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MEMORANDUM FOR: Interested Staff

SUBJECT: Discussion in Support of Letter to The President, dated August 22, 2015

*Re: Transformational Anti-Sexual Assault Initiatives
for the Armed Services*

This memorandum contains supporting discussion regarding our September 12, 2015, proposal to The President for anti-sexual assault measures in the Armed Forces, that amplify the rationale for our recommendations for changes in the military personnel system to eliminate sexual assault against women and male servicemembers, and related matters.

Our main theme is to approach sexual assault based on a fusion of sound policy, transformative concepts, cohesive management and strong enforcement to augment legislation and the Pentagon's plans. With sexual assault against servicewomen in 2014 at the level of 1 in 5, resulting in annual medical treatment and societal costs approximating \$4.4 billion annually (probably over \$35 billion from 2004-2014), the scope of the problem is not limited to sexual perpetrators and commanders. Rather, the protracted strategic defeat regarding sexual assault sustained by the Pentagon is indicative of underlying structural injustices at all levels of the Armed Forces. Through structural injustices, many perpetrators are shielded, justice for many victim servicemembers is denied, and elements of the bureaucracy stymie transformative change. As a result, women servicemembers remain under siege by a culture of sexual violence, are prone to becoming suicidal under certain failing health conditions, and have been reduced to the status of a suspect class.

Accordingly, we set forth a policy approach, followed by seven (7) foundations vital to transforming the landscape to assist servicemembers to avoid and escape from sexual assault. Those foundations are: (1) an executive order by The President; (2) a new anti-sexual assault command, the Joint National Defense Command, under the leadership of a dual-hatted four-star chief and commanding general or admiral; (3) appointing the four-star chief of the Joint National Defense Command as a member of the Joint Chiefs of Staff; (4) creation of the *Department of Defense Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters)*; (5) enactment of the *Military Sexual Assault Victims' Access to Federal Courts Act*; (6) Enhanced Special Security on a 24/7 Basis for Each Installation; and, (7) Heightened Personnel Evaluations.

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I. POLICY APPROACH

A. *Establishing a Transnational Anti-Rape Doctrine.* Seventy years ago, our Armed Forces should have developed a strong transnational anti-sexual assault doctrine, as a result of our experiences and observations during World War II. Shamefully, U.S. military personnel raped an estimated 17,000 women in Africa and Europe. Those crimes occurred in the larger context of other Allied powers engaging in brutal “retaliation” rapes of over 2-million women and girls, from ages 12 to 80, governed by the Axis powers – including subjecting many victims to 70-80 rapes per day and the fracturing of the backs of many of the victims. British historian and writer Keith Lowe, *Savage Continent* (2012) at 51-59.

Instead of formulating a transnational anti-rape doctrine, our Armed Forces experienced arrested moral and social development as of 1945, resulting in an unspeakable human misery index for women servicemembers as they have been besieged by an institutional environment consisting of a culture of violence that descends on women sexually. Professor Alicia Arrizon observes that rape and sexual assault in the Armed Forces are “symptomatic” of the “gendered wars” and “invisible terrorism” directed at “female soldiers” – a social pandemic in which, incredibly, the “military” has “failed its female soldiers so miserably.” *“Invisible Wars”: Gendered Terrorism in the US Military and the Juarez Femicidio*, Chapter 9 in *Gender, Globalization and Violence: Postcolonial Conflict Zones* (2014) (edited by Gender and Postcolonial Studies Professor Sandra Ponzanese (Utrecht University, The Netherlands).

Further, an investigation by Columbia Journalism School Professor Helen Benedict revealed that women servicemembers cannot trust the military to protect them from sexual assault; and, the dangers of rape were so widely recognized that some officers in charge of females in Iraq routinely warned them not to go to or use latrines or showers without another woman for protection. Benedict, *The Private War of Women Soldiers*, *Salom.com* (March 7, 2007); see Benedict, *The Lonely Soldier: The Private War of Women Serving in Iraq* (2009).

This is the time to complete unfinished business and reclaim the trajectory of the moral high ground and establish a transnational anti-sexual assault doctrine that begins with the U.S. Armed Forces setting the example now.

B. *Application of the Historical Transformation Doctrine.* President Lincoln and President Truman established the model of dramatic change regarding military personnel matters based on national security requirements – proper doctrine missing in the Pentagon’s approach – amid strong national opposition. President Lincoln – who had believed that blacks were not his equal and slaves should be colonized in Africa, the Caribbean, or South America – issued the 1862 Emancipation Proclamation, which approved the service of slaves from the South in the military in order to save the Union and republican government. President Truman’s 1948 desegregation of the Armed Forces, following the Southern terror against black veterans, constituted an upheaval in the social

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order in the military, particularly in the South, in order to provide required manpower and unity of operations to execute the Marshall Plan, limit the spread of the Soviet Union's "Iron Curtain," contain the worldwide expansion of Communism, and support readiness for a potential World War III.

In formulating his actions, President Lincoln, among other measures, consulted former slave Fredrick Douglass regarding the formulation of policy regarding the fate of the slaves, the emancipation proclamation, and peace negotiations with the Confederacy, as well as invited him to the White House. *See* Pulitzer Prize Recipient David Herbert Donald, *Lincoln* (1995) at 429, 430, 471, 475, 527. Similarly, President Truman conferred with the leadership of the National Association for the Advancement of Colored People (NAACP); addressed the NAACP membership (the first President to do so) regarding their need to be prepared to face further prejudice, insults and mob violence (*see* below) in the struggle for liberty; and, appointed the *Committee on Civil Rights*, consisting of members who embraced transformational change in law and social policy – and, in 1947, recommended sweeping reforms, including the elimination of lynching and the poll tax, as well as the end of racial discrimination in the Armed Forces, among other changes. *See* City University of New York Professor Lynda Dodd, *Presidential Leadership and Civil Rights in the Era Before Brown*, *Indiana Law Journal*, Vol. 85, No. 4 (2010) at 1599-1657.

Moreover, in 1946 and 1951, President Truman and Congress were unified in the decision to impose independent civilian control over a World War II military with a national reputation for harsh treatment of servicemembers. *See generally* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Presidential power is at its maximum when The President acts pursuant to the express or implied authorization of Congress). In 1946, The President and Congress established one of last of the New Deal structures, Service Boards for Correction of Military Records under the leadership and management of civilian board members, addressed below. In 1951, President Truman and Congress established the Court of Military Appeals (now Court of Appeals for the Armed Forces) and a new military justice system, under the leadership and management of civilian judges. Those models are viable formulas for today, and we apply it in the proposals, below. However, the sixty-nine (69) year-old architecture of boards for correction of military records is particularly in need of modernization for an effective resolution of the credibility challenges in sexual assault cases. This is addressed, below.

In formulating our proposals, we have reviewed, among other documents, the *Department of Defense's Report to [T]he President of the United States on Sexual Assault Prevention and Response* (November 2014) (consisting of 1,136 pages); the *Department of Defense Sexual Assault Prevention and Response Strategic Plan* (January 2015) (pages 1-12); and, the *Department of Defense Sexual Assault Prevention and Response Strategic Plan* (May 2013) (pages 1-21). The Pentagon's plans are commendable as far as they go. At the heart of the Pentagon's strategy countering sexual assault is the promise of rehabilitated commanders robustly involved in protecting women servicemembers, 1 in 5 of whom are

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currently subjected to sexual assault annually. Of that number nearly 50% of the female servicemembers are penetrated against their will. The Pentagon also proposes to augment the reformation of commanders through a meritorious broad multidisciplinary approach.

Lacking a viable and historically based transformation doctrine, however, the Pentagon's plan is devoid of numerous essential foundations for a major shift that ensures success by approximating fail-safe structures beyond the reach of conventional commands. For instance, under our approach, even if the commanders of tomorrow fail as they have in the past, the institutional structures we propose would trigger near fail-safe mechanisms, in order: at the installation and command levels, the Service Secretariats, a Department of Defense level super anti-sexual assault command whose job is to prevent failure, the Joint Chiefs of Staff, Secretary of Defense's board for corrections of military records for sexual assault cases (among other duties), the Secretary of Defense, The President's Commission on sexual assault, and federal court. We characterize that as a "constellation of defenses" designed to plug the gaps and holes in the current approach by adding clear doctrine and visibly cohesive management to the process of halting sexual assault and its ramifications.

We read the Pentagon's approach as lacking a contingency plan for failing commanders. In contrast, we propose a contingency plan that designed to liberate women and men servicemembers in spite of any commands that are obstinate regarding the implementation of The President's strategy for the civil right of a servicemember's entitlement to a "Zone of Essential Dignity" – including freedom from sexual assault, the threat of sexual assault, and the ramifications of sexual assault – to include sanctions against assisting third parties; retaliation; gender discrimination; discrimination against the lesbian, bisexual, gay, transgender, and same-sex marriage/couples community; other issues arising from sexual orientation; and related matters.

We, therefore, propose additional and indispensable reengineering remedies – not recommended by the Pentagon's strategic plan – to counter the prospective malignancy that sexual assault and its ramifications pose for readiness, the welfare of servicemembers and the military personnel system.

II. ASSESSMENT OF CONDITIONS REQUIRING A POLICY CHANGE

A. Exploring Conditions on the Ground in Assessing Escape Routes for Servicewomen Besieged by a Culture of Sexual Violence. Reporter Rajiv Chandrasekaren presents a sobering and instructive observation in his report of the *Washington Post* and the *Kaiser Family Foundation's Poll* of the current generation of veterans. In *A Legacy of Pain and Pride*, *The Washington Post* (March 29, 2014), Reporter Chandrasekaren succinctly captures the human dimensions of sexual assault – both how it grips female servicemembers with concern and illustrates the abject failure of the leadership to protect them. That explains why 50% of the veteran servicewomen in the poll believe the military's efforts to prevent sexual assault are deficient, and 25% of the veteran women servicemembers in Iran and Afghanistan were sexually assaulted:

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Although the military is fielding the most gender-integrated force in U.S. history, almost half of female vets say it is not doing enough to prevent sexual assault among service members. Among men, four in 10 share that view. In a recent VA survey of 1,500 women who deployed to Iraq and Afghanistan, one in four said they experienced sexual assault – defined as any unwanted contact from groping to rape – during their deployments. “Just being a woman was an additional stressor,” said Melissa Ross, one of the Post-Kaiser poll respondents, who deployed to Afghanistan as a staff sergeant three times and always wore an extra knife strapped to her back. “Just being a female. Just the amount of fear of ‘What if?’ – ‘What if you have that one airman or Marine or Army guy who doesn’t know you and looks at you just as a female?’ That was the biggest stressor for me daily. That crossed my mind way more than, ‘What if we hit an IED?’”

The RAND Corporation observed poignantly, “When a servicemember is assaulted from within the chain of command, he or she may have no route by which to escape the situation.” RAND Corporation (Francis, Schell, and Tamielian), *Enemy Within: Military Sexual Assault Inflicts Physical, Psychological, Financial Pain*, Summer 2013. The calculus of harm flowing from the dragnet of nonescape cast by the nefarious perpetrators of sexual assault, and any complicit chain of command leaders, includes vaginal bleeding; subordinate rape and exploitative rape with high impulse; broken bones; venereal disease; pregnancy; PTSD, depression, and suicide; substantial career damage; and mental anguish from denials of relief based on structural injustices. At a level that is unacceptably high, the Armed Forces has displayed a chronic, historical and pervasive pattern of discrimination and injustice regarding women servicemembers – particularly regarding their pleas for liberation from *defacto* sexual bondage.

Moreover, there are special circumstances relating to the extent of suffering by women servicemembers that warrant a more compelling response that places the equivalent of “troops on the ground” to create escape routes, and engage the spectrum of structural injustice, in which the military/civilian bureaucracy acts, at times, as inadvertent *defacto* accomplices to the perpetrators throughout the spectrum of the military’s administrative and justice system.

B. Underwriting the Costs for Medical Care and Societal Damage Caused by the Ravages of Sexual Assault Perpetrators. Servicewomen desperately seek to escape from the nightmare of sexual dragnets by perpetrators. And there can be no doubt that sexual assault has a catastrophic adverse impact on the health and careers of servicewomen. The ravages of sexual assault within the military costs about a staggering \$4.4 billion annually, consisting of societal costs and the amount the Armed Forces and Veterans Administration expend yearly on medical care for victimized servicemembers. We project that over the decade from 2004 through 2014, the total societal costs and expenditures by the Armed Forces and the Veterans Administration may have reached an astounding figure between \$35 and \$44 billion.

The costs are broken down into two categories: active duty and veterans. The 2012 baseline-year of medical and societal costs for sexual assault against active duty personnel approximated \$3.6 billion annually, at a cost of \$138,204 per victim. See RAND Corporation (Francis, Schell, and Tamielian), *Enemy Within: Military Sexual Assault*

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Inflicts Physical, Psychological, Financial Pain, Summer 2013. Moreover, the separate 2010 baseline-year costs of treatment by the Veterans Administration for victims previously sexually assaulted on active duty, has been reported as approximating more than \$872 million annually, at a cost of \$10,880 per victim. See Francis, *Military Sexual Assaults Cost More Than \$872 Million*, *The Fiscal Times*, April 30, 2013.

In this era of tight budgets, multiple worldwide missions and sequestration, many taxpayers may not understand why they, in effect, are underwriting the Pentagon's *de facto* subsidization of a culture of sexual violence instead of mounting an aggressive operation to eliminate sexual assault at a much lower cost than the \$4.4 billion in annual costs.

One reduction incentive to consider is a yearly evaluation of budget cuts for each unified or major command based on a formula related to the dollars expended on medical care and operational costs arising from sexual assault within those commands.

C. Exploring Material Causes of the Apparent Strategic Defeat of the Pentagon's Anti-Sexual Assault Measures. Whatever anti-sexual assault tactical success the Pentagon bureaucracy achieved between 2002 and 2014 or before, it appears it has sustained consistent strategic defeat. The band of sexual marauders still hold and defend the high ground they inherited from a previous generation. From that position (high ground) they may select and attack their next victims on a 1 in 5 basis, just as their predecessors approximated in 2002.

Yet, it is implausible to believe that a horde of nefarious male commanders, officers, and noncommissioned officers employed by the Pentagon manage – alone, with no outside assistance – to repeatedly, and at-will, inflict their culture of sexual violence upon female servicemembers while they ruin the health, careers, and lives of their victims at an annual medical treatment and societal costs of \$4.4 billion.

Since the modern administrative military system arose in 1946, the Armed Forces have always trusted the reliability of the reports of commanders, officers, noncommissioned officers, and civilians responsible for administrative justice. That trust is manifested in the form of a supremacy characterized as the “presumption of administrative regularity” – or presumption that official military records are true and accurate – and, their denials of culpability or knowledge of sexual assault take precedence over the written claims of sexual assault by servicewomen. It is apparent that for decades, some male servicemembers have regarded that “trust” factor as a weakness and exploited it by denying and obstructing their complicity in sexual assault.

Moreover, certain commanders, officers, noncommissioned officers, and civilians operating a *de facto* sexual crime unit, deny culpability or knowledge of sexual assault on official records with the knowledge that in the “system” their word is their bond and effectively closes the case. That phenomenon creates one of the numerous openings for the invasion of the decision-making process by structural injustice, that is “enduring,

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pervasive, and tentacular” in nature. Cf. University of Texas Professor Sager, *Congress’s Authority To Enact the Violence Against Women Act: One More Pass at the Missing Argument*, 121 *Yale L.J. Online* 629 (2012).

But that presumption of the veracity of military personnel is hollow regarding many sexual assault cases, as discussed below. Systemically, views from command and installation players involved in sexual assault should counsel hesitation or reservation as to their reliability when servicemembers advance a contesting perspective. The absence of an objective investigation creates a situation in which the presumption of administrative regularity may shield actual or apparent perpetrators and their accessories regarding sexual assault.

In any event, the refusal to conduct fair, objective and balanced hearings in sexual assault credibility cases negates the discovery of the truth, and the sending of the message to the field that high level scrutiny of sexual assault allegations will take place for those commands failing to clamp down on perpetrators. This is a concern because in credibility cases (actually, almost every case), the Army and Navy Secretaries, via their boards for correction of military records, decline to conduct hearings. Instead, even at that high level – rather than to observe and examine witnesses in person, electronically, or telephonically and reach a credibility determination – the Army and Navy boards rely upon the materials submitted by the commands and installations in summarily denying relief sought by servicemembers in many instances.

Consider the following dismal perspectives from servicewomen and servicemen, in which structural injustice appears to be a main problem:

1. ***Servicewomen as a Suspect Class & the Four Levels of Repression.*** The bottom line is that women servicemembers are a *defacto* invisible suspect class embedded in the military on a *sub silentio* basis, that triggers a duty of care dramatically higher than that proposed by the Pentagon. See generally Professor Alicia Arrizon, “*Invisible Wars*”: *Gendered Terrorism in the US Military and the Juarez Femicidio*, Chapter 9 in Editor Ponzanesi’s ***Gender, Globalization and Violence: Postcolonial Conflict Zones*** (2014); Professor Helen Benedict, *The Private War of Women Soldiers*, ***Salom.com*** (March 7, 2007); Benedict, *The Lonely Soldier: The Private War of Women Serving in Iraq* (2009). Sadly, in too many instances there are no serious relief options for women servicemembers regarding the grim experiences related to sexual assault, because in some instances the structures established to assist them are compromised and broken, in whole or part.

Again, Professor Arrizon describes the situation as the military’s dysfunctional response to institutionalized bias and gender wars. Notionally speaking, sexual assault against women in the military is occurring in a huge vat-like jumble of mishmash stew spewing expanding sexual assault, gender discrimination and related malignant social toxins. Those toxins include a spectrum of sexual harassment, gender discrimination, sexually hostile work environment, sexual jokes, comments about appearance, inquiring about sexual practices,

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unwanted touching, sexual gestures, sexually explicit materials, and threatening career harm unless *quid pro quo* sex is provided (extortion), among other inappropriate behaviors. Those factors are part of the slippery slope to sexual assault – and they are all inextricably related – confronting women servicemembers.

Borrowing from the view of the late Harvard Law School Professor Derrick Bell, that the place of African-Americans is last in American society, as articulated in his book *Faces At The Bottom of the Well: The Permanence of Racism* (1993), the military brings women on active duty, and smashes many of them into the bottom of the vat, and buries them under four layers which – instead of providing relief to them as originally designed – constitute impenetrable concrete and sexist stew. The data from the RAND studies provides insight regarding the realities on the ground, or the appearance thereof, from the perspective of servicemembers.

Level 1: First-Line Supervisors. RAND observes that because “military leaders have great authority over service members’ lives, more than supervisors in the civilian workplace,” the “misuse of authority” such as sexual *quid pro quo* demands by the supervisor upon the female victim servicemember “is a significant concern” and in some instances “likely to be crimes”; Women servicemembers perceive that legions of military superiors, such as office bosses, drill sergeants and officers, entrusted with the duty to nurture them are involved in over 67% of the gender discrimination and sexual harassment regarding them; RAND estimates that in 2014, approximately 44,000 active duty women (22%) experienced gender discrimination – but subject to RAND’s caveat that it could not estimate “hidden cases” of gender discrimination; and, “the fact that 1 in every 8 women perceived themselves to have been treated unfairly” in the military because of their gender represents “a problem.” *RAND’s Sexual Assault and Sexual Harassment in the U.S. Military, Volume 2, Estimates for Department of Defense Service Members from the 2014 RAND Military Workplace Study*, 2015, at 33-35, 47 (Chapter Four).

RAND’s observations corroborate the findings by Sadler, Booth, Cook and Doebbling’s foundational work in *Factors Associated With Women’s Risk of Rape in the Military Environment*, *American Journal of Industrial Medicine*, Vol. 43, at 262-273 (2003), that the rigid power structure and gender bias in the “male-dominated” military constitutes special and aggravating factors that overwhelm many women servicemembers and renders them – particularly the younger and lower ranking women – vulnerable to rape and sexual assault.

It is reasonable to conclude that the military’s Level 1 system for the redress of problems, such as gender discrimination, sexual assault and other inappropriate behavior, is dysfunctional because many of the very leaders who are supposed to assist are the problem, and have every incentive to obstruct complaints and fabricate about their actions through false denials and attacks on the victim’s character.

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Level 2: Chain of Command. With the first line of protection in a state of almost complete compromise for meaningful operational purposes, women servicemembers find next that commanders – the bedrock of good order and discipline – are legendary failures over a period spanning generations. However, some officers are part of the problem as well. Eighty-nine percent (89%) of the sexual assaults against women were perpetrated by military personnel – and of that number the women victims knew 93% of their assailants. RAND states that 54% of victims “indicated that the highest ranking offender was someone higher in rank than” the victim, “with 35 percent of similar rank and 9 percent of lower rank. Fifteen percent (15%) indicated that the sexual assault offender(s) included military officers. Among those that indicated someone of higher rank, one-third said the person was a unit leader or someone above them in the chain of command.”

Sexual assault perpetrators include members of the chain of command, officers, noncommissioned officers, military supervisors, and unit leaders – and it appears that RAND is implying those persons constitute 54% of the military perpetrators which tracks closely to the retaliation rate levels of 62% or 52%.

In any event, the involvement of the leadership in sexual assault is significant and fertile for conflict of interest and bias regarding official information emanating from the chains of command, and the installation entities influenced or tainted by the chain of command. That has major ramifications for the protection of the servicewomen, evaluation of evidence and the hunt for and discipline of perpetrators.

RAND also cited 1 in 8 servicewomen’s belief that they have been victimized by gender discrimination – 77% percent reported that sexual harassment was common and 69% reported that gender discrimination was common or very common – “as a problem.” Moreover, RAND observes that gender discrimination and sexual harassment described by servicemembers “very often...reflected a misuse of power by people of higher rank or in a supervisory role. Findings suggest that productivity and unit cohesion may be damaged by these violations of professionalism in the workplace.” *See RAND’s Sexual Assault and Sexual Harassment in the U.S. Military, Volume 2, Estimates for Department of Defense Service Members from the 2014 RAND Military Workplace Study, 2015, Chapter Three at 22, Chapter Four at 28, 47, 54, 56 and xxvi.*

RAND observes that a sexually hostile environment – and a culture of attempted sexual assault and/or sexual assault (including attempted or actual penetration), are extreme forms of sexual hostility – constitutes unwanted, “offensive” and “humiliating” experiences for women servicemembers; and, “can cause poor work performance or evaluations,” separation from the military, and “mental health problems.” Again, such behavior may “interfere with cohesion within military units, may degrade mission effectiveness,” and may cause qualified servicewomen to resign from the military, when so allowed, over unacceptable employment conditions. *RAND notes that such “events undermine the rights of service members, most often women, to fair treatment within the military,” and “interferes with women’s equitable treatment in the” military workplace.* RAND, *Sexual*

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Assault and Sexual Harassment in the U.S. Military Top-Line Estimates for Active-Duty Service Members from the 2014 RAND Military Workplace Study (2014) at 13, 28.

When asked if they could trust the military system to treat them with dignity and respect if they were sexually assaulted, 41% of the women servicemembers disagreed or had no opinion, while 59% of the women agreed. In contrast, only 25% of the male servicemembers disagreed, while 74% agreed. See RAND, *Sexual Assault and Sexual Harassment in the US Military: Annex to Volume 2. Tabular Results from the 2014 RAND Military Workplace Study for Department of Defense Service Members* (2015) at 425 (Table C.17.a). RAND also opined that by a percentage margin of nearly 2-1 in relationship to men, active duty women servicemembers not only have a lack of trust in the military to treat them with dignity and respect, but also to protect their privacy and safety.

When 41% of the female members of the RAND survey display hesitation regarding the military's capacity to treat their sexual assault complaints in a manner that preserves their dignity and shows respect for them – and decline to endorse the fairness of the military's treatment (including that of the chain of command) – there is a serious perception problem among women servicemembers that is undergirded by a structural justice flaw.

Indeed, assuming that at least 15% of the officers are involved with sexual assault – and it is prudent to expand that number – Level 2 is compromised, if not dysfunctional. Since most officers do not admit to sexual assault or attempted sexual assault if they believe they can escape the claim, one should reasonably expect them to misuse the system to subvert truth to save their careers. That would include the ritual fabricated denials of the truth and attacks on the servicewoman's lack of military qualities and veracity, among other matters. To the extent that the commander and others in the chain of command formulate views in reliance upon the accused officer's deemed denials – such sexual involvement is an unwanted embarrassment not only to the Officer Corps but to the leadership of the installation's senior leaders – the process is deeply infected with structural injustice. The traditional prejudices of believing an officer or noncommissioned officer over a female private E-1 may come into play; and, if so, the victim's claim may be headed toward the dismissal column.

The blending of the litany of barriers to the protection of women servicemembers from sexual assault and related issues by the first-line supervisors and the chain of command reveals a compromised administrative and military justice system as a matter of fact or appearance from the standpoint of public perception. That indicates a dramatic need for external supervision, review and correction of sexual assault issues and decisions at Levels 1 and 2 – reviews that are in addition to the training and education proposed by the Pentagon.

Level 3: Installation Review. Installation, major, specified, unified, joint and other commands and other entities responsible for enforcing the law, such as the military equal opportunity offices, appear to have such problematic reputations among some

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servicemembers for “stonewalling” sexual assault and related issues, that 54% of servicemembers decline to report sexually related offenses because of the belief the report will lead to nowhere or stigma; or because of the fear of retaliation regarding retention, assignments, personnel evaluation, schooling, promotion, separation, and social reprisal. Similarly, installation officials encouraged 44% of the victims to drop the sexual assault and related complaints, and took no action in 41% of the cases. *See Sexual Assault and Sexual Harassment in the U.S. Military, Volume 2. Estimates for Department of Defense Service Members from the 2014 RAND Military Workplace Study, 2015, at 27-30 (Chapter Three) and Chapter Four.*

The extent to which equal opportunity and other administrative installation review officials actively dissuade or attempt to dissuade servicewomen from reporting sexual assaults and related offenses is another indication of structural injustice. Common sense suggests that the intermediate agency or agencies may be biased, to some degree – as they may appear to rush to the defense of the commands, as opposed to performing duties as an objective party protecting the rights of servicemembers, and serving as a check and balance on abuse of authority by the commands. In effect, it appears that too many intermediate review agencies may have abdicated their responsibilities. If so, that has ominous consequences for the reliability of numerous reports or findings that the evidence does not support the servicemember’s sexual assault claim. Moreover, as stated, that problematic “red tape” of the bureaucracy – that serves as another defensive echelon for the commands – dissuades a number of servicewomen from filing reports. Consequently, the intermediate level of review, like Levels 1 and 2, appears to be fraught with structural weaknesses or injustices that continue to move silently up the chain and taint each level it infects. This result counsels hesitation regarding the fairness of Level 3.

Accordingly, the first three levels of review of a sexual assault claim appear to be compromised as a matter of fact or based on public perception. That appears to require additional training and oversight, as well as the investment in skilled and independent personnel.

Level 4: Service Boards for Correction of Military Records. With concrete levels one through three, above, in the way and blocking many women servicemembers from obtaining a fair opportunity for relief, many women may still be drowning by the time they turn to level four – if they are aware of it: Service boards for correction of military records. Our concern is with the version offered by the Army and Navy boards for correction of military records (BCMRs) – as we have no objection to the Air Force or Coast Guard boards.

One of the problems is that the Army and Navy BCMRs are dependent upon the very installation and command records that appear to be compromised by structural weaknesses related to bias in favor of the commands and against women servicemembers. And if that were not problematic enough, the Army and Navy BCMRs – the majority of all BCMR cases in the Armed Forces – lack a serious regard for fairness to many servicemembers challenging the judgment, discretion, and credibility of the chain of command. The Army

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and Navy BCMRs use sleight of hand practices in bids to defend the chains of command, as opposed to exercising critical judgment regarding them.

For instance, the Navy has a 20-year record of banning hearings, and the Army's few hearings are so low in the last decade they are statistically a virtual zero. After refusing to conduct hearings to determine credibility based on an assessment of the witnesses, the Army and Navy presume that the statements written by the commanders, command and installation personnel below, are covered by the presumption of administrative regularity – once again, the tainted and biased perspectives from the command and installation levels in a major credibility challenge, infect or appear to infect the decision-making at the Secretariat levels.

Abandoning their duties to exercise critical oversight of commands, the Army and Navy BCMRs blithely accept the command/installation versions below as the controlling facts. The Army and Navy then summarily reject the claim for relief on the grounds that the servicemember failed to present sufficient evidence warranting relief. That renders the Army and Navy BCMR processes generally problematic to many women servicemembers challenging sexual assault – yet, another structural weakness that is “enduring, pervasive, and tentacular.” Cf. University of Texas Professor Sager, *Congress's Authority To Enact the Violence Against Women Act: One More Pass at the Missing Argument*, 121 *Yale L.J. Online* 629 (2012); see also section III D, below.

In sum, Levels 1 through 3 are compromised unacceptably in the Armed Forces, and Level 4 is unacceptably compromised to a degree in the Army and Navy, all, by structural injustice. Either in fact or based on public perception, the military has gaping holes in its handling of sexual assault cases. That has the effect of reducing women servicemembers to a suspect class status because although they are in the military, the governmental mechanisms of the Armed Forces leave women servicemembers isolated and outside the reach of expeditious, effective, fair and balanced assistance, or creates that perception.

2. Sky-Rocketing Retaliation Levels. The Pentagon revealed that an astonishing 62% of servicewomen reporting they were sexually assaulted during fiscal year 2013-2014, were victims of retaliation, notwithstanding new laws rendering such retaliation a crime. That rate of retaliation matched that in 2012. See Reporter Molly O' Toole, *Retaliation Against Victims of Military Sexual Assault Still Persists*, *Defense One* (December 4, 2014); *But Compare Sexual Assault and Sexual Harassment in the U.S. Military, Volume 2. Estimates for Department of Defense Service Members from the 2014 RAND Military Workplace Study*, 2015, at 28 and abstract (about 52% of active duty women perceived they experienced professional or social retaliation after reporting a sexual assault).

In any event, the exact numbers are not the main point, rather both numbers corroborate there is not only retaliation at stunningly high levels, but those number denote the percentage of commands' failure to be fair to women servicemembers in the context of a sexual assault challenge. Both scores represent deep failures and grave problems with a

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62% retaliation level denoting a possible compliance rate of 38% and a 52% retaliation level denoting a possible compliance rate of 48%. Indeed, if commands had nothing to hide, why would they engage in retaliation against servicewomen to keep them from talking? Retaliation reveals the “true colors” of the command as it maneuvers to protect its leadership reputation and personnel through the deployment of an array of illegal and repressive acts with the effects of attempting to extort the complaining servicemember (i.e., withdraw or modify the complaint or suffer career and financial harm) or administering agonizing administrative, career and financial sanctions as punishment for challenging sexual assault and/or deterring others from reporting sexual assault.

The high level of retaliation is more than a dead canary in the mine; rather, it is an explosion in the mine that denotes a massive failure by commands to perform their duties of implementing sexual assault policy, and is a clear signal for augmentation on the ground at the installation level within the Armed Forces by an agency external to the command to “assist” in implementing sexual assault policy. That agency is the proposed National Defense Command, below.

3. *Impairment of the National Defense Mission.* Sexual assault and its ramifications are a serious impediment to mission execution. Regarding sexual assault, gender discrimination and sexual harassment, 53% of the victims perceived damage to unit and office cohesion; 50% of the victims encountered difficulty in completing their assignments; 48% of the victims believed mission execution was compromised; 43% of senior officers and 33% of junior officers wanted to exit the military after a gender discrimination or related experience; and 28% believed their personnel evaluations and promotion were adversely affected. RAND Corporation, *Sexual Assault and Sexual Harassment in the U.S. Military, Volume 2. Estimates for Department of Defense Service Members from the 2014 RAND Military Workplace Study* (2015), at 48 (Chapter Four).

4. *Unacceptably High Sexual Assault Levels Similar in 2002 & 2014.* The data over nearly the last generation of military leadership has generally been static, in which women servicemembers work magnificently in support of the mission, only to attempt to dodge depraved assailants upon the edge of night. For instance, “In a 2002 survey of active duty military women, more than one out of every five reported physical and/or sexual assault by intimate partners who often were active or retired military.” U.S. Department of Labor Women’s Bureau, *Trauma Informed Care for Women Veterans Experiencing Homelessness* (2010) at 8, 11. Twelve years later – 2014 – there appears to be no significant change. Regarding the active component, there were at least approximately 20,300 sexual assaults in a population of 1.3 million, consisting of 9,600 sexual assaults or 5% (1 in 5) against women servicemembers in a total active duty population of 204,000, in contrast to 10,600 sexual assaults or 1% against males in a total population of 1.1 million. RAND (Morral, et. al.) *Sexual Assault and Sexual Harassment in the U.S. Military, Volume 2. Estimates for Department of Defense Service Members from the 2014 RAND Military Workplace Study*, 2015, at summary.

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5. ***Distressing Forcible Penetration Levels.*** Moreover, approximately 50% of the sexual assaults against women servicemembers included forcible penetration. RAND (Morrall, et. al.,) *Sexual Assault and Sexual Harassment in the U.S. Military, Volume 2. Estimates for Department of Defense Service Members from the 2014 RAND Military Workplace Study*, 2015, at summary. And, overall, “Women experienced sexual assaults since joining the military at much higher rates than men (15 [percent for women] versus 2 percent [for men].” RAND (Morrall, et. al.,) *Sexual Assault and Sexual Harassment in the U.S. Military, Volume 2. Estimates for Department of Defense Service Members from the 2014 RAND Military Workplace Study*, 2015, at summary. In the meanwhile, the perpetrators appear to be unperturbed by all of the studies.

6. ***Justice and Equity Denied by the Army and Navy Boards for Correction of Military Records.*** With the efforts of many women servicemembers to obtain vindication from sexual assault facing a drowning from denials and retaliation at numerous installations, many turn to the Service Boards for the Correction of Military Records (BCMRs) – if they know about it.

One of the problems is that the Army and Navy BCMRs – which handle the majority of servicemember applications for relief from BCMRs – are dependent upon the very installation and command records that appear to be compromised by structural weaknesses related to bias in favor of the commands and against women servicemembers. And if that were not problematic enough, the Army and Navy BCMRs presume that statements from the chain of command and installation are reliable and accurate, decline to hold hearings (the Navy has a record of 20-years with zero hearings and the Army is in pursuit), have other unfair adjudication practices, and summarily reject relief on an unwarranted basis in many servicemember challenges to the judgment, discretion, and credibility of the chain of command and installation decision-makers. This is a significant problem because sexual assault claims are steeped in credibility analysis. *See* section III D, below.

7. ***Chairman, Joint Chiefs of Staff.*** Having begun this discussion with the military supervisor level, we conclude with the highest ranking military leader, the Chairman of the Joint Chiefs of Staff. As further evidence of structural injustice regarding sexual assault, consider that even the Chairman of the Joint Chiefs of Staff may have been tainted with structural injustice unknowingly. In 2013 – just after the Pentagon may have expended approximately \$3.6 billion in medical treatment for sexual assault victims in 2012 – General Dempsey revealed to the Armed Services Committee he took his eyes “off the ball,” in response to Senator Manchin’s request for the military’s protracted failure to make serious progress regarding the sexual assault crisis.

And while Chairman Dempsey is due respect for his forthrightness, it is inconceivable that the military leadership would have lost sight of an overseas Marine or Army all-male division surrounded and subjected to sexual assault by the enemy. Indeed, contrary to the lapse of focus on the sexual assault against servicewomen – in our notional sexual assault against men – the response of the Joint Chiefs would have been focused, decisive, lethal,

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relentless and overwhelming – no matter how many other worldwide engagements were in progress. That illustrates the precarious and highly sensitive nature of the second-class military status of women servicemembers, particularly since the failure of commanders to provide leadership and role modeling behavior for subordinates “can significantly increase women’s risk of rape, suggesting a continuum of violence, with rape the most severe form of coercion.” Sadler, et. al., *Factors Associated With Women’s Risk of Rape in the Military Environment*, *American Journal of Industrial Medicine*, Vol. 43, at 262-273 (2003).

D. Special Circumstances Warranting More Compelling Relief Action Regarding Sexual Assault. Additionally, there are *special circumstances* regarding the sexual assault of women servicemembers that counsel The Commander-in-Chief, Congress, Secretary of Defense, and Service Secretaries to invoke their moral, equitable and legal authority even more than their already considerable and historic pace. ***That is, the period in which women servicemembers may have been subjected to sexual assault and its ramifications may be the most protracted period of continuous and relentless violent attacks against members of the military in the history of our Armed Forces – and, in any event, surely rates among the highest in that category.***

Assuming the reasonably conservative estimate of 5,000 annual sexual assaults of female servicemembers since President Truman’s 1948 transformational desegregation of the Armed Forces through Executive Order 9981 – mandating “equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin” – a possible minimum of 335,000 women may have been sexually assaulted since 1948 (the actual figure could be higher or lower). For context, based on *The Summary of Selected Data on Women in Service* from DOD’S **2013 DEMOGRAPHIC** (2014), at iii-viii, that number exceeds the 204,000 women currently on active duty, the entire active duty Air Force (326,573), Navy (319,838) and Marine Corps (195,848), and 63% of the active Army (528,848). In any event, regardless of the actual number, the scope of sexual assault in the Armed Forces is astonishing.

That protracted period of sexual violence against women servicemembers is shaped, in part, by factors similar to those that influenced violence against another group in the military and that give rise to an extraordinary expansion of civil rights in the Armed Forces and established a pillar for the broader civil rights movement in the 1960s.

1. ***Targeted Minorities in the Military: Blacks and Women.*** The point is illustrated by the domestic terror war on Negro veterans at the close of World War II. The shocking crimes included the 1946 police gouging out of the eyes of Sergeant Isaac Woodard, an African-American veteran in uniform, returning home, via bus, from duty in World War II – emanating from his use of a restroom in South Carolina. See Professor Lynda Dodd, *Presidential Leadership and Civil Rights in the Era Before Brown*, *Indiana Law Journal*, Vol. 85, No. 4 (2010) at 1612-1622. To avoid being murdered upon his return home to Mississippi from overseas duty in World War II, African-American veteran Henry Murphy complied with his father’s instructions to put away his uniform and “returned home dressed

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as a sharecropper in overalls and a jumper.” See Wormser, *The Rise and Fall of Jim Crow: Jim Crow Stories, U.S. in World War II (1941-1945)*, www.pbs.org/wnet/jimcrow/stories_events_ww2.html.

In July 1946, two husband and wife African-American couples were murdered in rural Georgia, in what is referred to as a “lynching by gunshot.” An angry white mob dragged the victims from their car, beat them, tied them to a tree, and riddled their bodies with a hail of gunshots fired at point-blank range. The victims included war veteran George W. Dorsey, who had just returned from service in the Pacific for five years; and, his wife, Mae Murray, whose seven-month old fetus had been cut out of her lifeless body at knifepoint. The nation was stunned. Those and other violent acts directed at African-American veterans – in which there were no federal or state convictions – were among the factors that motivated a shocked President Truman to issue *Executive Order 9808*, establishing the *President’s Committee on Civil Rights*, December 5, 1946. See Author and scriptwriter Laura Wexler, *Fire In A Canebrake: The Last Mass Lynching in America* (2004); Professor Lynda Dodd, *Presidential Leadership and Civil Rights in the Era Before Brown*, at 1614-1615, 1622.

The relationship between the African-American veterans of World War II and women servicemembers of today is instructive in four regards.

First: “Lynching” By Gunshot and Sexual Assault. The classification of the Georgia murders by gunshot as a lynching, in a sense, opens the door to the classification of the sexual assaults against thousands and thousands of women as the equivalent of a lynching. However, the women servicemembers are lynched sexually by their brothers-in-arms, who disgraced the uniform.

Second: Attacked While Disoriented and Vulnerable. Both parties were in a state of disorientation when the attacks upon them commenced. African-American veterans returning stateside in 1946, were vulnerable to the repressive retaliation of Jim Crow, after experiencing years of relative freedom and respect overseas in defense of America. Similarly, many women enter the Armed Services in a state of high vulnerability to the precise exploitation military bosses and colleagues execute.

Syracuse University Sociology Professor Amy Lutz, in her study, *Who Joins the Military? A Look at Race, Class and Immigration Status*, *Journal of Political and Military Sociology*, Vol. 36, Issue 2, (2008), at 167-188, concluded that the major groups comprising the US military are whites, blacks and Latinos; and, the all-volunteer force continues to see overrepresentation of the lower, working and middle classes. Reporter Carissa Wyant contended in 2012 that since Professor Lutz’s study, data reveals that the military recruits a substantial number of poor, women and minority personnel. Wyant, *Who’s Joining the US Military? Poor, Women and Minorities Targeted*, *MintPress News* (December 18, 2012).

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In 2011, the *PewResearch Center* conducted a social and demographic trend analysis, *Women in the U.S. Military: Growing Share, Distinctive Profile, A Snapshot of Active Duty Women* (December 22, 2011), by researchers Eileen Patten and Kim Parker. The study found, among other matters, that white women constitute 53% of women in the military, while consisting of 78% of the overall female civilian population; 31% of the women in the military are black while constituting 15% of the civilian female population; Hispanic women constitute 13% of women in the military, while consisting of 16% of the civilian female population; and, 54% of women on active duty are unmarried.

Rand Corporation senior economist and defense manpower specialist Beth Asch stated the “military tries to attract high school graduates who are looking for job training, good benefits and help with college tuition – and that a high percentage of black women fit that bill.” Reporter James Dao, *Black Women Enlisting at Higher Rates in U.S. Military*, *The New York Times*, December 22, 2011.

That information paints a portrait of an average servicewomen’s profile for victimization as unmarried and interested in a route out of the limitations of a lower or working class environment, who seeks job training for the future, GI benefits, and college tuition assistance. Scoundrel military supervisors know the women want to perform admirably so they can obtain a good military record, benefits, and college tuition assistance to improve the quality of their lives. These servicewomen are literally extorted for sexual favors and they are highly vulnerable to the pressure that many of them harbor as dark secrets.

“More than half of female veterans experienced some type of trauma or abuse before joining the military”; “Twenty-seven to 49% of women veterans experienced childhood sexual abuse and 35% have experienced childhood physical abuse”; and, “Traumatic experiences continue in adulthood with 29-40% of female veterans experiencing sexual assault and about half experiencing physical assault. U.S. Department of Labor Women’s Bureau, *Trauma Informed Care for Women Veterans Experiencing Homelessness* (2010) at 8, 11.

Third: Hunted by Unalterable Characteristics. Both groups were and are readily identifiable by physical characteristics, including skin color for African-Americans; and, hair, voice, appearance, mannerisms, and physical strength for women. As a result, both groups could be identified as prey with ease by their hunters.

Fourth: Physically Assaulted. African-American veterans were brutally beaten during the 1946-era. Similarly, as stated, 1 in 5 female servicemembers are sexually assaulted, 50% of whom are sexually penetrated by force. The women victims are physiologically and psychologically intimidated by depraved perpetrators who exploit them for self-serving sexual gratification motivated by factors such as subordinate rape, power-reassurance rape, exploitative rape with high impulse, anger rape, sadistic rape, abduction rape, gang sexual assault, enterprise rape, personal cause sexual assault, domestic sexual assault, entitlement

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rape, and social acquaintance rape, among others. See Former FBI Supervisory Special Agent John Douglas, et. al., *Crime Classification Manual* (1997) at 191-246.

2. ***The Effect of Sexual Assault on Women.*** A servicewoman's reaction to rape or sexual assault can include, among other factors, vaginal bleeding, bruising, broken bones, sexually transmitted infections and diseases, pregnancy, fear, helplessness, shock and trauma, post-traumatic stress disorder, self-blame, and disassociation.

Moreover, the sexual and physical assaults sustained by females prior to entering active duty – *combined with the sexual assaults they sustained on active duty* – in many cases triggers posttraumatic stress reactions and or major depressive episodes, as well as a deleterious impact on their quality of life. See Hanson, Saunders, et. al., *Impact of Childhood Rape and Aggravated Assault on Adult Mental Health, American Journal of Orthopsychiatry*, Vol. 71(1), Jan. 2001 at 108-199. Further, the adverse impact of sexual assault on a women's duty performance and career may be incalculable.

Whereas the record reflects the murders of some African-American veterans during the 1946-era, the Pentagon may not know the number of suicides that may have resulted, in whole or in part, as a result of the sexual assaults against servicewomen. What is known, however, is that "High rates of suicide among military service members and veterans may be related to traumatic experiences they had before enlisting, making them more vulnerable to suicidal behavior when coping" with multiple stressors; "*Sexual trauma of any type, whether or not the perpetrator is in the military, increases the risk for suicidal behavior among military personnel*"; "Service members and veterans who attempted suicide before joining the military were six times more likely to attempt suicide after joining the military than those who had never attempted suicide." American Psychological Association, *Trauma Before Enlistment Linked to High Suicide Rates Among Military Personnel, Veterans, Research Finds* (Press Release, August 9, 2014).

The bottom line is that the Armed Forces recruited these vulnerable women and its personnel are exploiting them as an extension of the culture of sexual violence. The military has the highest moral, ethical, legal and equitable responsibility to fully protect the servicewomen. With imagination and the proper doctrine, the legions of diverse professionals in the Armed Forces should be able to construct an effective strategy and plan to protect those young people – whether it includes adding a new but effective 60-day, gender-separate, block of intensive instruction with role playing at an installation different from basic training or another approach.

In any event, a sense of great urgency is required – as the ticking time bomb regarding potential suicide by women servicemembers in the immediate or distant future, along with the apparently unknown suicides dating back to at least 1948, renders the matter a possible inferno that should be addressed accordingly on a crisis basis. If anything, the pace of attacking the problem should be accelerated exponentially, as The Commander-in-Chief has already directed – and it surely will not cost \$4.4 billion a year.

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III. SEVEN POINT TRANSFORMATION PLAN

Seven-Point Transformation Plan. In our opinion, and as stated, the Pentagon’s plan lacks vital foundations for a major shift that ensures success by approximating fail-safe structures beyond the reach of conventional commands. Under our approach, even if the commanders of tomorrow fail as they have in the past, the institutional structures we propose should trigger fail-safe-like mechanisms at the following levels, in order: immediate commands, installations, major and unified commands, Service Secretariats, Department of Defense anti-sexual assault command whose job is to prevent failure, Joint Chiefs of Staff, Secretary of Defense’s board for corrections of military records for sexual assault and related cases, Secretary of Defense, and federal court. We, therefore, propose additional and indispensable reengineering remedies – not recommended by the Pentagon’s strategic plan – to counter the prospective malignancy that sexual assault and its ramifications pose for readiness, the welfare of women servicemembers (as well as all servicemembers so victimized regardless of gender or sexual orientation), and the military personnel system.

The primary difference in our approaches is that with the lives – suicide is a major issue as discussed – and health of women and national security on the line, we do not believe this is the time for traditional and conservative approaches via the style of the Pentagon’s bureaucracy. Rather, it is time for the Pentagon to be visionary, as were President Truman and Congress when they created boards for correction of military records and the Court of Appeals for the Armed Forces in 1946 and 1951, respectively; and, as were Presidents Lincoln and Truman when they integrated the Armed Forces. Moreover, it is time to trust any newly created bodies, and give them the freedom to do their jobs. Accordingly, we propose the following:

■ A. *Executive Order.*

At the heart of our recommendations is an executive order, *Ending Sexual Assault Against Women and All Members in the Armed Forces*, including (1) national anti-sexual assault policy within the Armed Forces; (2) an order to the Secretary of Defense to implement The Commander-in-Chief’s directive for the withholding of the authority of all Army, Air Force and Naval officers below the rank of general or admiral to take initial disposition action regarding sexual assault and related cases, and the reservation of that initial disposition authority to the first general or flag officer in the chain of command, pursuant to ***Manual for Courts-Martial, United States, 2012***, at *Rule for Courts-Martial 306* (a superior commander may “withhold the authority” of a subordinate “to dispose of offenses in individual cases, types of cases or generally”) – a maneuver Army commands apply frequently in reserving the disposition of officer misconduct cases to the commanding general. That would ensure sexual assault cases become the “high visibility” cases they deserve within commands under the seasoned watch of a senior leader via an identifiable general or flag officer accountable to superiors for justice; and, (3) the establishment of *The Commander-in-Chief’s Standing Commission For the Elimination of Sexual Assault in*

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the Armed Forces, consisting of a bipartisan, civilian, and diverse 15-member commission representative of the distinguished and concerned female veteran and sexual assault support groups, retired military, government, legal, educational, religious, medical, nursing, social work, nonprofit, and private and public communities, among others.

The Commission's duties would include investigating and critically assessing the Pentagon's proposals and actions, and making recommendations to The Commander-in-Chief and Congressional Armed Services Committees for improvement. The Commission would also inspire a willingness of women and other victims to "fight back" by inviting women leaders from Congress, anti-gender and sexual orientation discrimination leaders, anti-women's sexual assault leaders, veterans and other interested organizations to form a united task force in national symposia. That symposia would visit installations worldwide and deploy lifelines to servicemembers in a program sponsored by the Pentagon.

We believe this Commission is discrete from the previously approved independent review panel comprised of civilians and military personnel. The Commission would have a broader charter and be far more robustly independent in its critical assessments of the Pentagon's actions than the independent review panel. Unlike the independent review panel, the Commission would not have as members active military personnel, whose ability to criticize efforts of the Pentagon leadership would be greatly constrained. Moreover, as a Presidential-level entity, the Commission has diversity requirements, a broader charter – including the power to conduct administrative hearings in which witnesses must attend – and would be vigorously autonomous in its support of The President's Executive Order and directives for exponential progress. We do believe, however, there is room for both the panel and the Commission, and anticipate the leadership on both will coordinate to avoid unwarranted duplication.

■ ***B. Establishment of a 4-Star, Anti-sexual Assault Worldwide Joint National Defense Command.***

Overview. The Joint National Defense Command (a joint anti-sexual assault command) sits at the right hand of the executive order and serves as a global management and enforcement organization and tool. It is indispensable to the success of the transformation effort. For that reason, we spend more time explaining this proposal and showing how it is a compromise between the Senate sentiment for maintaining an intact chain of command and Senator Gillibrand's proposal for exclusion of the chain of command. In sum, we propose an independent chain of command under the authority of the Secretary of Defense that is directed to execute the mission of preventing commands around the globe from failing to implement The Commander-in-Chief's directive to terminate sexual assault.

That Joint National Defense Command's primary means is through conciliatory education, advice and persuasion, but it would be armed with the authority – under limited circumstances – to involuntarily transfer jurisdiction of sexual assault cases to the Joint National Defense Command for disposition in instances in which the originating command

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allowed sexual assault and related cases to unreasonably languish or engaged in other actions inimical to the policies of The President and bests interests of national defense and justice.

At the core of the jurisdictional transfer – which would be a measure of last resort to enforce The President’s directive and protect the women and men victimized by sexual assault – is The Commander-in-Chief’s designation of the Secretary of Defense and the National Command Authority as having concurrent general courts-marital and administrative jurisdiction over all sexual assault and related matters arising in the Armed Forces. As stated, there would conditions that limit the opportunity for that concurrent jurisdiction to be exercised or “spring” into primary and exclusive jurisdiction. That feature would be an emergency measure designed to protect women and men from the abyss of sexual assault in the context of failed military institutions of justice, and a leadership that values support of the status quo and its failed leaders over the best interests of national defense and victimized women and male servicemembers – as discussed below.

2. *The Need for Strength.* Women entering the Armed Forces transitioned from their communities to a new life in the military not only for the pay, benefits and college tuition, but for the defense of the nation. About 53% are white and almost 47% are African-American and Hispanic. Most take their first oath of office in a solemn ceremony that sends shivers down their backs as they declare they “will support and defend the Constitution of the United States against all enemies, foreign and domestic”; that they “will obey the orders of [T]he President of the United States”; and, they will obey all superior officers and “the orders of the officers appointed over” them – which includes noncommissioned officers acting as extensions of the will of the officers.

With the Service ethical values, traditions, music, pageantry and larger than life leaders, there is always an element of excitement. Those servicewomen gradually come to understand that military life is fraught with contradictions – hoping to avoid war but the first to be in it, training to be invulnerable but realizing they are highly vulnerable, and wanting to live a long life only to discover that the words, “Theirs not to reason why, Theirs but to do and die” young, by United Kingdom Poet Laureate Alfred Lord Tennyson’s 1854 *Charge of the Light Brigade*, are true.

Sexual assault by perpetrators shocks, uproots and destabilizes servicewomen and shoves them down a cascade of pain, inexcusable contradictions and the realization that the nightmare they are experiencing – as a result of actions by personnel in control of their lives – is real and an absolute certainty. Sexual assault destroys any notion that the military installation is a home away from home. In fact, sexual assault strikes many servicewomen as they are in the midst of a major transition from home to the military.

For all practical purposes, those victims are trapped in zones of lawlessness occupied by rouge servicemembers and cannot escape – sectors that ruin the health of the victims; drain \$4.4 billion annually out of the budgets of the Pentagon, Veterans Administration and

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society; impede national security operations; and allow the rogues to operate with the advantage of strategic superiority for many decades.

The mission of the Joint National Defense Command, under the command of a four-star general or admiral, is to bust up and destroy zones of lawlessness by performing duties in a manner equivalent to General Ulysses S. Grant attacking General Lee. The four main missions are:

First, restore faith and hope to the servicewomen by freeing them from existing *defacto* sexual bondage by deploying on the ground, and opening escape routes immediately. If President Lincoln could free the slaves from the clutches of the Confederacy and enlist blacks in the Union Army – in numbers approximating 200,000 – the Pentagon can free women servicemembers from virtual or *defacto* sexual captivity and its threat.

Second, halt the immoral and illegal *defacto* sexual extortion by taking direct aim at the rogue perpetrators, hunting them down, and bringing them to justice. To accomplish that mission, the commanding general or admiral of the National Defense Command may use all of her or his command and coordination powers.

If President Truman and Congress could put an end to the wide scale abuse of 16-million servicemembers during World War II – in large part, by establishing civilian controlled Service boards for correction of military records and the Court of Appeals for the Armed Forces – the Pentagon can refine existing structures of administrative justice and The President, Congress and the Secretary of Defense can establish new structures as required to terminate sexual assault.

We propose a new paradigm, in which commanders and installations understand clearly that they will be held accountable for their judgments regarding sexual assault issues; and, that the Secretary of Defense has established organs that shall actively engage in executing the will of The Commander-in-Chief, Congress, servicemembers, and the American people. The Armed Forces should understand that there has been a termination of the old paradigm in which periodic or consistent neglect of the plight of sexually assaulted servicewomen was regarded as an acceptable foible for a brilliant tactician of war or logistics – and has been replaced by a paradigm that requires a demonstration of consistently sound judgment, including regarding the quality of life for women servicemembers and other personnel, as a prerequisite before the Armed Forces invests in that officer or noncommissioned officer as a material leader.

Third, lead the charge to transition the military and civilian bureaucracy that play an inadvertent role in undermining relief to servicewomen who have been sexually assaulted, protecting perpetrators, or performing some other role inimical to the best interests of national security and the victimized servicemembers. That path would include additional oversight boards to correct errant decisions, and coordination with a wide range of experts

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and professionals in the private, government, nonprofit, social advocacy and other sectors to design a new paradigm and transition the bureaucracy.

Fourth, approximate the function of a fail-safe organization that refuses to allow commands and intermediate reviewing institutions to be unsuccessful in executing the sexual assault mission. In that process, the commanding general or admiral, National Defense Command, is required to do all in her or his power – and leverage the right pressure points from the appropriate sources – to prevent failure. The reason is failure punishes women servicemembers even further, and that is manifestly unfair to them.

3. **Rationale.** The lynchpin of the Pentagon's approach is that despite an abysmal history, commanders will be reformed. However, the Pentagon appears to lack an effective alternative to the failure of commanders to be fair toward servicewomen who challenge the military based on sexual assault and related claims. Nevertheless, even if all commanders were rehabilitated – and that is not a realistic assumption – the larger context of a prevailing culture of sexism, gender bias, and sexual violence toward servicewomen will taint some supervisors, noncommissioned officers, officers, installation investigating bodies, boards for correction of military records, and maybe even members of the Joint Chiefs and their staffs.

Accordingly, unless The President's transformation efforts turn on whether commanders decide to comply – and that is surely not his intent – there must be an alternative or back-up command ready to go and continue the mission. This plan is based on the mantra that the servicewoman or servicemember will no longer suffer or bear the costs of intransigent commands, because there will be a change in tracks and a new engine will deliver the freight to the destination. In order to prosecute a perpetrator that the originating command refused to bring to justice, the entity responsible for ensuring there is no failure of justice must be a *worldwide command* – with all of the rights, privileges and powers of a major command – and the power authorized by The Commander-in-Chief to involuntarily transfer suspects and, if warranted, subject them to trial by courts-martial. The independent and stovepipe National Defense Command will have entities co-located with combatant, unified and major commands, and some installations worldwide.

With the command retaliation rate against servicewomen complaining about sexual assault and related matters raging at 62%, their health devastated as a result of sexual attacks, and some women contemplating suicide, there is no time or room for perpetrators to hide from justice, where they will be free to strike again. Officials must know what the perpetrators know – the identity, number and location of other servicemen involved in these grave breaches of trust; as well as their past operations, plans and schemes for future operations, and the shields to the operations provided by all protectors, including noncommissioned officers, officers, civilians and commanders.

In other words, the execution of an uncompromised investigation is exactly what commands have guarded and fought against for years: being rooted out with the same

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degree of relentless they have shown their victims in demands for sex. Besides, a message of serious deterrence needs to be sent throughout the Armed Forces, instead of allowing perpetrators to run amok and engaging in misconduct that offends the nation's sensibilities. We believe that the unity of command concept should apply to sexual assault, and a single command should be vested with the responsibility to ensure that that U.S. Armed Forces and its subordinate commands do not fail in reaching the goals, objectives, deadlines and other missions in the process of immediately reducing and eliminating sexual assault in an orderly manner. The National Defense Command would be commanded by a 4-star general or admiral (frocking authorized), who would also serve as a member of the Joint Chiefs of Staff (discussed below).

4. ***Summary of Duties/Functions and Role of SECDEF.*** At the end of the day, the Joint National Defense Command (NDC) would, among other duties, prevent failure of the anti-sexual assault mission in the Armed Forces by (a) implementing the will of The Commander-in-Chief, Congress and the Secretary of Defense regarding anti-sexual assault policy; (b) providing strategic leadership worldwide for the anti-sexual assault mission, as directed and authorized by The Commander-in-Chief; (c) absorbing the mission and personnel of the Department of Defense's Sexual Assault Prevention and Response Office; (d) educating and advising commands worldwide on the disposition of sexual assault cases; and, (e) preparing and submitting to the Secretary of Defense and Service Secretaries annual assessments of (i) the disposition of sexual assault cases worldwide, (ii) in a manner that accounts for the actions of commands and commanders regarding the quality of their decision-making in sexual assault and related cases, and (iii) relative to the intent of The President and Congress regarding the preservation of fairness for the alleged victims, justice, readiness and interests of national defense.

5. ***Scope.***

(a) Summary of Educational/Advisory and Disciplinary Missions

The scope of the mission would be broad and worldwide in nature. The main mission of the Joint National Defense Command would be to execute The Commander-in-Chief's will of relentlessly eliminating sexual assault, among other means, by ensuring that no command in the Armed Forces fails in that mission. To that end, the National Defense Command provides two major categories of assistance.

First, the National Defense Command provides a wide range of advisory and counseling services to the Armed Forces. If in the judgment of the commanding four-star general or admiral, agencies or entities are failing in the mission despite substantial efforts by the Joint National Defense Command to assist those substandard entities, that commanding officer notifies the Secretary of Defense or his delegee with recommendations.

Second, because on-going sexual assault at ground level threatens the immediate health of victims ostensibly for years to come – and undermines current and future national security

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operations – The Commander-in-Chief and Secretary of Defense have an interest in immediate administrative and criminal action, in the event a command with original jurisdiction over a sexual assault allegation is unable to pursue the matter for operational reasons, or is negligent towards the case and allows it to linger and fester, or deliberately attempts to suppress the matter.

That interest is an obligation of leadership to ensure that the command system functions properly and protects all from unwarranted domestic harm. For the safety of women servicemembers and the execution of the defense mission, sexual predators must be deterred, discovered and subjected to justice expeditiously. In that context, and in light of the historical disproportionate adverse impact on servicewomen caused by the failure of commands to establish a protectorate for them (*see* Sadler, et. al., *Factors Associated With Women's Risk of Rape in the Military Environment, American Journal of Industrial Medicine*, Vol. 43, at 262-273 (2003)), the standing up of the National Defense Command as a foundational alternative or “back-up” to command failure, is an imperative.

Under a pre-existing grant of authority from The Commander-in-Chief, the Commanding General or Admiral, Joint National Defense Command would be empowered to (i) support or supplement a field command's efforts to pursue a sexual assault case; (ii) accept the field command's voluntarily relinquishment of authority over a case to the National Defense Command; or, (iii) involuntarily transfer the case from the original field command to the National Defense Command (to include the transfer of all suspects, any accused, all witnesses, all victims, all third parties, and all persons classified as collateral damage), for the full-range of appropriate administrative or criminal sanctions, including no action to trial by courts-martial. Included in the directive to prevent failure is the power to exercise discipline in the field on a graduated basis, as required, discussed below.

(b) Administrative Duties

The command would provide expert information and advice to elements of the Department of Defense and the Secretaries of the Air Force, Army and Navy regarding the Armed Forces' sexual assault elimination plan, timetables, procedures, and substantive measures; commands visited; number of servicemembers contacting the command; symposia, seminars, education, training and train-the-trainer programs; special training for commanders, lawyers and noncommissioned officers; measurements of the effectiveness of efforts; disposition of cases; assessments of the disposition actions of commands and their subordinate commands; and, a wide range of other actions, including:

(1) as stated, absorbs the mission and personnel of the Department of Defense's Sexual Assault Prevention and Response Office; (2) provides logistical support for any sexual assault commission appointed by The President; (3) conducts *Sexual Assault State of the Command Visits, Inspections and Conferences* annually at (i) commands in which there would be frank assessments of progress, deficiencies, and any steps required to maintain the schedule regarding the anti-sexual assault strategy, goals, and timetables – based on

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rolling information and trends as of the conference time; and (ii) designated subordinate commands, in which there would be visits and inspections with women servicemembers, equal opportunity offices, inspectors general, lawyers, medical personnel and social workers, supervisors, command groups and other personnel to develop a first-hand and realistic sense of the situation that sexual assault victims face; (4) engages in partnerships with the private sector regarding strategies for eliminating sexual assault; (5) engages in partnerships with colleges and universities for the elimination of sexual assault, including the commissioning of research grants; (6) provides electronic newsletters to Service Secretaries, boards for correction of military records, and commands, among other recipients; (7) operates a *Sexual Assault Advisory Program (SAAP)* for commands and other clients; (8) operates a sexual assault hotline for servicemembers and a sexual assault retaliation hotline for servicemembers; (9) conducts quarterly video teleconferences, webinars and related communications for commands, equal opportunity personnel and other intermediate reviewers of sexual assault claims; (10) conducts servicemember forums, both webinars and in-person meetings; (11) sponsors symposia in each major command in which there is participation by members of Congress, Pentagon officials, veterans organizations, sexual assault advocacy groups, personnel executives in business, legal practitioners in personnel law (including military, federal and private sector), command officials, medical and social work personnel, and religious and other guests; (12) conducts semi-yearly meetings with board members and staff of the boards for correction of military records; (13) holds victim servicemember forums – in which command officials are excluded – for sexual assault victims, women servicemembers generally, and servicemembers from the LBGT community, including same-sex married couples, among other participants; (14) conducts training programs for equal opportunity organizations; (15) implements an *Installation Security Management Program*, including the issuing of standards for and assessment of installation security for the protection of women and other impacted servicemembers; (16) manages and administers a program called *Strengthening Installation Review*, in which commanders, lawyers, equal opportunity organizations, chaplains, social workers, medical representatives, representatives of boards for correction of military records, military personnel leaders at the installation, major command and Service leadership levels, along with special guests, discuss strategies and synchronization for implementing the directives of Congress and National Command Authority; (17) conducts public relations campaigns as widely as possible (via the internet and Armed Forces radio, television and newspapers, and commercial radio television and radio), directed at preventing and responding to sexual assault; and, (18) conducts a weekly radio or television program directed toward the prevention of sexual assault and the response – including mental health, personnel management, law enforcement and installation leaders, as well as guest military and civilian leaders – in a program that gives servicewomen and servicemen hope by allowing trapped women and men to hear the voices of the persons and/or see the people that are sincere about liberating them, and gives them a concrete concept of what “liberation road” looks like, how it operates, where it is located, and how it may be accessed.

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(c) Disciplinary Duties

In addition to deploying law enforcement assets organic to her or his command, the commanding general or admiral of the National Defense Command shall fight sexual perpetrators by coordinating with other DoD assets, such as the Joint Chiefs of Staff; DoD Police and civilian law enforcement assets supporting DoD Police; Service Secretaries, including the Air Force Office of Special Investigations, Naval Criminal Investigative Service, and Army Criminal Investigation Command; federal entities such as the Department of Justice, US Marshals Service, Secret Service, and FBI; state officials; and, by taking all other lawful action as deemed appropriate

The main feature, however, is the provision of the Secretary of Defense and delegates with the reserve flexibility to meet contingencies pertaining to sexual assault matters. Specifically, the interests of national defense warrant that the Secretary of Defense deploy a near fail-safe mechanism to counter a command's dilatory action or operational limitations (i.e., exhausted by deployment missions, insufficient resources, or other) regarding sexual assault cases.

This concept has resonance considering that given the military's strict control over the conditions under which its servicemembers function, work and live, it is conceivable that but for the Supreme Court's decision in *Feres v. United States*, 340 U.S. 135 (1950) – that under the *Federal Tort Claims Act* Congress did not waive immunity for injuries caused to servicemembers incident to their military service – the federal judiciary could be co-managing the protection of women servicemembers from sexual assault based at least on determinations of actionable contributory negligence – similar to federal court management of the civil rights of African-Americans and other vulnerable minorities who were denied their constitutional rights because of their color by state and local governments administering a discriminatory Jim Crow system.

In the Armed Forces, women servicemembers are targeted, sexually exploited, attacked, penetrated and raped by servicemembers – some of whom are assigned as supervisors of the victims – similar to the Jim Crowers' hunting to lynch a black man and woman. Moreover, some chains of command and installations discourage complaints from women servicemembers like the Jim Crowers discouraged minorities from filing a complaint about the poll tax. In any event, in some instances, the military processes a servicewoman's complaint about sexual assault with the efficiency of the Jim Crowers' processing of a black woman's written complaint about the unfair literacy test.

What is at stake is not the discretion of the chain of command, but a major policy question of human dignity and civil rights in the bosom of an Armed Forces that is proud of its heritage of liberating the world from tyranny; and, is a military that does not fight to seize the land and people of its enemies, but fights for the concept of freedom and liberty. This presents an opportunity for introspection by the military. In the basement of the Armed Forces, are there some shackled women; and, in the sub-basement are there some members

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of the sexual orientation community? If the Armed Forces cannot get it right for servicewomen, is there any hope for the others? We believe that this ship can be right-sized, provided the correct level of effort is applied.

In that context, it appears the likelihood of a finding of negligence (if *Feres* were not in existence) could increase in light of scholarly findings such as the widely accepted failure of military commanders to provide leadership, effective controls and role modeling behavior for subordinates that “can significantly increase women’s risk of rape, suggesting a continuum of violence, with rape the most severe form of coercion.” Sadler, et. al., *Factors Associated With Women’s Risk of Rape in the Military Environment*, *American Journal of Industrial Medicine*, Vol. 43, at 262-273 (2003).

Further, regarding the notional negligence discussed above, it is conceivable that the federal judiciary could find at least contributory negligence liability based on the Pentagon’s failure – in the Pentagon’s 1,100-plus page, 2014, anti-sexual assault and other recommendations to The Commander-in-Chief – to recommend the implementation of concepts such as one or more proposed in this communication or by others in the marketplace of ideas. Again, notwithstanding that liability under the *Federal Tort Claims Act* is foreclosed, the analysis is still instructive. The Pentagon’s omissions and exclusions are disappointing and render servicewomen less safe, as sexual assault in the military – including the suicide crisis emanating from it – is a pressing matter, if not an emergency, regarding one of the most prominent civil rights, complex, costly and cutting-edge social-legal fields in the contemporary Armed Forces.

Accordingly, we vigorously recommend the deployment of a mechanism that approximates a near fail-safe system. We recognize that no personnel system can be 100% fail-safe, but measures may be implemented that come as close as reasonably possible to an approximated fail-safe system. That is what we are proposing. To implement that mechanism, pursuant to The Commander-in-Chief’s order, the Secretary of Defense would direct that the new National Defense Command would be vested with secondary concurrent criminal and administrative jurisdiction over all sexual assault cases worldwide. That “springing” secondary concurrent jurisdiction would generally remain dormant, but could be activated or “spring” into exclusive primary jurisdiction under three circumstances.

First, a field, major, specified, unified, joint or other command, with the concurrence of least its first general officer or admiral in the chain of command, may request the National Defense Command to partner with the originating command as co-counsel on a sexual assault case. The chief (commander) of the National Defense Command must approve the partnership before the National Defense Command participates. After the parties execute a memorandum of agreement, the National Defense Command’s personnel will assist under the color of authority and primary jurisdiction of the requesting command.

Second, a field, major, specified, unified, joint or other command, with the concurrence of least of its commanding general, may voluntarily relinquish a sexual assault case to the

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National Defense Command in the best interests of justice. Reasons for such relinquishment include the superior resources of the National Defense Command, time limitations due to training and deployments, complexity of the case, limited resources within the originating command, attrition, culminating point, other operational concerns, or special circumstances (i.e., the case is highly sensitive due to the potential suicide of a distraught victim female servicemember) and should be transferred to an organization highly skilled in handling such matters confidentially; or threats against the victims and witnesses by a network of suspected male perpetrator servicemembers have compromised the investigation and the case should be transferred to a command with the capacity to deal with such circumstances). The voluntary relinquishment would be memorialized by a Memorandum of Agreement, approved by the chief (commander) of the Joint National Defense Command.

Third, based on the recommendation of the command staff judge advocate or upon the National Defense commander's own discretion, the chief (commander) of the Joint National Defense Command may recommend to the Secretary of Defense or delegees that dilatory acts or operational limitations by any originating command *preliminarily* warrant transfer of the case to the Department of Defense via the Joint National Defense Command's activated exclusive worldwide primary jurisdiction.

Upon authorization to proceed by the Secretary of Defense or delegee, the chief (commander), National Defense Command, acting through the command staff judge advocate, confers with the senior staff judge advocate of the highest command to which the command in question is a subordinate. The parties may agree the case is proceeding appropriately or requires changes in approach, or otherwise resolve their concerns, and memorialize their conclusions through the execution of a memorandum of understanding.

On the other hand, if the Joint National Defense Command concludes a jurisdiction over a sexual assault and related case should be transferred involuntarily from the originating command and its superior commands, to the Joint National Defense command, due to engagement in dilatory actions, impairment due to operational limitations, or for some other valid reason, four steps come into play.

- (i) First, the chief (commander) of the Joint National Defense Command shall seek authorization for the case removal action from the Secretary of Defense or delegee.
- (ii) Second, if the authorization is granted by the Secretary of Defense or delegee, the chief (commander) of the National Defense Command, on behalf of the Secretary of Defense may transfer the matter. This duty cannot be delegated; meaning the chief/commander, National Defense Command, must personally issue the order of transfer.
- (iii) Third, any such transfer, at its election, the Joint National Defense Command, may transfer or include complaining servicemembers, alleged victims, alleged perpetrators,

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accused, suspects, and witnesses of sexual assault and its ramifications (such as bias and retaliation), and other pertinent parties.

(iv) Fourth, any such transfer to the worldwide Joint National Defense Command for disposition includes the employment of its expertise to evaluate the case objectively; and, a duty to render a fair decision regarding whether to take no action, administrative action, prosecution by courts-martial, or other appropriate action.

6. *Message to the Armed Forces.* However, we believe strongly that the more important signal to the Armed Forces from the Congress and the Joint National Command Authority is a clear and unambiguous message that after decades and generations of a lack of satisfactory progress, The President, Congress and the American people will no longer tolerate neglect and failure by commanders and commands in the area of sexual assault – at the expense of the effectiveness of the nation’s readiness and national security; and, at the expense of the lives, health, safety, quality of life and career development and progression of female servicemembers. As a result, any distant “footsteps” that commanders may hear behind them from the Joint National Defense Command are a strong message from The Commander-in-Chief and Congress that is fourfold in nature.

First, The President and Congress are consecrated and united in defeating sexual assault.

Second, a return to “business as usual” of dismissing the sexual assault claims of women servicemembers will not be tolerated.

Third, unprofessional judgments by commands will not be condoned at the expense of humiliating women servicemembers by discarding their assertions and giving their cases the boot. Rather, The Commander-in-Chief and Congress seek to vindicate women servicemembers when warranted, and the new scheme of operations includes a reserve command and force capable of getting the job done if regular commands signal failure. This is a new paradigm in which the originating commands shall bear the risk of their own failure, not shift that risk to women servicemembers who are already victimized in so many ways.

Fourth, the culture of non-accountability regarding the disposition of sexual assault cases has been terminated. That is why the first general officer or admiral in the chain of command is vested with initial disposition authority and oversight roles are conducted by the Secretary of Defense at numerous points in addition to the preexisting roles of Service Secretaries.

7. *Commentary Regarding the Senate’s Rejection of Senator Gillibrand’s Plan.* We seek a middle ground between the views of the Senate majority and Senator Gillibrand and the supporters of her plan. Both are equally committed to eradicating sexual assault, but the means differ in part.

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For those Congressional Members supporting the full engagement of the chain of command in sexual assault matters – and thereby maintaining the unity of command essential for victory on the battlefield – our proposal maintains the full engagement of a commander and chain of command in their traditional leadership positions at all times.

For those Congressional Members in Senator Gillibrand’s camp, we propose a series of unprecedented mechanisms – including a check and balance system, such as mandating general officers or admirals to exercise initial disposition of a sexual assault case and bringing the most problematic cases to the attention of the high level of the Secretary of Defense or his or her delegee. Those features should incentivize commanders to exercise strong and fair leadership. The overall breadth of our proposal promotes independent decision-making, transparency and accountability by commands.

Our proposed National Defense Command is driven by the realities of strategic failure by the Pentagon. Currently, about 1 in 5 women are subjected to sexual assault, not to mention gender discrimination, sexual harassment and other derivatives of mistreatment of women servicemembers. Those events occur over a wide global expanse as there are about 800 military installations overseas and about 4,000 installations within the United States. See American University Professor David Vine, “*We’re Profiteers: How Military Contractors Reap Billions from U.S. Military Bases Overseas*,” *Monthly Review*, Volume 66, Issue 3 (July-August 2015). Under those circumstances, the statistical indication that many front-line supervisors and some members of the chain of command, including officers, are engaged in sexual assault and gender discrimination in its broadest sense, is a crushing blow to justice.

Order cannot seriously be restored only through telephone calls, emails and policy papers from the Pentagon. Rather, the enforcement arm must be a command, like the other commands with which it deals; and, be on the ground around the globe making the protection of servicewomen and the LGBT community, as well as others, an in-person reality as an extension of the will of The President and Secretary of Defense. That is similar to the Armed Forces’ stand-up of the Trial Defense Service in the late 1970s and early 1980s. A Pentagon-headquartered stovepipe organization, Trial Defense Service offices were established in commands globally to provide servicemembers facing courts-martial with independent defense counsel beyond the reach any commander on an installation. The members of the Trial Defense Service displayed an unmatched vitality and advocacy that caused many a commander to feel uncomfortable as events embarrassing to the command were revealed in court – but there was nothing they could do about it.

To deter, root out and sanction sexual perpetrators – some of whom are reliable colleagues, friends of the command, family men, decorated war veterans and regarded as excellent warfighters, logisticians, or mechanics – another set of objective eyes with enforcement powers should be available to pull the trigger some commands, hunkered down in a defensive posture while fighting back through retaliation 62% of the time in which sexual assault is raised, cannot or will not pull. Those organizations have lost orientation. They

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have allowed their personal alliances and self-serving professional interests to take priority over their national defense responsibilities when the unwanted sexual activity with the female servicemember began and misused their authority to escape justice. The antidote to that loyalty problem is the example the National Defense Command would set if the command fails to handle it responsibly.

Our plan maintains a viable and able chain of command that essentially is no different than a commanding general of a major command assuming jurisdiction of specified cases by name or category from one or more subordinate commanding generals under existing policies in operation. Under our plan, instead of the major command or higher withholding authority, the transfer of authority would be to the Joint National Defense Command, which would be authorized to exercise such power by The Commander-in-Chief.

In weighing this proposal consider the extraordinarily compelling six circumstances:

First, as \$4.4 billion annually in medical care and societal costs attests to the suffering and deteriorating health of women servicemembers from sexual assault, it is imperative to preserve the health of future women servicemembers by terminating sexual assault immediately.

Second, the functions of the Joint National Defense Command are integral elements of our proposed “constellation approach,” that emplaces a series of external controls, at multiple levels in the Armed Forces to promote accountability. In that context, we envision the National Defense Command – including the appointment of its commander to the Joint Chiefs (*see* below) – as momentous structures for the liberty of servicewomen as well as all servicemembers in the Armed Forces.

Third, commanders are given a chance to lead and succeed regarding sexual assault, per their Pentagon rehabilitation training and considerable assistance from the Joint National Defense Command.

Fourth, only after the commands fail or appear to fail, and after a balance of the commanders’ exercise of the command function against the interests of the sexually assaulted victims and the interests of national security, is a decision made to involuntarily transfer the case – and before that happens, every effort would be made to assist the command and provide them with a frank assessment of where they stand and what they need to do.

Fifth, it is in the best interests of the taxpayers, Armed Forces, sexual assault victims, and future potential sexual assault victims to root out all involved in sexual assault or its cover-up so that justice is served and the odds of a recurrence drop dramatically.

Sixth, we propose such action to address the far reaching tentacles of a structural injustice problem that collapses the pillars of justice on servicewomen instead of liberating them.

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8. *Summary.* The lynchpin of the Pentagon's approach is that commanders will be reformed. However, it appears that the Pentagon lacks a serious and effective alternative to the failure of commanders to be fair toward servicewomen who challenge the military based on sexual assault and related claims. Again, a 2014 62% command retaliation rate against servicewomen who raise the issue of sexual assault, is devastating to the Pentagon's hopes that commands are on the road to shedding bias and discrimination against women. Not to be lightly regarded, that figure denotes that 62% percent of the time in which sexual assault claims are raised, commands are either involved in among the most pernicious of sanctions – in this context, it borders on extortion – and/or the command group cannot or will control, limit, and stop its subordinates, who are running amok in the command inflicting retaliation and reprisals at will.

Even if all commanders were rehabilitated – and that is not a realistic assumption – the larger context of a prevailing culture of sexism, gender bias, and sexual violence toward servicewomen will taint some supervisors, noncommissioned officers, officers, installation investigating bodies, boards for correction of military records, and maybe even members of the Joint Chiefs and their staffs.

Accordingly, unless The President's transformation efforts turn on whether commanders decide to comply, there must be an alternative or back-up command ready to go and continue the mission. Any argument that the current commands can handle the problem is flawed. Historically, commands have not been able to resolve the problem; and, currently rate, at best, at the grade of "F," the equivalent of the meager 38% of commands in which there is *not* retaliation. The reality for women servicemembers is that at least 62% of the commands fall substantially short of the mark as an independent, unbiased and objective organization toward women servicemembers and sexual assault. Further, whereas sexual assault personnel matters are part-time duties for commands busily engaged with operational missions, issues related to sexual assault *are* the main function and expertise of the Joint National Defense Command. Given those conditions, and with some women servicemembers displaying serious adverse effects to sexual assault – including potential suicide at some point – the Joint National Defense Command is a sensible approach to the problem in a manner consistent with previous and historic dramatic changes to resolve pressing personnel issues that impede national security.

We are not aware of another approach that has the capacity to strike as rapidly, with as much disruptive force into worldwide sectors of sexual violence – while simultaneously reconstructing bureaucratic structural injustice into organs of fairness, compassion, justice and equity – in the process of liberating women servicemembers from sexual bondage, providing multiple escape routes for them, and halting future attacks by paralyzing the rogues in their tracks in a cross-fire of highly aggressive legal means that will stop them and their conspirators and accessories.

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■ ***C. Chief & 4-Star Commanding General/Admiral of the Joint National Defense Command as a Member of the Joint Chiefs of Staff.***

1. ***Duties/Function.*** Under the proposal, The President and Congress would add to the Joint Chiefs of Staff the dual-hatted position of Chief, Joint National Defense Command and Commanding General/Admiral of the Joint National Defense Command. That position would join the established positions of the Chairman, Vice Chairman and Chief of the National Guard Bureau in addition to the Commandant of the Marine Corps, Chief of Staff of the Army, Chief of Staff of the Air Force, and Chief of Naval Operations.

The primary duties of the Chief, Joint National Defense Command as a member of the Joint Chiefs would be fourfold:

First, to provide The President, Congress, Secretary of Defense, and National Security Council – subject to the authority, control and direction of The President, Secretary of Defense and the Chairman – an assessment regarding the readiness and role of 360,000 (more or less), servicewomen in the Armed Forces relative to the nation’s strategic direction, strategic planning, contingency planning, requirements, programs, budget, doctrine, training, education, and other matters. Because the Armed Forces has for so long lost sight of the almost unprecedented protracted suffering of servicewomen as a result of sexual assault and its adverse impact on the national defense mission, this function ensures that the national defense mission is paramount in any evaluation of sexual assault and related matters, and that the response is proportionate to the national defense implications.

Second, as a key policy advisor regarding gender, sexual assault, gender discrimination, and related issues on the Joint Chiefs of Staff, the Chief of the National Defense Command would function as the principal military advisor to The Commander-in-Chief and Congress regarding (i) the role of the 360,000 women in the Armed Forces, (ii) the formulation of strategic approaches regarding the prevention, treatment, and elimination of sexual assault, and (iii) the formulation of approaches to discrimination against servicemembers based on gender and sexual orientation, and related matters in the Armed Forces.

Third, another major responsibility of the Chief, National Defense Command, is to materially reduce the \$4.4 billion expended annually on medical care for sexual assault victims, and secure a re-allocation of those savings to the Department of Defense for operational needs.

Fourth, carry out other functions, duties, and responsibilities, as assigned, and as she or he considers appropriate – subject to the authority, control and direction of The President, Secretary of Defense and the Chairman.

Be advised that the magnitude of the sexual assault issues require leadership and management by the Joint Chiefs personally. Thus, The President, Congress, Secretary of Defense, servicemembers and the nation want a focus and direction from the vantage point of the highest ranking and most seasoned leadership in the form of a policy-making Joint Chief, not a staff member, such as the J-1, Manpower and Personnel Directorate of the

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Joint Chiefs of Staff. In any event, the J-1 evinces no indication that it possesses the organic capacity to plan or manage such monumental personnel change.

2. *Commentary: Policy Justification.*

a. Premise. The proposal for the Chief, Joint National Defense Command, to have a place on the Joint Chiefs of Staff is based on a compelling rationale. Our main premise is that periodically, the Armed Forces engage in momentous personnel changes as a result of pressing social, cultural, economic and national security vectors – such as the previously mentioned historic actions by President Lincoln, President Truman and Congress. Additionally, we are living in an era in which the demands or expectations of young people in the All-Volunteer Force may exceed the Armed Force’s ability to comfortably make required adjustments. The chronic problem of sexual assault against women outpaces the Armed Forces’ current level control over its own servicemembers and their violent sexual impulses.

b. Problematic Support Structures. It appears that many of the main existing structures (security, investigations, commanders, lawyers, equal opportunity and Army and Navy boards for correction of military records) in the Armed Forces for preventing and responding to sexual assault are failing to respond adequately to The President’s repeated order for “exponential progress.” That was referred to previously as problematic “structural injustice.” We are arguing that the Joint Chiefs of Staff should not examine their focus on a conventional Joint Chiefs arrangement – as was the case for those in opposition to the National Guard’s membership – in a vacuum without regard to the structural injustice problems.

c. The Vantage Point of the JCS in an Era of Social Change. Rather than to cutoff the Joint National Defense Command’s membership on the Joint Chiefs for prudential considerations, focus on what is the most effective move to usher in transformational change for the best interests of our national defense and the women servicemembers – as well as men. More importantly, which entity is in the best position to do this? In the Uniformed Services, there is no question that the Joint Chiefs are in the best position to promote change from a leadership perspective and from a standpoint of access to The President and Congress. Frankly, it may take years to turn around the thousands and thousands of military and civilian employees to render gender discrimination nil. But a Member of the Joint Chiefs of Staff who is active in stemming the sexual assault problem brings a degree of legal and moral authority that no other servicemember can bring to bear on the situation – as well maintain the focus of the Armed Forces and accelerate the pace. In other words, the leadership from the perch of the Joint Chiefs is unparalleled.

d. Context of Social and Cultural Change. There is, however, a larger context or setting in which the sexual assault issue fits. We are living in an era of momentous legal, social and cultural change that confronts established “old guard” policy perspectives. Thus, there is a doctrinal tension. The failure of the Armed Forces to protect women servicemembers from sexual assault previously and currently, may be a predictor of the challenging times the

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Pentagon could face in protecting the sexual orientation community it has welcomed to military society, to include the lesbian, bisexual, gay, transgender, and same-sex married sectors. From an institutional perspective, from the boards for correction of military records on down, will the sexual orientation community be safe, function in a supportive climate, and operate under the protection of local institutional polices enforced by chains of command? Will other barriers to inclusion for that community be identified?

This is a unique time in our social and cultural history which calls for vision. On the one hand, the Pentagon is commendably showing adaptability with women in Ranger School, efforts to open closed positions to women, accommodations for transgender requests, and, welcoming same-sex marriages in a traditional man and woman marriage setting. On the other hand, it appears the Pentagon's social and cultural agenda may have outpaced its operational capacity to implement these changes. Again, the protection of servicewomen from rape, other sexual assault, and retaliation is the litmus test because certain elements of the military may harbor negative feelings toward the sexual orientation community that are equal to or more intense than their disdain for women.

e. Installation of Heightened Moral Values. Ending sexual assault and preventing distress to the sexual orientation community requires leaders who can walk through the waters of moral crises the Armed Forces face and lead a transformation of leadership, moral values, national security, the protection of women and other vulnerable parties, mental and physical health, social conditions, and the education of young people. *See generally*, Anderson and Clement, *Survey's Results Probably Understate Scope of Crisis*, **Washington Post** (June 14, 2015), at A-1; Brown, Anderson, Svrluga, Hendrix, *Sex Assault in College is Common, Often Traumatic*, **Washington Post** (June 14, 2015), at A-1. Moreover, an astute leader knows full well that no matter the RAND statistics, the actual extent of sexual assault in the military is probably significantly underreported and should be accounted for in planning purposes.

f. Stronger, More Definitive Action to Alleviate the Consequences of Prejudice Against Vulnerable Groups Without Waiting for the Demands of Public Indignation

In some respects, the burden on the Armed Forces itself to correct, reverse, and halt the oppression of its vulnerable minorities – sexual assault and gender discrimination, as well as rejection of members from the LBGT and same-sex marriage community, religious minorities, and racial and ethnic minorities – is so much greater, in part, because the military is a separate society notionally walled-off from the civilian world. *See* Dr. Samuel Huntington, Harvard professor and President Carter's coordinator for National Security Council security planning, *Soldier and the State* (1957) (for much of the nation's history the U.S. military has displayed the "outlook of an estranged minority"); *see also* World War II veteran, journalist and consultant to the Joint Chiefs of Staff, Arthur T. Hadley, *STRAW GIANT: Triumph and Failure: America's Armed Forces. A Report From the Field* (1986) (announced the "Great Divorce" consisting of the separation of the military – whose leaders and personnel live outside the American mainstream in an organization beset by inefficient intraservice and interservice rivalries – from the country's "financial, business,

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political and intellectual elite,” and whose children seldom serve in the military after the draft ended).

Correspondent and President Carter’s former chief speechwriter James Fallows has recently written about the dysfunctional divide between the public and the Armed Forces. Fallows asserts it is a danger to the nation for the public to continue to display apathy and complacency regarding military affairs, fail to question the military’s competence as it would any other institution’s competence, and decline to hold the military accountable for systemic failures and other major problems. Fallows, *The Tragedy of the American Military*, *The Atlantic*, January/February 2015 Issue.

As time has elapsed, the extent of the public’s experience in challenging the military decreases in a manner that corresponds with both the number of servicemembers and the degree to which they represent the socioeconomic, political and social spectrum of America. In 1945, under the draft system, over ten percent (10%) of the population or sixteen million (16-million) servicemembers were under arms. Today, under the All-Volunteer Force, comprised mostly of middle-class and lower-class personnel, less than one percent (1%) of today’s total population experienced military service. That difference is significant.

Thus, in the post-World War II 1940s, a public familiar with military institutions – and “bitterly disappointed” and “outraged” with the excessive powers of commanders, the arbitrary and harsh manner in which troops were treated, and inadequate protections afforded servicemembers – “erupted into tornado-like explosion[s] of violent feelings,” and “abusive criticism of the military,” and demanded that Congress initiate “fundamental reforms.” See James Finn, *Conscience and Command: Justice and Discipline in the Military* (1971) at 26; Brigadier General (Retired) John Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, *Military Law Review*, Vol. 165 (September 2000) at 6-7.

As a result, President Truman and Congress created the Service boards for correction of military records under all-civilian control, in 1946; and, initiated action in the late 1940s that resulted in discarding the military justice system dating back to 1775, creating the modern Uniform Code of Military Justice and creating and installing the Court of Military Appeals (now Court of Appeals for the Armed Forces) under all-civilian leadership, effective 1951.

In contrast, today, as a result of the increased separation between the military and civilian environments there is not the expansive, broad-based and engaged public support for a correction of the structural injustices in the military architecture that existed in the 1940s. That phenomenon, along with the military leadership’s lack of vision and sensitivity to the casualties and collateral damage caused by its inaction, leaves certain vulnerable servicemembers in a disadvantaged status, such as women servicemembers (rape, sexual assault, gender discrimination, career obstruction, and retaliation); and the lesbian,

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bisexual, gay and transgender society (resisted by a hypermasculine culture of physical and sexual violence, discrimination, career obstruction, and retaliation).

Note this communication attempts to stimulate further public interest regarding the military's institutional competence and recommendations for improvement in personnel management. This is done in the spirit of the *Partnership for Reinventing Government*, in which Vice President Gore spearheaded an assessment of government inefficiency and proposed reforms that emphasized a clear sense of mission, putting people first, serving and satisfying customers, and fostering excellence. The result was a federal government that "works better" and obtained "results Americans care about"; and, the citizens care very much about sexual assault in the military and have a duty to question and comment.

The recommendation to place the Chief and Commanding General/Admiral, National Defense Command, on the Joint Chiefs of Staff constitutes a bold stroke to provide designated institutional leadership for a problem that has defied the Pentagon's efforts and now requires massive acceleration.

g. The Supreme Court's Big Picture. The perspective from the vantage point of a Supreme Court Justice may assist the military leadership to expand its vision, on its own initiative.

Although women had been admitted to the Armed Forces, Virginia Military Institute (VMI) had excluded women for 157 years until the Supreme Court struck down its all-male admissions policy. In *United States v. Virginia*, 116 S. Ct. 2264 (1996), the Supreme Court ruled that VMI's exclusion of women violated the Equal Protection Clause of the U.S. Constitution, and rejected VMI's proposed remedy of admitting only all-men to VMI while women attended a leadership program at Mary Baldwin College. While the issue did not involve sexual assault, it did address discrimination against women which is a part of the societal culture contributing to sexual assault and renders the concepts in the VMI decision especially relevant to the Armed Forces.

Of import for this discussion is the broader context examined by Justice Ginsburg in writing for the majority. Justice Ginsburg observed the Supreme Court was "skeptical" of the validity of the official action taken by VMI; and, that the government's action of "denying rights or opportunities based on sex responds to volumes of history." See *United States v. Virginia*, 116 S. Ct. 2264, 2274 (1996); see also Christina Gleason, *United States v. Virginia: Skeptical Scrutiny and the Future of Gender Discrimination Law*, **St. John's Law Review**, Vol. 70: Issue 4, Article 5 (2012).

Duke Law School Professor Neil Siegel, Justice Ginsberg's former law clerk, stated in characterizing her constitutional vision in the American legal order in her view, "Each generation of Americans advances the constitutional design by slowly but surely coming to comprehend such commitments" as "the equal protection of the laws" to include within their embrace groups who previously did not count in constituting "the People" for whom the "Constitution purports to speak." Professor Siegel, "*Equal Citizenship Stature*": *Justice Ginsberg's Constitutional Vision*, 43 **New England Law Review**, 799-855 at 800 (2009) (symposium on jurisprudence of Justice Ginsburg). Professor Siegel observes that

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in a 1997 lecture sponsored by Hofstra Law School, Justice Ginsberg regarded “the balance between liberty and security” as one of the most interesting issues facing the nation. *Equal Citizenship Stature* at 810. In that context, in a 2004 City University of New York Law School question and answer session, Justice Ginsberg observed it is important to note that the “public interest” is served in helping “to make it ever more possible for our daughters, as well as our sons, to aspire and achieve according to their talent and capacities.” *Equal Citizenship Stature* at 810.

Moreover, Justice Ginsburg’s use of the phrase “essential human dignity” refers to a “zone of individual freedom,” autonomy and privacy “into which the government may not intrude. See *Citizenship Stature* at 840-841. The Pentagon should extend Justice Ginsburg’s doctrine by articulating for all the clear rule that in the Armed Forces there is a “Zone of Essential Dignity” for all that that must be preserved for all by all, including all servicewomen, all servicemen, and all members of the LBGT and sexual orientation community. Further, the Pentagon should announce it will vigorously enforce and vindicate the “Zone of Essential Dignity.” Considering it was derived from a Justice of the Supreme Court, surely it is a theme worthy of articulation and leadership by the Joint Chiefs of Staff.

Members of the Joint Chiefs of Staff are encouraged to (i) subscribe to the belief that the public interest is served – not just in the military but throughout the nation – by eliminating discrimination against women (of which, sexual assault and rape are violent extensions) in the Armed Forces; (ii) be cognizant of and responsive to the historical repression of vulnerable groups; and (iii) understand, that at some point, each generation has a rendezvous with destiny regarding the generational advancement of the constitutional design by embracing previously excluded or oppressed groups – and for today’s Armed Forces those groups include women and the LBGT community.

The same vision, moxy, commitment, and organization that overcame a major racial divide and a deleterious drug problems within a generation during the 1960s -1980s and allowed the Armed Forces to leave the low valleys of Vietnam and ascend the heights of the unquestioned supreme warfighting military in the world during Desert Storm and today, can be applied to wipe out sexual assault today.

Following the Vietnam War, the Armed Forces were a “weakened institution” due to leadership, drug problems, and a racial conflict. The Nixon Administration ushered in the All-Volunteer Force, which resulted in a substantial increase in women servicemembers. U.S. Army History Center, *American Military History, Volume II* (2006), at Chapter 12 (*Rebuilding the Army: Vietnam to Desert Storm*). That increase, however, “did not occur without problems,” including excluding women from combat. *American Military History, Volume II*. “Even more serious problems arose with the increase of sexual harassment,” fraternization problems, and, “inappropriate language, gestures, or actions of a sexual nature directed at women.” *American Military History, Volume II*. The Armed Forces

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attempted to resolve this problem through an enhanced equal opportunity program, but gender discrimination, sexual assault and rape are pervasive in 2015.

If history tells us anything, it is that the paradigm of the Armed Forces does not work effectively or fast enough. Our proposed approach rejects simply adding more work requirements to an already ineffective equal opportunity system. Rather, we advocate a broad or wide frontal approach, with redundancy of checks and balances and transparency. This is a mission for the leadership of the Joint Chiefs. It is time for a leader regarding this pernicious problem to sit as a member of the Joint Chiefs to energize the Armed Forces and symbolize the military's unwavering commitment.

When we get to the bottom line, which is more important? The quality of life of our servicewomen, the vindication of their essential human dignity, the prevention of devastating medical and emotional effects of sexual assault, and the strengthening of our national defense through the addition of the Chief and Commander, National Defense Command, to the Joint Chiefs?; or, prudential claims such as needless confusion, reduction of authority of existing members, and a lack of a compelling reason to alter the status quo?

h. Risk to All-Volunteer Force. How the Armed Forces resolves this issue is important to our national security. All servicemembers need to feel safe so they can focus on their jobs to support the national defense mission. Furthermore, the Pentagon already faces potential dire straits by 2030 in terms of the nation's recruitment pool for the volunteer-staffed Armed Forces. Seventy-five percent (75%) of young adults aged 17-24 cannot join because they do not qualify due to criminal background, health, and education deficiencies; and, of the remaining 25% not disqualified, only 1 in 4 pass the entrance exams. *See* Mission Readiness Group's (including former Secretary of the Navy John Dalton, Under Secretary of the Army Joe Reeder, and 85 retired generals and admirals), *Ready, Willing and Unable to Serve: 75 Percent of Young Adults Cannot Join the Military*; The Education Trust, *Shut Out of the Military* (2010); Associated Press, *Study: Nearly 1 in 4 Students Fails Military Entrance Exam* (December 21, 2010) (Secretary of Education Arne Duncan observed many high school students "are not eligible to serve in our armed forces" and that he was "deeply troubled by the national security burden created by America's underperforming education.")

It appears that serious recruitment problems may be compounded if the reputation or public perception of the military is that it resents or has fairness problems dealing with sexual assault, integration of women, and integration of and discrimination against the lesbian, bisexual, gay, transgender, and same-sex marriage community.

This is the propitious moment to add a new member to the Joint Chiefs of Staff to display to prospective and current women servicemembers, veterans, and the nation the existence of a consecrated, bold and unified effort for the elimination of sexual assault.

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■ **D. *Reversing Career Damage Through A Fair DoD Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters).***

1. **Duties.** Today, boards for correction of military records (BCMRs) are regarded as the highest administrative tribunals in the Armed Forces for the resolution of personnel matters regarding constitutional, statutory, regulatory, policy, traditional fairness in the Armed Forces and equity. *See Clinton v. Goldsmith*, 526 U.S. 538 & n12 (1999). There are separate BCMRs for the Air Force, Army and Navy (includes Marine Corps). The Service Secretaries may correct military records through the BCMRs comprised of civilian board members.

We propose the establishment of the *Department of Defense Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters) (SECDEF BCMR)*. This board would signal the significance of The President's and Congress' anti-sexual assault measures through the vesting of the Secretary Defense as the final appellate body for all sexual assault and related matters arising from the Army, Air Force and Naval boards for correction of military records (BCMRs).

Because sexual assault is part of a spectrum of a culture that includes hypermasculinity, immature behavior, gender discrimination, sexual harrasment and rape, limiting the *Department of Defense Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters)* to exclusively sexual assault would be artificial and tantamount to halting the battle with The President's mission only partially executed. Thus, the term "Related Matters" in the title of the DoD Board includes sexual assault and attempted sexual assault; gender discrimination; sexual harrasment; issues arising from or related to a lesbian, gay, bisexual, transgender, same-sex marriage or same-sex couples status; personnel sanctions arising from a third party's efforts or attempted efforts to assist persons in the aforementioned categories; retaliation arising from or related to the aforementioned categories; disability status and other medical treatment problems arising from the aforementioned categories; and other issues determined by the Secretary of Defense to be consistent with the purpose of this provision.

Further, the SECDEF BCMR rules on petitions for extraordinary relief from sexually assaulted women and men servicemembers, as well as lesbian, gay, bisexual and transgender (LGBT) military personnel; and third parties who witnessed or attempted to prevent sexual assault and its ramifications. The extraordinary or expedited feature allows all sexually assaulted servicemembers, or servicemembers assisting them, who believe their efforts for redress have been ignored, or they are victims of retaliation or other sanction, or are in a state of *defacto* sexual captivity without redress, etc., may request extraordinary or expedited relief from the SECDEF BCMR. Such requests may arise from any point within the military's spectrum, from a female private E-1 evading sexual assault in basic training to a female lieutenant colonel unable to take a shower on a deployment out of concern of a sexual attack. Note that the Service BCMRs do not provide servicemembers with an opportunity to seek expedited or extraordinary relief; and, that

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Army and Navy boards engages in unsound practices that are structurally defective, and materially unfair to servicemembers – as summarized below.

2. **History.** This proposal is a derivative of Congress' 1946 authorization of a Secretary of War Board for Correction of Military Records (*The Legislative Reorganization Act of 1946*, P.L. 601-79th Cong., § 207 at 30); and, War Department Chief of Staff General Eisenhower's implementation of that law by issuance of *War Department Memorandum 400-20-1, Secretary of War's Board for Correction of Military Records*, January 1, 1946.

3. **Members.** While we do not list the litany of qualifications and practices for the DoD board herein, we believe strongly it should consist of a core of full-time or permanent professional board members (administrative law judges or persons hired as full-time board members) – all of whom would be attorneys who exercise independent judgment, decide whether to grant hearings *sua sponte* or upon request of applicants, author their own opinions, and deploy stateside and worldwide as warranted particularly to hear requests for extraordinary relief, or gather facts in a hearing regarding the merits of an appellate petition.

In addition, the DoD BCMR panel would augment its full-time staff with part-time members (senior government employees with full-time positions who perform BCMR board responsibilities as a collateral or adjunct duty).

4. **Functions.** (i) The salient features of the *DoD Special and Confidential BCMR* include an adjudicative body highly sensitive to the history of sexual assault, the problems sexual assaults cause the victims, the needs of *pro se* applicants, the role of applicant's counsel, and the remedial and corrective nature of the mission – including a responsibility and obligation to use and employ equity to remove the stain on and damage to the careers of female servicemembers (and other servicemembers) who allege they have been victimized by sexual assault, as well as injuries to those attempting to assist them.

(ii) Additionally, as stated, empower the DoD Board to address any petition from any servicemember at any level – basic training, the field, offices, deployments, installations, major commands, unified commands, specified commands, and even Offices of Service Secretaries and DoD – for extraordinary relief regarding sexual assault and related misconduct (including transgender and other sexual orientation issues).

(iii) Moreover, the DoD Board members would have the discretion to engage in a *de novo* review if they believe such a review is warranted in the best interests of justice, law and equity to ferret out sexual assault.

(iv) As delays in correcting the records of servicemembers contribute to career harm, the DoD Board and the Secretary of Defense should resolve cases within 6 months.

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5. ***Sunset for Automatic Appeals.*** To protect servicemembers, all sexual assault and related BCMR decisions at the Service levels should be automatically reviewed by the DoD Board unless the applicant declines the automatic appeal. The review would consist of two stages. At *stage one*, the DoD Board would make a preliminary determination as whether the servicemember's position has potential merit. If not, the case would be closed with a rationale furnished to the servicemember. However, if the DoD Board determines the case has potential regarding the merits, the case would move to *stage two* and be reviewed on the merits, including hearings if the DoD Board so elected.

The automatic appeals process should be revisited after a 5-year period – which ensures the Secretary of Defense shall have a direct hand in the process as DoD attempts to quash sexual assault. After the initial 5-year period, the Secretary of Defense may decide whether to transition from automatic applicant appeals to applicant petitions for appeals that may be heard in the discretion of the *DoD Special and Confidential Board for the Correction of Military Records (for Sexual Assault and Related Matters)*.

6. ***Prohibited Practices.*** The *DoD Special and Confidential BCMR* would terminate the *Quadrangle of Denial* practices of the Army and Navy boards – the majority of BCMR cases within the Armed Forces – which vitiate the heart of the fundamental fairness Congress intended for servicemembers via the BCMR process. The practices to be terminated include the Army and Navy's rejection of admissible evidence, suppression of hearings for decades, routine determinations that applicants fail to overcome the presumption of administrative regularity, and routine summary denials of relief without meaningfully addressing the issues raised – in servicemember challenges to the judgment, discretion, credibility, motives, and fairness of the chain of command regarding sensitive personnel matters, such as assertions of sexual assault victimization and discrimination based on gender, race, color, diversity, national origin, religion, retaliation, bias and other areas that may signal concern for challenges based sexual orientation discrimination. See Jordan Patrick Cooley, *Memorandum to Secretary of Defense Hagel, et. al., Protecting the Due Process and Fairness Interests of Active Duty Servicemembers, Coast Guardsmen, National Guardsmen, Reservists, Veterans, former Servicemembers & Retirees From Unfair Adjudications By the Armed Forces Boards for Correction of Military Records* (November 23, 2014) (Re-issued Corrected Copy) (53-pages).

Our firm sent that memorandum (preceding paragraph) to Secretary Hagel, in part, as an objection to the Army Board for Correction of Military Records' (ABCMR) executive director's inference to 2-million listeners on National Public Radio, on or about November 6, 2014, that the ABCMR's typical adjudication session, consisting of 80 cases in 5 hours (300 minutes) at a pace of about 3.75 minutes per case, was fair to servicemembers. The memorandum argued that the Army and Navy BCMR processes are manifestly unfair. See generally Yale Law School Professor Eugene Fidell, *The Boards for Correction of Military and Naval Records: An Administrative Law Perspective*, Vol. 65 ***Administrative Law Review*** 499, Issue 2 (2013) (“Our active duty and former military personnel – the vast majority of whom cannot afford civilian lawyering – deserve better”); Wilmerhale LLP

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Attorney Rebecca Izzo, *In Need of Correction: How the Army Board for Correction of Military Records is Failing Veterans With PTSD*, 44 *Yale Law Review* Vol. 123, No. 5 (March 2014) at 1587); Attorney Wickham, John Wickham & Associates, LLP, *Federal Court Developments in Military Personnel Law: Protecting Service Members*, 55 *Naval L. Rev.* 337 (2008) (BCMRs confuse lawyers and applicants alike and elevate form over substance); Attorney Toney, Law Offices of Raymond J. Toney, LLP, *Military Record Correction Boards & Their Judicial Review* (2010) (presented to Texas State Bar) (discussion of studies of BCMR decision-making, including but not limited to adjudication of cases in less than 5 minutes per case by unprepared board members).

Furthermore, devices such as the presumption of administrative regularity – the Army and Navy boards employ them, in effect, to uphold the decisions of the command below and deny relief to applicants – would be terminated regarding sexual assault claims. Rather than to shortcut the adjudication process by blithely relying on statements prepared by command and installation officials, below, in a morass of actual or apparent conflict, bias, and unreliability, the *DoD Sexual Assault Special and Confidential Board for the Correction of Military Records* shall skillfully, fairly and objectively apply Congressional intent and standards in the adjudication process; and, in appropriate cases involving disputes regarding material facts, determine the “credibility of witnesses as shown by their demeanor or conduct at the *hearing*.” See *Camera v. NLRB*, 340 US 474 (1951) (bold added) (Justice Frankfurter asserts that it was Congressional intent under the *Administrative Procedure Act of 1946* (which parallels the creation of BCMRs also in 1946), for hearings to serve as the vehicle to resolve disputed material facts). See generally Professor Forkosch, *Credibility Gap in Judicial Review of Administrative Determinations*, 18 *Clev.-Marshall Law Review* 257 (1969) at 262-263. In that manner, the DoD Board should be able to correct erroneous Service BCMR and installation/command decisions. More importantly, the DoD BCMR would function as a true “last sentinel” in defense of fairness for servicemembers; sparing servicemembers the burdensome expenses of federal court litigation costs and lawyer’s fees – in battles against a phalanx of government lawyers from BCMRs, the Office of The Judge Advocate General, and the Department of Justice – to vindicate the relief to which they were entitled in the first place.

7. Special Circumstances Counseling Support for the DoD Sexual Assault Special and Confidential BCMR. At this point, the most prudent and expedient course of action is to take the surgical approach of creating a sexual assault appellate board, the *Department of Defense Special and Confidential Board for Correction of Military Records (BCMR)(for Sexual Assault and Related Matters)*, to supervise and review Army and Navy BCMR decisions – as well as those decisions of the Air Force (so that all sexual assault servicemembers obtain the same review opportunities) – and grant relief when it is warranted.

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The *DoD Special and Confidential BCMR* would exercise its discretion in handling two primary categories of cases:

First, automatic appeals, and servicemember appeals, of petitions for relief denied by Service Secretaries via Service boards for correction of military records (BCMRs) regarding sexual assault and related issues, as defined above.

Second, determine whether to grant *expedited relief* to servicemembers raising injustices regarding the immediately above categories, since Service BCMRs lack a case acceleration process for any servicemembers or public information regarding such; and, the cases of some sexual assault victims or other applicants eligible for DoD Board consideration may constitute exigent circumstances regarding mental and physical health, other medical matters, life, irreversible career ruination, extremely damaging financial conditions, and other circumstances warranting immediate intervention and temporary relief. Perhaps the Service BCMRs might become inclined to provide such services for their servicemembers.

8. Congressional History and BCMRs. Furthermore, the establishment of a *DoD Sexual Assault Special and Confidential BCMR (for Sexual Assault and Related Cases)* is the most direct course for ensuring servicewomen (and all other servicemembers with sexual assault issues) are treated in a manner consistent with Congressional intent. Congress enacted major BCMR changes following its disheartening discovery in the 1990s of service-wide mismanagement of the BCMR process and unfair treatment of servicemembers. Congress announced servicemembers and the public viewed BCMRs as “unresponsive” bodies that “abdicated their independence to the uniformed services.” Congress stated emphatically to Service Secretaries, servicemembers and the public that BCMRs were “**administrative arms of Congress entrusted with the responsibility to be ‘guarantors of fair and equitable treatment for thousands’** of active and former servicemembers.” See *Senate Committee on the Armed Services, Senate Report 104-112* (104th Cong., 1st Sess. (1995) at Section 555; *House Report 104-50*, January 22, 1996, Section 554a (*Review of BCMRs*); *House Committee on National Security Report, 105 House Report 532* (May 2, 1998).

9. Dispatching Reinforcements to Provide Relief for Sexual Assault Victims. The substantial Congressional reforms in the 1990s did not repair all problems, and additional procedural and substantive pathogens infected the system in existence today. That is another reason our firm advised Secretary of Defense Hagel, in November 2014, to launch *Operation Restoration Quantum of Fairness* as the antidote to the crisis created by the Army and Navy’s formidable *Quadrangle of Denial*.

We believe there is no effective final sentinel, guarantor of fairness, or guardian of righteousness for women servicemembers in the Army or Navy unless there is dramatic change. President Franklin Roosevelt observed a significant new law “represents a cornerstone in a structure which is being built but is by no means complete” as future laws, management and administrators “will flatten out the peaks and valleys” so the law will “take care of human needs” while promoting the strength and interests of the nation. See

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Presidential Statement Signing the Social Security Act, August 14, 1935, contained in ***FDR's Statements on Social Security, Presidential Statements, Official Social Security Website***, www.ssa.gov/history/fdrstmts.html.

Despite Congress' 1946 establishment of a visionary system to remedy the inevitable mistreatment of servicemembers by commands, and intervention in the 1990s to save the BCMR system from ruin, the Army and Navy have allowed the extraordinary infrastructure that Congress delegated to it to attrite. One of the primary reasons for that result is the systems of the Army and Navy lack adequate internal defense mechanisms to the perennial evil criticized by Congress, in the form of abdication of independence to the Uniformed Services in credibility disputes involving challenges to the chain of command. Effectively, in the generation since Congress' last major internal evaluation of BCMR operations, the Army and Navy BCMRs have evolved into the Praetorian Guard standing in defense of the chain of command of the Uniformed Services. Since the chain of command virtually always denies culpability or knowledge of sexual assault, it stands to reason that sexual assault victims' challenges to the judgment, decisions, discretion, motivations, fidelity, and actions of the chain of command may be denied on a disproportionate basis. As a result, in the Army and Navy – at the Secretariats – *institutional resistance* to the rise and equality of women apparently survives inadvertently and may constitute a harbinger for prospective claims of degradation based on sexual orientation.

Given the avalanche of problems confronting victims of sexual assault, apparently it has been and would continue to be an injustice to subject sexual assault – and related victims and persons sustaining reprisals for assisting them – to the profound unfairness of the Army system and the Navy's similar system. However, while the board for correction of military records system warrants modernization, the reclamation train for female servicemembers must leave the station now and cannot wait for a protracted correction of the bureaucratic quagmire regarding the corrections boards established in 1946.

America's daughters and the nation cannot subject women servicemembers to yet another test of endurance before problematic Army and Navy BCMRs. We believe that neither Service has shown any inclination for budging or changing on their own initiative; therefore, there is a meaningful risk that the proceedings may be unfair in the context of a servicewoman's challenges to her chain of command or other superiors in a sexual assault case. End the status of sexual assault victims as canaries in the methane infused coal mines of the Army and Navy BCMRs. Build on the considerable BCMR infrastructure and architecture that Congress established in 1946 – one of the last novel institutions of the New Deal – and carve out immediate relief in the form of the *Department of Defense Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters)*.

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■ **E. *Military Sexual Assault Victims' Access to Federal Courts Act.***

At the end of the day, many sexually exploited women servicemembers are cutoff from a Pentagon apparatus that is intended to prevent sexual assault or assist them obtain effective relief from violations of their persons. Further, for military servicewomen, the road to federal court intervention – and its possible resultant more active supervision regarding the military's mismanagement of sexual assault – is fraught with an avalanche of obstacles. Accordingly, proposed is a recommendation that The President submit to Congress a narrow proposal to exempt appeals of the decisions of the *Department of Defense Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters)* from the requirements of Title 5 USC § 706 (*Scope of Review*), of the *Administrative Procedure Act (APA)*.

1. *APA's Prudential Limitations on Access to Federal Court By Sexual Assault Victims*

Currently, Title 5 USC § 706 (*Scope of Review*), of the *Administrative Procedure Act (APA)*, requires federal courts to uphold a final decision by a Service Secretary acting through a board for correction of military records, unless the servicemember (a) can prove the decision was arbitrary and capricious; (b) overcome the rebuttable presumption that military administrators discharge their duties lawfully and in good faith; (c) establish the decision was unsupported by substantial evidence; or (d) prove the decision was contrary to law or procedure. See *Hill v. Geren*, No. 1:2007 cv 02085(D.D.C. February 11, 2009) (memorandum opinion), 2009 US Dist. LEXIS 10237. Those standards are materially higher than the women servicemembers' burden of establishing an injustice based on the preponderance of evidence before a board for correction of military records (BCMR).

2. *Balancing National Security and Defense Against Prudential Considerations*

The major premise undergirding the proposed exemption is as follows. The Commander-in-Chief and Congress did not intend for the prudential provisions of the *APA* to hamstring national security – consequently, Congress did not apply the *APA* to the BCMR process when it enacted both provisions in 1946. Thus, national defense matters generally outweigh the *APA's* prudential considerations. In evaluating this, it is vital to recognize that the immoral, inequitable and illegal manner in which some women servicemembers are treated not only implicates the *War Powers Clauses* in the *Constitution* (Article I, Section 8, War Powers of Congress; and Article II, Section 2, Commander-in-Chief), but directly interferes with America's national security.

Likewise, the paramount nature of correcting military records was illustrated in one of the most influential decisions of the Court of Claims regarding Service Secretaries acting through BCMRs in *Caddington v. U.S.*, 147 Ct. Cl. 629 (1959). Chief Judge Jones writing for the court observed, “the Secretary and his [B]oards have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and take steps to grant thorough and fitting relief,” and “equity delights to do justice and not by the halves.”

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In that context, it is doubtful that The President, Congress, or federal courts would intend for the APA's prudential factors raising a servicewomen's evidentiary burden for seeking relief to shield underlying structural injustices that have unfairly obstructed servicewomen from obtaining relief in the first instance. The increased evidentiary burdens for prevailing in federal court under the *Administrative Procedure Act* are premised on the presumption that the prior government reviews by military personnel are sound.

As stated, that is not always the case with sexual assault decisions by the military. RAND's research reveals that many persons involved in sexual assault, sexual harassment, and gender discrimination are supervisors of the female victims, noncommissioned officers and officers; and, numerous installation agencies attempt to dissuade complaints by the victims as opposed to investigating their assertions. Consequently, if anything, some of the sexual assault victims are cutoff from a responsive military leadership. This essentially relegates many women servicemembers to the status of an unrecognized, exploited and oppressed *defacto* suspect class in desperate need of lifelines. The proposed *Military Sexual Assault Victims' Access to Federal Courts Act* is such a lifeline.

Related to the issue of structural injustice through bias at the command and installation level is the seminal BCMR case of *Sanders v. United States*, 219 Ct. Cl. 285 (1979), 594 F.2d. 894 (Ct. Cl. 1979). There, the Court of Claims addressed a matter related to the impact of secret proceedings by military officials. The *Sanders* court observed that it is "all but impossible" for servicemembers to present the substance of "secret proceedings" conducted by military officials and which excluded the servicemember, or calculate the precise career harm of such unknown proceedings. *Sanders*, 594 F.2d at 815-816. The *Sanders* court determined "the ultimate burden should be on the party whose error and obfuscation of the evidence caused the problem in the first place." *Sanders*, 594 F.2d at 816.

That analysis has resonance for the resolution of sexual assault issues because the servicewoman victimized by her supervisor, command official, or male servicemember colleagues, has no knowledge of the communications between the assailant and supervisor – or assailant/supervisor and command officials, or assailant/command officials and the commander, or the commander and the equal opportunity officials, among other communications. However, with evidence of a command 62% retaliation rate against women servicemembers alleging sexual assault, it appears that defensive collusion by commands is afoot. One boilerplate web that is spun is that a servicewoman is lying about the sexual assault, her duty performance is poor and she is emotional unstable.

As stated above, under the current law, servicewomen victimized by sexual assault cannot access federal courts for relief unless they can meet the test set forth in the *Administrative Procedure Act* – a gauntlet premised on the reliability of official information submitted through military channels from supervisors, commanders, and review agencies. That is unfair because the Pentagon is fully aware that many of its supervisory personnel, among others, are involved somehow in sexual assault, and that chains of command are known for deflecting sexual assault challenges raised by women servicemembers.

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Consequently, this would appear to be the propitious opportunity for the establishment of a new doctrine or test based on sexual assault that renders official statements by supervisors, commanders and review agencies ineligible for the designation of inviolability that is very difficult for servicemembers to overcome under the presumption of administrative regularity. Sexual assault is not primarily a legal problem. It is foremost a national security problem undermining at least a reported 20% of the women servicemembers in the Armed Forces, impacting adversely on their ability to work, costing about \$4.4 billion annually in medical care and societal costs, and threatening the remaining servicewomen.

The Pentagon has a vested interest in getting to the root of the problem and destroying it. In that regard, prudential legal rules designed to limit appellate cases in the pipeline that inadvertently shield perpetrators masquerading as righteous military officials under the doctrine of the presumption of administrative regularity are contrary to the best interests of America's national security. Lower the barriers to discovering the tentacular nature of sexual assault and eliminate it.

It is time to apply vision to immediately leverage all lawful and equitable means necessary to break the concrete of sexism that encapsulates women servicemembers by permanently removing the perpetrators off their backs. For that result to materialize, women require greater ease of access to federal courts, just as racial minorities needed federal court assistance with desegregation efforts in the face of hostile state and local governments during the civil rights era. In turn, federal courts would exercise discretion in determining when to intervene – whether via extraordinary writ, on an interlocutory matter, or on a BCMR appeal on the merits – to protect victims in sexual assault and related cases when the military safeguards fail (and they have so failed). The result should contribute to the elimination of sexual assault, greater enforcement by the military, and enhanced accountability of the command structure and other players.

Accordingly, greater access to federal courts would create a warranted and greater incentive for positive change in the prevention and disposition of sexual assault allegations throughout the Armed Forces.

3. Minimizing the Injection of an Element of Structural Injustice: Potentially Biased Command/Installation Reports in Sexual Assault Cases That Shield Perpetrators

Sexual assault and related allegations appear to be unusual because many times they may involve serious allegations, with potential criminal implications, regarding a representative of the commander or leaders in the chain of command. As stated, the RAND survey reveals that inappropriate contact is frequently initiated by military supervisors and superiors. When it is alleged those supervisors or others are involved in sexual assault, the commander's command climate and leadership may be implicated. Likewise, if a member of the chain of command has knowledge of improper behavior by a subordinate but has been silent, again, the command's leadership may be compromised.

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Furthermore, given the inference of RAND statistics regarding the extensive efforts of organizations – ostensibly, such as commands and equal opportunity – to dissuade the filing of complaints by victimized servicemembers, it is reasonable to suspect whether bias or impartiality have tainted the “official” process, as the leadership may form a coordinated defensive perimeter. For instance, our firm recalls a situation at a prestigious military institution in which the equal opportunity office informed the regimental commander of a servicemember’s revelation that she had been sexually assaulted by a prominent installation servicemember, and the regimental commander hatched an elaborate but successful plan that convinced the servicemember to withdraw the complaint – after which, retaliation was nonetheless levied against her.

To the extent those concerns have any validity, the ethical standards are potentially involved pursuant to *D. DOD 5500.07-R, JOINT ETHICS REGULATION (JER)*, 30 Aug 93, Change 7, effective 17 November 2011, as amended; *Ethics in Government Act of 1978* (5 U.S.C. App. § 101 et. seq.); *Executive Order 12674, Principles of Ethical Conduct for Government Officers and Employees*, April 12, 1989, as amended; and *Standards of Ethical Conduct for Employees of the Executive Branch*, 5 C.F.R. Part 2635 (Office of Government Ethics Rules).

Essentially, the requirement for impartiality in performing official duties, 5 C.F.R. 2635.502(a)(2), subpart E, prohibits government personnel from engaging in transactions under circumstances that “would raise a question regarding his [or her] impartiality.” Further, government personnel shall not use public office for private gain, 5 C.F.R. 2635.101(b)(7); and, government personnel shall act impartially and not give preferential treatment to any private organization or individual. 5 C.F.R. 2635.101(b)(8).

Since a sexual assault and its ramifications reasonably implicate the command’s leadership regarding potentially serious matters, the command is in a potentially adversarial and defensive position regarding servicewomen or serviceman. At that point, any records prepared by the command group including its leadership subordinates, and any communications with equal opportunity or other parties, may have a dual-hatted purpose. On the one hand, such communications may be pursuant to military transactional business as the command’s perspective would be a relevant subject of any inquiry. On the other hand, the command appears to lack impartiality regarding its role, since it is also concerned about how the outcome might affect personnel evaluations by superiors and whether there may be a subsequent financial impact, such as a loss of income from a nonpromotion as a result of an adverse personnel evaluation.

This is important because the military gives credence to the views of command officials in the review process. Thus, based on our experience, many reviewers of sexual assault and related allegations read the command statements and attribute credibility to the authors because of their position and responsibility, without regard to a potential conflict of interest or misuse of position that may surface if there existed a serious inquiry, including an in-person examination of all pertinent witnesses by an authority qualified to assess credibility.

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The DoD BCMR would ensure that in the appropriate sexual assault credibility disputes that an objective administrative investigation – in the form of a hearing and the examination of witnesses – would be conducted by an experienced administrative law judges or lawyers to discover the truth. That process, would promote DoD BCMR decision-making on a factually developed record, and offset a fundamental flaw in the Army and Navy BCMRs.

We are not suggesting that command officials should not be permitted to record their views. However, we do believe that under the circumstances, views from command officials should not be clothed by the presumption of administrative regularity. Such a presumption is outweighed by greater societal interests in rooting out sexual assault to promote America's security and protect women and other servicemembers from harm.

4. Court of Appeals for the Armed Forces as a Designated Appellate Court for Appeals of DoD BCMR Decisions

Particularly for such a limited aspect of military administrative law regarding sexual assault and related matters, the Court of Appeals for the Armed Forces appears to be a reasonable “anchor court” for the judicial supervision of commands and BCMRs. Moreover, the Court of Appeals for the Armed Forces would provide Servicemembers with a home steeped in generations of experience regarding the military environment and a strong record of dealing with intransigent military commanders particularly in the field of unlawful command influence. Faithful to its 1951 charter and the purposes for which President Truman and Congress created it, the court's evolution includes an application of the public perception test in criminal cases to regulate and limit the actions of commands while preserving the rights of military personnel – and this is a major doctrinal shortcoming of some of BCMRs.

While applicants would retain the option of access to other federal courts if they so elect, it may be worthwhile to establish as a pilot or test program the *Department of Defense Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters)*, with the Court of Appeals for the Armed Forces as the test for federal court review. Upon conclusion of the test program and evaluation, The President and Congress could determine whether to proceed on a permanent basis that would involve potential access to federal courts across the board.

■ F. *Enhanced Special Security on a 24/7 Basis for Each Installation.*

A typical military police security drive through an installation is probably insufficient to protect women servicemembers from predators lurking in training fields, isolated facilities, office buildings, and residential quarters. To obtain the requisite hardening of security for women servicemembers, and as a show of force with deterrence power, each installation should be required to appoint, train and deploy *special security patrols – extra duty for military personnel and units on the installation directed to augment the installation military police.*

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Installation commanders would manage the program and the National Defense Command coordinates it with uniform guidance. That special security patrol would focus on *community policing* and provide materially enhanced security – particularly on foot – *in every structure and area of each installation* on a 24/7 basis to the extent possible, including housing and residential areas, workplaces, shopping areas, recreational areas, secluded woods, roads and training areas.

The objective is for sexual offenders to be reasonably deterred by the fact that on-post facilities and grounds are swarming with security personnel who have close contact to the women and girls, and are on the spot to quell abuses before they materialize, or dragnet offenders after a violation has been committed. As part of this process, security telephones and cameras would be installed in all facilities, structures and grounds – as costs allow. The decrease in the \$4.4 billion expended on medical care and societal costs would amply cover the costs of security telephones.

In addition to the mandatory extra duty patrols, the installations would coordinate a citizen-volunteer patrol consisting of off-duty servicemembers, civilians affiliated with the military or members of the larger civilian community (there would be background checks) – in conjunction with local civilian police and social work training (to promote integration with wider resources) – and deploy it.

■ **G. Heightened Personnel Evaluations.** An enhanced focus on deterring sexual assault of women servicemembers and related issues should include heightened personnel accountability standards regarding (i) the prevention of sexual assault and related matters; (ii) the fairness of a command's disposition of a servicemember's sexual assault and related claims; and, (iii) the propriety of the resolution of servicemember assertions that the command's resolution of a sexual assault or related matter was unfair, including challenges to the credibility of the assertions of some members of the chain of command and/or their subordinates. That accountability would be reflected through military and personnel evaluations regarding sexual assault and related matters for a broad range of personnel, including officers, personnel management specialists as well as equal opportunity personnel; lawyers and law enforcement personnel; senior noncommissioned officers; and, civilians and military personnel involved in the prevention, assessment, investigation, review, recommendations, decisions, or other disposition or involvement at all levels in the Armed Forces regarding association with sexual assault and related matters.

IV. CONCLUSION

Women have faithfully and bravely served this nation in every conflict with great distinction and honor. In that process, many American women gave their lives in defense of the nation as a result of enemy fire, maltreatment by the enemy, aircraft crashes, other accidents, illnesses, injuries, diseases, or other causes. In that context, there are legions of heroic deeds by women. For example, Union Doctor Mary Edwards Walker – who had been imprisoned as a suspected spy by the Confederacy – was the first woman surgeon in

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the Armed Forces and the only woman to be awarded the Congressional Medal of Honor for distinguished service during the Civil War. See Professor Jane E. Schultz, *Women at the Front: Hospital Workers in Civil War America* (2004). Doctor Walker was denied the commission of a medical officer and the title of military surgeon because she was a woman, although she performed on battlefields as robustly, if not more so, than her male officer and surgeon counterparts.

In contrast, Frank Moore – journalist, writer and assistant secretary of legation at the U.S. foreign mission in Paris (1869-1872) – portrays tragedy in one of his stories in his seminal work, *Women in War: Their Heroism and Self-Sacrifice* (1866). Nineteen year-old Emily had disguised herself as a Union infantryman. Unfortunately, she sustained a fatal gunshot wound in battle at Chattanooga, Tennessee. As she lay dying, attendants attempting to comfort her discovered her gender. With time of the essence, Emily dictated a telegram to New York City, where the recipient was her father – who did not know why she had disappeared or her whereabouts after she had run away from home to secretly join the Union Army. Emily's correspondence stated: "Forgive your dying daughter. I have but a few moments to live. My native soil drinks my blood. I expected to deliver my country but the fates would not have it so. I am content to die. Pray forgive me... Emily."

Honor the legacy of heroic women like Emily and Doctor Walker – as well as the legion of women who are serving or have served the nation proudly – with an inviolate commitment to equality regarding the opportunity to defend this nation. That includes consecration to the elimination of sexual assault and its ramifications – the mortal enemy of women servicemembers that infects and taints readiness and the nation's national security efforts.

Our proposal is intended propel achievement of The President's goal of exponential progress by the Pentagon. In that context, we believe the Pentagon is similar to a structurally deficient bridge and road system, lacking the infrastructure to support the effective resolution and termination of sexual assault and its ramifications to include woman servicemembers and male servicemembers; members of the lesbian, gay, bisexual and transgender community; same-sex marriages and couples; sexual orientation issues; gender discrimination; elements of a sexually hostile and/or sexually inappropriate environment; third parties acting to prevent sexual assault and, discrimination based on sexual assault, gender or sexual orientation; retaliation against the foregoing; and other injustices or problematic personnel actions or behavior consistent with the intent of this provision.

As the world's only superpower devoted to the maintenance of the international order, the nation's ability to provide the required stable and sustainable military support cannot continue to be disrupted not only by packs of nefarious servicemembers invading and occupying sectors of our military installations, but by the structural injustice at multiple levels – from recruitment stations to basic training facilities to the organs of Service Secretaries – that allow sexual assault and related problems to fester and metastasize.

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Accordingly, our plan calls for supplemental assistance from organs with expertise mostly comprised of civilian authorities who manage and supervise the system at critical path points, such as the (1) proposed President's Commission on sexual assault, comprised of the abundant talents from the anti-sexual assault and anti-womens' violence, veterans, private, business, legal, nonprofit, advocacy, social work, law enforcement, public interests, educational, medical, and other communities; (2) the proposed prospects for greater federal court judge intervention, with the ability to correct the system on a case-by-case basis or take other action as warranted, such as injunctions to free servicemembers from the oppression of sexual assault if the military is unresponsive to her or his plight (via greater servicemember access to federal courts); (3) a DoD professional board committed to actualizing its status as among the most powerful personnel governmental administrative boards in the nation, per the legal and broad equitable authority delegated to it by Congress – the *Department of Defense Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters)* – by granting relief to servicemembers in sexual assault cases and its ramifications (also including gender discrimination, and retaliation against intervening/assisting third parties and the LGBT community) (i) when there is an illegality; or (ii) when there is an inequity, based on public perception or the appearance of unfairness, even in the absence of a legal error; and, (4) the infusion of bold leadership in the ranks of the Joint Chiefs of Staff that would ensure that sexual assault issue would be communicated to The President and Congress in an unfiltered manner, so that the proper resources can be directed to eliminating this problem.

Moreover, the National Defense Command promises to be a significant difference maker. Its mission is to assist the Armed Forces to successfully implement the national anti-sexual assault strategy, and prevent elements in the Armed Forces from failing. No command mechanism is 100% fail-safe, but we believe the National Defense Command comes as close as reasonably possible to a near fail-safe mechanism for substandard commanders, installations, major commands, and unified commands. Not a paper-tiger, the National Defense Command would be a stovepipe organization deployed worldwide so that it can be on the ground to assist servicemembers in distress from sexual assault and related issues; and, if talks and negotiations with intransigent commands are unproductive, take action to remove sexual assault cases to the National Defense Command's jurisdiction (note, it is routine in the military for a superior to withhold authority from a subordinate in a single or category of cases). In this case, The President would authorize the National Defense Command to exercise the powers of a superior command to all in the Armed Forces regarding sexual assault and related matters. However, as stated, there is a very high probability that the removal action would rarely be invoked in light of the strong policy mandate by the National Command Authority and Congress.

The real question here is what is more important: a new paradigm to press the attack and eliminate sexual assault to improve our national defense capability or whether a DoD entity should have the authority to take jurisdiction of sexual assault cases from field commands manifesting failure in terms of compliance with the anti-sexual assault strategy? Since the women servicemembers and other victims lose if the latter prevails – the military would

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have fewer options to protect women servicemembers from sexual assault as the price to pay for commanders' desire to win a turf war even in the face of failure by their commands – we believe strongly the responsible and bold course is the National Defense Command.

Likewise, the executive order's reservation of the initial disposition of a sexual assault and related allegations to the first admiral or general officer in the chain of command prevents commands from burying sexual assault claims and ensures that a senior leader is examining the issue. As a practical matter, we believe that such senior officer intervention will reduce the likelihood of the National Defense Command's removal of cases, because the general officer or admiral involved would have a vested professional and career interest in ensuring that the sexual assault and related matters are resolved fairly and objectively. Under those circumstances, only in the rarest, or most infrequent of cases, would National Defense Command intervention be warranted. The key is that the National Defense Command is an operational contingency plan for failure in the field, and may assume the case seamlessly so that victims are not subjected to additional suffering, perpetrators are pursued administratively, prospective victims are safeguarded, justice is served, and the interests of national security are vindicated.

Through these and other structures, we open the lanes for women servicemembers who were once cutoff from access to assistance because of their military bosses, drill sergeants, and indifferent commanders, etc. Further, we install the equivalent of a "sexual assault express lane" that does not have tolls or other obstacles. Servicemembers facing sexual victimization, will be able to contact the independent stovepipe National Defense Command that will be located worldwide, and it will respond in an oversight mode like the Justice Department oversaw racist state and local police departments acting in an antagonistic manner toward blacks in the South during the civil rights era.

Even if the National Defense Command fails, servicewomen would be able to request expedited relief from the *Defense Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters)*. Not merely situated in the Pentagon, the DoD Board would travel to installations to conduct hearings – and in the process send a message of hope to servicewomen and others while denoting to wayward perpetrators and commands what The President meant by the directive to make exponential progress in the elimination of sexual assault.

And if the DoD Board fails, women servicemembers would have greater access to federal courts with an evidentiary threshold that is lower than that provided by current standards.

Moreover, through our 24/7 security plan, we place a law enforcement team force on the ground at every installation to deter sexual assailants and enhance the capture of them immediately after an incident.

Similarly, with enhanced personnel evaluation standards emphasizing the importance of strident efforts to eliminate all forms of gender discrimination, sexual harassment and

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sexual assault, officers and noncommissioned officers should be incentivized to strongly combat the culture of sexual violence.

That is the constellation of sound policy, transformative concepts, cohesive management and rigorous enforcement to augment legislation and the Pentagon's plans. The constellation includes numerous external factors, such as the foundational principles for transformative change, should be boot-strapped to the Pentagon's internal missions and operations.

We anticipate that the Joint Chiefs may not be pleased at the prospect of yet another unconventional new member but, as Chairman Dempsey's loss of situational awareness regarding sexual assault indicates, profound change is required at the pinnacle of the Pentagon's leadership as the historically oppressed women in the U.S. military need the equivalent of a U.S. Senator inside the Pentagon – a general or admiral whose duty it is to speak truth to power for the welfare of a class of servicemembers who have been victimized and set adrift; and, in a manner that ensures there can be no more secret wars by nefarious Pentagon servicemembers and commands against women, same-sex marriages and couples, bisexuals, lesbians, transgender personnel, or based on other sexual orientation issues.

With a broader vision and coalition – and a perspective steeped in historical doctrine – the Pentagon and America can reverse the sexual assault tide in the military. We view this, as Justice Ginsburg reminds us, as contributing to this generation's effort to deal with the question of expanding the military's tent for at least some of those previously excluded or treated unfairly.

Our law firm and colleagues in the legal and retired military communities are pleased to provide as much information and assistance as we can on this matter.

Most Respectfully,

original signed by Howard G. Cooley

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Senate Armed Services Committee

House Armed Services Committee

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