifurcated system (lowest level vs. highest level) that it suggests the two things can't really be connected."); e-mail from Tiffani Collier, Sexual Assault Response Coordinator, Base Los Angeles/Long Beach, U.S. Coast Guard, to author (Mar. 11, 2014, 13:33 EDT) (on file with author) ("Allowing sexual misconduct to be managed 'at the lowest level' implies that the Coast Guard does not take low level misconduct seriously.")

²⁸⁷ Memorandum from Junior Council, to Commandant, subject: Junior Council Report: SAPR Focus Group Results (28 Aug. 2013). The Commandant's Leadership, Excellence, and Diversity Council established the Junior Council to collect information, ideas, and perspectives related to the topic of sexual assault. Ten focus groups were conducted, with 267 participants representing all types of Coast Guard units. *Id.*

the lowest level but unwanted touching requires reporting.²⁸⁸ This confusion prompted a common recommendation from the focus groups: clarify the definition of sexual harassment and how it differs from or relates to sexual assault.²⁸⁹

Due to the needless confusion created by the artificial distinction between sexual harassment and sexual assault, Coast Guard policies and training need to be re-evaluated and updated to reflect the reality that sexual harassment is a part of the overall sexual-violence continuum. It is readily apparent that Coast Guard policy is drafted in a manner to view sexual harassment as discrimination and sexual assault as criminal conduct. This oversimplification of the nature of sexual harassment minimizes the fact that sexual harassment is also misconduct, and it can be criminal conduct as well.

The artificial distinction between sexual harassment and sexual assault should be immediately deleted from Coast Guard policy and training. Specifically, Article 3.B.2.b of the Civil Rights Manual, which states, “Sexual Harassment is not the same as Sexual Assault,” should be removed. All references to this distinction should also be removed from the annual mandated SHP and SAPR training modules. Not only should the substance of the mandated training be updated to reflect sexual harassment as part of the continuum of sexual violence, the method of delivery should be updated as well. Currently, this training is provided via an online module and does not allow interaction with subject-matter experts. The training should be combined and provided in a manner similar to the SAPWs, with a Sexual Assault Response Coordinator, a Civil Rights Representative, and a Judge Advocate facilitating the training. This format has proven successful in facilitating dialogue, increasing awareness, and clearing up confusion.

In addition to updating the Civil Rights Manual and the mandated training, the Coast Guard should update the Discipline and Conduct Manual to reflect the view that sexual harassment is misconduct. In particular, Article 2.B, titled “Sexual Harassment,” which currently falls under the “Discrimination” chapter, should be deleted. The Discipline and Conduct Manual should be updated with a stand-alone “Sexual Harassment” section that addresses sexual harassment as misconduct. A

²⁸⁸ *Id.* at 2.

²⁸⁹ *Id.* at 5.

proposed stand-alone section is included in the Appendix.²⁹⁰ This proposed section was drafted to define sexual harassment as offensive conduct rather than solely discrimination. In addition, this proposed section incorporates a lawful general order prohibiting sexual harassment as offensive conduct, thereby eliminating the necessity to prove intentional discrimination.

The recommendations above are immediate steps that can be taken in the near-term. To effectuate transformational change, and comprehensively combat sexual assault, the Coast Guard must incorporate the concept of sexual harassment as part of the sexual-violence continuum into its SAPR Strategic Plan. Unfortunately, sexual harassment is currently not explicitly addressed in the SAPR Strategic Plan.

VI. The Coast Guard Sexual Assault Prevention and Response Strategic Plan

The Coast Guard promulgated its first SAPR Strategic Plan on April 24, 2013.²⁹¹ The plan outlines four critical areas and establishes goals to eliminate sexual assault in the Coast Guard: Climate, Prevention, Response, and Accountability.²⁹² More specifically, in his foreword to the strategic plan, Admiral Papp states the plan to eliminate sexual assault will be accomplished by providing a strong culture, policies and procedures for prevention, education and training, response, victim support, intimidation-free reporting, fair and impartial investigations, and accountability.²⁹³ To implement this strategic plan, the Coast Guard chartered the SAPR MCO in June 2013.²⁹⁴ The MCO is tasked with maintaining, updating, tracking, and coordinating timely and effective

²⁹⁰ This proposed Sexual Harassment article was drafted with substantial assistance from Captain Steven Andersen, Commanding Officer, Legal Service Command, U.S. Coast Guard, and Lieutenant Commander Luke Petersen, Judge Advocate, District Eleven, U.S. Coast Guard.

²⁹¹ All Coast Guard Message, 197/13, 062012Z May 13, subj: The Coast Guard Sexual Assault Prevention and Response (SAPR) Strategic Plan.

²⁹² *Id.*

²⁹³ U.S. COAST GUARD, SEXUAL ASSAULT PREVENTION AND RESPONSE STRATEGIC PLAN 2013–2017, at 3 (24 Apr. 2013) [hereinafter COAST GUARD SAPR].

²⁹⁴ Memorandum from Deputy Commandant for Mission Support, to Captain Robert L. Smith, subject: U.S. Coast Guard Sexual Assault Prevention and Response (SAPR) Military Campaign Office (MCO) Charter (20 June 2013) [hereinafter DCMS SAPR MCO Charter].

completion of all activities listed in the SAPR Plan of Actions and Milestones (POAM).

Sexual harassment and its relationship to sexual assault are not specifically addressed in the strategic plan.²⁹⁵ The Introduction states, “[W]e must address all factors that enable this violent crime or impact our ability to prevent it.”²⁹⁶ Yet, sexual harassment is not included in the illustrative list of enabling factors.²⁹⁷ The first goal of the strategic plan addresses climate, and it mandates that the Coast Guard “[c]reate[s] a culture intolerant of sexual assault or behaviors that enable it.”²⁹⁸ In this section, sexual harassment is only addressed to ensure that incidents are properly classified as either sexual harassment or sexual assault.²⁹⁹ Similarly, sexual harassment is not addressed in the SAPR POAM with the exception of ensuring correct classification of incidents.³⁰⁰

Given the stated distinction between sexual harassment and sexual assault in the Civil Rights Manual, it is not surprising that sexual harassment is not directly addressed in the SAPR Strategic Plan or POAM. However, the mandate to “create a culture intolerant of sexual assault or behaviors that enable it” requires directly addressing sexual harassment.

The Coast Guard should study the Army’s SHARP program and execute a similar reorganization of sexual harassment and sexual assault prevention programs to provide for greater unity of effort. The Army has recognized sexual harassment as an enabler of sexual assault and integrated its sexual harassment and sexual assault prevention efforts into one program.³⁰¹ In December 2008, Secretary of the Army Pete Geren directed his Headquarters SAPR Office to restructure and integrate the Prevention of Sexual Harassment (POSH) office to form a new Sexual

²⁹⁵ Notably, sexual harassment and its relationship to sexual assault are not specifically addressed in the DoD’s SAPR Strategic Plan either. See U.S. DEP’T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE STRATEGIC PLAN (30 Apr. 2013).

²⁹⁶ COAST GUARD SAPR, *supra* note 293, at 7.

²⁹⁷ The enabling factors listed include poor leadership and command climate, alcohol abuse, predatory behavior, bystander inaction, and inadequate knowledge and education. *Id.*

²⁹⁸ *Id.* at 11.

²⁹⁹ *Id.* at 13.

³⁰⁰ U.S. COAST GUARD, SEXUAL ASSAULT PREVENTION AND RESPONSE STRATEGIC ACTION PLAN—PLAN OF ACTIONS AND MILESTONES (9 July 2013).

³⁰¹ See *supra* note 17.

Harassment/Assault Response and Prevention (SHARP) office.³⁰² Before this integration, the Equal Opportunity Office managed sexual-harassment complaints and POSH training for military members and the Army G-1³⁰³ managed the SAPR program.³⁰⁴

The Army integrated the POSH and SAPR offices after recognizing the relationship between sexual harassment and sexual assault.³⁰⁵ Specifically, the Army found that sexual harassment and sexual assault are often interrelated and exist along a sexual-violence continuum “in which acts of sexual harassment, if unchecked, may lead to acts of sexual assault.”³⁰⁶ The integration of these two offices now provides for a unity of effort between sexual harassment and sexual assault prevention efforts across the Army.³⁰⁷

Currently, the Coast Guard’s unity of effort in combating sexual assault is not maximized due to the separation of sexual harassment and sexual assault prevention efforts. To truly have a unity of effort, the Coast Guard must integrate these two efforts. This requires removing sole responsibility for sexual harassment prevention efforts from the Civil Rights Directorate and combining efforts with the Coast Guard’s SAPR Program Office. Given the relationship between sexual harassment and sexual assault, sexual harassment must be directly addressed to “create a culture intolerant of sexual assault or behaviors that enable it.” From a strategic perspective, the culture change and unity of effort required must start from the top of the organization. Accordingly, the Coast Guard must realign its organization to integrate sexual harassment and sexual assault prevention efforts.

³⁰² All Army Activities Message, 075/2009, 191404Z Mar 09, U.S. Dep’t of Army, subject: Sexual Harassment/Assault Response and Prevention (SHARP) Initiatives.

³⁰³ The Army G-1 develops, manages, and executes all manpower and personnel plans, programs, and policies across the Army. See *Deputy Chief of Staff, Army G-1*, U.S. DEP’T OF THE ARMY, <http://www.armyg1.army.mil> (last visited Mar. 18, 2014).

³⁰⁴ U.S. ARMY SEXUAL HARASSMENT/ASSAULT RESPONSE AND PREVENTION OFFICE, SHARP GUIDEBOOK 3 (Sept. 2013) [hereinafter SHARP GUIDEBOOK].

³⁰⁵ *Id.*; see also e-mail from Nate Evans, Program and Policy Specialist, Deputy Chief of Staff, Army G-1, U.S. Army, to author (Nov. 19, 2013, 15:57 EST) (on file with author). Secretary of the Army Geren discussed sexual harassment and sexual assault with subject-matter experts, to include discussions on the continuum of violence, from innuendo through sexual harassment to sexual assault before making the decision to integrate the Prevention of Sexual Harassment and SAPR offices. *Id.*

³⁰⁶ SHARP GUIDEBOOK, *supra* note 304, at 3.

³⁰⁷ *Id.*

VII. Conclusion

Sexual harassment is not a new problem, and it continues to be a problem as efforts to eradicate sexual harassment in the past three decades have proven ineffective. The GAO reports and DMDC statistics indicate that sexual harassment continues to be prevalent in the military. In addition, the higher levels of sexual harassment reported by GAO and DMDC plainly indicate that sexual harassment is underreported to the services' respective Equal Opportunity or Civil Rights offices.

Coast Guard leadership must recognize that sexual harassment remains an important issue that needs to be addressed. The strong correlations among organizational environment, sexual harassment, and sexual assault require a re-evaluation of sexual harassment prevention and response policies and training, and the culture that underlies these policies. Leadership should start by reframing the perspective through which sexual harassment and sexual assault are viewed. Specifically, the Coast Guard needs to eliminate the notions that sexual harassment is solely a discrimination issue and that the Coast Guard's Civil Rights program is solely responsible for sexual harassment prevention efforts. A re-evaluation of Coast Guard policies and training requires eliminating all references to the artificial distinction that "sexual harassment is not the same as sexual assault" and changing the training delivery to effectively facilitate discussion, increase awareness, and lessen confusion.

Sexual harassment is also a form of violence, a form of violence that falls along a continuum of sexual violence that leads to sexual assault. With this recognition that sexual harassment and sexual assault represent grades of sexual violence along a continuum, the sexual-violence continuum should serve as the conceptual model for addressing military sexual violence.

Sexual-assault prevention must start with addressing the lowest level of the sexual-violence continuum—sexual harassment. Current Coast Guard sexual-harassment policies and training provide an unworkable model for comprehensively preventing sexual assault. Rather than continuing to distinguish sexual harassment from sexual assault, the Coast Guard must embrace its operational principle of Unity of Effort³⁰⁸

³⁰⁸ U.S. COAST GUARD, COAST GUARD PUBLICATION 1, DOCTRINE FOR THE U.S. COAST GUARD 78–80 (Feb. 2014).

in addressing sexual harassment and sexual assault. The principle of Unity of Effort states that “[a]chieving successful outcomes requires positive leadership to ensure clear understanding of the objective and the role that each individual, unit, or organization is expected to play in meeting that objective.”³⁰⁹ Unity of effort in the mission to eradicate sexual assault requires changing the culture of treating sexual harassment and sexual assault as separate constructs and reframing the Coast Guard’s perspective to address the full continuum of sexual violence, starting with sexual harassment. Unity of effort also requires strategic change and organizational realignment; the Coast Guard’s sexual harassment and sexual assault prevention efforts must be integrated.

Reframing the Coast Guard’s perspective to address the full continuum of sexual violence is the type of transformational change that is sought by Coast Guard leadership to fight the sexual-assault problem. Vice Admiral Manson Brown, the Deputy Commandant for Mission Support, states in his SAPR POAM Charter that the campaign to address the scourge of sexual assault “will require innovation and new thinking to effect permanent and lasting organizational and cultural change” and “[e]lements of this change will likely require fundamental adjustments to our climate and culture, HR policies, training requirements, leadership focus, and accountability mechanisms.”³¹⁰ Dispensing with the Coast Guard’s current methods of addressing sexual harassment and sexual assault and viewing both within the sexual-violence continuum is a fundamental adjustment necessary to effect permanent and lasting organizational and cultural change.

³⁰⁹ *Id.* at 78.

³¹⁰ DCMS SAPR MCO Charter, *supra* note 294.

Appendix

Proposed Stand-Alone Sexual Harassment Article for Coast Guard Discipline and Conduct Manual, COMDTINST M1600.2

2.F Sexual Harassment

2.F.1 Policy

The Coast Guard is committed to maintaining a work environment free from sexual harassment and inappropriate behavior. All acts of sexual harassment are degrading to the offended individual and detrimental to the military profession. Commanding officers and officers in charge have a responsibility to investigate all allegations of sexual harassment and to take prompt and effective action. They must be aware of all options available to eradicate sexual harassment, to include discrimination complaint processes, administrative processes, and disciplinary measures under reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). Specific questions regarding holding offenders accountable under this Article shall be addressed to the command's servicing legal office.

2.F.2 Prohibitions

In support of this commitment, military personnel in the Coast Guard shall not:

- a. Commit sexual harassment, as defined in Article 2.F.3;
- b. Take reprisal action against a person who raises an allegation of sexual harassment, who assists another in raising an allegation of sexual harassment, or who provides information on an incident of alleged sexual harassment;

- c. Knowingly make a false accusation of sexual harassment; or
- d. While in a supervisory or command position, condone or ignore sexual harassment of which he or she has knowledge or should reasonably have knowledge.

The reasonable person standard, as defined in Article 2.F.3, shall be used to determine whether a violation of these provisions has occurred.

2.F.3 Definitions

- a. Reasonable person standard. An objective test used to determine if behavior meets the legal test for sexual harassment. The test requires a hypothetical exposure of a reasonable person to the same set of facts and circumstances; if such a person would find the behavior offensive, the test is met. The reasonable person standard considers the victim's perspective and does not rely upon stereotyped notions of acceptable behavior within that particular environment. The reasonable person standard also considers the Coast Guard's core values and customs of the service. Coast Guard members and civilian employees who model the Core Values and customs of the service do not engage in negative behaviors, such as sexual harassment, and do not condone those behaviors in others.
- b. Reprisal. In general, reprisal is taking or threatening to take an unfavorable personnel action or withholding or threatening to withhold a favorable personnel action, or any other act of retaliation, against a military member or civilian employee who raises an

allegation of sexual harassment, who assists another in raising an allegation of sexual harassment, or who provides information on an incident of alleged sexual harassment.

- c. Sexual Harassment. For purposes of this section, sexual harassment is offensive conduct that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
- i. Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or
 - ii. Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or
 - iii. 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. This definition emphasizes that workplace conduct, to be actionable as "hostile 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. 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.

- d. Work Environment. The workplace or any other place that is work-connected, as well as the conditions or atmosphere under which people are required to work. “Work environment” is an expansive term for military members and may include conduct on or off duty, 24 hours a day. Examples of work environment include, but are not limited to, an office, an entire office building, a base or installation, ships, aircraft or vehicles, anywhere when engaged in official Coast Guard business, as well as command-sponsored social, recreational and sporting events, regardless of location.

2.F.4 Behaviors that Constitute Sexual Harassment

Sexual harassment is behavior that is unwelcome, sexual in nature, and connected in some way with a person’s job or work environment. A wide range of behaviors can meet these criteria and, therefore, constitute sexual harassment.

- a. Unwelcome behavior. Behavior that a person does not ask for and which that person considers undesirable or offensive. Since perceptions of “undesirable or offensive” may vary, a reasonable person standard from the perspective of the recipient of the unwelcome behavior is used to determine if the behavior constitutes

sexual harassment. In this context, all behavior that a recipient reasonably finds unwelcome should be stopped.

- b. Behavior sexual in nature. Context matters; common sense and an evaluation of the circumstances surrounding an allegation shall be used to determine whether behavior is sexual in nature. Behavior that is sexual in nature may be verbal, nonverbal, or physical contact. Below are examples of each type, but these are not exhaustive lists.
 - i. Verbal. Examples of verbal behavior sexual in nature may include telling sexual jokes; using sexually explicit profanity, threats, sexually oriented cadences or songs, sexual comments, questions about one's sexual history or life, whistling in a sexually suggestive manner, and describing certain attributes of one's physical appearance in a sexual manner. Verbal behavior sexual in nature may also include using terms of endearment, such as "honey", "babe", "sweetheart", "stud", "dear", or "hunk" towards others.
 - ii. Nonverbal. Examples of nonverbal behavior sexual in nature may include staring at someone (commonly referred to as "undressing someone with one's eyes"), leering, blowing kisses, winking, licking lips in a suggestive manner, thrusting hips to mimic sexual behaviors, and pointing towards or touching one's own genitalia. Other

examples include printed materials that are sexually oriented such as calendars, pictures, or cartoons; using sexually oriented screen savers on one's computer; or sending sexually oriented notes, letters, faxes, or e-mails.

- iii. Physical contact. Examples of physical behavior sexual in nature include touching, patting, pinching, bumping, grabbing, cornering, or blocking a passageway; kissing; and providing unsolicited massages, back, or neck rubs. These acts may also constitute sexual assault; commands shall contact CGIS, the local Sexual Assault Response Coordinator, and their servicing legal office when allegations of physical contact sexual in nature arise.

2.F.5 Accountability

The prohibitions in Article 2.F.2 above are punitive general and regulatory orders and apply to all military personnel individually. A violation of these provisions by military personnel is punishable under reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended).

2.F.6 Process to Address Allegations of Sexual Harassment

Commanding officers and officers in charge have a responsibility to investigate all allegations of sexual harassment and to take prompt and effective action. They must be aware of all courses of action available to them to deal with sexual harassment allegations. Those actions generally fall into three categories:

discrimination complaint processes, administrative processes, and the military justice process. These processes are not mutually exclusive, and two or all three of them may be pursued simultaneously. The actions taken by a command in a particular case will depend upon the severity of the conduct, the state of the evidence, the limits of the commander's authority, and other such factors. Specific questions regarding prosecuting offenders shall be addressed to the command's servicing legal office.

- a. Discrimination Complaint Processes: Coast Guard Civil Rights providers administer these processes, which mirror civilian processes for investigating and handling reports of discrimination. Reference (1), Coast Guard Civil Rights Manual, COMDTINST M5350.4 (series), provides detailed information on processing complaints of discrimination based upon gender to ensure the complainant obtains an appropriate remedy or redress for any wrong he or she may have suffered.
- b. Administrative Processes: Prompt, appropriate administrative action should be taken simultaneously with discrimination complaint processes with regards to sexual harassment offenders when a command has sufficient information to reasonably believe an incident has occurred. It is not necessary to await the completion of the discrimination-complaint or military-justice processes. Commands have a wide variety of actions available, which include but are not limited to informal or formal counseling, evaluation in performance reports, and formal performance reviews, which could lead to separation.

c. Military Justice Process:

- i. As described in paragraph 2.F.5 above, the prohibition of sexual harassment is a punitive general order. A violation of this prohibition is punishable as a violation of Article 92(1), Uniform Code of Military Justice (violation of or failure to obey a lawful general order or regulation).

- ii. Specific acts of sexual harassment may also include criminal offenses punishable under other provisions of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). Sexual harassment is a specifically listed example of conduct amenable to prosecution under Article 93 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946 (as amended), (Cruelty and maltreatment), in certain cases. However, considering the wide range of conduct that could be characterized as sexual harassment, the following articles of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), may have provisions suitable for prosecuting sexual harassment cases depending on the facts of the case:

UCMJ	
Article 78	Accessory after the Fact
Article 80	Attempt to Commit an Offense
Article 81	Conspiracy
Article 89	Disrespect to a Superior Commissioned Officer

Article 90	Assaulting a Superior Commissioned Officer
Article 91	Insubordinate Conduct toward a Warrant Officer, Noncommissioned Officer, or Petty Officer
Article 92	Failure to Obey an Order or Regulation
Article 93	Cruelty and Maltreatment
Article 120	Rape and Sexual Assault Generally
Article 120a	Stalking
Article 120c	Other Sexual Misconduct
Article 125	Sodomy
Article 127	Extortion
Article 128	Assault
Article 133	Conduct Unbecoming an Officer
Article 134	Twelve Specifications, including: Indecent Acts, Assault, Exposure or Language; Communicating a Threat; Depositing or Causing to be Deposited Obscene Matters in the Mail; Disorderly Conduct; Fraternization; Misprision of a Serious Offense; and Soliciting Another to Commit an Offense

As a violation of a general order is a felony-level offense under the UCMJ, allegations of sexual harassment should be reported to the local Coast Guard Investigative Service (CGIS) office in accordance with Coast Guard Investigative Service Roles and Responsibilities, COMDTINST M5520.5F. However, sexual harassment investigations will normally be conducted at the unit level unless the circumstances indicate a specific need for CGIS assistance