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### Abstract

*The issues of sexual assault and sexual harassment are problems of culture, both in U.S. society as well as in the military. Within the military, these issues have been exacerbated by a number of scandals: Tailhook, Aberdeen, the U.S. Air Force Academy, Lackland and now the U.S. Marines and Fort Benning. While the issues have been addressed both in the Congress and the Department of Defense, the problems have not been resolved. There are three basic questions that need to be addressed: What has been done to date? Have the changes been effective? What more needs to be done?*

*Much has been written on this subject. What makes this paper different is that it looks closely at the actions of both the Congress and the Department of Defense tying them both to the scandals. Then the paper gathers the newest scandals which are tied to the McCaskill-Gillibrand debate over prosecution, evaluating the decisions of 2013 and whether the right decision was made.*

*Therefore, this paper attempts to do the following: address each scandal, what did the Congress do including the McCaskill-Gillibrand debate; what did the Department of Defense do, have the changes been effective, and what are the next steps necessary.*

**Key Words:** Sexual Assault, Sexual Harassment, Sexual Assault and Sexual Harassment in the Military, Congressional Oversight, Congressional Accountability, Defense Department Accountability,

Sexual Assault is any sexual activity between two or more people in which one of the persons is involved against her or his will and it contains rape and physical contact. (Wells, 2011:2) While sexual harassment is a form of gender discrimination that involves a request for sexual favors, unwelcome sexual advances, and other verbal or physical contact of a sexual

nature. And there are two kinds of sexual harassment: Hostile Environment that occurs when unwanted insulting and uninvited behavior happens to a person and it disrupts the work place and the person's work performance. And Quid Pro Quo is when there are conditions placed on a person's employment for the exchange of sexual favors, and usually entails threats if the person does not comply. Thus, when women and men face or experience such issues they become victims (Wells, 2011:3).

Sexual assault and sexual harassment in the United States Military have been persistent issues since women were admitted to the military. There have been six major scandals that have brought the issue to the attention of the American media and the public: Tailhook, Aberdeen, US Air Force Academy, Lackland and now the US Marine Corps at Fort Benning. A new term "Command Rape" has been introduced into society. Although it has not been listed on official Department of Defense website, but it is not a new form of rape as it is coined for others to understand the situation's complexity. Command Rape is defined as a superior (official or enlisted) who has power over others and demands or insinuates sexual favors in exchange for placing them in or out of a potentially hazardous situation (Wells, 2011:4&5). Reforms have been attempted by both the US Congress as well as the Department of Defense, but to no avail.

There seems to be a pattern that has developed over time with each scandal. The scandal occurs, the media brings it to light, and there is condemnation in public opinion which pressures the US Congressional committees to take action due to their oversight powers, recommendations to the Department of Defense and the military branch where the scandal occurs, some reforms then occur. The reforms NEVER go far enough. Then nothing else occurs until the next scandal. It has become a situation of "governance by scandal" (Crosbie and Sass, 2016). Action has ONLY been taken following the occurrence of a scandal. There is a lack of follow-up by the US

Congress, the US Department of Defense and the US military bodies responsible for overseeing the military. In general, oversight is induced by the media and public opinion.

It is not that the Congress and the DOD have not made reforms BUT how effective have the reforms been. Have the number of sexual assaults been reduced? Has the rate of reporting increased? Have there been more offenders prosecuted? Has there been the development of less tolerance for sexual assault? Have the victims been supported by the system in general and the UCMJ in particular? Has the chain of command been supportive of the victims or have they continued to drop cases where prosecution was warranted? Has the level of retaliation been reduced? If the answer to these major questions been no, then the level of effectiveness of the reforms is not enough and some other strategies must be sought to bring the issue of sexual assault in the military to an end.

### **Tailhook**

In 1991, the US Navy had a sexual harassment scandal, known as Tailhook (Wells, 2011:7) (Turchik & Wilson, 2010:267, 268). The Tailhook Scandal; which occurred from September 8 to 12, 1991, was a series of improper and indecent cases that happened at the Las Vegas Hilton Hotel in Las Vegas, Nevada. The events occurred on the 3<sup>rd</sup> floor where the Gauntlet of “*where male officers lined both sides of the hall waiting for a woman to approach, then two male officers would get behind her to prevent her from escaping once the men began grabbing her breasts and crotch and attempting to remove her clothing*” (Hunter, 2007:152). That incident was experienced by 83 women and 7 men who were sexually assaulted. The female victims included civilians, Naval and Air Force officers, government officials, spouses of

military personnel, and a teenage girl who was provided with enough liquor that she passed out (Winerip, May13, 2013).

The President of the Tailhook Association, Captain Rick Ludwig, answered by accident a letter to the members noting that the convention was “the most successful” and senior leadership had been “thoroughly impressed and immensely enjoyed their time”. He mentioned “five separate reports of young ladies, several of whom had nothing to do with Tailhook”, had been “verbally abused, had drinks thrown on them, were physically abused, and were sexually molested”. When this was revealed to the public, justified anger arose and the media started covering the scandaleagerly. Another Naval official Sean O’Keefe, held a press conference and announced “*Sex harassment will not be tolerated, and those who don’t get the message will be driven from our ranks*” (Vistica, Tuesday Oct.29, 1991) (Hunter, 2007:153).

President George H. Bush invited Lieutenant Paula Coughlin, one of the women assaulted, to dinner at the White House and assured her that justice would be done. A task force was formed to investigate the matter and met 21 times over a 5 month period. Within the investigation process, over \$1,000,000 (one million dollars) was spent to question more than 1,500 officers of the 5,000 who had attended the convention. But some of high levels Navy officers were not questioned nor interviewed, although they attended the convention those not questioned included; the Secretary of Navy, Lawrence Garrett, Vice Admiral Richard Dunleavy, the Chief of Naval Aviation, and “71” Admirals (Holm, 1992:473) (Hunter,2007:153)(McMichael & Moskos,1997:168).

During the trial, the Inspector General, George Davis, attempted to interview high-ranking personnel but was told by higher-ups that such questioning would not be useful to the investigation. The case released a report with hundreds of pages, which included enough evidence to file charges

under the Uniform Code of Military Justice(UCMJ) for their crimes. The judgments were noted by Naval Judge Captain William Vest Jr. that Admiral Frank Kelso had lied under oath and manipulated the investigations so as to “shield his own personal involvement in Tailhook ’91 to retire two months earlier than he had planned.” Although there was enough evidence to charge over 300 officers with crimes, only 70 were recommended for disciplinary action. Only one was a junior officer. No high-ranking personnel were held accountable. High-ups insisted that, even though Captain Rick Ludwig, the President of the Tailhook Association, who wrote that letter was not the senior officer in attendance, he ought to be held accountable for any misbehavior that took place. Two years later, the Navy and the Department of Defense completed a total of 7 investigations that cost US taxpayers \$3,000,000. Most Naval officers that had been charged with crimes were cleared or given non-judicial punishments. Of the 120 Naval personnel charged, 50 % of the cases were closed for lack of evidence (Hunter,2007:154). Although Tailhook was a huge scandal, the issue continued.

On July 2, 1992, the US House of Representative issued H. Congressional Resolution No. 344 (102<sup>nd</sup>); a concurrent resolution calling “*on the Secretary of Defense to complete a full investigation into the alleged sexual harassment...*” This resolution was cleared from the books because NO legislation was enacted.

Once it was determined that the Navy was covering up for its officers, the Senate Armed Services Committee instituted a procedure that flagged all the officers that were implicated in the scandal. This process known as the “Tailhook Certification” caused a review of each and every promotion by the Senate Armed Services Committee. Many promotions were delayed and 8 were turned down. This procedure would remain in place until 1996 (Rawles, 2000). The House Defense

Appropriations Committee cut 10,000 Naval jobs, because of the way the Navy handled the scandal (Browne, 2007).

However, it should be noted that there was no coordination between the House and Senate committees in the way that they addressed the scandal. Furthermore, there would be little or no follow-up except for the punitive damages extracted for all those officers implicated in the scandal. None of what was done addressed the chain of command and the unlawful intervention by the commanders to ensure that no one was prosecuted for the damage caused to the victims.

The Department of Defense established a sexual assault response system that gets a wide variety of military personnel to respond to victims, including Victim Advocates, Sexual Assault Response Coordinators (SARCs), physicians, nurses, mental healthcare providers, and chaplains. The Department of Defense's Sexual Assault Prevention and Response Office (SAPRO) within the Department of Defense created a Victim and Witness Assistance Program in 1994 to address victims of all crimes. (Castro, & et al., Sep., 2013: 17) These actions would address the situation once the sexual assault had been committed. It did nothing to change the environment that allowed the crimes to occur in the first place.

### **Aberdeen**

In 1996, at the Aberdeen Proving Ground Army Base a subsequent military sexual scandal occurred. ABC News reported about a scandal of rape, where 30 women reported cases of sexual harassment and sexual assault (Wells, 2011:7) (Dick, et al., 2012).By Nov. 7, 1996, the Army training base in northern Maryland reported that female soldiers had been raped, abused and sexually assaulted by their superiors.The Army found itself in the middle of a scandal exposing out of control sex and abuse of authority among male drill sergeants and the female soldiers who

were under their supervision (Spinner, 1997). Charges were filed against 3 soldiers who committed the crimes. The sex scandal expanded to other training facilities across the country, as thousands of abuse complaints poured into a special Army hot line. Army investigators' interviewed every female soldier who had trained at Aberdeen since 1995, which led to nine other trainers who later were charged with sex crimes (Spinner, 1997). Eventually, one Company Commander and three Drill Sergeants were sent to prison, including Delmar G. Simpson, who was convicted of raping six women and sentenced to 25 years. The other eight defendants were discharged or punished administratively (Spinner, 1997).

Since the Aberdeen scandal, the Army has assigned additional officers to training units so that commanders can spend more time with the soldiers. More chaplains have been assigned to give recruits another avenue to report problems and concerns. Since the scandal, soldiers never were allowed to visit a drill sergeant unaccompanied by another soldier, and drill sergeants were advised that the so-called buddy system was in their best interest to protect them from fake allegations (Spinner, 1997). To eliminate the relaxed college-like environment so many of the recruits said existed during their training at Aberdeen, commanders no longer dispensed as many weekend passes and instead filled idle time with more military training (Spinner, 1997).

The response by the US Congress to this second scandal was faster surer and wiser. The first to respond were the women in the Congress. They held a meeting with 4 military generals for over seventy minutes in closed session. The same generals met with the House National Security Committee within the same week. They received assurance that there would be a thorough investigation and there would be prosecution to the fullest extent of the law (Schmitt, 1996).

A letter to the Chairman of the Senate Armed Services Committee, Strom Thurmond, by Maryland Senator Barbara Mikulski discussed the role that congressional committees should play. She stated that besides the military investigation, "*Congress also has a responsibility to review this matter. Congressional hearings would help to provide the information and recommendations we need to change the culture of the military.*" (Rawles, 2000: 211) Congresswoman Susan Molinari went further.

*"The Tailhook debacle had taught lawmakers that Congress must intervene early to oversee the military's handling of scandals. Prior to Tailhook, I'd have concluded it was the responsibility of the United States Navy to deal with it. As a result of Tailhook, it's clear that unless there is rabble rousing and fingers are pointed, justice will not occur"* (Rawles, 2000: 69)

One caveat was a discussion held by a federal advisory committee to desegregate basic training in the military. The committee was chaired by former Senator Nancy Kassenbaum of Kansas. The discussion did not explain how females in basic training would be protected from male instructors. Also discussed was a buddy system for all females. This course of discussion was only conducted to blame the victim and didn't address how it would address the scandal at hand (Colletti, 2010) & (Chamallas, 1998).

Meetings were held, letters were written, discussions held. However, Congressional oversight was limited in impacting the Aberdeen scandal and the environment in the military that allowed for such scandals to occur (Colletti, 2010) & (Chamallas, 1998). "*DOD (Department of Defense) will look at the latest allegations about the Army's handling of the sexual misconduct investigation at Aberdeen Proving Ground, Md., but it is the Army's responsibility to deal with it*", said Pentagon spokesman Ken Bacon (Kozaryn, 1997). And that was the basic response of the



Department of Defense, let the Army handle it. They didn't call it sexual assault but rather sexual misconduct, sexual harassment, sexual abuse in other news stories written by the DOD.

A meeting before the Senate Arms Services Committee, on February 6, 1997, Undersecretary for Personnel and Readiness Ed Dorn testified that *"If even one soldier, sailor, airman or Marine feels pressured sexually, the department has a problem. ... Sexual harassment is an affront to human dignity, it is against the law and it undermines the trust and mutual respect necessary in a military unit... We have policies in place which tell people how they should behave. We also have punishments in place for those who do not behave properly,"* (Kozaryn, Feb. 6, 1997).

Nice statements with no teeth, no policies other than to let the Army handle it. This was the second scandal in less than 10 years. While committees met, everyone said sexual assault should not be tolerated; it was left to the military to deal with it. No major policies by either the Congress or the Department of Defense. The problems were the same, the chain of command, the culture within the military and the UCMJ.

### **Air Force Academy**

In 2003, an Air Force Academy scandal was reported, where rape and sexual abuse was reported in Colorado Springs by 142 women (Dick, et al., 2012). There was a large outcry on Capitol Hill which prompted a new sexual harassment and sexual assault scandal within the U.S. military institution in 2003. The Air Force Secretary, James G. Roche, on Capitol Hill announced that there were still numbers, of unknown women who have been sexually assaulted at the academy and probably they are more than 54 women, but they were afraid or ashamed to report the abuses (Schmitt, & Moss, March 7, 2003).

The scandal was initiated by an anonymous e-mail on January 2, 2003 to the Secretary of the Air Force, the Chief of Staff of the Air Force, Senator Wayne Allard, Senator Ben Nighthorse Campbell, other US members of Congress, and media representatives. The e-mail confirmed a significant sexual assault problem at the United States Air Force Academy that had been ignored by the Academy's leadership. The secretary at once commanded the General Counsel of the US Air Force (SAF/GC) to set a high-level working group to review cadet complaints concerning the Academy's program of intimidation and response to sexual assault.

In April, 2003 the US Congress launched its own investigation into the matter. In September, 2003 it released a report entitled Report "*Of the Panel to Review Sexual Misconduct Allegation sat the USAir Force Academy.*" The report concluded that Air Force General Counsel attempted both to "*shield Air Force Headquarters from public criticism*" and "avoid any reference to the responsibility of Air Force Headquarters for the failure of leadership which occurred at the Academy." (Report of the Panel, 2003; taken from Pickands, 2004). The panel was also called the Fowler Commission after Rep. Tillie Fowler. The commission discovered that the Air Force and the Academy had known about the sexual assault problem since 1993. It had been the leadership's responsibility to oversee the Academy and find a solution to the problem. They failed in both these endeavors.

The Secretary also asked the working group to review allegations of sexual assault reported from January, 1993 through December, 2002. Therefore, the Secretary directed the Air Force's Inspector General to review individual US Air Force Office of Special Investigations (AFOSI) cases and to investigate cadet grievances about the alleged mishandling of sexual assault cases. In due course these investigations were carried out and a report issued on September 14, 2004 (Report SECAF, 2004:1). Eventually, the cases were defeated (Wells, 2011:7).

Congress again addressed the issue of sexual assault in the 2005 National Defense Authorization Act. They “*directed the Secretary of Defense and the military services to develop policies and procedures to prevent and respond to sexual assault involving military members*”(Schmid, 2010:481-2). This would be the impetus behind the Sexual Assault Response Coordinators and Sexual Assault Prevention and Response Office. The Department of Defense was also required to make a report, on a yearly basis as to the incidents of sexual assault and the actions taken to combat the situation.

Also in 2005, Congress required the Department of Defense to revise the UCMJ to improve the laws dealing with sexual assault. However, the changes were not enough to lessen the number of sexual assault, increase the convictions against the perpetrators, nor would it change the culture within the military that fostered such an environment.

In January, 2005, the Department of Defence (DOD) presented to Congress a comprehensive policy on prevention and response to sexual assault. The policy presented a basis for the Department to improve prevention of sexual assault, by enhancing the support that victims needed to increase reporting and accountability. The Task Force and the Military Services worked together to ensure the rapid and effective implementation of this policy. And in 2005, the Task Force provided help to more than 1,200 Sexual Assault Response Coordinators (SARCs), chaplains, lawyers, and law enforcement to create a cadre of trained first responders. In addition, the Military Services trained more than 1,000,000 service members and established sexual assault program offices at all major installations (Lawhorne- Scott, et al. 2014:119)

In October, 2005, the Department of Defense established the Sexual Assault Prevention and Response Office (SAPRO). In the FY11 National Defense Authorization Act, SAPRO’s mission was codified to “*serve as the single point of authority, accountability, and oversight for*

*the sexual assault prevention and response (SAPR) program; and provide oversight to ensure that the military departments comply with SAPR program policy.*” SAPRO’s mission was limited to policy and data collection. It does not provide services to victims or hold offenders accountable. It does not have authority to intervene or advocate on behalf of a victim in any sexual assault investigation or case. The Services are responsible for providing training, investigating incidents of sexual assault, holding offenders accountable, and providing victim services. (Castro, & et al., Sep., 2013: 17)

The Sexual Assault Prevention and Response Office (SAPRO) was responsible for oversight of the Department's sexual assault policy. SAPRO worked with the Services and the civilian community to expand and implement innovative prevention and response programs (SAPRO, 2015). SAPRO men and women, both military and civilian, serve together in order to achieve their goal of eliminating sexual assault from the military to ensure a person’s dignity and respect by giving examples from their leaders who are committed to maintaining a workplace environment that rejects sexual assault and reinforces prevention, response and accountability under the leadership of Major General Jeffrey J. Snow (SAPRO, 2015).

In 2005, the Congress created a Task Force on Sexual Assault in the Military Services. However, still by the summer of 2006, nobody had been appointed to this committee. This delay created doubt that the Department of Defense was serious about change. It continued same old ideas that violence against women did not need to be a top priority (Coletti, 2010:52).

By 2006, nothing much had changed. The Department of Defense released a report in March 2006, patting itself on the back for all that it had accomplished. However, at a hearing in June, 2006 to evaluate the accomplishments of the Academies Taskforce Christina Hansen from the Miles Foundation spoke of her concerns within the Department of Defense;

*“Hansen's ideas also show the gap between a policy on paper and what is actually practiced within the military institution. Though the policy seemed to cover all bases, it was not proceeding exactly as one might think. Additionally, the military culture, and the values and attitudes it cultivates influence the outcomes.... Ultimately, Hansen's remarks make it evident that change was not happening quickly, and the military still failed to address their harmful culture.”* (Coletti, 2010:53).

### **Lackland Air Force Base Scandal**

Almost 10 years after the Air Force Academy scandal, a new scandal was brewing. However, the date of the scandal is unclear. Stated in one (Kuhl, 2017) the scandal began in June, 2011. Stated in another source (Rogowski, 2015) it began in the summer of 2013. This time there were 59 victims, 3 of them men. There were 35 instructors. The claims *“ranging from inappropriate Facebook posts to dorm room rapes...More than 70 members of Congress have signed a letter calling for a House hearing on the allegations”* (Jervis, 2012).

The military sexual assault advocacy organizations requested to be heard in front of the House Armed Services Committee. Congressional hearings were held on January 23, 2013. Both General Edward Rice and General Mark Welsh testified at this hearing along with two retired Air Force women and Dr. David Lisak. In the end, 35 Basic Military Training personnel were court martial for allegedly abusing trainees or sex related offenses. And after some time passed, whistleblowers have disclosed that the Air Force investigations trampled on due process rights. And individuals were railroaded with collateral charges which forced them to take plea deals to avoid excessive punishments. Two were found guilty of rape and sentenced to twenty years. The Air Force is being accused of going on a “witch hunt” after being politically motivated to clean up the basic training facility while under the watchful eye of the media, advocates, and Congress (Christenson, July 29, 2016).

Lackland is, unfortunately, only one of a group of scandals. The Congress and the Department of Defense again took actions to deal with the situation. The Department of Defense, Secretary Chuck Hagel took a number of steps to address the issue. On May 6, 2013 he strengthened “the SAPR program in the areas of command accountability, command climate, victim advocacy, and safety” (Burns, 2014: 1). On August 14, 2013 Secretary Hagel “directed additional measures to gain greater consistency of effort and enhance oversight, investigative quality, pretrial investigations, and victim support” which “included: enhancing and standardizing protections; elevating disposition authority for the most serious sexual assault offenses; establishing “*Special Victims Unit*” capabilities within each of the Services; requiring that sexual assault policies be explained to all service members within 14 days of their entrance on active duty” (Burns, 2014:1, 2).

The most major and most controversial reforms were the changes made to the UCMJ Article 60. Congressional legislation was included in the National Defense Reauthorization Act in FY2014. No longer would the military authorities be able to revise court martial’s for major offenses and would have to provide reasons for changes for minor offenses. This was to provide accountability and transparency within the system (Simms, 2015). “*The newly legislated changes to Article 60, while attempting to address the apparent abuse of clemency power in sexual assault cases, do not honor the original purpose of the convening authority’s role in the military justice process, and are thought by some to be a knee-jerk reaction to social pressures*” (Simms, 2014:304).

This is the fourth major national military sexual assault scandal. Following each scandal, the Congress and the Department of Defense have conducted numerous investigations, held frequent hearings, made many recommendations and instituted numerous reforms, all to no avail.

Each scandal has been brought to light by the media, pressuring governmental institutions to take action. And yet it took 4 scandals, 1 documentary and much pressure from the American public to get to the point of the major debate presented by Senators McCaskill and Gillibrand.

### **The Invisible War Movie:**

On March 7<sup>th</sup>, 2007 Salon.com published an investigative report on military sexual assault titled “*The Private War of Women Soldiers*” by Helen Benedict. This story inspired *The Invisible War* team to work on the movie and bring the issue of sexual assault and sexual harassment in the military ranks to the surface (Twine, 2013: 60).

By January 6, 2012, the Department of Defense report of (Annual Report on Sexual Harassment and Violence at the Military Service Academies - Academic Program Year 2009-2010) found a sharp increase of sexual abuses at the nation's military academies by nearly 60% during the 2010-2011 academic year. A total of 65 sexual assault reports were made involving cadets and midshipman, compared to 41 during the period of 2009-2010 (CNN, 2012).

January 20, 2012; the Americans woke up to a new fanfare; the Invisible War documentary movie, which had a huge impact on American society. And it won the 2012 Audience Award at the Sundance Film Festival (Twine, 2013: 60).

This movie finally talked about one of America’s most shameful and best –kept secrets: the widespread sexual assault and harassment within the US military ranks, as well as the Posttraumatic Stress Disorder PTSD that created in each victim (Dick, et al., 2012). This film presented testimonies by female veterans that echoed the lawsuit filed in 2012 against the Department of Defense -the Pentagon- (Twine, 2013: 60). And it found many supporters as advocates, lawmakers, and journalists; because of its influence over government policies.

Congress was asked to decrease the prevalence of rape in the armed forces by pushing to create new legislation which will be discussed later (Dick, et al., 2012). The movie revealed the Department of Defense report that clarified that the military was not a safe place for active-duty female soldiers (Twine, 2013:61). The Invisible War movie examined the issue of military sexual assault and / or military sexual harassment and described how the Department of Defense had mishandled rape cases by not providing appropriate channels for reporting these assaults that were outside of the “chain of command” (Twine, 2013:61).

In April, 2012, Leon Panetta, Secretary of Defense, and other leaders in the Defense Department, watched The Invisible War movie before it was released. By June, 2012, and after the movie was released, Panetta announced sweeping changes to military policy and to the Uniform Code of Military Justice, which were proposed to concentrate on the systematic abuses and inconsistent handling of the reporting, processing, and prosecution of sexual assault complaints and cases (Twine, 2013: 61).

The US military’s response was that any woman raped, it was her own fault. They perceived victims’ faults arose from being drunk, or maybe because the victim had walked back to the barracks alone at night...etc. reasons that made her vulnerable to be attacked. Most of the military laws did not serve the victims side as some of the military may be encouraged to blame the victim or rape myths, such as “women lie about being raped”(Gillibrand, & Weil, 2014:171).

The DOD Academic Program Year (APY) 2011- 2012 Report on Sexual Harassment and Violence at the United States Military Service Academies was released. By December 21, 2012 the overall rate of unwanted sexual contact increased in all three military academies. Compared to 2011, the Air Force Academy in Colorado showed the largest increase in sexual assaults from 33



to 52 in 2012. Sexual assaults at the Naval Academy in Annapolis, increased from 11 to 15, and the numbers were up at West Point, NY, from 10 to 13 in 2012 (Torreon, July 30,2013:1).

Referring to the Defence Manpower Data statistics, which viewed the slow wheel of improvements for reporting about the issue by the victims referred to the reason of victim's trust which had been betrayed. Thus they lost the confidence and the trust in the system even if there were many who worked on improving the situation (Hunter, 2007:161).

Within the same report, Congressional action was criticized by sexual assault and sexual harassment military victims on March 13, 2013. The victims stated under oath before a Senate panel examining the military's sexual assault cases and stated that the "*military justice system is broken.*" They insisted that Congress should make changes in the law by creating new legislation that would stop the rape, sexual assault, and sexual harassment, which spread throughout the service branches (Torreon, July 30, 2013:1).

### **Naval Academy in Annapolis**

In May, 2013, a female student at the United States Naval Academy(USNA) came forward and reported being sexually assaulted a year earlier by three players on the football team at an off campus house. The victim learned of the prior assaults upon her from friends and via social media, after the players had boasted to others about having sexual intercourse with the particular student while she was intoxicated. When the female student came forward to report the sexual assaults, she was disciplined for drinking and ostracized by her peers (Felsman, 2014: 379).

She testified at the preliminary hearing Wednesday, August 28, 2013. The Article 32 hearing, held at DC's Navy Yard, is one of the highest-profile military sexual assault cases since

President Obama made his first public condemnation of such actions, at the Naval Academy's commencement ceremony in May. President Obama said at the same day in Annapolis, Md. *"It only takes the misconduct of a few to further erode the people's trust in their government,"* (Weinberg, Aug. 28, 2013)

*"The inquisition took place during an Article 32 hearing".* This type of hearing is utilized when a court martial may be called for, are public in nature. Defense lawyers have the ability to cross-examine the victim. *"Intended to keep military prosecutors from steamrolling defendants, it can force sexual-assault victims to endure long rounds of intensely personal questioning before the trial."* (Thompson, Sept. 16, 2013)

An Article 32 Hearing has *"evolved into a device for abusive cross examination of the plaintiff. To be sure, the presiding officer easily could have restrained defense counsel from the type of abusive cross-examination inflicted on the complainant"* (Lurie, 2014, p. 411). The hearing concentrated on the victim's degree of intoxication and attacked her credibility. *"Under military law, the focus is on the accuser's perceptions of the victim's level of intoxication, which is likely to be based on the accuser's self-serving description of the victim's conduct"* (Schenck, 2014, p. 509).

The length and aggressiveness of the Article 32 hearing would later give impetus to the changes of the hearing by the Congress in National Defense Authorization Act for Fiscal Year 2014. The actual changes will be addressed later in this paper.

### **McCaskill vs. Gillibrand**

By 2014, the military sexual assault scandals as well as the large numbers of sexual assault victims pushed the US government to propose three pieces of legislation that defended sexual assault victims in the US Military (Cooper, 2014). The Invisible War movie opened doors to those pieces of legislation on the Congress floor. US Senator Claire McCaskill's Victim's Protection Act which was enacted, Senator Kristen Gillibrand's Military Justice Improvement Act (MJIA), which was defeated on the Congressional floor, and Representative Jackie Speier's Sexual Assault

Training Oversight and Prevention Act (STOP) which never made it to the floor of the Congress. The McCaskill and Gillibrand's bills were highlighted by the media, especially Senator's Gillibrand's MJIA due to the controversial nature of what was proposed in the legislation. Representative Speier's legislation, which was similar to Senator Gillibrand's legislation, proposed that the issue of sexual assault be taken out of the chain of command which would move the "reporting, oversight, investigation and victim care of sexual assaults" from the chain of command to an autonomous group made up of both civilian and military personnel." (Rasmussen, 2016: 21)

The reasons behind refusing Sen. Gillibrand's Amendment were; first, the limitations of the commander's authority that the Gillibrand's bill created to overturn a guilty judgment in sexual assault cases. Therefore, such a bill would create retaliation against victims who reported sexual assault. Secondly, the concept of "Good Military Character" should not be allowed as a factor in deciding whether or not to prosecute a perpetrator of sexual assault. Third, requiring any substantiated complaint of sexual assault to be permanently noted on a perpetrator's military service record. (Protect Our Defense, 2015)

One of the major issues between the two pieces of legislation is command control and command influence. *"Congress specifically authorizes command control of the military justice system, thereby making it lawful, and places the military commander at the head of the courts-martial. Conversely, command influence is unlawful and refers to the scenario in which a commander's personal biases and beliefs infiltrate the courts-martial process"* (Olsen, 2017: 11).

Sen. Gillibrand's speech in front of the Senate Armed Services Committee contended that commanders still had too much authority, which should be decreased, since she believed that: *"Not all commanders are objective... not every single commander necessarily wants women on the force. Not every single commander can distinguish between a slap on the ass and a rape, because they merge all of these crimes together"* (Gillibrand, & Weil, 2014:170).

Therefore, the command chain for commanders is really powerful and biased in favor of their interests, which was maintaining the military culture that created the environment that allowed sexual assaults to occur. Commanders, who should keep good order and discipline, have used their powers to humiliate and deny those who are under their command from obtaining full protection under the law. (Gillibrand, & Weil, 2014:170)

### McCaskill

The Victim's Protection Act was included in the National Defense authorization Act of 2014. It revised the SAPR programs within the military. The act included the following provisions: 1) that the Special Victim's Counsel should advise the victim concerning whether to prosecute by a court martial or civilian court; 2) the "good soldier defense" is no longer admissible unless it can be shown that it is directly related to the case; 3) requires the Departments of Justice and Defense to cooperate in ensuring that cases of sexual assault are averted and responded to; and 4) a performance evaluation of the commanding officer to ensure that the environment is conducive for a victim to report without fear of retaliation (VPA, 2013).

### Gillibrand

The Military Justice Improvement Act was perceived as being controversial and challenged the chain of command within the military. The legislation would decrease the discretion of those within the chain of command when making decisions related to the investigation of the case as well as whether or not to prosecute the alleged rapist (Lohman, 2015). *"The Act moves the decision to prosecute any crime punishable by one year or more in confinement to 'independent, trained, professional military prosecutors'"* (Rogowski, 2015: 1166). By moving the decision to a third party, it would take the decision to go to trial out of the hands of the Commanding Authority

(CA), who is within the chain of command and places it with a neutral party, therefore averting the bias of those who want to possibly cover up the incident ( Hood, 2015).“Currently, prosecution of sexual assault in the military is handled by an officer in the chain of command, which inevitably causes a conflict of interest based on the fact that one- fourth of sexual assaults in the military are committed by an individual in the chain of command”(Yuppa, 2015: 22-23).

Furthermore, it is those within the chain of command that harass victims that do come forward. The victims are *“in turn investigated and found to be guilty of violations under UCMJ for adultery, underage drinking, conduct unbecoming, and so forth ... In 2012, 60% of victims who reported their assaults experienced some form of retaliation from their command”* (Abbate, 2014: 4).

When the US military chain of command, for whatever reason, refuses to prosecute a case it creates a situation where the perception is of tolerance for sexual assault. Going even further, that the chain of command condones this type of behavior. It is pointed out that *“if a commander tolerates sexual harassment, it is 6 percent more likely that a sexual assault will occur under his command”* (Abbate, 2014: 4).

Speaking to her colleagues in the U.S. Senate Senator Gillibrand stated: *“sexual assault in the military is not new, but it has been allowed to fester. It has been festering in the shadows for far too long, and when our commanders for the past twenty-five years have said there is zero-tolerance for sexual assault in the military, what they really meant was there is no accountability”* (Olsen, 2017: 16).

The issue of taking sexual assault out of the chain of command has been done by other countries. These countries include Australia, Canada, Germany, Israel, Norway and the United Kingdom. Members of the military from Australia, Canada, Israel and the United Kingdom have stated that changes *“they have made to their military justice systems — including the one up for debate in the Senate as part of the Military Justice Improvement Act —have not diminished the*

accountability of commanders or their ability to maintain good order and discipline” (Gillibrand, 2015).

The MJIA was supported by numerous women’s and victim advocates groups. These include but are not limited to the Service Women’s Action Network (SWAN) and the National Organization of Women (NOW). These groups agreed that the issue of sexual assault in the military needed to be addressed with urgency that to date enough had not been done to address the issue. They supported removing the issue of sexual assault, as a whole, from the chain of command (Olsen, 2017). Additionally, 17 of the 20 women senators also supported this piece of legislation (Gillibrand, 2015)

### *The Debate*

Of course, taking on the US military commanders brought a strong contentious fight from the military elite, trying to preserve their environment, their culture, their way of life. While this is not the major focus of this paper it needs to be touched on for it explains why McCaskill’s Victim Protect Act was enacted instead of the Military Justice Improvement Act.

Those that opposed the Gillibrand legislation came forward with many different arguments. The most important of which was that the military is a world unto its own, that no one can understand the military except someone else in the military, that the military chain of command was the only group that could make the decisions concerning the sexual assault cases within the military. That creating a bureaucracy of lawyers, approximately 600 in number, at the cost of \$113 million, somehow takes scarce resources away from military families, when the US military budget is worth *billions* of dollars. (Dunlap, 2013)

They claimed that they were only trying to protect the rights of the accused, not trying to re-victimize the victim. That removing the decision for sexual assault cases would somehow affect the morale of those in the military and somehow affect the military's ability to do its job, again negating the rights of the victim. That the military justice system is somehow sacrosanct as is the role of the military commanders. Never addressing the fact that the military has had more than 25 years to address the issue, and the number of scandals, cases and bad publicity but still continue, still festers at the expense of the victims.

That somehow by getting support from women's organizations, victim advocate groups and lobbyist to help traverse the governmental political system was a crime in and of itself. Of course, the military did just the same thing but somehow it was wrong if the other side did it too. This is not to say that the rights of the accused should not be preserved, they should but *not* at the expense of the *thousands* of victims that come forward *every year*.

### **Subsequent Actions**

Discussion about sexual assault in the military did not end with the Gillibrand vs. McCaskill debate. Many more actions have been taken since 2013. However, while the Congress and the DOD continue to address the issue of sexual assault, many essential problems remain. Professor Eugene Fidell correctly likens these changes to "*piling Band-Aids on a badly broken 18th-century museum piece*" (Buchhandler-Raphael, 2014:19). Furthermore, it should be stated that the military doesn't always comply with what the Congress requests of them. An example is that Congress mandated, several years ago, that the military provide a database on sexual assault perpetrators, which the military has still not provided (Patrie, 2015).

In 2014, the Washington DC Circuit Court decided on one of two class-action lawsuits that were filed against former Defense Secretaries Leon Panetta and Robert Gates on behalf of hundreds of sexual assault victims. They alleged that there had been violations of their “*substantive and procedural due process rights (violation of bodily integrity, failure to implement federal regulations on sexual assault in the military), equal protection (creating a military environment hostile to women), and free speech (retaliation for reporting assaults)*” (Patrie, 2015: 6). The cases were dismissed but due to the lack of action by the Department of Defense and the Congress as well as the high numbers of sexual assault cases the victims were left with little other alternative than to file the lawsuits (Patrie, 2015).

In November, 2014, the DOD, in response to President Obama’s request, delivered a report, which presented indicators of the improved policies related to the issue of sexual assault from 2012-2014. Some of the indicators presented included: an increased leadership role in dealing with eradication of the issue of sexual assault; the Comprehensive Response and Report System which includes – Prevention, Investigation, Accountability, Advocacy and Victim Assistance and Assessment; the recent survey data shows that the prevalence is down and the reporting is up; as well as a Special Victim’s Counsel (DOD Report to the President, 2014).

While McCaskill’s Victim Protection Act became part of the National Defense Authorization Act for fiscal year 2014 (NDAA), there was an amendment to it in December, 2013 called the Levin Amendment for Senator Carl Levin, who was the Chairman for the Senate Armed Services Committee (SASC). It incorporated sections of the MJIA and the STOP without taking the issue out of the chain of command. Some of the issues included: “improving the rights of victims, changing how preliminary hearings are conducted, limiting the action convening authorities can take on a sentence, eliminating the statute of limitations for sex-related offenses,



requiring discharge of service members convicted of certain sex-related offenses, and establishing review procedures for decisions not to refer sex-related offenses to a court-martial” (Venghaus, 2015:109) & (Lucero, 2015). More specifically it also amended Article 32 of the UCMJ. It created a Special Victims Counsel for the advice and support of victims as well as dishonorably discharged all members of the service who were convicted of sexual assault (Tomes, 2015).

In December, 2014, Congress passed the NDAA for fiscal year 2015. It provided victims with a special counsel as well as permits them to decide whether to prosecute in a military or civilian court, no longer allowed for the ‘good soldier defense’, and requires an evaluation of the commander to ensure that the environment is conducive to victims coming forward (Rasmussen, 2016).

In November, 2015, Congress passed the NDAA for FY 2016. There are several provisions of note. The Special Counsel should be made available to the victim before meeting with any criminal investigator or interviews with trial counselors. The DOD is to develop a comprehensive strategy in order to prevent retaliation against a victim or one supporting the victim. There should be assessment and improvement of policies for sexual assault in relation to the National Guard and Army Reserves. Finally all commanders must undergo sexual assault prevention and response training and education (NDAA, 2015).

On June 14, 2016 the US Congress passed the Military Retaliation Prevention Act. This act was sponsored by Senators Claire McCaskill (D-MO) and Joni Ernst (R-IA). This legislation has four main goals: 1) separates retaliation into its own category in the UCMJ; 2) the DOD is to gather and issue data on cases of retaliation; 3) requires specific training for all within the military

justice system involved in investigating complaints; and 4) measure the outcomes of the collection of retaliation data (McCaskill, 2017).

In June, 2016, 9 members of the US Senate sent a letter to President Obama requesting that he open an investigation into the allegation that the Secretary of Defense, Ashton Carter, misled Congress concerning sexual assault cases. The allegations stemmed from a report from the group Protect Our Defenders (POD) *“found that Department of Defense officials provided misleading information in order to affect the policy debate in Congress over sexual assault in the military”*(Christensen, et al., June 6, 2016). POD investigated 93 cases where it was alleged that sexual assault perpetrators were court martialbut not convicted. These 93 cases were used during the McCaskill vs. Gillibrand debate in 2013 to show that there was no need to take the sexual assault cases out of the chain of command. However, the report presented a very different picture.

*“...out of the cases reviewed by POD, over two-thirds were not sexualassault cases declined by civilian prosecutors and later prosecuted by the military. Further, contrary to the rhetoric, the Pentagon was unable to provide a single example of a commander “insisting” a case be prosecuted. Instead, in every case for which such information was provided, either military investigators or military attorneys were the ones to request jurisdictionover the case. Crucially, the military did not identify a single case where a commander sent acase to trial after a military prosecutor refused to prosecute. The facts behind the Pentagon’sclaims reveal the great lengths they went to in order to distort the data to counter momentum and prevent reform”* (POD, 2016: 2).

In December, 2016 Congress passed the NDAA for FY 2017. There were several important provisions included in the legislation which include: to provide military justice development for judge advocates ensuring that they have sufficient experience and knowledge to prosecute and defend cases. Further, there is to be a five year pilot program to determine the feasibility and advisability of a career in military litigation track. In the yearly reports presented to the Congress, information on complaints of retaliation against victims and those supporting victims of sexual

assault should be provided. Lastly, there should be collection of reports of hazing and try to determine the prevalence of hazing (NDAA FY 2017).

In June, 2017 Senators' Kirsten Gillibrand and Joni Ernst introduced a piece of legislation to create a career track for Justice Advocate General (JAG) to advance the proficiency within military system of justice. It would encourage them to major in military law for the majority of their career.

*“Because JAGs transfer so frequently, most do not gain the necessary experience to try cases, defend the accused, or represent a survivor adequately. Moreover, JAGs are encouraged to have a broad range of experience, which means that a JAG who has very little experience trying cases may be assigned to a complex sexual assault case. Our service members deserve better. Our bill will change that and model the military justice system after the civilian system where lawyers become experts in their fields”* (Gillibrand, June 26, 2017).

It should be noted that the issue raised in the MJIA and STOP pieces of legislation have not died. Rep. Speiers in April, 2015, reintroduced a version of the STOP legislation. Although, the House Armed Services Committee did not include it in the NDAA for FY 16, it is assumed that she will continue to re-raise the issue into the future. Senator Gillibrand's MJIA legislation was not voted on for the NDAA for FY 2017 (Gillibrand June 24, 2016). The MJIA legislation has been introduced at least 5 times (Venghaus, 2015).

## **Newest Sexual Assault Statistics and Scandals;**

### Newest Statistics

The Defence Manpower Data Centre made a Service Academy Gender Relations Survey during the Spring of 2014. The survey viewed that the rates of sexual harassment for Academy women, which decreased from 51% in 2012 to 48% between 2013 and 2014, and 10% of Academy men perceived some form of sexual harassment in academic programs (SAPRO, 2015:6). The

2014 Service Academy Gender Relations Survey showed that 8.2% of Academy women and 1.1% of Academy men experienced unwanted sexual contact within the academic program between years of 2013-2014, which decreased from academic program between years 2012-2013 in average of 12.4% of Academy women and 2.0% for Academy men who had experienced unwanted sexual contact (SAPRO, 2015:7). Because of progress and improvement over the issue of victims' needs, the number of reports increased during the academic program between years 2013 and 2014. The Academies received 20 complaints of sexual harassment, comprised of 1 formal complaint and 19 informal complaints in reporting about sexual harassment. While complaints from academic programs between years of 2012 and 2013, was only 11 informal received complaints. Even though the improvements are slow, but the numbers were still increasing (SAPRO, 2015:7).

The SAPRO report for FY 2014 was released in May, 2015. Keeping in mind that there was a drastic jump (53%) between FY 2012 and FY 2013, the high rate of reporting continued in FY 2014, with 6, 131 victims reporting sexual assault. This was an 11% increase over FY 2013. Victims made 4,660 Unrestricted reports (DOD, Mar 24, 2015). This report shows that the level of sexual assault is similar to 2010, which means there are 19,000 victims of sexual assault, 52 assaults a day (Gillibrand Statement, May 1, 2015). Sixty-two percent of the women faced some form of retaliation, 33 % of whom received some form of administrative disciplinary action. *“The military has pledged zero tolerance for over 20 years. There is no other mission in the world for our military where this much failure would be allowed”* (Gillibrand Statement, May 1, 2015).

The DOD released the SAPRO report for FY 2015 on May 5, 2016. In the report it stated that 6, 083 victims reported incidences of sexual assault. This is a decrease of 1% in the number of cases reported the previous year. 4,584 cases were unrestricted cases which were investigated. Some type of disciplinary action was taken in 72% of the cases (DOD, 2016).

On May 23, 2016, Senator Gillibrand released a report concerning the review of 329 of the cases reported to SAPRO. These cases came from 4 military bases and showed that *“despite recent Congressional reforms, dysfunction in the military justice system remains”* (Senator Gillibrand, May 23, 2016). What the report showed was that civilian women that live close to the military bases as well as civilian women of servicemembers, two groups not covered by DOD statistic, reported a large number of cases. Furthermore, 20 percent of victims, after initial reports, did not proceed with prosecution, showing a lack of trust in the system. *“Even when cases did proceed, just 22 percent of the 329 cases reviewed went to trial and only about 10 percent of all cases resulted in a sexual assault conviction, and five percent were convicted of a crime other than sexual assault. Gillibrand’s analysis also found that zero cases of retaliation were prosecuted despite recent Congressional actions defining retaliation as a crime”* (Senator Gillibrand, May 23, 2016).

The U.S. military received a record number of sexual assault reports in 2016, the Pentagon said on Monday, 1<sup>st</sup> of May, 2017, calling it a sign of service members' trust in the system. The number recorded of sexual assault reports in 2016 were 6,172 cases compared to 6,082 the previous year and 3,604 cases in 2012, although experts say many more go unreported. Anonymous Pentagon surveys that include unreported incidents found 14,900 service members experienced some kind of sexual assault in 2016, down from 20,300 in the previous survey conducted in 2014. But 58 % of victims experienced reprisals or retaliation for reporting sexual assault, the report showed (Cronk, May 1, 2017).

Senator Christensen Gillibrand said another disappointing figure is the number of convictions: *“124 out of 4,794 investigated in 2016.” “Odds are, if you are a sex offender in the military, you are not going to be held accountable”* (Reuters, May 1, 2017).

Looking at the statistics following the passage of the Victim Protection Act there has been very little change in the number of victims. While there is more reporting, it is known that many more cases are still going unreported. The number of prosecutions is just abysmal and those convicted is even worse. The issue of retaliation for coming forward has not changed. Much of this has to be laid at the feet of the military itself, the chain of command and the commanding authority.

The DOD is still contending that the victims trust the system and that is why they are coming forward. It is really surprising that as many victims are reporting as they are with the system not providing the effective results of lowering the number of victims, increasing those that are prosecuted and the amount of retaliation.

### **Newest Scandals**

By March 5, 2017, there was a report of a Marine in-service nude photos scandal. Marines had secretly taken and shared sexual photos of their female colleagues in a secret Facebook group with joking about raping them (Taylor, March 6, 2017).

The closed group called “Marines United” on Facebook with 30,000 followers, had hundreds, possibly thousands of photos of unsuspecting servicewomen and many members made sexually aggressive comments about the victims. Some suggested in the 2,500 photo comments that the servicemen perform sexual acts with the women and film it for the other members. The group admin used Google Drive to store the photos and information of the female abused veterans as explored in the report of the Center for Investigative Reporting and the *War Horse* nonprofit news organization run by Marine veteran Thomas Brennan. Veteran Thomas Brennan, who runs *the War Horse* news outlet, first brought the scandal to light. Within a day of Brennan

contacting Marine Corps headquarters in 30 of January, more than 2 dozen women, many in the service, including officers and enlisted service members, have been identified by their full names, ranks and military duty stations in photographs posted and linked to from a private Facebook page, had been deleted by Facebook and Google at the Corps' request, and a formal investigation by the Naval Criminal Investigative Service has been launched (Taylor, March 6, 2017). On March 9, 2017 both CBS and Business insider reported that there were similar activities going on in the other branches of the military (NPR, March 10, 2017).

On August 23, 2017 allegations surfaced that five Fort Benning Drill Instructors were involved in sexual misconduct with six female infantry trainees. According to Representative Jackie Speier (D-CA), this appears to be a repeat of the Lackland Air Force Basic Training Scandal years ago. *“The alleged misconduct ranges from consensual sexual relationships to sexual harassment and assault, and includes the nonconsensual sharing of intimate images”* (Rep. Speier, August 23, 2017).

These two new potential scandals allude to the fact that the environment and the culture of the military has not been reformed the way that has been promised since the time of Tailhook. 6 scandals, many Congressional hearings, pieces of legislation proposed and enacted, many changes made by the DOD surveys, statistics gathered and yet two new potential scandals.

### **Conclusions and Recommendations**

Since the Tailhook scandal, the US Congress and the DOD have made many attempts to reform the system to deal with the issue of military sexual assault. And yet, there are two new potential scandals on the horizon. So where is the disconnection?

To begin with the governmental and military environments do not make reform easy. In the US Congress there are several committees and numerous subcommittees in both the House and the Senate that have tried to impact the reforms of the military in relation to the issues of sexual assault and sexual harassment. They do not speak with one voice or even several voices. The changes they have made have been incremental at best and they are addressing the issues after the fact, trying to stem the scandals, public opinion, and the media. They have not been very effective about changing the environment in the military that allows this problem to fester.

The DOD has its own environmental problems. Since Tailhook, there have been numerous Secretaries of Defense who have reflected each US President's agenda. In general, the DOD has shown through action and policy that while they have oversight of the military, the issues of sexual assault and sexual harassment are the military's problems. DOD has not done very much to address the nature of the problems, nor the environment or the culture. Their policies, like those of the Congress have been incremental at best and have addressed the issues from the standpoint of cleaning up, after the fact. Neither has spent as the vast majority of their time on prevention but rather on making minimal adjustments to the military system and the UCMJ.

The most basic question to be addressed is; have the reforms made by the Congress, the DOD and the military been effective in addressing the issues of military sexual assault and sexual harassment? The most basic statistic to be looked at is, has the rate of sexual assault been reduced? The answer is no. One year it is down 1% but the overall numbers are still way above 2012 number of victims. The Victim's Protection Act, which was touted as the answer in 2013 has not reduced the number of victims.



The number of victims is complicated by the fact that the number of victims reporting their rapes are up, as in 2016. This number is interpreted by the DOD as an increase in trust in the overall system addressing the issue. However, how can this be interpreted as trust when the rate of prosecution and guilty verdicts are so abysmal?

Since the very beginning the military has stated that there is zero tolerance for sexual assault. However, time and time again, their actions have shown otherwise. From Tailhook until the two newest potential scandals, the military has fought to maintain the *status quo* from leaving the issues of sexual assault and sexual harassment within the chain of command when there have been conflicts of interest to allowing the Commanding Authority to lessen sentences or to throw cases out altogether. No matter how one looks at it, the rate of prosecution and conviction is appalling.

That is not to say that there haven't been improvements made that benefit the victim. The creation of the Sexual Assault Response Coordinators by the DOD after the Air Force Academy scandal, changes made to the UCMJ, i.e. Articles 32 and 60, the inadmissibility of the 'good soldier defence' the creation of the Special Victim's Counsel and the elevation of the issue of retaliation against victims have all benefited the victim.

The military has always claimed that they support the victim. However, the number of cases prosecuted belies this point. When in 2016 only *124 out of 4,794* cases produced convictions, this is only a 2.6% conviction rate. This conviction rate is a complete failure on behalf of the victim. And this is after all the reforms, including the VPA, and the promises of zero tolerance for sexual assault by the military. Something has to change. This is also keeping in mind that the reporting rate is less than half of the number of victims being attacked from in the military as well

as none of the numbers from SAPRO include nonmilitary victims that are assaulted by servicemen on or near the military bases.

The issue of retaliation has been a concern since the time of Tailhook. Victims are not only re-victimized by the military court system they are also re-victimized from within the military environment and culture. The percentages of retaliation have hovered between the high 50's to the low 60's in the last few years, with approximately 1/3 receiving some type of administrative discipline. The military has claimed to address this since the time of Tailhook. Congress and DOD have left things up to the military. Recently the Congress has placed a major focus on this topic.

### Recommendations

It is clear by all the evidence presented in this paper that the issues of sexual assault and sexual harassment in the military cannot be left to the military to solve. All of that have been done up until those points have not fixed the problem. Therefore, it is time to take more drastic steps. The MJIA is currently up for a vote this week to be included in the NDAA for 2018. It still only addresses sexual assault and sexual harassment after the fact but it would go a long way to increase the trust of victims in the system so that it would increase the rate of reporting. It would also increase the rate of prosecution and conviction by no longer allowing the chain of command to intervene on behalf of the rapist. Further, by increasing the rates of prosecution and conviction it would begin to hold the rapists accountable for their actions as well as begin to act as a deterrent because it is clear that rapists are being sent to jail, thus, at least some perpetrators would think before they act.

There has to be more done to prevent the occurrence of sexual assault and sexual harassment and not just wait for scandals to occur to shed light on the issues. With 2 new potential scandals waiting in the wings, it is clear that sexual assault and sexual harassment have NOT been dealt with effectively. One area, although they have not been the focus of this paper, that is sorely lacking in reform is the environment and culture where this concern is allowed to fester. In the early days, back when Tailhook and Aberdeen occurred, Congress and the DOD believed that sexual assault and sexual harassment were the military's problem. As time has gone by and the issues have not been resolved, Congress and the DOD have become more proactive. Training, although helpful, in and of itself will not fix the environment and culture in the military.

The issue of retaliation, while it has become more of a focus, especially with the proposed legislation of McCaskill and Ernst, still needs to be addressed. There have not been any convictions for those who retaliate against victims, again no accountability. It needs to be addressed not only in terms of the retaliation that occurs within the environment but also the administrative discipline that is meted out by the military system itself. There is no administrative discipline for the perpetrators because they are not prosecuted. Therefore, the victim is revictimized. This administrative discipline is punitive and should not be allowed to continue.

Sexual assault and sexual harassment in the military have been allowed to fester. It needs to be addressed in a more effective manner. One thing is for sure, if this was given the weight it deserved from all parties concerned, it could have been done more effectively.

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