JUSTICE IN ENLISTED ADMINISTRATIVE SEPARATIONS

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Injustice anywhere is a threat to justice everywhere.[1]

I. Introduction

Specialist (SPC) Smith[2] sits in disbelief as his attorney tells him the bad news; he cannot believe what he is hearing. He thought he would be able to get back to his job when his attorney told him there would be no charges against him. Instead, SPC Smith's commander initiated an administrative separation board proceeding against him based on the substantiated allegation.[3] Despite SPC Smith and his attorney pleading his

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[1] Adri Nieuwhof, *The legacy of Martin Luther King: Injustice anywhere is a threat to justice everywhere*, ELECTRONIC INTIFADA (Mar. 25, 2007), https://electronicintifada.net/content/legacy-martin-luther-king-injustice-anywhere-threat-justice-everywhere/6829 (quoting a letter sent by Dr. King while he was in a Birmingham jail in 1963).

[2] Specialist Smith and Jenny are fictional characters who represent an accused soldier and an alleged victim and generalize a scenario in which an accused soldier is not tried at court-martial for an allegation of sexual assault, but is subject to an administrative separation.

[3] A substantiated allegations is also an allegation where probable cause exits to believe the accused committed the offense. Probable cause is "reasonable grounds to believe an offense was committed and the alleged offender committed it." Memorandum of Agreement between The Judge Advocate General and Commander, U.S. Army Criminal Investigation Command (CID), subject: Legal Coordination for Reports of Investigation March 2016.

case at his administrative separation board, the separation authority approved the administrative separation board's findings and its recommendation to separate him with an other than honorable (OTH) discharge. At the administrative separation board, the government presented very little evidence as to what happened on the night in question. The alleged victim did not even testify. Specialist Smith's attorney had no way to ask the alleged victim any questions because the government only offered the sworn statement she gave to investigators.

Dismayed, SPC Smith thinks back to how it all happened. He was at a party in the barracks when he met Jenny, and they started talking, drinking, and flirting. They both drank more than they probably should have, and one thing led to another. Specialist Smith thought Jenny liked him. She certainly gave no indication that she did not want to have sex with him. Jenny was the one who made the first move. He even asked her if she was sure, if she really wanted to have sex, and she said yes. Before she left, they shared a kiss at the door. Specialist Smith thought there might be a chance for them to have a relationship. He told all of this to the administrative separation board. However, the administrative separation board chose to believe what Jenny told investigators; Jenny claimed SPC Smith sexually assaulted her.

While fictional, SPC Smith's case is not an anomaly in the military. In fiscal year (FY) 2014, 111 military subjects, including eighty-one Army soldiers, received adverse administrative discharges for sexual assault-related misconduct.[4] Administrative separations often occur as an

[4] U.S. DEP'T OF DEF., REP., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2014, app. A at 22, encl. 1 at 63 (22 Apr. 2015) [hereinafter SAPR FY14 Report]. The Sexual Assault and Prevention Response (SAPR) fiscal year (FY) 2014 report defines reports of sexual assault.

> [T]he term "sexual assault" [is used] to refer to a range of crimes, including rape, sexual assault, nonconsensual sodomy, aggravated sexual contact, abusive sexual contact, and attempts to commit these offenses, as defined by the Uniform Code of Military Justice (UCMJ). When a report is listed under a crime category in this section, it means the crime was the most serious of the infractions alleged by the victim or investigated by investigators. It does not necessarily reflect the final findings of the investigator(s) or the crime(s) addressed by court-martial charges or some other form of disciplinary action against a subject.

Id. at 1. In the same year, there were 1550 reports of sexual assault commanders could take action on in the military. *Id.* app. A. In 15% of those cases, the subjects received a

alternative to a courts-martial because administrative separation boards have a lower standard of proof and afford the respondent, less due process than a trial by court-martial.[5] As a result of these administrative separation board proceedings, soldiers may suffer negative consequences of an unfavorable characterization of service.[6]

The Army must change how it conducts enlisted administrative separation board proceedings arising from sexual assaults because they provide inadequate due process[7] and cause unjust results for soldiers. When an alleged victim does not testify, the soldier/respondent cannot cross-examine[8] a substantial, material witness[9] and the administrative separation board cannot make a fair determination as to separation or characterization of discharge.[10] The respondent does not have the opportunity to question the alleged victim's memory, truthfulness, and credibility.[11] When the alleged victim does not testify, the respondent

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discharge or other adverse action. *Id.* The Army also reported that 15% of Army soldiers received involuntary, administrative discharges from allegations of sexual assault. *Id.* at encl. 1, at 63.

[5] Administrative separations allow the Army to administratively separate those soldiers who do not maintain the necessary standard to remain in the Army. U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (19 December 2016) [hereinafter AR 635-200]; *see infra* Part III & IV for discussion of Administrative Separations and how Administrative Separations intersect with the courts-martial process. A court-martial is the Army's mechanism to administer military justice and is governed by the Uniform Code of Military Justice (UCMJ). MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [hereinafter MCM]. *See* infra Part II for a discussion of Court-Martial Procedures.

[6] U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (4 Dec. 2015) [hereinafter DoDI 1332.14]. *See infra* Part III.A for discussion of enlisted separations, including the evidence needed and the procedures for an enlisted administrative separation.

[7] *E.g.*, AR 635-200, *supra* note 5, para. 2-4, 2-10 (offering the following due process protections: the right to confer with counsel, the right obtain documents supporting the proposed separation, the right to request witnesses but lacking in the right to compel live testimony appearances or the right to compel civilian witness.). Administrative separation boards are also governed by AR 15-6, which provide the respondent with the ability to call witness but the rules of evidence generally do not apply. Only MRE 401, MRE section V (privileged communications), and MRE 412 apply in administrative separation boards. U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (1 Apr. 2016) [hereinafter AR 15-6].

[8] *See* Coffin v. Sullivan, 895 F.2d 1206, 1212 (8th Cir. 1990); Wallace v. Bowen, 869 F.2d 187, 191–92 (3d Cir. 1989); Townley v. Heckler, 748 F.2d 109, 114 (2d Cir. 1984).

[9] AR 635-200, *supra* note 5, para. 2-10.

[10] *Id.*

[11] Doe v. United States, 132 F.3d 1430, 1434–35 (Fed. Cir. 1997).

does not have a fair opportunity to present a defense.[12] When soldiers are unable to cross-examine witnesses,[13] especially the alleged victim in a sexual assault case, the administrative separation board proceedings[14] fail to provide adequate due process. Furthermore, inadequate due process can lead to an unfavorable characterization of service for soldiers.[15]

Another area of concern is the Army's ongoing efforts to eradicate sexual assault, which create an environment of zero tolerance for sexual assault—even when it is only alleged sexual assault.[16] Those who allegedly commit sexual assault offenses suffer unjust results because of this environment.[17] Over the past few years, the Department of Defense (DoD) and the Army's focus has been on taking greater care of victims of

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[12] Weaver v. United States, 46 Fed. Cl. 69, 77 (2000).

[13] AR 635-200, *supra* note 5, para. 2-10. Soldiers can request the attendance of witnesses but they first must provide an explanation why recorded testimony would not be sufficient in providing a fair determination. The president of the board must first determine the witness testimony is not cumulative, written or recorded testimony is not adequate to accomplish the same objective, the personal appearance of the witness is essential in determining the issue fairly, and the need for live testimony is substantial, material, and necessary for the disposition of the case. *Id.*

[14] *See generally* AR 635-200, *supra* note 5; para. 2-10; AR 15-6, *supra* note 7.

[15] DoDI 1332.14, *supra* note 6, encl 4. Soldiers are notified of the worst characterization of service they might receive at a separation board, but the board makes a recommendation as to characterization of service to the convening authority. AR 635-200, *supra* note 5, para. 2-12. Over-reliance on potentially incompetent or irrelevant evidence may result in a recommendation of characterization of service lower than the soldier might truly deserve.

[16] *See, e.g.*, Sara E. Martin, *Sharp: No Tolerance for sexual harassment, sexual assault*, ARMY.MIL (Apr. 2 2014), http://www.army.mil/article/122809/; Steven A. Holmes, *Sharp decrease of sexual assault in military, study finds*, CNN (May 1, 2015 8:21 PM), http://www.cnn.com/2015/05/01/politics/military-sexual-assault-report/; *Will Military Sexual Assault Survivors Find Justice?*, NAT'L ORG. FOR WOMEN (Mar. 19, 2014), http://now.org/resource/will-military-sexual-assault-survivors-find-justice-issue-advisory/; Mary O'Toole, *Military Sexual Assault Epidemic Continues to Claim Victims As Defense Department Fails Females*, HUFF. POST (Oct. 6, 2012 9:36 AM), http://www.huffingtonpost.com/2012/10/06/military-sexual-assaultdefensedepartment_n_1834196.html; Lawrence Downes, *How the Military Talks About Sexual Assault*, N.Y. TIMES BLOG (May 26, 2013 9:00 PM), http://takingnote.blogs.nytimes.com/2013/05/26/how-the-military-talks-about-sexual-assault/?_r=0; *Department of Defense Press Briefing on Sexual Assault in the Military in the Pentagon Press Briefing Room*, DEFENSE.GOV (May 1, 2015), http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/607047; George Zornick, *New Study Demands Zero-Tolerance for Military Sexual Assault*, NATION.COM (Mar. 26, 2013), http://www.thenation.com/article/new-study-demands-zero-tolerance-military-sexual-assault/. *See also infra* Part V.C. for discussion of the current environment, including a discussion of bias and unlawful command influence (UCI).

[17] Jonathan P. Tomes & Micheal I. Spak, *Practical Problems with Modifying the Military Justice System to Better Handle Sexual Assault Cases*, 29 WIS. J. L. GENDER & SOC'Y 377, 382 (2014).

sexual assault[18] at the expense of the rights of the accused soldier.[19] The effort to rid the Army of sexual assault includes not only courts-martial, but administrative separation board proceedings as well.[20] Unjust results stemming from inadequate due process occur when an administrative separation board relies on weak or incomplete evidence[21] that does not meet the burden of proof, feels pressure in a zero tolerance environment, and ultimately separates a soldier. This article will explore the Army's focus on eradicating sexual assault, how it leads to those merely accused of sexual assault receiving inadequate due process, and how this, in turn, causes unjust results for soldiers in administrative separation board proceedings.[22]

Because SPC Smith's hypothetical case is common, this article examines the enlisted administrative separation board process as a necessary way to understand the problem and explore possible solutions.[23]

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[18] Major Troy K. Stabenow, *Throwing the Baby out with the Bathwater: Congressional Efforts to Empower Victims Threaten the Integrity of the Military Justice* System, 27 FED. SENTENCING REP. 156 (2015). *See infra* Part II.B. for a discussion of how the process has changed to focus more on victim's rights rather than the rights of the accused.

[19] *Id.* at 169.

[20] Generally, commanders have much discretion regarding how he wants to handle violations of the UCMJ. The commander can take no action, the commander can take administrative action, the commander can administer nonjudicial punishment, or the commander can begin the court-marital process by preferring charges. MCM, *supra* note 4, R.C.M. 306-07. Allegations of sexual assault generally follow the same path as previously mentioned; however, there are some differences that limit the discretion commanders have over sexual assault allegations. For example, special court-martial convening authorities (SPCMCAs) in the rank of colonel (O-6) are the initial disposition authorities for allegations involving rape, sexual assault, forcible sodomy, or any attempts of the same. All Army Activities Message, 299/2013, 080700Z Nov 13, U.S. Dep't of Army, subject: Army Responsibilities, Roles, Procedures, and Authorities for Responding to Sexual Assault Allegations [herein after ALARACT 299/2013].

[21] AR 635-200, supra note 5; para. 2-11. The rules of evidence do not apply at a separation board proceeding; the rules state, "[r]easonable restrictions will be observed, however, concerning the relevance and competency of evidence." *Id*. *See also* MCM, *supra* note 5, MIL. R. EVID. (2012). Because boards are composed of officers and enlisted personnel who are not lawyers, there is wide discretion in what constitutes relevant, competent evidence. AR 635-200, *supra* note 5, para. 2-7.

[22] While the focus of this paper is administrative separations based on substantiated allegations of sexual assault, it should be noted the unjust results can happen for any administrative separation when there was probable cause to believe an offense occurred but there was no court-martial. This paper focuses on substantiated allegations of sexual assault because in the author's experience this is the most frequent type of separation when it has been determined there will be no court-martial.

[23] The focus of this article is enlisted separations, as they represent over 70% of the subjects accused of sexual assault in the military. SAPR FY 14, *supra* note 4, app. A.

The first section discusses the court-martial process, as many allegations of sexual assault begin with an eye towards trial by court-martial.[24] However, as this article will show, administrative separation boards often occur as an alternative to trial by court-martial.[25] The second section includes a brief history of the Uniform Code of Military Justice (UCMJ), along with recent developments that demonstrate a shift toward protecting victims' rights, to the detriment of the accused.[26] This shift creates an environment that leads to inadequate due process and may cause unjust results for soldiers in administrative separation board proceedings arising from sexual assault allegations.[27] Although in the example SPC Smith's case did not result in a trial by court-martial, an understanding of the evidentiary standard required to prove a sexual assault case at a trial by court-martial will provide insight into the decision to use administrative separation boards to dispose of some cases, and will also be discussed in this section.

The third section discusses the administrative separation board process. It explains the standard of proof and due process rights of the respondent.[28] It also briefly discusses some of the potential ramifications of administrative separations where the discharge results in an OTH service characterization

The fourth section addresses how and when administrative separation boards occur in lieu of courts-martial, and how this alternative disposition may lead to unjust results for soldiers. It delves into the number of soldiers facing administrative separation boards arising from sexual assaults, and

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Army enlisted separation make up 90% of those administratively separated as result of sexual assault. *Id.* encl. 1, at 74. Officer administrative separations do occur and are governed by AR 600-8-24. U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR 13 Sept. 2011)

[24] As mentioned above only SPCMCA in the rank of O-6 is the initial disposition authority. ALARACT 299/2013, *supra* note 20. In addition, recent congressional changes require mandatory discharges for charges referred to a court-marital for penetrative offenses and attempts. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013) [hereinafter NDAA FY 14]. Finally, NDAA FY 14 also limited commanders in their discretion regarding whether or not to refer sexual assault cases. Id. § 1744.

[25] SAPR FY 14 Report, supra note 4, encl. 1. *See infra* Part IV.A. for a discussion of the use of administrative separations as an alternative to trials by Court-Martial.

[26] MCM, *supra* note 5. *See also* Stabenow, *supra* note 18. *See infra* Part V. for a discussion of due process, including military due process and inadequate due process.

[27] Major David S. Franke, *Administrative Separation from the Military: A Due Process Analysis*, ARMY LAW., Oct. 1990. *See infra* Part V for a discussion on military due process.

[28] *See infra* note 5 comparing administrative separations and UCMJ actions.

examines statistics from fiscal year (FY) 14, along with results from a survey conducted by the author for this article for FY15. This section examines additional potential causes of inadequate due process and unjust results for soldiers when administrative separation board proceedings arise from sexual assault allegations. This section looks at cases involving non-prosecution memorandums,[29] victims who are unwilling to testify, and weak evidence leading to a decision to adjudicate the case before an administrative separation board instead of at a trial by court-martial.

The fifth section explores the problems of inadequate due process. It explains due process and the implementation of due process protections in the military. It also discusses military cases defining due process in administrative separation board proceedings along with courts' views of a similar process used by collegiate tribunals attempting to deal with this issue at colleges and universities. Finally, this section explores unjust results for soldiers potentially caused by the Army's current environment of zero tolerance for sexual assault.[30] This zero tolerance environment has the potential to bias officers serving on separation boards and bolster potential unlawful command influence (UCI) claims. This section will explore how these issues together cause unjust results for soldiers in administrative separation board proceedings.

The final, sixth section proposes possible solutions. It includes simple solutions, such as elevating the separation authority for administrative separation boards resulting from sexual assaults to the Army's Human Resources Command (HRC), and raising the government's standard of proof to clear and convincing evidence. This section also considers having the Army Review Board Agency (ARBA) review *de novo* all administrative board separations arising from sexual assaults. A final, more drastic solution proposed is to have an independent judge hear all administrative separation board proceedings involving sexual assault. The proposed judge would replace the traditional board composed of noncommissioned officers (NCOs) and officers. A discussion of the problems with each proposed solution also follows.

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[29] *See infra* Part IV.B. for discussion.

[30] *See supra* note 16 and accompanying sources.

II. Courts-Martial

The UCMJ is the statutory framework for military justice.[31] It outlines criminal conduct in the punitive articles and sets out the rules and procedures for the services to administer military justice.[32] Within the UCMJ's statutory framework for military justice is the authorization for the President to establish procedures for conducting courts-martial.[33] The *Manual for Courts-Martial* (MCM) promulgated by executive order, establishes procedures for a trial by court-martial.[34] The MCM also contains the Rules for Courts-Martial (RCM), Military Rules of Evidence (MRE), punitive articles, and non-punitive articles of the UCMJ.[35]

The MCM governs court-martial procedure. This incluses disposing of misconduct, the Article 32 hearing,[36] and trial. All of these, discussed in more detail below, provide a background for the court-martial process prior to the congressional changes that afforded more rights to victims of sexual assault.[37] These changes, also discussed below, show the current environment of zero tolerance for sexual assault[38] that potentially leads to inadequate due process. Reasoning behind why administrative separation board proceedings occur in lieu of a court-martial will also be discussed.[39]

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[31] David A. Schlueter, *America Military Justice: Responding to the Siren Songs for Reform*, 73 A.F. L. REV. 193, 199 (2015).

[32] MCM, *supra* note 5, art. 88–139; THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER'S LEGAL HANDBOOK (Mar. 2015) [hereinafter COMMANDER'S LEGAL HANDBOOK]; *see* Jennifer Koons, *Sexual Assault in the Military: Can the Pentagon stem the rise in incidents?*, 23 CQ RESEARCHER 693, 702 (2013) (discussing Congress enacting the first UCMJ in 1950 as a response to concerns about the Articles of War and the execution of military justice during World War II).

[33] MCM, *supra* note 5, pt. I-1; *see also* Schlueter, *supra* note 31, at 199.

[34] MCM, *supra* note 5, R.C.M 202.

[35] *Id.* Some punitive articles are based in common law criminal offenses, with others based on the recognition that commanders need to maintain good order and discipline within their ranks. The common law articles include offenses like *rape, murder,* and *larceny*. *Id.* pt. IV, ¶ 45, ¶ 118, ¶ 46. The military disciplinary offenses include offenses like *desertion, failure to obey an order* and *disrespect of an officer*. *Id.* pt. IV, ¶ 9, ¶ 16, ¶ 13.

[36] MCM, *supra* note 5, art. 32.

[37] NDAA FY 14, *supra* note 24.

[38] *See supra* note 16 and accompanying sources.

[39] *See infra* Part IV for discussion.

A. Court-Martial Procedures

1. Disposing of Misconduct

In SPC Smith's hypothetical case, his commander had to decide how to dispose of his case. If a commander thinks a soldier has violated a punitive UCMJ article, he[40] has wide latitude and discretion.[41] His discretion may include deciding to take no action, initiating adverse administrative action, imposing nonjudicial punishment, or most seriously, beginning the court-martial process.[42] However, before the commander can dispose of a case, he must determine the facts and circumstances surrounding the allegation through an inquiry.[43] If the misconduct is serious, for example—an allegation of sexual assault, the commander must contact law enforcement to investigate the incident.[44] After the investigation is complete, the commander may choose to prefer court-martial charges.[45] After the commander has preferred charges, those charges go through the chain of command to be disposed of at the lowest appropriate level.[46] At that level, usually the special court-martial convening authority (SPCMCA) orders an Article 32 hearing if he believes the charges are serious enough to justify a trial by general court-martial.[47]

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[40] The author is using "he" or "his" throughout the article for either gender.

[41] MCM, *supra* note 5, R.C.M 401-04.

[42] *Id.*; *see also* Shelbi N. Keehn, *Striking a Balance Between Victim and Commanding Officer: Why Current Military Sexual Assault Reform Goes Too Far*, 48 COLUM. J. L. & SOC. PROBS. 461, 473 (2015).

[43] MCM, *supra* note 5, R.C.M. 303. The discussion of the RCM 303 states, "The inquiry should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation." *Id.*

[44] *Id.* Recent congressional changes now require commanders to refer any sexual assault violations to the Criminal Investigation Command (CID). NDAA FY 14, *supra* note 24, § 1742. Furthermore, CID now works in conjunction with judge advocates to determine whether probable cause exists to believe that a subject committed the alleged sexual assault. U.S. DEP'T OF DEF., INSTR. 5505.03, INITIATION OF INVESTIGATIONS BY DEFENSE CRIMINAL INVESTIGATIONS ORGANIZATIONS encl. 2 (1 Dec. 15) [hereinafter DODI 5505.03].

[45] MCM, *supra* note 5, R.C.M. 307. Only a SPCMA in the rank of O-6 can initially dispose of allegations of sexual assault, rape, forcible sodomy, and attempts of the aforementioned offenses. ALARACT 299/13, *supra* note 20.

[46] MCM, *supra* note 5, R.C.M. 401.

[47] *Id.* R.C.M. 404.

2. Article 32 Hearing Prior to Congressional Changes

An Article 32 hearing,[48] also known as the RCM 405 pretrial investigation,[49] was part of the original UCMJ.[50] During the Article 32,[51] an accused is entitled to certain rights, such as the right to cross-examine witnesses, present evidence in defense or mitigation, and have the assistance of representation by a military defense counsel at no cost to the accused.[52]

The investigating officer (IO) at the Article 32 hearing is responsible for the procedural aspects of the investigation, including determining what evidence is needed to prepare a thorough and impartial investigation, and deciding which witnesses are "reasonably available" to appear at the hearing.[53] Prior to the National Defense Authorization Act (NDAA) for Fiscal Year 2014,[54] the IO was charged with inquiring "into the truth and form of the charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges."[55] The IO documented his findings and recommendations in a report of investigation.[56] As discussed in more detail below, the inquiry is now more limited, victims' rights have expanded, and the ability of an accused to use the investigation as a tool for discovery has also been limited.[57]

After the IO forwards the report of investigation to the commander who appointed the investigation, the general court-martial convening authority (GCMCA)[58] decides whether to refer any charges to a trial by

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[48] MCM, *supra* note 5, app. A2, ¶ 832.
[49] *Id.* R.C.M. 405.
[50] Jonathon Lurie, *The Transformation of Article 32: Why and What?*, 29 WIS. J. L. GENDER & SOC'Y 409, 410 (2014).
[51] The Article 32 hearing, often analogized to a civil grand jury hearing, does have some differences. *See, e.g.*, *id.* at 410; Brian C. Hayes, *Strengthening Article 32 To Prevent Politically Motivated Prosecution: Moving Military Justice Back to The Cutting Edge*, 19 REGENT U. L. REV. 173 (2006); Major Christopher J. Goewert & Captain Nichole M. Torres, *Old Wind Into New Bottles: The Article 32 Process After the National Defense Authorization Act of 2014*, 72 A.F. L. REV. 231 (2015).
[52] MCM, *supra* note 5, R.C.M. 405(f).
[53] *Id.* R.C.M. 405.
[54] NDAA FY 14, *supra* note 24.
[55] MCM, *supra* note 5, R.C.M. 405(e).
[56] *Id.* R.C.M. 405(j)(2).
[57] *See infra* Part II.B. for discussion.
[58] MCM, *supra* note 5, app. A2, ¶ 818. A general court-martial convening authority (GCMCA) is a commander authorized to convene a court-martial pursuant to the UCMJ. *Id.*

court-martial. A trial date is set by the military judge once the GCMCA refers the charge(s) to a trial by court-martial.[59]

3. Trial

If the accused pleads not guilty, he will be tried on the merits of the case.[60] The accused will decide whether to be tried by a court-martial panel—jury—or by a military judge alone.[61] The standard of proof for a trial by court-martial is proof beyond a reasonable doubt.[62] If convicted, the soldier faces sentencing immediately following any finding of guilt.[63] During sentencing phase, the accused can present witnesses and other evidence for the court's consideration.[64]

B. Changes to the Process

The UCMJ, and subsequently the MCM, have undergone many recent changes. These changes include recent definitional changes, the expansion of victims' rights, and procedural amendments.[65] When Congress began making these changes, the Army's environment also

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[59] *Id.* R.C.M. 601. The GCMCA selects the panel members but does not select the counsel or the military judge. Schlueter, *supra* note 31, at 199–202.

[60] *Id.*at 199–203.

[61] *Id.*

[62] MCM *supra* note 5, R.C.M. 918. The *Military Judges' Benchbook* defines proof beyond a reasonable doubt as:

> [P]roof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution which does not amount to an element need not be established beyond a reasonable doubt.

U.S. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGES' BENCHBOOK para. 2-5-12 (10 Sept. 2014).

[63] MCM, *supra* note 5, R.C.M. 1001b; *see also* Schlueter, *supra* note 30, at 202–03. The Military Rules of Evidence (MRE) applies during this phase of the proceeding. MCM *supra* note 5, M.R.E. 101.

[64] *Id.* R.C.M 1001.

[65] NDAA FY 14, *supra* note 24. Article 120 of the UCMJ originally encompassed rape and defined it as intercourse by force and without consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES, art. 120 (2005); *see* also Koons, *supra* note 32, at 702.

changed,[66] culminating in the current environment where there is policy of zero tolerance for sexual assault.[67] While this may seem positive, this environment—where the focus is on victims' rights—is to the detriment of the accused.[68] The accused's due process rights diminish because of the focus on victim's rights throughout the legal process.

1. Definitions

In 2007, Congress adopted proposed changes from the Joint Service Committee (JSC) and began overhauling the article codifying rape and sexual assualt, changing the definition of rape and expanding Article 120 to include sexual assault.[69] The element *without consent* was no longer part of the definition of offenses like rape and sexual assault.[70] The 2007 version of Article 120 expanded the definition of sexual offenses into fourteen different offenses, including a new offense entitled *aggravated sexual assault*.[71] These changes were Congress's answer to sexual assault scandals that had erupted within the military.[72] Congress changed the law again in 2012, when it reorganized Article 120.[73] The 2012 version of the UCMJ outlined and defined rape, sexual assault, aggravated sexual

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66 Id.

67 *See supra* note 16 and accompanying sources.

68 Stabenow, *supra* note 18.

69 MCM, *supra* note 5, art. 120; *see also* Major Meridith L. Marshall, Perfect Storm: How Recent Congressional Interest and Influence Has Affected Sexual Assault Law and Policy in the Armed Services (Apr. 2013) (unpublished L.L.M. thesis, The Judge Advocate General's School, United States Army) (on file with the author). The Joint Service Committee (JSC) proposed changes to "clarify the differing degrees of gravity for each sexual offense and the proper correlation to the applicable punishment [and to] find a balance between conforming the format of the UCMJ and MCM to the format in Federal law." *Id.*

70 MCM, *supra* note 5, art. 120. Koons, *supra* note 32, at 702. This removed the burden from the victim of having to show that she said no or otherwise resisted the accused. *Id.*

71 MANUAL FOR COURTS-MARTIAL, UNITED STATES, art. 120 (2008). *See also* Michael Buchhandler-Raphael, *Breaking the Chain of Command Culture: A Call for an Independent and Impartial Investigative Body to Curb Sexual Assaults in the Military*, 29 WIS. J. L. GENDER & SOC'Y 341, 343 (2014).

72 Koons, *supra* note 32.

73 MCM, *supra* note 5, art. 120. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, § 573 (2011). The 2007 version of Article 120 was found unconstitutional by the Court of Appeals for the Armed Forces. Through this amendment, Congress also resolved the constitutionality issue. United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011) (holding that burden-shifting to the defense to *disprove* lack of consent was unconstitutional).

contact, and abusive sexual contact, and reorganized the offenses under one article.[74]

2. Victims' Rights

In 2013, Congress also overhauled the policies for treatment of victims after public outcry and dissatisfaction occurred with the way the military was handling sexual assault victims.[75] Some of the outcry came after the release of the film *The Invisible War*,[76] which harshly criticized the treatment victims were receiving.[77] The NDAA FY14 codified and expanded victims' rights, including rights in the pretrial, trial, and post-trial processes.[78] Congress mandated specific treatment for victims of sexual assault and prohibited retaliation against victims for reporting their crimes.[79] The NDAA FY14 statutorily incorporated the majority of the Crime Victims' Rights Act (CVRA) into military justice.[80] Victims gained many protections and rights, including the right to have trial counsel or victim counsel[81] present when being interviewed by the defense,[82] the right not to testify at a preliminary hearing,[83] and the right to submit post-trial matters for consideration by the convening authority.[84]

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[74] MCM, *supra* note 5, pt. IV, ¶ 45.

[75] Major Greg J. Thompson, *Victims' Rights in the Military: Empowering Sexual Assault Victims with Meaningful DOD Victims' Bill of Rights*, 21 VA. J. SOC. POL'Y & L. 421, 433 (2014).

[76] THE INVISIBLE WAR (Chain Camera Pictures 2012).

[77] *Id.*

[78] NDAA FY14, *supra* note 24.

[79] *Id.* § 1701, § 1709. Victims are entitled to certain treatment by the command, including for the command not to retaliate against victims for reporting allegations of criminal offenses. Retaliation is defined at a minimum as "taking or threatening to take an adverse personnel action, or withholding or threatening to withhold a favorable personnel action" and "ostracism and such of acts of maltreatment . . . committed by peers . . . or by other persons because the member reported a criminal offense." *Id.*

[80] *Id.* § 1701. This section extended the majority of the Crime Victims' Rights Act (CVRA) to the military, including providing victims of crimes actionable rights. Some of these rights include reasonable protection from the accused, notice of hearings and court-martial proceeding, and the opportunity to be heard during portions of the court-marital process. *Id. See also* Thompson, *supra* note 74.

[81] NDAA FY14, *supra* note 24, § 1716.

[82] *Id.* § 1704. If the victim does not want to testify at the preliminary hearing, she is unavailable for the hearing. *Id.*

[83] *Id.* § 1702.

[84] *Id.* § 1706.

3. Procedural Changes

In addition to enhancing victims' rights, the NDAA FY14 also procedurally changed how the military justice system works. Section 1744 added a check on the commander's authority when referring a charge to a trial by court-martial.[85] It established a new layer of review for sex-related offenses.[86] The process of review depends on the advice of the Staff Judge Advocate (SJA). When the SJA recommends and the convening authority agrees *not* to refer charges of a sex-related offense to a trial by court-martial, the next-higher commander authorized to convene a general court-martial reviews the case.[87] Conversely, if the SJA recommends referring charges of a sex-related offense to a trial by court-martial and the convening authority does *not* refer, then the Secretary of the Army reviews the case.[88] The expansion of victims' rights buttressed with the procedural changes in the court-martial process could encourage commanders to use administrative separation procedures for soldiers, which exposes them to limited due process rights at a hearing, rather than trial by court-martial.

The NDAA FY14 also significantly altered how the military conducts Article 32 hearings.[89] After the change, the preliminary hearing officer (PHO) should be a judge advocate (JA), rather than a line officer, and the PHO must determine: whether probable cause[90] exists to believe the offense occurred and the accused committed it, whether the convening authority has jurisdiction over the offense and the accused, and the form of the charges.[91] The PHO also makes a recommendation as to the

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[85] NDAA FY14, *supra* note 24, § 1744.

[86] *Id.* Prior to the NDAA FY14, when a commander declined to refer charges to a trial by court-martial the decision was final. MCM, *supra* note 5, R.C.M. 401.

[87] NDAA FY14, *supra* note 24, § 1744.

[88] *Id*.; *see* also Keehn, *supra* note 42, at 482–83.

[89] NDAA FY 14, *supra* note 24, § 1702; *see also* Goewert & Torres, *supra* note 51.

[90] Previously, Article 32 hearings were a thorough and impartial investigation requiring reasonable grounds to believe the offense occurred. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405 (2008). The hearing had four main purposes; inquiring into the truth set forth in alleged offense, the form of charges, recommendations regarding the disposition of the cases, and discovery. *Id.* It also allowed the accused to "present anything in defense, extenuation, or mitigation for consideration by the investigation officer." *Id.* The current version requires the preliminary hearing officer to make a probable cause determination. NDAA FY 14, *supra* note 24, § 1702. It also limits the accused rights, in that the accused can only cross-examine witnesses and present matters in defense that are relevant to the limited scope and purpose of the investigation. *Id. See also* Goewert & Torres, *supra* note 51.

[91] NDAA FY 14, *supra* note 24, § 1702.

disposition of the case.[92] The new Article 32 also limits the evidence presented and examination of witnesses at the hearing to "matters relevant to the limited purposes of the hearing."[93] Finally, the new Article 32 allows PHOs to deem victims unavailable for the hearing, based on the victim's desires.[94] This means victims are not required to testify at the hearing.[95]

These changes are a significant departure from prior Article 32 procedures. Before the NDAA FY14 changes, the IO determined the availability of all witnesses.[96] Now, the victim decides whether he or she wishes to testify at the Article 32 hearing.[97] This change underscores the shift from an accused having the right to call witnesses to victims determining whether or not they will testify. Not only does the victim determine whether he or she will testify, but the victim can also choose to be present during the Article 32 hearing.[98] Again, this demonstrates an environment where the expansion of victims' rights begins to diminish the rights of the accused.

C. Specialist Smith's Case

Specialist Smith's case did not proceed to a trial by court-martial because there was insufficient evidence to prosecute.[99] As mentioned

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[92] *Id.*

[93] *Id.*

[94] *See supra* note 82 and accompanying text.

[95] U.S. DEP'T OF ARMY, PAM. 27-17 PROCEDURAL GUIDE FOR ARTICLE 32 PRELIMINARY HEARING OFFICER, para. 2-3 (18 June 2015). The preliminary hearing officer (PHO) looks at all the evidence, including witness statements and victim's statement, and will only hear or consider evidence if it is "relevant, not cumulative, and necessary to the limited scope and purpose of the hearing." Furthermore, if the government will incur an expense, the convening authority (who directed the hearing) determines mode of testimony, i.e., in person, telephone, or similar means of remote testimony. *Id.* para. 2-4.

[96] MCM, *supra* note 5, R.C.M. 405.

[97] NDAA FY 14, *supra* note 24, § 1702.

[98] U.S DEP'T OF ARMY, DIR. 2015-09, IMPLEMENTATION OF SECTION 1702 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014—ARTICLE 32, UNIFORM CODE OF MILITARY JUSTICE PRELIMINARY HEARING (24 Feb. 2015). The directive states that the victim has a right not to be excluded from the hearing, unless the PHO determines the "testimony by the victim would be materially altered if the victim heard other testimony at the proceeding." *Id.* para. b(3).

[99] Before referral to a court-martial the Staff Judge Advocate (SJA) must determine the charges are warranted by the evidence. MCM, *supra* note 5, art. 34. This allows the SJA to advise the convening authority on the charges. The SJA is personally responsible for

above, the standard at a trial by court-martial is proof beyond a reasonable doubt.[100] As the scenario suggests, it might be difficult to meet the burden of proof because in the hypothetical, there was no corroborating physical evidence suggesting that SPC Smith committed sexual assault.[101] It is hard to meet the high standard of proof when there is little—or weak—evidence corroborating that an offense occurred, and cases based upon victim testimony alone are notoriously difficult to prosecute. Cases based on testimony alone are often referred to as "he said, she said" cases,[102] reflecting they generally pit one person's statement against another's, with little else to rely upon. It is similarly difficult to meet the standard of proof when victims do not want to testify at trial, and nearly impossible when they refuse.

Prior to referral or even preferral, when there is insufficient evidence to prosecute, the SJA will sometimes write a memorandum of non-prosecution, even though probable cause exists to believe an offense occurred.[103] This memorandum does not preclude the commander from taking administrative action.[104] In addition, the current environment of zero tolerance for sexual assault[105] potentially plays a role in the commander's decision about how to dispose of a case. In this environment, commanders often choose to initiate administrative separation board proceedings in cases like SPC Smith's, where there is insufficient evidence for a conviction at a trial by court-martial, and the victim does not want to testify.

III. Administrative Separation

The zero tolerance environment in the Army pressures commanders to eradicate sexual assault, an admirable, though nearly impossible

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ensuring advice and must make an "independent and informed appraisal of the evidence." *Id.* R.C.M. 406.

[100] *See supra* note 62.

[101] Cases with no physical evidence can result in a court-martial. Each case and the facts of the case are taken into consideration when determining how to dispose of the allegations.

[102] A "he said, she said" case refers to a case without additional evidence to corroborate victim testimony, which is contested by the accused. *See generally* Claudio Munguia, *How are "he-said/she-said" Cases Resolved in Courts of Law?*, QUORA (Jan. 26, 216), https://www.quora.com/How-are-he-said-she-said-cases-resolved-in-Courts-of-Law.

[103] *See infra* Part IV.B. for further discussion of non-prosecution memorandums.

[104] ALARACT 299/2013, *supra* 20.

[105] *See supra* note 16 and accompanying sources.

endeavor.[106] This is an important mission, but when allegations of sexual assault cannot meet the legal standard of proof beyond a reasonable doubt, or even when a soldier is exonerated, commanders might still feel the need to purge soldiers accused of sexual assault from their ranks. Consequently, commanders often initiate administrative separation board proceedings against an alleged offender.[107] This process, discussed below, employs a lower standard of proof and affords decreased due process protections to an alleged offender, despite the serious nature of accusations of sexual misconduct.

A. Enlisted Separations

Administrative separations[108] are the Army's force management tool; a way of maintaining readiness and competency.[109] There are two types of administrative separations, voluntary and involuntary.[110] The basis for involuntary separations is generally misconduct or unsatisfactory performance.[111] Army Regulation (AR) 635-200, Chapter 14 details the procedures for enlisted administrative separations based on misconduct.[112] Separations under Chapter 14 are broken down into separations for patterns of minor disciplinary infractions, separations for a pattern of misconduct, and separations for commission of a serious offense.[113] A serious offense is "a serious military or civil offense, if the specific circumstances of the offense warrant separation and a punitive discharge . . . ."[114]

A company-level-commander initiates the separation process through one of two procedures; through notification procedures, or through

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[106] *See infra* Part V. for further discussion.
[107] *Id.*
[108] Department of Defense Instruction (DoDI) 1332.14, outlines how the military conducts enlisted administrative separations. It is the basis for Army Regulation (AR) 635-200. DoDI 1332.14, *supra* note 6.
[109] AR 635-200, *supra* note 5, para. 1-1
[110] COMMANDER'S LEGAL HANDBOOK, *supra* note 32, at 169.
[111] *Id*. Other bases for separation exist, such as failure to meet height and weight standards, but only a few provide authority to impose a characterization of discharge other than honorable. *See generally id.*
[112] AR 635-200, *supra* note 5, ch. 4.
[113] *Id.* para. 14-12.
[114] *Id.* Some examples of serious misconduct include abuse of illegal drugs and any sexually violent crime. *Id.*

administrative separation board procedures.[115] The procedural process for administrative separations depends on the type of discharge, the basis for separation, and the number of years of service the soldier has completed.[116] Administrative board procedures take place if the soldier has more than six years of total active and reserve military service, or if the least favorable discharge contemplated by the commander is an OTH characterization of service.[117] Normally, cases involving serious misconduct warrant a board because the discharge contemplated is often an OTH.[118] The initiating commander must notify the soldier of his rights, just as in the notification procedures, but with some additional rights.[119] Additional rights include the following: the right to a hearing before an administrative separation board; the right to request the appointment of military counsel to represent the soldier; and the right to waive the board.[120]

An administrative separation board is composed of at least three commissioned officers, warrant officers, or NCOs chosen by the separation authority, who also is most likely the GCMCA.[121] Noncommissioned officers must be sergeant first class or above and at least one member of the board must be a major or above.[122] Board members should be experienced, unbiased, and cognizant of the applicable regulations or policies related to the proposed separation.[123]

The senior member serves as the president of the board and will notify the respondent when the board will meet, notify the respondent of expected witnesses, and ensure the respondent has a copy of the case file.[124] The formal procedures established in AR 15-6[125] set forth the process for the administrative separation board hearing not covered by AR

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[115] *Id.* ch. 2.
[116] *Id.*
[117] COMMANDER'S LEGAL HANDBOOK, *supra* note 32, at 177.
[118] AR 635-200, *supra* note 5, ch. 14.
[119] AR 635-200, *supra* note 5, para. 2-4.
[120] *Id.*
[121] *Id.* para. 2-7. The separation authority can also appoint a non-voting legal advisor and recorder. *Id.*
[122] *Id.* The majority of the members must be commissioned or warrant officers. *Id.*
[123] AR 6350-200, *supra* note 5, para. 2-7. If the respondent is female or a member of a minority group, the board, upon written request by the respondent, will have a voting member be female or a minority member, if reasonably available. *Id.*
[124] *Id.* para. 2-10.
[125] AR 15-6, *supra* note 7.

635-200.[126] The administrative separation board hears relevant evidence. However, the rules of evidence for courts-marital do not apply.[127] The respondent also has certain rights at the administrative separation board. These rights include the right to appear at the hearing in person, with or without representation,[128] submit material for the board to consider, question any witnesses who appear before the board, challenge for cause any voting member, and present an argument before the board closes.[129] The respondent can also request the attendance of witnesses, but there is no guarantee they will be compelled to appear before the administrative separation board.[130]

At the conclusion of the proceedings, the board deliberates in a closed session on its findings and recommendations.[131] In its findings, the administrative separation board must determine whether a preponderance of the evidence supports each allegation.[132] The administrative separation board then makes a recommendation as to whether the misconduct warrants the respondent's separation.[133] If the administrative separation board recommends separation, it also recommends a characterization of service: honorable, general under honorable conditions, or other than honorable. The board can also recommend suspension of the separation for up to one year.[134] Finally, the board can recommend retaining the

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[126] AR 635-200, *supra* note 5, para. 2-10.

[127] *Id.* para. 2-11. Privileged Communications as defined by MRE 502 through 504 are still protected. AR 15-6, *supra* note 7, para. 3-7.

[128] The respondent is detailed military counsel at no cost to him, and may hire civilian counsel at no cost to the government. AR 635-200, *supra* note 5, para. 2-10.

[129] AR 635-200, *supra* note 5, para. 2-10.

[130] *Id.* The respondent must make a written request to the presiding officer outlining why the testimony is relevant and why "written or recorded testimony would not be sufficient to provide for a fair determination." *Id.* The presiding officer must then determine that the witness's testimony is not cumulative and that the witness's personal appearance is "essential to a fair determination on the issues of separation or characterization." *Id.* Furthermore, the presiding officer has to determine that the same objective cannot be adequately accomplished by written or recorded testimony. *Id.* Finally, the presiding officer must determine whether "[t]he need for live testimony is substantial, material, and necessary for a proper disposition of the case." *Id.*

[131] AR 15-6, *supra* note 7, para. 3-12.

[132] *Id.* para. 2-12. The preponderance of evidence, according to *Black's Legal Dictionary*, is "the greater weight of the evidence; superior evidentiary weight that though not sufficient to free the mind from all reasonable doubt, is still sufficient to incline a fair and impartial mine to one side of the issue rather than the other." BLACK'S LAW DICTIONARY (9th ed. 2009).

[133] AR 635-200, *supra* note 5, para 2-12.

[134] *Id.* (this recommendation is not binding).

respondent, even when it finds the allegation supported by a preponderance of the evidence.[135]

After reviewing a board's recommendation to separate, the separation authority[136] takes action.[137] The separation authority can approve the board's recommendation to separate and direct separation, disapprove the board's recommendation to separate and retain the respondent,[138] or approve the board's recommendation to separate and suspend execution of the separation for up to one year.[139] The separation authority cannot direct separation when the administrative separation board recommends retention, nor can the separation authority authorize a characterization of discharge that is less favorable than what the administrative separation board recommends.[140]

B. Specialist Smith

In the hypothetical posed at the start of this article, SPC Smith received an administrative separation and the Army discharged him with an OTH characterization of service. This means that SPC Smith received notice that an administrative separation board would decide: (1) whether the allegations of sexual assault occurred; (2) whether to separate him; and (3) if he were to be discharged, recommend the characterization of service. The administrative separation board had to determine, by a preponderance of the evidence, that SPC Smith committed the misconduct in his notification. In SPC Smith's case, the administrative separation board found he did commit the sexual assault against Jenny. To expand the hypothetical, in this instance, the administrative separation board made this determination despite the fact that Jenny did not testify, and there was no other evidence supporting the sexual assault allegation. The

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135 *Id.* (this recommendation is binding).

136 The Secretary of the Army has almost unlimited separation authority, as does a GCMCA. *Id.* para. 1-19. The GCMCA can approve all separations except those that specifically require Secretary of the Army approval. *Id.* The GCMCA is the separation authority who has the ability to appoint the administrative separation board and is empowered to separate soldiers with an OTH characterization of service. *Id.* Special court-martial convening authorities are more limited in their separation authority. *Id.*

137 *Id.* para. 2-6.

138 *Id.*

139 *Id.* A suspension can occur "when the respondent's record reflects potential for full effective duty." *Id.*

140 *Id.* When a soldier has more than eighteen years of active federal service, Human Resources Command (HRC) must approve an involuntary separation. *Id.* para. 1-19.

administrative separation board gave substantial weight to a sworn statement Jenny gave to investigators, rather than the in-person testimony of SPC Smith. Because Jenny did not testify, SPC Smith's defense counsel was unable to cross-examine her.[141] His defense counsel did not have an opportunity to present his case because he could not elicit additional extenuating facts from the witness, or show inconsistencies in her statement or bias in her motives.[142]

In the hypothetical, the administrative separation board also recommended separating or discharging SPC Smith with an OTH characterization of service. The separation authority later approved his discharge. This characterization of service will carry negative consequences for SPC Smith.[143] The characterization of service determines the post-service benefits a soldier receives and carries a potential stigma that attaches to an OTH discharge.[144] An OTH characterization of service may deprive SPC Smith of some of his veteran's benefits.[145] For example, SPC Smith will most likely lose his

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[141] "It appears to us contrary to all rules of evidence, and opposed to natural justice, that the evidence of one party should be received as evidence against another party, without the latter having an opportunity of testing its truthfulness by cross-examination." Allen v. Allen, L. R. P. D. (C. A.) 253 (1894) (quoting L.J. Lopes).

[142] The hypothetical does not go into details as to whether SPC Smith requested that Jenny be a witness. If SPC Smith did request Jenny as a witness, then the presiding officer would have had to determine whether Jenny's sworn statement was sufficient and adequate. AR 635-200, *supra* note 5, para. 2-10.

[143] *Id.* para. 3-6; *see also* U.S. DEP'T OF VET. AFFAIRS, *Veteran Benefits Administration*, http://www.benefits.va.gov/benefits/character_of_discharge.asp (last visited Mar. 20, 2017) [hereinafter U.S. DEP'T OF VET. AFFAIRS] (containing character of discharge requirements for various benefits administered by the department).

[144] AR 635-200, *supra* note 5, para. 17-1. The regulation states:

> The high rate of enlisted personnel receiving other-than-honorable [OTH] discharges is a concern of commanders at all levels. The consequences of receiving an other-than-honorable discharge can have a lasting adverse effect on the individual [s]oldier . . . . Many [s]oldiers gain the false impression that an unfavorable discharge can be easily recharacterized by petitioning the Army discharge review board. This is not the case, since only a small percentage of such actions have been acted upon favorably. Many [s]oldiers can be discouraged from conduct that warrants an unfavorable discharge.

Id.

[145] *Id.* para. 3-5.

education benefits.[146] The Montgomery G.I. Bill[147] and its progeny can only be utilized by those who are discharged with an honorable characterization of service.[148] Another area potentially affected by an OTH characterization of service is his transportation benefits.[149]

IV. Intersection Between Administrative Separation Board and Courts-Martial

A. Use of Administrative Separations in Lieu of Trials by Court-Martial

The DoD Annual Report on Sexual Assault in the Military Fiscal Year 2014 (FY14 SA Report) found in the Army, there were 2199 unrestricted reports of sexual assault and 1566 servicemember offenders under investigation for sexual assault.[150] Over 1050 subjects were considered for action by commanders and of these allegations, eighty-one resulted in involuntary, adverse administrative discharges of the subjects.[151] Of the 1054 subjects considered for action by commanders, 199 were disposed of through non-judicial punishment, including 37 that also resulted in administrative discharges.[152] Of the 1054 allegations, commanders took no action in forty-four of the allegations due to the victim refusing to cooperate in the military justice process.[153] Of the 1054 allegations, sixty-seven allegations were determined to have insufficient evidence to support a charge, meaning the allegations met the probable cause standard to title the offender, but there was insufficient evidence to prove sexual assault beyond a reasonable doubt.[154] In other words, in FY14, 15% of the subjects considered for action by commanders resulted in adverse

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146 Major Joshua Smith, *Staying Abreast of Separation Benefits*, ARMY LAW., Sept. 2013, at 17, 20.

147 The Servicemember's Readjustment Act of 1944, P.L. 78-346, 58 Stat. 284 (1944). The act contained the original authorization for "college or vocational education for returning World War II [v]eterans (commonly referred to as GIs), as well as one year of unemployment compensation." UNIV. OF COLORADO DENVER, *VA Education Benefits*, http://www.ucdenver.edu/life/services/Veteran/BenefitsInformation/Pages/default.aspx (last visited Mar. 20, 2017); *see also* U.S. DEP'T OF VET. AFFAIRS, *Education and Training*, http://www.benefits.va.gov/benefits/character_of_discharge.asp (last visited Mar. 20, 2017).

148 U.S. DEP'T OF VET. AFFAIRS, *supra* note 143.

149 *Id.*; *see also* MAJ Joshua Smith, *supra* note 146, at 20.

150 SAPR FY14 Report, *supra* note 4, encl. 1, at 63–4.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

administrative separation actions.[155] A deeper look at the eighty-one soldiers involuntarily separated for allegations of sexual assault reveals there were cases in which victims refused to testify and cases that could not proceed to trial because of weak evidence. According to the FY14 SA Report, the Army separated ten soldiers in cases in which the victim refused to testify at a trial by court-martial, and five cases in which there was insufficient evidence to proceed to a court-martial.[156]

A survey sent to all chiefs of justice and regional defense counsel in the active Army produced quantitative evidence that soldiers are suffering inadequate due process because of unjust enlisted administrative separation boards.[157] Of the twenty individual responses received, fifteen provided information about administrative separation boards arising from sexual assault allegations.[158] Of those cases, ten resulted in discharges with an OTH characterization of service and five discharges with a general under honorable conditions characterization of discharge.[159] Boards retained soldiers in three cases, two cases resulted in discharges with an honorable characterization of service, and three officers requested resignations in lieu of other punishment, which were approved as separations.[160] At the time of the responses to the survey, there were also nine pending administrative separation boards for sexual assault-related offenses.[161]

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[155] *Id*. This is a 4% increase from fiscal year (FY) 2013 and a 3% increase from FY12 and FY11. *Id.*

[156] *Id.* encl. 1, tbl.7. These numbers could be much higher as the author, gleaned them from the synopsis of each case in table 7. *Id.* They are only as accurate as the amount of information gathered and put in the table from the units. Some entries are not clear as to why the case resulted in involuntarily separation. As the report noted, "FY14 is the first year that the disposition data is reported using DSAID. The Army continues to verify results with an aggressive quality control process." *Id.* encl. 1, at 63. Additionally unclear is whether or not the cases citing "insufficient evidence" reflects whether or not charges in an investigation was founded/unfounded or substantiated/unsubstantiated.

[157] Questionnaire from Major Latisha Irwin to chiefs of justice and regional defense counsel (Nov. 2, 2015) (unpublished survey) (on file with author). The surveys were sent to chiefs of justice (COJs) and regional defense counsel (RDC), asking them to disseminate the survey to their trial counsel (TC) and defense counsel (DC). Over 100 people received the survey. The author first went through the trial counsel assistance program (TCAP) and defense counsel assistance program (DCAP) to obtain the most up-to-date list of COJs and RDCs.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

One theater support command (TSC) also responded to the survey as a group. Their numbers were similar to the individual responses.[162] The TSC had five administrative separation boards based on sexual assault; three discharges with an OTH characterization of service and two discharges with a general under honorable conditions characterization of service.[163]

B. Non-Prosecution Memorandums

There are many reasons why a sexual assault case might not proceed to a trial by court-martial. The victim can refuse to testify.[164] Weak evidence may lead the government to believe they cannot prove their case beyond a reasonable doubt, or a witness may lack credibility. In this situation, the government may produce a non-prosecution memo.[165] The non-prosecution memo usually states the government does not intend to go forward with charges against an accused because the government cannot meet its burden of proving the case beyond a reasonable doubt.[166] In surveys from the field, thirty-five sexual assault cases resulted in non-prosecution memoranda.[167] However, in eleven of those cases, the commander later initiated administrative separation actions.[168] This means although there was insufficient evidence to try the accused at a trial by court-martial in those eleven cases, the command still chose to initiate adverse administrative action against the soldier.[169]

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[162] *Id*.

[163] *Id*.

[164] NDAA FY14, *supra* note 24, § 1704.

[165] The non-prosecution memorandum is the converse of the prosecution (pros) memorandum (memo). The pros memo is not a requirement in the court-martial process, but is widely accepted in the field as a starting point. The pros memo usually contains the case's strengths, weakness, anticipated defense motions, and a proof/elements matrix for each contemplated charge and specification. CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN. LEGAL CTR. & SCH, U.S. ARMY, PRACTICING MILITARY JUSTICE (Apr. 2013).

[166] *Id.*

[167] Irwin, *supra* note 157. The SAPR FY14 Report did not address non-prosecution memos. The only data the author was able to gather came from the case synopsis. SAPR FY14 Report, *supra* note 4, encl. 1, tbl.7.

[168] Irwin, *supra* note 157.

[169] *Id.* While the survey did not specifically inquiry as to whether or not there were probable cause opines given in the actions that went to administrative separations, the assumption is such opines were given since probable cause is a lower standard than preponderance of evidence.

C. Victims Unwilling to Testify

A victim's unwillingness to testify at a trial by court-martial is a major factor that can lead commanders to initiate administrative separation board proceedings, rather than a court-martial.[170] As mentioned above, in the FY14 SA Report, ten victims refused to participate in trial, resulting in the latter's administrative separation board initiation.[171] The results from the survey support the conclusion that a victim's unwillingness to participate leads to the initiation of administrative separation boards.[172] The survey results revealed twenty-six cases in which the victim was unwilling to testify at trial.[173] Of the twenty-six cases, initiation of administrative separation proceedings occurred in eight cases.[174]

Of course, an uncooperative victim[175] poses potential problems for the government.[176] If a victim is unwilling to participate in the trial process, she or he will likely be unwilling to testify during the trial.[177] Without other evidence, the government will be unlikely to meet its burden. The government can do little if the victim, at any point in the process, becomes non-participatory.

Department of Defense Instruction (DoDI) 6495.02 states, "The victim's decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases, including, but not limited to, commanders, DoD law enforcement officials, and personnel in the victim's chain of command."[178]

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[170] SAPR FY14 Report, *supra* note 4, encl. 1, tbl.7; Irwin, *supra* note 157.

[171] SAPR FY14 Report, *supra* note 4, encl. 1, tbl.7. It could not be determined how many of these cases led to discharges with OTH characterization of service. The only indication that the victim did not want to participate was in the case synopsis, but the synopsis did not necessarily state the discharge characterization. *Id.*

[172] Irwin, *supra* note 157.

[173] *Id.*

[174] *Id.*

[175] Victims can choose to report the alleged sexual assault, then not want to participate any further in the trial process, meaning the victim does not want to be interviewed by CID, cooperate in the Article 32 hearing, or participate in the court-martial.

[176] A non-participating victim, according to Department of Defense Instruction (DoDI) 6495.02, is a "[v]ictim choosing not to participate in the military justice system." U.S. DEP'T OF DEF., INSTR. 6485.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES gloss., pt. II (7 July 2015) [hereinafter DoDI 6495.02].

[177] Irwin, *supra* note 157.

[178] DoDI 6495.02, supra note 176, encl. 4, para. 1.c(1).

The government has few options when a victim becomes non-participatory and no other evidence is available. That is arguably why commanders are willing to initiate administrative separation proceedings. Administrative separations have a lower burden of proof and a victim does not, in all circumstances, have to testify at the hearing.[179] The respondent can request the victim as a witness, but the board president is not required to grant the request.[180] If the victim does not testify, the respondent cannot cross-examine the individual who, in many situations, is the only other witness. This deprives the respondent of his due process rights at administrative separation board proceedings.[181]

D. Weak Evidence

Another potential reason for a case to move from a trial by court-martial to an administrative separation board is weak evidence.[182] This can result from a variety of situations. This can include no forensic evidence, a he-said-she-said situation where there is no corroborating evidence on either side, or other evidentiary issues.[183] In the FY14 SA Report, this happened five times[184] and in the surveys from the field, fifteen cases were described as having weak evidence.[185]

Weak evidence can result from deficient CID investigations.[186] When the criminal investigation is lacking, the government may not be successful in prosecuting its cases, including sexual assault cases.[187] If the government cannot prosecute, the command must decide among administrative options, or take no action at all.[188] The problem of weak evidence can result from the nature and quality of criminal investigations.[189] Because there must be sufficient evidence to prosecute

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179 AR 635-200, supra note 4, para. 2-10. *See supra* Part III for further discussion.
180 AR 635-200, supra note 4, para. 2-10.
181 *See infra* Part V for further discussion.
182 SAPR FY14 Report, *supra* note 4, encl. 1, tbl.7; Irwin, *supra* note 157.
183 *See supra* note 102.
184 SAPR FY14 Report, *supra* note 4, encl. 1, tbl.7.
185 Irwin, *supra* note 157.
186 Buchhandler-Raphael, *supra* note 70.
187 *Id.* at 344. *See id.* at 345 (discussing reform through challenging the investigative practices and changing the military culture).
188 *Id.*
189 *Id.*

and meet evidentiary burdens, investigations that do not meet this burden tie the hands of the government from the start.[190] Put another way:

> Obtaining . . . evidence requires a comprehensive investigation of the allegations made in the case. Without thorough investigation, criminal prosecutions are not possible, regardless of the identity of the official making the decision whether to prosecute the case. Therefore, reforms targeted solely at taking the authority to prosecute away from commanders, without additional changes in the military police's handling of sexual assault investigations, would likely fail to result in more prosecutions.[191]

Deficient investigations and investigative practices can include: a lack of thoroughness; failure to follow standard operating procedures; cursory investigations; blaming the victim; following rape myths and stereotypes; threatening the victim with prosecution for false statements; professional retaliation or demotion; investigating and prosecuting the victims themselves for collateral misconduct; and more.[192] Any or all of these practices can affect the strength of the evidence and have a negative effect on the outcome of the case.[193] It leads to weak evidence and can prevent a commander from disposing of a case in the manner in which he may have otherwise have done.[194] Weak evidence and deficient investigations can also taint the administrative separation board proceeding when a sworn statement is the only evidence introduced. If a victim does not testify at the administrative separation board hearing, often the initial statement will be the only evidence. If the investigator was not thorough, the respondent has no way to meaningfully challenge it at the later hearing.

In SPC Smith's case, this could have happened. He testified to what he believed happened, yet the administrative separation board gave greater weight to the statement Jenny gave to investigators. What if the investigator conducted a cursory investigation? What if the investigator did not ask follow-up questions from Jenny because he did not want to be insensitive or make her think he was blaming her? Is one statement

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190 *Id.* at 361.
191 *Id.* at 361–62.
192 *Id.* at 364.
193 *Id.*
194 *Id.*

enough to meet the preponderance of evidence standard? The weak evidence that led commanders to initiate an administrative separation action in lieu of a trial by court-martial is the same weak evidence that a board will have to evaluate by a preponderance of the evidence standard.[195] Combine weak and deficient investigations with the Army's current environment of zero tolerance for sexual assault,[196] and there is a troubling possibility that soldiers will receive unjust results.

V. Why Due Process Matters

Due process is guaranteed by Fifth and Fourteenth Amendments of the U.S. Constitution. Generally, the concept entails the state and federal government cannot deprive a person of "life, liberty, or property without due process of law."[197] Two distinct doctrines are derived from these clauses; substantive due process[198] and procedural due process.[199] In determining whether due process violations have occurred, one must answer three underlying questions: was there a loss or deprivation, was it a deprivation of a life, liberty, or property interest, and what procedures were required.[200]

The first question is: "is there a deprivation?"[201] This can be obvious because the person has lost "life, liberty, or property."[202] The second

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[195] *See supra* note 132 and accompanying text

[196] *See supra* note 16 and accompanying sources.

[197] U.S. Const. amend. XIV. *See also* Erwin Chemerinsky, *Procedural Due Process Claims*, 16 TOURO L.J. 871, 871 (2000).

[198] This article focuses on procedural due process. As Professor Chemerinsky points out, substantive due process "asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose." *Id.* at 1501 (1999). While this might sound like an easy task, substantive due process has been discredited by the Supreme Court and applies in two narrow areas. *Id.* at 1506–10. The first area is "the protection of unenumerated constitutional rights." *Id.* at 1509. However, in recent years the Court has made it difficult "to recognize any additional unenumerated rights . . . ." *Id.* at 1522. The second area where substantive due process comes into play involves police behavior. *Id.*

[199] U.S. Const. amend. XIV. *See also* Chemerinsky, *supra* note 197, at 871.

[200] Chemerinsky, *supra* note 197, at 871.

[201] *Id.*

[202] *Id.* When there is no obvious deprivation, then courts generally ask two questions; "what is the mental state required in order to have a deprivation?" and "[a]re the existence of state procedures sufficient to prevent a finding of deprivation?" *Id.* at 872, 875. The intent question is usually a question concerning substantive due process issues and beyond the scope of this article. The second question, also known as a *Parratt* issue, applies in

question, assuming there is a loss, is what type of loss occurred?[203] Prior to the 1960s, courts drew a distinction between rights and privileges when answering this question.[204] Courts recognized a legal right, but not a privilege, in determining due process cases.[205] For example, prior to the 1960s, courts considered government employment and the receipt of benefits from a government program a privilege.[206] Therefore, firing someone, or terminating someone's government benefits, required no due process.[207] The Supreme Court changed this in *Goldberg v. Kelly*,[208] when the Court held, "welfare benefits are property and . . . the government has to provide due process before it can terminate receipt of [such] benefits."[209] Courts have also maintained government employment is "a property interest so that a person has to be given notice and a hearing before being fired."[210] The third question is, "what procedures are required?"[211] A denial of procedural due process occurs only if there is a deprivation of life, liberty, or property *without* adequate procedures.[212]

The Court in *Mathews v. Eldridge*[213] articulated a three-part balancing test to determine the proper procedures when there is a deprivation of a life, liberty, or property interest.[214] The court must first balance the "private interest that will be affected by government action" when determining proper procedure.[215] The more important the individual's

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very limited circumstances where there is an allegation of post-deprivation remedy only. *Id.* at 877.

[203] *Id.* at 879.

[204] *Id.*

[205] *Id.*

[206] *Id*. at 880.

[207] *Id.*

[208] Goldberg v. Kelly, 397 U.S. 254 (1970).

[209] *Goldberg*, 397 U.S. at 264. The Court later clarified its approach in *Goldberg*. Chemerinsky, *supra* note 197, at 881. The Court in *Bd. of Regents of State Colleges v. Roth* stated that "no longer is the rights/privileges distinction to be used, instead the question is whether there is a reasonable expectation to continued receipt of a benefit." Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972). When determining property or liberty interest, "look to the Constitution, federal statutes, state constitutions, and state law to determine if there is a reasonable expectation" of continued receipt of a benefit. Chemerinsky, *supra* note 197, at 882.

[210] Stone v. Fed. Deposit Ins. Corp., 179 F3d. 1368 (Fed. Cir. 1999). *See also* Chemerinsky, *supra* note 197, at 882.

[211] *Id.* at 888.

[212] *Id.*

[213] Matthews v. Eldridge, 424 U.S. 319 (1976).

[214] *Mathews*, 424 U.S at 335. *See also* Chemerinsky, *supra* note 197, at 888–89.

[215] *Mathews*, 424 U.S. at 335.

interest, the more protections the court will require.[216] The second balancing test weighed "the risk of any erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[217] In other words, "how likely is it that the additional procedures will reduce the risk of an erroneous deprivation?"[218] The final part of the test determines "the [g]overnment's interest, including . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[219] This means the court will look at the government's interest in administrative efficiency.[220]

Because this is a three-part test, courts "have enormous discretion and[,] in all likelihood[,] different factors will point in varying directions."[221] Despite enormous discretion, the procedures remain a question of constitutional law for the judge.[222] "It is not for the government to decide what due process requires, it is for the courts in interpreting the Constitution."[223] However, the courts have given deference to the military in deciding their own procedural requirements because of its distinct nature.[224] Due to this deference, the military may make incursions on due process rights with limited recourse for the affected individual.[225] The discussion below outlines decisions regarding military cases involving due process.

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[216] Chemerinsky, *supra* note 197, at 888.
[217] *Mathews*, 424 U.S. at 335.
[218] Chemerinsky, *supra* note 197, at 889.
[219] *Mathews*, 424 U.S. at 335.
[220] Chemerinsky, *supra* note 197, at 889. "The government's interest in administrative efficiency is such that the more expensive the procedures would, the less likely it is that a court will require them." *Id.*
[221] *Id.* at 889.
[222] *Id.* at 890 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)).
[223] Vitek v. Jones, 445 U.S. 480, 489 (1980).
[224] Daniels v. United States, 947 F. Supp. 2d 11 (D.D.D. 2013).
[225] Soldiers have limited rights to appeal. A soldier can appeal to the Army Board for Correction of Military Records (ABCMR), who corrects errors or removes injustices from a soldier's record. ARMY REVIEW BOARD AGENCY, http://arba.army.pentagon.mil/abcmr-overview.cfm (last visited Mar. 20, 2017). A soldier can also file a claim with the Court of Federal Claims to request monetary relief or back pay. ADMIN. & CIVIL LAW DEP'T., THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, GENERAL ADMINISTRATIVE LAW DESKBOOK para. C-13 (2015). Prior to filing a claim in the Court of Federal Claims, a soldier must petition the Army Discharge Review Board (ADRB), who examines the discharges of former soldiers to ensure the discharge was accomplished properly. ARMY REVIEW BOARD AGENCY, http://arba.army.pentagon.mil/adrb-overview.cfm (last visited Mar. 20, 2017).

A. Military Due Process

Due process is a necessary element in military administrative separation board proceedings, just as it is in civilian proceedings.[226] Servicemembers have a cause of action for deprivation of due process if they can show the deprivation of a property or liberty interest.[227] A property interest may arise when "the Army fails to comply with its own regulations in discharging a soldier."[228] A liberty interest may arise if "the government's action could impose a stigma or other disability on the individual that forecloses other employment opportunities."[229] As the court in *Weaver v. United States*[230] determined, "the imposition of a stigma on a servicemember in connection with his or her discharge from military service is not permitted without affording the servicemember due process in the nature of notice of the charges against him or her and a fair opportunity to present a defense."[231]

The court in *Weaver* likewise concluded that "notice and pre-discharge hearing[s] are only required if separation inflicts stigma or has some derogatory connotation that follows the servicemember."[232]

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[226] One court defined due process as: "[T]hat process that 'protects against the exercise of arbitrary governmental power and guarantees equal and impartial dispensation of law according to the settled course of judicial proceedings or in accordance with fundamental principles of distributive justice.'" H.E. Sargent, Inc. v. Town of Wells, 676 A.2d 920, 926 (Me. 1996) (citing Mutton Hill Estates, Inc. v. Town of Oakland, 468 A.2d 989, 993 (Me. 1983)).

[227] Major David S. Franke, *Administrative Separation from the Military: A Due Process Analysis*, ARMY LAW., Oct. 1990, at 11, 16. It should also be noted that a constitutional due process claim can stand alone in a federal court. However, it cannot be brought as a cause of action in the Court of Federal Claims because it is not money-mandating. *See, e.g.*, McClellan v. United States, 119 Fed. Cl. 494 (Fed. Cl. 2015). While it cannot be an independent cause of action, the Court of Federal Claims can review constitutional claims in conjunction with a determination of wrongful discharge. *See, e.g.*, Holley v. United States, 124 F.3d. (Fed. Cir. 1997).

[228] Franke, *supra* note 227, at 16 (citing Rich v. Sec'y of the Army, 735 F.2d 1220, 1226 (10th Cir. 1984)). Courts have found that they can review the military's compliance with a regulation for procedural error and "once a service-member has had recourse to a corrections board, the focus is both on the procedural infirmity alleged before the board, as well as on a review of the board's decision under the arbitrary and capricious standard." Miller v. United States, 119 Fed. Cl. 717, 731 (2015).

[229] Franke, *supra* note 227, at 16. In order to show a stigma for due process purposes the information must be actually stigmatizing, this includes the characterization of discharge. *Id.*

[230] Weaver v. United States, 46 Fed. Cl. 69 (2000).

[231] *Id.* at 77.

[232] *Id.* (citing Keef v. United States, 185 Ct. Cl. 454, 467 (1968)).

However, courts have established due process rights for respondents in administrative separations in the military setting are more limited and afford deference to the military process and its decisions.[233] Examples of this include failing to provide respondents with subpoena power in administrative separation board proceedings[234] and permitting a witness to testify telephonically.[235] Courts rely on the fact administrative hearings are to determine a servicemember's eligibility for continued military service and not to punish past wrongs.[236] The Ninth Circuit Court of Appeals in *Garrett v. Leham*[237] went so far as to say,

> There is a sharp and distinct delineation between the administrative process which has as its purpose the administrative elimination of unsuitable, unfit, or unqualified [m]arines, and the judicial process, the purpose of which is to establish the guilt or innocence

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[233] Doe v. United States, 132 F.3d 1430, 1434 (Fed. Cir. 1997). "To prevail[,] a plaintiff must 'overcome the strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith.'" (quoting Sanders v. United States, 219 Ct. Cl. 285, 594 (1979)); Adkins v. United States, 68 F.3d 1317, 1325 (Fed. Cir. 1995). "[P]laintiff bore 'the burden of demonstrating . . . that the correction board acted arbitrarily, capriciously, contrary to law, or that its determination was unsupported by substantial evidence.'" (quoting Arens v. United States, 969 F.2d 1034, 1037 (Fed.Cir. 1992)); Kendall v. Army Bd. For Corr. Of Military Records, 996 F.2d 362, 367 (D.C. Cir. 1993). "If the ABCMR's [Army Board for Correction of Military Records] decision is reviewable at all, the applicable standard of review is 'whether [the] action of the [the] military agency conforms to the law or is instead arbitrary, capricious or contrary to the statues and regulations governing that agency.'" (quoting Ridley v. Marsh, 886 F.2d 1526, 1528 (D.C. Cir. 1989)); Daniels v. United States, 947 F. Supp. 2d 11, 19 (D.D.C. 2013). "[T]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." (quoting Murphy v. United States, 993 F.2d 871, 872 (Fed.Cir.1993)); *Weaver*, 46 Fed. Cl. at 77. "The court should, therefore, give the 'widest possible latitude to military decisions, giving it special deference.'" (quoting Crager v. United States, 25 Cl. Ct. 400, 406 (1992)); Milas v. United States, 42 Fed. Cl. 704, 712 *aff'd*, 217 F.3d 854 (Fed. Cir. 1999). "Great deference is afforded to the BCNR's [Board of Corrections of Naval Records] decisions because 'Congress has entrusted the primary duty of correcting military records to the correction boards.'" (quoting Hoffman v. United States, 16 Cl. Ct. 406, 408(1989)).

[234] *Milas*, 42 Fed. Cl. at 704.

[235] *Weaver*, 46 Fed. Cl. at 79 ("Since administrative discharge hearings are not criminal proceedings, as previously discussed, plaintiff enjoys no Sixth Amendment protections.")

[236] *Id.* at 78. Although, commanders could potentially use the administrative separation process to punish those who are merely suspected of committing a sexual assault because of the current environment.

[237] 751 F.2d 997 (9th Cir. 1985).

> of a member accused of a crime and to administer punishment when appropriate. No evidence will be rejected from consideration solely on the grounds that it would be inadmissible in court-martial proceedings.[238]

Although the courts have limits for what it considers proper due process in administrative separation board proceedings,[239] some due process is available to respondents.[240] Courts have established that soldiers do not leave "constitutional safeguards and judicial protections behind when they enter military service."[241]

To that end, the courts have affirmed when admitting hearsay evidence in administrative separations, it must constitute substantial evidence.[242] To be substantial evidence, the court must examine the nature of the hearsay evidence to determine the credibility and veracity of it.[243] Courts have further emphasized the importance of cross-examining witnesses and held "hearsay is not substantial when there is no such opportunity to cross-examine the witnesses."[244] One court has even found a "claimant has a right to cross examine the author of an adverse report and to present rebuttal evidence."[245] Another court held, "[A]n opportunity for cross-examination is an element of fundamental fairness of the hearing to which a claimant is entitled . . . ."[246] Finally, another court determined that "[d]ue process requires that a claimant be given the opportunity to cross-examine . . . ."[247] Although courts have held due process requires the opportunity to cross-examine witnesses, this does not always happen in administrative separation boards.

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238 *Id.* at 1002 (citation omitted).
239 Kendall v. Army Bd. For Corr. Of Military Records, 996 F.2d 362, 367 (D.C. Cir. 1993).
240 AR 635-200, *supra* note 5, para. 2-10.
241 Doe v. United States, 132 F.3d 1430, 1434 (Fed. Cir. 1997) (quoting Weiss v. United States, 510 U.S. 163, 194 (1994)).
242 *Id.* at 1434–35 (citing Richardson v. Perales, 402 U.S. 389 (1971)).
243 *Id.* The court in *Doe* found that the appellant met his burden, and substantial evidence did not support his discharge. *Id.* at 1436.
244 *Id.* at 1435 (citing Richardson v. Perales, 402 U.S. 389 (1971)).
245 Townley v. Heckler, 748 F.2d 109, 114 (2d Cir. 1984).
246 Wallace v. Bowen, 869 F.2d 187, 191–92 (3d Cir. 1989).
247 Coffin v. Sullivan, 895 F.2d 1206, 1212 (8th Cir. 1990).

B. Inadequate Due Process

1. Inability to Cross-Examine Victims

When a victim refuses to testify in an administrative hearing he or she is deemed unavailable, and the government may then introduce a written statement from the victim—which the respondent cannot cross-examine; this violates the respondent's due process rights. Due process requires the respondent have the opportunity to cross-examine witnesses.[248] In sexual assault cases, the right to cross-examine alleged victims can be even more crucial. The credibility of the alleged victim is vital in determining whether an offense occurred.[249] The ability to cross-examine the alleged victim also gives the respondent a fair opportunity to present a case.[250]

Army Regulation 635-200 requires live testimony when "it is substantial, material, and necessary for the proper disposition of the case."[251] It also requires a witness to appear personally when the appearance "is essential to a fair determination on the issues of separation or characterization."[252] The live testimony of an alleged victim of a sexual assault is substantial, material, and necessary in determining whether the offense occurred. Moreover, an alleged victim's testimony is essential to a fair determination of separation and characterization, yet this right can be denied because of the contradictory rules in the regulation. The testimony of the victim is material, substantial, and necessary; however, under the amended regulations, such requests to present that testimony can be denied due to the recent incorporation of the victim rights act.

2. Weak Evidence as the Basis for Separation

When an administrative separation board relies only on hearsay evidence of an alleged victim to make findings that a sexual assault occurred, it is relying on unsubstantial evidence.[253] It cannot be substantial because of the nature of hearsay evidence. The hearsay evidence presented at a sexual assault administrative separation board is a

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[248] *See id.*; Wallace v. Bowen, 869 F.2d 187, 191–92 (3d Cir. 1989); Townley v. Heckler, 748 F.2d 109, 114 (2d Cir. 1984).
[249] *Doe*, 132 F.3d 1434–35.
[250] Weaver v. United States, 46 Fed. Cl. 69, 77 (2000).
[251] AR 635-200, *supra* note 5, para. 2-10.
[252] *Id.*
[253] *Doe*, 132 F.3d. 1434.

sworn statement alleging a sexual assault occurred. The respondent cannot show the administrative separation board the hearsay evidence lacks credibility or veracity without exercising the right of cross-examination.[254] When an administrative separation board uses unsubstantiated or uncorroborated evidence[255] as the basis for finding a sexual assault occurred, it is essentially finding a sworn statement alone is sufficient to meet the standard of proof.[256] Even when the military has legitimate interests that justify some limitation of constitutional rights, the respondent is denied due process when he is denied the substantial right of confrontation.[257]

A deprivation of the soldier's liberty may occur with the characterization of service, based on the facts. This separation can stigmatize the soldier, negatively impact employability, and limit access to veteran's benefits.[258] Therefore, a soldier is deprived of a liberty interest when an alleged victim of a sexual assault refuses to testify at an administrative separation board proceeding and that board relies on the alleged victim's hearsay statement as the basis for recommending a discharge with an OTH characterization of service.[259]

3. How Colleges Are Getting It Wrong

Unfortunately, the military is not alone. Colleges, in their zeal to eradicate sexual assault have implemented even more opaque and questionable procedures. When Amy Ziering, the producer of *The Invisible War*,[260] toured college campuses promoting the film, students

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[254] *Id.*
[255] *Id.*
[256] AR 635-200, *supra* note 5, para. 2-12.
[257] Despite courts giving special deference to military decisions, this does not negate constitutional safeguards and judicial projection for the respondent. Doe v. United States, 132 F.3d 1430, 1434 (Fed. Cir. 1997) (quoting Weiss v. United States, 510 U.S. 163, 194 (1994)).
[258] Weaver v. United States, 46 Fed. Cl. 69, 77 (2000).
[259] Even soldiers under the same circumstances who receive a general discharge are still being deprived of a liberty interest because the soldier has previously earned the education benefits that the soldier is then disqualified from receiving (with a general discharge). U.S. DEP'T OF VET. AFFAIRS, *Education and Training*, http://www.benefits.va.gov/benefits/character_of_discharge.asp (last visited Mar. 20, 2017).
[260] THE INVISIBLE WAR, *supra* note 76. It is a documentary movie highlighting the military's treatment of sexual assault victims.

approached her about sexual assault on campus.[261] Students told her about treatment by the administration and how college tribunals were handling sexual assault allegations.[262] This led to the production of the film *The Hunting Ground*,[263] which focused on sexual assault on college campuses and how colleges are doing little to fight it.[264]

Colleges and the military alike face problems, and both are struggling to handle the problem properly.[265] In 2011, the Department of Education addressed the issue by sending a "Dear Colleague" letter to colleges and universities.[266] The "Dear Colleague" letter provided guidance and requirements for handling sexual assault allegations and adjudicating those incidents.[267] However, colleges interpreted the guidance and requirements from the "Dear Colleague" letter differently, creating a lack of uniformity.[268] This led to enforcement problems for the Office for Civil Rights (OCR)[269] when upholding Title IX, which prohibits discrimination and provides protection to those attending schools that receive federal resources.[270] It also led to due process issues for those accused in college tribunals.[271] These tribunals are a type of administrative hearing because

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[261] Robert Scheer, *Scheer Intelligence: Discussing 'The Hunting Ground' With Director Kirby Dick and Producer Amy Ziering*, HUFF. POST (Dec. 26, 2015, 8:29 PM), http://www.huffingtonpost.com/robert-scheer/scheer-intelligence-rober_b_8879950.html.

[262] *Id.*

[263] THE HUNTING GROUND (CNN Films 2015).

[264] *Id.*

[265] Sara Ganim & Nelli Black, *An imperfect process: How campuses deal with sexual assault*, CNN (Dec. 21 2015, 4:38 PM), http://www.cnn.com/015/11/22/us/campus-sexual-assault-tribunals/.

[266] Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L. REV. 487 (2012). Congress enacted Title IX in 1972, prohibiting the "use of federal resources to support discriminatory practices and to provide individual citizens with effective protection against such practices." *Id.* at 495. Title IX prohibits sexual discrimination, which includes sexual harassment, and sexual violence falls within sexual harassment. *Id.* at 494–95.

[267] *Id.*

[268] *Id.* at 490–10.

[269] The Department of Education's Office for Civil Rights (OCR) enforces and administers Title IX. It is responsible for ensuring that schools receiving federal funding properly respond to sexual harassment, of which sexual violence is a subset. Triplett, *supra* note 266, at 489–507.

[270] *Id.* Title IX is the federal statue prohibiting sex discrimination in education. *Id.* 489. Sex discrimination includes sexual harassment, which also includes sexual assault. *Id.* at 489–507.

[271] *Id.* at 507–26.

they determine whether a sexual assault occurred and the consequences of an adverse finding.[272]

In a recent court case, *Doe v. Regents of University of California San Diego*,[273] the court addressed the accused's due process right to confront and cross-examine adverse witnesses.[274] The court held, "People involved in an administrative proceeding have a right to cross-examine witnesses. This right 'is considered as fundamental an element of due process as it is in court trials.'"[275] The court stated, "The right of cross-examination is especially important where findings against a party are based on an adverse witness's testimony."[276] This case is not the only case pending against colleges and universities for the way they are handling student claims of sexual assault.[277] In fact, "[t]he San Diego lawsuit is one of more than [twenty] such cases filed against universities in recent years. And what [is] happening at these disciplinary hearings is coming under increased scrutiny as judges across the country are overturning university decisions that punish those who are accused of sexual assault."[278] As the courts continue to deal with due process issues from college tribunals, the Army can use those tribunals' mistakes as a guide for what *not* to do.

C. The Current Environment

One can argue the current zero tolerance environment for sexual assault[279] creates potential due process issues and creates potential claims

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[272] *Id.*

[273] Doe v. Regents of U. Cal. San Diego, No. 37-2015-00010549 (Cal. Super. Ct. July 10, 2015) (order granting Writ of Mandamus and ordering the respondent to set aside its findings and sanctions issued against the petitioner).

[274] *Id.*

[275] Doe v. Regents of U. Cal. San Diego, No. 37-2015-00010549 (Cal. Super. Ct. July 10, 2015) (quoting McLeod v. Bd. of Pension Commissioners, 14 Cal. App.3d 23, 28. (Cal. Ct. App. 1970).

[276] *Id.* (citing Manufactured Home Communities, Inc. v. City of San Luis Obispo, 167 84 Cal. Rptr. 3d 367, 374 (Cal. Ct. App. 2008)). The court found the cross-examination in this case was essential, stating "The Student Conduct Review Report made findings regarding the credibility of Ms. Roe and the outcome turned on her testimony. The university unfairly limited petitioner's right to cross-examine the primary witness against him, Ms. Roe." *Id.*

[277] Ganim & Black, *supra* note 265.

[278] *Id.*

[279] *See supra* note 16 and accompanying sources.

of UCI.[280] As unattainable as an environment of zero tolerance for sexual assault is,[281] it sets the tone for everything that happens in the military. It can create an unfair environment for those accused of committing sexual assault because commanders are under pressure to take action—any action—in every sexual assault case.[282] This causes unfair, unjust results for those facing administrative separation boards when they might have received appropriate alternate disposition otherwise.

A comment made by the former commander-in-chief, President Barack Obama, established the tone for everyone in the military, especially commanders.[283] When the commander-in-chief states that dealing with sexual assault is as core to the mission as anything else,[284] it resonates. When the commander-in-chief states he has no tolerance for sexual assault and orders—or arguably even just suggests—the prosecution of anyone engaging in such behavior,[285] the message is clear. It tells commanders to take *some action* in every sexual assault case, despite weak evidence or other deficiencies.

Commanders at all levels are likewise ensuring they are tough on sexual assault and demonstrate they, too, have no tolerance.[286] In 2013,

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[280] Unlawful command influence derives from article 37 of the UCMJ. MCM, *supra* note 5, art. 37. The article outlines a commander's behavior with regards to court-martials. More specifically if prohibits commanders from reprimanding or admonishing those participating in the court-martial process. *Id.* The article goes on to prohibit anyone from attempting to coerce or use unlawful means to "influence the action of a court-marital or any other military tribunal or any member thereof." *Id.*

[281] *See supra* note 16 and accompanying sources.

[282] *President Obama's Remarks on Sexual Assault in Military: Summary of Meeting With Top Military Officers on Sexual Assault*, CONG. DIG. (May 16, 2013), http://www.CongressionalDigest.com.

[283] *Id*.

[284] *Id.*

[285] *Remarks by President Obama and President of South Korea in Joint Press Conference*, WHITEHOUSE.GOV (May 7, 2013, 1:44 PM), https://www.whitehouse.gov/the-press-office/2013/05/07/remarks-president-obama-and-president-park-south-korea-joint-press-confe. President Obama also made the comment that those who commit sexual assault in the military should be prosecuted, stripped of their positions, court-martialed, fired, and dishonorably discharged. Buchhandler-Raphael, *supra* note 71, at 385.

[286] *See supra* note 16 and accompanying sources; *see, e.g.*, Michael O'Brien, *Obama: 'No Tolerance' for military sexual assault*, NBC POL. (May 7, 2013), http://nbcpolitics.nbcnews.com/_news/2013/05/07/18107743-obama-no-tolerance-for-military-sexual-assault?lite; Jeremy Herb & Justin Sink, *Obama: 'I have no tolerance' for sexual assault in US military*, HILL (May 7, 2013), http://thehill.com/policy/defense/298173-study-military-sexual-assaults-on-the-rise; Jennifer Epstein, *Obama: 'No tolerance' for military sexual assault*, POLITICO (May 7, 2013), http://www.politico.com/story/2013/05/obama-no-

the Chief of Staff of the Army, General Raymond Odierno, led a video teleconference with top Army commanders addressing the issue of combating sexual assault in the Army through five imperatives, and everyone took notice.[287] These imperatives were set out to combat sexual assault within the ranks of the Army.[288] One imperative made combating sexual assault in the Army its number-one priority.[289] General Odierno also stated, "Commanders are ultimately responsible for ensuring [a]n environment of mutual respect, trust, and safety."[290] A commander potentially creates bias and commits UCI as a result of his actions after hearing this message.[291]

1. Bias

One could infer when everyone in the military hears from top leaders that he is responsible for eliminating sexual assault, it creates an environment where unjust results occur. This can occur because officers and NCOs selected as board members enter the administrative board thinking the respondent has committed the sexual assault. Members may also think it is their job to separate those who allegedly commit sexual assault from the Army, even if the only evidence of the crime is unsubstantial hearsay.

One could also infer bias occurs when a presiding officer emphasizes the rights of victims, even to the detriment of the respondent, including

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tolerance-for-military-sexual-assault-091021; Craig Whitlock, *Obama delivers blunt message on sexual assaults in military*, WASH. POST (May 7, 2013), https://www.washingtonpost.com/world/national-security/possible-military-sexual-assaults-up-by-33-percent-in-last-2-years/2013/05/07/8e33be68-b72b-11e2-bd07-b6e0e6152528_story.html.

[287] Raymond T. Odierno, *Pro & Con: Should Decisions Regarding the Prosecution of Sexual Assault Cases in the Military Be Removed from the Chain of Command?*, CONG. DIG., Sept. 2013, at 10, 13–15. General Odierno served as the 38th Chief of Staff of the Army. *Id.*

[288] *Id.*

[289] *Id.*

[290] *Id.* at 10, 15. General Odierno also stated that it was leaders who must take action "to establish and sustain standards at every level." *Id.*

[291] In recent years there are cases citing the appearance of UCI as opposed to actual UCI. United States v. Howell, 75 MJ 386 (2016) (finding the appearance of UCI led the court to reverse SSG Howell's conviction of sexual assault); United States v. Easterly, 2014 CCA Lexis 40, N-M Ct. Crim. App. Jan. 31, 2014) (deciding the military judge erred in failing to find the defense met the low burden of showing UCI but also finding there was no evidence of UCI actually affecting the court-martial).

allowing alleged victims to not testify at board proceedings despite their testimony being substantial, material, and necessary to the disposition.[292] This directly conflicts with the respondent's right to cross-examine and have a fair opportunity to present a defense.[293] However, a presiding officer serving in the current environment faces an untenable decision between focusing on the alleged victim's rights regarding whether or to participate in the process,[294] or providing due process to the respondent. Army Regulation 635-200 states, "Care will be exercised to ensure that . . . [t]he board is composed of experienced, unbiased officers . . . ."[295] Because a potential due process claim can arise when the Army fails to comply with its own regulation in discharging a soldier,[296] a commander who appoints biased board members creates a potential due process claim. Members, just like commanders, serve in the current environment, and may feel it is their responsibility to take action when they might otherwise appropriately dismiss a claim. They may do this even if it creates a potential due process claim and causes unjust results for the respondent.

2. Unlawful Command Influence

Poor leadership and mistakes generate unlawful command influence and raise another potential cause of action. Unlawful command influence occurs when a commander attempts "to coerce, or by any unauthorized means, influence the action of a court martial in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts."[297] The military setting is unique in that it is within the commander's authority to dispose of sexual assault cases, and commanders have a direct interest in the outcome of cases.[298] For example, when sexual assault occurs within a commander's unit, it reflects poorly on his ability as a leader and potentially jeopardizes his career.[299]

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[292] AR 635-200 *supra* note 5, para. 2-10.
[293] Weaver v. United States, 46 Fed. Cl. 69, 77 (2000).
[294] DoDI 6495.02, *supra* note 176.
[295] AR 635-200, *supra* note 5, para. 2-7.
[296] *See supra* note 233 and accompanying sources.
[297] MCM, *supra* note 5, app. A2, ¶ 837.
[298] Buchhandler-Raphael, *supra* note 71.
[299] *Id.* at 355-60 (discussing the commander's role in the disposition of a sexual assault complaints gives the appearance of bias and prejudice).

A recent military justice case shows the extent to which UCI affects the military environment.[300] A military judge recently found:

> [E]vidence that political considerations had influenced the decision, particularly the political implications of a military grappling with sexual assault cases based in emails between the assistant judge advocate general for military and operational law and the deputy staff judge advocate . . . that expressed concerns about the message that the plea bargain would send across the military.[301]

In addition to political considerations, President Obama's past words led to substantiated allegations of UCI in military justice cases.[302] Since his remarks, UCI has affected at least a dozen sexual assault trials, according to military judges and defense counsel.[303]

Unlawful command influence can be raised in civilian court reviews of a servicemember's discharge, even though it generally applies to court-marital proceedings.[304] For the plaintiff to prevail on a UCI claim, he must show the following: "(1) a command relationship, (2) improper influence by virtue of that relationship, and (3) a nexus between the alleged influence and plaintiff's dismissal."[305] Furthermore, UCI may exist "if a reasonable citizen, knowing all the facts of a given case, would believe the military justice system to be unfair and, as such, lose confidence in the entire system."[306] This means a plaintiff may prevail at the mere appearance of UCI, even if there is not actual unlawful command influence in that case.[307]

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[300] Jonathan P. Tomes & Micheal I. Spak, *Practical Problems with Modifying the Military Justice System to Better Handle Sexual Assault Cases*, 29 WIS. J. L. GENDER & SOC'Y 377, 382 (2014) (discussing Brigadier General Jeffrey Sinclair, who was on trial for a sex-related offense).

[301] *Id.* at 382.

[302] Buchhandler-Raphael, *supra* note 71, at 385.

[303] *Id.* "Military law experts said that those cases were only the beginning and that the president's remarks were certain to complicate almost all prosecutions for sexual assault." *Id.*

[304] *See* Werking v. United States, 4. Cl. Ct. 101 (1983); Milas v. United States, 42 Fed. Cl. 704, 712 *aff'd*, 217 F.3d 854 (Fed. Cir. 1999); (N G) v. United States, 94 Fed. Cl. 375 (2010).

[305] *Milas*, 42 Fed. Cl. at 712.

[306] *(N G)*, 94 Fed. Cl. at 387.

[307] *Id.*

Because civilian courts have extended UCI to administrative hearings,[308] this extension might similarly be used to apply UCI to military administrative board proceedings. A potential argument would look at the current environment in the same way the courts have looked at the command climate in UCI cases. One court held "the command climate, atmosphere, attitude, and actions had such a chilling effect on members of the command that there was a feeling that if you testified for the appellant your career was in jeopardy."[309] The same court found, "[m]oreover, acts of this type infringe upon important constitutional and statutory rights of servicemembers."[310]

VI. Solutions

The solution to this problem is not an easy one. Potential solutions seem even less likely when one considers the current environment, where victims seem to have all the power, and when it is incumbent upon the respondent after his discharge to bring his claim to either the Army Review Board Agency (ARBA)[311] or the Court of Federal Claims.[312] Below are

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[308] *Id.*

[309] United States v. Gleason, 43 M.J. 69, 73 (C.A.A.F. 1995).

[310] *Id.*

[311] The Army Review Board Agency (ARBA) is the agency responsible for the ADRB. The ADRB mission is as follows:

> Review discharges of former soldiers, except those given by reason of a sentence of a General Court Martial or over [fifteen] years since discharge. The purpose of the review is to determine if the discharge was granted in a proper manner, i.e. in accordance with regulatory procedures in effect at the time, and that it was equitable, i.e. giving consideration to current policy, mitigating facts, and the total record.

ARMY REVIEW BOARD AGENCY, http://arba.army.pentagon.mil/adrb-overview.cfm (last visited Mar. 20, 2017). The ADRB will "examine an applicant's administrative discharge and . . . change the characterization of service and/or the reason for discharge based on standards of equity or propriety." *Id.* The ARBA also houses the ABCMR. The ABCMR is "the highest level of administrative review within the Department of the Army with the mission to correct errors in or remove injustices from Army military records." ARMY REVIEW BOARD AGENCY, http://arba.army.pentagon.mil/abcmr-overview.cfm (last visited Mar. 20, 2017).

[312] The Court of Federal Claims hears cases dealing with claims of monetary relief or back pay. If there is non-monetary relief, a U.S. District Court hears the cases. The abovementioned courts will only grant review when an action is "arbitrary, capricious or contrary to agency regulation or statute by weight of substantial evidence." ADMIN. & CIVIL LAW DEP'T., THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY,

some possible solutions changing how the Army conducts administrative separations and the Army's subsequent review. A discussion of potential consequences of each proposed solution is included as well.

A. A Higher Standard of Proof

Currently, preponderance of the evidence is the standard of proof.[313] This is no longer sufficient for administrative separation proceedings dealing with sexual assault allegations. The standard of proof should be raised to clear and convincing evidence.[314] Clear and convincing evidence requires "evidence indicating that the thing to be proved is highly probable or reasonably certain."[315] This standard would require stronger evidence due to the complexity of sexual assault allegations. It could also cause boards to more diligently consider each piece of evidence. At the present time, a board need merely conclude it is more likely than not that the evidence warrants a discharge to separate the respondent.[316]

Potential problems with increasing the evidentiary burden include how to change it, and what kind of separations should apply the increased standard of proof. First, there must be changes to the DoD instruction and Army regulation that establish the preponderance of the evidence standard.[317] This could be time-consuming, burdensome, and require a long time to implement. Full coordination and legal review must occur for changes to the DoDI to take effect,[318] which will also take time.[319] The current standard has been in place for over twenty years.[320]

GENERAL ADMINISTRATIVE LAW DESKBOOK para. C-13 (2015).

[313] AR 635-200, *supra* note 5, para. 2-12.

[314] *Clear and Convincing Evidence*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[315] *Id*.

[316] *See supra* note 132 and accompanying text.

[317] Currently, the DoDI 1332-14 outlines how to conduct enlisted separations and establishes the burden of proof as a preponderance of the evidence. DoDI 1332-14, *supra* note 6, encl. 5 at 37. The Army regulations addressing enlisted separations also contain the preponderance of evidence standard. AR 635-200, *supra* note 5, para. 2-12.

[318] DOD ISSUANCES, http://www.dtic.mil/whs/directives/corres/writing/DOD_process_home.html (last visited Mar. 20, 2017).

[319] Since this is a substantive change a pre-coordination review, legal review, formal coordination, pre-signature review, legal sufficiency, and office of security review must all happen before the instruction can change. *Id.*

[320] U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (4 Mar. 1994). In 1994, the DoDI 1332-14 added language that the soldier proves by a preponderance of evidence why the Army should retain him. However, as far back as 1983, preponderance of evidence remained the standard for findings. *Id.*

A change to the standard of proof for administrative separations involving sexual assaults could lead to confusion as to *when* the increased standard of proof applies. There can be situations in which multiple bases for separation exist and not all bases might include allegations of sexual assault. In a case like this, when to apply the higher standard could be convoluted. It would be easy for the administrative separation board to apply the higher standard for each finding. However, the updated regulation could explain this situation and others like it, eliminating this issue.

Sexual assault allegations constitute a serious offense,[321] and an administrative separation board should use a higher standard of proof in making its decision on findings and recommendations. The higher standard would deter administrative separation boards from relying on unsubstantial, hearsay evidence as the only evidence to make its findings. An allegation of sexual assault denotes a behavior of serious criminal misconduct[322] and requires careful evaluation. In a sexual assault case, there are often only two people involved, the alleged victim and the accused, thus credibility and veracity of each are essential in determining the facts of the case. An administrative separation board needs to be reasonably certain[323] that the evidence supports a finding that the respondent committed the offense. To be reasonably certain requires more than unsubstantiated hearsay evidence. Because an allegation of sexual assault is a serious offense with potentially negative consequences for the respondent, there should be a higher standard to prove it.

B. A Higher Separation Authority

A simple solution that would be relatively easy to implement is to require a higher separation authority. Currently, in most situations, the separation authority for serious offenses is the GCMCA.[324] The Army's HRC could become the separation authority for separations arising from sexual assault allegations. Administrative separations involving enlisted

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321 AR 635-200, *supra* note 5, para. 14-12(c).

322 *Id.*

323 *Clear and Convincing Evidence*, BLACK'S LAW DICTIONARY (9th ed. 2009).

324 AR 635-200, *supra* note 5, para. 1-19(a). Army regulation 635-200 states, "[C]ommanders who are General Court-Martial Convening Authorities . . . and their superior commanders are authorized to approve or disapprove separation per this regulation. This includes the authority to convene administrative separation boards when required by this regulation." *Id.*

soldiers with more than eighteen years of active, federal service already require HRC to approve the separation, so a system is already in place and only needs expansion.[325] A higher separation authority would allow a neutral, detached commander to review the evidence and ensure it met the requisite standard of proof. Because the higher separation authority would be a step removed from the process, there would be less likelihood for bias.[326]

A higher separation authority does not directly resolve the problem of a zero tolerance environment or lack of due process. However, a commander who is more objective and detached from the initial process could look at the separation action and determine if there was a lack of evidence—i.e., the victim refusing to testify or weak evidence—and determine if the government met its burden.[327] The commander could then choose from the range of options that the separation authority had, including retaining the soldier.[328]

C. *De Novo* Review

The Army Board for Correction of Military Records (ABCMR) reviews military records to correct errors or injustice.[329] Another possible solution to correct inadequate due process and unjust results that respondents face is to have the ABCMR review separations arising from sexual assault allegations *de novo*.[330] The ABCMR could act similarly to

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[325] *Id.* para. 1-14(b).

[326] Currently, the separation authority selects the board members and likely knows each of the panel members. AR 635-200, *supra* note 5, para. 2-7. When reviewing an administrative separation board's findings and recommendations, the separation authority might be persuaded merely by the panel he picked rather than evaluating the merits of the action. Is he required to make an independent determination, or is it proper for him to rely on the findings and recommendations?

[327] An objective commander could also be less likely to use the administrative separation process as a means to punish past wrongs.

[328] AR 635-200, *supra* note 5, paras. 2-6, 4-6.

[329] U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS para. 1-8 (31 Mar. 2006) [hereinafter AR 15-185].

[330] *De novo*, BLACK'S LAW DICTIONARY (9th ed. 2009). *De novo* comes from the Latin meaning "anew"; therefore, a *de novo* judicial review means "[a] court's nondeferential review of an administrative decision, usually through a review of administrative record plus any additional evidence the parties present." *Id.*

the board of review (BOR) with officer eliminations.[331] The ABCMR could examine the entire case to determine if the board met the evidentiary standard related to its finding and recommendation.[332] It would not merely accept the administrative separation board's findings, but instead look at all the evidence, without deference to the findings and recommendations of the board.

Currently, a respondent must show error or injustice in his military record, present the reason for the error or unjust record, and provide evidence of the error or injustice.[333] The burden is on the applicant, who must show, by a preponderance of the evidence there was an error or unjust record.[334] The ABCMR starts with the presumption of "administrative regularity."[335] By having the ABCMR review the case *de novo*, there is no such presumption. The respondent would obtain an independent review of the administrative separation board's findings and recommendations and the action taken by the separation authority. The review would occur outside the chain of command, and presumably the ABCMR would be neutral; therefore, it would properly evaluate the case to ensure there was sufficient evidence to meet the standard of proof.

The problem with the ABCMR conducting a *de novo* review is that it is not mandatory. Therefore, this solution would not reach every potentially affected respondent. This solution would also require action by the respondent. The respondent would have to apply to the ABCMR for relief after discharge. Even if there were a *de novo* review, the respondent would still have to meet the other requirements, including exhausting other administrative remedies and filing within the three-year window.[336]

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[331] U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4-17 (12 Apr. 2006) (RAR 19 Nov. 2008). The Board of Review (BOR) evaluates officers recommended for elimination by a Board of Inquiry (BOI). *Id.*

[332] AR 635-200, *supra* note 5, para 2-12.

[333] AR 15-185, *supra* note 329, para. 2-4.

[334] *Id.* para. 2-9.

[335] *Id.* However, there are some cases where the ABCMR will scrutinize the decision to discharge the soldier. The ARBA has guidance stating that when administrative separations results from an Article 15 turndown, it will scrutinize the application against the government in favor of the applicant, but does not change its standard of review. Email from Jan W. Serene, Legal Advisor, Army Review Boards Agency, to author (Jan. 21, 2016, 11:08 AM) (on file with author). This scrutiny occurs because the "action raises a suspicion that the [g]overnment couldn't prove the [s]oldier committed the misconduct." *Id.*

[336] AR 15-185, *supra* note 329, paras. 2-4, 2-5.

A *de novo* review by the ABCMR would provide the respondent an independent forum to determine whether a preponderance of the evidence supports an administrative separation board's findings and recommendations.[337] It could also ameliorate the use of unsubstantial hearsay as the only evidence supporting the administrative separation board's findings and recommendations. This could retroactively shape how administrative separation boards use hearsay statements, by later determining they are not, in fact, substantial evidence. The ABCMR could achieve this by publishing the results of its *de novo* reviews.

D. Independent Judges

A final solution is to permit an independent judge to hear administrative separation cases. This is a drastic solution, but it has the potential to solve the current problem. If an independent judge hears the evidence, he can use legal training to decide if the evidence meets the standard, whether it is preponderance of the evidence or clear and convincing evidence. The independent judge, because he has legal training, would be more likely to see and address due process issues that arise when there is weak evidence or when the victim does not testify. An independent judge would also be more aware of the risk of UCI.[338] Furthermore, an independent judge would not be chosen by the commander, who potentially has a vested interest in the action.

Independent judges could either be a military officer (a part of the Army Judge Advocate General's (JAG) Corps) or a civilian administrative judge (AJ); like those employed in the Merit System Protection Board (MSPB) system.[339] An independent military judge could potentially revitalize a program the Army JAG Corps started a few years ago.[340] In that program, a major who had aspirations of being a trial judge would handle motions and smaller cases, such as guilty pleas.[341] The judge in that program would be assigned either by installation or by area to handle cases.[342] Likewise, an independent judge's assignment could be regional or to a specific installation.

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337 *See supra* note 132 and accompanying text.
338 *See supra* note 16 and accompanying sources.
339 5 U.S.C. §§ 1201–06 (1978).
340 Telephone interview with LTC Stefan Wolfe, Associate Judge, U.S. Army Court of Criminal Appeals (Jan. 27, 2016).
341 *Id.*
342 *Id.*

An independent judge could also be civilian. In the federal employment system, when removal occurs, the person removed can file an appeal with the MSPB.[343] An AJ will then hear the appeal.[344] The AJ hears from both parties and issues a decision.[345] Either independent judge option would allow a commander to initiate separation, but instead of a board making findings and recommendations, an independent judge would do so. All of the other procedures would remain in place, including the separation authority's responsibilities and the respondent's appeal rights. A potential problem with this solution is the potentially prohibitive cost and the additional resources it would require to initiate and maintain the new system, especially if the independent judge is civilian.

Of these potential solutions, an independent judge deciding administrative separations may be the best possible solution. It is the surest way to eliminate due process issues for the respondent because an independent judge has legal training and can weigh the evidence to determine if it is sufficient to meet the standard of proof. Furthermore, an independent judge is detached and less likely to let the Army's current environment of zero tolerance for sexual assault affect his decision.

VII. Conclusion

The future of SPC Smith is unclear because one night he and Jenny drank, flirted, and had what he thought was consensual sex. Specialist Smith did not get his day in court. He did not get to cross-examine Jenny in a trial by court-martial or at his administrative separation hearing. He did not get to stay in the Army. Specialist Smith's future looks bleak. He does not have money for college, as he planned, and he has a stain on his military record because he received an OTH characterization of discharge. This will most likely stigmatize him and prevent him from getting a decent job forever. His attorney told him he could appeal to the ADRB or the ABCMR, but his attorney no longer represents him,[346] so SPC Smith does not know where to begin. It was all a big mistake, and SPC Smith thought

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343 5 U.S.C. §§ 7701–7703 (1978).

344 5 C.F.R. §§ 2423.30–.34 (1997).

345 *Id.*

346 Representation terminates when the separation action is terminated without separation or when separation action is complete. TDS Policy Memo 2015-01, Trial Defense Services, subject: Detailing of Defense Counsel and Formation of Attorney-Client Relationships Within the Trial Defense Service (TDS) (31 July 2015).

someone would see that he would not commit sexual assault after he testified at his separation board proceeding. No one did.

Although SPC Smith's experience is not like that of all soldiers, it is similar to some. The Army has a problem with the way it handles administrative separation proceedings arising from sexual assault allegations in an atmosphere of zero tolerance. A respondent faces an uphill battle to show why he should remain in the military when there is an accusation that he committed sexual assault, yet must present his case before members inculcated in the same culture of zero tolerance. The battle gets even more difficult when the evidence is weak or the alleged victim refuses to testify at the administrative separation hearing. A deprivation of a respondent's due process rights occurs when an alleged victim, a substantial, necessary, and material witness, refuses to testify and when the administrative separation board relies on weak, unsubstantial evidence to meet its burden of proof. There is currently no mechanism in place to guarantee this soldier adequate review of a decision fraught with error.

The solution to the problem can be as simple as increasing the standard of proof, elevating the separation authority, or as potentially complicated as appointing independent judges; but a solution must be found. At least eighty-one documented soldiers have experienced the injustice of the administrative separation board process. This undermines the faith and fairness of the process and has lasting effects on soldiers and the military justice system. Injustice anywhere is a threat to justice everywhere.[347] Separation board proceedings, although administrative in nature, threaten the notion of fairness to military members through inadequate due process; the Army must do more to protect their constitutional rights.

[347] Adri Nieuwhof, *supra* note 1.