THE MILITARY JUSTICE DIVIDE: WHY ONLY CRIMES AND LAWYERS BELONG IN THE COURT-MARTIAL PROCESS

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I don't want just more speeches or awareness programs or training, but ultimately, folks look the other way. If we find out somebody is engaging in this stuff, they've got to be held accountable—prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period. It's not acceptable.[1]

I. Introduction

Public outcry over sexual assault and the decisions of senior military leaders with authority under the Uniform Code of Military Justice (UCMJ) has cast a shadow over military justice. In November 2012, then-Lieutenant Colonel (Lt Col) James Wilkerson, a former inspector general at Aviano Air Base, was convicted of sexual assault; three months later the convening authority, Lieutenant General Craig Franklin,

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[1] President Barack Obama, Address at the Naval Academy Graduation (May 24, 2013); *see also* Michael D. Shear, *Obama Calls for 'Moral Courage' at Naval Academy Graduation*, N.Y. TIMES, May 24, 2013, http://www.nytimes.com/2013/05/25/us/politics/obama-naval-academy-commencement.html.

overturned his conviction.[2] Lieutenant General Franklin may retire as a Major General after possibly losing a star following "scrutiny of his handling of sexual assault cases."[3] Congress blocked former convening authority Lieutenant General (Retired) Susan Helms's promotion due to the clemency she granted when she overturned Captain Matthew Herrera's 2010 sexual assault conviction.[4] She retired from the Air Force on April 1, 2014.[5] These cases have called into question whether commanders should have the authority to decide the path and ultimate fate of sexual assault cases. Even if command authority remains intact, potential loss of a star or the lack of promotion to the next rank in these aforementioned cases sends the message to senior leaders that severe professional consequences will result if commanders take what they think Congress believes to be the incorrect action in sexual assault cases.

The alleged or actual misconduct of senior leaders in the military also has been an attention-generating topic in the media. On June 14, 2012, then-Colonel James Johnson received what many perceived to be a light punishment of a $300,000 fine and a reprimand for 15 offenses, ranging from bigamy to fraud.[6] Colonel Johnson's case was followed by the investigation of then-General William "Kip" Ward, who was administratively reduced from a four-star general to a three-star general

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[2] Letter from Lieutenant General Craig A. Franklin, former Commander, Third Air Force, to Secretary Michael B. Donley, Secretary of the Air Force (Mar. 12, 2013) (on file with author) (detailing his reasons for dismissing the charges against Lieutenant Colonel James H. Wilkerson III); Kristin Davis, *Lt. Col. Whose Overturned Sex Assault Case Sparked Outrage Will Retire*, ARMY TIMES, Oct. 2, 2013, http://www.airforcetimes.com/article/20131002/CAREERS03/310020019/Lt-col-whose-overturned-sex-assault-case-sparked-outrage-will-retire.

[3] Kristin Davis, *Lt. Gen. Franklin Will Retire as a 2-star*, AIR FORCE TIMES, January 9, 2014, http://www.airforcetimes.com/apps/pbcs.dll/article?AID=/201401091322/ NEWS/ 301090021. As of publication of this article, the retirement grade decision had not yet been determined.

[4] Memorandum for Record from Lieutenant General Susan Helms, subject: Disapproval of Findings in U.S. v. Herrera (24 Feb. 2012); Craig Whitlock, *General's Promotion Blocked Over Her Dismissal of Sex-Assault Verdict*, WASH. POST, May 6, 2013, http://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07- b6e0e6152528_story_1.html; Jeff Schogol, *With Nomination Blocked, 3-star Applies for Retirement*, MIL. TIMES, Nov. 8, 2013, http://www.militarytimes.com/article/20131108/CAREERS03/311080013/Helms-set-retire.

[5] Telephone Interview with Lieutenant General (Retired) Susan Helms, former commander, 14th Air Force Space Command (Mar. 12, 2014).

[6] Nancy Montgomery, *Former 173rd Commander Handed Reprimand, $300,000 Fine*, STARS & STRIPES, June 14, 2012, http://www.stripes.com/news/former-173rd-commander-handed-reprimand-300-000-fine-1.180356.

and retired after it was determined he engaged in widespread suspicious spending of government funds amounting to more than $80,000.[7] In November 2012, news broke about an adulterous affair between General David Petraeus and then-Lieutenant Colonel Paula Broadwell; the affair also led to an investigation into the personal life of Marine General John Allen.[8] Shortly thereafter, Secretary of Defense Leon Panetta ordered a Department of Defense (DoD)-wide review of ethics among the senior officer corps.[9] Originally charged with forcible sodomy, on March 20, 2014, Brigadier General Jeffrey Sinclair was sentenced by a military judge to receive a reprimand and a $20,000 fine after pleading guilty to charges, including adultery, inappropriate relationships, conduct unbecoming an officer, and misuse of a government travel card.[10] These stories describing actual or alleged misconduct by senior military leaders preceded a flurry of proposed legislation calling for changes to the military justice system.[11]

The 2012 documentary "The Invisible War" has had an impact on military justice. The film provides detailed accounts of women of all services who had been sexually assaulted in the military, and most of their attackers were not prosecuted.[12] In April 2012, then-Secretary of Defense Leon Panetta mandated that all sexual assault cases be withheld to officers with, at a minimum, special court-martial convening authority and in the pay grade of O-6.[13] Several of the victims in the film met with

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[7] Lolita C. Baldor, *William Ward, Four-Star General Demoted for Lavish Spending, Ordered to Repay $82,000*, HUFF. POST, Nov. 13, 2012, http://www.huffingtonpost.com/2012/11/13/william-ward_n_2122379.html.

[8] Robert Burns, *Petraeus-Broadwell Probe Spreads to Gen. Allen*, ASSOCIATED PRESS, Nov. 13, 2012, http://www.military. com/daily-news/2012/11/13/ petraeus-broadwell-probe-spreads-to-gen-allen.html.

[9] Elisabeth Bumiller, *Panetta Orders Review of Ethics Training for Military Officers*, N.Y. TIMES, Nov. 15, 2012, http://www.nytimes.com/2012/11/16/us/panetta-orders-review-of-ethics-training-for-officers.html.

[10] Jeffrey Collins, *Army General Fined, Reprimanded in Sex Case*, ASSOCIATED PRESS, Mar. 20, 2014, http://news.msn.com/crime-justice/army-general-fined-reprimanded-in-sex-case?ocid=ansnews11.

[11] *See, e.g.*, Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013); Better Enforcement for Sexual Assault Free Environments Act of 2013, S. 1032, 113th Cong. (2013); Combating Military Sexual Assault Act of 2013, H.R. 2002, 113th Cong. (2013); Military Sexual Assault Prevention Act of 2013, S. 548, 113 Cong. (2013); STOP Act, H.R. 1593 113th Cong. (2013).

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

[13] *Id.*; Memorandum from Sec'y of Def., to Secretaries of the Mil. Dept's et al., subject: Withholding Initial Disposition Authority Under the UCMJ in Certain Sexual Assault Cases (20 Apr. 2012).

Senators Jackie Speier and Claire McCaskill;[14] these women have apparently spurred Congress to action. At least one of the victims, former Marine Captain Ariana Klay, appeared with Senator Kirsten Gillibrand during a press conference before the debates over amendments to the fiscal year (FY) 2014 National Defense Authorization Act (NDAA) involving the UCMJ.[15]

Whether a truly legitimate problem or an issue exaggerated by propaganda, sexual assault cases are changing military justice. Recent public interest and congressional response to perceived problems in the military justice system have resulted in both proposed legislation and actual modifications to the UCMJ. Congress revised Article 120 of the UCMJ twice in less than ten years to address perceived problems with the litigation of sexual assault offenses.[16] Senator Gillibrand's Military Justice Improvement Act (MJIA), proposed on May 16, 2013, called for the removal of certain offenses from command authority, the elimination of a commander's power to overturn or downgrade convictions in clemency, and abolishment of a commander's consideration of the

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[14] THE INVISIBLE WAR, *supra* note 12.

[15] J. Taylor Rushing, *Group of Senators Begin Push to Remove Sex Assault Cases from the Chain of Command*, STARS & STRIPES, Nov. 6, 2013, http://www.stripes.com/news/group-of-senators-begin-push-to-remove-sex-assault-cases-from-chain-of-command-1.251408.

[16] UCMJ art. 120 (2008); UCMJ art. 120 (2012); MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [hereinafter 2012 MCM]. Offenses committed before October 1, 2007, under Article 120 included rape and carnal knowledge. Rape and carnal knowledge of a spouse were not recognized as crimes, and the prosecution had to prove that sexual intercourse was done by force and without consent. The legislation for crimes committed between October 1, 2007, and June 27, 2012, expanded Article 120 to include crimes of rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, abusive sexual contact, abusive sexual contact with a child, indecent liberty with a child, indecent act, forcible pandering, wrongful sexual contact, and indecent exposure. The rape and aggravated sexual assault statutes allowed prosecutors to charge the accused for more than force, such as bodily harm, threats, rendering someone unconscious, and substantial incapacitation. Also, marriage became an affirmative defense to seven of the offenses. The current Article 120 includes the offenses of rape, sexual assault, aggravated sexual contact, and abusive sexual contact. Article 120a (stalking), Article 120b (rape and sexual assault of a child), and Article 120c (other sexual misconduct) are separate offenses under the current UCMJ. *See also* Major Mark D. Sameit, *When a Convicted Rape Is Not Really a Rape: The Past, Present, and Future Ability of Article 120 Convictions to Withstand Legal and Factual Sufficiency Reviews*, 216 MIL. L. REV. 77 (2013) (describing the changes to sexual assault and Article 120 from 1950 through 2012).

character of the accused in decisions about initial disposition of a case.[17] Senator Barbara Boxer's bill proposed significant changes to the Article 32 process to the detriment of the accused by limiting the scope of the hearing to a determination of only probable cause and giving the victim the option to be excused from participating.[18] Senator Claire McCaskill proposed the Victims Protection Act of 2013 on November 21, 2013; the bill's 33 sections proposed both improvements to the military's current program to prevent and respond to sexual assault and specific changes to the UCMJ.[19] Several of these bills resulted in legislation under the NDAA, which included over 30 sections related to the UCMJ that substantially change the *Manual for Courts-Martial* (*MCM*).[20] On March 6, 2014, the MJIA failed in the Senate by a vote of 55-45.[21] Senator McCaskill's additional legislation, the Victims Protection Act of 2014, passed the Senate on March 10, 2014, by a vote of 97-0.[22] Although both senators have proposed legislation to address the military's handling of sexual assault cases, the key difference between the two is that Senator McCaskill believes commanders should continue to have prosecutorial discretion over UCMJ cases, while Senator Gillibrand does not.[23]

These recent changes to the law will require even greater change to the military justice system in order for the court-martial process and the

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[17] Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013).

[18] Article 32 Reform Act, S. 1644, 113th Cong. (2013). Previously, an Article 32 investigation required a "thorough and impartial investigation of all the matters set forth" and an "inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline." UCMJ art. 32 (2012).

[19] Victims Protection Act of 2013, S.1775, 113th Cong. (2013).

[20] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701–1753 (2013).

[21] Robert Herriman, *Sen. Gillibrand's 'Military Justice Improvement Act' Falls Short in the Senate*, GLOBAL DISPATCH, Mar. 8, 2014, http://www.theglobaldispatch.com/sen-gillibrands-military-justice-improvement-act-falls-short-in-the-senate-67226/.

[22] Victims Protection Act of 2014, S. 1917, 113th Cong. (as passed by Senate, Mar. 10, 2014); Donna Cassata, *Senators Rally behind Military Sexual Assault Bill*, ASSOCIATED PRESS, Mar. 11, 2014, http://news.yahoo.com/senators-rally-behind-military-sexual-assault-bill-071253179--politics.html.

[23] *See* Charles J. Dunlap, Jr., Abstract, *Top Ten Reasons Sen. Gillibrand's Bill Is the Wrong Solution to Sexual Assault*, SOC. SERV. RESOURCE NETWORK 1, 3 (21 Nov., 2013), *available at* http://papers.ssrn. com/sol3/papers.cfm?abstract_id=2358044. Senator McCaskill believes that commanders are giving victims their day in court, that increased reporting shows the current system with commanders involved is working, and that foreign jurisdictions removed their commanders to protect the accused rather than the victim. *Id.* at 4, 13.

rights of the accused to remain intact. Because military justice has become so politicized, this article proposes that military lawyers in prosecutorial roles, rather than commanders, should have decision-making authority for preferral and referral of certain cases to special and general courts-martial. The proposed offenses eligible for preferral and referral to special and general courts-martial should be limited to those offenses that authorize more than one year of confinement as a maximum punishment and have a companion statute under either Title 18 or Title 21 of the United States Code in order to ensure military accused are only prosecuted for offenses recognized as criminal in nature by civilian federal courts. Commanders should retain authority to issue non-judicial punishment and administrative action for any and all offenses under the UCMJ. This proposal ensures: (1) that the subject matter experts in military justice make charging decisions; (2) that commanders can maintain good order and discipline by issuing quick and binding disciplinary actions through non-judicial and administrative action; and (3) that servicemembers are not prejudiced by federal convictions for minor or military-specific offenses. Without a substantial change to prosecutorial authority and types of offenses that can be tried at court-martial, the military accused unjustly stands to lose protections afforded to the criminal defendant tried in civilian court.

This article explores the process and concerns with commanders' UCMJ authority, analyzes recent legislation, and proposes a new military justice model by incorporating the spirit of the MJIA. First, part II outlines the historical background of the UCMJ and command authority in military justice. Second, parts III and IV explore some of the legal conundrums, such as command discretion and unlawful command influence (UCI), which uniquely affect military justice cases. Third, part V critiques both the changes to the UCMJ in the FY 14 NDAA and the previously proposed MJIA. Lastly, the article presents a model that allows military lawyers to obtain prosecutorial discretion over crimes, bolsters command authority to instill good order and discipline, and attempts to provide the means for a military accused to receive a fair trial.

II. History of the UCMJ

The UCMJ functions as a living, breathing document that reflects the changing times. Initially governed by the Articles of War of 1775 and the Articles for the Government of the Navy, in 1950 the armed forces became subject to the UCMJ, a code that provided the same military justice system for all uniformed services.[24] As David Schlueter points out, there is a great deal of literature "on the history and background of the UCMJ."[25] In short, the original intent for the UCMJ, other than uniformity for the services, was to provide: (1) rights to the accused without interfering with the military mission; and (2) an adjudicative process that was not a civilian criminal justice system, yet not completely controlled by military commanders.[26] While Congress debates the effectiveness of the UCMJ, scholars and practitioners argue that the present-day court-martial structure reflects this originally intended balance of criminal justice and command control because the accused is afforded most of—if not all or more—the rights of any criminal defendant in the United States,[27] and the commander investigates alleged offenses, decides which charges will be preferred and referred, selects the panel, and considers clemency requests.[28] Perhaps the difficult question is not whether the original intent of the UCMJ is being met, but rather, whether the UCMJ still sufficiently protects the rights of the accused.

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[24] David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline*, 215 MIL. L. REV. 1, 4 (2013); THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 10 (20 May 1970) [hereinafter BACKGROUND]; Sameit, *supra* note 16, at 82.

[25] Schlueter, *supra* note 24 (citing ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES (1956); BRIGADIER GENERAL JAMES SNEDEKER, A BRIEF HISTORY OF COURTS-MARTIAL (1954); Walter T. Cox, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987); Major Gerald F. Crump, *Part II: A History of the Structure of Military Justice in the United States, 1921–1966*, 17 A.F. L. REV. 55 (Fall 1975); Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953); David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980).

[26] BACKGROUND, *supra* note 24.

[27] *See generally* Schlueter, *supra* note 24 (describing and applying the due process and crime control models to the military justice system); Fred L. Borch III, Regimental Historian & Archivist, The Judge Advocate General's Legal Center and School, Evolution of the Military Criminal Legal System before the Response Systems to Adult Sexual Assault Crimes Panel (June 27, 2013), http://www.c-spanvideo.org/program/AdultSe.

[28] Schlueter, *supra* note 24, at 56–58.

Change is not unheard of in the military justice system; the Articles of War and the *MCM*, which includes the UCMJ, have been amended multiple times since their inception.[29] Albeit flexible and adaptive, this separate system for military offenses governed by command authority has survived over 200 years of American jurisprudence. One constant that has remained from the Articles of War to the present-day *MCM* is that military commanders have full disposition authority, or ultimate prosecutorial discretion, for offenses committed by those subject to the UCMJ.[30] Military justice is considered the "commander's tool for discipline," and the "commander is at the root of the system."[31] However, this is not the first time in history that command discretion over military justice has been called into question.[32] The perception of how the military prosecutes alleged sex crimes has given new life to the debate; in 2014, commanders will begin to lose some authority over clemency requests for sexual assault offenses.[33] It remains to be seen whether Congress will continue to whittle away commanders' authority, or remove it altogether.

III. The Competing and Conflicting Responsibilities of Commanders

Commanders have a caretakers' responsibility when it comes to servicemembers subject to their command. Commanders are responsible for the health, welfare, and morale of all of their troops.[34] The

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[29] *See generally* BACKGROUND, *supra* note 24. There were seven versions of the Articles of War from 1775 to 1948. Amendments include but are not limited to changes in types of punishment, maximum sentences, statutes of limitation, jurisdiction, and appointment of counsel. *Id*. at 3–5. The MCM has been updated five times since 1970, most recently in 2012. *See* MCM, *supra* note 16.

[30] BACKGROUND, *supra* note 24.

[31] Borch, *supra* note 27.

[32] *Id.*; *see also* Edward F. Sherman, "*Military Justice Without Military Control*," 82 YALE L.J. 1398 (1973) (describing abolishment of foreign military justice systems and advocating for civilianization of the military justice system in the United States in order to "provide American servicemen with a greater system of justice"). *Id*. at 1425.

[33] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702 (2013) (removing commanders' ability to disapprove convictions or lesser included offenses for most offenses under the UCMJ); *id.* § 1705 (requiring a punitive discharge for rape, sexual assault, rape and sexual assault of a child, and forcible sodomy for offenses committed after June 24, 2014).

[34] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY paras. 1-5, 3-1, 3-2 (18 Mar. 2008) (RAR 20 Sept. 2012) [hereinafter AR 600-20]; U.S. DEP'T OF AIR FORCE INSTR. 1-1, AIR FORCE STANDARDS para. 1.7.1 (7 Aug. 2012); U.S. DEP'T OF NAVY, U.S.

responsibility is broad; commanders must focus on the physical, material, mental, and spiritual state of their servicemembers, civilian employees, and their families.[35] The duty to take care of servicemembers is the cornerstone of command; commanders are evaluated on their duty to take care of servicemembers directly through command climate surveys[36] and individual evaluation reports.[37] Commanders' responsibilities for their servicemembers' morale and welfare must be executed at all times. Major General Anthony Cucolo, former Commandant of the War College and former general court-martial convening authority (GCMCA) for the 3d Infantry Division, described the commander as "responsible for everything that happens to every individual Soldier and every single thing on his installation."[38] He further maintained that the families of servicemembers trust that the commander will take care of every aspect of that servicemember's life both at home and abroad.[39] This huge undertaking of responsibility is inherent and fundamental to serving as a commander; in terms of military justice, the commander's major duties fall under the broad categories of reporting, evaluations, military justice, and duties owed to opposing parties.

NAVY REGULATIONS, 1990, art. 0802 (14 Sept. 1990); MARINE CORPS MANUAL app. A, paras. 2000, 2817, 1011 (21 Mar. 1980).

[35] AR 600-20, *supra* note 34, para. 3-2.

[36] *Id.* para. 6-3.

[37] *See generally* U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 1-8 (5 June 2012) [hereinafter AR 623-3]. In the Army, commanders distribute command climate surveys to their Soldiers, and the Soldiers anonymously respond to questions regarding the climate of the unit. Officer evaluation reports are completed by officers senior to the rated individual and comment on the officer's duty performance and promotion potential.

[38] Interview with Major General Anthony Cucolo III, former Commandant, U.S. Army War Coll., in Carlisle, Pa. (Jan. 22, 2014). As the commandant of the U.S. Army War College for two years (after relinquishing command in June 2014) he was directly responsible for the education and leader development of senior military and civilian leaders in the rank of Lieutenant Colonel, Colonel, and GS-15. His experience as a Division Commander and War College Commandant uniquely positions him to explain what is expected of commanders and senior leaders in the armed forces. *See also* Borch, *supra* note 27 (describing how the commander is the individual responsible for everything that happens to his servicemembers and his unit).

[39] *Id.*

A. Reporting

One obligation that a commander has is to report certain incidents or alleged offenses to designated personnel or agencies. In general, commanders use the established chain of command to inform the higher headquarters at each level of UCMJ actions.[40] Depending on the offense, a commander must send a serious incident report (SIR) to the higher headquarters.[41] Sexual harassment cases involving a commander in the rank of O-6 or higher or sexual harassment/assault response and prevention (SHARP) personnel, "curious cases," or cases likely to receive media attention, must be reported to Headquarters, Department of the Army.[42] Unrestricted reports of sexual assault cases where the victim is a servicemember must be reported to the installation commander, first officer in the grade of O-6, and first general officer in the chain of command, within eight days of receipt.[43] The report must include the victim's progress, care, and support, referral to investigators, details of the incident, and post-incident actions.[44] Reporting obligations ensure that appropriate personnel are informed of incidents that could affect members of an installation or deployed area, draw media attention, or that will require further action from those higher in the chain of command.[45]

B. Evaluations

Congress has required greater accountability of leaders' actions taken with regard to sexual assault. The secretaries of the military departments, and thus their subordinate commanders, must ensure that all

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[40] In practice, informing a senior commander of UCMJ actions can occur by informal means, such as an e-mail or "telephone call," or by more formal means, such as a briefing or memorandum.

[41] U.S. DEP'T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 1-1 (30 Mar. 2007).

[42] Memorandum from Deputy Chief of Staff, G-1, to Principal Officials of Headquarters, Dep't of Army et al., subject: Guidelines and Process for Critical Command Information Requirements (CCIR) regarding Sexual Harassment and Assault Incidents (11 Oct. 2013) [hereinafter G-1 memo].

[43] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1743, 127 Stat. 672 (2013).

[44] *Id.*

[45] *See generally* G-1 memo, *supra* note 42.

servicemembers have received extensive training on sexual assault.[46] Accountability for actions taken in furtherance of eradicating sexual assault has spread to every leader in the military as efforts made in support of the SHARP program must be reflected in every Army non-commissioned officer evaluation report (NCOER) and officer evaluation report (OER).[47] The Secretary of Defense is required to direct the military secretaries to "verify and track" their commanders' compliance in conducting climate assessments in an effort to prevent and report sexual assault.[48] Accountability is required to be evaluated by senior leaders in terms of their command climate regarding sexual assault.[49] Commanders must ensure that "sexual assault allegations are properly managed and fairly evaluated" and that "a victim can report criminal activity, including sexual assault, without fear of retaliation, including ostracism and group pressure from other members of the command"; if a commander fails in these tasks, he can be relieved of command.[50]

C. Military Justice

Military discipline is one component of a commander's responsibility.[51] In the armed forces, the UCMJ is an important part of command authority. The Army views military justice and good order and discipline as intertwined, and preserving the integrity of the system is of utmost importance.[52] Major General Cucolo underscored this point when he noted that command authority and the UCMJ go hand-in-hand:

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[46] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 577, 118 Stat. 1812 (2004); *see generally* U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT (18 Dec. 2009) (RAR 4 Aug. 2011) (outlining all mandatory Army training).

[47] U.S. DEP'T OF ARMY, DIR. 2013-20, ASSESSING OFFICERS AND NON-COMMISSIONED OFFICERS ON FOSTERING CLIMATES OF DIGNITY AND RESPECT AND ON ADHERING TO THE SEXUAL HARASSMENT/ASSAULT RESPONSE AND PREVENTION PROGRAM (27 Sept. 2013) [hereinafter ARMY DIR. 2013-20].

[48] National Defense Authorization Act for Fiscal Year 2014 § 1721.

[49] *Id.* § 1751.

[50] *Id.*

[51] AR 600-20, *supra* note 34, para. 4-1; *see also* Borch, *supra* note 27 (stating that discipline is one piece of everything the commander is responsible for, and the "commander is at the root of the system").

[52] *See generally* Memorandum from Sec'y of Def., to Sec'ys of the Military Dep'ts, et al., subject: Integrity of the Military Justice Process (6 Aug. 2013).

> Good order and discipline is the fabric of the armed forces, and to remove the UCMJ is to tear at the very fabric of the institution. The commander has the responsibility to take people from all walks of society, normalize them, and make them obedient to orders. A commander's responsibility becomes meaningless when his authority is removed. The UCMJ is a system of checks and balances on the people in the system to ensure they behave properly, and there is no way to parse command authority out of it. The commander is best situated to understand the Soldier and receive information from his subordinates about a case.[53]

Commanders have always been expected to instill good order and discipline in their units; UCMJ authority, including preferring and referring cases to court-martial, has been a tool to assist in that institutional responsibility.

First and foremost, the individual commander is charged with treating all of his personnel fairly and equally.[54] When an offense is alleged to have occurred, the commander of that servicemember has several obligations. The first category of obligation is investigation. A commander must make a preliminary inquiry into all suspected offenses.[55] A commander can then direct a member of his command to conduct an investigation[56] or contact the criminal investigative units, such as Criminal Investigative Division (CID), Naval Criminal Investigative Service (NCIS), or the Air Force Office of Special Investigations (AFOSI) for an investigation into alleged offenses within their purview.[57] In the military justice realm, the commander makes disposition decisions after appointed officers, military police, or criminal investigators have completed their respective investigations into alleged offenses.[58]

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[53] Interview with Major General Anthony Cucolo III, *supra* note 38.

[54] AR 600-20, *supra* note 34, para. 1-5.

[55] MCM, *supra* note 16, R.C.M. 303.

[56] U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006) [hereinafter AR 15-6].

[57] U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES app. B (15 May 2009) (RAR 6 Sept. 2011) [hereinafter AR 195-2]; U.S. DEP'T OF NAVY, SEC'Y. OF NAVY INSTR. 5430.107, MISSION AND FUNCTIONS OF THE NAVAL CRIMINAL INVESTIGATIVE SERVICE para. 6b(1) (28 Dec. 2005).U.S. DEP'T OF AIR FORCE, INSTR. 71-101, CRIMINAL INVESTIGATIONS PROGRAM paras. 1.5, 2.1.2 (8 Apr. 2011).

[58] MCM, *supra* note 16, R.C.M. 306.

Commanders have many options available when presented with evidence that a servicemember under their command has allegedly committed an offense under the UCMJ. Under certain circumstances, a commander can impose pretrial restraint on an accused, including "conditions on liberty, restriction in lieu of arrest, arrest, or confinement."[59] A commander has the option of taking no action against a servicemember, issuing an administrative action, imposing non-judicial punishment, or preferring charges.[60] Currently, only commanders have the ability to make decisions regarding alleged offenses under the UCMJ.[61] Although a commander can seek legal advice, he is only required to do so before referral of charges to a court-martial, and it is the commander's decision as to whether or not to follow that advice.[62] Although anyone subject to the UCMJ can prefer charges, in Army practice, a commander is the individual who signs the charge sheet against an accused. The commander has full prosecutorial discretion, and only a commander can refer a case to a court-martial.[63]

D. Duties Owed to Opposing Parties

The commander's multitude of military justice responsibilities can conflict. For example, in a case that involves both a victim and an accused, such as a sexual assault, a commander owes a duty to both individuals. The commander owes any accused several protections during and after the court-martial process.[64] In a sexual assault case, the commander may temporarily reassign or remove an accused for the purpose of good order and discipline as soon as the commander receives

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[59] *Id.* R.C.M. 304.
[60] *Id*. R.C.M. 306.
[61] *Id.*
[62] *See* UCMJ art. 34 (2012) (Before referring a case to trial, the convening authority must receive written advice from his Staff Judge Advocate (SJA) addressing jurisdiction, whether a specification alleges an offense, and whether the Article 32 report of investigation shows that the "specification is warranted by the evidence.").
[63] Borch, *supra* note 27.
[64] *See* MCM, *supra* note 16, R.C.M. 302, 304–05, 308, 705, 707, 1101, 1105, 1107–09, 1113–14, and ch. XIII. The commander is bound by the Rules for Courts-Martial in terms of apprehension, arrest, pretrial confinement, restriction, notification of charges, pretrial agreements, speedy trial, post-trial procedures, and summary courts-martial. *See also id.* MIL. R. EVID. 301, 305, 311–13, 315–16. The commander is bound by the military rules of evidence prohibiting compulsory confessions, illegal searches and seizures, and inspections.

an unrestricted report of sexual assault.[65] The commander has a duty to consider a victim's preferences and avoid re-victimization; he may also transfer the victim to a different unit.[66] Commanders issue military protective orders to either or both the accused and the victim to ensure the parties do not have contact with each other.[67] Commanders must appoint and train unit victim advocates, sexual assault response coordinators, victim witness liaisons, and special victim counsel, all of whom he must make available, to victims.[68] The commander has a responsibility to, "when appropriate, consult with the victim on pretrial and charging decisions"[69] and must also consider the victim's input when submitted during the post-trial process.[70] Additional protection and support for the victim is a positive step in the right direction,[71] as it is good for command responsibility, soldier care, morale of the unit, and encouraging reporting of sexual assault and justice for the victim. However, the enhanced focus on the victim could directly or indirectly impact the due process rights of the accused.[72]

It is the role as decision-maker in the military justice realm that creates the complex and untenable situation for commanders. Commanders are required to handle a multitude of tasks simultaneously.[73] They have been required to balance servicemembers' due process rights with serving military justice and maintaining good order and discipline in their units for decades.[74] As Major General Cucolo noted in praise of commanders, they "can handle vast quantities of diverse information, all of which is hitting them at the same time. They are trained and educated to do that."[75] The question then is not whether commanders can continue to have authority over complex cases,

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[65] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1713, 127 Stat. 672 (2013).
[66] AR 600-20, *supra* note 34, para. 8-5.
[67] *Id.*
[68] *Id.* para. 8-3; National Defense Authorization Act for Fiscal Year 2014 § 1716.
[69] AR 600-20, *supra* note 34, para. 8-5; U.S. DEP'T OF ARMY, REG. AR 27-10 MILITARY JUSTICE para. 18-15 (3 Oct. 2011) [hereinafter AR 27-10].
[70] National Defense Authorization Act for Fiscal Year 2014 § 1706.
[71] Interview with Major General Anthony Cucolo III, *supra* note 38.
[72] Borch, *supra* note 27; *see also* discussion *infra* Part V.B.
[73] *See generally* AR 600-20, *supra* note 34. Commanders at all levels are responsible and accountable for all personnel, equipment, missions, daily operational requirements, and military justice.
[74] *See* BACKGROUND, *supra* note 24.
[75] Interview with Major General Anthony Cucolo III, *supra* note 38.

but whether they should, especially as the pressure to protect victims and adjudicate every case grows.

The additional military justice requirements, by virtue of a change in law and policy, are on their face positive steps toward addressing sexual assault in the military. However, those being evaluated on how they address sexual assault allegations are also the decision-makers for military justice. Several retired senior officers testified during the January 30, 2014, Response Systems to Adult Sexual Assault Crimes Panel. In support of Senator Gillibrand's MJIA removing UCMJ authority from commanders, Major General (Retired) Martha Rainville, former Adjutant General of the Vermont National Guard (both Army and Air)**,** stated,

> I think that the decisions to prosecute or not should be based on evidence, independent of preexisting command relationships and that really our men and women deserve that fair treatment and due process that would come with that. I strongly believe in holding commanders responsible. That is a given. But we should not confuse command responsibility with leadership. Commanders should always be responsible for command climate. And this change, if made, would allow those commanders to focus their efforts on command business, improving the command climate, and on the warfighting abilities of their units.[76]

In advocating for military lawyers to make prosecutorial decisions rather than commanders, she further noted this would "let commanders lead, to free them to focus on mission-readiness and warfighting in their command climate and inspiring and leading."[77]

Clearly, commanders have a responsibility to prevent and respond to sexual assault, command their units, accomplish their missions, and take care of all of their servicemembers. However, commanders cannot properly evaluate cases without their loyalties and duties to the accused

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[76] *See* Transcript of Response Systems to Adult Sexual Assault Crimes Panel: The Role of the Commander in the Military Justice System: Perspectives of Retired Senior Commanders and Former Officers 11–12 (Jan. 30, 2014) [hereinafter RSP Transcript], *available at* http://responsesystemspanel.whs.mil/.

[77] *Id.* at 13–14.

and victim conflicting. Colonel (Retired) Paul McHale, former Congressman and Assistant Division Commander of the Fourth Marine Division**,** made this point when he explained the difficulty for a commander to remain "truly impartial" when adjudicating "an adversarial relationship" between "accused and accuser"[78] and discussed a commander's concerns about scrutiny of command climate, the unit, the war fighting mission, and his own career.[79] A commander's conflicting interests can jeopardize the individual due process rights of the accused when he is acting as the decision-making authority.

IV. The Present Concern about Unlawful Command Influence

Commanders may receive criticism for taking too little action in military justice cases. A victim of any crime could experience trepidation when she enters the criminal justice system. Victims of sexual assault might experience fear of retaliation, damage to reputation, harassment or violence to her or her family, and anxiety that no one will do anything on her behalf.[80] In the military justice system, victims might suspect that their superiors will not take their complaints seriously, and ultimately, the concern might be that the commander of the accused would not only take no action against the assailant, but would take action against the victim herself.[81] This theme is prevalent in "The Invisible War," as several women describe being raped or otherwise sexually assaulted, and the command taking little to no action in their cases or even punishing the victims.[82] The Commandant of the Marine Corps shared his experience with learning of the prevalence of sexual assault in the military upon speaking with a female captain and master sergeant who told him that they had been "sexually assaulted at every rank [they] held."[83] Statistics have been advertised to show that thousands of rapes

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[78] *Id*. at 44.
[79] *Id.* at 45, 86–87.
[80] Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, HERITAGE REP., Nov. 6, 2013, http://report.heritage.org/sr149.
[81] For example, a victim might have engaged in misconduct that is punitive under Article 92 of the UCMJ, such as underaged drinking or engaging in a prohibited relationship, which could lead to her reluctance to report.
[82] *See generally* THE INVISIBLE WAR, *supra* note 12.
[83] General James F. Amos, Commandant of the U.S. Marine Corps, Heritage Brief at Marine Corps Recruit Depot in Parris Island, S.C. 12 (Apr. 19, 2012) [hereinafter Amos Brief] (transcript on file with the author).

or sexual assaults are unreported in the military.[84] The question is whether victims do not report sexual assaults in the military because of lack of command action against the accused, fear of retaliation, prosecution for their own collateral misconduct, a resigned acceptance of the male-dominated climate and culture, a combination of the aforementioned factors, or another reason entirely. Regardless of the reason, a victim's reluctance or failure to report a crime of this nature is a problem in any circumstance.

When the commander has any influence over a court-martial involving victims, the military justice practitioner must be concerned with the opposite problem that can occur—that the commander will overreach in his power to influence or prosecute the case. A commander could engage in unlawful command influence by exercising too much authority and thus taking unlawful action in a case.[85] Unlawful command influence has been identified as the "mortal enemy of military justice" for decades because it "tends to deprive [s]ervicemembers of their constitutional rights."[86] In general, the integrity of the system is compromised by a finding of UCI, and for a specific case, a founded claim of UCI could result in the severe consequence of dismissal of those charges[87] or reversal of a conviction.[88] The prosecutor and victim in the military justice system have a unique concern that is not present in civilian criminal cases; the intentional or unintentional exercise of unlawful influence by a commander can result in dismissal of the charges for which that victim has suffered great harm.

The Rules for Courts-Martial (RCM) contain prohibitions for commanders who have authority over court-martial proceedings to minimize the possibility of UCI. First, absent a few exceptions, commanders and convening authorities are prohibited from reprimanding, censuring, admonishing, coercing, or influencing court-martial members, military judges, or tribunals in their roles of

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[84] THE INVISIBLE WAR, *supra* note 12; Lolita Baldor & Donna Cassata, "*Most Military Sexual Assault Cases Go Unreported*," ASSOCIATED PRESS, May 8, 2013, http://news.yahoo.com/most-military-sexual-assault-cases-unreported-071009797.html.

[85] DAVID A.SCHLUETER, MILITARY CRIMINAL JUSTICE PRACTICE AND PROCEDURE 365–67 (LexisNexis, 7th ed. 2008).

[86] United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

[87] Lieutenant James D. Harty, *Unlawful Command Influence and Modern Military Justice*, 36 NAV. L. REV. 231, 242 (1986).

[88] SCHLUETER, *supra* note 85, at 380 (citing United States v. Levite, 25 M.J. 334 (C.M.A. 1987)).

determining appropriate findings or sentences for an accused.[89] Second, neither those who have served as court-martial members nor defense counsel may receive negative evaluation reports due to the performance of their professional duty in a court-martial.[90] Third, neither general nor special court-martial convening authorities may prepare fitness or efficiency reports relating to duty performance for a military judge detailed to that convening authority's respective court-martial.[91] Fourth, commanders and judge advocates are prohibited from unlawfully influencing witnesses.[92] These prohibitions protect panel members, defense counsel, military judges, and witnesses in any and all court-martial proceedings.

Rule for Courts-Martial 104 merely scratches the surface of what can constitute UCI. It can occur at any point in the court-martial process, even before preferral of charges.[93] To allege UCI, defense counsel must present facts[94] showing that some evidence of UCI is present.[95] Once the defense has met this burden, the government must, beyond a reasonable doubt: (1) disprove the facts proferred as evidence of UCI; (2) persuade the military judge that the facts do not amount to UCI; or (3) prove that UCI will not affect the proceedings at trial.[96] If the defense is successful in its UCI claim, then several remedies are available to the accused,

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[89] MCM, *supra* note 16, R.C.M. 104(a)(1) –(3). The exceptions include: (1) commanders can receive military justice education; (2) the military judge and counsel may give statements and instructions "in open session;" (3) the Judge Advocate General may professionally supervise and discipline counsel; and (4) counsel, the military judge, or court-martial member can be prosecuted for a UCMJ offense.

[90] *Id*. R.C.M. 104(b)(1).

[91] *Id*. R.C.M. 104(b)(2).

[92] SCHLUETER, *supra* note 85, at 378 (citing United States v. Drayton, 45 M.J. 180 (1996); United States v. Thomas, 22 M.J. 388 (C.M.A. 1986); United States v. Harris, 65 M.J. 594 (N.M. Ct. Crim. App. 2007); United States v. Gleason, 39 M.J. 776 (A.C.M.R. 1994)).

[93] *Id*. at 365–92. Professor Schlueter's book includes an extensive explanation of unlawful command influence (UCI), to include the definitions and examples of actual, apparent, and perceived UCI, cases that show how UCI was raised at different stages of the court-martial and against both commanders and other military members, and how to avoid UCI.

[94] United States v. Simpson, 58 M.J. 368, 373 (C.A.A.F. July 1, 2003) (citing United States v. Biagese, 50 M.J. 143, 150 (C.A.A.F. Apr. 13, 1999)).

[95] *Id.* at 373 (quoting United States v. Ayala, 43 M.J. 296, 300 (C.A.A.F. Sept. 29, 1995)).

[96] *Id.* at 373 (citing *Biagese*, 50 M.J. at 151 and United States v. Stoneman, 57 M.J. 35, 41 (C.A.A.F. July 5, 2002)).

including the most advantageous to the accused—dismissal of a case or the overturning of a conviction.[97]

Notably, UCI has affected and continues to affect cases due to the outcry over sexual assault. Recent legislation suggests that Congress is trying to strike the right balance of influence the commander should have over a court-martial.[98] The amount of proposed legislation itself shows that Congress is displeased with the way the services have handled sexual assault.[99] However, some of the senior military leadership's efforts to address the alleged problem with sexual assault have backfired. One of the most high-profile examples occurred when defense attorneys successfully filed UCI motions based on President Obama's Naval Academy Graduation address.[100] In the past year, defense counsel have alleged UCI in various forms based on the leadership's response to the purported sexual assault crisis, and several have resulted in significant remedies for the accused.[101] Perhaps most significant was *United States*

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[97] SCHLUETER, *supra* note 85, at 371 (citing United States v. Lewis, 63 M.J. 405 (C.A.A.F. Aug. 9, 2006) (government failed to prove beyond a reasonable doubt that the court-martial was unaffected by UCI); *Simpson*, 58 M.J. at 373–74 (citing *Biagese*, 50 M.J. at 152 and United States v. Rivers, 49 M.J. 434, 443 (C.A.A.F. Oct. 1, 1998) (possible remedies include: transfer of case to a different general court-martial convening authority (GCMCA), orders prohibiting retaliation, "changes of venue, liberal grants of challenge for cause" during voir dire, "and the use of discovery and pretrial hearings to delineate the scope and impact of alleged unlawful command influence")).

[98] National Defense Authorization Act for Fiscal Year 2014**,** Pub. L. No. 113-66 (2013), 127 Stat. 672. Sections 1701, 1715, 1716, 1723–26, 1733–34, 1742–45, and 1751 require more action from the commander with regard to sexual assault, while sections 1702, 1705, 1806, 1708, 1741, 1751, and 1753 limit the commander's discretion in sexual assault allegations and cases.

[99] *See, e.g.*, Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013); Better Enforcement for Sexual Assault Free Environments Act of 2013, S. 1032, 113th Cong. (2013); Combating Military Sexual Assault Act of 2013, H.R. 2002, 113th Cong. (2013); Military Sexual Assault Prevention Act of 2013, S. 548, 113 Cong. (2013); STOP Act, H.R. 1593 113th Cong. (2013).

[100] Jennifer Steinhauer, *Remark by Obama Complicates Military Sexual Assault Trials*, N.Y. TIMES, July 13, 2013, http://www.nytimes.com/2013/07/14/us/obama-remark-is-complicating-military-trials.html?pagewanted=2&_r=1 (as quoted in the introduction to this article).

[101] Erik Slavin, *Judge: Obama Sex Assault Comments "Unlawful Command Influence,"* STARS & STRIPES, June 14, 2013, http://www.stripes.com/judge-obama-sex-assault-comments-unlawful-command-influence-1.225974. In both cases the option for the panel to punitively discharge the accused Navy seaman was removed from the options for punishment due to President Obama's comments. Also, in *United States v. Betts*, 12–188, at 40 (2d Marine Division, Camp Lejeune, N.C., Oct. 2, 2012) and *United States v. Maza*, 73 M.J. 507 (N-M. Ct. Crim. App. 2014) (appealed on other grounds), the military judge ruled that extensive *voir dire* would be allowed to determine whether and to what

v. Kaufman, an Army case in which the sexual assault offenses were dismissed when the GCMCA received a promotion after referring a case where the recommendation from the chain of command and investigating officer was to not send the case forward.[102] Additionally, in *United States v. Sinclair*, the military judge halted the trial and allowed the defense to submit another offer to plead guilty after finding that the convening authority had been unlawfully influenced.[103] Congress has attempted to address the problem of sexual assault by ensuring more cases are prosecuted, but the potential effect is that commanders may be sending cases forward when they should not. When a commander receives a career benefit, such as a promotion, after referring a sexual assault case, the benefit could be construed as an endorsement of his so-called independent authority being exercised exactly as Congress sees fit. Because of the nature of the commander's role in military justice, the result of the professional benefit to that commander could be the exact opposite of what Congress intended—a finding of UCI and the dismissal of a sexual assault case.

Even publicly discussing discipline and accountability in terms of military justice problems, such as sexual assault allegations, can create a UCI problem. It is understandable for senior leaders, such as the commander-in-chief of the armed forces and the Commandant of the Marine Corps, to address the problem of sexual assault in the ranks. However, the way in which statements are made and the audience to whom they are made could make a difference. For example, the commander-in-chief is speaking to all servicemembers when he makes a policy statement and calls for firing or a dishonorable discharge in all sexual assault cases; this could logically be construed as UCI.[104] General Amos made comments about his personal knowledge of Congress's lack of trust in the military's ability to handle sexual assault cases, demanded that his leaders fix the problem, and advocated that the health and future of the Marine Corps depended upon solving the problem of sexual

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extent UCI had infected the panel, and the accused was provided two additional preemptory challenges during *voir dire* after the Commandant of the Marine Corps, General James Amos, made several comments at his Heritage Bridge speech at Parris Island, South Carolina, on April 19, 2012.

[102] Transcript of Article 39(a) session, United States v. Kaufman, at 71–72 (Shaw Air Force Base, June 15, 2013) (investigating officer found that no reasonable grounds existed for any of the sexual assault charges).

[103] David Zucchino, *Judge Rules Army Command Interfered in Sinclair Sexual Assault Case*, L.A. TIMES, Mar. 10, 2014, http://www.latimes.com/nation/nationnow/la-na-nn-sinclair-judge-rules-military-interfered-20140310,0,1682787.story#axzz2w9ROt3UP .

[104] Shear, *supra* note 1.

assault.[105] In the current system, no leader with command authority can take a public stance against sexual assault without concern that the comments could be intentional or unintentional UCI.

The potential for UCI to taint any military case is palpable. Professor Elizabeth Hillman, who testified at the Response Systems to Adult Sexual Assault Crimes Panel in January 2014, noted the need to obtain "high prosecution and conviction rates has never been higher for a convening authority" and that UCI occurs because convening authorities have "pressure to demonstrate progress on all the metrics."[106] In an interview regarding UCI with two army brigade commanders who requested to remain anonymous, one stated that if a sexual assault or sexual harassment case comes across his desk, even if he thinks it is not a good case, he feels he should send it forward, err on the side of the victim, and hope that justice is served in the end.[107] He stated that there is "indirect UCI from the top right now."[108] The second brigade commander contended that the hard part is when he is told by someone that there is no case, but everyone looks to him to make the decision, and he will be scrutinized for not seeming to take the matter seriously enough if he does not opt for a court-martial.[109] He stated that there is a lot of indirect pressure, and his concern is that a statistic will show that he did not send enough cases forward, that his name will be out there as "someone who doesn't get it," and that if he does not believe the victim, then he is further victimizing her.[110] These commanders' comments and their request to remain anonymous show that UCI is a problem at ranks below the GCMCA, as commanders are fearful to make the unpopular decision to not refer a sexual assault case when they truly believe referral is not appropriate.

Commanders are not the only offenders of UCI. Any servicemember could influence a commander with military justice decision making authority to take action that amounts to UCI. For example, judge advocates can commit UCI, which ultimately occurs by virtue of their duty to advise commanders.[111] In *United States v. Sinclair*, the evidence

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[105] Amos Brief, *supra* note 83, at 12, 16.
[106] RSP Transcript, *supra* note 76, at 315–16.
[107] Interview with an Anonymous Person, Charlottesville, Va. (Nov. 7, 2013).
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] SCHLUETER, *supra* note 85, at 365–66 (citing United States v. Kitts, 23 M.J. 105, 107-8 (C.M.A. 1987) (case remanded to determine whether staff judge advocate (SJA)

that led to a finding of UCI by the military judge was a letter submitted by a judge advocate, the victim's special victim counsel, to the convening authority; she claimed that if the convening authority accepted the plea offer submitted by the defense, it "would have an adverse effect on my client and the Army's fight against sexual assault"[112] and "allowing the accused to characterize this relationship as a consensual affair would only strengthen the arguments of those individuals that believe the prosecution of sexual assault should be taken away from the Army."[113] Military lawyers, by virtue of their close advisory relationship with commanders or as advocates for individuals involved in the system, are positioned to unlawfully influence the process.

Even if commanders no longer had authority in prosecuting courts-martial, UCI could occur through panel or Article 32 investigating officer (IO) selection. A GCMCA selects panel members in accordance with Article 25 of the UCMJ.[114] He also selects IOs for Article 32 hearings.[115] The military judge and counsel must explore any scintilla of UCI or bias due to command relationships in *voir dire*.[116] Although the potential for UCI diminishes when the commander is not involved in the charging decisions and post-trial, IOs and panel members might be concerned with how their evaluation reports or promotions will be affected if they decide a case a certain way.[117] Because commanders still

committed unlawful command influence (UCI) by contacting witnesses, discussing the case on videotape, speaking with prospective court members, and obtaining defense counsel's pretrial motions prior to execution of the pretrial agreement); United States v. Hamilton, 41 M.J. 32, 37 (C.M.A. 1994) (an SJA could commit UCI because he "generally acts with the mantle of command authority") (citing *Kitts*, 23 M.J. 108).

[112] Zucchino, *supra* note 103.

[113] Alan Blinder & Richard A. Oppel, Jr, "*Plea Deal Talks Begin After Sexual Assault Trial Against Army General is Halted*," N.Y. TIMES, Mar. 11, 2014, http://www.nytimes.com/2014/03/12/us/general-sinclair-sex-abuse-court-martial.html.

[114] UCMJ art. 25 (2012).

[115] *Id*. art. 32; *see generally* SCHLEUTER, *supra* note 85, 371–72. The FY 14 NDAA mandates that an "impartial judge advocate" shall serve as the Article 32 hearing officer "whenever practicable, or in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer that is not a judge advocate." National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013). If a judge advocate is not available to serve as a hearing officer, then a judge advocate must provide legal advice to the hearing officer. *Id*.

[116] *See generally* SCHLUETER, *supra* note 85, at 371 and 373.

[117] Perhaps the most challenging concern is that panel members might not understand how they have been unlawfully influenced by congressional legislation, the current climate of sexual assault, and their leadership's expectations. Furthermore, they might not be forthcoming with their answers on this subject in a public setting or may conform their answers to those of the group. *See* RICHARD WAITES, COURTROOM PSYCHOLOGY

have the authority to make procedural and substantive decisions in all phases of a court-martial, there is the potential for unlawful command influence to forever plague the military justice system.[118]

One goal of sweeping changes to the military justice system should be to minimize UCI. Under the current MJIA, UCI could still occur in prosecution of the minor, military-specific offenses by either commanders or judge advocates advising commanders because commanders would still make those charging decisions under the UCMJ.[119] Presumably, for the serious, non-military offenses as delineated by the MJIA, there would be fewer, if any, claims of UCI in the court-martial decision making process because commanders would not make those charging decisions. Unless commanders were required to make and forward recommendations on disposition to the prosecuting judge advocate, then judge advocate UCI in the charging process would be minimized because military lawyers would make all charging decisions without command approval or authority.[120] Although types of UCI, such as influencing investigations, witnesses, or court members, could occur, UCI by commanders could be minimized in the charging phase if commanders no longer had prosecutorial discretion.

AND TRIAL ADVOCACY 292 (A.L.M. Media LLC 2002); Lieutenant Colonel Eric R. Carpenter, *An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, ARMY LAW., May 2011, at 6, 7 (citing S.E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, *in* GROUPS, LEADERSHIP, AND MEN: RESEARCH IN HUMAN RELATIONS 177 (Harold Guetzkow ed. 1951); SOLOMON E. ASCH, SOCIAL PSYCHOLOGY (1952); Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN. & APPLIED 1 (1956); *see also* GREGORY BURNS, ICONOCLAST: A NEUROSCIENTIST REVEALS HOW TO THINK DIFFERENTLY 88–92 (2008) (parenthetical omitted); SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 81–84 (2005)).

[118] *See* Victor Hansen, *The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences*, 21 MICH. ST. INT'L L. REV. 229 (2013) (providing an overview of the changes to several foreign military justice systems to address the problems with military commander influence over the different actors and stages of the process).

[119] Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013).

[120] It is important to note that military lawyers and other servicemembers could still be influenced by Congress, senior military or civilian leadership, or their superiors during any phase of the process, which likely would be considered unlawful command influence even though the commander is no longer the decision making authority. However, the amount of UCI claims would likely decrease if commanders are not preferring or referring cases. Defense counsel also could consider motions for selective or malicious prosecution or prosecutorial misconduct if facts arise that support a claim of improper or unlawful influence by senior officials or superiors on the prosecution.

Currently, military leaders are in a catch-22 situation when it comes to sexual assault policy and UCMJ authority. Strong leadership and demands for culture change and accountability may be construed as UCI because commanders are the decision-makers for all UCMJ actions.[121] Unlawful command influence is an evil that must be uncovered and destroyed in any military justice case in order to protect the due process rights of the accused. A commander's congressionally mandated requirement of effectively addressing the problem of sexual assault is potentially in direct conflict with his need to exercise independent discretion in military justice. A commander has the ability to possibly taint every sexual assault case because a commander's message or actions to deter sexual assault could amount to UCI. Furthermore, when the government loses a case or the accused receives relief at trial due to UCI, then the senior leadership subsequently attempts to repair the statements construed as UCI[122] or Congress changes the law in an effort to avoid losing sentencing options for the panel.[123] The vicious cycle will only repeat itself when commanders' leadership responsibilities and military justice authority clash. Cases will be affected by UCI, only to lead to senior leaders' cleansing statements, additional proposed legislation, more efforts by commanders to address the problem, and thus new cases of UCI. Only a system that does not involve the commander in the most serious cases can effectively minimize UCI in the military justice system.

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[121] Obama Address, *supra* note 1; Amos Brief, *supra* note 83. By contrast, Lieutenant General David Morrison, Chief of the Australian Army, in response to an investigation into sexually inappropriate conduct, stated that those who engage in this behavior "have no place in this Army," should "get out," and that they did not belong "amongst this band of brothers and sisters." *Chief of Army Message Regarding Unacceptable Behaviour* (June 12, 2013), *available at* http://www.youtube.com/watch?v=QaqpoeVgr8U. He further promised he would "be ruthless in ridding the Army of people who cannot live up to its values" and stated he "need[s] every one of you to support [me] in achieving this." *Id.* In the United States military comments like these by a senior leader easily could be construed as UCI. However, the Australian military no longer has a convening authority. Hansen, *supra* note 118.

[122] Memorandum from Sec'y of Def., to Sec'ys of the Military Dep'ts, et al., subject: Integrity of the Military Justice Process (6 Aug. 2013).

[123] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1705, 127 Stat. 672 (2013). Congress "cured" any further potential UCI problems caused by the President's comments by making a dishonorable discharge mandatory in all rape, sexual assault, rape and sexual assault of a child, and forcible sodomy cases six months after the President's comments. *Id*.

V. The FY 14 NDAA Affects Actors in the Military Justice System

The FY 14 NDAA substantially changed several provisions under the UCMJ that affect the accused, victim, and commander—both pre- and post-trial. Just as claims of UCI have emerged as a result of the military's increased response to sexual assault, the changes in the law show a heightened focus on the responsibility of commanders to recommend prosecution of sexual assault allegations and protect alleged victims. President Obama signed the NDAA on December 26, 2013.[124] It was composed of H.R. 1960 and S. 1197, both of which passed on June 14, 2013.[125] Although additional legislation could be passed to further amend the UCMJ, the NDAA already greatly affects the process of courts-martial and the roles of many of the major players in the system—the accused, the victim, and the commander.

A. The Accused

When sexual assault allegations must be investigated by the appropriate service-specific criminal investigative team, an investigation into the accused's alleged actions will no longer be left to the discretion of the recipient of the complaint. Although Army Regulation (AR) 195-2 dictated that rape and sexual assault cases are within the purview of CID, and the general practice was that CID would investigate sexual assault cases, commanders were not necessarily required to send every allegation of sexual misconduct to CID.[126] Currently, when a commander receives a report of a "sex-related offense," he must immediately refer the case to the appropriate criminal investigative division.[127] The case cannot be investigated at the local level through a commander's inquiry or 15-6 investigation.[128] When any case investigated by CID is determined to be founded against a subject, then the accused will be titled with the offense.[129] A founded case is one that

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[124] *Obama-Signed Bill Provides Military Pay, Bonuses*, U.S. DEP'T OF DEF., Dec. 26, 2013, http://www.defense.gov/news/newsarticle.aspx?id=1214504.

[125] ARMED SERV. COMM., *FY 14 NDAA House-Senate Bill Text*, http://armedservices.house.gov/index.cfm/ndaa-home?p=ndaa (last visited Jan. 29, 2014).

[126] AR 195-2, *supra* note 57, app. B. For example, if the case involved a minor offensive touching, then the case, at least initially, might not have been referred to an investigative division, such as the criminal investigative division (CID).

[127] National Defense Authorization Act for Fiscal Year 2014 § 1742.

[128] MCM, *supra* note 16, R.C.M. 303; AR 15-6, *supra* note 56.

[129] AR 195-2, *supra* note 57, para. 1-4. Because this is a CID procedure, an accused is not titled for an offense as a result of an RCM 303 commander's inquiry or investigation

is "adequately substantiated by police investigation."[130] When an accused has been titled, then any law enforcement agency can presumably find that fact in a person's background.[131] If the accused is acquitted at trial or the charges are dismissed, the title will still remain, and the fact that the case was initially founded by CID results in a likely permanent stain on an accused's background.[132] All sexual assault allegations will be treated with the appropriate time, attention, and resources as they are thoroughly investigated by professionals trained in criminal laws and procedure. However, a low threshold for evidence will result in nearly every investigation being founded, which results in substantial consequences for the lifetime of each accused.

The accused is losing substantial due process rights under the FY 14 NDAA. Before the passage of the NDAA, an Article 32 hearing was a "thorough and impartial investigation of all the matters set forth therein" and an "inquiry as to the truth of the matter set forth into the charges."[133] The NDAA amends Article 32 of the UCMJ to a limited preliminary hearing where there must be a determination of jurisdiction, form of charges, probable cause that a crime has been committed, and recommended disposition.[134] The NDAA further limits the former thorough, impartial, and truth-seeking function of the Article 32 hearing by specifically providing that a victim is not required to testify and will be considered unavailable if she elects not to do so.[135] In contrast, at the Article 32 hearing, before the passage of the FY 14 NDAA, the accused was to be given a full opportunity to cross-examine witnesses, present a defense or matters in mitigation, and have the IO examine his available witnesses.[136] The Article 32 was also to "serve as a means of

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under AR 15-6. According to the glossary, a "subject" is "a person about whom probable cause exists to believe that the person committed a particular criminal offense." *Id*.

[130] *Id*.

[131] *Id*. para. 1-4.

[132] *Id.* para. 4-4. It is unlikely that a subject will be successful in removing a title. If the subject, upon request to the Director, U.S. Army Crime Records Center, can prove that "credible information did not exist to believe that the individual committed the offense for which titled as a subject at the time the investigation was initiated, or the wrong person's name has been entered as a result of mistaken identity," then the title will be removed. *See also* Major Patricia Ham, *The CID Titling Process—Founded or Unfounded?*, ARMY LAW. , Aug. 1998, at 1, 6, 12–15.

[133] UCMJ art. 32 (2012).

[134] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013).

[135] *Id.*

[136] UCMJ art. 32 (2012).

discovery."[137] Moreover, all relevant and non-cumulative evidence was admissible.[138] Thus, the Article 32 hearing was a forum where the accused could fully attack the credibility of his accusers and present a defense to all charges. The NDAA limits these provisions by requiring that cross-examination and evidence "relevant to the limited purposes of the hearing" be considered.[139] These changes might have been prompted by Congress's view that victims have been subject to "hostile" and graphic questioning at Article 32s.[140] That subjective determination as to what specific cross-examination might have been inappropriately included in previous Article 32s has substantially whittled away pre-trial protections afforded the accused.[141]

The prosecution benefits from the recent change in the law to Article 32 hearings to the detriment of the accused. The changes made by the NDAA transform the Article 32 hearing to a proceeding similar to a civilian grand jury because it is now limited to questions of jurisdiction, probable cause, and disposition.[142] The benefit to the trial counsel is that less evidence presumably will be necessary for a finding of probable cause; with such a low burden on the government and the loss of the previous thorough and impartial investigation standard, defense counsel will have fewer opportunities to demand that charges be dismissed. The government will also benefit at this stage of the proceeding because

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[137] MCM, *supra* note 16, R.C.M. 405(a) discussion.

[138] *Id.* R.C.M. 405(g)(1)(B).

[139] National Defense Authorization Act for Fiscal Year 2014 § 1702.

[140] Adele M. Stan, *Gillibrand's Sexual Assault Measure Slated for Stand-Alone Vote*, RH REALITY CHECK, Dec. 17, 2013, http://rhrealtity check.org/article/2013/12/17/gillibrands-sexual-assault-measure-slated-for-stand-alone-vote/; Annys Shin, *Judge Finds Midshipman Not Guilty in Naval Academy Sex Assault Case*, WASH. POST, Mar. 20, 2014, http://www.washingtonpost.com/local/judge-to-rule-in-naval-academy-sexual-assault-case-after-hearing-closing-arguments/2014/03/20/d9211394-b040-11e3-b8b3-44b1d1cd4c1f_story.html.

[141] Specific rules of evidence that protect the victim, such as military rule of evidence (MRE) 412 and MRE 303, apply at an Article 32 proceeding. Except in "exceptional circumstances," judge advocates are the IOs for all Article 32 investigations and presumably understand how to apply these rules. National Defense Authorization Act for Fiscal Year 2014 § 1702.

[142] Lieutenant Homer E. Moyer, Jr., *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 51 MIL. L.REV. 1, 10 (1971). The difference between the Article 32 and a civilian grand jury is that the investigating officer makes a disposition recommendation to the convening authority while a civilian grand jury's decision is determinative of whether or not a case is indicted. *Id*.

fewer resources will be needed for an Article 32 hearing.[143] Less testimony will be admissible due to the limitations on admissibility, and hearings presumably will be shorter in length. Because the accused is losing the opportunity to present a full defense to the charges, it is likely that fewer cases will be dismissed after Article 32 hearings when the admissibility of evidence is so limited for the defense.

The number of prosecutions will likely increase as a result of the FY 14 NDAA. Under RCM 306, commanders could consider 11 factors when determining how to dispose of an offense, including the character and military service of the accused.[144] The FY 14 NDAA strikes that factor from RCM 306; the accused's character and military service can no longer be considered when the commander is initially determining how he wants to dispose of a case.[145] This provision applies to all offenses under the UCMJ. In circumstances where a commander might have been inclined to give an Article 15, issue a reprimand, or allow resignation or discharge in lieu of court-martial for a servicemember with a stellar character and military service,[146] that accused might be prosecuted for even a minor violation of the UCMJ without consideration of his personal and professional record. Also, all crimes had a statute of limitations of five years other than "absence without leave or missing movement in time of war," "murder, rape, rape of a child," and "offenses punishable by death."[147] The FY 14 NDAA amended "rape" and "rape of a child" under Article 43 to "rape or sexual assault" and "rape or sexual assault of a child."[148] Servicemembers can now be prosecuted, tried, and punished for sexual assaults and sexual assaults of a child without regard to time limitations, which could lead to more prosecutions.

There are fewer options for the accused in terms of what sentence he receives for a sexual assault conviction. First, the maximum punishment

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[143] However, more cases will likely go forward. Initial savings on resources at the Article 32 will be eliminated if more cases with weak evidence are referred to courts-martial.

[144] MCM, *supra* note 16, R.C.M. 306 discussion (b)(J).

[145] National Defense Authorization Act for Fiscal Year 2014 § 1708.

[146] *See generally* UCMJ art. 15 (2012); U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ch. 10 (6 June 2005) (RAR 6 Sept. 2011) [hereinafter AR 635-200]; U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES ch. 3 (12 Apr. 2006) (RAR 13 Sept. 2011) [hereinafter AR 600-8-24].

[147] UCMJ art. 43 (2012).

[148] National Defense Authorization Act for Fiscal Year 2014 § 1703(a).

for rape has increased since the *MCM* was amended in 2012.[149] The FY 14 NDAA further limits the sentencing options for a panel or military judge for an accused convicted of sexual assault because the finder of fact is now required to give a dismissal or dishonorable discharge for a conviction, actual or attempted, for rape, sexual assault, rape or sexual assault of a child, and forcible sodomy.[150] The accused and convening authority cannot bargain for a lesser sentence in a pre-trial agreement than what is required by law when there is a mandatory minimum sentence for an offense; however, the parties can negotiate a bad-conduct discharge rather than a dishonorable discharge.[151] The sentence the accused will receive in specific cases under Article 120 will ensure that servicemembers convicted of these offenses will no longer serve in the military regardless of any characteristics or factors that could have once been in their favor and produced the result of continued service despite their crime.

As a result of the FY 14 NDAA, the accused is suffering an additional loss with regard to what he can petition for in his clemency request. Before the passage of the FY 14 NDAA, commanders could dismiss charges and specifications or change findings of guilty on charges and specifications to findings of guilty to lesser included offenses. Now an accused's conviction can only be set aside or reduced to that of a lesser included offense if his conviction is: (1) not for rape or sexual assault, forcible sodomy, or rape or sexual assault of a minor; and (2) for an offense for which the maximum sentence is no more than two years and does not include a punitive discharge.[152] If the commander grants the clemency request, he must state in writing his reasons for doing so.[153] For the remainder of offenses under the UCMJ, the commander can only set aside a conviction or change it to a finding of guilty to a lesser included offense if the maximum sentence that can be adjudged is two years or less, and the actual sentence adjudged does not include confinement for more than six months or a bad-conduct or dishonorable discharge.[154] These provisions substantially limit the

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[149] UCMJ art. 120 (2012); 2013 Amendments to the Manual for Courts-Martial, United States, Exec Order No. 13,543, 78 Fed. Reg. 29,559 (May 15, 2013). The maximum punishment for rape increased from life with or without eligibility for parole to life without eligibility for parole. *Id.*

[150] National Defense Authorization Act for Fiscal Year 2014 § 1705.

[151] *Id.* § 1702.

[152] *Id.*

[153] *Id.*

[154] *Id.*

accused's ability to request the convening authority to undo the gravest of consequences of a court-martial for serious offenses; namely, the conviction, term of confinement, and level of discharge.[155] If the accused is convicted of an offense that may not be dismissed by the convening authority in clemency, he might be limited to either a post-trial Article 39(a) session with the military judge to move for reconsideration of the findings or an appeal.[156] This limitation on the accused and the convening authority does place the military justice system on par with civilian criminal justice systems where the decision of a jury is final, absent a judge granting a motion for a new trial or an appellant winning on appeal.[157]

Article 60 of the UCMJ served both commanders and the accused by giving the convening authority the final say in a court-martial and providing an additional chance for the accused to essentially be found not guilty.[158] This provision of clemency allowed the military judicial process to become a nullity. Other than increasing the sentence an accused received, the convening authority had complete control over any court-martial because he could dismiss or alter findings of guilty for charges and specifications after a case had gone through the judicial process.[159] Regardless of the evidence presented and the verdict reached, the commander could undo a finding he determined to be incorrect without explanation or justification.[160] It is unclear whether the

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[155] *Cf.* Military Justice Improvement Act of 2013, S. 967, 113th Cong. § 6 (2013). In terms of limiting command authority, section 6 is even more restrictive to the accused and commander because it removes the convening authority's power to reverse or alter the findings of a verdict reached by a military panel. Section 6 strikes the provisions allowing for dismissal of charges and specifically states that convening authorities may not dismiss charges or change findings of guilty on charges or specifications to guilty to lesser included offenses.

[156] MCM, *supra* note 16, R.C.M. 1102. Rule for Courts-Martial (RCM) 1102 allows for post-trial Article 39(a) sessions for inquiries into a matter that "arises after trial and that substantially affects the legal sufficiency of any findings of guilty or the sentence." Rule for Courts-Martial 1102 also allows for a motion for reconsideration of a "trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence." *Id.*

[157] *Id*.; UCMJ art. 66 (2012); Sameit, *supra* note 16, at 93. If the accused receives more than one year of confinement or a punitive discharge, he can still appeal on the basis that there is no legal or factual sufficiency for the charges of which he was found guilty. *Id.*

[158] UCMJ art. 60 (2012).

[159] MCM, *supra* note 16, R.C.M. 1107(d)(1).

[160] Section 1702 of the FY 2014 NDAA also requires the convening authority to provide a written explanation for eligible cases of a sentence adjudged of less than six months and without a bad-conduct or dishonorable discharge, in which he disapproves, commutes, or suspends the sentence.

convening authority's power to grant any clemency will be removed entirely in the future.

Although the clemency provisions in the FY 2014 NDAA severely limit the accused and commander in post-trial, they add legitimacy to the military justice system. When a conviction is overturned by a commander, the perception is that the court-martial is a useless waste of time and resources. This is evidenced by the congressional discontent with Lieutenant General (Retired) Helms's and Lieutenant General Franklin's dismissal of findings of guilt in sexual assault cases when unconvinced beyond a reasonable doubt that the servicemembers were guilty even though the panel of military officers who heard all the evidence were in fact so convinced.[161] Removing the power to dismiss or alter convictions from the convening authority ensures that a panel's decision is final, and if there is legal error or other grounds for an appeal, the accused will use the well-established appellate process to request relief.[162] The FY 14 NDAA aligns the rights of a convicted servicemember with the rights of a convicted civilian, and it demands that the judicial process in the military be equally credited and respected.[163] Although civilianization adds legitimacy to the military justice system the question is whether and which of the FY 14 NDAA provisions have in effect created a system with fewer rights for the military accused.

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[161] Davis, *supra* note 2; Whitlock, *supra* note 4. Lieutenant General (Retired) Helms and Lieutenant General Franklin were the same GCMCAs who found sufficient evidence of a crime to send the case forward to court-martial. However, the evidence available at the Article 32 hearing is not as substantial as that in a complete record of trial, which the convening authority reviews post-trial. Section 6 of the MJIA, which called for an absolute prohibition on the commander's authority to set aside findings of guilty or amend findings of guilty to lesser included offenses regardless of the type of offense, was in part motivated by the outrage expressed over the clemency granted to Lieutenant Colonel Wilkerson. Interview with Major Bridget Byrnes, former advisor to Senator Kirsten Gillibrand, in Washington, D.C. (Dec. 4, 2013).

[162] MCM, *supra* note 16, R.C.M. 201(e)(5), 1203, 1204, 1205. servicemembers have the right to appeal their convictions to their respective service court of appeals, the Court of Appeals for the Armed Forces, and ultimately the Supreme Court of the United States. *Id*.

[163] *See infra* p. 134 and note 27.

B. The Victim

Defense counsel will have less access to victims as a result of the UCMJ provisions in the FY 14 NDAA. For example, a victim is not required to testify at the Article 32 hearing.[164] If the victim elects not to testify, she will be deemed "not available."[165] This clear mandate would likely preclude defense counsel from requesting that the IO indicate that the victim refused to testify on the Department of Defense (DD) Form 457, IO's Report, thereby eliminating the opportunity for the convening authority to draw a negative inference from her lack of participation. If the victim chooses not to participate, then the defense is unable to cross-examine the victim before trial and thus loses the ability to observe the victim's appearance, voice, and mannerisms, assess her credibility, and obtain recorded sworn testimony about the offense.[166] It appears that this change in the law was prompted by the perception that victims have been subject to mistreatment at Article 32 hearings.[167] Although Congress has ensured that victims are not subjected to perceived mistreatment, this provision of the FY 14 NDAA will substantially limit the scope of what the accused was originally entitled to—including discovery, an opportunity for substantial cross-examination, and presentation of evidence—at the Article 32 hearing.[168]

Defense counsel could be precluded from or substantially limited in their ability to talk to the victim before an Article 32 hearing or trial. Under the *MCM*, counsel and the court-martial had "equal opportunity to obtain witnesses and other evidence."[169] Now, when the trial counsel notifies the defense counsel of a sexual assault victim in a case involving a charge under Article 120, 120a, 120b, 120c, or 125, the defense counsel must request an interview of that victim through the trial counsel.[170] Furthermore, the trial counsel, special victim's counsel, or sexual assault victim advocate must be present during any interview by the defense counsel if the victim so chooses.[171] This substantially

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[164] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702 (2013).
[165] *Id*.
[166] LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES 1-2, 1-9 (LexisNexis, 2d ed. 2004).
[167] Stan, *supra* note 140.
[168] *See* UCMJ art. 32 (2012).
[169] *Id*. art. 46.
[170] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1704.
[171] *Id*.

changes the battlefield for defense counsel because in the past, counsel could contact a victim directly or through her chain of command without government counsel knowing about or impacting the interview. Also, during the interview, defense counsel could now be forced to show their trial strategy and work product to the government counsel. Defense counsel will likely want to speak to victims, but might choose not to under the new law, so as not to "show their hand" before trial. Whether or not counsel decide to interview the victim, they lose a previously held advantage that ultimately affects the accused's chances at trial.

Victims are gaining substantial rights in the military justice system under the FY 14 NDAA. Victims are now entitled to a special victim counsel who will represent their interests from the initial report of the crime through the post-trial process and can even argue motions on a victim's behalf at court-martial.[172] In a sexual assault case, the victim will have the following resources: a trial counsel and special victim prosecutor handling the case, a special victim counsel, a unit victim advocate, a victim witness liaison, and any other potential services that she needs, such as a behavioral health physician.[173] The victim's opinion now must be considered by the convening authority who is considering granting an accused's request for discharge in lieu of court-martial.[174] Additionally, the victim of a case may submit matters to the convening authority when the convicted servicemember has submitted a petition for clemency, and her waiver of the right to do so must be in writing.[175] During clemency, the convening authority can only consider the victim's character as it was introduced at trial.[176] These provisions of the FY 14 NDAA have ensured that the victim's voice will be heard, that her rights will be protected, and that any evidence of bad character is not introduced to the convening authority if not properly admitted at trial.

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[172] *Id*. § 1702; LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. July 18, 2013).

[173] By contrast, the accused is only entitled to be represented by one counsel, which can be civilian counsel at the accused's expense, one detailed military defense counsel, or an individual military counsel as selected by the accused if that counsel is reasonably available. MCM, *supra* note 16, R.C.M. 506. It is also important to note that all of the individuals providing services to the victim work for the Staff Judge Advocate, who advises the GCMCA.

[174] National Defense Authorization Act for Fiscal Year 2014 § 1753.

[175] *Id*. § 1706.

[176] *Id*.

C. The Commander

The commander is losing independent discretion in the military justice realm as a result of the FY 14 NDAA. The sentencing, clemency, initial disposition considerations, and pretrial agreement changes that affect the accused and victim also affect the commander, as he is the party who makes the final decision in a case. Military justice decisions ultimately belong to the commander, and judge advocates advise commanders on those decisions.[177] Prior to the passage of the FY 14 NDAA, there was no explanation required for UCMJ decisions; commanders could claim that they merely followed the advice of their lawyers upon issuing an unpopular decision, and judge advocates could claim that they were only advisors.[178] Now, if both the staff judge advocate (SJA) and convening authority agree that a case should not be referred, and the convening authority does not refer the case, then the case will go to the next level in the chain of command for review.[179]

Additionally, when the SJA advises a GCMCA to refer a case to court-martial, and the GCMCA does not refer, the case will be submitted to the Secretary of the military department for review.[180] The change in the law does create more accountability in the system by ensuring that the SJA's advice and GCMCA's action are being documented and reported when a case does not go forward. However, unless there are special circumstances, an accused will have little to no ability to determine whether anyone influenced a commander to refer a case.[181]

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[177] MCM, *supra* note 16, R.C.M. 105.

[178] *But see* Opening Statement of Jack B. Zimmerman at 3, Meeting of the Response Systems Panel on Sexual Assault (Nov. 8, 2013), *available at* http://responsesystemspanel.whs.mil/public/docs/meetings/20131107/20131108/09_Persp_Mil_Def_Bar/Statement_Zimmermann_20131107.pdf (stating that commanders rely on their SJAs and "rarely" do not follow their advice).

[179] National Defense Authorization Act for Fiscal Year 2014 § 1744. This provision was amended to allow either the SJA or senior trial counsel to serve in this role. Victims Protection Act of 2014, S. 1917, 113th Cong. (as passed by Senate, Mar. 10, 2014).

[180] *Id.*

[181] *See, e.g.*, Zucchino, *supra* note 103 (explaining that the military judge found the letter submitted by the special victim counsel improperly influenced the convening authority in *United States v. Sinclair*).

Both of the reporting scenarios create a climate in which a commander should refer every case to avoid having his superior officer or the Secretary of the military department question his decisions. Furthermore, it creates friction between the SJA and convening authority if they do not agree on every case because that fact will now be disclosed to the appropriate Secretary of the Army. As Major General Cucolo pointed out, this change in the law has the potential to breed moral cowardice in the ranks because commanders will be afraid to make the unpopular and difficult, albeit correct, decision in not referring a weak case.[182] During the Response Systems Panel, in discussing the issue of commanders referring weak cases to trial against the advice of their lawyers, Mr. Harvey Bryant, a former Virginia prosecutor,[183] stated that it is an "abuse of the process" to "teach somebody a lesson when you know you're not going to win" and that losing weak cases teaches servicemembers that people can get away with crimes.[184] These perspectives show that Section 1744 will likely impact the rights of the accused, create weak leadership, and adversely affect the public's perception of the court-martial process.

Although Congress did not explicitly require convening authorities to make the same, specific decision in sexual assault cases regardless of the facts, one section of the FY 14 NDAA is problematic in terms of eroding commanders' discretion. It is Congress's "sense" that commanders should court-martial rape, sexual assault, and forcible sodomy cases or an attempt to commit those offenses, and if they decide not to do so, a written justification for their decision should be placed in the file.[185] Congress also stated that discharge in lieu of court-martial requests should be granted "exceedingly sparingly" and that an other-than-honorable discharge should be issued when separating the servicemember.[186] Congress's message is clear: a commander's prosecutorial discretion should be exercised by deciding to prosecute every alleged sexual assault at court-martial, regardless of the facts or weight of the evidence.

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[182] Interview with Major General Anthony Cucolo III, *supra* note 38.

[183] *Harvey Bryant Biography*, Response Systems to Adult Sexual Assault Crimes Panel, http://responsesystemspanel.whs.mil/index.php/about/panel/Bryant 9 (last visited June 9, 2014).

[184] RSP Transcript, *supra* note 76, at 287.

[185] National Defense Authorization Act for Fiscal Year 2014 § 1753.

[186] *Id*.

D. Additional Changes Post-FY 14 NDAA

The sweeping changes contained in the FY 14 NDAA already were amended to remove additional rights from the accused and provide further protection to the victim. As of September 6, 2014, the accused may no longer assert the "Good Soldier" defense at trial; he may no longer profess his innocence to a charge on the basis of his character.[187] Although the decision to prosecute a case in military or civilian court traditionally belonged to counsel or the convening authority, the commander must now give the victim's preference "great weight" in this decision.[188] As Lieutenant General (Retired) Helms pointed out in her critique of the recent changes to the UCMJ:

> Politics have become law because Congress is using law to fix a social problem. All cases are different; there cannot be one answer that solves a general problem. Congress wants the "right" outcome of every trial. There are very distinct phases of the sexual assault problem. Awareness, education, and accountability have created phenomenal change, but the military is not getting credit for it. Sexual assault has become a politically useful tool to attack the UCMJ process without understanding it and analyzing how structural changes will impact the victim and accused. Congress influencing the justice system is short-sighted and too damaging to the accused because influencing the process negatively influences his rights.[189]

The FY 14 NDAA and its follow-on legislation have tipped the scale in favor of the victim (and therefore the government) without any additional due process protections for the accused to ensure the scales of justice are in balance.[190]

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[187] Victims Protection Act of 2014, S. 1917, 113th Cong. § 3(g) (as passed by Senate, Mar. 10, 2014).
[188] *Id*.
[189] Interview with Lieutenant General Susan (Retired) Helms, *supra* note 5.
[190] Borch, *supra* note 27.

VI. The MJIA: Lost But Not Forgotten

A. The Great Debate over the MJIA

Several foreign jurisdictions, such as Canada, the United Kingdom, and Australia, have civilianized their military justice systems.[191] The MJIA proposed to civilianize the U.S. military justice system by entrusting lawyers with prosecutorial discretion over all felony-level UCMJ offenses.[192] Military leaders expressed opposition to the MJIA before the bill failed in the Senate.[193] General Raymond Odierno, in his testimony before the Senate Armed Services Committee opposing the MJIA, predicted a worsening of the problem with sexual assault and the enormous monetary cost of implementing the changes proposed under the MJIA.[194] The judge advocates of all of the military services stated the bill created "parallel systems of justice" with jurisdictional, non-judicial punishment, plea bargaining and manning problems.[195] Additionally, many retired judge advocates argued that commanders had both sufficient legal training and working relationships with their legal counsel to make UCMJ decisions and that the U.S. military justice system was distinguishable from the justice systems of U.S. Allies.[196] Several retired military officers asserted that the bill would reduce confidence in the chain of command, adversely affecting good order and

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[191] Hansen, *supra* note 118. Canada limited the role of commanders in the court-martial process; the Director of Military Prosecutors now determines the level of court-martial and panel members for a case, and the military police can request that a case go forward if the commander does not. *Id.* at 238. In the United Kingdom, the "prosecuting authority" now determines which cases will be referred to court-martial rather than the convening officer, and a court administrator establishes the logistics of the trial. *Id.* at 241. Australia abolished the convening authority, and the Director of Military Prosecutors and Registrar of Military Justice make court-martial decisions. *Id.* at 243. *See generally* Major General Michael D. Conway, *Thirty-Ninth Kenneth J. Hodson Lecture in Criminal Law*, 213 MIL. L. REV. (2012).

[192] Military Justice Improvement Act, S. 967, 113th Cong. (2013).

[193] *See* Jim Garamone, *Leaders Urge Care in Changing Commanders' UCMJ Responsibilities*, U.S. DOD AM. FORCES PRESS SERV., June 4, 2013, http://www.defense.gov/news/newsarticle.aspx?id=120209.

[194] Julian E. Barnes, *Gen. Odierno Opposes Gillibrand Measure on Sexual Assaults*, WALL ST. J., November 13, 2013, http://blogs.wsj.com/washwire/2013/11/13/gen-odierno-opposes-gillibrand-measure-on-sexual-assaults/.

[195] Letter from Lieutenant General Flora Darpino et al., to Senator James Inhofe (Oct. 28, 2013) (on file with author).

[196] Letter from Lieutenant General (Retired) Jack L. Rives et al., to Senators Carl Levin and James Inhofe (Aug. 30, 2013) (on file with author).

discipline, and impacting mission readiness.[197] Although it did not pass the Senate, the bill's strengths and weaknesses deserve evaluation because commanders' continued UCMJ authority will likely be questioned until Congress is satisfied with the military's handling of sexual assault.

B. Subject Matter Experts Should Practice Their Craft

In terms of congressional action in the military justice arena, section two of the MJIA proposed the most substantial change thus far. On May 16, 2013, Senator Gillibrand introduced the MJIA, and the act was debated in the Senate on November 20, 2013.[198] Section two of the MJIA divided UCMJ offenses by their respective maximum punishments and required judge advocate advice on the disposition of certain UCMJ offenses.[199] Under the current UCMJ, commanders have authority to dispose of all offenses, regardless of the seriousness of the crime or possible sentence.[200] Under the MJIA, commanders would have maintained disposition authority, including the power to prefer and refer charges to special or general courts-martial, for all offenses with either a maximum sentence of less than one year of confinement or that are uniquely military in nature.[201] Of the fifty-eight punitive articles with potential punishment, commanders would have retained authority for approximately twenty-five of those punitive articles.[202]

Former convening authorities and commanders expressed their concern with military lawyers making prosecutorial decisions. Lieutenant General (Retired) Helms stated that lawyers must consider the evidence, legal sufficiency, and risk of losing a case, rather than the overall human concept implicated by a case.[203] Commanders, on the other hand, consider the human beings affected and whether the accused

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[197] RSP Transcript, *supra* note 76; Letter from Lieutenant General (Retired) Robert K. Muellner et.al., to Senator Carl Levin (Nov. 13, 2013) (on file with author).

[198] Ramsey Cox, *Gillibrand: Military Has "Zero Accountability" for Assaults*, THE HILL, Nov. 20, 2013, http://thehill.com/blogs/floor-action/senate/190918-gillibrand-military-has-zero-accountability-for-assaults.

[199] Military Justice Improvement Act of 2013, S. 967, 113th Cong. § 2 (2013).

[200] MCM, *supra* note 16, R.C.M. 306.

[201] S. 967.

[202] *See generally* MCM, *supra* note 16, pt. IV. The author performed this calculation by counting the punitive articles that include offenses with a maximum punishment of up to and including one year and adding the excluded offenses under the MJIA.

[203] Interview with Lieutenant General (Retired) Susan Helms, *supra* note 5.

is guilty and being held accountable.[204] Similarly, Major General Cucolo noted that commanders are concerned about everyone involved in the process, including the accused, victim, and witnesses, and the family members of those individuals entrust commanders and the military in general to see that justice is served.[205] Brigadier General (Retired) Malinda Dunn, both a former Chief Judge of the Army Court of Criminal Appeals and Staff Judge Advocate,[206] commented that commanders have told their lawyers that some cases need to go to trial regardless of the outcome because "it is a critical case and it has a critical impact on good order and discipline."[207] These perspectives show that commanders have a greater stake in the outcomes of individual courts-martial than the actual result for the accused. The process is inherently unfair to an accused when the individual with prosecutorial discretion must consider anything other than the facts and the evidence in reaching a disposition decision in a criminal case.

Military justice attorneys are the best equipped to make all decisions regarding a criminal case because they are the subject matter experts personally and professionally invested in each part of the case. As Rear Admiral (Retired) Marsha Evans[208] pointed out in support of the MJIA:

> I think I would have accepted and even welcomed a senior JAG officer with prosecuting experience weighing the evidence and making a fact-based decision about whether to move forward with a court-martial. That would be in the best interest of the victim and accused. I cannot see how a commander's authority would be undermined and that she or he would somehow not be able to set the proper command climate to support

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[204] *Id.* Lieutenant General (Retired) Helms's position is that commanders are charged with the ability to cut through political questions and the emotions of politics. However, if commanders no longer have UCMJ authority over felony offenses, then civilian courts should have jurisdiction over these offenses. Her opinion is based on many factors, including Congress's scrutiny of the system based on politically unpopular decisions and the recent changes to the UCMJ as a result of the FY 14 NDAA that severely impacts the rights of the accused. *Id*.

[205] Interview with Major General Anthony Cucolo III, *supra* note 38.

[206] Brigadier General (Retired) Malinda Dunn, Response Systems to Adult Sexual Assault Crimes Panel, http://responsesystemspanel.whs.mil/index.php/about/panel/dunn.

[207] RSP Transcript, *supra* note 76, at 72.

[208] Rear Admiral (Retired) Evans served as a commander in the Navy for eight years with six years as a GCMCA. In 1992 she also served as the Director of the Navy's Standing Committee on Military and Civilian Women after *Tailhook*. *Id.*, at 22–23.

> the unit's mission, if cases proceeded to trial based on the strength[s] and weaknesses of evidence.[209]

Colonel McHale echoed this sentiment in his support of the MJIA:

> [A]n effective commander needs to focus his or her attention on the warfighting responsibilities of the command. Our commanders are superbly trained and carefully chosen to fulfill this warfighting duty. By contrast, commanders are rarely trained or prepared to exercise informed judgment regarding the weight of evidence in pending criminal matters.[210]

In his opinion, the judge advocate would give "an objective and professional assessment of the evidence."[211]

Commanders should not dispose of criminal offenses in today's military because commanders do not and cannot be expected to have the legal training necessary to make charging decisions. Throughout their careers, commanders receive legal advice about charging decisions but are not bound to follow it because they are the sole decision-making authority.[212] Most commanders attend a one-week Senior Leaders' Legal Orientation Course (SOLO) when they are selected for or serving in Brigade Command at the rank of lieutenant colonel or colonel.[213] Although they may receive some legal training in various courses throughout their career, such as a career course or intermediate level education, they receive little to no legal training during the first 15 to 20 years of their careers and only a short course during the SOLO.[214] During that gap between serving as commanders and receiving some legal training, all commanders have the ability to prefer charges, forward charges, or issue company grade or field grade Article 15s, which could lead to court-martial.[215] The MJIA addressed the problem with the

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[209] *Id.* at 26–27.
[210] *Id.* at 43.
[211] *Id.* at 86.
[212] MCM, *supra* note 16, R.C.M. 306, 105.
[213] Each year the dates for the SOLO courses and the SOLO curriculum are posted on http://www.JAGCnet.army. mil. COURSE CATALOG: FISCAL YEAR 2014 (The Judge Advocate Gen.'s Legal Ctr. & Sch., 2014), *available at* https://www.jagcnet2.army.mil/Portals/Files/ jaglcsfiles.nsf/ Index/d5835b60be18c5cc85257bcd0074cc6b/$FILE/FY14%20TJAGLCS%20Course%20Catalog%20-%20Approved.pdf (login required).
[214] *Id.*
[215] *See* MCM, *supra* note 16, R.C.M. 306.

current system; untrained individuals should not make decisions that forever impact the lives of all accused servicemembers and others affected by the case, such as victims and witnesses.

Military lawyers are better suited to make charging decisions and determine which cases should go to trial because they have the necessary legal training and background. All military lawyers must earn a degree from an American Bar Association-accredited law school, gain admission to and maintain good standing in their state bar,[216] graduate from an Officer Basic Course with mock trial experience for a typical sexual assault case,[217] and may attend short courses with additional sexual assault litigation training.[218] Judge advocates from all services with several years of experience also attend a graduate course at The Judge Advocate General's Legal Center and School. The MJIA allows for the subject matter experts to perform their legal duties directly, without having to advise commanders and rely on their ultimate judgment in cases.

Lawyers are the gatekeepers for keeping weak cases from going to trial. Judge advocates serving as trial counsel are the attorneys who know the case intimately and are best suited to make the decision as to which cases should go forward based on the evidence.[219] Courts-martial are a drain on resources for which the taxpayers bear the burden. A military lawyer's independent, professional, and trained analysis of which felony cases should be court-martialed is necessary to ensure that the accused receives a fair trial, victims are not re-victimized, and government resources are not wasted in order to serve a political agenda.

The use of one-year maximum confinement as a dividing line for disposition authority is a sound legal concept. The one-year cutoff in the

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[216] HOW TO BECOME A JAG LAWYER: 6 STEPS, http://www.wikihow.com/Become-a-JAG-Lawyer (last visited Mar. 20, 2014).

[217] Officer Basic Course Student Guide provided by Major (Professor) Meghan Wakefield, Instructor, The Judge Advocate Gen.'s Legal Ctr. & Sch., to author (Nov. 26, 2013, 10:15 A.M. EST) (on file with author).

[218] Intermediate Trial Advocacy Course Student Guide provided by Major (Professor) Jeremy Steward, Instructor, The Judge Advocate Gen.'s Legal Ctr. & Sch., to author (Nov. 26, 2013, 10:20 A.M. EST) (on file with author).

[219] *See* RSP Transcript, *supra* note 76, at 311–13. The Honorable Barbara Jones stated that prosecutors consider facts, law, and risk of defeat at trial. Mr. Bryant stated that lawyers consider credibility of the victim, probable cause, resources, problems that exist in a case, and whether or not there should be a conviction.

MJIA delineated which offenses are more serious than others.[220] Generally, felony offenses are punishable by more than one year of imprisonment.[221] Felony convictions have more serious consequences in society, such as the loss of the right to vote,[222] loss of the right to serve as a juror,[223] and employment, housing, and education consequences.[224] The message that the MJIA sent is that military lawyers should handle crimes that carry more serious consequences to the accused, while commanders may continue to dispose of cases that are less serious or purely military in nature.[225] When considering the fact that lawyers are better trained and equipped to handle more serious offenses, this one-year cutoff is a sensible way to ensure that the most serious crimes receive due attention from the subject matter experts. The MJIA's proposed sweeping change of removing serious offenses from commanders ensures that traditional crimes are treated as such by lawyers practicing criminal law and that commanders influence good order and discipline by handling minor, military-specific offenses. However, there are inconsistencies within the legislation that detract from the success of that feat.

VII. Improvements to the Military Justice Improvement Act

A. Exclusion of All Crimes

Senator Gillibrand's SA 2099 was an amendment to the original MJIA that gave additional disposition authority to commanders initially

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[220] Interview with Major Bridget Byrnes, *supra* note 161. Major Byrnes confirmed that the one-year cutoff is the bright-line rule that is defined by what constitutes a felony-level offense. Those offenses deserve the fairest, blindest justice. *Id*.

[221] BLACK'S LAW DICTIONARY 694 (9th ed. 2009).

[222] Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?*, 31 HUM. RTS. 16 (2004); *see also* Andrew S. Williams, *Safeguarding the Commander's Authority to Review the Findings of a Court-Martial*, 28 BYU J. PUB. L. (forthcoming Summer 2014).

[223] Gabriel J. Chin, "*Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*," 54 HOW. L.J. 675, 687 (2011).

[224] *Id*. at 689.

[225] Military Justice Improvement Act of 2013, S. 967, 113th Cong. § 2(a)(4) (2013). The MJIA specifically excludes several offenses from the mandatory removal from command authority that carry more than one year of punishment but are military in nature. One example of this is desertion. UCMJ art. 85 (2012). *See also* Interview with Major Bridget Byrnes, *supra* note 161. Lawyers should decide the disposition on serious offenses. The offenses that are excluded to remain with commanders are uniquely military in nature and address disciplinary problems.

removed by her bill. Thus, SA 2099 struck the MJIA's original section 552 and replaced it with an amended version of section 552.[226] The initial version of the MJIA failed to exclude some offenses that are minor, purely military offenses from the list of those proposed for removal from command authority, such as Article 92 and many offenses under Article 134. [227] Article 92 has a maximum sentence of confinement of two years, and the three possible violations of the article are: violation of a general order or regulation, violation of a superior order, and dereliction of duty.[228] All three of these offenses are considered minor and purely military in nature. Several offenses under Article 134 that are purely military in nature were not excluded due to their greater than one year of maximum punishment.[229] The most recent version of the MJIA allowed punitive articles 83–117, 133, and 134 to remain within command disposition authority.[230]

In general, the problem with the MJIA is that some excluded offenses carry the most severe of maximum punishments, such as death, and it is unclear why a commander should not have disposition authority over a "bad checks" offense under Article 123a but can still dispose of desertion charges under Article 85.[231] It is also unclear why certain offenses under Article 134 were excluded from removal. Article 134 is comprised of 55 offenses, including the general article that allows the government to allege any conduct is illegal if the terminal element, "that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces."[232] Approximately 27 of the Article 134 offenses carry a maximum punishment of greater than one year of confinement, and of those 27, only five do not have a companion

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[226] *Id*. (amended by SA 2099 (2013)).
[227] *See generally* S.967 § 2.
[228] UCMJ art. 92 (2012).
[229] The Article 134 offenses previously not excluded by the original MJIA are: disloyal statements, impersonation of a commissioned, warrant, noncommissioned or petty officer, or an agent or official with intent to defraud, self-injury without intent to avoid service in time of war, or in a hostile fire pay zone, intentional self-inflicted injury, intentional self-inflicted injury in a time of war or in a hostile fire pay zone, loitering or wrongfully sitting on post in time of war or while receiving special pay under 37 U.S.C. § 310.
[230] S. 967 (amended by SA 2099 (2013)).
[231] *Id*.
[232] *See generally* UCMJ art. 134 (2012). Within those fifty-five offenses are additional offenses that are named and described as "lesser included offenses" or "other cases" of the title article.

offense under Title 18 or 21 of the United States Code.[233] If the bill excluded all Article 134 offenses from removal for being purely military in nature, then it is unclear why several offenses that have a criminal component or comparable federal criminal statute were excluded as well.[234] If commanders cannot be entrusted with the authority to handle serious, non-military offenses, then the MJIA should not have excluded the serious, non-military offenses contained within Article 134. The UCMJ could be amended to carve specific offenses, such as child pornography and kidnapping, out of Article 134.[235] Otherwise, the notion that commanders cannot have authority over sexual assault and murder cases but can maintain disposition authority over a violent crime, such as kidnapping, or child pornography, a crime with potentially thousands of victims in one case, defies logic.

B. Prosecution of Criminal Acts

The MJIA should have eliminated prosecution of minor offenses. The MJIA allowed for courts-martial for offenses that would not carry the possibility of a criminal conviction in civilian court. Under the MJIA, commanders could still prefer and refer charges that carry a maximum sentence of confinement of one year and below for approximately 23 punitive articles.[236] Some examples of this are Article 134 (adultery), Article 134 (fraternization), and Article 133 (conduct unbecoming an officer and gentleman).[237] Each of these offenses is minor and would not be prosecuted in civilian criminal court.[238] Under

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[233] *See* Appendix. These offenses include bigamy, disloyal statements, fraternization, self-injury, and loitering in a time of war.

[234] Examples include but are not limited to: possession and/or distribution of child pornography, kidnapping, assault with intent to commit murder, voluntary manslaughter, rape, robbery, arson, burglary, or housebreaking, negligent homicide, child endangerment, and communicating a threat.

[235] As the MJIA is currently written, this could only be accomplished by Congress subsequently enacting new punitive articles for these offenses because all offenses under Article 134 are excluded from removal.

[236] Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013).

[237] *See* MCM, *supra* note 16, app. 12.

[238] Fraternization and conduct unbecoming an officer and gentleman are military offenses. *Id.* part IV. Adultery is a misdemeanor crime under Section 255.17 of New York Penal Law but generally not prosecuted. Sewell Chan, *Is Adultery a Crime in New York?*, N.Y. TIMES CITY ROOM (Mar. 21, 2008, 1:51 PM), http://cityroom.blogs.nytimes.com/2008/03/21/is-adultery-a-crime-in-new-york/?_r=0.

the MJIA, the military accused would still be prosecuted for misdemeanor offenses for which he can receive a federal conviction.

The potential for convictions for misdemeanor-level and military-specific offenses is a reality in military justice. Minor offenses are regularly prosecuted, and convictions result. In the Army alone, from 2011 to 2013, there were 127 convictions for Article 134 (adultery), 13 for Article 134 (fraternization), and 41 for Article 133 (conduct unbecoming an officer and gentleman).[239] From 2011 to 2013, there were 509 convictions for Article 92 violations alone.[240] Thus, the MJIA's failure to exclude prosecution for these minor offenses would not be without consequences to the accused because commanders could still refer these offenses to court-martial. The MJIA proposed a radical change to the system that did not consider alternatives to prosecution for minor, military-specific offenses, but it should have.

A servicemember should not face the possibility of a federal conviction for minor offenses, especially those that are military in nature. Minor offenses that would not otherwise carry a criminal conviction in civilian court should not be adjudicated in a court-martial because the consequences of a federal conviction are too severe for minor, military-specific offenses. Servicemembers will not serve in the military for the duration of their lifetimes; they will retire or be discharged at some point in their careers. They should be afforded the same protections that a civilian court would provide, such as a differentiation between major and minor offenses and resulting consequences, depending on the nature of the offense. The military justice system fails to provide this protection because regardless of the seriousness of the offense or the maximum punishment, all offenses can be tried at a general court-martial.[241] Also, any conviction could be considered a federal conviction because military

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[239] E-mail from Malcolm Squires, Clerk of the Court, Office of the Clerk of Court, Army Court of Criminal Appeals, to author (Nov. 21, 2013, 16:04 P.M. EST) [hereinafter Squires e-mail] (on file with author). These figures represent convictions at court-martial solely for these specific individual offenses; these numbers are not indicative of convictions where the servicemember was convicted for additional offenses. Additionally, there were 631 convictions for Article 86 (Absence Without Leave), for which there is a maximum punishment of less than one year for all offenses with the exception of being absent without leave for more than thirty days and terminated by apprehension, which carries a maximum punishment of eighteen months. *Id*.

[240] *Id.* This does not include convictions for the offense where the servicemember was convicted of additional offenses.

[241] MCM, *supra* note 16, R.C.M. 201(f)(1)(A)(i).

courts are federal courts.[242] Servicemembers might be able to explain that a special court-martial conviction should be treated as a misdemeanor conviction due to the jurisdictional one-year confinement maximum that can result from that proceeding, but the argument is complicated due to their differences in federal and state laws and their potential interpretations of a servicemember's conviction.[243] The military accused experiences a greater consequence at court-martial than a criminal defendant in civilian courts because the military accused can be prosecuted for offenses unlikely to have been prosecuted in civilian court.

The MJIA would not have solved the problem of unlawful command influence or the pressure on commanders to prosecute all cases in order to retain UCMJ authority. It is an understood practice, whether civilian or military, that the prosecution will include all possible charges or advise the commander to prefer all charges, even those minor in nature, in the hopes of securing a conviction for at least one offense.[244] Furthermore, when commanders must report the outcome of cases, it benefits the command to report that the accused was convicted of some offense, even if acquitted of the greater offense of rape or sexual assault.[245] Thus, one can predict that if given the authority, the commander would continue to refer even minor offenses for prosecution at court-martial.

The MJIA attempted to differentiate serious from less serious offenses by using the one-year maximum punishment as a line of demarcation. However, because it allowed for prosecution of minor and military-specific offenses and does not limit the type of conviction that can result, it did not address the remaining inherent unfairness to the military accused who will receive all of the burdens of a criminal conviction through a court-martial.[246] If legislation extinguished the possibility for prosecution at court-martial for minor, military-specific offenses, then the military accused only could be prosecuted for criminal

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[242] *Id*. R.C.M. 907(b)(2)(C).

[243] *Id*. R.C.M. 201(f)(2)(B)(i) *see* Williams, *supra* note 222 (citing Matthew S. Freedus & Eugene R. Fidell, *Conviction by Special Courts-Martial: A Felony Conviction?*, 15 FED. SENT. R. 220 (2003)).

[244] This assertion is based on the author's professional experiences as a Trial Defense Counsel and Trial Counsel from 2009 to 2013.

[245] *See* RSP transcript, *supra* note 76, at 315–16.

[246] *See* Williams, *supra* note 222.

offenses recognized by civilian courts.[247] The spirit of the MJIA was to civilianize the military justice system by requiring that lawyers rather than non-lawyers have prosecutorial discretion.[248] A system that mirrors modern civilian criminal law will meet the intent of the bill and makes the revised UCMJ process as proposed more practical.[249]

C. One System of Prosecution

The MJIA does not address the practical or ethical considerations that result from granting commanders prosecutorial discretion for some offenses and judge advocates for others. Under military law, the commander should prefer all known charges at the same time.[250] Serious and minor offenses are included on one charge sheet. Under the system proposed by the MJIA, the judge advocate would have authority over the serious felony-level offenses, and the commander would have authority over the misdemeanor-level, military-specific offenses.[251] This division of authority will result in two charge sheets for the accused: one prepared by a judge advocate and one by a commander. Questions then arise, such as whether the same judge advocate that prepared the felony-level charge sheet should advise the convening authority on the "misdemeanor" charge sheet and whether there should be two different courts-martial for the accused, especially if a commander decides charges should be referred to a summary or special court-martial. The system should be one in which the judge advocate exercises prosecutorial discretion regarding felony-level offenses to avoid practical problems and injustice to the accused.

If the MJIA or similar bill were enacted, then judge advocates would be the disposition authority for offenses with a maximum sentence of more than one year of confinement and offenses specifically excluded in

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[247] Perhaps the modern court-martial for an all-volunteer military no longer needs to prosecute individuals for offenses that were enumerated in the Articles of War of 1775. *See id.* at 7–9.

[248] *See generally* Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013).

[249] Interview with Major General Anthony Cucolo III, *supra* at note 38. Although Major General Cucolo believes that commanders should retain UCMJ authority, he agrees that minor offenses should not be prosecuted at court-martial. Some offenses, such as adultery, allow for extreme viewpoints to impact justice. The military justice system should be one that sets the example and reflects the best of society in the 21st century. *Id*.

[250] MCM, *supra* note 16, R.C.M. 307.

[251] S. 967**;** *see* Letter from Lieutenant General Flora Darpino et.al., *supra* note 195.

the Act. The MJIA required an O-6 or higher, able to be detailed as a trial counsel, to be the disposition authority for these offenses.[252] However, this provision of the MJIA was too limited. Any individual in a prosecutorial role, regardless of rank, is qualified to make the decision of whether or not to charge and which charges to prefer due to their legal training.[253] The prosecutor for the government, or trial counsel, works closely with criminal investigators during the investigative process. They provide an opinion as to whether there is a founded offense case that leads to CID titling the subject for those offenses. Trial counsel draft charge sheets, prepare witnesses and other evidence for trial, and present the case at the court-martial. Even if captains in the position of trial counsel are the individuals making charging decisions, they are supervised by senior trial counsel, chiefs of military justice, deputy SJAs, and SJAs.

D. Questions Regarding Scope and Purpose

Another problem with the MJIA is the lack of clarity in its purpose for the breadth of change to the military justice system. During the NDAA debates, Senator Gillibrand stated that she would consider changing the removal of offenses from those carrying more than one year of maximum confinement to only sexual assault offenses.[254] If the bill was intended to only address perceived problems with the prosecution of sexual assault offenses, then there is little rationale as to why the one-year maximum sentence of confinement was ever the qualifier for removal of offenses from command authority. The bill appears to be a reaction to a few victims' stories about their beliefs, founded or

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[252] *Id.* § 2(a)(4); Interview with Major Bridget Byrnes, *supra* note 159. Major Byrnes noted that the intent of this decision was to ensure that officers were of a rank where they could make decisions without fear of reprisal or concern about promotions because they might be promoted only one or more times in their career, if that. Judge advocates in the grade of O-6 have the requisite education and experience to make these decisions. *Id.*

[253] *But see* Stimson, *supra* note 80, at 16–23 (describing civilian prosecutor and public defender training and practices and advocating for a military career litigation track).

[254] Jeremy Herb, "*Gillibrand Supporters Wary of Her Changes to Sexual Assault Bill*, THE HILL BLOG (Nov. 14, 2013, 5:26 PM), http://thehill.com/blogs/defcon-hill/policy-strategy/190344-gillibrand-supporters-wary-of-sex-assault-bill-changes. *Cf.* Interview with Major Bridget Byrnes, *supra* note 159. Senator Gillibrand would not limit the bill to removal of sexual assault charges in this Congress because separating sexual assault cases might do more harm than good by highlighting those cases and garnering media attention for them.

unfounded, that their cases were not handled well by commanders.[255] Any concession or major change to the bill exposes it to greater scrutiny and criticism because limiting the removal to one type of offense indicates that the entire bill was not thoroughly researched. If the bill is amended to only remove sexual assault, then the proponents must explain what makes commanders capable of handling all serious offenses except sexual assault and why lawyers will be in a better position to evaluate those cases.

VIII. Proposed Solution for Crimes and Disciplinary Infractions

Congress could remove UCMJ authority from commanders in the future; meanwhile, the services are taking action now that cuts against the longstanding tradition of independent discretion enjoyed by their own commanders. Lieutenant General Franklin, the convening authority who overturned Lieutenant Colonel Wilkerson's sexual assault conviction, dismissed another sexual assault case after the Article 32 hearing was complete.[256] Rather than Lieutenant General Franklin's decision being final, the accused Airman was administratively reassigned to another GCMCA, and a new Article 32 hearing was scheduled.[257] This is an example of the Air Force communicating to its GCMCAs that sexual assault allegations will go forward to a court-martial, and if Congress is unable to remove commanders' prosecutorial discretion, then the service will do so when displeased with the result. The impact of this message on the accused is severe because no matter how weak the case or how little evidence is present, a case will go forward to court-martial.

The FY 14 NDAA and Victims Protection Act of 2014 have created a framework for military justice for, at the very least, the near future. As

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[255] Interview with Major Bridget Byrnes, *supra* note 161. The genesis of Senator Gillibrand's bill was that she was listening to victims' stories, including that horrific things were happening to them, their chains of command were not acting on their complaints, and they had nowhere else to go. Senator Gillibrand wanted a bill that took these cases out of the chain of command, and the bill represents her reaction to what she heard in those victims' voices. Although Congress is focused on sexual assault, Senator Gillibrand is concerned with a fairer justice system in general that includes sexual assault under that umbrella. However, limiting the bill to sexual assault is simply reactionary, as her stated goal is to create an overall better and fairer justice system. *Id*.

[256] Staff Report, *General Who Overturned Sexual Assault Conviction Loses Authority over New Sex Assault case*, A.F. TIMES, December 8, 2013, http://www.airforcetimes.com/article/20131218/NEWS/312180013.

[257] *Id*.

explored in this article, the revisions to the UCMJ and the current climate for sexual assault and command authority in general have created a no-win situation for commanders. If commanders prefer and refer cases, especially those involving sexual assault, they will be subject to allegations of unlawful command influence. If they do not prefer and refer cases, these actions could result in negative evaluations, lack of promotions, demotions, or uncomfortable scrutiny from their superior commander or the Secretary of the military department.[258] In terms of protecting their careers and the integrity of the military, commanders should send every case to court-martial in order to deflect scrutiny from Congress and special interest groups that have little confidence in their ability to handle crime.[259] It is difficult to imagine how the military justice system would be viewed as one that actually administers justice. Major General Cucolo discussed the potential second- and third-order effects of great change to the system and asked how the military would be able to continue to recruit bright, educated, talented people to join its ranks if it becomes a system that the civilian populace lack confidence in and do not perceive as being just.[260]

The military justice system has greatly changed over the last year with its new focus on the rights of the victim.[261] Criminal cases have traditionally had only two parties: the government or prosecution and the accused or defendant. Arguably, the recent congressional legislation has created another party to the system: the victim.[262] Due process in a

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[258] *See generally* ARMY DIR. 2013-20, *supra* note 47; Davis, *supra* note 2; Whitlock *supra* note 4; National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1744, 127 Stat. 672 (2013).

[259] Interview with Anonymous Person, *supra* note 107.

[260] Interview with Major General Anthony Cucolo III, *supra* note 38. Major General Cucolo believes that the retention of UCMJ authority over commanders is of utmost importance, even after considering the changes to the law under the NDAA. He could envision a system where commanders do not have authority over the most heinous of crimes, but it was difficult for him to imagine a scenario where it would benefit the accused, accused's family members, and the military as a whole to relinquish command authority over the UCMJ. *Id*.

[261] *See, e.g.*, UCMJ art. 6b (2013); 10 U.S.C. § 806b (2013).

[262] A recent example of an alleged victim impacting a pending case occurred in April 2014 when military defense counsel for Lieutenant Colonel Jay Morse requested the United States Army Court of Criminal Appeals prohibit the accused's chain of command from enforcing its order for the accused's counsel to cease interviewing witnesses or potential witnesses as part of their pretrial investigation for his case. The chain of command ordered the accused to cease and desist his investigation because the alleged victim was displeased with defense counsel's efforts on behalf of their client. Petitioner's Petition for Extraordinary Writ in the Nature of Writ of Prohibition (Apr. 15, 2014).

criminal case protects the accused from overreaching by the government.[263] Although a victim might not be vindicated by the process or may feel embarrassed by the proceedings,[264] she will never lose basic rights, such as life, liberty, or property. The accused, on the other hand, has everything to lose. The problem with the recently passed and proposed legislation is that the focus of the bill is on serving victims of sexual assault without considering the consequences that the court-martial of certain offenses has on the accused. The military justice system needs additional change to regain its balance and focus on ensuring the due process rights of the accused over the concerns of the victim.

UCMJ authority should be removed from commanders as the MJIA suggested. Over sixty years ago, the UCMJ was originally instituted to ensure the accused was protected from a commander with "virtually unlimited control over military justice."[265] However, politically unpopular cases and the inevitable unlawful command influence in sexual assault cases necessitates the overhaul of our military justice system. The system is no longer a balance of command authority and the rights of the accused because it no longer sufficiently protects the process or the individual servicemember. The MJIA provided a remedy for the present conundrum by removing serious offenses from commanders. If UCMJ court-martial convening authority is removed from commanders, then commanders will have less ability to exercise unlawful command influence or exert pressure personally on cases by sending every case forward. Lawyers in a prosecutorial role should exercise the same discretion that civilian prosecutors enjoy without command involvement in the adjudication of crimes.

When offenses are removed from both command authority and the possibility of trial by court-martial, federal law should assist in the division of punitive articles. Military law is federal law.[266] If all offenses that had a maximum punishment of greater than one year and a companion statute under Title 18 or Title 21 of the United States Code were exclusively available for court-martial, then serious crimes—

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263 U.S. CONST. amend. V, XIV.
264 Stimson, *supra* note 80.
265 Hansen, *supra* note 118, at 244.
266 *See generally* MCM, *supra* note 16, pt. I.

whether military in nature or not—would be adjudicated.[267] Under this system, companion federal law would support the prosecution of offenses at court-martial that are acts traditionally recognized as criminal in nature, rather than minor disciplinary infractions. This adds legitimacy to the military system by prosecuting conduct analogous to civilian criminal conduct and creates a dividing line between serious crime and minor behavior that affects the good order and discipline of military units.

Commanders should retain non-judicial and administrative authority for every offense under the UCMJ. Commanders need the punitive articles for the exercise of good order and discipline in the ranks; counseling statements, Article 15s, and reprimands that refer to misconduct under those articles serve that purpose. Counseling statements, Article 15s, and reprimands are sufficient to address minor disciplinary offenses because these actions allow a commander to make on-the-spot corrections and affect good order and discipline. Article 15s serve as a disciplinary tool for a commander.[268] An Article 15 allows a commander many options, such as demoting servicemembers, reprimanding them, forfeiting their pay, imposing extra duty, and restricting them.[269] Non-judicial and administrative actions affect the servicemember's status in the unit; thus, avoiding discipline imposed by the commander is enough of an incentive to deter minor misconduct.[270] Good order and discipline can remain intact when a servicemember receives swift, binding punishment.

The military justice system should use Article 15s as a disciplinary tool only, whereby a servicemember could not refuse the Article 15 and demand court-martial. Other jurisdictions have implemented a system where servicemembers cannot refuse Article 15s.[271] Due process

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[267] Title 18 and Title 21 include all serious offenses, such as murder, rape, and kidnapping, but also include drug offenses and desertion. *See* Appendix (comparing punitive articles in the MCM to federal criminal statutes).

[268] *See generally* Schlueter, *supra* note 24, at 59.

[269] AR 27-10, *supra* note 69.

[270] Note, *The Unconstitutional Burden of Article 15*, 82 YALE L.J. 1481, 1485–86 (1973).

[271] The concept of disallowing servicemembers to turn down non-judicial punishment is not new. States that do not allow their Soldiers to reject non-judicial punishment while in a Title 32 status under their respective state UCMJs include: Oklahoma, Maine, North Dakota, Oregon, New Hampshire, Mississippi, Alabama (unless restriction is imposed), North Carolina, Illinois, Minnesota, Missouri, Georgia (unless serving on State Active Duty), and Kentucky. Also, a servicemember "attached to or embarked on a vessel" may

concerns may be lessened when the action taken by the commander is limited to affecting the servicemember's military conditions of employment.[272] Commanders could issue Article 15s for any offense, even murder, and that would not preclude the prosecuting judge advocate from preferring court-martial-eligible cases carrying more than one year maximum confinement and a companion statute under Title 18 or Title 21 of the United States Code. This would allow the commander to exercise immediate good order and discipline but still allow for the government to prosecute serious offenses. Practically, the commander might not issue an Article 15 for a serious offense; yet, it would give him the option to do so and also discipline the servicemember for any minor misconduct that is part of the case but will not be part of the court-martial. The balance exists for the accused because although conditions of his employment and pay would be at stake, he would no longer be subjected to court-martial for minor offenses. This component of the system allows for crimes to be adjudicated in a criminal prosecution without the possibility of the accused receiving a federal conviction for minor violations of the UCMJ, while improving a commander's disciplinary authority over minor and military-specific infractions by showing that servicemembers will be held accountable for behavior that impacts mission readiness.

IX. Conclusion

Recent changes to the UCMJ and the perceived culture of sexual assault in the military have created a minefield for the military justice practitioner and commanders. The FY 14 NDAA increased the rights of victims but removed several protections from the accused. The MJIA took the greatest leap in proposing the removal of some offenses from commanders, but the division of offenses will not solve the perceived problem of sexual assault without substantially affecting the rights of the

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receive non-judicial punishment without the right to demand trial by court-martial. MCM, *supra* note 16, pt. V, para. 3.

[272] Commanders could be limited to imposing rank reduction, forfeiture of pay, restriction, and extra duty as conditions of employment adversely affected by an individual's misconduct under paragraph 5 punishments. During their respective interviews, both Major General Cucolo and Lieutenant General (Retired) Helms agreed with a no-turn-down Article 15 policy. Lieutenant General (Retired) Helms stressed the need for continued ability of individuals to appeal any Article 15s imposed to ensure they receive fair and equal treatment and that commanders do not abuse their authority. Interview with Major General Anthony Cucolo III, *supra* note 38; Interview with Lieutenant General (Retired) Susan Helms, *supra* note 5.

accused. Regardless of whether the MJIA is passed, the problem of UCI, overemphasis on victim concerns to the detriment of the accused, and further amendments to the UCMJ will not end in this current climate of constant effort to eradicate sexual assault.

In order for the accused to be served justice and for the military justice system to be the most fair system possible, judge advocates should have prosecutorial discretion for allegations of serious, felony-level offenses under the UCMJ that are analogous to federal law under the United States Code. Commanders should be able to take administrative or non-judicial action that servicemembers cannot refuse, especially for minor, misdemeanor-level, and military-specific offenses, in order to instill good order and discipline. This model ensures that the right offenses are being tried at court-martial because the system is supported by companion federal law. Individuals who are trained and experienced in criminal law are making the decisions to effect that result, and commanders can maintain good order and discipline by addressing and punishing minor, military-specific disciplinary infractions. Crimes will be prosecuted in the proper forum by the appropriate personnel, and minor, military-specific offenses will be handled in an administrative or non-judicial proceeding by the individual responsible for good order and discipline. Only then will the military justice system protect the rights of the accused and operate in a cost-efficient and respectable manner that ensures justice for all.

Appendix

UCMJ Punitive Articles Authorizing Greater Than One Year of Confinement and Companion Statutes Under Title 18 or Title 21, United States Code[273]

UCMJ	U.S.C.
82 Solicitation to desert	18 U.S.C. § 1381 Enticing desertion and harboring deserters
82 Solicitation to mutiny	18 U.S.C. § 2192 Incitation of seamen to revolt or mutiny;18 U.S.C. § 373 Solicitation to commit a crime of violence
82 Solicitation to commit act of misbehavior before enemy	18 U.S.C. § 757 Prisoners of war or enemy aliens
82 Solicitation to commit act of sedition	18 U.S.C. § 2192 Incitation of seamen to revolt or mutiny; 18 U.S.C. § 373 Solicitation to commit a crime of violence
83 Fraudulent enlistment, appointment	18 U.S.C. § 35 Imparting or conveying false information
83 Fraudulent separation	18 U.S.C. § 35 Imparting or conveying false information
84 Effecting unlawful enlistment, appointment, separation	18 U.S.C. § 498 Military or naval discharge certificate; 18 U.S.C. § 35 Imparting or conveying false information; 18 U.S.C. § 495 Contracts, deeds, and powers of attorney
85 Desertion	18 U.S.C. § 1381 Enticing desertion and harboring deserters
86 AWOL more than 30 days and terminated by apprehension	No companion statute
87 Missing movement through design	No companion statute
90 Assaulting, willfully disobeying superior commissioned officer (all)	18 U.S.C. § 111 Assault

[273] *Comparison of Title 18 Sexual Offenses and UCMJ Sexual Offenses* tbl., DOD.GOV, *available at* http://www.dod.mil/dodgc/php/docs/comparison_with_Title18_3-2-05.pdf.

91 Striking or assaulting warrant officer	18 U.S.C. § 111 Assault
91 Striking or assaulting superior NCO or petty officer	18 U.S.C. § 111 Assault
91 Willfully disobeying warrant officer	18 U.S.C. § 111 Assault
92 Violation of or failure to obey general order or regulation	No companion statute
94 Mutiny & sedition	18 U.S.C. § 2193 Revolt or mutiny of seamen; 18 U.S.C. § 2192 Incitation of seamen to revolt or mutiny
95 Escape from post-trial confinement	18 U.S.C. § 751 Prisoners in custody of institution or officer; 18 U.S.C. § 752 Instigating or assisting escape;
96 Releasing a prisoner without proper authority; suffering a prisoner to escape through design	18 U.S.C. § 752 Instigating or assisting escape; 18 U.S.C. § 757 Prisoners of war or enemy aliens
97 Unlawful detention	18 U.S.C. § 913 Impersonator making arrest or search
98 Knowingly, intentionally failing to enforce or comply with provisions of the code	18 U.S.C. § 4 Misprision of felony
99 Misbehavior before enemy	18 U.S.C. § 757 Prisoners of war or enemy aliens
100 Subordinate compelling surrender	No companion statute
101 Improper use of countersign	18 U.S.C. § 757 Prisoners of war or enemy aliens
102 Forcing safeguard	No companion statute
103 Captured, abandoned property, failure to secure of value of $500 or more or any firearm or explosive	18 U.S.C. § 922 Unlawful acts
103 Looting or pillaging	18 U.S.C. § 654 Officer or employee of United States converting property of another; Accounting generally for public money; 18 U.S.C. § 648 Custodians, generally, misusing

	public funds
104 Aiding the enemy	18 U.S.C. § 757 Prisoners of war or enemy aliens; 18 U.S.C. § 756 Internee of belligerent nation
105 Misconduct as prisoner	18 U.S.C. § 757 Prisoners of war or enemy aliens
106 Spying	18 U.S.C. § 793 Gathering, transmitting or losing defense information; 18 U.S.C. § 794 Gathering or delivering defense information to aid foreign government
106a Espionage	18 U.S.C. § 793 Gathering, transmitting or losing defense information; 18 U.S.C. § 794 Gathering or delivering defense information to aid foreign government
107 False official statements	18 U.S.C. § 1001 Fraud and False Statements; 18 U.S.C. § 35 Imparting or conveying false information
108 Military property; loss, damage, destruction, disposition selling or otherwise disposing of a value of more than $500, firearms or explosive	18 U.S.C. § 32 Destruction of aircraft or aircraft facilities; 18 U.S.C. § 33 Destruction of motor vehicles or motor vehicle facilities
108 Military property; damaging, destroying, losing or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of a value or damage of more than $500 or any firearm or explosive	18 U.S.C. § 32 Destruction of aircraft or aircraft facilities; 18 U.S.C. § 33 Destruction of motor vehicles or motor vehicle facilities
109 Property other than military property of U.S.: waste, spoilage, or destruction of more than $500	No companion statute
110 Wilfully and wrongfully or negligently improper hazarding of vessel	18 U.S.C. § 342 Operation of a common carrier under the influence of alcohol or drugs
111 Drunk or reckless operation	18 U.S.C. § 342 Operation of a

of vehicle, aircraft, or vessel resulting in personal injury	common carrier under the influence of alcohol or drugs
112 All drug offenses	21 U.S.C. § 841 Prohibited acts A – 21 U.S.C. § 865 Smuggling methamphetamine or methamphetamine precursor chemicals into the U.S. while using facilitated entry programs
113 Misbehavior of sentinel or lookout in time of war or while receiving special pay under 37 U.S.C. 310	No companion statute
115 Malingering, feigning illness, physical disablement, mental lapse, or derangement in time of war, or in a hostile fire pay zone	No companion statute
115 Intentional self-inflicted injury (all)	No companion statute
116 Riot	18 U.S.C. § 2101 Riots
118 Murder	18 U.S.C. § 1111 Murder
119 Manslaughter	18 U.S.C. § 1112 Manslaughter
119a Death or injury of an unborn child	18 U.S.C. § 1841 Protection of unborn children
120 Rape, sexual assault, aggravated sexual contact, abusive sexual contact	18 U.S.C. § 2241 Aggravated sexual abuse, 18 U.S.C. § 2242 Sexual abuse; 18 U.S.C. § 2244 abusive sexual contact
120a Stalking	18 U.S.C. § 2261A Stalking
120b Rape and sexual assault of a child	18 U.S.C. § 2243 Sexual abuse of a minor or ward
120c Indecent viewing, visual recording, or broadcasting, forcible pandering, indecent exposure.	18 U.S.C. § 1460 Possession with intent to sell, and sale, of obscene matter on Federal property; 18 U.S.C. § 2257A Record keeping requirements for simulated sexual conduct; 18 U.S.C. § 1461 Mailing obscene or crime-inciting matter; 18 U.S.C. § 1462 Importation or transportation of obscene matters
121 Larceny of military property	18 U.S.C. § 641 Public money,

of a value of more than $500 or of any military motor vehicle, aircraft, vessel, firearm, or explosive	property or records; 18 U.S.C. § 643 Accounting generally for public money;18 U.S.C. § 654 Officer or employee of United States converting property of another
121 Larceny of property other than military property of a value of more than $500 or any motor vehicle, aircraft, vessel, firearm, or explosive	18 U.S.C. § 641 Public money, property or records; 18 U.S.C. § 654 Officer or employee of United States converting property of another
121 Wrongful appropriation of MV, aircraft, vessel, firearm, or explosive	18 U.S.C. § 38 Fraud involving aircraft or space vehicle parts in interstate or foreign commerce
122 Robbery, with a firearm or otherwise	18 U.S.C. § 2111 Special maritime and territorial jurisdiction; 18 U.S.C. § 2112 Personal property of United States
123 Forgery	18 U.S.C. § 470 Counterfeiting and Forgery
123a Bad Checks more than $500	18 U.S.C. § 641 Public Money, property or records; 18 U.S.C. 335 Circulation of obligations of expired corporations; 18 U.S.C. § 651 Disbursing officer falsely certifying full payment
124 Maiming	18 U.S.C. § 114 Maiming within maritime and territorial jurisdiction
125 Sodomy (repealed by § 1707 of FY 14 NDAA)	No companion statute
126 Aggravated arson; arson with more than $500 damage	18 U.S.C. § 81 Arson
127 Extortion	18 U.S.C. § 872 Extortion by officers or employees of the United States; 18 U.S.C. § 873 Blackmail
128 Assaults: simple assault with unloaded firearm, assault upon commissioned officer of U.S. or friendly power not in execution of office, assault upon warrant officer, not in execution	18 U.S.C. § 111 Assault; 18 U.S.C. § 111 Assaulting, resisting, or impeding certain officers or employees; 18 U.S.C. § 113 Protection of foreign officials, official guests, and internationally

of office, upon, in execution of office, person serving as sentinel, lookout, security policeman, etc.,; consummated by battery upon child under 16 years; assault with a dangerous weapon (all)	protected persons; 18 U.S.C. § 113 Assaults within maritime and territorial jurisdiction
129 Burglary	18 U.S.C. § 2117 Breaking or entering carrier facilities; 18 U.S.C. § 2118 Robberies and burglaries involving controlled substances
130 Housebreaking	18 U.S.C. § 2117 Breaking or entering carrier facilities
131 Perjury	18 U.S.C. § 1621 Perjury
132 Frauds against US – more than $500 or under article 132 (1) or (2)	18 U.S.C. § 1002 Possession of false papers to defraud United States; 18 U.S.C. § 1003 Demands against the United States;18 U.S.C. § 35 Imparting or conveying false information
134 Assaults with intent to commit murder or rape, with intent to commit voluntary manslaughter, robbery, sodomy, arson, or burglary, with intent to commit housebreaking	18 U.S.C. § 111 Assault
134 Bigamy	No companion statute
134 Bribery and graft	18 U.S.C. § 201 Bribery, graft, and conflicts of interest
134 Burning with intent to defraud	18 U.S.C. § 1519 Destruction, alteration, or falsification of records in Federal Investigations and Bankruptcy
134 Child endangerment (other than by culpable negligence)	18 U.S.C. § 2251 Sexual exploitation of children; 18 U.S.C. § 2251A Selling or buying of children
134 Child pornography	18 U.S.C. § 2251 Sexual exploitation of children; 18 U.S.C. § 2252 Certain activities relating to material involving the sexual

	exploitation of minors
134 Disloyal statements	No companion statute
134 False pass with intent to defraud	18 U.S.C. § 499 Military, naval, or official passes
134 Services under false pretenses of more than $500	18 U.S.C. § 35 Imparting or conveying false information; 18 U.S.C. § 287 False, fictitious or fraudulent claims
134 False swearing	18 U.S.C. § 35 Imparting or conveying false information
134 Fraternization	No companion statute
134 Negligent homicide	18 U.S.C. § 1112 Manslaughter (Involuntary)
134 Impersonation with intent to defraud	18 U.S.C. § 912 Officer or employee of the United States; 18 U.S.C. § 701 Official badges, identification cards, other insignia; 18 U.S.C. § 702 Uniform of armed forces and Public Health Service
134 Indecent language communicated to child under 16 years of age	18 U.S.C. § 1464 Broadcasting obscene language; 18 U.S.C. § 1470 Transfer of obscene material to minors
134 Kidnapping	18 U.S.C. § 1201 Kidnapping
134 Mail taking, opening, secreting, destroying, or stealing, depositing or causing to be deposited obscene matters in	18 U.S.C. § 1700 Desertion of Mails
134 Obstructing justice	18 U.S.C. § 1501 Obstruction of Justice
134 Wrongful interference with administrative proceeding	18 U.S.C. § 115 Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member; 18 U.S.C. § 201 Bribery, graft, and conflicts of interest
134 Pandering	18 U.S.C. § 1384 Prostitution near military and naval establishments[274]

[274] Table, *Comparison of Title 18 Sexual Offenses and UCMJ Sexual Offenses, available at* http://www.dod.mil/ dodgc/ php/docs/comparison_with_Title18_3-2-05.pdf.

134 Perjury	18 U.S.C. § 1621 Perjury
134 Destroying public record	18 U.S.C. § 1519 Destruction, alteration, or falsification of records in federal investigations and bankruptcy
134 Self-injury	No companion statute
134 Loitering in time of war	No companion statute
134 Soliciting more than $500	18 U.S.C. § 201 Bribery of public officials and witnesses
134 Wrongful refusal to testify	18 U.S.C. § 1509 Obstruction of court orders
134 Threat, bomb, or hoax	18 U.S.C. § 115 Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member; 18 U.S.C. § 119 Protection of individuals performing certain official duties; 18 U.S.C. § 175 Prohibitions with respect to biological weapons
134 Communicating a threat	18 U.S.C. § 115 Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member; 18 U.S.C. § 119 Protection of individuals performing certain official duties