The Consequence of Legislation: An Analysis of Military Sexual Assault

by

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First, I would like to dedicate this thesis to the individuals who are victims of military sexual assault, to those who have survived the insufferable and to those who didn’t.

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Abstract

The purpose of the thesis is to analyze the evolution of military sexual assault and misconduct laws, under Article 120, in the Uniform Code of Military Justice to determine what factors influenced Congressional interventions that lead to policy amendments. Additionally, this thesis will examine the implications of these policy changes within the greater landscape of military sexual assault prosecution and prevention. Despite numerous changes to the definition of rape and sexual assault and provisions to protect MSA victims, instances of professional retaliation continue to be disruptive. Some scholars have written about the pervasiveness of military sexual assault and the hardships of navigating the military judicial system. Yet, no literature traces the history of military sexual assaults, to locate shortcomings and recommend potential solutions. Additionally, the existing literature lacks a veteran’s perspective. Critical Military Scholars are needed in this field to investigate the ways in which different structures and power dynamics within the Armed Forces perpetuate problems, such as military sexual assault. An examination of Congressional oversight, which developed and amended the military justice system and implemented policy modifications will illuminate some of the factors that perpetuate the military sexual assault.
Chapter One: Introduction

“Thus, when we try to increase the visibility of particular rapes committed by particular men as soldiers, we are engaging in a political act.” –Cynthia Enloe

Introduction

This thesis examines the lack of Congressional aid in terms of military sexual assault (MSA) from the viewpoint of someone who has served in the United States Army. There is a lack of research in the field by a female identified veteran. It seems fitting that there be at least one piece written by an individual that served in the United States Military and has firsthand knowledge and experience of the injustices servicemembers endure. A feminist analysis of MST, with this unique point of view, is a necessary and essential addition to the field of Critical Military Studies. Not to suggest that other individuals did not have good intentions or were not accurate in their critiques. Instead, an analysis of MST at the intersection of a feminist and veteran identity seems appropriate.

Description of the Problem

In 2016, the Department of Defense (DOD) estimated that approximately 14,900 active duty servicemembers experienced MST. The number is estimated because officials believe that only 32% of victims reported the assaults through the

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2 In this thesis, the term servicemembers refers to any uniformed members of the U.S. Army, U.S. Marine Corps, U.S. Navy, U.S. Air Force, and the U.S. Coast Guard.
3 In the wake of Ford versus Kavanaugh congressional hearings regarding sexual violence allegations, I found my inspiration for this topic and the idea to use congressional hearings as the site for critical analysis. This analysis will start at the inception of the Uniform Code of Military Justice (UCMJ) and examine how Congress and military officials have amended the laws against military sexual assault and harassment. Further, I hope to find answers as to why Congress and senior military officials are unable to resolve the prolonged issue of MSA.
proper military channels. Additionally, only 4% of complaints result in some form of conviction, whether mild or severe. In hopes of reducing the amount of sexual violence, the military implemented the Sexual Harassment/Assault Response and Prevention (SHARP) program. With such a high rate of sexual assaults and low rates of reporting, one must question why there is such a disparity.

![Graph showing number of reports over fiscal years](image.png)

**Note:** Figure 1. Restricted reports do not initiate an official investigation. Unrestricted Reports, once filed, immediately initiate an official investigation. Discussed further in Chapter Two.

In 2011, several victims of military sexual assault took a journey to stand before the Supreme Court and beg for Department of Veterans Affairs assistance for the physical and mental ailments due to the sexual violence they faced while in the service. Not

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7 A Connecticut federal judge recently certified a class action law to provide benefits to veterans who received less-than-honorable discharges due to conditions directly related to their military service.
unlike the system already in place, the Supreme Court ruled that military sexual assault (MSA), or any other type of criminal act, was not in the Court’s jurisdiction thus, further creating a divide between victims and leadership support.

In 2012, Director Kirby Dick released the award-winning documentary *The Invisible War* which provided audiences with an opportunity to receive first-hand accounts of the hardships regarding professional retaliation after sexual assault and rape in the military. The main storyline of *The Invisible War* captures the tremendous difficulties MST survivor Kori Cioca faces throughout a legal battle with the U.S. Department of Veterans Affairs and Congress. *The Invisible War* showcases the VA’s refusal to provide Cioca with mental and physical health care services—the accused servicemember broke her jaw during the assault—despite the physical and psychological damage that occurred during her time of service. Cioca and other MST survivors bring a civil suit against the DOD for failing to address MSA in the military adequately. In the civil suit *Cioca v. Rumsfeld*, the final court ruling state:

In the present case, the Plaintiffs sue the Defendants for their alleged failures concerning oversight and policy setting within the military disciplinary structure. This is precisely the forum in which the Supreme Court has counseled against the exercise of judicial authority. Where the Supreme Court has so strongly advised against judicial involvement, not even the egregious allegations within Plaintiffs Complaint will prevent dismissal..., but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.\(^8\)

In other words, the court ruled that it should not concern itself with this matter. What the Supreme Court and military fail to recognize are the severe psychological ramifications that could occur if the MSA victim was subjected to continue to work

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\(^8\) Kori Cioca, et al. V. Donald Rumsfeld, 2011.
with the respective perpetrator. Considering the high rate of restricted and unrestricted reports followed by the meager rate of convictions (see figure 2), it is evident that several perpetrators are walking away from any form of punishment, whether mild or severe. The Supreme Court's decision to continue to allow unit commanders to oversee disciplinary actions, after sexual assault investigations, is a significant contributor to the continued psychological damage that victims experience.

Note: Figure 2. Statistics from 2009-2010 military sexual assault allegations compared to the number of courts-martial cases.⁹

Simply implementing the military’s Sexual Harassment and Response Prevention (SHARP) program is not enough to drastically reduce the number of violent attacks. Rather, acknowledging the system that created the culture in the first place, could yield significantly different results. The goal of basic combat training is to transform civilians into soldiers that are unsympathetic to the destructive practices of war. However, the methods used in basic combat training to create a culture of fighters can unconsciously misinterpret aggressive behaviors, such as acts of sexual violence, as morally acceptable behavior. Eliminating the biased judgment of the unit commanders, and showing genuine support to victims, could also reduce the number of sexual assaults. Incidents of sexual violence are damaging to the cohesion and morale of a unit. Within the realm of the military, individual units value morale highly. The overall decrease of sexually violent incidences in the military will be conducive to a stronger military, both internally and externally.

**Methods**

The methods used in this thesis draw from a feminist perspective and the meaning found within the context. In the case of this thesis, the context is the discussions, debates, and final decisions determined during congressional hearings and legal proceedings regarding MST. This thesis will identify all the substantive discernible changes to Article 120 of the UCMJ and analyze the internal and external factors responsible for enacting the changes. Once this analysis is complete, the subsequent chapters will investigate case studies that illustrate Congress' refusal to involve itself with the military sexual assault judicial system, despite several requests to do so. This thesis will consider feminist theories and concepts when analyzing the
various revisions to Article 120 of the UCMJ. This thesis will draw upon the work of Cynthia Enloe, Michel Foucault, and other feminist authors. This thesis adopts a political science methodology as follows.

**Independent Variables**

Congress developed the UCMJ to prescribe and constrain the behaviors of servicemembers within all the branches of service in the military. Before the development of the UCMJ, the various branches of the armed services followed their respective judicial systems.\(^\text{10}\) The development of the UCMJ ensured that all members of the United States Military answered to one code of rules and regulations. In 1950, President Harry S. Truman signed the first edition of the UCMJ into law.\(^\text{11}\) Throughout the last 68 years, the UCMJ has undergone several changes and alterations. For example, Article 120 which used to be named ‘Rape and carnal knowledge,' is currently titled Rape and Sexual Assault Generally.\(^\text{12}\) Since then, Congress and military officials have enacted several editions of the UCMJ and implemented countless policies in an effort to mitigate MSA. This thesis postulates that various sexual assault scandals, excessive command influence, and public outrage from these events are the causal factors that influenced Congress and the DOD to implement policies regarding sexual assault. This thesis will primarily analyze the history of the UCMJ amendments, specifically Article 120, and the development of policy using the intervening variables

\(^{12}\) IBID.
presented below. This thesis strives to identify the modalities or events that may bring about changes for the good or for ill. Further, this thesis contends that the main source of modifications stems from National Defense Authorization Acts.

Figure 3.

**Independent Variable (Question Set 1):** What influences changes to occur?

1. Does public awareness of large-scale military sexual assault scandals play a role in congressional action?
2. Does the commander’s personal stake in low rates of sexual misconduct reporting motivate the abuse of command authority?
3. How does pressure from public outcry change the urgency and efficacy of congressional oversight?
4. What punishments are convicted perpetrators sentenced to for MSA?

**Intervening Variable (Question Set 2):** What external factors influence the decision to develop policy?

1. Does the prevalence of MSA reflect deeper cultural problems within the military?
2. How does the need for expedient reform sway Congress’s ability to develop meaningful and effective policies?
3. Does the valorized public image of the military create a culture of silence that aims to protect perpetrators and conceal issues of sexual assault in order to maintain the reputation of military professionalism?
**Dependent Variable (Question Set 3):** The aim of this question set is to determine if sexual predation, which influences a call to action, affects the development of policy changes regarding sexual assault revisions in all four branches of the U.S. Armed Forces.

1. What were the changes to Article 120 in the UCMJ?
2. What new policies were implemented?
3. Were all four branches affected by the policy change?
4. Does the independent chain of command, coupled with the self-governance of separate military branches, affect the scope of policy change in the institution as a whole?

**Parameters of the Study**

This thesis will investigate the policy changes regarding MSA which are enacted through UCMJ revisions, DOD directives, executive orders, and branch specific memorandums. This thesis analyzes the evolution of military rape laws and the factors that caused the changes. Additionally, events inspiring pleas for Congressional oversight are analyzed. In terms of the UCMJ, this thesis will only investigate revisions that implement substantive discernible changes to Article 120. This thesis will analyze the efficacy of this system in which unit commanders have total control over the reporting, investigations, and prosecution of MSA

**Literature Review**

Rape is a type of sexual assault involving some form of penetration carried out against a person without consent. This is usually carried out through the use of force, coercion, or against a person who is unable to give valid consent. For example, a person who is intoxicated or disabled. Rape is a mechanism, or tool, used to express dominance, power, and control. Rape does not only occur within the armed forces; however, some feminist theorists suggest that there is something institutionally
imposed. For example, Cynthia Enloe argues that there is such a disparity between the number of men and women that enlist, to ensure the military remains a masculinized institution.\textsuperscript{13}

Critical Military Studies is a field of research that investigates the way power operates within the military.\textsuperscript{14} At first glance, it would be easy to assume that all of the power is top-down and located within the hierarchical ranks of military servicemembers. However, there are greater forces involved that affect the individuals within the military and outside of it. Critical Military Studies aims to investigate and understand these relationships of powers with an interdisciplinary approach.

The present study uses various authors’ work, within the realm of Critical Military Studies, to obtain a better understanding of militarization and the gendered and racialized implications associated with it. The conceptual understanding gained from this literature review will be drawn upon and implemented when conducting the analytical research. This thesis will investigate congressional hearings that determine military laws against sexual assault and the legal proceedings against those accused of such crimes, from 1950 to the present day. The most salient issue is the judicial system that names bias commanders, as the sole individual responsible for deciding the perpetrators' punishment, if found guilty. The purpose of the thesis is to determine why Congress is not effective and ultimately not doing enough, to help victims of military sexual assault. For example, Congress denied the Military Justice Improvement Act

\textsuperscript{13} Enloe, Cynthia. 200. “Maneuvers,” University of California Press. 3.
(MIJA) which different senators introduced to Congress each of the three times. A critical feminist analysis of these hearings would not be productive without proper consideration of the present literature and theories used to investigate militarization. Despite the multitude of authors that have critiqued militarization, Cynthia Enloe, Deborah Cowen, and Megan McFarlane, produce work that is more relevant to the current thesis topic.

First and foremost, no feminist analysis of the military would be complete without the work of Critical Military Studies’ founder, Cynthia Enloe. Enloe wrote the book *Maneuvers* which discusses the ways in which militarism literally, and figuratively, maneuvers itself into the daily lives of individuals to create and perpetuate systems that best function through dominance and control. Enloe states that militarization is a step by step process by which a person or a thing gradually becomes controlled by the military or begins to depend on militaristic ideas for their well-being.\(^\text{15}\) Throughout various chapters of this book, Enloe adopts topics that demonstrate how militarization has impacted people’s lives in ways that are not straightforwardly visible. Specifically, in chapter seven of *Maneuvers*, Enloe investigates women’s inclusion into the military.

What Enloe seems to brilliantly notice is that the military is not a site of resistance but a site of compliance. In chapter seven, titled ‘Filling the Ranks,’ Enloe discusses the militaries strategies when recruiters are unable to incentivize enough male volunteers. If there are not enough men enlisting into the military, then recruiters must open its ranks to more women. This strategy, Enloe argues, is performed as a "political

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\(^{15}\) Enloe, Cynthia. 200. “Maneuvers,” University of California Press. 3.
high wire act.\textsuperscript{16} To keep the military as a masculine space, women should not become even a third of the populous and too many women should not reach too high of a rank. In other words, the military must ensure that the inclusion of women does not subvert the fundamentally masculinized culture. Similar ideas are applicable to the inclusion of the lesbian, gay, and bisexual community, as well as the exclusion of transgender individuals. Despite these limitations, the inclusion of women offers this demographic a step toward first-class citizenship and seemingly affords women with higher social standing. However, according to Enloe's argument, this political action does not provide women in the military with newfound equality. Enloe writes, “[women] don’t see themselves as being militarized by the state; they are exercising women's political agency.”\textsuperscript{17} This lack of insight is likely due to the positive connotation of their long-awaited ‘achievement,’ as women may feel they have won a battle against patriarchal oppression. In its place, a desired number of recruits are mustered, and feminist critics may temporarily turn a blind eye to the patriarchal norms of this masculinized institution.

Equally important to a feminist analysis of military sexual assault are the racial implications of militarization. Deborah Cowen and Amy Siciliano published \textit{Surplus Masculinities and Security} in the scientific journal the \textit{Antipode: A Radical Journal of Geography} in November 2011. Through a geographical lens, Cowen and Siciliano can examine the people, places, and environments that target specific demographics (i.e., low-income men of color) for either military recruitment or incarceration; which is

\textsuperscript{16} IBID., 237.  
\textsuperscript{17} IBID., 238.
perceived either way, as a surplus masculine population that sustains and manufactures a reserve military. Cowen and Siciliano expose the entangled relationships of the police and military institutions while also exposing the possessive investment in the profit of this form of social reproduction. They specifically explore the link that creates a racialized masculinity that they term "securitized social reproduction." The authors use examples from the US, UK, and Canada to argue that three main trends lead to this continued development of securitized social reproduction: the marketization of the military, urban policing, and the stark association of these overlapping industries. The authors also mention the privatization of military work and prison management, which further strengthens their argument.

In their work, Cowen and Siciliano argue that through securitized social reproduction a reserve military is accumulated through a system that cycles bodies through criminalization to incarceration to militarization. The focus on these racialized and gendered elements of hyper-masculinity perpetuate the entanglement of policing and militarization amongst privatized institutions. To conclude Deborah Cowen and Amy Siciliano make a compelling argument that the geographies of military recruitment and urban policing suggest that specific demographics are targeted, thus acknowledging the lack of value for their lives.

Furthermore, a feminist analysis of sexual assault must explore various ‘embodied experiences’ of the physical body and how women’s bodies are discursively defined. Megan McFarlane’s dissertation, *U.S. Military Policy and the Discursive*

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18 Deborah Cowen and Amy Siciliano, "Surplus Masculinities and Security," *Antipode* 00.00, 2011. 4.
Construction of Servicewomen’s Bodies implements Foucauldian concepts to showcase how women's bodies in the military are regarded as less valuable than men's bodies in modern media. Furthermore, throughout the various chapters of the dissertation, McFarlane discusses the ways in which female soldiers are regarded as inferior to male soldiers, by male soldiers. McFarlane argues that this is most likely because the men are unable to reconcile the idea that these women are capable of performing as effective, efficient, and hardworking troops, while simultaneously considering them to be feminine and ‘out of place’ within the masculine institution.

According to McFarlane, "the hypermasculine culture of the military [which] continues the biopolitical regulation of and discrimination against women based on their bodies," implicitly ignores the ‘progress' achieved by the policies and practices established to promote gender equality.\(^\text{19}\) In her chapter about military sexual assault, McFarlane mentions the denial of MIJA when examining the Congressional hearing which resulted in nothing positive for victims of sexual assault. McFarlane critiques Congress’ decision and concludes this section with the notion that Congress puts band-aids on problems in hopes that no one will notice.

Increasingly, Perceived Barriers to Reporting Military Sexual Assault: An Interpretative Phenological Analysis by Wendy Jo Rasmussen, investigates how female servicemembers struggle with reporting military sexual misconduct. Rasmussen found four themes (external factors, internal processes, interpersonal aspects, culture) which play a significant role in the lack of sexual assault reporting. Rasmussen

implemented a literature review and semi-structured interviews with three sexual assault survivors to determine that a lack of reporting occurs due to various perceived barriers. However, Rasmussen asserts that there is not enough qualitative research to determine the reasons why some servicewomen do not report sexual assault or seek some form of medical care (physical, mental).\(^{20}\)

Moreover, in the second chapter of *Understanding and Treating Military Sexual Trauma*, Kristen Zaleski attempts to demonstrate how the culture of the military perpetuates sexual violence and fails to protect the victims of military sexual assault. In this chapter, Zaleski considers how the continuous training for war and the strong emphasis on aggressive masculinity are two main factors for the culture that allows this epidemic to continue. Zaleski also argues that this form of training implicitly develops the necessity for an “honor code of silence” which urges victims to remain quiet for the sake of the battalion and the mission.\(^{21}\)

Within the chapter, Zaleski investigates explicitly how military law and the UCMJ effects the culture of the military as well. For example, Zaleski mentions Article 32 of the UCMJ which states the “commanding officer to whom the victim reports the assault to does not believe him/her or finds that the accusation will interfere with the overall mission of the team, he or she can choose to ignore the complaint.\(^{22}\) There may have been a perfectly understandable reason for Congress and military leaders to

\(^{22}\) IBID.
believe that such an article would be necessary when creating the UCMJ. However, the asymmetrical ratio of reports to convictions demonstrates that military commanders could potentially be abusing this power. In other words, in 2012 only 302 sexual assault cases were brought to Courts-Martial despite there being over 26,000 reported cases of physical sexual misconduct. Increasingly, the same report states that only 50% of female victims reported any form of sexual misconduct suggesting that not only should the number mentioned above be doubled, but it also suggests that female servicemembers do not trust their commanders and would rather remain silent.

Although countless individuals have written about and critiqued the military, Cynthia Enloe, Deborah Cowen, and Megan McFarlane provide work that is most relevant to the ways in which Congress and the military implicitly condone state-sanctioned sexual assault. The combined works of each of other these authors use various theories that provide an intersectional approach to militarization, and the dominant and subordinated populations formed within the ranks of the military. The analysis of the U.S. Congressional hearings will include the theoretical knowledge obtained from this literature review.

**Military Culture**

It is generally accepted that there is a unique “military culture” that is first encountered in basic combat training and further internalized throughout the duration

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of one’s military service time. Each branch within the Armed Forces has its own subculture and variations that come from their respective histories. Military culture, in general, includes the language used, rituals, belief systems, and shared traditions. From the beginning, basic combat training teaches servicemembers how to be disciplined and how to push themselves with maximum effort. Basic combat training also teaches servicemembers how to rely on their team and indiscriminately trust those around them. This level of trust is not only necessary, but integral, to military prowess. In times of war, servicemembers must be able to rely on this level of trust to ensure individual and group survival. Without this level of trust, one’s fate is at stake. Increasingly, one of the most important aspects of initial military training is the collective mindset; servicemembers should always value the group over the individual. This training is imperative to soldiers as it ensures the survival of the self and the entirety of the unit in times of war. With this understanding, servicemembers feel a sense of community which furthers their ability to work as a team and accomplish the mission at hand. Unit cohesion and esprit de corps are essential to the military.

Basic combat training quickly teaches servicemembers about and subjects them to higher standards than traditional civilian employees and servicemembers must live by the branch’s value systems. For example, the Army values are loyalty, duty, respect, selfless service, honor, integrity, and personal courage. Samuel Huntington, a known Military Historian, describes military officers as “professional managers of violence.”

Civilian authorities have placed trust in military officers and granted them with the

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permission to bear arms to protect the people and the physical borders of the United States. In *The Soldier and the State*, Huntington offers an explanation of the development of military professionalism and civilian control of the military in the U.S. constitutional system. Huntington provides two models of civil-military relations: subjective and objective. In the subjective model, the military integrates with and participates in the political and social system. This model suggests military professionalism is minimal. In the objective model, military professionalism is maximized. This model assumes a Clausewitzian method in which “war is the continuation of policy by other means.” Military officials manage the security of the state while simultaneously serving as military professionals who demonstrate their expertise in the realm of politics and national strategy. According to Dayne Nix, civil-military relations operate on a continuum between the subjective and objective models.

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30 IBID., 58.
31 IBID., 58.
Due to this culture of collectivism and high standards of military professionalism that makes military sexual assault unique when compared to other institutions (i.e. universities). There is a plethora of consequences not only for the MSA victim but for the entire unit. For example, the aforementioned level of trust causes damage when other servicemembers blindly believe the assailant, rather than the victim. Evidence suggests that units ostracize MSA victims, who also face professional retaliation, for ‘fracturing’ the camaraderie. Either way, instances of sexual assault negatively impact the bond of the unit which in turn can destroy the groups’ effectiveness, thus disturbing military prowess as a whole.

However, military culture cannot account for the entirety of the problem. According to Robert Cassidy, “culture...is not so much of an experimental science in search of laws; instead, it is an interpretive science in search of meaning. Culture is not something to which causality can be readily attributed.” In other words, it would be inappropriate to blame high rates of MSA on military culture. Rather, military culture could account for patterns of misconduct. Thus, sexual assault in the context of the military’s unique culture of collectivism and professionalism is situated as a threat to the greater integrity of the military as an institution. Researchers have suggested that the unique military culture may exacerbate the MSA problem. It is because of these

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unique differences that the problem of MSA necessitates distinct interventions and provisions in hopes of improvement.

Chain of Command

When the Army was first established in 1775, lack of communication technology necessitated a command structure that withstood the devastations of war. A strongly enforced and highly structured chain of command is essential to military proficiency. Each servicemember has a rank and a pay grade which signifies their position in the chain of command. In other words, an individual’s rank determines their level of responsibility and makes it explicitly clear who is in charge and who makes the decisions. The rank structure starts at the lowest rank E1: private first class and goes all the way up to the President of the United States, also known as the Commander-in-Chief. The higher the rank, the more authority and responsibility is afforded to the servicemember. Servicemembers are divided into two groups: officers and enlisted. Officers (O1-O9), about 20% of the military, are leaders and are responsible for their respective units. Enlisted servicemembers (E1-E9), about 80%, and carry out the missions that senior leaders direct. Clear boundaries must be maintained between officers and enlisted servicemembers to ensure that the highly structured chain of command remains intact.

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Chapter Breakdown

1. Chapter One: This chapter will describe the purpose of the thesis and the description of the problem.

2. Chapter Two: This chapter will summarize and analyze the evolution of rape and sexual assault laws.

3. Chapter Three: This chapter will conclude the analysis conducted in the previous chapter and provide readers with recommendations.
Chapter Two: History of Sexual Violence Criminalization Under the UCMJ

"It was an astounding admission when Sen. John McCain, R-Ariz., confessed that he had advised the mother of a young woman interested in joining the military that he couldn't in all good faith tell her it was the right career path for her daughter. McCain wasn't faulting the military for lack of opportunity, or gender discrimination, but for something far more basic, the continued inability to protect servicewomen, and men too, from sexual assault, and to give those who are the victims of assault or sexual harassment a fair hearing without fear of retribution." —Protect our uniformed women, 2013

Introduction

To understand the ways in which the President, Congress, and other military affiliates implement the current military justice system, it is imperative to acknowledge the origins of rape and sexual assault laws within the military context. United States military law has always operated as a system of jurisprudence independent of the civilian court system. Historically, the military has safeguarded its unique justice system through the practice of holding courts-martial. The most critical difference between the civilian and military legal systems is that military law functions through a courts-martial, which are "simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein." The military justice system progressed over time and courts-martial function as a seemingly effective method of punishing servicemembers by their respective commanders. Initially, commanders had total authority to punish and prosecute servicemembers within their

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respective units due to possibilities of isolation and lack of communication from one unit to another. Military units needed a sole authority who possessed the power to investigate and potentially punish accused soldiers in order to quickly return to their unit’s main focus or mission. The role of the commander throughout the proceedings is a prominent characteristic of the military justice system and distinguishes it from the civilian sector. The criminalization of rape and sexual misconduct under military jurisdiction has been subject to many changes throughout military history and has only been seriously criminalized in the last decade. This chapter will summarize the evolution of military rape and sexual assault laws and its relationship with civilian judicial development.

The Articles of War

On June 30, 1775, about two weeks after founding the Army, the U.S. established the first military justice code. Passed into law by the Second Continental Congress the judicial code was titled the American Articles of War. As Congress established the various branches of the Armed Forces, each respective branch developed distinct justice code. For example, the Articles for the Government of the Navy regulated all Naval servicemembers. Each article within the documents names and defines each crime. Due to particular historical traditions within the two branches, the two codes differed in structure and content. However, the two systems authorized commanders’ full authority to maintain “good order and discipline.”

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5 IBID., 17.
and regulations stated in the Articles of War only applied to servicemembers in the Army and Navy. At this time, the Coast Guard had a separate judicial system. Due to the Coast Guard's jurisdiction and peacetime status, military law did not regulate these servicemembers.6

Nevertheless, the development of the Air Force in 1947 required airmen to follow the Articles of War. Although Congress maintained the authority to alter and amend the military justice system, it rarely did so. Over 175 years, revisions to the Articles of War occurred in 1806, 1874, 1916, and 1920.7 Changes to the Articles of War included modifications to punitive action and procedures, as well as which service members it regulated. Despite the changes made to the Articles of War, the law and procedures were relatively unchanged and consistent with the Articles of War passed in 1775.8 However, two specific changes are imperative for this analysis.

Initially, the Articles of War only condemned crimes that affected military efficacy or standards of professionalism, such as mutiny, being intoxicated while on duty, and or disrespecting a superior. Though in 1916 Congress markedly increased the military’s jurisdiction of courts-martial to include common law crimes such as assault, battery, mayhem, larceny, and so forth. Furthermore, military jurisdiction increased to anywhere within the geographical limits of the United States, whether during peacetime

or war. Accusations of capital crimes—murder and rape—were excluded from this broadening jurisdiction and were the responsibility of the civilian court system. Exceptions only occurred if the alleged crimes transpired outside of the United States or during a time or war. However, the Articles of War of 1916 did not include a definition of rape; therefore, in the event of wartime courts-martial for rape, the common law definition was followed. This change illustrates a small shift in the amount of power, authority, and control each branch and its respective commanders had over servicemembers. However, this small change has remarkable effects when looking at the issue of MSA holistically.

The second notable alteration occurred with the passing of the Articles of War of 1948, which was enacted on June 24th, 1948. This revision substantially changed the system of military justice and was deemed necessary by Congress due to what seemed like excess command influence over troops and increasing reports of "drumhead justice." Command influence refers to the legal term within U.S. military law which occurs when a person bearing all of a command authority uses or appears to abuse their power to influence the outcome of military judicial proceedings.

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Increasingly, the phrase “drumhead justice” refers to courts-martial that were conducted in the field using a drum as a desk, in an effort to portray a semblance of a commanders’ office. There was little attempt to provide an impartial ‘judicial' hearing as the primary purpose was to hear the facts and determine punishments rapidly. It was commonplace for crimes associated with disobedience and disorder to receive much more severe sentences than traditionally deemed appropriate in the civilian sector. For example, being sentenced to the death penalty for minor offenses such as tardiness or disrespecting a superior officer. These court-martial abuses and excessively harsh punishments lead to a public outcry from the conscripted servicemembers in World War II. Subsequently, an increased number of reports and investigations due to this type of biased prosecution influenced the 80th Congress to make extensive changes and revisions to the previous edition of the Articles of War. Commanders were hoping to maintain strict discipline amongst servicemembers, as they believed a system of order and control would be more beneficial in the military context. The final edition of the Articles of War did include an article criminalizing rape. The Articles of War of 1948 defined murder and rape under the same article, Article 92, which states:

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450 (A.W. 92) Murder; Rape. —any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: Provided, that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.\(^\text{18}\)

Despite including this article criminalizing rape in the military, commanders continued to leave the judicial proceedings involving rape and murder in the hands of the civilian court system.

For most of the period after World War II, in which an influx of complaints of unfairness and abuse of authority engulfed senators’ and congressmen’s mailboxes, Congress decided that a new system was necessary. The development of the Air Force as a branch further increased the already high levels of pressure on Congress and military officials.\(^\text{19}\) This new system would integrate all four branches of the Armed Forces under one legal system code, in hopes of reducing and eventually eliminating the amount of command influence in terms of punitive action of servicemembers.\(^\text{20}\) Thus, in 1949 Congress started to develop the new system for military justice.

**Development of The Uniform Code of Military Justice**

Article I, Section 8 of the United States Constitution affords Congress the power to raise, support, and regulate the Armed Forces and appoints the President of the United States the Commander-in-Chief of it.\(^\text{21}\) It is due to this authority that Congress developed and passed the Uniform Code of Military Justice (UCMJ) into law. The


\(^{21}\) Id. art. I §8, cls. 11-14 (War Power).
UCMJ is the current framework for military law in the United States, codified as 10 U.S.C. Chapter 47. This code applies to all U.S. servicemembers regardless of their physical location, unlike the Articles of War. In terms of jurisdiction, an individuals’ military status is more relevant than physical location. The President implements the UCMJ through an Executive Order: The Manual for Courts-Martial (MCM). The MCM encompasses the Rules for Courts-Martial, the Military Rules of Evidence, and the UCMJ.

The Congressional subcommittee named the Forrestal Committee, after Secretary of Defense James Forrestal, drafted the first UCMJ. The Forrestal Committee primarily focused on ensuring that all four military branches—Army, Navy, Air Force, Coast Guard—had a single judicial system and set of laws that all members of the United States Armed Forces would answer to, if necessary. The word ‘uniform’ in the title of the code is indicative of the desire to develop one system for all branches of the military. Further, due to the rising complaints involving amplified command control, the Forrestal Committee also focused on increasing constitutional protections for the accused. Felix E. Larkin, the Assistant General Counsel of the Department of Defense, supervised the entirety of the Forrestal Committee (including the code committee, working group, research group, and assistants), and Harvard Law Professor Edmund M. Morgan chaired the Code Committee during draft proceedings.

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The Code Committee compared the previous codes from the Army and Navy and worked to harmonize the various articles while simultaneously reforming them into the new military judicial system, the UCMJ.\textsuperscript{24} The Code Committee included Harvard law Professor Edmund M. Morgan, Assistant Secretary of the Army Gordon Gray, Under Secretary of the Navy W. John Kenney, Assistant Secretary of the Air Force Eugene M. Zuckert, and Assistant General Counsel, Office of the Secretary of Defense Felix E. Larkin. Notably, the members of the committee who served in the military did not hesitate to provide suggestions about the new courts-martial system. Along with Mr. Larkin, the entirety of the Forrestal committee consisted of 15 lawyers (10 military, 5 civilian).\textsuperscript{25} The majority of the letters mentioned arbitrary punishments and commanders’ misuse of power and authority. The influx of anecdotes revealed the central issue in the reform of the courts-martial system and the development of the UCMJ was the commanders’ function and responsibilities.\textsuperscript{26} In January 1949, the committee completed the final draft, and on February 8, 1949, Secretary of Defense Forrestal delivered it to Capitol Hill for Congressional Approval.

The draft of the UCMJ that the Forrestal Committee proposed to Congress defined rape as, "Any person subject to this code who commits an act of sexual intercourse with a female, not his wife, by force and without her consent, is guilty of rape."\textsuperscript{27} During the hearing which took place before the House of Representatives (H.R.}

\textsuperscript{24} Sherman, Edward F., "The Civilianization of Military Law" (1970). \textit{Articles by Maurer Faculty}. 2260.
\textsuperscript{25} Index & Legislative History of the UCMJ: Hearing before the Subcommittee of the Committee on Armed Forces, 81st Cong. 1. (1949).
\textsuperscript{26} Sherman, Edward F., "The Civilianization of Military Law" (1970). \textit{Articles by Maurer Faculty}. 2260.
\textsuperscript{27} Uniform Code of Military Justice (UCMJ). (1950).
2498), there was no disagreement with the proposed definition of rape. Instead, the
debate focused mainly on carnal knowledge.\textsuperscript{28} In the military context, carnal
knowledge at this time was defined as consensual sex with a partner under 16 years
old.\textsuperscript{29} After much debate and three periods of off-the-record discussions, the
subcommittee members decided that Section B of Article 120 would define carnal
knowledge and Section C would define rape as a penetrative act.\textsuperscript{30} Article 120 of the
UCMJ of 1951 states:

\begin{verbatim}
ART. 120. Rape and carnal knowledge.  
(a) Any person subject to this code who commits an act of sexual intercourse
with a female, not his wife, by force and without her consent, is guilty of rape
and shall be punished by death or such other punishment as a court-martial
may direct.  
(b) Any person subject to this code who, under circumstances not amounting to
rape, commits an act of sexual intercourse with a female, not his wife who has
not attained the age of sixteen years, is guilty of carnal knowledge and shall be
punished as a court-martial may direct.  
(c) Penetration, however slight, is sufficient to complete these offenses.\textsuperscript{31}
\end{verbatim}

The first edition of the UCMJ was signed into law by President Harry S. Truman on
May 5th, 1950 and subsequently enforced on May 31st, 1951.\textsuperscript{32} The first edition of the
UCMJ does not include an article that discusses sexual harassment or assault, other
than rape. This overlooked or intentional exclusion provides insight into the way
Congress and military officials viewed and understood acts of sexual violence and
harassment at that time. Increasingly, an analysis of sections A and C offers further
insight to this issue.

\begin{itemize}
\item \textsuperscript{28} Index & Legislative History of the UCMJ: Hearing before the Subcommittee of the
Committee on Armed Forces, 81st Cong. 1. (1949).
\item \textsuperscript{29} Uniform Code of Military Justice (UCMJ). (1950).
\item \textsuperscript{30} IBID.
\item \textsuperscript{31} IBID.
\end{itemize}
First off, under these laws, Congress partially defined rape as “penetration, however slight.”\textsuperscript{33} Although this is an apt definition, it is indicative of the committee’s narrow comprehension of what is considered sexual violence or misconduct. Sexual intercourse requiring penetration provides the hegemonic and heteronormative understanding of sex but also excludes other physical sexual violence that does not include penetration. There is nothing in the first version of the UCMJ about other forms of sexual violence or sexual harassment.

This edition of the UCMJ has an extraordinarily one-sided and ignorant view of who commits an act of rape and who potential victims are, which is illuminated by the use of the word ‘female' in the article. In other words, this suggests that Congress and military officials did not think it was relevant to consider the possibility that women or other men could rape men. This limited perspective on the identity of victimhood is evidence that they believe rape is more about sexual conquest rather than dominance and power by following heteronormative ideals of sexuality. Further, this edition of the UCMJ states that rape is only illegal if it occurs "with a female, not his wife", which is evidence to the ways in which the men who wrote and approved the UCMJ perceived wives as their husbands’ property with no agency in their marital sexual experiences and undermines the prevalent existence of marital rape.\textsuperscript{34} It was not illegal to rape one’s wife because wives gave up their legal right to consent on their wedding day and were always expected to fulfill their husbands’ sexual desires. The exclusion of one’s wife or men from the legal definition of rape is problematic not only because of the

\textsuperscript{33} Uniform Code of Military Justice (UCMJ). (1950).
\textsuperscript{34} IBID.
patriarchal social implications of sex and sexuality that it reinforces but also because it forbids individuals within these demographics from accessing legal resources within the military judicial system. If it is not illegal to rape these people, who identify in this way, the abuser would likely be convicted with battery or under a general UCMJ article. However, these charges do not have the same legal implications as rape; this allows individuals who are found guilty to escape the legal consequences of their actions on the basis of arbitrary and archaic legal definitions.

Additionally, it should be noted that all of the Forrestal Committee members were white males. In other words, it is not surprising that the definition of rape had a one-sided narrow view, or that majority of the conversation revolved around the appropriate age of consent. The power dynamics at play regarding who gets to make policy, who supervises investigations, and who is afforded the authority to prosecute rape charges, should all be considered. All of the problematic aspects of the definition of rape and the policies regarding sexual assault align perfectly with the knowledge that all of the members of the Forrestal Committee were white males.

**Amending the Uniform Code of Military Justice**

To ensure the UCMJ and the MCM "constitute a comprehensive body of criminal law and procedure," the Joint Service Committee on Military Justice (JSC) was established on August 17, 1972. A year later, on July 13, 1984, Executive Order 12473 required the JSC to conduct annual reviews of the MCM.35 The JSC consists of the Voting Group, Working Group, and Advisors. The Voting Group includes one judge advocate from the Air Force, Army, Coast Guard, Marine Corps, and Navy.

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35 Executive Order 12473, July 13, 1984
The Working Group includes additional judge advocates from each of the services.\textsuperscript{36} The JSC drafts provisions for the UCMJ and the various components of the MCM. Once the JSC votes and agrees on the proposed changes, either Congress or the President approves or denies the proposed amendments. National Defense Authorization Acts or Presidential Executive Orders legislate the revisions. Either way, the acting President then signs an Executive Order approving the new MCM and UCMJ provisions, thus enacting new ‘editions' of the UCMJ.\textsuperscript{37} Notably, unlike the Executive Branch, which has established checks and balances, the Commander-in-Chief has authoritarian control over the military judicial system. The reality of having the Commander-in-Chief (the President) make the final call on the judicial system is further evidence of the power structures that encompass the military. This is further illuminated by the fact that every U.S. president thus far has identified as male.

The author had a personal phone call with Lieutenant Colonel Adam Kazin, the JSC Executive Secretary, to inquire about the location of the JSC meeting minutes pertinent to this thesis. According to LTC Kazin, the meeting minutes are confidential and are not posted as public record. However, LTC Kazin did suggest reviewing other committee documents for similar information.

Between 1951 and 1994, there were few changes and revisions to the UCMJ. Presidential executive orders administered most of the changes, with two exceptions: The Military Justice Act of 1968 and The Military Justice Act of 1983. Despite the considerable changes to the military judicial system, the UCMJ lacked reforms in terms

\textsuperscript{36} DoD Directiveff00.17, “Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice” May 8, 1996 (hereby canceled)

\textsuperscript{37} Uniform Code of Military Justice (UCMJ). (1950).
of command influence.\textsuperscript{38} To create even more Constitutional protections for the accused, Congress deemed it necessary to intervene. The Military Justice Act of 1968 and The Military Justice Act of 1983 both address issues of command control, however, neither revision modified the military rape laws.

**Tailhook 91 Scandal**

In 1991 the news broke of the Tailhook Scandal of a military sexual assault scandal broke. 90 Naval servicemembers reported either MSA or sexual harassment. Congress and the Navy responded to the media attention by conducted an investigation.\textsuperscript{39}

The annual Tailhook Symposium began as a reunion of naval aviators which took place in Tijuana, Mexico and San Diego, California. The purpose of Tailhook was to increase morale and ensure naval aviator retention. In 1963 the symposium was moved to Las Vegas, Nevada where it expanded to include professional development activities with Navy admirals and Marine Corps general officers. Throughout the Naval community, it was common knowledge that the Tailhook Symposium was a time for extreme inebriation and belligerence.\textsuperscript{40} In 1985 after hearing these rumors, the Deputy Chief of Naval Operations, Vice Admiral Edward H. Martin warned subordinates:

\textsuperscript{39} *Part 1 of Tailhook 91*, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
\textsuperscript{40} IBID.
The general decorum and conduct last year was far less than that expected of mature naval officers. Certain observers even described some of the activity in the hotel halls and suites as grossly appalling, "a rambunctious drunken melee." There was virtually no responsibility displayed by anyone in an attempt to restrain those who were getting out of hand. Heavy drinking and other excesses were not only condoned, they were encouraged by some organizations. We can ill afford this type of behavior and indeed must not tolerate it. The Navy, not the individual, his organization or the Tailhook Association, is charged with the events and certainly will be cast in disreputable light. Let's get the word out that each individual will be held accountable for his or her actions and also is responsible to exercise common sense and leadership to ensure that his squadron mates and associates conduct themselves in accordance with norms expected of naval officers. We will not condone institutionalized indiscretions.  

Despite the warning, Naval and Marine Corps officers did not alter their behavior and "it became common practice for the President of the Tailhook Association to write to squadron commanders prior to each symposium exhorting them to ensure that conduct in the hospitality suites comported with standards of decency." This routine continued for the next six years. At the time of Tailhook 91, Naval Captain (Capt) Frederick G. Ludwig specifically wrote a paragraph in the behavioral warning letter that condemned "late night gang mentality."

At the 35th annual Tailhook Symposium, 5,000 visitors attended, despite only 2,000 guests officially registering. After the investigation, the Inspector General concluded that the disparity in registered guests versus unregistered guests came from civilians and other military personnel who admitted to being in attendance solely for the parties and not professional development. Once the official symposium program

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41 Part 1 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
42 DOD, 1992.
43 Part 1 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
concluded, the registered officers invited several unregistered guests back to the third floor of the hotel where the parties centered around 26 hospitality suites. The countless acts of sexual assault and harassment mainly occurred in the corridor of the third floor, commonly known as the “gauntlet”, where Navy and Marine Corps officers lined the walls outside of the parties and would touch mostly women and some men as they passed by. The unwanted touching ranged from groping women’s backsides to violent groping of genitals. Witnesses observed “butt-biting” (officers would bite guests on the butt until they could free themselves), “zapping” (officers would aggressively stick stickers of their squadron logo onto the private body parts of women as they passed by), shaving women’s legs and pubic areas,

*Figure 4. Rhino Mural.*

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44 *Part 2 of Tailhook 91*, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
aggressively holding guests down and forcing them to drink from a rhino mural with a phallic alcoholic dispensing contraption all while being groped (Figure 4). Additionally, officers wore shirts that read “WOMEN ARE PROPERTY” or “I Survived the 3rd Floor” across the back (Figure 5 and Figure 6).

On Saturday, September 7, 1991, a male officer partaking in the “gauntlet” sexually assaulted Navy helicopter pilot, Lieutenant (LT) Paula Coughlin. The next morning, LT Coughlin reported the incident to her commander, Rear Admiral (RADM) John Snyder (President of the Tailhook Association from 1985 till 1987), via phone conversation.

Figure 5. “WOMEN ARE PROPERTY” Shirts

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45 Part 1 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
46 IBID.
After several weeks of silence and inaction, LT Coughlin reported the sexual assault to Admiral (ADM) Jerome Johnson, who notified officers further up in the chain of commander, triggering an open formal investigation by the Navy Criminal Investigative and Counterintelligence Agency (NIS). Learning about the lack of action lead the Chief of Naval Operations (CNO), Frank Kelso, to lose confidence in RADM Snyder’s effectiveness and ability to command naval servicemembers. In November 1991, the CNO relieved RADM Snyder from his command position because of his failure to respond to LT Coughlin’s sexual assault complaint. LT Coughlin is now known as the Tailhook Whistleblower.\textsuperscript{47}

\textit{Figure 6. “I Survived the Third Floor” Shirt}

\textsuperscript{47} Part 2 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
The open investigation regarding LT Coughlin’s assault triggered an investigation of the entire 1991 Tailhook Symposium. The NIS opened a criminal investigation that would encompass all incidences of sexual assault, sexual misconduct, and other military crimes, known as an “all-up investigation.”\textsuperscript{48} The Naval Inspector General (Naval IG) assembled three teams to investigate:

1. Whether the Navy had a cultural problem that contributed to the assaults
2. Whether the chain of command took appropriate action when Navy servicemembers reported the assaults
3. Whether there were noncriminal violations arising from Tailhook occurred\textsuperscript{49}

The various teams interviewed over 2,000 witnesses throughout the duration of the investigation. However, some officers refused to be interviewed or have their photographs taken for eyewitness testimonies. Among the sample of officers interviewed, an indeterminable number of them engaged in the “conspiracy of silence” which further obstructed the investigative process and findings.\textsuperscript{50} The “conspiracy of silence” refers to an unexpressed or covert consensus to remain silent among those who may know something which, if disclosed, would be damaging or detrimental to the best interest of the group and ones’ self. Given the aforementioned level of trust and group cohesion in the military, the “conspiracy of silence” can be particularly strong and powerful. Notably, the senior military officials managing the Tailhook investigation knew that the Secretary of the Navy, the CNO, and numerous Navy and Marine Corps

\textsuperscript{48} Part 1 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
\textsuperscript{49} Part 2 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
\textsuperscript{50} Part 1 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
officers attended the 1991 Tailhook Symposium and previous symposiums in years prior. The Inspector General referred 119 Navy and 21 Marine Corps officers for potential disciplinary action.\textsuperscript{51}

Throughout the course of the three nights of the Tailhook Convention, 83 women and seven men experienced varying degrees of sexual assault and harassment. The charges that many faced included but were not limited to: rape, forceful unwanted sexual contact, indecent exposure, conduct unbecoming an officer or failure to act in proper leadership capacity.\textsuperscript{52} Despite the high volume of statements from Tailhook victims, the Navy’s zero tolerance policy of sexual harassment, and nationwide publicity, not one of the 140 cases ever went to trial for formal prosecution.\textsuperscript{53} At the conclusion of the initial Tailhook 91 investigation, the Naval IG stated:

The activities which took place in the corridor and the suites, if not tacitly approved, were allowed to continue by the leadership of the aviation community and the Tailhook Association…conduct in the corridor was merely reflective of the atmosphere that was created by the activities in a number of the suites…I think a Navy captain who had seen that over four or five years, had seen the Rhino room with a dildo hanging on the wall, is not going to walk in there in 1991 and change anything.\textsuperscript{54}

Put simply, the Naval IG determined that a “cultural problem” within the Navy caused the misconduct at the Tailhook Symposium throughout the years. Further, the Naval

\textsuperscript{51} Part 2 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
\textsuperscript{52} Part 1 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
\textsuperscript{53} IBID.
\textsuperscript{54} Part 2 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
IG concluded that military camaraderie and Tailhook “atmosphere condoned, if not encouraged, the gang mentally which eventually led to sexual assaults.”

Assistant Secretary of the Navy of Man Power and Reserves Barbara S. Pope refused to accept the results of the investigation and subsequent lack of convictions, sparking concern that the Navy was not conducting a proper investigation. Secretary Pope was particularly perturbed with the admirals in charge of the investigative process and commanders who were aware of this behavior but permitted the misconduct to continue. Pope’s frustration increased after RADM Duvall M. Williams Jr., commander of the NIS, made sexist comments about Pope’s position. RADM Williams’ most noteworthy comment, “a lot of female navy pilots are go-go dancers, topless dancers, or hookers,” illustrated the misogynist notions that permeated the ranks of the Navy and its senior leadership. Pope’s efforts triggered a second investigation, this time conducted by the Inspector General, Derek J. Vander Schaaf, who believed that the Naval IG was inadequately staffed to conduct such a large-scale investigation. The ASG final recommendations is as follows:

55 Part 1 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
56 IBID.
58 Part 1 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
1. Consider whether the Under Secretary, the Judge Advocate General, the Naval Inspector General, and the Commander of the Naval Investigative Service should continue in their current leadership roles within the Department of the Navy.

2. Consider appropriate disciplinary action with respect to the Judge Advocate General and the Commander of the Naval Investigative Service for their failure to fulfill their professional responsibilities in the Navy's Tailhook investigation.

3. Consider whether any organizational changes or procedural modifications would improve the investigative process within the Department of the Navy and coordinate any changes with the Office of Inspector General, Department of Defense.\(^{59}\)

Despite multiple investigations of the 1991 Tailhook Symposium, the NIS only condemned two suspects: Secretary of the Navy Henry Lawrence Garrett III and Chief of Naval Operation (CNO) Frank Kelso. Neither Garret nor Kelso faced criminal charges, rather, they resigned from their command positions and the Navy forced them to retire, for their failure to conduct a thorough investigation of the allegations at the 1991 Tailhook Symposium.\(^{60}\) Fourteen other admirals and close to 300 Naval officers ruined their careers due to their connection to the 1991 Tailhook Annual Symposium.\(^{61}\) Nonetheless, no court-martial convictions transpired. Although their military careers were ruined, escaping these legal charges did not destroy their lives. Based on the information available, the servicemembers were likely asked to step down from their command positions and received honorable discharges. Essentially, the misconduct within this system did not carry into other aspects of their lives, as it would have been if the matter was handled through the civilian court system. Additionally, LT Coughlin,

\(^{59}\) Part 2 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries

\(^{60}\) Part 2 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries

\(^{61}\) Dod, 1993.
who initially notified the senior chain of command and Congress of the Tailhook misconduct, was denied justice when charges against her alleged abuser were dropped due to lack of evidence. Further, the NIS believed that LT Coughlin was intoxicated at the time of the assault and thus misidentified her alleged abuser.  

Following the conclusion of the Tailhook Scandal, Congress formed the Presidential Commission on the Assignment of Women in the Armed Forces and appointed Navy Secretary Pope as the chair of the committee. The committee was tasked with reporting findings and recommendations on a wide range of topics regarding the deployment of women in combat roles within the four branches. In the Presidential Commission Report, Pope stated, “as we looked at assimilation and integration of women, combat exclusions and how we do business, it was clear women had been made to feel like second-class citizens.” The efforts of the committee played a role in Secretary of Defense Lee Aspin’s April 1993 directive to end the ban that prohibited women from assuming combat roles within the U.S. Navy and ask Congress to allow women to serve on Navy combat vessels. Although this was helpful in terms of women’s equality within the Armed Forces, this modification did not fully address the MSA issues illuminated by the Tailhook 91 Scandal.

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62 IBID.
63 Part 2 of Tailhook 91, United States. Dept. of Defense. Assistant Inspector General for Departmental Inquiries
66 IBID.
On January 6th, 1993, three months after news broke about the Tailhook Scandal, the Navy announced a new regulation prohibiting sexual harassment. Until this regulation was published, commanders prosecuted instances of sexual harassment under other criminal statutes. This Naval regulation marked the first time any military branch of criminalized sexual harassment on its own. The regulation read:

No Individual in the Department of the Navy shall:
1. Commit sexual harassment
2. Take reprisal action against a person who provides information on an incident of alleged sexual harassment;
3. Knowingly make a false accusation of sexual harassment; or
4. While in a supervisory or command position, condone or ignore sexual harassment of which he or she has knowledge or has reason to have knowledge.

Additionally, the policy also established education, training, and a system to track incidents of sexual harassment.67

In three separate sections, the new policy attempted to define what the crime of sexual harassment entailed; however, despite the Navy’s best efforts, the law was vaguely written, and was thus difficult to prosecute.68 For example, the policy defines “unwelcome” as “conduct that is not solicited and which is considered objectionable by the person to whom it is directed, and which is found to be undesirable or offensive using a reasonable person standard.”69 The purpose of adding “unwelcome” was to provide an aspect of objectivity to the evidence at hand, yet the subjective nature of the experience of sexual misconduct is reduced through this objective lens. Increasingly,

67 IBID.
69 IBID.
the addition of this amendment was to ensure that the victim had the latitude to report any behavior that created a hostile or uncomfortable work environment.

Although well-intentioned, this addition of the “reasonable person standard” requirement can significantly reduce victim’s subject perception on “unwelcome.” Due to the historical abuse of command authority, it was necessary for the Navy to implement a higher standard of objectivity in order to protect those accused. However, this emphasis of objectivity significantly deemphasized the power of a victim’s subjective experience in the punitive process. Thus, this punitive approach places objectivity above naval servicemembers, thus making issues of sexual harassment more difficult to investigate and prosecute under this policy.

The caveat of “reasonable person” requires that the reasonable person has the sexual harassment recipient’s perspective. This stipulation suggests that sexual harassment can occur under the reasonable person standard if the servicemembers working in an environment in which sexual harassment has been normalized they may not find offense in the conduct and behavior that impacts the recipient. It is a contradiction to the requirement that the behavior is “unwelcome”; rather than turn to the person who experienced the actions to define them as “objectionable”, “undesirable”, or “offensive”, the Navy is looking to an objective third party to validate the victim’s subjective experience of harassment. In the wake of the Tailhook Scandal, and the sizeable amount of servicemembers who condoned such inappropriate behavior, it is peculiar that the Navy would include such a caveat.

Navy leadership made an effort to improve the lives of servicemembers with the implementation of a new policy that criminalized sexual harassment. The
aforementioned policy was introduced just three months after military officials released the news about the Tailhook Scandal. One possible explanation for the vague and contradictory language within the policy could be a consequence of a hasty effort to produce legislation that would appease the public. A second possible explanation for the seemingly ineffective policy could be evidence to a deeper structural problem within the Navy, and other branches, that reflects how military culture conditions servicemembers to view sexual misconduct as acceptable behavior.

Even with all of the national media coverage and Congressional oversight, none of the other military branches were subject to the same changes and for the most part all other punitive processes remained unaltered. Although the Tailhook 91 Scandal called attention to a greater systemic issue within the Armed Forces, ultimately the Navy was the only branch that executed policy modifications. The Tailhook 91 Scandal brought a lot of underlying issues in military culture and sexual harassment to the surface; however, the awareness did not address the structural issues.


Despite the common understanding that the Tailhook 91 Scandal was the worst case of sexual misconduct in the military, it did not engender a military wide transformation. Other than the Navy’s new sexual harassment policy, there had not be any significant changes in rape or sexual misconduct laws between the years of 1951-1994, almost 43 years.

Throughout this time, the critical elements of the crime of rape included lack of consent, use of force, the victim, had to be a woman not married to the accused
perpetrator.\textsuperscript{70} As a result of the Annual Report of the Code Committee on Military Justice (1992), the JSC proposed two significant revisions to Article 120.\textsuperscript{71} The first change removed the spousal exception to rape. The second change redefined Article 120 and removed gendered language so that men and women could both be accused of the crime or be the victim of it.\textsuperscript{72} Congress approved the proposed changes, and through the National Defense Authorization Act for Fiscal Year 1993, the words “with female” and “hers” were removed from the article.\textsuperscript{73} Article 120 of the UCMJ of 1984 (1994 Edition) appeared as follows:

\section*{§ 920. Art. 120. Rape, and carnal knowledge}
(a) Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.
(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.
(c) Penetration, however slight, is sufficient to complete either of these offenses.

The removal of the spousal exception did not pertain to Section B, carnal knowledge, and it remained until Congress approved the National Defense Act for Fiscal Year 1996. Other legislation revised section b of Article 120; however, that is outside the scope of this thesis.

\textsuperscript{73} IBID.
Aberdeen Scandal

Another scandal that demonstrates Congress and military officials’ reactionary policy changes occurred just five years after the Tailhook 91 Scandal. Similar to how the Tailhook 91 Scandal attempted to mitigate structural military issues through swift and reactionary policy changes, the aftermath of the Aberdeen Scandal emphasized the prosecution gaps produced by the military’s narrow definition of rape.

The Aberdeen Scandal occurred in 1996 at Aberdeen Proving Ground Army based in Maryland in 1996. 34 female Army trainees filed multiple reports, ranging from sexual harassment to rape. The women reported that what started out as consistent sexual harassment evolved into repeated acts of forcible rape and sodomy throughout the course of the 9-week long Basic Combat Training. Twelve army drill sergeants were charged with crimes involving sexual misconduct. Four drill sergeants were sentenced to prison and the other 8 were discharged from the Army or received non-judicial punishments. Additionally, the military sent letters of reprimand to Aberdeen Proving Ground’s commanding general and three other senior officers.

Part of the immediate response to the allegations made at Aberdeen Proving Grounds, the Army installed an anonymous hotline for allegations, complaints, or concerns that soldiers could directly address within their respective command. The Army implemented this anonymous hotline to safeguard and protect the soldiers from

75 Ohio State Journal of Criminal Law, Vol. 11, p. 579, 2014
76 The term “soldier” is used here as the Aberdeen Scandal specifically occurred on an Army base.
professional retaliation.\textsuperscript{77} A few weeks after the installation, the hotline received 7,000 calls.\textsuperscript{78} Of those, DOD employees determined 1,074 calls contained sufficient information and referred those callers to the Army Criminal Investigation Division (CID). 20 percent of the reports had allegations that occurred in 1995 and 1996, 33 percent had allegations within the last ten years, and 19 percent had an unknown time frame.\textsuperscript{79} Rape is considered a capital crime within the military justice system in which no statute of limitations could be employed.\textsuperscript{80} The sizeable number of callers from several Army bases compelled the Secretary of Army Togo D. West Jr. to initiate a large scale sexual harassment and sexual misconduct investigation at multiple training locations. The investigators interviewed over 9,000 people, both military and civilian. Further, the investigators surveyed over 20,000 soldiers.\textsuperscript{81} Investigators revealed a “rape ring” that consisted of Army officers who raped trainees at the Aberdeen Proving Ground training camp.\textsuperscript{82} The investigation concluded that drill instructors at Aberdeen used their positions of authority to coerce subordinate female trainees to engage in consensual and non-consensual sexual activity.\textsuperscript{83} The 11 accused soldiers, the allegations, and their sentences are as follows:

\textsuperscript{77} U.S. Congress. Senate Committee on Armed Services. 1997. redeen hearing, page 6
\textsuperscript{78} IBID., 6.
\textsuperscript{79} IBID., 32.
\textsuperscript{80} IBID., 33.
\textsuperscript{81} Ohio State Journal of Criminal Law, Vol. 11, p. 579, 2014
\textsuperscript{82} Browne, supra note 32, at 777-78.
\textsuperscript{83} IBID., 777.
<table>
<thead>
<tr>
<th>Rank and Name</th>
<th>Charges</th>
<th>Number of Victims</th>
<th>Sentencing</th>
</tr>
</thead>
<tbody>
<tr>
<td>SGT Delmar Simpson</td>
<td>18 counts of rape and 29 other offenses</td>
<td></td>
<td>25 years in military prison</td>
</tr>
<tr>
<td>Staff SGT Vernell</td>
<td>19 counts of sodomy, adultery, communication a threat, obstructing</td>
<td>5 women under</td>
<td>6 months in prison, demoted to private, forfeited all benefits, and</td>
</tr>
<tr>
<td>Robinson Jr.</td>
<td>justice and disobeying orders</td>
<td>his command</td>
<td>dishonorable discharge</td>
</tr>
<tr>
<td>CPT Derrick Robertson</td>
<td>Rape, forcible sodomy, adultery, indecent assault, conduct unbecoming</td>
<td>1 female soldier</td>
<td>1 year in prison with 8 months of suspension.</td>
</tr>
<tr>
<td></td>
<td>an officer, violating general order, and obstruction of justice</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Staff SGT Herman</td>
<td>Rape, assault, adultery, indecent assault, sexual intercourse by fear,</td>
<td>3 female trainees</td>
<td>A reprimand and to demotion by two grades</td>
</tr>
<tr>
<td>Gunter</td>
<td>conspiracy to obstruct justice, violation of general order, and</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>cruelty and maltreatment for inappropriate sexual comments and</td>
<td></td>
<td></td>
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<td></td>
<td>harassment</td>
<td></td>
<td></td>
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<tr>
<td>SGT 1st Class</td>
<td>One count of indecent assault, one count of drunkenness on duty, and 7</td>
<td>6 female trainees</td>
<td>Discharge proceedings</td>
</tr>
<tr>
<td>William Jones</td>
<td>counts of fraternizing with recruits</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SGT 1st Class</td>
<td>Violation of a general order, sodomy, adultery, making a false</td>
<td>Two female</td>
<td>Discharged from service in lieu of courts-martial</td>
</tr>
<tr>
<td>Theron Brown</td>
<td>statement, and disobeying a superior’s order</td>
<td>trainees and one</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>civilian</td>
<td></td>
</tr>
<tr>
<td>SGT Nathanael Beech</td>
<td>Violation of a superior’s order, failing to obey a general order,</td>
<td>2 female soldiers</td>
<td>Administrative discipline rather than court-martial</td>
</tr>
<tr>
<td></td>
<td>making a false official statement, adultery, communication g a threat</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>and fraternization with a female soldier</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SGT Isiah Chestnut</td>
<td>“variety of offenses”</td>
<td>4 female trainees</td>
<td>Article 15 (non-judicial punishment), permitted to resign in lieu of</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>court-martial</td>
</tr>
<tr>
<td>SGT 1st Class Ronald Moffett</td>
<td>Indecent assault, indecent language, adultery, cruelty and maltreatment, violating an order prohibiting social relationships with trainees</td>
<td>4 female soldiers</td>
<td>Discharge in lieu of court-martial</td>
</tr>
<tr>
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</tr>
<tr>
<td>SGT Tony Cross</td>
<td>Adultery, sodomy, wrongfully socializing with trainees and failing to report prohibited relationships</td>
<td>4 female trainees</td>
<td>Discharge in lieu of court-martial:</td>
</tr>
<tr>
<td>Major General John E. Longhouser</td>
<td>An adulterous affair with a civilian woman while separated from his wife</td>
<td>1 civilian woman</td>
<td>Early Retirement</td>
</tr>
</tbody>
</table>

**Note:** Figure 7. This information was obtained from various news articles.\(^84\)\(^85\)\(^86\)\(^87\)

On November 7, 1996 the Aberdeen Scandal became a nationwide media story after military offices announced the investigation of two drill sergeants and one training company commander. Public outrage ensued when the military disclosed that only one of the two drill sergeants was being held in pretrial confinement due to communication of threats involving female trainees, sodomy, and rape charges.\(^88\)

As a result of the public outrage concerning the Aberdeen Scandal, The Congressional Committee on Armed Services convened. The committee met to hear the testimonies concerning MSA and sexual harassment within the Armed Forces and

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\(^{84}\) Some sources state that 12 servicemembers were convicted in the Aberdeen Scandal, however, information regarding the charges and convictions proved unavailable.


\(^{87}\) Francis X. Clines, Drill Sergeant Gets 6 Months for Sex Abuse at Army Post, New York Times (May 31, 1997).

review the policies and procedures within the DOD. Secretary of the Army Togo D. West Jr., Army Chief of Staff General Dennis J. Reimer, Secretary of the Navy John H. Dalton, Secretary of the Air Force Sheila E. Widnall, and Secretary of Defense Edwin Dorn testified to the committee.\textsuperscript{89} The first panel of the hearing mainly focused on the inclusion of women in the Armed Forces. Although this conversation is important for women’s rights, whether in the military context or not, an increased amount of female identifying servicemembers is not going to fix the deeply internalized and structural issues of sexual assault in the military.

Given such egregious charges, one possible explanation for the lack of ‘proper’ convictions throughout the Aberdeen Scandal could be the fault of Article 120. At the time, the UCMJ only criminalized forcible rape and thus did not effectively prevent coercive sexual acts. For the most part, Article 120 had not been changed and was virtually undistinguishable from the 200-year-old traditional common law definition.\textsuperscript{90} As a result, there were definitive gaps in what devastating behaviors commanders were allowed to prosecute under Article 120. This narrow definition of rape ensured that coercive sexual activities would be tried under other articles that imposed inadequate punishments relative to the potential punishments for rape convictions.

In the case of the Aberdeen Scandal, panel members may have acquitted accused perpetrators who abused military authority to pressure subordinates into having sexual intercourse because their crime did not fit within the boundaries of Article 120. The misuse of rank and authority for coercive sexual intercourse falls

\textsuperscript{89} 32 CFR § 105.3
through the cracks created by Article 120’s reductive definition of rape. The necessary physical factors may have been missing, however the pressure to perform sexual acts remained a dominant aspect of the abuse. Coercive sexual activity is particularly destructive in the military, where hierarchy and structure are so essential to unit success.

The markedly low rate of convictions given the egregious charges is noteworthy and an analysis of MSA would not be complete without questioning the possible sentences of MSA. It is peculiar that an acceptable punishment for a rape conviction is an honorable discharge. The military is a professional institution with substantial control over the individuals within it but ultimately remains a form of employment. Getting fired from a job has very different implication than being charged with rape and the individuals in this position can easily move on and live relatively normal lives. The consequences and the overall distance from the civilian criminal justice system is enough to allow people to slip through the cracks as if nothing happened, despite the incident(s) of MSA.

2003 Air Force Academy Sexual Assault Scandal

In January 2003, the military found itself under harsh criticism again after the media reported that female cadets experienced sexual assault while in attendance at the United States Air Force Academy.\textsuperscript{91} Subsequent news reports released that Air Force Academy officers covered up the crimes and failed to punish sexual offenders. Additionally, an investigation revealed that the Air Force Academy charged female

\textsuperscript{91} Erin Emery, Cadet Cuts Deal; Rape Charges Dropped, DENVER POST, June 9, 2004, at A1.
cadets with collateral misconduct in retaliation for reporting MSA. Collateral misconduct refers to victim misconduct that is associated with the time, place, or circumstances of the MSA incident.\(^\text{92}\)

Collateral misconduct is one of the most significant barriers that MSA victims face when choosing to report MSA due to fear of the consequences or punishments. Some examples of collateral misconduct include underage drinking, illicit drug use, fraternization (it is illegal for certain ranks and position to engage in sexual relationships; for example, officers and enlisted servicemembers), adultery (adultery is a prosecutable offense within the military), and other forms of military misconduct.

Appalled by the news, Senators Wayne Allard and John Warner requested the Secretary of the Air Force investigate allegations made by a former cadet who was repeatedly raped while in the academy and subsequently punished upon filing the report.\(^\text{93}\) Going against the Article 32 Investigation officer’s recommendation, the Academy Superintendent referred Cadet Douglas Meester to a court-martial for rape charges. Notably, Meester’s rape charges were dismissed in exchange for a guilty plea. Meester was charged with conduct unbecoming an officer, dereliction of duty, and the commission of an indecent act.\(^\text{94}\)

In an effort to mitigate future sexual assaults disputes, in 2003 Congress established the Panel to Review Sexual Misconduct Allegations. Tillie K. Fowler (R-

\(^{92}\) 32 CFR § 105.3

\(^{93}\) Mike Soraghan & Erin Emery, AFA Rape Claim Investigated, DENVER POST, Feb. 14 2003, at B2. At the time, Article 32 of the UCMJ provided for a “thorough and impartial” investigation into the “truth of the matter set forth in the charges” before trial. UCMJ art. 32 (2000).

led the panel, thus named the Fowler Commission. The Fowler Commission’s main task focused on reviewing the Air Force Academy’s current polices, unveiling any unaddressed MSA reports, and punishing potential perpetrators. At the conclusion of the investigation, the Fowler Commission reported that since 1993 the highest members of the Air Force Academy leadership knew about the MSA issue and failed to correct the matter.

In accordance with expectations, the egregious findings prompted Congress to conduct a military wide investigation of all US military academies. The results of this investigation influenced Congress to mandate Secretary of Defense Donald Rumsfeld to construct the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies. The committee was established in 2004 and consisted of six servicemembers from the four branches and six civilians. The main purpose of the task force focused on addressing how the Army and the Navy address sexual harassment and assault within the academic institutions.

Military Sexual Assault Annual Reporting Office

In October 2004, the 108th Congress mandated that Secretary of Defense Donald Rumsfeld develop a comprehensive policy on the prevention and response to MSA in which servicemembers were involved as perpetrator or victim. Further, Congress dictated that the DOD must submit an annual report that included the number

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96 IBID.
97 32 CFR § 105.3
of MSA reports committed by servicemembers, the number of cases substantiated, and a summary of the disciplinary action taken in each reported case, if any.\textsuperscript{99}

Moreover, in 2005, Congress mandated the military to establish the Sexual Assault Prevention and Response Office (SAPR/SAPRO) as the authority to manage MSA reports and cases. Congress tasked SAPRO with developing a comprehensive plan to address MSA.\textsuperscript{100} Due to SAPRO’s three years of inactivity and delay, some criticized it as simply a symbolic office with litter authority or efficacy.\textsuperscript{101}

\textbf{Military Sexual Assault Victim Reporting Options}

Sexual Assault in the military is defined as “intentional sexual contact characterized by the use of force, threat, intimidations, or abuse of authority or when the victim does not or cannot consent. The term includes a broad category of sexual offenses consisting of the following specific UCMJ offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these offenses.”\textsuperscript{102} If any of these offenses occurred, servicemembers and their adult military dependents can report them through military

\begin{flushright}
\textsuperscript{100} Nancy Montgomery, “After 2 decades of sexual assault in military, no real change in message,” Stars and Stripes, July 7, 2013.
\textsuperscript{102} DoD Instruction 6495.02, “Sexual Assault Prevention and Response Program Procedures,” June 23, 2006 (hereby cancelled)
\end{flushright}
law enforcement or the chain of command. Military dependents are the spouses, children, or possibly other familial relationships categories of the servicemembers.\footnote{DoD 6010.8-R}

Initially, the military only offered MSA victims, whether servicemembers or dependents, with a traditional reporting process: the assault occurs, mandatory reporters notify legal authorities, and CID performs a nonconfidential investigation. This process proved unsatisfactory after RAND surveys (2002) discovered a large discrepancy between anonymous self-reported MSA and the number of reports filed through ‘proper’ channels.\footnote{IBID.} The discrepancy is much higher for male servicemembers than female servicemembers. Further, RAND surveys revealed that servicemembers, regardless of gender, elected not to report experiences of MSA as a safeguard against professional retaliation. In an effort to ensure that servicemembers received proper care, Congress passed FY 2005 NDAA which required the DOD to change the reporting policy and develop a system that offered confidential reporting.\footnote{National Defense Authorization Act for Fiscal Year. (2005).} In June 2005, a new confidential reporting option was available to MSA victims.\footnote{U.S. Department of Defense. (2005). Department of Defense Annual Report on Sexual Assault in the Military. Retrieved from www.sapr.mil/index.php/annual-reports.}

Secretary of Defense Donald Rumsfeld enacted DOD Instructions (DODi) 6495.02 which provides MSA victims with two reporting options: unrestricted and restricted reporting.\footnote{DoD Instruction 6495.02, “Sexual Assault Prevention and Response Program Procedures,” June 23, 2006 (hereby cancelled)} If MSA victims elect an unrestricted reporting option an investigation is immediately filed, and their unit commander is notified. According to
the Army’s Sexual Harassment/Assault Response and Prevention (SHARP) website, unrestricted reporting is for MSA victims “who desire medical treatment, counseling, legal assistance, SARC/SHARP Specialist and VA/SHARP Specialist assistance, and an official investigation of the crime.”¹⁰⁸ A SARC, Sexual Assault Response Coordinator, is another servicemember that serves to ensure that the MSA victim receives timely and appropriate care following their assault. In an effort to maintain the victims’ privacy and mitigate instances of professional retaliation the SHARP website states that only limited personnel are privy to the knowledge that a sexual assault occurred, and that a victim filed an unrestricted report. According to the DODi 6495.02, only limited personnel are privy to the knowledge that a sexual assault occurred.¹⁰⁹ The DODi states that there must be a “legitimate need to know.”¹¹⁰ From the author’s experience serving in the Army, this particular assertion does not align with reality.

For example, if an incident of sexual assault occurred in the barracks (junior servicemember housing), the CID investigators would question all servicemembers present in the barracks at the time of the alleged assault. Despite policies that forbid investigators from discussing the sexual assault incident with interviewees, this widespread inquiry sparks interest and curiosity. Thus, servicemembers begin to gossip about the investigation. In other words, to conduct a thorough investigation, CID personnel trigger a network of rumors that inevitably become associated with the MSA

¹⁰⁹ DoD Instruction 6495.02, “Sexual Assault Prevention and Response Program Procedures,” June 23, 2006 (hereby cancelled)
¹¹⁰ DoD Instruction 6495.02, “Sexual Assault Prevention and Response Program Procedures,” June 23, 2006 (hereby cancelled)
victim. This common occurrence is one of the most significant reporting barriers that influences MSA victims to choose the restricted reporting option.

The barriers that exist in the process of reporting sexual assault in the military necessitated the development of an unrestricted reporting option. MSA by another servicemember is a violation of the trust that is instilled during basic combat training. However, the double-edged sword of this cohesion is that some may feel as if the victim is betraying the unit by reporting the assault, versus blaming the accused perpetrator. If MSA victims choose to file restricted reports, they receive identical clinical and nonclinical support. The most important distinction of restricted reporting is that an official or formal investigation is not conducted. MSA victims may choose this option to ensure the preservation of their privacy. However, a drawback to this type of restricted reporting is that MSA victims cannot press charges against the alleged perpetrator. Notably, if an MSA victim reports the sexual assault to anyone other than a SARC or VA/SHARP representative, the report must automatically be filed as an unrestricted report. This includes unit commanders, hospital staff, law enforcement, and essentially any military personnel that is not SARC or VA/SHARP trained, as all military personnel are considered mandatory reporters (see Figure 8).111


Until 2006, Article 120 of the UCMJ only consisted of two crimes: rape and carnal knowledge. From the military’s founding in 1775 until 2006, no legal definition or article specifically criminalized sexual harassment or sexual assault that did not

include penetration. Commanders prosecuted all other forms of sexual misconduct under Article 134, the general article or Article 125, sodomy. Furthermore, as a result of military scandals regarding sexual misconduct, public outcry influenced Congress' decision to review and revise Article 120. Congress required the Secretary of Defense to conduct a review of the UCMJ with the primary purpose of determining necessary

Note: Figure 8. Red indicates the filling of a restricted or unrestricted report. Dark blue indicates the victims’ initial action.\textsuperscript{112}

modifications and to establish a system to address the issues. The Secretary of Defense delegated the task to the JSC.

In March of 2005, the JSC submitted the report, Sex Crimes and the UCMJ: A Report for the Joint Services Committee on Military Justice, which consisted of 826 pages and six options for rewriting Article 120.\textsuperscript{113} The JSC unanimously (15 committee members) recommended Congress not to revise Article 120, or any other articles that managed sexual misconduct. The JSC review determined that the UCMJ and MCM accounted for instances of sexual misconduct and believed that the rationale for substantial legislative change would not compensate for the disorder that changes would prompt.\textsuperscript{114} Although, the JSC report did state that if “higher authorities” deemed UCMJ modification necessary in order to conform to Title 18, United States Code, then option five would be the most appropriate for the military context.\textsuperscript{115}

Not in favor of the JSC recommendation, Congress preferred to make changes to Article 120 that would mirror civilian statues and federal law. In January 2006, Congress passed the National Defense Authorization Act for Fiscal Year 2006 which implemented a complete revision of Article 120. The amendment is an identical copy of option five from the JSC report. The revision consists of a range of 14 separate offenses from indecent exposure to forcible rape.\textsuperscript{116} This revision marks the first-time

\textsuperscript{113} Sex Crimes and the UCMJ. A report for the Joint Services Committee on Military Justice. (2005).
\textsuperscript{114} Sex Crimes and the UCMJ. A report for the Joint Services Committee on Military Justice. (2005).
\textsuperscript{115} Title 18, United States Code is the federal law that deals with sexual assault.
the UCMJ explicitly criminalized sexual assault, that does not necessitate penetration.

Specifically, Article 120, Section a, Rape states:

§ 920. Art. 120. Rape, sexual assault, and other sexual misconduct
(a) Rape. Any person subject to this chapter who causes another person of any age to engage in a sexual act by—
   (1) using force against that other person;
   (2) causing grievous bodily harm to any person;
   (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
   (4) rendering another person unconscious; or
   (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.\textsuperscript{117}

\textit{The Invisible War}

In February 2011, 28 veterans filed Cioca v. Rumsfeld, against the Pentagon and Defense Secretaries Robert Gates and Donald Rumsfeld alleging that through command indifference, they allowed a military culture that disproportionately reported and punished MSA, specifically rape.

Aforementioned in the introductory chapter of this thesis, \textit{The Invisible War} premiered in June 2012. The release of the documentary became a major turning in the fight against MSA. The documentary presents interviews with various MSA victims and their hardship after the traumatic event. Additionally, the documentary includes interviews with DOD personnel and MSA advocates. The interviews conducted throughout the documentary focus on professional retaliation, indifference,

\textsuperscript{117} Uniform Code of Military Justice (UCMJ). (2008).
commanders’ lack of interest or concern, inadequate provisions for physical and mental health care, and the common theme of MSA victims release from service. Even worse, in some interviews MSA victims discuss being forced to work with the accused assailant after reporting the incident. The most significant aspect of The Invisible War is that it emphasizes that past MSA scandals are far from exceptional and at the present time, little action had been taken to correct the behavior.\textsuperscript{118} From the author’s experience, regardless of one’s relationship to the military or with sexual assault, the documentary is difficult to watch.

The award-winning documentary gained so much attention that it generated a public call to action.\textsuperscript{119} Learning about the documentary and the public outrage, Secretary of Defense Leon Panetta issued an amended version of DODi 6495.02, which mandated all penetrative MSA reports be handled by an at least an O-6 officer (Colonel or Navy Captain).\textsuperscript{120} The amount of public outrage drew the attention of Congress and led the House of Representatives Armed Services Committee and a Senate subcommittee to hold MSA hearings.\textsuperscript{121} In the aftermath of The Invisible War, the most noteworthy outcome manifested in an abundance of legislation attempting to address MSA.\textsuperscript{122}

\textsuperscript{118} NYT Article.
\textsuperscript{120} DODi NUMBER 6495.02
\textsuperscript{122} Military Sexual Assault: Chronology of Activity in Congress and Related Resources
Despite the large-scale efforts to improve the problem of sexual assault in the military, evidence suggests that some aspects of military culture continue to exist as contributing factors. For example, Defense Secretary Chuck Hagel and Chairman of the Joint Chiefs of Staff Army General Martin Dempsey held a press briefing to discuss their meeting with President Barrack Obama, Vice President Joe Biden and other senior military officials regarding MSA. During the press briefing, General Dempsey stated that he believed that the prolonged wars in Iraq and Afghanistan may be a contributing factor in the increase of MSA. Further he stated, “[i]f a perpetrator shows up at a court-martial with a rack of ribbons and has four deployments and a Purple Heart, there is certainly a risk that we might be a little too forgiving of that particular crime.”

General Dempsey’s acknowledgement that certain aspects of military culture—such as valor—play a role in the problem of MSA suggests that it may take more than legislative amendments to correct the issues at hand.

Shortly after, President Obama directed Secretary of Defense Hagel to update him on the DOD’s progress to improve the problem of MSA.

Military Justice Improvement Act Proposals

Senator Kirsten Gillibrand (D-NY) first introduced the Military Justice Improvement Act (MIJA) in May 2013. The Invisible War inspired Senator Gillibrand

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to produce such a bill.\textsuperscript{125} Senator Gillibrand proposed the MIJA to Congress as an attempt to reform procedures for determinations to proceed to trial by court-martial for offenses under the UCMJ. The bill focused on removing MSA prosecution decisions from the alleged perpetrator’s chain of command to an unbiased military prosecutor, specifically retired military attorneys.\textsuperscript{126} The Senate voted against the controversial bipartisan bill. Later, in March 2014, Senators Deb Fischer, Claire McCaskill, and Kelly Ayotte proposed a second bill that removed the commanders’ authority to overturn convictions, provided special counsel to victims, and mandated dishonorable discharge.\textsuperscript{127} Similarly this bill was not passed. Then, in June 2015, Congresswoman Jackie Speier proposed a third version of the bill, the Sexual Assault Training Oversight and Prevention Act (STOP Act), which focused on removing the responsibility of reporting, the investigation, and care for the MSA victim from the chain of command to an autonomous group of both servicemembers and civilians.\textsuperscript{128} The general structure of the bill did not change, despite multiple revisions. All three of the proposed bills attempted to modify the military justice system in hopes that more MSA victims would report their assaults and gain more protections and support. Those against MIJA stated that their main criticism focused on the reduction of command authority. It was stated that a reduction of the hierarchy could destabilize the essential structure that is so integral to military operations.


\textsuperscript{128} IBID.
In fiscal year 2012, a total of 3,374 reports involving MSA were filed. Of those 2,558 filed unrestricted reports (816 restricted). These reports comprise incidences in which either the victim or the accused perpetrator is a military servicemember. Of the aforementioned number of reports, 1,159 reports accused a servicemember of sexual predation. Majority of offenses alleged involved rape, aggravated sexual assault, and sexual assault. Congress requires that the DOD report on the dispositions of MSA allegations made against servicemembers.

In fiscal year 2013, a total of 5,061 reports involving MSA were filed. Of those 3,768 filed unrestricted reports (1,293 restricted). These reports comprise incidences in which either the victim or the accused perpetrator is a military servicemember. Of the aforementioned number of reports, 3,234 reports contained enough information and evidence to proceed with legal prosecution. Majority of offenses alleged involved rape, aggravated sexual assault, and sexual assault. Congress requires that the DOD report on the dispositions of MSA allegations made against servicemembers.

This year is especially noteworthy because of the subsequent drastic increase in MSA legislation. However, it is difficult to determine if sexual predation or the actions taken by policymakers that made MSA victims perceive a compassionate command climate caused the substantial increase in MSA reports. Further analysis of the data and

130 IBID.
132 IBID.
anonymous self-report questionnaires could provide considerable insight, however, that is outside the scope of this thesis.

In 2013, Congress passed the National Defense Authorization Act for fiscal year 2014 which included Senator Claire McCaskill’s bill. McCaskill’s bill removed the commanders’ ability to overturn convicted perpetrators mandated dishonorable discharge, allowed MSA victims to request a permanent change or duty station, and gave commanders the authority to force alleged perpetrators to move duty stations or units. Within the military setting, allowing MSA victims to request a change of duty station or unit is especially important given the close proximity that servicemembers have with the other unit personnel. If the accused perpetrator happened to belong to the same unit, the MSA victim would be subjected to field training exercises and various other forced interactions.

In the following year, Congress passed the National Defense Authorization Act for fiscal year 2015. The Act included 33 sections of law and 16 changes to the UCMJ. The bill included several amendments including removal of the “good soldier” defense, allowing the victim to decide whether the crime is prosecuted in civilian or military justice system, and extra methods to ensure command accountability. Nonetheless, providing MSA victims with a special counsel was among the most significant of the policy changes.

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135 IBID.
As part of the National Defense Authorization Act of fiscal year 2017, Congress enacted the Military Justice Act of 2016 (MJA 16), effective January 1st, 2019. The purpose of MJA 16 is to improve the military justice system through military effectiveness while sustaining “good order and discipline.” The MJA 16 is the most extensive change to the UCMJ in over 60 years. Unlike other aforementioned changes to Article 120, the MJA 16 is the first comprehensive update to military justice since 1984. As a whole the proposed revision is an effort to modernize the somewhat outdated UCMJ. For example, Article 120, “Stalking,” now includes the misuse of social media, text messages, emails, and other forms of modern technology.

Despite the many changes, commanders remain the sole authority responsible for military justice. The main changes include:

- Increased rights and broadened protections for victims of all crimes to include more opportunities to be heard and integrated in the court-martial process
- Expansion of court-martial authorities to include issuing subpoenas earlier in the investigative process
- Special court-martial bench trial
- Plea agreements now contain a minimum and maximum sentence
- New punitive articles which specifically criminalize sexual relationships between junior level servicemembers and people in superior positions

In term of MSA, the MJA 16 includes a new definition of adultery and intimate partner violence and a specific law against sexual relationships between trainees and instructors. The hope is that MJA 16 improves the judicial system relating to all crimes,
but specifically MSA. As Congress enacted MJA 16 on January 1st, 2019, while this thesis is in progress, an analysis of its effectiveness will not be included.
Chapter Three: Conclusion

*And for those who are in uniform who have experienced sexual assault, I want them to hear directly from their Commander-In-Chief that I’ve got their backs. I will support them. And we’re not going to tolerate this stuff and there will be accountability. If people have engaged in this behavior, they should be prosecuted.* — President Barack Obama

**Discussion**

In many ways, the military is a unique institution and various authors have suggested that military culture plays an implicit role in encouraging sexual harassment and sexual assault.¹ Further, the desire for comradery and unit cohesion discourages MSA victims from reporting incidents of sexual misconduct. Showcased in this thesis, the authority of the chain of command also plays a role in one’s ability to report sexual assault. Over the past decade, Congress and the DOD have developed countless provisions to decrease the barriers to MSA reporting, yet many institutional barriers to justice continue to negatively impact victims. However, there may be other factors, other than legislation, that play a significant role in the continuation of the MSA problem.

**Limitations of this Study**

A major limitation of this thesis was the inability to view the Joint Service Committee of Military Justice (JSC) meeting minutes. Aforementioned in Chapter 2, the JSC is responsible for recommending changes to the Commander-in-Chief. The author filed a Freedom of Information Act (FOIA) request; however, the author did not file the FOIA request in time to include its data in this thesis.

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¹ Enloe, Cynthia. 200. “Maneuvers,” University of California Press. 3.
Another limitation of this study was the sole use of primary and secondary sources -- mainly government documents and newspaper articles. This study would have benefited from individual case studies of MSA victims. This would have introduced a qualitative methodology to shed light on the subjective experience of MSA within the context of its systemic and cultural problems.

Another limitation of this thesis was the lack of access to MSA prevalence. Congress did not mandate the various branches to report MSA until 2004 and restricted reporting was not developed, and data collection began in 2006. It proved difficult to find MSA data prior to 2004. Therefore, a limitation of this study was the inability to determine the prevalence of MSA from 1951 to 2004.

Recommendations

Public outrage has produced some improvements and reforms to the military justice system regarding sexual assault in the military. However, these modifications have proven to be incomplete, and at times, counterproductive, due to the failure to address a major underlying weakness: commanders’ authority. Historically, the abuse of command authority concealed individual sexual assault reports as well as large-scale sexual assault scandals. Although some command authority has been reduced, it remains true that military officers come with a plethora of priorities and motivations that may influence MSA reporting and outcomes. Considering commanders’ limited legal training, low conviction rates are unsurprising. However, given the military’s desire to maintain “good order and discipline” and uphold its strict rank structure, it is unlikely that Congress would implement such a dramatic transformation any time soon. Notably, the author does not recommend a complete removal of command authority.
The author’s military service and belief that total removal of command authority could destabilize military hierarchical structures substantiates the recommendation against a complete removal of command authority. It may seem odd to the civilian population that such a weakness exists within military power structures, however, the shortcomings of command authority in the context of sexual assault do not compare to the benefits of the chain of command. When considering combat operations, the command structure is crucial in ensuring individual and unit survival. Rather, the author recommends that sexual assault reports be heavily supervised by a coed panel of commanders before they make decisions. Rather, the author recommends that a coed panel of commanders heavily supervise the sexual assault reports before the prosecution makes their decision. Military sexual assault, rape, and sexual harassment are crimes that occur more commonly than any other criminalized offense, therefore MSA reports must be managed with special attention.

A second recommendation is for Congress and the DOD to develop a new systemic strategy that is not predicated on public awareness in misconduct. Rather than reactionary efforts to fix the problem, Congress and military officials should slowly work to create a system in which data collection of MSA reports, investigations, and rates of convictions, are managed by an outside, unbiased, and trained entity. This would increase the accuracy of both data collection and interpretation.

As demonstrated throughout this thesis, Congress and military officials never implemented all of the recommendations by any of the various committees tasked with MSA cases. Instead, Congress implemented recommendations in a piece-meal fashion. This piece-meal approach could be an impediment to improving the problem of MSA.
It seems as if policymakers, who take the time to establish such committees, would trust the research, interpretation, and recommendations regarding issues of MSA. If Congress implemented all of the recommendations, many of the cracks in the system discussed in this thesis would not exist.

A fourth recommendation to improve the MSA problem is to develop better education and training for servicemembers. From the author’s experience, sexual harassment and assault prevention training is conducted in a large auditorium or briefing room filled with the majority of the servicemembers in the unit. For the majority of the time, the instructor reads the information off of generic PowerPoint slides. The author recommends developing a training program that includes role play, hands on learning, and opportunities to convene in small groups to discuss consent, power dynamics, and other imperative themes. This integrative training program could increase servicemembers’ understanding of sexual assault beyond its current parameters in both federal and military definition.

**Future Directions of Research**

Initially this thesis aimed to analyze the changes, or lack thereof, made to the UCMJ. Aforementioned, the JSC meeting minutes are confidential. Future research should file a FIOA to delve into the decision-making process of UCMJ policymakers. This information could potentially provide valuable insight regarding the reasons why such long intervals of time elapsed. The intricacies of the decision-making process and the reality of the JSC meetings could offer further awareness of the military’s structure and the complexities of its functioning that outsiders, civilians or junior servicemembers may not understand. Further, the FOIA would grant researchers
access to which individuals are involved in the decision-making process. Before the author learned that the JSC meeting minutes were confidential, a few of the pertinent questions the author wanted to inquire are as follows:

1. Who are the committee members?
   a. Gender?
   b. Political party affiliation?
   c. Prior military service?

The answers to these questions could shed light on why military sexual misconduct laws have, or have not, been improved.

A second possibility for future research could also investigate the data on the frequency of rape and sexual assault reports versus the rate and severity of convictions throughout the various UCMJ and policy amendments. This investigation could explicate whether these revisions influence or motivate sexual predation.

**Conclusion**

Congress has played a significant role in the development of the military justice system. Throughout the last 68 years, since the modification of the UCMJ, Congress has labored to ensure that the military justice system effectively benefited the military. In the last decade or so, Congressional attention focused on the problem of sexual assault in the military. Throughout the evolution of the UCMJ life-span, Congress enacted a variety of National Defense Authorization Acts, and implemented numerous reforms and policy changes.

This thesis illuminates the gaps in the military justice system that have perpetuated MSA. The military is a microcosm of society. In other words, similarly to the civilian sector, it is impossible to end all incidents of sexual predation, however, addressing the issues and developing policy changes could drastically reduce the
problem of sexual assault in the Military. Furthermore, due to the unique barriers associated with reporting sexual misconduct in the military, it is imperative that Congress and the DOD address these concerns. Despite the high rates of sexual predation within the United States Armed Forces, a future of equality and freedom from sexual oppression is within grasp.
List of Acronyms

Admiral, ADM
Chief of Naval Operations, CNO
Criminal Investigation
Department of Defense, DOD
Department of Defense Instructions, DODi
Fiscal Year, FY
Joint Service Committee on Military Justice, JSC
Judicial Proceedings Panel, JPP
Manual for Courts-Martial, MCM
Military Justice Act 2016, MJA 16
Military Sexual Trauma, MST
Military Sexual Assault, MSA
National Defense Authorization Act, NDAA
Naval Captain (O-6), Capt
Naval Inspector General, Naval IG
Navy Criminal Investigative and Counterintelligence Agency, NIS
Sexual Assault Prevent and Response Office, SAPRO or SAPR
Sexual Assault Response Coordinator, SARC
Sexual Harassment/Assault Response and Prevention, SHARP
Uniform Code of Military Justice, UCMJ
Veterans Affairs, VA
Victim Advocate, VA
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