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## BIDEN'S #METOO PRESIDENCY: MILITARY AND CAMPUS JUSTICE REFORM

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How will the Biden Administration reckon with the ongoing #MeToo revolution? Will we get the Biden who failed to call supporting witnesses and allowed the GOP [mistreatment of Anita Hill](#) during the Clarence Thomas confirmation hearings or the Biden who pushed for female representation on the Senate Judiciary committee and [acknowledged his role](#) in Hill's mistreatment with a two decade-late apology. The Biden who [sniffed hair](#), [rubbed noses](#), gave [uncomfortably long hugs](#), and was [accused of sexual assault](#) by Tara Reade or the Biden who promised to respect the ["reset" boundaries](#) of personal space and [championed](#) the It's On Us college anti-rape campaign.

Perhaps the [defining element](#) of Biden's presidency so far is his twinned capacity for [grief](#) and [empathy](#). I cannot help but wonder how those traits might inform his policy preferences and decisions on issues of sexual assault and harassment. His extraordinary empathy likely emerged from [very difficult](#) personal tragedy. Will Biden's unusual experience of having both acknowledged and apologized to some women harmed by him while also claiming to be wrongfully accused of rape also give rise to this empathy, and if so, where will it lead? An optimist might hope it will provide Biden the needed perspective to empathize with all the affected parties and make sure all are treated fairly and with respect.

Candidate Biden pledged both to lead by example and to implement major policy overhauls in this area. In this short essay, I assess President Biden's performance on both components in his first hundred days. I look first at his comments and decisions on personnel matters as they may give us some hints about or lessons for the policy decisions coming down the road. Then I turn to universities and the military as two sets of institutions likely subject to serious executive reform.

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## I. PERSONNEL LEADERSHIP

President Biden kicked off his administration with an announcement of his colloquial zero-tolerance White House workplace policy. [He said](#), “If you ever work with me and I hear you treat another colleague with disrespect . . . I promise you I will fire you on the spot . . . Everybody is entitled to be treated with decency and dignity. No ifs, ands, or buts.” This new standard for professional behavior seemed designed to restore civility to a White House recently [plagued by incivility](#). Perhaps the admonition was also implicitly meant to advance the [Biden Agenda for Women](#). Mandating respect for co-workers ought to redound to the benefit of professional women who often face various forms of harassment ranging from physical touching and unwanted sexual propositions to microaggressions like mansplaining and maninterruptions.

But the first public test showed this zero-tolerance promise quickly broken. When Deputy White House Press Secretary T.J. Ducklo disrespectfully responded to a Politico reporter’s request for a comment on a story that he was dating a reporter and the related possible conflict of interest, he issued a lackluster apology and was [suspended](#) for a week. Keep in mind that he [yelled](#) at female reporter Tara Palmieri, threatened “I will destroy you” if she ran the story, and alleged she was jealous because a different man “wanted to fuck” his girlfriend instead of her. The White House further fumbled by barring Ducklo from having any interactions with Politico reporters, which could be read as a punishment of Tara Palmieri for reporting their conversation to her bosses and of her bosses for pursuing it. Only after a public backlash did Ducklo [resign with a more fulsome apology](#). While the ultimate outcome may have been appropriate, the White House process demonstrated a lack of commitment to a zero-tolerance atmosphere and either at best a misunderstanding of how selectively barring access to a senior press official was an inappropriate punishment, or at worst, a willingness to retaliate against those bringing harassment to light.

Another potential test for Biden involves the workplace harassment allegations against Governor Cuomo. Cuomo stands accused by several women of unwanted sexual advances in the form of touching and conversations, as well as more generally “[belittl\[ing\]](#), [bully\[ing\]](#) and [harass\[ing\]](#) his employees and colleagues.” When asked about the Cuomo scandal, Biden has emphasized a commitment to the process and an opposition to retaliation for those exposing the toxic working environment. While others such as Senate Majority Chuck Schumer and Senator Kirsten Gillibrand have [called](#) for Cuomo to resign immediately, Biden [commented](#) that Cuomo should step down *if* an investigation confirms allegations of sexual harassment, face prosecution, and that “a woman should be presumed telling the truth and should not be scapegoated and become victimized by her coming forward.” Again, this approach seems to fall short of an aggressive zero-tolerance policy which would include immediate termination or resignation for colloquial harassment and other lawful but awful activities that might fall short of legal prohibitions. This is not to say that Biden’s policy should be that any act of witnessed incivility should be subject to immediate firing, but rather that when pressed, Biden clearly does not hold that view.

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What might we expect, then, in the areas where Biden is reviewing the existing process to deal with sexual harassment and sexual assault? In his first hundred days, he has made clear addressing #MeToo in the military and universities is a top priority. While the military and universities face distinct challenges in addressing sexual assault and sexual harassment, they also share some important similarities. Sexual assault and harassment occur there in higher rates than among the general population—perhaps because of a combination of demographics, culture, working and living arrangements and/or failures of accountability. Both are distinctive institutions with unique core missions that are not the administration of justice but something else entirely. Yet both institutions have the authority to issue a range of remedies and punishments inside a specialized justice system that differ in meaningful ways from the standard American civil and criminal justice processes. Despite, or perhaps because of those specialized systems, both face [massive](#) underreporting and a lack of trust in the process by victims. As much as regular systems of justice have struggled with defining and enforcing laws of sexual assault and harassment, these specialized systems seem to lag behind even more as they seek to balance or account for additional interests such as the need for command authority and educational access. And thus, both are ripe for potential reform— but the looming question for Biden is whether reform should replicate the ordinary civilian justice system as much as possible or rather reflect the distinctive nature and purposes of these special institutions?

#### A. *Sexual Harassment and Assault in the Military*

At the very least, President Biden seems to be following through on the promises of Candidate Biden on sexual harassment and assault in the military. He pledged to make it a top priority, and all signs are that he has. On International Women’s Day, he [spoke](#) of sexual harassment and assault in the military as corrosive of unit cohesion and a threat to national security and of efforts to eradicate it as an “all hands on deck effort.” Despite the military’s decade long [lip-service to zero tolerance](#), Biden seems to understand that merely saying zero tolerance and actually achieving it are two different things here.

As I have written [elsewhere](#), freshly installed Secretary of Defense Lloyd Austin kicked off his own tenure by calling on the Pentagon to do an [immediate review](#) to identify “high risk” military installations for sexual harassment and assault and appointing Lynn Rosenthal to chair of the 90-Day Independent Review Commission on sexual assault in the military. And unlike the numerous similar commissions in the past decade-plus, both Austin and Rosenthal have promised that [all options are on the table](#), including the role of command in decisions to refer cases to prosecution as well as other major shifts in the military justice system. In a nutshell, many reformers want the military justice system to look more like the civilian justice system with a larger role for attorneys and a smaller role for commanders who must balance interests outside of justice tradi-

tionally conceived. The hope is that such a change would both encourage increased trust in the system and thus greater willingness to report as well as decrease the possibility of undue or even unlawful command influence.

The commission's initial recommendations have followed this "civilianization" path. They [include a recommendation](#) for lawyers, rather than commanders, to make charging decisions related to "special victim crimes" as well as the decision of whether such charges go to court martial. The commission also wants the investigation of sexual harassment claims taken out of the chain of command and to begin discharge processes for the accused once the charge is substantiated rather than waiting for the conclusion of all legal processes. While Austin has not yet heard from service leaders, many are optimistic that Austin will endorse these significant changes.

To my mind, the real challenge here is whether the administration will risk alienating military leadership who generally and intensely wants to [keep command authority](#) in investigating, charging, and disposing of charges. It is a question not just of politics and political capital, but potentially also of expertise. How much will the administration trust and defer to the military given their specialized knowledge? While many other militaries have moved away from the chain of command and more heavily relied on career military lawyers to make these decisions, it would be a very significant departure for the United States. And if Biden wants to avoid a bifurcated system in which sex related offenses are tried outside the chain of command and others remain under the commander's control, then removing all felonies from the chain of command would be an even more significant change to the military justice system as we know it.

Of course, some changes need support from the legislative branch. The legislature can and has passed reforms to the military justice system. In the past fifteen years, Congress [enacted 249 legislative proposals](#) concerning sexual assault in the military. These include procedural reforms to encourage reporting as well as requirements that commanding officers immediately refer reports of sex-related assaults to the relevant military criminal investigation organization. Several members of Congress, led by Kirsten Gillibrand, are pursuing an overhaul through the [Military Justice Improvement Act](#). Recent [bipartisan support](#) from legislators like Republican and retired serviceperson Joni Ernst suggests serious momentum for such reform.

### *B. Title IX Reform for Universities*

Biden's commitment to review all sex and gender discrimination policies in schools is also moving ahead in his first 100 days. After an executive order in March, Biden [announced](#) in April an effort to seek public input via public hearings and questionnaires as well as through the regular notice and comment for Title IX amendment process. In thinking about possible course reversals, four of the [most contentious changes](#) under the Trump administration were: eliminating the requirement that schools respond to off-campus incidents, narrowing the definition of sexual harassment to [severe, pervasive, and objectively offensive](#), enhanced due process protections for accused students including the requirement

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for [a live hearing with cross-examination](#), and requiring schools use [either](#) the preponderance of the evidence or clear and convincing standard.

I predict that Biden will return to a broader interpretation of university responsibility. Given his involvement in the It's On Us college campus campaign and the conventional wisdom that most university sexual assaults happen off-campus, I think he will want a more expansive jurisdictional requirement. That said, [many campuses](#) already choose to voluntarily address off-campus incidents, so Biden's choice here will only be a weighty one for those campuses that embraced the minimum interpretation under the DeVos guidance. Similarly, I anticipate that the administration will reject the stingy interpretation of harassment as "severe, pervasive, and objectively unwelcome" even if it does not return to [the Obama interpretation](#) of sexual harassment as "unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature" which creates a hostile environment "if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program."

In contrast, I do not have much predictive confidence in how much Biden may want to roll back due process, evidentiary, and other DeVos innovations that moved the higher education process much closer to the non-educational justice system. Will Biden want to return to a singular preponderance of the evidence standard or allow universities discretion to choose between that and the higher clear and convincing standard? Similarly, Biden will likely struggle with what due process and its fundamental value of fairness mean in this setting. Jennifer Klein, co-chair of the White House Gender Policy Council, has assured the public that "both the accused and accuser" [are entitled](#) to a fair process, but what does that mean in concrete terms? The current rules provide for cross-examination, and those parties who opt out may not have their statements used as evidence. A [circuit split](#) exists as to whether the provision of cross-examination is required when credibility is at issue. Some schools were allowing the accused and accuser to conduct the cross-examination of each other until [recent guidance](#) made clear that advocates or attorneys should conduct the questioning. The stakes are high—many accusers feel forced to decide between abandoning their claims and risking retraumatization through aggressive questioning. Of course, those accused also face high stakes, such as losing access to their educational institution and other serious material and emotional consequences that can flow from being adjudicated a Title IX violator.

Nor has Biden given us much sense of where, if at all, restorative justice might fit into Title IX reform. The Obama administration prohibited mediation, and some schools took that as a signal that other forms of alternative dispute resolution were also disfavored. With DeVos's changes, either party could push an investigation into a courtroom like proceeding with cross-examination, but an informal or alternative resolution was also permitted. [Many](#) have urged that traditional restorative justice practices could and should be adapted to the educational setting. The idea is that rather than utilizing an increasingly legalistic

framework with its focus on a determination of wrongdoing and demands of heightened evidentiary standards and due process, students on both sides of a dispute might be better served with a focus on the harms inflicted, restoring both parties, and avoiding the sort of trauma sometimes inflicted by a formal legal process. Others worry that schools will take this as a signal that they can take the matter less seriously, that they might pressure victims into choosing alternative modes of resolution and that such modes will lack sufficient accountability or healing. While Candidate Biden's [Agenda for Women](#) was extensive and carefully detailed, it simply did not speak to this question, and neither has President Biden.

#### CONCLUSION

What these personnel matters, military justice, and universities currently share is a superficial commitment to zero tolerance and an actual process not designed to enforce zero tolerance. That may be appropriate as justice systems must also embrace fairness and other process based values, but it does suggest we should be modest about what justice reform can achieve in this area. While the first 100 days of the Biden administration have set reform as a priority in both the military and universities, we will have to look to the next 100 and beyond to track the actual path of that reform and whether it moves these institutions towards or away from the civilian system of justice.