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MILITARY SEX SCANDALS FROM TAILHOOK TO THE PRESENT:
THE CURE CAN BE WORSE THAN THE DISEASE

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**Military Sex Scandals from Tailhook to the Present:
The Cure Can Be Worse than the Disease**

Kingsley R. Browne*

Abstract: Over three decades after the birth of the All-Volunteer Force and sexual integration of the service academies, and over a decade since some combat positions – including aviation and service on warships – were opened to women, sexual integration continues to be fraught with controversy. The subject of sex – that is, sexual relations – is an integral part of the story.

As harmful as the sexual behavior can sometimes be, the military's reaction to it and the ensuing scandals are often even more harmful. This reaction – often driven by political considerations operating on the military's civilian leadership and its congressional overseers – has been a repeated source of morale problems. A characteristic response to sexual issues has been to label men as sexual predators who require punishment and to label women as victims who require counseling (at most), irrespective of the willingness with which women participated in the challenged activities. These reactions create a substantial impediment to women's acceptance.

* **Optional** footnote for author's professional title and thanks, if desired and not included in body of article

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KINGSLEY R. BROWNE*

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INTRODUCTION

Over three decades after the birth of the All-Volunteer Force and integration of the service academies, and over a decade since some combat positions—including aviation and service on warships—were opened to women, sexual integration of the military continues to be fraught with controversy.¹ Differences in physical strength and in a variety of psychological characteristics make the sexes differently suited to both combat and non-combat positions. Apart from these individual differences between men and women, interpersonal dynamics between men and women can imperil the cohesion of military units in a number of ways, and the military's response to these dynamics can imperil cohesion even more.

The subject of sex—that is, sexual relations—is an integral part of the story of integration of women into the military. It is a fact of life that, when large numbers of reproductive-aged men and women are brought together, there will be a fair amount of sexual behavior, a fair amount of unwanted sexual attention, and, especially unfortunately, some sexual coercion. The military is not unique in this respect. The same can be said for, say, universities, corporations, and bars. A number of attributes of the military present special challenges, however, including the existence of a formal rank structure, the fact that the military is an inherently masculine enterprise,² and the centralized—and often politicized—mechanisms for responding to sexual issues at the level of the service, the Department of Defense, and Congress.

As harmful as sexual behavior sometimes can be, the military's reaction to it can be even worse. It is fair to say that a characteristic response to sexual issues by military overseers has been to label men as sexual predators who require punishment and to label women as victims who require counseling (at most), irrespective of the willingness with which women participated in the challenged activities. The military's reaction to sexual scandals—often driven by political pressures operating on the military's civilian leadership and its congressional overseers—has been a repeated source of military morale problems.

I. TAILHOOK

Perhaps the “granddaddy” of all military sex scandals was the one arising out of the September 1991 convention of the Tailhook Association, which was held at the Hilton Hotel in Las Vegas. The association, which gets its name from the hook on the rear of a plane that snags the arresting wire on an aircraft-carrier flight deck, is a private association of active-duty and retired Navy and Marine aviators.³ Although the 1991 convention has by now acquired the reputation of

1. See generally KINGSLEY BROWNE, CO-ED COMBAT: SHOULD WOMEN FIGHT THE NATION'S WARS? (forthcoming Nov. 2007).

2. *Id.*

3. Rowan Scarborough, *10,000 Navy Jobs Cut: The Reason—Tailhook or Politics?*, WASH. TIMES, June 30, 1992, at A1 [hereinafter Scarborough, *10,000 Navy Jobs Cut*].

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an out-of-control fraternity party from *Animal House*—a reputation not wholly undeserved—it also served the more serious function of a professional association, including symposia on aviation issues and providing aviators the opportunity to mingle with their superiors.⁴ The events for which the convention has come to be known were not themselves sponsored by the Association, but rather by individual members and their flight squadrons. In all, about 4,000 participants attended this Tailhook convention (the first since the military's dazzling success in the 1991 Gulf War), including thirty-two active-duty Navy admirals and Marine generals.⁵

The story is a familiar one that has been told many times, often being embellished in the retelling. On Friday and Saturday of the convention, "hospitality suites" hosted by various flight squadrons were the scene of what can accurately be described as debauchery.⁶ The activities included performances by female strippers, sexual interaction with these strippers,⁷ drinking "belly/navel shots,"⁸ which entails men drinking alcohol out of women's navels, "butt biting"⁹ and leg shaving,¹⁰ which are what they sound like, and "ball walking," which consisted of fully clothed male officers walking around with their genitals exposed.¹¹ The activities spread into the third-floor hall linking the suites. The most infamous of the activities occurred on Saturday night. A "gantlet" (or "gantlet")—a double line of male aviators, one on each side of the hallway—was set up, and those women who had the fortune or misfortune, depending upon their preferences, of finding themselves in the hallway were fondled and groped as they walked past the men.¹²

One of those women was Paula Coughlin, an admiral's aide who claimed that she had been victimized in the gantlet.¹³ Depending upon whose version of the story is believed, she reported this activity to her boss within a day or a couple of weeks, and the Chief of Naval Aviation learned of the event sometime shortly after that.¹⁴ Although the convention took place in early September, it did not make the news until late October,¹⁵ at about the same time that the nation was transfixed by allegations of sexual harassment by Anita Hill against Supreme Court nominee Clarence Thomas.¹⁶

4. OFFICE OF THE INSPECTOR GEN., THE TAILHOOK REPORT 15-17 (1993) [hereinafter TAILHOOK REPORT].

5. *Id.* at 17, 90.

6. *Id.* at 25-27.

7. *Id.* at 74.

8. *Id.* at 69.

9. *Id.* at 15-17.

10. *Id.* at 67-69.

11. *Id.* at 61-65.

12. *Id.* at 37-54.

13. *Id.* at 213-16.

14. GREGORY L. VISTICA, FALL FROM GLORY: THE MEN WHO SANK THE U.S. NAVY 339-40 (1997).

15. John Lancaster, *Navy "Gantlet" Probed: Sex Harassment Alleged at Fliers' Convention*, WASH. POST, Oct. 30, 1991, at A1.

16. Dan Balz, *Thomas Hearings Resonate Across U.S.: Harassment Controversy Highlights Political, Cultural, Class Divisions*, WASH. POST, Oct. 17, 1991, at A1.

A. The Reaction

The reaction of the Navy and Congress to the Tailhook mess converted an out-of-control party into a career-killer for hundreds of Navy personnel and a morale-killer for thousands of others. The Navy's initial response was to assign investigatory responsibility to its Inspector General and the Naval Investigative Service. This investigation turned up many incidents of inappropriate behavior but little in the way of identifiable suspects. Few women were able to identify their assailants, and few of the men attending the convention provided useful information. Although some attributed the aviators' reticence to a conspiracy, Jean Zimmerman suggests that no conspiracy was even necessary. Most of these aviators had gone through Survival, Evasion, Resistance, and Escape ("SERE") training, she argues, and were well-versed in ways to avoid providing useful information to interrogators.¹⁷ The failure of the investigation to produce suspects to match the lurid facts it uncovered led to charges of "cover-up." Navy Secretary H. Lawrence Garrett, III, resigned and was replaced by Sean O'Keefe as Acting Secretary, who was quick to announce that "we get it."¹⁸

The political reaction to the case—and to the perceived Navy cover-up—was intense. The Chairman of the Defense Appropriations Subcommittee, Rep. John Murtha—who has more recently earned a measure of fame for his call for immediate withdrawal from Iraq—announced that his subcommittee was cutting 10,000 Navy jobs in retaliation for the Navy's handling of the scandal.¹⁹ The Senate Armed Services Committee put a hold on promotions of about 4,500 Navy and Marine Corps officers until it could be determined which ones were associated with the Tailhook convention.²⁰

Advocates of an expanded combat role for women seized on Tailhook to argue—somewhat irrationally, if one thinks about it—that the scandal proved the necessity of placing women into combat positions. Opening such positions to women would result in their receiving greater respect from their male colleagues, they argued, making women's abuse at the hands of their colleagues less likely.²¹ Others drew the opposite conclusion, asking how women are going to stand up to the enemy if they require intervention of Congress and the Pentagon to protect them from their peers.²² As one columnist suggested, "If a grown woman can't handle some friendly drunks in a public place, then she's hardly qualified to command men in the much more serious and stressful environment of war."²³ Or, as Elaine Donnelly of the Center for Military Readiness put it, the argument is that "military women must be exposed to

17. JEAN ZIMMERMAN, *TAILSPIN: WOMEN AT WAR IN THE WAKE OF TAILHOOK* 67–79 (1995).

18. Melissa Healy, *Pentagon Blasts Navy's Tailhook Investigation*, L.A. TIMES, Sept. 25, 1992, at A1.

19. Scarborough, *10,000 Navy Jobs Cut*, *supra* note 3.

20. *Id.*

21. Letta Tayler, *Operation Parity: Assaults Renew Debate on Role of Women*, NEWSDAY, July 27, 1992, at 6.

22. John Lancaster, *Reports of Sexual Assaults Add Fuel to Debate over Women in Combat: Partisans on Both Sides Find Ammunition in Tailhook, Other Incidents*, WASH. POST, July 14, 1992, at A3.

23. Charley Reese, *Women in Navy Should Handle Their Own Personal Problems*, ORLANDO SENTINEL, July 7, 1992, at A8.

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thugs behind enemy lines in order to protect them from drunken comrades at home.”²⁴

Make no mistake: The third floor of the Hilton Hotel was not a place one would like his daughter, his wife, his girlfriend, his sister, or his mother to be (or, for that matter, his son, his brother, or his father). Unquestionably, sexual misconduct occurred that reflected poorly on the Navy and, at a minimum, warranted administrative punishment of some of the participants. The investigation, however, went far beyond any reasonable bounds. The approach of the Navy and of its congressional overseers was to view all complaints as well-founded, all of the women involved as victims (whether or not they viewed themselves that way), and all of the men who attended the convention (and many who did not) as oppressors of women.

B. The Pentagon Inspector General’s Investigation

Dissatisfaction with the Navy IG’s investigation led to assignment of investigatory responsibility to the Department of Defense Inspector General, with the investigation being headed by Deputy IG Derek J. Vander Schaaf.²⁵ It was clear from the outset that the Pentagon Inspector General’s Office had no taste for the kind of accusations of cover-up that sank Secretary Garrett. The Pentagon IG’s investigation and subsequent Navy prosecutions were often—and not unfairly—compared to “witch hunts,”²⁶ “inquisitions,”²⁷ and “Star Chamber” proceedings.²⁸

The Inspector General’s report identified 140 Navy and Marine officers, eighty-three female victims, and seven male victims,²⁹ although the male “victims”—even ones who claimed to have been subjected to sexual groping by women—were never mentioned again. The investigation clearly demonstrated that the IG was more concerned about avoiding criticism for being too lax than avoiding criticism for being unfair. In Paula Coughlin’s later civil trial against the Hilton, the judge refused to allow the IG report to be admitted, finding that it was “largely conclusory and based on hearsay and double hearsay indicating its lack of trustworthiness.”³⁰ One need not feel too sorry for Coughlin, however, as she was awarded \$6.7 million by the jury (reduced by the judge to \$5.2

24. Elaine Donnelly, *The Tailhook Scandals: How the Navy’s Sexual Harassment Investigation Case Was Mishandled*, NAT’L REV., Mar. 7, 1994, at 59.

25. Bill Gertz, *140 Implicated in Tailhook Report: Navy Leadership “Breakdown” Cited*, WASH. TIMES, Apr. 24, 1993, at A1 [hereinafter Gertz, *140 Implicated*].

26. Rowan Scarborough, *Open Season on Navy: Scandal Gives Hill Ammunition*, WASH. TIMES, July 20, 1992, at A1.

27. Philip Gold, *This Is Not the Navy I Knew . . . but it Was Adm. Boorda’s Navy*, WASH. TIMES, May 21, 1996, at A15.

28. Paul C. Roberts, *Military Loyalties vs. Sexual Politics*, WASH. TIMES, Mar. 9, 1994, at A16.

29. Gertz, *140 Implicated*, *supra* note 25.

30. Rowan Scarborough, *Tailhook Report Barred at Civil Trial: Pentagon Probe “Not Trustworthy,”* WASH. TIMES, Sept. 6, 1994, at A1 [hereinafter Scarborough, *Tailhook Report Barred*].

million), in addition to the \$400,000 paid by the Tailhook Association to settle the case against it.³¹

Inspector General investigators engaged in conduct that can only be called abusive. Many officers were subjected to questions about whether they masturbated and the kind of sex they engaged in with their wives or girlfriends. Others were falsely told that a colleague had implicated them in misconduct, a common interrogation technique in civilian law enforcement but a dangerous one to use in a widespread fishing expedition among comrades in arms. Sowing the seeds of distrust among squadron-mates is a perilous course, and the technique contributed to the low morale already created by the investigation. As one Marine flier said,

When you're in combat, you depend on a lot of people, and one thing you don't want is people who might have to save you thinking you might be doing something behind their back. It's very dangerous to play people off of each other who rely on each other in combat.³²

Of course, the Tailhook investigation and the subsequent rush to put women in combat positions were never about military effectiveness.

C. The Navy Prosecutions

The Pentagon IG then passed the baton to the Navy for prosecution. Admiral Frank B. Kelso, Chief of Naval Operations, placed Admiral J. Paul Reason in charge of Navy prosecutions and Major General Charles Krulak (later Commandant of the Marine Corps) in charge of Marine prosecutions.³³ The Navy's approach to prosecutions turned out to be as heavy-handed as the IG's approach to investigations.

1. *Paula Coughlin: The Victim's Face*

The poster girl for the Tailhook case was Paula Coughlin herself, "Victim Number 50" in the Inspector General's report.³⁴ She alleged that she had come onto the third floor of the hotel on Saturday night and was immediately pulled into the gauntlet, and that men were groping her and trying to take off her panties. She says that she twice bit her primary attacker, who had grabbed her from behind, believing that she had drawn blood. She then was able to escape.

Coughlin subsequently picked out the picture of a Marine from a photographic array, identifying him as her attacker. The only problem was that the Marine pictured was a "ringer"—someone who had not attended the Tailhook convention. After being tipped off that the person she had identified had not even been at the convention, she then picked Marine Captain Gregory

31. Patricia Brennan, *"She Stood Alone: The Tailhook Scandal": Did They Get Away with It?*, WASH. POST, May 21, 1995, at Y7.

32. Rowan Scarborough, *Morale Shot down by Tailhook Probe: Fliers Humiliated by Sex Questions*, WASH. TIMES, March 22, 1993, at A1.

33. Gertz, *140 Implicated*, *supra* note 25.

34. TAILHOOK REPORT, *supra* note 4, at 213-16.

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Bonam out of a line-up.³⁵ He had been wearing a burnt-orange shirt, she claimed. Unfortunately for Coughlin, pictures from the event showed that Bonam had been wearing a green shirt with a distinctive pattern.³⁶ Moreover, Bonam had no scar on his arm, as would have been expected from Coughlin's description of the ferocity of her bite, and Bonam had alibi witnesses who placed him on the hotel terrace at the time of the attack.³⁷ Also, a civilian witness had described Coughlin's assailant as being about five-foot-four, about nine inches shorter than Capt. Bonam.³⁸ None of this evidence was enough to spare Bonam from the efforts of Navy prosecutors, however.

It also turned out that Coughlin had been a willing participant in some of the "wrongful" activities. She claimed that her visit to the third floor on Saturday night had been her first. On Friday night, she asserted, she had been in her hotel room all evening, going to bed around 9 p.m.³⁹ However, she was placed on the third floor on Friday night by the sworn testimony of four witnesses, including two female pilots, one of whom had lobbied alongside Coughlin on Capitol Hill for repeal of the ban on women flying in combat missions. According to one of the female pilots, she saw Coughlin getting her legs shaved. It caught her eye because "she was in her uniform, in her whites, and she had bare legs, you know, no hose on, and she had her skirt, you know, hiked up fairly high."⁴⁰ Although this pilot attempted to tell investigators from the Inspector General's office about Coughlin's activities, she said that they were not interested in hearing anything negative about Coughlin.

Indeed, it was established Defense Department policy that the investigation would not include misconduct by female officers, and even when eyewitness accounts were provided to investigators, they took no action.⁴¹ For example, Lt. Rolando Diaz—nicknamed "the Barber of Seville"⁴²—had told IG investigators that he had shaved Coughlin's legs and that she had shown her appreciation by signing a banner, "You made me see God. The Paulster." Despite Diaz's statements and the banner bearing her signature, which the IG had in its possession, the IG claimed not to have received any direct evidence that Coughlin had participated in any misconduct.⁴³ Although neither Coughlin nor any other woman whose legs he shaved was subjected to any discipline, Lt. Diaz faced a court-martial that could have resulted in a prison term and dismissal from the Navy. Before trial, he agreed to accept a non-judicial punishment,

35. Bill Gertz, *Tailhook Defense Cites "Irregular" Investigation*, WASH. TIMES, Aug. 19, 1993, at A3.

36. Rowan Scarborough, *Corps Urged to Drop Weak Tailhook Case*, WASH. TIMES, Oct. 4, 1993, at A1 [hereinafter Scarborough, *Corps Urged to Drop*].

37. Bill Gertz, *Tailhook Suspect Calls ID Mistaken: Marine Flier Disputes Accuser's Tale*, WASH. TIMES, Aug. 18, 1993, at A1.

38. Scarborough, *Corps Urged to Drop*, *supra* note 36.

39. Rowan Scarborough, *Tailhook Accuser Is Suing the Hotel: Witnesses Counter Coughlin's Claims*, WASH. TIMES, July 11, 1994, at A1.

40. *Id.*

41. Scarborough, *Tailhook Report Barred*, *supra* note 30.

42. ZIMMERMAN, *supra* note 17, at 3.

43. TAILHOOK REPORT, *supra* note 4, at 215.

which could result in a fine or letter of reprimand but spare him from the court-martial.⁴⁴

The claim that Coughlin “unwittingly”⁴⁵ stumbled onto the third floor that Saturday night simply appears to be false. Her presence on Friday night indicates that she had reason to know what was going on. Any notion that Coughlin was a shrinking violet is also dispelled by statements by a former boyfriend given to the staff of Admiral Kelso indicating that she had shown up at a Navy “dining-in party” wearing “black fishnet panty hose, high heels, a short black miniskirt, a black tuxedo jacket and carrying a large rubber dildo.”⁴⁶ Given her prevarication, it is small wonder that she later complained that she was ostracized by her fellow aviators.⁴⁷

The double standard applied to male and female misconduct in the Tailhook affair was palpable. The IG Report specifically noted that “many women freely and knowingly participated in gauntlet activities . . . and seemed to enjoy the attention and interaction with the aviators.”⁴⁸ They were “smiling and giggling” and some went through the line numerous times. Yet none of the Navy women involved were censured for their participation. As military sociologist Charles Moskos observed, “no female officer who misbehaved was reprimanded or sanctioned, sending a terrible message to the fleet, meaning women were held to a different standard.”⁴⁹

2. *Cole Cowden and Elizabeth Warnick*

A particularly egregious case involved Navy Lt. Cole Cowden, who was prosecuted for sexual assault and for conduct unbecoming an officer. One charge, which dated back to the 1990 Tailhook convention, involved a claim by Navy Lt. Elizabeth Warnick that Cowden, along with two other men, had forcibly sexually assaulted her by pushing her down on a bed, removing her panties, and grabbing her genitals in an attempt to gang rape her. Warnick also complained that she had been receiving threatening telephone calls from California, where Cowden had been stationed at the time; that someone had slashed the tires on her car; and that she had received a bouquet of roses with a death threat. Another charge against Cowden was based on a picture showing a civilian nurse pulling his face against her clothed breast.

Warnick later admitted under oath that she had lied about the attempted gang rape.⁵⁰ She had concocted the story because she had had consensual sex

44. William H. McMichael, *Navy Officer Avoids Court-Martial: Flier Agrees to Non-Judicial Punishment in Tailhook Case*, SUN-SENTINEL (S. Fla.), Sept. 25, 1993, at 3A.

45. Dana Priest, *Conduct Unbecoming: In the Navy, Sexual Harassment Has Reached Titanic Proportions*, PLAYBOY, July 1996, at 64.

46. VISTICA, *supra* note 14, at 356.

47. Kenneth B. Noble, *Woman Tells of Retaliation for Complaint on Tailhook*, N.Y. TIMES, Oct. 5, 1994, at A18.

48. TAILHOOK REPORT, *supra* note 4, at 42.

49. Gilbert A. Lewthwaite, *Army Heeds the Lessons of Tailhook: Quick Response Averts Suspicion of Cover-Up*, BALTIMORE SUN, Nov. 18, 1996, at 1A.

50. Rowan Scarborough, *Tailhook Witness Told Lies: Navy, IG Knew, Still Sought Trial*, WASH. TIMES, July 23, 1993, at A1 [hereinafter Scarborough, *Tailhook Witness*].

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with Cowden and was afraid that her fiancé would find out. She also admitted that the stories about threats and vandalism were false.⁵¹ Much of Warnick's story was apparently intended to deflect attention from her own misconduct at the 1991 convention. When IG investigators first contacted her, she had been identified by six officers as having taken part in the leg shaving and "belly shots."⁵² She apparently thought—correctly, as it turned out—that playing the victim would spare her conduct from scrutiny.

After Warnick's story fell apart, the hearing officer recommended dropping the other charge against Cowden because the nurse had told investigators that the contact was consensual and she did not consider herself a victim.⁵³ When the Navy prosecutor concurred, expressing ethical objections to continuing the prosecution, Captain Jeffrey Williams, Admiral Reason's senior legal officer, removed the Navy prosecutor from the case and advised Admiral Reason to continue with the prosecution. Captain William Vest, Jr., the judge presiding over the Tailhook prosecutions in Norfolk, Virginia, ultimately removed Williams from the case, finding that Williams had deceived and badgered Cowden and declaring that Williams had "become too personally involved in the prosecution" and had "exceeded the permissible bounds of his official role as legal adviser."⁵⁴ The charge against Cowden was subsequently dropped after review by a specially appointed lawyer.

The most serious wrongdoing in the Cowden story was Warnick's false charge of sexual assault, but she apparently received little, if any, discipline. Yet her attempt to destroy the careers of fellow officers by false accusations of a serious felony was far more calculated than the exuberance that characterized most of the Tailhook activities. Warnick's story is an example of the inaccuracy of the fashionable contention that when women allege sexual assault, "they are almost always telling the truth."⁵⁵

3. Robert Stumpf

One of the most well-known casualties of Tailhook was Commander Robert Stumpf. Commander of the Navy Flight Demonstration Squadron ("Blue Angels"), Stumpf was a superstar F/A-18 pilot, decorated for heroism in the Gulf War. Stumpf attended the convention to receive an award for the best fighter/attack squadron of the year. His Tailhook sin appears to have been being present in a hospitality suite where a stripper was performing. Because Stumpf had to fly home early the next morning, he went back to his room to go

51. United Press International, *Tailhook Defendant Rails at Accusers*, July 16, 1993.

52. *Id.*; Scarborough, *Tailhook Witness*, *supra* note 50.

53. William H. McMichael, *Navy Drops Charges Against Tailhook Officer: The Decision Raises Doubts about the Navy's Ability to Successfully Prosecute Other Officers Implicated in the Scandal*, NEWPORT NEWS DAILY PRESS, Sept. 21, 1993, at A4; Eric Schmitt, *Navy Drops Case of Tailhook Flier*, N.Y. TIMES, Sept. 21, 1993, at A14.

54. Rowan Scarborough, *Tailhook Judge Removes Navy's Top Legal Adviser*, WASH. TIMES, Sept. 17, 1993, at A1 [hereinafter Scarborough, *Tailhook Judge Removes*].

55. ERIN SOLARO, WOMEN IN THE LINE OF FIRE: WHAT YOU SHOULD KNOW ABOUT WOMEN IN THE MILITARY 325 (2006).

to bed. After he left, the stripper apparently performed oral sex on one of the remaining officers.

Stumpf was relieved of his duties after the Inspector General's report indicated that he had been present at the time of the "lewd act." After a week-long hearing five months later, however, the Navy cleared him of any wrongdoing, and he was allowed to rejoin the Blue Angels.⁵⁶ According to his lawyer, the Inspector General knew about a witness who could clear Stumpf, but they had not bothered to interview him.

Stumpf was subsequently up for promotion to captain and assignment as a carrier air-wing commander, a dream job for a naval aviator. The promotion was delayed, however, when the Senate Armed Services Committee learned of his Tailhook involvement, and the Secretary of the Navy removed Stumpf's name from the promotion list.⁵⁷

The Navy then began yet another in the series of investigations into Stumpf's conduct to determine whether his promotion should once again be forwarded to the Senate. However, the hostile and adversarial nature of that proceeding led Stumpf to conclude that the Navy was simply trying to justify not promoting him. Stumpf announced his retirement, effective October 1996, complaining that "the conduct of the last of nine investigations convinced me that the promotion was no longer going to be supported."⁵⁸

Stumpf was ultimately exonerated, although most of the harm he suffered could not be undone. In 2002, the Navy concluded that "an injustice has resulted in not promoting [Stumpf] to the grade of captain."⁵⁹ Although the promotion entitled Stumpf—then flying cargo jets for FedEx—to back pay for the difference between a commander and a captain's pay, it could not restore to him the dream of being carrier air-wing commander. Stumpf expressed the hope that "this is the beginning of a measured re-examination of the injustices accorded to hundreds of naval officers whose promising careers were terminated prematurely during the shameful political hysteria following the 1993 investigations."⁶⁰

4. *Other Victims of Prosecutorial Overreaching*

Cole Cowden and Robert Stumpf were far from the only officers seemingly unfairly targeted by prosecutors. Consider Lt. Mike Bryan, who, while on his way to get a hot dog, spent about five minutes on the third-floor hallway where

56. Rowan Scarborough, *Blue Angels Chief Is Cleared in Tailhook*, WASH. TIMES, Oct. 8, 1993, at A1 [hereinafter Scarborough, *Blue Angels Chief Cleared*].

57. Rowan Scarborough, *Navy Chief Reverses: Won't Promote Pilot Cleared in Tailhook*, WASH. TIMES, Dec. 29, 1995, at A7.

58. Rowan Scarborough, *Tailhook Officer Gives up Fight for Promotion, Retires: Navy Officials Relieved That Battle Is Over*, WASH. TIMES, July 13, 1996, at A3.

59. Rowan Scarborough, *Tailhook Scandal "Injustice" Righted: Retired Officer to Get Promotion*, WASH. TIMES, July 31, 2002, at A1.

60. *Id.*

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women were groped later that night.⁶¹ A promising aviator, he was one of just a few given the opportunity to make the transition from the discontinued A-6 Intruder to the F/A-18 Hornet. Although no one—not the Inspector General, the Navy, nor anyone present at the convention—accused Bryan of any misconduct, the Senate Armed Services Committee blocked his promotion to Lieutenant Commander, although it declined to say exactly why.⁶²

The “hold” on his promotion derailed Bryan’s career. During the pendency of the investigations, Bryan was mostly relegated to desk work, so he had fallen too far behind in the career competition with other aviators ever to catch up. “I’ve slid so long I’m completely off track with my career,” he complained. Frustrated with the long delay that was putting him farther and farther behind, he resigned in early 1997. The Navy’s response was to demand that he return \$10,000 in a re-signing bonus before allowing him to join a Navy reserve unit, despite the fact that he had remained in the Navy to fly, which the Navy was not allowing him to do.

The demand for return of Bryan’s bonus—although ultimately withdrawn⁶³—stands in contrast to the treatment of Paula Coughlin, who was allowed to keep \$18,600 in unearned retention bonus despite her resignation over four years prior to the end of her commitment.⁶⁴ This unprecedented exception was approved by Navy Secretary John Dalton, and it was the only time to date that the Navy had allowed an aviator departing early voluntarily to keep a signing bonus. The stated reason was that her case was special because she was resigning due to the stress of Tailhook and its aftermath. She had, however, signed her contract eight months *after* the Tailhook convention, which is the event that she claimed during her civil trial against the Hilton caused her “post-traumatic stress.”

Consider also the case of Commander Gregory Tritt, an EA-6B Prowler anti-radar jet pilot. A hearing judge had recommended dismissal of charges against him, the most serious of which was indecent assault against a female ensign who had failed to pick him out of a lineup or to identify him at a pretrial hearing. Admiral Reason overruled the recommendation to dismiss and ordered the court-martial to proceed, despite the fact that no victim had identified Tritt as being present.⁶⁵ The final charge of “conduct unbecoming an officer” (for failure to stop the misconduct of others) was finally dropped when Captain William Vest threw out the charges against Tritt and the remaining Tailhook defendants.⁶⁶ Tritt was told that he could return to his job, but facing \$100,000 in

61. Rowan Scarborough, *Tailhook Red Tape Drives Pilot Out: Navy Demands Return of Bonus*, WASH. TIMES, Jan. 3, 1997, at A1; Rowan Scarborough, *Tailhook Scandal Casts Long Shadow: Brings Promising Careers to Their End*, WASH. TIMES, Feb. 15, 1996, at A9.

62. Rowan Scarborough, *Lawmakers Ease Tailhook Promotions: Panel Also Orders Process to Help Officers Answer Charges*, WASH. TIMES, Sept. 28, 1996, at A1.

63. John Fritz, *Denied Promotion, Navy Pilot Quits*, FLA. TIMES-UNION, Jan. 10, 1997, at B1.

64. Rowan Scarborough, *Tailhook Whistleblower to Keep Retention Bonus*, WASH. TIMES, Apr. 27, 1994, at A1.

65. Rowan Scarborough, *Only 3 Assault Cases in Tailhook Scandal*, WASH. TIMES, Aug. 16, 1993, at A1 [hereinafter Scarborough, *Only 3 Assault Cases*].

66. See *infra* text accompanying 78.

debt to his lawyers and having been absent from his squadron for six months while fighting the criminal charges—with the attendant loss of competitive position—Tritt retired a month after the charges were dismissed.⁶⁷

D. The End Result of the Navy Process

Despite the zeal of Navy prosecutors (or perhaps partly because of it), the Navy's prosecutions resulted in not a single conviction. Of the 140 cases referred by the IG for disciplinary action, a majority of them (and almost all of the most serious ones) were dropped due to insufficient evidence. Twenty-eight cases were dealt with by Admiral Reason at non-judicial "admiral's masts," with sanctions generally being limited to fines, reprimands, and some non-punitive actions.⁶⁸

Some interpreted the failure of the prosecutions as more evidence of cover-up rather than as a product of weak cases and prosecutorial over-reaching. Frank Rich of the *New York Times* asserted: "The scandal has been swept under the Navy's rug—140 marauding Navy and Marine pilots; 83 assaulted women; 0 Courts-Martial."⁶⁹ It is doubtful in the extreme that the officers who faced charges and investigations—who suffered serious and sometimes fatal career damage—believed that the scandal was being swept under the rug. According to a PBS report,⁷⁰ Tailhook terminated or damaged the careers of fourteen admirals and almost 300 naval aviators.⁷¹ The report might have added that it made naval aviation an unpleasant place to be for thousands of others and led to an exodus of aviators from the Navy.⁷²

Far from wishing to protect the accused officers, the mindset of much of the naval prosecution was to get them at all costs. In the words of one Tailhook defense lawyer, a former Marine Corps prosecutor, "Anybody who said they were a victim, their words were taken as gospel, and anybody who happened to wear wings was a culprit. The insanity of this whole thing is a substantial percentage of people . . . identified as victims didn't regard themselves as victims."⁷³

67. Rowan Scarborough, *Cleared but Tainted: Tailhook Defendant Decides to Leave Navy*, WASH. TIMES, Mar. 14, 1994, at A1.

68. Rowan Scarborough, *Navy Judge Says Kelso Lied in Tailhook Probe: Rebukes Admiral, Dismisses Last 3 Cases*, WASH. TIMES, Feb. 9, 1994, at A1 [hereinafter Scarborough, *Navy Judge Says Kelso Lied*].

69. Frank Rich, *Journal: The Girl next Door*, N.Y. TIMES, Feb. 20, 1994, § 4, at 13.

70. *Frontline: The Navy Blues: Tailhook '91* (PBS television broadcast Oct. 16, 1996).

71. PBS, *Frontline: The Navy Blues: Tailhook '91: Post Tailhook Punishment*, <http://www.pbs.org/wgbh/pages/frontline/shows/navy/tailhook/disc.html> (last visited Mar. 5, 2007); see also *Frontline: The Navy Blues: Tailhook '91* (PBS television broadcast Oct. 15, 1996) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/navy/script.html>).

72. Robert Stumpf, *Problems with Pilot Retention in the Post-Tailhook Armed Forces*, Remarks at the Center for Military Readiness Conference at the U.S. Capitol, Washington, D.C. (Oct. 21, 1998) (transcript on file with author), cited in Kingsley R. Browne, *Women at War: An Evolutionary Perspective*, 49 BUFF. L. REV. 51, 199 n.761 (2001).

73. Rowan Scarborough, *Politics Blamed for Flaws in Tailhook Probe, Cases*, WASH. TIMES, Feb. 18, 1994, at A3 [hereinafter Scarborough, *Politics Blamed*].

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Admiral Reason, who headed the Tailhook prosecutions, had actually attempted to prevent the accused flyers from defending themselves at all. He urged that the Secretary of Navy issue unusual "letters of censure" against six officers, including Robert Stumpf. Unlike a court-martial or even an admiral's mast, a career-ending letter of censure does not give the accused officer an opportunity to defend himself. Admiral Stanley Arthur rejected this request and ordered that Reason either prosecute the accused officers or dismiss the charges.⁷⁴

The judicial response to the behavior and investigatory tactics of the Inspector General and Navy prosecutors was harsh. Military judge Commander Larry McCullough wrote in an opinion that IG investigators "were heavy-handed and possibly abusive in their treatment of junior officers whom they questioned."⁷⁵ Captain Vest, the judge who ultimately dismissed the last charges of the Tailhook charges because of Navy misconduct, described the conduct of IG investigators as a "novice approach to criminal investigation [that] resulted in the wholesale repudiation of reports by many of the witnesses."⁷⁶ The U.S. Court of Military Appeals described the attempts by IG investigators and Navy prosecutors to implicate others as "reflect[ing] a most curiously careless and amateurish approach to a very high-profile case by experienced military lawyers and investigators. At worst, it raises the possibility of a shadiness in respecting the rights of military members."⁷⁷

Three Navy prosecutors were removed by the judge for inappropriate and overzealous conduct.⁷⁸ By contrast, it will be recalled, the Navy removed a prosecutor from the prosecution of Cole Cowden for *not* being sufficiently overzealous, as reflected in his expressed reservations about continuing the prosecution after Elizabeth Warnick admitted that she had lied and the hearing officer had recommended dismissal of all charges.⁷⁹

The final act in the criminal prosecutions was written by Captain Vest, when he dismissed charges against the remaining three officers. He ruled that Admiral Frank Kelso had a fatal conflict of interest that tainted all of the prosecutions. Admiral Kelso had been present at the Tailhook convention, although he denied having been present for any of the sexual misconduct. A number of witnesses challenged his account, however, and Captain Vest concluded that Admiral Kelso had lied.⁸⁰ He also concluded that Kelso had manipulated "the initial investigative process and the subsequent [adjudication] process in a manner designed to shield his personal involvement." Among other things, Captain Vest concluded, the Admiral had excluded from the charge of the Naval Investigative Service the conduct of flag-rank officers and had taken

74. See Scarborough, *Blue Angels Chief Cleared*, *supra* note 56.

75. Scarborough, *Politics Blamed*, *supra* note 73.

76. *Id.*

77. *Id.*

78. Rowan Scarborough, *Tailhook Judge Fires Prosecutor for Misconduct*, WASH. TIMES, Feb. 1, 1994, at A3.

79. Scarborough, *Tailhook Judge Removes*, *supra* note 54.

80. Scarborough, *Navy Judge Says Kelso Lied*, *supra* note 68, at A1.

custody of all Tailhook files on the flag officers who attended the convention, including his own. Captain Vest ruled that in light of his conflict of interest, Kelso's naming of Admiral Reason warranted dismissal of the last three charges in Tailhook.

During the course of the Tailhook proceedings, Admiral Kelso had modified his opposition to women's service on combat ships, a turnaround that many attributed to his desire to keep his job.⁸¹ After Captain Vest's stinging rebuke, Admiral Kelso sought to retire two months before his term as CNO was over. Kelso's decision to retire provoked an acrimonious fight in the Senate over whether he would be allowed to retire with his four stars or lose two of them, as the Senate must confirm the retirements of all three- and four-star officers; if it does not, they retire with just two stars. By a narrow 53–46 vote, with all seven of the Senate's women voting against him, Kelso was allowed to keep his four stars.⁸²

E. Unlawful Command Influence

The unfairness to the Tailhook accused resulted in part from characteristics of the military judicial process. Military prosecutions face a special challenge, one that many in Congress were either ignorant of or simply insensitive to. The problem is command influence. In the civilian world, the Justice Department, a part of the Executive Branch, prosecutes federal criminal cases. The cases are heard by federal judges, who are representatives of the Judicial Branch. These judges have "life tenure," insulating them to a very large extent from political pressures. In the military, however, almost all of the players are military personnel in the military chain of command.⁸³ Thus, in the Tailhook cases, the decision to prosecute was made by the "convening authority"—Admiral Reason in the Navy prosecutions, who was named by Admiral Kelso.⁸⁴ The prosecutors were Navy officers from the JAG corps, and the judges and jurors were also Navy officers. If the accused did not hire a civilian lawyer—though many did—then his defense lawyer was also a Navy officer. The Navy chain of command goes up through the uniformed ranks, to the Secretary of the Navy, to the Secretary of Defense, and ultimately to the President—the Commander in Chief.

In the Tailhook scandal, there were many indicia of inappropriate command influence, starting at the top. After Paula Coughlin went public with her accusations, she was invited to meet with President George H.W. Bush and First Lady Barbara Bush and was given their sympathy. Congress was on the

81. VISTICA, *supra* note 14, at 373; Editorial, *Frightened Chiefs, Abandoned Troops*, WASH. TIMES, Apr. 30, 1993, at A4 (suggesting that Admiral Kelso had "become a pathetic caricature, so eager to retain his brass buttons and silk stripes that he would buy his uniforms at Victoria's Secret if Patsy Schroeder suggested it").

82. Rowan Scarborough, *Women Foes Aside, Senate Votes Kelso 4-Star Retirement*, WASH. TIMES, Apr. 20, 1994, at A3.

83. Frederic I. Lederer & Barbara H. Zelfiff, *Needed: An Independent Military Judiciary: A Proposal to Amend the Uniform Code of Military Justice*, in EUGENE R. FIDELL & DWIGHT H. SULLIVAN, *EVOLVING MILITARY JUSTICE* 27, 28 (2002).

84. Scarborough, *Tailhook Witness Told Lies*, *supra* note 50.

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warpath, putting pressure on the civilian leadership in the Pentagon and on the Navy brass. It was abundantly clear to the players all along the chain of command that the higher-ups wanted heads to roll, as revealed in the prescient prediction of retired Rear Admiral John Gordon, former Navy Judge Advocate General, who was relieved of duty for his part in the initial Navy investigation and who had retired shortly thereafter.⁸⁵ Even before the Inspector General issued his report, Admiral Gordon predicted:

It is now clear to all that the [Inspector General] has absolutely no standard for its reporting and is primarily interested in the political outcome, not the facts. I truly believe that the command-influence problem created by our political leadership is so severe that we will not see one successful court-martial come of this process.⁸⁶

The result of this command-influence problem was a series of ham-fisted prosecutions, apparently produced by a desire to garner favor from those higher in the chain of command. It is hardly a surprise, then, that those facing charges often felt betrayed by their leadership.

The fact that mistakes were made in the Tailhook investigation does not mean that those who engaged in misconduct should not have been held accountable. Major mistakes were inevitable, however, once the alleged misconduct came to be viewed as the moral equivalent of capital crimes. A critical failure of perspective resulted primarily from pressure by Congress, with the gleeful and at times prurient encouragement of the press. Because the case was always as much about women serving in combat positions as it was about sexual abuse, there was no way that it could have a happy ending for the accused. The investigation was never really about the individual guilt or innocence of the accused, but rather about the collective guilt of the institution for failing to incorporate women fully. The political pressure paid off. Before the scandal and its aftermath were over, the ban on women serving on warships and flying combat aircraft had been lifted.⁸⁷

The misbehavior of Navy and Marine personnel at Tailhook—predominantly, but not exclusively, engaged in by men—was inappropriate, and in a few instances probably criminal. Problems of that nature—although perhaps not to that extent—are entirely foreseeable, even if not inevitable, when high-spirited young men and women are brought together. As the Tailhook investigation revealed, many women were voluntary and eager participants.

Although Tailhook is the best known of the scandals, as will be seen below, it was merely the smash “opening act” for a host of similar events.

85. Melissa Healy, *Wide Range of Victims in Wake of Tailhook Scandal*, L.A. TIMES, Nov. 1, 1992, at A1.

86. Scarborough, *Politics Blamed*, *supra* note 73.

87. John Lancaster, *Nearly All Combat Jobs To Be Open to Women: Front-Line Ground Units Would Be Excluded*, WASH. POST, Apr. 29, 1993, at A1.

II. BEYOND TAILHOOK

Tailhook was justly characterized as “the worst catastrophe for the Navy since Pearl Harbor.”⁸⁸ Indeed, a strong case could be made that it caused more long-lasting damage to the Navy than the 1941 attack, despite the fact that the Japanese attack killed over 2,400 people and destroyed a substantial part of the U.S. fleet. Within a year after Pearl Harbor, the Navy had come back stronger than before the attack, and in less than four years, it had utterly destroyed the Japanese navy. Four years after Tailhook, by contrast, the Navy was still reeling, and some of the harm it inflicted lingers on a decade and a half later.

The harm of Tailhook came primarily in the form of damage to the prestige of the institution, to the careers of hundreds—if not thousands—of Navy and Marine personnel, and to the morale of the entire service, especially the aviation community. To the extent that integration of women into combat roles is viewed negatively—a subject about which there is obviously debate—that is another cost of Tailhook, as is the difficulty of even having a reasoned debate on the subject.

Tailhook was in some ways the beginning—although there had been “mini” scandals even before—but it was surely not the end. Rather, it was the harbinger of much that was to come. It made the civilian and military leadership exquisitely sensitive to any claim that had anything at all to do with sex, and it went far toward purging the military of the “warrior” mentality.

A. The Navy in the Aftermath of Tailhook

One of the most significant results of Tailhook was the Navy’s resultant mad dash to place women into combat positions. The Navy put on a full-court press to get women through aviation training, even, it appears, in circumstances in which men would wash out.⁸⁹ The result was a widespread perception that women were simply not allowed to fail and that attempting to impose standards on women could be career suicide.

When Admiral Frank Kelso retired in 1994, he was replaced as Chief of Naval Operations by Admiral Jeremy (“Mike”) Boorda. Admiral Boorda was to hold that position for a scant two years, until his suicide in 1996. The ostensible reason for his suicide was that he had been wearing “combat V’s” on two of his ribbons that he was not entitled to wear, but there is much speculation that Tailhook, and the timidity—if not outright cowardice—that it instilled in the Navy leadership, played a major role.

An important thread in the Boorda saga began with a sexual-harassment charge filed by Lt. (j.g.) Rebecca Hansen, a helicopter-pilot trainee at Corpus Christi, Texas. She alleged in 1992 that one of her flight instructors had sexually harassed her both physically and verbally. The Navy investigated, and it

88. VISTICA, *supra* note 14, at 15.

89. Becky Garrison, *Female Aviator’s Flying in Question: Squadronmate of Hultgreen Subject of Investigation Aboard Carrier*, NAVY TIMES, July 3, 1995, at 10; Becky Garrison, *Internal Report Confirms Hultgreen’s Error*, NAVY TIMES, Apr. 3, 1996, at 3.

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confirmed the charges of verbal harassment but not those of physical harassment, and the accused harasser was discharged from the service.⁹⁰

After completing ground school in Texas, Hansen was transferred to Pensacola, Florida, for advanced flight training. In March 1993, she washed out of flight school, primarily for poor hand-eye coordination (a rather important ability for a helicopter pilot).⁹¹ Hansen's removal was upheld by a review board and by the commander of the school. Hansen then claimed that the failing grade at Pensacola had been in retaliation for the Corpus Christi sexual harassment complaint. Reviews by the Navy and Defense Department failed to substantiate Hansen's allegation.

Hansen took her complaint to her home-state senator, David Durenberger of Minnesota.⁹² Although the decision had already been reviewed up the chain of command, Admiral Stanley Arthur undertook another review of the matter in response to an inquiry by the senator. Arthur was Vice Chief of Naval Operations and the most senior aviator in the Navy. According to one description, "big, easygoing Stan Arthur was perhaps the best liked and most admired officer in the Navy."⁹³ He had been a legendary pilot in Vietnam—having flown 513 combat missions and been awarded eleven Distinguished Flying Crosses—and was commander of allied naval forces in the Gulf War.⁹⁴ After his review, Admiral Arthur reported to the senator that Hansen was not qualified to be a pilot. She was a "problem student" who not only lacked situational awareness but also had a poor attitude. Arthur wrote, "I do not desire to see her or perhaps others die because she could not perform at a level consistent with our standards."⁹⁵

Not satisfied with the Navy's response, Senator Durenberger placed a "hold" on the nomination of Admiral Arthur to the position of Commander in Chief of Pacific Forces (CINCPAC), the most prestigious operational command in the Navy. Apparently unwilling to be accused of taking the wrong position on a "women's issue" (and unwilling to leave the CINCPAC position vacant for very long), Admiral Boorda gave up on Arthur's nomination,⁹⁶ an action soon followed by Admiral Arthur's retirement.

To add insult to injury (as far as Admiral Arthur's supporters were concerned), Admiral Boorda overruled the decision to discharge Hansen and offered her a job on his staff to work on women's issues, an offer he had also made to Paula Coughlin.⁹⁷ This offer was not good enough for Hansen, who demanded that the Navy upgrade her poor performance ratings to

90. Rowan Scarborough, *Sex Case Trips up Admiral*, WASH. TIMES, June 20, 1994, at A1 [hereinafter Scarborough, *Sex Case Trips*].

91. Gilbert A. Lewthwaite, *Navy Now Ousting Would-Be Pilot Who Was Sexually Harassed*, BALTIMORE SUN, June 30, 1994, at 3A [hereinafter Lewthwaite, *Navy Now Ousting*]; Editorial, *Anchors Aweigh, My Boys and Ms. Lt. Hansen*, WASH. TIMES, July 6, 1994, at A18.

92. VISTICA, *supra* note 14, at 389.

93. Nick Kotz, *Breaking Point*, WASHINGTONIAN, Dec. 1996, at 92-121.

94. *Id.*

95. Scarborough, *Sex Case Trips*, *supra* note 90.

96. VISTICA, *supra* note 14, at 391.

97. BRIAN MITCHELL, *WOMEN IN THE MILITARY: FLIRTING WITH DISASTER* 287 (1998).

“outstanding,”⁹⁸ promote her to full lieutenant on a non-competitive basis, send her to law school, and thereafter assign her to work on women’s issues. She also demanded that the Secretary of the Navy personally apologize to her. When these demands proved to be too much for even the post-Tailhook Navy, she resigned.⁹⁹

The treatment of Admiral Arthur, a much-revered figure, caused substantial resentment, especially among “traditionalists” already alarmed by what they viewed as the overly “politically correct” Navy leadership in the wake of Tailhook. The Hansen affair sent, in the words of Gregory Vistica, “a clear message—one not to be missed by many admirals.”¹⁰⁰ After Admiral Arthur’s experience, he wrote, “any politically sensitive officer understood, rightly or wrongly, that women were to succeed as pilots—period.”

Part of the reaction to Admiral Arthur’s experience was based on the perception that he was a “warrior” who had not been supported by the “political” brass. The conflict between these two viewpoints remains in today’s Navy, and throughout the rest of the military, but at the time it was perhaps at its height. The conflict came to a head when James Webb—who recently won a U.S. Senate seat in Virginia¹⁰¹—gave a blistering speech at the Naval Academy.

Webb is a legendary figure for many people. An Annapolis graduate, he served as a Marine officer in Vietnam. Injured trying to shelter his men from a grenade, he returned from Vietnam with numerous medals, including the Navy Cross.¹⁰² In 1979, three years after women were first admitted to the service academies, Webb made a splash with an article in *Washingtonian* magazine entitled “Women Can’t Fight.”¹⁰³

On April 25, 1996, Webb gave a speech excoriating Navy leadership. He stated, in part:

When one of the finest candidates for Commander in Chief of the Pacific in recent times, a man who flew more than 500 combat missions in Vietnam and then in the Gulf War commanded the largest naval armada since World War II, is ordered into early retirement by the Chief of Naval Operations because one Senator asked on behalf of a constituent why Stan Arthur as Vice Chief of Naval Operations had simply approved a report upholding a decision to wash out a female officer from flight school, who expressed their outrage? Who fought this? Who condemned it?

When a whole generation of officers is asked to accept the flawed wisdom of a permanent stigma and the destruction of the careers of some of the finest aviators in the Navy based on hearsay, unsubstantiated allegations, in some

98. Lewthwaite, *Navy Now Ousting*, *supra* note 91.

99. Rowan Scarborough, *Sex-Case Accuser Demands Pilot Slot, Rejects Pentagon Job*, WASH. TIMES, June 29, 1994, at A9.

100. VISTICA, *supra* note 14, at 393.

101. Michael D. Shear & Alec MacGillis, *Democrats Take Control of Senate As Allen Concedes to Webb in Va.—Victor Vows New Approach To Iraq War*, WASH. POST, Nov. 10, 2006, at A1.

102. Rowan Scarborough, *Navy Academic’s Published Attack Riles Webb Allies*, WASH. TIMES, Sept. 18, 1997, at A6.

103. James Webb, *Women Can’t Fight*, WASHINGTONIAN, Nov. 1979, available at <http://www.washingtonian.com/articles/mediapolitics/2182.html>.

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cases after a full repudiation of anonymous charges that resemble the worst elements of McCarthyism, in effect, turning over the time-honored, even sacred, promotional process which lies at the very core of military leadership to a group of Senate staffers, what admiral has had the courage to risk his own career by putting his stars on the table and defending the integrity of the process and of his people?¹⁰⁴

Webb had hit a nerve. His remarks were greeted with a standing ovation by midshipmen in the audience.¹⁰⁵

Admiral Boorda was dismayed by news of the speech. What bothered him was not so much the content of Webb's remarks—that was just “Webb being Webb,” he commented to aides.¹⁰⁶ What seemed to hurt Boorda the most was the enthusiastic response that Webb had elicited from the midshipmen. The day before Webb's speech, Boorda himself had given a speech at the Academy and had received a standing ovation, yet the next day that same audience was applauding a man who was raking him over the coals.

On Saturday, May 11, 1996, Boorda told his wife that he was going to retire that summer and not serve out the last two years of his term as CNO.¹⁰⁷ The following Monday, an anonymous letter was published in the *Navy Times* stating that Boorda had lost the respect of the officer corps.

Then came the last straw. Shortly after noon on Thursday, May 16, Boorda learned that the *Newsweek* reporters he was scheduled to meet with after lunch were not coming to follow up on the Webb speech but rather to ask him about his wearing of “combat distinguishing devices” on his Navy Achievement Medal and his Navy Commendation Medal, both of which had been awarded to him based upon service off the coast of Vietnam.¹⁰⁸ The Navy had received a Freedom of Information Act request on Boorda's medals the year before, after which the JAG informed Boorda that he was not entitled to wear the “combat V's.” Boorda had then stopped wearing them. “It was an honest mistake,” Boorda said after learning of the reporters' purpose.¹⁰⁹

Boorda then drove to his home at the Navy Yard in southeast Washington, and typed two letters, one to his wife and family, the other “To My Sailors.” The latter noted that “What I am about to do is not very smart but it is right for me.”¹¹⁰ He had asked his sailors “to do the right thing, to care for and take care of each other and to stand up for what is good and correct.” He was about to be accused of improperly wearing the combat devices on two of his medals, and he did not believe that reporters would believe it was an honest mistake, “and you may or may not believe it yourselves.” He could not, he wrote, “bear to bring

104. James Webb, Speech at the Naval Academy, Annapolis, Md. (Apr. 25, 1996) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/navy/readings/jwebbspeech.html>).

105. Kotz, *supra* note 93.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

dishonor to you.” Then, clad in his dress whites, he went out into his garden and put a .38-caliber bullet into his heart.

The response to Admiral Boorda’s death reflected the tensions that roiled the end of his life. Eulogized as a “sailor’s sailor” by Defense Secretary William Perry, Boorda’s many contributions to the Navy were recounted. Sailors had genuine fondness for Boorda, in part because he was a “mustang,” an officer who had worked his way up through the enlisted ranks. A hallmark of his career was, in the words of one chief petty officer, that “he was always willing to fight for what we needed: better housing, better living conditions, more time at home with our families.”

That focus was precisely the problem, according to some of Boorda’s detractors. Richard Grenier, a columnist for the *Washington Times* and an Annapolis graduate and former naval officer himself, wrote:

My friends, now in the older officer class, mostly hate him for having meekly accepted every attack on the Navy from feminists and politically correct politicians. When I went to the Academy I was told in no uncertain terms, “You’re not at a college. You’re not at a university. You’re at a school for fighting men.” I wonder if they still tell the incoming midshipmen that.¹¹¹

Grenier continued, “I’ve never heard a word of praise for Adm. Boorda for anything even remotely warlike, and on any feminist issue he, of course, always took the woman’s side.”¹¹²

Thus closed the 40-year career of Admiral Mike Boorda.

B. The Coast Guard, Too

Boorda was not the first military officer to take his life for reasons ultimately related to Tailhook. Just the year before, Coast Guard Captain Ernie Blanchard had met a similar fate.

In January 1995, Blanchard stood at a lectern to give a speech at the Coast Guard Academy in New London, Connecticut, to an assemblage of cadets, fellow officers, and guests.¹¹³ Given the times, his first statement was an ominous one. Turning to Captain Pat Stillman, his old friend and Commandant of Cadets at the Academy, Blanchard said “Request permission to dispense with political correctness.” And he did. He attempted to warm up the crowd with what some called “dirty jokes,” jokes that you would be embarrassed to tell your mother. Following his “opening monologue,” he turned to more serious Coast Guard topics, which consumed most of his address.¹¹⁴

There remains some disagreement about exactly what jokes were told. One was that Pat Stillman and his wife had enjoyed a memorable honeymoon.¹¹⁵ On their wedding night she snuggled up to him in a sexy negligee and asked,

111. Richard Grenier, *This Is Not the Navy I Knew . . .*, WASH. TIMES, May 21, 1996, at A15.

112. *Id.*

113. Karl Vick, *No Laughing Matter*, WASH. POST, July 7, 1996, at F1.

114. *Id.*

115. *Id.*

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“Dear, now that we’re married, can I do anything that I want?” He replied, “Yes, dear, anything you want.” So, she went to sleep. Another joke involved two “firsties” (seniors) at a pickup joint. Two underclassmen were there, and one asked the other “What’s the difference between garbage and a Bravo Company firstie? The garbage gets picked up!” Yet another involved a cadet who had given his fiancée a diamond brooch with several maritime signal flags surrounding it. When complimented on the brooch, she said that her fiancé had given it to her and that the flags meant “I love you.” In fact, they actually meant “Permission granted to lay alongside”—ba da boom! All together, Blanchard told approximately a dozen jokes.

Now, the primary reason one would be embarrassed to tell one’s mother these jokes is that they are not very funny. They are far from obscene and would pass unremarked if included in a Jay Leno or David Letterman monologue. Yet, predictably, some in the audience were offended. The next day, a chaplain expressed his concerns to Stillman, and the following day a civilian female instructor likewise complained.¹¹⁶ Consultation with the brass at the Academy yielded the conclusion that Blanchard should apologize. Blanchard was contrite and immediately faxed a letter to the Academy to be given to all cadets. His letter was of the self-flagellation genre, which is *de rigueur* in these matters: “I offer my sincere apology if I offended anyone,” he wrote. “If only one person was offended, then my remarks were inappropriate and I will take action to be more considerate in the future. Us old seadogs also need to adapt and change the way we have always done things.”¹¹⁷

The Academy leadership thought that the matter was taken care of, but not everyone was satisfied. Some people, most of whom had not attended the dinner, wanted blood. About a month later, Commander Kathleen Donohoe, the Coast Guard’s “gender policy adviser,” was at the Academy on a routine visit and learned about the Blanchard affair from female officers, none of whom had attended the dinner.¹¹⁸ They gave Donohoe an ultimatum: unless headquarters commenced an official sexual-harassment investigation, they would go to the media. Showing the fortitude that the military so often does in such matters, Admiral Robert Kramek, the Commandant of the Coast Guard, ordered an investigation.

Blanchard was visited by an investigating officer, Captain David A. Potter, who gave him his *Miranda* warnings.¹¹⁹ Blanchard was startled: Over a “bad joke?” he asked. He wanted to know how serious it was, and Potter replied that it was serious enough to convene an informal investigation overseen by Rear Admiral William C. Donnell, who was in charge of Coast Guard personnel.

About a week later, Blanchard was summoned to Potter’s office for interrogation.¹²⁰ Blanchard asked Potter what was the worst that could happen. Potter replied that Blanchard could be court-martialed and lose his pension. To

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

Blanchard, this meant disgrace for himself and financial ruin for his family. Blanchard called Admiral Donnell and offered to resign from the Coast Guard if that would head off the investigation. Donnell urged Blanchard not to overreact and told him that he was being premature. Donnell also told him, however, that his resignation would not terminate the investigation.

Blanchard was bewildered about why the Coast Guard, the institution that he so loved and had given thirty of his forty-six years to, seemed to be giving him no support. He feared that the Coast Guard was going to sacrifice him in order to avoid the fate that befell the Navy in the wake of Tailhook.

At the office the following Monday, Blanchard said he needed to take a few days off.¹²¹ The next morning, the office called him at home and told him that the public-affairs staff had learned that the *Chicago Tribune* was working on a sexual-harassment story. "It's all over," he replied. "We're doomed." Within the next few hours, Blanchard took out an old .32-caliber Winchester revolver that had belonged to his grandfather, put the gun in his mouth, and pulled the trigger. Nothing happened; the gun had misfired. Blanchard then fired again, and this time the gun worked as intended. Blanchard's wife Connie found his body in the back yard. As it turned out, the *Tribune* was not investigating sexual harassment at all.¹²²

A "psychological autopsy" concluded that "the emotional pain and shame that Captain Blanchard felt he had brought upon himself and the Coast Guard led him to choose suicide as a solution."¹²³ Writing in the *Washington Post*, Karl Vick observed: "This is about a death by political correctness. Whether it was suicide by political correctness or homicide by political correctness depends on your point of view."¹²⁴ Vick pointed out the parallels between Blanchard and Boorda: "Both men were terrified of exposure in the media. Each man feared he would bring disrepute to a service where he had spent his adult life. Each man was operating under what, to many outside the military, might seem a bewilderingly unforgiving code of honor and rectitude."

After Blanchard's death, Admirals Donnell and Kramek reversed Potter's findings of sexual harassment.¹²⁵ Some months later, Admiral Kramek, speaking at the National Press Club, denied that Blanchard faced serious punishment. Kramek stated:

Captain Blanchard was not facing a court-martial, nor would he have ever faced a court-martial. . . . There was no move to court-martial him, and there wouldn't have been after the investigation and fact-finding was over. He hadn't committed any offenses serious enough other than to call him in and tell him he had used bad judgment.¹²⁶

121. *Id.*

122. *Id.*

123. Mark Thompson, *A Political Suicide*, TIME, May 13, 1996, at 44.

124. Vick, *supra* note 113.

125. *Id.*

126. National Press Club, *Morning Newsmaker With Admiral Robert Kramek, Coast Guard Commandant*, Aug. 5, 1996.

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Given that, even before the investigation had begun, Blanchard had already been told he had used bad judgment and had issued an apology, one wonders about the purpose of the *Miranda* warnings, the extended investigation, the statement that he could end up being court-martialed and lose his pension, and the 800-page investigative report of the incident. One also wonders why the investigation would not have been terminated upon Blanchard's retirement, if it was convened only to decide whether Blanchard should be told that he had used bad judgment.

C. Then Came Aberdeen

Following close on the heels of the Tailhook scandal came another scandal involving allegations by dozens of female trainees at Aberdeen Proving Grounds (and shortly thereafter at Fort Leonard Wood) that they had been subjected to rape and sexual harassment by, or had engaged in fraternization with, their drill sergeants.¹²⁷ Determined not to duplicate the Navy's public-relations mistake during the early days of the Tailhook scandal (*i.e.*, giving the initial impression that it was not interested in getting to the bottom of things), the Army swiftly pulled out all the stops. It set up a worldwide "hot line" for service members to call to report sexual misconduct, anonymously if they desired. The Army touted how quickly it had brought charges against some of the instructors as evidence of how seriously it took the complaints.¹²⁸ And the charges were serious. Unlike the night of debauchery that was Tailhook, the Aberdeen scandal involved charges of a variety of sexual misbehavior, including forcible rape and sodomy, on an apparently broad scale and extending over a prolonged period of time.

Sexual relations between instructors and trainees apparently were widespread, although most cases did not involve force, and in many of them the female trainees were willing participants in—or even the instigators of—the sexual behavior.¹²⁹ The Army took the position that the sex between instructors and trainees was *per se* not consensual, because of the imbalance of power and the "constructive force" that necessarily occurred as a result. Thus, even if the sexual relations had been initiated by the trainee, the instructor was still charged with rape.

The most heavily punished wrongdoer was Sergeant Delmar Simpson, who was convicted of multiple counts of rape and sodomy and sentenced to twenty-five years in prison. Although clearly inappropriate and certainly warranting a dishonorable discharge, Simpson's conduct was not sufficiently egregious in the eyes of some to warrant the heavy punishment.¹³⁰ Writing in *The New Republic*, Hannah Rosin observed about the Army's "constructive force" argument:

127. Rowan Scarborough, *Army Trainees Accuse Instructors of Rape, Harassment*, WASH. TIMES, Nov. 8, 1996, at A3.

128. Lewthwaite, *supra* note 49.

129. Jackie Spinner & Dana Priest, *Consensual Sex Was Rampant at Army Base; Inquiry Finds Breakdown of Discipline at Aberdeen*, WASH. POST, Mar. 30, 1997, at A1.

130. Dana Priest, *Verdict Deepens Divisions Over Women in Uniform; While Some Hail Army's Prosecution, Critics Say Crime of Rape Has Been Redefined*, WASH. POST, Apr. 30, 1997, at A14.

The storyline has remained unchanged: the entire military is an alien, retrograde institution, conspiring against feminist concerns. So it may be. But not from the evidence at the Aberdeen trials. . . . The most tradition-minded, socially conservative and overwhelmingly male institution in America has in fact embraced a theory of sexual intercourse that belongs not only to feminism, but to feminism's more radical wing. On the central question of the trials—whether or not the sex was consensual—the United States Army has proved itself less a disciple of Rambo than of Andrea Dworkin and Susan Brownmiller.¹³¹

By attempting to avoid the Tailhook mistake of not initially responding vigorously enough, the Army made the Navy's second mistake of overreaching. This became apparent when, several months into the investigation, five female soldiers came forward and accused Army investigators of pressuring them to make false claims of sexual abuse.¹³² Four of the women acknowledged having consensual sexual relations with instructors, but they refused to accuse the men of rape, despite what they characterized as bullying by investigators to do so. The fifth woman confessed to having consensual sexual relations with an instructor, but later recanted the charge attributing it to coercion by instructors.¹³³

The "hot line" was also a big success by some measures, yielding over 8,000 calls, many anonymous.¹³⁴ Ironically, among those netted was the general who had taken over the Aberdeen base after most of the misconduct had occurred. It seems that, five years earlier, he had an affair with a civilian in his office at a time when he and his wife were separating and anticipating divorce. He was forced into retirement.¹³⁵ Finally uncomfortable with the system of anonymous complaints, even Defense Secretary William Cohen began questioning whether they had gone too far. As Charles Moskos noted, the hot lines "opened up a Pandora's box for those seeking revenge for whatever reason, and many good careers are being ruined needlessly."¹³⁶ The Army ended up shutting down the Aberdeen hot line.

D. Fraternization, Adultery, and Harassment

With a spate of fraternization and adultery cases in the 1990s, the public came to learn that military personnel live under very different rules from those governing the civilian world. These rules often clash with civilian mores, but the military views them as critical to the maintenance of good order and discipline.

131. Hannah Rosin, *Sleeping with the Enemy*, NEW REPUBLIC, June 23, 1997, at 19.

132. Paul C. Roberts, *Crying Rape to Hide Failed Policy?*, WASH. TIMES, Mar. 17, 1997, at A14; Rowan Scarborough, *Prober Problems?: Female Recruits Say Army Pressured Them to Make False Charges of Rape*, WASH. TIMES, Mar. 12, 1997, at A1; Jackie Spinner & Dana Priest, *Women Say Army Agents Bullied Them: 5 Allege Investigators Urged Sex Accusations*, WASH. POST, Mar. 12, 1997, at A14.

133. Editorial, *Rank Accusations*, WASH. TIMES, Mar. 12, 1997, at A20.

134. Rowan Scarborough, *Sex-Abuse Hot Lines' Value Questioned: Gone Too Far? Cohen Wonders*, WASH. TIMES, June 16, 1997, at A4 [hereinafter Scarborough, *Sex-Abuse Hot Lines' Value*].

135. Editorial, *Overly Friendly Fire*, WASH. TIMES, June 6, 1997, at A22 [hereinafter *Overly Friendly Fire*]; Rowan Scarborough, *Army Probers Live under Tailhook Specter: Former Lawyer for Fliers Sees Attempt "To Make Heads Roll"*, WASH. TIMES, Nov. 23, 1996, at A1.

136. Scarborough, *Sex-Abuse Hot Lines' Value*, *supra* note 134.

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Unfortunately for military discipline, however, the increasing prevalence of an “occupational” orientation leads to the same kind of resentment of such rules that would attend them in civilian life. In his study of extended field maneuvers in Honduras, for example, Charles Moskos found a widespread attitude among junior enlisted personnel of both sexes that what they did in their “private lives” was their own business, rather than the Army’s.¹³⁷ Women most strongly objected to the anti-fraternization rules, hardly surprising in light of the unbalanced sex ratio in the military.

1. *Kelly Flinn*

In 1997, accusations of adultery and fraternization against Kelly Flinn, the first female B-52 bomber pilot, created a national spectacle. She was threatened with court-martial for having an affair with the civilian husband of a female airman, disobeying a direct order from a superior not to see him again (in fact, a week after that order, she took him to Georgia to meet her parents), lying under oath to investigators about the relationship, and fraternizing with an enlisted man (including an episode of sexual intercourse with him on her front lawn).¹³⁸

The most visible reaction from the civilian community focused on the adultery charge, stemming from the belief that Flinn should not be punished for having had a sexual relationship with a married man. After all, the argument went, her private life was her own business and a court-martial was a gross over-reaction.¹³⁹ Furthermore, critics argued, under most civilian definitions of adultery, Flinn was not guilty because she was unmarried.¹⁴⁰ Under military rules, however, an unmarried person commits adultery by having sexual relations with a married person.¹⁴¹

The objection that the Air Force was over-reacting to the adultery ignored the fact that there would have been no adultery charge if Flinn had simply terminated her relationship with the airman’s husband when she was ordered

137. Charles C. Moskos, *Female GIs in the Field*, SOCIETY, Sept./Oct. 1985, at 28, 31.

138. Elaine Sciolino, *Pilot Facing Adultery Charge Agrees to a General Discharge*, N.Y. TIMES, May 23, 1997, at A1; Nancy Gibbs, *Wings of Desire: The Air Force’s Star Female Pilot Finds Herself Enmeshed in a Tale Full of Passion and Lies*, TIME, June 2, 1997, at 28.

139. Elaine Sciolino, *From a Love Affair to a Court-Martial*, N.Y. TIMES, May 11, 1997, at A1.

140. Richard Cohen, *Snooping on Soldiers*, WASH. POST, May 1, 1997, at A23.

141. Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (2000) (general article)

[A]ll disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter [10 U.S.C. §§ 801–934] may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Id. (alterations added). According to the *Manual for Courts-Martial*, the elements of adultery are:

- (1) That the accused wrongfully had sexual intercourse with a certain person;
- (2) That, at the time, the accused or the other person was married to someone else; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, Punitive Article 134, 64(b).

to. No charges were brought against her when her superiors learned of the affair through complaints of the female airman. Surely, the Air Force's reaction to a female airman's complaint about an officer having an affair with her husband should not have been "That's her business, not ours; go away."

In contrast to the reaction of the press, the position of the military and most of its defenders was that the adultery charge was only a small part of the transgression. Although the adultery was not trivial, more threatening to military discipline was Flinn's disobeying an order and lying to her superior. As Air Force Chief of Staff General Ronald Fogleman stated in testimony before the Senate Armed Services Committee, "This is not an issue of adultery. This is an issue about an officer, entrusted to fly nuclear weapons, who lied. That's what this is about."¹⁴²

What may have been the greatest threat to military discipline, however, got little attention: Flinn was having an affair not just with any married man, but with the husband of a female airman. Adultery violates the Uniform Code of Military Justice only if it impairs "good order and discipline."¹⁴³ It is hard to imagine a greater threat to good order and discipline in the enlisted ranks than "poaching" of the spouses of enlisted personnel by officers. Indeed, numerous male officers have been prosecuted for making sexual advances toward enlisted men's wives,¹⁴⁴ with no public outcry.

Outcry there was for Kelly Flinn, however. Senate Majority Leader Trent Lott expressed the view that the Air Force had "badly abused" Flinn and that she should, at the least, be granted an honorable discharge. The Air Force should "get real" and ease its rules against relationships between its personnel, he said.¹⁴⁵ Representative Nita Lowey of New York declared, "The Air Force should have offered Kelly Flinn counseling, warnings and a transfer. Instead it has thrown the book at her, treating her like a criminal." Of course, Flinn, in fact, had been counseled and warned, and she had disregarded the warnings. As for "treating her like a criminal," the Air Force had some justification: she was one. The Uniform Code of Military Justice makes criminal the following: fraternization, adultery detrimental to good order and discipline, failure to obey a lawful order, and lying under oath; Flinn faced the possibility, although not the likelihood, of 9-1/2 years of imprisonment.¹⁴⁶ The *New York Times* also rushed to Flinn's defense, characterizing her conduct as mere "lovesick blundering."¹⁴⁷ A publisher gave Flinn a lucrative book contract.¹⁴⁸ For her part, Flinn argued that, although the Air Force "trained me to carry nuclear weapons, it had not taught me how to be a human being; and nobody had taught the Air

142. Gregory Vistica & Evan Thomas, *Sex and Lies*, NEWSWEEK, June 2, 1997, at 26.

143. See *supra* note 141.

144. Kevin W. Carter, *Fraternization*, 113 MIL. L. REV. 61, 79 n.107 (Summer 1996).

145. Elaine Sciolino, *Air Force to Postpone its Court-Martial of Female Pilot*, N.Y. TIMES, May 21, 1997, at A16.

146. Vistica & Thomas, *supra* note 142.

147. Editorial, *Trent Lott's Military Mind*, N.Y. TIMES, May 21, 1997, at A22.

148. Judy Quinn, A "Big Book" Correction, PUBLISHERS WEEKLY, Mar. 23, 1998, at 41, 44.

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Force how to deal with women.”¹⁴⁹ She was “singled out for shame,” she said, because she was a woman. In fact, however, the prior year, sixty-seven Air Force personnel had been court-martialed for adultery, of whom sixty were men.¹⁵⁰

In the end, Air Force Secretary Sheila Widnall offered Flinn a deal. Rather than the honorable discharge that Flinn was seeking or the court-martial that most of the brass wanted, Flinn could accept a “general discharge under honorable conditions,” a form of discharge given to those whose negative record outweighs their positive contributions but who have not brought disgrace upon the uniform.¹⁵¹ With such a discharge, rather than an honorable one, Flinn would not be able to fly for the National Guard. Apparently realizing what a good deal she was offered, she accepted.

Had the sexes been reversed, and a male Air Force pilot had been having an affair with the wife of an enlisted man, it is doubtful that the national media and congressional leaders would have rushed to the pilot’s defense or that he would have been favored with a lucrative book contract. Indeed, he would have almost certainly been viewed as a sexual predator rather than a figure worthy of our sympathy.

Ironically, Kelly Flinn herself can be considered a victim of Tailhook. That scandal made the services much more sensitive to claims of sexual misconduct, as witnessed by the almost doubling of the number of Air Force adultery courts-martial between 1990 and 1996.¹⁵² Without that increased sensitivity, she might have been ignored if she had maintained a low profile, although once the female airman complained, it is difficult to see how the Air Force could have responded any way other than the way it did.

2. “Payback”: General Joseph Ralston

With Kelly Flinn having been abused so badly in the eyes of her defenders, it was inevitable that there would be “payback.” Payback there was, and it came quickly. Shortly after culmination of the Flinn affair, Air Force General Joseph Ralston was the leading candidate for the position of Chairman of the Joint Chiefs of Staff, the country’s top military post. It turned out, however, that, as a colonel back in the early 1980s, he had begun an affair with a female CIA intelligence analyst while he was studying at the National War College.¹⁵³ At the time, he was separated, but not divorced, from his wife.

Ralston’s situation was very different from Flinn’s. Ralston had not disobeyed an order, and he had not lied. The adultery itself was not harmful to good order and discipline. It was private and did not involve the chain of command. Nonetheless, the sharp knives were out. Then-congressman Charles Schumer insisted that it is “a double standard and it is wrong” not to punish General Ralston.¹⁵⁴ Secretary Cohen continued to support General Ralston,

149. Kelly Flinn, *My Conduct Unbecoming*, WEEKEND AUSTRALIAN, Feb. 14, 1998, at R1.

150. Vistica & Thomas, *supra* note 142.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Overly Friendly Fire*, *supra* note 135.

despite claims that, not only should Ralston not be confirmed as Chairman of the Joint Chiefs, but he should also be disciplined. As one congresswoman put it, "If you are a friend of the Secretary of Defense and you've had an affair, you're in. If you're a successful woman who'd had an affair, you're out."¹⁵⁵ Amid the furor, Ralston withdrew his name from consideration.¹⁵⁶

The ultimate irony of the Flinn case is that there was in fact a double standard applied. She got off much *easier* than most people charged with those offenses would have. In the years following Flinn's case, many military personnel charged with adultery or fraternization would beg to be treated as "badly" as Kelly Flinn was, claiming that, if she got off so easily, so should they.¹⁵⁷

The inevitability of problems arising from fraternization rules makes it tempting to conclude that the rules should simply be changed. Most civilian employees do not stand to lose their jobs if they get caught cheating on their spouse, for example, and most civilian employers do not object to romantic relationships among employees of different status, as long as there is no reporting relationship or indirect supervisory control. Because of differences between the military and the civilian sector, however, such relationships create different problems, and these problems can ultimately lead to lives being lost. As Kelly Flinn herself wrote, "You can't have an aircraft commander and a copilot get into a lover's quarrel at six hundred feet and crash their plane into the side of a building."¹⁵⁸

3. *Claudia Kennedy: A High-Ranking "Victim"*

As so many officers, especially men, learned after Tailhook, it does not take much to derail a career when sex is involved. When Major General Larry G. Smith was nominated for the position of deputy Army inspector general, Lt. Gen. Claudia Kennedy came forward to scuttle his appointment. She claimed that Smith, who at the time held the same rank that she did (both major generals), had "touched her in a sexual manner and tried to kiss her" in her Pentagon office four years earlier.¹⁵⁹ She did not allege a pattern of such activity, only that it happened on one occasion. There was no indication that similar incidents had occurred with other women. There was no attempt to intimidate with rank. Nonetheless, the nomination was withdrawn and Smith was forced into retirement.

Once again, the Army seemed to be overreacting. *Washington Post* columnist Richard Cohen asked, "Whatever happened to understanding that in

155. John Barry & Evan Thomas, *Shifting Lines: After Cracking down on an Adulterous Female Pilot, the Brass Shields an Adulterous Male General*, NEWSWEEK, June 16, 1997, at 32.

156. Rowan Scarborough, *General Gives up Shot at Top Post; Ralston Cites Flap over Affair, Denies Comparison to Flinn*, WASH. TIMES, June 10, 1997, at A1.

157. See, e.g., Charlie Goodyear, *Air Force Set to Try Travis Pilot over Affair; Accused Captain Could Get 27 Years in Prison*, S.F. CHRON., Feb. 12, 1999, at A21; Steve Young, *S.D. Captain's Love Tale Could End in Jail*, ARGUS LEADER (Sioux Falls, S.D.), Apr. 18, 1999, at 1A.

158. KELLY FLINN, PROUD TO BE: MY LIFE, THE AIR FORCE, THE CONTROVERSY 246 (1997).

159. Thomas E. Ricks & Robert Suro, *Army Verifies Harassment Claim: Female General's Charge Likely to Mean Reprimand, Retirement for Fellow Officer*, WASH. POST, May 11, 2000, at A1.

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matters of love, sex, romance and that sort of thing, all sorts of misunderstandings are possible?” He pointed out that, if General Kennedy had welcomed the kiss, there would have been no transgression. “Making a pass nowadays is like striking at the king,” he said, “You’d better succeed.”¹⁶⁰ Columnist Mona Charen noted that General Kennedy—best known for implementing the “Consideration of Others” (“COO”) training, which taught soldiers to “indicate a sensitivity to and regard for the feelings and needs of others”—had three years earlier described sexual harassment as follows: “His hand lingers on your back. He touches you on your upper arm and you can’t tell if he’s a touchy-feely person. All you know is that he gives you the creeps.”¹⁶¹ Charen asks, “Our women warriors, who insist they should be permitted to lead men in battle, cannot handle so much as a touch on the upper arm?” About the COO program, Charen tartly quipped, “Heck, why not close down the Army and replace it with a sewing circle?”

If the Claudia Kennedy case is “sexual harassment”—with no imbalance in power, no persistent and repeated conduct, and little more than a rebuffed advance—then almost all men have been guilty of sexual harassment. Only the lucky few whose advances are never rejected are spared the “predator” label, and it is tempting to think of them as the most predatory of all. If Kennedy had been the one who initiated the contact, say by placing her hand on Smith’s thigh, would we feel comfortable forcing her into retirement simply because he expressed a lack of interest? What would we have thought of Smith for having made the incident public? Would we have thought that he was nobly “speaking truth to power,” or would we have concluded that he was a pathetic figure unfairly attempting to terminate the career of a female colleague? It is difficult to imagine that he would be viewed positively.

III. THE TWENTY-FIRST CENTURY

If anyone thought that sexual problems would end at the millennium, they were sadly mistaken. Although the spate of “blockbuster” scandals of the nineties has not been repeated, scandals persist.

A. The Air Force Academy

Perhaps the event that received the most press coverage in the new century was the allegation of rampant rape and sexual assault at the Air Force Academy and the claims of official indifference, if not hostility, toward those who reported such misconduct. These allegations, first made in an e-mail to Secretary of the Air Force James G. Roche, resulted in a series of investigations. An investigation headed by Air Force General Counsel Mary L. Walker confirmed that there had

160. Richard Cohen, *Did the General Deserve This?*, WASH. POST, July 20, 2000, at A25.

161. Mona Charen, *The General’s Protracted Charge*, WASH. TIMES, Apr. 10, 2000, at A18.

been several dozen cases of sexual assault over the prior decade but concluded that most of them had been appropriately disposed of by the Academy.¹⁶²

One problem identified in the report was that the Air Force Academy's definition of sexual assault was broader than the criminal-law definition, and the breadth of that definition may have created unreasonable expectations on the part of those complaining.¹⁶³ For example, any sexual conduct engaged in when the non-initiating party is "alcohol impaired" is defined as sexual assault by the Academy, whereas under the UCMJ, consent is effective unless the alcohol impairment is so severe as to render the person incapable of consent. In other words, having "one too many" and consenting to sex that you later regret appears to constitute sexual assault under Academy rules but not under the UCMJ. Another identified problem was the intermingling of rooms of men and women in the dormitories—where a majority of incidents of sexual assault occurred—rather than having separate space for the two sexes.¹⁶⁴

Although the review by the General Counsel's group, as well as a subsequent review by the Inspectors General of the Air Force and Defense Department identified some procedural shortcomings at the Academy, they did not confirm the central thrust of the Air Force Academy scandal—that the Academy was a hotbed of rape and sexual assault and that its leadership cared little for the plight of the victims.¹⁶⁵ Indeed, it is not clear that sexual assault rates are as high at the Air Force Academy as at civilian universities of comparable size.¹⁶⁶

B. A Medley of Little Scandals

Continued problems revolving around sex continue to plague the military. A taste of ongoing problems can be obtained simply by looking at some headlines:

*Warship or Loveboat: One Destroyer. 19 Months. 13 Cases of Fraternization and/or Adultery and the Courts-Martial Aren't Over Yet.*¹⁶⁷

*Adultery, Fraternization, Drugs, Graft & Guns: The Disturbing Tale of a Brand-New Destroyer.*¹⁶⁸

162. REPORT OF THE WORKING GROUP CONCERNING THE DETERRENCE OF AND RESPONSE TO INCIDENTS OF SEXUAL ASSAULT AT THE U.S. AIR FORCE ACADEMY 158 (2003), http://www.dtic.mil/dtfs/doc_research/p18_17.pdf.

163. *Id.* at 22–26.

164. *Id.* at 103.

165. *Id.* at 158–64; AIR FORCE INSPECTOR GEN., SUMMARY REPORT CONCERNING THE HANDLING OF SEXUAL ASSAULT CASES AT THE UNITED STATES AIR FORCE ACADEMY (2004), http://www.af.mil/library/posture/usafa_report.pdf; OFFICE OF THE INSPECTOR GEN. OF THE DEP'T OF DEFENSE, EVALUATION OF SEXUAL ASSAULT, REPRISAL, AND RELATED LEADERSHIP CHALLENGES AT THE UNITED STATES AIR FORCE ACADEMY (2004) [hereinafter OIG, EVALUATION OF SEXUAL ASSAULT], available at <http://www.defenselink.mil/news/Dec2004/d20041207igsummary.pdf>.

166. See generally BONNIE S. FISHER, FRANCIS T. CULLEN, & MICHAEL G. TURNER, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN (U.S. Dep't of Justice, Bureau of Justice Statistics 2000).

167. William H. McMichael, *Warship or Loveboat: One Destroyer. 19 Months. 13 Cases of Fraternization and/or Adultery and the Courts-Martial Aren't over Yet*, NAVY TIMES, Nov. 21, 2005, at 14.

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*Pentagon Blocks Nudie GI Peep Site.*¹⁶⁹

*Amorous Officers on Notice in Wake of Air Force Case.*¹⁷⁰

*Pimping Alleged at Patrick: NCO Arranged for Subordinate to Have Sex with Inspector, Captain, Charges Say,*¹⁷¹ followed by *Sex for Job Status: AF NCO Guilty of Goadng Subordinate into Liaisons.*¹⁷²

*Pulling the Plug on Video Voyeurs: Peeping Cameras Found Aboard Ships Reflect Disturbing Technical Trend.*¹⁷³

*"I Wasn't Wearing the Uniform": And That, Former Sailor Argues, Made Posing for Playboy OK.*¹⁷⁴

*Admiral Loses Battle Group Command: Improper Relationship with Officer Costs Kunkle His Kitty Hawk Post,*¹⁷⁵ followed by *Female Officer Gets Reprimand, Will Retire.*¹⁷⁶

*On a Strange Mission: Police Say Astronaut Drove 12 Hours, Donned Disguise and Assaulted Woman She Saw as Rival for Shuttle Pilot's Love.*¹⁷⁷

The central flaw exhibited by the military in the sex arena is its failure to appreciate the nuances of sexual issues. By announcing, in essence, "zero tolerance for everything sexual," it has lost the ability to differentiate between serious threats and bad manners. Tailhook was certainly more than bad manners, but the Navy prosecuted it as if it had been mass rape. Unfortunately, the primary lesson learned by the military is that "nothing exceeds like excess," as witnessed by the prosecutorial excesses of the Aberdeen incident.

One would like to think that the crusading zeal has abated, that the lesson has been absorbed that over-reaction ultimately hurts rather than helps the cause of female integration. Recent incidents at the Naval Academy suggest that such a hope is unwarrantedly optimistic.

168. William H. McMichael, *Adultery, Fraternization, Drugs, Graft & Guns: The Disturbing Tale of a Brand-New Destroyer*, NAVY TIMES, Jan. 30, 2006, at 14.

169. Niles Lathem, *Pentagon Blocks Nudie GI Peep Site*, N.Y. POST, Feb. 22, 2005, at 23.

170. Thomas E. Ricks, *Amorous Officers on Notice in Wake of Air Force Case*, WASH. POST, Nov. 30, 2000, at A4.

171. Rod Hafemeister, *Pimping Alleged at Patrick: NCO Arranged for Subordinate to Have Sex with Inspector, Captain, Charges Say*, AIR FORCE TIMES, June 19, 2006, at 8.

172. Rod Hafemeister, *Sex for Job Status: AF NCO Guilty of Goadng Subordinate into Liaisons*, AIR FORCE TIMES, July 24, 2006, at 16.

173. Matt Hilburn, *Pulling the Plug on Video Voyeurs; Peeping Cameras Found Aboard Ships Reflect Disturbing Technical Trend*, NAVY TIMES, May 17, 2004, at 10.

174. Christopher Munsey, *"I Wasn't Wearing the Uniform": And That, Former Sailor Argues, Made Posing for Playboy OK*, NAVY TIMES, Aug. 7, 2000, at 8.

175. Christopher Munsey, *Admiral Loses Battle Group Command: Improper Relationship with Officer Costs Kunkle His Kitty Hawk Post*, NAVY TIMES, Feb. 24, 2003, at 8.

176. *Female Officer Gets Reprimand, Will Retire*, NAVY TIMES, Aug. 25, 2003, available at <http://www.navytimes.com/legacy/new/0-NAVYPAPER-2132282.php>.

177. Henry P. Curtis, *On a Strange Mission: Police Say Astronaut Drove 12 Hours, Donned Disguise and Assaulted Woman She Saw as Rival for Shuttle Pilot's Love*, NEWSDAY, Feb. 6, 2007, at A7.

C. Lieutenant Bryan Black

In August 2005, Lt. Bryan Black, a Naval Academy oceanography instructor on a training cruise to Norfolk, said something to several midshipmen to the effect that the decommissioned battleship *USS Wisconsin* gave him a “hard-on,” and he suggested to the lone female midshipman that the *Wisconsin*, instead of giving her an erection, “would be tweaking your nipples.” That statement was certainly bad manners and worthy of a reprimand, but the Academy turned it into a court-martial offense.¹⁷⁸ The female midshipman, warrior-in-training Samantha Foxton, later said that she was “appalled” by the statement but that Black had apologized to her the next day and that she had accepted his apology. Unfortunately for Black, however, a female faculty member, who apparently nursed a strong dislike for Black, conducted her own “investigation” and pushed the matter to higher levels. It turned out that not only had Black made the comment in Norfolk, but someone also reported that he had used vulgar language to characterize his ex-wife.

An investigation by Marine JAG officer Major C. J. Thielemann, a professor of leadership and law at the Academy, concluded that Black should be issued a “non-punitive letter of caution and counsel.”¹⁷⁹ The Academy superintendent, Vice Admiral Rodney P. Rempt, rejected Thielemann’s recommendation, however, and insisted instead on holding an admiral’s mast, a hearing that could result in up to sixty days’ confinement to quarters and a letter of reprimand, which would effectively terminate his career. The superintendent also announced that he was taking the unusual step of holding the usually private proceeding in the foyer of the administration building and inviting the faculty and staff to attend. Sensing—no doubt correctly—that the proceeding was to be a “show trial” to make an example out of him rather than to mete out justice, Black invoked his right to refuse the admiral’s mast and proceed by special court-martial.

Admiral Rempt’s decision to disregard the recommendation of a nonpunitive letter was widely viewed as influenced by criticism he had received from the Academy’s Board of Visitors that he was not making sufficient progress against sexual harassment.¹⁸⁰ Black’s lawyer attempted to disqualify Rempt from convening the court-martial and to move the proceeding to a different command where the jury pool would not include Naval Academy faculty. He argued that his client could not get a fair trial because of unlawful command influence. Major Thielemann testified at a preliminary hearing that, because of this political pressure, Rempt was attempting to make an example out of Black. Indeed, Thielemann testified, he was actually concerned for his own career, because his condemnation of Black’s behavior had not been as hard-hitting as the admiral had wanted.

178. Andrew Scutro, *Foul Comments: Academy Instructor’s Remarks Land Him in Court-Martial*, NAVY TIMES, Jan. 30, 2006, at 8.

179. Earl Kelly, *Academy Professor Unfairly Targeted?*, CAPITAL (Annapolis), Jan. 14, 2006, at A1.

180. *Id.* Kathleen Parker, *The Dangers of Cussing like a Sailor; The Altar of Victim Advocacy Takes on Salty Language*, CHI. TRIBUNE, Jan. 11, 2006, at C19.

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Ultimately, after holding the court-martial over Black's head for months, Admiral Rempt offered to downgrade the proceeding to an admiral's mast to be held before a different admiral "to avoid any perception of bias or any predetermined outcome."¹⁸¹ As this is what Black and his lawyer had earlier requested, the offer was accepted. The hearing lasted an hour, and Black was given a "non-punitive letter of caution," which does not become a part of his military record, although a negative fitness report from the Academy could nonetheless block any promotion and lead to his forced dismissal. Black was counseled by the admiral before whom the proceeding was held and advised, among other things, that it was unwise to have dinner at Hooters restaurant because of the "appearance of impropriety."¹⁸² No, this really is not your father's Navy.

Predictably, self-styled advocates for women were upset that something remained of Lt. Black's career. One asserted that, in the civilian world, the offended employee (one hesitates to call her a "victim") would have been able to obtain redress in the courts.¹⁸³ This is not true. The case would almost certainly be dismissed before trial, since to be actionable the offending conduct must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."¹⁸⁴ Much worse conduct than this—including conduct by a former Commander in Chief¹⁸⁵—has been held to fall short of that standard.

Ultimately the right result was reached. Black's comment was clearly inappropriate and deserving of admonishment, as he himself acknowledged, first by apologizing and then after the admiral's mast by admitting his mistake. But at what cost in time and money? Black's original comment was made in August 2005, and the admiral's mast did not take place until September 2006. Black had been scheduled to deploy to Bahrain shortly after the complaint to support the fighting in Iraq, but his orders were changed because of the complaint, placing him in "limbo." The result obtained was one that the Navy could have had from the very start but declined in its zeal to appease the Academy's critics.

What would have happened if the sexes had been reversed between Black and the midshipman? Probably nothing. There would likely have been no complaint even if a male midshipman had been offended. And, can one really imagine a female officer being prosecuted for having said vulgar things about her ex-husband? It is extremely unlikely that any man would complain, and if he did, his complaint almost certainly would have been ignored and he would have been made to feel like a fool for complaining.

The overreaction of the Academy does women no favors. The blog *CDR Salamander*, apparently hosted by a Navy commander, predicts that the response

181. Bradley Olson, *Ex-Academy Instructor Cleared at Hearing; Officer Receives No Punishment for "Crude" Remarks*, BALT. SUN, Sept. 2, 2006, at 1A.

182. *Id.*

183. *Id.*

184. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

185. *Jones v. Clinton*, 990 F. Supp. 657, 675-76 (E.D. Ark. 1998).

to the Black case—and presumably others like it—will be that “the smart officers will gather their male buddies and ditch their female shipmates at the first chance they get on liberty or the weekends.” Then, he notes, “Wait, my male JOs [junior officers] already do that . . . those who aren’t sleeping with them.”¹⁸⁶ The whole affair, he says,

does a disservice to the great women I have served with who have more important things to do than get the vapors over some big talking LT, and wind up chewing up dozens to hundreds of Flag Officer hours over less than she will hear in the first liberty call overseas.¹⁸⁷

D. Lamar Owens

The other recent incident at the Naval Academy was the court-martial of Lamar Owens. Owens was the star quarterback of the Navy football team, and the team’s “most valuable player,” who had taken Navy to a victory in the Poinsettia Bowl in the 2005 season. The charges against Owens were much more serious than those against Black. He was accused of having raped a fellow midshipman in Bancroft Hall, the residence hall at the Academy, in January 2006.

The case was a classic “he said, she said” acquaintance-rape case. Both parties agreed that sex had taken place. She said that it was non-consensual; he said that it was consensual. The exact truth is hard to know, but what is crystal clear is that the prosecution had a very weak case.

According to the woman, she had been drinking heavily the night of the incident. Indeed, she testified, she had consumed seven or eight drinks in a two-hour period, including at least four shots of hard liquor and three mixed drinks. She went home to her room and fell asleep. She awoke around four in the morning, she said, to find that Owens—whom she barely knew—had come to her room uninvited and was kissing her. She turned away from him, said that she had a boyfriend, and then “blacked out.” Owens then climbed into bed and raped her. Her roommate was asleep in the room, but the accuser did not call out to her.¹⁸⁸

According to Owens, he and the woman had been flirting and getting to know each other in the weeks before the incident. That night, shortly before the incident, the woman had sent him an instant message inviting him to her room. When he got there, they chatted, and she climbed into her bunk and tugged on his sweater, indicating that she wanted him to join her in bed. They began

186. CDR Salamander, LT Black’s Court Martial: Unintended Consequences (Jan. 25, 2006), <http://cdrsalamander.blogspot.com/2006/01/lt-blacks-court-martial-unintended.html>.

187. *Id.*

188. Bradley Olson, *Mid Tells Jury of Rape in Her Dorm: Defense Attacks Credibility, Says Navy QB Had Consensual Sex*, BALT. SUN, July 12, 2006, at 1A [hereinafter Olson, *Mid Tells Jury of Rape*].

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having sex, but she passed out, so he stopped (without ejaculating) and left the room.¹⁸⁹

About ten days after the incident, Owens called her and “tearfully apologized” to her, saying, “I’m so sorry. . . . I woke up the next day and I called you, and I wanted to kill myself and I still feel like that.”¹⁹⁰ He also said, “I didn’t do it long.” Unbeknownst to Owens, Navy investigators were recording the call.

Owens’s general court-martial occurred in July 2006. He was charged with rape, conduct unbecoming an officer, and violation of a protective order against being near the alleged victim after the incident, the last charge added later after he had been observed on the hallway where her room was. The rape charge carried a maximum sentence of life imprisonment, and the other charges carried lesser penalties, including prison and a dishonorable discharge. A discharge under these circumstances would require Owens to repay the \$136,000 cost of his Naval Academy education.¹⁹¹

The alleged victim’s testimony was marred by inconsistencies and claims of selective memory loss due to black-out from alcohol consumption. She admitted that she drank almost every weekend from the time she arrived at the academy until the incident, which, because she was under twenty-one, was a rule violation for which she could have been expelled.¹⁹² Despite her trial testimony that she had not invited Owens to her room, her boyfriend testified that days after the incident she told him that she “might have” sent Owens an instant message inviting him to her room. At the Article 32 hearing to determine if there was enough evidence to proceed to court-martial—similar to a preliminary hearing in the civilian world—she was asked whether it was possible that she gave Owens her consent and because of her intoxication did not remember it. She responded, “I suppose,” adding later that “I wouldn’t define it as consent if I can’t remember it happening.”¹⁹³

A central issue in the trial concerned whether the accuser had sent the instant-message invitation to Owens. Her boyfriend testified that he had left her at her room at 3:30 a.m. and returned to his room. She began sending him instant messages, asking him to come back. The last such message was sent at 3:47 a.m. Then, at 4:12 a.m., she sent him a telephone text message after the alleged rape had occurred. He came to her room and found her crying hysterically. She told him, “*I think* I was raped” and identified Owens as the perpetrator.

At 4:11 a.m., one minute before she sent the text message to her boyfriend, the instant-message session on her computer had been closed, erasing any

189. Bradley Olson, *Owens Claims Accuser Invited Him into Bed: Mid Says Alleged Victim “Misrepresented” Facts of Case*, BALT. SUN, July 19, 2006, at 1B [hereinafter Olson, *Owens Claims Accuser Invited*].

190. Bradley Olson, *Mid Player Apologized to Accuser on Tape: Phone Call Used at Rape Hearing of Navy Quarterback*, BALT. SUN, 9, 2006, at 1A.

191. Raymond McCaffrey & Steve Vogel, *Case Stirs Criticism of Naval Academy Chief: As Ex-Quarterback Waits for Decision on Future, Alumni Question Leadership*, WASH. POST, Dec. 17, 2006, at C1.

192. Olson, *Mid Tells Jury of Rape*, *supra* note 188.

193. Bradley Olson, *Navy Trial in Rape Case: Mids’ Quarterback to Face Most Serious Form of Court-Martial*, BALT. SUN, Apr. 29, 2006, at 1B [hereinafter *Navy Trial in Rape Case*].

instant messages that might have occurred between her and Owens. The accuser testified at trial, however, that she had not gotten out of bed between the time of the alleged rape and the time that her boyfriend arrived. She said that she did not know how the instant-message session was closed, although the defense argued that she had closed it to eliminate evidence that she had invited Owen.¹⁹⁴

In closing arguments, the prosecutor made three points. First, the accuser had no reason to lie; second, she had been crying hysterically when her boyfriend came to her room; and third, Owens's recorded conversation with her was evidence of a guilty mind—a window into his soul, she said.

In his closing argument, Owens's lawyer, Reid Weingarten—known best for his defense of high-profile white-collar defendants—emphasized the many weaknesses in the woman's story. Gaps in her memory made her unable to remember whether she had invited Owens to her room, even though she had initially testified with some certainty that she had not. The woman also had no explanation for how the instant-message session had been closed. The prosecution's theory that Owens came to her room uninvited, Weingarten argued, implies the unlikely scenario that Owens was just "prowling" the halls looking for someone to rape, and, coincidentally, he just happened to show up just after she had instant-messaged her boyfriend at 3:47 a.m. Finally, the "black out" seemed to be strangely selective. The woman's story was that she was sleeping and unconscious only for the 20 minutes of the encounter, but was sending instant messages just before it happened and text messages right after. As for the recorded conversation between Owens and the victim, Weingarten pointed to Owens's testimony that he made the statements because he had heard there was an investigation going on, and he was trying to get her to "back off" of making charges, hoping to avoid a confrontation. He realized only when she passed out how impaired she was, at which point he left.¹⁹⁵

The defense's theory was that the accuser had consented to the sex, had then regretted it, and relied on the Academy's practice of not punishing alleged rape victims for their conduct violations. Moreover, he argued, Owens was a scapegoat: "A system, needing to look like it was tough on rape, having a star quarterback in its sights, took the bait. And here we are."¹⁹⁶

The jury deliberated for about ten hours before reaching its verdict. It found Owens not guilty of rape but guilty of conduct unbecoming and violation of the protective order.¹⁹⁷ The jury then recommended "no penalty" for the offenses for which Owens was convicted.¹⁹⁸ Owens was not completely out of the woods, however, as it was now left to the Academy—in the person of Admiral Rempt—to decide what kind of administrative action to take. Although

194. Olson, *Mid Tells Jury of Rape*, *supra* note 188.

195. Olson, *Owens Claims Accuser Invited*, *supra* note 189.

196. Bradley Olson, *Judge Rebukes Prosecution in Owens Rape Trial: Navy, Defense Close Arguments; Verdict Could Be Returned Today*, *BALT. SUN*, July 20, 2006, at 2B.

197. Nelson Hernandez, *Navy Quarterback Cleared of Raping Midshipman*, *WASH. POST*, July 21, 2006, at A1.

198. Nelson Hernandez, *No Penalty for Midshipman Owens: Found Guilty of Two Non-Rape Charges*, *WASH. POST*, July 22, 2006, at B1.

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Owens was scheduled to graduate in May 2006, his graduation was held up, leaving open the possibility that he could be discharged from the Academy, which would require him both to reimburse the Navy for the cost of his tuition and to leave the Academy without the degree that he had earned.¹⁹⁹ In February 2007, after leaving Owens twisting in the wind for seven months, Admiral Rempt recommended to the Secretary of the Navy that Owens be expelled from the Academy with neither a commission nor a diploma.²⁰⁰ As of March 2007, the Secretary has not acted, although the Academy's recommendations are usually accepted.²⁰¹

The eagerness of the Academy to appear tough ultimately harmed its case. After the incident but prior to the court-martial, two e-mails were sent out to the Academy community at Admiral Rempt's direction. One e-mail referred to the alleged victim as "the sexual assault victim," without any qualifying language indicating that the claim was just an allegation yet to be proved.²⁰² Another e-mail advised recipients to be wary of media accounts, stating that "the only story that gets to the media" is a false or misleading one told by defense attorneys.²⁰³

The defense argued prior to trial that these communications constituted unlawful command influence, tainting the jury pool, which is drawn from the command bringing the charges.²⁰⁴ Thus, the jury was to consist of Naval Academy officers—selected by the convening authority (Admiral Rempt)—who were among the recipients of the e-mails. The defense argued for dismissal of the charges, or, failing that, use of a different jury pool.

The judge agreed that at least "the appearance of unlawful command influence" was created by the "rather damnable e-mails": "They insinuate guilt. They suggest it. They're simply badly written."²⁰⁵ According to the judge, the e-mails gave the impression that the admiral was more concerned with public relations and the reaction of Congress and the Pentagon than in ensuring that Owens got a fair trial. "This is almost like a trial by . . . public affairs," he said. He concluded, however, that the superintendent had not intended to taint the jury pool. The judge denied the defense motion, although he gave the defense an additional two peremptory challenges. During the subsequent jury selection, the jury was whittled down to the minimum allowable size of five jurors. Because a guilty verdict requires agreement of at least two-thirds of the jury, the prosecution needed four out of five jurors to convict, rather than the four out of

199. Earl Kelly, *Taped Call Allowed in Owens Rape Case*, CAPITAL (Annapolis), July 15, 2006, at A1.

200. Bradley Olson, *Navy Wants Mid Gone: Academy Moves to Expel Former Star Quarterback Acquitted of Rape*, BALT. SUN, Feb. 14, 2007, at 1A.

201. *Id.* As a consequence of negotiations between the Academy and Owens, Owens will not be required to repay his tuition even if the Secretary upholds the expulsion.

202. Steve Vogel, *Superintendent Faulted over Rape Case E-Mails*, WASH. POST, July 7, 2006, at B4.

203. *Id.*

204. *Id.*

205. *Id.*

six that would have been required if not for the additional peremptory challenges granted the defense.²⁰⁶

Had the case been tried without a jury, the trial would have been substantially shorter. After the cross-examination of the accuser, the judge stated that Weingarten had “eviscerated the alleged victim” and “took her apart like a Swiss watch,”²⁰⁷ and that, if it had been a judge-only trial, he would have dismissed the case at that point.²⁰⁸

One thing that is not clear from the record is what the result of the Article 32 hearing was. After that hearing in early March 2006, the presiding officer made a recommendation to Admiral Rempt as to whether Owens should be court-martialed. In late April, the Academy announced that Owens would face a court-martial.²⁰⁹ It declined to say, however, what the recommendation coming out of the Article 32 hearing had been, leaving open the possibility that Rempt ignored a recommendation not to proceed by general court-martial.

The view that the prosecution of Owens was politically motivated was widely shared. After his acquittal, an editorial in the Annapolis newspaper *The Capital* argued:

We don't know if the superintendent got bad advice from the attorneys or if he decided to make an example of Midshipman Owens, the former quarterback of the Navy football team. But now that Midshipman Owens has been acquitted of rape, we believe he has suffered enough. If his accuser ends up with the commission that [Owens] deserves, then the worst miscarriage of justice is yet to come.²¹⁰

A few days after Owens' trial ended, Admiral Rempt is reported to have confirmed his political motivation. Explaining privately to a small group of alumni why he pursued charges against Owens, he is reported to have said, “I had no choice; if I did not, we'd have every feminist group and the ACLU after us.”²¹¹ If that story is accurate, it is an appalling indictment of the admiral.

E. A Lack of Balance

The final point raised in the editorial quoted above—that a gross miscarriage of justice would occur if the accuser ended up receiving the commission that Owens deserved—hints at a common injustice in these cases. The accused is often acquitted of criminal wrongdoing but then punished administratively for it, while the accuser, who may have violated the same rules

206. Bradley Olson, *Five Are Chosen to Decide Fate of Midshipman: Potential Jurors Questioned about Views on Alcohol Use, Sexual Abuse in Rape Case Against Owens*, BALT. SUN, July 11, 2006, at 2B.

207. Earl Kelly, *Taped Call Allowed in Owens Rape Case*, CAPITAL (Annapolis), July 15, 2006, at A1.

208. Annie Linskey & Bradley Olson, *Owens' Lawyer Tops in Corporate Defense: Rape Case Outside the Norm for Weingarten*, BALT. SUN, July 18, 2006, at 1B.

209. Olson, *Navy Trial in Rape Case*, *supra* note 193.

210. Editorial, *Our View: Academy Can Help Dispel Cloud from Rape Case*, CAPITAL (Annapolis), July 30, 2006, at A8.

211. Earl Kelly, *Naval Academy Grads Take up Owens' Cause*, CAPITAL (Annapolis), Oct. 6, 2006, at B1.

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as the accused, gets off unscathed because of immunity given her in exchange for her testimony or because of policies of “amnesty.” Addressing this issue in the context of the investigation of sexual assaults at the Air Force Academy, the Pentagon Inspector General observed that this imbalance in treatment is “contrary to fundamental fairness.”²¹²

In the Owens case, the accuser and her witnesses had been granted immunity for numerous violations, including under-age drinking, drinking in Bancroft Hall, maintaining a party house off base, abusing prescription painkillers, having sex in Bancroft Hall, drinking on guard duty, being absent from the guard post, and sexual assault (it seems the accuser had grabbed a male midshipman’s genitals in a bar).²¹³ Thus, even if the sexual intercourse between Owens and the accuser was consensual, Owens can still be expelled for having sex in Bancroft Hall—but his accuser cannot. Moreover, his name has been dragged through the mud, and he will carry around the burden of this accusation for the rest of his life, but the accuser’s name, in contrast, was carefully protected and her confessions of wrongdoing do not go into her record.

Such inequities can occur even in the absence of immunity. For example, several years ago, a male-female pair of Naval Academy midshipmen was found in the woman’s room “after a long night of drinking and socializing.”²¹⁴ The man admitted to having consensual sex; the woman contended that she was heavily intoxicated that night and had no memory of having sex with the man, but that she “suspected” that maybe she had been sexually assaulted. Because Academy rules forbid sex on campus, the man was expelled. The woman, by denying having engaged in consensual sex, had admitted no wrongdoing and therefore was not prosecuted. The man found himself working in a warehouse to pay off the \$76,000 he owed the Navy to reimburse it for education costs, and the woman graduated to the fleet. As recognized by the Pentagon Inspector General in its report on the Air Force Academy investigation, the draconian punishment imposed for engaging in consensual sexual activity—repayment of tuition and termination of a military career—coupled with amnesty for the accuser, creates a strong incentive for false claims of sexual assault.²¹⁵

Whether Lamar Owens was actually guilty of rape, only he knows. Even the accuser may not know, if her claims of blacked-out memory are to be believed. But one thing is clear: There was simply no way, on this evidence, that a reasonable jury could conclude “beyond a reasonable doubt” that Owens was guilty. That should have been apparent to the prosecutors at least by the time of the Article 32 hearing, when the accuser “supposed” that she might have consented to intercourse but had been too drunk to remember. To bring criminal charges against a person to appease a political constituency is unconscionable.

212. OIG, EVALUATION OF SEXUAL ASSAULT, *supra* note 165, at 3.

213. Earl Kelly, *Judge Blasts Prosecution in Owens’ Trial*, CAPITAL (Annapolis), July 14, 2006, at A1; Countervailing Force, *Duke on the Severn: Lamar Owens Testimonial Immunity*, July 22, 2006, http://pcrevolt.blogspot.com/2006_07_01_archive.html (last visited Mar. 5, 2007).

214. David Brown, *Danzig Seals Midshipman’s Expulsion*, NAVY TIMES, June 21, 1999, at 17.

215. OIG, EVALUATION OF SEXUAL ASSAULT, *supra* note 165, at 3.

To pursue them once the possibility of conviction has evaporated is even worse. Yet if Admiral Rempt pursued the case to appease Academy critics, as he apparently acknowledged, that is precisely what happened.

CONCLUSION

The seemingly endless parade of sexual scandals—just a few of which were reviewed in this essay—is a predictable, if not inevitable, consequence of mixing the sexes together in the often intimate and cloistered environments in which military personnel operate. When they occur, the typical response has been to label men as “predators” and women as “victims,” to impose often draconian punishments, and to increase the amount of diversity and sexual-harassment training.

The military’s goal of “zero tolerance” for everything sexual is misguided for a number of reasons. First, it tends to mask the distinction between serious and trivial offenses, as exhibited in the case of Bryan Black. Second, it creates self-imposed pressure to pursue even weak cases, such as that of Lamar Owens. One can believe that rape is a serious offense and at the same time think that a given case is too weak to pursue. Third, the zero-tolerance mentality tends to suggest that “zero” is the appropriate target level for the various offenses. But that is not a broadly applicable position. Murder and rape occur in the civilian world, and the criminal justice system deals with them as best it can, but we do not go around talking about having “zero tolerance” for murder and rape, nor do we go looking for some institutional failure when they happen. Most prosecutors do not think that they have to prosecute *somebody* every time a crime occurs, and when they succumb to the temptations of over-reaching, they are roundly criticized for it.²¹⁶ Any given murder or rape is “unacceptable” in the sense of its being something that society condemns, but it is not necessarily an indicator that something is unacceptably wrong with the system. This is not to suggest that sexual assault and sexual harassment are not bad things or that the military should not take reasonable steps to reduce their frequency. No one argues that or, presumably, even thinks it. The problem is not that these problems are trivial; the problem instead arises from the “witch-hunt” mentality that so often takes over when these issues come up.

Sexual transgressions in the military are not going to go away. They have not gone away in the civilian sector, and the forced intimacy of military life virtually guarantees that they will persist in the military at even more intense levels. The prolonged separation of military personnel from their families increases the likelihood of straying from vows of fidelity. Moreover, the natural attraction that men have for young women, combined with the natural attraction that women have for high-status men,²¹⁷ means that temptations for fraternization are always going to be high. At one extreme, this attraction results

216. See, e.g., Sylvia Adcock, *New Ethics Allegations in Prosecution at Duke: Bar Says DA Lied, Withheld Evidence*, WASH. POST, Jan. 25, 2007, at A3.

217. See generally Kingsley R. Browne, *Sex, Power, and Dominance: The Evolutionary Psychology of Sexual Harassment*, 27 *MANAGERIAL & DECISION ECON.* 145 (2006).

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in sexual coercion or sexual bribery. At the other, it results in feelings only and no sexual behavior. In either event, it has consequences.

The core lesson that the military and its civilian overseers need to take to heart is this: extraordinary attempts to “help” women ultimately harm their position within the military. Military women are not helped when false charges of sexual assault are overlooked, as in the Elizabeth Warnick/Cole Cowden Tailhook incident. It does military women no favor to insulate them from the same punishment that they would receive if they were men, as in the Kelly Flinn incident. Military women are not going to gain acceptance by men when men know that women can give them the “Bryan Black treatment” if they say the wrong thing. As long as there are military women like the ones who demanded high-level action against Lt. Bryan Black and Capt. Ernie Blanchard—women who apparently view it as their charge in life to root out any arguable sexism and take it to the highest level—military men will not trust military women. Period.

The treatment of military sex scandals is but one example of a more general problem presented by a sexually integrated military. For a variety of reasons, both the military and its civilian overseers have been reluctant to hold women to the same standards to which they hold men.²¹⁸ The result has been widespread application of double standards coupled with a climate that imperils the careers of those having the temerity to point out the existence of those standards. This protectionism toward women likely derives from the same protective impulse that men are likely to feel toward women in battle. In that context, advocates of sexual integration generally deny any special tendency (or responsibility) of men to protect women, while in the context of sexual issues within the military, they demand it. Ultimately, a decision must be made: Can women take care of themselves, or can't they?

218. See BROWNE, *supra* note 1.