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Michael I. Spak
Chicago-Kent College of Law

Jonathan P. Tomes

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SEXUAL HARASSMENT IN THE MILITARY: TIME FOR A CHANGE OF FORUM?

MICHAEL I. SPAK¹ AND JONATHAN P. TOMES²

Laws are regulations and institutions. Those who excel in war first cultivate their own humanity and justice and maintain their laws and institution. *Sun Tzu, The Art of War*

I. INTRODUCTION	335
II. SEXUAL HARASSMENT-A CONTINUING PROBLEM FOR TODAY'S MILITARY	336
III. COURTS-MARTIAL FOR SEXUAL HARASSMENT-THE WRONG SYSTEM AND THE WRONG FACTFINDER	339
IV. A FEDERAL (NON-MILITARY) REMEDY FOR MILITARY SEXUAL HARASSMENT CLAIMS?.....	355
V. CONCLUSION.....	369

I. INTRODUCTION

Little doubt exists that despite “zero tolerance” policies, increased sensitivity training, and other measures designed to eliminate or at least minimize sexual harassment in the military, female service members are still subjected to pervasive sexual harassment. Although both co-authors have proposed the abolition of the military courts-martial system in time of peace³ and one has proposed the repeal of the so-called *Feres* doctrine which prohibits servicemembers from suing their military commanders for monetary damages,⁴ perhaps stronger reasons exist to replace courts-martial with civil rights lawsuits for sexual harassment offenses committed by servicemembers. This article will review the current status of sexual harassment in the military, discuss why courts-martial are ineffective in punishing and deterring sexual harassment, and suggest that permitting sexual harassment claims in a forum other than the military justice system would help deter future sexual harassment in the military at no greater cost to military discipline and preparedness than is inherent in the current system.

¹Professor of Law, Chicago-Kent College of Law, B.S. 1958; J.D. 1961, De Paul University; L.L.M. 1962, Northwestern University. Professor Spak is a retired reserve colonel in the Army Judge Advocate General's Corps and author of *CASES AND MATERIALS ON MILITARY LAW*.

²Partner, Tomes & Dvorak, Leawood, Kansas; B.S. 1968, University of Cincinnati; J.D. 1975, Oklahoma City University. Mr. Tomes is a retired lieutenant colonel in the Army Judge Advocate General's Corps and author of *THE SERVICEMEMBER'S LEGAL GUIDE* (3d ed).

³Michael Spak & Jonathan Tomes, *Courts-Martial: Time to Play Taps?* 28 S.W. U. L.REV. 481 (2000).

⁴See Jonathan P. Tomes, *Feres to Chappell to Stanley: Three Strikes and Servicemembers are Out*, 25 U. RICH. L. REV. 93 (1990).

II. SEXUAL HARASSMENT—A CONTINUING PROBLEM FOR TODAY’S MILITARY

Despite increased training in the prevention of sexual harassment,⁵ “zero tolerance” policies,⁶ and highly publicized courts-martial of those accused of sexual harassment,⁷ sexual harassment continues to be a problem for the United States military. For example, Naval investigators reported 156 cases of inappropriate relationships between January 1996 and May 1998 at Great Lakes Naval Base, where the Navy conducts its basic training. Among these cases were 14 cases of sexual harassment of recruits by instructors.⁸ Not only do investigations and disciplinary

⁵See STATEMENT AND STATUS REPORT OF THE CONGRESSIONAL COMMISSION ON MILITARY TRAINING, “GENDER - RELATED ISSUES IN MILITARY TRAINING,” 1999 WL 8086648 (March 17, 1999), which notes, for example, that the Army now includes prevention of sexual harassment as a part of basic combat training, and equal opportunity and sexual harassment training as part of the Pre-Command Course, Cadre Training Course and others.

⁶An article in the Naval Law Review defined a “zero tolerance” sexual harassment policy as one that “means that every individual complaint of sexual harassment will be investigated and that the individuals involved in the ‘unwanted’ sexual attention will be brought to justice.” Kristin K. Heimark, *Sexual Harassment in the United States Navy: A New Pair of Glasses*, 44 NAVAL L. REV. 223, n. 9 (1997). The Navy announced its “zero tolerance” policy in 1989 when Navy Secretary Lawrence Garret issued the following instruction:

Sexual harassment is unacceptable conduct; it undermines the integrity of the employment relationship, debilitates morale, and interferes with the work productivity of an organization. Sexual harassment will not be tolerated at any level. Substantiated acts of or conduct which results in sexual harassment shall result in corrective action. Department of the Navy, Office of the Secretary, SECNAV INSTRUCTION 5300.26A (1989).

Criticism of the “zero tolerance” policy focuses on the belief that the military professes zero tolerance easily but fails to enforce it:

The military professes to have “zero tolerance” of sexual harassment, with elaborate policies to define and prevent offenses. Unfortunately, the phrase “zero tolerance” has become a parody of itself, more accurately referring to things the military doesn’t really care to do anything about. Instead of taking action to enforce a policy and eliminate problem behavior, which the military is historically quite effective in doing, it is much easier to just proclaim there is “zero tolerance” and move on to something else.

Diane H. Mazur, *The Beginning of the End for Women in the Military*, 48 U. FLA. L. REV. 461, 464 (1996).

⁷Perhaps the most notorious trial was that of the Sergeant Major of the Army, Gene McKinney, for sexual harassment, allegedly consisting of pressuring subordinates for dates, forced kissing, and boasting of his sexual prowess to female subordinates. Sergeant Major McKinney was acquitted by general court-martial of all sexual harassment charges and convicted of one specification of obstruction of justice for attempting to coach the testimony of one of his accusers. See e.g., Stephen Komarow, *Army Sex Scandal Reaches Higher, Service’s Top Enlisted Man Faces Charges*, USA TODAY, May 8, 1997, at 3A; Jane Gross, *Former Top Sergeant of Army is Acquitted of All Sex Charges*, NY TIMES, Mar. 14, 1998, at A1; Jane Gross, *When Character Counts*, NY TIMES, Mar. 15, 1998, at A1. Certainly some irony exists in being convicted of trying to cover up crimes one was found not guilty of.

⁸*Navy Report: Sexual Harassment Not Pervasive at Coed Boot Camp*, THE STATE JOURNAL-REGISTER, Dec. 26, 1998, (Local) at 12. If 156 cases is not pervasive, what is?

actions⁹ indicate that harassment continues, but also so do formal reports and scholarly writings.¹⁰ This continued problem with sexual harassment not only harms the victims, but also harms the morale, discipline, and effectiveness of our fighting forces. Some see these adverse effects as a part of the legacy of the Clinton administration's efforts to make the military reflect the wider American society as shown by mandating the Navy to assign women to all combat ships.¹¹ One woman commentator noted:

Bill Clinton's tenure in office has been quite damaging to the military. Readiness has suffered terribly. Morale is very low. And attrition is leaving the Air Force with a shortage of pilots and the Navy with a shortage of officers.

Because the Clinton administration has been determined to advance the cause of women in combat, the military has been plagued by sexual harassment, rape, pregnancy and low morale. . . .¹²

This commentator is not alone in her concern. Regardless of whether the problems the military is experiencing are attributable to the Clinton administration; to an inherent "warrior mentality" in the male-dominated military;¹³ or to poorly

⁹*E.g.*, Amanda Vogt, *Ex-Navy Instructor Admits to Sex Charges*, CHICAGO TRIBUNE, Oct. 7, 1998, (Metro Lake) at 1 (Navy Petty Officer sentenced to a demotion, a bad-conduct discharge, and 198 days confinement for pleading guilty to sexual harassment and fraternization with recruits); *Sailor in Sex Case Still Unhappy*, AP ONLINE 1998 WL 21782521 (Nov. 3, 1998) (reporting the victim of sexual harassment's dissatisfaction with nonjudicial punishment taken against the commander of a Navy destroyer who made suggestive comments and kissed her. The maximum punishment he could receive (the actual punishment was not reported) was 30 days restriction and a punitive letter of reprimand). 10 U.S.C. § 815 art. 15 (1999) (hereinafter U.C.M.J.) permits commanders to impose various punishments, depending on the rank of the commander and the servicemember being punished without a trial by court-martial.

¹⁰*See e.g.*, William S. Cohen, Secretary of Defense, Annual Report to the President and the Congress App. G, Table G-2 (1998) (detailing the high number of sexual harassment complaints filed with the Department of Defense between 1987 and 1996); MARGARET C. HARRELL & LAURA L. MILLER, *NEW OPPORTUNITIES FOR MILITARY WOMEN: EFFECTS UPON READINESS, COHESION, AND MORALE* 73-77 (1997).

¹¹Paul Craig Roberts, *The 'Can-do' Curse . . . and Fade-out*, THE WASHINGTON TIMES (Mar. 18, 1999) at A18.

¹²Mona Charen, *Editorial: What is Sapping the Spirit of America's Military*, THE AUGUSTA CHRONICLE, (Oct. 26, 1998) at A04.

¹³*See* LINDA BIRD FRANCKE, *GROUND ZERO: THE GENDER WARS IN THE MILITARY* 152 (1997). This author describes the warrior culture as one that demands women's marginalization because accepting women as peers would be antithetical to the macho identity encouraged by the military. *Id.* at 157. Professional soldiers, however, maintain that the warrior culture is necessary to develop combat soldiers. One marine infantryman stated, "You can call [the warrior culture] BS but until someone comes up with a better way to get terrified 18-year-olds to stand up in front of machine guns . . . I'm sticking with it." Thomas E. Ricks, *U.S. Army Fights to Recruit Amid Less- Macho Image*, WALL STREET J. EUR., (Jul. 17, 1997), at 4 (quoting John Lundy).

thought-out policies to combat sexual harassment,¹⁴ sexual harassment and the methods used to remedy it continue to cause problems for commanders and those they lead. For example, the Defense Advisory Committee on Women in the Services (DACOWITS) reported that male supervisors feared their superiors would not support them if they tried to hold women accountable, and subordinate females feared that this situation harmed their opportunity to be treated as equals.¹⁵

The solutions to these problems may actually exacerbate the problems women face in the military. Professor Diane H. Mazur, a former Air Force officer, in an article which demonstrates a great insight into the military, has noted that potential solutions, although advanced by those who support greater military participation by women, “are more dangerous because they are superficially protective and supportive, yet unwittingly they will erode the already uncertain status of military women even further.”¹⁶ She believes that the solutions are based on an incorrect assumption—that women are incapable of resisting inappropriate sexual behavior or, in many cases, of reporting it:

The military has already taken a number of steps to prevent future instances of sexual misconduct against women recruits and, at least so far, the military’s actions have been applauded. In particular, the Army has increased supervision of recruits, has moved to severely punish past offenders, and is devising new systems for reporting misconduct. Unfortunately, these actions have been myopically short-term in nature. Each carries a long-term danger for women in the military, and in the hurry “to do something,” little attention has been paid to whether they are doing more harm than good.¹⁷

As examples of “fixes” that are counterproductive, Professor Mazur cites training regulations which prohibit trainees from going anywhere alone. She believes that such a policy, that women must be protected from harm by restricting their liberty, is similar to the rationale behind prohibiting women in combat, that no one on the battlefield can protect women from attacks by their fellow soldiers.¹⁸ Further, in her view, prosecutors often only discipline the men, where both men and women

¹⁴See, e.g., Tom Bowman, *Army Officers Fear Dating Ban May Hurt Bonds Within Units: Cohen Expected to OK Policy Soon; He Wants Same Code Among All Branches*, THE DALLAS MORNING NEWS (Jan. 3, 1999) at 9A (ban on socializing between junior officers and their sergeants would harm camaraderie and unit cohesion). A very-well thought out article postulates that “more so than in other areas of the law, the legal regulation of sexual conduct has been characterized by inattention and panic, minimization and overreaction.” Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 306 (1998) (the military is a dramatic illustration of the inattention/panic contradiction leading to the conclusion that curing the problem of sexual harassment by the resegregation of women in basic training stems from faulty logic that confuses sexual harassment with heterosexuality, and mistakes power for sexual desire).

¹⁵Rowan Scarborough, *Pentagon Finds Less Harassment; Officers Cite ‘Fear’ of Women*, THE WASHINGTON TIMES (Dec. 10, 1998) at A1.

¹⁶Mazur, *supra* note 6, at 42.

¹⁷*Id.* at 465.

¹⁸*Id.* at 466.

have engaged in inappropriate but consensual relationships. The problem with this is that exempting women from responsibility diminishes their service and sets a poor precedent for the future.¹⁹ Finally, new systems for reporting misconduct are unlikely to be productive because they do not use the chain of command. Using the chain of command is ingrained in all servicemembers, but once one goes outside it to report a problem, that problem is no longer a priority for the command:

Policies that encourage women to take their complaints outside the chain of command are the worst possible way to approach the problem of sexual misconduct. If we tell the military that it is incapable of preventing sexual misconduct, it will never become capable. If we tell individual supervisors and commanders that they are incompetent to respond to women's concerns, they will remain incompetent.²⁰

In short, sexual harassment continues to be a major problem for the military. Further, the existing system for dealing with sexual harassment does not appear to be adequate to deal with the problem. Rather, both the existing system and recent "fixes" appear to be exacerbating the problem—harming both the military and those the system is designed to protect. While scholars have proposed a number of solutions,²¹ this article will focus on the forum for adjudicating harassment cases—the court-martial—and suggest another forum—the civil lawsuit for sexual harassment—would better reduce the problem and protect potential victims of such harassment.

III. COURTS-MARTIAL FOR SEXUAL HARASSMENT—THE WRONG SYSTEM AND THE WRONG FACTFINDER

The military justice system, including courts-martial, was hardly designed to determine whether a female servicemember was the victim of sexual harassment by another servicemember.²² Nor are the factfinders in this system particularly suited

¹⁹*Id.* at 467-69. The author does not suggest that men should not be punished as severely as has occurred, nor that women should be punished as severely. The punishment should be related to the degree of culpability which will normally result in a higher-ranking male being punished more severely than a lower-ranking female. *Id.* at 467.

²⁰*Id.* at 470.

²¹Chamallas, *supra* note 14, at 361-63 (rename and reorient the offense of fraternization because in its current "sexualized meaning," the rules are incoherent and place too much emphasis on the dangers of sexual conduct as opposed to overly-familiar behavior, and reduce or eliminate broad bans on consensual conduct outside the chain of command); Yxta Maya Murray, *Sexual Harassment in the Military*, 3 S. CAL. REV. L. & WOMEN'S STUD. 279, 290-91 (1994) (extend Title VII to uniformed personnel).

²²Besides the lack of women in the military at the time our military justice system was created, little doubt exists that it was viewed as an instrument of discipline, not a system of justice. See *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969) (off-post offenses must be "service-connected" for courts-martial jurisdiction) ("A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.") *overruled by Solorio v. United States*, 483 U.S. 435 (1987) (active duty status at the time of the offense is sufficient for jurisdiction); JOSEPH W. BISHOP, JR., *JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW* 21-24 (1974).

for making this type of determination, whether the factfinder is a commander who is deciding whether the allegation is substantiated so as to require disciplinary action against the offender, whether the factfinder is a convening authority deciding whether to try a case by court-martial, or whether the factfinder is a court-martial panel trying to determine beyond a reasonable doubt whether to convict an accused harasser.

The problems with the military justice system itself are exacerbated by sexual harassment cases. The first problem is that commanders, not lawyers, decide what, if any disciplinary action to take. While under Rules for Court-Martial (hereinafter R.C.M.) 301, any person may report an offense subject to trial by court-martial, any military authority who receives such a report must forward it to the suspect's immediate commander. Upon receiving such a report, the commander should make a preliminary inquiry into the allegations.²³ Under R.C.M. 306, each commander has the discretion to dispose of offenses by members of his or her command. A commander may take any of the following actions:

- No action.²⁴
- Administrative action, such as an administrative separation.²⁵
- Nonjudicial punishment.²⁶
- Trial by court-martial.²⁷

If the commander believes that the offense is too serious to dispose of at his or her level, the commander may forward the matter to a superior authority for disposition.²⁸ Lower-level commanders may not convene courts-martial,²⁹ for

²³RULES FOR COURTS-MARTIAL (hereinafter R.C.M) 303.

²⁴R.C.M. 306(c)(1).

²⁵The MANUAL FOR COURTS-MARTIAL (hereinafter M.C.M.) lists the following possible administrative actions a commander may take in response to a reported offense: counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges in R.C.M. 306(c)(2). Other administrative measures include adverse efficiency or academic reports, reassignment, career field reclassification, reduction in grade, bar to reenlistment, security clearance revocation, pecuniary liability for negligence or misconduct (as if the offense damaged military property), and administrative separation. *Id.*, Discussion.

²⁶R.C.M. 306(c)(3). *See* note 9, *supra*, for a short summary of a commander's powers to impose nonjudicial punishment under Article 15, U.C.M.J.

²⁷R.C.M. 306(c)(4).

²⁸R.C.M. 306(c)(5).

²⁹10 U.S.C. §§ 822-824, specify who may convene general, special, and summary courts-martial. A general court-martial may adjudge any penalty specified for the offense under the punitive articles of 10 U.S.C. §§ 880-934, including the death penalty, confinement for life, dishonorable or bad-conduct discharge, reduction to the lowest enlisted grade, and total forfeitures of pay and allowances. 10 U.S.C. § 818. A special court may adjudge a bad-conduct discharge, confinement for not more than six months, reduction to the lowest enlisted grade, and forfeiture of two-thirds pay per month for six months. 10 U.S.C. § 819. A summary court may only adjudge confinement for not more than one month, and forfeiture of two-thirds of one month's pay. 10 U.S.C. § 820. All these courts-martial can adjudge other penalties, such as reprimands, restriction to specified limits, and the like. Under Article 22, above, a typical Army general-martial convening authority, for example, is a general officer

example, and the nonjudicial punishments they may impose are less severe than those which higher commanders may impose. In making these decisions, commanders often get advice from judge advocates as to how to dispose of offenses, but do not have to do so except if referring³⁰ a case to a court-martial. And even in those cases, they do not have to follow the advice. In both authors' experience as judge advocates, it was not uncommon for a commander to not follow legal advice as to whether to try a particular offense by court-martial or not. Sometimes commanders ordered a trial when the lawyer advised otherwise and sometimes they refused to order a trial when the lawyer urged that the offense was so serious that no other means of disposition was appropriate. If the lawyer disagrees, his or her only recourse is to ask a superior commander to take away the subordinate's authority to act and persuade the senior to order trial by court-martial, an act that hardly endears the lawyer to the subordinate commander, who may be sitting on the lawyer's next promotion board.³¹

While a commander's ability to prosecute a case or not prosecute a case against the advice of military lawyers may either subject an innocent servicemember to trial, subject a guilty servicemember to a far more severe sanction imposed by a court-martial than is warranted, or permit a guilty servicemember to avoid criminal liability in any type of case, the potential for making a bad decision as to how to dispose of a sexual harassment case is even greater for the following reasons:

- Evaluation of a sexual harassment case is far more complicated than deciding whether a servicemember should be punished for absence without leave.³² Professor Chamallas, in her article on the military's "gender panic," opines that this panic lumps both coercive and consensual sexual conduct into the same undifferentiated source, biological urges, which results in commanders treating rapists as if they caused the same type of injuries to persons who have committed adultery.³³ Further, because most commanders are male, and the senior ones are usually older males, they may have difficulty divorcing themselves from a culture that has historically viewed sexual harassment as unimportant.³⁴

commanding an Army division, separate brigade, or major installation. A typical Army special court-martial convening authority is a brigade, separate battalion, or small installation commander under Article 23. A typical Army summary court-martial convening authority is a battalion or separate company commander under Article 24. *See generally* Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 125 (1992).

³⁰"Referral" is "the order of a convening authority that charges against an accused will be tried by a specified court-martial." R.C.M. 601(a).

³¹R.C.M. 306(a) notes that a superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally.

³²10 U.S.C. § 886 (2000) criminalizes leaving one's military unit without authority.

³³Chamallas, *supra* note 14, at 320.

³⁴Douglas R. Kay, Comment, *Running a Gauntlet of Sexual Abuse: Sexual Harassment of Female Naval Personnel in the United States Navy*, 29 CAL. W. L. REV. 307, 330 (1992) (citing Kay Krohne, *The Effect of Sexual Harassment on Female Naval Officers: A Phenomenological Study* at 178) (unpublished Ed. D. dissertation, University of San Diego) (on file with author). For a discussion of the effects of the military's culture on sexual

- Political correctness pressures, media pressures, and the like may lead to bad decisions. Such pressures can cause the commander to either prosecute a servicemember he or she shouldn't or, strangely enough, prevent prosecutions that should occur. Professor Chamallas has noted the phenomenon that the excessive media coverage of the numerous military sex cases creates the impression that things have gone too far and it is time to stop the accusations.³⁵ In addition, media saturation has generated a high degree of skepticism about the legitimacy of complaints of sexual harassment.³⁶ Finally, commanders, out of fear of the post-Tailhook bloodletting (which destroyed careers or delayed promotions) may tend to err "on the side of inquisition, persecution, and recrimination."³⁷
- Further, commanders have a strong incentive not to find a sexual harassment claim to be valid. Finding that one of his or her subordinates sexually harassed another may well indicate to the commander's superiors that he or she does not have an effective program to combat sexual harassment. Further, if the media gets involved, it makes not only the immediate unit, but higher units, and the military service itself look bad. Such problems are hardly career-enhancing:

At each level of the chain, the superior officer has discretion concerning how to deal with the complaint. Additionally, each superior has a vested interest in what is termed in naval aviation parlance "covering your six." Each individual is held responsible for the personnel below them. Covering your six can lead to many complaints being hidden or ignored. Investigations into a complaint attract attention to the problem, and a problem looks bad for the superior responsible.³⁸

Assuming that the commander makes a proper decision to send a sexual harassment case to a court-martial,³⁹ the issue remains whether a court-martial is a

harassment and other sex crimes, *see* FRANCKE, *supra* note 13, at 152, 190; Murray, *supra* note 21, at 296-97; Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 525 (1991).

³⁵Chamallas, *supra*, note 14, at 320.

³⁶*Id.* at 321.

³⁷Bruce T. Smith, *Tempting the Better Part of Valor*, 44-FEB FED. LAW. 13, 13 (Feb. 1977).

³⁸Krohne, *supra*, note 34, at 331 (citing DOROTHY SCHNEIDER & CARL SCHNEIDER, SOUND OFF? AMERICAN MILITARY WOMEN SPEAK OUT 47 (1988) ("Usually the physical assaults servicewomen told us about were reported but handled semiofficially, at as low a level as possible, by people who wished to quiet the troubled waters or swim out of them."). *Id.*

³⁹The MANUAL FOR COURTS-MARTIAL provides the following guidance to commanders as to how to dispose of offenses:

(b) *Policy.* Allegations of offenses should be disposed of in a timely manner and the lowest appropriate level of disposition listed in subsection (c) of this rule: (*see supra* notes 20-24 and accompanying text for a discussion of the dispositions authorized by R.C.M. 306(c)).

Discussion

The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including,

proper forum for a sexual harassment case. Among the many problems with the court-martial system in general are: courts-martial are not sitting courts, but rather are “convened” by commanders; commanders select the court-members (jurors); commanders decide, subject to review by the military judge, on many pretrial motions, such as discovery motions and motions to produce witnesses; commanders enter into plea bargains with defendants or immunize witnesses to induce them to testify, and so-called “command influence” can taint the trial. These problems may make arriving at a proper decision unlikely in a court-martial. In addition, other aspects of the military justice system, which may not lead to unfair decisions in other cases, such as the requirement to prove guilt beyond a reasonable doubt and the non-unanimous jury verdict requirement in a court-martial, may prevent reaching a proper decision in a sexual harassment case.

Courts-martial are not sitting courts, but rather comprise *ad hoc* tribunals to which commanders may refer one or more cases for trial.⁴⁰ The same problems with commanders investigating and disposing of sexual harassment complaints apply to convening authorities’⁴¹ decisions whether to send a sexual harassment case to trial by court-martial. First, as one military court-martial illustrated, the convening authority may not be the one who should make decisions as to whether a sexual harassment claim goes to trial. In *United States v. Kroop*,⁴² the convening authority in a sexual harassment case was being investigated for sexual crimes of a similar nature to those of the accused. The military appellate court did not find these facts relevant to disqualify the convening authority.⁴³ Would a civilian criminal justice system allow a prosecutor under investigation for a crime make decisions about defendants charged with similar crimes? In addition, the higher ranking commander who convenes courts-martial and refers cases to them, may have difficulty evaluating a sexual harassment case, may be pressured by the media or others, or may want to cover-up a harassment case to avoid looking as if such problems exist in his or her command, rather than referring the case to trial.⁴⁴

The difficulty with evaluating a case at the convening authority level, as opposed to a lower level, is that the convening authority who believes the offense is serious

to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, any recommendations made by subordinate commanders, the interests of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.

* * * * [listing factors, such as (D) possible improper motives of the accuser and (E) reluctance of the victim or others to testify.

R.C.M. 306(b).

⁴⁰JOSEPH W. BISHOP, JR., *JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW* 27 (1974). See also WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 49 (2d ed. 1920).

⁴¹See *supra* note 25.

⁴²*United States v. Kroop*, 34 M.J. 628 (A.F.C.M.R.1992), *aff’d*, 38 M.J. 470 (C.M.A. 1993).

⁴³*Kroop*, 34 M.J. at 632.

⁴⁴See *supra* notes 31-38 and accompanying text.

enough to warrant trial by court-martial must decide what charges apply. Even with lawyers drafting the charges, doing so is not easy because the Uniform Code of Military Justice does not, in terms, prohibit sexual harassment. Although the Department of Defense (DOD) has defined sexual harassment,⁴⁵ convening authorities must choose between a number of potential charges, none of which may cover conduct that constitutes sexual harassment under the DOD standard. An act of sexual harassment may constitute “cruelty and maltreatment of a subordinate,”⁴⁶ extortion,⁴⁷ indecent language,⁴⁸ provoking words and gestures,⁴⁹ disorderly conduct,⁵⁰ and/or fraternization.⁵¹ If the harassment involves physical contact, it may

⁴⁵The Department of Defense definition of sexual harassment, which applies to both military members and civilian employees, is as follows:

Sexual harassment is a form of sexual discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of a person’s job, pay, or career; or
- (2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or
- (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creates an intimidating, hostile, or offensive working environment.

MEMORANDUM, SECRETARY OF DEFENSE, TO SECRETARIES OF THE MILITARY DEPARTMENTS, CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE, DIRECTOR, ADMINISTRATION AND MANAGEMENT, DIRECTORS OF THE DEFENSE AGENCIES, SUBJECT: PROHIBITION OF SEXUAL HARASSMENT IN THE DEPARTMENT OF DEFENSE (DOD), Aug. 22, 1994, at 1.

⁴⁶10 U.S.C. § 893 (2000). This article will often apply to sexual harassment cases, but cases interpreting this article are ambiguous as to whether it criminalizes maltreatment of direct subordinates only or extends to any lower-ranking personnel. *Compare* *United States v. Hullett*, 40 M.J. 189 (C.M.A. 1994) (sexually-oriented statements to a junior may violate Article 93) *with* *United States v. Curry*, 28 M.J. 419 (C.M.A. 1989) (remanding because even though the alleged victim was junior, the appellant had no authority over her). *See* William T. Barto, *Sexual Harassment and the Uniform Code of Military Justice: A Primer for the Military Justice Practitioner*, ARMY LAW. ARMY LAW, at 4-6 (July 1995). Further, voluntary acts between the victim and the accused may exonerate the accused. *Id.*, at 7-8.

⁴⁷The U.C.M.J. defines extortion as communicating a threat with the intent to obtain anything of value. 10 U.S.C. § 927 (2000). Sexual favors qualify as something of value. *United States v. Hicks*, 24 M.J. 3, 5-6 (C.M.A. 1987).

⁴⁸10 U.S.C. § 934 (2000). Indecent language is language that is “grossly offensive to modesty, decency, or propriety, or shocks moral sensibilities because of its vulgar, filthy, or disgusting nature, or its tendencies to incite lustful thought.” M.C.M. ¶ 89c.

⁴⁹10 U.S.C. § 917 (2000). Provoking words or gestures are those that tend to provoke breaches of the peace. M.C.M. ¶ 42. c.(1).

⁵⁰10 U.S.C. § 934 (2000). Disorderly conduct is conduct of a nature to affect the peace and quiet of those who may witness it and be disturbed or provoked to resentment, including conduct that endangers public morals or outrages public decency. M.C.M. ¶ 73 c. (2).

⁵¹10 U.S.C. § 934 (2000). Fraternization comprises the act(s) of a commissioned or warrant officer fraternizing on terms of military equality with an enlisted person when such fraternization violated the custom of the accused’s service that officers shall not fraternize

constitute assault, assault consummated by a battery,⁵² indecent assault, assault with the intent to commit rape or sodomy,⁵³ rape,⁵⁴ or sodomy,⁵⁵ as well as cruelty and maltreatment and/or fraternization. In addition, a court-martial could punish an accused under the so-called “general article” for conduct to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces,⁵⁶ or as conducting unbecoming an officer.⁵⁷ Choosing among all of these potential offenses is not easy and often results in so-called “stacking” the charges—charging the accused with all that may apply and letting the court members sort it out. Selecting the wrong charge or overcharging can certainly result in an improper verdict.⁵⁸

with enlisted members on terms of military equality. The explanation states that factors the court-martial should consider to determine whether the contact or association comprises an offense include whether the conduct has compromised the chain of command, resulted in an appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. M.C.M. ¶ 84 c. (1). Fraternization may also be prosecuted as a violation of Article 92, as violating a general order or regulation if the accused’s service has such a regulation prohibiting fraternization. 10 U.S.C. § 892 (2000), M.C.M. ¶ 16c.

⁵²These assaults are both prohibited by 10 U.S.C. § 928 (2000).

⁵³10 U.S.C. § 934 (2000). Indecent assault is one done with the intent to gratify the lust or sexual desires of the accused. *See* ¶ 63, M.C.M. Assault with the intent to commit rape or sodomy requires a specific intent to commit such crimes.

⁵⁴10 U.S.C. § 920 (2000). The maximum punishment for rape is death, confinement for life, a dishonorable discharge, total forfeitures of all pay and allowances, and reduction to the lowest enlisted grade. ¶ 46e, M.C.M. Under current military law, the military recognizes that the necessary “by force and without consent,” ¶ 45b(1), M.C.M., may include “constructive force,” in which the victim’s consent is induced by the extraordinary power a military superior has over a subordinate. *E.g.*, *United States v. Clark*, 35 M.J. 432 (C.M.A. 1992). *See generally*, Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 A.F. L. REV. 19, 26-34 (1996).

⁵⁵10 U.S.C. § 925 (2000). Sodomy consists of unnatural carnal copulation, defined as taking into one’s mouth or anus the sexual organ of another, placing another’s sexual organ in one’s mouth or anus, or to have carnal copulation in any opening of the body other than the sexual parts. ¶51c, M.C.M.

⁵⁶10 U.S.C. §§ 133-134 (2000) criminalize conduct unbecoming an officer and conduct prejudicial to good order and discipline or of a nature to bring discredit on the armed forces, respectively. Article 133 criminalizes “action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, severely compromises [his or her character], or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person’s standing as an officer.” ¶ 59(c).(2)., M.C.M. Article 134 applies to all ranks, and comprises offenses that are specified in the MANUAL, *see supra* notes 42, 45, and acts that are only criminal because they are prejudicial to good order and discipline or service-discrediting. ¶ 60, M.C.M.

⁵⁷10 U.S.C. § 934 (2000).

⁵⁸*See* Krohne, *supra* note 34, at 329. The author concludes:

From these cases one can begin to understand how unpredictably sexual harassment is handled in the military courts. The wide variety of charges illustrates the inconsistency of sexual harassment enforcement and punishment. In addition, it is apparent that a body of consistent case law on sexual harassment has not been developed in the military courts.

When a convening authority refers a case to a court-martial, he or she personally selects the court-members, the military equivalent of civilian jurors.⁵⁹ Although the U.C.M.J. provides guidance as to the criteria the convening authority must use to select court-members,⁶⁰ as a practical matter the convening authority can get away with selecting pretty much anyone he or she wants. If, for example, the convening authority selects all subordinate unit commanders rather than more junior staff types, he can easily justify it, if challenged by the defense, by saying that commanders are best qualified by virtue of age and experience to adjudge guilt or innocence and an appropriate sentence, if the accused is guilty. However, senior commanders would be more likely to see things in the same way as the convening authority and decide the case as they believe the convening authority wants them to. Another problem is the potential appointment of law enforcement officers. Military appellate decisions often uphold the selection of law enforcement personnel who, presumably, have a bias toward convicting those they, or their subordinates, have investigated.⁶¹

Further, although the U.C.M.J. prohibits reprisals, such as lowered efficiency reports, against court members for making decisions the convening authority dislikes,⁶² court members know that the commander can harm their career without taking an action severe enough to violate this prohibition, such as “damming [the court member] with faint praise.” In today’s military, you don’t get promoted unless you “always exceed requirements,” should be “promoted ahead of contemporaries,” as opposed to “usually exceed requirements” and “promote with contemporaries.” Trying to prove that this faint, but career-killing praise is a reprisal for a court-martial decision is problematical at best. The high-ranking officer who wrote such a report just has to say that, no, the efficiency report was accurate because the officer in question always meets requirements and frequently, but does not always exceed them and thus should be promoted along with all of his or her contemporaries.⁶³

Id.

⁵⁹10 U.S.C. § 825 (2000), details who may serve on courts-martial. Any commissioned officer may serve on a court-martial. § 825(a). Warrant officers may serve on any court-martial except those trying commissioned officers. § 825(b). If the accused requests enlisted members, they must comprise at least one-third of the court members and must not be from the same unit as the accused. § 825(c).

⁶⁰Under 10 U.S.C. § 825(d)(2), the convening authority “shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”

⁶¹*E.g.*, United States v. Fulton, 44 M.J. 100 (C.A.A.F. 1996) (proper to deny challenge against chief of security police); United States v. McDavid, 37 M.J. 861 (A.F.C.M.R. 1993) (no per se exclusion of security police). *Cf.* United States v. Berry, 34 M.V. 83 (C.M.A. 1992) (abuse of discretion to deny challenge against command duty investigator for base security who worked with key government witnesses).

⁶²10 U.S.C. § 837, titled “Unlawfully influencing action of court,” prohibits any convening authority or commanding officer from reprimanding any court member, military judge, or counsel with respect to the findings or sentence adjudged by the court. Nor may they evaluate the performance of duty of any court member in any fitness or efficiency report used to determine promotions, assignments, retention on active duty and the like.

⁶³*See* Michael Spak & Jonathan Tomes, *Courts-Martial: Time to Play Taps?* 28 S.W. U. L.REV. 481, n.262 and accompanying text.

Considering the presumption of regularity that the selection of court members enjoy,⁶⁴ persuading a military judge to find that the convening authority selected tough senior commanders to hammer the accused would almost always be doomed to failure. If, on the other hand, the convening authority selected such members because they would be unsympathetic to a lower ranking enlisted woman so as to protect a high-ranking harasser, his or her lawyer, the trial counsel (prosecutor) is hardly in a position to complain. Thus, the victim's claim will not result in a conviction and she will have no effective way to get redress. Double jeopardy applies in the military as well as in civilian courts.⁶⁵

Even if the convening authority does not select court members that will reflect his or her view of good order and discipline, the alternative may be as bad or worse. Some convening authorities either don't want their best officers, such as those selected to be commanders, taking time away from really important things, such as training for war, and will select court members who are more expendable—and often less qualified.⁶⁶

Potential court members that the convening authorities will not select are low-ranking enlisted members. Even when an enlisted accused requests enlisted court members, those court-members will come from the highest enlisted ranks—sergeant majors, master sergeants, and sergeants first class from the Army, master chief petty officers and chief petty officers, and similar high-ranking Marine and Air Force noncommissioned officers.⁶⁷ These high-ranking enlisted members will share the same values as the high-ranking officers they work for—and may be even more conservative and less likely to believe a low-ranking female victim of sexual harassment by a high-ranking officer or noncommissioned officer.⁶⁸

Another problem with the convening authority's control over courts-martial is that the official decides many pretrial motions. Defense counsel must submit requests to produce witnesses to the trial counsel (prosecutor) who works for the convening authority. If the trial counsel does not believe that the law requires their production, the defense may litigate the matter before the military judge.⁶⁹ Requests for expert witnesses, however, must be made directly to the convening authority. Again refusal may be litigated before the military judge.⁷⁰ Obviously, the lack of witnesses harms the truth finding process.

⁶⁴*E.g.*, United States v. Giles, 48 M.J. 454, 455-56 (C.A.A.F. 1998); United States v. White, 36 M.J. 284, 287 (C.M.A. 1993).

⁶⁵*See* R.C.M. 907(b)(2)(C).

⁶⁶James Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1, 32 (1993).

⁶⁷In the authors' experience with courts-martial, neither has ever seen a low-ranking enlisted person detailed to a court-martial as a member of the "jury."

⁶⁸According to the NAVY PERSONNEL RESEARCH AND DEVELOPMENT CENTER, ASSESSMENT OF SEXUAL HARASSMENT IN THE NAVY: RESULTS OF THE 1989 NAVY-WIDE SURVEY 4 (1992), females comprised 10% of the active duty personnel of the Navy. Most of these women are in the lower enlisted ranks. *Id.*

⁶⁹R.C.M. 703(c)(2).

⁷⁰R.C.M. 703(d).

Convening authorities also decide whether to grant immunity to witnesses⁷¹ and whether to enter into plea bargains.⁷² Because the military may view the victim of sexual harassment as a suspect, as in a case in which a regulation bans dating between a trainee and a drill instructor, a refusal to grant immunity to the victim may result in the greater offender—the one who abused his higher rank and position going free. And, because of the way convening authorities grant immunity, coupled with an order to testify, significant potential exists for an alleged victim of fraternization to either lie or exaggerate the culpability of the higher ranking servicemember on trial. Although the order to testify is usually couched in terms of testifying “truthfully,” it is the trial counsel who will decide whether or not the testimony is truthful. Often the immunity and order to testify are coupled with the preferral of court-martial charges against the less-culpable, lower ranking female servicemember and a discharge in lieu of court-martial if she testifies “truthfully” against the higher ranking defendant. This puts an alleged victim who either fabricated a sexual harassment complaint or exaggerated it in the unenviable position of having to testify so as to perpetuate the lie or the exaggeration to avoid trial herself—again hardly conducive to arriving at the truth.

In a recent trial in which one of the authors was involved, for example, the alleged victim of fraternization told Army criminal investigators some 50 times that she did not have sex with the accused, a sergeant at the U.S. Disciplinary Barracks (DB) at Fort Leavenworth, Kansas. She had admitted to sexual relations with other DB guards. After being charged with fraternization and other offenses herself, the convening authority immunized her and ordered her to take a polygraph examination. The polygraph examiner told her she had flunked, which caused her to change her story to implicate the accused, relating that she and the accused had sexual relations on May 16th. The military judge denied a defense request for production of the polygraph report and charts to determine whether she had, in fact, shown deception or, as the defense believed, was lied to in order to get her to implicate the accused. The day before the trial actually started and after the trial counsel prepared her to testify after receiving notice of the defense alibi for May 16th, she changed her testimony to stating that the sexual encounter occurred the preceding night, May 15th. She testified at trial that she would lose her discharge in lieu of court-martial if she did not testify “truthfully” against the accused. Further, she was ignorant of certain physical aspects of the accused which were so remarkable that she would have noted if they had actually engaged in sexual relations. The court members deliberated three hours before acquitting the accused, who had to face a general court-martial, a dishonorable discharge, and in excess of

⁷¹R.C.M. 704(c).

⁷²R.C.M. 704. The military pretrial agreement, what civilians would call a “plea bargain,” differs from civilian practice in that it places a ceiling on the punishment. If the court-martial imposes a lesser punishment, the accused gets the benefit of that lesser punishment and the pretrial agreement was nothing more than an insurance policy. If, however, the court-martial sentences the accused to a more severe punishment, the convening authority must reduce the sentence to that specified in the plea agreement. *See generally*, Francis A. Gilligan & Michael D. Wims, *Civilian Justice v. Military Justice: In Many Instances, Service Members Accused of Crime Are Granted More Rights Than Civilians*, 5 SUM. CRIM. JUST. 2, 37 (Summer, 1990). For a contrary view comparing military and civilian justice, see the authors’ article, *supra* note 1.

ten years' confinement based on such an unreliable witness.⁷³ While this case involved an innocent accused, it nonetheless demonstrates the unreliability of a witness who was induced to testify by the convening authority's powers to enter into plea bargains and grant immunity—again powers reserved to lawyers in the civilian system. And failure to exercise such powers could also harm the truth-finding process and either result in the conviction of an innocent party or the rejection of a valid claim of sexual harassment.⁷⁴

The final problem with command control over courts-martial is the problem of illegal command influence. While much command control is not illegal, such as the power to select court members,⁷⁵ convening authorities and other commanders who go too far in controlling courts-martial may violate Article 37, U.C.M.J., which

⁷³See Connie Parish, *Sergeant Acquitted in USDB Court-Martial*, THE LEAVENWORTH TIMES, March 5, 1999, at 1.

⁷⁴The Tenth Circuit's recent *Singleton* case, which sent shock waves through federal prosecutors before the Tenth Circuit on rehearing en banc reversed the decision, illustrates the unreliability of testimony induced by a promise of leniency. *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *rev'd*, 165 F.3d 1297 (10th Cir. 1999) (en banc), *cert. denied*, 119 S.Ct. 2371 (1999). In the original opinion, the 10th Circuit held that 18 U.S.C. § 201(c)(2), which prohibits unlawful inducements to a witness applied to a U.S. attorney's promise to file a motion for a downward departure from the sentencing guidelines if a witness testified truthfully and not to prosecute him for any other drug offenses against the defendant. Section 201(c)(2) reads:

Whoever . . . directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . authorized by the laws of the United States to hear evidence or take testimony . . . shall be fined under this title or imprisoned for not more than two years, or both.

In finding that the statute applied to government agents, the court cited *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988) (“[i]t is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence”); *United States v. Kimble*, 719 F.2d 1253, 1255-57 (5th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984) (witness “admitted lying in over thirty different statements motivated by his sense of self-preservation” under plea arrangement requiring his testimony in return for a lenient sentence.) In support of the proposition that an obvious purpose of § 201 was to keep testimony free of influence to protect its truthfulness. The *en banc* opinion, however, held that § 201(c)(2) did not apply to the United States acting in its sovereign capacity. That holding would not, however, appear to deny the danger to the fact-finding process inherent in promising leniency to a defendant in return for “truthful” testimony. And these dangers may be greater in the military context than in the civilian federal context because of the command control of the convening authority.

⁷⁵See *supra* nn. 55-60 and accompanying text. The lawful participation of the commander in the system is one of the dominant features of the military justice system. Teresa K. Hollingsworth, *Unlawful Command Influence*, 39 A.F. L. REV. 261 (1996), citing DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 255 (1992). When, however, commanders and convening authorities try to influence decisions that should be independent of command and convening authority prerogatives, it becomes “illegal” or “unlawful” command influence as prohibited by 10 U.S.C. § 837. *Id.* Nor is illegal command influence limited to commanders and convening authorities. Military appellate courts have applied Article 37 to staff officers, noncommissioned officers, and military judges. *Id.*

prohibits illegal command influence.⁷⁶ Notwithstanding this prohibition, military officials have continued to attempt to influence courts-martial results improperly. Among recent such attempts are:

- Issuing policy statements that castigate a certain class of offenders, state that they should be removed from the military, or discourage witnesses from testifying for the defense.
- Making speeches that stress the above points to audiences which include potential witnesses and court-members.
- Publicly humiliating the accused, as by stripping them of unit insignia in a public military formation, thereby stripping the accused of the presumption of innocence and biasing potential court members and witnesses.
- Witness tampering, consisting of intimidating witnesses to prevent them from testifying or punishing those that do.⁷⁷

While such actions have great potential to prejudice the case, military appellate courts have developed such a high standard for prevailing on an illegal command influence claim that the accused seldom gets meaningful, if any, relief.⁷⁸ Further, finding evidence of illegal command influence is problematic, at best. Those who were illegally influenced or witnesses thereto may be reluctant to risk their careers by informing on their superiors. Further, military defense counsel may not want to accuse these commanders or others who may sit on the lawyer's future promotion

⁷⁶10 U.S.C. § 837(a) reads:

(a) No authority convening a . . . court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive or procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

Section (b) of Article 37 prohibits any person subject to the U.C.M.J. from evaluating the performance of any member of a court-martial in the preparation of a fitness or similar report or from giving a less favorable rating to counsel for the accused because of the zeal with which counsel represented the accused.

⁷⁷Deana M.C. Willis, *The Road to Hell is Paved With Good Intentions: Finding and Fixing Unlawful Command Influence*, 1992-AUG ARMY LAW. 3, 6-12 (1992).

⁷⁸Under the so-called *Ayala/Strombaugh* test, the defense must first demonstrate that the alleged source of illegal command influence acted with the mantle of command authority. *United States v. Strombaugh*, 40 M.J. 208 (C.M.A. 1994). *Ayala* places the burden on the defense to produce sufficient evidence to raise the issue and permits the court to decide that the evidence of the alleged illegal command influence was not strong enough nor prejudicial enough to grant relief. *United States v. Ayala*, 43 M.J. 296 (C.A.A.F. 1995). See Lawrence J. Morris, *This Better Be Good: The Courts Continue to Tighten the Burden in Unlawful Command Influence Cases*, 1998-May ARMY LAW 49 (1988).

boards, of illegal command influence.⁷⁹ And, alleging illegal command influence is not likely to improve one's chances for a favorable pretrial agreement (plea bargain) or for clemency if the court-martial imposes a harsh sentence.⁸⁰

While the requirement to prove guilt beyond a reasonable doubt at a court-martial which can impose criminal sanctions⁸¹ is appropriate, this high burden of proof may result in perpetrators of sexual harassment "getting off," thus, failing to vindicate actual victims of such harassment. While only Sergeant Major of the Army Gene McKinney and the six women he was accused of sexually harassing⁸² will ever know what, if anything, really happened, commentators have postulated that the heavy

⁷⁹Perhaps the most egregious example of a defense counsel being "punished" for raising illegal command influence resulted in a Congressional inquiry. An Army lawyer who raised an illegal command influence issue for one of his appellate clients after his supervising attorney, a full colonel, told him not to was nonselected for promotion to lieutenant colonel when his supervisor later sat on the promotion board. The Army Board for Correction of Military Records found that the colonel should not have sat on the promotion board and ordered the promotion to lieutenant colonel. As a result of the Congressional inquiry, the Acting Judge Advocate General of the Army was not confirmed as Judge Advocate General and retired. A nomination to the grade of brigadier general also failed and the President withdrew two other nomination for brigadier general. One of these withdrawn nominations for brigadier general was for the colonel who "punished the defense counsel and later sat on the counsel's promotion board. SENATE COMM. ON ARMED SERVICES, REPORT ON THE INVESTIGATION OF ISSUES CONCERNING NOMINATIONS FOR GENERAL OFFICER POSITIONS IN THE JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, S. Rep. No. 102-1, 102d Cong., 2d Sess. (1991).

⁸⁰Under R.C.M. 705, a convening authority may enter into a plea bargain, known as a "pretrial agreement," with the accused. In cases in which the court-martial adjudges a more severe sentence than that called for in the pretrial agreement, the convening authority must then reduce the sentence to that called for in the agreement. If the court-martial adjudges a less severe sentence, then the accused has "beat the deal," and gets the lesser sentence, relegating the plea bargain to the status of unused insurance against a more severe sentence. *See generally*, Gilligan & Wims, *supra* note 72 at 37. In any case, whether a pretrial agreement exists or not, the convening authority may grant clemency by disapproving the entire sentence or any part thereof. R.C.M. 1107(d) specifies that the convening authority may for any or no reason disapprove the sentence in whole or in part, mitigate the sentence, or change a punishment to one of a different nature as long as doing so does not increase the severity of the punishment. For example, the convening authority could change six months' confinement to, say, two months restriction, but could not change such a period of restriction to confinement. In the authors' experience, the granting of clemency by convening authorities is very rare. More often, they want to, but cannot, increase the sentence.

⁸¹Under R.C.M. 920(e), the military judge must instruct the court members that "[t]he accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt."

⁸²SGM McKinney was accused of pressuring female subordinates for sex, forced kissing, and boasting of his sexual prowess to the six women and one sexual encounter. *See* Stephen Komarow, *Army Sex Scandal Reaches Higher Service's Top Enlisted Man Faces Charges*, USA TODAY, May 8, 1997, at 3A; Jane Gross, *Former Top Sergeant of Army Is Acquitted of All Sex Charges*, N.Y. TIMES, Mar. 14, 1998, at A1. The court-martial did, however, convict him of one obstruction of justice offense for attempting to coach the testimony of one of his accusers. He was demoted one grade and reprimanded. Jane Gross, *Sergeant Major Gets One-Step Demotion But No Time in Jail*, N.Y. TIMES, Mar. 17, 1998, at A1.

burden of proof beyond a reasonable doubt⁸³ or the so-called “good soldier” defense led to the acquittal. Military Rule of Evidence 404(a)(1) is an exception to the general rule that evidence of a person’s character or a trait, thereof, is inadmissible to prove that the person acted in conformity with that character or trait on a particular occasion. Rule 404(a)(1) permits introduction of a “pertinent character trait.”⁸⁴ In the military, general good military character qualifies as such, as do as other pertinent character traits.⁸⁵ The theory is simple—good soldiers don’t commit crimes.⁸⁶ Because servicemembers receive periodic performance evaluations and often commendations and decorations for duty performance, adducing evidence of good military character is seldom difficult.⁸⁷ In the case of a high-ranking officer or non-commissioned officer, like Sergeant Major McKinney, such evidence can be overwhelming. To be selected to be the highest-ranking enlisted member of one’s service, one’s record has to be beyond stellar.

Thus, to convict a high-ranking officer or non-commissioned officer of sexual harassment, the high-ranking court-members must believe the lower-ranking complainant, whose credibility cannot be bolstered by evidence of good military character,⁸⁸ against the higher-ranking accused, who can adduce evidence of his good (or overwhelmingly good) military character.⁸⁹ And unless the lower-ranking

⁸³Editorial, N.Y. TIMES, Mar. 17, 1998, at A24.

⁸⁴M.R.E. 404(a)(1) is identical to Federal Rule of Evidence 404(a)(1). *See generally*, Elizabeth Lutes Hillman, Note, *The Good Soldier Defense and Military Rank at Courts-Martial*, 108 YALE L.J. 879 (1999).

⁸⁵For example, an accused’s character for truthfulness would be relevant in a prosecution for making a false official statement. STEPHEN A. SALTZBURG, LEE D. SCHINASI, DAVID A. SCHELUETER, *MILITARY RULES OF EVIDENCE MANUAL* 366 (1981, 1986).

⁸⁶*E.g.*, United States v. Vandelinder, 20 M.J. 41 (C.M.A. 1985)(evidence of good military character should have been admitted at trial for drug offenses because one with good military character is less likely to commit offenses which strike at the heart of military discipline and readiness).

⁸⁷Captain Andrea, *Expanding the Good Soldier Defense: Use of Character Evidence as a Defense at Trial*, 1993-Dec. ARMY LAW. 30 (1993).

⁸⁸Military Rule of Evidence 404(a)(2) only permits evidence of a pertinent trait or character of the victim of a crime offered by an accused, or by the prosecution to rebut the same, or evidence of peacefulness of the victim offered by the prosecution in a homicide or an assault case to rebut evidence that the victim was the aggressor. The Federal counterpart only allows such use in homicide cases. F.R.E. 404(a)(2). Under M.R.E. 404(a)(2), the accused can use this section to attempt to prove that the victim of an assault or homicide has character traits which tend to prove that the victim may have been responsible for the crime. Good military character would hardly prove that the victim was responsible for the crime. Under M.R.E. 608(a) allows an attack on the credibility of a witness or the rehabilitation of the witness, subject to two limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness and (2) such evidence is only admissible after the character of the witness for truthfulness has been attacked. Again, general good military character would not qualify.

⁸⁹Aside from the authors’ experience, *see* Hillman, *supra* note 84, at 906-09 and n. 144 (citing interviews with practitioners of military law).

complainant has a lot of corroborating evidence, it is not difficult to guess which one a court-martial is likely to believe.⁹⁰

Another possible reason for aberrant decisions by court-martial is the potentially small size of the jury panel and the two-thirds majority required for conviction. Unlike federal and state criminal trials, which must have larger juries,⁹¹ a military jury need only consist of five members for a general court-martial and three for a special court-martial.⁹² *Ballew v. Georgia*⁹³ found a five member jury to be unconstitutional because the quality of justice in group deliberations decreases as the size of the group decreases and the quality of justice of a jury of fewer than six is unacceptable. *Ballew* has not been extended to trials by court-martial, however,⁹⁴ leaving convening authorities free to detail as few as five members to general court-

⁹⁰See, e.g., J. Lancaster, *In Military Harassment Cases, His Word Outranks Hers*, Wash. Post, Nov. 15, 1992, at A1; Editorial, *McKinney Case Showcases Military Law's Shortcomings*, USA TODAY, Mar. 16, 1998, at 14A; All Things Considered: *Fort Hood Reactions*, (NPR radio broadcast, Mar. 16, 1998) (quoting Army officer who stated, "the outcome of the Gene McKinney case proves what [a female servicemember]'s already known . . . the more a superior has on his collar, the more he'll get away with."). Although officers and noncommissioned officers do not always wear their rank on their collars, the meaning is plain.

⁹¹*Williams v. Florida*, 399 U.S. 78 (1970) (six-person jury is sufficient in all but capital cases; referring to the federal twelve-member jury as a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance); *Johnson v. Louisiana*, 399 U.S. 356 (1972) (nine-to-three vote for conviction upheld); *Apodaca v. Oregon*, 406 U.S. 401 (1972) (ten-to-two vote for conviction upheld). Cf. *Burch v. Louisiana*, 411 U.S. 130 (1979) (five-of-six verdict unconstitutional, noting that only two states allowed non-unanimous verdicts by six-person juries); *Ballew v. Georgia*, 435 U.S. 223 (1978) (trial by five member jury unconstitutional). A general courts-martial may try persons subject to the Uniform Code of Military Justice (U.C.M.J.), see 10 U.S.C. § 802, for any offense punishable under the U.C.M.J., see Articles 77-134, U.C.M.J., 10 U.S.C. §§ 877-934, and may adjudge any lawful punishment, including death when authorized by the U.C.M.J. 10 U.S.C. § 818. A special courts-martial may try persons subject to the U.C.M.J. for noncapital offenses and may adjudge any punishment not forbidden under the U.C.M.J. except death, dishonorable discharge, dismissal, confinement for more than six months, forfeiture of pay exceeding two-thirds pay per month or forfeiture of pay for more than six months. 10 U.S.C. § 819.

⁹²10 U.S.C. § 829(b).

⁹³435 U.S. 223 (1978).

⁹⁴In *U.S. v. Curtis*, 32 M.J. 252 (C.M.A. 1990), the Court of Military Appeals found, in a capital case, that the capital procedure promulgated by the President was not facially unconstitutional despite the accused's assertion that the rule did not prescribe such cases to be decided by at least 12 members. Cf. *U.S. v. Simoy*, 46 M.J. 592 (A.F.C.C.A. 1993) in which Judge Morgan's concurrence found trial defense counsel's successful efforts to reduce the size of the court-martial panel to be deficient, but not so deficient as to warrant relief despite the following language:

I cannot conceive, therefore, of any single thing appellant's defense counsel could have done more damaging to appellant's chances to escape the death penalty than to abet the diminution of his court-martial panel. Certainly, this blunder exceeds by an order of magnitude any errors in choosing not to present more of appellant's psychosocial history.

Id. at 627.

martial. Further, only two-thirds are required to convict.⁹⁵ If the prosecution does not convince two-thirds of the court members on the first ballot, the accused is acquitted.⁹⁶ Thus, a “hung jury” is not possible on the question of guilt or innocence in a court-martial. But taken with the small size of the jury, making such a determination on but one ballot, which may thereby severely cut down discussion, this voting requirement has great potential for erroneous decisions—especially with biased court members or an accused with great character evidence.⁹⁷

Finally, even the U.S. Supreme Court has opined that “courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law”⁹⁸ and certainly were not designed to protect servicemembers from discrimination.⁹⁹ Courts-martial are purely criminal tribunals and are only empowered to determine guilt or innocence and impose a sentence on a guilty accused.¹⁰⁰ While the military judge may decide whether military law enforcement authorities coerced a conviction or conducted an illegal search, military judges and court members have no particular competence in deciding sexual harassment claims, even if they had jurisdiction to consider anything other than whether the accused is guilty of some offense under the U.C.M.J. Thus, even if a court-martial believes a sexual harassment complaintant, and convicts the accused, the victim’s only compensation will be the knowledge that her complaint was vindicated and her harasser punished.

⁹⁵10 U.S.C. § 852(2).

⁹⁶R.C.M. 921(a).

⁹⁷In a case in which one of the authors was military defense counsel—the accused, a drill sergeant, was accused of hitting a trainee—the small court-martial panel acquitted in less than two minutes after the defense put the accused on the stand to testify that he had hit the trainee. He further testified that he had been provoked and intimated that the court members would have done the same thing. The defense also adduced good military character evidence. Regardless of whether this was the correct result, two minutes did not leave much time for discussion and deliberation.

⁹⁸*O’Callahan v. Parker*, 395 U.S. 258, 265 (1969) (holding that off-post offenses must be “service-connected” for the military to exercise jurisdiction over them), overruled by *Solorio v. United States*, 483 U.S. 435 (1987).

⁹⁹*O’Callahan*, 395 U.S. at 265.

¹⁰⁰Col. William Winthrop’s explanation of the criminal nature of courts-martial is as true today as it was in 1920:

[T]he court-martial is strictly a criminal court. It has in fact no civil jurisdiction whatever; cannot enforce a contract, collect a debt, or award damages in favor of an individual. . . . Even where it tries and convicts an accused for an offense involved in an obligation incurred or injury done to another person, . . . it cannot adjudge that the debt be paid, that the property be returned, or that its pecuniary value or the amount of the damage, be made good to the party aggrieved. Its judgment is a criminal sentence, not a civil verdict: its proper function is to award *punishment* upon the ascertainment of guilt.

WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 49-50 (2d ed. 1920). For a more current view, consider William Westmoreland, *Military Justice—A Commander’s Viewpoint*, 10 AM. CRIM. L. REV. 5, 8 (1971). “[I]t seems too clear for argument that courts-martial are criminal courts, possessing penal jurisdiction exclusively and performing a strictly judicial function in enforcing a penal code and applying highly punitive sanctions.” *Id.*

If, as it appears, the court-martial is the wrong system and has the wrong fact-finder to determine the validity of sexual harassment complaints and, if it is a decent system, it cannot award damages, what avenue of redress is preferable?

IV. A FEDERAL (NON-MILITARY) REMEDY FOR MILITARY SEXUAL HARASSMENT CLAIMS?

A military victim of sexual harassment may not suffer employment related losses, such as lost wages, because military law would not excuse a harassment victim who went absent without leave (AWOL) because of the harassment—the military version of a constructive discharge.¹⁰¹ In *United States v. Sutek*,¹⁰² the Navy-Marine Court of Military Review overturned the AWOL conviction of Seaman Susan Sutek finding that her fear of an impending shipboard initiation which had elements of sexual harassment was sufficient to excuse her absence because of duress.¹⁰³ However, in *United States v. Biscoe*,¹⁰⁴ the Court of Appeals of the Armed Forces upheld the guilty plea of a female officer who contended on appeal that the military judge had not made sufficient inquiry into her possible defense of duress based on sexual harassment. The court focused on her lack of fear of serious bodily injury—a fear that the Navy-Marine Court had found present in Seaman's Sutek's case. Thus, it appears that a servicemember cannot be “constructively discharged” from the military because of sexual harassment unless that harassment puts her in reasonable fear of serious bodily injury.

Of course, many times the military ends up discharging the victim of the harassment. She may have violated the same regulations against fraternization that the accused did, although she would clearly be less culpable. Or, the higher ranking harasser may, upon suspecting that his improper actions may become known, begin his defense by discrediting the victim—by documenting her poor duty performance and so on. In a society where arriving to work five minutes late is a criminal offense,¹⁰⁵ any supervisor can easily document “poor” duty performance by counseling statements, reprimands, poor efficiency reports, as well as by punitive measures such as nonjudicial punishment and courts-martial. Low-ranking victims may find themselves facing charges, receiving a grant of immunity and an

¹⁰¹*Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993). A constructive discharge occurs when an employer deliberately makes an employee's working condition so intolerable that the employee is forced into an involuntary resignation. *Id.*

¹⁰²*United States v. Roberts and Sutek*, 14 M.J. 671 (N.M.C.M.R.1982), *rev'd.* (as to Roberts), 15 M.J. 106 (C.M.A.1983). As to Seaman Ronald Roberts, the husband of Seaman Sutek, the Navy-Marine Court of Military Review only approved a sentence of non-punishment. The Court of Military Appeals reversed the lower court's decision as to Seaman Roberts, reinstating his adjudged punishment. *Id.*

¹⁰³Paragraph 216g of the MANUAL FOR COURTS-MARTIAL specifies that an accused is excused for criminal responsibility under the defense of duress if she had a reasonably grounded fear of the receipt of serious bodily injury.

¹⁰⁴47 M.J. 398 (C.A.A.F. 1998).

¹⁰⁵M.C.M. & 10e(1). Failing to go to, or going from, one's appointed place of duty is a violation of 10 U.S.C. § 836, punishable by confinement for one month and forfeiture of two-thirds pay for one month. *Id.*

administrative discharge in return for testifying “truthfully” against the accused.¹⁰⁶ Because the harassment victims usually want out of the military by this point, they will accede to this procedure even when it results in a less-than-fully-honorable discharge and the corresponding loss of military and veteran’s benefits.¹⁰⁷ Of course other victims may continue to serve in the military.

Any military sexual harassment victim, however, may suffer other damages that sexual harassment law recognizes, such as intentional infliction of emotional distress, pain and suffering, invasion of privacy, and the like.¹⁰⁸ Is there any avenue of redress for such injuries in the military?

As for administrative remedies within the military, only three exist and none of them has the power to afford much relief. First, a victim of sexual harassment may file an Article 138 complaint with her commander.¹⁰⁹ If the commander denies redress, the complaint is forwarded up the chain of command to the officer exercising general court-martial jurisdiction. The convening authority conducts an inquiry, grants or denies the relief, and sends a report to the service secretary.¹¹⁰ But, as discussed above,¹¹¹ commanders loathe to find sexual harassment in their commands and short of transferring or disciplining the alleged offender, have little ability to compensate the victim. An article in the *Southern California Review of Law and Women’s Studies* pointed out flaws in using Article 138 to correct sexual harassment problems:

Although Article 138 does give service people an avenue for redress, it is not adequate for sexual harassment purposes because . . . it requires the servicemember to go through the chain of command for relief. Recent events surrounding the Tailhook scandal and the responses of both the female service-members who were assaulted and their superiors display this weakness with the Article. When a Navy Lieutenant helicopter pilot filed a complaint with her boss, he replied, “That’s what you get for going to a hotel party with a bunch of drunk aviators.” Another problem with Article 138 is that it applies only to wrongs committed by a commanding officer upon a subordinate. The provision will not extend to sexual harassment between fellow enlisted personnel or to harassment which is visited upon a commander by a subordinate. Furthermore, depending on

¹⁰⁶See *supra* notes 68-70 and accompanying text.

¹⁰⁷JONATHAN P. TOMES, *SERVICEMEMBER’S LEGAL GUIDE* 40-47 (3d ed. 1996). Less than fully “honorable” discharges include “general” discharges, which are under honorable conditions and entitle the recipient thereof to military and veteran’s benefits and “other-than-honorable” discharges which generally do not result in the receipt of such benefits. Only a court-martial may adjudge “punitive” discharges—bad conduct and dishonorable discharges which result in the loss of all benefits. The officer version of a punitive discharge is a “dismissal.” *Id.*

¹⁰⁸Lawyers Cooperative Publishing, *HANDLING SEXUAL HARASSMENT CASES* § 28 (1993).

¹⁰⁹10 U.S.C. § 938.

¹¹⁰*Id.*

¹¹¹See Chamallas, *supra* note 14, at 308, and accompanying text; *O’Callahan*, 395 U.S. at 265.

which service the victim is in, she may not even have the right to a military attorney.¹¹²

Second, a servicemember can obtain review of his or her discharge from his or her service's discharge review board. Such a board can change an unfavorable discharge to a more favorable one but it cannot revoke the discharge. Nor can it award damages for improper discharge or anything else.¹¹³ Finally, boards of correction of military or naval records may correct such records to correct an error or remove an injustice.¹¹⁴ While such a correction could result in the award of back pay for an improper discharge or reinstatement, these boards cannot award other damages.¹¹⁵ Further, to get relief, one must have an incorrect record to correct. In *Saal v. Middendorf*,¹¹⁶ the court noted that by issuing an honorable discharge, the Navy "effectively precluded review . . . by the Board for Correction of Naval Records for there [was] no record left to correct."¹¹⁷ Nor does the board conduct an independent investigation¹¹⁸ or have the authority to strike down military policy and it probably lacks the competence to decide constitutional issues.¹¹⁹ As one commentator noted:

[The Board of Corrections] is an inadequate means to redress sexual harassment complaints because it offers no aid unless a victim has a negative comment on her record as a function of, or in retaliation for, complaining about sexual harassment. Sexual harassment is rarely manifested by recorded admonishments. Moreover, "injustice" is not defined, service-members have no right to a hearing, and complainants rarely know when they have exhausted intramilitary remedies and earned

¹¹²Murray, *supra* note 21, at 290-91.

¹¹³10 U.S.C. § 1553. See David S. Franke, *Administrative Separation from the Military: A Due Process Analysis*, 1990-OCT ARMY LAW. 11, 19 (1990).

¹¹⁴10 U.S.C. § 1552.

¹¹⁵See *Von Hoffburg v. Alexander*, 615 F.2d 633 (5th Cir. 1980) (inadequacy of a remedy available from the Army Board for Correction of Military Records, which lacks authority to award damages, is outweighed by considerations of efficiency and agency expertise underlying the exhaustion requirement and by the availability of other remedies such as reinstatement and payment of backpay).

¹¹⁶427 F. Supp. 192 (N.D. Cal. 1977), *rev'd on other grounds*, *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 454 U.S. 855 (1981).

¹¹⁷427 F. Supp. at 197.

¹¹⁸See, e.g., 32 C.F.R. § 723.3(e).

¹¹⁹See *Walmer v. United States Dep't of Defense*, 835 F. Supp. 1307 (D. Kan. 1993), *aff'd* 52 F.3d 851 (10th Cir. 1995), *cert. denied* 516 U.S. 974 (1995) (servicemember pending discharge for homosexual conduct was not required to appeal her discharge to the Army Board for Correction of Military Records before asserting the unconstitutionality of the regulations under which she was discharged in federal court because the ABCMR has no power to strike down military policy and constitutional issues which are inappropriate for decision by an administrative body).

the right to appeal to a civilian court. Furthermore, civilian courts usually defer to the BCMR's decisions.¹²⁰

If, as it appears, the military intra-service remedies cannot afford relief to a victim of sexual harassment, what about the federal courts? At present, sexual harassment victims have no greater chance for redress in the federal courts than in the military system because of the so-called *Feres* doctrine and because Title VII does not apply to the military.

Fifty years ago, in *Feres v. United States*,¹²¹ the U.S. Supreme Court held that servicemembers could not sue the military for monetary damages. *Feres* involved lawsuits brought by three active duty servicemembers who were victims of negligence by military personnel acting within the scope of their employment under the Federal Tort Claims Act (FTCA).¹²² The Court focused on three rationale for its decision. First, the FTCA did not create an action by servicemembers against their military superiors or the government itself because the FTCA created no new causes of action and because no American cause of action ever allowed a servicemember to recover damages from their military superiors.¹²³ Second, because the FTCA bases liability on the law of the state where the act or omission occurred and because servicemembers have no control over their assignments, it would be nonsensical to base liability on the law of the state of the forum.¹²⁴ Finally, because servicemembers have a generous statutory scheme of military and veteran's benefits, Congress must not have intended to give them an additional remedy under the FTCA.¹²⁵ Thus, servicemembers cannot maintain a suit if the injury is "incident to service."

Notwithstanding almost universal scholarly criticism of the decision,¹²⁶ the Supreme Court has continued to affirm *Feres*. For example, in *Chappell v.*

¹²⁰Murray, *supra* note 21, at 286-87.

¹²¹340 U.S. 135 (1950).

¹²²28 U.S.C. §§ 2671-2680. The FTCA waived sovereign immunity for certain torts committed by employees of the United States. The relevant portion reads:

[F]or injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

¹²³*Feres*, 340 U.S. at 141-42.

¹²⁴*Id.* at 143.

¹²⁵*Id.* at 140.

¹²⁶See, e.g., Jonathan P. Tomes, *Feres to Chappell to Stanley: Three Strikes and Servicemembers are Out*, 25 U. RICH. L. REV. 93 (1990); Barry Bennett, *The Feres Doctrine, Discipline and the Weapons of War*, 29 St. Louis U. L.J. 383 (1984); David E. Seidelson, *The Feres Exception to the Federal Tort Claims Act: New Insights Into an Old Problem*, 11 HOFSTRA L. REV. 629 (1983); Donald N. Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489 (1982); Robert Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24 (1976).

Wallace,¹²⁷ the Court extended *Feres* to constitutional torts committed by the military, holding that servicemembers could not recover monetary damages for such wrongs.¹²⁸ *Unites States v. Stanley*,¹²⁹ affirmed *Chappell*, noting that the courts should not allow lawsuits that would call into question decision-making:

Even putting aside the risk of erroneous judicial conclusions (which would becloud military decision-making), the mere process of arriving at correct conclusions would disrupt the military regime. The “incident to service” test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.¹³⁰

Obviously, many sexual harassment cases could involve extensive inquiry into military matters. However, the disruption to the “military regime” by allowing such lawsuits would hardly seem greater than the disruption caused by the Navy’s investigation into Tailhook, the Sergeant-Major McKinney case, or the Aberdeen Proving Ground trainee sexual harassment cases.¹³¹

¹²⁷462 U.S. 296 (1983).

¹²⁸*Chappell* involved claims of racial discrimination. Although the Supreme Court’s earlier decision in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) authorized suits for damages against federal officials who had violated the plaintiffs’ constitutional rights, the *Chappell* Court held that the *Bivens* limitation on such remedies when “special factors counseling hesitation” are present, applied to suits by military members against their superiors, thereby foreclosing relief. *Id.* at 396. The Court focused on the unique disciplinary structure of the military and Congress’ activity in the field. 462 U.S. at 304. The Court did note that injunctive relief or other forms of relief not involving damage awards remained available. *Id.*

¹²⁹483 U.S. 669 (1987).

¹³⁰*Id.* at 682.

¹³¹At the 1991 Tailhook convention, junior Navy officers assaulted approximately 83 women. As to the effect of the investigation, one commentator noted:

After allegations surfaced of junior Naval officers’ assaults on women at the Tailhook convention, the Navy’s attempts to police itself revealed a disturbing pattern of outright sexism and corruption. The executive branch during the Bush Administration was also angered by the Inspector General’s inability to investigate the allegations successfully. The Inspector General and the Naval Investigative Service Command began preliminary investigations more than a month after the incident and concluded them only seven months later. After more than 1,500 interviews with officers and civilians who had been present at the convention, “investigators were able to identify only two suspects because of officers’ refusals to talk about the incidents.” The Inspector General’s report also revealed that certain commanding officers refused to order their subordinates to be photographed so that victims would not be able to identify their assailants. . . .

As the investigation progressed, scandal heaped upon scandal. H. Lawrence Garrett III, the Secretary of the Navy and the head of the Tailhook investigation, asked the Pentagon to take over the investigation when reports surfaced that he was present at the festivities and that fifty-five pages of documents that revealed his presence were deleted from the official reports. . . . Using lie detectors, undercover agents, and detailed computer analyses to dismantle the “wall of silence” that hampered earlier investigations, the Inspector General found that even more women than suspected had been assaulted and identified 175 naval officers for possible disciplinary action. . . .

Nor is there any real evidence that barring servicemembers from suing harms discipline. *Feres* and its progeny has not stopped servicemembers' suits. Rather, it has made it next-to-impossible for them to win. Servicemembers have still brought uncounted cases against their superiors and the military.¹³² Nor does *Feres* and its progeny factor in the costs of not affording servicemembers a remedy for sexual harassment and other forms of discrimination.¹³³ Further, everyone other than servicemembers can sue the military for negligence and constitutional torts regardless of any alleged harm to the military from such litigation.¹³⁴ And many of those suits involve federal civilian employees of the Armed Forces suing for sexual harassment.¹³⁵ Nonetheless, Congress would have to legislatively overturn *Feres* for servicemembers to be able to maintain sexual harassment actions in the courts.

Murray, *supra* note 21, at 282-83. Of all these suspects, none were convicted by court-martial and only fifty were disciplined at all by fines, reprimands, and the like. *Id.* at 283-84.

In the Aberdeen Proving Ground case, female trainees accused drill sergeants of sexual harassment. The investigation into the allegations uncovered out-of-control sexual misconduct. "A parade of former trainees, all women, . . . testified that drill sergeants and trainees alike routinely initiated consensual sexual relations, a violation of military law." Elaine Sciolino, *Rape Witnesses Tell of Base Out of Control*, N.Y. TIMES, Apr. 15, 1997, at A8. These witnesses testified about the freewheeling, libidinous atmosphere in which sexual activity between superiors and subordinates was rampant and drill sergeants competed to have sex with as many trainees as they could. *Id.* at A12.

How, then, could the disruption caused by federal court litigation of a sexual harassment complaint be any more disruptive to the "military regime?"

¹³²See Rhodes, *supra* note 126, at 42:

[T]here is no evidence that negligence actions by service members over the past twenty-five years has degraded the military mission.

The modern soldier has also been litigious in other areas. Although this litigation has not been particularly productive for the plaintiffs, service members have vigorously asserted their positions in direct court action against high-ranking officials. The proliferation of this constitutional litigation apparently has not interfered with military operations.

¹³³Uncorrected sexual harassment and other forms of discrimination can certainly harm morale, unit cohesion, and even the ability to fight. Discrimination against black soldiers in Vietnam resulted in racial violence and impaired combat efficiency. De Nike, *The New "Problem Soldier"—Dissenter in the Ranks*, 49 IND. L.J. 685, 687-89 (1974) (asserting that racial violence was prompted by underlying resentment by blacks of unequal treatment); D. CORTWRIGHT, *SOLDIERS IN REVOLT* 41 (1975) (recounting black soldier's refusal to go into the field). See also *id.* at 56, 140, 154-55, 210, 218-19 (recounting disobedience of orders and threats to readiness inherent in response to discrimination). Author Tomes's personal experience as an infantry platoon leader in Vietnam confirms the above points.

¹³⁴See Tomes, *supra* note 126, at 111.

¹³⁵*E.g.*, *Greene v. Dalton*, 164 F.3d 671 (D.C. Cir. 1999) (District court improperly invaded the province of the jury in granting summary judgment for Navy in sexual harassment action by former employee); *Brown v. Perry*, 184 F.3d 388 (4th Cir. 1999) (Department of Defense was not vicariously liable for supervisor's harassment because of functioning antiharassment policy and prompt and effective action taken against harassing behavior); *Yamaguchi v. U.S. Dept. of Air Force*, 109 F.3d 1475 (9th Cir. 1997) (employee was entitled to jury trial and compensatory damages for harassment occurring after effective date of the Civil Rights Act of 1991); *Bailey v. West*, 941 F. Supp. 1023 (D. Kan. 1996) (Army employee

In addition to the overall *Feres* bar, the F.T.C.A. itself bars intentional torts, whether based on assault or for negligence that resulted in the intentional tort.¹³⁶ Thus, Congress would have to amend this section involving intentional torts to permit victims of sexual harassment to obtain relief under the FTCA.

Another barrier to a lawsuit against the military, assuming Congress overturns *Feres*, is the so-called *Mindes* doctrine. Some circuits follow the *Mindes v. Seaman's*¹³⁷ test to determine whether a military claim is justiciable. First, as a threshold matter, *Mindes* held that judicial review of military activities is permissible under two conditions: (1) if a servicemember alleged either that he had been deprived of a constitutional right or that the service in question had violated its own regulations and (2) that the servicemember had exhausted all available administrative intraservice remedies.¹³⁸ After the servicemember meets that test, *Mindes* specifies four factors for a court to review: (1) the nature and strength of the plaintiff's challenge to the military determination; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved.¹³⁹ Even though the *Mindes* court intended for these tests to determine whether to review a case or abstain therefrom, two of the criteria clearly go to the merits of a case. Thus, the court must evaluate the merits of a case before deciding whether to hear it—and they may not have enough information early in the case to do so properly.¹⁴⁰ Not all circuits follow *Mindes*, however, and may substitute another test to determine whether a military case is justiciable.¹⁴¹

made sufficient allegations to support quid pro quo sexual harassment claim); *Skinner v. Caldera*, 1999 WL 1001468 (E.E.O.C) (agency (Army) is liable because it knew of the sexual harassment and did not take prompt remedial action).

¹³⁶28 U.S.C. § 2680(h); *Perkins v. United States*, 55 F.3d 910 (4th Cir. 1995). The 1974 amendment to the F.T.C.A., however, added some intentional torts committed by law enforcement officers, such as assault, battery, false imprisonment, and the like to the torts for which a plaintiff could recover. Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50, 28 U.S.C. § 2680(h).

¹³⁷453 F.2d 197 (5th Cir. 1971), appeal after remand, 501 F.2d 175 (5th Cir. 1974).

¹³⁸453 F.2d at 201.

¹³⁹*Id.*

¹⁴⁰Mary C. Griffin, Note, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 YALE L.J. 2082, 2103 (1987).

¹⁴¹The Seventh Circuit, for example, however, appears to follow *Mindes*. In *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765 (7th 1993), a dismissed Wisconsin Air National Guard officer brought a civil rights action against the National Guard. In declining to follow *Mindes*, the Seventh Circuit noted:

As the Third Circuit has pointed out, the *Mindes* approach erroneously “intertwines the concept of justiciability with the standards to be applied to the merits of the case.” . . . Rather than embracing the *Mindes* balancing test, we prefer a different approach. Our inquiry does not involve a balancing of individual and military interests on each side, but rather a determination of whether the military seeks to achieve legitimate ends by means designed to accommodate the individual right at stake to an appropriate degree.

Id. at 768 (citations omitted).

*Hill v. Berkman*¹⁴² illustrates the problem with the *Mindes* doctrine and its variations with regard to Title VII actions against the military. Plaintiff Hill challenged the Army's use of the combat exclusion policy contending that it was a pretext for discrimination against women. The court declined to follow cases holding that Title VII did not apply to the uniformed military,¹⁴³ but rather applied a balancing test similar to the *Mindes* test to determine whether to review a Title VII claim against the military. To avoid second-guessing common decisions that are crucial to disciplinary relationships, courts should not afford a Title VII remedy for "isolated individual allegations of discrimination," which are better left to intramilitary remedies.¹⁴⁴ Even those cases involving policies that are applicable to a large number of servicemembers should not be reviewed unless "the military decision was clearly arbitrary and erroneous, with a harmful effect present at the time the dispute reaches the court."¹⁴⁵

Thus, the *Hill* court used a variant of the *Mindes* test to vitiate Title VII. Although Title VII does not permit either individual instances of discrimination nor discriminatory policies,¹⁴⁶ the *Hill* test only permits hearing military cases involving the latter. Further, although Title VII does not permit a good faith defense,¹⁴⁷ this decision does, by adopting the clearly arbitrary standard.

Even assuming that a military victim of sexual harassment could bring a lawsuit for damages, she would find another bar to recovery—the law that protects victims of civil rights violations. Title VII¹⁴⁸ is "the exclusive judicial remedy for claims of discrimination in federal employment."¹⁴⁹ While one might think that uniformed military members were federal employees, at least for protection from discrimination, the overwhelming weight of authority holds that Title VII did not extend to uniformed military personnel.¹⁵⁰ Thus, Congress must not only legislatively overrule *Feres* to permit sexual harassment suits against the military, it

¹⁴²635 F. Supp. 1228 (E.D.N.Y. 1986).

¹⁴³See *infra* notes 144-46 and accompanying text.

¹⁴⁴635 F. Supp. at 1241.

¹⁴⁵*Id.* The court believed that such a highly deferential test would allow the military the necessary flexibility to make and alter policies, *id.*, without explaining why military policies with a discriminatory impact should be afforded more deference than other organizations. Griffin, *supra* note 123, at 2094.

¹⁴⁶See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (individual discriminatory actions); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (discriminatory institutional policy).

¹⁴⁷*Griggs*, 401 U.S. at 432.

¹⁴⁸42 U.S.C. § 2000e *et. seq.*

¹⁴⁹*Brown v. General Services Administration*, 425 U.S. 820, 835 (1976).

¹⁵⁰*E.g.*, *Gonzalez v. Dep't of Army*, 718 F.2d 926 (9th Cir. 1983); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978). The only case to find sexual discrimination in the military to be actionable under Title VII is *Hill v. Berkman*, 635 F. Supp. 1228 (E.D.N.Y. 1986) (Title VII could apply in limited circumstances involving facially discriminatory policies). *Berkman*, however, was not a sexual harassment case and would only extend jurisdiction to outrageous incidents of discrimination because investigations into less serious military decisionmaking would be too intrusive. *Id.* at 1241.

must ensure that courts do not use *Feres* or a variant thereon as a court-made bar to such lawsuits, and make it clear that uniformed military members are indeed protected by Title VII.

The recent case of *Shiver v. United States*¹⁵¹ illustrates the effect of these bars to sexual harassment lawsuits. The plaintiff was a trainee who was raped by her drill sergeant at Aberdeen Proving Grounds.¹⁵² She sued under the F.T.C.A. The U.S. District Court for the District of Maryland found against her on all three grounds: *Feres* barred her claim, the intentional tort exception of the F.T.C.A. barred her claims, and federal rights laws prohibiting sexual harassment of federal employees do not give rise to civil liability in favor of active-duty military personnel.¹⁵³ Because the court found no jurisdiction, it did not have to decide whether *Mindes* made the case non-justiciable.

One commentator has noted that promulgating an Executive Order prohibiting sexual harassment in the military and setting up a system using administrative law judges or Inspectors General to investigate and adjudicate claims is unlikely to be effective because the next President can invalidate the Order and the Inspector General has demonstrated its inability to handle sexual harassment claims.¹⁵⁴ Thus,

¹⁵¹34 F. Supp. 2d 321 (D. Md. 1999).

¹⁵²See *supra* note 109 for a general discussion of the harassment at Aberdeen Proving Ground.

¹⁵³34 F. Supp. 2d at 322-23. The court could hardly have been more pro-military:

The military services of this country cannot effectively be managed or deployed if subject to litigative hindsight by federal judges . . . , and, contrary to plaintiff's assertion, military discipline would be adversely affected by allowing tort litigation under the FTCA, as officers' and non-commissioned officers' authority and credibility would both be open to attack outside military authority, thus undermining their authority. The resulting fear of litigation would paralyze decision-making in the one section of our society that remains free of such paralysis, and that must remain free of it, if it is to fulfill its mission. The point needs no more discussion than that.

Id. at 322. One doubts whether the command at Aberdeen, particularly the non-commissioned officers that committed rape and other sexual harassment had much authority left to undermine. And, their decision-making appears to have been so aberrant that it needed fear of something such as litigation. Justice Brennan's dissent in *United States v. Stanley*, 483 U.S. 669 (1987), which held that *Feres* barred the claim of a soldier who was the victim of the unknowing administration of LSD during military testing, seems equally applicable to sexual harassment amounting to rape:

The Court holds that the Constitution provides [the plaintiff] with no remedy, solely because his injuries were performed while he performed his duties in the Nation's Armed Forces. If our Constitution required this result, the Court's decision, though legally necessary, would expose a tragic flaw in that document. But in reality, the Court disregards the commands of our Constitution, and bows instead to the purported requirements of a different master, military discipline, declining to provide Stanley with a remedy because it finds "special factors counseling hesitation." This is abdication, not hesitation.

Id. at 686.

For another horror story in which a federal court found that *Feres* barred relief, see *Stubbs v. United States*, 744 F.2d 58 (8th Cir. 1984) (lawsuit by an enlisted woman who committed suicide as a result of sexual harassment would disrupt discipline).

¹⁵⁴Murray, *supra* note 21, at 288.

Congress should include uniformed service personnel in Title VII. For this proposal to work, Congress must also make the military subject to the jurisdiction of the EEOC.¹⁵⁵

This commentator's proposal is for the Title VII protection for servicemembers to retain some of the military's existing grievance procedures while guaranteeing an impartial review of their complaints in federal civilian courts.¹⁵⁶ Such a procedure would have a number of benefits. First, filing the complaint simultaneously with the commander and the EEOC counselor as opposed to going straight to the EEOC while bypassing the command would preserve the commander's authority and permit early correction efforts. The EEOC's initial assessment should, however, result in preventing or minimizing cover-ups by commanders who do not want their superiors to think that they have a sexual harassment problem in their unit,¹⁵⁷ while protecting the military from frivolous lawsuits.¹⁵⁸ Second, once the victim has exhausted administrative remedies, a jury can decide sexual harassment cases under a "preponderance of the evidence" standard.¹⁵⁹

What about the potential harm, if any, inherent in permitting servicemembers to maintain Title VII actions against the military? Commentators have asserted the following potential harms: disruption of military discipline, inability of the civilian courts to evaluate military decisionmaking,¹⁶⁰ civilian investigators would be disruptive to the military, and military personnel must have faith in their superiors so they should not seek recovery from fellow servicemembers and superiors.¹⁶¹

While certain of these concerns have some superficial validity, none of them, nor the aggregate of them, justify the ban on sexual harassment lawsuits of *Feres* and other judicial decisions on the grounds discussed above.¹⁶²

¹⁵⁵See *Gonzalez v. Army*, 718 F.2d 926, 928 (9th Cir. 1983).

¹⁵⁶*Murray supra* note 21, at 299. Murray suggests that servicemembers would first have to bring simultaneous complaints to their commanding officer and an Equal Employment Opportunity counselor. They would review the matter with the servicemember and try to resolve the matter informally. An unsatisfied complainant would then be able to file a formal complaint with the EEO officer, who would investigate the claim. If the EEO resolution is unsatisfactory, the servicemember could have an EEOC hearing and bring a civil action. The extension of Title VII would permit reinstatement, back pay, or other relief. *Id.* at 299-300. See 32 C.F.R. § 588.1 *et seq.* for federal regulations governing the EEOC claims procedure.

¹⁵⁷See *supra* note 38 and accompanying text.

¹⁵⁸Griffin, *supra* note 140 at 2106.

¹⁵⁹Professor Chamallas terms the ability of a civilian jury to decide such claims under a preponderance of the evidence standard a "valuable opportunity," and notes that civil suits have the advantage of permitting victims to be vindicated without sending offenders to jail. Chamallas, *supra* note 14, at 363.

¹⁶⁰See Robin Rogers, Comment, *A Proposal for Combatting Sexual Discrimination in the Military: Amendment of Title VII*, 78 CALIF. L. REV. 165, 193-94 (January, 1990).

¹⁶¹Douglas R. Kay, Comment, *Running a Gauntlet of Sexual Abuse: Sexual Harassment of Female Naval Personnel in the United States Navy*, 29 CAL. W. L. REV. 307, 340 (1992).

¹⁶²See *supra* notes 121-53, and accompanying text.

As to the disruption to discipline, the *Feres* doctrine, as discussed above, has not eliminated lawsuits—only recoveries.¹⁶³ Thus, servicemembers continue to sue the military and their commanders:

[T]here is no evidence that negligence actions by service members over the past twenty-five years have degraded the military mission.

The modern soldier has also been litigious in other areas. Although this litigation has not been particularly productive for the plaintiffs, service members have vigorously asserted their positions in direct court actions against high ranking officials. The proliferation of this constitutional litigation apparently has not interfered substantially with military operations.¹⁶⁴

Nor does *Feres* and its progeny prevent lawsuits by servicemembers seeking relief other than monetary damages nor suits by civilians against the military, including civilian employees of military departments suing for employment discrimination including sexual harassment.¹⁶⁵ As Justice Scalia noted:

The Court fears that military affairs might be disrupted by factual inquiries necessitated by *Bivens* actions. The judiciary is already involved, however, in cases that implicate military judgment and decisions, as when a soldier sues for nonservice-connected injury, when a soldier sues civilian contractors with the Government for service-connected injury, and when a civilian is injured and sues a civilian contractor with the military or a military tortfeasor.¹⁶⁶

Further, how could a sexual harassment lawsuit be any more disruptive than the Tailhook investigation and disciplinary action, the Aberdeen Proving Ground's courts-martial, or Sergeant Major McKinney's trial? For example, the Naval Investigative Service's investigation into Tailhook comprised of 1,500 interviews with Navy and Marine aviators, and the incident certainly caused other harm to good order and discipline:

The failure to deal adequately with Tailhook has had an enormous effect on the Navy. In the wake of Tailhook, the Secretary of the Navy resigned. The Senate Armed Services Committee halted all officer promotions in the Navy. Many valuable officers have lost their jobs; many more will probably follow. Morale is at a dangerous low. . . .¹⁶⁷

In short, no evidence exists that Title VII or any other lawsuits by servicemembers against their superiors or the military itself seeking damages actually harms discipline, assuming *arguendo* that such harm exists, it is no more

¹⁶³See *supra* notes 121-35, and accompanying text.

¹⁶⁴Robert Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F.L. REV. 24, 42 (1976).

¹⁶⁵See *supra* notes 130-33, and accompanying text

¹⁶⁶483 U.S. 669, 703 (1987) (Scalia, J., dissenting).

¹⁶⁷Kay, *supra* note 161, at 310.

than exists in cases in which military members sue for other redress, such as injunctive relief, or that harm which exists when civilian employees sue the military department that employs them. Nor does any evidence exist that a civilian lawsuit is any more disruptive than a highly politicized sexual harassment court-martial. Finally, again assuming some harm from such suits, it pales in comparison to the disruption caused by the continuing harassment experienced in the military service. As General Douglas MacArthur noted, servicemember's morale "will quickly wither and die if soldiers come to believe themselves the victims of indifference or injustice on the part of their government, or of ignorance, personal ambition, or ineptitude on the part of their military leaders."¹⁶⁸ More recently, General Frederick M. Franks, who commanded the United States and British forces of VII Corps during Desert Storm in the main ground attack that liberated Kuwait, discussed the necessary character traits for leaders:

Soldiers need to know that we will be there for them when they need us during the battle and later.

* * * *

Integrity is one of those principles continually put to the test. . . . Integrity in command is the province of the commander. Are there litmus tests. Do we mean what we say? Does say equal do? Do we accept responsibility for our actions no matter what the consequences, or in these days, the media pressure, or the instant historical reputation? Where are our loyalties? Do we return loyalty to our subordinates? . . . Do we share hardships with our troops? Do they see us and hear from us when the going really gets tough? Do we square up to the really tough calls? *Do we shine the spotlight of inquiry into any area that is called for no matter the consequences?*¹⁶⁹

He concludes that if leaders believe in their subordinates and "establish trust, mutual respect, and loyalty, there is no limit to what the organization can accomplish."¹⁷⁰

To the extent that such an action would adversely affect ongoing military operations, the proposed modification by Congress permitting such lawsuits could have a section similar to the Soldiers' and Sailors' Civil Relief Act,¹⁷¹ which permits the court to stay civil proceedings, at any stage thereof, in which a servicemember is a plaintiff or defendant during his military service, unless it finds that the servicemember's ability to prosecute or defend the suit is not materially affected by

¹⁶⁸Griffin, *supra* note 140, at 2109, quoting Annual Report of the Chief of Staff, U.S. Army, for the Fiscal Year Ending June 30, 1933, quoted in BARTLETT'S FAMILIAR QUOTATIONS 771 (15th ed. 1982).

¹⁶⁹General Frederick M. Franks, Jr., *The Fourth Annual Hugh J. Clausen Leadership Lecture: Soldiering Today and Tomorrow*, 158 MIL. L. REV. 130, 134-35 (Dec. 1998) (emphasis added).

¹⁷⁰*Id.* at 136.

¹⁷¹50 U.S.C. § 501-593.

reason of his or her military service.¹⁷² If the military's ability to defend itself in a Title VII action was materially affected by, say, a deployment of the unit involved so that government witnesses were unavailable, a similar provision could provide for a stay in such circumstances.

The argument that permitting Title VII suits will involve the judiciary in military matters that it does not have the competence to evaluate does not hold water. First, sexual harassment cases hardly involve decisions of whether to use Navy Seals, Army Green Berets, or Marine Force Recon for a particular mission, or determinations of which servicemembers should be promoted to the next higher grade based on their military records. Rather, they involve questions such as whether a particular situation qualifies as a hostile work environment or whether a particular assault or other action rises to the level of sexual harassment,¹⁷³ something federal courts do regularly. Even if such a case has the additional element of having to evaluate the effect of the hierarchical ranking structure of the military on the conduct, both sides can educate federal judges and juries on that matter as experts do on other complicated subjects in many complicated cases, such as civil and criminal Medicare fraud cases brought under the anti-kickback statute,¹⁷⁴ such as antitrust actions, such as patent infringement cases, and others in which the trier of fact know little about the technical aspects of the matter.

Would civilian investigators be disruptive? Possibly, but again, no more so than the military investigators in cases such as Tailhook. First, military investigators often wear civilian clothes. The Army's Criminal Investigation Division, the Naval Investigative Service, and the Air Force Office of Special Investigations typically wear civilian clothes when conducting investigations.¹⁷⁵ Second, any investigator is

¹⁷²*Id.* at § 521.

¹⁷³Section 703 of Title VII defines sexual harassment as: unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

¹⁷⁴The federal health care antikickback statute prohibits transactions intended to induce patient referrals or to compensate one for making such referrals. 42 U.S.C. § 1320a-7b as amended by H.R. 3101, 105th Cong. 204. These extremely complicated cases may involve billing experts to testify as to whether a payment is bona fide or a kickback, accounting experts to testify whether an equipment lease is for fair market value, *see generally*, Pamela H. Bucy, *The Poor Fit of Traditional Evidentiary Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions*, 63 FORDHAM L. REV. 383, 398-411 (1994), or comprises an illegal kickback, legal experts to explain the nuances of the statute because, as a specific intent crime, the defendant's belief that the transaction was legal under the complicated statutory and regulatory scheme is a defense. *See Hanlester Network v. Shalala*, 51 F.3d 1390 (9th Cir. 1995).

¹⁷⁵*See United States v. Swift*, 17, C.M.A. 227, 38 C.M.R. 25 (C.M.A. 1967) (Air Force Office of Special Investigations agent who participated in an investigation by German Police did not make rights warnings necessary where the agent was solely an observer, was dressed in civilian clothes, and was not introduced as a police officer).

disruptive in a sense, military or civilian. But again, so is sexual harassment.¹⁷⁶ And again, it is hard to imagine anything more disruptive than situations such as Tailhook or the Aberdeen Proving Ground cases,¹⁷⁷ whether they ultimately end up with an EEOC investigation on top of the criminal one or not.

The argument that permitting such lawsuits will cause military members to lose faith in their superiors seems to be the most specious of all. Such an argument presumes that service members do not know when their superiors commit wrongs such as sexual harassment, do not know when their superiors fail to investigate such wrongs, do not know when their superiors cover up such wrongs,¹⁷⁸ and do not know or care that victims of such wrongs fail to receive compensation. Or, such an argument presumes that those servicemembers who do know of such wrongs don't care, or that they condone sexual harassment. While a few servicemembers, such as Tailhook aviators, may not care, nothing could be further from the truth with regard to servicemembers in general. Servicemembers do know of such wrongs and they do care. Experiencing or learning of such wrongs and their superior's failures to correct those wrongs clearly harms morale.¹⁷⁹ Servicemembers take an oath to support and defend the Constitution, not to support and defend their commanders.¹⁸⁰ And the

¹⁷⁶See *supra* note 165 and accompanying text.

¹⁷⁷See *id.*

¹⁷⁸General Franks, *supra* note 169, states that in this information age, servicemembers are informed. "They notice. They pay attention to not only what they are doing but what goes on around them. They communicate with fellow soldiers about the mission, training, and the organization." *Id.* at 142.

¹⁷⁹From the earliest times, military experts have stressed the need to treat servicemembers well. Sun Tzu, the ancient Chinese general, opined that a primary responsibility of a general is to treat soldiers with warmth and beneficence. SUN TZU, *THE ART OF WAR* 64 (Samuel B. Griffith trans., Oxford Univ. Press 1963). The strict military disciplinarian, Baron von Steuben observed that a commanders first objective should be to "gain the love of his men, by treating them with every possible kindness and humanity, inquiring into their complaints, and when well founded, seeing them redressed," quoted in R. RIVKIN, *G.I. RIGHTS AND ARMY JUSTICE* 335 (1970). Subsequent military leadership theory confirms von Steuben. World War I studies demonstrated that resistance to military authority springs from, among others, degrading use of military authority. See L. RADINE, *THE TAMING OF THE TROOPS: SOCIAL CONTROLS IN THE UNITED STATES ARMY* 9-10, 34-38, 78-79, 115-16 (1977). What could be more degrading than a military superior sexually harassing a subordinate and then not permit the victim the same recourse as civilians enjoy? General McCaffery, past commander of the U.S. Southern Command, speaking of preventing war crimes against noncombatants, noted that "[i]f we treat our own soldiers with dignity under the rule of law, with some sense of compassion, then our soldiers are much more likely to act in a similar fashion toward the civil population." General Barry R. McCaffrey, *Role of the Armed Forces in the Protection and Promotion of Human Rights*, 149 *MIL. L. REV.* 229, 237 (1995). Author Jonathan Tomes's 20 years' experience in the military as an infantry platoon leader in combat in Vietnam, as a commander in Europe, as a military prosecutor, defense counsel, and military judge is entirely consistent with the foregoing.

¹⁸⁰All servicemembers take the following oath:

I, _____, do solemnly swear (or affirm) that *I will support and defend the Constitution of the United States* against all enemies, foreign and domestic, *that I will bear true faith and allegiance to the same*, and that I will obey the orders of the

Constitution would seem to require equal protection of the laws for victims of sexual harassment in the military as in the civilian sector. Nor are any alleged harms to the military inherent in such lawsuits supported and, to the extent that they exist, they are certainly outweighed by the disruption of the amount and nature of the sexual harassment that is occurring in today's military, and by the failure to provide adequate remedies to redress those wrongs.

V. CONCLUSION

To date, the military, and in particular the military justice system, has been ineffective in eliminating or at least reducing sexual harassment in the military. Nor does the military have any effective mechanism for protecting the victims of sexual harassment and compensating them for the harms they suffer. Whether the courts are correct or not that Title VII does not apply to the uniformed military, Congress should permit Title VII sexual harassment actions by servicemembers. Further, Congress should legislatively overrule *Feres* and its progeny to permit sexual harassment lawsuits by military members. Even though the doctrinal underpinnings of *Feres* and its progeny are wrong at worst or have no evidence backing them up at best, servicemembers cannot depend on the courts to protect their rights as would seem to be the federal courts' function.¹⁸¹ Even assuming the existence of some adverse impact on the military inherent in permitting Title VII actions for sexual harassment, that harm cannot possibly be worse than the harm from allowing the continuation of serious incidents of sexual harassment. Courts-martial have not eradicated it. Zero tolerance policies have not eradicated it. Public condemnation has not eradicated it. Large damage awards might. Even if Title VII actions do not deter sexual harassment, at least its military victims will be compensated and "women constituting our Armed Forces [will be] treated as honored members of society whose rights do not turn on the charity of a military commander."¹⁸²

President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.
10 U.S.C. § 502 (emphasis added).

¹⁸¹*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Chief Justice Marshall stated, "[t]he very essence of civil liberty certainly consists in the right of *every* individual to claim protection of its laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.* at 163 (emphasis added). See also *Zwickler v. Koota*, 389 U.S. 241, 247 (1967) (the Constitution intended the courts to be the branch of government primarily responsible for enforcing the Bill of Rights).

¹⁸²*Winters v. United States*, 89 S. Ct. 57, 59-60 (Douglas, J., 1968). The entire quote reads:

[I]t is the function of the courts to make sure . . . that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander. . . . A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our Public Laws.

Id.