
The Military Justice Improvement Act: A Struggle for Reform

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Abstract

This study investigates the evolution of military sexual trauma (MST) and military sexual assault (MSA) laws under Article 120 of the Uniform Code of Military Justice (UCMJ) to decide what elements encouraged Congressional interventions leading to policy change. Moreover, this study will look at the consequences of these policy changes in the view of MSA prosecution and prevention. Scholars have written about the pervasiveness of MSA and the hardships of navigating the military judicial system. However, literature tracing the history of MSA to identify deficiencies and suggest solutions seems to be scarce. This study is a fitting addition to the academic sub-discipline of Critical Military Studies (CMS). It seems appropriate that there be a study written by a prior-enlisted junior veteran, having first-hand experience of the injustices endured by service-members. CMS is a community of multidisciplinary academics and activists, critically analyzing military authority (CMS Journal: Our Scope and Aims, 2019).

"To be critical is not to be dismissive, rather, it is to stay open to the possibility that our curiosity and skepticism can be used to shed much-needed light on our blind spots and to bring about social and political change" (Basham et al., 2015).

Chapter 1: Introduction and Purpose of Study

In recent years, the media has shed light on sexual assault (SA) within the United States Military, placing the matter on our nation's legislative agenda. The purpose of this study is to examine military sexual assault (MSA) under the Uniform Code of Military Justice (UCMJ) to discover whether the military justice system produces equity and justice for service-members. The American public has been paying attention to military justice issues, especially approaching the 70th anniversary of the UCMJ, which Truman signed into law in 1950 (Ghiotto, 2014). This study will attempt to answer the following questions: Has the failure of military commanders in the fair and concise application of the UCMJ in addition to, the lack of reporting, have a detrimental effect on producing equity and justice for our service-members? While this widespread problem produces a strong push for change, what is the fundamental problem? This study hypothesizes that the military justice system does not produce equity and justice for service-members and that the MSA prevention structure fails to produce such results.

This study will examine the UCMJ through its history, including its amendments, and the changes in policy. This study will attempt to identify the ways that may bring about changes. Additionally, this study asserts that reform stems primarily from the changes to the National Defense Authorization Act (NDAA) as well as the Military Justice Improvement Act (MJIA).

This study will further investigate policy changes to military sexual trauma (MST) and MSA, through revisions made to the UCMJ, executive orders, and supreme court decisions. This study will examine the progress of the UCMJ and the factors that have caused changes. Furthermore, this study will examine the effectiveness of the military's framework, where unit commanders are the sole presiding authority holding prosecutorial power and the right to conduct investigations.

Description of the Problem

For over twenty years, military leadership has repeatedly pledged "zero tolerance" for sexual misconduct over and over (Gillibrand, 2013). The Department of Defense (DoD) estimates there had been approximately 26,000 cases of sexual assault (SA) in 2013 alone, an increase of 37 percent from 2012. Of those, over 3,300 reported, and 302 went to trial (Gillibrand, 2013). In 2019, the DoD estimated that about 20,500 active duty service-members experienced SA. The DoD believes that roughly just 30% of survivors reported through the proper channels (SAPRO Report, 2019). Furthermore, less than 5% of reports result in some form of conviction (SAPRO Report, 2016). The DoD created the Sexual Harassment Assault Response and Prevention (SHARP) program to reduce SA within the ranks. One must question why such a statistically significant disparity exists between rates of SAs and reporting.

It is not sufficient to implement the military's SHARP program to decrease the number of assaults radically. Instead, recognizing the framework that made this one of a kind culture possible could yield significantly dramatic results. Basic combat training transforms civilians into warriors unfazed with the damaging effects of war. Methods used such as these produce a culture of warriors with likely distorted behaviors, distorting one's moral views, i.e., acts of sexual violence. Showing genuine support to survivors, and eliminating commanders' biased judgments could decrease the number of SAs.

Chapter 2: Literature Review

Scholarly debate over the United States' military justice system has grown, triggering calls for reform from one side and support from the other (Alleman, 2006). In early 2013, Gen. James Amos, the then Commandant of the United States Marine Corps, stated, "Why wouldn't female Marines come forward? Because they don't trust us. They don't trust the command. They don't trust the leadership" (Gillibrand, 2013). According to the DoD, numerous survivors do not report their attack because they do not think anything will come of it (Gillibrand, 2013). With no legal training, commanders rely solely on *The Manual for Court Martials* (MCM) when they feel a service-member has "broken" some rule/regulation (MCM, 2016). Sen. Gillibrand argues that "this lack of confidence in military leadership and fear of retaliation and retribution can have a detrimental effect on reporting, which leaves guilty assailants to assault again without consequence" (Gillibrand, 2013).

Critical Military Studies

Critical Military Studies (CMS) is a field of research that critically examines how military exercises its' power (Basham et al, 2015). One may assume that power within the military is located at the top of the hierarchical ranks. However, there are internal and external factors that affect individuals. CMS aims to critically think and evaluate these relationships and power dynamics with an interdisciplinary approach.

Cynthia Enloe, one of CMSs' founders and editorial board member, wrote the book *Maneuvers*, which examines how militarism exercises itself into the day to day lives of service-members to create and perpetuate systems that operate with control and dominance. Enloe argues that militarization is a multistep process where an individual or object progressively becomes

controlled by militaristic ideas, also becoming dependent on their health and welfare (Enloe, 2000).

Enloe talks about the Armed Forces strategies when recruiters cannot recruit enough male volunteers. On the off chance that insufficient men are entering into the military, at that point, recruiters open their doors to an increasing number of women. Enloe contends, this practice to be a dangerous political balancing act (Enloe, 2000). To keep the military as a masculine system, ladies ought not to comprise over 1/3 of service-members, and such a large number of women ought not to reach a high-ranking position. The military must guarantee that the consideration of women does not undercut the in a general sense the masculinized culture. Enloe explains how the military, using this political act, does not produce equitable results for women. (Enloe, 2000).

Wendy Rasmussen and co-researchers explore how female service-members battle with revealing with MSA & military sexual trauma (MST). Rasmussen et al. discovered a few topics (internal and external factors, processes, and culture), which affect SA reporting or lack thereof. Rasmussen et al. executed semi-organized meetings with three SA survivors to verify that perceived barriers cause an absence of reporting. Rasmussen et al. further attests, unfortunately, because of the sheer lack of data, there is still no clear indication that quantifiably explain why some servicewomen do not seek medical care or report SA (Rasmussen et al., 2016).

Rape is a form of SA against an individual without consent, involving penetration. Rape is a method used to display dominance and force over another. Rape happens everywhere, and not just within the confines of the Armed Forces, making scholars propose that it may be something institutionally forced. Cynthia Enloe contends that militarization requires the production of different violent masculinities; racial, ethnic, and class hierarchies, woven into most military chains of command (Enloe, 2000). Enloe, further states the divergence between

recruits of different opposite sexes ensures that the Armed Forces remain a masculinized establishment (Enloe, 2000).

Military Culture & Basic Training

The author recognizes that Military Forces around the world have their unique customs and cultures. The United States Military is no exception to this. Military culture is experienced in basic combat training, then internalized through one's service. Each branch of service has its unique subculture varying from one branch of service to another. Military culture, as a rule, incorporates the language, ceremonies, conviction, and common customs. From the moment you get off the bus, boot camp teaches individuals how to be restrained, but at the same time propel themselves to the extreme, both mentally and physically. Basic combat training teaches individuals dependence on their team, and if this dependence on a team is important, then trust is absolutely necessary. This level of trust is vital to military success. In combat, one depends on this degree of trust for survival. Without this trust, a life or that of a unit can be at stake.

It is because of this culture within the military that makes MSA one of a kind when contrasted with different organizations. The consequences of MSA are extremely destructive not only for the survivor but for the unit as a whole. For instance, the degree of trust causes harm at the point when members of a unit accept the aggressors claim, instead of the survivors. When this happens, units tend to alienate MSA survivors, who subsequently face retaliation for 'breaking' the brotherhood (US Dept. of Defense and USA, 2012). Examples of rape adversely affect 'unit cohesion,' which in turn destroys that unit's military effectiveness, morale, among just a couple of consequences.

Still, military culture cannot represent the totality of the issue. As indicated by Robert Cassidy, culture is less of exploratory science. Instead, it is an interpretive science looking for significance. Culture is not something to which casualty can be accredited (Cassidy, 2004). It is incorrect to accuse MSA to culture alone. Military culture may instead exacerbate misconduct. This way, MSA, with regards to the military's culture of comradery, is regarded as a threat to the military establishment as a whole, worsening the MSA issue. These unique contrasts are the reasons that MSA requires intervention.

Chain of Command

On June 14, 1775, the US Army, the first and oldest branch of the Armed Forces, was born. The absence of reliable communication required a structure that withstood the obstacles and destruction of war, a well-organized hierarchy (chain of command). Every service-member holds a position within the hierarchy determined by rank and grade, which implies their exact position within the chain. A person's rank decides their position within the hierarchy, as well as responsibilities. The rank structure begins at the lowest level, such as a Private (Rank) E1 (grade) up to the Commander-In-Chief, the President of the United States. The higher the position, the greater power, and obligation. The chain of command is separated into two distinct groups: officers and enlisted personnel. Officers, in the case of the US Army, 1st Lieutenant to General known as the Chief of Staff of the Army (O1-O10 (Grade)), comprise about 20% of the military, responsible for their units. Enlisted in the case of the US Army, Private 2 to Sargent Major of The Army (E1-E9), approximately 80% of all service-members are enlisted, following orders by all those appointed over them (JSC Fact Sheet, 2013).

Civilian vs. Military Justice System

In the search to understanding why change is needed, one must understand the significant differences among civilian and military judicial systems. The Constitution, to provide for the common defense (US CONST. Preamble), gives Congress the power to raise, support, and regulate the Armed Forces (art. I §8, cl. 14), also making the President Commander-in-Chief of the Armed Forces (art. II §2, cl. 1). Art. III of The US Constitution governs the federal judiciary without a specific role in the military. The United States Supreme Court has viewed Congress's power to make rules and regulations of the land and naval forces entirely separate from Art. III (Dynes v. Hoover, 1857). Hence, court-martials are not Art. III courts, which in turn allow them to abstain from the same rules imposed on federal courts, such as the Fifth Amendment right to a grand jury indictment. Instead, they are established under Art. I of the Constitution, and as a result, are of limited jurisdiction. Under this authority, Congress enacted the UCMJ, which is the code of military criminal laws applicable to all US military members worldwide (10 USC §§801-941). The Supreme Court has also inferred that there is no right to a civil jury in court-martials (Dynes v. Hoover, 1857). However, partly because of the different standards provided in courts-martial, their jurisdiction is limited to those persons and offenses the military has a legitimate interest in regulating. Courts-martial jurisdiction extends mainly to service-members on active duty, prisoners of war, persons accompanying the Armed Forces in time of declared war, and specific individuals that violate the law of war (10 USC §§801-941).

History of the UCMJ

The House of Representatives draft of the UCMJ characterized rape and subsequently guilty of such if, any person who engages in sexual acts with a female, not his wife, forcibly and

without her consent (UCMJ, 1950). In the meeting with the House of Representatives regarding H.R. 2498, there was no conflict with the proposed meaning of rape. Instead, the discussion concentrated for the most part on carnal knowledge (Congressional Floor Debate, 1949). In the military setting, carnal knowledge was characterized as consensual sex with an individual under 16 years of age (UCMJ, 1950). After much discussion and three times in private conversations, the subcommittee concluded that Art. 120 would have to characterize fornication as section B, and penetrative demonstration as section C (UCMJ, 1950). The main release of the UCMJ does exclude an article that talks about lewd behavior or attack, other than assault. This ignored issue or purposeful avoidance gives an understanding of how Congress and military authorities saw and comprehended demonstrations of sexual savagery and badgering around then.

The Joint Service Committee on Military Justice (JSC) was established in the summer of 1972. As required by Executive Order 12473 of July 1984, to guarantee the UCMJ and the MCM be maintained as adequate legal and judicial systems, the JSC has the responsibility to assist the DoD and conduct an annual review of the MCM (Executive Order 12473, 1984). There were barely any progressions and updates to the UCMJ between 1951 and 1994. Executive orders issued by the President directed the vast majority of the reforms, with exceptions being The Military Justice Act (MJA) of 1968 and 1983. Although there were extensive changes to the military legal framework, the UCMJ needed changes as far as to be impactful (18 Cath. U. Law R., 1969). To ensure considerably increasingly Constitutional protections by those charged in crimes, Congress decided it was essential to intervene. The MJA of 1968 and The MJA of 1983 both talked about the issue of control. Even though extensive changes were made, none of the revisions modified MSA laws.

2003 United States Air Force Academy MSA Scandal

In early 2003 the US Air Force Academy, located in Colorado Springs, CO, found itself at the center of an MSA scandal (Soraghan et al., 2004). Media reports released suggested Air Force Academy Officers attempted to coverup SA against female cadets. After an investigation into the incident was launched, it was revealed that survivors were subsequently charged with collateral misconduct when reporting MSA. Collateral misconduct is defined as survivor "misconduct that might be in time, place, or circumstance associated with the" survivor's "sexual assault incident." (32 CFR § 105.3).

Military Sexual Assault Reporting Office (SAPRO)

In 2004 Congress directed Secretary of Defense Rumsfeld to examine matters relating to SA in cases in which service-members are either survivors of, or perpetrators, and also to recommend ways the DoD can adequately address issues relating to MSA (NDAA, 2005-2006). Congress further directed the Secretary of Defense to submit an annual report concerning MSA involving all service-members to the defense committees. (NDAA, 2005-2006).

In 2005, the Sexual Assault Prevention and Response Office (SAPRO) was created and charged with the responsibility for all cases and reports about MSA. SAPRO was tasked with the development of a comprehensive DoD policy on the prevention of and response to SA involving service-members of all branches (Montgomery, 2013).

MSA Survivor Reporting

According to the DoD, DoD Instruction (DoDi) 6495.02 defines SA as "Intentional sexual contact characterized by the use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent. As used in this Instruction, the term includes a broad

category of sexual offenses consisting of the following specific UCMJ offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these offenses" (DoDi 6495.02).

To ensure that MSA survivors received proper care, the NDAA of 2005 was passed by Congress, requiring the DoD to reform policy offering a confidential reporting process (NDAA, 2005-2006). Defense Secretary Rumsfeld enacted DoDi 6495.02, providing MSA survivors two forms of reporting: restricted and unrestricted reporting (DoDi 6495.02).

The restricted reporting option allows for SA survivors to confidentially report the crime, identifying individuals without initiating an official investigation. Members of the Armed Forces who desire restricted reporting under this policy must use one of the following avenues for reporting to maintain such confidentiality: Sexual Assault Response Coordinator (SARC), Victim Advocate (VA), and Health Care Provider (HCP) (U.S. Army SHARP, Sexualassault.army.mil).

The Unrestricted Reporting option is suggested for survivors of SA who seek medical treatment, counseling, and an official investigation of the crime. When a survivor opts for the unrestricted option, they may use the same reporting avenues available under the restricted reporting options. However, they may also use the following channels for reporting: Chain of Command, Law Enforcement, and Legal Personnel. Once SA has been reported, the SARC will promptly assign a VA at the survivor's discretion, or request. Immediately after reporting to a SARC, "health care personnel will conduct a sexual assault forensic examination (SAFE), which may include the collection of evidence. Details regarding the SA will be restricted to only those personnel who have a legitimate need to know" (U.S. Army SHARP, Sexualassault.army.mil).

DoDi 6495.02, makes it clear that only individuals on a "need to know" basis would be notified in the event of MSA (DoDi 6495.02).

The UCMJ between 1984 and 2008

Up until 2006, Art. 120 UCMJ remained unchanged, consisting only of rape and carnal knowledge. Between 1775 and 2006, no specific article of the UCMJ criminalized SA or harassment that did not include the physical act of penetration. Sexual offenses were prosecuted under Art. 134, the general article, a catch-all for crimes that are not spelled out elsewhere, in other words, anything that may be regarded by an officer with commanding authority adverse to good order and discipline and unit cohesion.

In 2005, the JSC submitted an 826-page report, contained within it were six options for rewriting Art. 120 (Judicial Proceedings Panel, 2005). The JSC report concluded that the UCMJ contained satisfactory methods to combat MSA, further attesting that Congress' rationale for a substantial legislative change would not offset the MSA problem (Judicial Proceedings Panel, 2005). In the 2006 edition, supplement I of the UCMJ, Art. 120, which went into effect on January 8, 2008, was significantly restructured into the following:

§920. Art. 120. Rape, sexual assault, and other sexual misconduct

- (a) RAPE.-Any person subject to this chapter who causes another person of any age to engage in a sexual act by-
- (1) using force against that other person;
 - (2) causing grievous bodily harm to any person;
 - (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
 - (4) rendering another person unconscious; or
 - (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct;

(UCMJ 2006 Ed. and Supplement I, 1-8-2008)

Congress' response to survivors

US Air Force 1st Lt. Adam Cohen became the focus of an investigation after reporting to his superiors that he was sexually assaulted. In 2013, 1st Lt. Cohen was told by his commanding officer, "I don't believe you were raped" (Gillibrand, 2013). Even after recounting the attack, he was told, "That's good acting, but I still don't believe you." 1st Lt Cohen was later be denied an expedited transfer (Gillibrand, 2013). According to Sen. Gillibrand, "that is merely one example of what is said by" leaders "directly to" survivors "strong enough to come forward" (Gillibrand, 2013). In response to this incident, Sen. Gillibrand (D-NY) would propose the Military Justice Improvement Act (MJIA) (Rosenthal, 2013).

Military Justice Improvement Act of 2013

Despite an ardent communication campaign enacted by Gillibrand, in 2014, the bill fell short in the Senate by ten votes, 55-45, failing to receive the five votes needed to overcome a filibuster (James, 2015). Sen. Carl Levin, (D-MI) stated that one of the "toughest decision was on a proposal to remove military commanders from the process" completely (Levin, 2013). Even though the MJIA failed to obtain enough votes, on December 26, 2013, President Obama signed into law the National Defense Authorization Act (NDAA). Sen. Gillibrand's plan of taking the presiding and deciding authority out of the chain of command failed (Levin, 2013), the NDAA adopted some noteworthy and progressive reforms, said to offer more robust safeguards for SA survivors and likely resulting in higher number prosecutions of assailants (Levin, 2013).

MJIA of 2017

On November 16, 2017, Sen. Gillibrand, despite previous failure to pass the MJIA in 2013, the MJIA would subsequently be reintroduced in the 115th Congress by Gillibrand in 2017. Gillibrand sponsored the legislation with bipartisan support of 29 legislators. Senate Bill 2141, known as the MJIA of 2017. Bill 2141, like its predecessor, would be a bill to amend title 10 of the United States Code (USC) reforming methods for ascertaining the nature of charges and the convening of courts-martial for certain specific severe offenses under the UCMJ, such as MST & MSA (S. 2141, 2017).

SAPRO report FY2018

The DoD's SAPRO issued the FY2018 report in May 2019. The report indicates that there were approximately 20,500 SAs, a substantial increase of approximately 15,000 in the FY2016 report. Servicewomen who were survivors of SA increased by nearly 50 percent, from 8,600 in the fiscal year 2016 to 13,000 in 2018. By SAPRO admission, the odds of young servicewomen experiencing SA in our military is one in eight.

However, military commanders have sent fewer cases to court-martial, from 588 in 2014, to 389 in 2016, and 307 in 2018. The SAPRO report also indicated an intriguing new program launch for the fiscal year 2019. The DoD will implement the Catch A Serial Offender Program, permitting Service-members who pick Restricted Reports to report about their attacker at a later time (SAPRO Report, 2019). Should the authorities find a match in other incidents, individuals will be notified and given a chance to change their report from Restricted to Unrestricted and partake in the military justice process.

MJIA of 2019

On June 11, 2019, Sen. Gillibrand, now the senior member of the Senate Armed Services Subcommittee on Personnel, led a bipartisan group of congressmen and women reintroduced the MJIA, introduced as S. 1789, and cited as the "Military Justice Improvement Act of 2019."

Senate Bill 1789 was read twice and referred to the Committee on Armed Services (Carle, 2019).

According to the US Senate Committee on Armed Services website, as of December 10, 2019, there are no scheduled hearings regarding the bill.

Chapter 3: Methodology

The methods used in this study will draw from critical military studies, questioning how military institutions, practices, and processes are an outcome of social and political contestation. In critical military studies, nothing is taken for granted as inevitable or natural, but the ongoing processes of construction, Constitution, and contestation are explored (V.M. Basham et al., 2015). The approaches in this study attempt to prioritize how military power operates, how it has come to work in the ways it does, as well as its limits.

In this study, the context is the discussions, considerations, and outcomes of congressional and judicial proceedings concerned about the UCMJ and whether changes produce equity and justice for our service-members. This study will identify many observable changes to the UCMJ, analyzing factors responsible, both externally and internally. Succeeding sections will attempt to provide a detailed examination of particular instances showing Congress' refusal to engage in the military justice system, notwithstanding requests to do so, especially concerning the military's handling of MSA.

The creation of the UCMJ guaranteed all members of the Armed Forces answered to one set of laws (UCMJ, 1950). Within the past 70 years, the UCMJ has experienced multiple amendments. One example of this is Art. 120, once known as "Rape and carnal knowledge" (UCMJ, 1950). Ever since, Congress has enacted multiple editions of the UCMJ, implementing numerous policies and programs to help mitigate MST (Enloe, 2000).

This study will consider theories and concepts, drawing upon work such as that of feminist scholar and CMS founder, Cynthia Enloe. This study will investigate events such as the 2003 US Air Force Academy scandal and show how events such as these send cries of outrage from within members of the general public and the media. It is from events such as these that are

the direct causal factors that influence Congress as well as Pentagon officials to implement changes to SA policies and operating procedures.

Chapter 4: Findings and Discussion

The criminalization of rape and sexual misconduct under military jurisdiction has been subject to many changes throughout military history and has only been seriously criminalized in the last decade. This chapter will present several cases applying a CMS approach, discussing the evolution of laws and factors that influence the decision to develop MSA policy changes in all branches of the Armed Forces.

2003 United States Air Force Academy MSA Scandal

In response to the horrific news, Congress demanded the Air Force investigate allegations relating to retaliation against former cadets for reporting MSA (Emery, 2003). At the time of the Air Force Academy scandal, Art. 32 of the UCMJ granted a "thorough and impartial" investigation into the "truth of the matter set forth in the charges" before trial (UCMJ art. 32, 2000). In opposition to the Art. 32 investigation and the investigating officer's recommendation, the Cadet, was later referred to court-martial for charges of rape, in violation of Art. 120 of the UCMJ. In securing a guilty plea, the Cadet was charged with dereliction of duty, the Commission of an indecent act, and conduct unbecoming an officer (Denver Post, pp. A-01, 2004).

In 2003, Congress established the Fowler Commission (NDAA, 2005-2006). A congressional panel to review MSA Allegations, to mitigate future disputes. The Commission was first tasked with reviewing the Air Force Academy's policies relating to MSA and unearthing and punishing MSA attackers (NDAA, 2005-2006). The Commission indicated culture as a contributing factor to the SA at the Academy. Air Force Academy Cadets reported sexualized comments and sexism as being prevalent to the extent where such comments were considered the

status quo. A SA survey conducted at the Air Force Academy indicated that one in five cadets did not believe women belong at the Academy (Schmitz, 2004). The Commission's report makes it clear that the Air Force Academy leadership failed to alter the culture, creating an environment conducive to SA.

Senior officers in the chain of command were a contributing factor to the SA problem. Brigadier-General S. "Taco" Gilbert III, leading the Academies' internal investigations into SA, was quoted showing an excellent example of how senior officers contribute to the culture problem. Brigadier-General Gilbert told a Cadet who reported being raped after she had been at a party that "If I walk down a dark alley with hundred-dollar bills hanging out of my pocket, it doesn't justify my being attacked or robbed, but I certainly increase the risk by doing what I did." (Fowler, 2003).

After review, the Commission stated that the Air Force Academy's high-ranking members and leadership were aware of the presence of MSA at the Academy even as early as 1993, but failed to address the matter (Senate Hearing 108-652, 2003). In light of the egregious findings, the investigation led Congress to order Donald Rumsfeld, the then Secretary of Defense, to construct the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies (32 CFR § 105.3). The Task Force was comprised of six service members from all branches of the Armed Forces and six civilians.

There were several changes the DoD made after the Air Force Academy SA scandal. One change was creating new SA reporting procedures. It was in light of the SA scandal that took place at the Air Force Academy that pushed Congress to mandate such a policy. In 2004, Congress mandated that Defense Secretary Rumsfeld develop a comprehensive policy on the prevention and response to MSA in which service-members were involved as perpetrators or

survivors (NDAA, 2005-2006). In 2005, Defense Secretary Rumsfeld mandated the military to establish the Sexual Assault Prevention and Response Office (SAPR/SAPRO) as the authority to manage MSA reports and cases. Congress tasked SAPRO with developing a comprehensive plan to address MSA (Montgomery, 2013).

MSA Survivor Reporting

Initially, MSA survivors were offered a reporting process where when MSA occurs, survivors or reporters would notify legal authorities, and investigators would investigate the allegations of MSA without maintaining the confidentiality of either party involved. This process proved unacceptable after reporting discrepancies, such as the higher frequency of reports for male service-members than female service members (NDAA, 2005-2006).

The author's military experience attests that the "need to know" aspect of DoDi 6495.02 does not align with the reality of what occurs within a military unit. For instance: If SA were to happen in the junior enlisted barracks (reserved for single/unaccompanied junior enlisted members usually of the rank of E-1 (Private) to E-4 (Specialist/Corporal) with one E-5/E-6 (Sargent/Staff Sargent) per floor), the investigators would question all service-members present in the barracks at the time of the alleged assault. Despite policies, this general inquiry sparks interest and curiosity. Thus, service-members begin to gossip about the investigation. To conduct a thorough investigation, investigating personnel triggers a network of rumors that inevitably become associated with the MSA survivor. This a worrisome barrier, especially when one of the critical concerns the military still faces is a lack of reporting by MSA survivors.

The UCMJ between 1984 and 2008

Given the history of MSA scandals, public outcry persuaded Congress to review Art. 120 critically, requiring The Defense Secretary to conduct a review of the UCMJ recommending modifications, subsequently establishing a system where MSA issues may be addressed. Against the recommendation of the JSC, Congress favored changes to Art. 120, mirroring civilian statutes. In 2006, Congress passed the NDAA FY 2006, which wholly revised Art. 120 of the UCMJ, mirroring option 5 of the JSC report (NDAA, 2005-2006). With the passing of the NDAA of 2006, the DoD criminalized SA without the need for a perpetrator to penetrate a survivor physically. Limiting the resistance requirement developing a doctrine of force to account for cases in which the force used is not physical.

The military justice system has been slowly and methodically attempting to eliminate the requirement for force in instances of MSA, arriving at a consent-based approach. In many ways, the new statute takes a step forward in the military's struggle against SA, but at the very center of the statute, Congress missed the mark. The new law approached rape and SA as a crime of violence, placing a force requirement at the center of the offense. A consent-based approach to the statute would better address these issues and concerns, in the unique culture of the military, a statute requiring affirmative consent such as affirmative verbal consent could be a significant positive change, and best serve our members of the armed forces'.

Congress' response to survivors

In response to Air Force 1st Lt. Adam Cohen, Sen. Gillibrand (D-NY) proposed the Military Justice Improvement Act (MJIA) (Rosenthal, 2013). The MJIA would establish the "decision-making authority regarding whether serious crimes such as MSA go to trial moving

from the hands of the chain of command to professionally trained military prosecutors, where it belongs" (Rosenthal, 2013, p.337). Sen. Gillibrand indicates that opponents of the MJIA say that moving the decision-making authority "will diminish good order, discipline, and 'unit cohesion'" (Rosenthal, 2013, p. 337). Though Sen. Gillibrand replies by saying that "America's closest allies such as the U.K., Canada, and Israel have already adopted this approach without reported negative consequences to the 'good order and discipline' our military leaders are trying but failing, to uphold" (Gillibrand, 2013).

Had we blindly obeyed the 'good order and discipline' catchphrase in the past, we would still have a non-integrated military and non-diverse force. We would be very limited in the range of military occupational specialties (MOS) available for women and men, and if you are other than heterosexual, you can guarantee a less than honorable discharge. Every change in military policy has gone against the approval of senior defense leaders and top military brass (1-star generals or above) with the certainty that any of these changes would have negatively impacted 'unit cohesion' and 'good order and discipline.' We know that each of these changes did not compromise the military or command abilities; instead, it enhanced our military's reputation and ability as well as the ability of individual service-members to serve without added fears.

Military Justice Improvement Act of 2013

Notwithstanding continuing advancements in military weaponry, tactics, and technology, the military judicial system remains fixed in an antiquated system (Rosenthal, 2013, p. 337). Instead of legal personnel within the military, commanders are bestowed with authority to administer justice (MJIA, 2013). Despite the failure of the MJIA to be enacted, the NDAA adopted an alternate approach as opposed to the proposal to eliminate commanders' authority

(Levin, 2013). The first time in US military history, retaliation against survivors who report a SA would be a crime under the UCMJ (Levin, 2013). Before the of the NDAA, Commanders could make decisions regarding the selection of members of the jury, but also overturn court decisions (James, 2015). The commanding officer making these severe decisions is in the accused chain of command, creating an unjustly biased situation, threatening both the right to a fair and impartial trial as well as survivors' access to meaningful justice (James, 2015). Sarah Plummer, MSA Survivor, U.S. Marine Corps, stated that this kind of decision-making authority "just doesn't make sense. It's like your brother raping you and having your dad decide the case" (Gillibrand, 2013).

MJIA of 2017 & 2019

The MJIA of 2017 was another try by Sen. Gillibrand to amend title 10 of the USC, specifically severe offenses under the UCMJ. Again, the bill, unfortunately, failed to be enacted. Bill 2141 was read twice and referred to the Committee on Armed Services, where it was never scheduled for future hearings (S. 2141, 2017). In regards to the MJIA of 2019, unfortunately, it seems that Congress will not pass. According to GovTrack, this bill has a "2% chance of being enacted," the reasoning for this statistic is because the bill's primary sponsor is a Democrat, but further states that "...factors are based on correlations which may not indicate causation." (GovTrack.us, 2020).

SAPRO report FY2018

By its admission, the Pentagon is out of time and excuses, said Gillibrand (Gillibrand, 2013). For years, survivors have said that change needs to be made to the military justice system

to end the plague of MSA & MST, changes that our allies around the globe have already made. Move the decision-making authority outside of the chain of command, transferring cases to trained military prosecutors (Gillibrand, 2013). The DoD has tried multiple reforms, but they do not work, SA is still pervasive (Carle, 2019). Gillibrand is correct. The SAPRO report released in 2019 concerning FY 2018 shows that SA in the military has increased exponentially, while the number of cases going to courts-martial is steadily going down. About 6.2 percent of active-duty women indicated experiencing SA in the year before being surveyed. This rate reflects a statistically significant increase compared to the 4.3 percent for women measured in 2016. The estimated prevalence rate for active duty men remained statistically unchanged from 0.6% in 2016, and 0.7% in 2018. Using these rates, the Department estimates 20,500 Service members, representing about 13,000 women and 7,500 men, who experienced some form of SA in 2018, up from approximately 14,900 in 2016. (SAPRO Report, 2019).

“For years, survivor after survivor has told us the change we need to make in the military justice system to end the scourge of sexual assault in our military – the same change that some of our allies all around the world have already made: move the decision to try these crimes outside of the chain of command to trained military prosecutors. The Department of Defense has tried incremental reforms, but they clearly haven’t worked. Sexual assault is still pervasive – in fact the latest DoD numbers show that sexual assaults in the military have dramatically increased while the number of cases going to trial has gone down. None of this is acceptable. It’s long past time for Congress to step up and create accountability where the DoD has failed. That is how we will finally give our men and women in uniform a justice system that is fair, professional, and actually works” (Gellibrand, 2019).

Chapter 5: Conclusion

Importance should be posed to ensure military leaders, particularly commanders, not be let "off the hook" when it comes to ensuring the concise and appropriate application of the UCMJ. Commanders should still be fully responsible for their "command climate" if the Senate is to make any changes. Many crimes should continue to be processed by military commanders, ensuring 'good order and discipline.' Had we uncritically observed this idiom in the past, we would not have integrated such a diverse population within the military. These advances in military policy went in complete contrast to multiple military brass and senior defense personnel hiding behind the veil that these advances would be detrimental 'unit cohesion' and 'good order and discipline,' damaging the effective capability of the Armed Forces to operate. However, integrating and diversifying the military did not erode the military, instead, it enhanced to a good degree the reputation and capability of our military and the ability of individual military members to serve without added fears. The MJIA is attempting to leave many crimes in the military chain of command, offenses such as insubordination, being absent without leave (AWOL), and desertion are among a few that would be required to stay, especially in times of war and in operational combat environments.

Limitations of the study

This study is limited in the inability to view the JSC meeting minutes. The JSC has the responsibility for recommending modifications to the President in regards to the UCMJ and the MCM. A Freedom of Information Act (FOIA) request was not filed, but it is very likely the request would be denied because those reports are deemed Confidential - For Official Use Only.

Should the JSC minutes become available or ever get released to the public, it might be interesting to review.

Additionally, another limitation this study faced was the lack of MSA/SA/MST reported data before 2004, before the establishment of SAPRO. The branches of the Armed Forces were not instructed by Congress to report MSA until that year. Reporting at least in a restricted fashion was yet developed, and data collection on restricted reporting did not begin until 2006. It has been very challenging to locate MSA data before 2006. Consequently, this study is limited in the inability to determine the frequency of MSA between 1950 and 2004, outside of media reported scandals.

It could have been beneficial to this study to have conducted interviews of SA, MST, or MSA survivors (Survivor stories are available, but not entire analyzable case studies). This would have introduced substantial data and analysis within the framework of MSA.

Future Research

This study intended to analyze the changes to the UCMJ or lack thereof. Any potential continued research should file a FOIA in an attempt to gain access to information not readily available such as JSC meeting minutes. This data could provide significant insight with regards to the reasons why such long-time frames elapse between discernable changes to the UCMJ. The complexities of the decision-making process and what goes on behind the closed doors of the JSC meeting could offer more familiarity with the complexities of its inner workings by junior and senior service-members, civilians, and all who may not understand the intricacies of military life, culture, customs, and courtesies.

Policy Recommendations

Survivors do not have the assurance needed for justice to be attained within the chain of command. Lack of faith in the system, as well as the fear of retribution, and retaliation, has a damaging consequence on reporting, leaving attackers free to attack again without any consequences. Even with public outrage in light of scandals, modifications to the military justice system have proven to be inadequate, and at times, a failure due to the significant underlying weakness: commanders' authority.

Many crimes should continue to be processed by military commanders that ensure 'good order and discipline' within the ranks of our military. Just as the MJIA attempted to do by allowing many prosecutable crimes to be left within the military chain of command, offenses such as insubordination, being AWOL, and desertion are among a few that would be required to stay notably in times of war.

Historically, abuses from command authority covered-up reports as well as MSA scandals. Even though command authority has diminished with the various improvement in the UCMJ, MJIA, and the NDAA, military officers have their priorities that may or may not be in line at the top, impacting SA announcing and results. When considering the lack of judicial training, low conviction rates are to be expected. Nevertheless, given leaderships constant demand for 'good order and discipline' in our Armed Forces, it is doubtful that Congress would execute such a change at any point soon.

Congress, the Pentagon, and the DoD should build a strategy not asserted in rage and awareness by the general public entangled in scandals and misconduct. Instead, Congress, as well as military authorities, should work to create a system in which external, impartial, analysts manage an assortment of information such as reports, analyses, and conviction rates. Should

Congress enact the recommendations, it could seal many cracks in MSA, possibly ending this disgraceful epidemic.

Conclusion

The United States Armed Forces prides its self as an organization of leadership and integrity. Every day the majority of service-members carry themselves with an extraordinary level of professionalism that we have come to demand of our nation's service-members. When it comes to SA, the DoDs track record is getting exponentially more severe. The people of the United States should cringe at the thought of what is to come, with every passing day, week, month, year stories involving sexual misconduct and scandals in the military make headlines. SA, MSA, MST in the military are on a dangerous and steep climb, and it is necessary that Congress and military leaders, leave no option off the table if they genuinely wish to halt this reprehensible epidemic. By all measures, the status quo is failing.

“I’ve seen many attempts to squash this harassment culture from the military. Zero tolerance. Reporting procedures. Trained personnel to help guide victims through the process. Sensitivity training for all personnel. Films. Discussions. Focus groups. Role playing. Sometimes as often as every six months. Always hoping that the next thing will be the one to make a difference. Somehow there was always one more case. Now SPC Guillen was dead. And I knew why. Because the culture of sexual harassment was still alive and well, despite our best efforts.”

(Col. Schoeller. Betsy, USAF (Ret.), 2020).

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