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Removing Camouflaged Barriers to Equality: Overcoming Systemic Sexual Assault and Harassment at the Military Academies

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REMOVING CAMOUFLAGED BARRIERS TO
EQUALITY: OVERCOMING SYSTEMIC SEXUAL
ASSAULT AND HARASSMENT AT
THE MILITARY ACADEMIES

*Rebecca Weiant**

ABSTRACT

The Education Amendments of 1972 introduced requirements to protect female students from discriminatory policies at post-secondary institutions. A portion of those amendments, commonly known as Title IX, require that no students be subjected to discrimination based on their sex by any educational institution or activity receiving federal financial assistance. An exemption under § 1681(a)(4), however, explicitly prohibits application of Title IX to any educational institution whose primary purpose is to train individuals for military service or the merchant marine. Although those students are still subject to stringent conduct standards, the service academies themselves are tethered to sex discrimination policies only by their goodwill, reputation, and the boundaries of the Constitution. Answering only to the Department of Defense (or Transportation, in the case of the United States Merchant Marine Academy) does not hold these institutions accountable to their students or to the American public. The academies' attempts at combatting this widespread problem have been ineffective, and they continue to perpetuate a culture of sexual violence. This Note proposes the removal of exemption language from Title IX, or, alternatively, insists that the academies comply with mandatory reporting requirements under the Clery Act.

INTRODUCTION

Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in any educational program or activity receiving federal funding.¹ Title IX is best known for highlighting the disparity in funding and facilities allocated to male and female varsity athletics, although the

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1. 20 U.S.C.A. § 1681.

statutory language in Title IX never discusses specific applicability to sports.² More recently, a number of historically significant Title IX claims have arisen after incidents of sexual harassment, on the theory that “when students suffer sexual assault and harassment, they are deprived of equal and free access to an education.”³ But while Title IX gives substantial protection against discrimination to students enrolled in post-secondary schools, it does not protect those whose educational institutions are specifically exempted by statute. In crafting the Education Amendments of 1972, Congress carved out several exemptions to Title IX, including, problematically, the one discussed *infra*—that Title IX “shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine.”⁴ Currently there are five schools that qualify for an exemption as educators of the Military and Merchant Marine: the United States Military Academy at West Point, the United States Naval Academy at Annapolis, the United States Air Force Academy, the Coast Guard Academy, and the United States Merchant Marine Academy. In 2016, a total of approximately 15,000 students were enrolled in these schools, 3,642 of whom were female—less than 25 percent of the student body at all five schools combined.⁵

On June 16, 2016, all midshipmen⁶ from the United States Merchant Marine Academy (USMMA) were recalled from “Sea Year” after receiving

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2. Katrina Berishaj & Gregory DiBella, *Athletics & Title IX of the 1972 Education Amendments*, 15 GEO. J. GENDER & L. 255, 256 (2014).
 3. *Title IX and Sexual Violence in Schools*, ACLU, <https://www.aclu.org/title-ix-and-sexual-violence-schools?redirect=womens-rights/title-ix-and-sexual-violence-schools> (last visited Jan. 15, 2017).
 4. 20 U.S.C.A. § 1681(a)(4) (2012). Exemptions also exist for other entities, including but not limited to: religious institutions with contrary viewpoints, both Boy and Girl Scouts, sororities and fraternities, and beauty pageant scholarships. *Id.* § 1681.
 5. *United States Military Academy*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-colleges/west-point-2893> (last visited Apr. 19, 2018); *United States Naval Academy*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-colleges/naval-academy-2101> (last visited Apr. 19, 2018); *United States Air Force Academy*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-colleges/air-force-academy-1369> (last visited Apr. 19, 2018); U.S. NEWS & WORLD REPORT, *United States Coast Guard Academy*, <https://www.usnews.com/best-colleges/coast-guard-academy-1415> (last visited Apr. 19, 2018); U.S. NEWS & WORLD REPORT, *United States Merchant Marine Academy*, <https://www.usnews.com/best-colleges/us-merchant-marine-2892> (last visited Apr. 19, 2018).
 6. “Midshipmen” is the official name for cadets at the Merchant Marine Academy. See Ariel Kaminer, *New Hope for Turnaround at Troubled Service Academy*, N.Y. TIMES, Aug. 30, 2012, <https://www.nytimes.com/2012/08/31/education/at-troubled-merchant-marine-academy-hope-for-a-turnaround.html>.

reports of troubling rates of sexual assault and harassment at sea.⁷ The USMMA made these statistics available at a closed-door meeting with Department of Transportation officials; industry, military, and academy representatives; and other individuals targeted for their involvement in cadet education.⁸ Although the midshipmen were eventually able to return to sea for training (the program was fully reinstated in January 2017), the Academy continues to struggle with addressing instances of sexual violence on campus.⁹ In June 2017, Congress introduced legislation that attempted to guide the Academy in its efforts, the Merchant Marine Academy Improvement Act (H.R. 3157), which even included a failed attempt to bring the USMMA under Title IX.¹⁰

That same year also saw increased reporting of sexual violence at other federal service academies, such as the Air Force Academy in Colorado.¹¹ Pentagon officials suggested that the increase could be due to students feeling comfortable reporting sexual violence, since reporting is increasingly likely to lead to productive investigations.¹² Unfortunately for the academies and their cadets, it appears that student surveys tell a different story—that the increase in reporting is due to an ever-increasing amount of sexual violence.¹³ In fact, in 2018, a Pentagon report chastised the Air Force Academy for “significant evidence of mismanagement and unprofessionalism that

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7. Sea Year is a mandatory requirement for graduation at the United States Merchant Marine Academy. See *USMMA Sea Year Guide*, U.S. MERCH. MARINE ACAD., <https://www.usmma.edu/academics/departments/sea-year> (last visited Apr. 19, 2018). Cadets spend approximately one year serving on either federally owned vessels or commercial carriers, giving them actual experience on-deck or in the engineering room. *Id.* Some portion of their time may also be completed on USMMA Training Vessels, which are entirely cadet operated. *Id.*
 8. *At Closed Meeting, Details of USMMA Sea Year Problems*, MAR. EXEC., June 24, 2016, <http://maritime-executive.com/article/marad-discusses-sea-year-decision-at-closed-meeting>.
 9. See Associated Press, *Members of U.S. Merchant Marine Academy Soccer Team Won't Graduate Due to Probe*, NBC NEWS, Jun. 13, 2017, <https://www.nbcnews.com/news/us-news/members-u-s-merchant-marine-academy-soccer-team-won-t-n771681>.
 10. Scott Eidler & Candace Ferrette, *Congress Passes Bill that Bolsters Sexual-Assault Protection at USMMA*, NEWSDAY, Nov. 21, 2017, <https://www.newsday.com/long-island/education/usmma-sexual-harassment-1.15090296>; Merchant Marine Academy Improvement Act of 2017, H.R. 3157, 115th Cong. § 2 (2017).
 11. *Reports of Sexual Assaults Spike at Military Academies*, CBS NEWS, Jan. 8, 2016, <http://www.cbsnews.com/news/sexual-assault-reports-air-force-army-navy-military-academies-us>.
 12. Jenny Kutner, *Sexual Assault Reports at West Point, Naval Academy on the Rise*, VOGUE, Mar. 6, 2017, <https://www.vogue.com/article/sexual-assault-reports-west-point-naval-academy>.
 13. *Id.*

negatively impacted victim advocacy and assistance rendered to a number of cadets.”¹⁴

Although sexual violence is unfortunately widespread in higher education, there is a distinct disadvantage for those who happen to be victims at the federal service academies.¹⁵ Cadets cannot file a complaint with the Office for Civil Rights, and they cannot bring a lawsuit against their educational institution for violating Title IX. Exempting these academies has removed federal oversight from their sexual violence reporting policies and has left educational processes, investigations, and policy-making in a black-box of military discretion. It also removes several avenues for victims seeking a remedy.¹⁶ Removing the Title IX exemption would allow the victims of the pervasive sexual assault and harassment that occurs at military academies to seek redress and hold the schools responsible. The removal of the exemption would also hold the academies accountable to the Department of Education. Additionally, this Note suggests that the Academies should be required to comply with Clery Act reporting as well, where the schools could be subject to substantial financial penalties for failing to disclose certain incidents of violence that occur on campus or in programs otherwise connected to the academies.

This Note argues below for the removal of the exemption by first addressing the historical background of sex discrimination law and policy. It then reviews judicial interpretation of the boundaries of Title IX enforcement and concludes with a proposal to remove the existing Title IX exemption for the military and merchant marine academies.

PART I: GENDER-SPECIFIC LEGISLATION: THE BIRTH-STORY OF TITLE IX

A. Legislative History Prior and Concurrent to the Education Amendments of 1972

The passage of the Reconstruction Amendments (13th, 14th, and 15th Amendments to the Constitution) spurred women’s rights advocates to fight for the same protections then afforded to victims of discrimination

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14. Zachary Cohen, *Air Force Academy Mismanaged Sexual Assault Program*, *Pentagon Says*, CNN, Feb. 7, 2018, <https://www.cnn.com/2018/02/07/politics/dod-service-academies-sexual-assault-report/index.html> (citing DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES, ACADEMIC PROGRAM YEAR 2016–2017, 15 (2018), http://sapr.mil/public/docs/reports/MSA/APY_16-17/APY16-17_MSA_Report_FINAL.pdf).
 15. *Protecting Students from Sexual Assault*, DEP’T OF JUSTICE, Jan. 17, 2018, <https://www.justice.gov/ovw/protecting-students-sexual-assault> (last visited Apr. 19, 2018).
 16. See, e.g., *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992).

because of race or national origin.¹⁷ In 1923, a precursor to the Equal Rights Amendment was introduced at Seneca Falls, New York, on the 75th anniversary of the Women's Rights Convention of 1848.¹⁸ A version of the Amendment was introduced at Congress every year thereafter until it was ultimately passed by both the House and Senate in 1972.¹⁹ Although most states that approved the Amendment did so within the first year following its passage by Congress, the Equal Rights Amendment ultimately was not ratified by the required thirty-eight states before either the original deadline in 1978 or the extended deadline in 1982.²⁰

While pursuing the Constitutional amendment, women's rights activists also worked concurrently on other legal reforms related to gender equality. Ironically, the first major legislation to implicate sex discrimination (Title VII of the Civil Rights Act of 1964) was not on purpose; the initial draft lacked any language about sex or gender at all. Instead, the Act (and its predecessors) was primarily aimed at addressing racial discrimination.²¹ Title VII is the only portion of the Civil Rights Act that directly implicates sex discrimination, and it is widely understood that the language was only included as an attempt to stop the bill from passing.²² Nevertheless, the resulting language of Title VII made it illegal for employers to discriminate on the basis of race, color, religion, sex, or national origin.²³

Judicial interpretations of Title VI of the Civil Rights Act of 1964 also informed the interpretation of Title IX of the Education Amendments, which were passed eight years later.²⁴ Title VI provided that "no person in the United States shall, on the ground of race, color, or national origin, be

17. The text of the Equal Rights Amendment that was ultimately sent for ratification by the states was as follows: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." The Learning Network, *March 22, 1972: Equal Rights Amendment for Women Passed by Congress*, N.Y. TIMES, Mar. 22, 2012, <https://learning.blogs.nytimes.com/2012/03/22/march-22-1972-equal-right-amendment-for-women-passed-by-congress/>.

18. *The History Behind the Equal Rights Amendment*, EQUAL RIGHTS AMENDMENT, <http://www.equalrightsamendment.org/history.htm> (last visited Apr. 19, 2018).

19. *Id.*

20. Kate Nielson, *Let's Ratify the ERA: A Look at Where We Are Now*, AM. ASS'N OF UNIV. WOMEN, <http://www.aauw.org/2015/11/05/ratify-the-era/> (last visited Apr. 19, 2018).

21. See generally Francis J. Vaas, *Title VII: Legislative History*, 7 B.C.L. REV. 431, 433–39 (1966), <http://lawdigitalcommons.bc.edu/bclr/vol7/iss3/3>.

22. See Jo Freeman, *How Sex Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, <http://www.jofreeman.com/lawandpolicy/titlevii.htm> (last visited Apr. 19, 2018); Ted Gittinger & Allen Fisher, *Summer 2004: Civil Rights Act*, U.S. NAT'L ARCHIVES, <https://www.archives.gov/publications/prologue/2004/summer/civil-rights-act-2.html> (last updated Apr. 19, 2018).

23. 42 U.S.C.A. § 2000e (Westlaw through Pub. L. No. 115-90).

24. See generally *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²⁵ When an institution is found to have violated these laws, it risks losing federal funding.²⁶ Both Title VI and Title IX tie compliance with the anti-discrimination policy to programs receiving “Federal financial assistance,” although only Title IX is specifically directed towards educational programs.²⁷

B. Title IX

The Education Amendments were signed into law by President Nixon in 1972 and in many ways are successor legislation to the Civil Rights Act of 1964. These amendments were intended to address gender inequality at one of its earliest junctures, by ending the “continuation of corrosive and unjustified discrimination against women in the American educational system.”²⁸ Title IX of the Education Amendments requires that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”²⁹ The statutory language of Title IX is broad, and its interpretation, to date, has been developed primarily through case law and guidance documents issued by the Department of Education or its predecessor in enforcement, the Department of Health, Education and Welfare. Title IX has not been substantively altered by Congress since its enactment.³⁰

Title IX contains specific exemptions that preclude its application to certain groups, including: academies training individuals for military services or the merchant marine, certain social groups present in educational institutions (generally 501(a) groups like sororities and fraternities, Girl and Boy Scouts, etc.), gender specific parent-child activities (provided that comparable events are held for the other gender), and beauty pageant scholarships (provided the pageant itself is not otherwise in violation of federal laws).³¹ There are other exemptions listed in the statute that provided protections for schools that were converting from single gender to coeduca-

25. 42 U.S.C.A. § 2000d.

26. *Id.* § 2000d-1.

27. *Title IX Legal Manual*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/title-ix> (last visited Apr. 19, 2018).

28. *Id.* (citing 118 CONG. REC. 5803 (1972)).

29. 20 U.S.C.A. § 1681.

30. *Compare* 92 P.L. 318, 86 Stat. 235 (original public law), *with* 20 U.S.C.A. § 1681 (the current statute).

31. 20 U.S.C.A. § 1681.

tional, which received a prolonged timeline for compliance.³² Some of these exemptions are largely outdated today: for example, the Boy Scouts of America no longer receive any federal financial assistance (and, as of 2017, they allow girls to participate), most beauty pageant scholarships do not come directly from any university, and only a few schools remain eligible for exemption under the guise of a traditionally single-sex institution.³³ However, the exemption for religious institutions is used regularly; as of September 2016, 248 educational programs claimed or had requests to claim a Title IX exemption for religious reasons.³⁴ The majority of these exemption requests are not due to objections to the presence of women in their institutions, but instead have arisen in response to a specific “Dear Colleague Letter” issued by the Department of Education under President Obama in 2016, which indicated that discrimination on the basis of gender identity and sexual orientation fell within the scope of Title IX’s protection.³⁵ This particular Dear Colleague Letter was withdrawn nearly immediately after President Obama left office.³⁶ There is no restriction on the receipt of federal funds for these institutions if the institution meets one of the specified criteria for an exemption.³⁷

This Note focuses on the remaining relevant exemption: Title IX “shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine.”³⁸ The First Circuit Court of Appeals has indicated that one reason for the exemption was “to shield service and merchant marine academies from funding cutoffs in order to avoid jeopardizing national defense interests.”³⁹ It is likely that the exemption for the service academies

32. *Id.*

33. See, e.g., *The BSA Expands Programs to Welcome Girls from Cub Scouts to Highest Rank of Eagle Scout*, BOY SCOUTS OF AM., Oct. 11, 2017, <https://www.scoutingnewsroom.org/press-releases/bsa-expands-programs-welcome-girls-cub-scouts-highest-rank-eagle-scout/>.

34. *Institutions Currently Holding Religious Exemptions*, U.S. DEP’T OF EDUC. OFF. FOR C.R., Dec. 31, 2016, <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/rel-exempt-approved-and-pending.xlsx>.

35. See Shane Windmeyer, *Withdrawing Title IX Exemption: the Curious Case of Pepperdine University*, HUFFINGTON POST, July 25, 2016, http://www.huffingtonpost.com/entry/withdrawing-title-ix-exemption-the-curious-case-of_us_578670fae4b0cbf01e9effda.

36. Sandra Battle, Acting Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter on Transgender Students 1 (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

37. See Jackie Robel, *Freedom and Federal Funding: Religious Institutions and Title IX*, JURIS MAGAZINE, Oct. 22, 2016, <http://sites.law.duq.edu/juris/2016/10/22/freedom-and-federal-funding-religious-institutions-and-title-ix/>.

38. 20 U.S.C.A. § 1681(a)(4).

39. *United States v. Mass. Mar. Acad.*, 762 F.2d 142, 149–50 (1st Cir. 1985).

under Title IX is a carryover from a similar exemption under Title VII of the Civil Rights Act.⁴⁰ Title VII does not apply to military service members—just civilian military employees.⁴¹ It is, or was, relatively simple for the military to prove that, in their circumstance, “Sex [was] a *bona fide occupational qualification*,” and, as such, the military should be permitted to select an applicant in a manner that would not otherwise be consistent with Title VII.⁴² Courts seemed to approve this permissive discrimination due to the stereotypes that dominated the mid-nineteenth century regarding female abilities and the requirements of military service.⁴³ Although the military now allows females to participate in jobs previously barred, the Title VII claims are still out of reach; they are able to pursue discrimination claims only under the Department of Defense’s Uniform Code of Military Justice.⁴⁴

C. Post-Title IX Legislation and Guidance from the Executive

Government Agencies issue “Dear Colleague Letters” (DCLs) to:

provide recipients with information to assist them in meeting their obligations . . . to provide members of the public with information about their rights.

[T]his guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR [the Office for Civil Rights] evaluates whether covered entities are complying with their legal obligations.⁴⁵

These letters allow the Executive branch to provide guidance and, in the case of Title IX especially, to broaden or narrow the scope of enforcement without requiring congressional action.

The Department of Education has issued a series of successive letters that provide information on how Title IX should be applied in situations

40. See 42 U.S.C.A. § 2000e.

41. Mary C. Griffin, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 YALE L.J. 2082 (1987). Civilian military members are those who are employed by the U.S. military, but are not members of the armed forces, for example, the Army Corps of Engineers, on-base retail employees, etc. *Gonzalez v. Dep’t of Army*, 718 F.2d 926, 928 (9th Cir. 1983).

42. Griffin, *supra* note 41, at 2107; 42 U.S.C.A. § 2000e-2e (2012).

43. See Paula S. Ogg, *Title VII: Are Exceptions Swallowing the Rule?* 13 TULSA L.J. 102, 104 (1977).

44. Griffin, *supra* note 41, at 2083, 2086–87.

45. U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5 (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/5WYX-B5VE>] (last visited Jan. 15, 2017).

not previously anticipated by Congress, or not otherwise clarified by Congress or through a Supreme Court decision. There is some suggestion by the educational institutions that the Office for Civil Rights treats these letters as more than guidance; they use them to threaten the funding of institutions receiving federal financial assistance.⁴⁶

In 2011, the Obama Administration published a Dear Colleague Letter (DCL) that reminded educational institutions of their obligations to meet Title IX requirements in the prevention, investigation, and adjudication of instances of sexual assault and harassment.⁴⁷ Schools must, at minimum, have three things in place: a policy against sex discrimination, a Title IX Coordinator, and a known set of procedures for students to file complaints of sex discrimination.⁴⁸ These procedures must “provide for prompt and equitable resolution of sex discrimination complaints.”⁴⁹

Under the 2011 DCL, students are guaranteed certain procedural rights under Title IX: to present a case [to their university], to receive adequate representation, to proffer and question witnesses, and to participate in an appeal process.⁵⁰ The Department of Education’s Office for Civil Rights (OCR) is responsible for the enforcement of Title IX.⁵¹ OCR instructed schools to decide complaints using a *preponderance of the evidence* standard—that it is more likely than not that sexual assault or harassment occurred.⁵² OCR also permits informal methods for resolving some

46. Jake New, *Must vs. Should*, INSIDE HIGHER ED, Feb. 25, 2016, <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance>.

47. See Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter on Sexual Violence 1 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (last visited Apr. 19, 2018).

48. *Id.* at 6.

49. U.S. DEP’T OF EDUC., KNOW YOUR RIGHTS: TITLE IX PROHIBITS SEXUAL HARASSMENT AND SEXUAL VIOLENCE WHERE YOU GO TO SCHOOL, <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf> (last visited Apr. 19, 2018).

50. *Id.*

51. Successive Dear Colleague Letters provided further guidance to educational institutions. In 2013, the Department’s letter reminded schools that they have a Title IX obligation to support pregnant and parenting students; the difficulties those individuals face increases the likelihood that they will not complete either their high school diplomas or further post-secondary education. Seth Galanter, Acting Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter on Supporting the Academic Success of Pregnant and Parenting Students 1 (June 25, 2013), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-title-ix.pdf> (last visited Apr. 19, 2018).

52. *Id.* at 2. Prior to 2017, the Department of Education allowed institutions to find evidence of sexual violence through the use of a “preponderance of the evidence” standard. In 2017, the new Question and Answer document told schools they may

harassment conflicts (such as mediation), but the complainant maintains the right to begin formal proceedings at any time.⁵³

In 2014, OCR published an in-depth Question and Answer Guide to the 2011 Dear Colleague Letter in an attempt to clarify its instruction. The Guide notes that neither the Clery Act nor the Violence Against Women Act (explained further below) have an effect on the enforcement of Title IX itself—the requirements under those acts are distinct from Title IX and should be considered separately.⁵⁴ OCR published a Dear Colleague Letter in 2015 that addressed the responsibilities and authority of a Title IX Coordinator.⁵⁵ In 2016, OCR issued another DCL indicating that discriminating against students because of their gender identity is a form of sex discrimination falling under the auspices of Title IX, thus providing protection for transgender students.⁵⁶

Unfortunately, the current Executive Branch (under the Trump Administration) is hostile to the expansion of Title IX. In fact, it has steadily rolled back existing protections through the withdrawal of Obama-era guidance.⁵⁷ Most significantly, in September 2017, Department of Education Secretary Betsy DeVos rescinded both the 2011 Dear Colleague Letter on Sexual Violence and the 2014 Question and Answer Guide.⁵⁸ Immediately following this action, the Department of Education issued a new “Question and Answer” guidance document, which gave guidance to educational institutions with the promise of upcoming rulemaking clarification for Title IX enforcement.⁵⁹ Several procedurally significant changes came from the 2017 Guide. First, the Department now permits schools to determine the appro-

elect to continue using the “preponderance of the evidence” standard, or to apply the higher “clear and convincing” evidence standard. *See* U.S. DEP’T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT, Sept. 2017, [hereinafter Q&A] <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

53. *Id.*

54. U.S. DEP’T OF EDUC., *supra* note 45, at 44.

55. *See* U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER—2015, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf> (last visited Apr. 19, 2018).

56. *See generally* Catherine E. Lhamon, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter on Title IX Coordinators 1 (Apr. 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (last visited Jan. 15, 2017), officially withdrawn on Feb. 22, 2017, <https://www.justice.gov/opa/press-release/file/941551/download>.

57. Sophie Tatum, *Education Department withdraws Obama-Era campus sexual assault guidance*, CNN, <http://www.cnn.com/2017/09/22/politics/betsy-devos-title-ix/index.html> (last updated Sept. 22, 2017).

58. *See* Q&A, *supra* note 52.

59. *Id.*; *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, U.S. DEP’T OF EDUC., Sept. 22, 2017, <https://www.ed.gov/news/press-releases/departament-education-issues-new-interim-guidance-campus-sexual-misconduct>.

appropriate evidentiary standard to be used in a sexual misconduct case.⁶⁰ Previously, the 2011 DCL instructed schools that the relatively low “preponderance of the evidence” standard should be used.⁶¹ Now, schools have the option to choose between the preponderance standard and the more demanding “clear and convincing” standard.⁶² This change makes difficult cases harder to prove, so that it is nearly impossible for survivors to get closure. Second, schools are now permitted to use mediation to resolve incidents of sexual violence, which previously was a specifically impermissible mode of informal resolution.⁶³ Under the Obama Administration, mediations were considered undesirable because they implied that sexual assault was merely a misunderstanding that could be worked out between the parties.⁶⁴ Additionally, schools now could force survivors to participate in mediation before allowing more formal proceedings to commence.⁶⁵ Under the new guidance, schools may choose to allow appeals, and they have the option to make appeals available only to the accused.⁶⁶ Finally, the Department removed existing estimated timelines on the resolution of cases, stating that there is “no fixed time frame” to complete an investigation where the previous DCL allowed for a general presumption that cases would be resolved within six months.⁶⁷ Schools may now drag out an investigation so long that the outcome is irrelevant to the parties, who in the interim may have graduated, or—more likely for the victim—dropped out. Technically, neither the newly published Q&A document, nor the rescinded Dear Colleague Letter change the existing law (Title IX). But they do directly impact how Title IX administrators handle sexual assault and harassment claims.

While the system contemplated by Title IX and the DCL guidance documents is not perfect, it attempted to provide procedural clarity to students, educational systems, and the public. Unfortunately, that proffered clarity is inapplicable to those institutions that are statutorily exempt from Title IX—the military academies. Although the military academies have

60. See U.S. DEP’T OF EDUC., *supra* note 59.

61. Ali, *supra* note 47.

62. See U.S. DEP’T OF EDUC., *supra* note 59; see also Q&A, *supra* note 52.

63. Q&A, *supra* note 52, at 4. See also U.S. DEP’T OF EDUC., KNOW YOUR RIGHTS: TITLE IX PROHIBITS SEXUAL HARASSMENT AND SEXUAL VIOLENCE WHERE YOU GO TO SCHOOL 3–4, <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf> (last visited Apr. 19, 2018) (clarifying that for “cases involving allegations of sexual assault, mediation is not appropriate”).

64. *Id.* at 2; Stephanie Saul & Kate Taylor, *Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations*, N.Y. TIMES, Sept. 22, 2017, <https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html>.

65. Saul & Taylor, *supra* note 64.

66. See Q&A, *supra* note 52, at 7.

67. *Id.* at 3.

their own procedures and Sexual Assault Response Coordinators, the high rate of sexual violence in these institutions, compared to the low rate of unrestricted reports⁶⁸ indicates a lack of confidence by the student body that the rules will be enforced appropriately.

D. Sexual Assault and Harassment Reporting

Since the passage of Title IX, other laws have been enacted to help combat sexual violence in educational settings, although they, too, lack applicability to the military academies. The Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (now known as the “Clery Act”) was enacted in 1990 after ineffective campus security policies led to the rape and murder of a young female student at Lehigh University in Bethlehem, Pennsylvania.⁶⁹ The Clery Act requires universities and colleges to publicly disclose incidents of sexual violence, including a daily campus crime log, an annual report of campus crime statistics, and a record of timely issuance of warnings.⁷⁰ The Clery Act was expanded in the Campus SaVE (Sexual Violence Elimination) Act in 2013 (a reauthorization of the Violence Against Women Act (VAWA)).⁷¹ The updated Clery Act broadens the list of criminal activities that must be reported (stalking, dating violence, and domestic violence), updates the definition of rape to reflect the definition used by the Federal Bureau of Investigations, and demands that colleges and universities educate their incoming students and faculty members about reporting policies and prevention programs.⁷² The Act requires schools to make definitive statements prohibiting crimes of sexual violence.⁷³ The Clery Act expansion also requires schools to report their disciplinary process and show that it satisfies the conditions prescribed in VAWA: it is conducted by officers who have received annual training on sexual violence, it includes a notification process that is equally available to both parties, and it permits both the accused and the accuser to have advisors present during proceedings.⁷⁴ Schools that violate the Clery requirements are subject to

68. An unrestricted report of sexual misconduct is one that will trigger an official investigation through either the academy or law enforcement, or both. For further explanation of the differences between unrestricted and restricted reports, see <https://www.usmma.edu/academy-life/sexual-assault-prevention/reporting-options>.

69. Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX, and VAWA*, 15 GEO. J. GENDER & L. 563, 565 (2014).

70. 20 U.S.C.A. § 1092(f)(1), (3)–(4) (Westlaw through Pub. L. No. 115-90).

71. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89–92 (2013).

72. 34 C.F.R. § 668.46 (Westlaw through Feb. 8, 2018).

73. *Id.*

74. *Id.*

substantial fines for each violation.⁷⁵ The Clery Act increases the information available to incoming students, the federal government, and any interested parties regarding on- and off-campus sexual violence.

In contrast, the Department of Defense requires the Military Service Academies annually to assess and report their sexual assault and harassment response and training programs, per the requirement of Section 532 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364).⁷⁶ This report should review the “effectiveness of the Academies’ policies, training, and procedures regarding sexual harassment and sexual violence involving Academy personnel” at West Point, Annapolis, and the Air Force Academy.⁷⁷

In addition, each Academy is required to participate in the Service Academy Gender Relations (SAGR) focus groups every two years. These groups provide cadets and midshipmen an opportunity to anonymously report the information that is missing from the Department of Defense Reports: data on the actual prevalence of sexual assault and harassment, specific characteristics of the unwanted behaviors, and the reasons that may lead a cadet to report, report-restricted, or not report an incident.⁷⁸ The SAGR survey estimates the amount of “Unwanted Sexual Contact” by extrapolating the focus group data to the student-body at large.⁷⁹ And although Unwanted Sexual Contact is not a term directly taken from the Uniform Code of Military Justice, all of the actions it encompasses are expressly prohibited in the UCMJ.⁸⁰ Instead of being easily available to incoming students—as it would be if the Academies were governed by the Clery Act—this information is buried in a report submitted to Congress in support of the annual Department of Defense appropriations bill.⁸¹

75. 20 U.S.C.A. § 1092(f)(13) (Westlaw through Pub. L. No. 115-132).

76. DEP’T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES 7 (2017), http://sapr.mil/public/docs/reports/MSA/APY_15-16/APY_15_16_MSA_Report_v2.pdf.

77. *Id.*

78. *Id.*

79. DEP’T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES 12 (2011), http://www.ncdsv.org/images/DOD_AnnRepSexHarassmentAndViolenceMilitaryServiceAcademies_AcadPrgrmYear2010-2011.pdf.

80. *Id.* Examples include “uninvited and unwelcome completed or attempted sexual intercourse, nonconsensual sodomy (oral or anal sex), penetration by an object, and the unwanted touching of genitalia and other sexually related areas of the body.” *Id.*

81. H.R. 2810, 115th Cong. (Westlaw through Pub. L. No. 115-91 (2017)).

PART II: JUDICIAL INTERPRETATIONS AND TITLE IX
APPLICATION IN PRACTICE

A. Judicial Interpretations of the Scope of Title IX

Title IX was drafted with ambiguous, broad language that has resulted in decades of Supreme Court litigation. The first significant Title IX lawsuit to appear in the Supreme Court was *Cannon v. the University of Chicago*, a 1979 case which sought an answer to the question of whether Title IX provided a private cause of action outside of the removal of federal financial assistance.⁸² The Court looked at three factors: first, the language of the statute to determine if there was an express provision that created a private cause of action; second, if the legislative history indicated a desire by Congress to create a private cause of action; and third, if the application of a federal cause of action would intrude into an area traditionally reserved for the state.⁸³ The Court, in general, determined that since the language of Title IX directly reflects Title VI of the Civil Rights Act of 1964 (and at the time Title IX was enacted, the Fifth Circuit had found that Title VI had an implied private cause of action), it was the intention of the legislature to create a private cause of action for victims of sex discrimination.⁸⁴

The statute's phrase "Federal financial assistance" was another one of the earlier portions of Title IX to undergo Supreme Court scrutiny.⁸⁵ In *Grove City College v. Bell*, the Supreme Court determined that the federal financial assistance requirement applied to whichever program or activity was in receipt of funds, but not the entire educational institution.⁸⁶ Shortly thereafter this ruling was overturned by the legislature with new language that clarified that any receipt of federal funding by an institution applied the requirement to the entire institution.⁸⁷ The Court found that there was nothing in the original language of Title IX that indicated a desire to narrow the statute's applicability to only the specific programs receiving federal

82. See *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

83. *Cannon*, 441 U.S. at 688.

84. *Cannon*, 441 U.S. at 688.

85. The Office for Civil Rights codified the definition of "Federal financial assistance" (used in both Title VI and IX litigation) to include: (1) grants and loans of federal funds, (2) the grant or donation of federal property and interests in property, (3) the detail of federal personnel, (4) the sale and lease of, and permission to use federal property or interest in such property without consideration or at a nominal consideration, and (5) any federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance. 45 C.F.R. § 80.13(f) (2009). It was interpreted by the Court in *Grove City College v. Bell* to include the receipt of scholarships, grants, and other federal student aid. 465 U.S. 555, 567-68 (1984).

86. See *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

87. Civil Rights Restoration Act of 1988, Pub. L. 100-259, 102 Stat. 28.

funds.⁸⁸ In this way, the language of Title IX is again reflective of language found in the Civil Rights Act of 1964.⁸⁹

In 1992, the Supreme Court decided what damages were available to plaintiffs bringing Title IX claims against universities or other institutions.⁹⁰ In *Franklin v. Gwinnett County Public School*, a student who was sexually harassed by an athletic coach brought a Title IX claim against her high school seeking monetary damages.⁹¹ The school district did not believe that Title IX afforded monetary damages, only equitable relief, and the district court agreed, dismissing the suit.⁹² The Eleventh Circuit affirmed that decision.⁹³ The Supreme Court granted certiorari to resolve the circuit split between the Eleventh and Third Circuits on the issue of whether monetary damages were appropriate.⁹⁴ The Court noted that there is a presumption of availability of all damages unless expressly proscribed by the legislating body, and that “where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”⁹⁵ The student had since graduated from high school, and the offending athletic coach had resigned, so any injunctive relief was no longer of any use.⁹⁶ The Court did not find the legislative history of Title IX informative, nor the text itself (both were extensively analyzed in *Cannon*), so it turned to post-Title IX legislative history to find guidance.⁹⁷ Here, the Court found that the Civil Rights Restoration Act and the Rehabilitation Act Amendments, enacted post *Cannon*, made “no effort to restrict the right of action recognized in *Cannon* . . . or to alter the traditional presumption in favor of any appropriate relief for violation of a federal right.”⁹⁸ Accordingly, the Court held that the student was entitled to monetary damages.⁹⁹ The outcome of *Franklin* created a new set of motivations for schools; not only did they risk (however unlikely) the possibility of losing federal financial assistance, but they also faced civil suits for monetary damages brought by students.

88. *Grove City Coll.*, 465 U.S. at 564.

89. 42 U.S.C.A. § 2000d (2012) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

90. *See generally*, *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992).

91. *Franklin*, 503 U.S. at 63–64.

92. *Franklin*, 503 U.S. at 64–65.

93. *Franklin*, 503 U.S. at 65.

94. *Franklin*, 503 U.S. at 65.

95. *Franklin*, 503 U.S. at 66 (citing *Bell v. Hood*, 372 U.S. 678, 684 (1946)).

96. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 63–64 (1992).

97. *Franklin*, 503 U.S. at 71.

98. *Franklin*, 503 U.S. at 73.

99. *Franklin*, 503 U.S. at 76.

It was not until the late 20th century that elementary and secondary school students had the ability to hold their schools accountable for Title IX enforcement against discriminatory actions. In *Davis v. Monroe County Board of Education*, the sexual harassment of a ten-year-old girl by a peer student led to a lawsuit against the school board.¹⁰⁰ The case was dismissed on summary judgment by the district court for lack of applicability of Title IX because the discriminatory actor was a fellow student, instead of an employee of the school district.¹⁰¹ But the Supreme Court held that this peer-to-peer sexual harassment was discriminatory under the original statute and could lead to a substantial barrier to education.¹⁰² Also at issue was the more initial question: whether there was still a cause of action against the school district when it was not its employee or institution committing the discriminatory actions.¹⁰³ The Court found that in the case of peer-to-peer harassment the school district would only be liable under a “deliberate indifference” standard, where the “deliberate indifference” of the educational institution “causes students to undergo harassment or makes them liable or vulnerable to it.”¹⁰⁴ Additionally, the action will “lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”¹⁰⁵ *Davis* was a significant decision because its “deliberate indifference” standard became a high bar for plaintiffs to overcome.

A recent federal case, *Doe v. Forest Hills Sch. District*, specifies a three-part test for determining when a school district is liable under Title IX. A school district is liable when:

- (1) the harassment is sufficiently severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit;
- (2) an official with the authority to take corrective action has actual knowledge of the harassment; and
- (3) the school is deliberately indifferent in its response or lack thereof because it responds in a way that is clearly unreasonable under the circumstances.¹⁰⁶

100. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999).

101. See *Davis*, 526 U.S. at 629.

102. *Davis*, 526 U.S. at 651–52.

103. *Davis*, 526 U.S. at 643.

104. *Davis*, 526 U.S. at 630.

105. *Davis*, 526 U.S. at 633.

106. *Doe v. Forest Hills Sch. Dist.*, No. 1:13-CV-428, 2015 WL 9906260, at *8 (W.D. Mich. Mar. 31, 2015) (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

This test further expands the requirements to prove liability against a school district, because it requires actual knowledge in addition to Davis's deliberate indifference element, and it adds the "severe, pervasive, and objectively offensive" standard.¹⁰⁷

One final Supreme Court case is critical to judicial interpretations of Title IX. *Fitzgerald v. Barnstable School Committee* asked whether Title IX restricts itself to being the sole remedy for plaintiffs who elect to bring suit under the statute.¹⁰⁸ Petitioners brought suit under both Title IX and 42 USC § 1983.¹⁰⁹ Section 1983 provides a civil cause of action for deprivation of rights by someone acting "under color of any statute . . . of any State."¹¹⁰ In *Fitzgerald*, the Court explained that a school district can be liable for a Title IX claim by manifesting "deliberate indifference."¹¹¹ A Title IX claim and a § 1983 claim are distinct, and the remedies they allow are different. Title IX expressly provides both an administrative action (where federal funding can be ceased) and an implied private right of action (where both "injunctive relief and [monetary] damages are available").¹¹² The Supreme Court held that the "divergent coverage" between the statutes meant that a plaintiff may bring both suits—a § 1983 claim against an individual government actor for overt sex discrimination, and Title IX lawsuit against the school district for failing to enforce anti-harassment policies.¹¹³ It concluded that "Title IX was not meant to be an exclusive mechanism for addressing discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights" and "§ 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional sex discrimination in schools."¹¹⁴ The Court has set a high bar for Title IX claims but does allow the law broad leeway to provide remedies for the injured parties.

B. Title IX in Practice

While the judicial system has interpreted the scope of Title IX itself, the Department of Education continues to provide more instructions on policies, reporting mechanisms, and responses to changing situations that require congressional comment. As discussed above, the Obama Administration's Office for Civil Rights in the Department of Education issued multi-

107. See generally *Doe*, 2015 WL 9906260, at *8.

108. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 248 (2009).

109. *Fitzgerald*, 555 U.S. at 248.

110. 42 USC § 1983 (2006).

111. *Fitzgerald*, 555 U.S. at 257.

112. *Fitzgerald*, 555 U.S. at 255.

113. *Fitzgerald*, 555 U.S. at 257–58.

114. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009).

ple Dear Colleague Letters to provide guidance to educational institutions about their obligations under Title IX.¹¹⁵ In 2014, the White House Council on Women and Girls published a lengthy document describing the prevalence of sexual assault among college-aged women.¹¹⁶ Media outlets, from the *Huffington Post* to *Marie Claire*, have made sexual assault prevention into a cause célèbre, imploring Congress and universities to take further action.¹¹⁷ Rallies and marches are a regular occurrence on college campuses, allowing survivors to share their stories and gain strength in solidarity with supporters and fellow survivors.¹¹⁸ As public intolerance for sexual violence increases, the government and universities are empowered to take steps that benefit their students.

The processes for reporting a Title IX violation are similarly well-publicized. Students generally may elect to report through the criminal justice system or through their school's designated Title IX coordinator.¹¹⁹ Reports submitted through the school may be submitted anonymously.¹²⁰ University policies often specifically spell out possible timelines, amnesty policies, protective measures for victims, confidentiality provisions, dispute resolution and hearing processes, and annual reporting information and procedures.¹²¹ This information is publicly available in one easy-to-locate-and-navigate location.¹²² Should the university violate its obligations, Title IX allows an individual to report to the Office for Civil Rights or file a lawsuit in federal court.¹²³ The policies and procedures for either of these decisions are speci-

115. See U.S. DEP'T OF EDUC., *supra* note 45. See generally New, *supra* note 46, for a discussion of critical responses to this guidance.

116. WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *Rape and Sexual Assault: A Renewed Call to Action* (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf.

117. See generally Marcia G. Yerman, *Sexual Assault on Campus: We Believe You*, HUFFINGTON POST, May 31, 2016, http://www.huffingtonpost.com/marcia-g-yerman/sexual-assault-on-campusw_b_10185942.html; Kayla Adler, *President Obama is Getting Serious About Stopping Rape on College Campuses*, MARIE CLAIRE, Jan. 22, 2014, <http://www.marieclaire.com/politics/news/a8906/president-obama-stopping-rape-college-campuses>; Kayla Adler, *Big Shame on Campus*, MARIE CLAIRE, Oct. 16, 2013, <http://www.marieclaire.com/politics/news/a8217/big-shame-on-campus>.

118. See, e.g., TAKE BACK THE NIGHT ANN ARBOR, <http://tbtannarbor.org/> (last visited Apr. 19, 2018); see also 2018 Updates!, SARVA, <http://sarva.asuw.org/> (last visited Apr. 19, 2018).

119. See, e.g., *Reporting Options*, U. MICH., <https://studentsexualmisconductpolicy.umich.edu/content/reporting-options> (last visited Apr. 19, 2018).

120. *Id.*

121. *Id.*

122. *Id.*

123. NAT'L WOMEN'S L. CTR., *How to File a Title IX Sexual Harassment or Assault Complaint with the US Department of Education* (June 23, 2016), <http://nwl.org/re>

fied on several websites and in periodicals dedicated to Title IX education.¹²⁴

But the presence of extensive and publicly available policies does not guarantee an environment free from sexual assault and harassment. As of June 2016, a Freedom of Information Act (FOIA) request by the *Huffington Post* revealed 315 active investigations into violations of Title IX by schools in regards to their handling of sexual assault and harassment claims.¹²⁵ *The Chronicle of Higher Education*, a publication geared towards school administrators, notes that as of January 18, 2018, 339 schools with potential Title IX violations are under investigation, with another 119 schools whose potential violations were marked as resolved.¹²⁶ Still, these numbers only account for those incidents that are mishandled, a number that is smaller than the total number of incidents reported.

Advocates have proposed requiring schools to conduct campus climate surveys, where anonymous reporting will allow for greater comparison between those incidents occurring and those reported “officially.” These surveys would be useful to both the educational institutions and the criminal justice system; however, some schools are opposed to this potential requirement because of the projected expense and other logistical concerns.¹²⁷ Some universities also fear the potential spread of information that was never officially reported or independently verified.¹²⁸ Although some public and private universities elect to conduct their own climate surveys, only the military academies—which are exempt from Title IX and Clery Act obligations—are required to collect and analyze campus climate surveys. Even absent congressional requirement for climate surveys, public and private universities have a better grasp on what is actually happening on campus; students at these schools have more avenues for reporting incidents. This may give students greater confidence in their administration, believing that their concerns will be heard and respected. In addition, universities make

sources/how-to-file-a-title-ix-sexual-harassment-or-assault-complaint-with-the-u-s-department-of-education/.

124. *See id.*; *see also Title IX—End Rape on Campus*, EROC, <http://endrapeoncampus.org/title-ix/#complaint> (last visited Apr. 19, 2018).

125. Tyler Kingkade, *There are far more Title IX Investigations of Colleges than Most People Know*, HUFFINGTON POST, June 16, 2016, http://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment_us_575f4b0ee4b053d433061b3d.

126. *Tracking Sexual Assault Investigation*, CHRON. HIGHER EDUC., <https://projects.chronicle.com/titleix/> (last visited Apr. 19, 2018).

127. *See* Tyler Kingkade, *Proposal to Require Campus Climate Surveys On Sexual Assault Faces Quick Opposition*, HUFFINGTON POST, April 29, 2014, http://www.huffingtonpost.com/2014/04/29/campus-climate-surveys-sexualassault_n_5235457.html.

128. *See* Alia Wong, *Why the Prevalence of Campus Sexual Assault is so Hard to Quantify*, ATLANTIC, Jan. 26 2016, <https://www.theatlantic.com/education/archive/2016/01/why-the-prevalence-of-campus-sexual-assault-is-so-hard-to-quantify/427002/>.

information about sexual violence and their internal reporting methods easy to find and available, allowing access to necessary information prior to enrolling.

C. Sexual Assault Reporting Without Title IX

Students in the military service academies (which includes the United States Military Academy at West Point, The Air Force Academy, the United States Naval Academy, the United States Coast Guard Academy, and the United States Merchant Marine Academy) have less recourse than those at any other public or private institution (with the exception of those religious institutions who maintain an exemption to Title IX).¹²⁹ A 2015 op-ed piece in the *New York Times*, written by students of Yale Law School's Veterans Legal Services Clinic, requested a change in the policies that allow the academies to "get away with harassment and assault."¹³⁰ Students at these academies have the option of reporting through their command or via the Sexual Assault Response Coordinator (SARC) (or a specified proxy) but have no real recourse if the school declines to enforce its own policies.¹³¹ The lack of recourse is noted in other instances as well. In 2014–2015, the United States Merchant Marine Academy ("USMMA") disclosed one "unrestricted" incident of sexual assault.¹³² "Restricted Reporting" is the official designation of incidents that do not go through a disciplinary process and remain relatively anonymous.¹³³ The same report indicated that 17.1% of female midshipmen and 2% of male midshipmen were sexually assaulted.¹³⁴ More troubling is the fact that there were zero restricted or unrestricted

129. Megan Friedman, *A Scary Look at What Life is Like for Women in Military Academies*, MARIE CLAIRE, May 13, 2015, <http://www.marieclaire.com/politics/news/a14414/women-military-academies>.

130. Ashley Anderson & Elizabeth Deutsch, *Stop Assaults on Military Campuses*, N.Y. TIMES, May 12, 2015, <https://www.nytimes.com/2015/05/12/opinion/stop-assaults-on-military-campuses.html>.

131. Although the N.Y. Times article, *supra* note 130, indicates otherwise, most academies have policies that allow reporting to the SARC in lieu of solely through the chain of command. The SARC is partially analogous to the Title IX Coordinator in a traditional college or university; however, they are not held to any publicly accountable standard (e.g. Title IX). For reporting options at the United States Merchant Marine Academy, see generally *Reporting Options*, UNITED STATES MERCHANT MARINE ACAD. (Dec. 22, 2017), <https://www.usmma.edu/academy-life/sexual-assault-prevention/reporting-options>.

132. *Preliminary 2014-2015 Academic Program Year Annual Report on Sexual Harassment and Sexual Assault at the United States Merchant Marine Academy*, UNITED STATES MERCHANT MARINE ACAD., <https://www.marad.dot.gov/wp-content/uploads/pdf/S10-160111-011-2014-15-Report.pdf> (last visited Apr. 19, 2018).

133. *Id.*

134. *Id.*

reports of sexual harassment, but the SAGR survey indicates that 63% of women and 11% of men had experienced sexual harassment (and 4% and 2%, respectively, had reported these incidents to an alternative authority).¹³⁵ At a school of approximately 950 midshipmen, these discrepancies are significant.¹³⁶

In June 2016, midshipmen from the USMMA were removed from their positions on commercial carrier ships as part of Sea Year.¹³⁷ This removal, called the “Sea-Year Stand Down,” was subsequent to a “warning” issued by their accrediting body (Middle States Commission on Higher Education).¹³⁸ At least some portion of the warning was given due to the “institutional response to sexual assault and harassment.”¹³⁹ The numbers indicated in the SAGR surveys also contributed to the response, but the Department of Transportation (who oversees the Academy) indicated that there was no single catalyst event that caused the removal of 116 midshipmen from their stations. After ordering the removal of the cadets, the Department of Transportation convened a roundtable discussion with the maritime industry to address problematic culture at sea.¹⁴⁰ The sexual assault and harassment numbers were so troubling that they were immediately addressed in S. 2829-Maritime Administration Authorization and Enhancement Act for Fiscal Year 2017, which directed the Secretary of the Department of Transportation to compel the Superintendent of the Academy to create policies to address the situation.¹⁴¹ Unhappy alumni and the school’s parents association, however, have resisted the USMMA’s efforts to combat

135. *Id.*

136. The classes of 2016–2020 had between 15% and 20% female matriculation. *See Class Profile*, UNITED STATES MERCHANT MARINE ACAD. (Sept. 6, 2017), <https://www.usmma.edu/class-profile>.

137. *United States Merchant Marine Academy Announces Resumption of Commercial Sea Year Implements Strict Zero-Tolerance Policies*, UNITED STATES MERCHANT MARINE ACAD. (Feb 15, 2017), <https://www.usmma.edu/about/communications/united-states-merchant-marine-academy-announces-resumption-commercial-sea-year>.

138. Letter from Dr. George A. Pruitt, Chair, Middle States Comm’n on Higher Educ., to Dr. James Helis, Superintendent, United States Merchant Marine Acad. (June 23, 2016) (on file with author, <https://www.usmma.edu/sites/usmma.edu/files/docs/MSCHE%20Letter%20-%20June%202016.pdf>).

139. UNITED STATES MERCHANT MARINE ACAD., REPORT TO THE FACULTY, ADMINISTRATION, ADVISORY BOARD, AND STUDENTS OF THE UNITED STATES MERCHANT MARINE ACADEMY 4, <https://www.usmma.edu/sites/usmma.edu/files/docs/2016%20Final%20MSCHE%20Team%20Report%20-%20USMMA.pdf> (last visited Apr. 19, 2018).

140. MAR. EXEC. *supra* note 8.

141. Maritime Administration Authorization and Enhancement Act for Fiscal Year 2017, S.2829, 114th Cong. § 51318 (2016) (as passed by Senate, June 29, 2016).

sexual assault and insist that the statistics are wildly overblown by the government in order to hide their own leadership failures.¹⁴²

There may be growing pains as the government adjusts to the discomfort of realizing how prevalent sexual assault and harassment are at these institutions; however, increased reporting can only benefit students at the academies, where awareness has the ability to drive institutional accountability. Notwithstanding the apparent difficulties of enacting meaningful change in the culture of the academies, they must be held accountable to their students and the public.¹⁴³

*D. Insufficient Legal Processes for Victims of Sexual Violence
at the Service Academies*

Currently available avenues for recourse against a non-responsive, Title IX-exempted institution are insufficient to produce the type of systemic change needed at the academies. Victims of sexual assault may make an unrestricted report, triggering a law enforcement investigation (by either academy personnel or civilian police) that could lead to criminal charges against their assailants.¹⁴⁴ However, they do not have any ability to bring tort claims. If the academies were state entities, the victim could bring a § 1983 claim for violation of Equal Protection laws by a state actor.¹⁴⁵ Title IX and the 14th Amendment generally protect against violation of the same right; however, they provide distinct remedies for the victim, because Title

142. Lisa Rein, *Sexual Misconduct has Started a Civil War at this Federal Service Academy*, WASH. POST, July 18, 2016, <https://www.washingtonpost.com/news/powerpost/wp/2016/11/01/sexual-misconduct-has-started-a-civil-war-at-this-federal-service-academy>.

143. Lisa Rein, *'Transformational Change' Needed to Address Sexual Misconduct at Merchant Marine Academy, Obama Official Says*, WASH. POST, Sept. 2, 2016, <https://www.washingtonpost.com/news/powerpost/wp/2016/09/02/transformational-change-must-happen-at-u-s-merchant-marine-academy-obama-official-demands> (detailing the Transportation Secretary's decision to hire a team of outside experts to reform the USMMA's campus culture).

144. *E.g.*, *Frequently Asked Questions*, U.S. ARMY, <http://www.sexualassault.army.mil/faqs.aspx#question15> (last visited Apr. 19, 2018); *Sexual Assault Response Resource Guide 2017–2018*, U.S. NAVAL ACADEMY, https://www.usna.edu/SAPRO/_files/documents/SAPR%20RESOURCE%20GUIDE%202017%20P%20.pdf; *Reporting a Sexual Assault*, U.S. AIR FORCE ACADEMY, https://www.usafa.edu/app/uploads/Reporting_Assault.pdf; *Reporting Options*, U.S. MERCHANT MARINE ACADEMY, <https://www.usmma.edu/academy-life/sexual-assault-prevention/reporting-options>.

145. See Michael A. Zwibelman, Comment, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465, 1468 (1998) (specifying that Section 1983 creates an action for individuals against state actors).

IX itself does not preclude § 1983 claims.¹⁴⁶ The federal counterpart to a § 1983 claim, a “Bivens Action,” is insufficient because it does not allow a lawsuit against the agency itself, only against the agency representative who perpetuated the tort.¹⁴⁷ Not only is it insufficient as a remedy—it is disallowed when applied to the U.S. Military, because the Court considered enrollment in the Military Academy as “incident to service.”¹⁴⁸

Students at the academies also cannot bring claims (for sexual harassment, assault, or otherwise) under the Federal Tort Claims Act.¹⁴⁹ In *United States v. Stanley*, the Court observed that “the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service,” citing the holding of *Feres v. United States*, commonly known now as the *Feres* Doctrine.¹⁵⁰ *Schoenfeld v. Quamme* puts pressure on that definition, holding that a U.S. Marine who was severely injured in a motor vehicle accident, at least partially due to the negligence of the officer responsible for road maintenance, was not barred from a *Feres* claim because there was “nothing distinctly military” about the car crash that created the damage to the guardrail that was subsequently left uncorrected by road maintenance.¹⁵¹ However, even if claims were available, it still does not prevent the occurrence of sexual assault and harassment, nor does it educate potential cadets about the rates of incidents on campus.¹⁵²

PART III: PROPOSED REMOVAL OF THE MILITARY ACADEMY EXEMPTION

Reformation of Title IX is critically important to student safety at the military academies; although military academies claim general compliance with many of the athletic implications of Title IX, they are not held accountable except where and when it is convenient for them to do so. They

146. *See id.* at 1485 (arguing Supreme Court case law “leads to the conclusion that Title IX has no preclusive effect on either statute-based or Constitution-based Section 1983 claims”).

147. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 473 (1994) (refusing to extend *Bivens* to provide an implied cause of action for damages against federal agencies).

148. *See United States v. Stanley*, 483 U.S. 669, 673 (1987) (relying on the presumption that incidents occurring at the Academy would be considered automatically “incident to service”).

149. *See* 28 U.S.C.A. § 2672 (Westlaw through Pub. L. No. 115-90).

150. *Stanley*, 483 U.S. at 672 (citing *Feres v. United States*, 340 U.S. 135, 146 (1950)).

151. *See Schoenfeld v. Quamme*, 492 F.3d. 1016, 1026 (9th Cir. 2007) (explaining the claim may proceed because it is not barred by the *Feres* doctrine).

152. Possible head of the Education Task Force, Jerry Falwell, Jr., is said to want to “cut federal rules on investigating and reporting sexual assault under Title IX”. Ian Simpson, *Evangelical Jerry Falwell, Jr. to Head Trump Education Task Force*, REUTERS, Feb. 1, 2017, <http://www.reuters.com/article/us-usa-trump-falwell-idUSKBN15G5F4>.

are not accountable to the public, and they are not accountable to their student body. The academies do not report to the Department of Education; instead, they report to the Department of Defense, Department of Homeland Security, and the Department of Transportation.¹⁵³ However, those arms of the federal government are so far removed from other educational institutions that they cannot be fairly relied upon to provide accurate information to potential students. This Note does not imply that the federal academies blatantly disregard instances of sexual assault and sexual harassment; however, the culture at these institutions is such that a lack of student reporting necessarily means that these offenses are not being investigated as often as they occur. It is apparent from the Sea-Year Stand Down that at least some portion of the Maritime industry is concerned about the ramifications of continued instances of sexual assault and harassment.¹⁵⁴

The federal government recognizes that these behaviors are not conducive to a safe learning environment. Department of Transportation official Michael Novak indicated as much—“The Secretary is interested in a transformational change at the Academy; one that creates a culture that protects these young women and men and ensures respect for everyone.”¹⁵⁵ Unfortunately, USMMA alumni have other feelings about the issue, going so far as telling current students to completely refrain from submitting data to the Department of Transportation—“Data is the ammunition they need to

153. See 10 U.S.C.A. § 3011 (Westlaw through Pub. L. 115-90) (the Department of the Army “operates under the authority, direction, and control of the Secretary of Defense”); *Id.* § 4331 (Westlaw through Pub. L. 115-90) (the Military Academy is under the control of the Department of the Army); *Id.* § 5011 (Westlaw through Pub. L. 115-90) (the Department of the Navy “operates under the authority, direction, and control of the Secretary of Defense”); *Id.* § 8011 (Westlaw through Pub. L. 115-90) (the Department of the Air Force “operates under the authority, direction, and control of the Secretary of Defense”); *Id.* § 9331 (Westlaw through Pub. L. 115-90) (The Air Force Academy is under the control of the Department of the Air Force); 10 U.S.C. § 5033(c) (The Chief of Naval Operations is under the control of and is directly responsible to the Secretary of the Navy); *Id.* § 6951(a) (Westlaw through Pub. L. 115-90) (The Naval Academy is under the control of the Secretary of the Navy); 14 U.S.C.A. § 3(a) (Westlaw through Pub. L. 115-90) (“The Coast Guard shall be a service in the Department of Homeland Security, except when operating as a service in the Navy.”); 46 U.S.C.A. § 51301(a) (Westlaw through Pub. L. 115-90) (“The Secretary of Transportation shall maintain the United States Merchant Marine Academy”); see also Letter from Chief of Naval Operations, Dep’t of the Navy (Nov. 6, 2017) (on file at <https://doni.documentservices.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-400%20Organization%20and%20Functional%20Support%20Services/5450.330B.pdf>).

154. MAR. EXEC. *supra* note 8

155. Rein, *supra* note 143.

weaponize SA/SH against you.”¹⁵⁶ (SA/SH is the common abbreviation in the academies and federal government for sexual assault and sexual harassment.) The alumni complain that “sexual harassment and assault have long existed at Kings Point—and long been ignored by the school and the Maritime Administration.”¹⁵⁷ Even a suddenly convenient attempt at SA/SH prevention should not be so dramatically criticized by these alumni groups if they are actually concerned with the conduct of students at the Academy or otherwise involved in the maritime industry. The “fanatical, deep, deep loyalty these alumni have to Kings Point [the USMMA]” is grossly indicative of a culture more concerned with short-sighted loyalty to the reputation of their academy than long term progress towards eradication of sexual assault and harassment.¹⁵⁸

This Note advocates for the removal of the exempting language of 20 U.S.C § 1681(a)(4). This would require the federal service academies, the United States Military Academy (West Point), the United States Naval Academy (Annapolis), the Air Force Academy, the Coast Guard Academy, and the United States Merchant Marine Academy (Kings Point), to comply with all Title IX provisions and their interpretations (both court holdings and those contained in the federal government’s “Dear Colleague Letters”).¹⁵⁹ These schools would be “legally required to respond and remedy hostile educational environments . . . failure to do so is a violation that means a school could risk losing its federal funding.”¹⁶⁰ Title IX compliance mandates (among other things): published notices of nondiscrimination, the appointment of a Title IX Coordinator, a clear grievance procedure for sex discrimination, appropriate training for administrators who are to respond to acts of sexual harassment and sexual violence, prompt responses to complaints, informing victims of their reporting options, an equitable complaint process (protecting rights of both the victim and the accused), and prevention against retaliation and other hostile environments due to the alleged complaint.¹⁶¹

It is unlikely that the academies would respond positively to the imposition of requirements by anyone but the Department of Defense due to perceptions regarding military security and autonomy. There is a significant question of the realistic ability of the federal government to fully comply with enforcement of Title IX at the academies. For example, if a public or

156. Rein, *supra* note 142.

157. Rein, *supra* note 143.

158. Rein, *supra* note 142.

159. See Griffin, *supra* note 41; U.S. DEP’T OF EDUC., *supra* note 45.

160. *Title IX, KNOW YOUR IX*, <https://www.knowyourix.org/college-resources/title-ix/> (last visited Apr. 19, 2018).

161. Q&A, *supra* note 52.

private university is found to be noncompliant with Title IX, the specified course of corrective action is loss of its federal funding; this includes any federal monies allocated to the university *plus* disqualifying students for federal loan programs. The federal service academies do not require their students to take out loans (in fact, students at the military academies are paid to attend and receive full Department of Defense benefits; students at the Merchant Marine Academy do not receive payment but do not pay to attend as their “cost” to attend is made up for in a service requirement).¹⁶² Additionally, the United States’ continued reliance on a strong military presence makes it unrealistic to expect the federal government to remove Department of Defense funding completely from the academies if violations of Title IX continue.

Not only does this funding pay for instructors and facilities, but it also pays the wages of every single cadet who is enrolled at each of the military service academies. Still, meaningful federal control is possible by simply decreasing the funds available (perhaps for athletics, social programming, and other non-military-specific activities). Irrespective of the funding concerns between the federal government and the academies, removal of the exemption would at least create a guaranteed private cause of action for students. Increased lawsuits finding in favor of plaintiffs would justify the government’s removal of federal funding. Increased publicity, as well as knowing the exact statistics of sexual assault and harassment, would decrease the number of students willing to enroll at the academies. The statistics would notify the federal entities responsible for budget allocation that all is not well at the academies.

In 2018, the academies can offer little continued justification for the perpetuation of permissive sex discrimination via ineffective prevention, investigation, and prosecution of sexual assault and harassment on their campuses. The status of women is, thankfully, not the same as when Title IX (and its predecessor legislation mentioned above) was enacted. The Women’s Armed Service Integration Act was signed in 1948, providing for a permanent female military presence.¹⁶³ Direct commissions were offered to female college graduates in 1949.¹⁶⁴ Women received mandatory defensive weapons training beginning in 1975.¹⁶⁵ In 1976, women were allowed

162. See *Service Obligation*, U.S. MERCHANT MARINE ACAD., <https://www.usmma.edu/admissions/application/service-obligation> (last visited Apr. 19, 2018).

163. *Women in the Army*, U.S. ARMY, <https://www.army.mil/women/history/> (last visited Apr. 19, 2018).

164. *Id.*

165. *Id.* (“To obtain more WAC officers, the first direct commissions were offered that year to women college graduates as second lieutenants in the Organized Reserve Corps.”).

to be admitted into all of the service academies (and the first women graduated from West Point in 1980).¹⁶⁶ In 2013, the exclusion rule for direct ground combat was removed.¹⁶⁷ Finally, in 2016, the federal government opened all military occupations to women.¹⁶⁸ If West Point's purpose is to "produce leaders of character who are prepared to provide selfless service to our Army and the nation," then it has long outgrown any need for a specific exception to Title IX.¹⁶⁹

There can be no justification for less regulation regarding mandatory reporting. In fact, since these academies are *per se* a federal entity under the Department of Defense, there should be an absolute presumption of openness for information that is not a matter of national security. The Academy may have concerns about the athletic components of Title IX based on the large disparity in makeup of the class profile between men and women.¹⁷⁰ But they have no reason to worry if they are not actually discriminating based on sex: the 1996 "Clarification of Intercollegiate Athletics Policy Guidance" letter explains that a purely equal representation of the genders in sports is not required for Title IX compliance. In fact, it requires institutions to meet only one of the three tests offered, including the "proportionality" test, which measures the ratio of male and female athletes to male and female enrollments.¹⁷¹ The proportionality test notwithstanding, it may be difficult to overcome the centuries of gender bias surrounding the military academies.

Another option remains that would force the academies to publicly account for incidents of sexual assault: making them comply with the Clery

166. U.S. ARMY, *supra* note 163.

167. *Id.*

168. *Id.*

169. *About West Point*, U.S. MILITARY ACAD., <https://www.usma.edu/about/SitePages/Home.aspx> (last visited Apr. 19, 2018).

170. West Point does not make the exact breakdown publicly available, but its class profile on the U.S. News & World Report indicates 81% male and 19% female enrollment. *See United States Military Academy*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-colleges/west-point-2893> (last visited Apr. 19, 2018). The U.S. Coast Guard Academy has the least amount of disparity between the genders, with a breakdown of 65% male and 35% female. *See United States Coast Guard Academy*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-colleges/coast-guard-academy-1415> (last visited Apr. 19, 2018).

171. JODY FEDER, CONG. RESEARCH SERV., RL31709, TITLE IX, SEX DISCRIMINATION, AND INTERCOLLEGIATE ATHLETICS: A LEGAL OVERVIEW 6 (2012), <https://fas.org/sgp/crs/misc/RL31709.pdf> (citing the Department of Education's Office for Civil Rights, Letter regarding the Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>).

Act.¹⁷² This could be accomplished in several ways. First, the Clery Act could attempt to tie itself to receipt of federal financial assistance (as in Title IX), rather than to those institutions who receive federal student aid (under Title IV, which controls the receipt of federal student aid such as the Pell Grant, Stafford loans, etc.). Although the distinction may be slight, this change provides the government authority with significantly more teeth, as Title IX allows the government to cease funding if an institution refuses to comply, whereas Title IV can generally only affect receipt of federal student funding.

The academies do not have a leg to stand on when attempting to persuade legislators not to make this type of change to their reporting structure. Lieutenant General Michelle Johnson, Superintendent of the U.S. Air Force Academy in 2015, describes at length the reporting requirements imposed on the Academies by the Department of Defense.¹⁷³ She insists that while the academies are not required to report under the Clery Act, “all the FSAs [Federal Service Academies] must report sexual assault data annually through various other laws that cover the institutions.”¹⁷⁴ If, as she purports, that data is already collected, there can be no rational objection by the academies or the Department of Defense to releasing the information in the same manner as universities.

K. Denise Rucker Krepp, former Chief Counsel of the Maritime Administration—the Department of Transportation agency in charge of operating the USMMA—portrays an entirely different reporting process at the academies. She indicates major differences between the reporting processes in Clery and those used by the academies, most notably the fact that [at the academies] “only formal complaints are to be included in the report [to Congress].”¹⁷⁵ The culture at the academies is apparently so toxic that the

172. The Clery Act is only currently applicable to those institutions that are subject to Title IX of the Higher Education Act of 1965 (private and public universities in receipt of federal student aid funds). *See generally* 20 U.S.C.A. § 1070 (Westlaw through Pub. L. No. 115-140); *see also* U.S. MERCHANT MARINE ACAD., PRELIMINARY 2014–2015 ACADEMIC PROGRAM YEAR ANNUAL REPORT ON SEXUAL HARASSMENT AND SEXUAL ASSAULT AT THE UNITED STATES MERCHANT MARINE ACADEMY 8, <https://www.marad.dot.gov/wp-content/uploads/pdf/S10-160111-011-2014-15-Report.pdf> (noting that the USMMA has purported to move its own program documents to “reflect Clery Act requirements.”).

173. Michelle D. Johnson, *Sexual Assault Prevention & Response at Federal Service Academies*, UNITED STATES AIR FORCE ACAD., May 12, 2015, <http://www.usafa.af.mil/News/Article-Display/Article/626114/sexual-assault-prevention-response-at-federal-service-academies/>.

174. *Id.*

175. K. Denise Rucker Krepp, *Service Academies, Too, Should Have to Publicly Report Sexual Assaults*, CHRON. HIGHER EDUC., Oct. 29, 2014, <http://www.chronicle.com/article/Service-Academies-Too-Should/149705>.

number of formally reported incidents is vastly disproportionate to those reported in climate surveys or through the academy's Sexual Assault Response Coordinator (SARC) (where those students who do not wish to proceed with formal charges still report the incident for varying reasons).¹⁷⁶

Another distinction between current Department of Defense and Clery reporting is the existence of a daily crime log and mandatory real time reporting of criminal conduct punishable by significant fines to the institutions.¹⁷⁷ Compliance with the Clery Act could be a major step towards addressing the systemic culture issue at the military academies by creating an awareness of the issue by current and potential students, alumni, the media, and the government. The Clery Act requires reporting of every incident that occurs in so-called "Clery Act geography" (the areas that are under the institution's control).¹⁷⁸ Additionally, some incidents may occur off campus, or in a location that otherwise has an insufficient connection to the institution, such that Clery is not implicated.¹⁷⁹ Although the rules are specific, it is possible that the off-site locations used for educational purposes during the USMMA's "Sea Year" program would still qualify.¹⁸⁰

PART IV: HOW THE TITLE IX EXEMPTION COULD BE DEPLOYED IN KNOWN INSTANCES OF PERVASIVE SEXUAL ASSAULT AND HARASSMENT

In 2010, a cadet at the United States Military Academy at West Point, known only as Jane Doe, was sexually assaulted by a fellow cadet.¹⁸¹ Three

176. *Id.*

For example, in a 2010 survey at the Merchant Marine Academy, seven students said they had been the victims of 11 incidents of actual or attempted rape or assault over the previous 12 months. But none of those incidents were reported through the formal reporting channels, and so they were never acted upon by the academy leadership.

177. Penn State University faced \$2.4 million in fines following the Jerry Sandusky case, the largest fine levied thus far under the Clery Act. See Charles Thompson, *Penn State Faces \$2.4M Fine for Violating Federal Law in Jerry Sandusky Case*, PENN LIVE, Nov. 3, 2016, http://www.pennlive.com/news/2016/11/penn_state_faces_1_million_fin.html.

178. See U.S. DEPT. OF EDUC., OFFICE OF POSTSECONDARY EDUC., *The Handbook for Campus Safety and Security Reporting 2-1-2-27* (2016).

179. See *id.* at 2-25-2-33 (2016), <https://www2.ed.gov/admins/lead/safety/handbook.pdf>. For clearer visualization, see flowchart created by Joseph Storch, *Properly Classifying Geographic Locations for Clery Act Annual Security Report Purposes* HIGHER ED COMPLIANCE ALLIANCE (May 2013), http://www.higheredcompliance.org/resources/resources/ProperlyClassifyingGeoLocale_CleryAct.pdf.

180. Storch, *supra* note 179.

181. *Doe v. Hagenbeck*, 870 F.3d 36, 39 (2d Cir. 2017).

years later, she filed a lawsuit against two officers of the Academy in their personal capacities.¹⁸² Ms. Doe claimed that these men, as the highest ranking officers at the Academy, “perpetuat[ed] a sexually aggressive culture at West Point that discriminated against female cadets [and] put female cadets at risk of violent harm,” which directly led to the rape she suffered during final exam period of her second year.¹⁸³ She sought immediate medical treatment and filed a restricted report of the incident, stating that she was afraid to file an unrestricted report—the kind that can lead to disciplinary action on the perpetrator.¹⁸⁴ Ms. Doe feared that “an unrestricted report would damage her career prospects, place her reputation in jeopardy, and cause her to be punished for violations of curfew and drinking regulations.”¹⁸⁵ The reasons that Ms. Doe decided to make a restricted report are likely the same reasons that so many incidents of sexual assault and harassment go unreported at the academies in general. Collateral misconduct (such as when the victim is found to be breaking curfew or under the influence of alcohol) is reported to Academy commanders, and under West Point policy, this collateral misconduct by the victim will be adjudicated after the perpetrator’s sexual assault.¹⁸⁶ These policies silence those who otherwise would report the crimes against them.

Ms. Doe filed suit under four distinct causes of action:

a *Bivens* claim based on due process violations against the commanding officers, a *Bivens* claim based upon equal protection violations, a claim for breach of the covenant of good faith and fair dealing under 28 U.S.C. § 1346(a)(2) against the United States, and a Federal Tort Claims Act violation against the United States alleging negligent supervision, negligent training, negligence, negligent infliction of emotional distress, and abuse of process.¹⁸⁷

Three claims were dismissed; however, the Southern District of New York allowed Ms. Doe to proceed under her equal protection *Bivens* action.¹⁸⁸ The court acknowledged that, “absent Congressional authorization for

182. *Hagenbeck*, 870 F.3d at 40.

183. *Hagenbeck*, 870 F.3d at 38 (internal quotation marks omitted).

184. *Hagenbeck*, 870 F.3d at 39–40.

185. *Doe v. Hagenbeck*, 98 F. Supp. 3d 672, 679 (S.D.N.Y. 2015).

186. DEPARTMENT OF DEFENSE, *Annual Report on Sexual Harassment and Violence at the Military Service Academies Academic Program Year 2010–2011*, 42 (Dec. 2011), http://www.ncdsv.org/images/DOD_AnnRepSexHarassmentAndViolenceMilitaryServiceAcademies_AcadPrgrmYear2010-2011.pdf.

187. *Doe v. Hagenbeck*, 870 F.3d 36, 40 (2d Cir. 2017).

188. *Hagenbeck*, 870 F.3d at 41.

money damages, the need to insulate the military's disciplinary structure from judicial inquiry constitutes a special factor" (where a *Bivens* remedy may not be available even in the presence of a clear violation of constitutional right).¹⁸⁹ Further, the court noted that both *United States v. Stanley* and *Feres v. United States* severely limit the ability of a servicemember to bring a tort claim against the United States; effectively, the decision in *Stanley* applied the *Feres* doctrine to *Bivens* actions.¹⁹⁰ Even so, the court stated that the primary reason for these exceptions (to existing tort law) was "the need to . . . prevent judicial involvement in sensitive military matters," and found that Ms. Doe's claim, at least thus far, "did not implicate such concerns."¹⁹¹

The Second Circuit, however, disagreed with this interpretation and relied entirely on established Supreme Court precedent to find that "no *Bivens* remedy is available for injuries that arise out of or are in the course of activity incident to service."¹⁹² Both the D.C. Circuit and Fourth Circuit Court of Appeals have upheld *Feres* applicability to the *Bivens* claim as well; for example, the Fourth Circuit stated that "*Bivens* suits are never permitted for constitutional violations arising from military service, no matter how severe the injury or how egregious the rights infringement."¹⁹³

In 2010, the year of Ms. Doe's assault, West Point officially reported 11 sexual assaults, which led to the dismissal of one cadet.¹⁹⁴ The 2010 Service Academy Gender Relations (SAGR) survey at the academy showed different results: 9.1% of women and 1.2% of men experienced unwanted sexual contact.¹⁹⁵ Sexual harassment statistics were even more dramatic. The survey showed that 51% of female cadets (over 100 women) and 9% of men

189. *Hagenbeck*, 870 F.3d at 41.

190. *Hagenbeck*, 870 F.3d at 41. In *United States v. Stanley*, a servicemember was denied the ability to bring a Federal Tort Claim against the United States Government after he was unknowingly placed in an experimental program that administered him hallucinogenic drugs (LSD), because the injuries he suffered were incidental to his military service. *United States v. Stanley*, 483 U.S. 669 (1987).

191. *Hagenbeck*, 870 F.3d at 41.

192. *Hagenbeck*, 870 F.3d at 41.

193. *Doe v. Hagenbeck*, 870 F.3d 36, 46 (2d Cir. 2017) (citing *Cioca v. Rumsfeld*, 720 F.3d 505, 512 (4th Cir. 2013)).

194. *Doe v. Hagenbeck*, 98 F. Supp. 3d 672, 678 (S.D.N.Y. 2015). *But see* DEP'T OF DEF., *supra* note 186, at 11 (listing a total of 10 reports made at West Point during the year 2010).

195. PAUL J. COOK & RACHEL N. LIPARI, 2010 SERVICE ACADEMY GENDER RELATIONS SURVEY IV (Dec. 2010), http://www.sapr.mil/public/docs/research/FINAL_SAGR_2010_Overview_Report.pdf.

had been subjected to sexual harassment.¹⁹⁶ Sexual assault and harassment at the academies are severe and pervasive, and students are left helpless to address them with the current means available.

If Congress rescinded the existing exemption to Title IX for the Military Service Academies, Ms. Doe would have other avenues to pursue a remedy for the substantial injuries she suffered. If West Point were subject to Title IX, the *Bivens* issue would no longer matter, because there would be a specific Congressional authorization overriding the existing exemption to *Bivens*.

CONCLUSION

The Federal Service Academies no longer have good reason to maintain complete autonomy over their sexual assault and harassment enforcement and reporting procedures. The Military Academies have not proven themselves capable of providing a discrimination-free environment. In fact, the opposite is clearly true, as female students are regularly subjected to demeaning, sexualized interactions with many members of the student body and their superior officers. The dissent in *Doe* shares a disturbing, yet representative, chant used by cadets:

*I wish that all the ladies
Were bricks in a pile
And I was a mason
I'd lay them all in style. . .
I wish that all the ladies
Were holes in the road
And I was a dump truck
I'd fill them with my load. . .
I wish that all the ladies
Were statues of Venus
And I was a sculptor
I'd break 'em with my penis.¹⁹⁷*

The time has passed for the academies to be allowed to address these issues on their own terms. The academies should be required to comply with the Clery Act's reporting requirements and with Title IX's investigation methods for incidents of sexual assault and harassment. They should also be sub-

196. Paul J. Cook & Rachel N. Lipari, *2010 Service Academy Gender Relations Survey*, DEFENSE MANPOWER DATA CENTER iv-v (Dec. 2010), http://www.sapr.mil/public/docs/research/FINAL_SAGR_2010_Overview_Report.pdf.

197. *Hagenbeck*, 870 F.3d at 50.

ject to financial damages to students to whom they have failed to provide a discrimination-free environment. The Title IX exemption is outdated and based on historically inaccurate and discriminatory gender stereotypes. #TimesUp for the academies to be allowed to address these issues on their own terms. ♣